

# JUSTICE AND COUNTER-INSURGENCY IN AFGHANISTAN

## A MISSING LINK

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**Recent counter-insurgency doctrine has largely ignored the justice sector. This article, referring to current multinational efforts in Afghanistan, contends that this is a serious mistake. It is an error not made by the Taliban, who are acutely aware of its importance.**

Complex insurgencies are powered by injustice. The ability to adjudicate and resolve disputes in a way that the population believes to be fair is a major step towards establishing the legitimacy an insurgent requires for success. If an insurgency is powered by injustice, it succeeds partly through appropriating the virtual territory of justice. This is especially true in the 'Maoist' type protracted insurgency we are encountering in Afghanistan.

'Legitimacy is the Main Objective'<sup>1</sup> and 'without the host nation achieving legitimacy, COIN cannot succeed'.<sup>2</sup> These are undoubtedly critical truths. The US Army/Marine Corps field manual *Counterinsurgency* goes on to list some indicators of legitimacy. They are said to include laudable democratic aims such as free selection of leaders, popular support for the political process, low levels of corruption and finally sufficient acceptance of major social institutions.<sup>3</sup> Presumably this last indicator is intended to include an acceptable system of justice. Justice is seen as simply one subsidiary component of legitimacy.<sup>4</sup> And yet the field of justice is arguably the key area where the individual, or indeed the group, meets the state. COIN soldiers and civilians rarely, at least in Afghanistan, hear complaints about a democratic deficit. This is because most Afghans simply do not care very much about politics. They like anyone else, care about their families, themselves,

their land and their possessions in that order. To the farmer of Helmand or Badakhshan politics are simply an irrelevance. Who owns or controls the land he works on; who will decide upon disputes with his neighbour; can the judge be trusted? These are overriding and persistent issues in Afghanistan.

Whilst the central importance of justice has to some extent eluded counter-insurgent theorists, successful *insurgents* place it at or near the top of their objectives. Courts are a measure of the power and reach and to some extent, integrity of

### *Complex insurgencies are powered by injustice*

government. A judgement can be delivered anywhere. If it is not enforced it is not worth the paper it is written on. Worse, an unenforced or dishonest judgement is testament to the impotence, and far more importantly in the long run, illegitimacy of government. The lack of capability of a state to decide upon disputes, and ensure its decisions are enforced, provides a crucial opportunity for the insurgent to establish legitimacy. Insurgents recognise it as a key centre of gravity of the COIN effort. Successful insurgents have been more than aware of this. If, as Brigadier Mackay put it in 2007,<sup>5</sup> 'the population is the prize', it is won partly through providing justice.

As in any legitimate state there is a requirement for executive and to some extent legislative functions. What is indispensable is the judicial branch. When the insurgent can provide the means to settle grievances fairly, or to be perceived as such, he is a long way down the road to replacing the most central of governmental functions.

During the Irish War of Independence (1919–1921), a successful insurgency fought by the Irish Republican Army (IRA), Sinn Féin, the IRA's civil or political arm, understood this viscerally. They operated the 'Dáil Courts'. By the end of the war, there was a national network of working 'Parish Courts' arbitrated by IRA members, parish clergy or Sinn Féin figures. Their decisions were enforced, and more important than that, were respected. They succeeded in marginalising the British state in the key area of justice.<sup>6</sup> In doing so they had taken a huge step towards establishing and entrenching their own shadow state's legitimacy.

### **Taliban Justice**

It is easily forgotten that the Taliban came to power in 1996 on a manifesto, if it can be called that, of security and justice. Mullah Omar, still at large, famously began his public career by hanging a pair of local warlords and rapists from the barrel of a tank gun in Kandahar. Ideas of justice and security are at the heart of the attraction the organisation has for



'Courts are a measure of the power and reach and to some extent, integrity of government.' Photo courtesy of ISAF/ Khalil-Ur-Rehman Roshan.

Afghans. The Taliban idea of themselves as bringers of justice and security is once again taking hold. Additional to deciding their own cases, if the Taliban can present themselves as correcting specific defects of the state system, as they do, so much the better.

Against that background the Taliban in the south of Afghanistan have been quick off the mark. In an environment where 90 per cent of the land is effectively under their control, like the old IRA, they have established their courts as the only effective and trusted tribunals of justice. Above all, unlike the state courts, their decisions are not dependent on the ability to pay bribes and will be enforced.

In Helmand Province, for example, there is said to be a cadre of four Taliban judges 'learned in the law' (Sharia law in this case) travelling the countryside deciding cases referred to them by village elders.<sup>7</sup> In the way they work they are rather redolent of the medieval English circuit courts. They have established for themselves a reputation for condign, quick justice. There is evidence that Taliban courts are operating throughout the areas under their control, or where their support is significant, notably in the Pashtun south.<sup>8</sup>

A typical case, well-publicised, took place in Garmsir, the southern Helmand town retaken in 2008 by a joint Anglo-

American operation. The state court had sentenced a murderer to six months. The shortness of the sentence, for a crime which would in the normal course of events have attracted the death penalty,

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was said to have been explained by the fact that the murderer's family had bribed the judge. The victim's family referred the case to the Taliban. After serving his six month sentence, they re-arrested the murderer on his release from Lashkar Gah prison. The Taliban heard the case again, found him guilty and presented him to the victim's family for their disposal. The family killed him. This kind of justice is common. Helmandis, indeed all Afghans, crave security, and the execution of bandits or murderers goes down very well indeed. Similarly in Washir District, the application of what are regarded as the evidentiary rules pertaining to rape took an unusual turn:

A woman was raped. No recourse to governmental authority was available. So the case was taken before the Taliban judges. They ruled that the necessary four witnesses for a rape case were not available and that therefore no crime could be proved. The victim's

family were unhappy with this, and took matters into their own hands. They kidnapped the perpetrator and raped him themselves. In turn he brought his own rapists before the Taliban Court. The ruling was the same. The alleged rapist, now the victim, could produce no witnesses and therefore the crime could not be proved.<sup>9</sup>

A senior member of the provincial council in Helmand told me that, if nothing else, she missed the Taliban's condign approach to crime in the years to 2001, particularly when compared with the appalling corruption with which she now had to deal.

In the absence of legitimate machinery of justice, society will move to fill a vacuum even in the most hopeless of situations. Justice is a doubly dangerous weapon in the hands of a competent insurgent operation. As the *Counterinsurgency* puts it, 'sometimes the best weapons are those which do not shoot'.<sup>10</sup> This is as true for the insurgent as for his adversary. Not only does the provision of the ability to adjudicate critically important disputes (such as property or crime) build legitimacy for the insurgent at the most critical point, in the hands of an information-literate indigenous insurgent it bleeds legitimacy away from an already seriously damaged state system. The challenge of COIN is to identify when

we should intervene in such a process and how.

### The International Response

These are highly dangerous developments for the international effort. The Taliban have identified a key centre of gravity of the state and attacked it. Working against them, the international effort has been embarrassingly disorganised and unfocused. In 2001, leading nations were given responsibility for key areas of concern. The Germans took on the police, the UK counter-narcotics. Italy was to lead the justice sector. This 'lead nation' approach has not been a success. Within the justice field at the national level there have been a plethora of plans and initiatives aimed at building a legal infrastructure. An attempt was made to co-ordinate these approaches at the Rome Conference in 2007. Amongst a slew of resolutions and new plans, the most effective move arising from Rome was the setting up of a network of justice assistance offices countrywide to be administered by UNAMA. This has been an innovative and potentially constructive initiative, if just the intention. And it seems from early indications that the result has been a great improvement of co-ordination of efforts nationally.

At the best of times, legal development work is glacially slow, working for effects in the medium to long term. Even in Bosnia, which has had thirteen years of expert effort, a relatively high degree of expert effort, a relatively high degree of international co-ordination and billions of dollars dedicated to justice sector reform, the courts remain generally regarded as inefficient and corrupt: that, in a country with a strong formal legal tradition. Experience shows that rule of law development, of the kind being promoted in Afghanistan, is a slow-burning process. It is an axiom in the field that results might, or might not, be apparent in twenty years.

There is scope for effective action which might produce relatively quick results. In 2007 the Dutch government tried to force such action by tying \$15 million of aid to the justice sector to Afghan members of parliament removing their self-awarded immunity from prosecution for the gross war-crimes

committed in the 1990s, prior to Taliban rule. Needless to say, the Afghan politicians were not interested in giving up their immunities. No other governments were prepared to apply any conditions at all to the tens of millions of dollars of aid they were providing for the Afghan Ministry of Justice. In the absence of any real incentive, effective progress in justice reform at the national level is unlikely in the medium to longer terms, notwithstanding the ostensibly noble aims of the National Justice Strategy or the 'Justice for All Strategic framework/vision plans' [sic].<sup>11</sup>

For the purposes of COIN there is not a 'longer term' in which to work. The longer it takes, the better for Taliban war aims. They are keen to portray the government as ineffectual and chronically corrupt. They are of course right. COIN operators, working locally by necessity, are not going to be able to correct the faults of a disastrously compromised elite, and a largely unco-ordinated international effort that might take decades to bring positive effect.

### Local Solutions

The solution lies, as with so much in the world of COIN, in local solutions. Local solutions, however, often collide with national aspirations. The awakenings movement in Iraq, which extracted much of the sting from the Sunni resistance cells, was hardly compatible with aspirations for state monopoly on force. Similarly, local justice initiatives may not strictly be compatible with traditional ideas of the judiciary holding the monopoly on final adjudicative authority

The elephant in the room, fully recognised though rarely approached, is the informal system of justice. Nowhere is that stronger than Helmand, the heart of the Pashtun lands.

### Helmand

Although there is a state system in operation in all provinces, the reality is that this is, at best, ramshackle and inefficient, at worst criminally corrupt on a huge scale. The reality is, certainly in the south of Afghanistan – the Pashtun regions – that 99 per cent of disputes are solved using informal mechanisms, outside the discredited formal state courts system.

This is the case whether for property disputes, or what our culture would call 'crime'. Over the last thirty years of civil war and chaos in Helmand, strict compliance with the ancient Pashtun code of *Pashtunwali* has to a great degree, diminished. However, this has not prevented the essence of the code, based on the idea of compensation (following mediation) as a substitute for punishment retaining its function as the primary method of dispute resolution. Mediation is conducted in the form of *shuras*. These are simply councils, or meetings of interested parties, convened by consent. Efforts are in train, strongly supported by the governor, to strengthen the role of *shuras* in dispute resolution. This approach is parallel to extensive efforts to train and equip state courts and prosecutors, as well as support the development of defence lawyers.

In an innovative attempt to combine the respect accorded to the *shura*, with the perceived necessity for state intervention, provincial and district justice *shuras* have been convened. These have, at least officially, only consultative status. However, they are beginning to have effect on, for example, reviewing the status of prisoners – many of whom were detained after flagrantly corrupt proceedings. Some prisoners were held by judicial authorities effectively for cash ransom – nothing less than judicial kidnapping. Practices such as this have not assisted in the promotion of respect for judges and courts. With review of arrests by what we would call a respected advisory body – a *shura* composed of respected members of society – there is hope that flagrantly corrupt detention *might* cease. Moves are also being made to ensure recognition of informal judicial processes, possibly by having decisions, registered or recognised by state administrative institutions. This is particularly vital in property cases.

The Helmand approach, seriously trammelled though it is by the extremely poor security, is not being replicated nationally. In any event it may fall flat. Time, or what is left of it, will tell. Whether it does or not, there is a realisation that justice is an area that needs to be addressed now. As the *Manual* says, 'Sometimes the best weapons don't

shoot'. Just as there is no more effective weapon in the Taliban's armoury than an effective court, the same can be true of the COIN effort.

### Realistic and Robust

Hitherto awareness of the justice sector within the COIN community has been low. This needs to change. The journalist and author David Loyn has said that for the people of Afghanistan, justice is the single most important issue.<sup>12</sup> Whether that is at the national level with warlords responsible for the slaughter of literally thousands of people holding highly lucrative posts in government and voting for immunity for themselves, or the more intimate but equally vital questions of property and restitution (sometimes, restitution against those very same warlords). These act as drivers for any insurgency. In the end any successful COIN operation must take steps, or more importantly be seen to take steps to address the legitimate grievances insurgents use to generate and sustain popular support. A corrupt, discredited justice

system only serves to provide a self-perpetuating fuel to power the Taliban insurgency, bleeding legitimacy from the government in strategically vital areas of the country.

Measures taken by COIN must also be realistic and robust. This is a difficult and highly controversial field, but there are strong arguments in favour of placing politically correct priorities on hold. For example, any contemporary discussion on justice sector reform whether of the formal or informal systems, will rightly stress the centrality of human rights to any concept of legitimacy. But women's *shuras* and human rights colloquia and the like, often promoted, are a luxury in the current climate. In a country where matters concerning gender and what are regarded in the West as basic rights are potentially incendiary, there needs to be more of a concentration on what *can* be achieved rather than what Western advisors perceive ought to be tried. As Jason Burke has written, 'even if we do succeed in building a stable Afghanistan it will not be the kind of country we

envisaged at the start of the campaign. Think Saudi Arabia crossed with Somalia, not Sweden'.<sup>13</sup>

In conclusion, a realistic approach in assisting local justice development can be an effective and cheap way of attacking a key objective of the insurgent. The Taliban have, like the IRA did, seen the importance of attacking the government with their own 'shadow courts'. They have adopted a direct approach in attacking what they rightly see as a weak centre of gravity of the government. As matters stand they are bleeding away the life-blood of legitimacy from the Afghan state and winning the battle for the virtual territory of justice. ■

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## NOTES

- 1 US Army, *Counterinsurgency* FM 3-24 (Washington DC: US Army, 2006), para 1-112.
- 2 *Ibid.*, para 1-97.
- 3 *Ibid.*, para 1-116.
- 4 FM 3-24 does nod to the justice sector in Chapters 6 and 8. Department of justice officials are encouraged to assist host nation ministry of justice counterparts (6-106-107), emergency tribunals (8-47) and provisional laws (8-48).
- 5 Brigadier Andrew Mackay commanded the UK Task Force Helmand from October 2007 to March 2008. His Concept of Operations issued in October 2007 stipulated that force was to be used in a way calculated to influence the population, whom he described as 'the prize', and increase the standing of the Afghan government.
- 6 I am indebted to Drs David Betz and John Mackinlay of the War Studies Department, King's College, London for their exposition of the concept of 'Virtual Insurgency'.
- 7 See Aziz Tassal, 'Afghan Recovery Report 265' (IWPR, 12 September 2007), <[www.iwpr.net](http://www.iwpr.net)> (last accessed 13 January 2009). The details of Taliban court practices were separately confirmed by the author in interviews with judicial and law enforcement officers in Helmand.
- 8 In a remarkable interview by Ghaith Abdul Ahad, 'Face to Face with the Taliban', *The Guardian*, 14 December 2008, it was reported that in Wardak Province '...the civilian apparatus of the Taliban-run districts operates a more effective justice system than the government's, which is corrupt and inefficient'. Journalists and aid workers report this pattern throughout the Pashtun lands.
- 9 The resident of Washir district in Helmand, who reported the case to the author, said that since the Taliban had arrived 'there had been no robbery or kidnappings. Indeed no crime'.
- 10 *Counterinsurgency*, para 1-197.
- 11 For an indication of plans currently in force, see <[www.undp.org/cpr/we\\_do/justice\\_afg.shtml](http://www.undp.org/cpr/we_do/justice_afg.shtml)> (last accessed 13 January 2009)
- 12 Talk at Frontline Club discussing his book *Butcher and Bolt*, 9 October 2008. Available at <[www.frontlineclub.com\\_videoevents](http://www.frontlineclub.com_videoevents)> (last accessed 13 January 2009).
- 13 *Prospect*, 'Misreading the Taliban' (November 2008).