

**IS UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS,
CONSTRUCTION AND SERVICES A SUITABLE LEGAL MODEL TO “ALL”
STATES? – CASE OF AFGHANISTAN**

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ABSTRACT. Fragile situations, post-conflict, developing economies with ongoing insurgencies and failed states have one thing in common: weak or nonexistent public institutions that prevent or limit efficient and effective delivery of goods and services to their societies. Afghanistan is often defined as ‘fragile’ situation, ‘post-conflict’ state, ‘developing’ economy with ongoing insurgency and/or ‘failed’ state, yet its national legislation is based on UNCITRAL Model Law on Procurement of Goods, Construction and Services of 1994. The goal of UNCITRAL Model Law, also the recent one of 2011, is to create suitable legal framework for “all” states to effectively deliver goods, services and works. The principle aim of the article is thus to discuss suitability of UNCITRAL model principles and provisions to procurement in Afghanistan, based on field research and legal analysis.

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The views expressed in this article are those of the author and do not necessarily represent, and should not be attributed to any state and institution affiliated with the author.

INTRODUCTION

Adopting sets of national laws that are acceptable internationally is only a partial success on the road to development. Ensuring their implementation by national authorities remains a challenge, especially there, where state structures and justice sector are weak or inexistent. In such situations, state apparatus remains unable to deliver on its own, and becomes recipient of different forms of aid. During the process of state development, there is a significant involvement of other states, NGOs and international and regional organizations. "Assisting in state development" often means *inter alia* drafting laws or supervising their drafting and strengthening national and local authorities that are to implement and/or to oversee implementation of laws. This is not an inclusive list. There is also a constitution-making, electoral processes, a building up rule of law and national reintegration and reconciliation, where the involvement of external actors, who frequently are also donors, is often of a great importance. In development, the proactive role of the recipient remains limited. Often, its decision to follow proposed solutions constitutes a fulfillment of condition made upon it, in return of which, financial sources are released and political support is provided on international arena. Such practice has not been described as "tied aid", notion that has a significant academic literature for years, yet it has become a practice around the world. It is a method of 'stick and carrot' used by donors, which this way assure that reforms undertaken in concerned state go the preferred path. Another way of understanding decision to follow proposed solutions is to look at the motivation of donors. In this approach, rather than promoting democracy on the basis of the universal capacity of people for self-rule, international state-building assumes that people lack capacity to make their own judgments. This way, the democracy requires intervention of external actors in the building of civil society and state institutional capacity (Chandler 2010).

The method applied in this article is essentially that of legal analysis and field research. The first requires involvement of two different areas of law: public procurement and public international law. The field research was conducted in Afghanistan.

The author spent 30 months in Afghanistan working in domain of public procurement. During this period, aside of conducting analysis of central procurement capacities, the author visited eleven out of thirty four provinces to evaluate provision of goods, works and

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services to the Afghan National Police (ANP). This research was characterized by a number of constraints i.e. limited access to resources due to threat to security.

Lack of uniform, official translation of legal documents always constitutes a serious constraint in the assessment process. Despite presence of international donors in the country since more less 2001, no effective attempts have been made to provide a translation of documents that would be official and uniform across Afghanistan – and as such could provide reliable grounds for any assistance to take place, especially in analysis of law. This constraint remains valid throughout the parts of the work on the Afghan context.

As the study conducted by the author in Afghanistan shows, acceptance of standards and laws different from culture of a state leads to situation in which their immediate application may not be fully assured. Moreover, the capacity of state institutions remains insufficient to implement proposed laws as required. It is therefore argued, that the solution of democratic change, through 'legal transplants' to be sustainable and effective has to emerge from the culture and local context or, alternatively, has to obtain sufficient support of all sides for its implementation and oversight while the preparation to legal transplantation occurs. This also applies to instruments commonly known as model laws, which constitute basis of 'legal transplantation'. Within this article, law is considered as a form of institution in the meaning of definition proposed by Richard W. Scott. According to him "institutions are defined as systems composed of regulative, normative and cultural-cognitive elements that act to produce meaning, stability and order. Institutional elements move from place to place and time to time with the help of carriers" (Scott 2007:48). The 'legal transplantation' and the concept of 'carriers' are interlinked, as explained further in the article.

THE THEORIES OF 'A POST-CONFLICT STATE', 'A FRAGILE SITUATION' AND 'A FAILED STATE'

There is no agreement in academic world regarding what the terms 'post-conflict state', 'a failed state' and 'a fragile situation' mean, leaving large scope of individual interpretation to scholars. The definitions vary and emphasize different elements.

A 'fragile situation' may be a result of a number of factors. According to the World Bank study 'fragile states' is a term used for countries facing particularly severe development challenges: weak institutional capacity, poor governance, and political instability. "Often these countries experience ongoing violence as the residue of past severe conflict. Ongoing armed conflicts affect three out of four fragile states" (World Bank 2009).

The State Fragility Index, elaborated by the Center for Systemic Peace, points out the following constitutive indicators of fragility: 1) relative to security: vulnerability to political violence and state repression 2) political: regime/governance stability and regime/governance inclusion, 3) economic: GDP per capital and share of export trade in manufacture goods, 4) social: human capital development and human capital care (Center for Systemic Peace 2010). In this index, the indicators focus on regime stability and regime inclusion.

According to a definition by Development Assistance Committee (DAC): "states are fragile when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations" (OECD 2007). This definition has a number of weaknesses such as i.e. presumption that the source of fragility is internal, and not caused by any external factors. It precludes that fragility may be resolved only by strengthening state structures, which is not always the case. In addition, it does not measure political will, sufficient to diminish fragility of the situation.

In post-conflict states, there is an absence of war, but there is no peace. There may be ongoing insurgencies. The state institutions do not have sufficient strength to uphold security within the territory. International Development Agency defines 'post-conflict countries' as: (i) a country that has suffered from a severe and long-lasting conflict, which has led to inactivity of the borrower for an extended period of, or at least a substantial decline in the level of external assistance, including from IDA; (ii) a country that has experienced a short, but highly intensive, conflict leading to a disruption of IDA involvement; and (iii) a newly sovereign state that has emerged through the violent break-up of a former sovereign entity. Throughout this work, post conflict situation refers to the aftermath of a conflict of internal character.

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The theory of 'a failed state' has been a subject of several publications (see i.e. works by Daron Acemoglu and James A. Robinson, Jared Diamond, Ashraf Ghani, Mark Massey, Robert Rotberg and William Zartman). According to Fund for Peace, a state that is failing has several attributes. One of the most common is the loss of physical control of its territory or a monopoly on the legitimate use of force. Other attributes of state failure include the erosion of legitimate authority to make collective decisions, an inability to provide reasonable public services and the inability to interact with other states as a full member of the international community. Twelve indicators proposed in the Index cover a wide range of state failure risk elements such as extensive corruption and criminal behavior, inability to collect taxes or otherwise draw on citizen support, large-scale involuntary dislocation of the population, sharp economic decline, group-based inequality, institutionalized persecution or discrimination, severe demographic pressures, brain drain, and environmental decay. States can fail at varying rates through explosion, implosion, erosion, or invasion over different time periods (Fund for Peace 2011). In this approach, the failure to respond to basic needs of society and deprivation of civil rights is a sign of state failure.

The definition of 'a failed state' proposed above, focuses mainly on the capacity of a state and not on nature of political regimes and its consequences, as it is case of studies of democratization (see i.e. works on democratization by Dirk Berg-Schlosser, Paul Brooker, Thomas Carothers, Larry Diamon, Vladimir Gelman, Jean Grugel, Juan J. Linz, Guillermo O'Donnel, Andreas Schedler, Alfred Stepan, Lucan A. Way).

According to Daron Acemoglu and James A. Robinson, who wrote one of the most recent books on failed states, the key differentiator between countries is 'institutions'. The nations fail when inclusive political and economic institutions become extractive and concentrate power and opportunity in the hands of only a few. Based on history, the economy and politics are interlinked and only when political situation is stable, the economic growth may occur (Acemoglu and Robinson 2012).

LINKING PUBLIC PROCUREMENT WITH SECURITY

In this work, the author adopts a definition of term 'public procurement' as supply of goods, works and services by public institutions with public funds.

Conducting procurement in a post-conflict state, a fragile situation, developing state with ongoing insurgencies is a challenge. As explained above there is inability or limited capacity to supply basic needs of society by public institutions. National authorities of post-conflict state, a fragile situation, developing state with ongoing insurgencies or a failed state tend to desire to build state structures and provide all necessary services and goods for its nation. Unquestionably, state weakness reduces the role of the public sector. Therefore to fulfill their desires, the recipients turn to donors for financial resources and additional capacities. As result, standards, values and laws provided by donors are accepted as a basis of state apparatus. Moreover, as weak state structures are present, implementation of laws is mainly assured by numerous international consultants.

Sectors like economy, justice, infrastructure, health and education require support of effective state structures, or those assisting them in a permanent manner. However, the needs may not be satisfied, despite significant resources made available, if security within territory is not assured. Lack of security influences implementation of law, impacts justice sector and functioning of state institutions. In 2008, Robert B. Zoellick, the President of World Bank stated: "only by securing development can we put down roots deep enough to break the cycle of fragility" (Zoellick, 2008). Strong public institutions, in particular in the security and justice sectors, provide criminal accountability for abuses. The special role plays in this respect both branches of security forces: national police and national army. Once peaceful environment is established, and other conditions are fulfilled delivery of goods, works and services to a nation.

LEGAL TRANSPLANTS

In 1970's, Alan Watson introduced into legal theory term 'legal transplant' to indicate the process of introducing a rule or a system of law from one country to another, and/or of borrowing certain aspects if it (Watson 1993). As he pointed as, the national laws often are inspired, if not derived from outside. He indicated three main categories of the legal transplants: first, when people move into a

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different territory, where there is comparable civilization, and takes law with it. Second, when people move into a different territory where there is a comparable civilization, and takes its law with it. "Thirdly, when people voluntarily accept a large part of the system of another people" (Watson 1993:30). The book written in 1970 does not yet encompass the phenomenon of conditioning provision of international aid upon acceptance by the recipient of large parts of the legal system. Nevertheless, the author indicates that receptions and transplants may come in all different shapes and sizes such as imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation. By far, transplanting is the most fertile source of development (Watson 1993:95). Although coming from outside, the law is rooted in the past (Watson 1993:95), what means that there is always a link with past experiences and previous legal solutions.

According to Watson, transplanting of legal rules is socially easy, even where rules come from a very different kind of system. In his view, legal rules do not make significant impact on individuals and what counts is the fact of having a rule. However, "what rule is adopted is of restricted significance for general human happiness" (Watson 1993:96).

While, the above statements remain in the author's view unquestionable for process of transplanting, it may be argued that it is not the case for sustainability of reception, once the legal system or parts of it are put into new cultural context. Forty years later, it becomes clearer that compliance with culture and basic social principles does in fact matter for the permanent effective implementation of rules and laws transplanted into society. Thus, undertaking reform of legal system must be more sensitive to local context (World Bank *legal culture and judicial reform resources*). The case of legal transplants in public procurement in Afghanistan may be of support to that argument.

Proposed in 1995, and further elaborated in 2007 the theory on institutions by Richard W Scott does provide further arguments to that respect. According to Scott, the institutions require a sort of 'carriers' such as culture, social structures, routines, which cause the institutions to materialize in form of specific patterns, regular behaviors or structures. From a cultural perspective, institutions of

regulative character take on form of rules and laws. The 'carriers' like social structures give a managing framework as well as legitimacy to institutions of regulative character. Routines materialize themselves through procedures and standards. (Scott 2007:50-59). This means, that the 'carriers' do impact the institutions, adding to the argument, this time from a sociological perspective, that the i.e. cultural context of legal transplanted has a meaning on effective application of laws in a specific recipient country.

The extent to which choice of a rule to be borrowed and the modification made to it actually correspond to the needs of the society has not been analyzed by Watson. If included, this would bring more light on the effectiveness of the legal transplants, once received in the new cultural context.

It seems that Watson's point that legal rules are not peculiarly devised for the particular society in which they operate (Watson 1993:96), could be used indirectly as grounds for creating models of laws, that are proposed as legal templates - 'a one size fits all' solution to development of legal systems.

THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

The United Nations Commission on International Trade Law (UNCITRAL) was established by the UN General Assembly in 1966. It has remained a principle vehicle for harmonization and standardization in the field of the international trade law. The general mandate includes inter alia the issue of conventions, model laws, cooperation with other international organizations and technical assistance¹. The Commission is composed of sixty member states elected by the General Assembly². Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years and represent following regional groups: African states, Asian states Eastern European states, Latin American and Caribbean states, Western European and Other states. In accordance with its mandate, UNCITRAL takes into account in its work "the interest of all peoples, and particular those of the developing countries, in the extensive development of international trade". The developing countries, as stated by UNCITRAL play an active role in both drafting and adoption of UNCITRAL texts.

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UNCITRAL texts are initiated, drafted and adopted by the United Nations Commission on International Trade Law. Participants in the drafting process include the member states of the Commission, observer states, as well as interested international inter-governmental organizations (IGOs) and non-governmental organizations (NGOs).

The Commission issues two types of texts: legislative and non-legislative. UNCITRAL legislative texts such as conventions, model laws and legislative guides may be adopted by states through the enactment of domestic legislation. Non-legislative texts, such as the Arbitration Rules can be used by parties to international trade contracts.

From a law-making perspective a soft law describes set of non-binding acts, in contradiction to hard law, which is always binding, and requires certain procedure for its adoption. Soft law is not a source of law in the meaning of article 38 paragraph 1 of the Statute of the International Court of Justice.

Soft law always represents an attractive alternative to binding instruments. As pointed out by Boyle, it may be easier to reach agreement when the form is non-binding (Boyle 2006:143). Soft law often permits to come to an agreement on more detailed and precise provisions and it does not require domestic treaty ratification process (Hillgenberg 1999:501). Moreover, the soft law instruments are easier to supplement, amend or replace than treaties.

The UNCITRAL Model Law on Procurement of Goods, Construction and Services first adopted in 1994, and recently in 2011, provides 'a template' for reforming regulatory systems on public procurement. UNCITRAL indicates that nowadays around 30 states have enacted legislation based on the Model Law³, either transitional economies or developing states. It has been used to reform existing systems largely because institutions financing reform, particularly the World Bank, have required or encouraged its use (Arrowsmith 2004:21).

As explained in the guide to enactment of the Model Law, the Commission work on the Model Law was undertaken since in a number of countries existing legislation governing procurement was perceived to be inadequate or outdated, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the failure of

the public purchaser to obtain the adequate value in return for the expenditure of public funds. The need for the Model Law was considered to most acute in developing countries and countries in transition (UNCITRAL 1994).

According to UNCITRAL, in those countries a substantial portion of all procurement is engaged in by the public sector. Those countries, due to their nation, in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible (UNCITRAL 1994).

The Model Law on Public Procurement in its version of 1994 and of 2011 contains procedures and principles aimed at achieving value for money and avoiding abuses in procurement process.

The following are the principles of the Model Law: accountability, objectivity, fair treatment, participation and competition as well as transparency. It covers “all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities” (UNCITRAL 1994:paragraph 12). It deals with scope (article 1-3), qualifications (articles 6-8), specifications (article 16), and procurement methods (articles 18 -51) and review (articles 52 – 57). Arrowsmith points out, “as a guide to best practice, the Model Law can encourage sound policies, reduce the resources needed for implementation, and minimize errors or other defects” (Arrowsmith 2004:19). Moreover, it is considered as “achievement, since not only does it offer sound solutions, but it is well drafted” (Arrowsmith 2004:20).

While it is not difficult to agree with the above statements, what often is neglected is the requirement of existence of functional state institutions that will implement the law arising from the legal template. The Model Law does not reflect on various levels of state development, although provides several options of specific solutions. Being supportive to the intend of those drafting the Model Law, one could presume, that in fact its provisions act as a roadmap towards achieving sound procurement system at the moment when statehood is sustainably assured.

As explained above, fragile situations, post-conflict states and developing economies with ongoing insurgencies often do not have sufficient and operational state apparatus, which can conduct public procurement and put in place relevant policies. This requires relevant

resources in terms of people, qualifications and system solutions and procedures. Thus, the efficiency and effectiveness of the procurement legislation based on Model Law may not always be assured. Sole enactment of legislation based on the Model Law is not sufficient for claiming success. Assurance of its implementation and simultaneous compliance with international standards has to follow. Executing procurement on behalf of a state, through external consultants may be a temporary means that do not necessarily help in establishment of sustainable procurement system. In this sense, the Model Law is not “a one size fits all” solution for “all” states, as it is based on conditions which are often left unfilled by fragile, post-conflict and especially failed states. “An effective public procurement demands high quality public governance in terms of transparency and accountability as well as effective management that can deliver optimum risk management and value for money outcomes. It also demands coherence with other public policy environments, especially business policy because of its significance in the economy” (Schapper 2006:4). The most importantly public procurement to be effective should happen in secured environment. Insecurity leads to domination of emergency procurement that is considered as exemption from a standard procurement procedures.

AFGHANISTAN AND PUBLIC PROCUREMENT

Ten years after the fall of Taliban government, Afghanistan continues to be defined as a ‘fragile situation’ (World Bank), a ‘post-conflict’ (IDA) and/or ‘developing economy with ongoing insurgency’ (UN), or even a ‘failed state’ (Fund for Peace). Each adjective is judgmental in itself. In 2001, the key economic institutions such as central bank, and key functions like budget preparation, execution and monitoring, tax collection and customs, statistics, civil service, law and order and the judicial system – have been weak (World Bank 2002:3). In 2010, in State Fragility Index, Afghanistan was marked as ‘extreme fragility’ with score just below Somalia, Sudan and Democratic Republic of Congo. What it means is that Afghanistan has been hardly capable of managing conflict, make and implement public policy and deliver essential services. In Failed State Index of 2011, Afghanistan ranks 7th worst, and is described as critical, with maximum level of external intervention, weak security apparatus and ineffective service delivery. While having opinion of a ‘failed state’ and ‘fragile situation’, there is

enormous expectation internally and externally for the state institutions to deliver and respond to needs of the nation.

Since 2005 the Afghan public procurement is based on the principles of UNCITRAL Model Law. Having it as an example, the law of public procurement was first issued in 2005, and then in 2008 (further amended in 2009).

The acceptance of the principles of Model Law has not necessarily come easy for Afghans. Prior to year 2005, the Purchase Regulation of 1999 was in place and through 56 articles regulated supplies and services procured by public institutions.

The Regulation provided different than the Model Law principles, such as permitting negotiation over price and no clear system of selection of the winner. As the principles of Regulation were similar to those of earlier law of public procurement of 1988, they were applied across the country for a period of approximately 17 years in total, thus much longer than the application of new legal framework. An example of the difficulties encountered while introducing new sets of rules in Afghanistan is explained by the UNDP in document titled 'Institution Building in Procurement Policy Unit of Ministry of Finance Implementation of new Procurement Law 2008. Restoration of ARTF Recurrent Cost Funding':

"In July, 2008 a new Procurement Law, which was the successor of the Afghanistan Procurement Law 2005 was enacted by the Government of Afghanistan (GoA). However, World Bank (WB), a major donor and ARTF administrator, expressed strong reservations against the new law since many provisions in the new Law did not meet international standards and prior consultation was not done with relevant donors while enacting it. Consequently, it suspended Afghanistan Reconstruction Trust Fund (ARTF) recurrent cost funding to GoA. This was a serious situation for GoA and if not resolved, had the potential of triggering a financial crisis for the government", since a substantial portion of the budget of government of Afghanistan is funded through ARTF funds.⁴

As explained by the UNDP, incompliance by the Afghan authorities with international standards resulted in suspension of funding – a 'stick' in a 'carrot and stick' method used by international donors. It is only when the procurement law was amended in accordance with, that the funding was resumed.

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The legal framework on public procurement in Afghanistan is not fully adapted to the Afghan context, since the society undertook steps to modify it in its own way, unacceptable to the donors.

LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT IN AFGHANISTAN

The legal framework for the public procurement in Afghanistan includes: Constitution, the Public Procurement Law, and the Rules of Procedure for Public Procurement in Afghanistan as well as Circulars of Procurement Policy Unit (PPU) in Ministry of Finance, a principle body responsible for monitoring of procurement in Afghanistan.

Compliance with the Afghan procurement legislation is obligatory to all the procuring entities and other participants of the public procurement process, unless there is an explicit derogation provided in the law.

In addition, there are Standard Bidding Documents (SBD), which when signed by parties, become binding and a Manual of procedures for procurement appeal and review, issued by the PPU on March 18, 2007. This manual does not seem to be legally binding, since it is issued based on the law of 2005, that is not in force anymore.

The Public Procurement Law enacted in 2008 and further amended in January of 2009, as mentioned above is based on the UNICTRAL Model Law of Public Procurement. The drafting and revision of the Public Procurement Law was done with assistance of a foreign consultancy company. For the Law of 2008, it was CKP (Charles Kendall Partners) that took on task of assisting in drafting and revision of Public Procurement Law, within the project financed by the World Bank, while the earlier version of Law, of 2005, was drafted with assistance of the *Crown Agents* and also was financed by the World Bank.

The Public Procurement Law of 2008 regulates both domestic and foreign procurement of goods, works and services for administrations, institutions and companies with major public ownership.

The law includes so called 'domestic preference clause' in article 7. The priority in the Afghan procurement is given to goods, works and services produced (furnished) domestically, "provided that the price

of the domestic procurement is not higher than the imported procurement by a percentage set in the procedure”.

Its purpose is to ensure transparency in procurement proceedings, to have effective control of financial affairs and public expenditure, to ensure best value for money and to provide tendering opportunities for participation to all eligible bidders in procurement proceedings.

Other legislation relevant to public procurement includes:

- a) The Rules of Procedure for Public Procurement in Afghanistan;
- b) The PPU Circulars, published by the Procurement Policy Unit in Ministry of Finance;
- c) Local Administration Law of 2000 (1421);
- d) Provincial Administrative Assembly Law (1964).

As it may be understood from the above explanation, when it comes to the legal framework regulating public procurement in Afghanistan it can be considered generally as complete. There is a principal legislation, which is in general based on the UNCITRAL Model Law and subsidiary legislation with documents issued by the public entity entitled to regulate this domain in the country.

The circulars are available on the website of the Ministry of Finance and are applied in general by the public entities in the capital – yet they remain of doubtful legal value. They are based on law that is not in force anymore. For the time being, there is neither plan nor activities under way to modify or update them (source: Ministry of Finance).

The legal framework on public procurement in Afghanistan is not fully adapted to the Afghan context. It lacks specific and detailed provisions for sub-national procurement.

Despite international efforts, the country continues to face insurgency threats and attacks. In parts of the country, the armed conflict is ongoing and the Afghan National Police acts as a paramilitary force that takes active role in fighting. The standard procurement process as provided in the legislation may not take place due to lack of security and alteration of the market forces. Instead, a form of emergency motivated single source procurement takes place and often becomes a standard method of supply.

In addition, the current legal framework does not include any provisions on the procedures applied to so-called 'sensitive procurement', both at the central and sub-national level.

THE AFGAN PUBLIC PROCUREMENT IN PRACTICE

During the field research the author discovered that there is no clear understanding of differences between logistics and procurement processes among those dealing with public supplies on daily basis. 'Procurement' in the Afghan context is an acquisition process that takes place mainly at the (or just before or just after) beginning of the financial year. The process aims at acquisition of goods, works and services from external contractors that are selected through relevant procedures. In case the legitimate need arises (i.e. lack of stock) or there is a delay (i.e. in budget approval) the procurement process may also take place exceptionally during the given financial year. 'Logistics' process is an acquisition of goods from existing and already procured supplies and stocks. It takes place throughout the whole financial year. Yet in practice – the term 'procurement' often is misunderstood with term 'logistics'. The previous laws on procurement did not clarify the difference between those two terms. More often the word 'logistics' was used.

In addition to lack of understanding of diverse supply processes, use of so called 'empty envelopes' method indicates application of law that precedes principles of UNCITRAL Model Law. The method of 'empty envelopes' described in Purchase Regulation of 1999 remains a standard practice across most of the provinces. Term 'empty offers' for the Afghan means a page of document with an empty table, in which bidder fills in offer and signs with a finger mark following discussion with selection committee. It is based on the presumption that the bidders fill in their offers at the opening session, when a negotiation may occur. The bidders may receive also empty offers earlier, i.e. at the pre-opening session meeting.

In the method of 'empty envelopes', tendering takes place in the presence of bidder. In a meeting, committee "tries to encourage bidders by using all necessary administrative measures, to reach the price of needed commodity or service and their provision's conditions to the favorable limit" (rule 25 of the Purchase Regulation of 1999).

Such procedures stand against the principles provided in the UNCITRAL Model Law, yet as they are known and applied for years, they became a standard practice replacing new “complicated” rules included in Law of Public Procurement of 2008 (amended in 2009). Change in the approach towards the ‘new’ law probably would require in depth professional training of public personnel, new resources and adjustment of procedures to new legal framework.

CONCLUSION

In this article, the author has attempted to analyze whether the Model law on Public Procurement of Goods, Construction and Services, as drafted by the UNCITRAL, is a suitable legal model for “all” types of states. The specific focus was given to Afghanistan, classified as a ‘post-conflict state’, ‘fragile situation’, developing economy with ongoing insurgency or ‘a failed state’, where the principles of UNCITRAL Model Law were transplanted into national legislation, using existing ‘carriers’. While there is no doubt, that the “Model Law can encourage sound policies, reduce the resources needed for implementation, and minimize errors or other defects”, the author argues that it does not provide the ‘one size fits all’ solution to ‘all’ types of states. In order for the law derived from the UNCITRAL legal template to be effective, state apparatus has to be functional. It is a condition *sine qua non*. In post-conflict states, fragile situations and failed states like Afghanistan, public institutions are weak or inexistent and they are not fully capable of providing all the needs to society. Moreover, in such types of states security is not present. There is not ongoing war, but peace is not preserved either. This has a direct impact on the use of legal instruments. The efficiency of delivery, unless supported from outside, is not secured. Its effectiveness (thus to deliver) in urgency becomes priority. In such situation exception of emergency and *ad hoc* procurement often becomes a rule. This opposes the basic principles of UNCITRAL Model Law, which support competitive fair and transparent supply of goods, works and services.

NOTES

1. Detailed information on the effects of culture on law, and impact of law on culture may be found in World Bank resource titled *Legal*

culture and Judicial Reform.
<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalCultureBrief.pdf>

2. For further information on UNCITRAL's mandate see http://www.uncitral.org/uncitral/en/about_us.html
3. As from June 2011, the members of UNCITRAL and the years when their membership expire are Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom (2013), USA (2016), Venezuela (2016)
4. The following countries enacted legislation based on the UNCITRAL Model law: Afghanistan, Albania, Azerbaijan, Bangladesh, Croatia, Estonia, Gambia, Ghana, Guyana, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi, Mauritius, Moldova, Mongolia, Nepal, Nigeria, Poland, Romania, Rwanda, Slovakia, Tanzania, Uganda, Uzbekistan and Zambia.
5. The full explanation of the steps taken by the UNDP team to overcome a deadlock may be found at http://www.undp.org.af/Projects/CAP/CAP.SuccessStories/ImplementationProcurementLaw.SS4_CAP.pdf

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