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Limits of the rule of law: Negotiating Afghan “traditional” law in the international civil trials in the Czech Republic

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ABSTRACT

Drawing on ethnographic research of judicial cases in the Czech Republic which involve the law in migrants' countries of origin, this Article outlines how multiple strategies handle encounters with the legal-cultural differences of Afghanistan in order to neutralize what may be called the "alterity" of law. The Article suggests that far from being analytical tools, concepts such as "context," "culture," and "customary" are strategically used by courts to neutralize unsettling aspects of foreign Afghan legalities. Further, it applies Leopold Pospíšil´s ethnological concept of legal authority as a vehicle for reinterpreting the contextual differentiation of Afghan "traditional" law as an alternative to the standard judicial approach. Lastly, this Article

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suggests that the legal-cultural differences in this and similar cases can be bridged by a new concept of legal sodality, which offers an anthropologization of legal authorities' distinctive manner of imagining the law of the others.

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I. INTRODUCTION: FOREIGN-LAW ADJUDICATION BETWEEN LAW AND ETHNOLOGY

Images of a territorially bounded law within and beneath nation-states often hide deeply seated legal and normative orders. The shifting global interdependence and technological advances in digital communication in particular have brought details of subnational orders of law closer to foreign-law adjudication. These subnational legalities form part of migrants' transnational bonds and foreign "local" legal systems, but they are not merely foreign statutes that have entered the intimate domestic legal framework. These encounters pose vexing practical questions for domestic legal arenas, which often require the help of legal-anthropological expertise. The example this Article explores, Afghan traditional legalities localized first in international civil trials in the Czech Republic as well as in research reports concerning the law in Afghanistan, reveals a new way that the law may be conceptually understood that is in line with Leopold Pospíšil´s theory of legal multiplicity.

The findings challenge an assumption embedded in the transnational idea of legal transplants that law should be seen as an objective, bounded, and territorially fixed system of values and principles. Instead of the laws travelling, this Article asserts that a significant number of Afghan traditional tribunals involve Afghan legal authorities travelling and crossing societal boundaries. This trans-societal and inter-community composition of traditional councils disintegrates the image of the traditional law as a limited local system. These two kinds of legal mobility are labelled "transnational" and "translocal" respectively, with the reservation that the term "local" still

carries a subnational meaning but not necessarily one that is subordinate to the central nation-state.

Based on observations of foreign adjudication in international civil trials in the Czech Republic, this study further claims that the Afghan trans-societal composition of legal authorities is in fact incompatible with the transnational mobility of legal systems. Specifically, Afghan traditional infrastructure of intersocietal dispute resolution represents an untransferable aspect of migrants' legal identity assumed during foreign-law adjudication. This observation poses a more general hypothesis about the locus of law whose validity may be informed by data from different ethnographic sites.

This exploration starts at a peculiar place in foreign-law adjudication in the Czech Republic: Czech judges in the Czech Republic sometimes face the duty to apply foreign law in the context of international civil trials involving migrants that are governed by private international law.[1] Foreign law may be applied in various ways depending on the circumstances of the case and applicable conflict-of-law rules of private international law. In the Czech Republic, this instruction is laid out in Article 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."[2]

Czech judges navigate through the law of other countries with only its textual representations and their theoretical legal knowledge to guide them. When foreign law is applied as binding in private matters, the occasion requires "one-shot applications of foreign law to specific litigants" who are usually both foreigners.[3] Before this can happen, however, the judge has a legal imperative to conduct thorough research behind the scenes.

In cases of very unfamiliar legal cultures, such as that of Afghanistan, judges face an enormous task to identify the actual law and then to correctly familiarize themselves with it. Besides the legislation of the government in Kabul and the system of state courts, judges may also encounter information about unusual forms of law embedded in traditional legal authorities. Together with the data

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1. The foreign law of another country is most typically adjudicated by Czech courts in civil, commercial, family and inheritance matters, which involve foreign litigant(s) or a piece of real estate abroad.

2. Zákon o mezinárodním právu soukromém [Act on Private International Law], Zákon č. 91/2012 Sb. (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021).

3. Christopher A. Whytock, *Foreign Law in Domestic Courts: Different Uses, Different Implications*, *in* GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 45, 53 (Donald W. Jackson, Michael C. Tolley, & Mary L. Volcansek, eds., 2010).

about the dysfunctional nature of the state courts and legislation,[4] these facts may spark a reorientation concerning where the actual law in Afghanistan is found.

Traditional Afghan dispute resolution bodies ("*jirgas*" or "councils" in related Western literature[5]) have a number of features that are unfamiliar to judges in the Czech Republic. These include the gathering of men sitting on the ground, ceremonial dress, 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."[6] 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."[7]

For the Western observer immersed in the ideas of the "rule of law" and the legal state, the nature of these traditional bodies is often unclear and difficult to interpret. Despite some superficial similarities to familiar courts—for example, 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[8]—there is nevertheless nothing which truly mirrors the Western national court. *Jirgas* rely on neither legislation nor conventional symbols of the sovereign power of the state and offer no obvious indications that would allow for ranking these bodies under the expected forms within the rule of law.[9]

But descriptions of these institutions of Afghan law typically do not reach the Czech judges who are supposed to apply this law. The present discussion describes the gap that arises when one set of legal assumptions blinds the court to those of a relevant foreign jurisdiction, a problem of both theoretical and practical significance. It does so by

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4. Hatem Elliesie, *Rule of Law in Afghanistan* 4–5 (SFB 700 Rule of L. Working Paper Series, Paper No. 4, 2010).

5. *See, e.g.*, Ali Wardak & John Braithwaite, *Crime and War in Afghanistan: Part II: A Jeffersonian Alternative?,* 53 BRITISH J. CRIMINOLOGY 197, 199 (2013) ("In the Pashtun-majority areas of Afghanistan, village councils or jirgas ('circles')—or maraka in the south—are the key decision-making and dispute-resolution institutions, not only at the village level, but also from the smallest lineage up to tribal and inter-tribal confederations."); *see also infra*, Part III.

6. INT'L LEGAL FOUND., THE CUSTOMARY LAWS OF AFGHANISTAN: A REPORT 36 (2004).

7. THOMAS BARFIELD, NEAMAT NOJUMI, & J. ALEXANDER THIER, THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 11 (2006).

8. HASSAN M. YOUSUFZAI & ALI GOHAR, TOWARDS UNDERSTANDING PUKHTOON JIRGA: AN INDIGENOUS WAY OF PEACE-BUILDING AND MORE 19 (2012).

9. There is even "a policy line that a state court system should displace the patriarchal justice of *jirgas/shuras*." Wardak & Braithwaite, supra note 5, at 203. The claim that jirgas and shuras are irreparably patriarchal and simply displaceable is nevertheless not our position.

examining the need for Czech judges to apply that foreign law just as it works in its original setting.

The lead author encountered this problem when working as a foreign law expert for the Czech Ministry of Justice from 2009 through 2015. His regular assignment was to help Czech judges to prepare the application of foreign law. During this time, he was also completing his studies in anthropology, and the peculiarity of his position as both researcher and practitioner resulted in a distinctive anthropological self-awareness when conducting routine legal activities and conversations with legal professionals. As a legal professional, he understood that Afghan law would be applied in specific cases by Czech courts as a "text" that is relatively easily transferable from one country to another, with the issue being at most its culturally differing legal interpretations. At the same time, as an anthropologist, he realized that this transplanted version of Afghan law differed abysmally from the law as applied in its original world, and that, while some of its knowledge was successfully transmitted during these trials, other parts were lost entirely. This opportunity led him to conduct research in the form of "para-ethnography,"[10] which continued in 2018–2019 in order to seek a situated "participant comprehension"[11] of how Czech courts apply foreign law.

The study and application of foreign law, though a tricky and ambiguous task, is formally codified and ordinarily perceived as part of the judges' standard routine. It is the official duty of the court in question to take all necessary measures to ascertain the content of the foreign law, and the court can ask for help from the Ministry of Justice in this effort.[12] The author's "participant comprehension"[13] while

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10. Ethnography typically involves the anthropologist interacting and inferring from culture participants the social rules and norms. These insights are typically presented in an ethnographic monograph. But when the participants are themselves producers of the cultural analysis, as in this case the author as a former foreign law expert and the judges reflecting on the significance of their practices and interpretations, this approach results in "para-ethnography." *E.g.*, Gazi Islam, *Practitioners as Theorists: Para-Ethnography and the Collaborative Study of Contemporary Organizations*, 18(2) ORGANIZATIONAL RSCH. METHODS 231, 231 (2015); Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage,* 108(1) AM. ANTHROPOLOGIST 52, 53 (2006); *see generally* Tomáš Ledvinka, *Právní etnografie a "právo a etnografie": Dva přístupy k etnografickému výzkumu práva* [Legal Ethnography and "Law and Ethnography": Two Approaches to the Ethnographic Research of Law] 108 ČESKÝ LID: CZECH ETHNOLOGICAL J. (2021) (exploring distinct positions of ethnography in the domain of law and social anthropology).

11. David Hess, *Ethnography and the Development of Science and Technology Studies, in* HANDBOOK OF ETHNOGRAPHY 234, 234 (Paul Atkinson, Amanda Coffey, Sara Delamont, John Lofland, & Lyn Lofland eds., 2007).

12. *See* Zákon o mezinárodním právu soukromém [Act on Private International Law], Zákon č. 91/2012 Sb. §§ 23(2)–(3) (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021).

13. *See* Hess, *supra* note 11, at 234.

helping Czech courts as one of their ministerial foreign law experts was further shaped through anonymous semi-structured interviews with twenty judges and judges' assistants, who were professionally committed to the application of foreign law, and by a number of the author's practical experiences and informal conversations with judges applying foreign law and other legal actors, especially the other ministerial experts, as well as by his self-reflection upon his daily routine.[14] These experiences included observations on the development of legal arguments about foreign law and the analysis of legal documents and internet sources. The formal hierarchy of the Czech courts was well reflected in the interviews—the author gained access to three tiers of the Czech justice system, with the Supreme Court of the Czech Republic represented by two judges, three experts of the court's foreign department, and one district judge who had previously worked at the Supreme Court. It may be noted, however, that the applications of Afghan law discussed below did not usually reach beyond the courts of first instance. This Article reflects a small but revealing segment of a variety of foreign-law adjudication cases in Czech courts that included the study of foreign law in particular: Afghan law was involved in four cases during the research periods.

This project employed specific ethnographic solutions that helped to situate "law" in the ethnological sense within the broader realm of normativities, practices, and cognitive operations that are conventionally considered legal practice.[15] First, the cases of foreign law's study and application were seen as the most appropriate ethnographic unit upon which to start the study.[16] However, the research focused on *soft interpretative strategies* behind the scenes, rather than on the adjudication itself. In this regard the strategy followed John Conley and William O'Barr's imperative that, in the ethnography of legal discourse, it is necessary to give equal consideration as "paradigmatic artifacts of modern knowledge practices"[17] to "what the participants in legal institutions are saying."[18]

Second, in the context of international civil trials there can arise a difference between the meaning attributed by legal authorities who construe foreign law on the basis of documents and the meanings intended by the authors of those documents. Accordingly, the discussion focuses first on the gap between the ways Czech judges

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14. Interviewed by Tomáš Ledvinka (Feb. 10, 2015; Apr. 4, 2015; May 20, 2015; and Nov. 9, 2018).

15. For "law" in ethnological terms see especially LEOPOLD POSPÍŠIL, THE ETHNOLOGY OF LAW 30–51 (1978).

16. *See* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 29 (1941) (discussing the value of cases).

17. ANNELIESE RILES, DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 2 (2006).

18. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 2 (1990).

apply Afghan law in the textual form of foreign law (Part III), and then on the ways Afghan "traditional" councils resolve disputes (Part IV). The legal practices of both Czech judges and Afghan councils are deemed complex, reasonable, and efficient in the terms of their own worlds. However, some aspects of Czech legal practices resist being studied using the conceptual and methodological equipment of legal ethnology, while conversely some aspects of Afghan legal practices are not approachable through the categories of conventional legal education. During trials, it was necessary to grapple with an uneasy compatibility between the anthropological attitude, on the one hand, which tends to add culture, context, and details, and, on the other, the reductionist juridical attitude, which strives to filter out culture and other "irrelevant" detail.[19]

II. THE COMPARATIVE LEGAL ANTHROPOLOGY OF LEOPOLD POSPÍŠIL

It hardly needs to be said that preconceived categories and analytical tools of different disciplines imply different research politics and outputs. In the case at hand, the study of the law of Afghanistan

19. The debate about the divergence between lawyers and anthropologists is enormous. *See, e.g.*, Riles, *supra* note 10, at 53 (referring to "longstanding debates in the anthropology of law and science"); Randy Frances Kandel, *Six Differences in Assumptions and Outlook between Anthropologists and Attorneys, in* DOUBLE VISION: ANTHROPOLOGISTS AT LAW 1–4 (Randy Frances Kandel, Ralph J. Bishop, & Pamela Amoss, eds., 1992) (listing differences as locating liability v. explanatory analysis, judgment v. relativity, the concrete v. the wholistic, discrete v. multifactorial causality, the meaning of fact and truth, and the approach to temporality); Sally Falk Moore, *Law and Anthropology: Research Traditions, in* COMPARATIVE LAW & ANTHROPOLOGY 17, 17–26 (James A.R. Nafziger ed., 2019) (describing anthropological approaches to legal issues such as human rights, land tenure reform, and other national legislation); James A.R. Nafziger*, Introduction to Comparative Law and Anthropology, in* COMPARATIVE LAW & ANTHROPOLOGY 1, 1–4, 9–12 (James A.R. Nafziger ed., 2019) (addressing "the mutuality, though certainly not congruence, between the two disciplines [law and anthropology]"); ANTHONY GOOD, ANTHROPOLOGY AND EXPERTISE IN THE ASYLUM COURTS 15–38 (2006) (discussing how the relationship between anthropology and law "flourished, waned, and–arguably – began to prosper again, while . . . display[ing] distinct modes of reasoning and attitudes to evidence"); JAMES M. DONOVAN & H. EDWIN ANDERSON, III, ANTHROPOLOGY AND LAW 14–20 (William O. Beeman & David Kertzer, eds., 2003) (discussing the historical relations between anthropology and law); JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 197–239 (2008) (touching on the tensions between law and anthropology in practical scenarios such as terrorism, human rights, intellectual property rights, and the culture defense); *see generally* MARK GOODALE, ANTHROPOLOGY AND LAW: A CRITICAL INTRODUCTION (2017) (focusing on the crossroads of anthropology and law); Tomáš Ledvinka, *Právo a antropologie: Distinkce, jež neskomírá* [Law and Anthropology: Distinction that does not dissolve] 107 ČESKÝ LID: CZECH ETHNOLOGICAL J. (2020) (stating that both law and anthropology differ from the anthropology of law because of the "ethnocentrism of conventional jurisprudence and the understanding of the Otherness in non-legal anthropology").

is often dominated by categories such as the "rule of law,"[20] human rights,[21] women's rights,[22] and state-driven modernization.[23] Modern—supposedly universal—legal concepts can obstruct the anthropologists' vocation to construe the Afghan "traditional" law in terms of its own world. As such, because the discourse of the rule of law to which Czech judges "belong"[24] envisions legal reform as located in the future and as a property belonging to the Afghan state,[25] the actual realities of the law on the ground in the present attract little attention, being regularly perceived as, at most, obstacles that hinder legal evolution and progress.[26]

The bias introduced by the rule of law discourse applies for related legal-cultural dichotomies such as formal–informal, official–traditional, state–non-state, and law–culture. They all help to generate a static version of legal pluralism in Afghanistan, one usually reduced to a combination of three possible forms of law (state legislation, customary law, and *sharīʿah*)[27] without taking into account how or whether these forms are actually applied by legal authorities.[28] A more

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20. *See, e.g.*, Carol Wang, *Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability,* 55 HARV. INT'L L. J. 211, 212 (2014) (examining "the structural weaknesses and contradictions in rule of law efforts in Afghanistan").

21. *See, e.g.*, Barnett R. Rubin, *Transitional Justice and Human Rights in Afghanistan*, 79 INT'L AFFS. 567, 570–74 (2003) (describing the difficulties in constructing policies that hold parties accountable for human rights abuses in Afghanistan).

22. *See, e.g.*, Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 354–61 (2003) (listing efforts taken by the Afghan government to address "gender crimes and institutionalized gender discrimination" and exploring the limited effect of those efforts).

23. *See, e.g.*, SAYED HASSAN AMIN, LAW, REFORM, AND REVOLUTION IN AFGHANISTAN: IMPLICATIONS FOR CENTRAL ASIA AND THE ISLAMIC WORLD 81–92, 99 (1992) (recounting the government's attempts to undertake modern legal and social reform starting at the turn of the twentieth century).

24. Peggy Levitt & Nina Glick Schiller, *Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society*, 38 INT'L MIGRATION REV. 1002, 1010 (2004).

25. *See* Elliesie, *supra* note 4, at 1–2 (discussing the reform process).

26. For an overview of the rule-of-law reconstruction approaches in Afghanistan, see generally Geoffrey Swenson, *Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed,* 42 IN'TL SEC. 114, 114–51 (2017).

27. *Sharīʿah* is usually defined as Islamic religious law. There are, however, more understandings of this legal system even within Afghanistan. *See, e.g.*, Thomas Barfield, *Afghanistan: The Local and the Global in the Practice of Shariʿa, in* SHARI'A POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD 179, 188–90 (Robert W. Hefner ed., 2007); see generally Faiz Ahmed, *Shariʿa, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan*, 7 GLOB. JURIST [i] (2007) for details about the position of *sharīʿah* among the state and customary law in Afghanistan.

28. *E.g.*, MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY 3–4, 197 (1985) (disqualifying traditional legal authorities as a form of "tribalism" entirely and recognising it as a legal means only when initiated by state ministry of justice as an "experimental scheme"); Nadjma Yassari & Mohammad Hamid Saboory, *Sharia and National Law in Afghanistan*, *in* SHARIA INCORPORATED 273, 273, 313 (Jan Michiel Otto ed., 2010) (these

dynamic picture of legal pluralism in Afghanistan focuses on the relationships between Afghan traditional councils such as *jirgas* and Afghan state courts, as well as the fluctuation of people between them. While an improvement, this approach still fails to open the black box of Afghan "traditional" law.[29]

In the context of the encounters of Czech judges with Afghan "traditional" law, this contradiction between *data* and *discourse* unsettles the conventional idea of the rule of law and suggests the need to employ legal-ethnological concepts in research on the cases. For this reason, this *problematique* is deeply related to an extensive debate about the possibilities of cooperation between two seemingly irreconcilable positions: the ethnological emphasis on cultural particularity and the rule-of-law emphasis on modern normative universality. The mutual relationships between anthropology and law,[30] human rights,[31] and legal sciences[32] remain somewhat controversial, while the universal claims of the rule of law and other legal concepts are broadly accepted among social scientists. The hard lines have weakened, though. Today, it seems that law and

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authors particularly illustrate the paradox of the discourse on Afghanistan´s legal pluralism: while contemplating the fact that "Afghanistan's statutory laws and regulations exist solely on paper", they claim at the same time that the "reality" is that "Afghan law is a combination of Islamic law, state legislation, and local customary law"); Ali Wardak, *State and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 33 U. PA. J. INT'L L. 1145, 1150–59 (2012) (discussing key issues with state and non-state justice systems).

29. *Cf.* Antonio De Lauri, *Corruption, Legal Modernisation and Judicial Practice in Afghanistan*, 37 ASIAN STUD. REV. 527, 539–41 (2013) (discussing "the interconnection of customary practices, state judicial mechanisms, references to the principles of Islamic law, and . . . Western models of justice").

30. *See* Franz von Benda-Beckmann, *Riding or Killing the Centaur? Reflections on the Identities of Legal Anthropology*, 4 INT'L J. L. CONTEXT 85, 94–101 (2008) (analyzing the relationship between anthropologists of law, lawyers, sociologists of law, and general anthropologists); *see generally* DONOVAN & ANDERSON, *supra* note 19 (looking at the practical and theoretical benefits of anthropology to law and vice versa); CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective, in* INTERPRETIVE ANTHROPOLOGY (Clifford Geertz ed., 2000) (describing the complicated relationship between anthropology and law); KAIUS TUORI, LAWYERS AND SAVAGES: ANCIENT HISTORY AND LEGAL REALISM IN THE MAKING OF LEGAL ANTHROPOLOGY (2015) (describing the history of legal anthropology from the nineteenth century to the 1970s); GOODALE, *supra* note 19 (offering a comprehensive look at post-Cold War legal anthropology).

31. Riles, *supra* note 10, at 52; *see also* Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999*, 23 HUM. RTS. Q. 536, 538–49 (2001) (dissecting the American Anthropological Association's "embarrassing" statement on human rights and detailing anthropologists' efforts to distance the field from that statement); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology along the Way)*, 26 POLITICAL & LEGAL ANTHROPOLOGY REV. 55, 56–57 (2003) (explaining the tension between anthropologists' relativist view of culture and activists' universal conception of human rights).

32. *See* PAUL BOHANNAN, LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT 43, 47–48 (Paul Bohannan ed., 1967) (discussing anthropology and its relationship to legal institutions).

anthropology have become more aligned—at least in academic rhetoric—as anthropology's "culture" concept becomes more fluid and dynamic, and the contextual limits of many legal ideals better recognized.[33]

The earlier divergence between law and anthropology has, nevertheless, reemerged in situations where anthropologists and their expertise are invoked during dispute resolution cases.[34] This misalignment has been studied specifically in relation to asylum proceedings.[35] When serving as expert witnesses the pressure and demands of trials often require anthropologists to compromise the presentation of their knowledge to conform with a legal way of thinking. They must speak in the language of "objectivity"—the only language that modern adjudicators are willing or able to hear.[36]

Much like asylum proceedings, international civil trials are a site of struggle over disciplinary ontologies and epistemic authority. Here, too, the anthropological view concerning the application of foreign law may be subject to procedural demands and trial pressures. In particular, the discipline's insistence on "irreductions"[37] and "commitments to contextual differentiation"[38] are contradicted by the doctrinal and somewhat reductionist legal approach towards foreign law as merely a text to be interpreted. As a natural response to the pressure to accommodate the trial setting, social anthropologists tend to challenge, as in this Article, assumptions that are accepted as "given" by instead offering a proper ethnographic description or anthropological reflection on the phenomena of legal concern.[39]

Part III of this Article outlines the problem to be resolved and describes the perspectives of Czech judges needing to apply foreign law in their courts. In trial situations that involve application of foreign law, legal professionals, such as the authors of documents about

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33. *See id.*

34. *See* JAMES R.A. NAFZIGER, COMPARATIVE LAW AND ANTHROPOLOGY 7 (James R. A. Nafziger ed., 2017) (detailing forms of dispute resolution that take place outside the scope of law enforcement).

35. *See* NICK GILL & ANTHONY GOOD, ASYLUM DETERMINATION IN EUROPE: ETHNOGRAPHIC PERSPECTIVES 15–18 (Nick Gill & Anthony Good eds., 2019) (explaining the differences between legal and anthropological approaches to asylum).

36. *See* GOOD, *supra* note 19, at 34–37.

37. *See* BRUNO LATOUR, THE PASTEURIZATION OF FRANCE 192–211 (1988) (posturing how phenomena such as power, knowledge, force, reason, nature, and culture cannot and should not be reduced to one another, but can only be understood through their relationships with one another).

38. Riles, *supra* note 10, at 54.

39. A telling example of this social anthropologists' tendency is PAUL BURKE, LAW'S ANTHROPOLOGY: FROM ETHNOGRAPHY TO EXPERT TESTIMONY IN NATIVE TITLE 241 (2011) (describing the "struggle between judge and expert over the prerogative to authoritatively interpret the anthropological archive" in particular Australian *native title* cases); GOOD, *supra* note 19, at 208 (reflecting "hegemonic struggle" for authority between anthropologists as experts witnesses and judiciary within British asylum trials).

Afghan law, should be seen as both linguistic and intercultural "translators."[40] Afghan law itself may be conceptualized as a "travelling model" or "token" that is "de-territorialised from its original setting and re-territorialised in new settings and problem-spaces."[41] Fidelity to this translation task requires making legal cultures as different as those of Afghanistan and the Czech Republic commensurable while at the same time disqualifying state sovereignty as a point of departure.

To bridge this gap, the discussion in Part IV adopts Leopold Pospíšil's analytical concept of "law" as an open set of elements that characterize certain social actions as being of a legal nature.[42] As "the divergence . . . between the Czech situation and the Afghan situation" is enormous,[43] the analytical concepts of Pospíšil's legal ethnology are needed to overcome the static image of the pluralism of legal forms (state law, customary law, and *sharīʿah*).

Because of the heavy work Pospíšil's work plays in this discussion, a few additional words of background may be appropriate. Pospíšil's concept of "law" is intended to be applicable regardless of whether the law operates on the level of the state, society as a whole, or on subsociety or substate levels.[44] His innovation helps to distinguish law from the rest of culture according to four attributes (authority, intention of universal application, obligation, and sanction).[45] 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 that allow researchers to project their own cultural assumptions onto the legal unknown.[46]

The attribute emphasized in this Article is the presence of legal authorities (i.e., a person or persons "in many ways comparable to that of the state . . . [who are] regarded as jural authorities by their

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40. *See* Clark D. Cunningham, *Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1991-1992) (offering "the metaphor of the lawyer as translator as a way of both understanding and altering the ways lawyers change the meanings of their clients' stories").

41. ANDREA BEHRENDS, SUNG-JOON PARK, & RICHARD ROTTENBURG, TRAVELLING MODELS IN AFRICAN CONFLICT MANAGEMENT: TRANSLATING TECHNOLOGIES OF SOCIAL ORDERING, 3–4 (Andrea Behrends, Sung-Joon Park, & Richard Rottenburg eds., 2014).

42. POSPÍŠIL, *supra* note 15, at 30–51.

43. Jonathan Eddy, *Rule of Law in Afghanistan: The Intrusion of Reality in Afghanistan*, 17 J. INT'L COOP. STUD. 1, 4 (2009).

44. *See* LEOPOLD POSPÍŠIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 98–99 (1971).

45. *See id*. at 43.

46. Although he eschews it as an exact match, see *id*. at 275–76, Pospíšil's method to objectively identify "law" may still be usefully analogized to that employed by Hohfeld, who attempted to dissipate the linguistic ambiguity surrounding the term "rights" by analyzing the recognized applications of the label into a set of legal primitives/or prerogatives. WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 36–64 (Walter W. Cook ed., 1923).

followers."[47]). The importance given to the element of authority cannot be better illustrated than by Pospíšil´s brief remark that "the totality of the principles incorporated in the legal decisions of an authority of a society's subgroup constitutes that subgroup's legal system."[48] This understanding of "legal authority" forms part of a more complex comparative theory of law, which avoids the tendency to limit the inquiry into law to the state level only and which breaks down the dichotomy between state and nonstate law. As a result, any legal authority identified by this concept may be situated within a continuum of various degrees 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 also use brutal force of various kinds.[49] Part V of this Article suggests adding a third continuum along which an authority 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 addition can help account for situations in which a judge is an invited member of another segment of society or when a stranger fills the role out of the obligations of hospitality.

The usefulness of this addition arises because even though social anthropologists as well as many legal scholars would agree in principle with the Pospíšilian contextual perspective, during actual research they can be tempted to fall back upon the essentialist viewpoint, such as the assumption that law is "law" only when promulgated from states,[50] which then arguably leads into interpretive misunderstandings.[51] The most common such error is the implied assertion that stateless societies, lacking law, are thereby necessarily "lawless," thus rendering them vulnerable to interventions by

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47. Leopold Pospíšil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 J. CONFLICT RESOL. 2, 7–8 (1967).

48. *Id*. at 9.

49. *See* POSPÍŠIL, *supra* note 44, at 60–61.

50. For example, this contrast is sharply apparent when comparing Brian Tamanaha's early essentialist claim in defense of legal centrism that "'law' is the law of the state," Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J. L. & SOC'Y 192, 212 (1993), with his more nuanced, even Pospíšilian, model that "law is identified not with an abstract concept of definition but through collective (conventionalist) recognition of law within communities: law is whatever people identify and treat through their social practices as 'law.'" BRIAN Z. TAMANAHA, LEGAL PLURALISM EXPLAINED: HISTORY, THEORY, CONSEQUENCES 206 (2021). Although Tamanaha would like to continue to withhold the term "law" from the social levels recognized by Pospíšil, he now concedes that this is an empirical question rather than a definitional one, to be settled by whether the people regard subnational norms as functioning as laws. *Id.*

51. *See* Franz von Benda-Beckmann, *Who is Afraid of Legal Pluralism*? J. LEGAL PLURALISM & UNOFFICIAL L. 37, 41–42 (2002) (Many debates and misunderstandings between legal scientists and legal anthropologists . . . have suffered from the tendency to . . . look for 'the one' correct or useful concept for both lawyers and social scientists . . . .").

paternalistic law-giving states presumably for the societies' own good.[52]

For this reason, the argument below hopes to strengthen Pospíšil's position by approaching law not only in terms of systems of rules, but also through emphasising the authoritative dimension of law and its societal configurations as *legal sodalities* (in which the emphasis is on law as communication in the form of intergroup meeting-like associations of legal purpose) as distinct from *legal modalities* (wherein the default emphasis is on legal normativity as objective or objectified systems of legal knowledge). Following Flood's suggestion that "theory is to be viewed as part of the research process, not its goal nor necessarily its starting point,"[53] the argument sees the purpose of using Pospíšil's analytical concept of "law" 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[ing] legal practice and vice versa."[54]

III. THE LAW-CULTURE DIVIDE IN INTERNATIONAL CIVIL TRIALS

Tasked with applying foreign law in the same way it works in its original jurisdiction, Czech judges must first discern what, in fact, the law is. Trained lawyers look to the foreign analogues of their own legal systems, which in most instances means statutes passed by national legislatures and interpreted in state courts. This default orientation fails in the case of Afghanistan, however, due to the failures of these institutions and the corresponding overlooking of the more vital nonstate dispute resolution bodies. As a result, judges often miss entirely the locus of actual legal work within Afghan society, dismissing the contrary evidence as mere cultural holdovers that impede the establishment of a truly modern rule-of-law system. This Part traces more fully how Czech judges approach the task of identifying the applicable Afghan law and their reflections on the significance of the outcome.

The initial step taken by Western legal professionals who wish to familiarize themselves with the law in Afghanistan is usually to look at internet sources for legislation. More detailed information about Afghan law, however, shows that statutory laws, despite their formal enactment, are generally not applied in the country.[55] Additionally, the state courts, except perhaps the Supreme Court of Afghanistan and a

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52. *See*, *e.g.*, Karl Widerquist & Grant McCall, *Myths about the State of Nature and the Reality of Stateless Societies*, 37 ANALYSE & KRITIK 233, 235–42 (2015) (Ger.) (analyzing the claim that "everyone under a sovereign government is better off").

53. JOHN FLOOD, THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 33 (Reza Banakar & Max Travers eds., 2005).

54. SUSAN BIBLER COUTIN & VÉRONIQUE FORTIN, THE HANDBOOK OF LAW AND SOCIETY 71–72 (Austin Sarat ed., 2015).

55. *See* Elliesie, *supra* note 4 at 4–7.

few other tribunals,[56] are massively overshadowed by "traditional" legal authorities who have played "a central role" and "still govern daily life of most of the Afghans."[57] 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."[58] By contrast, the Afghan "traditional" law that is usually hidden from outside observers behind the façade of the state may stand *above* rather than beneath the state's rules.[59]

This articulation need not imply hierarchies, either between state courts and "traditional" bodies or between state law and any other law. Rather, it only suggests that before approaching any conclusion, the mutual relationships should be determined on a case-by-case basis. What then is a judge outside Afghanistan to do, after encountering such unusual information during 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 finding the relevant law? To illuminate this question, the strategies used by Czech judges to study Afghan law before it can be applied as binding law to litigants in international civil trials must first be described.[60]

When a foreign law is involved in an international civil trial, Czech judges are usually required to undertake research under the official imperatives of the aforementioned Article 23 ("The Ascertainment and Use of Foreign Law") of the Czech Act on Private International Law.[61] Because judges are not experts on all, if any, other countries' legal systems, they must navigate the law of a foreign state regularly using only their theoretical legal background and practical knowledge. In practice, the judges themselves become substitutes for Afghan legal authorities towards the Afghan litigants, despite the fact that the judges are acknowledged to work merely on the basis of the scant information available to them. Calling upon

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56. Jonathan Eddy, *Rule of Law in Afghanistan: The Intrusion of Reality*, 17 J. INT'L COOP. STUD. 1, 1–23 (2009).

57. AFG. LEGAL EDUC. PROJECT, AN INTRODUCTION TO THE COMMERCIAL LAW OF AFGHANISTAN 65–66 (Stanford Law School, 2011).

58. *See* Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State Building Opportunity or Dangerous Liaison?*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 149, 158–60 (Whit Mason ed., 2011) (explaining the perception of the formal legal system in Afghanistan).

59. We attempt to re-articulate in a strictly Pospišil way the phenomenon of "the subordination of national law to local law." Karin Ask, *Legal Pluralism and Transitional Justice in Afghanistan: A Gender Perspective*, 2003 HUM. RTS. DEV. Y.B. 347, 363 (2003).

60. *Cf.* Whytock, *supra* note 3, at 48–52 (discussing how US courts approach the application of foreign law in domestic courts).

61. Zákon o mezinárodním právu soukromém [Act on Private International Law], Zákon č. 91/2012 Sb. § 23 (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021).

expert witnesses is permitted by Czech law, but the option is seldom used. [62]

The application of foreign law is one of the core themes of private international law, whose procedural environment concerns mainly the resolution of status and property disputes that include a significant cross-border factor.[63] The "connecting factor" might be, for instance, that one or more of the litigants are foreigners or that the contract is subject to foreign law.[64] 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 domestic legal authorities to cope with legal-cultural difference. Nevertheless, and again in practice, doctrinal inquiry seldom focuses on more than the interpretation of two elementary issues: what rules determine the applicable law and whose state courts have jurisdiction.[65]

This Article only marginally touches on this doctrinal approach to foreign law. Rather, it focuses on how the concepts of the rule of law shape this understanding of what qualifies as the relevant "applicable law" that feeds into those inquiries. Czech legal doctrine conventionally divides the application of foreign law in international civil trials into the phases of determination, study, and application.[66] The first phase—determination of the foreign law—involves identifying which country's laws should be applied.[67] This phase will decide whether to apply domestic or foreign law to the case as a whole or to some of its elements.[68] To this end, the judge consults 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.[69]

In the second, preparatory phase of the study of foreign law, the Czech court may ask for a copy of the identified foreign law, which is then usually translated and interpreted on the basis of Czech legal prescriptions.[70] This step serves as a precondition for the third phase,

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62. *See* Postup justičních orgánuů ve styku s cizinou ve věcech občanskoprávních a obchodněprávních [Procedure Of Judicial Authorities In Contact With Foreigners In Civil And Commercial Matters], Vyhláška č. 7/2018 Sb. (Czech).

63. *See* ZDENĚK KUČERA, MONIKA PAUKNEROVÁ & KVĚTOSLAV RŮŽIČKA, MEZINÁRODNÍ PRÁVO SOUKROMÉ [PRIVATE INTERNATIONAL LAW] 23–24 (2015).

64. MONIKA PAUKNEROVÁ, EVROPSKÉ MEZINÁRODNÍ PRÁVO SOUKROMÉ [EUROPEAN PRIVATE INTERNATIONAL LAW] 3–12 (C.H. Beck ed., 2013).

65. For an overview of the foreign law adjudication in EU member states, see generally CARLOS ESPLUGUES, GENERAL REPORT ON THE APPLICATION OF FOREIGN LAW BY JUDICIAL AND NON-JUDICIAL AUTHORITIES IN EUROPE (Carlos Esplugues, José Luis Iglesias & Guillermo Palao eds., 2011).

66. *See, e.g.*, KUČERA, PAUKNEROVÁ, & RŮŽIČKA, *supra* note 63, at 184–87.

67. *See id.*

68. *See id.*

69. *See id.*

70. It is the official duty of the court in question to take all necessary measures to ascertain the content of the foreign law. *See* Zákon o mezinárodním právu soukromém

the appropriate and correct application of foreign law in place of domestic law. This last process is the most complex and involves activation of knowledge of the identified foreign laws and precedents, which have been interpreted in relation to the case.[71]

This process of applying foreign law may seem to be a formal procedure.[72] But it often evokes a deeply existential dimension. 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 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 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.[73]

[Act on Private International Law], Zákon č. 91/2012 Sb. § 23(2) (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021). The court may ask for help of the Ministry of Justice in this effort. *See id.* at § 23(3).

71. *See, e.g.*, KUČERA, PAUKNEROVÁ, & RŮŽIČKA, *supra* note 63.

72. *See, e.g.*, PETR BŘÍZA ET AL., ZÁKON O MEZINÁRODNÍM PRÁVU SOUKROMÉM: KOMENTÁŘ [ACT ON PRIVATE INTERNATIONAL LAW, A COMMENTARY] 144–51 (2014); MONIKA PAUKNEROVÁ ET AL., ZÁKON O MEZINÁRODNÍM PRÁVU SOUKROMÉM: KOMENTÁŘ [ACT ON PRIVATE INTERNATIONAL LAW, A COMMENTARY] 166–73 (2013).

73. Interviewed by Tomáš Ledvinka (Feb. 10, 2015) ("*než jsme šla … na tu odvolačku, tak jsem měla třeba spis z roku 2013, rozvod, návrh podal manžel Čech proti Japonce, mají nezletilou dceru, takže nejprve probíhalo řízení ohledně nezletilé dcery, to trvalo cca rok a já jsem si tedy nechávala vyznačit speciálně doložku právní moci, abych to ještě v prosinci opravdu skončila. Aplikovala jsem české právo, protože on je Čech, žijou tady v Čechách a při aplikaci českého práva jsem nakonec potom ztroskotala na tom, že ta kulturní odlišnost té Japonky, je úplně jiná než tady naše, ona mi v jednačce…, dokonce mi jednačku opustila, já jsem řízení přerušila, přestože věděla už rok a půl, dva roky už věděla, že rozvod bude, tak se s tím vlastně nedokázala smířit a skončilo to tak, že když po tom přerušení řízení se vrátili s tlumočnicí, tak jsem si myslela, jak ji dovyslechnu, nejprve jsem provedla výslech jeho, pak jsem tedy začala vyslýchat ji, no a pak najednou tlumočnice… Japonka vzala papírek a tlumočnice mi přeložila, že nemůže mluvit. Já jsem se snažila zajistit jinou tlumočnici a v rámci toho telefonického rozhovoru, který jsem měla s tou jinou tlumočnicí, mi ta tlumočnice řekla, že ta jejich mentalita je taková, že nepřipouští rozvod. Pro ně je to něco jako u nás třeba ve 20. letech neprovdaná matka, která má dítě. Nemůže se tím pádem vrátit do Japonska, protože by se na ni dívali*

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 interpreters and through her own inquiries into Japanese culture.

In this way the review approaches the particular "alterity," or "otherness," which Afghan law, both state and "traditional," poses for Czech judges.[74] Since Czech law's imperative is to apply the foreign law in the exact way as it is applied in the original "context,"[75] the present analysis will focus on the strategies and dimensions of understanding the "alterity" of Afghan law. Referring to the anthropological issue of "alterity" or "otherness" emphasizes that this interrogation of a situated production of legal-cultural difference is contingent, heterogenous, and context-specific. It could be contrasted with the perception of legal differences as a given, such as occurs in a comparative juxtaposition of one national legal system with another.

This topic—the alterity of foreign law in private international law—has been addressed in cultural terms somewhat theoretically in legal studies. For instance, Volkmar Gessner designates (in the title of the monograph he edited) the treatment of foreign law as "civil litigation in foreign legal cultures" and emphasizes that "only anthropological studies are confronted with the problem of 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."[76] Even in the field of law and anthropology, the ethnological investigation of the application of foreign law has only recently entered the research agenda.[77] Wolfgang Fikentscher still sees "the legal

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určitým způsobem jako na rozvedenou a i tady v té japonské komunitě, tady v Čechách, by byla vyčleněná z té jejich společnosti. A aplikujete české právo.").

74. For a fuller social and philosophical unpacking of the term "alterity," see Doris Bachmann-Medick, *Alterity – A Category of Practice and Analysis*, ON CULTURE, Winter 2017, at 2, 2–10, http://geb.uni-giessen.de/geb/volltexte/2017/13387/pdf/On_Culture_4_Bachmann-Medick.pdf (last visited Aug. 30, 2021) [perma.cc/8N34-Q7WG] (archived Aug. 30, 2021).

75. *See* Zákon o mezinárodním právu soukromém [Act on Private International Law], Zákon č. 91/2012 Sb. § 23(1) (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021) ("[S]aid [foreign] body of laws must be applied in the way that it is used in the territory to which it applies").

76. Volkmar Gessner, *Introduction, in* FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN LEGAL CULTURES 4 (Volkmar Gessner ed., 1996).

77. *See e.g.*, Marie-Claire Foblets, *Mobility Versus Law, Mobility in Law: Judges in Europe Are Confronted with the Thorny Question "Which Law Applies to Litigants of Migrant Origin?"*, *in* MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD 297, 297–99 (Franz von Benda-Beckmann, Keebet von Benda-Beckman, & Anne Griffiths eds., 2005) (estimating that this approach originated in the 1960s, a period characterized by mass migration and maintaining ties to one's country of origin).

anthropology of conflict of laws as a novelty,"[78] even though the research on conflict of laws directly addresses the debates on legal pluralism and interlegality.[79] Some legal scholars, however, reflect that there is a complex theme of "cross-border migration of legal norms"[80] and even suggest, as does Horatia Watt, that "the forum and the foreign" can be perceived as "the Self and the Other."[81] Nevertheless, methodologically, some writers still continue to uphold conventional doctrinal positions of legal theory.[82]

In the case law of the Supreme Court of the Czech Republic, the "investigation" ("*zjišťování*" in Czech) of foreign law is in fact a process subjected to traditional evidentiary principles, excepting the adversarial principle, which the court replaces with judges' legal research.[83] This means in practice that Czech judges study foreign law like old-fashioned, nineteenth-century armchair anthropologists, reading texts, and reports available online or delivered to them through diplomatic or consular channels. At the same time, the case law requires judges to become as "objectively" familiar with foreign law as with their own.[84]

In this doctrinal view, there is no explicit difference between the foreign law as located in its original world and the foreign law applied within the host country. The intercultural transmission of law is an issue that is simply overlooked. Nevertheless, the data below will demonstrate that the practices and strategies judges employ for purposes of understanding the law are primarily shaped by the tension between the demand to be "objectively" familiarized with foreign law and interstate respect for each other's sovereignty (also termed "reciprocity").[85] This reciprocity might be perceived not merely as

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78. WOLFGANG FIKENTSCHER, LAW AND ANTHROPOLOGY: OUTLINES, ISSUES, AND SUGGESTIONS 433 (2009).

79. *See* Tomáš Ledvinka, *Bronislaw Malinowski and the Anthropology of Law*, *in* BRONISLAW MALINOWSKI'S CONCEPT OF LAW 55, 69–72 (Mateusz Stępień ed., 2016); *see also* Nafziger, *supra* note 19, at 9–11; Gessner, *supra* note 76, at 5 (addressing the controversies legal pluralism creates for anthropological studies in a national context).

80. Whytock, *supra* note 3, at 46.

81. *See* Horatia Muir Watt, *Future Directions?*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 343, 374 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

82. *See, e.g.*, TAMANAHA, *supra* note 50 at 206–07 (discussing the approach of "folk law," which the author labels a "conventionalist approach"); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3, 4 (1997).

83. For evidentiary principles related to the investigation of foreign law see, for example, Rozsudek Nejvyššího soudu České republiky ze dne 17.08.2015 [Decision of the Supreme Court of Aug. 17, 2015], sp.zn. 21 Cdo 4674/2014 (Czech). In this decision the court made use of the application of the Isle of Man´s legal system by Czech courts to specify how foreign law should be ascertained. *See id.*

84. *See id.*

85. *See* Anatol Dutta, *Reciprocity*, *in* 2 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1466, 1467–69 (Jürgen Basedow, Giesela Rühl, Franco Ferrari &

stimulating scholarly respect for concrete legal reality but also as precluding certain avenues of legal research as inappropriate. In this context, the legal-cultural and spatial distance between domestic and foreign law becomes a background concern.

While "reciprocity" is a buzzword and, as one judge said, the "unwritten spirit of the application" of foreign law,[86] the doctrinal interpretation is that "[t]he judge applies foreign law *ex officio* irrespective of any reciprocity principle."[87] This contradiction means merely that the reciprocity has been so deeply embedded in the individual national systems governing the conflict of rules, and so generalized in recent international judicial cooperation, that its application no longer needs to be determined for specific cases.[88] 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,"[89] is almost unknown in this field in the Czech Republic. [90]

The assumptions supporting legal reciprocity may be seen primarily as principles that both emanate and distract from respect for the alterity of Afghan law as perceived by Czech judges. 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. In this sense, the law is essentially directed toward an *Other*. 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. As this Part demonstrates, foreign law adjudication is usually not based on direct communication between mutually distant, separate legal authorities (be they Czech courts or Afghan courts) but on the anticipation of the way the other state's legal authorities answer to the question "what is the applicable law?" in specific situations. This 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

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Pedro de Miguel Asensio eds., 2017) (defining reciprocity as the expectation that other members of society will react to conduct in an equivalent manner).

86. Interviewed by Tomáš Ledvinka (May 20, 2015).

87. Monika Pauknerová, *Czech Republic – Treatment of Foreign Law in the Czech Republic*, *in* TREATMENT OF FOREIGN LAW – DYNAMICS TOWARDS CONVERGENCE? 113, 115 (Yuko Nishitani ed., 2017).

88. *See* Anatol Dutta, RECIPROCITY, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL L.AW 1466, 1467–69 (Jürgen Basedow et al. eds., 2017).

89. *See Comity*, USLEGAL, INC. (last visited Dec. 30, 2018), https://conflictoflaws.uslegal.com/comity/ [https://perma.cc/N85B-YU6W] (archived Aug. 22, 2021).

90. *Cf, e.g.*, BŘÍZA ET AL., *supra* note 72, at 145–51; *see also* PAUKNEROVÁ ET AL., *supra* note 72, at 166–73. Even these minute commentaries do not mention the concept of comity.

reciprocity, is particularly challenged when the foreign state and the foreign law diverge. This fracture 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 law. This contradiction may easily escape the attention of Czech judges when they analyze the situation using conventional legal tools and categories, which define law as a dimension of a state while making other forms of law virtually invisible. Although this approach may be inherently ethnocentric, it is not a conscious strategy of the judges themselves; rather, it is hidden from them within the category of law itself.

Active presumptions suggest that law stands with the state above a society or that it exists autonomously and distinctly outside culture. This understanding, despite being convenient for transferring Afghan law across legal-cultural boundaries, transforms the original law when travelling from its country of origin: the multiple threads linking it to the world of its home are ripped apart and the remains are situated within new artificial relations attaching it to the milieu of the host country.[91] In particular, the objectified knowledge of Afghan law is stripped of the legal authorities which function in the segmented societal environment of Afghanistan and which correspond to the ethnological concept of "legal authority," defined as "a specific individual or a group of individuals effecting social control" whose "decisions and advice . . . are followed by the rest of the members of the group."[92]

Although each stage of the law's travels is laborious, the knowledge of foreign law at its final destination is seen as "imaginary" and "approximate," as one of the judges interviewed has said, rather than "accurate."[93] Curiously enough, this outcome seems irrelevant for the operation of transnational governance via private international law.[94] The observation is, however, that Czech judges and foreign law experts do not *a priori* exclude any detailed representation of foreign law, including empirical reports or scholarly articles describing, for instance, Afghan "traditional" law, 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 or to translate them both linguistically and interculturally. Even when judges go beyond their comfort zone, they may employ the interpretive schemata mentioned above—for example, the divide between law and culture—to navigate this unknown terrain, which may allow recognition of the foreign state

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91. *E.g.*, BEHRENDS, PARK, & ROTTENBURG, *supra* note 41, at 4.

92. POSPÍŠIL, *supra* note 44, at 44, 47.

93. Interviewed by Tomáš Ledvinka (Apr. 4, 2015) (original: "*pomyslný*" "*přibližný právo*").

94. *See, e.g.,* BŘÍZA ET AL., *supra* note 72 at 144–51; *see also* PAUKNEROVÁ ET AL., *supra* note 72, at 166–73.

legislation while avoiding such phenomena as "[t]he subordination of national law to local law,"[95] and the true extent of the legal-cultural distance between the Czech Republic and Afghanistan may go entirely unnoticed.

One reason why "traditional" Afghan law is not taken into account is, for example, that Czech judges approach the sources of Afghan law with a view to answering very specific questions. To paraphrase a judge preparing for the application of foreign law: "Can a property jointly owned by two spouses be 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?"[96] When 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 the *hanafī* legal school preferred by the Afghan Constitution prescribes the separation of martial property.[97] 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 situation,[98] a judge doubted whether an Afghan company that signed a particular contract was a real entity, whether it ever existed or if it continued to exist. 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 situation,[99] a commercial contract submitted to a court as evidence required an interpretation in light of Afghan law. In response to its search for information, the court was provided with an internal document with Czech translation of a partially unreadable and incomplete Afghan Commercial Code from a ministerial collection of translation.

In the last-mentioned situation, the main issue was the authority of the code in relation to the date when the contract entered into force.[100] This was impossible to determine only on the basis of the document itself.[101] It was necessary to dig into sources beyond state

95. Karin Ask, *Legal Pluralism and Transitional Justice in Afghanistan: A Gender Perspective*, 2003 HUMAN RTS. DEV'T YR. (2003) 347, 363 (2003).

96. The author worked as a foreign law expert for the Czech Ministry of Justice and his regular assignment was to help judges to prepare the application of foreign law. Sometimes the judges informally called for advice or consultation or formally asked for materials about foreign law, or both. This Article reflects this routine behind the scenes of official justice, not the cases themselves. *See supra* Part I.

97. *See* KABEH RASTIN-TEHRANI & NADJMA YASSARI, MAX PLANCK MANNUAL ON FAMILY LAW IN AFGHANISTAN 15, 55 (2011).

98. *See supra* note 96.

99. *See id*.

100. *See id*.

101. For complete English translation of Afghan commercial code, AFG. LEGAL EDUC. PROJECT, COMMERCIAL CODE OF THE REPUBLIC OF AFGHANISTAN (Elite Legal Services trans. 2014) [hereinafter AFG. COMMERCIAL Code] https://www-

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 *shura* or *jirga*," and that "[c]ommercial courts and government institutions frequently rely upon customary practice or older laws."[102] These 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 simple text of the Commercial Code of Afghanistan. Although the court searched for a pretext to rely on state law, further research did not provide one. Instead of finding evidence for use of state law alongside customary practices, as implied by limiting phrases like "[i]n most instances" and "frequently,"[103] 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.[104]

The court was completely baffled by this situation as to how to identify the applicable law since conventional concepts of (state) law 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 bewilderment about what the law in Afghanistan actually is, the judge chose to ignore the data, which directed her away from the use of state law. The argument for this deliberate decision was that "after all we do recognize states"[105] but not anything beyond them. A likely interpretation of this argument is that the judge preferred to respect another state rather than the messy "reality" of law within its territory because it allowed her to relatively easily resolve the issue.

As the lead author inferred from his cooperation with the judges applying foreign law, this outcome was in no way an impulsive decision. The judge in question 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 facilitated continuing the trial without much delay.

While this strategy might be seen as arbitrary, it was in fact not uncommon in international civil trials.[106] Judges are not primarily

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cdn.law.stanford.edu/wp-content/uploads/2015/10/Commercial-Code-of-Afghanistan-ALEP-Translation.pdf (last visited Aug. 23, 2021) [https://perma.cc/3AJ8-NUTD] (archived Aug. 23, 2021).

102. AFG. LEGAL EDUC. PROJECT, *supra* note 57, at 2.

103. *See id*.

104. Rebecca Gang, *Community-Based Dispute Resolution Processes in Kabul City*, 2011 AFG. RSCH. AND EVALUATION UNIT 1, 2.

105. Personal communication (Feb. 17, 2014).

106. Czech courts make sometimes use of and are guided by authoritative worldwide thematic collections of family law and inheritance law. *See* FERID, FIRSCHING, & HAUSMANN, INTERNATIONALES ERBRECHT (2021); *see also* RIECK & LETTMAIER,

social scientists but rather persons concerned with matters of practical power, and an arguably chaotic use of legal doctrines or principles is one 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 considered than the facile 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, is only symbolically 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 fit into 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"[107] 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 any other way than his own, I mean in our way. This is a fact, a reality of judging, not a culture.[108]

AUSLÄNDISCHES FAMILIENRECHT (2021). These monumental works comprise statutory laws of most countries but usually do not particularly concentrate on legal-cultural differences beyond or beneath the state in particular countries.

107. Interviewed by Tomáš Ledvinka (Apr. 4, 2015) (original: "*kulturu*" "*kontext*" "*něco jako právo, ale ne právo*").

108. Interviewed by Tomáš Ledvinka (Nov. 9, 2018) (original: "*Jako tak v Afghánistánu to funguje úplně jinak, takže tam ty věci jedou jakoby jako vedle sebe, prostě jakoby to kmenový prostě a moc nějakejch regionálních vůdců je prostě nad moc státní v praktickém životě, takže jakoby tak oni ti můžou říct: A máme na tohle systém, máme tenhle zákon, todle máme, jako dobrý, to je jedna věc, jak to funguje, jak funguje ten formální právní rámec, ale to, že prostě v praxi jedou podle úplně něčeho jinýho a zvykovýho práva, protože prostě to stovky let se dělalo takhle, a to, že to prostě teďka nemá bejt takhle, . . . to prostě ty lidi ve vesnici v kopci jako nezajímá . . . ale víš ty co? Ten vesnický pohlavár nebo ten státní soudce, pokud dostane na stůl náš rozsudek, co se pravděpodobně stane? Bude pragmatický, pravděpodobně jako my, a nebude ho shazovat*

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 challenge what is considered legitimate legal authority towards the litigants, as her main anxiety generated by the application of foreign law concerns maintaining her legal or cultural identity—as she said, "after all I am not *their* judge."[109]

However, this worry does not address the question of whether such legal differences really pose a threat to the identity of modern centers of legal power or to the legitimacy of state courts with regard to foreign litigants, or whether, instead, such a threat is merely imaginary.[110] The application of foreign law is a courtesy expressing respect to another authority, which is in this case primarily perceived as the Afghan state and not the traditional Afghan conflict resolution bodies. It is for exactly 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."[111] Besides, "they [i.e., the legal authorities in Afghanistan] would also not study Czech law that much."[112]

This "comity of nations" way of thinking—unimaginable, for instance, in criminal trials, in which culture 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 (i.e., the Afghan state) rather than towards the litigants whose identities are connected to this state. Second, rule of law and legal modernity are perceived as something highly desirable, as Czech judges constantly identify themselves with them. 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

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ale ani se ho nebude snažit pochopit jiným způsobem než svým vlastním, myslím tím, tím našim. Toto je skutečnost, to je realita souzení, to není kultura.").

109. *Id.* (emphasis added).

110. *Cf.* David Graeber, *Radical Alterity is Just Another Way of Saying 'Reality': A Reply to Eduardo Viveiros de Castro*, 5(2) HAU: J. ETHNOGRAPHIC THEORY 1, 7 (2015).

111. Interviewed by Tomáš Ledvinka (Apr. 4, 2018) (original: "*příliš důkladné zkoumání by ukázalo slabiny toho jejich práva*" "*nezdvořilost*" "*že to jejich právo není tak supr jak by mělo nebo jako to naše, nebo, že je … nemoderní, neodpovídá právnímu státu.*").

112. Interviewed by Tomáš Ledvinka (Apr. 4, 2018) (original: "*Taky by nestudovaly český právo tak moc.*").

Double of legal modernity (state legislation) even during the preparatory phases of applying foreign law in which contrary evidence was discovered. Through the classification of contradictory data as merely *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 *shura* are equivalents of modern nation-state courts seems entirely absurd.

However, the discomforting data about the state of the official justice system 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 can base this conclusion 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.[113] Second, Afghan state law "still lack(s) efficiency, capacity and nationwide coverage."[114] Third, Afghan state judges are mostly absent from the courthouses and visit them only irregularly and briefly.[115] Fourth, cases are referred by Afghan state courts to "traditional" dispute resolution bodies via an official mechanism known as *eslaah*.[116] For an anthropologist, those data are a reason to conclude that 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.[117]

As the lead author noticed during his legal practice, legal practitioners tend to see those nominal Afghan state courts as the only fully-fledged equivalents of modern courts. Their conventional approach understands law as a dimension of the state and excludes from consideration exactly the data which—in an ethnological view—support the conclusion that "traditional" Afghan dispute resolution bodies should also be considered true legal authorities. Judges instead classify these dispute resolution bodies as "something else than the law."[118] The external resemblance of Afghan legislation to Czech statutory laws, with 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, is as important for its recognition as a *partner* legal system.

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113. *See* Elliesie, *supra* note 4, at 4.

114. *See id*. at 8.

115. *See* U.S. Agency Int'l Dev., AFGHANISTAN RULE OF LAW PROJECT 12 (2005) [hereinafter USAID].

116. *See id*. at 13, 31, 38.

117. *See* POSPÍŠIL, *supra* note 44, at 44, 47.

118. Interviewed by Tomáš Ledvinka (Apr. 4, 2015) (original: "*něco jiného než právo*".).

Drawing upon the sentiments of the research informants, the lesson appears to be that the symbols of state and justice are taken to signal the familiar: the judges are convinced that they "see" an equivalent of their own statutory laws, and consequently they presume the state justice system in Afghanistan is more or less the same as their own.

From the perspective of Pospíšil's analytical concept of law, however, Afghan state law might be seen, at least partly, as an appearance of law or, at the most, as "project[ing] law."[119] Prioritizing this state law may contradict the actual law inside Afghanistan. Afghan legislation nevertheless promises 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.[120] In this way, the reliance on external symbols and similarities may be deeply misleading in a comparative or cross-cultural perspective. The focus on the Afghan Commercial Code, for instance, diverted the attention of the judge 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.[121] However, the trope of legal authority dispensing justice under a tree is often seen as rather orientalist,[122] which is not the position offered here. The recognition of Afghan "traditional" law through ethnological analytical tools nevertheless only approaches the native point of view through a small set of evidentiary documents used for the application of foreign law, as will be seen in the next Part.

IV. RECOGNIZING AFGHAN "TRADITIONAL" LAW AS "LAW"

As mentioned above, reports about the law and 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 relevant dispute resolution processes are

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119. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, & Julia Eckert, *Rules of Law and Laws of Ruling: Law and Governance between Past and Future*, *in* RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW 1, 4 (Franz von Benda-Beckmann, Keebet von Benda-Beckmann, & Julia Eckert eds., 2016).

120. *See* KAREL KOSÍK, DIALECTICS OF THE CONCRETE: A STUDY ON PROBLEMS OF MAN AND WORLD 2 (Robert S. Cohen & Marx W. Wartofsky eds., 1976).

121. As mentioned above, the author (being a foreign law expert at that time) and the judge attempted to interpret an internal document with Czech translation of a partially unreadable and incomplete text of the Afghan Commercial Code from a ministerial collection of translations. For a complete English translation, see AFG. LEGAL EDUC. PROJECT, *supra* note 101.

122. Intisar A. Rabb, *Against Kadijustiz: On the Negative Citation of Foreign Law*, 48 SUFFOLK U. L. REV. 343, 346–47 (2015).

often carried out by "traditional" legal authorities.[123] 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.

But if not these, then what fills the niche of "law" in Afghanistan? By what standard can the traditional dispute resolution practices be understood as "law"? It is here that Pospíšil's analysis can be fruitfully employed. Despite being nonstate institutions, *jirgas* and *shuras* satisfy the criteria to be seen as legitimate sources of law in Afghanistan.

As described in Part III of this Article, judges applying Afghan law in the form of foreign law in international civil trials do not usually take seriously doubts cast on the status of Afghan state courts as the dominant legal authorities in the country; rather, for reasons discussed earlier, the judges prefer to treat the Afghan state courts as counterparts to their own. At the same time, however, the official imperative of Czech private international law is to apply the law of another country as it is applied in its original world.[124] 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. In such a situation, an ethnological concept of law such as Pospíšil's may become indispensable, but employing this concept brings with it its own difficulties.

In Pospíšil's ethnological perspective, the law is to be identified according to the actual legal authorities on the ground and not according to similarities and resemblances to the external symbols of law.[125] A persuasive logic stands behind this methodological suggestion: if one is mistaken about *who* applies the legal rules, it is not possible to then 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."[126] However, when, guided by the anthropological perspective, a judge in a Western trial 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*, she soon realises

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123. USAID, *supra* note 115, at 1; Elliesie, *supra* note 4, at 4–5.

124. *See* Zákon o mezinárodním právu soukromém [Act on Private International Law], Zákon č. 91/2012 Sb. § 23(1) (Czech), *translated in* MINISTRY OF JUSTICE OF THE CZECH REPUBLIC http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (last visited Sept. 15, 2021) [https://perma.cc/N4F4-2WPN] (archived Sept. 15, 2021).

125. *See* POSPÍŠIL, *supra* note 44, at 44–47.

126. POSPÍŠIL, *supra* note 15, at 30–42.

that there is even less solid information about these rules. This gap may cause further uncertainty among legal professionals who are applying Afghan law for practical purposes.

For this reason, the research informants were asked 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.[127] The results argue that there is indeed an obstacle that is extremely difficult to overcome, at least in the context of international civil trials but, on the other hand, there is no 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 the actual legal authorities on the ground.[128] 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. Respect given to decisions is a key criterion of legal authority in the ethnological sense, and there are enduring and repeated empirical findings that the councils' judgments carry the same weight and respect as court decisions[129] and that ordinary people respect them.[130] On the other hand, this observation indicates neither that the particular "traditional" councils in Afghanistan, which evince many idiosyncratic features, easily fit into the concept of legal authorities, nor that the aforementioned observations generally disqualify state courts as 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, a distinction between *legal sodalities* (intergroup meeting-like associations with a legal purpose) and *legal modalities* (the more familiar objective or objectified systems of legal knowledge) is warranted, which would reflect the peculiar flexibility in the way Afghan law is integrated into the societal structure in the country.

The concept of "legal sodality" is intended to capture aspects of the actual Afghan legal authorities, which are usually perceived by Czech judges as confusing or, as one of the research informants claimed, "extra-terrestrial."[131] These problematic aspects are related to the differences 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 are integrated into the overall social organization and the

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127. Interviewed by Tomáš Ledvinka (Feb. 10, 2015).

128. *See* POSPÍŠIL, *supra* note 15, at 7.

129. YOUSUFZAI & GOHAR, *supra* note 8, at 75–76.

130. LYNN CARTER & KERRY CONNOR, A PRELIMINARY INVESTIGATION OF CONTEMPORARY AFGHAN COUNCILS 36 (1989).

131. Interviewed by Tomáš Ledvinka (Apr. 4, 2015) (original: "*mimozemské*").

spatiotemporality that stands behind it.[132] 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 trans-locality, trans-collectivity, or multiplicity. To Czech judges, consequently, the organizational characteristics of Afghan "traditional" law can 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 which favored designifying the councils was that the councils are something slightly different from courts but not courts: they are bodies that "only resolve dispute[s]."[133] Or perhaps they are "something" that resists understanding as a different cultural equivalent of the rule of law.

One of the most striking elements of "traditional" councils in Afghanistan, the one that may constitute their alterity, is that they are constituted as a meeting between *equal* individuals of various social groups to which the parties belong without including any higher authority.[134] Even though this may be the foremost principle of the social organization of Afghan "traditional" equivalents of modern courts, there is no way to transfer it smoothly into the Western legal imagination. In cases of an intergroup dispute that was not settled otherwise, a legal council can be constituted through a meeting between both social groups that are mutually *sāŕaj*, or equal.[135]

Consider what societal aspects the ideal of *sāŕaj* 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 a 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 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 or their legal authorities. This aspect is in fact invisible when the societal entanglement of law is not considered.

If *sāŕaj* is indeed a principle of the societal arrangement of Afghan councils, it might be seen as a concrete example of the social

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132. *See generally* Donald Black, *The Boundaries of Legal Sociology in* THE SOCIAL ORGANIZATION OF LAW 50–54 (Donald Black & Maureen Mileski eds., 1973).

133. Personal communication (Feb. 17, 2014).

134. *See* YOUSUFZAI & GOHAR, *supra* note 8, at 19.

135. *See* M. IBRAHIM ATAYEE, A DICTIONARY OF THE TERMINOLOGY OF PASHTUN'S TRIBAL CUSTOMARY LAW AND USAGES 83 (A. Mohammad Shiawary trans., A. Jabar Nader ed., 1979). The concept is also referred to as '*musāwat*.' *See, e.g.*, Lutz Rzehak, Report, *Doing Pashto: Pashtunwali as the Ideal of Honourable Behaviour and Tribal Life among the Pashtuns* 1, 12 (2011), http://afghanistan-analysts.net/uploads/20110321LR-Pashtunwali-FINAL.pdf (last visited Sep. 7, 2021) [https://perma.cc/8BDE-FXQ7] (archived Sept. 7, 2021).

anthropological concept of "reciprocity." In the context of Afghan legal culture, some authors suggest that the idea of "reciprocity" has an equivalent in the Afghan concept of "*badál*," the term used for feud, revenge, or blood money.[136] 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.[137] Similarly, in the entries for "*jirga*" and "*sāŕaj*" in Atayee's dictionary of Pashtun legal terminology, both legal councils and revenge are conducted between people who are considered equal, equivalent, or partner to one another. [138]

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"[139] or "horizontal legal systems,"[140] rather than merely "non-state justice institutions."[141] 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,[142] then the preference for binary understandings of Afghan legal systems can obstruct Western legal authorities' ability to identify a legal system of their own equal partners to be applied as the foreign law, one beyond Afghan state law. This conclusion can be demonstrated using the *problematique* of where equality is situated in European and Afghan cultural settings.

Legal *equality* is traditionally understood as equality before the law. Upon closer examination, the concept indicates specific yet unconscious social arrangements that secure it: 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.[143] In this light, the

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136. *See* USAID, *supra* note 115, at 49; So Yamane, *The Rise of New Madrasas and the Decline of Tribal Leadership within the Federal Administrated Tribal Area (FATA), Pakistan*, *in* THE MORAL ECONOMY OF THE MADRASA: ISLAM AND EDUCATION TODAY 11, 14 (Fariba Adelkhah & Keiko Sakuraieds., 2011); David B. Edwards, *Counterinsurgency as a Cultural System*, *in* READINGS FOR A HISTORY OF ANTHROPOLOGICAL THEORY 545, 551 (Paul A. Erickson & Liam D. Murphy eds., 4th ed. 2013).

137. YOUSUFZAI & GOHAR, *supra* note 8, at 78.

138. ATAYEE, *supra* note 135, at 37–38, 83.

139. LAWRENCE ROSEN, THE JUSTICE OF ISLAM: COMPARATIVE PERSPECTIVES ON ISLAMIC LAW AND SOCIETY 59 (2002).

140. MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 65 (1968).

141. Mathias Kötter, *Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation*, *in* NON-STATE JUSTICE INSTITUTIONS AND THE LAW: DECISION-MAKING AT THE INTERFACE OF TRADITION, RELIGION AND THE STATE, 155 (Mathias Kötter et al. eds., 2015).

142. *See* USAID, *supra* note 115, at 56; CARTER & CONNOR, *supra* note 130; YOUSUFZAI & GOHAR, *supra* note 8, at 19.

143. William Lucy, *Equality Under and Before the Law*, 61 U. TORONTO L.J. 411, 411–12 (2011).

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 the parties and witnesses. The description of Afghan "traditional" councils as collectives of equals then strongly suggests that there are no individuals who are distinguishable as authorities responsible for a judgment and that parties and other actors in the trial in question are equals to conventional judges.[144]

The problem of the social organization of law is perceived—both by Western judges who attempt to apply foreign law and by the Afghan sources for various reports[145]—as so axiomatic that it is seldom mentioned at any point in the translation process between the Afghan and the Western legal frameworks. The detailed descriptions of the Afghan councils nevertheless indicate another concrete social arrangement behind legal equality in Afghanistan: within the councils, various authoritative individuals called "'Spingiris,' or "white bearded elder men," resolve disputes and "act as judges."[146] 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.[147]

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*. As each member of the council represents his social group to which one party belongs, the idea that the legal authorities within a concrete dispute resolution body are all *mutually* equal is a legal ideal or *fictio legis*,[148] 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 as commonplace as in European countries but rather a *dependent variable* or otherwise derivative 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.[149] In any given case, the

144. JOLANTA SIERAKOWSKA-DYNDO, THE BOUNDARIES OF AFGHANS' POLITICAL IMAGINATION: THE NORMATIVE-AXIOLOGICAL ASPECTS OF AFGHAN TRADITION 9 (2013).

145. *See generally* CARTER & CONNOR, *supra* note 130; USAID, *supra* note 115; YOUSUFZAI & GOHAR, *supra* note 8.

146. YOUSUFZAI & GOHAR, *supra* note 8, at 20.

147. *Id.* at 19–20, 48.

148. *See* Thomas Yan, *Fictio legis: l'empire de la fiction romaine et ses limites médiévales*, 21 DROITS: REVUE FRANÇAISE DE THEORIE JURIDIQUE 17, 18 (1995).

149. CARTER & CONNOR, *supra* note 130, at 9, 29; YOUSUFZAI & GOHAR, *supra* note 8, at 17–19.

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 what is being contested and 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 whether it is a first trial or a trial initiated by an appeal.[150] Even councils with permanent members meet only occasionally in order to resolve disputes.[151] Accordingly, the more permanent councils may 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 center[152] is missing but also confirms that the authority of the councils and their powers are constituted in a truly reciprocal way,[153] meaning that their legitimacy is based on the approval of the decision by both parties or both social groups to which the parties belong,[154] instead of any kind of power monopoly.

The same principle 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 and their *arbakai*,[155] or *mîrs* and *wazîrs* in the case of bazaars.[156] 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 within the meeting.[157] In this way the

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150. YOUSUFZAI & GOHAR, *supra* note 8, at 20–21.

151. *See* MOHAMMAD HAMID SABOORY, MAX PLANCK INST. FOR FOREIGN PRIV. L. & PRIV. INT'L L., FAMILY STRUCTURES AND FAMILY LAW IN AFGHANISTAN 6–7 (Nadjima Yassari ed., 2005). MAX PLANCK INST. FOR FOREIGN PRIVATE L. & PRIVATE INT'L L., FAMILY STRUCTURES AND FAMILY LAW IN AFGHANISTAN: A REPORT OF THE FACT-FINDING MISSION TO AFGHANISTAN JANUARY–MARCH 2005 6–7 (2005).

152. *See* PIERRE BOURDIEU, THE PRACTICAL REASON: ON THE THEORY OF ACTION 40–42 (Polity Press trans., Stanford Univ. Press, 1998).

153. *See* BARFIELD, NOJUMI, & THIER, *supra* note 7, at 6.

154. *See* USAID, *supra* note 115, at 38–40; YOUSUFZAI & GOHAR, *supra* note 8, at 21, 49, 64.

155. *See* Mohammad Osman Tariq, *Community-Based Security and Justice: Arbakai in Afghanistan*, IDS BULLETIN, March 2009, at 20, https://bulletin.ids.ac.uk/index.php/idsbo/article/view/677/PDF (last visited Aug. 27, 2021) [https://perma.cc/AWG9-BMEZ] (archived Aug. 27, 2021).

156. *See* Klaus Ferdinand, *Nomad Expansion and Commerce in Central Afghanistan: A Sketch of Some Modern Trends*, 4 FOLK 123, 154 (1962).

157. *See* YOUSUFZAI & GOHAR, *supra* note 8, at 20 (stating that "All the parties involved are required to respect the Jirga members" but "If the parties have any reservation, those need to be shared in the pre-mediation process and stage."); USAID, *supra* note 115, at 13, 15 (suggesting the importance of "the personality, experiences, and social positions of the representatives of each party in a Jirga or Shura rather than

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" and consensus.[158] This implies that the "center[s] 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[159]—are located below Afghan "traditional" dispute resolution bodies and legitimize them as a higher legal level.

Much like the way that the concept of a social group is flexible, the composition of the intergroup legal authorities is determined by various factors, in particular the "legal level" at which the dispute arises.[160] The composition of the legal authority of *jirgas* results from 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 primarily relevant for the group members. Since the precedential case law, *narkh* or *tsə́laj*,[161] 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 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 convening formal trial-meetings between them for the purposes of resolving cross-border disputes. This fact 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 and meet one another 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, intertribal or intervillage) relations. In order to navigate more appropriately in such situations, the concept of "legal sodality" is offered as an analytical tool in relation to the Afghan situation, one which could help to understand this

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formal principles of law" as well as "the social power of persuasion" as being an asset of Jirga and Shura").

158. *See* USAID, *supra* note 115, at 5, 13, 15.

159. *See* POSPÍŠIL, *supra* note 44, at 116–19.

160. *See* Pospíšil, *supra* note 47, at 9.

161. *See* ATAYEE, *supra* note 135, at 67; INT'L LEGAL FOUND., *supra* note 6, at 9.

nonstate societal and spatial configuration of law as a possible specific variant of the rule of law.

V. TRANSNATIONAL AND TRANSLOCAL: THE LENS OF LEGAL SODALITIES

As *jirgas* and *shuras* are convocations of equals representing the parties, the problem quickly arises as to how disputes between groups can be handled. Lacking a strong unifying state to enforce a single legal process, a different method must be found. The temporary agglomeration of involved parties for purposes of resolving specific legal questions solves this potential obstacle. Viewing the process through the concept of legal sodalities enables the observer to more fully understand the reciprocal respect that allows Afghan "traditional" justice to do its work.

Afghan "traditional" councils or *jirgas* do not *perfectly* match the ethnological concept of "legal authority." Pospíšil's concept of "law" suggests that the "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."[162] Does the intertribal nature of councils contravene Pospíšil's presupposition that law is fundamentally an intragroup phenomenon?[163] Not necessarily: 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. This higher legal level is not stable enough to be the basis for a durable, long-term higher level of social association. Dispute resolution gatherings at this level, like *jirga*, *shura*, and others, which may also be termed mobile or segmentary courts, 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.

To capture the features of their societal organization, the councils should be analysed through the concept of the legal sodality, which may help rationalize the apparent idiosyncrasies of Afghan "traditional" law that are often perceived as incoherent and chaotic from the perspective of Western legal frameworks. This analysis may reveal that, far from being chaotic, the councils are in fact based on a discernible societal logic of relatively mobile and nonpermanent courts, established via meetings of otherwise separate legal authorities of the social groups to which the parties to the dispute belong.

Since Afghan "traditional" legal systems, as sets of rules, do not travel in the form of textual representations, there has to be another

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162. Pospíšil, supra note 47, at 24.

163. *See* POSPÍŠIL, *supra* note 44, at 8–9.

legal technology to handle human movement across societal and geographic boundaries with the concomitant disputes. The Afghan councils' members do in fact travel and visit or are invited by disputing parties. In this way they 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 legal units of Afghanistan that are 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 intertribal legal decisions.

Although such legal sodalities are more fragile and less noticeable to outside observers, they create laws (in the ethnological as well as juridical sense) which are eventually attached to more durable social groups or subgroups, as the decisions are 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 reestablishment of parties' identities (social subgroups) as well as their common referent, an authority allocated on a higher legal level, ranging from family to tribe to state. This suggests that legal sodalities cannot in principle be limited to only two affected social segments or subgroups—which has been the 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*' or others.[164]

This Article is not primarily intended as an anthropological comparison, but a clear contrast emerges between two concrete technological solutions that make it possible for law to transcend societal and geographical boundaries and maintain its effectiveness in cases where disputes result from transactions between distant and mobile contractors: the application of foreign law in international civil trials (as detailed in Part III of this Article) and the Afghan legal sodalities (as in Part V). 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 effectiveness of the hierarchy of the intimate intragroup relationships between the social group's legal authority and the rest of the group's members could

164. *See* Barfield, *supra* note 27, at 186. For the perception of *Pashtunwali* in recent scholarship, see, for example, Antonio De Lauri, *Law in Afghanistan: A Critique of Post-2001 Reconstruction*, J. CRITICAL GLOBALISATION STUD. 6, 25 n.17 (2013); Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 351–52 (2008) [hereinafter Barfield, *Culture and Custom*].

indeed be disrupted by situations such as international or intertribal trade and migration.[165]

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 be aligned, or at least coordinated, with the other legal authority or the other legal regulation outside the conventional extent of its societal "jurisdiction." Otherwise, 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 realign the bifurcated respect of the nonauthoritative "others" from different communities or localities.

One way to solve this issue is via a *translocal* or *trans-societal* face-to-face meeting of legal authorities conducted within the "code of hospitality"[166] as seen in Afghan "traditional" councils, a solution which is inconceivable for Western judges. In such a configuration of visiting authorities, written laws are simply not necessary. The Western judges, by contrast, incline to the other solution, namely, the application of foreign law. This result suggests that 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 characterized by two kinds of substitutions (thus making it less authentic than "traditional" Afghan councils): textual representations of the law replacing the mobile law actually applied in the country of origin and state courts of the host country replacing the legal authorities from a migrant litigant's country of origin. It seems that the foreign legal authority is more acceptable to the Western legal framework as a specific species of the *Other* in its substitutive forms such as legislation and written legal decisions rather than in its authentic, immediate face-to-face form.

Perhaps the fact that substitutive forms of legal authority are much more acceptable (or even more convincing) than a direct meeting with an *Other* legal authority corresponds with the invisibility of

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165. *See* MAX WEBER, GENERAL ECONOMIC HISTORY 195 (Frank H. Knight trans., Greenberg 1927) (1923) (defining trade as a phenomenon "external" to tribes or being located "between" communities); JULIAN PITT-RIVERS, *The Law of Hospitality*, *in* THE FATE OF SHECHEM OR THE POLITICS OF SEX: ESSAYS IN THE ANTHROPOLOGY OF THE MEDITERRANEAN 94–112 (1977), *reprinted in* 2 HAU: J. ETHNOGRAPHIC THEORY 501 (2012) (overviewing culturally diverse treatments of various kinds of strangers and the mitigation of their disruptive potential towards established intra-community hierarchies).

166. *See generally* PITT-RIVERS, *supra* note 165.

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.

VI. CONCLUSIONS

Afghan "traditional" law as conceptualized in terms of Pospíšil's ethnological concept of "law"[167] 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, as in Afghanistan where the firm sovereignty of a single state is lacking. Although both social anthropology and legal studies have widely accepted the notion of legal pluralism, some researchers have retreated from this 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 nonstate legal authorities.[168] This generalization also applies to some studies of the law in Afghanistan.[169] Many researchers who have taken the "rule of law" concept as their starting point have directed their attention primarily to the country's three major sources of law (state legislation, *sharīʿah*, and customary law) or the distinction between formal and informal[170] and similar dichotomies.[171] As a result, the apparent multiplicity of "traditional" Afghan legal systems, which have been described as "a wide variety of cluster [sic] of norms and practices, often uncodified and orally transmitted, usually combined together in varying mixes,"[172] are entirely disqualified as informal, restorative, or nonstate, etc.

A similar tendency may be found in the practices used in international civil trials for the application of Afghan law as binding foreign law. As described in Part III of this Article, when conventional legal categories are used by legal professionals to identify the

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167. POSPÍŠIL, *supra* note 15, at 8–13.

168. *See, e.g.*, TAMANAHA, *supra* note 50, at 205–06.

169. *See generally* KAMALI, *supra* note 28; Yassari & Saboory, *supra* note 28; Wardak, *supra* note 28; AMIN, *supra* note 23.

170. *See, e.g.*, JENNIFER BRICK MURTAZASHVILI, INFORMAL ORDER AND THE STATE IN AFGHANISTAN xxxv, 10 (2016) (distinguishing between "archaic, traditional, and informal order" and "modern, codified form" of legal order associated with the State).

171. Besides the formality–informality distinction, various authors either applied or criticized various other distinctions and dichotomies which were used to characterize the legal landscape of Afghanistan, for instance, state–non-state (*see* BARFIELD, NOJUMI, & THIER, supra note 7), law–custom (*see* Barfield, *Culture and Custom*, *supra* note 164), restorative–retributive (*see* Lauri, *supra* note 164, at 12–17).

172. USAID, *supra* note 115, at 4.

applicable law when studying documents about Afghan law, the resultant, identified Afghan law is inherently linked to the state. On the other hand, when anthropologists identify the applicable law with the help of anthropological analytical concepts, as shown in Part IV of this Article, the applicable law is identified with clusters of legal principles, practices, and values situated beyond the Afghan state and its legislation.

"Law" from the ethnological perspective, 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.[173] While this metric will ratify the conventional understanding in most Western societies, it is able to encompass more. In the present example, it discards the Afghan state legislation and the apparatus of state justice in many cases as being of legal nature only *nominally*.[174] Legal authorities in the ethnological sense mostly correspond with *jirgas* and other 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 each see as the "law" in Afghanistan are two very different things with almost no overlap between them. Anthropological expertise can be employed to assist the legal apparatus in trial situations such as asylum proceedings or international civil trials to reflect, at least, upon the issue of an intercultural translation of the foreign law from its original world into the Western rule-of-law framework.

The general lesson from such studies is that the law from "out there" is transformed as it travels. It can hardly be an exact replica of the original,[175] but even though the detailed descriptions of its alterity, idiosyncratic aspects, and peculiar features are included in various available sources, the judges in this case study evince an absence of appropriate cognitive containers which could enable them to transfer the "traditional" law into the imaginary of Western legal professionals. As a result, the legal knowledge travelling from Afghanistan to the Czech Republic is too readily "accepted through deference" and directed towards an *Other* sovereign state, rather than through understanding the alterity of the law inside that state's territory.[176]

Since alternative models of the law are absent in the shadow of state law, it is difficult to notice and recognize very different kinds of law and legal authorities in different cultural contexts. This myopia is shown to be especially true in Afghanistan, weighed under the tremendous influence of the rule-of-law assumption that law must

173. POSPÍŠIL, *supra* note 15, at 13, 30.
174. *See* ELLIESIE, *supra* note 4, at 4.
175. *Cf.* BEHRENDS, PARK, & ROTTENBURG, *supra* note 41.
176. MAURICE BLOCH, ESSAYS ON CULTURAL TRANSMISSION 127–28 (2005).

assume the form of a system related to society as a whole. In this context, the mosaic of social groups and subgroups constitutes a rather uneasy reference point for legal analysis. For this reason, the concept of legal sodality affords a better understanding of the special nature of the actual "traditional" legal authorities in Afghanistan, allowing an escape from the sociological bias generated by Western legal orthodoxy and supporting the classification of the Afghan "traditional" law as a nonstate variant of the rule of law. This insight should be applicable to other contexts as well, wherever peoples order themselves outside the strictures of state institutions.