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# OUT OF A TANGLED SKEIN INTO THE INTERNATIONAL: THE DEVELOPMENT OF LEGAL CULTURE

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*The authors examine the heterogeneous and heteronomous threads in a skein of national and international legal cultures using the Czech Republic as a case study.*

## I. INTRODUCTION

The role of law in the post-1989 transition of the international system is ambiguous. Can the rule of law be reinstated by reinforcing the state or does the law itself guide the changes? How does intensive foreign external influence shape these changes and the legal culture that grows out of them? The ex-socialist economies of Eastern Europe show such causal questions to be absurd, as legal systems struggle to develop from the tangled skein of cacophonous foreign legal cultures, domestic histories and hangovers, and political-economic realities.

Many fear that the new, quickly developed, market capitalist economies in East and Central Europe will not be able to

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institute a firm autonomy of law from the state, of *non sub homine, sed lege e dei*. After all, the rule of law did not happen overnight in the western democracies. It is a product of slow cultural maturation. Yet few of the political, economic or legal developments in Eastern Europe's recent history have been gradual or "natural." With a strong hand the state might attempt to institute a rule of law regime quickly, but this is not likely in the transitional economies. A pure, Montesquieuan separation of powers system is unlikely to be instituted in Eastern Europe. One reason for this, as expressed by Heydebrand, is that "[a] reluctant neo-corporatist or executive-centered state apparatus will resist the institutionalization of the rule of law, or at best, use law as an instrument of societal guidance and control."<sup>1</sup> The budding market philosophy opposes a strong state and pure separation of powers, both for basic economic reasons, supported by the Washington consensus, and as a reaction against the socialist past.<sup>2</sup> There is a need for active change, but simultaneously a need to move away from strict planning and enforcement measures in society.

As a solution to this dilemma, the present article extends the view onto the international plane. Since the nation state's role

1. Wolf Heydebrand, *The Dynamics of Legal Change*, 15 *STUD. L. POL. & SOC'Y* 263, 264 (1995). Some scholars would argue that the state should resist such an institutionalization. For example, Bojan Bugarcic argues that it is legal and political fetishism to assert that democracy, civil society and the market are packages indivisible from their built-in elements, and concludes that the role of the courts should be demoted in all but basic human rights areas, and that separation of powers should be abandoned, so as not to interfere with the efficiency needed in the transition. Bojan Bugarcic, *Legal and Political Fetishism in Eastern Europe* (1997, work in progress).

2. However, not all commentators (Czech or otherwise) agree. See, e.g., V.S. Nersisjanc, *Civilismus Jako Koncepce Postsocialism*, CXXXIV 1089 *PRÁVNÍK* (1995). Nersisjanc argues that unless 40 years of socialism is seen as an historical error, the Czech Republic's future, although clearly not communism, is unlikely to be capitalism. He expects, using a faintly Marxist methodology, the next evolutionary stage to be something he calls "civilism." For one view from the economic front, Professor Alice Amsden argues that instead of reacting against the past and eliminating all government guidance in development, the East European countries would fare better if they learned from the East Asian example and instituted an industrial policy, perhaps something like an East European version of Japan's Ministry of International Trade and Industry (MITI), through which government and business would work together, rather than simply abdicating development to 18th century type laissez-faire factor price comparative advantage. ALICE AMSDEN, *THE MARKET MEETS ITS MATCH: RESTRUCTURING THE ECONOMIES OF EASTERN EUROPE* (1994).

in advancing the rule of law and the market economy is beset with internal contradictions, the cultivation of law may be approached through the avenue of reliance on the traditions of international law and comity.<sup>3</sup> We shall discuss the influence of international legal culture on the transitional state, but also the mirror effect: What reflexive impact does such an influence portend for the fundamental doctrines of statehood and sovereignty?

When international law is invoked (even implicitly) in a (trans)national context, the principles of non-interference, sovereignty and autonomy must be taken into account. We argue that the international works as a culture *for* law. It influences as a fulcrum, as a translator and as an atmosphere. We shall illustrate the workings of the international legal culture and the mirror effects it generates in two sections. We shall also discuss the conceptions of statehood and sovereignty in view of one of the authors' legal experience in the Czech Republic in 1996.<sup>4</sup>

Before we begin, a caveat is in order. In the following text we use the term "culture," both in the context of "international legal culture" and of "Czech culture." In so doing, we do not mean to follow those who would use this term to capture some distilled, essential quality to which context is irrelevant. On the contrary, we use culture as a context, framework or texture for certain types of social transactions, discontinuities and commonalities.<sup>5</sup> To abandon the term "culture" as merely a

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3. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991). Comity is a tradition in international public and private law. The U.S. courts, for instance "often recognize and enforce foreign judgments or limit domestic jurisdiction . . . or apply law, even where foreign law is contrary to U.S. law and policy" guided by notions of comity. However, the meaning of the concept has always been uncertain. Its justifications do not sound clearly normative or rule-like. They entail concerns of utility, courtesy, morality, and an expectation of reciprocity. *Id.* at 2-3, 47-53.

4. Alexander Boldizar worked in the Prague office of a French law firm during the summer of 1996. For reasons of privacy of clients and the firm, references must necessarily remain general. Any assertion within this work not supported by cited authority is either a personal observation of the author, or qualifies as knowledge general enough in nature to be easily verified.

5. Culture is an integrated pattern of atmosphere, cultivation, social context, market of ideas and way of life of a community. We follow Gayatri Chakravorty Spivak's discussion of essences in *OUTSIDE IN THE TEACHING MACHINE* (1993).

social construct, because it lacks essence, would be to essentialize it, as well as the concept of "social."<sup>6</sup> Thus we use the term, but in so doing we hope to show the non-bounded, non-unified and contingent nature of the various relevant cultures playing in the sandbox of the emerging Czech legal context — the Czech, French, German, American and International cultures, among an infinite<sup>7</sup> continuous spectrum of others.

## II. INTERNATIONAL LEGAL CULTURE AND CHANGES IN STATEHOOD

The consequences of the 1989 turmoil are likely to reverberate for decades, in a manner comparable to that of the decolonization period.<sup>8</sup> New actors continue to emerge within the changing societies. Some old actors must undergo profound change, while even the most stable among them must respond to the new opportunities and challenges. In other words, the changes in Eastern Europe cannot be conceived as a simple recoloring of the political map; instead all maps have to be redrawn, all doctrinal borderlines reassessed. Decolonization first raised questions regarding territorial frontiers, but then, as today, raised questions regarding the rationales of the systems themselves.

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"Essentialism appears as a certain resistance to reading, an emphasis on the constraints of form, the limits at which a particular form so compels us as to □stipulate' an analysis." *Id.* at 1.

6. Following Spivak again, "[T]he idea that calling everything a social construction is anti-essentialist entails a notion of the social as an essence. If one carries the notion of the social as an essence, that can very quickly lead to an unexamined assumption of capitalist society as a kind of essence, as *the* social. So that everything else becomes places of difference." Gayatri Chakravorty Spivak, *Subaltern Talk: Interview with the Editors*, in *THE SPIVAK READER* 294 (Donnal Landry & Gerald MacLean eds., 1993).

7. We include the term "infinite" to acknowledge, albeit in passing, that a culture is often not to be defined by national or ethnic boundaries. For this approach, see Malley, Manas and Nix's discussion of transnational solidarities. Robert Malley, Jean Manas & Crystal Nix, *Note: Constructing the State Extra-Territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 *HARV. L. REV.* 1273 (1990).

8. This term refers to the post-war period during which Western colonial powers lost their control over third world countries, particularly in Africa and the Middle East.

Very few periods in the history of international law can be clearly characterized as “status quo.” Most of the time, the system at large is undergoing a continuous transition: colonization, decolonization of the Americas, the emergence of human rights, the Hague Process (culminating in two inter-European peace conferences in 1899 and 1901 and the establishment of the Permanent Court of Arbitration), the world wars, the building of institutions, further decolonization, and the transformation of the former second world. If this general position is accepted, the argument made in this article becomes more widely significant, and our thesis about how international law works can be applied to other transitional periods. However, the scope of this article is limited, thus we only wish to suggest the possibility of wider applicability.

Statehood consists of four elements in international law: defined territory, permanent population, effective government, and capacity to claim rights and perform duties. These may be viewed from different perspectives — subjective versus objective interpretation, declarative versus constitutive effect<sup>9</sup> — but the elements themselves have become increasingly firm since the Montevideo Convention.<sup>10</sup> The only element open to transformation is the requirement of an “effective government.” There are clear indications that the nature of government, in addition to its mere existence, has become an international issue.<sup>11</sup> This development started twenty years ago with the

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9. In this regard, consider the doctrinal debate about whether the interpretation of the qualification by the state itself (subjective) or by already existing other states (objective) should be decisive, as well as the debate about whether the recognition by other states is necessary (constitutive) or only complimentary (declaratory) to the emergence of a new state. *See, e.g.*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88-91 (1990).

10. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, LNTS CLXV, 25.

11. Today it is customary for international institutions to assert qualifications as to what kind of governments they want their members to have. For instance, the European institutions (the Union and the Council of Europe) require their members to be democratic and respectful of human rights. These institutions also scrutinize their members much more carefully than does the United Nations (UN) when interpreting its membership requirement of the “peace-loving” nature of the state of the charter. U.N. CHARTER art. 4, para. 1. This is evident in the treatment of Turkey in the European institutions, the loss of membership privileges by Greece during the junta rule in the 1970s, and the jurisprudence of both the European Court of Justice and the

first Conference on Security and Cooperation in Europe (CSCE) and has continued as the increasingly institutionalized Helsinki process.<sup>12</sup>

The Helsinki process has recognized that an international discussion of domestic issues is both crucially important and beneficial. The strict interpretation of sovereignty as the right to have any kind of domestic system whatsoever has come to be considered backwards, if not absurd, and the international community increasingly scrutinizes the civil rights situations in particular countries. Evidence of this trend can be found, for example, in the boycott of the South African government and the related Advisory Opinion of the world court finally condemning the domestic policy of apartheid in 1971.<sup>13</sup> In Europe, cooperation among western states has long included discussion and scrutiny of each other's adherence to principles of civil society.<sup>14</sup> Nevertheless, some voices have continued to insist upon a strict interpretation of the principles of the UN Charter, and have invoked sovereign equality,<sup>15</sup> territorial integrity and political independence,<sup>16</sup> and non-interference in domestic jurisdiction<sup>17</sup> in order to oppose international scrutiny and debate. However, these dissonant voices have become extremely rare since 1989.

The changes since 1989 not only move in the familiar direction of increased mutual scrutiny. The interpretation of the elements of statehood is changing as well. For instance, it seems quite "natural" today that the international community does not require a new democracy to stand on its own in taking control of its inner turmoil. The international community does not shy away from scrutinizing the form of government, or of

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European Court of Human Rights. *See, e.g.*, KNUT IPSEN, *VÖLKERRECHT* 651-656 (1990).

12. A succession of conferences started in Helsinki 1973 - 1975 with 33 participating states from Europe, as well as the U.S. and Canada. The so-called Helsinki accords were signed as the Final Act of the first Helsinki Conference, Aug. 1, 1975.

13. Advisory Opinion on Namibia (South West Africa), 1971 I.C.J. 16.

14. For instance, in the Council of Europe (established 1950).

15. U.N. CHARTER art. 2, para. 1.

16. U.N. CHARTER art. 2, para. 4.

17. U.N. CHARTER art. 2, para. 7.

expressing opinions about how Montesquieu's separation of powers model<sup>18</sup> should be applied and how all the details of a modern market economy should be implemented. Governmental actors (such as ministries of justice and even the U.S. Navy), non-government organizations (NGOs, such as the American Bar Association), and other international organizations — not to mention private actors — cooperate to establishing these new states as entities in which decision-making is diffused, commingled, and heteronomous (i.e. subject to external controls or impositions).

Rare is the international lawyer who would insist on leaving the government to rely on its own efforts in establishing a new order, as would follow, for example, from a strict interpretation of article two of the UN Charter.<sup>19</sup> The increased interdependence and the degree of transnational interaction on all levels have changed the nature of the relationship between the international and the state. Thus, states whose legal cultures emerge within the context of this altered relationship carry within them, in their hybrid domestic legal cultures, an especially pronounced imprint of the international. And this imprint itself can, in turn, offer insights into the international culture that made it.<sup>20</sup>

### III. THE NATURE OF INFLUENCES: THE CZECH EXAMPLE

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18. This model is exemplified by the French and American constitutions.

19. See Kristin DeKuiper, *At the Mad Hatter's Tea Party*, 41 R.I. BAR J. 7 (1993).

20. This line of research has been pursued by Nathaniel Berman, who is a leading authority in the field of culturalist approaches to international law. See Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992); *But the Alternative is Despair, European Nationalism, and the Modernist Renewal of International Law*, 106 HARVARD L. REV. 1792 (1993); and *Legalizing Jerusalem, or Of Law, Fantasy, and Faith*, 45 CATH. U. L. REV. 823 (1996). In the latter article, Berman argues that the "culturalist approach" can better account for the different commitments and fantasies which national and international actors will inevitably have in a hard case of legal governance. It can combine elements of legal formalism and pragmatism, but will also provide space for cultural issues. In the contested case of Jerusalem, for example, the different meanings cannot be eradicated or reduced if a tenable legal solution is to be secured.



The Czech Republic is a budding market economy in the heart of Europe. Because of its central location, cosmopolitan past and recent transition, its legal culture is well suited for analysis here. Since the Czech Republic is meant to work as a context for understanding the on-going integration of the national with the international legal culture, we provide a short reference to some key historical and cultural features.

The Czech and Slovak Slavs have historically seen themselves as Central Europeans with a western mentality, akin to the Germans. They generally look down upon Russian Slavs as "barbarians barely escaped from the Mongol yoke."<sup>21</sup> This admittedly stereotyped cultural pecking order goes back hundreds of years, but it waxes and wanes with political tides. Czechoslovakia was actually born under this moon. After World War I, the (future) first Czechoslovak president, Tomáš Garyk Masaryk, saw a danger in the Czech desire to associate with, and possibly lose itself in, Germany. He thus forged a pact with the Slovak leader Milan Rastislav Štefanik, who equally feared a renewal of Hungarian control. Together the Czechs and Slovaks meant to shield each other from the German and Hungarian spheres of influence.<sup>22</sup> This agreement, which aimed at securing independence from foreign pressures, was prepared in the United States and is known as the Treaty of Cleveland (October 1915). Since much support came from American Czechs and Slovaks, the American Constitution

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21. Although the comment is very old, in 1839 the Marquis de Custine, in describing the Russian people, inadvertently reflected the opinion, which each Slavic nation has of its eastern neighbors. "[Russia's] princes, and especially Peter the Great, counting time for nothing, made [Russia] pass violently from an infancy to virility. Barely free of her foreign yoke, she thought everything that was not Mongolian domination was freedom..." MARQUIS DE CUSTINE, *JOURNEY FOR OUR TIME: THE RUSSIAN JOURNALS OF THE MARQUIS DE CUSTINE* 356 (Phyllis Penn Kohler, translator and ed., 1987). In the cultural fantasies of each country they themselves are the easternmost civilized state. Each of them also prefers to associate with its western neighbors. Some Czechs see the present situation as both a parallel repeat move west, and a reversal in trading off the local yoke for the foreign one. Most commonly, however, it is seen simply as regaining their traditional standing among the civilized (*viz.* □western') nations of Europe.

22. The new independent nation was born on October 28, 1918, its boundaries recognized by the Treaty of Versailles. Masaryk said it would take fifty years for the Czechs and Slovaks to become one nation. Lloyd N. Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 513 (1991).

naturally had an impact on the form and on the 1920 constitution of the new federation.

Seen against this history, today's international influence reflects, despite the superficial irony, the continuation of a long-standing domestic cultural tendency to embrace the international in order to escape more direct foreign imperialism (then German, now Russian). Within the context of this post-1989 embrace of the international, the country that wields the strongest economic influence on the Czech Republic is once again Germany.<sup>23</sup> This role is visible in the influence which German law, particularly German commercial law, has today in the emerging law of the Czech Republic. Prior to World War II German law significantly influenced the laws of Czechoslovakia, but the adoption was relatively moderate and gradual.<sup>24</sup> After 1989 Czechoslovakia tried to reorient itself westward in legal, as in economic and political matters. The Velvet Revolution called for drastic reorientation of the role that economics was to play within the state. Thus, German legal influence was sought in particular for commercial law. Antonin Kanda, for example, has written of the need to create a separate corporate law (*pravo spolecnosti, Gessellschaftsrecht*) which would harmonize Czech corporations with those of the European Union (EU) and thus help future unification.<sup>25</sup> It also bears mention that the author of the new Czech Commercial Code, Mr. Dedic, spoke only German as a foreign

23. The divorce of Czechoslovakia can be blamed in part on the fact that Slovakia was slowing down the Czech desire to rush towards the west. Instead of being perceived as a counterbalance to the western (German) influence, Slovakia simply came to be seen as a drag on Czech efforts to enter capitalist civilization and the European Union (EU).

24. The period of occupation presents an entirely different situation. The First Czechoslovak Republic (CSFR), under its 1920 Constitution, looked to the French parliamentary system for its legislative branch, and constitutionally mandated elections by proportional representation. Like Austria and Weimar Germany, the CSFR adopted a dual executive, constituting a president and a government. It also included a seven-member Constitutional Court that had the power — which it never exercised — to determine whether statutes conflicted with the Constitution. Cutler & Schwartz, *supra* note 22, at 14.

25. Antonin Kanda, *Úvaha Nad Naší Soucasnou Právní Upravou Obchodnich Spolecnosti Z Hlediska Její Možné Harmonizaces S Právem Evropské Unie*, in CXXXIV PŘÁVNÍK 166-182 (1995). For an example of how the "adaption" called for by Kanda is taking place, see Lasfargue & Baguenault de Puchesse, *Le Nouveau Code de Commerce*, PRAGUE TRIB., supplemental francophone, Aug. 1996.

language; thus German law was the natural place for him to turn.<sup>26</sup> It is telling that there was no question about whether or not to turn outwards for guidance; such a turn was taken as a given — both natural and inevitable.<sup>27</sup> With the progression of the Czech Republic's transition and the increased hope of becoming an EU Member State in the near future, however, the western influence on Czech law has become less German and more European. This EU influence is explicit under the harmonization requirement of the EU-Czech Republic Europe Agreement. Most amendments to the Czech Commercial Code are undertaken with harmonization directly in mind, such as the provisions increasing shareholder protection, which are designed to add stability to corporate takeovers and increase the transparency of securities markets.<sup>28</sup> The Czech turn outward has thus been impelled by various factors, including aspects of tradition, history, concrete pragmatism, and national identity.<sup>29</sup>

A full discussion of the harmonization of laws to conform to the EU's requirements is beyond the scope of this article.<sup>30</sup> Instead, we propose to examine the foreign influences being imported into the Czech context, not simply by the drafters of the new Commercial Code, but also by its users and interpreters — not just within Codes, but in practice as well.

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26. The Czech Civil Code is based largely on the Austrian Civil Code.

27. International legal theorists have described turning outwards in this manner as a natural direction, and often fiercely oppose any kind of — particular or general — protectionism. Even if the turn outwards in this example is mainly a transnational turn, we argue that it always carries an internationalist element as well. "Internationalism" here refers to an attitude or sensibility that orients one towards transboundary, non-exclusionary, heterogeneous influences, based on a belief that international interaction is inevitable, desirable, and/or beneficial in our one "common world". See, e.g., Berman, *supra* note 20.

28. Act No. 513/1991 Coll. The 1996 Amendment, among other things, created mandatory public offers for shareholders exceeding certain threshold percentages, clarified various shareholder rights and obligations, and formalized the relationships, responsibilities and liabilities of company executives. See Lasfargue & Baguenault de Puchesse, *supra* note 25, at 19.

29. Cf. Berman, *supra* note 20.

30. This has been done in a much more complete format elsewhere. See, e.g., Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WISC. INT'L L.J. 115 (1997).

First, it is often the growing ranks of foreign lawyers practicing in the Czech Republic who are handling its most important commercial transactions today, and who are thereby shaping the day-to-day “lawyers’ law.” While working in Prague, I<sup>31</sup> naturally deferred to my American legal education and concepts of contract law, even though I worked for a leading French law firm. My recollections from basic law school courses served as the default source of the legal terms, styles and concepts I used while drafting Czech language contracts ostensibly governed by Czech law. It is true that Germany, as a neighboring country, and the EU, as the aspiration, both strongly influenced the Czech Code itself. But in an environment without precedents, where there are no pre-established models in which to pigeonhole contracts, the plethora of foreign individual and institutional actors have an enormous impact on the emerging Czech legal culture, in which various foreign influences intermingle in the everyday practice of law. Eventually, these various influences form an international culture that cannot be traced directly to a specific foreign state.<sup>32</sup>

Although it is not uncommon for a legal culture to be influenced by external forces, particularly at its inception, the extent, depth and speed of the foreign legal intrusion into the Czech Republic presents a new type of situation. The U.S., for example, looked to Blackstone among other English and French scholars, and continued to be influenced by the English common law long after its birth. The America of that era, however, was young not only in its legal system but also as a nation and culture. The Czech Republic, in contrast, has a cultural pedigree reaching back one thousand years.

Foreign writers did influence America, but they were largely interpreted within the local context, by American jurists. And even if some of these jurists were immigrants, they had nevertheless invested themselves in “becoming American” and

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31. In the following, when the argument is presented in the first person, it is contributed by Mr. Boldizar and based on his on the spot experience.

32. This is an event or example of what we defined, *supra* note 27, as “internationalism.”

had left behind their previous national identities. The Czech Commercial Code, on the other hand, is primarily interpreted not by Czechs, but by lawyers trained in the French, American, German, Austrian and other legal systems, in whose case there is no question of becoming Czech. The “lawyer’s law” — i.e. the individual contract texts, concepts and terms — is being filled in by mostly foreign lawyers. If maintaining a legal sensibility rooted in the local culture is seen as beneficial, then locals should perform the initial filling in and fleshing out of the Code text. But in the Czech Republic, where the speed of incorporating western legality has outstripped the supply and education of local lawyers, and where there is a desire to use western methods, stemming in part from the insecurity resulting from a 40 year “mistake,” the foreign-trained lawyer is a prized asset.<sup>33</sup>

The real picture of the Prague office of foreign law firms is not so polarized, however. Both law firms I worked for in Prague, as well as many of the others with which I am familiar, have a mix of foreign nationals, Czechs educated in Czech law schools, and hybrids that range from ex-immigrants returning to Prague, to Czech students educated abroad. The partners in the law firms, however, are almost invariably foreign, and most of the foreign attorneys who populate these law firms speak only rudimentary Czech. In both the French and American law firms, reference was made much more readily to the French or English translations of the Code, than to the Czech original.<sup>34</sup>

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33. Another socio-psychological factor at work in the Czech Republic is size and related cultural (in)security. For example, China’s legalization process is of a very different nature, due in part to its vast size and ability to set the tone for western actors. Pure size is also one of the main reasons the Czechs regret having “lost” the five million Slovaks, since a combined population of fifteen million would rank the country among the larger of Europe.

34. The Czech example parallels many earlier but quite similar cases, such as the so-called Finnish Question at the turn of the century. See Outi Korhonen, *A Case of Unconventional Dispute Settlement*, 12 LEIDEN J. INT’L L. (1999, forthcoming). See also UPENDRA BAXI, *TOWARDS A SOCIOLOGY OF INDIAN LAW* (1986) (regarding the development of the Indian legal system after decolonization). In short, the Czech example is meant to refer to a more general trend that has played an important role in molding the culture of international law for a long time.

Thus, it seems clear that the foreign influence is incapable of easy and discrete categorization. This picture is complicated even further by the fact that cultural influence is not a one way street. The lawyers in Prague, wherever they may be located on the Czech-foreign continuum, nevertheless operate within the larger Czech context. The combination of dealings with Czech clients, opposing parties, secretaries, and other support personnel, in business, social and personal encounters, together make up a culture that will necessarily affect the thinking of the foreign lawyers, and even stay with them after they return to their home countries.

The cultural influence may run in both directions, but there are many imbalances in the quality and intensity of the influences. Foreign influence on the Czech Republic – for example, the use by people who often do not speak Czech of western legal concepts to draft contracts binding under Czech law, and the lack of developed legal concepts which prompts even foreign educated Czech lawyers to fall back on the legal culture and concepts in which they were educated – is occurring in a direct and immediate way. The Czech influence on foreign systems, on the other hand, amounts only to a subtle change of the consciousness of those foreign lawyers who spent a longer period of time within the Czech Republic, and thus will at most have a diffuse effect over a very long time period. This imbalance is exacerbated by the Czechs' residual (but quickly diminishing) sense of cultural and economic national insecurity, and the perceived need to "catch up"<sup>35</sup> and join the EU. Were the desire within the Czech Republic to westernize weaker, the difficulty of the Czech language would serve as a protection or buffer offering a greater degree of autonomy.<sup>36</sup>

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35. The preferred manner of "catching up" has been hotly debated, but by and large has been consistent with the prescriptions of the Washington consensus.

36. Pre-war Japan, for example, adopted western legal methods in order to be admitted into the family of "civilized nations," though without ever doubting its cultural identity, and even while challenging Europe militarily. It always stressed language as a form of cultural protection, going so far during the Tokugawa period as to punish by death foreigners who learned Japanese. After the war, Japan naturally lacked this strong sense of self and adapted significantly to the west. For the prewar Japanese view, see Onuma Yasuaki, *Japanese International Law in the Prewar Period; Perspectives on Teaching and Research of International Law in Prewar Japan*, 29 JAPAN INT'L L. 23 (1986).

Combined with such desire, however, the reluctance of foreigners to learn Czech means that the Czechs must adapt.

While working in Prague, I reflected upon the ethics of such foreign influence. Conscious of my Canadian and American educational background, as well as of my lack of grounding in Czech law,<sup>37</sup> I constantly tried to disentangle what was American from “general legal knowledge” and to search for some sort of fair baseline to guide my actions. This challenge arose not so much in connection with how to interpret a clause, since that may be defined by a *telos* (task) posed by the client, but rather in connection with more fundamental issues concerning forms, structures, concepts, whole systems and categorizations of law. I found myself balancing the legal principles asserted by my fellow lawyers — foreign and Czech — on the fulcrum of international law. It seemed more practical, but also more fair and equitable, than strictly adopting any of the competing, but not quite appropriate, foreign laws and principles. In the process, my concerns that international law might reflect American cultural values were submerged, and international law became my baseline and counterpoint for trying to extricate the “American” from my education.

In one case, I wrote a contract for an Irish parent corporation to place its Greek employees at the disposal of its Czech subsidiary. The contract was to be written in English. I was given this task by the French partner (my senior), who insisted that the contract contain a preamble typical of French contracts, presenting in very general terms why the parties have entered into the particular contract, their business relationship, etc. The French model was very unlike the American contracts with which I was familiar, and there were no local precedents or ready-made Czech model contracts for me to consult. Thus, I fell back on reading international treaties. I considered the preambles of international treaties ranging from the United Nations Charter to the General

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37. This was attributable in part to the fact that I was not trained there, and in part to the fact that the new Czech law is far from solidified.

Agreement on Tariffs and Trade (GATT). I imported the international custom into both the specific contract in that case, as well as into the model agreement that eventually grew out of it. In the end I wrote an English-language model contract that attempted to mimic the French way of contracting under Czech law. Then, since the firm lacked a model for this topic even in French, my English-language model was translated into French. Thus, the final French version of the contract was a translation of an English contract that mimicked French style that was intended to be interpreted within the Czech context. In short, a true tangle of language, culture, and legal style.

This intricate example illustrates our contention that the traditional relationship between domestic and international legal systems is changing. We can hardly claim that the Czech domestic legal system possesses the characteristics of inalienable autonomy, closure, and self-referentiality that are traditionally associated with a sovereign, autonomous, and integral domestic legal system, but neither does it completely lack these elements. These characteristics just have to be understood in light of a different relationship between the domestic and the international. The diffusion of influences and the general openness seem more to be (international) cultural characteristics, than systemic ones. The Czech example suggests that newly emerging domestic legal systems will necessarily emerge as interpenetrated with the international, even where the underlying national culture itself is neither new nor emerging but merely shaken up. At the same time, the “old” legal systems are being modified and are letting go of a variety of national barriers. Here, too, a new type of relationship between domestic and international legal spheres is emerging, which appears to be the inverse of nationalism, in which the domestic both profits from and reinforces a strengthening international legal culture.



#### IV. BEYOND THE STATE: INTERACTION FORCES AND CULTURAL BARRIERS

In order for a foreign party to have an impact on the domestic legal *culture*, on the texture in which locals transact, the foreign party must be able to interact with the culture. The forces pushing towards such interaction are myriad: economic necessity, political pressure to deliver on the promises of 1989, and the cultural and historical desire to associate with the West. The foreign parties, for their part, have their own guiding economic and political interests. This section examines one aspect of difference in contract drafting practice between the West and the Czech Republic, locates the cultural context of this difference, and examines the difficulties and costs of transiting from the Czech to the western mode.

Many of the Czech cultural and legal barriers to incorporation of western legal thought are apparent even in regard to simple aspects of contract drafting, such as the length of the contract. This issue might seem banal and uninteresting to a western reader. But as recently as April 1998, at the Language and the Law Conference held in Bratislava, the session on "Language and Culture in Contract Negotiations" was opened with the observation that "one of the culture shocks [of western legality in Eastern Europe] was the length of □western' standard agreements."<sup>38</sup> Pre-1989 Czech contracts would have been considered *de minimis* by western standards, and those of today are still short by common law standards. This difference can be partly explained by the differences between civil and common law approaches to drafting. Whereas the civil law subsumes a whole variety of contingencies and situations under general expressions or simply under a recitation of a particular code provision, the common law drafting methodology is to enumerate every remotely foreseeable

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38. This observation was made by Dr. Josef Mály, of Detvai, Ludik, Mály, Udvaros, a leading Slovak law firm. The conference on "Language and the Law: The Clash of Cultures in Central and Eastern Europe" was reported in Andrew Greenfield, INT'L BAR NEWS 17, 18 (April 1998). Dr. Maly added that "if Slovak partners in a joint venture were forced to sign an agreement [of such a nature] which they did not understand, this may even mean that they would breach the agreement."

eventuality. As Glatzová points out, no Czech lawyer would even think about defining “Environmental Laws” for the purposes of a contract. Further, in her view, a Czech court faced with interpreting such a definition might well assume that the intention behind the enumeration was to limit its scope, rather than to add clarity.<sup>39</sup>

And yet the civil-common law distinction does not fully explain the typical difference in length between Czech and western contracts. It particularly lacks explanatory power regarding the sudden increase in Czech contract length between the period before 1989 and today. For example, a financially significant lease that would have been one or two pages in length ten years ago, is twenty pages long today.

This difference can be explained in some measure by cultural and historical factors. Western marketing experts consider the Czechs to have a “trusting” and “kinesthetic” nature,<sup>40</sup> which means that they prefer to do business with a trusted person with whom they feel comfortable, even at the expense of a material disadvantage. Czechs supposedly “know” when they have come to an understanding. This *animus contrahendi* prevails over the manifest form, and the subsequent written contract is hence a mere formality – a rubber stamp. This elevation of spirit over form, together with caution bred by a socialist past during which too much explicit detail was

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39. Vladimira Glatzová, *When is a Warranty Not a Warranty? Common Law Versus Civil Law*, INT'L BUS. LAW. 453, 454 (November 1998).

40. According to a western marketing expert who teaches salesmanship and sales force management at the Anglo-American College in Prague and who performs customized Czech sales training seminars, “[t]he trusting prospect is very concerned about other people, likes to please, avoids confrontation, and really dislikes aggressive selling tactics. Whatever you do with these prospects, don’t be bold or manipulative. You must earn their trust. Your mannerisms and voice should always convey the message of a doctor trying to help a patient. ...In the Czech Republic you will find that a surprisingly high percentage of your prospects fall into the ‘trusting’ category, a...holdover from the pre-revolutionary days] when people only did business with those whom they trusted. ...You should always assume...that your prospect will probably have strong tendencies in this direction. ...Kinesthetic prospects process information according to the way they feel. You have to make the ‘kinesthetic’ prospects feel comfortable and trust you. ...Czechs more often fall into the ‘kinesthetic’ category than in the visual or auditory categories. ...[T]he ‘kinesthetic’ prospect parallels the trusting type. Both should be handled the same way.” Mark Harmon, PRAGUE BUS. J., Aug. 26-Sept. 1, 9 (1996).

potentially politically dangerous, partly explains the extreme brevity of the traditional Czech style of contract writing. This tradition considers it offensive to try to insert additional conditions into the contract, if these conditions conflict with the spirit of the original agreement arrived at in mutual trust. The Czech expectation is not at all unlike the teleological aspect of the international culture of treaties, where the importance of the “object and purpose” of the agreement provide central guidelines for interpretation.<sup>41</sup>

This emphasis on trust is rooted in the structure of the socialist economy. Prior to 1989, most private agreements — e.g., with a bricklayer or car mechanic<sup>42</sup> — were illegal, and thus made orally. Written, signed contracts were used primarily between government agencies, and mainly served to provide evidence to central authorities that the governmentally decreed quotas would be met. Every actor knew that the quotas were unreasonable and could not be satisfied, and thus that the written contract and signature were largely meaningless. Industries actually secured the raw materials they needed through gifts, bribes and friendships with administrators who were able to supply the needed goods, often with the aid of alcohol. In fact, it was usual practice for such bribery — both on the personal level of trying to find a mechanic to repair one’s car, and on the industrial level of securing raw material for the factory one was managing — to include non-cash elements such as food, gifts, and alcohol. The economic relationship was very much a relationship. Thus for forty years, the written contract was a meaningless, proforma instrument, while “real” economic

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41. The “general rule of interpretation” of treaties includes the “object and purpose” as a primary interpretation guideline. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, para. 1. Although the strictly textualist theory of interpretation does not accept the general spirit or the intentions of the parties as falling within the scope of the rule, it has not been uncommon for international tribunals to reflect on the spirit of the agreement in a wide context. *See, e.g.*, The *Wimbeldon Case*, P.C.I.J. Rep. Ser. A, No. 1 at 25 (1923). *See also* The *Reservations to the Convention on Genocide*, 1951 I.C.J. 15; The *Admission of a State to the United Nations*, 1947-48 I.C.J. 57; and The *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174.

42. Mechanics, repairmen, bricklayers and other skilled laborers generally earned more money at their unofficial part-time jobs than they did at their official government jobs, but they had to maintain the latter both as a cover (since private enterprise was illegal) and as a source for obtaining spare parts, etc.

activity went forward through contacts and bribery. Since these underground channels were illegal even though they were in common usage, and since periodic political purges attempted to eradicate such "corruption" despite its necessity to the socialist economic system, trust was a key element. Without trust, economic activity would have ceased.

In consequence of this historical experience, Czechs are highly risk averse in the culturally grounded, intangible realm of trust. Risk aversion, although generally presented as a constant factor in most economic models, is contextual and highly dependent on the cultural backdrop. Equally contextual are the ways to hedge against risk aversion. Within the Czech context, the absence of personal trust is considered very risky. Therefore, ironically, a carefully hammered out contract, rather than assuaging risk, actually exacerbates the feeling of the Czech party that the contracting partner is untrusting, and thus untrustworthy. Such a contract also invokes the memory of the meaningless administrative signature. Thus, one still hears anecdotal accounts of multi-million dollar agreements (e.g., distributorship) being entered into without lawyers or written contracts.

Western legalism, in contrast, devotes much energy to minimizing the need for such personal trust, and is only geared toward making the parties feel comfortable with each other as a secondary goal. Trust is established by the presence of a good lawyer with a sense of business, though it is often viewed as an extra-legal aspect of good legal representation. The law itself is sometimes regarded as a medium of aggressive and even cunning self-advancement, of carving out needs in the contract and thereby preventing possible risky contingencies. Since personal trust becomes merely a background issue that cannot be assumed, risk avoidance is explicit, legalistic and formal. This is the image that a stereotypical cosmopolitan and politically correct international lawyer likes to maintain.<sup>43</sup>

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43. See Berman, *supra* note 20.

For many Czechs, these two types of trust are mutually exclusive. Czech conventional wisdom holds that Czech businesses suffered in the first few years after 1989 because they were too unsophisticated, too naïve, and too eager. Thus, they failed to engage in tough western-style contractual drafting and interpretation arguments, since they assumed that the written agreements would not run counter to the general spirit and purpose of the *animus* agreement.

This tension has produced a split in Czech society. The regular Czechs, the consumers, the workers, and the voters construe their identity as a “kinesthetic” one that is hostile to manipulative legal analytical feats. The new classes of lawyers and businesspeople, on the other hand, rather construe their identity in opposition to such irrational kinesthesia. As a consequence, a specific cultural stratification has occurred, in which the internationalist and nationalist orientations mark the difference between social classes. The business class has very quickly absorbed some aspects of western legal tactics.<sup>44</sup> Indeed, many in this group see the aspiration to and achievement of precise analytic legality as a significant step forward. In support of this legality, they invoke the revival of Czech juridical science, as well as all the usual economic arguments, such as the decrease in transaction costs through foreseeing future situations and the efficiency appurtenant to contractual allocation of obligations. But they also invoke a Darwinian cultural stereotype that calls upon Czechs to wake up to the necessities of a modern economy, in order to regain their place as one of the most prominent cultures in Europe.<sup>45</sup> Czechs remind observers that, prior to World War II, Czech culture was influential and Czechoslovakia had the seventh highest GDP in the world.<sup>46</sup>

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44. Cf., *Tradice A Perspektivý Českého Práva A Právní Nauky*, in CXXXI PRÁVNÍK (1995) (introduction dedicates the issue to the renewal of Czech juridical science).

45. *Id.*

46. See, e.g., Jaroslav Krejci, *Stežejní Problémý Sociálne Kulturní Plaurality Soucasnosti*, CXXXIV PRÁVNÍK (1995). Krejci discusses the Czech conventional wisdom, which holds that the Czech nation was torn out of civilization where it belonged for 1000 years, and is now returning to it. Mothers still tell their children that “we used to be second in Europe.”

On the level of cultural experience, the shift from trust to contract can be perceived as a significant loss. On the international cultural level, such a change constitutes yet another sublimation of uniqueness into the lowest common denominator of explicit text, yet another loss of heterogeneity or, in Derrida's terms, the conquest of homogenous over heterogeneous cultural reality.<sup>47</sup> Yet even on the economic level, there are costs to importing western legal cultural idioms at the expense of a background cultural context of kinesthetic and trust based contract. Ultimately this precipitates an identity crisis. Where such trust exists, it establishes a precondition of the legal and economic culture. A major goal of contract law, and one of the arguments for a piecemeal approach to contractual drafting, is to reduce future transaction costs. Yet the need for contracts, and the associated costs of contracting, stem not only from the unexpected future but also from differences in backgrounds and baselines between the parties. Much of modern contract law represents an attempt to compensate for the lack of trust between parties.

Thus, as commonality decreased in the United States, contract law supplanted it with implied obligations of "good faith"<sup>48</sup> and warranties, with principles of interpretation, and with doctrines such as mistake, misrepresentation, and reasonableness (which itself constitutes an explicit version of a cultural background consensus reflecting the American legal idiom). Professors Farber and Matheson, for example, justify promissory estoppel by saying that its purpose is "to foster trust between economic actors."<sup>49</sup> Trust is not merely related to honesty and justice: "Trust is a moral good, but it is also an economic asset. It allows coordination and planning between economic actors and fosters the formation of valuable economic

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47. JACQUES DERRIDA, *THE MONOLINGUALISM OF THE OTHER, OR THE PROSTHESIS OF ORIGIN* (transl. by P. Mensah, 1996). "Heterogeneous" is used here in the dual sense, meaning both "consisting of dissimilar or diverse ingredients," and "originating in an outside source."

48. U.C.C. § 1-203 (1977); *RESTATEMENT (SECOND) OF CONTRACTS* § 205 (1981).

49. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 945 (1985).

institutions.”<sup>50</sup> Therefore, trust is the backbone of an efficient and functioning economy. This is true whether one approaches the economy from the perspective of pure economic rationality and efficiency maximization, or from the culturalist perspective which holds that belonging to a community and possessing an identity are essential to the proper functioning of any society.

The impersonal trust created through enforcement of contract principles and promissory estoppel is different from the background trust that is part of the predominant self-image in the Czech Republic. The trust of a Czech is a trust in the other party, a trust in a meeting of minds between the two persons. Where a party requires the contract to ensure that the trust existed, it would already indicate distrust. This paradox might disturb a western legal mind, but the dilemma is not unknown in the West. The pre-nuptial agreement poses a similar dilemma, since in many marriages it will have a negative effect on the trust between the spouses. Again, it might seem absurd to equate a business transaction to marriage. But for the stereotypical Czech, a business deal is an extension of herself, and the lack of trust makes her existence vulnerable to unpredictable contingencies. Indeed, during the past forty years the lack of trust could subject a Czech to political and personal danger that overshadowed the economic risk. The impact of trust reaches far beyond that created by a stable contract regime. Finally, where such trust is prudently placed, it eliminates the transaction costs associated with lawyers and drawn out negotiation.

Legal systems generally strive for justice, efficiency and administrability. But what justice means, and what methods are most efficient and administrable, all depend on the cultural context. Moreover, the compromise between efficiency and other values is definitely cultural. The foregoing discussion of trust is intended to illustrate that even this most “objective” of considerations is highly dependent on context. As such, Westerners’ attempts to transpose western notions of legality into new environments, in the hope of transferring with them

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50. *Id.*

the justice, efficiency and administrability with which they are associated in the domestic western contexts, too often forget that these concepts themselves are contingent on their own home environments. In other words, a system that maximizes justice, efficiency and administrability in one cultural context will not necessarily do so in a different culture, but may, in fact hamper the very things it is trying to build. Such are the dangers of a legal and economic order overly influenced by external forces.

## V. LANGUAGE AS A REFLECTION OF CULTURAL BARRIERS TO WESTERN LEGALITY

One of the central elements of national identification is undoubtedly language. Shared language or languages constitute an important part of the evolution of the culture of a nation. Both language and culture can be generally described as idioms or idiomatic structures in which meanings are created through the experiences of the people and carried over from one generation to another.<sup>51</sup> In law, language is central. It incorporates the substance, the form and the medium all in one. Legal culture can be studied through legal concepts, their differing interpretations, and their meanings. Yet, in the modern world, business, academics, litigation, and production transgress national spheres, and lawyers have to accommodate themselves to the fact that legal meanings must travel across these boundaries as well. As a result, none of the idiomatic structures — law, language, or culture — can claim any purity. Only an ultimately heterogeneous and heteronomous international legal culture can provide a “home” context for all the legal meanings, which no longer seem to belong to their origin, but have yet to become completely a part of anything else. We argue that after 1989, this function of the international legal culture has increased considerably.<sup>52</sup> It is

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51. See, e.g., WILHELM DILTHEY, *INTRODUCTION TO THE HUMAN SCIENCES, SELECTED WORKS*, vol. I (1989); for a more contemporary formulation, see JACQUES DERRIDA, *OF GRAMMATOLOGY* (transl. by G.C.Spivak, 1976).

52. This development is also favorable for all multinational states that encompass various languages and sub-cultures. It can help to mediate intrastate tensions in the



important to bear in mind that while pure idioms, origins and national "homes" disappear from both mental and geographical maps, the culture of international law should not be thought of as their equivalent replacement. Rather, it should be thought of as a new and different *situs* for that identification which has habitually been perceived in relationship to the "home," origin, and own idiom including law, language, and culture.

The idiom of language clearly links law to the other forms of cultural life. Not only does language shape thinking and culture in general,<sup>53</sup> but the concepts through which a lawyer is educated inevitably affect the way she approaches any legal problem. This is so even when the problem arises within a completely different legal culture and thus outside the systemic context of those concepts, i.e. outside her "own" idiom. Every such out-of-idiom encounter has a dual impact: one on the host, another on the guest.

In the tangled skein of influences, however, even this line between host and guest has blurred, as I, born in Czechoslovakia, educated in the Canada and the United States, and practicing law in Prague for a French firm quickly discovered. I thought in Slovak, and applied American legal concepts into French language contracts governed by a Czech commercial law largely imported from Germany. The impurity of my idiom could hardly be more obvious. Often the debate on how to phrase a contract became a mini-contest in which these legal cultures clamored for turf in a vulnerable Czech context temporarily stripped of its cultural defenses.

This contest of laws and languages involves both concepts that seem similar but in fact carry different meanings, and the more

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modern world of increased cultural and sub-cultural awareness, which in many cases cannot be released in a series of secessions nor contained with force.

53. Legal language is one of the most important elements of socialization in the legal tradition. By adopting the expressions of the trade, a lawyer ties his arguments to a larger context of meanings that are the products of tradition. The language-based critique often points out that the individual (lawyer) has no control of the bulk of these meanings and often does not even consciously know all the meaning relations that impact his or her position or argument. See generally, CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (1979), or in international legal context, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, Introduction (1989).

subtle structures of language. In terms of individual legal concepts, Glatzová points out a number of material differences between Czech law and common law, such as the legal significance of representations,<sup>54</sup> the availability of damages, the use of contractual penalties and liquidated damages,<sup>55</sup> the invalidity of exclusion clauses,<sup>56</sup> the concept of indemnity,<sup>57</sup> and the concepts of frustration and *force majeure*.<sup>58</sup>

Legal-linguistic clashes on the level of individual concepts, such as the different meanings of “indemnity” under common law and “promise to indemnify” under Czech law, are but the surface. Subtler are the differences in the idiomatic structure, in how the languages are articulated, and how one concept links to another. Such differences manifest themselves in the everyday moments that together make up the practice of law, rather than in abstract concepts which can be captured in codebooks or judicial opinions. A typical example of such cultural struggle in a mundane, practical context may be seen in the case of a large quasi-governmental lease contract.<sup>59</sup> I worked on this case with a Czech lawyer who had been educated in France. He often suggested that, although

54. At common law, representations incorporated into the contract constitute a part of the contract, and a breach thereof entitles the innocent party to damages. Under Czech law, however, they would not be considered part of the “due and timely performance of contractual obligations” under §344 of the Code (*nesplní rádn a včas svůj závazek, prodlení*), and thus would not provide a right to repudiate the contract. Moreover, the right to repudiate and the right to damages are considered independent under Czech law. Glatzová, *supra* note 39.

55. §544 et seq. of the Civil Code permits contractual penalty clauses. See Glatzová, *supra* note 39, at 457.

56. §386 of the Commercial Code prohibits waivers of the right to claim damages prior to the occurrence of the breach giving such right. This provision constitutes a specific application of the more general principle contained in §574(2) of the Civil Code, which prohibits any agreement by which a person waives a right which may arise in the future. See Glatzová, *supra* note 39, at 458.

57. The Czech “promise to indemnify” (§725 of the Commercial Code) can only apply to acts or omissions regarding which there is no legal obligation, but this is not the case in a contractual relationship. Moreover, there is an obligation to mitigate losses on the party to be indemnified. See Glatzová, *supra* note 39, at 459.

58. Not recognized generally by Czech law. See Glatzová, *supra* note 39, at 460.

59. The building which was the object of the lease was later described by President Vaclav Havel as “the best example of the worst of Prague’s most abhorrent architectural trends... With the arrival of freedom and democracy, we thought people would build more attractive buildings, but nothing has changed.” Tim Jasek, *Havel Hates Myslbe; So What Else Is New?*, PRAGUE POST, Sept. 2, 1996.

linguistically awkward, the English contract should parallel at times the Czech and at other times the French phraseology, in order to capture closely the nuances of the French-Czech negotiations. Yet when no reasonable equivalent English term was available, we changed the Czech version so as to imitate the more precise, analytic English. For example, phrases such as *s tím ze* (“understanding that”, literally “with that that”) or *ohledně* (“regarding”) — the staple of traditional Czech contracts — were replaced with more precise Czech equivalents of “and” or “if.” Thus the “precision” of the Czech contract was tightened: Instead of “regarding A, understanding B we might consider C” (lax), it read “if A and B then C” (precise). This served to prevent the English version from being nonsensical, but still allowed the two versions to match closely, both linguistically and in substance. In general terms, all such activity clearly involves breaking all idioms which are at play and, consequently, increases the heterogeneous character of the legal practice, thereby removing it from the confines of any pure recognizable legal or cultural structure.

The drafting “improvements” described above also present a cultural dilemma. Viewed from a western cultural perspective, the change from “lax” to “precise” drafting amounts to a rationalistic improvement in legal writing. But a Czech reading such precise drafting would likely be irritated at a gut level (kinesthetically), and feel as if she were interacting with a coercive authority figure who offered no way out, rather than a potential business partner. As a consequence, the Czech might react negatively, either by refusing to sign the contract, or by regarding it as meaningless, in accordance with her experience during forty years of communism. Human relationships, including legal relationships, entail a constant struggle between the irrational and rational. The rational is often regarded as the more worthy, but the irrational, gut level reaction can never be entirely discounted. Thus one must recognize that the western rationalistic contract — characterized by length and exhaustive preemption of contingencies, and by strict, no-way-out language — works against a cultural norm of trust.

Notwithstanding the overwhelming preference for western legal rationalism, any attempt to transgress a specific legal language barrier presents several practical difficulties in which the cultural and linguistic elements are inextricable. Clarity cannot always be obtained by replacing, for example, a traditional Czech contract drafting term with one that seems more precise, for it is the very style of the Czech language to maintain an element of what from the western perspective could be called “ambiguity” and “passivity.” Whereas English legalese strives for active tenses, Czech prefers the passive tense, prefers constructions such as the subject-less “such things are not done” to the “do not do that” formulation. The latter is rejected as a personal, somewhat offensive admonition, rather than a norm of behavior, mutually agreed upon according to general cultural standards. On the level of individual words, often even the more precise Czech words still maintain much more ambiguity than their English counterparts. As many linguistic philosophers say, translation is always possible only to a very limited degree. For example, even when the Czech word for “if” (*pokud*) is used rather than the more vague “regarding” (*ohledne*), in addition to “if” it can also mean “where,” “how,” “as long as,” “as for,” and in certain contexts “unless,” to name but a few. Section 183a(5) of the 1996 Amendment to the Czech Commercial Code,<sup>60</sup> which uses the word *pokud* to mean both “if” and “unless” in the same paragraph, is confusing to Czechs, but all the more to foreigners reading translations, which are often prepared by non-lawyers. At the Language and the Law Conference in Bratislava, the lack of good translations was identified as one of the major obstacles to developing a western legal culture in Eastern Europe. But the reason “poor translations are the rule and not the exception”<sup>61</sup> is not because translators lack skills, but because the cultural barriers between western and Czech legality and thought structure are manifested in these idioms.

The “lax” Czech expression is not an imprecise version of the “precise” anglicized phrase, but rather reflects a cultural

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60. Act No. 513/1991 §183a(5).

61. See Greenfield, *supra* note 38, at 19.

baseline for forming agreements. The expression only becomes lax or precise when viewed from an external (here Anglo-Saxon) cultural and legal perspective. In the Czech context, "lax" contracts not only work perfectly well — buildings are leased, marriages entered, and contracts fulfilled — but are also a part of the cultural origin with which one can identify, i.e. the Czech way of life. No fundamental problem arises until this system comes into contact with lawyers from "precise" legal traditions, at which point it is the gulf between the two systems that creates practical problems. The new interpreters lack the background trust and identification that fill in, and give sense to, the "lax" Czech contract. The foreign parties and lawyers seeking precise assurances cannot access the implied portion of the meaning, the portion that can be found more in the stereotypical "glass of vodka" than in the document. Meanwhile, the Czech parties and lawyers may experience these precise assurances as a *cul-de-sac* from which there is no escape. Thus, the traditional Czech expression can be perceived as "lax" only in an "out-of-culture encounter," from a perspective informed by a narrative that sees progress in the development from a legal system founded on a deeply identity-bound social relationship to one founded on arms'-length contract.

There are cultural costs to viewing one's legal culture as backwards, and to viewing one's past from a stance of such profound insecurity that one is willing to adopt a foreign perspective on one's entire language structure, idioms, method of forming agreements, and meaning of contracts. The struggle over translation illustrates the cultural insecurity, the alienation from identity-bound background norms, and the tension between perspectives experienced by the Czech lawyer whom western influences tempt to see her own system from the outside. The linguistic struggle also underlines the fact that the cultural backdrop is broader than the legal, and that it is not possible simply to abandon the past, the origins and idioms in favor of the new ways, however rational or otherwise desirable they might be. The old methods have roots which cannot be so easily cut, and the "irrational" elements — desires, gut feelings, fantasies — are never completely

defeated, even where the Czech adopts the foreign perspective on her own legal system.

## VI. CULTURE INSTEAD OF DOCTRINE

There has been a change in the right to participation in the international community. One cannot represent the international community as a purely western community, without incurring reproach from a large body of actors and, even more, from one's own conscience. Indeed, one hardly dares to assert that a single international idiomatic structure of language, culture or law exists, because such a variety of subjects is involved. One central yardstick by which to measure the right to participation in the international legal community is the doctrine of statehood. Various actors ranging from individuals to multinational corporations justify their participation by claiming "functional equivalence with classical statehood," "acceptance as legitimate by classical players," or "the apparent entailments of some theory of statehood or of the international system, or of the concept of justice hidden beneath both."<sup>62</sup> The right to participation has expanded so far, it is has virtually stopped being something granted by leave of the core players, and has become a right which must be granted, although it ultimately changes little for the emerging actors. There is no longer any hegemonic power or western club that only grants admission to newcomers on the basis of their conformity with the hegemonic idiom.

Recognizing the participation of various kinds of new actors has become a condition of life for the core players as well. Above, we explained how international doctrines were used as a baseline when the American, French, and English legal cultures were employed in the operation of the emerging Czech systems. Heterogeneous and mixed legal identities have become too commonplace to cause any heated debates over their international legal "status."

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62. For an extensive discussion of the proceduralization of the participation and recognition criteria in international law, see DAVID KENNEDY, *THE STRUCTURES OF INTERNATIONAL LAW* 129 - 130 & passim (1987).

Today, the doctrine of statehood has become something of a prototype in a glass cabinet, while the international legal culture — with its “hidden concepts of justice” and heterogeneous elements — has become the standard for the everyday mish-mash of a global transnational context. In one sense, the visits have increased to the museum where the prototypical doctrines and cultures are kept, and the museum itself has started to resemble a flea market of cultural influences. Consider, for instance, the following experiential account which illustrates the situation of the newly emerged cosmopolitan legal class which must look outwards towards the international legal culture, rather than deferring to the kinesthetic rationale still preferred in the periphery.

One weekend I visited Český Krumlov, a small scenic town in the south of the Czech Republic. I obtained a room for 670 crowns, moved my bags in and went back to the reception to complete the necessary paperwork. When the clerk asked for identification, I presented my Canadian driver's license, at which point she told me that I would, in fact, have to pay 1500 crowns. Because I had spoken Slovak, the clerk had not realized that I was a westerner. For a foreigner, the price was in fact 1500 crowns. I was informed that I could speak to the hotel lawyer, to whom I argued that Article 10 of the Czech constitution incorporates directly into Czech law all international treaties “on human rights and fundamental freedoms” ratified by the Czech Republic.<sup>63</sup> I argued that the double pricing scheme was illegal, in the spirit and letter of the Czech constitution and the human rights treaties in force,<sup>64</sup> as well as under the Consumer Protection Law. The lawyer responded that: “It is done by everybody.” Shifting from international law to general (including Czech) contract principles, I stated that the clerk and I had formed an oral contract for 670 crowns. The lawyer replied that I had not

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63. Article 10 states that “[r]atified and promulgated international treaties on human rights and fundamental freedoms to which the Czech Republic is party are directly binding and take precedence over the law.” CZECH REP. CONST. art. 10 (Dec. 16, 1992).

64. See, e.g., The European Convention on Human Rights and Its Protocols of 1950, which is perhaps the most strict human rights instrument in the world, and to which the Czech Republic acceded in 1991.

revealed that I was a foreigner. It is possible, though awkward, to characterize her argument in western legal terms as saying that my fluent Slovak was a “misrepresentation” material enough to invalidate the oral contract. From the perspective of my Slovak identity, however, her argument could be understood more amorphously in terms of my having tried to “pull one over on her.” In this idiomatic interpretation, I had violated the *animus*, the spirit and trust, of the agreement.

This split which I encountered in Český Krumlov between my internal and external perspectives continued after I returned to the office in Prague, in an encounter with two Czech lawyers. One colleague, whom I shall call O, had studied and practiced law in France during the previous six years. The other colleague, M, had a purely Czech background. In O’s view my story signified that the Czech Republic did not quite yet belong among the legally civilized nations. He argued that tiered-pricing schemes would disappear as more Czechs realized that they could not do business that way without harming foreign investment. They would have to realize that their position was irrational. M was angry, but even the most stereotypical Czech lawyer, by virtue of being a lawyer, cannot defer purely to kinesthesia. Thus, M also buttressed her argument by pragmatically asserting the financial benefits that this practice brought to Czech hotel owners. O, assuming a more idealistic tone, pointed out that the Czech constitution required abandoning the tiered-pricing system. M responded by attempting to defeat legal idealism with pure cost-benefit analysis. She asserted that O’s constitutional argument was meaningless, since there was nothing to be lost by the tiered-pricing practice. M was the last of the original Prague lawyers at my office, and she left soon after to join a Czech firm. Her replacements, like O, believed that the writings in the constitution were important, if nevertheless secondary to pragmatic, real life situations such as the impact on foreign investment. For O (but not for M), the constitution had become a valid and strong source of support for one’s claims; it had become an element of a new identity.



The complete dismissal by M and by the hotel lawyer of Article 10<sup>65</sup> of the Czech Constitution is grounded in the day-to-day cultural milieu, but simultaneously stands in contradiction to many elements of the larger historical and cultural context with which a stereotypical Czech would eagerly identify. Article 10 directly incorporates international treaties dealing with human rights and fundamental freedoms, declares that they are binding on Czech territory, and gives them precedence over its own laws, upon ratification and publication.<sup>66</sup> Only the Netherlands has a more monistic system, which does not require an act of the legislature to incorporate international treaties into domestic law.<sup>67</sup> Article 10 is unique, however, in that it only makes treaties on human rights and fundamental freedoms directly applicable.<sup>68</sup> The special status of such treaties is historically and culturally rooted in the dissident movements of Charter 77 and later Civic Forum, which rallied around the idea of fundamental rights such as those found in the Helsinki Accords, and constitute the quintessential heroic objects of identification for virtually every Czech.<sup>69</sup> It is no exaggeration to state that Article 10 represents the very heart

65. Article 10, which was originally adopted as the Constitutional Act of Jan. 9, 1991, was preceded by a similar, yet "toothless," version in Article 106 of the 1920 Constitution. Jiri Malenovsky, *Pripad Praktické Aplitické Clánku 10 Ústavy České Republiky: Rámcová Úmluva Na Ochranu Národností Menšin*, CXXXIV PRÁVNÍK 855 (1995).

66. Note that the official English translation changes the Czech system of incorporating human rights treaties from a monistic to a dualistic one, by using the ambiguous word "promulgation" for the Czech *vyhlášení*, which means "announcement" or "publication." Thus, it confuses the English reader by suggesting that an act of Parliament is necessary. The predominant interpretation by both practicing attorneys and scholars is that the Czech system is monistic. See, e.g., Malenovsky, *supra* note 65.

67. *Id.* See also Eric Stein, *Constitutional Changes in Eastern Europe and Foreign Affairs Powers*, AM. SOC'Y INT'L L. PROCEEDINGS 319, 321 (April 17-20, 1991).

68. The special status of fundamental rights and freedoms in the Czech Republic has a parallel in the jurisprudence of the German Constitutional Court. The *Bundesverfassungsgericht* has made clear during the last two decades that not even the European Union treaties can override the human rights and freedoms embedded in the Germany's internationally drafted constitution. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, May 23, 1949 (*Bundesgesetzblatt I*) as amended. For a discussion, see IPSEN, *supra* note 11, at 1103-04 (1990).

69. Charter 77 was the communist era dissident movement that was formed in 1977 by intellectuals and artists, including the playwright Vaclav Havel, with the goal of enforcing the Helsinki Accords (1975). During the revolution, Charter 77 reformed itself into Civic Forum, a coalition under Havel's leadership, that sought to end communist rule. Havel became President on Dec. 29, 1989.

of the Velvet Revolution in the Czech cultural memory. Thus it seems strange that Article 10 in practice gets the most respect from foreign trained lawyers, and that Czech lawyers tend to dismiss it in practice almost as lightly as they once did the socialist legislation.<sup>70</sup> The Czech culture *vis-à-vis* the law — the absence of any significant cultural norm of compliance — is strong even with respect to laws which enshrine the most historically dear principles and elements of national identity. The cultural stereotype of kinesthetic interactions lacks the compliance pull of formalist law but neither is it idealist; the kinesthetic type, as far as it can be construed, however, is not another approach to law in the above terms, but rather is willingly self-contradictory.

An international culture of law is at work here, but it is very different from the conventional notions of idiomatic unity associated with the existence of “a culture.” There exists no definition of what it means, except for ever-wanting descriptions of case-by-case determination. We suggest that this culture of international law has gained status, even while its conventional contents — such as the doctrine of statehood described above — have lost status. What the realists and those taking new approaches to international law have long claimed about the “doctrine of relative indeterminacy” manifests itself as this new form of a culture of non-culture, i.e. the museum turned flea market.<sup>71</sup> From a formalist perspective this means that international behavior is judged contextually, with a wide area of discretion left open to all participants acting in good faith. As contextual influence has

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70. For an example of this debate, see Malenovsky, *supra* note 65, who analyzes Article 10 in light of the European Convention for the Protection of Minorities. That Convention explicitly excludes direct application into internal law; thus, it creates a paradox — “an obstacle for harmonization of internal and international law . . . [and] . . . a schizophrenia of state power” — if the constitution is seen to trump international treaties. *Ibid.* Malenovsky argues that Article 10 must be interpreted *de lege lata*, such that the constitution and international treaties are given equal weight according to the later-in-time principle.

71. See, e.g., KOSKENNIEMI, *supra* note 53, at 20. Koskenniemi argues that international lawyers are savvy of the absurdity of an “automatic, logical reduction” between law and legal decision. He refers to H.L.A. Hart in arguing for the persuasiveness of legal argument, not for legal absolutes, and says “[t]he determining force of law is, under such a conception, always contextual.” *Ibid.*

come to be accepted in the process of legal decision making, however, the context (however amorphous and heteronomous) has been legalized. Stated simply, actors rely on rules that are not formally in force, even if such rules do not yet exist nor ever will. For instance, in the Czech Republic investors hardly even consider the possibility of economic loss caused by wanton expulsion, expropriation, confiscation, or any forceful measure by the sovereign power. Instead, they know that the contemporary international legal culture would sanction the exercise of formal sovereign powers to that effect would be sanctioned, even if the formal basis for such enforcement were clearly absent. Fears center around the delays and political struggles involved in *rule* adoption, implementation, and negotiation. Interested parties rely on an international culture to assure the direction of the necessary norms, even if neither the "culture" nor the desired norms have any definable, let alone verifiable, essence. In kinesthetic terms, investors "trust" the international.

The crisis in Yugoslavia proves that the reliance on legality even without rules is not based on the concept that certain standards are expected from Europeans, i.e. inside the western "domestic" idiom. The situation in ex-Yugoslavia also proves that in the heart of Europe — the *situs* of a large part of western history — there are explosive tensions with much older origins than we usually care to remember. With this in mind, one might expect the border of Slavic and European, Catholic and Protestant, Habsburg and Hungarian traditions to produce much uncertainty, especially if the culture of rules is not perceived as an underlying guarantee.

In the case of the Czech Republic, it is clear that the country's economic performance in the last few years<sup>72</sup> and its formal commitments to the international community<sup>73</sup> create

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72. Its Gross Domestic Product growth in the last two years has been between 4% and 5%, in practice it has full employment, and in 1995 the government budget deficit disappeared altogether. BUSINESS INTELLIGENCE REPORT WORLD OF INFORMATION, Oct. 1996, at 6-8.

73. For instance, the accession to international treaties can be regarded as a significant indicator of this commitment, as can the level of eagerness to become a member of the European Union. Since 1989 the Czech Republic has become a full

“international trust.” We argue, however, that even more significant than any case-specific commitments in the Czech example is the overall increase in relevance of the international legal culture, characterized as a non-culture or an impure idiom *par excellence*. It both covers and uncovers the spheres of the old and the new actors equally. It fills in the empty spaces of a “complete regulatory vacuum”<sup>74</sup> where specific norms do not yet exist, or from which they have been transferred to the museum of antiquated prototypes. This is perhaps a case for the theory of complex systems, where predictability and rules of behavior have no determining value, yet the system is not random and can be understood in terms of its basic characteristics. The “filling essence” of this non-culture cannot be defined, any more than can the agents causing the unexpected turbulence and warps familiar from reports and forecasts on the world economy, but equally present in all forms of international social life. The basic characteristic of international legality is what we call “international legal culture.” Its effect is twofold. First, it works very much like “trust” within the Czech setting, with its mixture of anti-rationalist hopes, commitments and national identification. Second, it works through surrendering the effort to uphold an idiomatic structure, which effort when failed causes the bubbles of idiom — such as “national identity” and its pure and exclusive sphere of domestic law — to burst. The international legal culture of non-culture, as we argue, does not in any way promote this bubble bursting. In fact, its heteronomous structure of non-structure allows for a kinesthetic that is often very strong despite the inevitable break of the domestic legal sphere and the massive influx of foreign influence, as our Czech example above shows.

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member of the Council of Europe, the Organization for Economic Co-operation and Development (OECD), and the World Trade Organization. In addition, it has submitted a formal application of membership to the Commission of the European Community. The Czech Republic is also reforming its laws, such as by adding commercial law provisions to increase shareholder protection, in order to bring the legal system in line with that of the EU. Lasfargue & Baguenault de Puchesse, *supra* note 25.

## VII. Conclusion: New Sovereignty, New International Legal Culture

Notwithstanding these deeply interpenetrating influences, the concept of sovereignty cannot be abolished. And yet it is increasingly admitted that its meaning has changed. We have shown the cultural parallel to this change. Traditionally, sovereignty meant the whole of the inviolable rights and privileges of an international actor of the highest rank. Sovereignty ensures that no higher authority can bind the sovereign, deprive it of its equal rights *vis-à-vis* its peers, nor penetrate its domestic geographical, political or cultural domain. As codified in the UN Charter and the 1970 Friendly Relations Declaration,<sup>75</sup> sovereignty implies equal legal rights, the right freely and independently to choose a political, social, economic, and cultural system, and the duties to recognize the legal personality of other states and to enable peaceful co-existence with other sovereigns. This doctrine makes the international legal system a consensual one, for a sovereign is only bound by its consent and “possesses” an exclusive sphere in the international world where it may cultivate *inter alia* its “cultural system.”

The traditional sovereignty doctrine is by no means strictly formal. As the World Court put it in 1935: “It is perhaps not easy to define the distinction between equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of merely formal equality.”<sup>76</sup> The same can be said about “international culture in fact” and “international legal culture/culture in law,” namely, that the former excludes the possibility of thinking of the latter as a strictly formal and definable idiomatic structure.

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74. This description was offered in 1992 by an American lawyer who had been invited to give technical assistance in the creation of a “legal infrastructure critical to a market economy.” DeKuiper, *supra* note 19, at 7.

75. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res 2625 (XXV). It lists seven principles, including the prohibition of intervention, the duty of co-operation, the equality and self-determination of peoples, and sovereign equality.

76. P.C.I.J. Ser. A/B, No. 64 at 19 (1935).

In recent years, the concepts of sovereignty and sovereign equality have shifted. Account has been taken of the increasing interconnectedness and inter-penetration of influences in the international system. Today, the traditional conception has given way to a looser and more systemic understanding. As two highly experienced international legal scholars reflecting on what they call “the new sovereignty” put it: “Sovereignty, in the end, is a status — the vindication of the state’s existence as a member of the international system.”<sup>77</sup> It is widely accepted, as a pragmatic matter, that international sovereigns do not act as billiard balls.<sup>78</sup> Instead, they naturally compromise their exclusionary sovereign powers. They are influenced through “interacting processes of justification, discourse, and persuasion”<sup>79</sup> occurring in the manifold operational regimes<sup>80</sup> of today’s international system. This is one of the major doctrinal examples of the change on the more general level, i.e. at the level of international legal culture.

The result is a hermeneutic change of meaning both at the level of the cultural idiom and of the doctrines embedded within it.<sup>81</sup> The culture has become one of non-culture by virtue of surrendering its pretense of idiomatic virginity; correspondingly, sovereignty doctrine has long been regarded as being in “abeyance.”<sup>82</sup> The dispute resolution power of the

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77. CHAYES & CHAYES, *THE NEW SOVEREIGNTY—COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

78. See, e.g., Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 722, 724, where she discusses the evils of an utterly realist view of the international realm and critiques the realist basis in the light of the findings of the international relations studies.

79. See CHAYES & CHAYES, *supra* note 77, at 28.

80. Regime is a concept used to denote the normative framework that can be based on a treaty, and can include a broad scope of social interactions and constraints in an independent fashion. See CHAYES & CHAYES, *supra* note 77, at 228.

81. For juridical hermeneutics, see, e.g., Emilio Betti, who explains that it is a question of continuous search for the *ratio juris* which results in the periodic overstepping of the original meaning. This is how juridical hermeneutics differ from historical hermeneutics. EMILIO BETTI, *ZUR GRUNDLEGUNG EINER ALLGEMEINEN AUSLEGUNGSLEHRE* 45 - 53 (1988).

82. The concept of “abeyance” comes originally from Lord McNair’s *Southwest Africa Opinion*, 1950 I.C.J. 128, 150 (McNair, separate opinion). It seems that when there is a transition due to undergoing transformations, the applicability of legal doctrines remains obscure and uncertain. In McNair’s argument, as in the *Aaland Islands’ Case*, it was expected that the doctrinal application “will not become clear until

sovereignty norm has collapsed to the point that has prompted renowned internationalist jurists to exclaim that dispute resolution is "either...illegitimate preference (of one sovereign over another) or doing away with the dispute altogether".<sup>83</sup> Furthermore, one often hears that, "(t)he inner dichotomy between 'individual' (state) and 'community' has had a self-destructive effect on the sovereignty discourse. A point has been reached, where sovereignty is increasingly understood as a descriptive rather than a prescriptive concept."<sup>84</sup> If accepted as merely descriptive, "it is understood that sovereignty does not bar other international actors from constraining, persuading and pushing (short of the use of force) their peers into compliance with consented to as well as unconsented to norms."<sup>85</sup> As in our Czech example, the international and transnational mish-mash of influences is strongly present in the everyday of the legal relationships that occur in a perfectly sovereign state. There is no prescriptive norm or doctrine to exclude these influences and thereby protect the purity of the Czech legal culture. Thus the international has changed no less than the national cultural context.

To give a further example, consider the impact of the controversial privatization of Czech telecommunications in June 1995.<sup>86</sup> There is little doubt of its enormous significance for the legal self-conception and identity-formation of the young

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the period of development is completed." *Id.* See also Report of the International Committee of Jurists on the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 9 (1920). Unlike McNair and the Aaland Committee, today many would argue that stages of development and transformations are rarely "completed" in the fast pace of the modern world, and thus doctrines, such as sovereignty, remain indefinitely in "abeyance." These developments have been identified, reviewed, and discussed recently. See, e.g., KOSKENNIEMI, *supra* note 53, at 262; Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 56, 58 (1991). Berman argues that as a consequence of the dichotomy of free state will and a normatively constraining international law, sovereignty has lost significance to the principle of self-determination, which entails that "the adjudication of legal rights...cannot always be based on sovereignty...[instead] sovereignty...[m]ust be derived from another source, that of the 'people' it claims to represent." *Ibid.* Berman describes this as a "jurisprudential challenge" to "sovereignty's claims of representation with a transcendental criterion of legitimacy." *Id.* at 58.

83. KOSKENNIEMI, *supra* note 53, at 263.

84. *Id.* at 187, 192.

85. See, e.g., CHAYES & CHAYES, *supra* note 77, *passim*.

86. See FRANCIS FUKUYAMA, *THE NATIONAL INTEREST* 16 (1989).

Republic. In this transaction the Dutch-Swiss consortium TelSource acquired nearly a third of the Czech voice telephone monopoly, SPT Telecom. This was the single largest privatization in central and eastern Europe by 1995. The transaction was effected despite strong objections by a domestic bidder who urged protectionism based on all conceivable legal, political and cultural grounds. Whatever the domestic climate at that time, it would have been possible to protect the Czech domain through international legal means, such as by restricting the sale to nationals or half-national joint ventures on *ordre public* grounds. The privatization was not in fact so restricted. However, the point here is that an international *ordre public* argument aimed towards upholding sovereign spheres of exclusion would have sounded absurd, however formally correct as a matter of law. This is what we called the surrender of idiomatic structures in the new international culture of non-culture.

Of course, there exists an international legal rationale of another kind: an international legal culture of economic efficiency. It can be contended that instead of a non-culture, we have finally sailed into the harbor of economic opportunism and rational actors, as in the case of privatization in the Czech Republic. One can simply point out that a market capitalist economy — which the Czech Republic has declared itself to be<sup>87</sup> — requires efficient privatization, and that its World Trade Organization (WTO)<sup>88</sup> obligations require it to refrain from extensive protective measures. But we do not accept this simple economic contention. We have argued that sovereignty cannot be understood in the traditional way. But we do not maintain that the international system has arrived at a Fukuyama<sup>89</sup> end stage, where western rationalism has exhaustively defeated all “irrational” needs of cultural belonging and identification, and the principles of capitalism

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87. When the Czech Republic joined the Council of Europe in 1991, it accepted the organization's membership requirements, which include democracy, respect for human rights in the form of the European Convention of Human Rights, and market economy.

88. The new Czech Republic joined the WTO in 1995, but it was one of the founding members of WTO's predecessor, the GATT regime.

89. FUKUYAMA, *supra* note 86.



provide the only incentive and yardstick for their measure. Indeed, we assert that the meanings have changed. The Czech telecommunications privatization is not regarded as asserting a "foreign" influence into a highly important domestic field, either from the domestic or the international perspective. Rather, the impact of transnational ownership is regarded as more "natural" than the state ownership of the socialist era, and even more "natural" than a protective restriction or a subsidized deal. It is somehow understood as a necessity to be open to transnational actors in a way that flies in the face of the old international legal culture, which protected the idioms of its national sub-cultures. A purely nationalist culture is regarded as a product of forced closedness and artificial isolation from international culture, which itself has surrendered its purity and structural integrity.

The international legal culture is dispersed by the presence of transnational actors. Perhaps most importantly, it influences the emerging legal sphere in the various ways we discussed above. Actors argue, negotiate, and make demands according to those among the largely inarticulable "general principles accepted by the major cultures of the international system"<sup>90</sup> that do not cross over into the realm of condemnable cultural imperialism. They do so partly because of the transitional state of the local law, but also because they do not even expect the local system to be frozen to national standards in times of increased international mobility. Perhaps, in this sense, some of the spirit of the Roman *jus gentium*<sup>91</sup> is revived. *Jus gentium* was born when the old empire reached so far beyond the limits of a homogeneous entity that it was impossible to administer in a uniform way.<sup>92</sup>

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90. This is offered as a more up-to-date formulation of the third source of international legal decision making. The traditional formulation, which was codified during the colonial era, provides: "The Court shall thirdly look into the general principles of law recognized by the civilized nations." Statute of the International Court of Justice, art. 38c. See also the discussion of double pricing, affording national treatment to foreigners, and Article 10 of the new Czech Constitution in Part VI.

91. "The law of nations." BLACK'S LAW DICTIONARY 859 (6th ed. 1990)

92. *Ibid.*

Today's national societies, and especially new democracies, increasingly need each other's help. They can communicate better and faster, owing to developments in telecommunications, media, and transportation. They share closely-related cultural heritages, such as in Central Europe, or derive substantial profit from cooperation, such as in the EU or under the North American Free Trade Agreement (NAFTA). These are garden-variety examples of the reality of interdependence, which suggest that adherence to reasonable international standards is more necessary than ever.

In fact, questioning the need for or the existence (ontology) of international law has been declared moot.<sup>93</sup> A more pressing question is whether what we have detected is only a passing trend, and whether everything will solidify once the new legal systems find their new cultures, form their identities, and perfect their idioms. In our view, the lawyers' fantasy that eras of stabilization and dynamism always follow each other does not hold true. Consider, for instance, the post-war era in the international legal world. The decolonization process never resulted in a uniform world in which the newly independent states adopted the model of the western legal and political regimes. The same can already be argued about the new democracies of Europe. The changes do not progress rung by rung on a ladder towards a model of the "old democracies" as a final stage. Instead, we will continue to see "hybrids" and rapid movements to unexpected, even unrecognizable forms of equilibria — i.e. equilibria of non-equilibria — to push the argument. It is perhaps not all that far-fetched to describe the unstable developments as "a near-permanent state of emergency." This state, politically and legally speaking, "tends to favor pragmatic, decisionist, neo-corporatist and technocratic styles of decision making, thereby imposing de-formalizing and

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93. See, e.g., Anne-Marie Slaughter, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUMBIA L. REV. 1907 (1992); for a critique of the central assumptions, see Outi Korhonen, *Liberalism and International Law: A Center Projecting a Periphery*, 65 NORDIC J. INT'L L. 481 (1996)

de-legalizing tendencies on whatever elementary forms of positive law and procedure are in place or being proposed.”<sup>94</sup>

The argument here advanced can be stated in another way. Where an increasing number of national legal systems exist in a state of flux, an international legal culture offers a *situs* for lawyers, who are practicing without firm, positive law standards. This is an argument against both positivism and pragmatism, and in favor of “law as culture” approach, in which the notion of culture itself must be questioned. In addition to avoiding the Scylla of technocratic positivism and the Charybdis of over-generalizing pragmatism,<sup>95</sup> the argument challenges our conception of the world as whole and the role of international law in it.

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94. Heydebrand, *supra* note 1, at 267.

95. Heydebrand poses the problem in somewhat different terms, but the general concern is similar to ours. He asks, “how can one approach this complex moving totality [of Eastern European Social Change] without being shattered by the Scylla of myopic over-specialization and concretization [a kind of narrow, expert idiocy] and the Charybdis of holistic abstraction and over-generalization [a kind of trendy dilettantism]?” Heydebrand seeks the answers in a “comparative-historical framework” which, in our view, downplays the part of the international legal culture, even though it makes very important inquiries into the national historical contexts. *Id.* at 279.