Drafting for a Post Conflict and Collapsed State – The Case of Afghanistan

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Abstract

Millions of dollars are being poured to recover countries from post-conflict situations and stop other from relapsing into failed state without satisfactory outcomes. This paper is an attempt to establish that quality laws, strong institutions and clear procedures for enforcement are of immediate concern in post conflict countries and should not be compromised due to security reasons. This paper outlines the causes and consequences of state failure and role of quality laws and strong institutions in arresting states from relapsing into failed and collapsed states. It asserts that it is the responsibility and liability of a state to make quality laws and if a state is failing it is committing negligence and negating an important fundamental human right. The paper also suggests the reform menu for a collapsed state in general and for Afghanistan in particular and urges the UN agencies and other international donors that the quality laws are no luxury. The paper also examines and evaluates the existing framework for legislative drafting in Afghanistan; the challenges to legislation in Afghanistan; the problems faced by draft persons; causes of failure of international efforts to bring peace to Afghanistan; presents critical appraisal of current situation in Afghanistan after seven years. Finally it presents a detailed recipe for shaping the laws for post-conflict Afghanistan in line with Afghan National Anti-Corruption Strategy. In the end a seven steps strategy for improving law drafting in the post-conflict states generally and in Afghanistan specifically is outlined.

A. Introduction

The role of legislative drafting in the creation and administration of law has received very little attention from governments, national and regional, development organizations, policy makers and even legal commentators especially in the developing countries. The developed countries, the EU and some international development organizations[1] have realized the importance of laws and legal systems in social transformation, rule of law, good governance and development. This neglect is a big mistake on the part of developing countries. Quality legislation is also not getting due attention in post-conflict countries. No doubt the rule of law has been hailed as a panacea for transition. Post-conflict countries and donors push for the rule of law as a necessary condition for the acceleration of economic activities, investment, peace and security and protection of human

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1 R. E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14(1)The World Bank Research Observer (1999) and R. Posner *Creating a Legal Framework for Economic Development*, 13(1) The World Bank Research Observer (1998).

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rights.[2] And the rule of law itself depends upon good laws. Therefore, the absence of proper attention to quality of laws has resulted in a list of disappointments and a bad track record of rule of law success in post-conflicts reconstruction[3] and in other development co-operations.[4] In this era of democracy, national and international economies driven by market forces, development, environment, and globalization of human relations, the drafting of quality laws have become more and more important. Law provides conducive conditions for growth and investment.[5]

The lessons learned from post-conflict situations present sufficient evidence that quality of laws and regulations and effectiveness of institutions are of immediate concern for economic development, democratic development, peace and rule of law. The laws that are burdensome, complex, over lapping, unstable, conflicting and confused, unclear or impractical and without any enforcement mechanism further worsen rather than improve the uncertain situation, public ownership and public confidence in international community helping in reconstruction and development by slowing down economic growth, increasing insecurity, injustices and violation of human rights, reducing public cooperation and increasing administrative costs and corruption. This uncertainty in laws coupled with flawed and weak institutions result into misallocation of resources provide opportunity for corruption and organized crimes. The post conflict countries need clear and express legal principles, strong institutions and easy procedures more than development funds. An effective state needs effective laws and institutions. The quality laws are essential and a necessity for post conflict situations and are no more a luxury. Laws and regulations lay down foundations

[2] R. Sannerholm, *Beyond Criminal Justice: Promoting Rule of Law in Post-Conflict Societies*, paper presented at the Conference on Globalization and Peace-Building, Uppsala 6-8 November 2006, at 1, argues that a third rationale for rule of law in post conflict countries is the relation of rule of law with peace and security. His argument goes like this: "conflict and crisis is caused by human rights violations and high levels of insecurity. If rule of law is an essential condition for making human rights justifiable claims, and not merely rights on paper, then rule of law is the key strategy for post-conflict recovery."

[3] Disappointing results of rule of law reforms are reported from nearly all post conflict scenes. The most recent example is Afghanistan where resurgence is getting the upper hand despite seven years rule of law program. In Kosovo serious problems in the legal and administrative system persist despite concerted efforts of the international community in the form of an international transitional administration where UN, EU, and OSCE have assumed responsibility over the province since 1999. In series of OSCE reports on the criminal and civil justice system, a lack of enforcement, misconduct by the judiciary and violations of fair trial standards are frequently cited. The same can be found in reports from East Timor, Sierra Leone, Liberia, Burundi and Afghanistan.

[4] R. Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 Mich. L. Rev. 2275, at 2280 (2003), "despite billions of aid dollars, programs to promote the rule of law have been disappointing." *See also* B. Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DePaul L. Review 383 (2003).

[5] Afghan business owners cite insecurity, a 20 percent corporate tax rate, government corruption, lack of business infrastructure and antiquated investment laws from the Soviet occupation or earlier monarchy. Last year the World Bank rated Afghanistan 162nd out of 175 countries in terms of ease of doing business.

for cooperation, development and peace. Poorly-conceived laws and institutions do have unexpected disastrous effects in post conflict countries as such laws enhance conflicts and take away public confidence in this new system.[6]

It is high time for developing countries and post conflict countries to awake to this modern reality and necessity. The quality laws affect legal relations and everyday situations at individual level, at companies' levels, at national levels, at regional levels and at international levels. At the individual level, bad legislation may lead to lack of certainty and insecurity in the law. Good quality legislation is essential for effective judicial protection. At companies' level, bad legislation is a hurdle to the creation of a secure, properly regulated, competitive business environment. The vague, conflicting and inaccurate provisions also damage the credibility of a country and its economic relations with neighbors. Not only this, the consequences of bad quality laws transcend boundaries of a country. Business relations are affected. The quality in legislation affects to the citizens and also integration and harmonization and globalization. Such laws hinder and slow down integration of local and regional economy into the global economy.

The quality laws have a direct relation with state failure and conflicts in the society like Afghanistan. Almost all post conflict states are composed of multiethnic and linguistic groups. In internally torn societies, states need to be effective, impartial and fair. An effective state needs an effective legal system. There is no second opinion that effective legal systems need quality laws and strong institutions to enforce. No doubt security is an immediate concern and problem in post conflict countries. However, quality of law should not be compromised due to security reason. The rule of law needs more attention and rule of law comes out of good laws and institutions. If quality laws are not made then results are disastrous as we see in Afghanistan even after seven years and the same is true in Iraq, Burundi, Kosovo, East Timor and Liberia. There is great concern and deep dissatisfaction with the state of the legislative instruments and institutions in these countries. The reasons for failure are multiple but the most important are old statutes without any revisions, there is no record of statutes and regulations in force, there are many statutes and regulations in the same field, the laws and regulations are inaccessible to public, laws and regulations are complex to understand, and most of the statutes are out dated and out of touch with the reality of modern life. This dissatisfaction has multiplied in Afghanistan over the seven years period simply because there are no rules concerning policy development, no rules to determine the substance of the legislative text, no rules on process and procedure of legislation and no rules concerning techniques of designing and composing a text . The quality of legislation is based on the quality of the contents of law and the quality of the form of law.[7] The contents of law depend

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[6] The example is Afghanistan. In 2001, the majority was happy and was hopeful for a bright future for them and for future generations. However, these hopes evaporated soon. Insurgents have increased their activities during the last two years. They are finding more fertile soil inside Afghanistan for their activities. The reason is the lack of a legal and institutional framework. The international community failed to give accurate, clear and quality laws and institutions to Afghanistan.

[7] J. Piris, *The Quality of Community Legislation: the Viewpoint of the Council Legal Service, in*

heavily on policy development, impact assessment and consultation. There is no such thing in Afghanistan. There are no standards for style, structure and form of a legislative text. The parliament, Council of Ministers and line ministries are faced with a flood of legal and regulatory decisions of long lasting and profound importance for the shape, direction, and effectiveness of new governments. However, all these institutions are facing a shortage of human resources, capacity and clear direction. There are no guidelines, no manuals on policy development, process and technical composition and design of laws and regulation.

However, setting up sound, effective, efficient laws and regulations are a challenging task and require continuous well planed efforts. It is a continuous process and complacency is the enemy of high quality laws and regulations. There have been fundamental changes in the political and economic systems of Afghanistan. The 2004 Constitution makes Afghanistan a constitutional democracy and market economy, observing all international obligations and human rights. This requires a great activity in legislation. This has not happened yet. Compared to other post conflict countries, the Afghan democratic and legal reform has required not only a complete revision of the existing legislation but also the introduction of a whole series of new legal domains and institutions that did not even exist under the former communist regime.[8] Therefore, a significant legislative effort is necessary to support this comprehensive rebuilding of the Afghanistan democratic, social and legal system. So far, the priority of the Afghanistan government and the international community have mostly been security. Law-making received far less attention than would be necessary to ensure a higher quality of legislation. The result is that laws are prepared inadequately without any policy development. Such laws have no legal certainty and stability. Those laws do not achieve their objectives, are expensive and are leading to expensive litigation to resolve textual ambiguities. Unsatisfactory implementation of legislation may also reduce its ready acceptance by citizens. The most damaging and alarming aspect of such laws is that the legal vacuum created by the dismantling of the former legal system coupled with inadequate enactment of new legal norms is disorientating the people, the courts and the public administration and thus undermining the rule of law.

This paper will examine and analyze the importance and role of quality laws in a post conflict and failed state. It will also analyze some important causes of state failure. Then, it will examine the current short-comings and weaknesses in the legislative and regulatory system of Afghanistan and prove that quality laws and regulations provide a sound basis for security, rule of law, peace and development. Finally, a comprehensive strategy for improving quality of legislation and regulation in failed and post conflict states is provided.

A. Kellermann *et al.* (Eds.), Improving the Quality of Legislation in Europe 25, at 28 (1998), has stated that "there are two aspects in the issue of quality: quality in the substance of the law and quality in the form of the law."

[8] For example, intellectual property laws and institutions are unknown in Afghanistan. Money laundering and organized crimes laws did not exist.

B. Why States Fail and Collapse

I. A Failed, a Collapsed and a Post Conflict State

Today one has no difficulty in finding failed states or collapsed states receding into conflict. Such states are not only hospitable but also breeding grounds for non-state actors such as warlords and terrorists. I feel confident, on the basis of empirical evidence, to say that a failed state is a man-made phenomenon and is a direct result of mismanagement, lack of law, lack of institutions and resulting into the rule of man and not the rule of law. A state is constituted for political goods and exists to deliver political goods – security, education, health, services, economic opportunities, a legal framework, an institutional framework and fundamental infrastructural requirements such as roads and communication facilities. When a state fails to deliver those political goods, it becomes illegitimate in the eyes of its citizens and in this global village it becomes failed in the eyes of other countries and organizations.

A collapsed state is the end of a failed state. In other words it is an extreme stage of a failed state. There is a complete vacuum of authority in such a state. It is mere a geographical expression and sub-state actors take over control of regions and build their own security, sanctions and rules and principles. These indicators are in abundance in collapsed states like Somalia, Lebanon, Afghanistan, Pakistan, Sudan, Angola, Burundi and Sierra Leone. These states exemplify the criteria of state failure. Afghanistan is a typical example of a collapsed state. It was declared a post conflict state in 2001. However, the recent insurgency proves that it is yet passing through conflict. There is another dimension to Afghanistan. It is a transition state as well. Afghanistan had command economy and all its resources were under state control.

II. Causes of a Failed State

There are myriad of causes and symptoms. A failed state has weak or flawed institutions. In most of the cases only executive institutions exist and those are also infested by corruption and inefficiency. These institutions are also controlled by factions. If the legislature exists at all, they become rubber stamp machines. There are no political debates in legislatures. The judiciary is docile and is under the control of the executive and is not independent. The citizens know that they cannot approach the court for redress of their grievances especially against the state. Bureaucracy is not professional. It merely exists to carry out the orders of the executive.

There is legal uncertainty in a failed state. The citizens are uncertain of the effects of provisions of their legal system on the results of their actions. They are uncertain about what the law is. There is also absence of law in many areas. Laws and regulations are unstable as the amendments to laws and regulations are frequent and unforeseen and it is always difficult to find out the current legal position. This results in denial of justice to the citizens. It distorts democracy and

rule of law. The enforcement of such uncertain and unstable laws and regulations is not possible by institutions.

Corruption flourishes in a failed state. Corruption, kickbacks are widespread. Corrupt elites invest their gains overseas. No doubt, corruption occurs in all societies, but threatens the economic and political fortunes of developing countries the most. Bribery, conflict of interest, and illegal deals impose heavy costs on the economy while distorting development policies and undermining confidence in public institutions. The Centre for International Private Enterprise (CIPE) believes that corruption must be treated as the product of institutional failures, not simply individual moral failings. Building a system of strong, balanced institutions is the best way to reduce corruption. Corruption has multiple roots, but generally can be attributed to the poor design of institutions which result from bad laws.

The other important root of a failed state is unclear, complex, and frequently changing laws and regulations.[9] When laws are contradictory or require extensive interpretation, the discretionary power of officials is amplified, increasing the risk that they will make arbitrary, self-serving decisions. When laws are unpredictable, entrepreneurs do not know their rights and obligations, so they cannot comply fully nor defend themselves against illegal inspections.

Inadequate, inconsistent, and unfair enforcement of laws and regulations is another prime cause of conflict, corruption and injustice. Even if laws are on the books, lax enforcement can invite abuse. A weak justice system, low penalties, and high costs of compliance will render laws ineffective.

Resources misallocation is yet another prime cause of conflict. Inadequate laws are responsible for this. Low investment is the prime cause of poverty. Irresponsive policies and poor administration are the prime sources of chaos. Reduction in competition, efficiency and innovation are other causes of poverty.

Laws are at the core of conflict. Injustice drives people to take arms. Without a liable, responsible and strong system, no security can be provided and conflicts cannot be solved. We can therefore say that the legal system is one of the main elements of the collective life of human beings. It is of great influence in the

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[9] Reform Toolkit, *Combating Corruption: A Private Sector Approach*, March 2008, Centre for International Private Enterprise, at 2-3, www.cipe.org. Legal Simplification in Ecuador.

The National Association of Entrepreneurs (ANDE) initiated reform in 2000 to change the direction of business and institute 'clean' practices. The ANDE studies showed that there are over 92,250 legal norms with overlapping, unclear, and contradictory laws, which are left to the discretion of government officials for implementation. Because Ecuador is legally a civil code country, the courts have not been able to reconcile the law or create precedents.

Despite the political turmoil that plagues relations between the private sector and the government in Ecuador, ANDE has been able to eliminate approximately 1,310 outdated or conflicting laws regarding commercial transactions. More importantly, perhaps, was the clear enunciation of the guiding principles underlying the legal simplification effort, including the importance of creating and maintaining juridical security; the primacy of the Constitution as the basis for the validity of subsequent rules, norms, and decrees; consistency across executive branch agencies in their rule-making; and better transparency and accountability for the decisions reached by public sector officials. ANDE continues to work with the Chamber of Commerce of Quito to pressure the government to adopt legislation that would eliminate still more conflicting laws now on the books.

relationship between people and secures all physical and moral needs for the development and completion of the individual.

The good laws and institutions are also critical to poverty reduction and have lasting development impact. This view is supported by a growing body of scholarship, analysis and empirical research.[10]

In a failed state citizens become more loyal to factions, clans, warlords and other powerful groups. They have no trust in state institutions and laws. The legitimacy of state legal system collapse. The citizens are not consulted over law making and institution making. Those institutions are controlled by powerful. Whatever is the form of existing institution, it has no ownership. The failed state is not accidental; it is not caused by geographical, environmental or external factors. The leadership decisions, bad laws, weak institutions have caused state failures.

III. Responsibility and Liability of a State to Make Quality Laws[11]

People in failed states like Afghanistan need effective, efficient and good laws. To conceive and think to bring the rule of law and democracy without good laws is futile. It is one of the basic duties and part of the 'social contract' of a state to give clear, simple, user friendly laws in plain language to its citizens. It is as important as providing security. The absence of laws means anarchy. Good law should be the basis for liberty and prosperity. The consequences of bad laws are much worse than any other type of negligence by a state. The legislative negligence is not causing only economic loss to individuals. Such negligence may result also into loss of life and personal injuries. Moreover, legislative negligence is not limited to primary legislation only. Secondary legislation can result into dire consequences.[12] In a country like Afghanistan where there is no parliamentary control of delegated legislation and courts are not competent, the executive could make or omit any delegated legislation. There is more need for

[10] R. Cooter, Innovations, Information and the Poverty of Nations (2005), argues that defective legal institutions cause national poverty. Michael Porter makes a similar point in *Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index*, Global Competitiveness Report 2003-2004 (2003), where he draws empirical correlations between macro-level indicators of competitive potential (e.g., efficiency of the legal framework, effectiveness of bankruptcy law) and microeconomic outcomes- rising prosperity over time. Similarly, the World Bank's *Doing Business Surveys* (available at http://www.doingbusiness.org) provide a cross-country comparative ranking of various economic conditions that constrain or enable economic activity at the firm level.

[11] The reason why so many people died when the RMS Titanic sank in 1912 was because the Board of Trade Rules relating to the numbers and capacity of lifeboats that had to be carried on such a ship had not been changed since 1894. The Titanic had 2207 peoples on board and lifeboats were only able to carry 962 peoples. The 1894 Rules for Life-Saving Appliances, made under section 427, Merchant Shipping Act 1894, treated the Titanic as a vessel of over 10,000 tones even though it was a vessel of 46,328 tonnage.

[12] Town and County Planning (control of advertisement) Regulation 1984, lead the Law Lords to take judicial notice of the fact that secondary legislation does not receive sufficient scrutiny and let them to rewrite those regulations in *Porter v Honey,* [1988] 1 WLR 1420.

control on the power to make delegated legislation. The failure by a state to repeal or amend outdated laws is as serious a negligence as the enactment of defective and bad laws.[13] Legislation in modern states is a vital function of parliament and government. When they do that task well, they promote a just social order. When they do it badly, they may promote injustice and impose unnecessary costs. Indeed they make the law unknown and unknowable.

IV. Reform Menu for a Collapsed State

The rule of law is the key. Whether we are talking about Afghanistan, Pakistan, Bosnia, Haiti, Somalia or Sudan the cure is in the rule of law. The rule of law in simple words means that laws are clear, understandable, certain, predictable and accessible to the public and are also applied equally and fairly. In the words of Thomas Carothers,

> The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[14]

He goes on further and states that,

> the relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy, and the like – would be unfair, inefficient, and opaque.

Then he raises the critical question of where to start. He proposes three types of reforms in three stages. The first stage is the laws themselves: revising laws or whole codes to weed out antiquated provisions. Often the economic domain is the focus, with the drafting or redrafting of laws on bankruptcy, corporate governance, taxation, intellectual property, and financial markets. Another focus is criminal law, including expanding the protection of basic rights in criminal procedure codes, modifying criminal statutes to cover new problems such as money laundering and electronic transfer fraud, and revising the regulation of police.

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[13] L. Blake, J. Pointing & T. Sinnamon, *Over Regulation and Suing the State for Negligent Legislation*, 28(3) Statute Law Review 219 (2007).

[14] Th. Carothers, *The Rule of Law Revival*, 77(2) Foreign Affairs 95, at 96-97 (1998).

Type two reforms is the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable. Training and salaries for judges and court staff are increased, and the dissemination of judicial decisions improved. Reform efforts target the police, prosecutors, public defenders, and prisons. Efforts to toughen ethics codes and professional standards for lawyers, revitalize legal education, broaden access to courts, and establish alternative dispute resolution mechanisms figure in many reform packages. Other common reforms include strengthening legislatures, tax administrations, and local governments.

Type three reforms aim at the deeper goal of increasing government's compliance with law. A key step is achieving genuine judicial independence. Some of the above measures foster this goal, especially better salaries and revised selection procedures for judges. Above all, government officials must refrain from interfering with judicial decision making and accept the judiciary as an independent authority. They must give up the habit of placing themselves above the law. Institutional reforms can help by clarifying regulations, making public service more of a meritocracy, and mandating transparency and other means of increasing accountability.

V. Need for Quality Laws and Regulations

The promotion of good legislation is one of the basic and essential functions as legislation lays the foundation of a society. Law is the embodiment and guarantee of a 'social contract'. Law is now considered as an independent agency for social cohesion, social control and social change. There is no doubt that it is instrumental to social change in many ways. Laws shape various social institutions which influence social changes.[15] Law also provides the institutional framework for an agency, which exerts its influence to bring change in society, such as political institutions for democracy. Law creates various duties and obligations on public authorities and individuals and these duties foster change in society such as provisions of public services. Legal rules are becoming more and more essential for the functioning of our modern globalized society; for maintaining the social structure of society; for cohesion in global society; for regulating relations between or among individuals; for collective welfare of the society; for regulating industrial and business activities; for orderly resolution of disputes; for providing social services; for gathering taxes and for establishing institutions to carry out the above mentioned activities. Law also provides mechanism and machinery to prevent social conflicts and frictions. It is a barrier to violence, brutality, discrimination, insensitivity, stupidity, and other ever present regressive tendencies.[16] Therefore, the decision to make legislation should not be taken

[15] R. Cotterrell, The Sociology of Law – An Introduction (1984).

[16] B. M. Zupancic, *From Combat to Contract: What Does the Constitution Constitute?*, 1 European Journal of Law Reform 59 (1999), The author enlists the functions of a constitution and argues that even technological and scientific development would not have been possible without basic premises of legal organization. "Constitutional and legal order create and maintain the social reality in which the creative individual can grow and flourish in his genuine identity, and remain true to

easily as legislation not only involves significant costs for the community but also leaves a long lasting impact on society. There are numerous costs and evils which result from faulty contents and the substantive quality of law for being against market forces or human nature; inappropriate legislative policy; faulty style, form , shape and lay out; or from unclear, complicated, convoluted, vague and ambiguous legislation.

VI. Effective and Efficient Laws as Bedrock for Rule of Law,[17] Good Governance,[18] Peace[19] and Development[20]

Quality laws and regulations are foundations of a society. They promote true and liberal democracy. They promote the rule of law. They promote good

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it. Since there is no inner liberation without the systematic outer liberation, such as the freedom of expression, the guaranteeing rule of law is indeed now, perhaps more than ever before, an exalted postulate. Here the progress that has been made in Western civilization, or the scientific and technological advances of the last century, would not have been even conceivable. It is proposed, in this article, that this is kept in mind and that in this sense there will be reconsideration of some of the basic premises of legal organization that made of this possible."

[17] There is a direct relation between justice and good law-making. Where laws are clear in the problem they are trying to address, equitable, well-drafted and enforceable, then justice is not only more easily done, it can be done more effectively and at lower cost. *See* Response of the Law Society of England and Wales, August, 2004 to European Commission Communication: Assessment of the Programme and Future Orientations.

[18] First used in 1989, the World Bank later defined 'good governance' as, "the manner in which power is exercised in the management of country's economic and social resources for development." The Bank's General Council identified governance with, "... 'good order', not in the sense of maintaining the status quo by the force of state (law and order) but in the sense of having a system, based on abstract rules which are actually applied and on functioning institutions which ensure the rules' application. Reflected in the concept of 'the rule of law,' this system of rules and institutions appears in different legal systems and finds expression in the familiar phrase, government of laws and not of men."

[19] Sannerholm, *supra* note 2, "conflict and crisis is caused by human rights violations and high levels of insecurity. If rule of law is an essential condition for making human rights justifiable claims, and not merely rights on paper, then rule of law is the key strategy for post-conflict recovery."

[20] In 2000 the World Bank assessed the 'quality' of Afghanistan's governance institutions as falling in the bottom one percent of all countries. Progress since 2001 includes the adoption of the constitution; successful parliamentary and presidential elections, and progress in improving the livelihood and welfare of women and other disenfranchised groups. Despite some progress, a number of significant issues must be addressed, including: (i) the existence of multiple and often parallel structures of state and non-state governance entities; (ii) the confusion over core centre-periphery administration and fiscal relations; (iii) weak public sector institutions and underdeveloped governance and administrative capabilities; (iv) high levels of corruption; (v) fiscal uncertainty; (vi) weak legislative development and enforcement; (vii) weak political and parliamentary oversight capacities; (viii) weak community and civil society institutions; (ix) limited capacity in a justice system; (x) gender inequality; and (xi) underdeveloped human rights enforcement capacities. If significantly improved governance is not rapidly achieved it will be difficult to make substantial progress with respect to security and economic development. An emerging political and administrative vacuum will be filled by non-state structures driven by illegal and narcotic interests, not by the Government.

governance. Good laws define institutions and institutions define a country, be it a developing or a developed. Good laws devise good institutions and good institutions ensure fair and equitable allocation of resources, define a countries poverty and vulnerability and security.[21] They are essential for market economy, order, development[22] and peace.[23] It is well researched and documented that in post-conflict countries, insecurity and poverty are linked.[24]

C. Challenges of Legislation in Afghanistan

I. Background

The US-led military operation ousted the Taliban regime in 2001, and the Bonn Agreement – signed by representatives of the Afghan people on 5 December 2001 established an Interim Afghan Authority, and provided the basis for an interim system of law and governance, using the 1964 Constitution as its foundation. The Agreement also laid out a timetable for further steps toward establishing a new government, constitution, and ultimately elections. The new Constitution was passed on 4 January 2004.

However, matters did not evolve as simple as the international community thought they would. The legal sector in Afghanistan is complex and highly factionalized.

The lack of clear legal guidelines regarding proper institutional roles, and the absence of steps to provide clarity, has allowed this situation to persist amongst three important institutions: the Attorneys General Office, the Ministry of Justice, and the Supreme Court. The Ministry of Interior could not play an active role in the reform of police, as the latter is dominated by a certain ethnic group.

In the same way, legal reform in Afghanistan has been complicated by the lack of clarity regarding what laws exist in the country. The Bonn Agreement called for existing law, with some exceptions, to continue to apply, but this provision ignored the fact that there are significant overlaps and contradictions among different laws promulgated during different periods. All existing significant collections of legal texts were destroyed during the wars.

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21 *See* A. Seidman, R. Seidman & & N. Abeysekere, Assessing Legislation – a Manual for Legislators (2003), Chapters 1 and 9. *See also* A. Seidman & R. Seidman, Legislative Drafting for Democratic Social Change – A Manual for Drafters (2001), Chapters 1 and 2, where the authors establish a relation between laws, governance, behavior, institutions and development.

22 A. Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 ICLQ 779-799 (2000). *See also* A. Perry-Kessaris, *Uses, Abuse and Avoidance: Foreign Investors and the Legal System in Bangalore*, 12(2) Asia Pacific Law Review (2004).

23 U. Karpen, *On the State of Legislation Studies in Europe*, 7 European Journal of Law 59, at 64 (2005): "[...] the torrent of laws is a function of development of the social and economic system. [...] the law has primarily three tasks: first, the law has the function of providing order, guarantees, and protection; it has the function of ensuring transformation and improvement; and ultimately it has the planning and constitutional function, it integrate the state."

24 C. Stone, *et al.*, *Supporting Security, Justice and Development: Lessons for a New Era*, June 2005, available at www.vera.org/download?file=199/Supporting%2Bsecurity.pdf.

The lack of clarity regarding existing law is likely to persist for some time; some progress has meanwhile been made in revising laws and writing new ones. During this transitional period several laws were passed. Many international treaties were ratified. There was no parliament. It was easy to make laws by decree of the President. These laws were mostly in the field of commerce, economics, finance, economic crimes and narcotics.[25] The purpose was to attract international investors and encourage domestic investment by national investors. However, numerous lacunae may be pointed out in these laws. These laws are not quality and effective laws. There were and are no drafting guidelines and manuals. This created further uncertainty. Consultants transposed laws from other countries without analyzing them or following the principles of comparative law. The result is that these laws are simply published in the official gazettes and on the website, but are not embedded in society. The users are not informed about those laws. And above all no policy was developed about these laws. Even no arrangements were made for the implementation of those laws. Even now Afghanistan still does not have the administrative capacity to implement those laws. In order to create a possibility of implementation, a system will have to be devised for publication, distribution, and providing training regarding the new and revised laws to judges, prosecutors, and legal educators.

All this proved to be a mirage. Seven years after the fall of the Taliban, Afghanistan is at a defining moment concerning its future. With earnings from narcotics amounting to about half of the country's gross domestic product, Afghanistan has become a more instable country, which is more close to a conflict and a narco state.

II. Framework for Legislative Drafting in Afghanistan

The existing framework includes a Regulation Governing the Procedure for Preparing and Proposing Legislative Documents, 1999[26] and Rules of Procedure of Wolesi Jirga and Meshrano Jirga, 2006.[27] The first is the only document covering all aspects of policy development and drafting of law. However, these regulations were made during the Taliban regime and are in conflict with the current constitution. There was no parliament at that time. So it takes into consideration only those legislative documents presented for approval to Amir-ul Momenin (the Leader of the Faithful) and the Council of Ministers. The main source of guidance here is Hanafi Shariah. International donors do not bother to look into this document and the same is the case of Ministries. According to this Regulation the following steps are involved in drafting of a law.

[25] For example, the Companies Law, the Mediation Law, the Arbitration Law, the Partnership Law, the Money Laundering Law, the Narcotics Law, the ICPC etc. None of these laws are quality laws. These laws have created further uncertainty. The existing provisions are not expressly repealed. There is no implementation mechanism. The Narcotics Law and ICPC are under revision. There is a vacuum.

[26] Regulation Governing the Procedure for Preparing and Proposing Legislative Documents, Part IV, Gazette Number 787 (1999).

[27] Rules of Procedure of the Wolesi Jirga, adopted in 3 January 2006.

a) a legislative plan of action is to be prepared by the Ministry of Justice each year based on the proposals of the ministers, the Chief Justice of the Supreme Court, the Minister of Justice and independent general departments. This plan of action is submitted by the Ministry of Justice to the Council of Ministers and the President for approval. There is no consultation nor are there any requirements for consultation. It is purely a government job. The private sector is not consulted.
b) Preparation of a legislative draft is through a committee consisting of officials of the ministry and experts. This committee is constituted by the minister of a ministry responsible to prepare the legislative document. In case of high level legislation, this committee may be constituted by the President of the Council of Ministers. If a legislative document involves several ministries, all would be involved in this preparation.
c) Submission of a legislative draft to the Council of Ministers is by the concerned line ministry or independent department through the Minister for Justice. This legislative document once approved by the Council is sent to the Government for publication. Parliament does not have a role, and the Council of Ministers has no rules and regulations and till now they do not have enough capacity.
d) Principles on the format and contents of a draft are explained in Chapter Five of these regulations. This chapter provides for essential requirements as to form and style of legislative documents.
e) Delegated legislation means in Afghanistan rules, regulation, practices, orders and code of conducts. Delegated legislation is very important in modern day. However, there is no clear procedure here. Only regulations are required to be placed before the Council of Ministers. All other forms of delegated legislation are approved by Ministers. There is no role for parliament. This result in vesting arbitrary powers in ministries. There are no standards and no jurisprudence on the relation between primary legislation and secondary legislation.

III. The Critical Appraisal of Current Situation

The situation facing post-conflict countries is daunting, however not impossible if adequate planning and management is done for developing, approving, enacting and implementing laws. The government or international community is stretched in some cases by a number of factors. There is a problem of policy consensus. The urgency of legislation and quality in legislation are petted against each other as in so many areas of human activities there are no laws at all. The demands for legislation are exponentially high and capacity is alarmingly low at all levels. There are other pressing needs of security, law and order. There is no proper prioritization. The governments or international communities are flooded with legal and regulatory decisions. Afghanistan presents three problems in one for the international community: (1) it is a post-conflict country and some say it is still in conflict; (2) it is a transition country as its economy was planned and

controlled and now it is developing into a market economy, although people are not yet convinced what the possible benefits might be, as they are afraid of change; (3) above all it is a collapsed state. After 2001, a transition period followed. Transition is a great period for legislation, regulations, political and public sector reforms.

The main problem is the lack of institutions, procedures and in many areas the lack of principles and rules. This is not unique to Afghanistan. It is common to all post-conflict countries. Parliament plays a key role in law-making but has even less information than the government and has also less capacity. There are no detailed regulations prescribing the procedures and requirements to be followed in drafting legislation. There are some regulations governing the procedure for preparing and proposing legislative documents.[28] However, these regulations are by no means practical and need to be revised. There are no legislative guidelines or manual used by the Ministry of Justice, the line ministries or the Council of Ministers (Cabinet). Consequently there are no standard procedures to be followed for the drafting process and no standard requirements as to form, format, style of drafting and operation of legislation. There are no regulatory checklists used for various stages of legislative drafting. There is a Legislative Drafting Department in the Ministry of Justice. However, its charter,[29] functions and duties need to be revised and there is hardly any official who knows something about drafting.

The implementation structure and follow-up is also almost non-existent and if there is some structure it is very weak and driven by corruption and factionalism. This factor is further multiplied as there is no capacity; there is no training in new laws, there are no uniform and predictable application guidelines and interpretation.

Another challenge faced by post-conflict countries like Afghanistan is that laws and regulations are not accessible to the public and users. This is against the principle of the rule of law. If laws are not available to users, how can such laws claim equal and fair applicability? Moreover, in Afghanistan there was no concept of private and independent defense lawyers. The appeal process and judicial system has no capacity and is highly closed and secretive.

There is legal uncertainty in a failed state and the same is true in Afghanistan. The citizens are uncertain about the effects the provisions of the dominant legal system might have on their actions. They are uncertain about what the law is.[30] There is also absence of law in many areas. Laws and regulations are unstable as the amendments to laws and regulations are frequent and unforeseen and it is

[28] Regulation Governing the Procedure for Preparing and Proposing Legislative Documents, Part IV, Gazette Number 787 (1999).

[29] Charter of the General Department for Law-Making and Academic Legal Research Affairs, Part V, Gazette Number 787 (1999).

[30] The following Codes were already proclaimed: the Commercial Code, the Civil Code and the Criminal Procedure Code, 1976. However, the international community decided to make new laws. First, Interim Criminal Procedure Code (ICPC) was enacted. The ICPC does not repeal the Code of 1976. Both are applicable in the field. Similarly four new laws have been enacted, namely the Limited Liability and Corporation Law; the Partnership Law, the Arbitration Law and the Mediation Law. These laws do not repeal similar provisions in the Commercial Code and the Civil Code.

always difficult to find out what the current legal position is. This results in denial of justice to the citizens. The enforcement of such uncertain and unstable laws and regulations is not possible by institutions.

IV. Analysis of Problems Faced by Drafters in Afghanistan

The policy makers, strategists, and drafts persons are facing physical challenges, Security challenges, Organizational challenges and multilingual problems in Afghanistan.

There is no coordination amongst trainers, law-drafting personnel and enforcement agencies. Everyone is preparing and interpreting laws in his own way not compatible with each other or with prevalent legal structures. Even the Supreme Court has no capacity to interpret laws and regulations uniformly. The Study and Research Department in the Supreme Court lacks capacity. The international donors are also transplanting and transposing laws from their respective countries without strictly and consciously following comparative principles and methods.

Language is a social as well as a purposeful activity. It exists not just to express a message but also to communicate it successfully to others. It cannot be said that an act of language has really occurred unless the message is comprehended; and no law can accomplish its task of regulating behaviour unless it can be understood. In Afghanistan Dari and Pashto are the official languages. However, these are not modern languages. They borrow from Arabic and Iranian Persian. There are no synonyms. In many cases terminologies do not exist. The problem may be gauged by the fact that parliament spent many days discussing terminologies for university and students. The translation from English to Dari and Pashto is a problem. Such languages are always susceptible to ambiguities. However, in some countries the solution is to interpret when language is unclear and ambiguous. If words are clear then courts must enforce and not rewrite laws. There is no interpretation system in Afghanistan. Many words have more than one meaning. Some of the other problems and shortcomings are: lack of diversity of policy tools; no transparent and predictable procedures; non-accountability; personality driven systems; non-participatory process;[31] inadequate emphasis

[31] In Afghanistan every development organization is working individually, consultants and lawyers are also working without any coordination with others working in the same field. In 2005 many laws were enacted by Presidential Decree as thereafter parliament was coming. This has created a mess: laws are often conflicting and contradictory. A good example is the Narcotic Law which was promulgated in 2005. Many persons and institutions were involved and tried to push their own agenda: the UN Head of Mission, UNODC, the Americans, the British. The Attorney General and two other persons from MOJ were involved in making this law. But those laws are defective and not workable. Now these laws are being revised. The result is that the narcotics laws are unclear. Even the Chief of Police in Kabul once said that he did not know that there is a police law in Afghanistan. Similarly, the ICPC was made in 2005. It does not repeal the Criminal Procedure Code 1977. This leads to confusion and uncertainty. The Criminal Procedure Code is again being revised. There are now five news laws covering the same issues as the Commercial Code, 1955 and the Civil Code, 1976, *see supra* note 30.

on form and style;[32] lack of consultation; lack of development of the private sector; constituencies are not developed; there is no system for consolidation,[33] revision,[34] and no system of publication.

D. Shaping the Laws for Post-Conflict Afghanistan

I. Goals of Afghanistan National Development Strategy

Afghanistan National Development Strategy presents four goals to be achieved by 2013.[35] None of these objectives can be achieved without having security, political will, strong institutions[36] and enforcement. Good governance, security, rule of law, economic and social development all are intertwined and have a direct relation with the quality in laws. Rule of law and good governance do not work in a vacuum. There is a need for high quality laws. This need cannot be dispensed with for lack of security. Even in the most stressing circumstances, the international donors must strive to develop a transparent mechanism for quality laws. The common concerns about legislation are widespread in all countries and especially in post-conflict and transition countries like Afghanistan. There are complaints about the burdensome nature of legislation, such as its complexity, its inefficiency or failure to deal with the problem it is intended to deal with, its multiplicity, overlapping with other laws, uncertainty, isolation from existing legal culture, style and form, lack of ownership by the users, lack of legitimacy, lack of access to legislation and poor levels of enforcement and compliance.

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[32] There is no law structure in Afghanistan. In the past they followed Egypt, Turkey and Germany. The draftsmen some time have to follow a structure given by the departments. That sometimes is based on a policy decision. The Department decides which structure and design they would like to follow. Sometimes that structure and even contents are contrary to the reality on the ground.

[33] Consolidation is a process of combining the legislative provisions on a single topic into one coherent act. The aim is to allow for easy access to a particular subject matter on which there have been numerous amendments to the law at different times. Laws are constantly being changed, social needs are in flux. Therefore, the need for consolidation is perpetual.

[34] The statute law revision is also very important for making laws of high quality. It should be taken at a convenient opportunity. A law should be revised normally after five years. Law revision involves: (a) the definite repeal of obsolete or obsolescent enactments; and (b) the changing of the language of the enactments to bring them in line with current usage, without making any change in the substance of the enactments.

[35] The four objectives are: (a) Security-achieve nationwide stabilization, strengthen law enforcement, and improve personal security of every person; (b) Good governance, rule of law and human rights-improve democratic process and institutions, human rights and rule of law, delivery of public services and government accountability; (c) Economic and social development-develop market economy, reduce poverty through market led economy; and (d) Elimination of narcotics industry

[36] Seidman, Seidman & Abeysekere, *supra* note 21, at 7-8, present a historical definition and show the importance of institutions as, "historically-shaped institutions define country. Their institutions and how they work distinguish the United States from Uruguay, Norway from Nepal, and Canada from Kazakhstan."

II. Giving Quality Legislation to Afghanistan

The legislation is the major medium through which social, political and economic changes, both national and international are instituted. It is a mechanism through which government and parliament may respond to changing needs of society. It also provides a settled framework within which individuals and firms can regulate theirs affairs with reasonable predictability. Legislation is also a source of rules and regulations of individual's conduct contrary to social interest or conducive to social interest. Afghanistan is a transition country and is changing its economic and social structure from a command economy to a market economy. For this smooth transition it needs quality laws and regulations in all areas. However, not all legislative attempts succeed. There may be many causes for legislative failures in Afghanistan. The main causes are defective policy development and legislative schemes, inadequate scrutiny of law as it is being made, absence of a coherent system, no coherence with the existing legal structure, improper transposition, absence of consultation and lack of ownership and acceptability by the public.

III. Uses of a Good Legislation

Good legislation needs to be developed, planned and produced by state institutions effectively and efficiently. Such legislation is high quality and high quality legislation has unbound benefits. Such benefits include that it:

a) endures for a longer time;
b) does not need frequent changes;
c) gives effects to government policies;
d) reduces fiscal risks to government;
e) avoids courts having to decide what it means;
f) reduces the job of regulatory authorities;
g) reduces compliance cost of users;
h) limits the chances and scope for avoidance;
i) saves time, money, effort and sometimes distress;
j) is obeyed and owned by the masses;
k) reduces the number of cases in courts;
l) brings cohesion in society by removing conflicts and tensions;
m) brings legitimacy, ownership, peace and security in society;
n) promotes democracy , transparency and the rule of law.

Moreover, there are ethical reasons to give people correct information, when they make informed choices based on what they believe is best for them. Unreadable information is unethical because it takes away the ability to make an informed choice. At best, people make choices that are uninformed or misinformed – not

informed. How can they make informed decisions if they do not understand the information upon which those decisions are supposed to be based? People cannot be expected to make good decisions based on bad information.

IV. Characteristics of Good Legislation[37]

The need for quality legislation is indispensible and undisputed. There is a global movement and realization that quality legislation is critical to the rule of law, democracy and development. Professor Keith Patchett put together some characteristics of quality legislation which are accepted generally. His views are equally applicable to post-conflict countries. These characteristics are in my opinion the bare minimum for good legislation, a legislation that works for the rule of law, democracy, liberty, freedom and human rights in post-conflict situations. If one compromises on these standards it is bound to result in uncertainty and confusion. Good legislation:

a) achieves objectives;
b) is financially viable, cost effective and benefits of such legislation justify costs;
c) is operationally practicable; efficient to manage and enforce;
d) is likely to secure public acceptance and reasonable compliance;
e) is predictable and stable in application; no likelihood of unforeseen or undesired consequences;
f) imposes restrictions on citizens proportionate to intended benefits;
g) is fair in application between different groups;
h) is legally sound; consistent with the Constitution, treaties and existing law;
i) is clearly drafted and reasonably comprehensible to users or affected persons;
j) is published properly and readily accessible to all interested or affected by it.

V. Strategies for Improving Law Drafting in a Post Conflict State Like Afghanistan[38]

In Afghanistan like most countries, the initiation of drafting a law is dominated by government. The parliament may also embark upon making laws. It is imperative that the same preparation and drafting standards are used and the same processes followed by government and by parliament. The development of a legislative project or draft may be divided into two stages. One is policy formation or the

[37] K. Patchet, *Preparation, Drafting and Management of Legislative Projects*, Workshop on the Development of Legislative Drafting for Arab Parliaments, 3-6 February 2003, Beirut.

[38] This idea has been adopted and developed from *Law Drafting and Regulatory Management in Central and Eastern Europe*, SIGMA papers: No. 18, OCDE/GD(97)176 (1997).

development stage; the second one is law drafting to give effect to the policy adopted. In Anglo-Saxon countries the policy drafting is separate from law drafting in case of government bills. The policy developers are different from drafters. Policy is a political decision. However, there is regular consultation between policy developers and drafting experts. In the continental system usually policy development and drafting is done by the same group or officer. The policy group usually includes a drafting expert as well. In Afghanistan, each line ministry is responsible to develop policy and then submit this to the Ministry of Justice for submission to the Council of Ministers. The policy development is left to the concerned ministry and the *Taqnin* department merely checks the draft against the constitution, existing law and style. The Supreme Court may also initiate a law. This is what the theory tells us. In practice line ministries have no man power. The legislative plan was prepared by the international community through the London Conference and Paris Conference. However, the process has proved to be a failure. The laws prepared by international consultants and contractors are not quality laws. The laws so far have been prepared without any prior policy development, without thorough appraisal of the problem and of local needs and circumstances. These laws heavily draw on legislative precedents from other countries with little consideration for their suitability to Afghanistan.[39] This has resulted into waste of time of seven years and waste of resources. The result is that there is more chaos without any substantial legal change in this country. Lessons so far learned clearly lead to the conclusion that more attention must be given to developing policy and making good quality laws for good governance, rule of law, development, poverty reduction and avoiding that social frictions develop into bigger conflicts. These areas are no less important than security and the international community should pay more attention to them. The following are seven strategies for improving law drafting that should be considered:

1) Creating and enforcing a regulatory framework for law drafting;
2) Improving policy development prior to drafting;
3) Setting up and maintaining law drafting standards;
4) Making fuller use of consultation;
5) Applying equivalent procedures and standards to Parliamentary initiatives;
6) Applying equivalent procedures and standards to secondary law-making;
7) Improving access to legislation

[39] Borrowing from another legal system is the most common form of legal change. Legislative drafters borrow institutions, policy or legal solutions and legislative texts from foreign jurisdictions as a means of promoting and developing legislation quickly. However, little attention is paid to established theories of comparative law on the legitimacy of legal transplants and the constraints for drafters' choices. This leads to inapplicability of the transplanted law in the post conflict situations. This results into failures of the transplanted law and failure leads to confusions, wastages of time and sources. *See* H. Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 ICLQ 659-673 (2008) for the prevailing theories of comparative law, the best practices in legal transplant and guidelines on constraints for drafters. *See also* Sannerholm, *supra* note 2, at 13-14.

1. Creating and Enforcing a Regulatory Framework for Drafting

There is a need for a regulatory framework for legislative drafting be it primary or secondary legislation. Drafting is a highly technical art and it requires talent, theory and experience. There are tried and accepted standards for policy development and for the content, structure and design of a law. The lack of security should not be used as an excuse not to apply these standards. It becomes more critical in a post conflict country to develop guidelines and manuals for drafting and to train lawyers in those guidelines and manuals. In the absence of these guidelines, every consultant and every firm makes laws according to their own experience. Similarly, line ministries make regulations according to their own experience. There is a need for guidelines and manuals for drafting laws and regulations that must be supplied and followed by all line ministries. In order to improve the quality of legislation a post-conflict or collapsed country has to invest in lawyers who have the aptitude, the talent and an interest in legislative drafting. An adequate number of persons should be selected and trained in drafting. A drafts person is a precious commodity and it is very difficult to have specialist drafts persons in each ministry. Moreover, all ministries are not equally engaged in drafting activities. In my opinion, there is no other, better or more efficient way of achieving consistency and uniformity and meeting the highest quality standards in the drafting of legislation than setting up a centralized office in a ministry. By the passage of time lawyers in other line ministries may be trained in drafting of laws and regulations. Before arriving at some reasonable conclusions, we should look at some of the advantages and disadvantages. A centralized office:

a) provides a permanent resource of high quality lawyers with expert knowledge of existing legislation and experience in solving legislative problems;
b) makes available collective experience and know-how, in relation to the drafting procedure and techniques;
c) ensures that standard procedures will be followed by all ministries in relation to the preparation of legislation;
d) leads to consistent standards and greater uniformity in legislation and legislative approaches;
e) facilitates the proper management of the Government's legislative programme;
f) makes the best use of limited numbers of well-qualified law drafters;
g) Provides a place for training of new draftspersons.

However, a centralized office is not immune from some drawbacks. Usually such an office:

a) does not have enough capacity to handle the flood of legislation, especially of secondary legislation, needed by the line ministries that have absolutely no man power;

b) has little specialist subject knowledge as compared to the line ministries lawyers, which may result in legislative solutions that do not reflect specialist requirements as well as they might;

c) is rarely able to be concerned in the process of policy development, given the overall demand on its drafting capacity;

d) is heavily dependent upon instructions prepared by the ministries as to the legislative requirements, which may vary widely in quality and must compensate for the law drafters' lack of subject knowledge;

e) is usually put under extreme pressure of work and stringent timetable;

f) could become self-conceited and start considering themselves as the elite class and become inflexible to modern developments in drafting.

Despite all these drawbacks, a centralized office is a more successful arrangement, especially in post-conflict situations where one is faced with institutional and human resources challenges. There is a need to create a well-trained team in each line ministry and in parliament as well as in the Ministry of Justice. There is an urgent need to enhance the legislative drafting training of line ministries, parliament, and the Council of Ministers and Ministry *Taqnin* department. There is also a need to create a well-trained team in all line ministries and parliament. The following areas also need capacity building:

- Developing uniform and standard legal terminology. Dari and Pashto are not modern language. Both languages are short of proper terminology. Whenever there is a problem they turn to Iranian Persian, which they prefer not to follow. The second source is Arabic and the majority does not understand Arabic terminologies.
- Preparing handbooks on policy development, policy implementation, policy evaluation, policy tools and their applications. Drafting manuals and guidelines may help in making good legislation, particularly where there are no directions and no uniform terminology. However, the need is changing, the language is changing, techniques are changing and general approaches are changing. These manuals and guidelines must therefore be revised regularly.
- Introducing regular and free training and education on access to information, analytical tools, policy development techniques and project management skills
- Introducing regular meetings and training of the officials from legislative departments of all ministries to develop legal drafting skills
- Setting up an Independent Law Commission: there is an urgent need for a permanent mechanism for law consolidation,[40] law revision[41] and law reforms.

[40] Laws are constantly being changed. The need for consolidation is perpetual. Absolute laws are repealed. The consolidation solves the problem of uncertainty which is very common in post conflict countries like Afghanistan. It also in text collation corrections, minor amendments, resolving ambiguities without any substantial change.

[41] There are 700 legislative documents that must be reviewed and revised to ensure their compliance with the new Constitution, 2005(http://www.moj.gov.af. Law revision is also very important. It is definite repeal of obsolete or obsolescent enactments and the changing of language of enactments to bring them into line with current usage. Law revision should deal with expired

At present this function is performed by the *Taqnin* department. However, it is over burdened, lacks resources and it has other priorities.

2. Improving the Policy Development

The most useful step in improving the quality of legislation is policy development. This is a precursor to quality legislation. Policy development and quality laws have a proportionate relation.[42] The more the problem is thrashed out and investigated, the more the quality law is produced. This requirement should not be dispensed with for security reasons. Before adopting any law, a thorough study must be carried out into all aspects of legislation, reasons for adopting, objectives of new legislation, the anticipated results, costs and resources required. For this purpose the line ministry, Ministry of Justice, the Council of Ministers and Parliament need a competent and expert machinery. Unfortunately, international developers have a problem as they do not have sufficient capacity. Parliament has no rules and regulations for policy development. The same holds true for the line ministries, the Council of Ministers and the legislative department of the Ministry of Justice as none of them have adequate resources.

a. Best practices in policy formation

Policy development involves various stages and checks to be carried out. It is needed to make decisions about the legislation to see whether it is adequate to achieve the policy objective.[43] The other important stages involve policy analysis, impact assessment and consultation in the policy process. The following checks developed by SIGMA for Eastern European countries are critical for the best policy development in post conflicts countries as well.[44] The same policy standards must be applicable to legislation initiated by Parliament and in case of delegated legislation. The cost on the public purse and economic, social and environmental impacts assessment are equally important. A law, which has been developed, prepared and drafted after observing these checks, is a quality law and can ensure peace, development and progress in conflict countries. The non-

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enactments, spent enactments, enactments repealed in general terms, enactments virtually repealed, superseded enactments, obsolete enactments and unnecessary enactments.

[42] In October 1992 the Sutherland Report suggested that each new legislative measures must be assessed on the basis of five criteria, (a) the need for action; (b) the choice of most effective course of action; (c) proportionality of the measure; (d) consistency with the existing measures; and (e) wider consultation of the circles concerned during the preparatory stages. *See* "*The Internal Market After 1992: Meeting the Challenges*, Report to the EEC by the High Level Group on the operation of the internal market, SEC (92) 2004; *See also*, H. Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 Common Market Law Review 651 (2001). The article addresses standards for substance and form of a legislative text and problems in EU legislation.

[43] In this regard Chapter 1 of the Guidelines 2001, issued by the Legislative Advisory Committee of New Zealand is very relevant. These Guidelines are available on: http://www.justice.gov.nz/lac/index.html.

[44] These checks have been adopted and developed from *Law Drafting ...*, *supra* note 38.

observance leads to chaos and further destabilization. Unfortunately very little attention is paid to policy development which leads to dramatic consequences.[45]

Policy Options

- Regulatory checks
  - to determine that the problem has been correctly identified;
  - conclude that the problem cannot be resolved by taking some action under existing law;
  - to determine whether the policy objectives could be secured without resorting to new legislation;
  - to verify that the policy proposal complies with the Constitution and will not give rise to irreconcilable conflicts with other legislation or with the structures of the legal system.
- Administrative Requirements:
  - to ascertain the levels in government or the agencies through which the new scheme will be implemented;
  - to check whether existing administrative structures, and human resources, will be adequate or will have to be supplemented or additional ones provided.
- Costs and Economic Impact
  - to determine the cost effectiveness of alternative policy options;
  - to quantify in money terms as many of the benefits and the costs of a policy option as possible to help establish its efficiency;
  - to determine the fiscal/budgetary implications of a policy option for government or other governmental authorities;
  - to estimate the likely financial impact on the private business sector in complying with the policy option;
  - to quantify the social costs to the general community;
  - to estimate likely effects in increasing or reducing employment;
  - to predict possible indirect economic risks or adverse consequences.
- Efficiency Checks:
  - to check that the policy option will achieve its objectives in ways that are administratively efficient and are proportionate to the intended objectives;

[45] The USAID funded project run by Bearing Pont has produced four laws, namely, the Partnership Law; the Companies and Corporation Law; the Arbitration Law; and the Mediation Law. These laws were made without considering the implementation capacity. There is no administration to enforce these laws. The Ministry of Commerce and Industry has no capacity at all to implement these laws. There is no registry to register partnerships and companies as has been mandated by these laws. There is no arbitration or mediation set in Afghanistan. The result is plunging into further uncertainty, quagmires and chaos.

- to make sure that the policy option will not result in new hazards or consequences that outweigh the intended benefits.

- Practicability Checks:
  - to check that the policy option does not involve unnecessary or unduly complex procedures, for the administrators or those required to comply, that could make the policy less effective;
  - to determine whether the policy option could create opportunities for corruption or criminal enterprises;
  - to ascertain whether the policy option takes full account of the ways in which the activity to be regulated is currently conducted;
  - to determine that the procedures for implementing the policy option will be the minimum necessary to make it effective and are capable of being put into effect by those required to comply with it, without unnecessary disruption.
- Implementation Checks:
  - to check that the methods adopted for securing compliance with the policy option will achieve a satisfactory level of implementation;
  - to check that these methods and those involving enforcement measures and for adjudicating disputes are effective, fair, consistent and open in their operation;
  - to ascertain that the modes of securing compliance and enforcement, and those concerned with adjudication, are likely to command the confidence and co-operation of those affected and are within their capacity to implement.

b. Impact assessment

A major element in the legislative process is determining the effectiveness of existing or proposed legislation. This should cover all aspects of legislation. There are different ways of evaluation. Whatever is suitable must be used in post conflict countries. The Regulatory Impact Assessment (RIA) developed by the EU and USA is very useful and practical. It includes the following steps:

- Identification and clear determination of problems and political objectives that the normative act aims to regulate;
- Identification of the form of intervention (legal and non-legal forms) and selecting one for addressing the problem;
- Collection of information and identification of interested parties;
- Consultation with interested parties;
- Pre- and post-impact assessment that includes a cost and benefit analysis after and before the implementation of the law;
- Publication of the documents drafted as a result of impact assessment.

There is a need for a prospective and a retrospective assessment of all legislation on the criteria of its effectiveness, efficiency and efficacy. That is the only way to ensure quality legislation at all levels. This should be done by the line ministries.

3. Setting and Maintaining Law Drafting Standards

a. Drafting standards

As discussed earlier, legislative drafting calls for special skills, expertise, methodology and experience. Legislative drafting is concerned with converting policy into a body of rules. Communication is very critical to effective and efficient drafting. It should be drafted in such terms which make it crystal clear to those targetted or effected persons. Plain language is to enhance democracy and rule of law by making legislation accessible to the people whose life it affects. Such language achieves more direct communication with the public. Legislation written in simple and plain language is affordable to the poor. It is always easy to interpret and enforce.

In order for Afghan legislation to be better understood and correctly implemented and enforced, it is essential to ensure it is well drafted. Acts adopted by the institutions must be drawn up in an intelligible and consistent manner, in accordance with standard and principles of policy development and legislative drafting so that citizens and economic operators can identify their rights and obligations and the courts can enforce them. High quality laws are recognized at the highest political level. The drafting of legislative act must be:

- clear, easy to understand and unambiguous;
- simple, concise, containing no unnecessary elements;
- precise, leaving no uncertainty in the mind of the reader;
- compatible with existing legal structure;
- consistent with other provisions in the law and in other laws;
- complete , covering all essential aspects;
- comprehensible, readily understandable by users;

These standards are based on common sense principles such as:

- Equality of citizens before the law;
- Rule of law;
- Law should be comprehensible and accessible to all.

Legal certainty is a must and it should be foreseen how the law will be applicable. This will make law more comprehensible and disputes resulting from poor drafting can be avoided. The provisions which are not clear may be restricted by the courts in interpretation.[46] Drafting which is grammatically correct and respects the rules of punctuation makes the text easy to understand and contributes to the translation into another language.

[46] Judgment of 28 October 1999 in *Case C-6/98, ARD v. PRO Sieben Media AG*, [1999] ECR I-7599.

b. Drafting Procedures

This is another important aspect of quality legislation. There is a certain methodology and if followed, it brings quality legislation. To put policy decisions into rules you need to apply a series of verifications throughout the drafting process. The other persons involved in drafting should also carry out similar verifications. An experienced law drafter has suggested that drafters should follow the logical progression through five stages.[47] These stages are equally applicable to post-conflict countries and drafters should follow these steps to make effective and quality laws.

Understanding the Proposal

Modern drafting has a clear purpose. It is not just coming out of the sovereignty of the state. Legislation is proposed to address some social, economic or political issue. At this stage the drafter must understand the objective and intention of the donor or funder. It is better to get maximum information from the policy makers or donors. Part of this understanding comes if the drafter is participating in policy development. All information must be sought from the policy developer. In countries where policy formation is separate, this is provided in the form of instructions. This instruction is also helpful to get political approval.

Analyzing the Proposal

Drafters need to analyze a number of issues themselves. They should understand the proposal in terms of existing law and coherence with the legislative scheme. Before drafting, the following matters should be considered and verified:

- how does the proposal impacts upon matters already governed by existing law;
- are the legal means to be used compatible with the Constitution, the existing legal structure and norms;
- is the new law not in contradiction with any provision guaranteeing individual rights;
- in which places does the existing law need to be repealed or amended, because it is incompatible with the proposals;
- is the legislation compatible with applicable international treaties and regional treaties and human rights treaties;
- are the means of implementation and enforcement which have been proposed practical and efficient, and how should they be structured to ensure fairness and transparency;
- is there a need of secondary legislation and what are the parameters;
- should the policy be given effect by amending an existing law or by a self-contained bill.

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[47] G. Thornton, Legislative Drafting 128 (1996).

Designing the scheme

A piece of legislation must be carefully designed. A logical design aids in communication and understanding, which, in turn, develops democracy and the rule of law. The drafter should design the regulation and get approval from the policy formers about the basic approach to address the problem, topics to be covered and administrative structure. It should also include decisions about position of provisions; local conventions; and convention structure of a law. If the following principles of legislative design[48] are adopted both in primary and secondary laws, it would result into quality legislation in Afghanistan and in any other post-conflict country:

- Related provisions should be gathered together in the same part of the bill, and distinct groups of related provisions should be created as separate Parts of the bill.
- Groups of provisions, and Parts, should be ordered according to the same principles that govern individual provisions.
- Primary provisions should come before those subsidiary provisions that develop or expand or depend upon them.
- In particular, general propositions should come before a statement of exceptions to them.
- Provisions of universal or general application should come before those that deal only with specific or particular cases.
- Provisions creating bodies should come before those that govern their activities and the performance of their functions.
- Provisions creating rights, duties, powers or privileges should come before those that state how things are to be done.
- Provisions that will be frequently referred to should come before those which will not be in regular use.
- Permanent provisions should come before those that will be in force or have application for only a limited time.
- Provisions affecting a series of related events or actions should be set out following the chronological order in which those events or actions will occur.
- The objectives of the bill should be stated at the beginning, since they set the context in which the provisions that follow must be read.
- Any definitions provided for terms used in a bill should be set out before the terms are used; in any case, the way in which a bill is using a term should be self-explanatory from the first occasion that the term is used.
- The application or coverage of the bill should come before the provisions that apply to those cases.
- Provisions setting out the scope of powers to make secondary legislation should be dealt with after the substantive provisions of the legislative scheme.

[48] These design principles are adopted and developed from *Law Drafting ...*, *supra* note 38.

Composing and developing the draft

Composition is cited as one of the three major problems in legislation. The legislative style and composition of a draft is generally controlled by drafting conventions in a country reflecting language and grammar. It varies from country to country. These practices are usually available in drafting manuals. Such manuals are scanty or non-existent in post-conflict countries. Afghanistan has regulations but these are firstly not comprehensive and secondly not followed. However, the composition rules presented by Thornton are equally applicable to all jurisdictions because these enhance communication and understanding of legislation.

- Express normative rules in prescriptive rather than in narrative form;
- Express norms directly, avoiding circumlocution;
- Include only those norms that perform a necessary legal function;
- Avoid long sentences;
- Follow word order in conventional usage;
- Use expressions in every day usage, wherever possible; avoid unnecessary legal jargon, but use legal terms to express legal concepts;
- Omit unneeded words;
- Use terminology consistently throughout a bill and in all secondary legislation implementing it; use the same term for the same case, and a different term for a different case;
- Avoid ambiguous expressions and terms that are vague and lack clear definition;
- Limit cross-referencing to other norms as a method of providing the content to norms;
- Make amendments to other laws by express alteration of specified provisions.

Scrutinizing and testing the draft

The process of scrutinizing the legislative text is continuous throughout the drafting, particularly to improve clarity. Each version should be checked on legal form, clarity and comprehensibility. A more thorough scrutiny should be given to the final version. The following checks of the final version are essential:

- Constitutional and legal compliance;
- Approximation to existing legal system;
- Compliance with international treaties, notably international human rights;
- Implementation arrangements;
- Secondary law-making powers;
- Legal form, style, structure, clarity and comprehensibility;
- Making use of consultation.

Consultation is very important at every stages of the legislative process. It is important at the policy process stage and during the drafting process and procedure. It must be inter-ministerial and external consultation. In post-conflict countries there is no consultation. Even in transition countries consultation with NGOs is resorted to reluctantly. Few legislative projects are the concern of one ministry only. Many ministries are involved. There is a need of full and open consultation within ministries. Then there is a need for public consultation and consultation with all those going to be affected and governed by the proposed legislation. There are many benefits of broad public consultation: a) it may give the range of policy alternatives; b) it may facilitate the collection of some categories of data needed; c) it may be used to verify the results of completed analyses; d) it may make the law-making process, and the reasons for policy choices, more transparent to affected groups; e) it may give rise to a better understanding of the activities to be regulated and the problems to be solved; f) it may result in more informed choices as to the appropriate legal mechanisms; g) it may result in legal solutions more likely to encourage compliance; h) it may lead to improvements in the legal text, ensuring clearer communication of requirements; i) it may enable government to be more responsive to the needs and interests of affected persons; and, (j) it may give legitimacy and ownership to a piece of legislation.

4. Applying the Same Procedures and Standards to Parliamentary Initiatives

Legislatures have many roles in a democracy and one of the roles is to initiate bills and to propose amendments to government bills submitted to them. The quality of that legislation should be measured by the same standards as are applied to the bills prepared by government. The standards must be applied to the policy development stage. However, this is not happening as parliaments in post conflict countries are not equipped for policy formation and drafting of legislative texts.[49] Any bill introduced by parliament must be consulted, developed and verified by government like bills initiated by government. It must comply with all the drafting standards and procedures about the form and contents of a legislative piece. For this purpose there is a need for developing guidelines, manuals and training of legislators and staff of parliaments. The Afghanistan Parliament came into existence in 2005. Its lacks capacity and procedures to investigate, propose and oversee laws.

[49] *Guidebook on Strengthening the Representative Capacity of Legislatures*, a background paper for the UNDP staff training Seminar, "Strengthening the Legislatures-Challenges and Techniques" Brussels, 22-24 October 2001. *See also* Strengthening Oversights by Legislatures – Findings, (September 2003). As per these findings legislatures perform four important functions of governance: (a) making of policies and laws; (b) representing the citizens; (c) overseeing the executive; and (d) recruiting future leaders.

5. Applying the Same Procedures and Standards to Delegated Legislation

Delegated legislation is a necessity in any modern, dynamic and effective legal system. While there is no escape from this phenomenon, there is a need for more effective and efficient mechanism for promulgation and oversight of delegated legislation. Failure to do so impacts adversely upon human rights, democracy, rule of law, good governance principles, social justice and principle of separation of powers, on which the very concept of liberal democracy hinges.

In Afghanistan delegated legislation is also very important. At present it does not go to parliament. Only regulations are required to be approved by the Cabinet. That means the Cabinet also needs capacity enhancement. Currently, there is no procedure for Cabinet to approve delegated legislation. Then there are rules, practices and codes of conduct approved by the respective minister. In short, there is a need for control of delegated legislation as well.

Dividing matters between primary and secondary legislation is crucial and critical. Parliament should make sure that laws contain the principal substantive rules of a new legislative scheme. The following matters are substantive and should not be left to delegated legislation:

- Matters that involve significant questions of policy;
- Rules which will have significant effect on individual rights and duties;
- Significant criminal offences and penalties;
- Taxes and significant fees and charges;
- Procedural matters that go to the essence of the legislative scheme;
- Amendments and repeals to the existing law.

Secondary legislation should built upon the policy and principles established by the parent act, and deal with matters of less significance or with the detail of the legislative scheme, filling it out and supplementing the core features in the parent legislation and providing for procedures and administrative matters.

Delegated legislation has become indispensable for the flexible and expeditious government response to unforeseen developments in the reality of life. What is critical is the creation of a detailed and stern legislative framework by parliament in which delegated legislation should take place. It should also retain the authority to monitor and regulate the use of such powers by the executive. Mere Parliament post-drafting oversight is not effective due to lack of time. It has become virtually impossible to scrutinize all forms of delegated legislation. Parliamentary oversight becomes even more of a formality in a parliamentary system where Ministers are from the ruling party. On the other hand, judicial review is expensive and lengthy. The solution lies in proper drafting of the enabling clauses by Parliament after thorough discussions of necessity, nature, objective, purpose, scope and parameters of delegated legislation. Pre-drafting oversight is critical, especially in countries like Afghanistan, where there is an acute shortage of skilled drafters. For delegated legislation drafting, each ministry needs a sufficient number of experienced and qualified law drafters. However, in most jurisdictions parliaments

and executive departments lack skilled and qualified drafts persons. There is a lack of legal experts even in executive departments. It would not be wise to leave this crucial task of drafting delegated legislation to such ministries as all delegated legislation carries out specific policies and objectives of government, having direct and indirect effects on the economy. Delegated legislation is also at the centre of a legal system and the rule of law. A good, effective and efficient regulation enhances the rule of law and discourages the rule of man. It is a serious drafting activity and it should not be left in the hands of unskilled employees of administrative departments. The proposed pre-drafting safeguard may be in the form of some central body, composed of qualified and experienced law and drafting experts, based in the Ministry of Justice or an independent office or commission. This sort of arrangement exists in developed countries like the UK, Canada[50] and New Zealand.[51] This pre-drafting scrutiny does not relieve parliament of monitoring and post-drafting scrutiny. The post-drafting scrutiny is equally important to oversee the effectiveness, efficiency, practicability and cost and benefits of delegated legislation. And moreover, parliamentary scrutiny and judicial review should be inherent rights of parliaments and courts. Non-exercise of these powers by parliaments and courts will make the executive more and more powerful. If such safeguards are not in place, the executive would make excesses and try to violate fundamental rights, economic liberty, distort elements of market economy, freedom and liberty of the individual – the very basis of a democratic society.

6. Improving Access to Legislation

Access to law is one of the bases of the rule of law, democracy and market economy. In post-conflict countries and in almost all developing countries laws are made in government offices and often there is no proper publication. This creates a problem of access to laws and regulations. Laws should be easily available. Every person should be able to get access to law and regulations, practices and codes of conduct. Publication of a laws is basically the responsibility of state. Laws may be published by commercial organizations. However, the commercial publication must be updated and certified by the state. There is an official gazette and there is a regulation on the publication of laws in Afghanistan.[52] This regulation mandates to notify all the official and non-official entities and citizens of the nation of the laws, decrees, regulations, charters, approvals, and other documents of a legislative nature and to regulate the manner of their publication and enforcement.[53] However, due to limited resources, circulation of the official gazette is limited. Certain international organizations have collected and translated laws and published these in a single volume and on the internet.

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[50] Guide to Making Federal Acts and Regulations, Canada, Part 3, at 175-188 (2003).

[51] Legislative Manual Structure and Style, New Zealand Law Commission Report 35, Appendix A, May 1996.

[52] Law on Publication and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, Official Gazette no. 787, 1999.

[53] Article 1 of 32 *supra.*

However, keeping in mind the communication methods, infrastructure and literacy rate, this is far less than satisfactory. All laws and regulations must be registered and a record must be maintained.

E. Conclusion

It is safe to conclude that a failed state is not accidental. It is not caused by geographical, environmental or external factors. It is purely man-made and a direct consequence of human failings. Leadership decisions, bad laws, and weak institutions cause state failures and conflict situations. By the passage of time it becomes a social problem and part of culture. The citizens have no trust in the state laws and institutions. They become more loyal to faction, clans, warlords and other powerful groups. The citizens are not consulted about law-making and institution making. Those institutions are controlled by powerful factions. The state legal system does not have legitimacy.

This current trend in state failures resulting into conflict will continue if no proper attention is given to establish good institutions and effective laws. In this era of democracy, national and international economies driven by market forces, development, environment, globalization of human relations, explosion of information, easy access to information, we see recurrent public demands for good governance, rule of law, sharing of powers and allocation of resources, hence drafting of quality laws have become more and more important. All the past experiences of development, strongly indicate that effective development requires adequate allocation of resources and good governance. Good governance requires the rule of law, in essence, the exercise of political decisions through clear rules, transparent, accountable and participatory decision making procedures. For good governance, allocation of resources and rule of law, there is need for quality laws and effective institutions which are absent in failed states.

Quality law thus plays an important role in ensuring the success of legal reform, peace, development and prevention of future conflicts in a post-conflict and collapsed state like Afghanistan. No doubt, fashioning sound laws and regulations is a challenging and uphill battle. However, there is no other option if the international community and administration is sincere in bringing to a halt the trend of failing states. Strengthening weak states against failure is far easier than reviving them after they have definitely failed or collapsed and bad blood has been created. As Afghanistan shows, reconstruction takes very long, and is a very expensive, difficult and hardly a smooth process. Yet, it is urgent to turn this situation around, as it is in the interest of not only the citizens of Afghanistan, but also of economic development, poverty reduction, conflict prevention and world peace. Of course, creating security and a security force from scratch, amid bitter memories, is the immediate need. Then comes responsible leadership and good governance. Subsequently comes the creation of an administrative structure, legal framework, and institutional framework. The international community may provide funds for all this but without a sound, certain, clear and predictable legal and institutional framework, it will prove to be no more than an illusion.

Quality law making is a permanent and conscience effort. It requires rigorous techniques, methodology and process. Quality laws and regulation require quality in substance and quality in form of law. The quality in substance can be achieved through thorough policy formation and development. A good policy can be developed through ante- and post-impact assessment and consultation including the government sector and public sector, especially those who are going to be affected by new legislation. At the policy stage the problem to be addressed should be determined exactly and all legislative and non-legislative solution should be checked. It is not something too difficult to be achieved in post conflict countries. What is required is realignment of priorities in such countries. The concepts and methods of policy development are successfully followed in developed countries like UK, New Zealand, and Canada. The legislative drafters are free to borrow institutions, policy or legal solutions or even legal texts from foreign jurisdiction. Only they need to be indigenous and functional. The guidelines for policy development must be developed in post conflict countries. This provides direction for all drafters whether national or international.

The second quality aspect is the form of a legislative text. This may be achieved through the development of manuals for drafting standards and drafting procedures. These manuals and guidelines are essential for uniform laws. All drafters have to follow those standards and procedures. Drafting standards must not conflict with existing legal culture, principles and system. Post conflict countries have some form and style of laws and regulation. The new legislative text must comply with those standards and style. If those are not workable and effective, other effective standards and procedures may be introduced following the principles of legislative transplants. There are very successful standards for the design and composition of legislative texts. These models are equally applicable to post conflict situations like Afghanistan. These standards and procedures should equally be applied to the initiation of laws by parliament and most importantly to secondary legislation. In post-conflict countries and in Afghanistan as well, there is also a need to create a perpetual mechanism to consolidate, revise and reform laws and regulations. The independent law commissions have proven to be a successful mechanism.

In order to accomplish these goals, it is critical to invest in drafts persons and provisions of technical and institutional resources at all levels of line ministries, parliament and central legislative office in Ministry of Justice is critical. Drafters can be taught drafting rules, conventions and techniques to develop their skills to prepare clear and concise legislation. This training should also include international successful standards and methods to assimilate those standards into national jurisdictions. This training should be extended to members of parliament, staff of parliamentary secretariats, the Council of Ministers and their secretariat, line ministries, members of lawyers associations, chambers of commerce and other actors of society like NGOs, CBOs etc.

In short, there is hope for failed states and post-conflict states and that hope lies in quality laws, effective institutions and transparent and accountable processes and procedures.