

Shadow Justice

How the Taliban run their judiciary?

Report Authors : Antonio Giustozzi, Claudio Franco and Adam Baczko

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INTEGRITY WATHC AFGHANISTAN

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SUMMARY

As the Taliban re-organised after their overthrow in 2001, re-establishing their judicial system rapidly emerged as their top non-military priority. Initial attempts to recreate the system mostly as it was under the Taliban Emirate in 1996-2011 proved inappropriate because of the environment, in which the Taliban were operating as an insurgent organisation. By 2012 the Taliban judiciary had taken the shape of mobile courts, lean structures, and little record keeping. A major consequence of the new organisation was that the appeal system became largely dysfunctional, even it continued to exist in theory.

The Taliban made efforts to staff their judiciary with trained judges, but often this was not possible due to a shortage of volunteers for what was in fact a dangerous and uncomfortable job in remote parts of Afghanistan. Still the Taliban managed to bring their judiciary to many areas of Afghanistan hitherto ignored by Afghan governments.

Until 2010, the Taliban mostly maintained fixed courts in known locations, where complainants could approach judges or clerks and file a case. From 2011 they have relied on mobile courts, because the threat of the 'night raids' was becoming too serious. This has made it more complicated for villagers to access the courts, although the Taliban have adapted by tasking commanders to enquire in the villages if anybody needed the judges and by giving elders mobile numbers to call. More importantly, the Taliban have had to shorten their trials in areas where they do not feel secure. Many villagers appreciated the quick justice provided by the Taliban, where trials would very rarely last more than two weeks, but when many trials started getting resolved in one hour or even less the room for incautious sentences grew to the point that many villagers saw this as a major liability.

The Taliban have strict and established procedures in their trials, which are an adaptation of old style Shari'a trials which have existed for centuries in Afghanistan. Much of the output is dispute resolution, but the Taliban are keen to administer criminal justice as well; in such cases the judges are supposed to impart strictly Shari'a punishment, but in reality there is room for negotiation there too.

There is evidence that problems like corruption and cronyism existed within the Taliban judiciary, but also that the Taliban have been actively trying to contain them. To achieve this they have adopted a series of tools, from multiple channels of reporting on the judges within the Taliban themselves, to forms of external oversight (typically village elders and religious figures).

When judging disputes and criminal but not political cases, the Taliban court appear to have achieved a relatively high degree of perceived fairness, according to our non-Taliban interviewees, even if favouritism has proved difficult to stamp out. However, judging cases of spying or collaboration with the Afghan government remains a field where the Taliban are still often recurring to arbitrary executions (despite internal rules to the contrary) or to show trials where the defendant does not have a fair chance. Cases are known of Taliban judges and commanders having been punished for violating the rules in espionage and collaboration trials, but this does not appear to have been enough to eradicate the practice.

On the whole, given the difficult conditions in which the Taliban operate, their judiciary has served the movement rather well and certainly better than any other non-military component of their effort. Even if it is difficult to assess how popular the Taliban judiciary really is, it is certainly more popular than the Taliban fighters and it is the closest thing the Taliban have got to a functioning shadow government.

Against this brief background the main scope of this report is to examine how the Taliban have been fighting corruption and cronyism within their judiciary in order to highlight how there are a variety of mechanisms which can be used to keep corruption and institutional decay in check even in remote areas and when operating under great constraints. If the Taliban can involve portions of the population in monitoring the functioning of the judiciary, then it seems feasible for others to consider such options too.

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1. INTRODUCTION

From at least 2008 on and in an environment of growing and rampant corruption¹, press reports have been popping up indicating that many Afghans who are not sympathetic to the Taliban seem to believe that the Islamic Emirate was successful in 1996-2001 in maintaining law and order, both in terms of policing (catching culprits) and in delivering justice.² The issue appeared worth investigating to the authors of this paper. The Taliban's justice system has always been controversial because of its reliance on the threat of corporal punishment and executions and because of the role that 'moral' crimes play within it. However, this view of justice was shared by many Afghan villagers and only faced significant opposition within Afghanistan's cities.

The analysis of judicial systems in general and of the Taliban shadow justice in particular is warranted also by another consideration. The literature on failed and failing states tends to stress that failure to control territory and population is a key weakness leading to state failure.³ The ability of any state to deliver justice to every corner of its territory is therefore an important indicator of its capacity. It tells us something about state-building in Afghanistan that the Islamic Emirate was the first state in Afghanistan to bring some kind of homogeneous, state-enforced justice to every corner of the country. Its jurisprudence was based on the Sharia and on customary justice, but supervised by Ulama and state officials. That these results have to do partly with the authoritarian character of that state is not a sufficient explanation as previous authoritarian regimes in Afghanistan failed in bringing their judicial system to most villages. The issue of the character of the justice enforced by the Taliban cannot be dismissed lightly. Still, the very fact that the Taliban were able to implement their own version of law and order with a modest budget invites an explanation—even more so since the Taliban have re-established their judiciary in the shadows after 2001.

Efforts by the Taliban as an insurgent movement to establish their shadow government (which includes courts as well as governors, education officers and sometimes health officers) have certainly not been trouble free after 2001. However, given the context in which the Taliban were operating and the immense constraints they were facing (the pressure of the counter-insurgency effort had a major impact from 2010 onwards) it could be argued that their 'shadow government' achieved a degree of effectiveness, reaching areas of Afghanistan not served or reached by Kabul. There is therefore perhaps something to be learned from how the Taliban managed territory and population over the last 9 years, particularly considering the fact that they have succeeded in establishing their system of courts in the more economically and socially marginal areas of the country, where the Afghan state had a tradition of devolving parts or all of its authority to local institutions.⁴

¹ See IWA survey and especially the national corruption survey, available on line at <http://www.iwaweb.org/corruptionSurvey2010/NationalCorruption2010.html> (accessed on the 23 December 2012).

² Pamela Constable, 'As Crime Increases in Kabul, So Does Nostalgia for Taliban', *Washington Post*, 25 September 2008; Jim Wildman, 'As Fighting Escalates In Kandahar, Nostalgia For Taliban Rule, Islamic Law', *NPR*, 22 September 2010; Chris Sands, 'Afghans missing Taliban justice', *The National*, 24 November 2008; Abdul Maqsud Azizi, 'Taleban Justice Dominant in Logar Province', *Afghanistan Recovery Report*, issue 437, 2 August 2012.

³ Jonathan DiJohn, 'Conceptualising the causes and consequences of failed states: a critical review of the literature', Working paper Series 2 n. 25, London: CSRC, 2008, p. 4.

⁴ See footnote 8 below for literature on the Afghan systems of justice.

Although the Taliban model of governance, and particularly justice, is likely never going to be an attractive model of government for western policy makers and western public opinions, nor to a substantial part of the Afghan population, understanding its workings is nonetheless essential for the task of developing effective governance in Afghanistan. In particular, we focus here on the Taliban's shadow judiciary, which most interviewees in this study viewed as the seemingly most efficient component of the Taliban's shadow government structures.

This report examines the Taliban's shadow judiciary. Our aim is to illustrate its functioning and the problems of managing a judicial system which extends to the most remote corners of Afghanistan. The strengths and weaknesses of the Taliban are the exact opposite of those of the Kabul-based Afghan government; they can operate in remote villages, while the Kabul government is mostly limited to cities and towns, which are conversely off-limits to the Taliban. If the urban-rural split which has bogged down the Afghan state and society from the XX century onwards is ever to be bridged, some lessons could be learnt from the Taliban.⁵

The Taliban's judiciary has a reputation for being largely corruption-free, as discussed in *The political context* below. In this report we investigate this claim and also examine the mechanisms that the Taliban have put in place for exercising oversight and supervision of their judiciary. The report focuses particularly in how the Taliban deal with issues of corruption and unfairness in their judiciary, but in order to provide a context we also describe in some detail the Taliban judicial machinery and its internal coherence, its geographical and social reach and its ability to comply with the tasks assigned to it. The report also looks at the Taliban's recruitment policies (how they select judges), under which rules and frameworks (established by the Taliban leadership) they operate and how the Taliban make sure that such rules and frameworks are respected.

⁵ On the rural-urban split see: 'The eye of the storm: cities in Afghanistan's civil wars', London: Crisis States Research Centre, Working Paper 62.2, 2009.

2. METHODOLOGY AND INSTRUCTURE

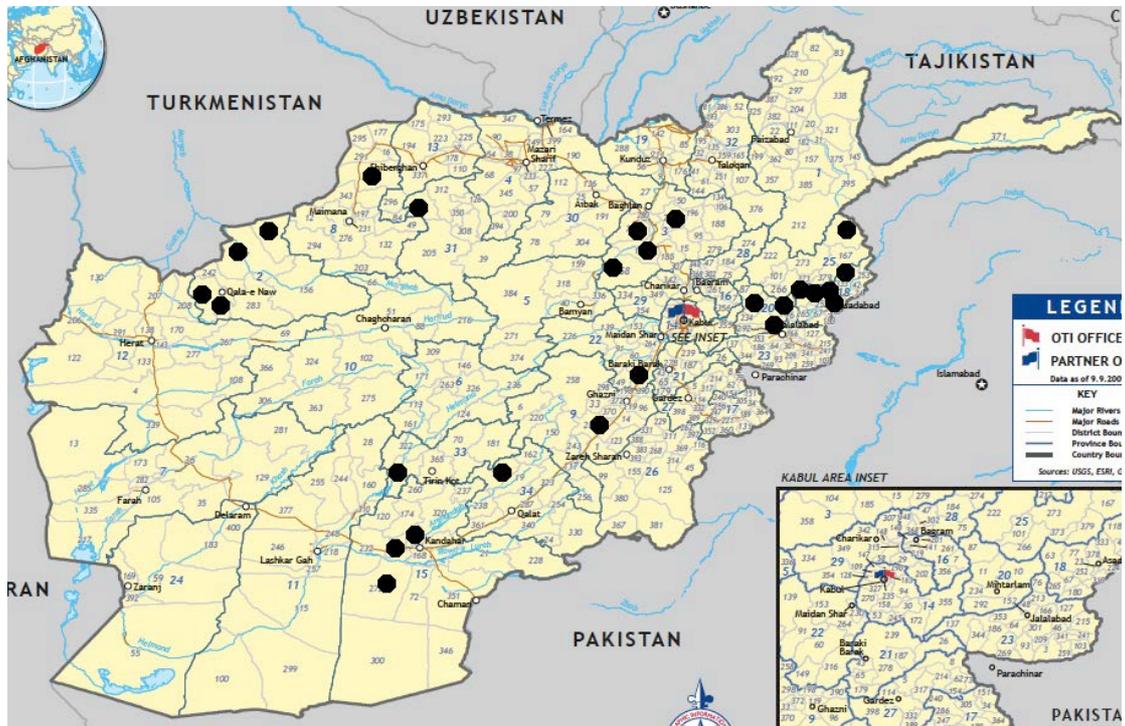
The methodology of the study consists of both semi-structured interviews with members of the Taliban and of the population living in areas under the control of the Taliban, and informal enquiries carried out by collaborators selected on the basis of their contacts and experience and by the authors themselves. Interviews have been carried out in Kabul as well as in a number of districts spread around the country, in order to ensure a regional balance.⁶ One reason for doing this was to establish whether the structures of the Taliban shadow government (the courts and the structures tasked to supervise and manage them) are homogeneous. These districts include some long-standing Taliban strongholds (Kandahar, Zabul, Uruzgan, parts of Badghis), others which resisted the Taliban Islamic Emirate until 2001 but joined the insurgency early (Nuristan), others still in which the Taliban presence is rooted in formerly 'Salafi'⁷ and Hezb-i Islami networks (Kunar), or in more recently acquired Taliban strongholds (Pashtun areas of Ghazni, Laghman and Wardak) and finally also in areas of very recently established Taliban control (Baghlan, Faryab and parts of Badghis).

A total of 26 Taliban judges, 21 Taliban commanders and cadres, 19 court users (of both government and Taliban courts) and 23 community elders (both pro- and anti-Taliban) have been interviewed. Most of the interviews were carried out by Afghan researchers (typically journalists and stringers operating in their own province) who were able to gain access to the local Taleban, the local authorities and the local elders. They took notes, which were then translated into English. They introduced themselves as journalists to the interviewees, as the figure of 'researcher' means little to the large majority of rural Afghans. The Afghan interviewers were organised in two separate groups, which did not know or communicate with each other, so as to minimise the risk of 'manufactured' interviews. Some of the interviews with Taliban commanders and with elders were also carried out by the authors themselves, in meetings arranged by local contacts. The authors introduced themselves by saying that they were working on a 'book' on the topic. The interviews were conducted with the condition of anonymity in order to protect the participants. The sample of judges might have been biased by the very fact that only those accepting to be interviewed were of course answering questions, but we tried to balance this with interviews with elders and court users.

⁶ See map 1 for a detail of our coverage.

⁷ The Salafi of Nuristan and Kunar are in fact very close to the Hanafi line and follow the same jurisprudence.

Map 1: districts covered in the survey.



The report is structured in four sections. The preliminary section discusses the political context within which the Taliban's shadow judiciary emerged and operates. The main section of this report describes the ways the Taliban's judiciary operates, analysing its social organisation, recruitment patterns, access, procedures and the punishment inflicted on culprits. The issues of transparency and fairness in the Taliban's courts are then analysed in a third section. The final section compares the Taliban's courts with state courts and with traditional customary justice in Afghanistan.⁸

⁸ Related to the same project, these authors are also publishing a report on the more political aspects of the Taliban judiciary with the Afghanistan Analyst Network entitled 'The politics of justice'. That report features an analysis in greater depth of the role of the Taliban judiciary in their overall strategy, as well as a discussion of the use of their judiciary as a tool to discipline the Taliban's rank-and-file.

3. THE POLITICAL CONTEXT

There is a general consensus that the Afghan government judiciary is affected by a high degree of corruption, chronic understaffing and weak commitment from many judges. It is also clear that its reach to rural areas is very limited; even before the insurgency became a major issue, most villagers and even a portion of the urban population were relying on customary justice rather than on state justice. Particularly in the rural areas, but also in the cities, the implementation of sentences is difficult, not just because of the limited reach but also because of weak coordination with the police. There is also confusion among the judges concerning which laws and codes should apply. Not only there are 60 laws in force that contain penal provisions, but in addition some judges apply the Shari'a when they think no law covers a case. Customary justice, on the other hand, was affected by a number of problems deriving from a long period of armed conflict and civil war, namely the interference by new actors who emerged from the war, such as local strongmen, parties and factions.⁹ This structural weakness created opportunities for the Taliban to step in, as admitted even by some who worked on ISAF's side after 2001.¹⁰

The Taliban claim to have taken steps to re-establish their own judicial system from the very start of their insurgency in 2002; in practice, the Taliban started bringing portions of Afghan territory under their military control in 2003 and this is likely to be the time when the first 'shadow' judges may have made their appearance. The first press reports on their activities started emerging only in 2007, but the interviewees mentioned having been aware of the existence of a Taliban judiciary for several years, dating back to at least 2005. The Taliban view their judiciary as being in continuity with the Taliban Emirate's judiciary of the 1900s; in fact initially the way the Taliban planned to structure it was an exact clone, but it proved unfeasible to have the same system while operating as an opposition movement and changes had to be made.¹¹

The development of the post-2001 Taliban judiciary should be seen in the context of the wider effort of the Taliban leadership to rule the population and establish their own system of governance. Initially the Taliban were organised in several networks led by charismatic mullahs, but under a shared national leadership. Over the years, the Taliban improved and to

⁹ For overviews of the Afghan justice system see: Afghanistan Human Development Report 2007: bridging modernity and tradition, UNDP, 2008; Susanne Schmeidl, 'Engaging traditional justice mechanisms in Afghanistan', in Whit Mason, (ed.), *The rule of law in Afghanistan: missing in inaction*, Cambridge : Cambridge University Press, 2011, pp. 149-171; R. Gang, 'Community-Based Dispute Resolution Services in Kabul City', Kabul: Afghanistan Research and Evaluation Unit, 2011; Rule Of Law In Afghanistan Conference Report, Organized by the American Institute of Afghanistan Studies Boston University, September 23-24, 2010; EUPOL, 'A Glance at the Penal Code', Kabul, May 2012; Thomas Barfield, Neamat Nojumi, and J Alexander Their, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', Washington: USIP, n.d.

¹⁰ Frank Ledwidge, 'Justice and Counter Insurgency in Afghanistan: A Missing Link', *RUSI Journal*, 154/1: 6-9, 2009; David Kilcullen, 'Deiokes and the Taliban', in Whit Mason (ed.), *The rule of law in Afghanistan*, Cambridge : Cambridge University Press, 2011, p. 45; Stephen Carter and Kate Clark, 'No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan', London: Chatham House, 2010; Elizabeth Lee Walker, *Culturally-Attuned Governance and Justice in Helmand Province, Afghanistan*, International Media Ventures, Saint Petersburg, 48-52, 2010; Ali Wardak, 'Building a Post-War Justice System in Afghanistan', *Crime, Law & Social Change*, 41: 319-341, 2004; Ali Wardak, 'State and Non-State Systems in Afghanistan: The Need for Synergy', *University of Pennsylvania Journal of International Law*, 32/5: 1305-1324.

¹¹ For full details on this see Giustozzi, Baczkowski and Franco, 'The politics of justice: the Taliban's shadow judiciary', Berlin: Afghanistan Analyst Network, forthcoming.

some extent centralised their organisation, in part as a result of their effort to establish a shadow government inside Afghanistan.¹² By 2005 there were at least 11 Taliban shadow provincial governors, who also played a role in the delivery of justice, particularly in resolving disputes among individuals and communities. The effort to establish a shadow governance structure was clearly meant to bring the Taliban some political legitimacy, but also responded to the need of administering the territories and communities that they were gradually bringing under their control. By arbitrating disputes among the people and pursuing criminals, the Taliban are attempting to strengthen the credibility of their claim of being the legitimate state in Afghanistan. By 2010 ISAF estimated that 15 Taliban courts operated in the Afghan south, mainly involved with resolving local disputes. In 2011, David Kilcullen described the work of the Taliban courts as 'translating local dispute resolution and mediation into the local rule of law, and thus into political power'.¹³

The Taliban's effort initially faced little opposition; the Afghan government and NATO/US Armed Forces paid little attention to it until about 2010, clearly underestimating its impact despite being well aware of its existence. Over the years, however, the targeting of Taliban cadres intensified and by early 2010 even the judges were being seriously affected and suffered casualties; ISAF has alleged that judges were directly involved in the Taliban military effort, but this seems to rarely occur.¹⁴ The Taliban were rapidly forced to abandon the fixed courts system in most if not all provinces and switched to a mobile courts system, where the judges would hold a trial at a different place each time within a particular district. In Nuristan and Kunar at least, the courts appear to have always been mobile. This innovation disrupted the operations of the Taliban judiciary, particularly during 2010 and early 2011, as the Taliban were working out a system to allow the villagers to easily report cases to the judges. By late 2010 or 2011 at the latest, the Taliban judiciary seemed to have adapted pretty well to the new challenge.

¹² On this point see Claudio Franco and Antonio Giustozzi, paper on the Taliban command and control system, forthcoming for AAN.

¹³ Kilcullen, p. 45.

¹⁴ See for example: 'Afghan-led Security Force Detains Taliban Leader', US DoD press release, 7 May 2012.

4. FUNCTIONING OF THE TALIBAN JUDICIARY

4.1 Organisation

According to the judges interviewed, the Taliban seem to have a judicial department or commission based in Pakistani territory (probably Peshawar), which handles the administrative dimensions of the judiciary. It is led by Mawlawi Hazrat and is in charge of handling the recruitment and rotation of judges, among other things. However, this department does not deal with the substantive activities of the judiciary. The top judicial institution of the Taliban is the Central Court which is the ultimate instance of appeal; it is said to be based in Nawzad district of Helmand province and is presided over by Maulawi Abdul Shakoor Sanayee, whose father was the head of the Taliban's Central Court in the Emirate's time. In practice, Sanayee spends his time largely in Pakistan. According to the Taliban, the Central Court receives 20-25 appeal cases a day, but it was impossible to verify the accuracy of this claim and the figure appears to be inflated.¹⁵

In the provinces controlled by the Peshawar Shura (south-east, east, central region, north), the role of ultimate instance of judgement is played by the Provincial Military Commission of the Taliban¹⁶. This structure is led by a Taliban official sent from the national leadership and incorporates all the main Taliban figures province-wise. The Military Commission always plays a major role in the handling of the Taliban's judicial system. In practice, the judges are actually managed by a provincial Executive Commission, which works under the supervision of the Military Commission to deal specifically with the judiciary (the Military Commission has many other tasks). The Executive Commission is typically composed of 12 religious scholars and its tasks include handing over every verdict to the Military Commission for implementation after considering it, making recommendations for the appointment and rotation of the judges, issuing guidelines to new judges and drafting leaflets and declarations. Different members of the Executive Commission seem to have responsibility for supervising specific districts. When a judge cannot decide on a particular case, he can consult the Executive Commission for help and advice.¹⁷

The Military Commission and the Executive Commission meet in a judicial council at the provincial level, sometimes as often as once a week and in any case at least once a month. Particularly in areas where the pressure from ISAF and Afghan government forces is higher, the Taliban try to avoid meeting too frequently as that would involve movements of cadres across the province and carries some risk. Typically, the Taliban shadow provincial governor, the Military Commissioner, the province's higher-ranking judges and the Executive Commission's religious scholars attend these meetings, for a total of 20-25 attendees. The purpose of these meetings is to:

- redistribute orders and news received from the leadership concerning the administration of justice;
- receive reports from judges concerning the cases that have been dealt with;
- manage and coordinate appointments and transfers of judges;

¹⁵ See below.

¹⁶ See Figure 1 below.

¹⁷ This is how the judges described the structure to us. For detail on the Military Commission, see Franco and Giustozzi, Paper on the command and control system of the Taliban, forthcoming for AAN.

- discuss any issues of province-wide interest.

In some areas at least the judicial council takes place in different districts all the time, probably to distribute the burden (and the risk) of moving around more evenly.¹⁸

Regional judicial commissions also exist, sometimes covering as little as two provinces, sometimes several; their role is primarily to discipline the Taliban combatants and political cadres and act on accusations of abuses towards the villagers or lack of respect for internal rules, and not to handle judicial cases involving the general population.¹⁹

The actual degree of independence of the courts varies, being higher in southern Afghanistan and lower almost everywhere else. Except in the south, the judges answer ultimately only to the Provincial Military Commission, not to the shadow provincial governor or, officially, to the military commanders. The Military Commission supervises the judges and even pays the judges' salaries and allowances. It has the authority to bar a judge from announcing a verdict, as well as to sanction or fire a judge found to have been misbehaving, and even to imprison him for up to six months. It also functions as an appeal court (when gathered in a Judicial Council). In theory, individuals can lodge appeals during the regular meetings between the Military Commission and judges by contacting Taliban commanders and judges in the districts. The Commission also appoints the judges and regulates their rotation. Finally, the Military Commission also keeps summary files of all cases determined by the judges. Some sources say that the Military Commission coordinates with Peshawar before confirming every single case (on the advice of the Executive Commission), but this does not seem likely and is probably limited to the most controversial cases.²⁰

In the provinces under Quetta's control (south, west), independent (i.e. not integrated in the Military Commission) Provincial Judicial Councils are reported to exist, being ultimately responsible to the Shadow Governor.²¹ District Military Commissions are also involved.

Judges do not report their daily small cases to anyone, but as far as big issues like killing, big robberies and others which are of provincial concern, we are reporting them to the Taliban Provincial Judges council. Every month we have a meeting with the Council and report our monthly work to the members of the council. But when we are stuck or can't solve some cases, then we don't need to wait for one month to meet the Council, we visit on that day or maybe one or two days later the council and present our case to them to get help to resolve it. If any Taliban judge makes a wrong judgment, first he will be investigated by the Taliban district council, then he will be investigated by Taliban provincial judges council.

Taliban judge in Arghandab district(Kandahar), summer 2011.

Even in areas under Peshawar's control, the governors sometimes claim to have power over the judiciary, as illustrated in the following testimony:

¹⁸ See note 13 above.

¹⁹ See Giustozzi, Baczko and Franco, 'The politics of justice: the Taliban's shadow judiciary', Berlin: Afghanistan Analyst Network, forthcoming.

²⁰ See footnote 13 above.

²¹ Taliban Peshwar officials (contacted June 2012) stated clearly that there are different approaches in Quetta and Peshawar to this issue; it is worth noting that the Military Commission is based in Peshawar (hence the tendency to attribute more power to the local Military Commission), while the Political Commission is based in Quetta.

Were any Taliban judges to commit a mistake or do something wrong, then the Military Commissioner would inform me and the judges should respond first to me and if I was not here then they should respond first to the Military Commissioner. When the judge's inquiry is complete, then the Judicial Council has the responsibility to supervise and the judge should respond to the Judicial Council. [...] If I take a decision about the Taliban judges, I should talk with the chief of the Judicial Council in Nuristan Province and with the governor of Nuristan.

Shadow governor of Berg-e Matal district, autumn 2011.

However, sources in Peshawar and on the ground state clearly that in the areas under the responsibility of the Peshawar Shura, provincial and district shadow governors have no authority over the judges and can only advise them and supervise them on behalf of the Provincial Military Commission:²²

Taliban governor has control over his subordinates but he has nothing to do with Taliban courts. According to the constitution and law of Taliban, no one including provincial council has any control over courts. Only the military commission controls Taliban courts. [...] The Military Commission summons a judge, if there is any flaw in his verdict. The judge will have to explain his verdict to the members of commission to satisfy them and justify his verdict.

Taliban judge in Dahane Ghor, autumn 2011.

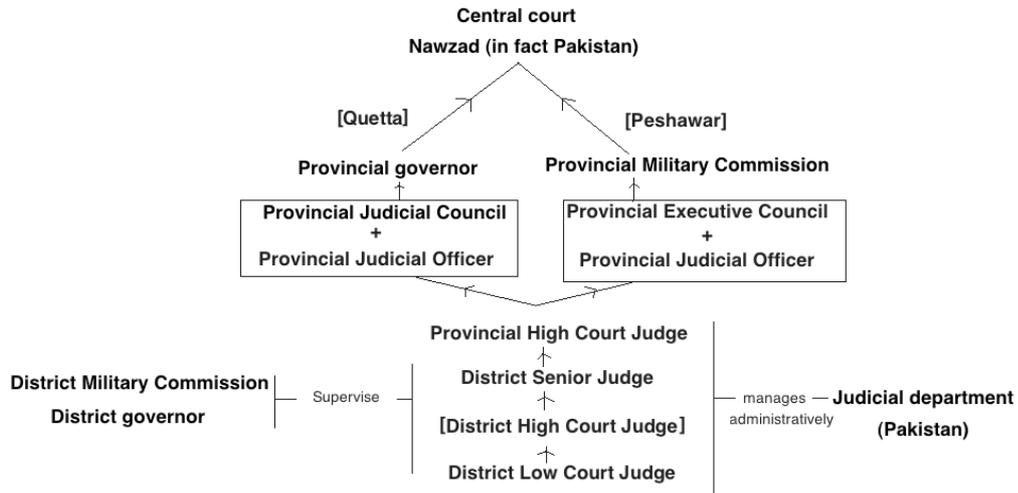
A judge can summon any governor without any hesitation, if someone files a petition against him.

Taliban judge in Alingar, autumn 2011.

²² Interview with Taliban Peshawar official, June 2012.

Figure 1

THE ORGANISATION OF THE TALIBAN'S JUDICIARY



In principle, the Taliban courts consist of two types, 'High Courts' and 'Low Courts', as described in Figure 1 above. The former should handle appeals against lower court decisions, as well as the most important cases, according to Taliban claims. In the grand governance plan of the Taliban, each district has a High Court and a Low Court. In practice, few if any province really have High Courts at the district level and often they have no High Court at all. A number of provinces have a single High Court at the provincial level (for example, Faryab), which only seems to handle appeals.²³

Each district covered by the Taliban's judiciary will have between 1-7 judges, depending on its size and number of villages. The smallest districts are entitled to three judges, but because often the Taliban only control parts of a district, cases are found where only one or two judges operate. This was for example the case of Sayyad district in Sar-i Pul, where from those surveyed a single judge was reported to be operating. In Sayyad, therefore, there must have been a single court. Similarly, in Faryab province, three of five districts where the Taliban had a presence only had a single judge, while the remaining two had two judges each.²⁴

One Taliban commander explained that the number of judges also depends on the facility of movement. If judges can easily travel over the district, fewer are necessary to cover the area. The Berg-e Matal district of Nuristan has just two judges, because the Taliban have full control there; in neighbouring Kamdesh, where some competition with Hizb-i Islami still exists, three judges are necessary, while in Khugyani in Nangarhar, contested between Taliban and the Afghan government, five judges are needed.²⁵

Every district in principle has a chief judge who is responsible for coordinating with the Military Commission and the Executive Commission; he also regularly attends the shadow judicial councils at the provincial level. He also attends the Taliban's district councils, which brings together the higher Taliban authorities in the districts, such as the district governor

²³ See footnote 12 above.

²⁴ Interviews with judges, Taliban and elders in Sar-i Pul and Faryab, summer-autumn 2011.

²⁵ Interview with Taliban commander in Berg Matal, January 2012.

and the military commissioner. The chief judge is typically supported by a deputy, who covers his absences, among other tasks. Some of the remaining judges may be trainee judges who are not yet entitled to decide cases alone.²⁶

The Taliban judiciary is definitely not a very sophisticated one; sometimes clerks are employed to assist, depending on the ease of recruitment of literate people, the workload and the general conditions of an area. In Laghman, for example, judges are assisted by a few clerks, mostly accepting cases from the population and charging 20 Afs. for each petition (*ariza*). In most provinces, the only form of assistance to the judges is some Taliban fighters serving as assistants and bodyguards. At least in some cases one or two butchers also work with the judges, carrying out amputations (which are in fact rare in most provinces); doctors or nurses are called in to assist when mutilations take place, in order to control the bleeding of the culprit.²⁷

It is also common practice for the Taliban judges to be assisted in their judgement by a few religious scholars, who sit with them, typically two-three in the lower courts and three-four in the high courts, depending also on needs:

It depends upon the volume of work in a particular area, the number of cases and the sensitivity of the area. And then we place staff in every locality and every court accordingly.

Military Commissioner of Laghman province, autumn 2011.

The scholars appear to be employed by the Islamic Emirate as the judges are. However, they are not to be rotated like the judges. Therefore, they are always local.

In two cases reported to the researchers in the Asmar district of Kunar and in the Andar district of Ghazni, the provincial judge, the district governor, the security officer and the education officer were present during the trial in addition to the district judge. The district governor signed the final documents with the district judge in both cases.²⁸

Because the Taliban do not have a police force, the judges have to rely on commanders and fighters temporarily tasked to play a police role to carry out arrests and sometimes investigations. The Taliban appointed district 'chiefs of security' to coordinate the handling of the 'policing' element of their justice system. Sometimes appointment to this position seems to be meant to reward Taliban commanders as a mere formality, but some appointees seem to be more proactive. The chief of security in Asmar (Bar Kunar district) in 2011, for example, would regularly visit the bazaar despite the risk deriving from the presence of a government police post not far away.²⁹ The Taliban also claim to be relying on their network of informants, spies, and sympathisers in the villages, who supply information useful in conducting the trials.³⁰

²⁶ See footnote 12 above.

²⁷ See also Miles Amooore, 'Afghans flock to Judge Dread and his butcher boys', *The Sunday Times*, 23 January 2011.

²⁸ Interviews with a court user in Asmar and an elder in Andar, summer 2012.

²⁹ Interview with an inhabitant of Asmar, summer 2011.

³⁰ Interviews with Taliban judges and commanders, summer- 2011-winter 2012;

4.2 Recruitment

The Taliban judges are recruited on the basis of their practical experience and religious education in a madrasa. In principle, a minimum requirement for the candidate judges is having reached the rank of mawlawi (a fully educated religious scholar); those having specialised in jurisprudence and claiming a Qazi (Shari'a judge) title are even more favoured. In practice the Taliban often appoint judges that lack a complete religious education and are not recognised as mawlawis or qazis. This is because the Taliban lack enough sufficiently trained cadres to fill all positions. As of 2010-11, there were an estimated 500 Taliban judges in Afghanistan and in a number of provinces the caseload was more than they could cope with.³¹ This was, for example, the case of Zabul, whose 40 Taliban judges were insufficient according to the Taliban. In fact, the Taliban encourage would-be mawlawis and qazis to leave their studies and join the Taliban's judiciary, in order to fill the gaps.³² All candidates have to pass an exam before becoming judges.³³

Some of those chosen on the basis of their experience served in the Taliban judiciary in the 1990s; others might be commanders who gained a positive reputation solving people's problems, or individuals who had some apprenticeship as a judge with their fathers or with other older relatives as judges. Of the judges interviewed for this project, 9 had been trained in Afghan madrasas and 16 in Pakistani madrasas (one was unknown). 8 of the judges were in their 20s, 6 in their 30s and 11 in the 40s or early 50s. In terms of their personal past, three had served as judges under the Emirate, one in the Ministry of Vice and Virtue, 9 had fought in the Emirate's army in the 1990s, 6 had no previous job experience but had fought occasionally with the Taliban as seminarists, 5 started their career as judges after 2001 and 1 was just a mullah before becoming a judge. The salary of a Taliban judge is reported to be 10,000-12,000 Afs. (\$250), a decent wage in Afghanistan and higher than most teaching positions in madrasas³⁴.

³¹ Based on interviews with elders and Taliban, we counted around 70 districts where the Taliban courts have access to most villages, and another 100 or so where they have partial access. Since 1-7 judges serve in each district, we assumed 3-4 for well covered districts and 2 for the other districts. See Giustozzi, Baczko and Franco, 'The politics of justice', for more details.

³² For such a case see Miles Amoores, 'Afghans flock to Judge Dread and his butcher boys', *The Sunday Times*, 23 January 2011.

³³ See box 1.

³⁴ See box 1 for exemplary biographies of Taliban judges.

The recruitment exam:

Taliban judges are appointed by a 10-member Commission [based in Pakistan] through the Military Commission. The Commission sends sample legal cases through the Military Commission, which are then used to examine the candidates. They are asked to determine the cases. The candidates write down their determination. Then the papers are sent to the Shura along with three photos and photocopies of identity cards of the candidates. The Shura forwards the photocopies of the identity cards of successful candidates to the Military Commission, which announces the names of the candidates appointed as Taliban judges.

Taliban judge in Alingar, autumn 2011.

4.3 Accessibility and caseload

According to both Taliban and villagers, the Taliban judges are accessible to the villagers in a number of ways. In areas that have telephone coverage, mobile telephone numbers to contact judges are widely distributed to the village elders. Moreover, the Taliban fighting teams who regularly visit the villages can be contacted and in turn they will report to the judges. Although in some cases this procedure can take a few days before the judges are informed of a case, the alternative would be either no dispute resolution or accessing a government court, which would require the villager to travel at own expense and often long distances.

According to the various judges interviewed for this project, the workload varies from a few cases a day to 20 or so; the table below shows some examples.³⁵

Qarghayi	10-12/day
Alingar	2-3/week
Tala wa Barfaq	5-6/day
Doshi	5-10/day
Dahane Ghori	10-12/day
Nahreen	15-20/day
Bala Murghab	8-12/day
Ab Kamari	5-6/day

Again according to the judges, approximately 80% of the cases handled by Taliban courts are civil disputes, mostly family, land/property and water issues. The remaining 20% are criminal cases such as theft, robbery, murder and rape. The number of actual disputes reported to the Taliban is even greater, but the Taliban encourage the complainants to approach their local village elders to solve their problems. Only if a satisfactory solution is not available through this method (typically due to problems with enforcement, or when the issue affects two separate communities), the Taliban take over the case.³⁶

4.4 Procedures

³⁵ For comparative purposes, the government courts in Bamyan province handle 1.2 cases a day and government courts in Kapisa handle 1.9 cases a day.

³⁶ See also Bilal Sarwary, 'What happened when US forces left Afghan hotspot?', BBC News, 3 December 2011.

The procedures described by the judges and the elders are remarkably similar across Afghanistan; the judges refine their skills and knowledge as trainees assisting more senior judges. The Taliban stress that for this reason they can even rely on judges who have not completed their madrasa curriculum. Rotation of judges around the country contributes to ensure that procedures remain consistent from province to province.

Depending on the caseload, several Taliban judges might sit on cases together. The Taliban judge may interview the complainant and the defendant separately and in private before the public hearing takes place, but not always; informants in Kunar stated that complainant and defendant were interviewed together. There do not appear to be written proceedings until a sentence is issued, although the judges may keep notes of the trial. The complainant and the defendant will then be both summoned. They are expected to bring witnesses to the hearing. Witnesses, in line with Sharia law, are of primary importance in the Taliban's judicial procedures, and not having a credible witness will generally compromise a party's case and result in its dismissal. As Sarah Chayes described, in Kandahar the Taliban judge 'formally subpoenas people to testify in court' and rarely people refuse to do so because they fear being punished by the Taliban.³⁷

The Taliban also insist that the two sides bring a number of elders from their own villages with them, to witness and oversee the proceedings, which however cannot fully be described as in many cases public security concerns prevent the participation of the general public. The risk to the judges is generally high because they too are targeted in the 'night raids', so the proceedings have to be relatively quick, especially in areas where the risk is deemed to be higher. However, the heightened risk does not seem to have affected the transparency of the process, that it is open to scrutiny by village elders and local religious notables. The religious scholars who assist the Taliban also fulfil in part the role of oversight. The importance of witnesses also derives from the fact that written documents, material land delimitation and other evidence are rare in rural Afghanistan. Sometimes the parties have documents, but very often it is hard to ensure their credibility, and more often than not, at least one party has none, especially concerning land property. The reliance on witnesses and elders is more a political choice to adjust to people's situation, than the result of a determination to follow religious rules; it is about offering people means to resolve their disputes.³⁸

It is however worth noting that physical torture is sometimes used to extract confessions when the judges think they have identified a suspect.³⁹

The complainant and the defendant present their case before the Taliban judge, or judges, and face cross-examination under oath, having sworn to the truth of their words on the Holy Quran. Their witnesses are likewise heard and questioned as well as the elders. For the purpose of serving as court, a house will be requisitioned for the occasion, and the audience will be generally held in the living room. The judges, and the judiciary staff, will sit on thin mattresses (*toshak*) on one side of the room and the accused or the disputing parties on those of the other side. The elders, the witnesses and the public will sit on the *shak* on both sides. This setting resembles most public meetings; the shura and the jirga which punctuate rural life, giving a sense of shared solemnity.⁴⁰

³⁷ *Op. cit.*, in Kilcullen, p. 45.

³⁸ Interviews with Taliban judges, Taliban commanders, elders and court users, summer 2011-winter 2012. see Annexes 3 and 4 for examples.

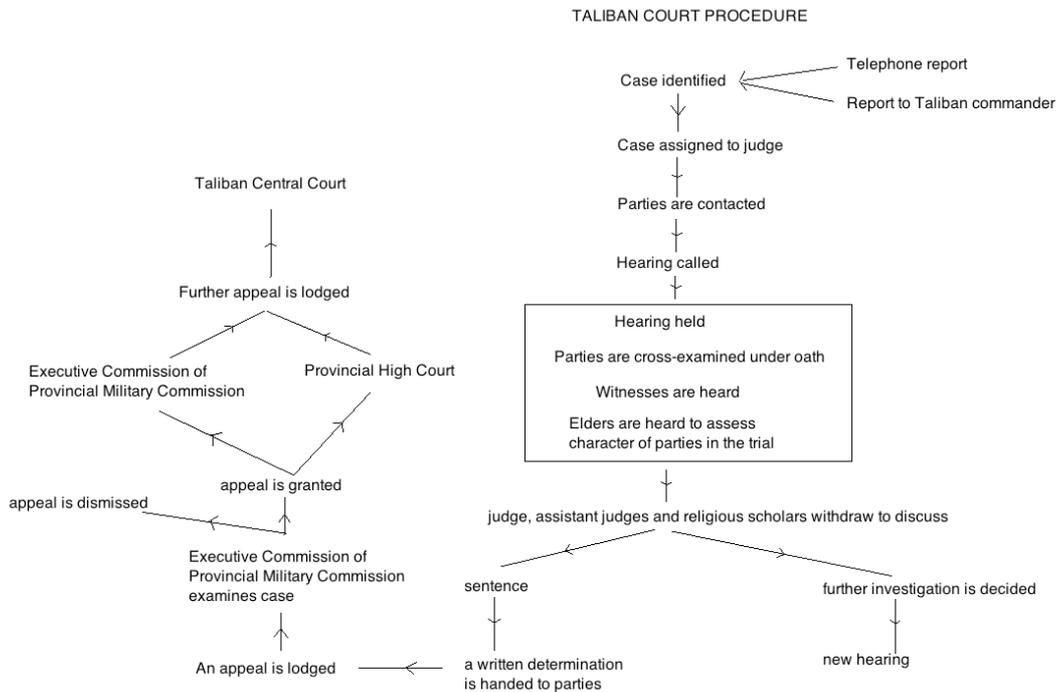
³⁹ See Annex 2.

⁴⁰ See footnote 30 above. See Figure 2.

Should the judge be satisfied as to the justice of the case of one of the parties on the basis of the evidence and the witnesses heard, a sentence will be passed immediately. If it is considered that further investigation is necessary or that further witnesses are required, a new hearing will be set, typically a week later, rarely more than 14-15 days later and never more than a month later, although some judges remember some cases which dragged on since the time of the Emirate and were settled only recently. In the meantime, the judge will conduct further inquiries, interviewing witnesses in greater depth. Taliban teams will help him when moving through villages, questioning people about the case and about the backgrounds of the people involved. The judge may also present the case for consideration to the district's other judges, or in particularly difficult cases, to the provincial judicial regular meeting.⁴¹

At the final hearing, the judge will announce their decision. The basis for judgements rests heavily on witnesses, and to the extent their testimonies corroborate or contradict the case as presented by the parties in dispute. The complainant and the defendant have an opportunity to sum up their cases, and final submissions from elders and witnesses are accepted.⁴²

Figure 2: Taliban court procedure



The procedure allows for appealing to the High Court, where it exists, or to the Military Commission, or again to the Supreme Court, but these seem to be rare occurrences. High courts and Military Commissions would handle an appeal at the provincial level, while in order to appeal to the Central Court an individual would have to travel to Pakistan, and then would face major logistical issues (witnesses and rival party would not likely to agree to travel to Pakistan). Although the Taliban do not state this explicitly, it would appear that appeals taken to the Supreme Court mostly involved individuals vs. the Emirate and its 'officials', including judges. Still, in some cases described by the sources, one of the parties

⁴¹ See footnote 30 above.

⁴² See footnote 30 above.

has immediately challenged the decision. This is done at great risk of appearing in contempt of court and if seen by the Taliban as unjustified, it invites immediate harsh retribution and punishment:

Sometimes it happens that if someone was not happy from the Taliban judgment and think that it was not fair judgment, then he should prove that it was not fair. If he could do so, then the Taliban respect to the complainer and will hold another trial. If he did not prove, then he will get very strong punishment. That's why people are afraid and do not appeal against the Taliban's judgment.

Farmer in Said Abad district, interviewed in autumn 2011.

In fact, elders and Taliban agree that very few formal complaints have ever been lodged in the areas surveyed for this project, a fact that contributes to doubts regarding the high number of cases reported to be reaching the Central Court.⁴³ The Taliban judges and pro-Taliban elders and villagers maintained that this was due to there never being any cause for complaint, but it seems clear that fear was also a major factor.

Just I remember that six or seventh months ago a villager did not accept the Taliban judges' decision and he was claiming that the judge got money from the other side. First we told him to come and prove this, but he couldn't prove it and we gave him 200 lashes. From that time on no one has dared stand against a Taliban judge.

Taliban commander in Berg-e Matal, autumn 2011.

However, such appeals will sometimes be entertained, and even considered to be evidence in the favour of the complainant telling the truth.

In the case of a land dispute, the written sentence of the court given to one or both parties is explicitly described as a title.⁴⁴ Sometimes, in a society and population disrupted and dislocated by three decades of continuous war, forced migration and upheaval, and where illiteracy is widespread, unequivocal decisions on land ownership are difficult to make. The Taliban will even try to obtain documents from the government administration, but in most cases there will be no reliable record and then the judge will opt to split the land between the disputing parties. In some recorded cases, 'Solomonic judgements' have been used, where the reaction of one of the parties to the decision of the judge is taken as further evidence to reach a final decision. It is also common practice to invite the parties in a dispute or criminal case to take an oath on the Holy Quran and then observe their reactions.⁴⁵

In major criminal cases, such as murders, a full record will be usually kept, but in all other cases the judges simply make a note of their sentences. The judge, or his assistant acting as court clerk, records the details and outcome of the case on Islamic Emirate letterhead paper, has it signed by witnesses, such as Taliban commanders or elders who are present, and gives a copy to the winner of the case. On the document will also be written what will be the penalty if one of the parties were to refuse to obey the decision of the Taliban judge. The paper is presented as an official document, which the Taliban judge keeps for record of the judgment, with a serial number. In general, it is up to the winners of cases to keep copies of judgements, backed up by the testimony of witnesses to the original proceedings. Since many cases are in fact land disputes, the Taliban judges are effectively participating to the

⁴³ See *Organisation* above.

⁴⁴ Interview with a court user in Asmar, summer 2012.

⁴⁵ See footnote 30 above. See Annexes 4 and 5.

creation of a cadastre of sorts in the rural areas, where one never existed before.⁴⁶

The practice of keeping records also varies from place to place:

When I was a judge in Kandahar province, Shah Wali Kot district, at that time we kept a record of most cases. But in here we do not keep a lot the record of the cases because we know that no one will create problems for us in future and also while we judge lots of elders and people are witnesses of our judging. That's why no one or none of the parties will create problem for us.

Taliban Judge in Qarabagh district, autumn 2011.

Reportedly the judges have to file a copy of their trial summary report with the Military Commission, which then keeps the records. The Taliban say that the Commission then also forwards a copy of summary reports to Quetta. A source within the Taliban says that the creation of district level judicial archives is being considered, but faces considerable practical difficulties.⁴⁷

4.5 Punishment

The punishment imparted by the Taliban courts is derived from Sharia law and elder-led negotiations. There is very little new legislation from the Islamic Emirate that is relevant to courts:

In some of the cases, I would say very few, the written laws are applied. For the rest, Sharia laws remain supreme.

Taliban judge in Ab Kamari district, autumn 2011.

Murder is in principle punished with the firing squad, but the victim's family can forgive if they like, usually in exchange of blood money. Government officials, soldiers and police (all considered to be criminals by the Taliban) are also to be punished with hanging after having been warned to quit their job; spies are to be shot. Adulterers (married men and women) are to be stoned and thieves to have a limb amputated; lashes are inflicted on those responsible of other infractions, such as 'adultery' with an unmarried woman (120 lashes), adultery with a widow (60 lashes), cheating, etc. Often, however, deviations from these standard punishments are reported, such as for example the flogging and shooting of a pregnant woman accused of unlawful intercourse in August 2010.⁴⁸ Perjury is considered a major crime and any individual found to have provided wrong information to the Taliban judges will generally be sentenced to a punishment, usually consisting of a number of lashes, carried out immediately by Taliban fighters. In addition to corporal punishment, fines or demands for compensation are occasionally levied, typically to be paid to the other side.⁴⁹

Although the Taliban do not rely often on imprisonment as a sentence, they will hold suspects while investigating cases, usually for a few days at most. Detention seems to occur in safe houses. Sometimes, however, Taliban judges and elders imply the existence of veritable prisons and refer to sentencing culprits to prison terms.⁵⁰

⁴⁶ See footnote 30 above.

⁴⁷ Taliban judge in Dahan-e Ghori, winter 2011-12.

⁴⁸ "Taliban judges kill pregnant woman", ANI, August 10, 2010.

⁴⁹ See footnote 30 above.

⁵⁰ See footnote 30 above.

Amputations do happen. One Taliban judge in Ghazni interviewed by a journalist estimated in late 2010 that his butchers had severed 40 arms and hands in 18 months.⁵¹ However, by and large the heaviest punishments seem to be rare. When asked about the last stoning or about the last amputation they saw personally or participated in, interviewees usually answered in the negative or evasively. Often, the cases reported to us were the ones heralded by the press. The judges try to avoid a situation in which harsh punishment becomes applicable; inter-party agreement, weddings, and questioning are obviously meant to let the accused avoid the adultery accusation, etc.⁵² Some other examples follow.⁵³

I have decided many cases in my career. One of the cases was about a couple. The husband was a cruel man and he would torture his wife. The woman was seeking divorce but he was not ready to divorce her. According to Sharia a woman can't divorce her husband. I convinced the man to divorce his wife. It was a case of Laghman province.

Taliban judge in Alingar, autumn 2011.

Before Eid-ul Azha, a girl identified as BH fled with a resident of Laghman identified as X. The father of the girl was determined to kill both of them. I made them appear before the court where the girl said that she would marry only X and no one else. I solemnized their marriage and told all that the father of the girl would be responsible if the couple was harmed. I also solemnized the marriage of X's sister with the brother of BH. So the issue was resolved. And I take pride of the case where, I believe, I saved the couple from being killed at the hands of the girl's annoyed father in the name of honour killing.

Taliban judge in Alisheng district, autumn 2011.

4.6 Relation with customary justice

In other cases it was the intercession of local elders which succeeded in transmuting sentences. For example, in a case where a thief was to have his hand amputated, the pleas of local elders that the thief had acted out of desperation convinced the Taliban judge to have the convict punished by lashes instead.

One case story we were told, dating from 1996, suggested that during the Taliban Emirates, the Taliban judges could offer ways out to avoid harsh punishment that they claimed was prescribed by Sharia Law. The former Taliban judge sitting in Jalalabad at that time angrily justified the only stoning sentence he pronounced for adultery with the stupidity of the accused woman. Explicitly asked if she had sexual intercourse with another man than her husband, she answered positively. In the absence of four witnesses having seen from their own eye the sexual encounter itself, a rather rare occurrence, simple oral denial would have been sufficient to save her life.⁵⁴

However, such flexibility and tendency to avoid the heaviest punishment is not universal and

⁵¹ Miles Amore, 'Afghans flock to Judge Dread and his butcher boys', The Sunday Times, 23 January 2011.

⁵² See footnote 30 above.

⁵³ See also Annex 2.

⁵⁴ Interview with Alain de Bures, summer 2011. Alain de Bures was living and working as a rural development specialist around Jalalabad during the civil war and the Taliban reign.

depends on the inclinations of the individual judges:

A man had pronounced his wife divorced three times on a single occasion, which is enough to prove that the divorce had happened, but then he wanted a patch up with her. According to Islamic laws when you say the word "divorce" three times, divorce happens. But he did not want to leave her anyway. The case was brought before me. "According to Sharia, if someone divorce his wife and then want to keep her again as his wife, the woman will have to marry another man and then get divorce from him before living as a wife with the first husband," I told the man. I handed over divorce letter to them and both, the man and his wife, left the court. Though according to the rules and Sharia laws I had done a right job, as a human being this really left me shocked but I had to stand by Sharia laws.

Taliban judge in Dahane-Ghori, autumn 2011.

One of the sensitive cases brought to my court was about a man, who had illicit relations with the sister of his wife. His sister-in-law had become pregnant as a result of these illicit relations. The case was brought before me. It took a lot of time to decide the case because it involved some social complications and there was a tremendous pressure from the elders of the society, but I had to abide by the Islamic laws and I ordered his stoning to death. Though it attracted somehow a harsh response from society, later people got convinced that the concept of punishment was for their betterment in Islam and that was only to discourage crimes.

Taliban judge in Tala wa Barfaq, winter 2011.

In some occurrences, the Taliban judiciary can even go against an informal settlement as in the much-reported case of the stoning of Siddiqa and Khayyam in Kunduz in January 2011.⁵⁵ These divergent attitudes are reflected in the approach of the judges towards Pashtunwali, the tribal code of the Pashtuns. Settlements brokered by village elders in Pashtun villages will typically follow Pashtunwali. Reconciling Pashtunwali, other community codes (which exist among Tajiks, Uzbeks and other ethnic groups) with Sharia is in any case not always easy. As the Siddiqa and Khayyam case exemplifies, the retributive Islamic law, focusing on the crime, lacks, in specific situations, the flexibility offered by reparatory customary law, which is focused on the unity of the community.⁵⁶

Once cases are reported, the Taliban can be proactive in seeking the culprits, even interacting with Taliban in other districts in order to track down individuals.⁵⁷

⁵⁵ Nick Schifrin, 'Stoning in Afghanistan: graphic video of execution shows Taliban's growing strength', ABC News, January 26, 2011.

⁵⁶ A more detailed discussion of the attitude of Taliban judges towards Pashtunwali is in Antonio Giustozzi, Adam Baczko and Claudio Franco, 'The politics of justice: the Taliban's shadow judiciary', Berlin: AAN, forthcoming 2012.

⁵⁷ See Annex 1 for an example.

5. HOW THE TALIBAN DEAL WITH CORRUPTION AND ABUSE OF POWER

5.1 Allegations and evidence of corruption

Generally speaking, the Taliban's courts have been viewed both before and after 2001 as relatively transparent, at least among Sunni Afghans and in particular Pashtuns, who think they understand its functioning and the legal code being used, as well as trust elders and local religious figures to monitor their functioning.⁵⁸ In the summer of 2011, interviews carried out with both pro- and anti-government elders seemed to confirm the strength of this reputation, even if the sample was small (20 elders in all). A typical example is that of a man coming from Ghaziabad, who has worked for several years with former governor Sayed Faizal Akbar for the provincial administration, who said that despite strong anti-Taliban opinions, when one of his cows got stolen, he went to the Taliban and filled an *ariza* (*complaint*). It contrasted the Taliban's judiciary with the government judges whom he viewed as corrupt and likely to side with the most powerful party in the disputes. In addition, he added that the price of bringing the case to a government judge would have ended up being more expensive than the cow itself. On the contrary, he described the Taliban judge as not corrupt. The perception of the Taliban judges' honesty used to be one of the sources of legitimacy of the Taliban system of justice. It should be stressed that the elders interviewed were often very critical of the Taliban and the behaviour of their commanders and fighters and had no wish for the re-establishment of the Taliban Emirate as such, so when they expressed positive appreciations for the work of the Taliban courts we can rule out that

1. they were motivated by fear of retaliation in doing so;
2. they were biased towards the Taliban.

The main weakness in the Taliban judicial system as identified by the elders interviewed was that access to fair justice with the Taliban was limited by the flawed appeal procedure. Only those who were well connected with the local Taliban leadership were likely to feel that lodging a complaint against a verdict was a real option.⁵⁹

Keeping the Taliban's judiciary reasonably free of corruption appears to have been a constant challenge for the Taliban, as the rotation of judges and commanders constantly created new operating environments. Elders interviewed in Sayed Abad in autumn 2011 stated that until about six months earlier the Taliban courts were indeed considered to be delivering a fair and speedy judicial service. Since then, however, allegations of corruption and unfair treatment have been increasing. The reason was reported to be the interference by and the corruption of some Taliban commanders, who were reportedly taking bribes from individuals to try to influence trials. The same was true of Berg Matal:

⁵⁸ Even ISAF officers seem to concur: Troy Anderson (Rule of Law Advisor), 'Insurgent Justice', COIN Common Sense, Volume 1, Issue 3, July 2010. This is also the image which emerges from the press: Tom A. Peter, 'Leery of courts, Afghans seek Taliban justice', *USA Today*, 7 March 2012; Soraya Sarhaddi Nelson, 'Taliban Courts Filling Justice Vacuum In Afghanistan', NPR, 12 December 2008.

⁵⁹ Interview with elders and Taliban court users, summer 2011-winter 2012.

In general I can say that these judges do not have a good reputation for being fair among the villagers, but before them there were three other Taliban judges. They were very good and they did not take bribes.

Elder in Berg-e Matal district, autumn 2011.

Cronyism appears to be a bigger problem than bribery. When friends of Taliban commanders are involved in crime, the judges can come under pressure to rule in their favour. Allegations of this kind emerged in Berg-e Matal:

Just around six or seven months ago, a local Taliban commander interfered in his cousin's case in our village and, until he got a positive result for his cousin, he did not give up. He threatened the other side to force him to abandon the trial many times. Eventually because the other side was a poor man and he did not have any supporter he told the Taliban judge that he did not want to continue the case. The case was a dispute on 3000 square meters of agricultural land.

Elder in Berg-e Matal district, autumn 2011.

While cronyism, as already hinted at above, may always have been a problem in the Taliban judiciary, it may have become a conduit for bribery; villagers would bribe or befriend Taliban commanders rather than judges, counting on their access to the judges to influence the trial. As such, one factor driving corruption could be the heavy (but indirect) pressure from the local population on the Taliban judges to make them neglect their duty and do favours:

When someone has a problem or has a case in the court, he will buy one weapon and give it to his son. He will then introduce his son to one of the Taliban commander as his fighter and request from that commander to solve his problem or his case.

Elder in Sayed Abad district, autumn 2011.

In Dai Chopan as well we found some indications that Taliban commanders interfere in the conduct of trials from time to time. According to an elder:

Sometimes it happens but not often, as most of the Taliban in Dai Chopan district are local people and when their relatives use the Taliban court for their cases, some of Taliban commander try to interfere on behalf of their relatives. [...] Some local people are bribing the Taliban judges and Taliban commanders for their work. They are not paying only money as a bribe, sometimes they bribe the Taliban judges and commanders by giving sheep or cows and also sometimes by giving even their daughters in marriage to Taliban judges or commanders as a bribe. Not all the villagers bribe the Taliban commanders and judges. Only those people who have enough money and do not care of their daughters bribe the Taliban judges and commanders. [...] Before, it was not like this. Before, the Taliban never thought of getting bribe.

Village elder in Dai Chopan district, autumn 2011.

Another elder concurred:

Bribery has become a rule in the whole world in these days. Taliban are also human beings and they take bribes. I do not blame all the Taliban; only some of the commanders and judges are taking bribes. Some local people are bribing some of those Taliban commanders who are locals; they can't bribe the Taliban who came from different provinces. They bribe the local Taliban because they know them very well and they are from the same district. The Taliban get money, cows, sheep and weapon as bribe from the villagers and solve their problems. [...] Local Taliban commanders also make contact with one or two Taliban judges and when they get the money from the local villagers for solving their case and winning the trial, Taliban local commanders also pay half of the bribe to the Taliban judges. Then the Taliban judges, somehow prepare some good reason and defense before the trial and announce the result of the trial according those papers to benefit the side that paid him. [...] These things happen occasionally, it's not something normal. If these things happened all the time, the local elders would prevent them.

Village elder in Dai Chopan district, autumn 2011.

The problem in Dai Chopan seemed to be much less widespread than in the wealthier Sayed Abad, suggesting again that the Taliban's judiciary is coming under pressure from the wealthy to adjust justice to their needs and interests, as in the case of the Kabul government's judiciary. The fact that in 2011 the rotation of Taliban commanders was slowed down or even cancelled might have increased exposure to this kind of corruption.⁶⁰

In the end, the elders who made the allegations of corruption still considered the Taliban judges to be better than government judges as of 2011:

Still the local villagers prefer to use the Taliban court for their cases, because Taliban judges are not as corrupt as the Afghan government is.

Elder in Sayed Abad district, autumn 2011.

5.2 Accountability and internal oversight

The Taliban leadership is well aware of the risk of their judiciary being tainted by corruption and of the risk of arbitrary judgements. Internal oversight and direct supervision over the judges, is exercised through the district Commission and the Provincial Military Commission.⁶¹

In one case in Yargatu (Andar district, Ghazni Province), a judge issued a judgement against a person [who] should have won the case. The person complained to the [district] commission. They investigated [and] discovered that the judge had taken bribes. The judge was sentenced to six month in exile and his work as a judge was terminated.

Elder in Andar, summer 2012.

Taliban commanders are requested to seek information about the work of the judges when

⁶⁰ On the rotation of Taliban commanders see Antonio Giustozzi, 'The evolution of Taliban tactics', forthcoming for the Naval Postgraduate School.

⁶¹ See *Organisation* above.

they visit villages and talk to the population. The Taliban counter-intelligence system is also said to be tasked with collecting information about the judges and picking rumours and evidence of misbehaviour. The judges are informed of these practices and are therefore aware of being under constant scrutiny.⁶²

The Taliban generally appoint judges who are not local to the district where they serve but are from other provinces, or at least from other districts of the same province. Moreover, judges are rotated from district to district, based on the decision of the Provincial Military Commission and independently of their will. This policy appears to be a conscious effort to keep individual judges or commanders insulated from involvement in personal and tribal politicking, from building up personal power bases, and from displaying favouritism and abusing their positions of power in their home districts:

This is only to avoid any unpleasant incident. Sometimes you know when you remain in power for a longer time, you become used to everything, you come to know people very well but on the other hand you become despotic and there is a great possibility that you become corrupt. That's why Taliban have devised a system to transfer everybody after a fixed tenure so that there should be no possibility of that at all.

Taliban judge in Qala-i Naw, autumn 2011.

This is often appreciated by the elders:

People who are using the Taliban judges, they are all very happy from their judgment and believe that Taliban judges' decisions are fair, because all these Taliban judges in Qarabagh district are not from Qarabagh and they do not need to do unfair judgment in this district. If there were a Taliban judge from Qarabagh district, there might be possibilities of do unfair judgment for the benefit of their family, friend etc. Now these Taliban judges do not have family here and friends in this district to do unfair judgment for.

Elder from Qarabagh district, autumn 2011.

The Commission also determines how often the rotation takes place. In some provinces it can be every two or three years, although more often if complaints are lodged against a judge, while in others as often as every three to six months, with the upper limit of six months being quite inflexible (Baghlan, Laghman, Badghis). The Taliban say that the policy is also intended to allow circulation of personnel through different areas of Taliban control, both to expose them to and familiarise them with different parts of the country and the 'Emirate' and to circulate fresh personalities and influence through different areas. In some areas, like Nuristan, Pech and Higher Kunar areas in the Kunar and Andar districts of Ghazni, rotation is not implemented and judges are generally locals. Language might be a factor in some cases in Nuristan and the Salafi roots of the local Taliban account for the situation in Kunar. The reasons for local recruitment of judges in Andar remain unclear. The large clerical population of Andar might play a role. A local Afghan researcher reported to us that it might have to do with the will of Mawlawi Ismail, one of the Taliban leaders originating from Ghazni, who would be using his influence to keep control of the local Taliban networks.⁶³

When a new judge is appointed, he is introduced to the local population through mosques

⁶² Interviews with Taliban judges and commanders, as well as with elders, summer 2011-winter 2011-12.

⁶³ Interviews with two inhabitants and a researcher from Andar, summer 2012.

by village mullahs. The old judge will stay on for a period of time with the new one in order to promote continuity and to familiarise him with the district and with ongoing cases.⁶⁴

Taliban courts appear particularly sensitive to Taliban members attempting to take advantage of their positions within the movement to influence cases, and such offenders are likely to face particularly harsh punishment. In one case cited by a source, a Taliban fighter who had attempted to use his influence with the movement to bring a case against his fiancée's family was found guilty of abusing his position as a Taliban, sentenced to many lashes, stripped of his rank, and exiled (See also the case of the doctor in 4.4 below).⁶⁵

On the whole, despite the growing criticism detected in some areas, 15 of the 23 elders interviewed still tended to agree that the internal oversight exercised by the Taliban keeps bribery under control, even if it cannot fully eradicate it, arguing for example:

If the Taliban took bribes from all the villagers, then the high ranking officials of Taliban would know about this and sack or arrest their commanders or judges very soon. I know some people in the district who paid bribes to the Taliban judges and commanders for their case to influence in the trial. I know also those Taliban commanders and one of the judges in the district who took the bribe, but for my own security I can't make their names. Maybe the other Taliban judge also takes bribe but I haven't heard about him and also haven't seen that he got bribe from some villagers, that's why I can't say anything about him. [...] If we compare the Afghan government court and Taliban court from any angle Taliban court is better than the Afghan government court. Taliban court is not as corrupt as the Afghan Government court, Taliban court is solving the case in a very short period, but the Afghan Government solves that case in many years.

Elder in Berg-e Matal district, autumn 2011.

Taliban high-ranking officials are very serious to punish those Taliban commanders or judges who take bribes and those villagers who give bribes. That's why Taliban commanders, judges and villagers are afraid a lot and they take bribe very secretly.

Elder in Berg-e Matal district, autumn 2011.

⁶⁴ See footnote 30 above.

⁶⁵ Interview with farmer in Zhari districts (Kandahar), summer 2011.

5.3 Accountability, transparency and external oversight

Robust internal oversight appears to have always featured in the Taliban's judicial system since its beginnings; in a sense this is also the case of external oversight, whose effective weight seems to have been strengthening recently. Community elders essentially exercise such oversight and the level of their influence varies from district to district. We found it to be stronger than average in Dai Chopan, where the elders maintain a capacity to act collectively through a district Shura:

As I heard in other provinces Taliban judges do not have good reputation for being fair, but in Dai Chopan due to the local elders having much authority and control over the Taliban judges, that's why Taliban commanders and judges are not too corrupt. But in other districts in other provinces, the local elders do not have much authorities and Taliban do not care about them, that's why they easily take bribe from the villagers and take unfair decisions.

Elder in Dai Chopan, autumn 2011.

[Taliban commanders try to interfere] but it doesn't work, because the local elders are observing all the Taliban judges and will not let the Taliban commanders interfere in the trial. If the Taliban bring pressure on local elders, then the local elders complain to the Taliban leadership and then the leadership of the Taliban in Dai Chopan district will give them punishment.

Elder in Dai Chopan, autumn 2011.

Sometimes reports of judicial corruption are known to have sorted positive results. An elder in Dai Chopan reported the case of a Talib judge called Mullah Janan, originally from Ghazni, who repeatedly made 'mistakes' in his judgements and was reported by the elders to the Taliban leadership, who eventually dismissed him in spring 2011. In 2010 a Taliban judge was already removed from Sayed Abad upon allegations of having taken a bribe. Another judge was reportedly rotated out of the province in 2011 after a complaint against him.⁶⁶

Not all the elders were as convinced that their peers would be always able to keep the Taliban judges and commanders in check, but nonetheless acknowledged an influence. One of them pointed out that if a judge were careful in framing his corrupt verdict in accordance to Sharia, it would be difficult for the elders to detect any misbehaviour:

Sometimes Taliban judges get money from one side in the dispute and try to prepare a convincing defence and reasons for the man who bribed him before the trial. Then the local villagers can't complain because the judge apparently solved the case on base of proofs and positive reasons which he had made before.

Elder in Dai Chopan, autumn 2011.

This, however, would still greatly constrain the room for arbitrary behaviour by the judge, even if it did not completely eliminate its possibility.

In areas where the elders were not as organised and united as in Dai Chopan, such as Sayed Abad or Ghazni, their influence was much smaller, although the practice of inviting elders to the trials seems universal across Taliban controlled areas. The weak appeal procedure

⁶⁶ Interviews with elders, Taliban judges and Taliban commanders in Sayed Abad, autumn 2011.

contributes to make oversight less effective. In some areas, the Taliban have even set up an 'ombudsman' system to allow locals to make complaints about a judge. In practice, a villager would normally approach a local Taliban commander to intercede on their behalf and convey their complaint to one of the Taliban institutions. Most villagers will however fear taking such an approach and only those best connected to the Taliban really have this option.⁶⁷

Little is known of the punishments inflicted on judges found to have violated the rules, other than that they are removed from their job and recalled to Pakistan. What happens to them once they are there is not known.

That the Taliban started allowing for increased oversight by elders could be an indicator that the Taliban leadership realised the limitations of internal supervision in combating corruption and decided to give more space to some kind of external oversight.

5.4. Fairness

The post-2001 Taliban judges have clearly been instructed not to take sides in local ethnic and tribal conflicts. The Nuristanis and the Gudjurs, who live since the 19th century under Pashtun domination, have won trials under the Taliban system of justice in Kunar. Moreover, the judges usually do not take into account social statuses and they have decided against influential people in some key decisions related to land issues. In this case, by treating individuals equally, Taliban justice tends to reduce a collective conflict to an individual dispute, effectively depoliticizing social relations.⁶⁸

This does not however mean that the Taliban judiciary is exempt from accusations of unfairness. Though corruption and favouritism have become more of a concern recently, the most widely discussed cases of negative behaviour by Taliban judges have to do with arbitrary executions. One recent case in Sayed Abad had a major impact among local opinion. A 'doctor' was accused of being a government spy, tried and executed, and his house was ordered by the Taliban judge to be burnt down. The summary justice implemented in the case of the 'Doctor' highlighted how 'fast justice' is subject to abuse.⁶⁹ One elder commented that :

The Taliban are not good and fair in making decision. [...] Because the Taliban take decisions very quickly, they do not see the other part of the case. Because they are mobile teams and are taking decisions quickly, they just hear a few eyewitnesses for a case and then immediately judge on that basis. Taliban should investigate the case for at least 30 days, Taliban should ask for lots of proofs [...] to solve the case. Everyone can buy eyewitnesses in Afghanistan now.

Elder in Sayed Abad, autumn 2011.

The Taliban system has been trying to deal with this type of abuse for some time, with at least some results. There is an effort to contain arbitrary executions⁷⁰ and abuse of power by

⁶⁷ See footnote 30 above.

⁶⁸ Interview with an inhabitant of Ghaziabad, summer 2010

⁶⁹ Interviews with elders, Taliban judges and Taliban commanders in Sayed Abad, autumn 2011

⁷⁰ see Annex 6.

Taliban members is severely punished when discovered.⁷¹ The judge involved in the case of the 'doctor' above was arrested by a commission sent by Quetta after complaints that he had been unfair in his judgement. The Taliban fighters who burnt the house were reportedly disarmed. However, the local leadership of the Taliban had not been able to inflict the punishment on the judge and on an important Taliban commander involved in the case and had to request the intervention of the supreme leadership. These efforts by the leadership to maintain a degree of fairness do not completely restore the image of the Taliban's judiciary, but do succeed in limiting the damage. The Taliban's efforts to punish some of those responsible for misbehaviour have been noticed by the elders.⁷²

Although there have been cases of Taliban judges acting arbitrarily, villagers tend to contrast the behaviour of Taliban commanders in cases of alleged collaboration with the Karzai government or of spying, with the character of the judges. The commanders tend to show an inclination towards rough justice and arbitrary violence and often enough, mere suspicion is ground for summary execution. The judges, by contrast, are usually reported to investigate allegations thoroughly and to set defendants free if the allegations are proved unfounded.⁷³

⁷¹ see Annex 7.

⁷² Interviews with elders, Taliban judges and Taliban commanders in Sayed Abad, autumn 2011

⁷³ Interviews with elders, summer 2011-winter 2011-12. See also Dan Murphy, 'Dent in Afghanistan war strategy: Why Kandahar locals turn to Taliban', AP, July 6, 2010.

6. COMPARISON WITH GOVERNMENT COURTS

If the Taliban are struggling to deal with their caseload⁷⁴, the Afghan government often has fewer judges in a province than the Taliban have in a district. These few judges have to process cases through a system much more complicated than the Taliban's; in practice it can easily take years to process cases in government courts. As of 2010, the judge positions in 69 districts across Afghanistan (mostly in Pashtun areas) were vacant,⁷⁵ which meant that the villagers had to travel to the provincial capital to have access to governmental justice, often through a war zone. One district governor in northern Afghanistan admitted:

I also confirm that people are solving their problem[s] through the Taliban, because those villages are very far from district centres. They cannot come here because they are afraid of the Taliban and because we do not have any control there.

District chief of in Faryab province, summer 2011.

In the absence of government judges, district governors and police chiefs deal with disputes and criminal cases. Theoretically, they pass cases on to courts in the city. In practice, often district officials handle cases in whatever arbitrary fashion they see fit, all the more as some of them have personal interests in the area where they have been nominated. Access to officials in the district centres in order to file a claim is often limited by the ability of a claimant to pay bribes.⁷⁶ Moreover, even visiting a district or provincial centre is a risky proposition for a rural villager, as it is cause for immediate suspicion and intimidation from the Taliban, their informants or their sympathisers. The Taliban adamantly claim that they will severely punish any villager found to be taking a case to a government court.⁷⁷

The main constraint to the Taliban courts operating in government-held areas is that they can only function if both sides in a case agree to meet the judges in a safe place and take witnesses and elders there, or wait until the Taliban take over:

I will fight as long as I have blood [left in my body], because Islam says to fight for your right until you are dead. I will go to the second court and the Supreme Court until I get a fair decision. If I do not get a fair decision, then I will wait until the Taliban capture the area and complain to the Taliban judges. I am 100% sure that by using a Taliban Sharia court, I will get a fair decision and I will get my rights back.

Farmer from Arghandab district, summer 2011.

⁷⁴ See the part on accessibility.

⁷⁵ International Crisis Groups, 'Reforming Afghanistan's Broken Judiciary', Asia Report N°195, Bruxelles, – 17 November 2010, p. 24.

⁷⁶ Interviews with elders and court users, summer 2011-winter 2011/12.

⁷⁷ See footnote 30 above. See also Crisis Group, 'Reforming Afghanistan's broken judiciary', Bruxelles, 2010.

The popular perception is that corruption in government courts is so endemic that it is taken as a given;⁷⁸ this is appreciated perhaps by those wealthy enough or connected enough to benefit, but obviously not by the vast majority of the populace. It means practically that a larger part of the population have an interest in the expansion of the Taliban judiciary than in that of the government system:

I say that the Afghan government judges have never once come up with a fair decision in their judgments. Sometimes when both sides of the dispute are poor and neither of them can pay money to the judges or lawyers, in this case the judges may issue a fair decision.

Villager from Panjwai district, summer 2011.

The Taliban court is for all people of Afghanistan but Afghan court is only for rich people.

Farmer in Sayed Abad district, autumn 2011.

There is also no question that the Taliban process is much faster than the process of the government courts⁷⁹; every interviewee among elders and court users agreed on this, whether they liked the Taliban courts or not. Taliban judges also appear to be seen by many villagers as fair and meticulous, conducting thorough investigations and interviewing witnesses. Villagers usually have little experience of what a 'meticulous' judicial process should look like. As we have seen, the elders tend to be more critical, sometimes pointing out that quick justice and fair justice do not get easily together. The fact that few village-dwellers can afford to engage in months- or year-long processes in the government courts makes these kinds of doubts redundant.

Furthermore, the Taliban's judiciary is perceived as more credible than the government courts as far as enforcing the judges' decisions are concerned. In the districts where the Taliban administration is well developed, resisting a Taliban sentence is impossible, exile being the only available alternative choice to obedience. On the contrary, the isolation of the courts and the police from many villages means that, with a strong local network of solidarity, or if the Taliban take a contradictory stance on a case, one can practically oppose the government court's decisions:

The difference between the government and the Taliban is that when the Taliban pronounce a verdict, they implement their decision. When they say something, they do it.

Farmer in Ghaziabad district, summer 2011.

The government courts should have the advantage of easier access to any government documentation relevant to a case, but even that is not always the case:

Mohammed, who also asked that his full name not be used, is a landowner and also has a business running minibuses between Kandahar city and some of the surrounding towns. He chuckles about how his case was handled. After his first approach to the Taliban, they told him to go to the land registry office and get the documents for his case. "I walked in and they asked me why – I told them I was

⁷⁸ On this point see A. Giustozzi, 'Justice and state-building in Afghanistan: state vs. society vs. Taliban', Working Paper, The Asia Foundation, 2012.

⁷⁹ see Annex 9.

taking a dispute to the Taliban. They were scared, and they gave me the documents without any hassles.”⁸⁰

Last, but perhaps most importantly, the Taliban's judiciary gains legitimacy due to its being Sharia-based. In the deeply religious society of the Afghan south, such is the weight of Sharia that even criticising a verdict is nearly tantamount to blasphemy:⁸¹

“My cousin [who lost the case] was not happy about it at first,” he says. “But the Taliban mullahs convinced him that taking my land was a sin, and that he would go to hell for it. They eventually satisfied him.”⁸²

If I do not respect the decision of Taliban, it means that I do not respect to the Sharia law, it means that I do not respect the Holy Quran. I am against the Taliban system in general and do not want them, but when we talk about their judgement, they are really judging according to Sharia law and I really respect their judgement, not their activities in Afghanistan, not their fighting and not their killing.

Farmer in Zharai district, summer 2011.

The Taliban's sentences are strengthened by the presence at the trials of a few local religious scholars and community elders; they certify to the villagers that the sentence is in conformity to the Shari'a.⁸³ Similar feelings are found in the remote rural areas of most of Afghanistan. As the case recounted in Annex 8 illustrates, if a verdict is believed by villagers to be in conformity of Shari'a, it will be difficult for the losing party to object to it; quite the contrary in order to remain integrated in the community the loser in the verdict will have to acknowledge his wrongdoing.

The importance given to witnesses and elders over procedural aspects and the fact that most Taliban judges allow the elders to broker deals based on customary justice make the Taliban's system of justice more of a shared asset, led by the Taliban but to an extent community-based, with ties to traditional modes of dispute resolution and negotiation through shura and jirga. Because there is a large body of villagers that share and possess some knowledge of the Shari'a, especially among the elders, the rulings tend to be more transparent and better understood in the villages.⁸⁴ The rural population feel it can judge of their fairness:

I have also used the Taliban court around 6 months ago in my villages and my case was a family case that I can't give you information about that case. I can tell you that I lost the case, but I am happy from the decisions of Taliban judges. In fact the case was about my daughter and her fiancé, that's why I can't give you more information about the case. It's a big shame on my family and my daughter's fiancé's family.

Elder from Qarabagh district, autumn 2011.

The government court system, in stark contrast, appears remote, alien and contrary to local customs and norms, as well as lacking transparency.⁸⁵ In Annex 11, what is narrated is a petty case of road accident; one can imagine what it might look like when a more serious dispute

⁸⁰ Dan Murphy, 'Dent in Afghanistan war strategy: Why Kandahar locals turn to Taliban', AP, July 6, 2010.

⁸¹ see also Annex 8.

⁸² Dan Murphy, 'Dent in Afghanistan war strategy: Why Kandahar locals turn to Taliban', AP, July 6, 2010.

⁸³ Interviews with elders and court users, summer 2011-winter 2011-12.

⁸⁴ See footnote 30. On the tendency to allow elders to broker deals see also Giustozzi, Baczko and Franco, 'The politics of justice'.

⁸⁵ Annexes 9 and 10.

involving life and death, large sums of money or big property could look like. In Annex 10, the interviewee discusses his own case of undue interference by a local strongman in his case. We have seen that cronyism affects the Taliban courts too, but for those who are locked in a dispute with somebody close to the government, the Taliban courts are a more convenient venue for having their cases heard. It is not uncommon for villagers to try the government system first and then opt for the Taliban's after having been disappointed.⁸⁶ Similarly, the setting up of the Taliban trials, which resemble the jirga and the shura, give a sense of proximity and shared ownership to the elders and the population, which is absent from the Western-inspired ceremony of the government courts.

⁸⁶ See Annex 11.

7. CONCLUSION

Bringing a relatively standardised and centralised judicial system of any kind to the most remote concerns of Afghan people after three decades of civil war is a challenge that no Afghan government except the Taliban has ever managed to meet with any degree of success. This gives us a measure of the difficulties that the Taliban have been facing. Therefore, leaving aside value considerations, the Taliban have demonstrated that they own considerable human and organisational capital by the standards of the Afghan countryside. Whatever the merits and demerits of customary justice, it is not per se functional to state-building. Any 'state-builder' willing to incorporate Afghanistan's villages into the Afghan state would have to face the same problems the Taliban faced, hence the value of studying the Taliban's experience.

The first problem the Taliban had to deal with was the recruitment of judges and supporting staff; between judges, religious scholars, clerks and others, they were probably as many as of 3,000 individuals in 2011. While this implies a financial burden for the Taliban, the main problem to be faced is to find individuals willing to spend their working life in remote villages and even face serious risks; quite a few judges have been killed or apprehended by the pro-government side. The Taliban have resolved this problem in part, because they can tap into their pools of recruits, which is rich with madrasa-trained individuals, but they have always been facing staff shortages. This is a problem the Afghan government also faces and to a much greater extent—how to staff positions in the rural areas.

The second problem the Taliban had to face was how to maintain a degree of control over their judges, a task made particularly difficult by their dispersed location and by the constraints on the use of modern means of communications. The Taliban have tackled this problem by combining multiple forms of control and supervision; their tactical military units, the counter-intelligence structure, the command and control structure and specifically designed Provincial Judicial Commissions all contribute in various degrees to this effort. Multiple chains of reporting translate into a strong chance that repeated misbehaviour by a judge would be detected; the willingness of the Taliban leadership to punish misbehaviour does not seem to be in doubt. Although as this report has shown the Taliban's judiciary is not exempt from problems related to corruption and favouritism, on the whole these have been kept in check by the Taliban quite successfully until recently; over 2011-12 there were signs of decay, but it would be premature to assess this as an indicator of a long term trend. Supervising officials operating in remote areas is a problem the Afghan government also faces and to which no effective solution has yet been found.

The third problem faced by the Taliban was aligning their judiciary to the demands of the local population, at least to some degree. Internal supervision can deal successfully with corruption, but certain forms of behaviour can be perceived differently internally and externally to an organisation. The most obvious example of this is the punishment of spies and government collaborators. The Taliban rank-and-file unsurprisingly feels very strongly about this, as many casualties are attributed to the work of spies. Left to their own devices, they have a natural tendency to act arbitrarily in this regard; their violent purges were in past highly resented by the villagers, who were not as convinced of the strength of the evidence. The Taliban leadership tasked their supervision structures to restrain arbitrary punishment as well, but they do not seem to have been too successful in this regard,

because all Taliban (including judges) tended to be emotionally charged when dealing with alleged spies. In dealing with this particular problem, allowing a higher degree of external oversight seems to have had beneficial impact on the Taliban's judiciary. Oversight is primarily exercised by community elders, but also by the religious scholars who assist in the trials. Although the latter are employed by the Taliban, their links to the communities help to give them an oversight function to some degree. Again, the Afghan government has not been very good at using external oversight in order to keep its bureaucrats in line. Perhaps this is the most important lesson of all – that even the Taliban might do better than Kabul in allowing oversight of their trials.

The Taliban's judiciary peculiarities notwithstanding, some of the findings of this report have wider relevance. In order to keep judicial corruption under control and to align the judiciary at least to some extent with the requirements of the population, both effective internal supervision and external oversight are required. As the case of the Taliban shows, these can be achieved even in a country as poor and underdeveloped as Afghanistan; the main problems are the absence of political will and the lack of understanding of the specific requirements of the local environment.

Whatever individuals might think of the features of the Taliban's judiciary, the Taliban's success in bringing their judiciary to remote rural communities in thousands of Afghanistan's villages is undisputed; in this the Taliban were helped by the specific characteristics of madrasa socialisation, which cuts trainees off from their local roots and produces judges who are not strongly rooted anymore in specific communities. The Kabul government is having serious problems getting its judges to spend time in the district centres, let alone in the villages. The old dichotomy between city and village, so characteristic of Afghan history, is highlighted here again; the Taliban would not appeal to many Afghan city-dwellers, but the city-centred Afghan state cannot reach out to most of the villagers. Whether a synthesis between the two poles of Afghan society can be worked out only time will tell, the more so since there are multiple views about justice even among both urban dwellers and rural communities.

8. ANNEXES

The following 13 annexes are meant to provide illustrations to the issues discussed in the body of the report. Annexes 1-5 show how Taliban courts function in detail in a range of case types: hunting for suspects, criminal cases (theft), disputes (land, property) and civil law (adultery). Annexes 6-7 deal instead with 'political case' and the role of the judiciary in containing indiscipline by the Taliban rank-and-file. Annex 8 shows how reliance on a popular and well known code of justice like the Shari'a is a strength of the Taliban courts. Annexes 9-10 are instead dealing with government courts and police, illustrating the type of problems discussed in 4.5. Related to these are also Annexes 11-12, where interviewees offer their own views about the two alternative systems. Annex 13 finally is the base questionnaire used for the interviews.

- ***Annex 1: Exemplary biographies of Taliban judges***
- ***Annex 2: Taliban hunting for a suspect.***
- ***Annex 3: Taliban deal with theft case***
- ***Annex 4: Taliban deal with land dispute***
- ***Annex 5: Taliban deal with adultery case***
- ***Annex 6: Taliban deal with property dispute***
- ***Annex 7: Taliban judges deal with spying allegations***
- ***Annex 8: Taliban judges deal with abuse by Taliban fighter***
- ***Annex 9: The legitimising impact of the Sharia***
- ***Annex 10: Non-transparent handling of cases by police***
- ***Annex 11: Allegations of corruption in courts***
- ***Annex 12: Taliban courts as alternative to state courts***
- ***Annex 13: Taliban corruption compared to the government's***
- ***Annex 14: Base questionnaire for interviewing Taliban judges***

Annex 1: Exemplary biographies of Taliban judges

The senior judge of district X, has no formal qualifications beyond a basic madrasa education. He was a Taliban fighter from the beginning of the post-2001 anti-American jihad. He was soon promoted to a commander in his local district, during which time he gained a reputation for effectively solving disputes among local people. The local Taliban Shura, in need of a judge, approached him and asked him to take on the role.

The senior judge of district Y, instead, gained his position through his qualifications. His father was a judge from a district of Helmand during the Islamic Emirate years, under whom he first learned Sharia. After the fall of the Emirate in 2001, the senior judge moved to Quetta in Pakistan to study in a madrasa. Finding himself unemployed, he approached a high-ranking Taliban official and applied to work with the Taliban as a judge on the advice of a friend. He was accepted and sent back to Afghanistan, where he has served in districts of Helmand and Ghazni before being posted to district Y.

One of the judges in district W was initially a local Taliban commander who was then asked to become a judge because of his reputation of being good at solving disputes in the villages. He served in Kunduz first.

One of the judges in district Z is the son of a mullah from Nad Ali, who worked for the Taliban as a judge as well. He accompanied his father to work in his youth and learnt the tools of the trade that way over the years. He studied in a Pakistani madrasa during the early years that followed the fall of the Taliban and became a mawlawi. There, the Taliban recruited him as a judge.

A judge in district V served as a judge under the Taliban emirate until 2001; he studied in a Pakistani madrasa. After one of his friends became an important Taliban commander, he requested the freshly trained mullah to start again working as a judge. He passed a small exam and was then deployed as a judge to Kandahar province.

A judge in district U graduated from the 'Minhaj –al- Uloom' religious seminary in Pakistan in 2001. Initially he took up a career as a madrasa teacher in the district of Charsadda but later he decided to join the fight against NATO forces. This brought him in close contact with Khalifa [Sirajuddin Haqqani] in a seminary called 'Manba'a –al-Uloom in Miranshah in the tribal areas of Pakistan. Khalifa introduced him to the relevant quarters and he became a judge:

This, I believe, is a great opportunity to serve my community and the Islamic Emirate of Afghanistan in the capacity of a judge. A war-stricken community needs justice and that is what the government can't provide. So I am happy I am contributing to the war-ravaged community of Afghanistan as a judge.

Annex 2: Taliban hunting for a suspect

“Around six years ago one of our villagers, TK, fought with my son because of water dispute and killed my son with his knife and escaped from the village to an unknown place. We looked a lot for TK but could not find him. Someone said that he escaped to Pakistan and others told us that he was in Kabul, but we completely lost him. Around 8 months ago, I went to Arghandab district center to do shopping, and suddenly I saw TK who was also doing shopping. I did not attack him or show myself to him, because if he would have seen me, he might have escaped again. I just followed him to find out where he lived [...] and found out that he was living in KM village of Arghandab district. Then I came back to my own village, I collected the elders. I also asked help from the Taliban commanders in our village to arrest him and bring TK to our village.

Around 8 months ago Taliban had lots of power in Arghandab district and most of the villages were completely under their control. The commander of Taliban [...] MAJ himself came with me to KM village. We together arrested TK and brought him to our own village. Then the Taliban commander called the judges [...]. The Taliban started the trial and asked me to first tell him the entire story. [...] The elders of our village also said the same things to the Taliban judges and when the Judges asked TK if he has any defence, TK said nothing. Then the Taliban judges understood that TK was the killer. The Taliban judges took the decision to hang TK as his punishment, but TK's father came to me, begged to forgive TK. He was ready to pay any price to compensate for the loss of my son. When I saw that his father was crying a lot, and I myself also had overcome the loss of my son, because he was killed 6 years ago, I told the Taliban judges that I forgive TK, but on condition that TK's father should give his daughter for my other son for free. My son would marry his daughter but he would not take money from us. On the spot Taliban Judges announced their decision and told TK and his father that they should give their sister/daughter to my son. Both sides agreed and within one week, my son married with TK's sister and now we are living in peace”.

Farmer in a village of Arghandab district, Kandahar, summer 2011.

Annex 3: Taliban deal with theft case

“Around one and half months ago, I used the Taliban court and solve my problem with them. My case was that I had two cows which I employed to work my land. Around two months ago, I left my cows for lunch and came home. When I finished lunch, I went back to work and saw that my cows had been stolen. I came to the village, spoke with elders and complained to the village Shura. Elders from the village Shura collected people in the mosque, they told the people that my cows were lost yesterday and they asked if anyone would know something to help us. Suddenly one boy, he was around 16 years old, said that he had seen MA the day before around 2 or 3 pm, with two cows with him, taking them out of the village.

MA did not come back to the village for almost one week. When he came back, me and all the elders asked him where he had been. He answered that he had gone to Kandahar city to visit one of his friend. Then again the elders told him that my cows were lost and whether it was true that one of the village boys saw him taking the two cows out of the village the previous week. MA completely rejected the accusation and got very angry. He said that the boy should come in front of him and should make that claim again. [...] I did not know what to do. Then people told me to inform the Taliban judges about this and that they would solve my problem very soon. [...] I went to the Taliban commander who is responsible for our village. He was called MAA, and communicated my complaint. Then MAA called the Taliban judges by phone and spoke with them. They said that they would be coming in two days. [...] After two days, three Taliban judges came and collected all the elders with MA and told the elders that they have received a complaint from me about the loss of two of cows and that I accused MA.

Then all the elders confirmed and told the Taliban judge that my cows were lost and that a village boy had seen MA leaving the village with two cows. The Taliban judges [interrogated me and MA and the village boy as witness]. All villagers knew that MA did not have any cows and he was very poor. The Taliban judges asked from the village elders about MA's background. Everyone knew that he was not a good man, he had been involved in some robbery before and he also was a gambler. Then the Taliban understood that MA stole the cows. That's why the Taliban judges asked the Taliban fighters to lash MA until he would admit that he had stolen the cows. When the Taliban fighters started lashing, MA was shouting after around ten lashes. He accepted that he had stolen the cows and sold them in Kandahar city because he needed the money. The Taliban judges planned to cut off his hand as his punishment, but the elders requested from the Taliban not to do it. The Taliban gave two days to MA to go back to Kandahar city and bring the cows back, if he had failed to come back they would give his little land and house that he has in the village goes to me. MA went to the Kandahar city and just came back after one day with my cows and gave my cows back to me and strongly apologised. When the Taliban judges learnt that MA had returned back with cows, then they came again in the village and told the Taliban fighters to inflict 50 more lashes”.

Farmer from a village in Arghandab, summer 2011.

Annex 4: Taliban deal with land dispute

“I used the Taliban court around 5 months ago. At that time Taliban did not have any specific place for their court, they asked me to come two days later with my rival and five elders of our area in XYZ village for trial. My case was a land dispute with a man called HJM. He claimed that one jerib (2,000 m²) of my land belonged in reality to him and he produced a fake title for that land. For almost 6 months we were fighting each other and always HJM with his sons attacked me [...]. Then I went to near of Taliban commander and complained about HJM. The Taliban commander came to HJM to ask about the issue, HJM showed the fake title and, because the Taliban commander was not educated, he sent us to the Taliban judges.

When we went to the Taliban Judges, they saw the case and asked for witnesses, but as we did not bring any witnesses, the Taliban postponed the court for two days. They told us to bring two witnesses, our papers and to try to bring one or two elders. [When we came back we showed our legal titles]. The Taliban judges told us to come back after three days to the same place and that they would announce their decision. During the three days, the Taliban came to our village. They interrogated many people and found out that HJM had in fact made a fake title. After three days HJM and I went to the same place and the judges announced that the land belonged to me. He said that HJM had lied to the Taliban and produced a fake title. The judges gave him 20 lashes and warned him that he would be punished again if in the future he dared bothering me”.

Farmer in Zharai district, summer 2011.

Annex 5: Taliban deal with adultery case

“The most difficult cases that I have solved, and I have seen lots of problem, was an adultery case in Pashmul village, around 4 months ago. The case was about a husband, who told me that his wife has had an affair with a man called NN. The husband said that his wife spent a few hours in NN’s house. Then I called NN, the husband who was called MJ and his wife, and I started the investigation. NN completely rejected the accusation and said that he did not have any relationship with MJ’s wife, that the wife was just coming to his house sometimes, because his sister was her friend. [...] I started investigation on MJ’s wife and she also told me the same story. I have also spoken with NN’s sister; she also told me the same story, MJ’s wife being her friend. It was very difficult for me to find out the truth and there weren’t any witnesses about this case. Then I brought the Holy Quran and told the NN to put his hand on Holy Quran and to tell us that he did not have any [sexual] relations with MJ’s wife. He put his hand and said it. But MJ also put his hand on the Holy Quran and said that his wife had a relationship with NN. I thought that it was odd, because no one tells that his wife has relations with someone else. If MJ swore it to the Holy Quran, he must have been sincere. I told both sides that I would announce the result later, after 10 days. I brought the case to the Executive Committee and talked with them about the case. The Shura and I started the investigation. After 15 days of investigation, we found one of his neighbours, who was aware of the case and knew that NN had a relationship with MJ’s wife. He said that they even had a relationship before she became MJ’s wife. And he saw many times NN and MJ’s wife together in the parks and in NN’s House. Then all the Shura Judges determined that NN is lying and that he committed a big crime by swearing on the Holy Quran. Before we managed to go to Pashmul village where they lived to announce the sentence and to inflict a heavy punishment, which was stoning, they both found out about our decision and escaped from the village. We still do not know where they went. MJ also left the village because he was shamed among the people”.

Taliban Judge in Zharai district, summer 2011.

Annex 6: Taliban deal with property dispute

“The most difficult case I have resolved was a land dispute in S village around 6 months ago. The case dealt with a rich man, who was living in this village, and his son, who had been living in the Arabic countries for a long time. This rich man called HTM had a lot of land and a farmer named NK, who had been working for him for 10 years. HTM died around two years ago and only his old wife was left in the village; his wife also died after 5 months. Around 6 months ago HTM’s son MR came back to the village and wanted to sell the land of his father and to go back to the Arabic country, but NK, the farmer of his father, claimed that his father sold all the land to him. He had a paper from his father with the thumb stamp of his father. Both sides came to me complaining against each other’s and telling me that the lands belonged to them. First I heard from the son MR. He told me that his father gave all the lands and the house to him years ago as he was his only son, but the farmer said that HTM got sick many times and called his son to come to Afghanistan to take care of his father. But, while MR did not come, his father became sad and sold all the lands at half price to NK, because he had been working with him for ten years.

When I spoke with the elders, they said that NK should at least have told the elders about this issue before. There wasn’t any witness from NK to confirm his claim. But he had a document from HTM, which however was not sufficient proof for us, as everyone can make a paper and put a stamp on it. We did not know whether the stamp was HTM’s or not, as he was dead by now, and we lacked such technology to verify. His son was also right, because he was the only son and the entire property of his father became his own after his father’s death. I took the case to the Taliban Provincial Judicial Commission to solve the issue. We investigated for 12 days and, during those 12 days, I spoke with many other farmers. They said that after the death of HTM, NK always had told them that he had bought the lands from HMT before he had died. I also spoke with the relatives of HTM, they did not confirm it. It was very difficult because some farmers told me that they were aware before that NK bought the lands, and some other people, including the elders, completely rejected it. During the 12 days, none of the team found an exact witness or a proof that the land belonged to one or the other. So the Judicial Commission took the decision to divide the land in two parts, with one part going to NK and the other part to the son MR. It was after 14 days that I came back to the village and collected the people and the elders and announced the decision. MR did not accept the result and told me that this was not fair, that the land belonged to him, but NK accepted our decision. In front of all the villagers and the elders, I told MR that first he did not have any paper from his father and second he had been out of the country for a long time without coming back to Afghanistan when his father was sick, without even coming back when he died. I told him that our decision to give half of the land to him was too generous to him. Then he accepted and we divided the lands in two parts, giving the first to NK and the second to MR”.

Taliban Judge in Arghandab district, interviews in summer 2011.

Annex 7: Taliban judges deal with spying allegations

“Just two months ago, I went to the Taliban court because someone told them that I had links with the ANA soldiers which have a base in our village. He also told the Taliban that I would go to the ANA base every day and give them a report. It was around 9:00 pm when the Taliban came to my house, accusing me of working for the Afghan security forces and of reporting on the Taliban to them. I completely rejected that and said that I do not have any

relation with the ANA. The Taliban commander told me to come the day after in Pashmul village to be questioned by the Taliban judge. [...] When I went to Pashmul village, [the judge] said that they had a report that I was working for the Afghan army. I completely denied and said that I do not work for them. The Taliban put me in the jail for two days, while they were investigating about me. They asked some questions about my background and my work to the elders and also to our neighbours, but they couldn't find any proof that I was working for the Afghan forces. After two days, they took me out of the jail and brought me again to the Taliban court. When I arrived at the Taliban court, I saw one of our villagers who had a long-standing problem with me because my son loved his daughter, but he had engaged his daughter to someone else. From that time he had become my enemy and had tried to cause me trouble. The Taliban judges told me that this man saw me entering the ANA base several times. Then I told the Taliban judges that he had been trying to cause me trouble for a long time. [...] The Taliban judges asked for witness or for proof, but the man did not have those [...].

After two hours the judges came together and talk to each other for two hours. Then they came back to the room where we were announced the result, which was that my enemy had given wrong information to the Taliban and had lied to the Taliban because I was his old enemy. [...] They decided to release me and to punish him with one-week in jail followed by 50 lashes before releasing him. In this judgment I think that Taliban really do very good judgment and stand on proof and witness. Later I discovered that my enemy was one of the Taliban spies. He always gave reports about the villagers and the Afghan Forces. [But] even if Taliban commanders complain on someone or give a report to the Taliban judges, they never take any decisions until they finish their investigation".

Shopkeeper in Zharai district, summer 2011.

Annex 8: Taliban judges deal with abuse by Taliban fighter

“I have also used the Taliban court around two months ago. My case was a family problem. We went to the Taliban judges and they solved my problem. The problem was with my neighbour’s son who was working for the Taliban in Zharai district and who was my daughter’s fiancé. After he had spent around 3 months with my daughter, though most nights they were together, after three months, the man, named SG, came to my house and argued with me. He told me that my daughter had another boyfriend in the district. I asked him if he had seen my daughter with someone else and if he had any proof. He said “Someone from the Taliban has seen her with a man in his garden. That’s why I give her divorce now.” Because SG had connections with the Taliban and had power in the village, I thought he would have the Taliban’s support. I called all the elders of the village in the mosque, I told them about the issue and I asked them to solve the problem. The elders [interrogated SG but could not resolve the problem]. Then, after one week, I complained to a Taliban in our village and told the entire story. He told me to ask help from the Taliban judges; he called the judges and made an appointment. [The Taliban came and organised a trial. They interrogated me and SG.] After asking questions from SG and hearing the witnesses that I had brought from our village, the Taliban judges found that SG had misused the power deriving from his work with the Taliban and that he wanted to leave his fiancée after spending lots of time with her, destroying the girl’s reputation. The Taliban announced as a result that SG was lying and that he had misused the Taliban’s name, for which he should get 50 lashes and then marry my daughter. Then I did not accept the punishment, I told the Taliban judges that if my daughter was to marry him, he would harass or beat her every day. The Taliban changed therefore the result and decided that SG should get 60 lashes in public and be banned from the district forever. Then I accepted the decision”.

Farmer from Zharai district, summer 2011.

Annex 9: The legitimising impact of the Sharia

“I personally used the Taliban court in our village around one month ago. Unfortunately, I lost the trial, but I am not angry on Taliban Judges, because they judged according the Sharia Law and I can’t stand against the Sharia Law. My case was that I bought a five Jereb (one hectare) agriculture lands in partnerships with my friend M in our village around one year ago. Before we bought the land, we came to the agreement not to sell it before five years [...]. Just around one and half month ago, I decided to buy a car and use it as a taxi between Panjwai and Kandahar city. I became tired of asking money from our relatives or friends so I decided to sell the land to buy a car with the profit. I told my friend that we should sell the land, because I needed money to buy a car. He did not agree with my plan and he reminded me of the agreement not to sell the land for five years. It had just been one year since we had bought it. We had this discussion for almost one week and it turned into a fight.

I went to the elders and [asked for help], but the elders also supported my friend’s view. They told me that M has a paper agreement that the land can’t be sold for five years. Then [as] I had a friend who is working with the Taliban, I tasked him to come and threaten M into selling the land and to give me my money. My friend came to M’s house at night and threatened him into selling the land. I never thought that M would bring the Taliban judges in. They came to our village after around 3 or 4 days and [organised] a trial in our village. [...] When the Taliban Judges asked me to say something, I did not have a good defence. I told to the Taliban Judges that I became tired of the land and wanted to sale it to buy a taxi. That’s why I was forcing M to sale the land. I also told the Taliban judges that I confirmed having made an agreement with him to not sale the land within five years, but now I needed money [...]. The Taliban judges told all the elders and me that I could not do anything because M had a proof. [...] Then M also complained that I had sent a Taliban fighter to his house to threaten him until he would sell the land. The Taliban asked me about this, I completely denied and said that I had no knowledge about this. In the end, the Taliban decided that the land should not be sold for five years [...] and they told me that if I would threaten or disturb again M, than they would give me a strong punishment”.

Farmer in Panjwaie district, summer 2011.

Annex 10: Non-transparent handling of cases by police

“I was busy in carrying different types of materials for the villagers on my Zaranj motorbike and, through this; I was earning money, living my life normally. One day I had an accident. I hit a man with my motorbike. The man was not seriously injured but people took him to the hospital and then the police came, arrested me and took me to the police station. When my older brother was informed, he went to the hospital and stayed there with the patient all day, and he came after to the police station. The Criminal Investigation Department (CID) officer first asked me lots of questions such as why I had this accident and how I hit the person. I was asked lots of questions like these, and I told them the whole story step by step. Then the police officers put me in jail and submitted my files to the district centre. My brother dealt with my case in the district centre and that is how it started.

My brother visited the patient in the hospital and after two weeks the injured man was completely treated. So my brother and some other elders of our village talked with the injured man, explaining him that it was an accident and that it was not deliberate. The injured man and his family forgave me and he did not submit any complaint against me. But the Afghan government was not releasing me, they filed my case and the district police chief ordered his CID officer to investigate the whole case, and the CID officer was asking me questions day after day. I could not understand what they wanted from me. My brother was trying to find a way to get me out of the jail but he could not find any. The policemen told me that I would be in jail for more than five months. So, I was waiting there for the result of my case, my brother was running from offices to other offices to solve my case, still the officials were postponing my cases by different excuses. As everyone knows, the Afghan government officials are not honest and they are corrupted, and they know many ways to get money from people. That is why they always delay the cases of the people.

[...] From the first days of the accident till the time I was released from jail, I spent 140,000 Afs (\$3,000) in different places. As I said before that the injured man was in hospital for more than two weeks and my brother was with him. All the expenses of the treatment were on us, so we spent some of the money there. Also my brother said that he had given some of the money for the policemen and some other workers in the district center as *bakhshish*, and he also gave money to some other high officials as well”.

Small trader in Panjwaie district centre, summer 2011.

Annex 11: Allegations of corruption in courts

“My case was about using of water for my agricultural land. People, all the farmers, use the canal water for their agricultural lands and everyone needs to send water into their lands. We do not have any more water for our lands beyond that of the canal. There are no wells, or no other ways to send water into the lands except the canal water. Local people, when it is their turns, send water to their agricultural lands. Someone takes four hours or someone takes six hours to send water into their lands. My father and grandfather have long used this water for the land and everyone knows us in the area. We have the right to send the water for eight hours every day to our agricultural lands, but four hours were cut by a powerful man in the area. Our eight hours were decreased by four hours without any reason or any logical explanation by Qumandan N. He used to send water to his agricultural lands for six hours and but now he used it for ten hours. Qumandan N is a powerful and wealthy person and he is also famous for smuggling drugs abroad. I told to him not to decrease our time as we have had the right to irrigate during eight hours for a long time, that everyone knew that, even him. He answered “you have a small surface of agricultural lands but mine is very large and we should send the water during a long time.” Then I said that mine was also large and really need water for more than 7 hours until the whole land would become wet. Finally I was told by him not to make too big an issue of it and to keep quiet and that if I were to raise this issue again he would physically beat me.

[...] I decided to write a complaint letter addressed to the district governor, and submitted to the Arghandab district governor office. The district governor signed the letter and told me to take this to the court in Kandahar city to resolve the problem.

It took a week to get to the court, and then it was very difficult to get the decision because the court was delaying it.

I took the letter to the court in the city and the judges there told me to hire a lawyer. I did not have enough money to hire a lawyer and I told them that I would defend by myself. They refused telling me “if you do not find any lawyer then this case will be over.” So I said I would find someone. Finally after a few days, I found a lawyer who was a friend of my father. The trial started two days after I hired a lawyer and Qumandan N was also present. Qumandan N had hired a good lawyer with more money [...]. In the court, I started explaining everything. Qumandan N’s lawyer was telling to the judge that Qumandan N had been using 10 hours of irrigation rights for a long time and that I was the one trying to decrease the time of Qumandan N. The court did not make any decision on that day and postponed to the following week. When we came back to the court, his lawyer and my lawyer started talking in the court but still the judge did not make his head up and told us to come back in next two weeks with some witnesses. The reason why the court was delaying things was in fact that the judges were trying to get a bribe whether from me or from Qumandan N. After two weeks, I brought to the court two witnesses and Qumandan N also brought two witnesses. When we went there, the court delayed the start of the trial for another three days. Finally, after more than one month, the trial started in the court. Suddenly, the judge made an announcement to the benefit of Qumandan N without letting us talk and without even hearing our eyewitnesses. When we came back to the district, I heard that N had paid a lot of money for the lawyers and bribed for judges in the court. [...] I was told that Qumandan N paid 30,000 Afs (\$600) for the lawyer and the judges”.

Farmer from Arghandab district, summer 2011.

Annex 12: Taliban courts as alternative to state courts

“I had house dispute with my cousin for 10 years in our village. Because my cousin was wealthier, he paid money to the judges in the court and won the trial, but honestly the house belonged to me. I had lots of evidence, but due to the bribe he won in court. When I lost the trial, I went to Iran and returned only last year. When I return back to our village, my neighbours told me to complain again against my cousin with the Taliban. I went to Mullah K, who is a Taliban commander in our village, and told him of my problem. K then told me that he would call the Taliban judge, who is called Mullah NM. [...] It was around 10:00 am when the Taliban came and collected the elders and my cousin. They saw my papers and my cousin papers, after around two hours of discussions between me and my cousin Taliban announced the result according the Islamic Sharia law, giving the house back to me. The judge also gave me letter with the Taliban logo, so that if Mullah NM was to change from our district to another one and someone else came as his replacement, and if again my cousin complained to new judge, than by showing this letter the new judges would not accept his complaint”.

Villager from Dawlatabad, summer 2011.

Annex 13: Taliban corruption compared to the government's

“Some local villagers bribe the Taliban commanders not to disturb them, to have the Taliban commanders' support and also those villagers who are a bit richer than other villagers bribe the Taliban commanders to take care of them. The Taliban judges are also getting bribes; they take bribes from the villagers to solve their case according to their choice. But if we compare the Afghan government court and Taliban court, Taliban court take much less bribes than Afghan government court. When the Taliban commanders take bribes the Taliban judges do not know about that and when the Taliban judges take bribes then the Taliban commanders do not know that. Taliban commanders and Taliban judges take bribes from those villagers with whom they are well acquainted and they take the bribe very secretly. They do not take from everyone who has a case or a problem. Maybe they take bribe from 10 villagers' one villager. [...] Taliban judges are much better than the government court, I myself haven't gone to the Afghan government court but as I heard about the Afghan government court and about its reputation, I can say that Taliban court is much better than Afghan government court. People are happy from Taliban court and Taliban judges, there are two judges in Berg-e Matal district, both of them have a good reputation in the district. They take bribe but not always and they do not take bribe from every villager, as I said that they take bribe from those people that Taliban judges know them very well. But when they do not take bribes, they are judging very well and according the Sharia law and both sides should bring enough witness and enough proof.”

Elder in Berg-e Matal district, autumn 2011.

Annex 14: Base questionnaire for interviewing Taliban judges

1. Are Taliban courts active all over Afghanistan?
2. When did the Taliban create the Courts system?
3. Is there someone who contributed to this effort in particular among Taliban leaders?
4. Why are Courts important to the Taliban?
5. To what extent (how much) is the system used locally? (Out of ten citizens, how many would you say use the system?)
6. Where the Taliban Courts are used the most? In which area/province/region? How does the Taliban court system function and how do the Taliban process cases? (Please describe in detail the procedure of hearing a case, emitting a sentence and enforcing the decision.)
7. How do the Taliban select their judges? (on the basis of education? Experience?)
8. How many judges are there in the district and province where you live? (if there aren't precise info on this, an approx estimate is useful)
9. Who do the judges report to within the Taliban? Is there a central judiciary department?
10. How do the Taliban make sure that the judges do their jobs properly, are there inspectors?
11. Do judges rotate or are they permanently assigned to a certain place?
12. Do the Taliban keep a central record of the cases? Or local records/archives of the decisions taken?
13. Can people complain about a judge if they consider him unfair? How?

14. What happens if one of the parts involved in the dispute does not accept the Taliban authority?
15. How long does it take to get a case heard and a sentence issued?
16. Do you provide certificates to prove that a verdict has been passed on a given case/dispute?
17. How has the system been changing? We hear the system has changed recently, and the courts have become mobile and are not based in one certain place any more. Is this true?
18. Does this create complications? How do people know where to find the court/judge if he is mobile?
19. Have many judges been targeted by ISAF and killed or arrested?
20. Are judges protected by local communities where they work?
21. Apart from the judges, who else works in the Taliban judicial system? Are there clerks, attorneys, etc.?
22. Is there a Taliban police?
23. Who is in the police? Normal Taliban fighters? Or fighters who only assist the local judge in his work? How are they selected?
24. Do Taliban judges work exclusively in accordance of the Sharia law? Or is there also a written set of laws promulgated by the Taliban, in addition to Sharia law? (if there is an additional legal code, please provide details.)
25. How were you recruited as a judge?
26. Were you a Taliban commander/fighter before becoming a judge?

27. For how long have you been serving in this area?

28. Where were you educated?

29. Who is your direct superior?

30. Do you depend directly on the Province's shadow governor?

9. BIBLIOGRAPHY

Carter, S. and Clark, K. (2010), *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan*. London: Chatham House.

Clark, K. (2011), *The Layha: Calling the Taliban to Account*, Thematic Report. Kabul: Afghanistan Analyst Network.

Forsberg, C. (2010), *Power and Politics in Kandahar*, Afganistan Report 5. Washington DC: Institute for the Study of War.

Gang, R. (2011), *Community-Based Dispute Resolution Services in Kabul City*. Kabul: Afghanistan Research and Evaluation Unit.

Giustozzi, A. (2010), *Negotiating with the Taliban: Issues and Prospects*. Century Foundation Report. Washington DC: Century Foundation.

Giustozzi, A. and C. Reuter (2011), *The Insurgents of the Afghan North*, Thematic Report. Kabul: Afghanistan Analyst Network.

Human Rights Watch (2011), *“Just Don’t Call It a Militia’: Impunity, Militias and the Afghan Local Police”*.

Ledwidge, L. (2009), *“Justice and Counter Insurgency in Afghanistan: A Missing Link”*, *RUSI Journal*, 154/1, p. 6.

Mason, W. (2011), *The Rule of Law in Afghanistan: Missing in Inaction*. New York: Cambridge University Press.

Munir M. (2011), *“The Layha for the Mujahideeb: An Analysis of the Code of Conduct for Taliban Fighters under Islamic Law”*, *IRCR*, 93, p. 881.

Strick van Linschoten, A. and Kuehn F. (2012), *Lessons Learnt: Islamic Independent, Perfect and Strong: Parsing the Taliban’s Strategic Intentions, 2001-2011*. Swindon: Arts and Humanities Research Council.

The 2007 Afghanistan Human Development Report. Kabul: UNDP/CPHD. (Accessed on the 18th December 2012, Available at:

http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name_3408.en.html)

Wardak, A. (2004), *“Building a Post-War Justice System in Afghanistan”*, *Crime, Law & Social Change*, 41: 319-341. (Accessed on the 18th December 2012, Available at: http://www.usip.org/files/file/wardak_article.pdf)

Wardak A. (2011), "State and Non-State Systems in Afghanistan: The Need for Synergy", *University of Pennsylvania Journal of International Law*, 32/5: 1305-1324. (Accessed on the 18th December 2012, Available at: http://www.mpil.de/de/data/pdf/wardak-state_and_non-state_justice_systems_in_afghanistan.pdf)

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