

**THE FISCAL-MILITARY ORIGIN OF PROCUREMENT CONTRACT:
REAPPRAISAL OF THE “REVOLUTIONARY” THESIS**

S.N. Nyeck*

ABSTRACT. The main purpose of this paper is to show the ways in which an interdisciplinary approach to procurement studies can enrich our understanding of both opportunities and risk government contracting presents to both developed and developing countries. For developing countries, in particular, I stress the importance of understanding what is at stake and how they might become real partakers in the conversation about public procurement reform. Using contractual data from the seventeenth until early twentieth century in Africa, I show that focusing on the legal underpinnings of procurement reform alone imperfectly responds to the needs of developing countries because historical and political contingencies still play important roles in determining which area of public policy is likely to get real attention.

* S.N. Nyeck , Ph.D. candidate, Department of Political Science, University of California Los Angeles, sngonye1@ucla.edu.

INTRODUCTION

*But let concealment, like a worm i' the bud,
Feed on her damask cheek...
Twelfth Night, Act 2 scene 4, Shakespeare*

The main purpose of this paper is to show the unique contribution of history and politics in public procurement studies specifically aimed at understanding development in the non-Western world today. Since 1990s, there has been a growing consensus over the need for reform in developing states' public procurement architecture. This movement towards public procurement reform in the developing world is seen as a "revolution" because it is believed that the harmonization of law and state's practices will lead to economic growth. Notwithstanding this noble and desirable outcome, the dominance of legal reform discourse over international debates on public procurement reform is of limited pedagogical value for non-Western states for at least two reasons. First, models of law-growth nexus are biased toward European and American historical narratives. Second the political content and context, key to understanding development in the non-Western world, are either treated as footnotes, or totally expunged in legal analyses that influence public procurement policy around the world today. Legal pressure, though important and necessary, is nevertheless insufficient to bring about effective change in practice. Thus, one observes a seeming trend towards legal conformism in the developing world without substantive domestication of the agenda and effective control of the debate and framework. This paper makes the case for an interdisciplinary approach to the study of public procurement using contractual data from the seventeenth to early twentieth century in Africa. This work is organized as follows. The first section presents the background of the debate, dominant frameworks and international instruments that influence policy over public procurement reform. The second part deals with the historical precedent of government contracting in Africa. I make the argument that politics matters in understanding what is at what in public procurement both in historical times and today. I show how interesting puzzles gathered from historical patterns are relevant to contemporary research questions. The third section demonstrates the historical connection between the rise of the fiscal-military modern state, government contracting, and public debt. I further trace this connection to international trade and the rise

of monopolistic concessions in Africa. Section four shows the beauty of procurement studies from a historical perspective. While existing theory of 'colonialism' often assumes domination of a given people or territory by a unitary foreign state, government contracting in Great Britain and the corruption it brought about suggest more nuanced view of the so-called 'empire.' The fifth and last section of this paper elaborates on the ambivalent nature of public procurement and the challenges of bureaucratic transformation in historical context. Finally, I draw some implications for the study of public procurement in the developing world.

I. Public Procurement Reform: The Background

States' legal prerogatives are not always easy to operationalize domestically. In actuality, what states need to attain full operational sovereignty domestically sometimes lies beyond their legal jurisdiction and budget. That is, at times, tangible and intangible services and resources that states need to assert domestic capability are not readily available at the government level, within their territory and political jurisdictions. States' wants and needs may not only lie outside their jurisdictions, they can also be located in uncharted foreign territories or owned by dissimilar entities such as non-state actors within the international system. If states' tangible and intangible wants and needs can only be met by external partners, the satisfaction of such needs requires that the needy states develop bargaining skills, become entrepreneurial and engage in risky and/or innovative ventures with external partners. These external partners can be dissimilar in relative economic and military power (other states), in legal status (non-governmental organizations, intergovernmental bodies, and transnational corporations), and in networking power and value creation capability (ideological regimes of governance such as democracy, human rights, and free trade). Purchasing products from external providers establishes modern government procurement² practices that may increase public utility or waste. As Arrowsmith puts it, "government procurement refers to the purchasing by government bodies from external providers the products and services these bodies need in order to carry out their public service mission...for the purpose of both national regulation and international treaties it is common to divide these transactions into three categories - construction services (works), supplies (non-

² I use state procurement and government procurement interchangeably.

construction, and services.³ Procurement practices are therefore one of the core functions of the modern state and important factors of development and underdevelopment. Public procurement therefore is particularly important in developing nations lacking human capital, technical expertise, and financial capital needed to conduct development projects of scale such as construction work, raw material processing, health crisis management etc.

The impetus to harmonize procurement practices in the twentieth century is driven by market-based free trade framework that primary views government traditional monopoly as a barrier to trade. In the non-western world, procurement practices are increasingly scrutinized partly because of capital flows across borders. The free market impetus demands for harmonized trade practices especially in developing and transitioning economies. These transitioning economies are those moving from either immature socialist and communist economic planning systems to a market-based liberal model, which seeks to extend free trade to both private and public markets. Government procurement is, according to free trade rationale, the last domain of public monopoly that market forces need to penetrate through competition, transparency, and non-discrimination.

Two perspectives and demands intersect and collude in the debate over public procurement: the perspective of national versus international expectations about the direction and objectives of reforms. Arrowsmith⁴ notes that although these two perspectives reinforce and support each other, they clash over means to achieving procurement objectives.

Domestic objectives are sometimes implemented by non-legal means, such as by internal administrative circulars directing the actions of the procurement officers – this, for example, has been the traditional approach of the United Kingdom government also followed by a number of countries whose legal and administrative systems have been influenced by the United Kingdom...However, many other states regulate the award of procurement contracts by

³ Arrowsmith, Sue. (2003). *Government Procurement in the WTO*. Studies in Transnational Economic Law Volume 16. New York: Kluger Law International, p. 2-3.

⁴ Arrowsmith, Sue and Arvel Davies. (1998). *Public Procurement: Global Revolution*. New York: Kluger Law International.

formal rules which have legal status...This approach has been followed by France and by many European and non-European states which has been influenced by the French system or administrative law.⁵

In the debate about procurement reforms, the French school, which emphasizes reform through legal formal rules, is the preferred model adopted by the European Union and the World Trade Organization. Other organizations such as USAID tie financial assistance to developing countries to reform in public procurement.

The spread of capital across national borders in the aftermath of World War II and the creation of the World Trade Organization (WTO) in 1995 lead to the adoption of international legal instruments aimed at promoting free trade. New interest in government procurement practices and law stems from the premise that, according to the WTO, this area can constitute important barriers to international trade. Previously neglected in the negotiations of the General Agreement on Tariffs and Trade (GATT), government procurement laws and practices are increasingly being scrutinized by the WTO partly because it is estimated that government procurement represents about 10 to 15 percent in GDP of OCED countries. Three important international agreements currently guide discussions about government procurement reform.

First, is the United Nations Commission on International Trade (UNICITRAL Model Law) created in 1966 to facilitate international trade and to assist developing countries in the process. Since 1995, the U.N. General assembly resolution (A/RES/49/54) noted that "procurement constitutes a large portion of public expenditures in most states" and suggested the U.N. adopt model legislative provisions on procurements of services inspired by the Model Law of Procurement of Goods and Constructions of the United Nations Commission on International Trade Law. The Model legislative provisions on procurement was intended to assist developing countries and states, which economies are in transition, to enhance procurement laws where they exist, and to formulate laws where none exist. Hence the legalistic U.N. approach was intended to harmonize procurement laws and practices through by supplying a unified language and model for developing countries.

Although the Model Law is not legally binding, its model has

⁵ Arrowsmith, Sue and Arvel Davies.(1998). Op. Cit.,p. 4-5.

been adopted throughout in many countries where “the existing governing procurement was inadequate or outdated.”⁶ This inadequacy, the commission secretariat found, “resulted in inefficiency and ineffectiveness in the procuring process and led to uneconomic results whereby the public purchaser failed to get the ‘value for money’... many of these laws did not promote international competition and were therefore a hindrance to international trade.”⁷ This finding suggests, even with international pressure, existing procurement practices of the developing world do not just constitute barriers to international trade, they often fail to meet national procurement objectives. UNICITRAL Model Law however is an open-ended text with regard to competitive negotiations of contract awards and affords marginal discretionary rights to states under specified conditions. Despite this shortcoming, legislation based on UNICITRAL Model Law on international commerce arbitration adopted in 1985 has been enacted in domestic legislations in developing countries.⁸ Hunja⁹ divides countries concerned with UNICITRAL procurement reforms into three categories: East and Central Europe countries transitioning from planned / socialist economies to market-based, middle income countries that have market-based procurements systems in process of modernization, and developing countries with procurement systems dating from colonial era. While many transitioning economies have moved to implementing UNICITRAL Model Law on procurement goods, works and services, Hunja notes that,

success in achieving comprehensive procurement reforms has proven difficult. Most post-colonial states, for example, have maintained procurement systems that largely resemble pre-independence regimes. Where attempts have been made to bring about

⁶ Hunja, Robert. (1998). “The UNICITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform.” In *Public Procurement: Global Revolution*. Arrowsmith, Sue and Martin Trybus. Eds. New York: Kluger Law International, p. 97.

⁷ Hunja, Robert. (1998). Op. Cit., p. 97-8.

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See

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html accessed Dec. 5, 2010.

⁹ Hunja, Robert. (2003). “Obstacles to Public Procurement Reforms in Developing Countries.” In *Public Procurement: The Continuing Global Revolution*. Arrowsmith, Sue and Martin Trybus. Eds. New York: Kluger Law International

significant changes, these have essentially mounted to marginal tinkering with some of the rules while leaving the general framework intact.¹⁰

Where change has occurred, it is attributed to states' effective use of UNICITRAL Model Law, the establishment of specialized procurement entities with a policy formulation mission, and the continuing professionalization and training of procurement officers. The Model law was a good start because nonbinding. Knowing which obstacles explain the absence or lack of incentives to reform in developing states foregrounds expected hurdles with other legally binding international agreements on procurement reform.

Second, the 1994 multilateral General Agreement on Tariffs and Trade (GATT), and the General Agreement on Trade and Services (GATS) apply to all WTO who enjoy substantial freedom to use procurement for non-commercial "governmental purpose" GATT Article III.8) and promote national objectives. To the extent that GATT provides language and regulation of government procurement, it does not apply to private parties contracting with the government. Arrowsmith notes the differential treatment of governments depending on whether they act as sellers or buyers of products and services in the international market when she writes, "it may seem paradoxical that the government is permitted to discriminate in its own purchases but is forbidden from requiring private purchasers to discriminate, since the former type of behavior presents a much more significant barrier to international trade. It is however, the very importance of the government of retaining the possibility of discriminating in their own procurement that has led to government procurement being excluded from the GATT.¹¹" In other words, what most governments wanted was to use discretionary discrimination as buyers and sellers of products and services in the international market.

If under GATT governments cannot require external private purchasers to discriminate by requiring them to use national products exclusively, how do they navigate the private-public divide when they purchase products? If under the GATT agreement more discretionary power to discriminate rests with the private purchaser of goods and services, how do developing countries adjust their procurement purchasing power to maximize discretionary prerogatives otherwise

¹⁰ Hunja, Robert. (2003). Op. Cit., p.16.

¹¹ Arrowsmith, Sue and Martin Trybus. (2003). Op. Cit., p. 52.

not afforded to governments? Given the anti-discrimination restrictions on the behavior of governments, regulating procurement through private domestic entities and non-governmental bodies is one option that allows government to delegate discretionary discrimination power domestically without losing influence over the regulatory body. Because GATT rests on traditional state apparatuses and not on these complex arrangements, knowing the kinds of institutional and political implications of government delegation in the domain of public procurement should contribute to theory building on political change based on the diverse legal and organization all forms of power in Africa. Also, because the ability to discriminate is linked to one's status as purchaser and seller and to whether or not in so doing one is acting as a private or public entity, it is important to determine whether the use of domestic private or public procurement bodies in Africa effectively is value added to national objectives including the promotion of domestic entrepreneurship.

Third, is the plurilateral WTO Agreement on Government Procurement (GPA) which is the only legally binding agreement on the subject of government procurement. The GPA has a *commercial criteria*¹² applied to works and services of the central states as well as with municipalities, counties and authorized local authorities not covered by the previous agreement. Hence, it is the entire state bureaucracy, not just the central authority, which is covered by this agreement. Originally drafted in 1978, it was further renegotiated in parallel with the Uruguay Round in 1994 and entered into force in 1996. Although accession to the agreement is open to all WTO members, GPA members remain OECD countries, EU countries, Hong Kong, Japan, Chinese Taipei.¹³ Interestingly, no developing country in Latin America, Africa and Asia has agreed to the binding rules of the WTO agreement on government procurement. A few however, have observer's status including Colombia (1996) Argentina (1997), Chile (1997) Panama (1997), China (2007)¹⁴, India (2010). In Africa, only Cameroon has observer status. Membership trends suggests important ideological and strategic gap between the WTO's vision of free trade and most of the developing world. Short of full membership, observer status allows states to attend meetings and participate in discussions. Based on overall membership, it is noticeable that African states are absent from discussions and debates on public

¹² These rules apply to cross-border contracts above certain thresholds.

¹³ For full membership, see <http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties>

¹⁴ China and Panama are negotiating accession to the agreement.

procurements. Yet, under Article XII of the agreement, a country only needs to apply basic standards of transparency in its own public procurement practices to become an observer. These transparency standards are: countries should specify their contracts in accordance with technical specifications (rules of transparency, non-discrimination, the use of performance-oriented outcomes and other unnecessary barriers to trade), publication of procurement notices, a willingness to ensure that procurement regulations are not tempered with during a procurement and, if such a change proves unavoidable, to ensure satisfactory means of redress. Besides the UNICITRAL, GPA and WTO frameworks, other bilateral agreement such as the EU-EPA trade agreements with ACP countries. The African Growth Opportunity Act (AGOA) by the U.S congress in 2000¹⁵ applies to countries at pre-commit to rules of transparency and non-discrimination in government procurement contracts.

Arrowsmith¹⁶ notes a few problems with the technical specifications of Article VI of the GPA. She notes that specification by the procuring entity works well with simple contracts, “they do not apply, for example, to a specification in the final contract that reflects the method of performance tendered by a particular supplier in response to a flexible initial specification.”¹⁷ One possible way to understand the absence of Africa in the debate about public procurement is to ask whether or not, African states disproportionately sign more complex contract that resist rigid specification *ex-ante* and what is the role of these incomplete contracts on the pattern of development of African states? What are other flexible contingencies that the WTO and other financial institutions could explore to recruit developing states into the project of harmonizing procurement practices and fostering trade in Africa? What types of government discretionary measures should be promoted along side with WTO rules for developing countries?

II. Government contracting in Africa: A Historical Approach

One of the characteristics of the pre-war period was the absence of a harmonized discourse and theory on public procurement. Scholars of western states’ political and economic

¹⁵ Trade and Development Act 2000 HRC 434.

¹⁶ Arrowsmith, Sue and Martin Trybus. (2003). Op. cit.

¹⁷ Arrowsmith, Sue and Martin Trybus. (2003). Op. cit., p. 312.

development have written about procurement dynamics between political leaders and private entrepreneurs, merchants guilds, and multinational companies. With the rise of international trade in late eighteenth and nineteenth centuries, procurement practices took the forms of political instruments given to private companies such as royal charters, monopoly rights over foreign and domestic trade. But state contracts were not limited to raw materials and economic goods, as Spruyt¹⁸ and Cooley & Spruyt¹⁹ write, private-public cooperation for development also brought about change in international political institutions involving intangible goods such as “sovereignty.” Kingdoms, city-states, and empires implemented different practices based on economic, political, and cultural forces allied with centers of powers. The rise of free-trade ideology, however, failed to foster harmonization of procurement practices across nations. Instead, free trade empowered an entrepreneurial class of profit-driven traders and adventurers working as middlemen between countries and contracting external services and goods needed domestically. With the collapse of the British Empire in the twentieth-century, many ex-colonies became independent by contracting security and/or strategic resources with either former colonial powers and with foreign private companies.²⁰ Although sovereign states and international legal instruments displaced and replaced the traditional individual entrepreneur as middleman in public procurement deals, history holds interesting puzzles that might be theoretically useful in understanding the specific challenges of government contracting given asymmetric power between contracting parties. In this section, I demonstrate that the rise of government contracting coincided with the emergence of the expansionist modern state. The main argument of this chapter is that the legal underpinning of contract theory, mostly taking place in America in the nineteenth-century and informing debates over public procurement reform today, were unique to the United States. Outside the U.S., and more specifically in Africa, experience with government contract was political in nature and tied to the expansion of Great Britain and other European powers

¹⁸ Spruyt, Hendrik. (1994). *The Sovereign State and Its Competitors*. Princeton: Princeton University Press.

¹⁹ Cooley, Alexander and Hendrik Spruyt. (2009). *Contracting States: Sovereign Transfers in International Relations*. Princeton: Princeton University Press.

²⁰ Cooley, Alexander and Hendrik Spruyt. (2009). *Op. cit.*

on the continent.²¹ First is the general pattern of public contracting in Africa from the seventeenth until early twentieth century. Contractual agreements are taken from primary documents, secondary sources, and archival material organized by regions and involving major political and economic players (Hertslet 1894²²; Davenport 1917²³; Newberry 1965,²⁴ 1971²⁵) in Northern Africa (Benjelou 1995²⁶; Abitbol 2009²⁷; M'barak & Charqi 2008²⁸; Mustapha 2011²⁹), Southern Africa (Kalley 2001³⁰), Central and West Africa (Busson

²¹ Although I focus on the evolution of contract theory and practices as related to the colonies within the Anglo-American tradition, France²¹, Prussia²¹, Italy and Spain²¹ had similar recourse to contracting their expansionist policy that I will not address here. See: Lewis, Gwynne. (2004). *France 1715-1804: Power and the People*. New York: Logman; The "Great Elector" of Brandenburg, Frederick William (1640-88) open trade with West Africa in 1681 with a treaty with three caboceers of Cape Three Points (Ghana) and later helped launch the Brandenburg African Company in 1862, which was given trade monopolistic rights over unoccupied areas of the coast of Guinea. The company successfully brought a few indigenous groups under its protection in 1685 and managed to build a trading post in an area that gave it a strategic advantage over the gold trade. For details see (documents 1, 2, 7, 13, 16-19) in Jones, Adam. (1985). *Brandenburg Sources for West African History 1680-1700*. Stuttgart: Franz Steiner Verlag Wiesbaden. Calabria, Antonio. (1991). *The Cost of Empire: The Finances of the Kingdom of Naples at the Time of Spanish Rule*. New York: Cambridge University Press.

²² Hertslet, Edward. *Map of Africa by Treaty*. (1894). London: Her Majesty's Stationary Office.

²³ Davenport, F.G. (Ed.). (1917). *European Treaties bearing on the History of the United States and its Dependencies to 1648*. Washington D.C. Carnegie Institution.

²⁴ Newberry, C.W. (1965). *British Policy Towards West Africa Select Documents 1786-1874*. Oxford: Clarendon Press.

²⁵ _____. (1971). *British Policy Towards West Africa Select Documents 1875-1914*. Oxford: Clarendon Press.

²⁶ Benjeloun, Abdelmajid. (1995). *Fragments d'Histoire du Rif Oriental et Notamment des BENI SAID dans la Deuxième Moitié du XIXème Siècle d'Après les Documents de Mr. Hassan Ouchen*. Rabat : El Marrif Al Jadida.

²⁷ Abitbol, Michel. (2009). *Histoire du Maroc*. France: Perrin.

²⁸ Zaki, M'barek and Mimoun Charqi. 2008. *Maroc: Colonisations & Résistances 1830-1930*. Salé: Fondation du Rif.

²⁹ Jmahri, Mustapha. (2011). *Magazan-El Jadida Deux Siècles d'Histoire Consulaire*. Casablanca: Les Cahiers d'El-Jadida.

³⁰ Kalley, Jacqueline. (2001). *South Africa's Treaties in Theory and Practice 1806-1998*. Boston: Scarecrow Press.

1895³¹; Anene 1966³²; Adeleye 1971³³; Atanda 1974³⁴; Aṣiwajux 1976³⁵; Ekeh 2005³⁶), East Africa (Millette 1973³⁷; Seaton & Maliti 1973³⁸; Rubenson 1987, 2000³⁹)...etc.

a- General Patterns: Contracting in Africa

Figure A (below) shows the contracting patterns in this period and it is noticeable that all major African polities engaged in early international and regional trades were situated in the Maghreb region. Algiers, Tunis, Tripoli, Egypt, and Morocco appear as the most internationalized centers of commerce in the seventeenth century. While Morocco has the longest contractual history followed by Tunisia, the contractual activities of Algeria and Libya ceased roughly in the early nineteenth-century. Egypt was relatively a latecomer in contractual diplomacy but remained involved until early twentieth century. In East Africa, Zanzibar and Ethiopia had roughly the same volume of contracts in this period. Madagascar, Mauritius started relatively late in the mid-nineteenth-century. In West Africa, early movers were Sierra Leone and Senegal, starting roughly in late

³¹ Busson Henri. Le régime du Niger. In: *Annales de Géographie*. 1895, t. 4, n° 15. pp. 202-209. doi :10.3406/geo.1895.5691<http://www.persee.fr/web/revues/home/prescript/article/geo_0003-4010_1895_num_4_15_5691> Accessed June 14, 2011.

³² Anene, J.C. (1966) *Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate*. Cambridge: Cambridge University Press.

³³ Adeleye, R.A. (1971). *Power and Diplomacy in Northern Nigeria 1804-1906: The Sokoto Caliphate and Its Enemies*. Ibadan: Humanities Press.

³⁴ Atanda, J.A. (1973). *The New Oyo Empire: Indirect Rule and Change in Western Nigeria 1894-1934*. New Jersey: Humanities Press.

³⁵ Aṣiwaju, A.I. (1976). *Western Yorubaland under European Rule: 1889-1945 a Comparative Analysis of French and British Colonisation*. New Jersey: Humanities Press.

³⁶ Ekeh, Peter. (Ed.) 2005. *Warri City and British Colonial Rule in Western Niger Delta*. Lagos: The Urhobo Historical Society.

³⁷ Millette, A. J. (1973). *Treaties in Force 1889-1971: Draft List of Treaties and Other International Agreements of Ethiopia*.

³⁸ Seaton, E.E. and S. T. Maliti. 1973. *Tanzania Treaty Practice*. Dar es Salaam: Oxford University Press.

³⁹ Rubenson, Sven. (Ed.). 2000. *Internal Rivalries and Foreign Threats 1869-1879*. Acta Aethiopica. Vol. III. Addis Abeba: Addis Abeba University Press.

Rubenson, Sven. (Ed.). 1987. *Correspondence and Treaties 1800-1854*. Acta Aethiopica. Vol. I, Addis Abeba: Addis Abeba University Press.

eighteenth century. Nigeria and Ghana were both latecomers in contractual transactions and surpassed both Senegal and Sierra Leone with their volume of contracts. Contractual activity intensified in both countries in early nineteenth-century. The peak of contractual activity was, however, recorded in the Congo and the minimum in Cameroon, Benin, Togo, and the Gambia. Only South Africa⁴⁰ yielded data for the southern part of the continent. Surprisingly, the amount of contractual activity in South Africa alone surpassed West Africa's. Given organizational and periodic patterns of data, it might be useful to ask whether public procurement in the developed world was/is somewhat correlated the degree of integration in world economy? If yes, then to what extent harmonization driven by exogenous interest can be beneficial or detrimental to states?

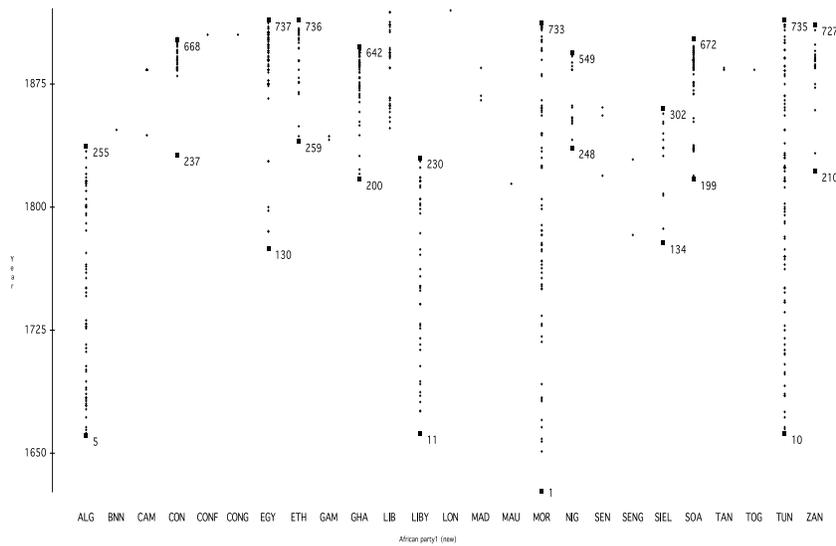


Figure A: Contractual patterns in Africa (1627-1920)

⁴⁰ As I mentioned in chapter 2, cases are considered as configurations. Thus, I retained contemporary names of states to in coding data to approximate the historical setting in which contractual agreement took place. This project not being a historical analysis of a particular country, but rather a snapshot of specific commercial and political dealings across countries inferences are limited to general patterns. Thus, 'Old South Africa' included territories that are now called Namibia and Zimbabwe, coding data from the southernmost tip of Africa as 'South Africa' does not distract from my main purpose. The same holds true for Zanzibar, which is part of Tanzania today. Still, in specific analyses of contracts in a given region in the following chapter, I will refer to local names where appropriate.

b- General Patterns: the Strategic Environment

The general strategic environment is coded as a function of the distribution of power, or polarity in two ways. First, polarity is determined by the political and military ordering of the international system, which concomitantly indicated asymmetric, or unequal embodiment of power, and influence.

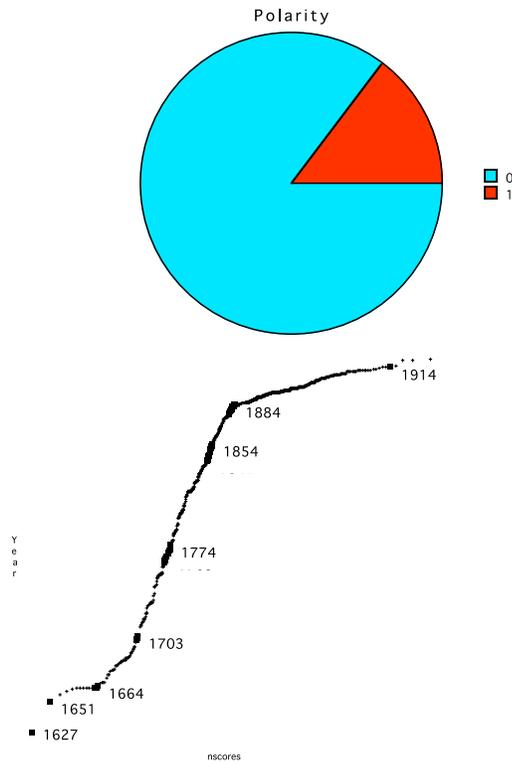


Figure B: [0] bipolar [1] multipolar (N= 735)

Figure C: Polarity Probability matrix

While Figure B above indicates that the bulk of contractual agreements in Africa took place in a bipolar world, figure C shows that the shift from bipolar to multipolar contracts happened in late nineteenth-century roughly at the same time the conference of Berlin that politically divided the continent took place. Thus, the distribution of polarity in the data is in agreement with Levy's⁴¹ classification of

⁴¹ Levi, Jack. (1985). "The Polarity of the System and International Stability: An Empirical Analysis." In Alan Ned Sabrosky, ed., *Polarity and*

Great Power and what we know about the structure of polarity in this period.

Because polarity also informs us about hierarchy and status, historical cases are particularly suited to identify the conditions under which contracting softens or hardens these entrenched features of the world system. Theory assumes that hierarchy structures incentives⁴² when the market fails. If theory is right, I might expect the decision-making process of small powers (henceforth the periphery) to contract or not to contract to be significantly influenced by the interest of the dominant international Great Powers. It might also be interesting to query about what gave a competitive advantage to hierarchy or self-organization over opportunistic behavior and how different political leadership styles emerged from the manipulation of residual rights after contracting in bilateral bargaining.⁴³

Asymmetric alignment of power and might between contractors has implications for domestic politics especially in transitional times. That is, beyond traditional hegemonic components of power in the international system, polarity is also a matter of framing discourse. How African domestic institutions converged or diverged in contracting patterns depended on their ability to adapt to emerging ideas that set in motion the transition from reputation-based transactions to contract domestically and internationally. At stake here was not just the problem of information management within domestic political institutions but also the question of the transformation of these institutions into producers and framers of discourse over contracting. One research possibility might be to find out whether domestic African institutions (centralized, non-centralized, and commercial) influenced the ways in which African contractors responded to ideological change over the meaning and function of contract mostly taking place in Europe in this period. Domestic institutions also reveal local monopolistic entrenchments and the way they adapted or resisted change resulting from contracting tangible and intangible goods and services with foreigners.

Indeed, the two significant revolutions in this period were revolutions against monopoly built-in maritime piracy in Northern

War: The Changing Structure of International Conflict. Boulder, Col.: Westview, p. 41-66.

⁴² Coase, R. "The Nature of the Firm." *Economica* Vol. 4 (1937):386-405; Williamson, Oliver. (1975). *Markets and Hierarchies*. New York: Free Press.

⁴³ Napel, Stefan. (2002). *Bilateral Bargaining: Theory and Application*. First edition. New York: Springer.

Africa (1670-1830), resulting in the intensification of trade with West, South, and East Africa; the fight against slave trade (1807) resulting in the appraisal of 'legitimate trade' and the challenge of coastal monopolies leading to long-lasting political and economic transformations that are still visible in Africa today.

What role government contracting played in displacing or reasserting monopoly is a question that is not just of historical interest, but might effectively contribute to understanding the complex nature of public procurement from an Africanist perspective. Thus, history presents us with a fertile ground for theorizing the contractual experience of the rest of the world beyond the "civil and common law" and, a critical platform for interrogating the surprising functions of power within and without contractual relationships.

III. Power Contracted, Power Redefined

Before the legal refinement of contract theory in the nineteenth-century, public procurement contracts were already in use as public policy tools to support the Crown confronted with political opposition at home and costly expansionist wars abroad in early seventeenth century Great Britain⁴⁴. As a public policy instrument of the modern state, public procurement was first used to maintain royal control over the bureaucracy (the Parliament), public spending, and foreign policy.

Data collected begin in the year 1627 with a commercial agreement between Morocco and Great Britain⁴⁵. The year is highly

⁴⁴ Throughout this work I use the term 'Great Britain' for the sake of conformity but one should keep in mind that the political entity named as such underwent dramatic transformations under different names during the period under consideration (17th to early 20th century). When quoting from secondary sources or citing specific terms of a contract, I use the name that appeared in the original document or reference.

⁴⁵ Morocco's diplomatic relations with England go back to the thirteenth century between King John and Sultan Muhammad an-Nasir when the Crown wanted support against France. "With the defeat of Portugal at the Battle of the Three Kings in 1578, the way was clear for Queen Elizabeth I (1558-1603) and the Sa'adi Sultan Ahmed al-Mansur (1578-1603) to strengthen the economic and political links between their two countries. Political relations were strengthened as a result of reciprocal diplomatic missions and commercial relations were strengthened through the creation of the "Barbary Company" in 1585 by which Britain obtained a monopoly on trade with Morocco for twelve years. Following the deaths of Al-Mansur and Elizabeth I in 1603, many missions were exchanged during the seventeenth

symbolic because shifting international discourse over the meaning of contract in early seventeenth century created political anxiety as well as commercial and legal opportunities that later transformed the ordering of power internationally and domestically, in the *metropolises* as well as in the colonies. Victoria Kahn⁴⁶ traces the cultural beginning of conversations over contract in early seventeenth-century Great Britain as emerging from a crisis of political obligation. By shifting discourse, from “the medieval pact of subjection, in which a corporate body of the people subjects itself to the sovereign” to a new discourse of obligation based on the freedom of individuals to enter social and political contract, early modern contract theory was, according to Kahn, “a radically new poetics of the subject and the state.”⁴⁷ Thus, at a very early stage, conversations over contract were ‘power-ful’ in essence because the discourse attacked political and social entitlement based on long-held corporatist views about the individual. Anxiety over the proper dimension of contract and contractual obligation in Great Britain was at the core of disagreement between royalists and parliamentarians ending with the beheading of a king, the triumph of the Parliament, and the displacement of the monopoly of the Church of England on Christian worship. But debates over contract were not just confined to politics. Contract theory emerged as a “central theme in the struggle over political legitimation and obligation in the 1640s precisely because it could be inflected in a variety of ways,”⁴⁸ Kahn adds.

The inflection of contract happened in the late eighteenth century not just in theory but in practice also. Despite the triumph of the Parliament in the seventeenth-century, the Crown retained a few prerogatives such as having Parliament adopt his Civil List (total expenditures for his service) without review. The prerogative to submit public spending to the Crown’s discretionary inventory eventually became a major source of influence and control over Parliament in the eighteenth-century. Holding the purse of public spending, the Crown was able to recklessly spend money in the colonies and tales of corruption quickly raised an investigation of

century to hold talks on the release of English captives incarcerated in Morocco.” Source Embassy of the Kingdom of Morocco in London <<http://www.moroccanembassylondon.org.uk/en/MoroBri.html>> Accessed March 2012.

⁴⁶ Kahn, Victoria. (2004). *Wayward Contracts: The Crisis of Political Obligation in England 1640.1674*. Princeton: Princeton University Press.

⁴⁷ Kahn, Victoria. (2004). Op. cit., p.1.

⁴⁸ Kahn, Victoria. (2004). Op. cit., p.22.

public finances. According to Reitan, a select committee of the House of Commons in a 10 pages report dealing with the ordnance of contracts “described in detail irregularities that presumably applied to contracting for the army and navy as well in 1763.⁴⁹” So far, the King had used the colonies to strengthen his own power. The origin of corruption is worth mentioning here because it shows that it wasn’t just legal theory or economics that inflected the language and practices of contract. Politics played a pivotal role in giving a global edge to contract as public policy instruments with tremendous effects on the administration of colonies situated in the Americas and beyond.

But it was not just the Crown that used contracts to coopt the Parliament. Due to the absence of an adequate bureaucracy, early Parliament was more an adjudicatory than a legislative body “ ‘making marginal adjustments to the reigning state of affairs’ without any significant alteration of the social system.⁵⁰” One of the consequences of the discrepancy between claims of independence from the Crown and the lack of effective means to proactively influence policy was that Parliament quickly became an institution of consultants for private interest seeking to extract concessions from the Crown. As Ayitah writes, “the Parliamentary process itself sometimes represented a statutory bargain. Petitioners would want a Bill passed in order to enable them to do this or that — and Parliament might, in effect, require a *quid pro quo* from the petitioners in return for the powers they sought.⁵¹” Baker estimates that between 1775 and 1783, “eighteen of the forty forty-six contractors were Members of Parliament during the time they held contracts.⁵²” It is in this context that most of the Royal charters were granted to companies operating overseas such as the East Indian Company operating in Africa, and the South Sea Company trading in South America.

The economy of war with the American colony further led to a rise in government contracting. Thomas Harley and Henry Drummond Banks received a contract for the “making of remittances of specie to the troops in North America, for which they received a commission of

⁴⁹ Reitan, A. Earl. (2007). *Politics, Finance, and the People: Economical Reform in England in the Age of the American Revolution, 1770-92*, p.7.

⁵⁰ Ayitah, P.S. (1979). *Op. cit.*, p. 93.

⁵¹ Ayitah, P.S. (1979). *Op. cit.*, p. 94.

⁵² Baker, Norman. (1971). *Government and Contractors: The British Treasury and War Supplies 1775-1783*, p. 216.

1 ½ percent.⁵³ Brewer notes that the “most lucrative contracts were for the supply and remittance of money either to garrisons such as Gibraltar or to pay troops in Europe or American services that the big merchant and banking houses which underwrote government loans were best equipped to provide.⁵⁴” Financial speculators benefitting from the strength of the fiscal-military English state were not just lending to or contracting with the Crown. They operated “monopolies granted by royal fiat, or the tenure of offices in the fiscal apparatus.⁵⁵” Before the economic reforms introduced in Great Britain in 1780s, political connections dispensed government contractors and public debt managers from competitive bidding. Although criticism of corruption shifted from moral to social arguments in the eighteenth-century, corruption remained rampant in corporate⁵⁶ and public bodies⁵⁷, including those involved in international trade and in the management of colonies⁵⁸ in Africa and beyond.

The process of institutionalizing contract as an emerging discourse and practice of the state was stochastic and remained so for a long time. Atiyah notes that as early as the sixteenth-century, Englishmen were already seeking greater freedom to deal with landownership in new ways. Central to the Englishmen concerns were what A.W.B. Simpson calls the “calculus of future interests⁵⁹” that is, how to go about maximizing possible use and ownership of land. The establishment of trust and the doctrine of estates to some extent afforded transferability of ownership for future enjoyment. Blackstone’s *Commentaries on the Laws of England* (1765-69) did provide some answers to the concerns of property owners. But, it wasn’t until Maine published his *Ancient Law* in 1861 that the

⁵³ Reitan, A. Earl. (2007). Op. cit., p 23.

⁵⁴ Brewer, John. (1989). *The Sinews of Power: War, Money and the English State, 1688-1783*. Boston: Unwin Hyman, p. 208.

⁵⁵ Brewer, John. (1989). Op. cit., p. 207.

⁵⁶ Sweet, Rosemary. “Corrupt and Corporate Bodies: Attitudes to Corruption in Eighteenth-Century and Early Nineteenth-Century Towns.” In *Corruption in Urban Politics and Society, Britain 1780-1950*. James Moore and John Smith, eds. Burlington: Ashgate

⁵⁷ Moore, James. (2007). “Municipal Corruption and Political Partisanship in Manchester 1885-95.” In *Corruption in Urban Politics and Society, Britain 1780-1950*. James Moore and John Smith, eds. Burlington: Ashgate.

⁵⁸ Sunderland, David. (2004). *Managing the British Empire: The Crown Agent, 1883-1914*. Suffolk: The Royal Historical Society.

⁵⁹ Simpson, A.W.B. “Land Ownership and Economic Freedom.” In *The State and Freedom of Contract*. Harry Schreiber. Ed. Stanford: Stanford University Press, p. 14.

changes in law governing property were conceptualized as a progressive transition *from status to contract*, by which the author meant the pervasiveness of legal relationships. As James Gordley writes, a fierce debate over fairness erupted between legal theorists and proponents of state intervention. While the theorists favored the will of the contracting parties, critics argued that without taking into account substantive fairness, “the terms of contract must necessarily reflect, not justice but power.”⁶⁰

The American revolution of 1776 was a revolt against unfair treatment by Great Britain and the denunciation of the Crown’s monopolistic power, the incompetence and corruption of Parliament, and reckless public spending based on a heavy tax burden. Unlike Great Britain, however, the court in the United States was later constitutionally empowered through the notion of judicial review⁶¹ to shield individuals from the discretionary powers of both the executive and the legislature. It is therefore not surprising that the concept of freedom of contract later emerged in the United States with a strong legal emphasis on the meaning of contract in the nineteenth century, a critique of corporatism, and the valuing of entrepreneurship. But even in the United States, legal formalizations of contract were constantly challenged and inspired by case law showing more stochastic behavior among contracting parties than theory captured. Although law and politics later took parallel routes in theory, case law in the nineteenth century United States remained “a chaotic mass of materials...[whereby] the cases [could not] be explained in accordance with the simplicity offered by new contract theory⁶²” only. What is interesting from my perspective is the fact that nineteenth-century contractual cases in the United States surprisingly yield data

⁶⁰ Gordley, James. (1998). “Contract Property and the Will.” In *The State and Freedom of Contract*. Harry Schreiber. Ed. Stanford: Stanford University Press, p. 85.

⁶¹ By allowing the court to adjudicate the constitutionality of statutes in *Marbury v. Madison* in 1803, the United States was not just innovating within the Common Law tradition, it was introducing a legal device that was not available to civil law judges in continental Europe such as France, Germany, and Italy, that were equally invested in Africa. Sir Edward Coke introduced the idea in Great Britain. Although aware of this work the court in the U.S. did not use Coke’s doctrine to establish a precedent for judicial review.

⁶² Kreitner, Roy. (2007). *Calculating Promises: The Emergence of Modern American Contract Doctrine*. Stanford: Stanford University Press, p. 3.

very similar to contractual undertakings in Africa at roughly the same time.⁶³

The newness of the challenges nations faced in this period due to significant changes in world trade and ideas about freedom led to different uses of contract mechanisms for problem solving. While some nations adopted contract mechanisms to negotiate sovereignty with imperial powers (Japan⁶⁴, Kuwait⁶⁵, African territories, etc.), other emphasized the use of contract as a metaphor of freedom⁶⁶ to assert individual and commercial rights (United States). Still others used contracting to reinvent and resize public bureaucracy in a modern world (Great Britain).

IV. Public Procurement & Corruption: A Worm in the Bud

Public procurement was entrenched with the rise of the fiscal-military power of the expansionist Crown, whose authority had only been partly challenged by Parliament in the aftermath of the English Civil War. As Brewer notes, “before mid-seventeenth century the chief beneficiaries of the growth of standing armies were not rulers but private entrepreneurs... But by the mid-seventeenth century rulers were gaining control of the forces that marched in their name, and self-sustaining warfare.⁶⁷” The fiscal-military origin of public contracting in Great Britain is particularly relevant to the political development of the non-western world, which is the focus of this paper. It allows one to investigate the missing link between law and politics historically and evaluate the strategic implication for non-Western nations over time. By tracing the connection between on the one hand, shifting focus in debates over monopoly, corruption, freedom of contract and fairness in Great Britain and the United

⁶³ Spelling, Thomas. (1893). *A Treatise on Trusts and Monopolies Containing an Exposition of the Rule of Public Policy against Contracts and Combinations in Restraint of Trade, and a Review of Cases, Ancient and Modern*. MOML Legal Treaties, 1800-1926. Print edition.

⁶⁴ Auslin, Michael. (2004). *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy*. Cambridge: Harvard University Press.

⁶⁵ Rush, Alan. (1987). *Al-Sabah: History and Genealogy of Kuwait's Ruling Family 1752-1987*. Ithaca: Garnet & Ithaca press. Slot, B.J. (2005). *Mubarak Al-Sabah: Founder of Modern Kuwait, 1896- 1915*. London: Arabian Publishing.

⁶⁶ Stanley Dru, Amy. (1998). *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation*. Cambridge: Cambridge University Press.

⁶⁷ Brewer, John. (1989). Op. cit., p. 11.

States, and on the other hand historical contractual cases that took place in Africa, I establish similarity of strategic context.

The crisis-like political context in which debate over contract theory grew in Great Britain has further theoretical implication for the analysis of 'colonial' expansion abroad. As a leaven of the expansionist state, contracting added to the strength and weakness of Great Britain. If on the one hand non-state actors were called upon to supply goods and services to the expansionist state, on the other contractors simultaneously limited its strength by potentially increasing institutional moral hazard. As Sunderland puts it, in addition to a more active presence in the colonies, there was a danger that suppliers' self-interest "would weaken the legitimacy of British rule in the eyes of both ruled and rulers.⁶⁸" This real fear forces us to rethink dominant assumptions about power, when analyzing Great Britain's foreign expansion.

It is my contention that hesitation about the wisdom of government contracts to manage foreign expansion was symptomatic of a struggle over the power devolved between the Crown and the Parliament. Government contracting did not just shift public responsibility to private actors, it also fostered new regimes of freedom through the creation of the Crown Agents, a "non-representative form of administration that comprised a governor and a nominated council⁶⁹" to run the business of government in the colonies. The Agents were appointed by the Crown and enjoyed administrative and financial independence from the Parliament.

That is, Great Britain's foreign expansion taking place at this time was the artifacts of a waning royal power desperately trying to maintain the illusion of effective control through the hiring of contractors. By contracting at home and expanding abroad, the use of contractors worked as a concealment strategy that sought to hide the bureaucratic corruption, which, like a worm in the bud, fed on Great Britain's damask cheek! Exemplifying corruption, or at least conflict of interest from government contracting was the frenetic debate over the role of contractors in Africa. Among other accusations, the Unionist government's image was tarnished by Parliament allegations; reports of corruption, and conflict of interest because most MPs were also board members of companies granted government contracts in Africa. In 1892 "three Conservative

⁶⁸ Sunderland, David. (2004). Op. cit., p. 17.

⁶⁹ Sunderland, David. (2004). Op. cit., p. 2.

investigation of the Boer War contracts “government took the line that holding an inquiry while the war was in progress would simply clog the wheels of the administrative machine.⁷³” At stake here was not just the question of regulating government contracts, but also concerns about the power of Trust, the monopolistic prerogatives of contractors, and their influence on government. According to Searle, the affair of the South African war contracts contributed, albeit in a minor way, to the disintegration of the Unionist government.⁷⁴ Thus, government contracting led to the consolidation of built-in monopolies and threatened the freedom of both the central colonial administration and of the people within soon-to-be administered territories.

Although government intervention in Africa in late nineteenth century after the conference of Berlin progressively sought to harness corporate monopoly for the sake of empire, the displacement of private monopolies through politics had, comparatively speaking, a worse effect on the managed territories. That is, while the restriction on political freedom might have been similar under private and public monopoly, *only with the latter came financial dependency*. Late nineteenth-century ‘hesitant’ expansionist Great Britain used the language and institution of the market to *invent* colonial national debt, a concept that was almost inexistent under private monopoly in Africa. This outcome was in part due to a shortage of capital to sustain Great Britain’s dependencies (Crown colonies, Protectorates etc.), but more importantly to a conflict of authority between various colonial agencies competing for the management of development programs: the Secretary of State, the Colonial Office, the Treasury, and the Crown Agents.

The speculative bond between creditor and debtor was only one of the many bonds of the expansionist modern state. As the historian Niall Ferguson rightly points out, “ in many ways the bond market was interesting precisely because it concerned itself with other bonds as well: above all, the usually implicit contractual bonds between the ruler and the ruled, the elected and the electors, but also the bonds –more often (though not always) contractual –

⁷² Important to this debate over government contracting during the Victorian era were arguments put forward by Henry Labouchere, a member of the parliament later accused of share-rigging.

⁷³ Searle, G.R. (1987). Op. cit., p. 72.

⁷⁴ Searle, G.R. (1987). Op. cit., p. 79.

between states.⁷⁵ The Colonial Loan Act (1899) approved loans to the colonies from the Local Loans Fund at an artificially high rate with the condition that “each borrowing colony was to pass legislation stating that *any loan under the act constituted a ‘first stage’ on the revenues and assets of the colony...*The effect of [this] lien clause made it more, not less, *difficult for a colony to borrow money in the open market once it had borrowed money under the act.*⁷⁶ Most affected by this act were the Cape of Good Hope, Mauritius and Natal. Although the Colonial Stock Act (1900) later made available loans at lower interest rate from the open market to finance public works and increased the number of borrowers in Africa, outstanding debt increased also a decade after in the Gold Coast (Ghana), Mauritius, Sierra Leone, and Southern Nigeria. In contrast to Africa, and with the exception of Trinidad, Colonial Stock Act loans did not increase the outstanding debt of West Indian colonies⁷⁷.

Bankers and contractors underwrote government loans. Between 1777 and 1783, Baker finds “thirteenth contractors who were not bankers subscribed to a total of £348,000” and concludes, “considerable sums were circulating between contractors and government, by way of contracting profits and subscriptions to government loans.⁷⁸” Thus, by tying aid to East Africa to preferential contracting with British companies and labor (Crowned Agents), the British government promoted monopoly, not free trade in public procurement. Monopoly, however, became part of the supply chain for public works for development of the colonies as a result of

⁷⁵ Ferguson, Niall. (2001). *The Cash Nexus: Money Power in the Modern World, 1700-2000*. New York: Penguin, p. 21.

⁷⁶ Kesner, Richard. (1981). *Economic Control and Colonial Development: Crown Colony Financial Management in the Age of Chamberlain*. Westport: Greenwood Press, p. 80, 81, my emphasis. For a complementary list of loans raised by British colonial government on London market under the colonial Stock Act and the Guaranteed Loan Act from 1919 to 1939, see Constantine, Stephen. (1984). *The Making of British Colonial Development Policy 1914-1940*. London: Frank Cass, p.296-7.

⁷⁷ Kesner, Richard. (1981). *Op. cit.*, p. 87-8 table 11. Sunderland (2004. *Op. cit.*), for instance, shows that the conversion of unsecured loan issued by investors into crown colony stock had positive effect on the purchasing power of the Crown Agents (p. 218). Nevertheless, Sunderland also notes that the terms of conversion often ignores the general ordinance which stipulated that conversion was to be done only when the debenture had a higher rate than the stock. The Gold Coast (Ghana) loan of 1909 and Sierra Leone 1904 loan did not follow the ordinance.

⁷⁸ Baker, Norman. (1971). *Op. cit.*, p.226-7.

institutional breakdown and bureaucratic capture. Sunderland, for instance, distinguishes monopoly in the purchase and supply of goods from Britain as a result of the underdeveloped state of crown colonies. Crown Agents in this case helped reduced transaction cost associated with the possibility of obtaining supply in world markets plagued with suspicion and rivalries at this time.

Another type of monopoly, however, was introduced in the procurement supply chain as a policy of adjustment to the fall of the Crown Agency's income and the growth in its workload in 1890s. This asymmetric alignment between responsibilities and revenue to sustain the agency in its management of colonies shifted its agenda from the maximization of the 'quality' of public goods to fund raising activities. As Sunderland writes, "it was in the [Agency's] own interests to turn a blind eye to colonial violations of the monopoly regulation and to purchase high quality goods" with the complicity of the colonial governors who continued to monitor "quality effectively through use" and not through price⁷⁹. The implication for the colonies was the rise in 'territorial' debt from the supply of public works at a very high price as colonies were forced to buy not from the market, but from the Crown Agency directly. The difference between market price and the Agency's price helped pay Crown Agents salaries and provide them with good retirement plans.

In 1922 the president of the Board of Trade declared that under the Trade Facilities Act, guarantees were made for orders for concrete, iron, steel and electric goods, all to be placed in Scotland, North of England, and the Midlands while labor required were to be supplied from Enfield, Tottenham, Lee Valley, and at London Docks.⁸⁰ The same Board of trade introduced a quota system in West Africa to please Manchester cotton manufacturers worried about Japanese goods flooding the market and caused dissent within its own administration in East Africa, Sierra Leone, Seychelles and Mauritius.⁸¹ Similar statutes and financial instruments were later adopted in East Africa with further implication on British government purchasing for development projects. Under the Trade Facilities Acts (1921), "projects financed in whole or part by the CDF⁸² should use

⁷⁹ Sunderland, David. (2004). Op. cit., p. 42.

⁸⁰ Hansard DC Deb February 13, 1922 Vol. 150 cc606-7 <http://hansard.millbanksystems.com/commons/1922/feb/13/trade-facilities-act#S5CV0150P0_19220213_HOC_267> accessed March 2012.

⁸¹ Kesner, Richard. (1981). Op. cit., p. 189.

⁸² Colonial Development Fund

British materials and British manufactured goods (made where applicable out of British materials) and should be shipped in British vessels and be insured by British companies.⁸³ The use of local shipping companies on the West Coast of Africa such as the German Woermann Company and Elder Dempster –with a contract to supply coal from America– unfortunately did not help bring price down because these companies refused to grant Crown Agents special rates.⁸⁴ Southern and Northern Nigeria, the Gold Coast (Ghana), Natal (South Africa), Mauritius, to name a few, all spent excessive fees in goods mostly purchased through shady subcontracts to British companies and secret dealers. Thus, competition fell with increase demand for public goods but this development was not specific to Africa; it rather confirm historical trends that linked the rise of public debts to public monopoly in Venetian State, the Spanish Crown, and other European monarchies in the sixteenth, seventeenth, and eighteenth centuries.⁸⁵

Notwithstanding eighteenth century bureaucratic weakness and corruption, Great Britain was able to remain the ‘lord and owner of her face’ through the revamping of the ‘fiscal military state.’⁸⁶ The combination of Great Britain’s domestic weakness and international strength up to the nineteenth century has puzzled many. Brewer, for instance, argues that the combination of strength and weakness “add to a consideration of the question of authority...[where] a large state apparatus is no necessary indication of a government’s ability to perform such tasks as the collection of revenue and maintenance of public order.”⁸⁷ This line of reasoning implies that government contracting initially played a key role in “faking” both strength and authority especially in Great Britain’s foreign ventures and allowed the bureaucracy to adjust to political pressure through a series of administrative reforms⁸⁸ leading to the Contractors Act of 1782⁸⁹, –

⁸³ Constantine, Stephen. (1984). Op. cit., p. 213.

⁸⁴ Sunderland, David. (2004). Op. cit., p. 46,47. For data on local purchase (p. 45) and comparative cost between the war office and the Crown Agents (p.51).

⁸⁵ see Ferguson, Niall. (2001). Op. cit., p.111-116.

⁸⁶ Brewer, John. (1989). *The Sinews of Power: War, money and the English State 1688-1783*. London: Unwin Hyman, p. xvii

⁸⁷ Brewer, John. (1989). Op. cit., p.. xix-xx.

⁸⁸ Harling, Philip. (1996). *The Waning of ‘Old Corruption’: The Politics of Economic Reform in Britain 1779-1846*. Oxford: Clarendon.

⁸⁹ Also known as Clerk’s Act. For types of contracts awarded and their specification see Binney, J.E.D. (1958). *British Public Finance and*

which barred government contractors from becoming members of Parliament and demanded for competitive bidding, and to the Victorian Corrupt and Illegal Practices Act of 1883, the growing precision of contract specifications, and the growth of equity law⁹⁰.

V. Public Procurement: An Ambivalent Undertaking

Eighteenth century bureaucratic weakness therefore did not just allow Britain's power to fester; it created bargaining opportunities for foreign nations interacting with her. For instance, during the military campaign that rooted out Napoleon in Egypt in early nineteenth century, contractors played a pivotal role in supplying food to the soldiers through Gibraltar. Great Britain reaped the fruit of sustained economic diplomacy in Northern Africa by finding in Morocco, Tunis, and Algiers local suppliers when the Victualing Board could not be counted on for transportation or replenishment⁹¹. After successful liberation from Napoleon, however, Egypt, quickly fell prey of speculative bonds made available by her liberators prompting a takeover of her public finances by her main creditors (France, Italy, Britain and Austria. Ferguson shows that "between 1862, the date of the first Egyptian foreign loan, and 1876, the total public debt rose from 3.3 million Egyptian pounds to 76 million, roughly ten times total tax revenue⁹²" excluding Khedive Ismail personal debt. While the rise of Egyptian public debt in this period is attributable to irresponsible borrowing by Egyptian leaders Muhammad `Ali (1804-48) Sa`id and Isma`il⁹³ for rapid political, economic, and social transformation and monopoly privilege, Labouchère (1831-1912), a liberal British politician and critics of empire in Egypt, blamed the financial contractors, or bondholders in the parliament for undermining "self-development" of the people of Egypt.⁹⁴ British intervention in Egypt

Administration 1774-92, p.176-179. Reitan, Earl A. (2007). Op. cit., adds that "after the Contractors Bill (22Geo.III, c. -45) passed with slight opposition, 12 members of the Parliament who held contracts with the treasury gave up their contracts rather than lose their seats in Parliament "p. 103.

⁹⁰ Morris, Roger. (2011). *The Foundation of British Maritime Ascendancy: Resources, Logistics and the State, 1775-1815*, p. 399.

⁹¹ Morris, Roger. (2011). Op. cit., p.378-381.

⁹² Ferguson, Niall. (2001). Op. cit., p. 300.

⁹³ Safran. Nadav. (1961). *Egypt in Search of Political Community*. Cambridge: Harvard University Press, chapter 2.

⁹⁴ Hind, R.J. (1972). *Henry Labouchere and Empire 1880-1905*. London: The Athlone Press, chapter V. Labouchere himself invested in Egyptian securities but sold his shares later. He opposed liberal hardliners in the

was 'for the sake of the bondholders and for that reason only,' Labouchère vehemently argued. Indeed a default from Egypt would have had tremendous financial consequences in Britain as data show that "countries under British control – Australia, Canada and Egypt—offered overseas investors markedly higher real returns than independent states like Japan, Russia, and Turkey.⁹⁵"

From what precedes, public procurement as a state policy in what is called a 'colonial' setting, is very much relevant to understanding the history of and politics surrounding this practice. In Great Britain early public procurement reform worked as a double-edged sword. While it is certainly true that government contracting became royal instrument for patronage contributing to the projection of power abroad, internal criticism of the use of contractors led to bureaucratic transformation as well as legal regulation. Thus, in a context of political uncertainty and transition, Great Britain's contracting policy and practices simultaneously complicated its foreign expansion. The formation of agencies to supervise the business of government in the colonies also created bureaucratic loopholes that technocrats were able to use to pursue their own self-interest. Equality acting according to self-interest given uncertainty about the nature of political transition in seventeenth and nineteenth centuries were African leaders contracting economic and political goods with various European nations.

CONCLUSIONS

The main purpose of this paper was to show the ways in which an interdisciplinary approach to procurement studies can enrich our understanding of both opportunities and risk government contracting presents to both developed and developing countries. For developing countries, in particular, I stressed the importance of understanding what is at stake and how they might become real partakers in the conversation about public procurement reform. Using contractual data from the seventeenth until early twentieth century in

parliament who wanted to take political control over Egypt and the Sudan. He further attempted to push policy centered on the economics of the Suez Canal rather than on the political control of the region by Great Britain.

⁹⁵ Ferguson, Niall. (2001). *Op. cit.*, p. 302. The author further adds that the problem with " 'informal imperialism' – investment in the absence of direct political control—was that financial control was harder to impose so that the risk of default remained high" (p. 301).

Africa, I showed that focusing on the legal underpinnings of procurement reform alone imperfectly responds to the needs of developing countries because historical and political contingencies still play important roles in determining which area of public policy is likely to get real attention.

Because the pressure to reform has been exogenous, legalistic conformism alone is yet to transform the character of the state in Africa. Implementation problems are also related to the degree to which countries appropriate discourse and set their reform agenda.

If nothing else, public procurement is very much tied to the creation and the rise of the modern state in Africa in a context of declining monopolies over maritime piracy and slave trade. Contracting in this context historically allowed Great Britain to implement some of her policies abroad, and gave African political leaders the opportunity to negotiate transition from illegitimate (piracy and slavery) to legitimate trade. Public procurement as a modern state practice, however, was also subject to bureaucratic capture, corruption and patronage in Great Britain and in the colonies. Besides the actual goods and services contracted, the ability to adjust local institutions to change seemed to have been a determining factor in punishing or rewarding contracting parties. In Great Britain, the process of institutional adjustment was stochastic in nature but eventually lead to statutory regulation of the practice.

This paper did not deal with how public contracting changed or failed to transform economic and political institutions in Africa. What I have been able to show are the many interesting puzzles and themes that data yield. Understanding the historical precedent in procurement studies in the developing world therefore fills an important gap in the literature and allows one to think about formulating research questions sensible to the hopes and fear from developing states when they are put under both market and ideological pressure.