

# Civil Dispute Resolution



## An Ignored Winning Strategy for Afghanistan

Col. Cornelia Weiss, U.S. Air Force, Retired

*Whoever administers justice will be the state.*

—Robert Reilly

*The Taliban's success in delivering justice is perhaps its single most effective means of undermining the Karzai government and appropriating legitimacy. . . . By itself, it is enough to establish its control and split the people away from the government, and by doing this one thing well, the Taliban gains allegiance.*

—Tom A. Peter

The thinking for this article began over a decade ago, the day I heard a story about Afghan women giving the only thing of value they owned—their jewelry—to the Taliban because of the Taliban's civil dispute resolution services. By “civil dispute resolution,” I mean resolving disputes about land and other issues through a nonviolent process in which disputants bring and plead their case to a decision-maker. Given the tension between my understanding of the Taliban's oppressive treatment of women and my background in the rule of law, I initially marveled that the need for civil dispute resolution was so great that it resulted in support given to those who could provide dispute resolution regardless of their treatment of women. But in Afghanistan, after decades of war, resulting in, for example, “destroyed documents” and “land grabs from owners that fled the fighting,” civil dispute resolution was a fundamental need.<sup>1</sup> And then

I wondered why the United States failed to learn from Che Guevara about the need to provide dispute resolution. According to Guevara, a “central department of justice, revolutionary laws, and administration (the council) is one of the vital features of a guerrilla army fully constituted and with its own territory.”<sup>2</sup> In contrast to the United States, the Taliban appears to have understood that the need for civil dispute resolution is so overpowering that it leads to support for whichever entity, government or antigovernment, will provide it, even if that entity is perceived to be antiwomen. Yet the United States, even to the end, clung to a strategy of a “formal legal system” (meaning building courthouses and other countable “tick-the-box” items) that, in its first year in Helmand, heard only five cases, instead of understanding that its strategy created the vacuum for the Taliban to co-opt the “favored informal, community-level traditional dispute resolution mechanisms, where an estimated 80 to 90 percent of civil disputes have always been handled.”<sup>3</sup> The result: the Taliban in Afghanistan, despite years of military personnel and funds used to combat it, did not succumb but instead, in stereotyped insurgency fashion, outlasted its opponents as a result of capturing the “civil dispute resolution” market. The failure to recognize the population's need for civil dispute resolution and the Taliban capture of this market was part of the Achilles' heel of the U.S. theory, doctrine, and efforts.<sup>4</sup>

To help prevent similar outcomes in the future, this article examines the strategies, policies, and

practices regarding civil dispute resolution and support for the Taliban because of its civil dispute resolution services. The United States failed to understand, through its lens of resolving disputes by armed force, the need for civil dispute resolution for civilians. The lesson that must be learned for the future—to include in doctrine, policy, and practice—is that whoever provides the population with the better civil dispute resolution services during a conflict will become the rulers, regardless of who they are.

## Nonexistent U.S. Strategies and Policies on Civil Dispute Resolution

The U.S. policy on civil dispute resolution appeared to be nonexistent. While the 2010 *National Security Strategy* asserted, “America’s commitment to democracy, human rights, and the *rule of law* are essential sources of our strength and influence in the world” (emphasis mine), it failed to define “rule of law” (as did the 2015 and 2017 *National Security Strategies*).<sup>5</sup>

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Likewise, while the 2011 *National Military Strategy* maintained, “Military power complements economic development, governance, and the *rule of law*—the true bedrocks of counterterrorism efforts” (emphasis mine), it too failed to define “rule of law.”<sup>6</sup> (The 2015 and the 2018 *National Military Strategies* failed as well to define the “rule of law.”)<sup>7</sup> And while the 2011 *National Strategy for Counterterrorism* contended that the United States was “committed to upholding our most cherished values as a nation not just because doing so is right but also because doing so enhances our security” with “adherence

to those core values ... upholding the *rule of law*—enables us to build broad international coalitions to act against the common threat posed by our adversaries while further delegitimizing, isolating, and weakening their efforts” (emphasis mine), its rule of law definition appeared limited to “maintaining an effective, durable legal framework for CT [counterterrorism] operations and bringing terrorists to justice.”<sup>8</sup> That is, it ignored countering terrorism through the affirmative steps of addressing the population’s need for civil dispute resolution. And the 2018 counterterrorism strategy does not even mention the rule of law.<sup>9</sup> The State Department did no better. The November 2011 *Status Report: Afghanistan and Pakistan Civilian Engagement* by the Office of the Special Representative for Afghanistan and Pakistan, acknowledged the following:

- Improved rule of law and access to justice are essential for long-term stability in Afghanistan.
- To help the Afghan government provide its people with transparent, affordable, and effective dispute resolution mechanisms, we support rule of law initiatives at the district, provincial, and national levels focused on increasing access to justice, capacity-building, and promoting transparency and accountability.
- We strive to help increase the Afghan government’s legitimacy, improve its perception among Afghans, and promote a culture that values rule of law above self-interest.<sup>10</sup>

However, it noted the corrections program, counternarcotic efforts, and the provincial justice centers did not address the population’s need for civil dispute resolution.<sup>11</sup> Further, while it asserted, “We will continue to focus our support promoting accountability in the Afghan legal community, and expanding of the formal justice system, with targeted assistance to the informal justice system,” it failed to address explicitly how and what.<sup>12</sup> While maintaining that the USAID Rule of Law Program “also supports traditional dispute resolution mechanisms and fosters linkages between the informal and formal justice sectors,” it declared it will continue to focus its support on “expanding of the formal justice system” with “targeted assistance to the informal justice system.”<sup>13</sup> Instead, it maintained that “the Karzai government” must create “predictable and *fair* dispute resolution mechanisms to eliminate the vacuum that the Taliban

have exploited with their own brutal form of justice (emphasis mine).<sup>14</sup> Yet, “despite the \$904 million in ‘rule of law’ funding from the U.S. alone between 2002 and 2010, much of it earmarked to improve the judiciary,” notably absent were funds to eliminate “the vacuum.”<sup>15</sup> (At the same time, the *Western Hemisphere Defense Policy Statement* of October 2012 acknowledged that “[corruption and] ineffectual judicial systems hamper the ability of governments to earn and keep the trust of citizens.”)<sup>16</sup>

Convention for Civil and Political Rights provide a guide for applicable human rights. The latter provides for derogation from certain rights, however, during a state of emergency. Respect for the full panoply of human rights should be the goal of the host nation; derogation and violation of these rights by HN [host nation] security forces often provides an excuse for insurgent activities.<sup>21</sup>

That is, instead of including the need of the populace of civil dispute resolution within its definition

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### Nonexistent U.S. Military Operational Thinking on Civil Dispute Resolution

While individuals like Gen. John Allen appeared to understand there was something needed, it appears the U.S. military failed to understand that it must address the need of the population to have civil dispute resolution. He testified: “While the Afghan National Army will battle your nation’s foes and, in that context, battle the Taliban, the battle for Afghanistan—the real fight—will be won by righteous law enforcement, a functioning judiciary and an unambiguous commitment to the rule of law.”<sup>17</sup>

While the 2014 counterinsurgency manual asserted, “Establishing the rule of law is a key goal and end state in COIN,” it failed to define rule of law.<sup>18</sup> However, it did articulate that “key aspects” of rule of law included the following:

- A government that derives its powers from the governed and competently manages, coordinates, and sustains collective security, as well as political, social, and economic development.<sup>19</sup>
- Sustainable security institutions. These include a civilian-controlled military as well as police, court, and penal institutions. The latter should be perceived by the local populace as fair, just, and transparent.<sup>20</sup>
- Fundamental human rights. The United Nations Declaration on Human Rights and the International

of “rule of law,” it focused on the penal aspects of “rule of law” (as did Annex F of Gen. Stanley McChrystal’s “Commander’s Initial Assessment” of 30 August 2009).<sup>22</sup> In contrast to the 2014 counterinsurgency manual, the 2011 *Rule of Law Handbook*, in a section titled “Individuals Have Meaningful Access to an Effective and Impartial Legal System,” acknowledges that “people must have practical access” to judicial institutions, stating, “It means little to have laws on the books if there is no mechanism for the enforcement of that law to redress criminal and civil wrongs.”<sup>23</sup> Yet the focus was the criminal system.<sup>24</sup> The handbook further acknowledges that “efficacy may be completely compromised by corruption ... gender bias ... or simple inefficiency,” and that a “nation with beautifully constructed courthouses may nevertheless fail to achieve the ROL [rule of law] if the judges in those courthouses are either arbitrary or corrupt.”<sup>25</sup> The handbook spells out, for rule of law projects, that the “temptation to set measurable goals pushes [rule of law] projects toward either making physical infrastructure improvements, such as building courthouses or jails, or implementing programs whose completion can be easily monitored, such as establishing training programs and measuring the number of graduates of the program.”<sup>26</sup>

Yet arguably, the government of Afghanistan was cognizant of its vacuum of thinking and action. According to Muhammad Ali Ahmadi, the deputy

governor of Ghazni, “Corruption and lack of judicial institutions in districts have led to a vacuum between people and the government, and presented an opportunity that the opposing armed [Taliban] forces have used to the full.”<sup>27</sup> While “strengthening the judicial system and the legitimacy of state institutions is one of the main ways to counter the influence of non-state actors,” it appears the government failed to fill this vacuum.<sup>28</sup>

form of justice in a manner that is seen as honest and efficient.”<sup>34</sup> The reasons articulated as to why Afghans used Taliban courts instead of government courts were access, corruption, efficiency, enforcement, and warnings from the Taliban.

## Access

According to the *Rule of Law Handbook*, over 80 percent of the population had no access to the

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## Thriving Taliban Strategy, Policy, and Practice on Civil Dispute Resolution

The Taliban, in contrast, understood that to win, to become the rulers of Afghanistan, it needed to attract the support of the population. To answer, “What methods of ‘guerrilla governance’ are attracting the support of local populations,” Patrick Devenny concluded:<sup>29</sup>

- There is no better place to start than the Taliban’s court system, staffed by groups of religious scholars who review disputes over land allocation and property rights—issues of vital importance in pastoral Afghanistan.<sup>30</sup>
- Their justice is visible, immediate, and familiar to Afghans who have relied on informal conflict resolution for centuries.<sup>31</sup>
- The courts’ attraction is rooted in the absence of effective alternatives, rather than ideological affinity. Afghans, desperate for some measure of order, will often turn to Taliban courts even if they do not support the organization’s overall goals.<sup>32</sup>
- The courts are better at gaining local support than dozens of gunmen or bomb-makers ever could.<sup>33</sup>

Thus, “while the Taliban use terrorism to advance their military and political aims, in the areas of Afghanistan that they control, their greatest weapon is not violence, but rather their ability to dispense a

government courts because the government courts were not in rural areas.<sup>35</sup> In contrast, the Taliban provided access. According to a Taliban judge named Ramani, “We are mobile judges. Sometimes we go to the people, and sometimes they come to us. We don’t have a courtroom, and we’re not official. But we are sanctioned by the Taliban leadership to carry out justice using Islamic law.”<sup>36</sup> That is, “Taliban courts provide roving support to remote rural locations in Afghanistan” and were not “fixed to urban areas like many Afghan government facilities.”<sup>37</sup>

## Corruption

The United States understood that corruption was an issue. Allen, then commandant of the U.S. Marine Corps, testified to Congress in April 2014 that corruption was more serious than the insurgency.<sup>38</sup> One saying in Afghanistan was, “Government courts for the rich, Taliban justice for the poor.”<sup>39</sup> That is, the government courts were understood to be for the rich because of bribable government judges. And the “monthly cut of the bribes local judges extort” got paid “to the chief justice of the Supreme Court.”<sup>40</sup> According to a 2010 Integrity Watch survey of Afghan perceptions of corruption, half the Afghan population saw government courts as the most corrupt government institution in



Afghanistan.<sup>41</sup> According to a February 2013 report from Afghanistan's Tolo TV, more than 50 percent of the populace in Afghanistan used Taliban court systems rather than those of the Afghan government due to corruption.<sup>42</sup> For example, in an agricultural water rights dispute, according to the losing litigant, the winner had paid "lot of money for the lawyers and bribed for [sic] judges in the court."<sup>43</sup> A quarter of Afghans said they "felt deprived of justice" because of

Taliban and have the matter settled in one day. It's an easy choice to make.<sup>51</sup>

The Taliban courts don't disturb people and tell them to wait for a long time before hearing a case, or demand bribes. When you go to the Taliban and ask them for help, they tell you that they need a certain amount of time to study your case, and then they will tell you to come on a special day.<sup>52</sup>

“However, even with the ‘warnings,’ it appears that the Taliban civil dispute resolution services were superior to those of the government.”

corruption and a system fed by bribes.<sup>44</sup> This excluded women too as women generally did not have the financial resources to bribe.<sup>45</sup> One tribal elder estimated that 90 percent of people in Helmand sided with the Taliban, labelling the government "corrupt."<sup>46</sup> That is, "No one can trust them. Whenever we have a problem, we go to the Taliban and the Taliban court."<sup>47</sup>

Not all Taliban judges were incorruptible. One elder recounted a case in which the judge "issued a judgment 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-months in exile and his work as a judge was terminated."<sup>48</sup> Still, according to one elder, local villagers preferred to use the Taliban court for their cases because Taliban judges were not as corrupt as the government judges.<sup>49</sup>

## Efficiency Over Inefficiency

Afghan citizens also cited the expediency, limited cost, and access to Taliban courts as advantages over the government courts to resolve civil legal disputes, to include individuals who lived only a few miles from a government court:<sup>50</sup>

I don't like our current government at all, and I don't really like the Taliban, either. But I can either spend months in the government court and pay bribes, or I can go to the

## Enforcement

The Taliban had, and used, its power to enforce its legal judgments served as a source "for building legitimacy" for the Taliban.<sup>53</sup>

When we referred the case to the Taliban they solved it instantly, and now we don't have any problem. If there is any further disagreement over this land, the Taliban will first warn the objecting party, then give him a beating, and if he still persists, they will kill him.<sup>54</sup>

Taliban enforcement included enforcement on behalf of women too. For example, a woman's husband would not grant her a divorce even though she had a divorce decree from a Pakistani court and a fatwa from a local mufti. When a Taliban court then heard the case and ordered the husband to give a divorce, he did. According to the woman's brother, "Under the Taliban, even the weak have rights."<sup>55</sup> Arguably in contrast, the government courts did not support women in divorce proceedings. According to Afghan parliamentarian Shinkai Korakhail, government courts granted women a divorce in only 1 percent of divorce cases.<sup>56</sup>

## Warnings from the Taliban

Of course, Afghans may have used the Taliban courts solely because of "warnings" from the Taliban. According to one Afghan, "The people of the villages are not going to the government courts. The Taliban are warning them that no one can go there."<sup>57</sup>

However, even with the “warnings,” it appears that the Taliban civil dispute resolution services were superior to those of the government. Thus, as Swenson explains, “Avoidance of the [government] courts was entirely rational.”<sup>58</sup>

## Conclusion

And so, it appears that the need for civil dispute resolution is so overpowering that it leads to support for whichever entity, government or insurgency, will provide it, even if that entity is perceived to be antiwomen. In the end, is it a surprise that a woman gave her support to the Taliban rather than to the government?

It is my hope that this lesson will be learned and that it will be incorporated into doctrine, strategy, military education, planning, and training. ■

*The opinions and views expressed are the author's personal views and do not necessarily represent the views of the U.S. government or any of its components. This article is a condensed and updated version of a paper I prepared as a student of the William J. Perry Center for Western Hemispheric Defense Studies 2014 Terrorism and Counterinsurgency Course taught by Gen. (ret.) Carlos Ospina Ovalle, former commander of the Colombian Armed Forces, and Dr. David Spencer.*

## Notes

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**Epigraph.** Tom A. Peter, “Leery of Courts, Afghans Seek Taliban Justice,” *USA Today*, 7 March 2012.

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12. Ibid.

13. Ibid.

14. Peter, “Leery of Courts.”

15. Rod Nordland, “In Spite of the Law, Afghan ‘Honor Killings’ of Women Continue,” *New York Times* (website), 4 May 2014, 12, accessed 29 August 2022, <https://www.nytimes.com/2014/05/04/world/asia/in-spite-of-the-law-afghan-honor-killings-of-women-continue.html>. Such government practices occurred despite “being outside the law.”

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