JUDGING IN THE MIDST OF CIVIL WAR
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De Boeck Supérieur | Politix

2013/4 - No. 104
pages 25-46

ISSN 0295-2319

This document is a translation of:
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Adam Baczko, « Juger en situation de guerre civile »,
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Translated from the French by JPD Systems

Available online at:
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http://www.cairn-int.info/journal-politix-2013-4-page-25.htm
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How to cite this article:
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Adam Baczko "Juger en situation de guerre civile",
Politix, 2013/4 No 104, p. 25-46. DOI : 10.3917/pox.104.0025
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Judging in the Midst of Civil War

The Taliban Courts in Afghanistan
(2001–2013)

Adam Baczko

Abstract – Since 2001, the Taliban insurgency in Afghanistan has been gaining momentum in a civil war characterized by the growing politicization of private conflicts. By establishing courts, the Taliban have managed to override the social and identity divides apparent in private disputes while striving to objectivize the armed movement and the national scope of its cause. Through their accessibility for the population and their proven effectiveness, the Taliban courts have enabled the insurgency to expand its social base across ethnic and tribal boundaries. The Taliban case suggests that in a situation of civil war, the establishment of judicial institutions is a component in a strategic repertoire and that the ability to judge is a decisive factor for an insurgency seeking to establish itself as a political authority against competing claims to appropriate the state’s monopoly.

Introduction: The Virtue of Commencements

Pierre Bourdieu writes that « one of the virtues of commencements […] is that they are theoretically interesting ».1 Following Franck Oppenheimer and

Norbert Elias, the social sciences have reflected upon the emergence of the State through the lens of historical sociology, by recounting its genesis in the Western world. However, situations of civil war, such as Afghanistan has experienced since 2001, provide an opportunity to examine similar phenomena outside of the West, on much shorter time frames, with faster and more brutal evolutions, while their directions remains undetermined. Pierre Bourdieu’s conclusion after three years of teaching on the State at the College de France thus constitute an entire research program in itself:

[…] all my work has consisted in showing how a State is formed, but one could have done the same work, almost as well, by looking at the dissolution of the State. Genesis and involution, as coined by certain evolutionists, have the same virtues of de-trivialization: the dissolution of a State enables to see everything that is implicit in the functioning of a State and what is evident, such as borders and everything that is unified. The dissolution of a State enables to see that the construction of the national unity is made against secessionist tendencies, that could be regional in nature, but could also [stem] from [social] classes.

It is certainly possible that Bourdieu witnessed such a process of state dissolution in the war in Yugoslavia of the mid-1990s. In fact, Afghanistan experienced a very similar process between 1992 and 1996, when the country was split apart between warring factions. Until the conquest of Kabul in 1996 by the Taliban, a movement of Sunni religion students and clerics who called for the implementation of Islamic (or Sharia) law, the country was divided between various politico-military entrepreneurs, whose opposition to one another followed social, ethnic, tribal, and territorial lines. However, it is also important to consider civil wars in which the central dynamic is not the dissolution of the state’s monopoly and a return to a competitive configuration but a challenge to the current political authorities, which continue to claim a monopoly of violence over a recognized territory despite not being able to satisfy this claim. Such configurations are not characterized by a struggle for secession but by a struggle to take hold of the state’s monopoly. It was just such a situation the Taliban faced when it reappeared on the Afghan scene following the Western intervention that had ousted it, with the Karzai regime, supported by the international coalition, claiming to exercise its authority over the whole of Afghanistan.

For the Taliban, this difference in configuration was decisive. In the 1990s, the discourse of restoring law and order legitimized a campaign that was above all military. A decade later, the presence of Western armies, much better trained and equipped than the Taliban, forced the movement to adopt a strategy of insurgency. The movement thus sought to establish itself gradually, beginning in rural areas, negotiating its presence village by village with the different social actors, and mobilizing the population against Western troops, which they present as occupation forces. It is from this perspective that we must understand the establishment of a justice system by the Taliban in the full throes of civil war despite the fact that it was just one politico-military player among others, with no further claim to legitimacy than the cause for which it professed to be fighting. Yet the enterprise is only paradoxical at first glance. On the one hand, the Taliban arbitrate disputes between individuals that, more often than not, span social, ethnic, and identity-based divides. If its judgment are to be recognized, the Taliban must therefore position itself as a third party. Its claim to this type of impartiality is facilitated by the fact that both the Western intervention and the official regime tend to exploit—and therefore exacerbate—the tangle of private conflicts and social, ethnic, tribal, and territorial cleavages. By contrast, by neutralizing social conflicts and interpersonal disputes, the Taliban intends to rebuild political unity in order to pursue and win the war. Thus the Taliban courts must be grasped in all of their ambiguity, namely the aim to restore justice in order to fight the war. The Karzai regime and the Western coalition are perfectly aware of this, and the Taliban judges have become primary targets of their attacks.

In this context, where the boundaries between the public and the private realm and between the social and the political sphere are constantly shifting as a result of the actions of the various parties and where judging is both a judicatory activity and a weapon of war, how does a politico-military movement manage to simultaneously produce a justice system, have it recognized as such, and derive a political advantage from it? How can an armed movement have its judges’ rulings recognized as judicial rather than political acts while, to the extent they are leveraged by an insurgency, they have eminently political effects? How, despite the Taliban being party to the civil war, can a Taliban judge deliver a verdict without getting caught in the confusion between political positions and personal interests that permeates the Afghan society in war? How can a Taliban judge, who is as much a Taliban as he is a judge, succeed in gaining public recognition for his office? Behind the issue of a judge being recognized as such in a civil war situation lies the question of imposing order within disorder, of producing authority when that authority is divided among several stakeholders.

The Taliban can be said to have succeeded where both the Western intervention and the incumbent regime have failed. The movement has managed to build an objectivized judicial system despite the politicization of private
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disputes that characterize the civil war in Afghanistan. Both Hamid Karzai’s administration and the Western coalition operate under a decentralized, clientelist approach based on a sectarian perception of Afghanistan, hoping in this way to co-opt the various tribes and ethnic groups. Conversely, the Taliban movement relies on the religious dimension as a political rationality and on the Sunni clergy to centralize the judicial system and limit exogenous social influences on the judges’ decisions. As a result, the insurgency has managed to go beyond individual conflicts and identity-based divisions, widening its social base while spreading to the entire territory. This process has been facilitated by the internal disciplinary function of the Taliban courts, which enabled the generalization of the third party position of the judges to the whole insurgency, forcing the fighters to renounce involvement in sectarian disputes.

To better understand how in a context of civil war the Taliban has managed to establish a system of courts and override sectarian cleavages, this argument is organized into three stages. First, we consider how since 2001, the civil war has been characterized by the increasing entanglement of private conflicts and political confrontation. Judicial disorder linked to the proliferation of competing judicial institutions, demographic, social, and cultural transformations, and the politicization of private disputes by “commanders” and the US military has led to an increase in violent disputes. Bearing in mind the context of a war-ridden Afghan society, it is then possible to understand how the Taliban has managed to objectivize the movement. The recruitment of clerical staff integrated into a centralized, hierarchical organization and within a system of judge rotation that prevents them from being affected by private conflicts has made it possible to produce a relatively formalized and increasingly autonomous judicial system. Lastly, we describe how by displaying coercive capability, accessibility, and detachment from sectarian cleavages, the Taliban judicial system has helped the insurgency win the support of the rural population, which suffers particularly severely from the politicization of private disputes, while also facilitating


7. We use the term “political rationality” in the sense given to it by Peter Miller and Nicolas Rose, who were extending Foucault’s reflection on “governmentality” as explained in Security, Territory, and Population. The use of Sharia law is a political rationality in that it has a moral form, prescribing a particular distribution of power. It also has an epistemological character because it contains a definition of that over which it operates (namely, men and women, whether believers or not). Finally, it is operationalized through a specific discourse, the preserve of the clerics who form the leadership of the Taliban movement. Peter Miller and Nicolas Rose, “Political Power Beyond the State: Problematics of Government,” British Journal of Sociology 43, no. 2 (1992): 173–205.

8. “Commander” (pronounced kumandan in Dari and Pashto) is a generic term used in Afghanistan to refer to the politico-military entrepreneurs who emerged during the war against the Soviets.
an arrangement with rural elites worried about the prevailing insecurity and transcending ethnic and tribal boundaries. In conclusion, we highlight the similarities between the Taliban case and what has been learned through a historical sociology of the State in the West in order to posit the importance of a sociological approach to civil war situations.

### Conditions and Limitations of Field Research in Afghanistan

This paper is the result of six visits to Afghanistan since 2010, from one to three months in duration. The difficulty to collect data makes it necessary to specify the conditions and the limitations of this study. The interviews were conducted in Kabul and three other provinces: Kunar, Kandahar, and Ghazni, in the east, south and center of the country. In each province, the presence of local facilitators was essential for the interviews, to guarantee to the interviewees the absence of political engagement of the author. The choice of these facilitators, who also played the role of key informants, was the decisive factor in gaining access to interviewees as well as their trust. However, it also constituted a bias, which could be offset to some extent by changing facilitators, which was possible in Kunar and Kandahar but not in Ghazni. Many lengthy, detailed interviews were conducted with users of the Taliban courts and the population of areas administered by the Taliban. Interviews with members of the Taliban movement, judges especially, always required particularly complicated logistics, and considerable flexibility had to be maintained in questioning these sometimes suspicious interlocutors. To facilitate discussions, the interviews with the judges focused on judicial technique and Islamic jurisprudence, a subject seen as apolitical. However, it was not possible to attend any Taliban court hearings, and all descriptions relating to legal practices and interactions at hearings come from interviews. Finally, participation in a study aiming to determine the extent and importance of the Taliban justice system alongside Antonio Giustozzi and Claudio Franco made it possible for the material to be compared with hundreds of additional interviews conducted by Afghan interviewers with Taliban judges, notables, and court users from all over the country. The ongoing nature of the war dictates that those cited remain anonymous.

### The Infra-political Dynamics of the Afghan Civil War

Since 2001, the war in Afghanistan has led to a proliferation of disputes between individuals and an increased use of violence in their resolution. Three factors contribute to this rise in private conflicts: the judicial disorder resulting from three decades of civil war and the weakness of the regime that emerged in Kabul in the 2000s, tensions related to the demographic, social, and cultural

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effects of the war, and the politicization of private conflicts by political actors, Afghan commanders, and the US military in particular.

**Judicial Disorder**

Judicial disorder is a major feature of post-2001 Afghanistan. Consequently, legal documents, including those issued in the past, are systematically called into question, and individuals endure a constant state of uncertainty and instability. From the 1980s onward, the civil war entailed the dislocation of state institutions in rural areas. With the disappearance of any state guarantee of transactions and property rights, conflicts proliferated over commercial and family issues and especially land ownership. Moreover, the lack of a land registry and of clear plot boundaries in a civil war context facilitated competing land claims. Thus, for thirty years, each local conquest by a politico-military figure gave individuals the opportunity to challenge decisions made by those previously in power. The appearance of the Mujahideen in 1979, clashes between leaders after the Soviet withdrawal, the arrival of the Taliban in 1996, its replacement by the US military in 2002, the return of the warlords during the following months, the gradual establishment of the Karzai regime, and finally the return of the Taliban as an insurgency from 2005 onward gave rise to cases complicated by a buildup of successive and often contradictory judicial decisions.

The sheer number of land titles reached a critical point in the 2000s. Pervaded by the perception of an immutable Afghanistan lacking a state tradition and governable only on a decentralized basis, the Western coalition and the regime it supports undertook a process of social engineering. Based on an “imaginary anthropology” of Afghanistan, Western stakeholders, non-governmental organizations (NGOs), and local authorities created in rural areas a series of institutions charged with dispensing “informal justice”. In 2010, an employee of the United Nations Assistance Mission in Afghanistan (UNAMA) counted four institutions for the resolution of private disputes in Paktia Province in southeastern Afghanistan, created by the United States Agency for International Development (USAID), US Special Forces, the provincial governor, and the Karzai regime, respectively. However, these judicial bodies succeeded only in multiplying the potential for deeds and contracts to be contested and more often than not, reactivating disputes.

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The construction of a real judicial system did not become a priority for the international community until a decade later, when the return of the Taliban made rural areas inaccessible to government agents. However, the courts that had been planned for the countryside struggled to function, and the judge positions were left unattended due to insecurity. As a result, the government’s judiciary remained confined to urban areas, and local political entrepreneurs were the main beneficiaries of this legal vacuum. The regime’s courts benefit them because they have the economic resources and social connections necessary to pay bribes and push their cases. For the rest of the population, going to court is a particularly risky and costly course of action as besides court and lawyer’s fees, the parties have to spend large sums on bribes. As a result, trials can be seen as a kind of auction, where the price paid often exceeds the amount at stake in the dispute, particularly in the land and family related cases, which carry a strong symbolic dimension.

The Transformations of the Afghan Society

Three decades of civil war and two interventions by foreign powers, first Soviet, then American, have abruptly transformed Afghan society. The speed and depth of these social, cultural, and demographic changes are direct causes of social tension. In a society that remained largely rural in the 1970s, the new mobility stemming from war gave rise to many conflicts. The exile of the majority of rural inhabitants and the death of nearly one-tenth of the population during the Soviet intervention led in the following decades to numerous disputes over inheritances and plot boundaries. However, these uncertainties over property are part of a more general transformation of land uses for the two-thirds of Afghans who recently became urbanized and who generally consider the land they own in rural areas as one source of income among others, with none of the key economic, symbolic, and identity-forging importance the land continues to have for rural dwellers.

In addition, changes in lifestyles caused particularly powerful tensions around family and matrimonial issues. Arranged marriages, which had long been the norm, were called into question by part of the younger generation, influenced by their exposure to images, music, and movies from India and the West. The elopement of young couples in love and the suicides of women refusing the
settlements concluded by their families bear witness to the problems caused by sociocultural developments. These cases often result in violent disputes, as the children’s refusal may well contravene an agreement signed years before, in which both families’ word and honor are at stake. In Kunar, for instance, ever since a young woman refused to marry a few years ago despite the arrangement concluded between two locally influential families, a whole village has been paralyzed by the conflict, and both families now live entrenched in their homes.

Lastly, the civil war set the scene for a radical disruption of social hierarchies, particularly with regard to ethnicity. Groups once considered inferior (Hazaras, Nuristanis, and Gujars) were able to arm and organize and therefore articulate social demands. At a more individual level, many Afghans followed courses in the context of the war their position in social, gender, or identity-based hierarchies would have made impossible in the 1970s or under the Taliban regime. Accordingly, like many other civil wars, the civil war in Afghanistan is a time of social revolution, in the sense that economic, social, cultural, and identity capitals are constantly reconfigured, leading to social ascents and declines previously unheard of.

The Politicization of Conflicts by Politico-Military Actors

During the 2000s, private conflicts increasingly took on a collective and political dimension, due largely to the actions of politico-military groups and leaders, notably the Afghan commanders and the US Army. During the war against the Soviets, commanders used their social capital, usually consisting of tribal or ethnic solidarities (qawm), to form their support base. Driven out by the Taliban between 1994 and 1996, these men regained influence with the intervention of the US military, which sought them as allies. They emerged in the 2000s as the local extension of President Karzai’s nascent regime, and monopolized key positions in the administration and security services.

From this strong position, the commanders instrumentalized private conflicts to increase their clientele and local influence. By supporting one side against another and by couching disputes in a strong sectarian discourse, they


16. For a precise definition of the notion of qawm, see Pierre Centlivres, Un bazar d’Asie centrale (Wiesbaden: L. Reichert, 1972), 158.
transformed disputes between individuals into tribal or ethnic conflicts.\textsuperscript{17} For instance, in the province of Uruzgan, the flight of a young Hazara man and a young Pashtun woman led to tensions between the two communities. However, the conflict only become violent following the intervention of a former commander of the Hezb-e Wahdat, Abdul Hakim Shujai, and his men, who killed seven Pashtuns and triggered an ethnic clash. At the same time, by involving state institutions, the commanders further blurred the boundaries between private and public spheres. In this context, land and family disputes become a stake in the production of the territorial and identity-based cleavages of the civil war.

Similarly, the American troops significantly contributed to the politicization of private disputes. The US Army and Special Forces engaged in many land disputes in order to obtain the favor of individuals they identified—often wrongly—as tribal elites. Furthermore, entertaining the same perception of a sectarian Afghanistan, the Special Forces financed and armed a series of groups recruited along tribal and ethnic lines. The anti-Taliban militias now ravaging the province of Kunduz, and Abdul Hakim Shujai’s Hazara militia in Uruzgan, the Afghan Security Guards, are directly responsible for abuses that led to sectarian conflict.\textsuperscript{18}

\begin{center}
\textbf{One Tribe after Another: US Military Involvement in Land Disputes}
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In 2009, Special Forces officer Jim Gant gave an account of his experience at the head of a detachment in 2003 in a pamphlet entitled “One Tribe at a Time.” This document reveals a stereotypical view of the population, mixing essentialism and caricature. Afghans are compared to American Indians, with the unit naming its post “Fort Navajo” and Jim Gant dubbing an influential figure in one village “Sitting Bull.”\textsuperscript{19} The document tells us a great deal about how the Special Forces operate in the province and about their perception of an imaginary, immutable Afghanistan, a tribal country without any state tradition:

When people say the “Afghan people,” what I believe they are really saying is “tribal member.”\textsuperscript{20}

“Afghanistan has never had a strong central government and never will. That is a fact we need to accept, sooner rather than later.”\textsuperscript{21}

\begin{thebibliography}{99}
\bibitem{19} Gant, “One Tribe at a Time,” 16.
\bibitem{20} Gant, “One Tribe at a Time,” 11.
\end{thebibliography}
After setting out his analysis of Afghanistan, Major Gant then gives an account of his detachment’s involvement in a land dispute, with the aim of setting an example to the entire US Army:

The highland people had taken and were using some land that belonged to the lowland people. The Malik told me that the land had been given to his tribe by the King of Afghanistan many, many years ago and that he would show me the papers. I told him he didn’t need to show me any papers. His word was enough. […] I made the decision to support him. “Malik, I’m with you. My men and I will go with you and speak with the highlanders again. If they do not turn the land back over to you, we will fight with you against them.”

Major Gant does not say how this story ends, adding only: “suffice it to say that the problem was solved.” There is little doubt that if the Special Forces detachment had spent time with the “highland people,” these would have told a tale similar to that of the “lowland people.”

These representations are widely shared throughout the US Army, which recommends that all military personnel read the pamphlet prior to their deployment in Afghanistan.

In addition, the strategy of targeted killings provided many Afghans with a convenient way to get rid of a cousin stalling a matter of inheritance, a neighbor opposing them in a land dispute, or a local rival. Night raids, including executions by Special Forces performed at night in the targets’ homes, and air strikes by fighter plane or drone are the American Army’s main methods for fighting the Taliban insurgency. The targeting on which this assassination strategy depends is based on calumnious denunciations. When dealing with military personnel who have no idea about the local configuration, do not speak the language, and have a mission to hunt down “terrorists” with local networks, Taliban insurgents, and Al Qaeda-affiliated members all lumped together, the Afghans who manage to have themselves recognized as a reliable information source or as a translator can easily leverage their position as an interface between the US military and the population. In fact, the lack of supervision of US Special Forces, particularly in the early years, allowed a freedom of action and a level of impunity that greatly facilitated personal contact between soldiers and certain local figures, who were thus able to take advantage of the war to advance their private interests.

The politicization of conflicts also affected the Taliban, as it sought to expand its insurgency throughout the Afghan society at war. Considerably weakened by the defeat of 2001, the movement was reconstituted by integrating various local

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networks, such as the former Salafi networks in Kunar and Nuristan,\textsuperscript{25} the men of Mawlawi Haqqani in the southeast,\textsuperscript{26} and those of Mawlawi Ismail between Ghazni, Wardak, and Zabul.\textsuperscript{27} More broadly, many small groups emerged with their own interests and a degree of freedom of action in relation to the chain of command. In addition, the Taliban also receives calumnious denunciations from individuals accusing their rivals of collaborating with Westerners. One of the frequent complaints against the Taliban regards its readiness to promptly eliminate men suspected of espionage. The politicization of private disputes therefore led to a privatization of politics, which the insurgency has endeavored to contain through the establishment of an objectivized judicial system.

**The Objectivization of the Insurgency by Judicial Means**

In this context of entanglement in violent political clashes and private disputes, the creation of courts by the Taliban forced the movement to position itself as a third party within a society at war. By recruiting clerics as judges and incorporating them into a relatively centralized and bureaucratized organization, the insurgency produced a judicial system relatively detached from the local stakes that undermine other bodies in charge of conflict resolution in Afghanistan. The Taliban judges, who are responsible for arbitrating disputes between fighters, between fighters and civilians, and between civilians, gradually contributed to the objectivization of the insurgency by judicial means.

**Establishment and Rationalization of the Taliban Justice System**

The Taliban began setting up a court system in 2004–2005, which by 2013 involved several hundred judges.\textsuperscript{28} The exercise of justice within the Taliban

\textsuperscript{25} These groups made up of former fighters from Hezb-e Islami opportunistically dubbed themselves Salafist in order to gain freedom from the tutelage of the party and receive funding from the Gulf. In fact, they maintain Hanafi jurisprudence. On the death of their commander, Mawlawi Hussein “Jamil al-Rahman,” assassinated in 1991, these fighters lost their grip on Kunar, and a large number of them now support the Taliban insurgency.

\textsuperscript{26} Without doubt, Mawlawi Jalaluddin Haqqani is the most famous of these. He survived the political upheavals of the past two decades by taking advantage both of his membership in the clerical network through the Dar ul-Ulum Haqqaniyah madrassa in Pakistan and of loyalties he earned in the southeast during the war against the Soviets.

\textsuperscript{27} Mawlawi Ismael, trained in the religious schools of Ghazni that surround the famous Nur ul-Modares madrassa and now a member of the Military Council (Shura Nizami), the insurgency’s commanding authority, has built a real stronghold on the border area between Ghazni, Wardak, and Zabul.

\textsuperscript{28} For the start date of the insurgent courts in Helmand, see Theo Farrell and Antonio Giustozzi, “The Taliban at War: Inside the Helmand Insurgency, 2004–2012,” *International Affairs* 89, no. 4 (2013): 845–71. For a description of the process of establishing these courts in the central regions of the country, see Mohammad Osman Tariq, “The Resurgence of the Taliban in Kabul, Logar, and Wardak,” in *Decoding the New Taliban: Insight from the Afghan Field*, ed. Antonio Giustozzi (London: Hurst, 2009). A detailed description of the Taliban justice system, including an estimate of the number of judges, can be found in Giustozzi et al., “Shadow Justice.” A more in-depth analysis of the effects on the rest of the Taliban movement can be found in Giustozzi et al., “The Politics of the Taliban’s Shadow Judiciary.”
movement is the exclusive domain of clerics, trained in religious schools and socially recognized as competent to administer Islamic law. They are recruited by the Taliban from the network of Deobandi religious schools located in the border areas of northern Pakistan.\textsuperscript{29} There, religious students are taught Hanafi jurisprudence based on the Qur’an, classical Hanafi scholars, and Hadith collections, all of which is relatively consensual in an 80% Sunni Afghan society.\textsuperscript{30} In their final years, they are trained in casuistry, a characteristic of Islamic law on which the judicial practices in the Taliban system are based. After a decade spent in religious schools away from their families and their villages, the clerics are integrated more deeply into clerical networks than into any ethnic, tribal, or territorial groups characteristic of their place of origin. By employing them as judges, the Taliban insurgency positioned itself from the outset outside of the local, segmental issues that fuel private disputes.

The technical capabilities of Western forces have placed strong limitations on the Taliban judges, who must perform their duties in secret in order to avoid being arrested or killed. The judges’ work also depends on the degree of control the insurgency commands over a given territory. In territories where they have entirely eradicated the regime’s presence and where Western troops no longer venture, the Taliban can set up a court and prison in buildings known to the local people. This was the case in several districts of Kandahar until 2010. Other judges have an official job as imam in a mosque or teacher in a religious school, for example, and perform their judicial duties in secret, while others must remain constantly on the move, traveling with a small escort on foot or by motorbike. These judges can be contacted through local Taliban sympathizers privy to their whereabouts or their mobile phone number. Judges also do rounds in the villages of their jurisdiction in order to offer their services. In the absence of a courtroom, the mosque or sometimes the reception room of a house is temporarily converted into a court, with the judges sitting on one side of the room, the parties facing them, and the audience sitting on either side.

Early on, the Taliban movement set up a centralized system for appointing and managing judges in order to ensure their dissociation from local networks. The Judicial Council, the authority in charge of administrating judges, located in Quetta, Pakistan with a sub-branch in Peshawar, must first approve candidates based on their training and religious references. They are then sent to


\textsuperscript{30} There is a great deal of confusion regarding the jurisprudence in use among the Taliban, who are often mistakenly linked to Salafism. The authors to whom the Taliban refer are those of the Hanafi tradition of Deoband, particularly Abu Hanafi and Al-Bukhari for the Hadiths, not those of the Hanbali jurisprudence specific to Salafism. In the interviews, most Taliban judges claimed to use Hanafi jurisprudence. See Barbara Metcalf, “‘Traditionalist’ Islamic Activism.”
a province other than their province of origin, where the local Taliban administration takes charge of them. The provincial commission, the insurgency’s executive authority in the provinces, examines the judge’s religious knowledge of the Qur’an, the Hadith, and Hanafi jurisprudence. “We test [the candidates] by giving them cases to solve and we observe the way they proceed. The examination is made in the provinces,” explains a Taliban officer attached to the Judicial Council of Quetta. If the new judge passes the exam, he is then officially appointed to one of the courts in the province and receives a salary paid directly by the Judicial Council.

To prevent any judge from forming personal ties with the local population and becoming susceptible to pressure or corruption, the Judicial Council of Quetta and its branch in Peshawar coordinate a rotation of judges every three to twelve months. The account of a notable from Qarabagh district in Ghazni suggests that the population understands the purpose of these measures as well as the Taliban:

If there was a Taleban judge originally from Qarabagh [working in the same region], there would be a possibility for unfair judgments that would benefit his family and friends. Now, these Taleban judges have no family or friends in this district with whom their judgments could be biased. This is why they pronounce equitable verdicts and they judge according to the Sharia.

Moreover, the judges are closely monitored by the Taliban provincial commissions, to which they are required to send the more important verdicts prior to announcing them publicly and which keep copies of earlier decisions, centralizing records at the provincial level. The commissions meet regularly, and residents may bring complaints about the judges to them. They also have networks of Taliban informants in the villages to keep an eye on the judges, and the Judicial Council of Quetta regularly sends men incognito to find out the population’s opinion of the district’s courts. All reported cases of requests for kickbacks or favors granted to an individual have consistently resulted in the dismissal of the judge by the supervisory authority. A case in Andar in Ghazni Province was described to the researcher during an interview in September 2012, with a notable often asked to facilitate the work of the Taliban courts. “A judge pronounced a verdict against the person who should have won the trial. The person complained to the commission. They did their investigation and discovered that the judge had been bribed. The judge was sentenced to six months of exile and was dismissed.” He added that “the Taleban judges are rarely corrupt, they are too afraid of their chiefs.”

The integration of judges into a hierarchical and specialized judicial system favors its rationalization. The Taliban used the regime’s administrative divisions to construct the judges’ jurisdictions in the provinces and districts. The provinces in which the courts are best organized have trial courts and courts of appeal in each district. A supreme court is located in Nawzad, in Helmand Province, but usually sits on the Pakistani side of the border. The level of organization of the Taliban courts differs between regions, and some districts, where the movement is too weakly implanted, have no court of appeal. The provincial military commission makes up for this deficiency where necessary by acting as a court of appeal. Judges frequently use practices common to a formal procedural justice system. The written word dominates the work of the judges, who produce official documents that are stamped, classified with a serial number, and archived by the movement’s authorities. “Each court keeps the judgments in the provinces, in a centralized fashion, sometimes on laptops”.

The verdicts of Taliban courts are used in areas under insurgent control as land titles and in some cases are even recognized by the regime’s own courts.

Judges as an Instrument of Internal Discipline for the Insurgency

The arrival of Taliban judges in rural areas has contributed to the centralization of the insurgency and to the subordination of the fronts (mahaz, Taliban combat groups) to the political leadership in Quetta. In the early years of the insurgency, many front commanders decided on their strategy independently and dealt with the various problems they encountered, including judicial issues, themselves, just like the politico-military entrepreneurs of the 1980s and 1990s.

The arrival of hundreds of judges as well as governors and education and health officers, all from a religious background, considerably reduced the spheres of activity of military leaders, laying the foundations for a distinction between civilian and military functions within the insurgency. The many local entrepreneurs, who had negotiated a place for their network of supporters within the Taliban movement, lost a number of prerogatives to religious men appointed to specialized positions. The commissions set up at the district and provincial level are now composed mainly of clerics and are the real executive organs of the movement. Their organization, with its official positions and centralized hierarchy, is in direct contrast to the clientelistic logic that facilitated the emergence of local warlords. Consequently, they have produced the conditions for an upheaval in terms of modes of organization and political action.

In the context of the insurgency, the judges gradually compelled recognition, in particular from fighters, by dealing both with conflicts between fighters and conflicts between fighters and the civilian population. The movement's internal

32. Interview with a Taliban officer attached to the Judicial Council of Quetta, 2013.
Code of Conduct (layha), the first edition of which dates from 2006 and which was republished with some modifications in 2009, 2010, and 2011, explicitly affirms the role of the judge, or in his absence, of the Taliban provincial governor, in judging fighters accused of crimes and abuses. The most recent versions of the layha also require that the judge pronounce sentence before someone accused of espionage can be executed.

Ensuring that the judges had sufficient authority to judge military leaders was not a smooth process. The judges are classified by the coalition and the regime as fighters, even if they take no part in the armed struggle. Their lives are therefore under threat, and they depend largely on fighters for their protection and supplies. They also depend on the movement’s military branch to enforce their sentences since in the absence of a police force, local commanders are responsible for implementing the verdicts, and this becomes highly problematic in cases where the accused person is a fighter, or worse, a military officer. At first, the judges did not have the necessary independence from the front commanders. The arrest of a commander in Kandahar in 2006 suggests that it was around that time that judges began to be in a position to confront military leaders. The time frame differs in the north due to the Taliban’s later infiltration there, with the first arrest of a military commander reported in Kunduz in 2009–2010.

For the Taliban, the control of fighters is an eminently conflictual process. In response to the resistance some commanders showed toward the judges and to complaints from the public, the Taliban leadership instituted regional judicial commissions covering several provinces. These jurisdictions transfer the commanders away from the territories in which they have support within the movement and the population. To arrest a military leader, depending on his importance, the judges often have to mobilize fighters from other districts if not other provinces. For instance, a man from Kajaki district in Helmand Province reported that the arrest in summer 2012 of an insurgent commander in the district, following a series of complaints from the population, was carried out by Taliban fighters from the neighboring district. However, some commanders have a regionalized network solid enough to stand up to the movement’s

34. Interview in summer 2010 with a Taliban activist in Kandahar.
36. Other similar cases have been reported. See Giustozzi et al., “The Politics of the Taliban’s Shadow Judiciary”.
The most severe case of resistance occurred in the strategically marginal territory of Farah in 2012, when a local commander, Baz Mohammad, managed to capture and detain Mawlawi Ismail, a member of the Military Council of Quetta.37

The judges’ ability to control fighters also depends on the shifting course of the war and the local intensification of military operations. The assassination campaigns carried out by US Special Forces since 2009–2010 have significantly weakened the Taliban chain of command in the most affected areas. As the judges have been particularly targeted by drones and Special Forces since the US military became aware of their key role in the insurgency, many courts have had to go into hiding and become mobile. The influx of 30,000 US troops in Kandahar and Helmand in 2010, the provinces where the Taliban judicial system was the most successful at the time, has returned judges to a state of greater dependence on fighters.

Courts and the Spread of the Insurgency

The Taliban judicial system has been a key factor in the spread of the insurgency throughout the country. The resolution of many disputes increased the movement’s popularity in rural areas, especially in comparison with that of the Karzai regime. In addition, the establishment of the judicial system contributed to the reconstruction of rural society in a state of war. Lastly, the courts provided the means for the insurgency to override sectarian cleavages.

The Popularity of the Taliban Courts

The ease of access to Taliban courts has helped the movement attract large sections of the rural population. The objectivization of judicial institutions significantly reduced the role of economic resources, social networks, education, and connections to the city played in the outcomes of trials. Because Taliban courts are organized at the district level and sit in the villages, travel, which is made increasingly risky by the war, can be avoided. Furthermore, Taliban courts are not expensive, and the system of recruitment and supervision of judges has largely checked corruption. While the absence of lawyers nullifies the right to defense in criminal proceedings and political accusations, it represents considerable savings in land or family disputes. With no fees to pay, the low-income rural population is more likely to bring cases to court. Furthermore, obtaining information on Sharia law from a local cleric is much easier for poorly educated rural people than consulting a lawyer about official law, which is little known in rural areas. Plus the consensus on Islamic law’s legitimacy makes the Taliban judges’ decisions difficult to contest. As a rural

resident around Kandahar explained in 2011, “I personally used the Taliban courts in our village a month ago. Unfortunately, I lost the trial. I am not upset at the Taliban judges, they judge according to the Sharia, and I cannot oppose the Sharia.”

Most Afghans whom I interviewed over four years spoke of the popularity of Taliban courts in rural areas and of their effectiveness, in the sense that they appease social relations and put an end to disputes that sometimes lasted for decades. For instance, I conducted an interview in Kandahar in 2010 with a notable close to President Karzai’s family who had taken refuge in the city of Kandahar after receiving threats from the Taliban. After vehemently criticizing the movement on a political level in the interview, he later praised the Taliban justice system. Similarly, in an interview in 2011 in Asadabad, a former mujahid from Kunar in profound ideological opposition to the Taliban movement admitted having recently used their court system. He extolled its effectiveness both in absolute terms and—what matters the most in a war—in comparison with that of the government.

In general, the popularity of the Taliban justice system is explained in contrast to the official system. While government judges and policemen are notorious for their corruption, Taliban judges are generally described as honest. The government justice system is seen as absent, distant, and ineffective, which can in part be attributed to the strategy of monopolization the insurgency has pursued on the judicial level. Government judges are denied access to areas under Taliban control and are systematically attacked. Likewise, residents who go to government courts are punished by the movement. As a result, the regime’s judicial system is confined to the cities, and its decisions are not enforced in rural areas.

Conversely, the Taliban give great importance to the enforcement of verdicts, threatening severe penalties for any resistance. Two of my interlocutors stressed this point: “The Taliban judges [as opposed to government judges] say what they do and do what they say,”38 The difference between [Karzai’s] government and the Taliban? When the Taliban pronounce a verdict, they enforce their decision. When they say something, they do it.”39 In a context of insecurity linked to judicial disorder and private disputes, the coercive dimension of the Taliban court system is appreciated, however, paradoxically, so long as it puts an end to the conflict. Even individuals who lost their case admit to preferring the Taliban system because they can stop fearing their neighbors or their rivals. Thus, with each verdict the Taliban courts deliver, the insurgency’s presence increasingly becomes the condition for sustaining the social peace it has produced.

38. Interview with R., 2011.
Guarantee of Transactions and Integration of Rural Elites

In rural areas, the Taliban has taken over the function of guarantor of transactions and property that is normally the prerogative of the state. This role of the judicial system in social interactions is particularly apparent among rural elites. In areas under its control, the Taliban often allows notables to attempt conciliation as long as no party appeals and the dispute has not turned violent. Similarly, they do not intervene when the conflicting parties turn to independent clerics to settle the dispute through a *fatwa*, a religious opinion on Islamic law. However, the two parties to the conflict know that if they fail in the conciliation process, the case will end up before the Taliban judges, and the verdict will be final. The Taliban thus assume the function of ultimate deterrent the state was still playing in rural areas in the 1970s.

Paradoxically, rural elites have recovered part of the social role of which the civil war and the rise of the commanders had deprived them, albeit in a situation of dependence vis-à-vis the Taliban movement. In principle, an order by Mullah Omar, to which two judges alluded in interviews, stipulates the exclusion of rural elites from decision making in legal matters.40 However, in practice, they serve as key witnesses in land and family affairs. For instance, in a boundary dispute in Kunar in 2012, the judge questioned all the old and influential men of the village one by one and followed the majority opinion while presenting his verdict as an expression of Islamic law. Similarly, while the Taliban apply a Hanafi Islamic law that is contrary to customary norms on certain points, including the role of women and their right to own land, some Taliban judges admit or even claim the use of *pashtunwali* in their decisions. Moreover, the situation varies from province to province. In Ghazni, the Taliban forces farmers to accept that their daughters inherit the half-share Islamic jurisprudence allows them, while in Logar and Kunar, judges tolerate the dispossession of women.

Altogether, the attitude of rural elites toward the Taliban movement remains ambiguous. Clerics represent additional competition for notables already weakened by the emergence of educated elites and politico-military entrepreneurs. In addition, any political opposition to the Taliban is severely punished, and notables and religious figures who have spoken publicly against the movement have systematically been murdered or forced into exile. At the same time, the establishment of courts coincides with the notables’ fundamental interests, which lie in a return to stability in rural areas. The Taliban courts provide a regularity absent from the formal justice system and enable social stakeholders to once again anticipate the consequences of their actions. The absence of

corruption in the decisions and the assurance that verdicts will be enforced provide valuable guarantees to a deeply conservative social group, many of whom are landowners and whose business activities require a minimum of stability. As in the 1990s, security is the main source of common ground between religious figures and notables, and the courts are the institutions in which this consensus emerges.

**Justice as a Means of Overriding Sectarian Divisions**

The establishment of an objectivized justice system has enabled the Taliban to override the tribal and sectarian divides that were the main factor in the breakup of the anti-Soviet insurgency in the 1980s. Thanks to their courts, the Taliban are no longer confined to Pashtun areas. The introduction of judges detached from local dynamics has allowed the insurgency to cross tribal and ethnic boundaries, regularly returning verdicts favorable to non-Pashtuns. Even Hazara people bring cases to the insurgent courts despite the fact that their Shiite community suffered severely from the Taliban advance in the 1990s and was the target of massacres during their retreat in 2001. Some groups force the movement to adopt a sectarian stance. For example, the Kuchi nomads, who are in conflict with the Hazara people over the use of pastures on the plains of southern Hazarajat, supported the Taliban in order to assert their rights. However, whereas the behavior of some commanders often favored the nomads, the judges have plainly kept clear of the conflict. As explained by Shah Jan Noori, a historical representative of the Hazara people in Ghazni Province and currently a Member of Parliament, “the Hazaras who live near the Talibans zones prefer to use the Taliban judge and do not suffer from discrimination.”

In the north, the courts have been one of the instruments through which the Taliban have managed to overcome ethnic boundaries and mobilize Uzbeks, Turkmens, and Tajiks. This political use of judges has been effective because it formed part of a broader strategy aiming to recruit from non-Pashtun populations, including the appointment of Tajik, Uzbek, and Turkmen commanders and governors. At first, the insurgency established itself in the Pashtun areas of Kunduz and Baghlan, where dissatisfaction with the Karzai regime and the return of former commanders was strongest. Subsequently, the resolution of disputes by courts outside of the Pashtun areas has been a means of extending the Taliban movement into other communities. Trials concerning land

ownership issues provided an opportunity for the judges to show that they do not favor Pashtuns, for example in Kunduz. The recruitment of non-Pashtun judges, in the Uzbek province of Takhar, for example, has also greatly facilitated the movement’s penetration throughout the north.45

By positioning themselves as arbitrators operating above social cleavages, the Taliban judges have reduced sectarian disputes to their individual dimension. They strictly reject any segmental, tribal, or ethnic claims, thereby bringing collective conflicts back to their initial, private motives. This strategy is made even more effective because it contrasts sharply with the strong bias of Western troops when involved in conflicts and the regime’s administration, which relies on former commanders who built their authority precisely by exacerbating the sectarian aspects of disputes. By combining impartiality, religious legitimacy, and coercion in order to make their verdicts incontestable, the Taliban has managed to resolve land disputes that in some cases had been going on for several decades.46 By positioning themselves outside of ethnic disputes and treating individuals in the same way regardless of their ethnicity or tribe, the Taliban judges strengthen their claim to sit above the communities and to act as the legitimate political authority in the rural areas they administer.

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The case of the Taliban courts underlines the grounds for using a sociological approach in the study of civil war situations. In the case of Afghanistan, the comparison between genesis and involution suggested by Bourdieu is particularly relevant. The centrality of the judicial system in producing a state monopoly is mirrored by the centrality of the judicial system in contesting it. As a result, it is interesting to compare the case of the objectivization of the Taliban insurgency through the court system with the findings of Elias and Bourdieu in their respective work on the historical sociology of the state. In Afghanistan, the rise of the clerics, given the rationalization and hierarchy that comes with their way of operating compared to the clientelist politico-military entrepreneurs of the early years of the insurgency, recalls in many ways the process of “courtization of the warrior class” described by Elias.47

Furthermore, the Taliban case reflects Bourdieu’s thinking when, drawing on the work of Ernst Kantorowicz, he explains that in the West, the state was built as a fictio juris, a jurist’s fabrication or invention. In the Afghan situation, the skills of the Islamic clerics are not so different from those of Western lawyers

47. Elias, La dynamique de l’Occident.
who, from the late Middle Ages, with their mastery of words and concepts and with the model of the Catholic Church in mind, exercised a symbolic, instituting power with which they legitimised and rationalized the power of the sovereign.\(^{48}\)

The rise to power of judges in Afghanistan therefore has highly political implications in a situation of civil war since one who judges and is recognized as a judge changes society by taking charge of it, that is, by positioning himself at its head, in place of the State. “To the extent that politics is a struggle over the principles of vision and division of the social world, to impose a new language with regard to the social world is, in large part, to change reality.”\(^{49}\)

By imposing their justice system in rural areas, the Taliban not only superseded territorial and identity-based cleavages but also asserted itself as the political authority in rural areas, thereby legitimizing its claim to govern the country as it gradually assumed the powers normally vested in the state. In doing so, the Taliban’s version of the situation in Afghanistan gains listeners and credibility. Instead of a group of “bandits,” “terrorists,” or “radicals” confronting the state and society, its own version sees itself as representative of a regime, the Islamic Emirate of Afghanistan, faced with a military occupation. In this war of political and historical narratives, the disastrous image of the occupying force gains real credence within the population as the Taliban effectively asserts itself as the authority that administers rural areas.\(^{50}\)

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50. I would like to thank Gilles Dorronsoro, Dominique Linhardt, Cédric Moreau de Bellaing, Robin Beaumont, and the anonymous reviewers for their comments on various versions of this paper.