

# **Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan**

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Between April 1 and April 10, 2006, a team consisting of Dr. Thomas Barfield, Omar Sharifi and Abdul Ahrar Ramizpoor visited three provinces in northern Afghanistan (Balkh, Kunduz and Takhar) to examine the current state of the Afghan legal system, particularly the relationship between the formal and informal systems. We met with judges (qazi), district attorneys (saronwali), local administrators (wuluswali), representatives of the new provincial councils, and village elders (mui safeed).

The formal court system functions in most rural areas, although in mountainous regions of Takhar access was reported to be difficult. About 80% of their caseload is civil, with the bulk of these cases focusing on disputes over inheritance, property and family law (mostly marriage and divorce). About 20% of the cases are criminal in nature but prosecutors noted a sharp decline in serious criminal offenses over the past four years. The courts and judges are widely disliked and avoided by most residents as a way to resolve disputes. People complain that the courts are too slow, expensive, and corrupt. Judges appointed by the Kabul government are often holdovers from the Taliban era whose knowledge of the law (governmental or sharia) is deficient and who are widely reputed to demand bribes. Given the nature of the appeals process, cases can drag on indefinitely even after they reach the Supreme Court level in Kabul because decisions of that court often throw the case back to the beginning or make a judgment that is locally unenforceable. Refusal to accept civil verdicts is common. While the courts claim an exclusive right to deal with criminal cases, the role of the police, district attorneys and other executive authorities often preempt their power because it is they who decide whom to refer to the courts. The courts have no effective power to take control of a case that is not referred to them even when they directly request it. Nor, once a criminal defendant is released for any reason, do the courts have an effective means of commanding his presence later even when the case remains legally open.

The informal system is much more popular because it is cheaper, quicker and more respected than the formal system for civil cases, in part because decisions there reflect a

greater respect for equity as opposed to legal nuance. In criminal cases it is the only way for victims to seek compensation for wrongs done to them or to restore harmony to a community divided by a criminal act (particularly homicide) because the court system focuses only on legal punishment. Representatives who decide such cases include village elders and mullahs who are accepted by both sides in a dispute to form a *shura*, the larger the problem the bigger the group chosen. People in the three provinces surveyed generally agreed that the influence of commanders and other formerly powerful local figures had declined significantly and that they were no longer in a position to act with impunity. Because decisions in the informal sector are made on the basis of sharia law, participants saw no conflict between their own interpretation of customary law and that of the court. Since the recent election, members of local provincial councils have begun to take the lead in handling disputes. Although they lack the formal legal authority to do this, they are more and more seen as mediators between the formal and informal system. Compared with thirty years ago, there is a much higher level of trust and closer connections between village elders and the local government. In part this is because at the local level officials are often members of the community themselves. They have local reputations to protect and are more familiar with local problems and the parties involved than officials, like governors, who are outsiders appointed by Kabul. By contrast judges in the court system are invariably outsiders who will not stay long in any one region. The old *arbab* system in which the government appointed representatives from each village to serve as links with the government disappeared during the war.

The general acceptance of the legitimacy and necessity of the informal system by officials working in the formal system at the primary level was universal. As the Deputy District Prosecutor in Mazar-i-Sharif, Nik Mohammad Waffa, explained,

*According to Islam, shura and consulting is always encouraged as the best way to settle disputes. Shuras are historical part of social life in Afghanistan from ancient times. They can work on social, family and criminal cases. Most of these cases use to be solved by shuras. According to the Afghan law, if there is a small dispute between husband and wife, even if it results in them beating each other, the law encourages them to settle it by themselves.*

Indeed the local *hoghoogh* offices recommend the majority of civil cases reported to them to the informal sector for resolution, particularly those involving less than \$200. Many cases that have gone through a complete cycle of court review were in the end referred to the informal sector for final settlement. Decisions in the informal sector for important matters are usually registered in the courts or *saronwali* office and therefore have some formal recognition. While actors in the formal sector claim a monopoly over criminal cases, they saw this monopoly as restricted to the "Rights of God" (*Huquq Allah*), that is in criminal matters those general overarching offenses against the state (as God's agent). But local communities have jurisdiction over the "Rights of God's servants" (*Huquq al-'Ibad*), the ability of individuals to seek personal redress in criminal matters. This may include compensation, apologies and reconciliation. Exchange of women as compensation (*bad*) was universally condemned as in conflict with both sharia law and local custom. Village elders and officials all pointedly noted that unlike the Pashtun south, such practices had never existed and were not condoned in the ethnic groups of the north.

In few of the cases we collected there was there any clear line between the formal and informal system. Executive officials regularly used the informal system to handle the majority of the disputes that came before them. Even court officials referred cases to the informal sector or accepted and recorded their decisions to end pending cases. Part of this is the result of more than two decades of war in which alternative forms of dispute resolution became the norm. During this period without formal government institutions it was often necessary to seek solutions based on consensus and this tradition has remained strong even as government institutions have reappeared. Men who practiced this form of dispute resolution and who now hold government positions still have respect for this tradition and are comfortable operating within it. Unlike their pre-war predecessors, who were appointed from Kabul and who often had little familiarity or sympathy with rural life, these men see the advantage of using local institutions to clear problems from their desks. Amanullah Khan, a saronwol in Imam Sahib, Kunduz, noted that courts did not object to this and even referred cases to shura councils. He complained that the formal system could not deal effectively with the 30% of cases that lacked written documents or had other technical problems that made it impossible to follow normal legal procedures. In such cases he appointed shuras composed of members who were respected for their ability in informal dispute resolution to settle them. He sat with council and their dispute resolutions were recorded in his office. A secondary court judge in Mazar explained that mediation was often necessary even after a case had been fully adjudicated.

*There was a property dispute in Mazar-i-sharif. A piece of land was sold with a fake document. The court also approved the documents because it was war. The property was sold four times to different people (the document was signed by Salikzadeh the former governor of Mazar-i-sharif). Recently the real owner of the land returned and claimed his property. But the present owner who had built a house on the land and spent a lot of money on repairing the damages refused to accept it. The three courts plus the Supreme Court decided in the favor of the real owner but the present owner refused to accept it on the basis of the money he spent for building a house on the on land. In the end the governor asked me to mediate. I sent for both of them. After long discussions I settled the dispute as follows: Although there was no question on the court decision, in order to have both sides satisfied, I asked the real owner to pay the expenses the present owner had made on the land which was about \$16,000. He paid it and the problem was solved.*

In another case in Kunduz, a land dispute that had been in the courts (including the Supreme Court) for over ten years was referred to a local shura of eleven mediators who settled it in two weeks and this decision was recorded in the case file.

The interplay of the formal and informal system takes place in three different realms: that of the courts, that of the executive authorities, and that of the ordinary people.

## Courts

The court system in Afghanistan has three levels: primary courts at the lowest level, a secondary appeals court in the provincial capital and a Supreme Court level in Kabul. In Kunduz, Qazi Mujeeb (Public Security and Special Crimes Court) noted that the court had three departments: 1) civil, business and public rights department, 2) ordinary crimes department, 3) public security department. This last handled 29 cases of corruption, drug smuggling, kidnapping and perjury during 2005. According to the prosecutor's office, major criminal offenses were down by 90% compared to the mujahideen period when Kunduz experienced two-three murders a week. By contrast Qazi Mujeeb noted that in the villages now the criminal cases were mostly for theft, animal rustling, cutting the trees and property disputes while those in the city consisted mostly of traffic accidents, theft and quarrels. The situation in Taloqan was similar and here the courts divided their work as follows: property cases on Thursdays, criminal cases on Sundays & Mondays, and the rest of the week devoted to civil cases. Here Qazi Aziz noted the court was willing to use the informal system to cut its workload:

*In most cases, we encourage people to solve their disputes through local shuras and councils. They have the right to choose their arbitrator(s). We never interfere in this process but at the end we stamp the arbitration paper as the representative of the court which gives it legal value.*

In Mazar-i-Sharif, one of the major cities of the north, the courts handled considerable more commercial cases. Even here there was a strong push to resolve these outside the court system but the courts here were more protective of their prerogatives. According to Qazi of the Mazar secondary court,

*In the business cases the priority is given to the traditions but it should not be against Islamic teaching. The decisions of the shuras do not have legal recognition. We do not interfere in this until it is referred to the court. Then we follow it according to the laws. No one has the right to interfere in the court decision. We are totally free in the decision making process. In family cases, if the shura takes a decision, we keep their resolution in the court as the evidence of settlement of the dispute.*

In practice it appears that such a strict line does not exist, such as the case below where the head of the newly created Provincial Council stepped into a dispute where the courts found for the plaintiff but in the process denied the equity interests of the defendants:

*A group of shopkeepers rented 16 shops in Mazar-i-Sharif 30 years ago. Recently the landlord sold his property to a rich merchant. He decided to destroy all the shops and build a super market. The shopkeepers refused to evacuate the shops because they are very poor and they can not afford to rent another shop with the present prices. The court decided in the favor the merchant but the dispute continued. At the end they came to the Provincial Council. I found out that they are really poor so I asked the landlord to come to my office and we held a shura with all Provincial Council members. At the end we asked the landlord to be generous and pay an amount of 2000 USD to each shopkeeper for the equipment and expenses they make during these years. He agreed and the case was solved. Our main purpose is to be a bridge between the*

*government and the people. I think having true and honest shuras will help the government and people.*

The chief District Attorney in Sholgar district, Balkh, similarly noted that,

*within these [past four] years, the rule of law is getting stronger in this province. We have different shuras in the district such as elders' shura, clerics' shura (Sunni and Shiite) and Islamic brotherhood shura. These shuras are in constant contact with government authorities.*

*In a meeting I had with the Shiite cleric shura, I told them that they can mediate in family and civil cases but not in criminal cases. If their cases are referred to the court, the decision will be according to the Jaafari School of Islam. It is not fair to let the shura handle all cases because it undermines the rule of the court and law. The shura should always base its decision according to the law.*

By contrast judicial officials were more prone to cite interference by the executive authorities. Indeed there seemed to be less friction between the courts and the informal system than between the executive and the judiciary. Complaints focused less on enforcement of court decisions than the concern the executive acted as its own parallel justice system, particularly in criminal cases. A judge in Kunduz cited the following case:

*The main problem for the court is lack of proper cooperation from Police Department. The corruption is not mainly during the court procedure but happens during the investigation by police.*

*For example, once the police captured 17 pounds of heroin in a truck. The drug was carefully stored among the fruit cartons. There were two people in the car, the driver and a passenger. After initial investigation, the police released the driver without consulting with the district prosecutor's office and sent the passenger, who was from Jalalabad, to the court. When we investigated the case, we found out that the passenger was beaten very badly. On the other hand he totally denied all charges and accused driver as the real smuggler. We sent a letter to the police department, demanding the re-arrest of the driver.*

*The police simply refused and wrote back a very illogical answer: we will arrest the driver when he is ready to be arrested.*

*Then we had to close the case because of lack of evidence.*

### **The executive**

This last case brings up the role of the executive officials in local legal matters. The main branches involved are, the civil law offices (hoquq), the prosecutor's office (saronwol), the police and administrators (governors, wuluswol, mayors, etc.). Because in terms of lines of authority, they are separate from the court system the courts have little control over them. Even within the executive the lines of authority between official who are part of the Ministry of Justice (saronwol) and those who report to the Ministry of the Interior (police) are separate. The local administrators have their own chains of command as well.

Officials at the local level see their job as acting as filters by which cases are sorted for disposition. Hajji Abdul Qodus Khan, head of Civil Law Office in Kunduz, said his job was to evaluate cases presented to his huqoq office according to the law and to decide whether to send a case to the civil court, refer it to prosecutor's office for a criminal complaint, or to refer to government if it involved a big issue. He argued that 60% of the cases he saw probably should have gone to court but that he tried to reduce this number by encouraging mediation so that he ended up sending only ending 20% to court. For such customary dispute resolution in minor cases he relied on elders drawn from the local community. For big problems and dealings with outsiders, he had at his disposal an unsalaried informal body of 15-20 elders recognized by government who were replaced or reappointed annually. Marital problems, like the one below, constituted a major source of dispute that such shuras dealt with.

*I have a brother in law; his name is Islam Khan. He did not have children from his first wife. Though it was clear that he is not able to impregnate her, he put all the blame in his first wife and decided to marry another woman.*

*He found a poor family from Shomali, who resided in Kunduz. He paid them some money and married the girl. Soon after they went home, the quarrel began between his wives. His first wife, who was the dominant figure in house, used to beat the second wife and deprive her of enough food and even proper clothing. On the other hand, Islam Khan lost his interest to his new wife and sided with his first wife. After this his second wife found life so difficult that she decided to flee her husband. One day she left home and went to Pakistan to her father. For eight years she lived there without contacting her husband.*

*After the collapse of Taliban, she and her father returned to Kunduz. Here she decided to divorce her husband but when she heard that I was the head of civil law department, she refused to come on the belief that I might side with my brother in law. After some time the people sent her to me. She came to my office and explained her story. When I realized what the truth was, I sent for her father to inform him what I was going to do. I went to the village in Aliabad where my brother in law lives and asked him to divorce his second wife. I also invited the elders of the village and told them the whole story. I blamed my brother in law for marrying his second wife because he was unable to have children and his wives had nothing to do with it.*

*Then I organized a shura of elders of Aliabad. They all decided to ask Islam Khan to divorce his second wife and in return she pardoned him the expenses of the eight years she spent with her father. He accepted the resolution of council and he divorced his wife.*

The huqoq's office in Taloqan also encouraged people to use shuras to settle their disputes, noting that as people's trust in government had risen, the number of cases presented to their office had also risen over the past year from less than 80 a month to around 120. Sayed Asrar Agha, the head of that office, explained that "When we feel that it is difficult to solve a dispute in the court, we encourage both sides to settle it in a Jirga" and gave the following recent case.

*Once a man gave one quarter of a jerib of land to his brother in law but after few years he decided to take back his land. He applied to the court on the grounds that his brother in law displayed a bad attitude towards his sister. We referred the case to the council of elders. They decided that as he freely gave the land to the husband of his sister, so he could not take it back again. The case was considered settled.*

Although the courts see criminal matters as their exclusive jurisdiction, the police and prosecutors offices (saronwali) serve as filters. Nik Mohammad Waffa of the Mazar prosecutor's office said,

*We have two kinds of rights, the Right of Person and the Right of God. The Prosecutor's office's responsibility is to never let the Right of God be violated. The shuras can only settle cases related to the Right of Person. It may decrease the punishment but still we will proceed with the law.*

*We are not sending [criminal] cases to the shura. If there is theft or a crime, the police report the case and this is our responsibility to follow it. When we have proved it then we send it to the court. The court announces its decision, if we find it unsatisfactory we send it to the second court and so on. We do not drop the case until we punish the criminals properly. I am pro having shura. I strongly believe it is very good for the people. But the decision of shura must be according to the Sharia and law.*

The prosecutors do sometimes, however, use evidence of a settlement in the informal sector to support a criminal charge. The head prosecutor of Sholgar district in Balkh explained that,

*Once there was a murder in the district but the accused strictly denied the charges. The people convened a shura and the accused agreed to give a bad, a daughter to the family of the murdered. This proved that he was the murderer, thus we arrested him.*

As described earlier, however, a great weakness in the system is the inability of the courts to force the police to find or hold defendants unless they wish to do so. And prosecutors may also choose to dismiss cases on their own as one did in the following case.

*Each crime or case has its own reasons. Once I was the district prosecutor in Badakhshan. The police arrested a man for stealing several kilos of wheat. They sent him in chains from a far district to the attorney general's office. I asked him the reason for his theft. He told me that his family was hungry and he had nothing to feed them with. Therefore he stole the wheat. I immediately freed him and sent him back to his place. The governor, Taj Mohamamd Wardak, asked me why, I told him the truth and he approved my decision.*

In one sense this flexibility to keep criminal cases out of court may allow context to be taken into account and serve a positive role. However, such flexibility also opens the possibility of corruption, as in the following case cited by the Provincial Council in Balkh Province shows.

*In Registan village a group of four thieves attacked a herd and tried to steal the sheep. The shepherd called the village and asked for help. Around 400 people*

*arrived in the scene and surrounded the thieves. In the conflict that followed two of the thieves were killed and others were captured. They confessed that they wanted to steal the herd. But later they bribed the district attorney's office and now the district attorney claims that they were not thieves. They were merchants who wanted to buy the herd. It is very illogical but they are pushing for this and sucking the money of the people. The case is still open and we are trying to find a just way for this.*

### **Ordinary people and Provincial Councils**

Historically, rural people attempted to keep their problems out of government view. They avoided both the courts and the civil authorities. Interviews with elders and officials in Imam Sahib, where I had worked thirty years ago, displayed a much closer integration between local communities and government institutions such as the mayor's office and the local huquq. Local elders (mui safeed) are now sought out by the government seeking their help in making assessments about land claims and inheritance disputes. As mentioned earlier this new openness is in part the result of having local officials who are also members of the community. Many of these leaders established reputations for problems solving during the war and retain strong reputations from that time. Another reason for the popularity of such shuras is their stress on equity even in the absence of a formal legal right (as a large number of previously cited cases make clear.) A new aspect of the informal dispute resolution is the growing role of the newly elected provincial councils. These were established by the Afghan constitution as advisory bodies, but their power and authority was unclear. They have quickly become intermediary bodies for dispute resolution.

The Provincial Councils in Taloqan and Balkh provinces proved to be particularly active. The head of Provincial Council in Mazar-i-Sharif, Farhad Azimi, explained his council's role as follows.

*We are working according the provincial council law, signed by the president. According to the law, the Provincial Council should have a consultative role but we also bridge the gap between the people and the government and help them in settling their disputes. As you know the court and district prosecutors' offices are heavily corrupt. The people always prefer to solve their problems through local shuras and the Provincial Council. We have received more than 25 cases recently and solved about three. Our decisions and resolutions are based on Sharia and Afghan law.*

*The government has an effective presence in the villages. The local shuras mainly consist of the elders, white beards and intellectuals. The commanders and arbabs lost most of their authority and have a minor role. The main disputes are on land issues and fake documents. The people avoid courts because of awful corruption there. We do not have executive power but the people and authorities respect our decisions.*

*Our main purpose is to be a bridge between the government and the people. I think having true and honest shuras will help the government and people.*

Qazi Mufrad, a member of the Takhar Provincial Council gave a very similar statement.

*As the main task of the provincial council is to bridge the people with the government, in the first instance we have to deal with cases from all over Takhar. This was really difficult. Therefore we created shuras in each district of Takhar. The main responsibility of these shuras is to help people solve their disputes, mediate in family cases and bridge them with the government. Their judgments are based according to the Sharia and traditions that are not against the Sharia law. Our tradition is unlike Pashtuns, based on humane and Sharia laws.*

### **Women's issues**

Women's issues, particularly revolving around disputes over engagements and marriage, divorce and inheritance, constitute a large number of cases. Qazi Aziz, a judge in the City Court of Taloqan noted that while serving in the south women's issues rarely appeared on his docket, while in Taloqan they made up a considerable number of cases, although his estimate of 75% may have been an exaggeration. He attributed this to women in the north being more "awakened," in regards to their rights than those in the south. Perhaps more pejoratively a Provincial Council leader was blunter about the difference.

*As you know the fundamentalist mullahs always keep the people in darkness but fortunately the war has shaken the power of mullahs and people are awake now. The evidence of this is my daughter. She was a candidate herself for the provincial council and despite of numerous efforts of the mullahs, she won 9000 votes.*

In all three provinces people made it clear that their customs differed from those of the Pashtuns in the south. As an elder in Imam Sahib stated,

*Among Pashtuns women can not inherit anything and the widows are not permitted to re marry except to her husband's brothers. It is totally different with Uzbek and Tajik women. They are allowed to inherit and get married after the death of their husbands.*

This difference is one of long standing and Pashtuns long resident in the north have been pushed to bring their own customs in line with other groups on the grounds that Sharia law should prevail in family matters regardless of tradition. The current head of Civil Law Office in Kunduz, Hajji Abdul Qodus Khan, explained that he had dealt with such issues long before the Karzai government came to power.

*As you know, during Mujahidin period, the power of central government collapsed and every where the armed groups took control of the towns and villages.*

*During those days, a man from Achikzai tribe murdered another man from different tribe in Aliabad district of Kunduz. According to Pashtun tradition the accused family should offer two girls to the murdered family. The quarrel continued for long time between both tribes. At the end, they decided to send for*

*me. As you know I was the commander of Aliabad district but in that time for some reasons I had to leave my home and reside in Baghlan. They came to my house and asked my help. I went to their Jirga for mediation. After long and frustrating discussions, I made them accept one girl instead of two. Two days later the Achikzai tribe brought the girl to my house. She was only nine years old. For whole night she was crying and asking for help. In the morning I went to the Jirga taking the girl with me. I asked the family of murdered man to do me a favor and let the poor girl be with her family for one more year. They agreed and I brought the girl back to her family.*

*I should say that giving girls for compensation and making peace is against Islam and Sharia. I am strongly against it and till I am here, I will not let it happen. Fortunately it does not exist among non-Pashtuns.*

We saw examples of this in all three provinces. The Takhar Provincial Council stepped in to end abuses in arranging marriages.

*A father married his daughter against her will to an old man. He paid the father a huge brideprice. The girl protested several times but her father refused to listen. Therefore she escaped to the city and went to the Women's Department of Takhar. They send us the information and asked our help. We went to the village to discuss with her a possible divorce but her father refused. At last we organized a shura of the elders and clerics. They decided that forced marriages are against the will of God and Sharia law. We forced the father to accept the divorce and let the girl return to her home. Then we sent a letter to all the shuras in each district, informing them about the decision of the elders and clerics.*

In Mazar a local qazi in the secondary court reported his reaction to this case:

*Once the judge in Kaldar village married a girl to someone she wanted and loved. The arbab of the village with around 60 people came to my office and complained about the decision. I asked him whether was she already married or engaged to some one else? He said no. So then I told them to leave because the decision was based according to the Sharia and law.*

On the other hand, officials in a district in Kunduz province attempted to arrest a troublesome woman as a prostitute for lobbying too hard for women's rights, but when the police arrived she became so enraged that she beat them with a stick until they fled. Local officials were mulling over the idea of sending a delegation of elders to meet with her and if that failed they suggested they might use the "Public Security and Special Crimes Court" claiming her actions could constitute a threat to national security.

## **Conclusions**

At the provincial and sub-provincial level, it is clear that methods of informal dispute resolution are readily accepted by local courts and executive officials. They commonly refer cases to such informal mechanisms even after they have entered the formal system in order to resolve them and that the records of such decisions are attached to case files as proof of their resolution. The Civil Law Offices (*huquq*) in particular seek informal dispute resolution mechanisms to solve most of problems brought before them. Because

both the formal and informal systems see sharia law as the basis of their decision making, there is no immediate conflict between the principles of "customary law" and the laws of the state. Local court and executive officials alike made it clear that the formal system could not cope with the burden without such referrals.

It was also clear that the informal system was seen as a means to remedy abuses in the formal system, which was widely criticized for being incompetent, corrupt, and too rule bound. By stressing equity, the informal system seeks judgments that are both socially acceptable to the community and that are seen as fair by the disputants. So many of the informal cases we were given involved cases that had gone through the courts but that could not be enforced because the losing party refused to accept the verdict. The refusal was less based on the loss of the case than the court's inability to consider the social consequences of its actions or deal effectively with the issue of "unjust enrichment" by the winning plaintiff. Local shuras by contrast investigated the social context of the dispute. They could determine whether an illegitimate owner of land was an innocent victim who needed some sort of compensation or a thief who should be justly dispossessed of his ill gotten gains. Courts could only determine who was or was not the legal owner of property. In other cases they were able to persuade parties that in the name of justice and equity they should make allowances to reduce the negative impact on poorer members of the community that resulted from the termination of longstanding, but not legal binding, relationships.

Outsiders, including government official at the national level, often assume that local mechanisms of dispute resolution are fixed in some age old "customs" that are impervious to change and obstacles to progress. In fact both the content of "customary law" and its mode of implementation change with time and social conditions. For example, not only was their universal condemnation of *bad* (exchange of women in marriage as compensation) but there was also a strong move to condemn and prohibit all forms of forced marriage as in violation of sharia law and hence un-Islamic. Perhaps more significantly is the emergence of new institutions to handle informal dispute resolution. The most significant of these are the newly created and recently elected provincial councils. They see themselves as links between the formal and informal systems have taken on a great deal of authority in dealing with such disputes. This is an institution that can move between the two systems and has legitimacy in both. Its popularity as a forum demonstrates that rural residents of Afghanistan are not averse to innovation and may provide an important structural mechanism for using customary forms of dispute resolution without incorporating that would be easier for the national government to recognize.