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# *Something Wicked That Way Went: Law and the Habit of Communism*

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Post-communist societies have experienced the transition to a market economy with varying results. The author argues that differences in experience and outcomes can be partly explained by the role of habit, culture, and tradition in the process of legal transition to a market economy. For example, the market economy relies upon institutions, such as "favourable moral traditions", which are an aggregate of individual rational choices. Trust is one such tradition that is particularly significant. There must not only be trust in the law but trust in the administrators of the law.

The author identifies two reasons for the more difficult transition to the market economy as experienced by Russia and other countries: first, the presence of individual opportunistic behaviour, distrust, and mafia behaviour, which are largely engendered by the prevailing habit of Stalinism/communism; and secondly, the destruction of civil society under communist ideology. In contrast, the author points to a parallel culture nurtured by dissidents and anchored in a pre-communist tradition as a factor explaining the relative success of other post-communist societies' transition. Because this parallel culture fostered trust it was an important factor in the successful transition to a market economy and the emergence of coincident legal institutions.

Les sociétés post-communistes ont vécu la transition vers une économie de marché avec des résultats variés. L'auteur soutient que les différences d'expérience et de résultat peuvent être partiellement expliquées par le rôle des habitudes, de la culture, et de la tradition dans le processus de transition légale vers une économie de marché. Par exemple, l'économie de marché se fonde sur des institutions telles que les «traditions morales favorables», qui sont un agrégat de choix individuels rationnels. La confiance est un exemple particulièrement significatif de ces traditions. Non seulement doit-on faire confiance aux lois mais aussi à leurs administrateurs.

L'auteur identifie deux facteurs afin d'expliquer la transition particulièrement difficile de la Russie et d'autres pays vers une économie de marché : premièrement, la présence du comportement opportuniste individuel, de la méfiance et du comportement mafieux, qui est largement engendrée par l'habitude prédominante du stalinisme-communisme ; et, deuxièmement, la destruction de la société civile sous l'idéologie communiste. En comparaison, l'auteur identifie la culture parallèle, nourrie par les dissidents et ancrée dans une tradition pré-communiste, comme un facteur expliquant le succès de la transition effectuée par d'autres sociétés post-communistes. Parce que cette culture parallèle a favorisé et privilégié la confiance, elle a été un facteur important dans la transition réussie vers une économie de marché et l'émergence d'institutions légales.

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*Synopsis*

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## Introduction

In the *Manifesto of the Communist Party* of 1848, Karl Marx and Friedrich Engels deride and attack bourgeois property and bourgeois law. They address their enemy directly, in the name of the proletariat:

Don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law ... Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class.<sup>1</sup>

The revolution could and did bring about the abolition of bourgeois property; but it could not and was not intended to bring about the immediate abolition of the state or law.<sup>2</sup> As Lenin extolled, the withering away of the state and the substitution of habit for law at the highest phase of communism would indeed come but, like the Messiah, only in the indefinite future.<sup>3</sup> For the interim, the state and law were to

<sup>1</sup> K. Marx & F. Engels, "Manifesto of the Communist Party" in R.C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: Norton, 1978) at 487 [hereinafter *The Marx-Engels Reader*].

<sup>2</sup> See: K. Marx, "Critique of the Gotha Program" in *The Marx-Engels Reader*, *ibid.* at 530-31; V.I. Lenin, "The State and Revolution: The Marxist Theory of the State and the Tasks of the Proletariat in the Revolution" in R.C. Tucker, ed., *The Lenin Anthology* (New York: Norton, 1975) 311 [hereinafter "The State and Revolution"] Lenin stated:

[I]t has never entered into the head of any socialist to "promise" that the higher phase of the development of communism will arrive; as for the great socialists' *forecast* that it will arrive, it presupposes not the present productivity of labour and *not the present* ordinary run of people, who, like the seminary students in Pomyalovsky's stories, are capable of damaging the stocks of public wealth "just for fun" and of demanding the impossible.

Until the "higher" phase of communism arrives, the socialists demand the *strictest* control by society *and by the state* over the measure of labour and the measure of consumption; but this control must *start* with the expropriation of the capitalists, with the establishment of workers' control over the capitalists, and must be exercised not by a state of bureaucrats, but by a state of *armed workers* ("State and Revolution", *ibid.* at 380).

<sup>3</sup> Lenin characterized the disappearance of law at the higher stage of communism in this way:

For when *all* have learned to administer and actually do independently administer social production, independently keep accounts and exercise control over the parasites, the sours of the wealthy, the swindlers and other "guardians of capitalist traditions," the escape from this popular accounting and control will inevitably become so incredibly difficult, such a rare exception, and will probably be accompanied by such swift and severe punishment (for the armed workers are practical men and not sentimental intellectuals, and they will scarcely allow anyone to trifle with them), that the *necessity* of observing the simple, fundamental rules of the community will very soon become a *habit* ("The State and Revolution", *ibid.* at 383-84).

See also, T.W. Waelde & J.L. Gundersou, "Legislative Reform in Transition Economies: Western

function as instruments of the proletarian dictatorship.

In Russia, that interim lasted over seventy years; elsewhere in Central and Eastern Europe, it lasted two or three decades less. In a manner of speaking, the state and its laws, as proletarian instrumentality, did wither. There is no small irony to its withering away so as to make room for capitalism,<sup>4</sup> although the absence of fully-developed capitalism in Russia at the end of the nineteenth century posed a quandary for those who envisaged a communist revolution there.<sup>5</sup> Moreover, Lenin was perhaps right to insist upon the role of habit after the state and law had lost their control. For some, the habit of communism dies hard. The purpose of this Note is to explore the somewhat elusive function of habit in post-communist societies. Habit, culture and tradition partly explain the different degrees of success with which post-communist societies have been managing their legal transition to market economies.<sup>6</sup>

## I. Variations on the Theme of Market Transition

The pace of economic transformation and, in particular, of privatization has varied considerably among the countries of the former Soviet bloc, in part, simply because some countries started the process earlier and, indeed, initially had somewhat differently organized economies. Nevertheless, differences in timing and starting points cannot fully account for some countries having had more difficulty than others in shedding the command economy.<sup>7</sup> Whether measured according to

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Transplants — A Short-Cut to Social Market Economy Status?" (1994) 43 I.C.L.Q. 347 at 348.

<sup>4</sup> In the Afterword to the Second German Edition of *Capital* (K. Marx, *Capital: A Critique of Political Economy*, ed. by F. Engels (New York: International, 1967), vol. 1 [hereinafter *Capital*]), Marx quotes at length a "striking and ... generous" account of his scientific method that had appeared in a St. Petersburg newspaper (*ibid.* at 19). Marx was apparently pleased by the following description of his thought: "[I]n his opinion, every historical period has laws of its own ... As soon as a society has outlived a given period of development, and is passing over from one given stage to another, it begins to be subject also to other laws" (*European Messenger* (May 1872) 427-36, quoted in *Capital, ibid.* at 18).

For Marx, the law to which bourgeois capital was subject determined its ultimate overthrow by communism. One might observe that this law of history displaces the juridical sphere in Marx's thought.

<sup>5</sup> Engels expressed great scepticism about the possibility of a communist revolution in Russia before the onset of communism in the advanced capitalist states of Europe (see F. Engels, "On Social Relations in Russia" in *The Marx-Engels Reader*, *supra* note 1 at 665-75).

<sup>6</sup> Arguments linking the legal underpinnings of both markets and commerce to culture have their origin in: C.L. de Secondat, baron de la Brède et de Montesquieu, *The Spirit of the Laws*, trans. T. Nugent (New York: MacMillan, 1949); M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. T. Parsons (New York: Charles Scribner's Sons, 1958). H.G. Skilling emphasized the role of culture in explaining institutional differences among and dissent within the various communist countries (see: H.G. Skilling, *Czechoslovakia's Interrupted Revolution* (Princeton: Princeton University Press, 1976; A. Brown, ed., *Political Culture and Communist Studies* (London: MacMillan, 1984)).

<sup>7</sup> See V. Rege, "Economies in Transition and Developing Countries: Prospects for Greater Cooperation in Trade and Economic Fields" (1993) 27:1 J. World T. 83 at 85-87. Indeed, the factor dis-

economic indicators — such as G.D.P. growth (or even non-shrinkage), average per capita income, proportion of the economy accounted for by the private sector, price liberalization, unemployment level, inflation rate, debt management and steps toward convertibility of currency<sup>8</sup> — or measured by the extent to which old legal structures have been dismantled and replaced by new ones,<sup>9</sup> a hierarchy of successful and significantly less successful countries is emerging. Suffice it to say that the Czech Republic, Hungary, Poland, the Slovak Republic and Slovenia are placed in the top economic tier of Central and Eastern European countries, while others are faring less well.<sup>10</sup>

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cussed here — habit, culture or tradition — helps to explain why some countries began their reform process earlier and why some preserved elements of a market economy within their command economy institutions.

<sup>8</sup> See I.M.F., *World Economic Outlook*, World Economic and Financial Surveys (Washington: I.M.F., October 1994) at 8, noting progress in the Czech Republic, Hungary, the Slovak Republic, Slovenia, Albania, the Baltic countries and Mongolia, which have all resumed growth after pursuing policies of macroeconomic stabilization and structural reform. In contrast, there has been contracting output in most of the other countries in transition (*ibid.* at 9). Of the countries of the former Soviet Union, only Armenia, Mongolia and Turkmenistan showed growth in 1994, and Mongolia stands alone as having had relatively sustained growth (*ibid.* at 65-66). Albania, Poland, Hungary, the Czech Republic, the Slovak Republic and Latvia all have close to or in excess of 50% of G.D.P. accounted for by the private sector (*ibid.* at 65). On the other hand, unemployment has been in the double digits everywhere except for the Czech Republic (4%), Estonia (7%), Latvia (6%) and Russia (6%) (*ibid.* at 68), and inflation has been in the double digits or more (10,000% in Georgia!) in all countries except the Czech Republic (9%). Moderate rates were also achieved in Hungary (19%), the Slovak Republic (14%) and Slovenia (18%) (*ibid.* at 66). “In the group of countries with the most advanced reforms, the Czech Republic stands out as the only country that has pursued tight financial policies and bold liberalization while avoiding a sharp rise in open unemployment” (*ibid.* at 68). It is also the only country with a positive trade balance (see OECD, *Economic Outlook*, N° 55 (Paris: OECD, 1994) at 118). For another review of the economic performance of transition countries, see W.C. Philbrick, “The Paving of Wall Street in Eastern Europe: Establishing the Legal Infrastructure for Stock Markets in the Formerly Centrally Planned Economies” (1994) 25 *Law & Pol’y Int’l Bus.* 565 at 568-71.

<sup>9</sup> See: M. Wierzbowski, “Eastern Europe: Observations and Investment Strategies” (1991) 24 *Vand. J. Transnat’l L.* 385; C.M. Cole, “Poland, Hungary, and the Czech and Slovak Federal Republic: An Examination of the Evolving Legal Framework for Foreign Investment” (1992) 7 *Am. U. J. Int’l L. & Pol’y* 667. Cheryl Gray, Senior Economist with the World Bank, has coordinated a series of studies of evolving legal frameworks in Eastern Europe. For accounts of the legal changes in the Czech Republic, Hungary, Poland and Slovenia, see: C.W. Gray, “The Legal Framework for Private Sector Activity in the Czech Republic” (1993) 26 *Vand. J. Transnat’l L.* 271; C.W. Gray, R.J. Hanson & M. Heller, “Hungarian Legal Reform for the Private Sector” (1992) 26 *Geo. Wash. J. Int’l L. & Econ.* 293; C.W. Gray *et al.*, “The Legal Framework for Private Sector Development in a Transitional Economy: The Case of Poland” (1992) 22 *Ga. J. Int’l & Comp. L.* 283; C.W. Gray & F.D. Stiblar, “The Evolving Legal Framework for Private Sector Activity in Slovenia” (1993) 14 *U. Pa. J. Int’l Bus. L.* 119. The former German Democratic Republic (East Germany) is a special case given the wholesale substitution of West German legal and economic institutions. This comes, perhaps, at the price of a demoralizing sense of colonization in the east and of resentment at an unmanageable level of subsidization in the west (see: N. Horn, “The Lawful German Revolution: Privatization and Market Economy in a Re-Unified Germany” (1991) 39 *A. M. J. Comp. L.* 725; H. Seibert, H. Schmieding & P. Nuunenkaamp, “The Transformation of a Socialist Economy: Lessons of German Unification” in G. Winckler, ed., *Central and Eastern Europe Roads to Growth* (Washington: I.M.F., 1992) 62).

<sup>10</sup> This “ranking” follows the discussion in P.H. Rubin, “Growing a Legal System in the Post-

## II. Institutions and the Black Box of Culture

A number of commentators have written about the role of law in the transition to market economies and note that differing legal cultures or traditions play roles in facilitating or impeding the transformation of the law.<sup>11</sup> In these accounts, however, culture appears to be a black box into which are placed all factors escaping definition and analysis.<sup>12</sup> Can one pry the box open?

Frydman and Rapaczynski begin to do so in their discussion of "markets by design".<sup>13</sup> Neo-classical economics, they note, constructs the model of a market that achieves equilibrium as a result of the rational choices of individual actors. Fully-rational choices tending to equilibrium, however, would depend upon perfect information of a kind that would make centrally-planned economies possible.<sup>14</sup> In contrast, choices are made in narrow contexts of partial information; the market is the aggregate of these choices. Within the market, institutional patterns of conduct take on prominence at the frontiers of individual rational choice.<sup>15</sup> Institutions are,

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Communist Economies" (1994) 27 Cornell Int'l L. J. 1 at 25-26.

<sup>11</sup> See e.g. C.R. Sunstein, "On Property and Constitutionalism" (1993) 14 Cardozo L. Rev. 907, commenting on the role of constitutions in Eastern Europe. Sunstein asserts that "[a] dramatic legal and cultural shift, creating a belief in private property and a respect for markets, is indispensable" (*ibid.* at 922 [emphasis added]). He goes so far as to claim the following:

It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes (Sunstein, *ibid.*).

Waelde and Gunderson assert that "[l]aws become effective by social forces and pressures interested in and working for implementation" (Waelde & Gunderson, *supra* note 3 at 360) and that "legal reform must be carried out carefully so that it nurtures development of a capitalist 'mind set' rather than incites nationalist rejection" (*ibid.* at 362). They suggest that any legal transplants take careful account of indigenous legal cultures. B. Rudden, "Civil Law, Civil Society, and the Russian Constitution" (1994) 110 L. Q. Rev. 56, draws attention to the "strident Soviet tradition of stern virtue which assigned to the law a function fulfilled in other epochs by the sermon ..." (*ibid.* at 82).

<sup>12</sup> R. Frydman & A. Rapaczynski, "Privatization and Corporate Governance in Eastern Europe: Can a Market Economy be Designed?", in Winckler, ed., *supra* note 9, 255.

<sup>13</sup> *Ibid.* at 285.

<sup>14</sup> Information technologies are beginning to approximate conditions of perfect information, at least in some markets. In such markets, bounded rationality consists not so much in absence of information as in limited capacity to organize, assimilate and apply information. Nevertheless, it has become increasingly plausible to speak of: (1) individuals having the same capacity (including low costs) to generate information as large firms; and (2) markets segmented down to the specific preferences of individuals. To the extent that propositions (1) and (2) obtain in real markets, contracting can occur without the intermediary of firms. A completely dispersed atomistic market characterized by perfect information would at the same time be the perfectly planned economy. This reflection was prompted by M. Hopper, "Competing in a Networked World" (Remarks presented to the Centre for the Study of Regulated Industries, Interdisciplinary Seminar Series, McGill University, Montreal, Canada, 26 January 1995) [unpublished].

<sup>15</sup> See S. Schiavo-Campo, "Institutional Change and the Public Sector: Towards a Strategic Frame-

thus, crucial to the functioning of markets because they generate the confidence necessary for choices to be actualized even in the absence of perfect information. In this sense, they are necessary conditions for the existence of markets. Yet, institutions are characterized “by an irreducible element of contingency, idiosyncrasy, and cultural specificity”.<sup>16</sup> Furthermore, not all possible institutional arrangements reinforce the aggregation of choice in the market. Some arrangements, such as those perpetuated by the state under communism, accomplish the opposite. Frydman and Rapaczynski conclude:

We have thus the makings of a genuine paradox that constitutes the most fundamental systemic obstacle to the economic transformation in Eastern Europe: the most important aspect of the transition to a spontaneously functioning market economy cannot be initiated by market forces themselves. Indeed, the only force powerful enough to set market forces in motion is the very state that is supposed to remove itself from the picture.<sup>17</sup>

### III. The Paradox of Spontaneous Markets

The paradox that a “spontaneously functioning market economy”<sup>18</sup> cannot bring itself into being has to do more with the term “spontaneous” than with the term “market”. It could be caricatured thus: everyone will naturally adopt rational market behaviour unless there is some externally imposed force — “market intervention” — that prevents it. Just as deregulation in western industrialized countries removes market intervention and, therefore, unleashes “spontaneous” market forces of competition, so too the removal of an albeit more massive market intervention — the centrally planned economy — will unleash the market. Such arguments give rise to the fallacy that the collapse of communism will inevitably unleash a “spontaneous” market economy. If one adopts this fallacy as a premise, the notion that the “force” of the state is needed to set market forces in motion is indeed paradoxical.

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work” in S. Schiavo-Campo, ed., *Institutional Change and the Public Sector in Transitional Economies*, World Bank Discussion Paper No. 241 (Washington: The World Bank, 1994) 3, where, drawing on Douglass North, he gives the following account of institutions:

Institutions comprise both formal and informal rules and procedures — which extend to cultural habits and psychological variables, including “commercial morality”, which is essential for a well-functioning market economy but is nonexistent or rudimentary in most transition economies. Formal rules can be changed overnight, but informal rules cannot. The implication is that real institutional change is always slower than was foreseen or can be visible on the surface. Rapid institutional change on the surface may go hand-in-hand with a frozen set of informal rules below the surface, yielding little or no behavioral improvement and presenting the agent of change with an apparent paradox (Schiavo-Campo, *ibid.* at 4).

<sup>16</sup> Frydman & Rapaczynski in Winckler, ed., *supra* note 9 at 265.

<sup>17</sup> *Ibid.* at 267. See also E. Klingsberg, “The State Rebuilding Civil Society: Constitutionalism and the Post-Communist Paradox” (1992) 13 *Mich. J. Int'l L.* 865.

<sup>18</sup> Frydman & Rapaczynski in Winckler, ed., *ibid.*

The theorist of “spontaneous orders”, Friedrich von Hayek, may be blamed for the pedigree of this fallacy,<sup>19</sup> but he cannot be charged with the fallacy itself. Hayek’s conception of the spontaneous order of the market was, indeed, the result of his reflection upon communism and central planning.<sup>20</sup> Commenting on Marx’s mistaken belief that capitalism and market economies were characterized by “chaos”, Hayek remarks: “Karl Marx was completely unaware of the manner in which appropriate rules of individual conduct induce the formation of an order ...”<sup>21</sup> That is, the spontaneous order of the market is brought into being by appropriate rules of individual conduct. The market is a spontaneous order not in the sense that it arises without an exogenous cause, but because once established, it can align and coordinate the multiplicity of human preferences without the exogenous determination of outcomes.<sup>22</sup> Hayek says a spontaneous order “results from the individual elements adapting themselves to circumstances which directly affect only some of them, and which in their totality need not be known to anyone ...”<sup>23</sup> Thus, the ideas of dispersed knowledge and limits to the range of individual rational choice, “bounded rationality”, are embedded in Hayek’s concept of spontaneous order. This, in turn, means that Hayek is able to accept the notion that institutional patterns of conduct — he uses the term “favourable moral traditions”<sup>24</sup> — take on prominence at the frontiers of individual rational choice and underpin the spontaneous order of the market.

#### IV. Markets, Culture and Trust

What characterizes the favourable moral traditions that underpin the market? Mark Casson has attempted to answer this question by describing “the cultural de-

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<sup>19</sup> F.A. von Hayek, *Law, Legislation and Liberty*, vol. 3 (Chicago: University of Chicago Press, 1979) [hereinafter *Law, Legislation and Liberty* (vol. 3)].

<sup>20</sup> See F.A. von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 72-87.

<sup>21</sup> *Law, Legislation and Liberty* (vol. 3), *supra* note 19 at 169. Hayek goes on to note that Marx misunderstood how the market’s prime mechanism provided a signal for future conduct. For Hayek, rules of individual conduct induce the formation of the market, which, in turn, channels conduct.

<sup>22</sup> See F.A. von Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: Chicago University Press, 1973) at 36.

<sup>23</sup> *Ibid.* at 41. One might wonder whether the choice of the adjective “spontaneous” was felicitous given the idea Hayek is conveying here. It is not so much that markets result from a natural impulse and are automatic or, to use current vocabulary, “autopoietic” systems. The key to Hayek’s thinking is that the market order results from the acts of multiple decision-makers rather than from a single or generalized will. As he puts it: “The possibility of men living together in peace and to their mutual advantage without having to agree on common concrete aims, and bound only by abstract rules of conduct, was perhaps the greatest discovery mankind ever made” (F.A. von Hayek, *Law, Legislation and Liberty*, vol. 2 (Chicago: Chicago University Press, 1976) at 136 [footnotes omitted]). Perhaps the term “pluralistic order” captures this idea better.

<sup>24</sup> *Law, Legislation and Liberty* (vol. 3), *supra* note 19 at 169. For recent empirical analysis in the post-communist context, see J. Kubik, “The Role of Decentralization and Cultural Revival in Post-Communist Transformations” (1994) 27 *Communist & Post-Communist Stud.* 331.

terminants of economic performance".<sup>25</sup> He identifies one characteristic that has special significance for the former communist countries: high levels of trust.<sup>26</sup> Given that widespread opportunistic behaviour — cheating on contracts, for example — can undermine contracting itself "[t]he question then arises as to whether people can be trusted to honor contracts even when it is not in their material interests to do so."<sup>27</sup> The problem of individual opportunistic behaviour can be addressed through reliable enforcement of private law. However, the willingness of contractors to rely upon law enforcement, in turn, depends upon perceptions of the trustworthiness of those responsible for the administration of the law. Niklas Luhmann generalizes the role of trust and confidence:

[L]ack of confidence and the need for trust may form a vicious circle. A system — economic, legal, or political — requires trust as an input condition. Without trust it cannot stimulate supportive activities in situations of uncertainty or risk. At the same time, the structural and operational properties of such a system may erode confidence and thereby undermine one of the essential conditions of trust.<sup>28</sup>

The growth of disclosure-based stock markets in the more successful transitional economies provides evidence of both growing market confidence, and that firms in these countries are investing in their reputations.<sup>29</sup>

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<sup>25</sup> M. Casson, "Cultural Determinants of Economic Performance" (1993) 17 *J. Comp. Econ.* 418.

<sup>26</sup> See also: N. Luhmann, *Trust and Power* (Chichester: Wiley, 1979); B. Barber, *The Logic and Limits of Trust* (New Brunswick, N.J.: Rutgers University Press, 1983); D. Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (New York: Blackwell, 1988). In characterizing his understanding of trust, Barber notes: "Luhman [*sic*] and I regard trust primarily as a phenomenon of social structural and cultural variables and not, as it has been treated in the social-psychology work ... as a function of individual personality variables" (Barber, *ibid.* at 5).

<sup>27</sup> Casson, *supra* note 25 at 426. On opportunistic behaviour in post-communist countries, see Rubin, *supra* note 10 at 13-16. On the theory of opportunistic behaviour, see O.E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York: Free Press, 1985).

<sup>28</sup> N. Luhmann, "Familiarity, Confidence, Trust: Problems and Alternatives", in Gambetta, ed., *supra* note 26, 93 at 103. Luhmann distinguishes between confidence and trust as two forms of faith in the fulfillment of expectations. Trust is engaged where that faith depends upon conscious undertaking of risk — for example, hiring someone. Confidence is reposed where a relationship is understood as unavoidable — for example, relying on the police. In Luhmann's terms, relationships of trust can transpose into relationships of confidence and *vice versa* (see Luhmann in Gambetta, ed., *ibid.* at 97-98).

<sup>29</sup> See Philbrick, *supra* note 8. See also S. Wolff, P. Thompson & D. Nelson, "Securities Regulation in Central Europe: Hungary and Czechoslovakia" (1992) 21 *Denv. J. Int'l L. & Pol'y* 103. One anecdote illustrates this in striking fashion. Two years ago, I bought some porcelain in Prague and was assured by the shopkeeper, whom I had never met before, that it would be packed so as to survive the flight to Montreal. When I unpacked the boxes, I discovered that a number of pieces were broken. I wrote to express my dissatisfaction and expected nothing more to come of it. When I arrived in Prague the following year on another trip, a replacement package of porcelain was waiting for me.

## V. Mafias, Communism and Distrust

On the other hand, evidence abounds of widespread opportunistic behaviour in Russia.<sup>30</sup> Indeed, generalized distrust breeds secretiveness in business relations, which in turn impedes the building of reputations for trustworthiness,<sup>31</sup> including that of legal institutions. The most dramatic manifestation of generalized distrust is the emergence of mafia behaviour touching upon large portions of the economy.<sup>32</sup>

Gambetta has elucidated the relationship between a situation of generalized distrust in civil society of Southern Italy and the emergence of the mafia there.<sup>33</sup> He hypothesizes that a generalized sense of distrust was first spread under Habsburg-Spanish domination, at which time “a bewildering and sophisticated array” of *di-vide et impera* strategies were implemented by the rulers,

ranging from discouraging commerce and the production of wealth to the manipulation of information; from fostering religious superstition to establishing vertical bonds of submission and exploitation at the expense of solidarity between equals; from destroying equality before the law to overturning the relationship between the sexes.<sup>34</sup>

This generalized sense of distrust was, and is, then reproduced and exploited by the mafioso who, on the one hand, is able to “protect” the performance of provident transactions through threat of violence and, on the other hand, acts through “regulated injections of distrust” (that is, taking advantage of “unprotected” parties) to “increase the demand for the product he sells — that is, protection”.<sup>35</sup> Gambetta’s insight is that the mafia’s endurance, certainly for over a century, is not only attrib-

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<sup>30</sup> See: Rubin, *supra* note 10 at 17-18; I. Bird, “The Unique Challenges of Practicing Law in the Russian Federation” (Faculty of Law, McGill University, 1995) [unpublished].

<sup>31</sup> See Rubin, *ibid.* at 10.

<sup>32</sup> Professor Yakov Gilinskij of the European University of St. Petersburg has conducted interviews with businesspersons in that city and has managed to trace out the scope of mafia behaviour. He cites the following opinion offered by an interviewee:

100% of commercial structures are embraced by [the] racket, except the ones located in the premises of large-scale state-owned enterprises, or the ones ... which have not yet begun making profit. [The] [r]acket [has] penetrated all the enterprises except those of [the] military-industrial complex and some foreign firms (Y. Gilinskij, “Black Market and Organized Crime in Russia” (European University, St. Petersburg, 1993) at 5 [unpublished]).

Gilinskij’s own conclusion is that “criminalization of the entire national economy has occurred” (*ibid.*). Also, see generally S. Handelman, *Comrade Criminal: The Theft of the Second Russian Revolution* (London: Michael Joseph, 1994).

<sup>33</sup> See D. Gambetta, “Mafia: the Price of Distrust”, in Gambetta, ed., *supra* note 26, 158 [hereinafter “The Price of Distrust” in Gambetta, ed.].

<sup>34</sup> *Ibid.* at 159, where Gambetta draws on the account of A. Pagden, “The Destruction of Trust and its Economic Consequences in the Case of Eighteenth-century Naples”, in Gambetta, ed., *supra* note 26, 127.

<sup>35</sup> “The Price of Distrust” in Gambetta, ed., *ibid.* at 173.

utable to its threats of violence but also stems from its capacity to create demand for its services — demand which, in turn, is dependent upon mafia capacity to maintain distrust in transactions. He therefore reaches the remarkable conclusion that “in a world of the mafia monopoly a reliable market is a contradiction in terms and is not likely to come about, or at least to spread, ‘naturally’.”<sup>36</sup> The paradox of spontaneous markets is, thus, amplified. Within the vicious circle of distrust not only are “market forces” insufficient to bring the market into being, but conduct tends “spontaneously” to undermine markets. Yet, this circle is breakable.<sup>37</sup>

What Gambetta calls the “self-reinforcing behavioural expressions”<sup>38</sup> of distrust — secrecy, duplicity, information intelligence and betrayal — were all systematically employed by the communist regime.<sup>39</sup> Just as mafia behaviour would appear to have emerged with the removal of the force that had destroyed civil society in Southern Italy and thrived under democracy, so too mafia behaviour and bribe-taking have gained pre-eminence with the fall of communism.<sup>40</sup> Interestingly enough, Gambetta notes a reverse phenomenon through which the mafia is curbed and is replaced by “another — bigger and better — mafia”<sup>41</sup> under centralized, authoritarian and military rule. This happened in some measure under Mussolini, with the resulting slogan of “better the mafia than fascism”. Will Russians adopt the slogan, “better the mafia than communism”? Will mafia institutions in Russia and other post-communist countries be as self-reproducing and durable as those in Southern Italy? Moreover, will they succeed, as in Southern Italy, in continuing to discredit legal institutions? These questions remain unanswered.

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<sup>36</sup> *Ibid.* at 167.

<sup>37</sup> The recent Italian war on corruption — the revolution by the judges — illustrates that legal institutions can themselves become agents for generating trust.

<sup>38</sup> “The Price of Distrust” in Gambetta, ed., *supra* note 26 at 166.

<sup>39</sup> Casson also observes:

Low trust is a legacy of Stalinism. The overcentralization of planning discredited the planner and, by implication, top enterprise managers too. The rigidity of senior officials in maintaining technically unrealistic production targets to maximize the output of obsolete consumer goods left considerable cynicism at lower levels of the enterprise system. Furthermore, the privileges conferred on party activists and the widespread use of informers discouraged the open expression of dissenting views and hence disabled group-centered problem solving (Casson, *supra* note 25 at 431).

Ironically, state enterprises, which had some national prestige at stake in performing their international obligations, are often more reliable partners for foreign investors than firms in the emerging private sector (see Bird, *supra* note 30).

<sup>40</sup> Gambetta notes that for mafia behaviour to emerge, absence of trustworthy legal institutions and commercial relations must be conjoined with opportunities for social mobility (“The Price of Distrust” in Gambetta, ed., *supra* note 26 at 163-64). This provides incentives for monopolistic rent-seeking and results in prominent mafiosi affecting middle class respectability. Russian economist Evgenii Starikov has elaborated the dangers of tolerating the mafia as a precursor to the development of a market economy (E. Starikov, “A Bazaar, Not a Market” (1994) 37:2 Probs. Econ. Transition 14).

<sup>41</sup> “The Price of Distrust” in Gambetta, ed., *ibid.* at 167.

## VI. The Apotheosis and Destruction of Civil Society

The notion that communism destroyed civil society, and entrenched habits of distrust, draws on a substantial literature that has developed around the concept of "civil society."<sup>42</sup> Like the term "culture", the term "civil society" is protean and can serve simply to encapsulate all the virtues that are taken to be absent from communist societies and miraculously present in liberal democracies.<sup>43</sup> Three different features of civil society are usually emphasized: (1) it is a public sphere of activity notionally prior to and autonomous from the state; (2) it comprises a collection of voluntary associations; and (3) it is characterized by virtues of civility.<sup>44</sup> Following Shils, I shall employ the term loosely as combining these three features, although they stand in some tension with each other.<sup>45</sup>

Ironically, Marxism, in its revolutionary practice and aspirations, can be seen as the apotheosis of civil society. The idea of class consciousness dramatises and gives a critical edge to the looser notion of public opinion. The dictatorship of the proletariat personifies those in civil society who would challenge the State's power in the name of self-determination. The withering away of the State would be the anarchic triumph of civil society. How, then, did the apotheosis of civil society become the enemy of civil society?

The morality play that was the final struggle between the proletariat and the bourgeoisie depicted a reduction of civil society into one simple conflict.<sup>46</sup> That re-

<sup>42</sup> See especially: E. Shils, "The Virtue of Civil Society" (1991) 26 *Gov't & Oppos.* 3; A. Arato, "Revolution, Civil Society and Democracy" (1990) 10:1/2 *Praxis International* 24; J.L. Cohen & A. Arato, *Civil Society and Political Theory* (Cambridge, Mass.: M.I.T. Press, 1992); J. Keane, ed., *Civil Society and the State: New European Perspectives* (London: Verso, 1988).

<sup>43</sup> Indeed, Ernest Gellner writes of the "miracle of Civil Society" that occurred in the west (E. Gellner, *Conditions of Liberty: Civil Society and its Rivals* (London: Hamish Hamilton, 1994) at 32).

<sup>44</sup> Indeed, Shils, *supra* note 42 at 4, simply combines these elements into a multi-faceted definition of civil society. See also C. Taylor, "Modes of Civil Society" (1990) 3 *Public Culture* 95, where he masterfully traces these elements through history and unearths tensions between Locke's "autonomous public sphere" and Montesquieu's "corps intermédiaires".

<sup>45</sup> Other uses of the term are less helpful. Sometimes it is understood as an open zone for private choices about the "good life" and seems to collapse into a certain liberal — if not libertarian — theory of politics, ignoring the public character of civil *society*. Sometimes it is understood as co-terminus with the market and the invisible hand, ignoring the collective responsibility of *civil society*. Michael Ignatieff understands "civil society" to involve a commitment to negative liberty: "Liberty in civil society is essentially negative because there cannot be, in principle, agreement among human beings about the positive ends of political communities, beyond the protection of the liberties of the individuals who compose it" (M. Ignatieff, "On Civil Society: Why Eastern Europe's Revolutions Could Succeed" (1995) 74:2 *Foreign Affairs* 128 at 130). G.M. Tamás decries such a "doxophilic" civil society as a reinvention of communism (G.M. Tamás, "A Disquisition on Civil Society" (1994) 61 *Soc. Res.* 205). However, these accounts underplay the efforts made to reconstitute the integrity of social institutions as part of the reconstruction of civil society.

<sup>46</sup> See C. Schmitt, *The Crisis of Parliamentary Democracy*, trans. E. Kennedy (Cambridge: M.I.T. Press, 1985) at 59-60.

duction was pursued under the dictatorship of the proletariat through political litmus-tests and purges at all levels of society. Thus, the Marxist apotheosis of civil society entailed that civil society speak with one voice. The champions of historical necessity displayed no modesty in the face of differing views. Since the proletarian state and proletarian civil society spoke with the same voice, the distinction between state and civil society blended away. Scouts became Young Pioneers, artists became socialist realists and religion became state orthodoxy.

Diversity in a functioning civil society is based on modesty and prudence, not on amorality or relativism. Civil society does not speak with a single voice because any grasp of the "good" is partial. Other opinions deserve respect because they may shed light on the truth. Civil society ought, therefore, to embrace both the rivalry and respect of ideas and institutions. Communism, however, destroyed both rivalry and respect.

## VII. Reconstituting Civil Society: Parallel Cultures Under Communism

The breakdown of civil society under communism and the creation of a culture of distrust work against the emergence of market economies. The surprising phenomenon, therefore, is not so much the rise of mafias and the painful transition to the market in Russia and elsewhere in Eastern Europe but, rather, the relative successes observed in the leading post-communist economies. If a culture of distrust partly accounts for market failure, how was that culture displaced in the successful countries?

Culture, if defined as "collective subjectivity"<sup>47</sup> or as the sum of achievements and practices of a particular collectivity, tends to be understood as a given determinant of conduct. The more traditional definition of culture, as training or refinement of the mind, reinforces the notion that culture is not only a condition determining behaviour but also derives from creative acts. We make and shape our culture, we are not simply made and shaped by it. Nor is culture a homogeneous phenomenon in a collectivity; it is composed of sometimes rival and contradictory traditions, expressions and teachings. As different cultural strands are followed in the public imagination, habits change, traditions are re-interpreted, and culture is transformed.

The cultural transformation that has occurred in some countries of Central and Eastern Europe has to do with what Václav Havel, writing eleven years before the Velvet Revolution, referred to as "parallel structures" and a "second culture" nurtured by dissidents.<sup>48</sup> My main claim is that the parallel culture, while representing only a strand of society, made it possible to attempt a redemption of the whole of civil society after the fall of communism. In particular, this culture fostered trust or,

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<sup>47</sup> Casson, *supra* note 25 at 420.

<sup>48</sup> V. Havel, "The Power of the Powerless" in J. Vladislav, ed., *Václav Havel or Living in Truth* (London: Faber & Faber, 1986) 36 at 100-101.

at least, a shedding of the communist habit of distrust. It facilitated the process by which legal institutions were reinvested with confidence, and it became a touchstone for a rediscovered morality of the marketplace.

The parallel culture consisted of myriad artistic, political and philosophical expressions symbolized by figures such as Lech Walesa and Václav Havel and by events such as the 1956 Hungarian uprising. Parallel institutions were formed — parallel unions, parallel universities, parallel publishing houses and to some extent even a parallel economy.<sup>49</sup> These institutions were in many instances only embryonic, but they represented the commitment and aspiration to a broader social transformation: they were meant to “foreshadow a general solution”.<sup>50</sup>

Unlike Russia, where a parallel culture also developed but arguably in less elaborate form, the parallel culture in the most successful post-communist countries was built, in part, on the notion that communism was an externally-imposed lie. The parallel culture sustained pre-communist traditions and, in many instances, was comprised of small acts, such as maintaining a semblance of commercial bookkeeping practices or sharing non-Marxist textbooks. This allowed many ordinary people to maintain the conviction that under the surface of day-to-day practices compelled by a corrupt system there lurked another set of only partly-suppressed practices. In Russia, the communist revolution was a Russian heritage, and the pre-communist tradition was a more distant and, indeed, unhappy memory. It was much more difficult, therefore, for Russians to embrace the parallel culture as a basis for revaluing social institutions. By contrast, the Czechs, Hungarians, Poles and Slovaks, despite the degree to which they had been co-opted by communism, could be convinced that the parallel culture was the truer image of themselves.<sup>51</sup>

### VIII. Law and the Parallel Culture

In considering the function of a parallel culture, Václav Havel placed great emphasis upon resurrecting respect for the law.<sup>52</sup> The communist state was “utterly obsessed with the need to bind everything in a single order: life in such a state is thoroughly permeated by a dense network of regulations, proclamations, directives,

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<sup>49</sup> See Havel in Vladislav, ed., *ibid.* at 101.

<sup>50</sup> *Ibid.* at 103.

<sup>51</sup> For an empirical analysis of this phenomenon, see G. Vainshtein, “Totalitarian Public Consciousness in a Post-Totalitarian Society: The Russian Case in the General Context of Post-Communist Developments” (1994) 27 *Communist & Post-Communist Stud.* 247. An analogy can be made to the mythical function of the French Resistance for the whole of France after World War II. If a parallel culture plays the role of redeeming the whole of civil society, can that society bear to look upon the extent of corruption and collaboration in the past? “Lustration” statutes aiming to cast light on the extent of past corruption have not been enforced with great rigour in part because too many people would come under the glare of scrutiny (see V. Cepl, “Lustration in the C.F.S.R.: Ritual Sacrifices” [Spring 1992] *E. Euro. Const. Rev.* 94. See also C.C. Bertschi, “Lustration and the Transition to Democracy: The Cases of Poland and Bulgaria” (1995) 28 *E. Eur. Q.* 435).

<sup>52</sup> Havel in Vladislav, ed., *supra* note 48 at 90.

norms, orders and rules.”<sup>53</sup> Over time, as communist ideology was hollowed-out and lost all semblance of persuasive appeal, the state borrowed a fragile legitimacy by adopting the facade and ritual of legality; at the same time, however, it flaunted the law at its convenience. The facade of legality allowed the vast majority of those who participated in and applied the communist order to ease their consciences, for they could pretend that they were merely applying the law.

Within the parallel culture, the purely instrumental legalism of the communist state was exposed in the name of law. Dissidents repeatedly challenged the state to uphold its own laws. Not to do so — simply to proclaim that legality was a facade — would have been to succumb to the corrupting idea that law consists only in manipulation. Rather, “[d]emanding that the laws be upheld [was] thus an act of living within the truth that threaten[ed] the whole mendacious structure at its point of maximum mendacity.”<sup>54</sup> Demanding that the laws be upheld revealed the character of the law under communism but, at the same time, highlighted a different way of interpreting and applying law. This especially confronted the consciences of those who were content to hide behind the facade of legality.

By placing fidelity to the law at the centre of the parallel culture, dissidents were able to construct an alternate normalcy for the functioning of legal institutions. In the absence of communism, it would be normal for officials and citizens to behave truthfully and for others to repose trust in them. After the fall of communism, fidelity to law could become a standard that guided the conduct even of those who had been previously co-opted. This standard helped to break the habit of communism.

## Conclusion

In liberal democratic societies, we take a great deal for granted about the functioning of markets and of law. Markets are seen as “spontaneous” emanations of human nature. The rule of law becomes a slogan and a formula. We rely heavily on habits of the marketplace and habits of legality. Yet, the experience of post-communist societies teaches us that the morality of the marketplace, grounded in trust and fiduciary conduct, is a fragile cultural achievement. Fidelity to law flows from a conviction that each shares responsibility for all.

The successful post-communist societies have benefited from a parallel culture, which was nurtured under communism, to begin the restoration of trust and fidelity to law. In so doing, they join the community of liberal democracies and may help to show those habit-driven societies how to revive their own cultural vibrancy.

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<sup>53</sup> *Ibid.* at 94.

<sup>54</sup> *Ibid.* at 98.