

Institute of Legal Studies  
Polish Academy of Sciences

Summary of a doctoral dissertation titled:

***Public procurement as a tool of state-building in post-conflict states.  
Case of Afghanistan***

by Ewa Suwara

*Supervisor: prof. dr hab. Jan Barcz*

The principal aim of this doctoral dissertation is to examine how the regulations of public procurement are implemented in practical terms in post-conflict states and how they affect impact effectiveness of international aid. Specific focus is given to Afghanistan, which in recent years has become a top beneficiary of international assistance. Since the fall of the Taliban regime, it has experienced a reform of public procurement regulations based on the *1994 UNCITRAL Model Law on procurement of goods, works and services* (further called 1994 UNICTRAL Model Law) commonly described as world's "best practices" in the domain.

The study covers a period between 2001 and 2011, where 2001 indicates the fall of the Taliban regime and an increase in international engagement. Year 2011 reflects the moment when the first set of Afghan provinces was identified for the transfer of responsibility from the NATO led *International Security Assistance Force* (ISAF) to the *Afghan National Security Forces* (ANSF), marking it politically as an important step for the Afghans towards achieving ability for self-governance.

This dissertation on the state of Afghanistan is timely. The ISAF completes its current security mission in 2014 which requires the Afghans to fully manage their domestic affairs and to protect their territory, completing transition process started in 2011. Here, public procurement will be required to play its role. Supplying goods, works and services, thus fulfilling basic state functions is crucial for Afghanistan's future. Hence, regulating this domain adequately remains at the core of the discussion on means to achieve sustainable effectiveness of state-building efforts in states like Afghanistan.

The dissertation examines the system of public procurement understood not only as regulations, but also as procedures and the public institutions established by them.

They have been reviewed from two perspectives: drafting and implementation, both occurring on domestic and international levels. Within the analysis of the drafting the procurement regulations, specific attention has been given to identifying the origin, the initiators and the methods used to prepare them. Within the scope of analysis of their implementation, focus is given to “who” implements the regulation and “how” they do it and whether (based on specific case study of the Afghan Ministry of Interior - MoI) they are adhered to in practice. The system of procedures is presented from the perspective of their application, while public institutions are discussed through an analysis of their competences and at their level of involvement in public procurement. These issues are presented in two contexts: the post-conflict situation and the state-building process. In practice both significantly influence application of procurement regulations. Therefore, they constitute a subject for in-depth analysis from an intertwined perspectives.

The motivations for engagement of international participants as well as reasons to use a chosen public procurement system plays an important role in the course of state-building. They are as complex and as diverse as forms and size of assistance and multiplicity of applied regulations. The international participation in rebuilding Afghanistan is of multichannel and multilayer nature. Establishing effective, transparent and efficient public procurement system constitutes part of the state-building process, as it aims to allow a state to fulfill its basic functions (which are discussed in the dissertation). It does not however, focus on achieving sustainability, self-sufficiency and state independence from external factors in long term perspective.

In order to analyze the above-mentioned issues, the dissertation is divided into nine chapters. It begins with an **introduction** that outlines the principal research goal, detailed questions and relevant methodology. It briefly explains the socio-political context, geographical situation, administrative characteristics and legal system of Afghanistan. It presents the motivation of the author to undertake this project as well as to delineate the challenges encountered during her research. The introduction includes a brief overview of Polish and international literature. **Chapter one** includes analysis of state-building concept. It researches possibilities of international engagement in this process and explores basic state functions. This chapter also presents a classification of states according to their capacities and discusses a *rationale* for international involvement in state-building including its rules of engagement. In **chapter two**, the author presents Afghanistan as a post-conflict state in which state-building occurs

through diverse set of means. This includes in-depth analysis of the conflict phenomenon in Afghanistan and the international activities supporting socio-economic development and security sector reforms from both the civil and military perspectives. The specific attention is given to definitions of “conflict” and, in consequence, “post-conflict situation” from a broad perspective, which includes international humanitarian law. **Third chapter** provides discussion on scope, types and a manner of supporting post-conflict states while focusing on Afghanistan. Here, the author analyzes international assistance which is provided to this state through systems of public procurement. Thus, channels to provide the aid, the participants involved, and diversity of public procurement rules applied are presented. In **chapter four**, the discussion on international engagement continues with attention focused on its role in achieving effective state development. A summary of the principal international documents on aid and procurement effectiveness is presented. The discussion centers on the ways chosen by external participants to influence both international assistance and public procurement policy. **Chapter five** attempts to answer the question of whether public procurement, aside of being a tool used for spending aid resources, constitutes a form of international assistance for post-conflict states. Thus it elaborates the issue of regulating public procurement with specific focus given to the 1994 UNCITRAL Model law as an example of a *soft law* instrument. An analysis of 14 years of work of UNCITRAL permits to identify the participants, sources, and the stages involved in adopting model law as the international standard in this domain. **Chapter six** presents the phases of development of public procurement regulations and the characteristics of reforms undertaken in Afghanistan during the period 1988-2007.

The next three chapters of the study refer to Afghan public procurement regulations that remain in force since 2008 from three distinct perspectives. **Chapter seven** identifies the laws applicable to public procurement and analyzes their provisions in order to evaluate their internal coherence and completeness. It also includes a comparison with former regulations as well as with 1994 UNCITRAL Model Law to indicate the extent of compliance with the international “best practices”. **Chapter eight** explains the organization of public procurement in Afghanistan, including the institutional aspects, thematic scope covered by the legislation, the procurement methods, and the appeal and review procedures. This aims to establish a level of relevance of the legislation to its local context. **Chapter nine** presents the procurement

process based on a case study of the Afghan Ministry of Interior (MoI). It discusses the methods used, the procedures followed and confronts local practice with law. Additionally, it discusses the training of personnel involved in the procurement process using data obtained from over two thirds of the Afghan provinces. The **conclusion** responds to the research question outlined in the introduction and includes some proposals to consider. The dissertation incorporates **fifteen annexes** to extend the scope of the specific issues discussed, including: the geographic location of Afghan ethnic groups, existing political opposition, the sources of the Afghan conflict, and sample questionnaires used in field research. Also included is an article-by-article comparison between the Afghan in-force procurement law and the previous legislation as well as a comparison between the current procurement law and the 1994 UNCITRAL Model Law.

The author worked in Afghanistan participating in state-building efforts for thirty months: between 2008 and 2011. The first-hand experience in Afghanistan as well as previous professional encounters in Malawi and Morocco have been brought to bear in the approach taken. To analyze this subject in its entirety, the author adopts a diverse methodology. A legal-dogmatic method is applied to analyze the legal acts and primary source documents of domestic and international character. A legal-historical method is used to identify and discuss the Afghan legislation and its development in the area of public procurement. The reform efforts presented are based on interviews, historical sources, legal acts and other available documents, including unofficial texts. The amount of international assistance provided to Afghanistan between 2001-2011, as well as the value of MoI public procurement is presented quantitatively, through application of statistical method. The dissertation contains a comparative study of the 1994 UNCITRAL Model law and the Afghan law on public procurement. There is also a sociological method applied to observe the functioning of regulations in society. The field research undertaken in Afghanistan between 2008 and 2011, using questionnaires and interviews with representative groups remains a pillar of analysis of the practical aspects of public procurement conducted by the MoI.

The complex and in-depth analysis of public procurement in post-conflict states presented in this study is of a unique character. It constitutes valuable input in the debate on the possible means of transferring international aid, its programming, the practice of using legal templates, the methods and instruments used in the state building

process, and the reasons for international engagement in post-conflict states. It also enriches available sources on public procurement regulations.

As the number of intrastate conflicts increases around the world and more international efforts come together to stabilize states, this dissertation offers a theoretical and practical look at issues that are becoming increasingly important to discuss from perspective of international public law.