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Negotiating Afghan 'Traditional' Law in the International Civil Trials in the Czech Republic[1]

Tomáš Ledvinka[2]

Abstract

Along with whatever belongings they carry, migrants and refugees always bring their laws, cultures, and contextually specific experiences (feuds, state failures) in some form to their host countries. Various migrants' identities may include law as a dimension that belongs to specific collectives (tribes, religious communities) beyond the nation-state. In contrast to the juridical notion of law as a dimension of the nation-state, legal systems within countries such as Afghanistan are sometimes classified as 'legal systems based on reciprocity', or 'horizontal legal systems'. Encounters of judges and other legal experts in the Czech Republic with such legal systems within the framework of international civil trials are driven by an official imperative that the foreign law must be understood as the law truly applied in the country of origin. Such a situation unsettles deep-rooted notions of the state, generates uncertainty about conventional understandings of the law, and indicates the necessity of employing legal-ethnological conceptual tools. Drawing on empirical cases involving Afghan law in the form of foreign law in international civil trials, this paper investigates the difference between a legal understanding of Afghan law in the Czech legal framework, achieved mostly through the concept of state law, and an ethnological understanding of law in Afghanistan based on Pospíšil's analytical concepts. Finally, it suggests the relevance of applying the analytical distinction between legal sodalities and legal modalities.

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Introduction

Traditional Afghan dispute resolution bodies (which are usually called '*jirgas*' or 'councils' in related Western literature) have a number of features that are unfamiliar to judges in the Czech Republic who may encounter them within the framework of international civil trials. These include: the gathering of men sitting on the ground, ceremonial dress code, discussions in the open air, sometimes under a tree with a backdrop of a parched landscape, or in some traditional inner meeting space, for instance in "a grandiose and beautiful hall (…) decorated with finely engraved wood" (ILF-Report 2004: 36), to name just a few. The bodies are referred to by different terms in various social segments of Afghanistan: they are usually called '*jirga*' in southern Afghanistan, '*maraka*' or '*majiles qawmi*' or '*jirga*' in the central region of Hazarajat, '*awri*', '*awra*', '*awrjast*', '*uloo*' or '*landhyar*' in Nuristan, '*shura-e-eslahi*' or '*shura-e-qawmi*' or '*jirga*' in northern regions of Afghanistan, '*mookee-jamaat-khana*' within the Ishmaelite community, and '*majles-eslahy*' in some Uzbek communities (ILF-Report 2004: 7, 21, 36, 51–53). We find further clarifications about the dispute resolution bodies, e.g., in a report by USAID which states that "*Shura* and *Jirga* are interchangeable terms for traditional decision making assemblies at the village, district and provincial levels, the former is a Persian/Dari term and the latter is Pashtu term" (USAID 2005: 8). The word '*shurá*'[3] is usually translated as 'meeting', while *'jirga'*, which has already been domesticated in Western experts' vocabulary, is translated as 'council' (Carter and Connor 1989: 37). Many ethnic groups "lack the regimented institutions of *jirga*, but most have traditions of ad hoc village assemblies (*Shura*) that mediate and make decisions. Dispute resolution relies on village elders (*rishsafid*, Persian; *aqsaqal*, Turkish) or important political leaders to serve as judges or mediators" (Barfield, Nojumi, and Thier 2006: 11). For the outside observer from the West, the nature of these bodies is unclear and difficult to interpret: there are people waiting or taking a break, a meeting, something religious or customary. Although the men occupy the ground seemingly at random, it may be noticed that they actually sit in a circle, which may indicate a kind of a council of elders or trusted men in the community, and perhaps also a dispute-resolution body. But these aspects of Afghan law usually do not reach the Czech judges surrounded by bundles of files in their bureaucratic offices inside historicist or modernist palaces of justice, who are supposed to apply this law. And nor do the deep structural differences of Afghan law that lie behind those noticeable idiosyncrasies. The law of Afghanistan in fact appears in a Czech judges' office only through textual materials.

Judges in the Czech Republic, as in other European countries, sometimes face the duty to apply foreign law (in this case Afghan law) in the context of international civil trials involving migrants that are governed by private international law (conflict of laws). Foreign law is a specific 'juridical'[4] category and refers to the law of another country; it may be applied in various ways depending on the circumstances of the case and so-called collision or conflict-of-law rules of private international law. In the Czech Republic, this is laid out in section 23 ('The Ascertainment and Use of Foreign Law') of the Act on Private International Law which states that "a foreign body of laws which should be applied (…) must be applied in the way that it is used in the territory to which it applies" (2012). Unlike legal authorities in common-law countries where foreign law

[3] Besides the terms mentioned in quotations I use Atayee's *A Dictionary of the terminology of Pashtun's tribal customary law and usages* (Atayee 1979) together with Pashtoon's *Pashto-English dictionary* (Pashtoon 2009) for the transliteration of the Afghan legal terminology.

[4] I use the term 'juridical' in order to refer to ordinary legal practices conceptualised by legal doctrine.

might be submitted to the court by a litigant as ‘proof of foreign law’ (Collier 2001), Czech judges are supposed to navigate through the law of other countries using only its textual representations and their theoretical legal knowledge. When a foreign law is applied as a binding law in private (civil, family, inheritance, or commercial) matters it involves “one-shot applications of foreign law to specific litigants” (Whytock 2010: 53) who are usually both foreigners. Before this can happen, however, there is a legal imperative to conduct thorough research ex officio behind the scenes of a court. In cases of very unfamiliar legal cultures such as that of Afghanistan, judges face an enormous task in identifying the actual law and correctly familiarizing themselves with it. Besides the legislation of the government in Kabul and the system of state courts, judges may also encounter information about various unusual forms of law that are mostly embedded in the above-mentioned traditional legal authorities. Together with the data about the ‘nominal’ or dysfunctional nature of the state courts and legislation (Elliesie 2010: 1), these ‘facts’ may cause a reorientation of the understanding of what the actual law in Afghanistan is.

I became involved with this topic through my work as a foreign law expert for the Czech Ministry of Justice. My routine work was to prepare numerous materials for the application of foreign law by Czech judges, assist them with it, and work with other experts on international judicial assistance. During this time I was also conducting my PhD in anthropology at Charles University in Prague, and I soon realized that the processes of applying foreign law were of great ethnographic interest. I began conducting a “para-ethnography” (Riles 2006a: 53) which subsequently crystallized into an extended research project. The peculiarity of my position as both a researcher and a practitioner resulted in a distinctive anthropological awareness *in* conducting routine legal activities and conversations with legal professionals. As a legal professional I understood the Afghan law that was to be applied in the specific cases by Czech courts as a ‘text’ that is relatively easily transferable from one country to another, with only the issue being at most its culturally differing legal interpretations; at the same time, as an anthropologist, I realized that Afghan law that is situated in various international civil trials is abysmally different from the law applied in its original world, and that, additionally some of its knowledge was successfully transmitted in these international trials, while other parts were lost entirely.

In this vein, this paper ethnographically focuses on the difference between the ways Czech judges apply Afghan law in the textual form of foreign law (part one) and the ways Afghan ‘traditional’ councils resolve translocal disputes (part two). The legal practices of both Czech judges and Afghan ‘councils’ are considered complex, reasonable, and efficient in the terms of their own worlds. However, I would point out that some aspects of Czech legal practices resist being studied using the conceptual and methodological equipment of legal ethnology, while some aspects of Afghan legal practices are not approachable via conventional legal education. During the research I had to grapple with this incompatibility – or at least uneasy compatibility – between the anthropological attitude, which tends to add culture, context, and details, and the reductionist juridical attitude, which tends to filter out any culture and context, including the reality of Afghan law on the ground. In this regard, accommodating anthropological expertise related to Afghan law to the judge’s narrow focus on the applicable law as a purely normative and textual phenomenon still seems to be inconsistent with the social anthropology’s tendency to study law on the ground, as an empirical social phenomenon. For that reason, an anthropological understanding of Afghan law cannot realistically contribute to the application of Afghan law (in the form of foreign law)

without a kind of anthropologization of Czech (or of any other state) legal authorities' "distinctive manner of imagining the real" (Geertz 2000: 173).

It hardly needs to be said that preconceived categories or analytical tools of different disciplines imply different research politics and outputs. In the case at hand, the politics of the research of law in Afghanistan is usually dominated by categories such as the rule of law (Wang 2014), human rights (Rubin 2003), women's rights (Drumbl 2003), and state-driven modernization (Amin 1992). Even some papers written from an ethnological perspective use these categories as their starting point (Barfield 2008). Although modern – supposedly universal – legal concepts are admittedly shaped by the various local arrangements of legal fields, adopting these categories obstructs, in my view, anthropologists' traditional vocation to construe the Afghan 'traditional' law in terms of its own world. Namely, the discourse of the rule of law, to which Czech judges are usually exposed and 'belong' (Levitt and Schiller 2004: 1010), is directed at a vision of legal reform that is located in the future and is dominated by the notion of law as a dimension of the Afghan state. In this discursive perspective the actual realities of the law on the ground in the present attract little attention and are perceived, at most, as obstacles that hinder legal evolution and progress. However, for experts (whether lawyers, social scientists, or both) who need to study or apply the law as it is applied in the original world, the discourse of the rule of law represents a kind of bias which distracts the attention of legal research from the law in the present. The same applies for legal-cultural dichotomies such as formal–informal, official–traditional, state–non-state, law–culture etc. They help to generate only a static version of 'legal pluralism' in Afghanistan – usually reduced to a combination of the three possible forms of law (state legislation, customary law, and *sharīʿah*) – without taking into account how or whether these forms are actually applied by legal authorities (Kamali 1985; Sadat 1986; Etling 2003; Amin 1992; Yassari and Saboory 2010; Wardak 2011). A more dynamic picture of legal pluralism in Afghanistan focuses on the relationships between Afghan traditional 'councils' such as '*jirgas*' and Afghan state courts and the fluctuation of people between them. This approach, too, however, fails to open the black box of Afghan 'traditional' law (cf. De Lauri 2013).

In the context of the encounters of Czech judges with Afghan 'traditional' law, this contradiction between *data* and *discourse* unsettles the conventional idea of law and suggests the need to employ legal-ethnological concepts in research. For this reason this *problematique* is deeply related to an extensive debate about the tensions and possibilities of cooperation between two so far seemingly irreconcilable theoretical and methodological positions: the ethnological emphasis on cultural particularity and the legal emphasis on modern normative universality. The mutual relationships between anthropology and law (Benda-Beckmann 2008; Geertz 2000; Donovan and Anderson 2003; Tuori 2015; Goodale 2017) or human rights (Riles 2006a: 52; Engle 2001: 67; Merry 2003: 67) or legal sciences (Bohannan 1967: 47–48) are still somewhat controversial, while the universal claims of the rule of law and other legal concepts are broadly accepted among social scientists. Many anthropologists paradoxically perceive these claims as incompatible with the idiosyncratic value of humans and their right to self-determination, which may be considered the legacy of Malinowski, who saw law as embodied directly in human beings (Malinowski 1922: 10–11). Today more than ever before, it seems that law and anthropology have become aligned – at least in academic rhetoric – as anthropology's 'culture' concept becomes more fluid and dynamic and the contextual limits of many legal ideals become recognized. The divergence of law and anthropology has, nevertheless, emerged anew in situations where anthropologists and their expertise are needed,

e.g., for "the use of anthropological evidence in specific instances of dispute resolution such as trials" (Nafziger 2017: 7). This has been studied specifically in relation to asylum proceedings (Gill and Good 2019). When serving as expert witnesses, anthropologists were often required to compromise the presentation of their knowledge with the legal way of thinking under the pressure and demands of trials. They were required to speak in the undesirable language of 'objectivity' as the only language that modern adjudicators were allegedly willing or able to hear (Good 2007: 54). Much like asylum proceedings, international civil trials are also a site of struggle over disciplinary ontologies and epistemic authority. Here, too, the anthropological attitude regarding the application of foreign law, if involved, may also be subject to procedural demands and trial pressures. In particular, the anthropological insistence on 'irreductions' (Latour 1988: 192–211) and "commitments to contextual differentiation" (Riles 2006a: 54) are contradicted by the doctrinal, somewhat reductionist, legal approach towards foreign law as merely a text to be interpreted. As a natural response to the pressure to accommodate to a 'given' situation such as a trial, social anthropologists tend to challenge, as in this paper, things that are accepted as 'given' by instead offering a proper ethnographic description or some kind of anthropological reflection.

Methodology and Analytical Tools

In order to arrive at a precise, nuanced, and situated understanding of how the courts apply foreign law, I adopted a research strategy that combines 'participant comprehension' (Hess 2007: 234), semi-structured interviews, and the analysis of legal documents and internet sources. My research included informal interactions and observations of the development of legal arguments about foreign law as well as analyses of written sources, debates, and informal conversations with lawyers and judges. The research also consists of semi-structured interviews (of 37 individuals in total) which were conducted in 2014–2015 and 2018–2019. The interviews provide insight into the final phases of the application of foreign law in particular, whereas the participant research focuses more on the preparatory phases. Each of the informants was professionally committed to the application of foreign law to a very significant extent. Many of them were so helpful as to also forward me textual materials mentioned during the interviews (the 'Afghan' cases contain extensive textual material which travels into international civil trials through various channels ranging from the internet to consular and diplomatic communications). The formal hierarchy of the Czech courts was particularly reflected in the fieldwork – I gained access to three tiers of the Czech justice system via the semi-structured interviews. The Supreme Court of the Czech Republic is the best represented in this research by two judges, three foreign-law experts, and one district judge who previously worked at the Supreme Court. In addition, many interviews with lawyers gave me insight into how the system works from the non-judge perspective. This paper, however, reflects merely a small segment of the ethnographic research into the study and application of foreign law. Afghan law was involved in a miniscule portion of the total number of cases examined (only four times during the research periods mentioned above). In general, however, the study and application of foreign law (whether Afghan or other), though a tricky and ambiguous task, is formally codified and ordinarily perceived as a part of judges' standard routine rather than a contested issue (as outsiders might expect).

This research further adopted several specific ethnographic solutions which particularly help to situate 'law' in the ethnological sense within the broader realm of normativities, practices, and cognitive operations that are conventionally considered legal, doctrinal, judicial, or juridical by

legal theory. First, I adopted Llewellyn's and Hoebel's concept of the trouble-case method that suggests that the cases themselves (in this case, of 'application of foreign law') are the most appropriate ethnographic site at which to start the study (Llewellyn and Hoebel 1941: 29). In this regard I followed Conley and O'Barr's imperative that in the ethnography of legal discourse it is necessary to give equal consideration to "what the participants in legal institution are saying" (Conley and O'Barr 1990: 2) as to documents as "paradigmatic artifacts of modern knowledge practices" (Riles 2006b: 2). In the context of international civil trials there is nevertheless also the difference between legal authorities who construe foreign law on the basis of various documents and the authors of those documents and their informants, including academics and native authorities.

In trial situations that involve application of foreign law, legal professionals (like the authors of documents about Afghan law and their informants) may be seen as both linguistic and intercultural 'translators' (Cunningham 1992) and the Afghan law itself may be conceptualised as a 'travelling model' or 'token' that is "de-territorialised from its original setting and re-territorialised in new settings and problem-spaces" (Behrends, Park and Rottenburg 2014: 3–4). In this vein, the result of this paper, rather than its method, might to illuminate the difference or rather the contrast between some aspects of the ways Czech judges apply Afghan law and the ways Afghan legal authorities resolve disputes.

Since this perspective requires making legal cultures as different as those of Afghanistan and the Czech Republic commensurable, at least in some regards (while at the same time state sovereignty is disqualified as a point of departure), I adopted Pospíšil's analytical concept of law as an open set of elements which characterise certain social actions as being of legal nature. Pospíšil's concept is fabricated in such a way as to be applicable regardless of whether the law operates on the level of a state or society as a whole, or on the subsociety or substate levels, and helps to distinguish the law from the rest of a culture (customs, habits, material representations of social reality, etc.) according to four attributes (authority, intention of universal application, obligation, and sanction), and three forms (abstract rules, decisions, and regularities of human behaviour). Each of these elements can be relatively easily ascertained in the field, and in this way Pospíšil's approach differs from the essentialist categories of law which allow researchers to project their own cultural background onto the legal unknown.

One of the elements that I emphasize in this paper is the presence of legal authorities, i.e., a person or persons "in many ways comparable to the state [who are] regarded as jural authorities by their followers" (Pospíšil 1967: 7–8) inside various segments of the society in question. The importance given to the issue of authority cannot be better illustrated than by Pospíšil´s brief remark that "the totality of principles incorporated in the legal decisions of an authority of a society's subgroup constitutes the subgroup's legal system" (ibid.: 9). This understanding of 'legal authority' is articulated as a part of a much more complex anthropological comparative theory of law which is meant to avoid the tendency to limit the enquiry into law to the state level only and which breaks down the dichotomy between state and non-state law. As a result, any real legal authority identified by this concept may be situated within a continuum of various degrees and elements of formality, ranging from extremely informal to extremely formal, and a continuum of various degrees of power, ranging from those who rely only on the power of personal persuasion to those who use also brutal force of various kinds (Pospíšil 1974 [1971]: 60–61). In part two of this paper, I also suggest adding a third continuum into which an authority in question can be situated,

ranging from a high degree of social integration into the social group or subgroup affected by the dispute to significant remoteness from the social (sub)group(s) in question. This can help us to take into account situations in which a judge is an invited member of another segment of society or a stranger who acts in the framework of hospitality.

Even though social anthropologists as well as many legal scholars would agree in principle with the Pospíšilian perspective, at any occasion during their actual research they can be tempted to return to the essentialist viewpoint. For this reason, I intend to strengthen Pospíšil's position by reflecting the law not only in terms of the systems of rules but also by emphasising the authoritative dimension of law and its societal configurations as legal sodality. Following Flood's suggestion that the "theory is to be viewed as part of the research process, not its goal nor necessarily its starting point" (Flood 2005: 33), I see the purpose of using Pospíšil's analytical concept of law at any moment of the research as providing a way to "destabilize taken-for-granted definitions of law, thus revealing the multiple ways that law is understood and practiced" and "inform legal practice and vice versa" (Coutin and Fortin 2015: 71–72).

Organization of this Paper

In the first part of this paper, I focus on how judges in the Czech Republic look at the law in Afghanistan when endeavouring to study or apply it in the form of foreign law within their domestic legal framework. The application of foreign law in international civil trials provides anthropologists material on the cultural practices and strategies used by modern nation-state courts for dealing with and construing both the Afghan state and 'traditional' law. The situation of liminal contact with the law of Afghanistan, which consists of multiple legal systems with mutual 'reciprocal' relationships (Rosen 2000: 59), is indicative of how modern state courts neutralize immense legal differences and 'colonize' the law from another place and time, or, as one of the foreign law experts put it, 'from another planet'.

In the second part I suggest how an ethnological understanding of the 'traditional' law in Afghanistan can be achieved by using Leopold Pospíšil's analytical concept of law (Pospíšil 1978: 8–13) while still upholding the official legislative imperative to apply foreign law exactly as it is applied in its original world. As "the divergence (…) between the Czech situation and the Afghan situation" (Eddy 2009: 4) is enormous, the analytical concepts of Pospíšil´s legal ethnology are needed in order to overcome the static image of the pluralism of legal forms (state law, customary law, and *sharīʿah*) in Afghanistan or the exclusive focus on the litigants' fluctuation between '*jirgas*' and other councils on the one hand and the state courts on the other, which is usually based on conventional legal dichotomies (formal–informal, official–traditional, etc.). In this part of the paper Pospíšil's theoretical and conceptual equipment reveals translocality, mobility, and composite character as specific features of 'traditional' legal authorities in Afghanistan, which requires a fundamental reconsideration of Pospíšil's premise that law may be viewed merely as an *intra-group* social phenomenon (Pospíšil 1978: 52–60).

In order to recognize the specific kind of 'social organization of law' (Black 1973) that is dominant in the segmented population of Afghanistan but suppressed in the monolithic societies of modernized nation-states as well as in the conventional discourse of the rule of law, I suggest employing a distinction between *legal sodalities* (where the emphasis is on the law as communication in the form of inter-group meeting-like associations of legal purpose) and *legal modalities* (where the emphasis is on legal normativity as objective or objectified systems of legal

knowledge) that will be in the closing section of this paper (‘Differing Realms of Legal Reciprocity’).

Part One: the law-culture divide in international civil trials

The first step taken by Western legal professionals who wish to familiarize themselves with the law in Afghanistan today is a cursory look at internet sources on Afghan legislation. Such information is indeed available online, at least in some languages, and meets the basic demand to know. More detailed information about Afghan law nevertheless shows that statutory laws, in spite of the fact that they were formally enacted, are mostly not applied in the country. Additionally, the so-called state courts, except, perhaps, the Supreme Court of Afghanistan and a few other tribunals, are, at least in the light of the reports mentioned below, massively overshadowed by ‘traditional’ legal authorities. To put it bluntly, in many cases the state law of Afghanistan can hardly be considered law at all, or at most only a ‘soft law’. By contrast, the Afghan ‘traditional’ law that is usually hidden beyond the façade of the state for outside observers may stand *above* rather than beneath the state rules in many cases. My intent is not to imply hierarchies, either between state courts and ‘traditional’ dispute resolution bodies, or between state law and the other law, but rather to suggest that their mutual relationship can only be determined on a case-by-case basis. However, I see this from a rather remote perspective of my field-site in which I primarily ask: What happens if a judge or other legal professional outside Afghanistan encounters such unusual information in the context of trials that call for consulting Afghan law? How does she handle a situation in which state sovereignty, although important in other domains, does not serve as a solid point of departure for researching law in that particular country? To illuminate this question, I describe the strategies used by Czech judges during the preparatory stages of the study of Afghan law in the form of foreign law before it is applied as ‘binding law’ to ‘specific litigants’ (Whytock 2010: 53) in international civil trials, with all the difficulties caused by the trial situation.

When a foreign law is involved in an international civil trial, Czech judges are usually required to undertake thorough legal research of this law ex officio in accordance with the official imperatives of the Czech Act on Private International Law (see the introduction to this paper). The judges are not experts on other countries’ legal systems; nevertheless, they are supposed to navigate through the law of a foreign state such as Afghanistan using only their theoretical legal knowledge. In practice, the judges themselves have to become substitutes, for instance, of Afghan legal authorities towards the Afghan litigants while the judges are usually acknowledged merely on the basis of the legislation available to them. (Calling upon expert witnesses is permitted by Czech law, but the option is seldom used.)

The application of foreign law is one of the core themes of private international law (the conflict of laws), where the procedural environment is international civil trials concerning the resolution of status issues or property disputes (mostly family, civil, and commercial matters) that include a significant cross-border element (or ‘factor’) which connects the case to a foreign country. The factor might be, for instance, the fact that one or more of the litigants are foreigners or that the contract is subject to foreign law. The country whose ‘foreign law’ is applied by Czech courts ranges from neighbouring states like Slovakia or Austria to very unfamiliar countries such as Afghanistan, Japan, or Yemen. Such cross-border trials include numerous aspects of ethnographic interest, from culturally specific behaviour of litigants in the courtroom to various cognitive

strategies employed by legal authorities to cope with legal-cultural difference. Nevertheless, doctrinal jurisprudence seldom focuses on more than the interpretation of two elementary issues: rules which determine the applicable law and rules determining whose state courts have jurisdiction (conflict-of-laws rules and jurisdictional rules). This paper only marginally touches on this doctrinal understanding of foreign law. However, it is important to note that Czech legal doctrine (the law as described by law professors) conventionally divides the application of foreign law in international civil trials into the phases of determination, study, and application. The first phase (determination of the foreign law) involves determining which country's laws should be applied to the case. In this phase it is decided whether to apply domestic or foreign law to the case as a whole or to some of its elements on the basis of, e.g., a clause in a contract that refers to foreign law, someone's foreign nationality, the location of real estate abroad. To this end, the civil judge consults international treaties on international legal assistance in private matters, European regulations, and the Czech Act on International Private Law, all of which are a part of the Czech legal order. In the second phase (the preparatory study of Afghan law), the Czech civil court may have to ask for a copy of the foreign law, which then must be translated and interpreted on the basis of aforesaid Czech legal prescriptions. This phase is considered a natural precondition for the appropriate and correct application of foreign law in place of domestic law. This last process is the most complex, and involves the activation of knowledge of the foreign laws and precedents which are variously interpreted in relation to the case. Nevertheless, there are also other, less complex situations for which the laws of a foreign state are used in trials: the recognition and enforcement of foreign judgments (or arbitral awards) and the recognition of a foreign court's jurisdiction. In such cases, the civil court does not try a case according to law but only approves the foreign court's ruling or its entitlement to make such a ruling on the basis of reciprocity. The research to determine whether reciprocity applies to the case may nevertheless require the study of the foreign law in question as well. While there are clear doctrinal distinctions between the formal application of foreign law and the formal recognition of a foreign judgment or foreign jurisdiction, the judge's cognitive strategies in each case are neither reflected nor mentioned in doctrine; they are similar in principle but as they take place in an empirical dimension of the trials, they are not recognized by legal doctrine.

From the doctrinal perspective the application of foreign law may seem to be a purely technical issue, but it often has a deep existential dimension. It is significant that one judge described an encounter with the foreign law in an international civil trial in this way:

> "Before coming to the [Appellate] court, I had a file from the year 2013. Divorce, proposed by the Czech husband. They had a minor child, a daughter. So the proceedings were first about the daughter. It took about a year, and I was hoping to conclude the case by the end of the year. I applied Czech law, because he was Czech, and they lived in Bohemia. In applying Czech law, I went against the cultural otherness of the Japanese wife. She was completely different (…). Once, she even left the courtroom. I had to stop the hearing. Although she had known for a year and a half, two years, that the divorce was coming, she could not come to terms with it. It ended inconclusively. She returned to the courtroom and I thought that I would finish the examination. First I examined the husband. Afterwards I started to examine her, but afterwards the interpreter suddenly … the Japanese woman took a sheet of paper and the interpreter translated that she could not speak. I tried to contact another interpreter and the other interpreter told me on the telephone that their mentality is such that it does not allow for divorce. For them it is something like being an unwed mother here in the 1920s. She cannot go back to the Japan because of how people would look at her as a divorced woman. Even in the

> Japanese community here in the Czech Republic, she would be excluded. And you are applying Czech law." (interview, 10 February 2015)

The judge thus perceived the trial as an unusual drama that compelled her to think about the situation in cultural and historical terms with the help of the interpreters and through her own inquiries into Japanese 'culture'.

In this way we are approaching the 'particular' (Abu-Lughod 2008) 'alterity' which Afghan (both state and 'traditional') law poses for Czech judges in the form of foreign law.[5] Or, put another way, it is the question of 'mutual alterity' or 'inter-alterity' between Afghan law and Czech judges. Since the Czech law's imperative is to apply the foreign law in the exact same way as it is applied in the original 'context', I will focus on the strategies and dimensions of understanding and (re)cognition of the 'alterity' of Afghan law. This topic, the 'alterity' of foreign law in private international law, has so far been addressed in cultural terms somewhat theoretically in legal studies. For instance, Gessner describes the treatment of foreign law as "civil litigation in foreign legal cultures" and emphasizes that "only anthropological studies are confronted with legal diversity" situated in such a context while "[i]n other areas of the sociology of law, the conflict of laws has never become a major issue" (Gessner 1996: 4). Even in the field of law and anthropology, the ethnological investigation of the application of foreign law has only recently entered the research agenda (Foblets 2005) and Fikentscher still sees "the legal anthropology of conflict of laws as a novelty" (Fikentscher 2009: 433), even though the research on conflict of laws directly addresses the debates on legal pluralism and interlegality (Gessner 1996: 5; Ledvinka 2016: 71; Nafziger 2017: 10). Some legal scholars, however, reflect that there is a complex theme of "cross-border migration of legal norms" (Whytock 2010: 53) and even suggest, as Watt, that "the forum and the foreign" can be perceived as "the Self and the Other" (2014: 374); nevertheless, methodologically, they mostly continue to uphold conventional doctrinal positions of legal theory.

Before we get closer to the treatment of Afghan law in the form of foreign law, it should be also noted that foreign law is "neither clearly considered as law nor as a pure fact, but it is treated as holding a hybrid nature, thus becoming a kind of *tertium genus*" (Esplugues Mota et al. 2011: 6). In view of the case law of the Supreme Court of the Czech Republic, the study or 'investigation' ('*zjišťování*' in Czech) of foreign law is in fact an evidentiary process subjected to traditional evidentiary principles (except the adversarial principle, which the court replaces with judges' legal research).[6] This means in practice that Czech judges study foreign law like old-fashioned nineteenth-century armchair anthropologists: they read texts and reports available online or delivered to them by diplomatic or consular channels. At the same time, the case law requires judges to become as 'objectively' familiar with the foreign law as with their own. In this doctrinal view, there is no explicitly noted difference between the foreign law as located in its original world and the foreign law applied within the host country's framework. The intercultural transmission of the law is an issue that is simply entirely overlooked. Nevertheless, the practices and strategies judges employ in practice for the purposes of the understanding of the law are primarily shaped by the tension between (rather imaginary) inter-state respect for each other's sovereignty (also termed 'reciprocity' in the field), which might be perceived not merely as stimulating but also as precluding certain avenues of legal research as inappropriate, and scholarly respect for the concrete

[5] For overlaps between the concepts of 'reality' and 'alterity' in ethnographic theory, see Graeber 2015.

[6] For evidentiary principles related to the investigation of foreign law see, for instance, the decision of the Supreme Court of the Czech Republic No. 21 Cdo 4674/2014, dated 17 October 2015.

legal reality (supported by the above mentioned Czech legislative imperatives of how to apply foreign law). In this context, the legal-cultural and spatial distance between domestic and foreign law is rather a background concern.

It should be understood that the Western historically rooted logic of this kind of reciprocity (inter-state respect for each other's sovereignty) is the foremost reason why Afghan (or any other foreign) law might be applied in a European country, but it also determines the depth of the study of foreign law. 'Reciprocity' is a buzzword and, as one judge said, an "unwritten spirit of the application" of foreign law (interview, 20 May 2015). Although the doctrinal interpretation is that "[t]he judge applies foreign law *ex officio* irrespective of any reciprocity principle" (Pauknerová 2017: 115), from a historical point of view this means merely that the reciprocity has been so deeply embedded in the individual national systems of the conflict of rules and so generalized in recent international judicial cooperation that its application no longer needs to be determined in specific cases. A related term, the 'comity of nations', which "specifically refers to legal reciprocity, the principle that one jurisdiction will extend certain courtesies to other nations" (USLegal, n.d.), is almost unknown in my field. This specific kind of reciprocity, which refers to an exchange of respect between nations in form of recognition and application of the law of the other state, is not at first glance related to the anthropological concept of reciprocity, the beginnings of which are conventionally linked with Malinowski. Nevertheless, according to some authors, Malinowski saw reciprocity as a defining attribute of law and that view resonates most resoundingly in his chapter titled 'Systems of law in conflict' (Malinowski 1926: 100).[7] Although the meaning of 'reciprocity' is intelligible across these disciplinary contexts, it should be always taken into account that the concept is used for different purposes – for instance, as a precondition for recognising and applying foreign law or judgments by judges in the trials, on the one hand, or as a tool for understanding the structure of social transactions by social scientists on the other.

In the given context, legal reciprocity may be seen primarily as a legal principle that both emanates and distracts from the respect for the *alterity* of Afghan law as perceived (or unnoticed) by Czech judges in trial situations. This situation is not entirely unique, as the law always includes a dimension of respect for alterity, as legal authorities of whatever kind communicate their decisions to distinct individuals and social groups which may, in some fundamental regards, be different from the authorities and vice versa. In this sense, the law is essentially "directed toward an *other*" (Jauss and Bahti 1979: 187). The alterity of foreign law nevertheless goes beyond the intra-group relations between a legal authority and the rest of the group members who follow his or her legal judgments, either willingly, because they have been persuaded that the judgments are desirable, or reluctantly merely due to their respect for the authority. In international civil trials we may rather witness *indirect* communication between mutually distant, separate legal authorities (be they Czech state courts or Afghan conflict-resolution bodies) whose answers to the question "What is the law?" might become a crucial obstacle to their mutual cooperation. In this regard, Czech judges' respect for the specific alterity of foreign law, driven by the principle of legal reciprocity, is particularly challenged when the foreign state and the foreign law diverge. This precisely applies to the law in Afghanistan.

Extending courtesies to Afghanistan as a nation-state and its 'legislation' is indeed peculiarly incompatible with respecting Afghan 'traditional' law. This contradiction may easily escape the

[7] For detailed reflections on Malinowski's work on 'reciprocity' and the 'conflict of laws' (or 'private international law') see especially Donovan (2016: 87–88), Ledvinka (2016: 66–72), and Nafzinger (2017: 3, 10).

attention of Czech judges when they analyse the situation using conventional legal categories, which define law as a dimension of a state while making other forms of law virtually invisible. Although this approach may be seen inherently ethnocentric, it is not a conscious strategy of the judges themselves, but it is hidden, even to them, within the 'legal' category of law itself. Presumptions beyond this category suggest that law stands with the state above a society or that it exists autonomously and distinctly outside culture (the divide between law and culture). This cognitive schema, which is obviously necessary for transferring Afghan law across the legal-cultural distance, transforms the original law in the country of origin: the multiple threads linking it to the world of its home are ripped away and it is situated within new artificial relations attaching it to the world of the host country (cf., e.g., Behrends, Park, and Rottenburg 2014: 4). In particular, the objectified knowledge of Afghan law is stripped of the legal authorities which function in the segmented societal environment of Afghanistan and correspond to the ethnological concept of 'legal authority', defined as "a specific individual or a group of individuals effecting social control" whose "decisions or advice (…) are followed by the rest of the members of the group" (Pospíšil 1974 [1971]: 44, 47).[8]

Although each of these stages of the law's travels is laborious, the knowledge of Afghan law (or any other foreign law) achieved at its final destination is seen as 'imaginary' and 'approximate', as most of the judges interviewed have said, rather than 'accurate' (interview, 4 April 2015). Curiously enough, this seems irrelevant for the operation of transnational governance via private international law in the Czech Republic or elsewhere: Czech judges and foreign law experts do not a priori exclude any detailed representation of foreign law, including empirical reports or scholarly articles describing different legal cultures and Afghan 'traditional' law in particular, but they are usually saved from having to confront major structural differences by the lack of available sources or by an inability to find them, understand their meaning, or translate them both linguistically and interculturally. Even when judges go beyond their comfort zone, they may employ interpretive schemata mentioned above like the divide between law and culture to navigate this unknown terrain, which may still allow replication of the 'legal' category of law while avoiding disruption of their own legal categories by undesirable data. However, there is also another factor which supports the resultant understanding of foreign legal cultures.

While a judge might be interested in the various aspects of the law in Afghanistan available to him or her through, for instance, online pictures of traditional Afghan dispute resolution bodies, they are mostly irrelevant in the predominantly textual environment of international civil trials. Moreover, when the judge confines his or her study merely to state 'legislation', the extent of the legal-cultural distance between the Czech Republic and Afghanistan may go entirely unnoticed. The textual representations of Afghan law considered by judges consists mostly of incomplete and multiple translations of the Civil or Commercial Code. Even though they openly acknowledge the deficiencies and incompleteness of available sources which resemble equivalents of Czech statutory laws as well as the presence of the information about the existence of Afghan 'traditional' law, these factors are not activated as grounds for refusing to apply Afghan state law in the trials in question. One reason why the other ('traditional') Afghan law is not taken into account is that Czech judges approach the sources of Afghan law with a view to answering very specific questions. I paraphrase a judge in a case: "Can a property jointly owned by two spouses be

[8] Nevertheless, because of the 'agency' attributed to the symbolic representations of the Afghan law, these representations might themselves also be seen as carrying a form of authority (McGee 2015: 64).

repossessed even if only one of them owes the debt in question presuming the spouses object that according to Afghan law marital property remains separate?" While asking such a fragmentary question, the judge expects an equally fragmentary answer, which might be a single statement taken from an online source indicating, for example, that "[t]he *hanafī madhhab* prescribes the separation of martial property" (Rastin-Tehrani and Yassari 2011). For the Czech judge this implied that, in contrast to Czech law regarding marital property, the property of an Afghan wife cannot be repossessed in the context of the debt of her husband. In another case a judge doubted whether an Afghan company that signed a particular contract is a real entity, namely whether it has ever existed or if it still exists. This question mobilized the Embassy of the Czech Republic in Kabul, which after several weeks concluded that the issue could not be verified due to the absence of a central registry and security obstacles related to accessing such information. In yet another case, a commercial contract submitted to a court as evidence required an interpretation in the light of Afghan law. In response to its search for information, the court was provided with a Czech translation of a partially unreadable and incomplete English translation of the Afghan Commercial Code.

In the last-mentioned case, the main issue was the validity of the code in relation to the date when the contract entered into force. This was impossible to determine only on the basis of the document itself. For this reason, it was also necessary to dig into sources beyond state legislation, which upended the understanding of Afghan law as state law. The crucial phrases that entered into the case were that "[i]n most instances, Afghans resolve their commercial disputes through informal channels, such as the *shurā́* or *jirga*", and that "[c]ommercial courts and government institutions frequently rely upon customary practice or older laws" (ALEP 2011: 2). The statements clarified that the duty of Czech courts to apply the law of Afghanistan in the same way as it is applied by Afghan legal authorities cannot be fulfilled using the statutory Commercial Code of Afghanistan. Although the court searched for a pretext to return to the state law, further in-depth research did not provide one; instead of finding evidence for use of state law alongside customary practices, as implied by limiting phrases like 'in most instances' and 'frequently' (ibid.), it was discovered that customary practices were applied throughout the country, not only in rural areas, which was the original presupposition, but even in urban contexts (Gang 2011: 2).

In this situation the court was completely baffled regarding how to identify the applicable law, as conventional legal categories were of no help. It was especially obvious that the 'juridical' reliance on external resemblances between Czech state law and the state 'legislation' of Afghanistan did not offer a sure way forward. In this uncertainty and bewilderment about what the law in Afghanistan actually is, the judge chose to ignore all the data which directed her away from the use of state law. The argument for this cognitive decision she used was that "after all we do recognize states" (personal communication, 17 February 2014) but not anything beyond them. She thus preferred to respect another state rather than the 'reality' of law within its territory, which allowed her to maintain a superficial approach that reduced law to legislation. Her argument also had an evolutionary overtone: she mentioned legislation as a desirable part of the development of law while customary practices were renounced as some 'historical' stage of the very same genesis. This step was in no way a sudden decision. The judge usually tries to balance the practical implications of her decision 'here' – in the host country – as well as 'out there' – in the country of the litigants' origin – with regard to their interest in finding legal certainty. Her strategy to shift from the relationships between *litigants* to those of *states* had very practical implications: it simply

facilitated continuing the trial without much delay. While this strategy might be seen as individual and arbitrary, it is in fact not uncommon in international civil trials. Judges are not primarily social scientists but beings concerned with matters of practical power, and what may be seen as a chaotic use of legal doctrines or principles is also a way to keep the system running. The judge's choice to stick to state legislation even though it was apparently not the applicable law is, at least, more reasonable than the discursive practices of the rule of law which tend to conceptualise law as legislation inside Afghanistan. After all, the trial situation taking place in the here and now, in the legal-cultural framework of the Czech court (the forum), is only symbolically and potentially related to the situation out there in Afghanistan. This is not to say, however, that the discourse of the rule of law shapes information in such a way that problematic and uncertain legal data which do not properly fit into the preconceived legal categories are erased. On the contrary, they remain present. Nevertheless, it is curious that exactly the data that do not fit the doctrine of the connection between the state and the law are conceptualized by the Czech judge as 'culture', 'context', or 'something like law but not the law' (interview, 4 April 2015) and consequently are not activated in the trial. So it seems that these strategies of culturalization, contextualization, or delegalization of legal 'alterity' are used to filter out elements that may disrupt the routine of judicial practice.

Later, the judge reflected on the issue in this way:

> "In Afghanistan it works entirely differently as the things there function alongside one another, the tribal or the regional is simply above the state, in practical life. So, they can tell you we have a system for this and for that, as if the way the formal framework functions is one thing, but that, in practice, they do it according to something entirely different, the customary law, because, simply, they did it that way for a hundred years, at least so they claim. And that it should not be like that now, the people in a village on the hillside, they are not concerned (…) but you know what, a village leader or a state judge, if he gets our judgment on his table, which will probably not happen, he will be pragmatic, probably, as we are, and would neither show disrespect nor try to grasp it in other way than his own, I mean in our way. This is a fact, a reality of judging, not a culture." (interview, 9 November 2018)

What is newly expressed here is the recognition of the 'alterity' of Afghan law, which is perceived as a problem in terms of the tacit assumptions of Czech judges about what the law is, and the neutralization of its alterity. Even more, in the view of the judge these characteristics of Afghan law, mentioned by her, challenge what is considered legitimate legal authority towards the litigants, as her main anxiety and worry generated by the application of foreign law concerns maintaining her legal or cultural identity – as she said, "after all I am not *their* judge" (interview, 9 November 2018, emphasis added). However, this does not answer the question of whether legal difference as such really poses a threat to the identity of modern centres of legal power or to the legitimacy of state courts with regard to the foreign litigants, or whether, instead, such a threat is merely imaginary (cf. Graeber 2015: 7). The application of foreign law is a courtesy expressing respect to another authority, which is in this case primarily perceived as the Afghan state, not the traditional Afghan conflict resolution bodies. It is exactly for this reason that judges limit their legal research to state legislation only. As another judge remarked: "Too thorough research may disclose the weaknesses of their law" and that might be perceived as an 'indecency' as it implicitly says that "their law does not work as well as it should or as well as ours or that it is (…) not modern or in accordance with the rule of law". Besides, "they [i.e., the legal authorities in Afghanistan – TL] would also not study Czech law that much" (interview, 4 April 2018). This 'comity of nations' way

of thinking – unimaginable, for instance, in asylum proceedings, in which information about the country of origin is regularly used to evaluate another country's state of law, or criminal trials, in which cultural defences are mostly subject to domestic moral imperatives – indicates several things. First, the judicial study of *the law of the Other* is perceived as an aspect of the relations of the authority in question towards another (the Afghan state) rather than towards the litigants whose identities are connected to this state. Second, the rule of law and legal modernity is perceived as a high moral standard or as something highly desirable, as Czech judges constantly identify themselves with it. Third, the evidentiary construction of Afghan law is influenced by searching for an *equal* or *partner* legal order (as seen by Czech judges), which is linked with the designification of any law that is not integral to the state: the original search for a law of the Afghan *Other* ('traditional' law) thus successively crystallizes into producing instead an Afghan *Double* of legal modernity (state 'legislation') even during the preparatory phases of the application of foreign law in which contrary evidence was discovered. Through the classification of contradictory data as *contextual* or *cultural*, modern juridical categories are protected from the challenge of the 'reality' of Afghan 'traditional' law. In this juridical view, saying that clusters of customary rules and practices represent law or that traditional dispute-resolution bodies such as the *jirga* and *shurā́* are equivalents of modern nation-state courts seems entirely absurd.

However, the discomforting data about the state of the official justice system, whether viewed from an ethnological or a juridical standpoint, suggest that the Afghan state 'courts' function more as executive than as judicial bodies and their decisions may be considered in many cases only nominally 'legal' in nature. Judges in the Czech Republic as well as elsewhere can base this opinion on the following reasons. First, there is an absence of a fully functioning state justice system and the majority of cases are resolved outside the state 'courts' (Elliesie 2010: 2). Second, Afghan state law "still lacks efficiency, capacity and nationwide coverage" (ibid.: 8). Third, Afghan state 'judges' are mostly absent from the courthouses and visit them only irregularly and briefly (USAID 2005: 11). Fourth, cases are referred by Afghan state 'courts' to 'traditional' dispute resolution bodies via an official mechanism known as '*eslaah*' (ibid.: 13, 31, 38). For an anthropologist, those data are a reason to conclude that those state courts, despite their designation, are *not always* 'legal authorities', at least not as Pospíšil understands them in the sense of individuals or groups of individuals whose decisions are respected inside the affected social groups (Pospíšil 1974 [1971]: 44, 47).

Conventional legal practitioners, however, tend to see those nominal Afghan state courts as the only fully-fledged equivalents of modern courts. This approach (which understands law as a dimension of the state) allows for an exclusion of exactly the same data which – in an ethnological view – support the conclusion that 'traditional' Afghan dispute resolution bodies should be considered true 'legal authorities' (for details, see the next section of this paper), because the judges instead classify these dispute resolution bodies as 'something else than the law' (interview, 4 April 2015). The external resemblance of Afghan 'legislation' to Czech statutory laws, by contrast, is as important for its recognition as a *partner* legal system as such powerful symbols as state emblems (coat of arms and flags) or the statue of Iustitia on the façade of a courthouse or in a courtroom. Both (the 'legislation' and these signs) are immediately recognizable as attributes of the apparatus of justice. In the eyes of Western lawyers, the familiar symbols of state and justice leave no doubt: they are convinced that they 'see' an equivalent of their own statutory laws, and

consequently, they may presume, the state justice system in Afghanistan is more or less the same as theirs.

From the perspective of Pospíšil's analytical concept of law on the other hand, Afghan state law might be seen, at least partly, as an appearance of law or, at the most, as 'project[ing] law' (Benda-Beckmann, Benda-Beckmann, and Eckert: 4). Moreover, acceptance of this state law may contradict the actual law inside Afghanistan. Afghan 'legislation' nevertheless admits an objectivity peculiar to shared symbols and representations, or to put it another way, it may constitute a 'pseudoconcrete' reality of textual representations of the law, not the reality of the law itself (Kosík 1976: 2). In this way, the reliance on external symbols and similarities may be deeply misleading in a comparative or cross-cultural perspective. The Afghan Commercial Code, for instance, diverted the attention of the legal experts I interviewed away from the features of the 'traditional' justice system such as meetings and discussions in mosques, homes, or outside under a shade-giving tree – a notion of justice once common in historical Europe, though mostly unknown to modern Europeans. However, the trope of legal authority dispensing justice under a tree (usually attributed to Weber [Rabb 2015: 348]) is often seen rather orientalist (ibid.), which is not the position I intend to communicate. The (re)cognition of Afghan 'traditional' law through ethnological analytical tools in this paper nevertheless also only approaches the native point of view through a small set of evidentiary documents used for the application of foreign law, as we will see in the next section.

Part Two: reconceptualizing Afghan 'traditional' law

As mentioned in part one of this paper, reports about law and the justice apparatus in Afghanistan regularly mention that the decisions of Afghan state courts are not always respected either by the disputing parties or by the wider public, and that the dispute-resolution processes are often carried out by 'traditional' legal authorities (USAID 2005; Elliesie 2010). In this regard, the state courts do not always correspond with the ethnological concept of legal authority and do not provide an appropriate point of departure for outsiders to identify law in Afghanistan in whatever practical and procedural context. Namely, judges applying Afghan law in the form of foreign law in international civil trials do not usually take seriously the doubts cast on the status of Afghan state courts as the dominant legal authorities in the country; rather, the judges prefer to treat the Afghan state courts as counterparts to their own. At the same time, the official imperative of, for instance, Czech private international law is to apply the law of another country as it is applied in its original world. Such an imperative tends to radicalize legal research towards a search for the most concrete law in Afghanistan, and, in this vein, it is necessary to ask whether Afghan legislation should really be considered the applicable foreign law. Using the juridical concepts of 'state courts' and 'state legislation' to identify the law actually applied in Afghanistan may only lead the inquiry to an impasse, as described in part one of this paper. In such a situation, an ethnological concept of law such as Pospíšil's may become indispensable but, as we will see further, employing this concept also brings with it certain difficulties.

In Pospíšil's ethnological perspective, as mentioned in the introduction to this paper, the law is to be identified primarily according to the actual legal authorities on the ground, not according to similarities and resemblances of the external symbols of law. There is a persuasive logic behind this methodological suggestion: if we are mistaken about *who* applies the legal rules, we could not

be correct about *what* the law is. Thus, the 'authority' defined in the broadest cross-cultural analytical sense is also considered the foremost 'attribute of law' (Pospíšil 1978: 30–42). However, when, guided by the anthropological perspective, a judge or other legal expert in a Western trial situation discards state sovereignty as an appropriate point of departure and begins the study of Afghan 'traditional' law from the structure and mode of constitution of 'traditional' Afghan '*jirgas*' and other 'councils', she soon realises that there is even less solid information about the law these institutions apply. This may cause further bewilderment and uncertainty among legal professionals who are studying or applying Afghan law for practical purposes. For this reason my informants ask questions such as "whether the law can ever actually be ascertained", meaning in the present, or "whether a restatement of such kind of law might be ever achieved" in the future (interview, 9 February 2015). I argue that there is indeed an obstacle that is extremely difficult to solve, at least in the temporal horizon of international civil trials but, on the other hand, there is no other more certain way to identify the actual legal authorities and the applicable law in Afghanistan.

Pospíšil's concepts of 'law' and 'legal authority' are intended as analytical tools and (unlike the essentialist legal categories) suggest a relatively precise and reliable procedure for identifying what the actual legal authorities on the ground are. Afghan 'traditional' councils might be considered such 'legal authorities' on the basis of the many occasions where the parties to a dispute have shown respect for these councils' decisions. The respect given to the decisions is a key criterion of legal authority in the ethnological sense, and, indeed, there are enduring and repeated empirical findings that the councils' judgments carry the same weight and respect as court decisions (Yousufzai and Gohar 2012: 76) and that ordinary people respect them (Carter and Connor 1989: 36). On the other hand, this neither indicates that the particular 'traditional' councils in Afghanistan, which evince many idiosyncratic features, do easily fit into the concept of legal authorities without further ado, nor that the aforementioned observations generally disqualify state courts as being juridical authorities. The concepts of 'law' and 'legal authority' must also be tested against the unusual data and, as tools, should be adjusted where they do not correspond to the data. To this end, I suggest introducing a distinction between *legal sodalities* (inter-group meeting-like associations with a legal purpose) and *legal modalities* (objective or objectified system of legal knowledge), which would reflect the peculiar flexibility in the way Afghan law is integrated into the societal structure in the country and vice versa.

The concept of 'legal sodality' is intended to reflect such aspects of the actual Afghan legal authorities which are usually perceived by Czech judges and other legal experts as confusing or, as one of my informant claimed, 'extra-terrestrial' (interview, 4 April 2015) and evoke bewilderment and uncertainty (as the experts perceive it [ibid.]). It may not be surprising that the problematic aspects are related to the difference in the 'social organization of law', to put it in Black's terms, or more precisely the manner in which the Afghan 'traditional' legal authorities (and with them also the law) are integrated into the overall social organization and the spatiotemporality that stands behind it (Black 1973). This does not automatically imply that actual Afghan 'traditional' law cannot be defined in terms of a static, coherent structure or system or, by contrast, in terms of a system that is incoherent, irrational, or unsystematic due to its translocality, transcollectivity, or multiplicity. The law is rather perceived by Czech judges as evincing some *not* understandable coherence, logic, and rationality. Indeed, the organizational characteristics of Afghan 'traditional' law fall outside the conventional modern legal imagination, and this means that its 'legalness' may

be questioned in the Western legal framework. The significant argument made by a Czech judge in an informal communication with me in favour of de-signifying the councils was that they are "something slightly different from courts but not courts" or bodies that "only resolve dispute" (personal communication, 17 February 2014). In this regard, it is not relevant that the 'councils' are intrinsically tied to a 'code' (Yousufzai and Gohar 2012: 13).

The most striking source of uncertainty arising from the traditional 'councils' in Afghanistan that constitutes their 'alterity' for Western judges in comparison to Afghan state 'courts' can be seen in the fact that they are constituted as a meeting between *equal* individuals of various social groups to which the parties in a dispute belong without including any higher authority. Even though this may be the first and foremost principle of the social organization of Afghan 'traditional' law, there is no way to transfer it into the legal imagination of Western legal professionals via modern legal concepts. When we reconsider the relationship between the law and its societal referent in order to move from the state to the mosaic of social groups and subgroups, it is possible to accept that in case of an intergroup dispute that was not settled otherwise, a legal council is constituted through a meeting between both social groups which are mutually their '*sáraj*' or equal (Atayee 1979: 83). Let me interpret what societal aspects the ideal of '*sáraj*' might suggest in legal practice: a plaintiff who belongs to one social group can be considered disloyal when demanding a decision from a legal authority of another social group and, conversely, a decision of legal authority which belongs to one social group will not be respected by a party to a dispute which belongs to another social group. The only way how to solve a dispute between parties from different social groups is by convening a council on the appropriate legal level, which holds together two otherwise separate social groups of a lower level. This aspect is in fact invisible when the societal entanglement of law is not considered.

If '*sáraj*' is indeed a principle of the societal arrangement of Afghan 'councils', it might be seen as a concrete empirical example of the social anthropological concept of 'reciprocity'. In the context of Afghan legal culture, some authors suggest that the anthropological idea of 'reciprocity' has an equivalent in the Afghan concept of '*badál*', the term used for feud, revenge, or blood money (USAID 2005: 49; Yamane 2011: 14; Edwards 2013: 551). However, Yousufzai and Gohar claim that '*badál*' should not be related merely to a particular institution of revenge but rather to "return, exchange or a reply" in the broadest sense (2012: 78). An interpretation similar to that in Yousufzai and Gohar's report may be found in the entries '*jirga*' and '*saray*' in Atayee's dictionary of Pashtun legal terminology (1979: 38, 83), which indicate that both legal councils and revenge are conducted between people who are considered equal, equivalent, or partner to one another. In any case, these considerations about the societal organization of Afghan 'councils' can lead to the conclusion that Afghan 'traditional' law should be classified as what scholars have variously called "reciprocity-based legal systems" (Rosen 2000: 59) or "horizontal legal systems" (Barkun 1968: 65), rather than merely "non-state justice systems" (Kötter 2015: 5). If the constitution of Afghan 'traditional' councils between equal individuals representing various societal segments is a central aspect of Afghan legal life, as it seems to be in many reports (Carter and Connor 1989; USAID 2005; Yousufzai and Gohar 2012), then the preference given to binary understandings of Afghan legal systems can indeed obstruct Western legal authorities' perception and ability to identify an equal, partner legal system (to be applied as the foreign law) beyond Afghan state law. I will demonstrate this using the *problematique* of where equality is situated in European and Afghan cultural settings.

Legal *equality* is traditionally understood in Europe as equality before the law and is perceived to be as ordinary as the air people breathe. Upon closer examination, the concept in fact indicates specific, yet unconscious social arrangements: the superordinate position of the code above ordinary persons accompanied by the superordinate position of the court above the parties, which is backed by the overwhelming sovereign power of the state. In this light, the claim that Afghan councils are collective bodies composed of equal individuals would mean that they stand in stark contrast to the modern individual judge or tribunal that is clearly situated, at least in the European legal imaginary, hierarchically above everyone else (for instance, the parties and witnesses). The description of Afghan 'traditional' councils as collectives of equals (Sierakowska-Dyndo 2013: 9) then strongly suggests that there are no individuals who are distinguished from the others as authorities responsible for a judgment and that parties and other actors in the trial in question are equals of the judge(s). The problem of the social organization of law is perceived – both by Western judges who attempt to apply foreign law and by the Afghan informants of various reports (Carter and Connor 1989; USAID 2005; Yousufzai and Gohar 2012) – as so axiomatic that it is seldom mentioned at any point in the translation process between the Afghan and the Western legal framework. The detailed descriptions of the Afghan 'councils' such as that provided by Yousufzai and Gohar's report nevertheless indicate another concrete social arrangement behind legal equality in Afghanistan: within the 'councils' various authoritative individuals resolve disputes and "act as judges". They are beyond a doubt functionally distinguishable from other important actors in a trial and may be identified as those who play "with sets of small stones lying before them like a chess board" which is an "apparent mind mapping" of legal arguments (Yousufzai and Gohar 2012: 19–20, 48). Saying that all members of Afghan 'councils' are equal thus does not refer to an equality between parties to the dispute and judges or to an absence of individual legal authorities in a collective court, but rather to the relations between judges within the tribunal of a *jirga* or another Afghan council. As each member of the council represents his social group, to which one party belongs, within the council, the idea that the legal authorities within a concrete dispute resolution body are all *mutually* equal is a legal ideal or *fictio legis* (Yan 1995: 18) which may counterbalance possible inequalities between different social groups and subgroups in the real world. The equality of the parties to a dispute is not at all a widespread commonplace as in European countries but rather a *dependent variable* or derivate from the equality of the legal authorities that together constitute the council in question. Due to the wide range of social groups in Afghanistan, 'councils' are established in heterogeneous ways to resolve conflicts between parties ranging from the level of individuals, families, and groups of families to the level of entire tribes (Carter and Connor 1989: 9, 29; Yousufzai and Gohar 2012: 18). In any given case, the authorities involved always reflect the parties, their identities, and the object of contention. The composition of '*jirgas*' and other 'councils' in Afghanistan thus depends on to what or where the parties to the dispute belong. Therefore, any preconceived association of a council with a particular social group and subgroup would be false.

The composition and size of the council also depends on the nature of the dispute and on whether it is a first trial or a trial initiated by an appeal (or second appeal). Even councils with permanent members meet only occasionally in order to resolve disputes (MPI Report 2005: 6–7). We may suppose that the more permanent 'councils' consist of intra-group legal authorities who belong to more durable social associations. The absence of any uniform formal mechanism for the appointment of members to a council not only indicates that a 'symbolic' and legitimizing power

centre (Bourdieu 1998: 40) is missing but also confirms that the authority of the 'councils' and their powers are constituted in a truly 'reciprocal' way (Barfield, Nojumi and Thier 2006: 6), meaning that their legitimacy is based on the approval of the decision by both parties or both social groups to which the parties belong (USAID 2005: 40; Yousufzai and Gohar 2012: 21, 49, 64), instead of any kind of power monopoly. The same applies to the acceptance or enforcement of the 'councils' decisions, which can hardly be supported by the power of the absent state. Whereas modern agencies charged with enforcing legal decisions are commissioned by the state sovereign power, the councils which resolve disputes rely instead on the power of communities or localities below them and their '*arbakai*' (Tariq 2009), or '*mîrs*' and '*wazîrs*' in the case of bazaars (Ferdinand 1962: 154). Therefore, making a decision at a trial-meeting requires persuading the members of the councils, who are respected as authorities by the social groups or places they represent, but who are not necessarily respected by *all* the social groups and places represented within the meeting (Yousufzai and Gohar 2012: 102). In this way the councils remain inherently segmentary and precisely for this reason the acceptance of legal decisions or their legitimacy relies so massively on "the social power of persuasion" (USAID 2005: 13, 15). This implies that the "centers of legal power" – defined by Pospíšil as the social subgroups in which the sanctions (of whatever kind) that secure legal decisions are most effective and immediate (Pospíšil 1974 [1971]: 116) – are located below Afghan 'traditional' dispute resolution bodies and legitimize them as a higher legal level.

Much the way that the concept of a social group is flexible, the composition of the inter-group legal authorities is determined by various factors, in particular "legal level" (Pospíšil 1967). The composition of the legal authority in question is based on a strategy whereby lower social groups can meet and establish temporary higher-level *legal* associations (legal sodalities), while maintaining the lower-level *social* associations still primary relevant for the group members. Since the precedential case law or *tsálaj* (ILF-Report 2004: 9) of a higher level reflects upon the differing clusters of legal principles and practices of lower social groups, when researching specific cases the number of legal levels from the lowest tier should be carefully established case by case.

This leads us to the final and most significant point: In Afghan legal culture, spatial distances and social boundaries do not preclude the travel of legal authorities and making of formal trial-meetings between them for the purposes of resolving 'cross-border' disputes. This places a particular strain on the Western legal imaginary, which ties the law to specific spatiotemporalities where political or geographic borders are usually seen as absolute dividing lines between systems of rules. Correspondingly, jurisdictions of concrete legal authorities are regularly strictly fixed to a particular geographic unit, such as the nation-state, region, or district. As the laws of various Afghan communities are not written and cannot be sent via post, the various legal authorities travel, visit, and meet other in order to form councils, make decisions and resolve disputes, thus transcending the local and societal boundaries of their lower-level 'jurisdictions'. In this light, it is the specific spatiotemporality embedded in the concepts of state borders and conflict of laws which hinders the imagining of 'inter-sovereign courts' that are a common phenomenon in the Afghan situation of segmentary (for instance, inter-tribal or inter-village) relations. In order to navigate more appropriately in such situation, I further elaborate on the concept of 'legal sodality' as an analytical tool in relation to the Afghan situation in the last section.

Differing Realms of Legal Reciprocity

Afghan 'traditional' law as conceptualized in terms of Pospíšil's ethnological concept of 'law' (Pospíšil 1978: 8–13) might be perceived as a Pandora's box by legal professionals in the West. Once opened it reveals the multiplicity of 'traditional' legal systems whose point of reference is a mosaic of social groups and subgroups in Afghanistan instead of the firm sovereignty of a single state. Although both social anthropology and legal studies have widely accepted the notion of legal pluralism, some researchers have retreated from the distinctive anthropological concept and reduced legal pluralism only to the mixture of legal traditions (state legislation, *sharīʿah*, and customary law) or relationships between state and non-state legal authorities. This also applies to some studies of the law in Afghanistan (Kamali 1985; Sadat 1986; Etling 2003; Amin 1992; Yassari and Saboory 2010; Wardak 2011). Despite the apparent multiplicity of 'traditional' Afghan legal systems, which have been described as "a wide variety of clusters of norms and practices, often uncodified and orally transmitted, usually combined together in varying mixes" (USAID 2005: 4) or '*tsə́laj*' (ILF-Report 2004: 9), the attention of many researchers, who have taken the 'rule of law' concept as their starting point, has been directed primarily to the country's three major sources of law (state legislation, *sharīʿah*, and customary law) or the distinction between formal and informal (Brick Murtazashvili 2016) and similar dichotomies.

A similar tendency may be found in the practices and strategies used in international civil trials for the purposes of the application of Afghan law in the form of foreign law. When the legal categories are used by legal professionals instead of ethnological analytical concepts for the study of the same set of documents about Afghan law, the results of its transfer into the Western legal framework are greatly divergent. For instance, for lawyers in European countries it is crucial that the law in their sense of the term is inherently linked to a state. Consequently, 'traditional' clusters of legal principles, practices, and values situated beyond the Afghan state and its legislation are virtually almost invisible to them; in other words, they make cognitive decisions that render these 'traditional' features irrelevant. The 'law' in the ethnological perspective (Pospíšil 1978: 8–13), on the other hand, primarily identifies legal authorities on the basis of the respect disputing parties have for the decisions of this individual or group of individuals. This approach discards the Afghan state legislation and the apparatus of state justice in many cases as being of legal nature only *nominally* (Elliesie 2010). Instead, as was mentioned above in part two of this paper, legal authorities in the ethnological sense mostly correspond with '*jirgas*' and other various dispute resolution bodies. These Afghan 'councils' may be seen either as alternatives to Afghan state 'courts', which cooperate with them in some cases or which stand above them with regard to the litigants in other cases. Thus, what Western legal professionals and what legal ethnologists see as the 'law' in Afghanistan according their distinctive concepts are two very different things with, and I emphasize this, almost no overlap between them.

The divergence between, on the one hand, the anthropological attitude, which tends to emphasise cultural details of legal practices and irreducible connections of the law with its societal and organisational contexts, and, on the other hand, the reductionist approach of legal professionals, which tends to filter anything more than normative texts out, indicates that anthropological expertise can be employed to assist the legal apparatus in trial situations such as asylum proceedings or international civil trials only with enormous difficulties. The process of the application of foreign law, for instance, should, however, be subject to anthropological reflection, at least, in terms of an intercultural transmission of the foreign law from its original world to

Western legal framework. In this view the law from 'out there', for instance the Afghan 'traditional' law, is transformed as it travels. It can hardly be an exact replica of the original (cf., e.g., Behrends, Park and Rottenburg 2014), but even though the detailed descriptions of its alterity, idiosyncratic aspects, and peculiar features are included in various available sources, there seems to be an absence of appropriate cognitive containers which could help to make the final step and enable them to be transferred into the imaginary of Western legal professionals. As described in part one of this paper, the travelling legal knowledge, for instance, from Afghanistan to the Czech Republic, is "accepted through deference" rather than through understanding (Bloch 2005: 127–128), while the conventional divides between the law and the other aspects (whether 'cultural' or 'social') of human society are deeply shaped by this deference directed towards an *other* sovereign state rather than the alterity of the law inside that state's territory.

Afghan 'traditional' councils (or the '*jirgas*' and the other dispute resolution bodies mentioned at the very beginning of this paper) do not *perfectly* match the ethnological concept of 'legal authority' either. To capture the specific features of their societal organization, I suggest analysing the 'councils' using the concept of legal sodality which may help to reflect upon the idiosyncrasies of Afghan 'traditional' law that are usually perceived as incoherent and chaotic in the milieu of Western legal frameworks. This analysis may reveal that, far from being chaotic, the 'councils' are in fact based on a coherent societal logic. Reconceptualizing Afghan 'traditional' councils as legal sodalities is crucial for an understanding of them as mobile and non-permanent courts established via meetings of otherwise separate legal authorities of the social groups to which the parties to dispute belong.

Since Afghan 'traditional' legal systems, as sets of rules, do not travel in the form of mobile textual representations such as statutory laws either between nations or between social or local segments within Afghanistan, there has to be another legal technology to handle human mobility across societal and geographic boundaries and concomitant disputes. The Afghan councils' members do in fact travel and visit or are invited by disputing parties. In this way they surely often carry the clusters of their principles, concepts, or practices with them. The travel of 'authoritative' individuals under the protection of the codes of hospitality is a manner in which the multiple 'traditional' legal systems interact with and transcend the pre-conceived legal units of Afghanistan that are usually conceptualized in terms of localities and communities. The legal authorities of two Pashtun tribes, for instance, come together to resolve a dispute, and, as a by-product, enact a higher legal level by issuing inter-tribe legal decisions. However, Pospíšil's concept of 'law' suggests that "adjudicating authority has to have power over both parties to the dispute – he must have jurisdiction over both litigants" or, in other words, "all three, the two litigants as well as the authority, have to belong to the same social group" (Pospíšil 1967: 24). Does the inter-tribal nature of 'councils' contravene Pospíšil's presupposition that law is fundamentally an 'intra-group' phenomenon? (Pospíšil 1974 [1971]: 8–9). Not necessarily: I claim that, by acting on a higher legal level, the legal authorities from different tribes establish a greater common social group that incorporates the subgroups involved in the dispute. At the same time, this higher legal level is not stable enough to be the basis for a durable, long-term higher level of social association as well. These dispute-resolution gatherings, or as we may also call them, mobile or segmentary courts, like '*jirga*', '*shurā'*, and others, are socially less stable but legally fully effective associations. This does not refer abstractly to the interaction between legal systems, but to a very concrete direct channel of face-to-face interaction between Afghan 'traditional' legal authorities.

Although such legal sodalities are more fragile and less noticeable for outside observers, they create laws (in the ethnological as well as juridical sense) which are eventually attached to more durable social groups or subgroups at the lower level, as their decisions are, probably for different reasons, recognized inside both groups and because the laws are created by both groups' authorities. In this regard, legal sodality may be taken as the opposite of legal modality (whose point of reference is a stable and easily recognizable social unit of any size and kind). On the other hand, the creation of 'councils' certainly contributes also to the re-establishment of parties' identities (social subgroups) as well as their common referent (the authority allocated on a higher legal level ranging from family to tribe to state). This suggests that legal sodalities cannot be principally limited to only two affected social segments (subgroups) – which, however, has been our model situation so far. The convening of occasional 'councils' with various other social (sub-)groups – for instance, additional tribes – may indeed explain why many, often distant, legal forums in Afghanistan relatively homogeneously refer to the same codes such as '*Pashtunwali*'.

Although this paper is not primarily intended as an anthropological comparison, we may observe here a clear contrast between two concrete technological solutions that make it possible for law to transcend societal and geographical boundaries and maintain its effectivity in cases where disputes result from transactions between distant and mobile contractors: the application of foreign law in international civil trials (see part one of this paper) and the Afghan legal sodalities (see part two of this paper). They both should be seen as a response to the same organizational problem: the need to manage disputes where the parties belong to different 'jurisdictions'. The effectivity of the hierarchy of the intimate intra-group relationships between the social group's legal authority and the rest of the group's members could indeed be disrupted by situations specific to, e.g., international or 'intertribal' trade (Weber 1950: 195).

In such situations when one of the parties does not belong to the same social group as both the other party and the legal authority and might feel more loyal to an external, foreign legal authority, it is highly desirable that the autonomy or micro-sovereignty of the social group or subgroup in question is aligned or, at least, coordinated with the other legal authority or the other legal regulation outside the conventional extent of its societal 'jurisdiction'. As the two authorities (domestic and foreign) may apply different laws in different ways, they may also issue contradictory legal decisions in the same case. Both legal authorities thus have a chance to mutually cooperate – while reciprocally respecting each other – in order to harmonize their resolutions of disputes and to resolve and re-align the bifurcated respect of the non-authoritative 'others' from different communities or localities. One way to solve this issue is a *translocal* or *trans-societal* face-to-face meeting of legal authorities conducted within the 'code of hospitality' (Pitt-Rivers 2012) as seen in Afghan 'traditional' councils, a solution which is inconceivable for Western judges. In such a configuration the written laws are simply not necessary.[9] The Western judges, by contrast, incline to the other solution, namely, the application of foreign law. But while the Afghan legal sodality represents a situation of immediate relations between concrete members of the affected social groups without the interference of technological substitutes, the application of foreign law is characterised by two kinds of substitutions (thus making it less authentic than traditional Afghan 'councils') – textual representations of the law replacing the law truly applied in the country of origin (mobile laws), and the state courts of the host country replacing the legal

[9] This issue is not related to the distinction between literate and illiterate cultures. Afghan culture is familiar with the technology of writing, which is, however, more important in other cultural and social spheres than law.

authorities from a migrant litigant's country of origin. It seems that the foreign legal authority (whether Afghan 'traditional' councils or some other institution) is more acceptable to the Western legal framework as a specific species of the '*Other*' in its substitutive forms such as legislation, written legal decisions, etc., rather than in its authentic, immediate face-to-face form. Perhaps the fact that substitutive forms of legal authority are much more acceptable (or more convincing) than a direct meeting with an *other* legal authority corresponds with the invisibility of authority as a *human* in the interspace between subjective rights and objective laws suggested by modern legal orthodoxy. However, this technology of substitutes may be seen as characteristic for the legal environment dominated by legal modalities (objectified systems of norms, structures of beliefs or values such as legal systems, customs, or cultures) like the culture of legal modernity in European countries.

Since alternative models of the law are absent in the milieu of state law, it is difficult to notice and recognize very different kinds of law and legal authorities in different cultural contexts. Even in Afghanistan, due to the tremendous influence of the implicit presupposition that the law can have only the form of a system related to the society as a whole that came with the rule of law, the mosaic of social groups and subgroups constitutes a rather uneasy reference point for this law. For this reason, I suggest the concept of legal sodality which may help to understand the special nature of the actual 'traditional' legal authorities in Afghanistan and escape the 'sociological' bias generated by Western legal orthodoxy. But where should the distinction between legal sodalities and modalities be anchored in social anthropology? There are two basic options: first, legal ethnology, which primarily focuses on normative phenomena within stable non-state social segments but also admits that there are various ways of creating higher or lower 'legal levels' (Pospíšil 1978: 52–60); second, political anthropology, which recognizes the formation of ad hoc temporary "political and war sodalities", "alliances", or simply social associations of a less stable nature with strong political implications (Fried 1967: 90–107; Kottak 2007: 124). Neither field has yet noted that sodality as an inter-group phenomenon could be linked with law or that legal level can be established as a sodality, although some writers have at least intuitively implied such an insight.[10] A closer link between law and sodality might be built upon the less noticed aspects of Afghan 'traditional' law that is created as a matter *between* legal authorities situated in the interspace of translocality (between states or between social groups and subgroups). These legal authorities' translocal coordination of social action that is necessary to resolve disputes between parties belonging to different places and social groups should be indeed considered the societal source of the particular organizational shape of 'legal systems based on reciprocity'. Sodality (not only of law) thus may represent an arena of normative and cognitive integration of respected authorities or other influential social actors from different social segments, which creates subtler forms of intergroup and translocal solidarity and may lead to a similarity or resemblance between separate systems of (legal or other) norms, beliefs, and values at a lower level of social integration. An example of this is the way that the legal systems of two Pashtun tribes affected by the same dispute and its resolution refer to a common code. However, social scientists should be careful even when accepting this perspective in principle because the tendency to see 'law' as a modality reasserts itself whenever we use terms such as 'legal system' or 'set of rules'. The use of these terms indicates that the research of law starts from 'what is determined' while missing the question

[10] For recent uses of the concept of sodality see, e.g., Appadurai (1996: 8), Lewellen (2003: 27), or Harris and Johnson (2006: 166).

of ‘who determines it’ as well as how both the law and the legal authority in question are legitimized in the broader sociocultural environment. The preference given to reading ‘law’ or ‘culture’ as a ‘text’ is surely one-sided and comes at the price of overlooking or disregarding a lot of data. When focusing on systems, sets of rules, statutes, or other textual or quasi-textual forms, we may entirely lose sight of various forms of social organizations of legal authorities and the societal question of why they are established the way they are.

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