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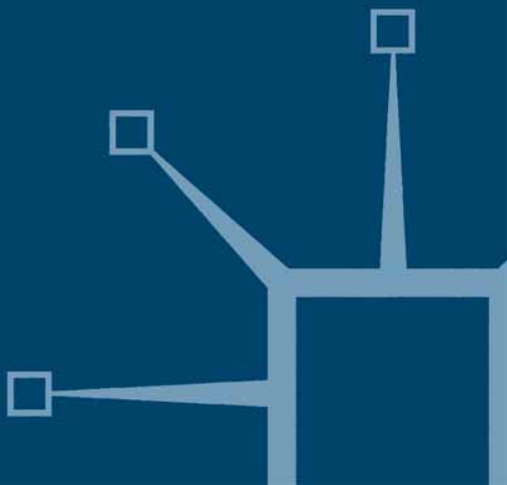
The Struggle for Constitutionalism in Poland

Mark Brzezinski



THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND

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Mark Brzezinski

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To my parents, Dr Zbigniew and Muska Brzezinski, and to Carolyn, with love

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Preface to the 2000 Reprint

A decade ago, in the summer of 1990, when I began my research in Poland for this book, my first stop in Warsaw was the *Trybunal Konstytucjyny*, Poland's first constitutional court. The Tribunal had been set up in 1986 as a concession to the democratic movement, which after martial law had demanded institutions to ensure that the regime followed the letter of the law. And while during the communist era the Tribunal never challenged the regime, I expected at least the structure of the Tribunal to reflect its stature – after all, like the Supreme Court in Washington, DC, this would be the most important judicial body of the land.

But when I finally found the Tribunal, it was housed in a couple of dingy rooms in an unused corridor of Parliament, a sign hanging from the front door with two letters: 'TK'. The Tribunal's judges had no clerks, no staff other than two secretaries, no real library and no chambers. The Tribunal met only periodically, and had to borrow rooms from Parliament, the institution it was supposed to check, in order to have a chamber to try cases. The twelve judges of the Tribunal traveled from around the country to hear the occasional case, but there was no formal docket to inform the public of forthcoming cases.

In short, in the summer of 1990 it was clear that little of importance had been expected from this institution. And its modest circumstances were a perfect metaphor of the subordination of law to power which characterized the communist regime.

So much has happened in Poland since those early days of the post-communist era. Economic reform, which at first caused so much pain, has made Poland one of the economic success stories of Europe. Poland has 'returned to Europe' through NATO enlargement, which finally eliminates the immoral and destabilizing lines in Europe, a division established by Stalin and perpetuated by the cold war.

A constitutional revolution also has occurred in Poland. In May 1997, after eight years of debate and *ad hoc* constitutional change, Poles voted in a nation-wide referendum to promulgate a new constitution. The document provides a modern constitutional definition of state system and a workable balance between president and parliament. It provides political stability through a no-confidence vote. Most important, the communist constitution imposed on Poland in

1952 has now been replaced by an entirely new document that the Poles truly can call their own.

In addition, over the last several years Poles have come to realize that while a free press, free elections and freedom of speech are essential components of constitutional democracy, none is secure without a truly independent and respected judicial mechanism that can protect human rights and interpret and judge the conformity of government behavior with the nation's fundamental constitutional norms. The Constitutional Tribunal's practice of judicial review gained legitimacy only over time, as the whole notion of constitutionalism became accepted and as the stature of the Tribunal grew.

Since 1990, first from those small rooms in Parliament and now from its own much grander building, the Tribunal has played a central role in the struggle for constitutionalism in Poland. Its new activist judges have defended the national constitution during an era of extraordinary politics.

This book is the first comprehensive examination of the development of constitutionalism in Poland. It was written at a time when constitutionalism was taking root in Poland, with the practice of limited government being a central test of the effective operation and growth of liberal democracy. Today democracy is not just an operational reality in Poland, but a genuinely pervasive institution, and the Polish experience is being closely considered by the fledgling democracies of the former Soviet bloc.

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List of Acronyms and Abbreviations

BBWR	Non-Party Bloc for Cooperation with the Government
CBOS	Center for the Study of Public Opinion
KCN	National Central Committee
KLD	Liberal Democratic Congress
KOR	Workers' Defense Committee
KPN	Confederation for an Independent Poland
KRS	National Judicial Council
ND	National Democratic Party
NIK	Supreme Chamber of Control
NSA	High Administrative Court
OTK	Decisions of the Constitutional Tribunal
PC	Center Alliance
PKWN	Polish Committee of National Liberation
PL	Peasant Accord
PPP	Friends of Beer Party
PPR	Polish Workers' Party
PRL	Polish People's Republic
PSL	Polish Peasants' Alliance
PWN-PSN	Polish National Community-Polish National Party
PZPR	Polish United Workers' Party
RdR	Movement for the Republic
ROAD	Movement for Citizens' Democratic Action
RPO	Ombudsman for Citizens' Rights
SB	Security Service
SChL	Christian Peasant Party
SD	Democratic Alliance
SdRP	Social Democracy for the Republic of Poland
SLD	Democratic Left Alliance
SN	National Party
UD	Democratic Union
UOP	State Protection Office
UP	Union of Labor
UW	Freedom Union
WAK	Catholic Election Action
WRON	Military Council of National Salvation
ZChN	Christian National Union

ZL-N	People's National Union
ZSL	United Peasants' Party

Introduction

In the summer of 1989, following the rebirth of democratic Polish political life, a prominent Solidarity leader, Jan Maria Rokita, had this to say about the existing Polish Constitution: 'From the point of national honor, the present Constitution is an insult; from the point of law, it is a monstrosity and an oddity; from the point of substantive politics, it is a document devoid of all meaning.'[1] His statement captured the essence of Poland's constitutional reality at the time: The existing constitution was an imposition from abroad, a socio-political anachronism, and alien to Polish constitutional heritage. With the collapse of the Polish communist regime, democratic constitutional arrangements would be promulgated, and new juridical guarantees of the rule of law established, leading to the development of constitutionalism in Poland.

Poland's rich, indigenous constitutional heritage finds its roots in the thirteenth century. For more than four centuries, the Polish state evolved toward an increasingly decentralized political structure, culminating in the creation of the 1791 Constitution, the enactment of which made Poland the second country in world history to adopt a written constitution. Two tragic historic instances interrupted Polish constitutional development: the 123-year partition of Poland by the Russian Empire, Prussia, and Austria; and the more recent occupation of Poland by Nazi Germany and the USSR.

The formal constitution adopted in communist Poland in 1952, while espousing democratic ideals, was a meaningless document in practice ignored by the Polish leadership, the ruling Communist Party. During most of the forty years of communist rule it was not the constitution but Party structures which provided the key to understanding politics and state policy-making. A series of amendments in 1976 made the document even more objectionable to the Polish people because the amendments advocated a unified brotherhood with the Soviet Union. During the 1980s, an unyielding popular movement incrementally achieved constitutional change in a Western democratic sense, signifying the beginning of the end of communist constitutional practice.

After 1989, as Poland once again returned to constitutional rule, democratic constitutional arrangements replaced communist political structures put in place in 1952. The first stage of post-communist constitutional reform concentrated on amending the

1952 Constitution to eliminate the essential features of the communist system and to provide the basis for further evolution of the polity. While the promulgation of an entirely new constitutional order proved politically impossible in 1990–1, in November 1992 constitutional legislation, colloquially known as the Small Constitution, came into force. The Small Constitution provided both a framework within which democratic political processes would operate as well as specific solutions to the institutional dilemmas which had emerged in the first two years of post-communist government. While the passage of the small constitution by no means settled all the conflicts over the nature of the post-communist state, the groundwork laid by the Small Constitution achieved genuine institutional stability until a more comprehensive, final constitution could be passed in the spring of 1997.

In addition to the promulgation of new constitutional provisions, after 1989 new institutions and procedures – foremost of which was judicial review – were developed in Poland to make constitutionalism not just an operational reality but a genuinely pervasive institution. Since 1989, the Constitutional Tribunal has played a crucial role in forging post-communist constitutionalism; it has actively delimited the law-making of the new state and defined and protected a new understanding of rights and the separation of powers. The 'activist' jurisprudence of the Constitutional Tribunal has responded to the necessities of Poland's post-communist transition, defining principled parameters of law-making particularly in those areas untouched by constitutional reform.

The transition in Poland from an unenforced to an enforced constitution manifests a turn away from communist constitutional practice towards adoption of a constitutional system characteristic of liberal democracies. But there exist a number of challenges to the development of constitutionalism in Poland. These include the inevitable conflict between expedient governance and the rule of law, dangers posed by decommunization and lustration initiatives, infringement of the constitutional separation of church and state, and the existence of xenophobia and threats to the freedom of speech. These challenges demonstrate why Poland's nascent constitutionalism, if it is to be enduring, must continue to be reinforced by institutions designed to make it genuinely pervasive.

This book examines the development of constitutionalism in Poland. After discussing the central themes and institutions that have been dominant in the Western liberal constitutional tradition, this book traces the roots of Poland's historic quest for a genuinely

effective and truly democratic constitutional system. It then discusses the collision between Poland's long-term constitutional development and the totalitarian system imposed on Poland after World War II, and examines the institutionalization of a communist 'people's democracy' during the period of Stalinist rule. Finally, it goes on to analyze the constitutional reform that accompanied Poland's democratic rebirth in 1989, and considers the political structures and institutions that have been created to provide a framework within which democratic political processes operate.

Central to the development of constitutional rule in Poland, and to the success of the transition from communist constitutional practice to a culture of normative constitutionalism, has been the emergence of the doctrine and practice of judicial review. This book discusses in detail the role of judicial review in democratic institutionalization during the first five years of post-communist Polish political life, and examines how the jurisprudence of the new Constitutional Tribunal is making Polish political culture more sensitive to enduring constitutional arrangements. It also describes how the Tribunal has been actively involved in delimiting the law-making of the new state and defining and protecting a new understanding of rights and the separation of powers.

Finally, this book considers how issues pertaining to Poland's political culture relate to its post-communist constitutional evolution, and assesses several challenges to building a state of law in Poland. These challenges became manifest as constitutionalism was taking root in Poland, with respect for enduring constitutional arrangements being a central test of the effective operation and growth of liberal democracy.

This volume is an original contribution to the study of constitutional politics. No previous study comprehensively documents the evolution of constitutionalism and judicial review in Poland. While a number of books document Polish social and political history, few works comprehensively chronicle Poland's long-term constitutional history, and even fewer analyze Poland's contemporary struggle to establish a constitutional democracy. This book, by examining the recent development of constitutionalism in Poland in the light of her deep constitutional heritage, addresses both areas.

PLAN AND OVERVIEW

Chapter 1 provides an introduction to the concepts of constitutionalism and limited government, and discusses the role of

constitution-making during transitions to democracy. This chapter defines the concept of a constitution and describes how constitutions and forms of government are closely interrelated. This chapter also addresses the central themes and institutions that have been dominant in the Western liberal constitutional tradition, including the separation of powers, checks and balances, and judicial review. In addition, this chapter identifies the institutional and political factors affecting constitution-making during a transition to democracy.

Chapter 2 provides an historic overview of Polish constitutional development. This chapter discusses how royal power in the early Polish state was incrementally limited and decentralized by constitutional structures, the highpoint of which was the promulgation of the 1791 Constitution, probably the most symbolic and enduring document in Polish history. This chapter also examines the central political and constitutional developments that occurred during Poland's period of partition (1795–1918), and considers the reemergence of constitutional government in Poland after World War I, focusing in particular on the 1921 and 1935 Constitutions.

Chapter 3 examines the institutionalization of a communist 'people's democracy' in Poland following World War II, and its degeneration into totalitarianism during the period of Stalinist rule. This chapter describes the theoretical and practical underpinnings of Poland's communist constitution promulgated in 1952, and traces the constitutional reform of a liberal democratic nature implemented by the regime following the 'Solidarity period' of 1980.

Chapter 4 examines the constitutional reform that accompanied Poland's democratic rebirth in 1989, and discusses the political structures and institutions that were created to provide a framework within which democratic political processes operate. This chapter discusses the democratic reconstruction initiated by the Round Table Agreement of 1989 and institutionalized by subsequent constitutional amendments. This chapter also discusses the passage and content of the 1992 'Small Constitution' and the new institutional framework it created. Finally, this chapter traces efforts towards passage of an entirely new constitution, culminating in the passage of an entirely new constitution in the spring of 1997, and assesses Poland's post-communist constitution-making process.

Chapter 5 examines the emergence of judicial review in Poland and considers the dynamic leading to the construction of the Constitutional Tribunal during the final years of Poland's communist era. This chapter discusses the organization, structure, and proceedings of the

Tribunal and describes the significant limitations placed on the the judicial review power to ensure that the Tribunal would not overstep politically acceptable boundaries.

Chapter 6 addresses the constitutional jurisprudence of the Tribunal and discusses the centrality of judicial review in the development of constitutionalism in Poland. This chapter appraises the Tribunal's evolution from an initially unadventurous body that under communism provided the illusion of constitutional legality to an increasingly activist judicial institution willing to challenge political bodies, build constitutional doctrine, and give normative effect to the Constitution. This chapter examines the Tribunal's interpretation of the Constitution's new Rechtsstaat clause and its enforcement of the constitutional 'principle of equality' which bans discrimination on the basis of race, sex, education, or religion. In addition, this chapter considers the growing political role of the Tribunal's jurisprudence as it addresses controversial constitutional issues and more aggressively reviews parliamentary statutes. This chapter concludes by noting procedural and jurisdictional changes that would strengthen the system of judicial review in Poland.

Chapter 7 discusses the challenges to the development of constitutionalism in modern Poland and considers how issues pertaining to political culture relate to Poland's post-communist constitutional evolution. This chapter describes how the difficulties of the ongoing socioeconomic transition lead certain Polish political elites to promote, rhetorically at least, stronger executive governance. It also examines dangers posed by decommunization and lustration initiatives to constitutional order. In addition, this chapter considers the strong political role of the Polish Catholic Church and how this role affects Poland's democratic constitutional evolution. Finally, the chapter describes how threats to freedom of speech and xenophobia mar Poland's post-communist record in the area of individual rights.

Chapter 8, the conclusion of this volume, synthesizes the preceding historical and contemporary analysis and assesses the progress Poland has made on the road to constitutionalism. Poland's return to constitutional rule reflects both a long-lasting national attachment to certain enduring constitutional principles and a willingness to utilize Western models when constructing constitutional institutions to underpin liberal democracy. This chapter also places constitutional development in Poland in a regional context by discussing the 'family' of constitutions that have emerged out of Central European constitutional reform.

1 Constitutionalism, Limited Government, and Transition to Democracy: An Analytical Framework

During the late 1980s and early 1990s, the world witnessed a shift from authoritarianism to democratization and a rebirth of experiments in constitutionalism. Within three years, transitions from one-party rule to constitutional democracy began in each of the former Soviet bloc countries, changing the political face of Central and Eastern Europe.

This wave of constitution-making is not altogether unique. In the late 1700s, the individual American states, the United States itself, France and Poland enacted a series of democratic constitutions. The wave of revolutions in 1848 in Europe also included brief constitutional episodes. After World War I, many of the Central and Eastern European states set up new constitutions that, with the exception of the Czechoslovak constitution, were not destined to last for long. After World War II, Italy, West Germany, and Japan adopted democratic constitutions that have remained in force to the present day. In the 1960s, a number of former British and French colonies in Africa gained independence and enacted new constitutions. In the mid-1970s, Greece, Portugal, and Spain created new constitutions that broke with the authoritarian past.

Such precedents notwithstanding, the current wave in Central Europe stands out in the following respects. First, all of these countries have emerged nearly simultaneously from communist rule. Second, a few of these countries – notably Poland, the Czech Republic, and Hungary – have pre-communist constitutional traditions. Third, along with political modernization, all of them are undertaking simultaneous transitions from central planning to a market economy.[1] Fourth, because communist constitutional practice provided a highly centralized state, the new constitutional arrangements are focused on separating and balancing powers among the branches of government, and in particular on limiting parliamentary power. Under these conditions, the constitution-making processes in Central Europe amount to an experiment unprecedented in scale.

This chapter introduces the general topics of constitutions, constitutionalism and constitution-making during transitions to democracy. Part A defines the concept of a constitution and describes how

constitutions and forms of government are closely interrelated. Part B explains the concept of constitutionalism, contrasting the concept with democratic theory. Part C discusses the institutions designed to ensure limited government and constitutional supremacy, especially the doctrines of separation of powers, checks and balances and judicial review. Part D examines the process of and the institutional and political factors affecting constitution-making during a transition to democracy.

A DEFINING A CONSTITUTION

To constitute means to make up, order, or form. From early on it was assumed that a nation's constitution should pattern a political system and contain the state's most basic ordering. In *The Politics*, Aristotle defined a constitution as 'the organization of a polis, in respect of its offices generally, but especially in respect of that particular office which is sovereign in all issues.'[2] Later, he widened the term's meaning: 'an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.'[3]

Most modern scholars agree that the primary purpose of a constitution is to describe the permissible scope and limits of governmental power and to protect individual liberties.[4] One leading book on the subject offers the following definition: 'Constitutions are codes of norms which aspire to regulate the allocation of powers, functions and duties among the various agencies and officers of government, and to define the relationships between these and the public.'[5]

According to Giovanni Sartori, 'constitutions are "forms" that structure and discipline the state's decision-making processes. Constitutions establish *how* norms are to be created . . . [C]onstitutions are, first and above all, *procedures* intent upon ensuring a controlled exercise of power.'[6] Sartori, capturing the essence of a constitution, describes a constitution as a 'technique of liberty', an unambiguous technical document which shows how political power is limited and how individual and societal rights are protected.[7] Forms of government which in practice live up to these techniques of liberty are democracies. Authoritarian and totalitarian regimes manifest differing degrees of characteristics antipodal to the principles of democracy – political power is not limited or checked and individual liberties are

not properly protected. In this way, the concept of a constitution has an inherently democratic nature.

In *Constitutional Government and Democracy*, Carl Friedrich provides an even more direct definition, describing a constitution as 'effective regularized restraint' and a collection of written and unwritten principles and rules that identify the purposes and restraints of public power.[8] Based on this concept of restraint, Friedrich classifies regimes on a continuum from unconstitutional (regimes lacking restraint) and actual governments (those having some restraint) to constitutional governments (those with complete restraint).

As seen in these definitions, a constitution serves two interrelated functions in a polity (but may not perform each function with the same degree of effectiveness). First, a constitution serves as a charter for government, sketching the limits and modes of legitimate governmental operations and establishing the machinery of government and relations between the powers of the state. Second, a constitution serves as a source of fundamental rights to political participation and protects substantive rights by limiting the power of the people's freely chosen representatives.

In an undemocratic state, however, the constitutional form can be misused so that far from limiting government and protecting rights and freedoms, it serves as a shield for non-democratic actions. Thus, authoritarian leaders and totalitarian regimes often attempt to legitimize their actions with documents of ambiguous legality purporting to be constitutions. Stalin's Soviet Constitution of 1936 provides an example of such authoritarian misuse of the constitutional form.

In light of the uses and abuses of the concept of a constitution, the degree to which a government departs in practice from what its constitutional document states in text is an important measurement with which to classify and distinguish constitutions. For example, Karl Loewenstein provides a useful typology of constitutions: 'Normative' constitutions are those that in practice are fully followed and enforced by political authorities. 'Nominal' constitutions may be legally promulgated but are not applied by political authorities. The 'semantic' constitution is used for 'legalizing, stabilizing and perpetuating an existing configuration of power but cannot serve as the procedural frame for the competitive power elements.'[9] While normative constitutions are found in western democratic polities, semantic ones are used by both totalitarian and authoritarian regimes.

Other constitutional continuums have been developed. Sartori distinguishes between 'nominal', 'real' and 'facade' constitutions

depending on whether they are effectively implemented documents or mere devices behind which lurk repressive regimes.[10] Bogdanor, Finer and Rudden, on the other hand, fit constitutions along a continuum from 'entirely realistic description' to 'unrealistic fiction'. Between these necessarily abstract extremes, they differentiate the useful categories of 'entirely' or 'largely non-fictive' constitutions (those found in working democracies) and 'partially non-fictive' constitutions such as the former Soviet constitution.[11]

As can be seen from the typology that has been developed, a constitution is a useful tool with which to understand a political system. When it does mirror reality, a constitution operates as a road map displaying the institutional and political landscape of a nation. When it does not mirror reality, a constitution provides insight into the nature of a regime.

(i) Constitutions and Forms of Government

Several observations about constitutions and what makes them 'democratic' can be developed from these definitions and classifications. As stated above, every type of government – from the most totalitarian to the most democratic – can promulgate a constitution. But, as Dr Andrea Bonime-Blanc notes, each type of government uses or abuses its constitution according to the existing power structures and practices that are in place.[12]

The totalitarian regime uses its constitution to legitimate its rule, to create the illusion of legality behind which it exercises a political power very different from that wielded in a democracy. As Robert Neumann wrote:

> There is a basic difference between constitutions in a democracy and a dictatorship. In a democracy a constitution, whether written or unwritten, whether supported by judicial review or under a system of legislative supremacy, is designed to limit, to restrain. Constitutional government in the Western sense is therefore limited, restrained government. But limitation and dictatorship are mutually exclusive terms.[13]

A cursory comparison of constitutional claims and human rights practices in any totalitarian or authoritarian regime dramatically proves the 'nominal' or 'semantic' nature of their constitutions. An excellent example may be found in Article 125 of the 1936 Soviet

Constitution, which guaranteed freedom of the press, freedom of speech and freedom of assembly. This provision was enacted during Stalin's massive purge and extermination of Soviet citizens in the late 1930s.

Thus, a constitution is simultaneously 'real' (for example, one which the government fully implements) and 'normative', 'largely non-fictive' and therefore democratic when its written guarantees are actual practices, enforced over political authorities. Dr Bonime-Blanc notes that this application of theory in practice involves the realization of several basic democratic tenets.[14] The institutions described in the constitution actually exist and function in their constitutionally-prescribed form. The political timetables delineated in the constitution (for example, for elections) are consistently observed. Abuses and violations of constitutional norms do not go unpunished and are dealt with strictly by law. Human rights, individual and societal, are not widely violated, and when they are, the state takes protective and prosecutorial steps against such violations. Institutions, therefore, must exist to enforce the constitution over political authorities. Institutions of limited government, such as separation of powers, checks and balances and judicial review, must be specifically created to prevent political imbalance and arbitrary power.

In the modern world, a democracy is the only form of government that fully complies with these constitutional guidelines. While differences between theory and practice are possible in democracies, they tend to be less frequent than in authoritarian regimes and do not go unnoticed or unpunished for long. If such departures occur frequently and go unheeded, however, they may be signs that the democratic character of the government is waning.

In this way, forms of government and constitutions are clearly interrelated. Moreover, constitutions are never uninstructive documents, as a constitution can always manifest something about the form of government within which it exists. When a state abides by its constitution, the document helps to perpetuate those realities and serves as a useful guide for political life. When a state does not, the fundamental text can still provide useful insight into why differences exist between political theory and reality.

B CONSTITUTIONALISM

It is important to distinguish between constitutions and constitutionalism. The former is a written document; the latter is a state of mind,

an expectation, a norm in which politics must be conducted in accordance with standing rules or conventions, written or unwritten, that cannot be easily changed; it is a principle whereby all power is limited, and whereby forces of power can act and decide only within strict limits defined by the national constitution. It assumes that the constitution is the supreme law, the fundamental source of norms from which are derived all other secondary norms, such as statutory laws, executive orders and ordinances.

Constitutions may exist without constitutionalism, if they are created mainly to be political tools or instruments for short-term or partisan interests. Conversely, constitutionalism may exist without a written constitution, if the unwritten rules of the game command sufficient agreement. The United Kingdom is a good example of the latter situation, for although it does not have a written constitution, it is often argued that it has an uncodified one based on unentrenched parliamentary statutes.

A clear definition of constitutionalism may also be found by contrasting it with democratic theory. Democratic theory's central assumption is that the most feasible way to recognize and protect individual dignity and autonomy is for the people to govern themselves by electing representatives. According to democratic theory, political process makes governmental decisions morally binding. The principal check against tyranny offered by democratic theory is the assumption that people will not tyrannize themselves, will choose officials who will not enact oppressive laws and will vote out of office those who do. Thus, democratic theory esteems popular political participation for its negative effect of deterring governmental incursions into individual rights.

In contrast, the concept of constitutionalism is more pessimistic about human nature and addresses the concern with the human penchant to act selfishly and abuse power (particularly on the basis of a majoritarian mandate). Advocates of constitutionalism do not deny the importance of the institutional and political checks of democratic theory, but see those checks as insufficient. While citizens must have a right to political participation, constitutionalism assumes that government must be hemmed in by substantive limits on what it can do, even when perfectly mirroring the popular will. Constitutionalism thus assumes institutional restraints to prevent political majoritarianism from degenerating into an authoritarian system on the basis of populist dynamics. To control majoritarianism and arbitrary power, constitutionalism assumes the establishment of

political systems and institutions reflecting the philosophy of limited government.

C SAFEGUARDING CONSTITUTIONALISM

As a doctrine to guarantee the supremacy of the constitution and to prevent concentration of power, constitutionalism draws on three major institutions of limited government: the separation of powers, checks and balances, and judicial review.

(i) Separation of Powers

The idea that the power and functions of government must be divided among several governmental branches to avoid arbitrary government was recognized by Aristotle and elaborated by Polubius in his examination of the well-balanced Roman system of power.[15] But it was John Locke and Montesquieu who developed this notion in its modern sense. Locke derived a two-fold division of functions of government, the making of law and its application, and hence placed legislative and executive powers in separate hands. But Locke did not recognize the judiciary as a separate power, which he considered part of the executive.

Unlike political theorists before him, Montesquieu promoted tripartite separation of legislative, executive and judicial functions as a guarantee of non-tyrannical government. In *The Spirit of the Laws*, Montesquieu declared that '[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.... Again, there is no liberty if the judiciary power be not separated from the legislative and executive.'[16]

Montesquieu mistrusted human nature, seeing man as exhibiting a general tendency towards evil, a tendency that manifests itself in seeking power. However, this tendency could be moderated by precluding concentration of public powers in one person's hands or in one institution. Instead, power should be divided into three parts: the legislative, the making of the law; the executive, the putting of the law into effect; the judicial, the announcing of what the law is by the settlement of disputes. Montesquieu saw the legislature and executive as representing real social forces, the monarchy, the nobility, and the people. The judiciary, therefore, was to be wholly independent of the clash of interests in the state.

According to Professor Maurice Vile, the assumption of the 'pure doctrine' of separation of powers is that if agencies, functions and persons are separated, then each branch of government will act as a check to the exercise of arbitrary power by the others, and each branch, because it is restricted to the exercise of its own function, will be unable to exercise undue control or influence over the others.[17] In this way, the pure doctrine embodies a 'negative' approach to checking the power of government agencies.

Separation of powers has rarely been applied in the 'pure' form, which conflicts with the need for a coordinated and effective system of government to deal with complex social and economic problems. But the three elements of the pure doctrine represent a prototype which may be used to observe variations of the development and implementation of the doctrine:

(a) The 'separation of branches or departments' element of the doctrine assumes that the government must be checked internally by the creation of autonomous centers of power that will develop an institutional interest. The diffusion of authority among different centers of decision-making is the antithesis of totalitarianism, which assumes a single all-embracing agency of government and prevents any division of the state machine from developing its own interest or from creating a degree of autonomy in the taking of decisions.

(b) The 'separation of functions' element is based on the assumption that, regardless of the number of agencies of government, all government acts can be classified as an exercise of either the legislative, executive, or judicial function. In France, the separation of powers has been interpreted to mean that one branch of government should not interfere with the work of another. It is for this reason that litigation involving administration is heard before separate administrative courts, including the Conseil d'Etat; for to confer on the judiciary the power to judge litigation involving administration would be to allow it to encroach upon the field of the executive.

(c) The 'separation of persons' element assumes that the three branches of government are constituted by separate groups of people, with no overlapping membership. This element was implemented rigorously in the US Constitution (except for the role of the Vice President as the presiding officer of the Senate). But unlike the US, most Western democracies are parliamentary-cabinet systems in which the personnel of the government link the legislative and

executive branches at the top, although none go as far as Britain in having an official, the Lord Chancellor, who is a member of all three branches of government.[18]

In practice, the mere existence of several autonomous decision-making bodies with specific functions is not a sufficient brake upon the concentration of power. A constitution must also describe how decision-making bodies are to be restrained if they do attempt to exercise power improperly by encroaching upon the functions of another branch. Indeed, if a single political party gains control of the different branches of government, it can unite what institutions divide and in so doing create the potential for autocratic governance. The inadequacy of the controls which the negative approach of the separation of powers provides to the checking of arbitrary rule leads to the amalgamation of the separation of powers doctrine with the doctrine of 'checks and balances'.

(ii) Checks and Balances

The doctrine of checks and balances imported positive limits on the exercise of power into the doctrine of the separation of powers. The checks and balances doctrine is based on the notion that functions of government branches must be to some extent blended and overlapping to prevent any institution from usurping power. The doctrine, similar to the theory of mixed government, is based on two assumptions. First, that every section of the community is likely to abuse its position if the government is left solely in its hands. Second, that the only effective check on the exercise of power by one section is the exercise of a countervailing power by other sections. In this way it is distinct from the doctrine of separation of powers, which looks for checks on the exercise of power through a functional distribution of authority.

Plato and Aristotle developed the view that the most effective way of controlling the power of one class of society was to check it by setting up a 'mixed' constitution in which differing sections of the community each had control over one of its parts. This idea was taken up in the seventeenth and eighteenth centuries and became the basis of the British 'balanced constitution'. In Britain, however, the equilibrium between the parts of the system of government was maintained not simply by juxtaposing them, but by giving to each branch a means of influencing or controlling the others. This theory of checks

and balances was set forth by Charles I in 1642 in his *Answer to the Nineteen Propositions*. The three estates of the realm, King, Lords and Commons, shared the legislative power, but each also had independent powers with which to check the others. The King made treaties and chose the officers of state, the House of Lords exercised final judicial power, and the Commons raised taxes and had the power of impeachment. Through the balancing and checking of one part of the government by another, each estate could ensure that neither of the others could destroy the balance of the constitution. After 1689, this became the established theory of the constitution and was elaborated by Bolingbroke, Montesquieu and Blackstone.

This system was effectively implemented in the US Constitution, the framers of which attempted, in James Madison's words, to give to 'those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others'.[19] Madison wrote that unless the several branches of government 'be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained'.[20]

In implementing this notion, in addition to balancing the powers of the federal government with those of the states, the US Constitution gave each branch the power to exercise a degree of direct control over the others by authorizing it to play a part, although only a limited one, in the exercise of the other's functions. Thus, the President was given a veto power over legislation, subject to the overriding power of two thirds of both houses of Congress, and the power to nominate justices of the Supreme Court. The Senate was given the power to ratify treaties and to confirm appointments to the Supreme Court and to senior offices in the administration; the House of Representatives was given the power to impeach the President and other officials and to order their trial by the Senate, and the exclusive right to initiate financial bills. The judiciary was given, by implication and according to the clear intention of a number of the Founding Fathers, the power of judicial review.

This power to 'interfere' was limited, so that a division of functions remained modified by the view that each of the branches could exercise some authority in the field of all three functions. This is the amalgam of the doctrine of the separation of powers with the theory of checks and balances which formed the separation of institutions sharing powers, rather than an absolute separation of powers, of the

US Constitution. Other constitutions use different variations of checks and balances, such as the constitutional power of the French President to bypass the legislature by calling a referendum jointly with the cabinet.

Thus, the framework for separation of powers combined with the theory of checks and balances protects constitutional values by ensuring that there exist three separate, overlapping, and mutually reinforcing remedies – legislative, executive, and judicial – against unconstitutional governmental conduct. But the doctrines of separation of powers and checks and balances did not specifically provide for a mechanism to determine when a government body is in violation of the constitution. The doctrine of judicial review filled this void.

(iii) Judicial Review

Judicial review, a court's power to invalidate laws on constitutional grounds, is generally recognized as an American invention. But the US Constitution does not explicitly provide for the judicial supervision of the constitutionality of laws. Alexander Hamilton, however, did sketch out the argument for judicial review in his essay number 78 of the *Federalist Papers*, the collection of essays in political theory written to influence the voters of New York in favor of the US Constitution. The judiciary, Hamilton said, would always be the least dangerous branch of government, having neither force nor will, but merely judgment. In a constitution of limited powers, judgment must be applied to declare void all acts contrary to the constitution; no legislative act contrary to the constitution could be valid. To deny this would be to affirm that the state, while representing the people, is superior to the people themselves.[21]

The American model of judicial review, in which every state and federal court has the power to declare all official actions, including legal enactments of the national legislature, void as unconstitutional, found its inception in 1803 in the authoritative judgment of *Marbury* v. *Madison*. Chief Justice John Marshall, using as his basis both the US Constitution's status as 'superior paramount law, unchangeable by ordinary means', and its inner logic in the arrangement and distribution of powers, asserted a constitutional power inherent in the courts to strike down unconstitutional laws. In his decision, Marshall declared 'that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.'[22] While Marshall was exercising powers he believed the Supreme Court

to have under the US Constitution, he made clear in his opinion that he was enunciating a principle applicable to constitutions generally:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to written constitutions, and is, consequently, to be considered by this Court as one of the fundamental principles of our society.[23]

Judicial review is a recent innovation in Europe. Up to the post-World War II era, European constitutional practice was dominated by the traditional French theory of popular sovereignty, which categorically rejected any form of judicial review of parliamentary acts. The national parliament was considered to be the most direct expression of the 'will of the people' and, as such, it remained immune from judicial control. Invalidation of a statute or interference in disputes between political bodies about constitutional questions would have been acts of a political nature and thus exclusively within the sphere of executive and legislative powers. In general, European constitutions were viewed as primarily symbolic, uniting society behind certain principles by which the state was morally and politically obliged to be guided, but which did not function as legally binding enactments in the American sense. As the national constitution could be amended by legislation (albeit by special majority), it was generally accepted that it could not, as in America, be regarded as a law superior to ordinary law.

The emergence of judicial review in Europe was based on the political ideal of the 'rule of law', which holds that government must be conducted according to law and that a state's constitutional arrangements should have effect. The rule of law implies that government by laws and not by men is facilitated when government is limited by a higher law such as the constitution, and the legality of government action may be challenged before a court where an independent judge adjudicates. As A.V. Dicey, the British jurist who saw the rule of law as a fundamental principle of the unwritten British Constitution, wrote in the *Introduction to the Study of the Law of the Constitution* (1885), the rule of law embodied two distinct but related conceptions: the absolute supremacy of regular law and the absence of arbitrary power or wide discretionary government authority; equality before the law with all, including government officials,

being equally subject to the law and the ordinary courts. Thus, according to the rule of law the courts would play a role in curtailing political power and enforcing the constitution over political authorities. Like the veto power, the establishment of judicial review depended upon the acceptance of the idea of limited government and checks and balances as essential barriers to the improper exercise of power.

The implementation of a constitutional court in Austria in 1920 introduced the practice of judicial review on the European continent. Provided by the Austrian Constitution of 1920, the Austrian system of judicial review arose from the premise that a special constitutional court, vested with the unique powers to interpret the national constitution and invalidate all legal acts incompatible with constitutional provisions, has exclusive responsibility over constitutional questions and disputes.

Hans Kelsen, the founder of the Austrian Constitutional Court, envisioned a hierarchy of sources of law in which the constitution occupied the principal position and authorized the creation of lower order, more concrete norms. Kelsen asserted that mechanisms are needed, particularly in federal states, to enforce the conformity of inferior laws with statutes passed by the national legislature and with the constitution. However, Kelsen felt that if the regular courts were given the right of judicial review, the judicial branch would eventually dominate the other branches of government and assume a legislative function.[24] Thus, judicial review was vested in a separate and singular state agency, and regular courts were precluded from reviewing the constitutionality of statutes.

Following Austria, judicial review was adopted in the Czechoslovak Constitution of 1920. While a seven-member Constitutional Court was given the exclusive responsibility to determine whether statutes were in conflict with the Constitution, the Court was never approached by any of the state bodies authorized to petition for judicial review. As a result, during the entire inter-war period the Czechoslovak Court did not handle a single case involving judicial review of legislation. Czechoslovakia was the first unitary state to adopt a constitutional court, and the only unitary state to do so during the inter-war period.

With the exception of Austria and Czechoslovakia, no other independent bodies were developed in European systems during the inter-war period to enforce the supremacy of the constitution over the state. The traditional French theory of constitutional law continued to

predominate, advocating the supremacy of parliamentary acts and precluding the development of a system of judicial review.

It was only after World War II, when the experience of fascism led to a general rejection of the concept of parliamentary supremacy, that the idea of judicially protecting the constitution through constitutional courts won approval in continental Europe. As Professor Mauro Cappelletti wrote: European experiences with 'tyranny and oppression by a political power unchecked by machinery both accessible to the victims of governmental abuse, and capable of restraining such abuse' demonstrated that 'the Rousseauian idea of the infallibility of parliamentary law is but an illusion . . . that legislatures might be made subservient to uncontrolled political power and that legislative and majoritarian tyrannies can be no less oppressive than executive tyranny. . . .'[25]

Since World War II, continental European countries, particularly those emerging from oppressive and authoritarian regimes, have followed similar paths in their efforts to build constitutional democracies. Each has adopted a codified constitution, declared to be binding on all branches of government; each has included a bill of rights in the constitution, thus extending the constitution's protection to the individual; and, most importantly, each has entrusted the enforcement of the constitution, and its bill of rights, to new or renewed judicial bodies endowed with important guarantees of independence in relation to the political branches. As Cappelletti concludes: 'Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.'[26]

Following Austria's decision to reimplement its constitutional court in 1946, constitutional courts were established in Italy (1947) and in the Federal Republic of Germany (1949). These countries were followed by Greece (1975), Spain (1978) and Portugal (1982).[27] Since the 1970s, even the French Conseil Constitutionnel has become decidedly more aggressive in its review of the constitutionality of parliamentary legislation. In this way, despite the European tradition of parliamentary supremacy, after World War II Europeans came to realize what Hamilton and Marshall realized was necessary for the American polity: although one must indeed rely on popular sovereignty if one desires a free democratic society, the legislature and executive are also likely to abuse their powers, and an independent

judiciary is necessary to guard and promote the rights of individuals against these officials. During the latter half of this century, the institution of judicial review has been adopted in other parts of the world, with Canada, India and Japan vesting regular courts with the power of judicial review.

The extraordinary growth of judicial review in post-World War II Europe has even developed a transnational dimension. Beginning in 1951 with Great Britain, the European Convention of Human Rights instituted a form of transnational judicial review in the indigenous law of its signing members. Article 25 of the Convention provides that, after exhaustion of national remedies, all individuals have standing to bring before the Convention's judicial machinery, the European Court of Human Rights in Strasbourg, their complaints against any sort of state action, including legislation, violative of rights entrenched in the Convention.

The establishment of the European Coal and Steel Community by the Treaty of Paris in 1951 created other levels of transnational judicial review in post-war Europe. The European Community features a double-limbed system of judicial review. Two sets of legislative acts and administrative measures are subject to judicial review by the European Court of Justice in Luxembourg: (i) the measures of the Community itself (principally acts and directives of the Council of Ministers, Commission, and European Parliament), which are reviewable for their conformity with the Treaties; and (ii) the acts of the Member States, which are reviewable for their conformity with Community law and policy. Judicial review as applied by independent courts has thus become an accepted mechanism with which to check political and legislative power in modern Europe.

Judicial review, of course, is not an infallible remedy. It is certainly true that the institution of judicial review cannot provide salvation for a nation bent on destroying the political and civil liberties of a minority of its citizens. It also seems certain, however, that the success of non-judicial review nations, like Great Britain, is largely due to the existence of traditions of adherence to the rule of law. In the new states of Central and Eastern Europe, there is no recent tradition of the rule of law. Under such circumstances, judicial review would seem to be an absolutely necessary safeguard of whatever form of democratic self-government these nations choose to adopt, and its practice would serve to remind the people of the obligations they voluntarily accepted upon ratification of new democratic constitutions. A doctrine of parliamentary supremacy without a tradition of the rule of

law could be extremely dangerous, as legislative majorities would feel less restrained to overlook established rules and procedures.

(a) The System of Judicial Review: 'Centralized' or 'Diffuse'

From a comparative standpoint, one of the most instructive features of any system of judicial review is the polity's choice of either a 'centralized' or a 'diffuse' system. The centralized system (based on the post-World War II Austrian Constitutional Court) confines the power of judicial review to a single judicial body. In contrast, the diffuse system (based on the American practice) gives all the judicial bodies within the polity the power to determine the constitutionality of legislation.

The differences between the European civil law and American common law judicial traditions are directly relevant to the choice of a centralized or a diffuse system of judicial review, with the centralized model typically being the preferred choice of civil law nations. Three reasons are generally assigned for this preference, each of which relates to characteristic features of the civil-law system. First, the civil law's tradition of legislative supremacy is partially appeased by the restriction of judicial review to a single specialized tribunal. Second, because civil law nations generally reject the notion of precedent, a diffuse system of judicial review raises the specter of radically inconsistent decisions being rendered on identical constitutional issues. Finally, the legal-judicial culture in which civil law judges operate limits the number of judges available who can effectively exercise judicial review.

Four elements distinguish the centralized model of judicial review from the diffuse American system. The constitutional courts of continental Europe have adopted these four elements to varying degrees.[28]

First, the power to review the constitutionality of legislation is 'centralized' in one special tribunal which is not part of the regular judiciary and does not adjudicate conventional litigation, a function left for regular courts. The constitutional court is separate from the system of regular courts, and is specially designed to decide constitutional issues. Thus, the constitutional provisions for the constitutional courts do not usually appear in the judiciary section of European constitutions but in a separate section.

Second, jurisdiction in constitutional matters is exclusively reserved for the constitutional court. Courts of regular jurisdiction have no

power to review the constitutionality of statutes. When a regular court has doubts regarding the constitutionality of a statute relevant to a case, the only action it may take is to refer the issue of constitutionality to the constitutional court. The constitutional court then assumes the responsibility of reviewing the question and rendering a decision. The jurisdiction of most constitutional courts includes statutes, international agreements, legal regulations as well as various political matters, such as supervision of parliamentary elections and delegalization of political parties.

Third, standing to petition for judicial review is available through three different procedures. Any individual may bring a complaint before the constitutional court against any kind of state action, including legislative, administrative or judicial, that violates constitutional rights. Access is also available through 'incidental initiative', a procedure whereby the constitutional court reviews constitutional questions related to specific cases and controversies pending in the regular courts. Finally, access is available through 'abstract initiative', a procedure that has decidedly political overtones, authorizing specific state agencies and political bodies to demand judicial review of a given legal act.

Fourth, because the responsibility of European constitutional courts is not to resolve concrete, live disputes between people or with their government, but with 'defense of the constitution' and the values it incorporates, the courts' jurisprudence has frequently gone beyond the language of the constitution as illuminated by the intent of its framers, considering the constitution as a living document and even at times invoking general principles of republican government, natural justice, or human rights as confining legislative authority. Accordingly, German, French, and other European constitutional courts have not hesitated to issue wide-ranging decisions on basic constitutional issues, often drawing on unwritten or historical principles and values.

Good examples of this are seen in a French Constitutional Council decision on freedom of association and a German Constitutional Court decision on abortion: for its ruling the French Council drew on the Preamble of the 1958 Constitution which incorporated the Declaration of 1789 on the Rights of Man;[29] the German Constitutional Court interpreted the 'right to life' in Article 2(2)1 of the German Basic Law to limit abortion rights, relying in part on its notions of 'the dignity of man' and sociopolitical considerations, as well as its reaction to the Nazi policy of destroying 'life unworthy to live'.[30] Through this broad normative interpretation the formal conception

of the 'Rechtsstaat' ('state based on the rule of law') has been able to flourish in modern Europe, with constitutional courts ensuring the consistency of positive law and state action with fundamental rules of justice, fairness, and equity.

(b) Judicial Review and Communist Constitutional Practice

While constitutional courts were permitted to flourish in Western Europe after World War II, the totalitarian regimes of Central and Eastern Europe rejected the 'bourgeois' concept of judicial review of parliamentary legislation as the 'manipulative' instrument of influential and powerful individuals. As Stalin's most trusted and prominent jurist, Andrei Vyshinsky, wrote: 'Every sort of statute [in bourgeois countries] is considered as having force until it occurs to some private person or capitalist enterprise to file a petition to have it, or a separate paragraph of it, declared unconstitutional. Naturally this right is broadly used by monopolist cliques of exploiters to obtain a declaration of "unconstitutionality" as to laws running counter to their interests.'[31] In the communist states, all concepts pertaining to judicial review were rejected in principle and were denounced as foreign to the new system of government.

According to the Soviet theory of 'unity of state power' imposed on communist states, Parliament retained the highest position in the state apparatus; no other governmental branch or agency was permitted to curtail parliamentary supremacy. Courts were not permitted to review parliamentary statutes because this would, in effect, have rendered the judiciary superior to Parliament. This assertion masked the actual operation of the communist regime: all major state decisions were made by the ruling Communist Party elite which exercised total power over the whole state machinery and over the whole nation. As the Party was responsible for maintaining the constitutionality of state actions, state policy was often arbitrary and contrary to provisions of the written constitution.

Communist constitutional theory did not recognize the principle of the separation of powers between the three traditional branches of government. Marxism-Leninism rejected the principle of separation of powers as bourgeois formalism designed to mask the 'exploitative character' of Western democracies. As two leading Soviet scholars wrote: 'The capitalist countries where this doctrine of separation of powers has been officially adopted, like the United States, show that it was used by the ruling class mainly to give blanket powers to the

executive, military bureaucratic apparatus, which for all practical purposes placed itself above the legislative organs.'[32] Communist constitutional theorists argued that since the Communist Party operated as a check on the exercise of power by all branches of government, there was no functional need for the separation of powers.

The constitutions of communist countries were textually recognized as the 'supreme legal force'; all laws and other state acts were to be promulgated on the basis of and in conformity with them. However, without extra-parliamentary and extra-Party means of constitutional control, these provisions were simply political-philosophical declarations as opposed to legally binding norms. As Professor Jan Triska put it: 'Communist Party-state constitutions do not limit the respective governments; instead, they are themselves limited by the ruling Party's decision makers, whether in government or not... [B]ecause they serve the rulers rather than limiting them, the norms which they contain are interpreted from the sole point of view of the interests of the state as determined by the rulers.'[33] Consequently, communist Central European countries were precluded from adopting any form of constitutional protection.

In 1963, an important deviation from communist constitutional practice emerged in Central Europe. Yugoslavia, in a quest for political and ideological autonomy in its relationship with the Soviet Union, enacted a constitution that introduced a limited system of judicial review through a Federal Constitutional Court and six republican constitutional courts. Following the Western European model, the Federal Constitutional Court, separate from the system of regular courts, had the right to review the constitutionality of all legal acts, including statutes passed by the Federal Parliament.

In practice, however, the Court was carefully structured so that its decisions in no way infringed the supremacy of the Federal Parliament and the Communist Party. The Court could neither automatically annul nor abrogate a government regulation which did not conform with the Constitution or a federal statute. Moreover, while theoretically a major function of the Court was the protection of basic constitutional rights and freedoms, the safeguarding of these rights was placed in first instance in the jurisdiction of regular courts. During its existence, although it received thousands of petitions alleging human rights violations by the government, the Court did not rule on even one case concerning an alleged violation of a basic right or freedom; it concentrated principally on settling disputes between the federal government and the republics. As one expert noted, 'while

during the nearly three decades of its existence, the Yugoslav Constitutional Court produced numerous decisions, few had any political importance.'[34] Despite these limitations, the establishment of the Constitutional Court was a radical departure from the theory of unity of state power, and the Soviet regime legitimized this development by maintaining that Yugoslavia, as a federal system, required a limited form of judicial review to settle disputes between republics.

While Yugoslavia was the first communist country to actively experiment with judicial review, even the limited Yugoslav experience was not easily copied in other communist countries. The attempt in 1968 to introduce a constitutional court in communist Czechoslovakia, by then developing toward a federal system (Czechoslovakia became a federation in 1969), ended in failure. The Czechoslovak communist regime suggested that it might implement a constitutional court during the 'Prague Spring' of 1968, when the Dubcek government was advocating 'communism with a human face'. While in October 1968 the communist Czechoslovak Constitution was amended to provide for a constitutional court, the Husak-led process of 'normalization' in the fall of 1968 ended development of the system. The concept of a constitutional court was denounced during the re-Stalinization of Czechoslovakia as 'undertaken without Marxist-scientific preparation' and an 'uncritical glorification of a bourgeois institution', a position maintained until the collapse of the Czechoslovak communist regime in 1990.[35]

It was not until the 1980s that another attempt was made to incorporate a limited form of judicial review into a communist power structure. In 1982, the Polish communist regime, conceding to the nation's democratic movement, amended the Polish 1952 Constitution to establish the Constitutional Tribunal, a judicial body similar to existing European constitutional courts, albeit with several important differences. While the Tribunal was modeled in part on Austrian and German Constitutional Court systems, the Law on the Constitutional Tribunal, passed only in 1985 to provide for the body's organization, procedure and jurisdiction, limited the Tribunal's scope of review and the validity of its decisions. Naturally, these limitations guaranteed that during the communist era the Tribunal would create only the illusion of constitutional legality and would fail to modify substantially the totalitarian political framework (Chapter 5 discusses in detail the development of, and limitations on, the Polish Constitutional Tribunal).

D THE CONSTITUTION-MAKING PROCESS

In 1990, Wojciech Sokolewicz, Justice of the Polish Constitutional Tribunal, reflected on the magnitude of the change ongoing in the former Soviet bloc:

> Most generally speaking, the changes now in progress in the political systems of Eastern Europe consist of transition from autocracy to liberal democracy; from arbitrariness of the Communist Party-controlled State to unconditional subordination of the State to the rigors of law; and from a loose system of sources of law, their hierarchy obscure in practice, to a coherent and strictly hierarchical one, based on a stable foundation of the national Constitution treated as the basic statute and the supreme law.[36]

Because a constitution is essentially a set of norms and principles limiting political power and protecting individual rights, constitution-making is a policy-making process in which political elites address two major clusters of decisions, one regarding the shape, limits and functioning of the new government and the other entailing the relationship between government and society and government and the individual.

Constitution-making is both the most varied and the most concentrated form of political activity during the transition. In it, political maneuvering, bargaining and negotiating takes place and the political positions, agreements and disagreements between groups and leaders come to the fore. Every constitutional document drafted and promulgated in a free society is likely to reflect a bundle of compromises necessary to obtain approval from the drafters and ratifiers. To understand constitution-making, one must understand the forces and influences on the processes that produce the new constitution.

(i) Legitimacy of the Constitution-Making Process

Because a constitution must be acceptable to the people of the state it regulates, a fundamental challenge underlying all constitution-making processes is that of legitimacy. Jon Elster identifies three challenges with respect to the legitimacy of the constitution-making process.

First, there is the challenge of what Elster calls 'upstream legitimacy': the document produced by a constituent assembly can only enjoy legitimacy if that assembly has come into being in a legitimate way.[37] An assembly whose members have simply been appointed by

the ruler does not pass this hurdle. In the past constituent assemblies that have had upstream legitimacy have usually had separate bodies convoke the assembly and select their delegates. In the US, the Federal Constitutional Convention was convoked by the Continental Congress, with delegates chosen by the individual states. In West Germany, the assembly that wrote the Basic Law of 1949 was convoked by the occupying powers, with delegates elected by the *Lander*.

Second, there is the challenge of what Elster calls 'process legitimacy': the internal decision-making procedure of the assembly must be democratic.[38] Thus, constituent assemblies for federally organized countries face the choice between 'one state, one vote' and proportional voting power in the internal decision-making process. The smaller sub-units of the nation will tend to claim equal voting power in the assembly, whereas the larger will insist on a voting system that reflects the numerical strength of their constituencies. The Federal Constitutional Convention chose the former method, whereas the West German assembly chose the latter. Obviously, a constitution that is visibly shaped by military force or threat of such force will lack process legitimacy.

Finally, there is the issue of what Elster calls 'downstream legitimacy': the process of ratification of the constitution must be legitimate if the document is to be respected.[39] A constitution that is ratified by popular referendum will have much stronger claims to embody the popular will. For example, the delegates of the Federal Constitutional Convention, instead of submitting the constitution to the state legislatures which had selected them, decided to have the constitution ratified by special conventions called in each of the states, giving the document greater downstream legitimacy.

(ii) Institutional and Political Party Interests

The interests of government institutions and political parties often play a major role in the constitution-making process.

Institutional interests are particularly clear when the institutions to be regulated by the constitution also take part in constitution-making. At the US Federal Constitutional Convention, the conflict over Congressional representation faithfully mirrored the nature of the actors, with the small states arguing for equal and the larger for proportional representation of the states in the Senate.

Most obviously, if the legislative body serves as the constituent assembly, strong legislative, as opposed to executive, powers are likely

to be included in the constitution. For example, in Poland between 1919–21 the Parliament served as a constituent assembly. At that time, it was widely expected that Joseph Pilsudski would be elected president under the new constitution. Perceiving Pilsudski both as a socialist and as a strong personality, the conservative Sejm drafted a weak presidency into the constitution – so weak, in fact, that Pilsudski, preferring to bide his time, refused to stand for election. By including an executive or presidential veto in the constitution-making process (or at least presidential constitutional initiative), the legislature is more likely to restrain the impulse of granting itself excessive powers. The French 'Assemblée Constituante', which also functioned as an ordinary legislature, adopted another solution, prohibiting its members from serving in the first ordinary legislature after the constitution was promulgated. To institutionally balance the constitution-making process, the Polish Constitutional Commission which convened in 1992 consisted of representatives of all branches of government.

In the modern era, political party interests have also had a strong role in constitution-making. This is seen particularly in the design of electoral procedures. Large parties and parties with highly visible candidates are likely to favor a majority electoral system or a proportional electoral system with a high threshold, and small parties are likely to favor proportional representation with a low threshold. In addition, large parties that are most likely to form a government will push strongly for a constructive vote of no confidence, which strengthens the position of government *vis-à-vis* parliament. The making of the Spanish Constitution of 1978 illustrates this point. Parties that have a strong presidential candidate are likely to argue for popular election of the president, whereas the other parties will push for election by the assembly and try to limit the powers of the presidency as much as possible. This is seen in the post-1989 Polish debates over presidential powers, with certain political parties, fearing the strong personality of President Walesa, trying to incorporate a weak presidency in the new constitution. The converse case is the constitution of the Fifth French Republic, which was specifically written to provide a strong executive basis for Charles De Gaulle.

(iii) Other Constitutions as Models

One way for modern constitution-makers to assess the consequences of various institutional arrangements is to look to contemporary and earlier constitutions to determine which provisions function well and

are enduring. In this way, pre-existing constitutional arrangements influence decisions in the constitution-making process. In constitutional debates, one invariably finds a large number of references to other constitutions as models to be imitated, disasters to be avoided, or evidence for certain views about human nature.

First, regarding the use of historical constitutional and political arrangements, in several Central European countries today, notably Poland, the Czech Republic, Hungary, Romania and Slovakia, there is a tendency to look to the pre-communist constitutions as sources for inspiration. These earlier documents may serve as focal points; they allow the constitution-makers to single out the most salient among the innumerable models that could be adopted. They may serve as a source of experience that is particularly relevant because of the sociological continuity with the past. They may be used symbolically, to affirm the continuity of the nation over time. Finally, they may be used as rationalizations of conclusions reached on other grounds. For example, in Poland, drafters who cite the existence of a senate in pre-communist constitutions as an argument for providing a bicameral parliament in the new one may in reality be motivated by institutional (or self-preservation) interests. Historic constitutions can also serve as negative models to be avoided rather than imitated. The Polish 1921 Constitution is often cited to illustrate the dangers of a constituent assembly that is so afraid of instituting a strong presidency that it creates a fragmented and powerless Parliament which in turn invites an authoritarian coup d'etat by the very person whom it feared.

Second, regarding the use of contemporary models, according to Edward McWhinney, '[t]he 1958 Constitution of the Fifth French Republic and the German Constitution of 1949 represent, together with the British constitutional system and the American constitution, the principal alternative models or stereotypes for democratic constitution-making in the [modern] time.'[40] Indeed, in Central Europe today, constitution-makers rarely look to each other (forced collaboration for forty years has led to a contemporary reluctance to cross-pollenize in legislative and constitutional reform) and strongly feel the pull of the constitutions of Western Europe, especially those of France (because of historic cross-pollenization) and Germany (because it is perceived as the most successful example of a formerly authoritarian European polity). Several Western constitutional mechanisms have already been adopted by the new Central European polities. The device of constructive vote of no confidence (parliament cannot vote down government unless it simultaneously names a new

prime minister), invented by Carl Friedrich for the German Basic Law of 1949, has been adopted in Hungary and Poland. The European institution of a strong constitutional court has had a pervasive impact throughout Central and Eastern Europe. The French model of semi-presidentialism has been a source of inspiration for several constitutional drafts in Poland and other Central European countries.

Third, Jon Elster makes the robust generalization that 'constitution-makers are more influenced by past disasters than by past successes' and thus look to previously existing political and constitutional arrangements in seeking ways to minimize the most dangerous effects of the previous form of government.[41] Indeed, this was true for the American and most recent French constitution-making processes. The American framers learned from the pathologies of various state constitutions, particularly from experimentation with legislative supremacy. The constitution of the French Fifth Republic was specifically designed to prevent the parliamentary chaos that had reigned under the Fourth. As Peter Merkl noted, the West German framers in 1948 'looked at the Weimar era in the same light in the which the fifty-five men at Philadelphia regarded the years following the War of Independence: as a period of anarchy during which the governmental institutions had fallen too much under the sway of popular whim and fancy', a situation to be avoided.[42]

Previous failures also guide Central European constitution-makers away from the construction of worst-case scenarios. As stated earlier, the experience with the 'unity of state power' has inspired post-communist Central European constitution-makers to institutionally guarantee a decentralized state. In addition, the general arbitrariness that prevailed under communist rule explains the important role allotted to constitutional courts in the new constitutions. Thus, a number of factors influence the constitution-making process and the accompanying choices on how to effectively limit the powers of the new government and protect the rights of citizens.

In this way, the constitution-making process is central to a successful transition to democracy. As Adam Przeworski wrote, democratic institutionalization is 'the devolution of power from a group of people to a set of rules.... Democracy is consolidated when under given political and economic conditions a particular set of institutions becomes the only game in town, when no one can imagine acting outside the democratic institutions.'[43]

The constitutionalization of political activity consists of the democratic reordering and restructuring of political rules and institutions. During this process, democratic mainstays, such as regular elections, freedom of association, the separation and balancing of governmental powers and the guaranteeing of individual liberties, become part of the fabric of the polity. Obviously, even the most well-designed constitution cannot alone guarantee a nation democratic governance, social peace and economic prosperity. But without a framework articulating the shape, limits and functioning of the new government and its relationship to society and the individual, comprehensive and lasting democratization is much less certain.

2 Early Polish Constitutional History

This chapter provides an historic overview of Polish constitutional development. Part A discusses early Polish constitutional history, which finds its roots in the thirteenth century. Part B analyzes the Polish constitution of 1791, probably the most symbolic and enduring document in Polish history. Part C examines the progressive political developments that occurred during Poland's years of partition. Part D discusses the reemergence of constitutional government in Poland after World War I, focusing specifically on the 1921 and 1935 constitutions. This part highlights the influence of Jozef Pilsudski on the constitutional changes that occurred in Poland during the inter-war period.

A EARLY DEVELOPMENTS (13TH CENTURY–1791)

A nation's constitutional history begins when it creates institutions and procedures to limit the power of government. '[T]he term ''constitutional government'' is only applied to those [governments] whose fundamental rules or maxims . . . impose efficient restraints on the exercise of power for the purpose of protecting individual rights and privileges. . . .'[1] Professor Kenneth C. Wheare wrote, '[c]onstitutions spring from belief in limited government'.[2] Beginning in the thirteenth century, Polish constitutional development focused on limiting the power of the King and enhancing the power of the people, or more exactly, the gentry.

In the thirteenth century, Poland consisted of five self-governing duchies, each with its own regional lord, loosely aligned on the basis of shared security and cultural interests. The principle of government by consensus and representation became entrenched early on among the duchies that constituted Poland. Delegates elected by individual districts attended provincial parliamentary sessions, or 'sejms', [pronounced 'seym'] to discuss and remedy local problems. These delegates represented the various interests of the Polish nobility, or 'szlachta'. The provincial unification of Poland, spurred in large part by the Tartar invasions of Europe in 1241, emerged through discussions and agreements within these sejms. By the coronation of Przemysl II of Gniezno in 1295, the year in which Poland was consolidated into one nation, the sejms were no longer ad hoc assemblies but

standing bodies, vital to the governance of Poland's provincial matters.

Significant constitutional advances occurred in Poland shortly after the coronation of Louis D'Anjou of Hungary in 1370, who was designated the successor of Kazimierz the Great (the last king of the Polish Piast dynasty).[3] Because he ruled from afar, the szlachta had great leverage with which to place restraints on Louis' leadership. Lacking male descendants, in 1372 Louis tried to solidify his daughter's right of succession to the Polish throne. In exchange for pledging their allegiance, the Polish szlachta forced Louis to grant them several 'liberties' and privileges. In an agreement known as the 'Privilege of Kosice', Louis agreed to obtain the szlachta's consent to tax increases through a vote of the provincial parliamentary sejms.[4]

In the years to follow, the szlachta pressed for further royal concessions. Once it became evident that the King's dynastic interests could be used by the szlachta to obtain certain privileges and advantages, the szlachta began to demand unprecedented protection from the government in order to promote their own needs and interests. For example, in 1378 Louis accepted as a royal obligation the responsibility to fight for the release of members of the szlachta taken prisoner in foreign lands, in effect creating a citizen's privilege of government protection while abroad. Louis also limited the King's patrimony to his immediate family, foreshadowing the eventual transfer to the szlachta of the responsibility for choosing the royal successor.

Louis' successor, King Jagiello, formerly the Grand Duke of Lithuania, never truly secured his grip on royal power. As with Louis, the szlachta forced Jagiello to make concessions to secure his dynastic interests.[5] In 1422 Jagiello pledged not to confiscate property of a member of the szlachta without prior judicial determination, reinforcing the autonomy of the szlachta. Even more significant was the Privilege of Krakow of 1433, which in practice came to be known as the doctrine of 'neminem captivabimus'. This doctrine, substantively similar to the English Habeas Corpus Acts of 1679 and 1816, mandated that the King could not detain or sentence a member of the szlachta without a prior judicial determination of guilt, effectively giving the Polish szlachta a right to due process centuries before their West European counterparts.[6] The King's inability to hold a member of the szlachta without trial reduced his tools for reprisal when the szlachta opposed royal decrees. It was through these and other concessions made by Poland's foreign monarchs that state

power slowly decentralized and notions of limited government developed, growing stronger and more enduring with their exercise.

Of course, only the Polish szlachta, a class consisting of over 10 per cent of the population, could enjoy the greater freedoms realized through the limits placed on royal power. But in her sociodemographic composition, Poland was unique; great diversity existed with regard to culture, level of education, and financial base among the szlachta. As Professor Wagner wrote:

> [D]uring most of her history the Polish 'golden freedoms' and democratic institutions could be fully enjoyed only by a minority of the population: the nobles... The percentage of nobles in Poland was, however, very high in comparison with that in other nations,... [constituting] from 10 to 14 percent of the entire Polish population.[7]

During the fifteenth century, as the szlachta proceeded to limit the power of distant rulers, the role of the provincial sejms was enhanced and regularized. By the end of the fifteenth century the provincial sejms met annually with the King's Council. This meeting was known as the 'Sejm Walny', or General Sejm. In 1493 the General Sejm divided into two chambers: the Senate as the higher, more elite chamber; and the House of Delegates. As the General Sejm expanded its role in the governance of Poland, it assumed control over two important areas of domestic governance: the budget and the process of royal succession. The development of parliamentary power not only decreased autocratic power in Poland, but served to lay a firm foundation for subsequent constitutional developments.

In 1501 the Sejm exacted from King Aleksander the power of legislative initiative in return for allowing him to succeed his brother to the throne. Moreover, in 1505 the doctrine of 'nihil novi', or 'nothing new without the Diet's permission', was introduced. This doctrine prohibited the King from creating new laws without the express advice and consent of the Sejm, thus guaranteeing the szlachta a direct role in the governance of the nation.

By the sixteenth century, state power was no longer vested in the crown alone, but in the 'King in Parliament'. Parliamentary government was composed of three bodies (called the three 'estates'): the King, the Senate, and the House of Deputies. The King was theoretically 'above other estates', but he in fact carried out his functions in consultation with representatives of the other estates, as well as with

dignitaries and experts. After 1505 the King's Council regularly cooperated with the Sejm in the legislative process. This system was the inception of the division and distribution of powers in Poland, a principle which would resonate in future Polish constitutional development. Moreover, during the sixteenth century the szlachta propagated the principle 'lex facit regem', which meant that the King is bound by the law enacted by him and his Council.[8]

The szlachta's growing appreciation for limited government and the rule of law was reflected in Polish political writings published during the sixteenth century. In particular, the enlightened political philosophy and statecraft of Poland's 'democracy of the gentry' is exemplified by a treatise entitled *De Optimo Senatore* (*The Accomplished Senator*), published in Latin in 1568 by a Polish statesman, Wawrzyniec Grzymala Goslicki.[9] In *The Accomplished Senator*, Goslicki, a Minister of State and Secretary to King Sigismund II, examined how the structures, institutions, rules and procedures of the state may serve as a barrier to reaction, majoritarianism and tyranny. Goslicki defended democracy as defined by Aristotle, but discovered in democracy unrestrained passions that may degenerate into absolute government and the tyranny of the majority. Goslicki asserted that the masses are changeable and given to excess and extravagance, and that uncontrolled majoritarianism is at times even more dangerous than autocratic rule.

According to Goslicki, one principle among others is fundamental to good government: laws must be greater than any individual, including those who rule the state. As Goslicki wrote:

> The King in Poland, in the Administration of his Government, is obliged to make the Law the Sole Guide and Rule of his Conduct. He cannot govern according to his own Will and Pleasure, nor make War or Peace, without the Advice and Consent of the Senate. He cannot go beyond, or break in upon, their Decrees, nor exceed the Bounds which They and their Laws have set him.[10]

Goslicki called for limitations on both the executive and the legislature:

> [T]he King can do no Publick Act of Government, without the Advice and Authority of the Senate, nor the Senate, in like manner, do any Thing without the King and the Nobility. Hence it is, that the Laws of Poland are in their full Strength and Vigour, and all

> Orders are solemnly Sworn to Keep, Observe, and Retain them. . . . [Political elites] are Bound to the Observation of the Laws, and the Maintenance of the Liberties of their Country . . . [for this provides] Defence for the Publick, against all Attempts upon its Laws, Liberties, and Happiness.[11]

The Accomplished Senator captures the szlachta's general acceptance of the authority of law as transcendant. The rule of law was the szlachta's guarantee of liberty. As Goslicki wrote, '[t]hat every government is Safe, in which every Subject stands in as great Awe of the Laws, as of an Arbitrary Lord or Tyrant.'[12]

By 1573 the szlachta had institutionalized the notion of an elected monarchy, or 'electio virilim', under which the szlachta as a class chose the nation's ruler, regardless of the existence of a natural heir.[13] Upon the death of the King, the Sejm established the terms of the new King's election, and then held an 'Election Sejm', in which every member of the szlachta participated. The election of the King had to be unanimous. This procedure precluded the King from possessing any notion of 'divine right' or royal privilege and initiated the principle that the national sovereignty belongs to the whole nation, not to one individual. As Professor Wagner writes, it was believed 'that [an elected monarchy] was the best safeguard of the famous Polish *zlota wolnosc* ('golden freedoms') and that the highest office in the state should be held by a person who had proven his qualities and capacities.'[14]

As the Sejm gained in power and prestige, the King conceded even more constitutional responsibilities, further decentralizing the state. Power no longer resided in a single individual nor a particular branch of government; rather, by the end of the sixteenth century a division of power between the legislative and executive branches of government, reenforced by a system of checks and balances, was emerging.

By 1600 the contractual state concept was also developing into a Polish institution; each new King had to swear an oath of loyalty to his subjects, pledging to protect their interests. Moreover, a newly-elected King had to agree to abide by the restrictive stipulations contained in two important documents, the 'Acta Henriciana' and the 'Pacta Conventa'. Both documents were in essence bilateral contracts between the King-elect and the szlachta, setting out obligations requiring the new King's consent before he could take office. The Acta Henriciana was an immutable document setting forth the standard responsibilities of each Polish King to preserve the fundamental principles of Polish government, including free elections and the leg-

islative power of Parliament. On the other hand, the Pacta Conventa was a flexible contract specifically tailored to the needs and obligations of a particular King-elect in the areas of foreign policy, finance and military affairs. The King, in pledging his obedience to the two documents, agreed that his violation of any of the documents' provisions would automatically release his subjects from their oath of loyalty to him.[15] While never actually invoked, this refusal clause existed to restrain arbitrary assertions of royal power. The Pacta Conventa and the Acta Henriciana formalized the constitutional innovations that had occurred thus far in Poland.

Reforms of the Polish judicial system accompanied these constitutional developments. An independent, inter-provincial judicial system replaced the manorial court system in which individual landowners had arbitrarily dispensed justice to their tenantry. Moreover, consistent with the system of checks and balances that was developing between the legislature and the King, in 1678 the Sejm delegated to an independent judicial body, the Supreme Tribunal, the functions previously assigned to the jurisdiction of the throne's Supreme Crown Court. The Supreme Tribunal was composed of representatives of the szlachta elected annually by provincial diets (*sejmiki*). The Supreme Tribunal was superior to all other courts and had original jurisdiction in criminal cases, in complaints against officials, and in all matters concerning the King himself.

In sum, by the seventeenth century certain institutions characteristic of constitutional government were emerging in Poland. The system of state authority was developing towards parliamentarism, increasingly reinforced by a system of separation of powers and a framework of checks and balances. Moreover, the Acta Henriciana and the Pacta Conventa formalized the notion of the contractual state and put in practice notions of limited government and rule of law that had been developing in Polish political philosophy.

(i) Constitutional Development Distorted

At the beginning of the seventeenth century, state power in Poland's 'democracy of the gentry' was theoretically controlled equally by 'the three estates': the House of Deputies, representing the szlachta; the Senate, representing provincial officials of the state and the church; and the King. In order for legislation to pass, for example, each estate had to vote in favor of the legislation – affording each estate the right to veto legislative measures. Toward the end of the seventeenth cen-

tury, however, the House of Deputies had subsumed much of the King's power. The szlachta engineered this power shift by leveraging more and more political concessions from the King.

Royal power became almost symbolic after the Sejm gained the ability to appoint the King's ministers and to control the army. Further eroding the King's power, during the eighteenth century municipal sheriffs, who previously had been directly subordinate to the King, began to free themselves from royal control. The view, at least among the gentry, that the King was little more than a figurehead was eloquently expressed by Stanislaw Orzechowski, a flamboyant 18th century Polish priest: 'Your king... is nothing but the mouth of your kingdom. He is bound by your voluntary and legitimate election and in this way he cannot do... anything but that which comes from your deepest conviction.'[16] A popular critic of those who wanted to strengthen the power of the crown, Orzechowski emphasized that a primary safeguard of the democracy of the gentry was the right to criticize the King.

The fundamental flaw of the resulting 'szlachta's democracy' was that it lacked effective procedures to ensure correct and expedient parliamentary conduct and relied instead on the honesty and sense of restraint of its participants to make the government function. The szlachta harnessed the institutions of the state to advance their own interests, eventuating the weakening of the monarchy during the eighteenth century. First, the szlachta was able to use the state to promote their own interests at the expense of other social classes. For example, in 1496 the szlachta restricted many of the rights of the peasantry, the burghers, and the clergy, and used the broad governmental powers they possessed to acquire land from those with less political influence. Second, except for a small levy on the land they owned, the exemption of the szlachta from all taxes resulted in the erosion of the national treasury. As a result, the nation's standing army disintegrated, which the szlachta allowed in order to keep the crown weak.[17]

As early as the seventeenth century, the szlachta class itself became acutely divided, with factions developing based on wealth and regional interests. Because no authority to silence or expel disruptive members existed, the 236-member Sejm became a chaotic stage for fights between regional interests and, as a result, accomplished little. Moreover, the parliamentary procedure of the 'liberum veto', through which a single member could veto the Sejm's ability to act, guaranteed national political paralysis. The liberum veto was based on notions of unanimity and equality among members of the szlachta and allowed a

single adverse voice in the Sejm to cause the adjournment of and the loss of any legislation completed in, a Sejm legislative session. Forty-eight of the 55 biennial legislative sessions held after 1652 were adjourned as a result of a single deputy's exercise of the liberum veto. Eventually, the Polish government became a powerless entity.

In this way, the important, but unrefined, constitutional reforms developed in Poland during the thirteenth through sixteenth centuries became distorted in the course of the seventeenth and eighteenth centuries, leading to an inefficient and ineffective Polish government. Three hundred years of accumulation of power by the szlachta created a system of parliamentary supremacy – with checks on governmental power exercised only *within* that body, as opposed to among governmental branches. Poland had made a valiant early attempt at constitutional government, but unfortunately the result was a flawed and one-sided political system (albeit a basis for later, more effective, constitutional reforms).

The foreign dynasties that had ruled in Poland since 1573 could not cope with the growing independence of the szlachta and maintain the military power necessary to protect the country from outside forces. The resulting chaos made Poland susceptible to foreign intrusion. In 1772 Poland had almost one-third of its territory partitioned away by Prussia, Russia, and Austria. This foreign aggression spurred a desperately needed rethinking of Poland's constitutional requirements. Eventually the szlachta's politically enlightened element initiated reforms – with the long range objective of formulating a national constitution.

B THE BLOSSOMING OF CONSTITUTIONAL GOVERNMENT IN POLAND (1791)

A reform coalition of select members of the Polish szlachta, known as the 'Four Year Diet', was convened in 1788 by King Stanislaw Augustus Poniatowski to develop appropriate constitutional reforms. To expedite the constitution-making process, the Sejm's rules of procedure were changed so that legislative decisions could be made by a simple majority vote, abandoning the unanimity requirement that had previously paralyzed this body. In 1789, there was growing concern over the impending peace treaty between Russia and Prussia, which would free Russia to conquer the rest of Poland. Thus, in August 1790 the King declared that the 'only method of assuring to Poland the

integrity of its possessions, and of preserving it from the ruin which foreign politics are preparing for it, is to establish a Constitution, which should secure its internal independence.'[18] The awareness of rising external threats to Poland's integrity and independence accelerated the effort to draft a new constitution.

King Stanislaw's appreciation for the English political system, with its division of power and bicameral parliament, led the drafters to study this system in detail. The reformers were well-versed in English political literature, and admired England's moderate constitutional monarchy, which they saw as successfully combining features of democratic, aristocratic and monarchical government. Hugo Kollataj, one of the leaders of the reform movement, was impressed that the unwritten English Constitution combined the 'authority of the crown and the personal impact of the King on the government with the parliamentary system.'[19] The drafters especially admired the balance of the unwritten English constitution, which they saw as being accomplished through 'cooperation and clashes' between the English King and the two parliamentary bodies.[20] Components of the unwritten English constitution were studied in Poland through the very early translations of Blackstone's *Commentaries on the Laws of England* as well as De Lolme's *The Constitution of England*. The writings of Henry Bolingbroke, in particular *The Idea of a Patriot King*, and his concept of a 'patriarchal monarch' whose throne was hereditary but whose power was limited, also influenced the drafters.

The constitutional reform coalition also closely analyzed the 1789 draft of the French constitution of 1791, which recognized the will of the people as the source of law and promoted the doctrine of separation of powers. The Poles drew substantially from Montesquieu's *The Spirit of the Laws*, which argued for the separation of powers between the executive, legislative and judicial branches of government. The reform movement also referred to Rousseau's social contract to conclude that 'the substantial transformation of the Polish social structure was not only necessary but quite feasible.'[21]

Because of acute differences within the Four Year Diet, the process of drafting the constitution proceeded slowly. As discussions dragged on and differences between the drafters over constitutional choices became entrenched, eventually the idea of preparing the final draft of the constitution outside of the Sejm gained viability. King Stanislaw Augustus secretly convened a smaller group to prepare the new constitution, and it was decided that for the sake of expediency their draft would be introduced in the Sejm at a time when the minimum number

of members of the opposition would be present. The draft was introduced on 3 May, when most of the opponents of reform were away for the Easter holiday. Although majority support for the constitution existed on 3 May, a legal quorum could not be achieved. But after having received the support of the majority of those present in the chamber, the King disregarded established legislative procedure and enacted the constitution into law. Thus, through political maneuvering, Stanislaw Augustus provided what one constitutional scholar has described as the basis 'for the organization of a modern state and modern society.'[22] On 4 May, twenty-eight Sejm deputies, all opponents of the constitutional reform, officially protested the circumvention of standard legislative procedure. But on the same day the full Sejm invalidated all protests against the new constitution, and formally voted by majority to promulgate the new constitution.

One of the chief purposes of the 1791 Constitution, entitled *Law of Government* (*Ustawa Rzadowa*), was to restructure and unify the ineffective Polish government. Accordingly the new constitution discarded the concept of the liberum veto, which had allowed the interests of an individual Sejm member to supersede the national interest. Even at the local diet level the concept of decision by majority vote replaced mandatory unanimity, which had so hampered the legislative process.

The framers wanted to recreate a unified state by establishing a cohesive political entity. In this vein the Constitution's article 7 emphasized the importance of the crown being 'elective in regard to families', re-adopting a hereditary monarchy and ending royal elections.[23] The new constitution was also meant to balance the power and influence of Parliament with other branches of the state. Thus, the power of the King was enhanced, with the crown having both the power of legislative initiative and the right to call the Sejm into session. Although the Constitution gave the King substantially greater power than he had possessed in the previous two centuries, it contained numerous provisions designed to keep absolute autocratic power in check. For example, the King regained effective control over the military, but the Sejm retained the power to declare war.

The 1791 Constitution reflected several of the constitutional developments that had surfaced in Poland during the fifteenth and sixteenth centuries. It provided for decentralized state power, with government authority dispersed at provincial and municipal levels.[24] The Constitution also stressed the centrality of separation of powers to the foundation of the government. Article 5 stated:

> 'Three distinct powers shall compose the government of the Polish nation, according to the present constitution.
> 1st. Legislative power in the assembled estates.
> 2nd. Executive power in the king and the Council of Guardians.
> 3rd. Judicial power in courts existing, or to be established.'

Important powers were retained in each of the three branches of government. The King shared executive power and the legislative initiative with a Council of Guardians, which was composed of a church Primate, and the Ministers of Justice, Police, War, Foreign Affairs, and Finance among others. The Marshall of the Sejm and the heir-apparent to the throne also sat on the Council of Guardians, although neither could vote. While the Constitution stated that '[t]he King's opinion ... decisively prevail[ed]' in this Council, his decrees were not valid without the signature of the relevant minister.[25] Ministers were appointed by the King for two-year terms, but members of the Council were ultimately responsible to the Sejm. Ministerial nominations were to be confirmed by a two-thirds majority vote of both chambers of the Sejm, which could also vote 'no confidence' in ministers and thus force their dismissal. However, the Constitution did not provide a procedure for the whole government to be dismissed.

The Constitution developed a parliamentary state structure. The Sejm was the official legislative branch, a bicameral body consisting of a Senate and a Chamber of Deputies, and had to be convened every two years. The Chamber of Deputies, declared by the Constitution 'a temple of legislature' where 'the national sovereignty is vested', consisted of over 204 'popularly elected' deputies that represented the szlachta and plenipotentiaries of various municipalities.[26] 'Popular election' is a somewhat misleading term, however, because suffrage was based on the ownership of land. As such, the Chamber of Deputies was essentially a body elected by the szlachta rather than the nation as a whole. Legislation originated in the Chamber of Deputies and then was sent in the form of legislative bills for Senate consideration. Senate amendments could be overridden by a majority vote of the Chamber of Deputies. The King did not have the right to veto the decisions of the Chamber of Deputies. The primacy of the 'lower chamber' of Parliament became an important characteristic of Polish constitutional practice.

The 1791 Constitution specifically assigned the Chamber of Deputies important state functions, such as the ability to levy taxes, respon-

sibility over government loans, and the powers to declare war and to ratify treaties. The Sejm effectively controlled foreign relations, as the King was forbidden 'to conclude definitively any treaty, or any diplomatic act', and was only allowed 'to carry on temporary negotiations with foreign Courts, and facilitate temporary occurrences, always with reference to the Chamber of Deputies.'[27]

The King formally presided over the Senate, in which membership depended on royal appointment.[28] The 132-member Senate consisted of voivodship (provincial) heads, bishops, and ministers. The Senate had less responsibility over the day to day governance of Poland than the Chamber of Deputies. The Constitution conceived of Senators as elder statesmen, able to apply stable views and political experience to public policy-making. By articulating their convictions whenever a matter of state importance arose, the Senate served as a balancing force in reviewing important or controversial legislation. As the Chamber of Deputies had to send all legislation to the Senate, which could amend it through majority vote, the Senate could voice reservation when questionable decisions were made by the Chamber of Deputies. But as stated above, the Chamber of Deputies could override Senate amendments in a subsequent session. While the 1791 Constitution established that laws promulgated by the state were superior to state authorities, there was no mechanism to enforce the constitutionality of state action.

In keeping with the separation of powers, the 1791 Constitution provided for an autonomous judiciary. Article 8 emphasized that '[a]s judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected.' Independent judicial courts were created, with judges selected for four year terms by a special committee comprised of deputies of the Sejm. Another important reform was the establishment of a court composed of members of the Sejm, elected by the Sejm, to hear cases 'against the nation' and 'against the supreme Government of the Commonwealth.'

In this way, the 1791 Constitution provided for a separation of powers framework reinforced by a system of checks and balances. While granting the executive greater powers than it had previously enjoyed, the Constitution vested the Chamber of Deputies and the Senate, the two houses of the national Sejm, with important powers designed to check the authority of the King and each other. The Constitution also provided for the creation of an independent judiciary to apply the law as enacted by the legislative branch. This

separation of powers framework was based on the principle of the Constitution's drafters that 'in order to prevent abuses by any of the branches of authority, which could turn [the state] into a tyrannical power, one [branch] must check another through a proper system of balances.'[29]

The term 'people', as provided in the 1791 Constitution, only included the single social class of the Polish szlachta. Even though the Constitution stated in Article 4 that '[w]e publish and proclaim a perfect and entire liberty to all people', the Polish state remained a far cry from genuine popular sovereignty. The Constitution maintained the political monopoly of power held by the szlachta (which included declaring the szlachta's predominance over 'private and public life'). The Constitution, however, did declare that the Polish nation was composed of peasants and townspeople as well as the nobility. While the peasantry gained no political participation rights from the new Constitution, it did entitle them to 'the protection of national law.'[30] Among other things, this gave contracts between the peasantry and the nobility legal grounding.

To an extent never before seen in Poland, the new constitution guaranteed a number of important individual liberties. Most of the privileges, liberties and property rights gained by the szlachta from Poland's foreign monarchs were retained. Some of the more fundamental privileges, namely the doctrine of *neminem captivabimus* (the Polish habeus corpus act) were extended beyond the szlachta to all property owners. Article 1 enacted a clear right to religious freedom: '[W]e assure, to all persuasions and religions, freedom and liberty, according to the laws of the country. . . .'

Thus, the 1791 Constitution both formalized the changes needed for Poland to rebuild a credible nation-state for external purposes, and preserved many of the szlachta's political gains that had evolved during the preceding five centuries. Out of concern for national survival, the Constitution provided institutional mechanisms to prevent the reemergence of the political chaos that had plagued seventeenth and eighteenth century Poland.

But While the new Constitution recreated effective Polish governance, the affairs of Europe had changed at an alarming rate. With the Constitution barely one year old, Russia, reacting to the eruption of hostilities between France and Prussia, sent 97,000 troops across the Polish border. Poland could field only 37,000 troops in its defense; the

Russians soundly defeated them. Then on 23 January 1793, Prussia and Russia agreed to a further partitioning of Poland.

Although in effect for only fourteen months, the 1791 Constitution became a symbol of Poland's national identity – an identity based on values of constitutionalism and limited, enlightened government. Polish historian Andrzej Zahorski writes that

> [e]ven in the modern era, we can see the 1791 Constitution's great creative ideas, which are still very dear to us. To Poles, the 1791 Constitution is a legacy of independence and sovereignty handed down from generation to generation, the heritage of the former Polish state. It is also an expression of democracy, because from its thought was born a Polish nation. It is an important signpost pointing towards parliamentary and pluralistic forms of government.[31]

As Professor Hawgood noted, the legacy of this historic document allowed its principles to 'remain alive in Polish political thought' for over 125 years of foreign domination.[32] The Law of Government was not only the first European written constitution, but for generations of Poles, it became a symbol of a mature political culture. It left an important legacy which was followed by Polish constitutional practice in the 20th century. A well-known Polish constitutional scholar, Bronislaw Dembinski, stated: 'The miracle of the Constitution did not save the state but it did save the nation.'[33]

On 10 October 1795, following Austrian occupation, Poland ceased to exist as an independent state. The 'Final Treaty of Partition', signed by Russia, Prussia, and Austria in January 1797, formalized the partition.

C THE YEARS OF PARTITION (1795–1918)

The form of government imposed on Poland by foreign monarchies during the nineteenth century displayed few similarities to that established by the Constitution of 1791. Following France's defeat of Prussia in 1807, Napoleon set up a puppet Polish state in that part of Prussia previously belonging to Poland. Napoleon, as was his practice with all his new territories, drew up a constitution for his new Polish state, which he called the Grand Duchy of Warsaw. His 'constitutional regime' closely paralleled his imperial government in

France, with Article 6 emphasizing that 'Government is vested in the person of the King.'[34] The legislative power of the reconstituted Sejm was limited to taxation and civil issues. A Council of State, composed of ministers and modelled on the one in existence in Paris, was given vast powers to work on bills which were to be submitted to the Sejm.

While autocratic government was imposed, the provision of the Napoleonic Code in the Grand Duchy of Warsaw introduced Poles to the principle of completely equal application of laws and statutes. Significantly, the Code's emphasis on egalitarianism had a leveling effect on the Polish social class system. Laws and statutes were enforced equally on every member of society by a uniform and effective court system.

Napoleon's constitution also provided freedom for the serf class. Article 4, in addition to establishing that 'all citizens are equal before the law', abolished Poland's ancient system of estates, as Norman Davies writes, 'put[ting] an end to serfdom as a legal institution.'[35] The Napoleonic constitution also provided the legal right to the peasantry to move freely within the borders of the Polish state. The enforcement of this provision, as well as efforts made toward instituting provisions commanding religious tolerance, contributed to Polish constitutional development. Napoleon's defeat in Moscow in 1812 placed Poland back in Russian hands, but the implementation of the egalitarian principles inherent in the Napoleonic system would remain an important experience for Polish constitutional thought.

In 1815, while the western part of the Duchy of Warsaw was incorporated by Prussia, out of the remainder Russia created the Kingdom of Poland. On 27 November 1815, Tsar Alexander signed the Constitution of the Kingdom of Poland, which provided that it was 'forever united' with the Russian Empire. The Russian Tsar was to be the King of Poland and was to be represented there by a deputy. The Poles assumed that the constitutional provision of a bicameral legislature would enable them to participate in the political process. But the Constitution of the Kingdom of Poland was not observed in practice, and the Commander of the Polish armed forces (the Russian Grand Duke Constantine) and the Tsar's Commissar imposed totalitarian rule over the country.

The Constitution of the Kingdom of Poland lasted until the next Polish upheaval, the Uprising of November 1830. The leaders of the November Uprising (1830–1) adopted a 'constitutional document' which emphasized universal individual rights. Although the constitu-

tional document of the November Uprising never became law, its substance reflected a new dimension of Polish constitutional thought, in particular the notion that individual rights belong to all, regardless of class. The collapse of the uprising in 1831 brought the return of Russian rule.

For the remainder of the century, Poland was in the hands of her partitioners. Periodically the Poles rose in resistance; in so doing, they asserted and further refined their constitutional values. In 1861, for example, the National Central Committee (*Komitet Centralne Narodowe* or KCN) was assembled to direct a well-organized and broad-based national rebellion. The Manifesto of the KCN, issued in order to mobilize the lower classes to support the KCN's cause, called for laws allowing peasants to own land. Moreover, in order to make the uprising a genuine rebellion of the people, in 1863 the KCN announced a complete emancipation and enfranchisement of every person in the Polish state, including the peasantry. At one point, the underground government even 'issued a decree providing [for] the death sentence for landowners who continued to exact payment in lieu of labor dues.'[36] This decree and the KCN's Manifesto built on the principles inherent in the Polaniec Manifesto and the Napoleonic Code. Although the national movement exacted some concessions from the Tsar, by April 1864 Russia had extinguished most of the insurrection and integrated the Polish nation into its empire.

Certainly the szlachta never would have made such offers to the peasantry absent the partition and subsequent occupations. And certainly no legitimately constituted national Sejm adopted them. The public pronouncement of these ideas to all Poles in the context of national struggle, however, elevated them to the level of constitutional expectations. These expectations of inclusion – of the contractual state for *all* the people – became the constitutional legacy of Poland's years of partition.

D RESTORATION OF NATIONAL SOVEREIGNTY AND CONSTITUTIONAL GOVERNMENT (1919–39)

(i) The 1921 Constitution

Poland reemerged an independent nation after World War I. In November 1918 Josef Pilsudski, a political and military leader whose popularity made him capable of unifying the politically fragmented

nation, was declared head of the resurrected Polish state until a new government could be formed. Elections for the Sejm were held on 26 January 1919, and two weeks later the first session of the new Sejm was convened. On 20 February 1919 the Sejm adopted a 'Small Constitution', effectively transferring power to the Sejm. This interim document provided the foundation of government for the next two years while a final constitution was being drafted. Unfortunately the Sejm, which had endowed itself with most state power under this document, had little experience in the practice of government, and had great difficulty in achieving the consensus necessary to address the nation's pressing socio-economic problems.

Rebuilding the state proved a difficult task. The area constituting resurrected Poland consisted of a conglomeration of regions that had, for over a century, belonged to either Germany, Russia, or Austria-Hungary. These regions possessed different social, cultural, economic, political, and legal standards. For example, the different regions used as many as six different currencies until 1920, when the Polish mark became the official currency. Unifying the legal system proved even more difficult. The existence of three primary legal systems, combined with recalcitrant provincial jurisdictions, frustrated the achievement of a unified national system. Moreover, the Poles found that many of the problems they had blamed on their occupiers actually originated from within their own society. For what seemed like the first time, Poles had to police themselves, form their own standing army, and discard their age-old suspicion of government control. The economic devastation of World War I further impeded the process of unification.

The multitude of political parties which emerged at this time differed on the substance of the new constitution and the future structure of the state. But most agreed that it should reflect democratic and parliamentary themes. On 14 February 1919 a commission of thirty Sejm deputies convened to create a draft of the new constitution. After over two years of discussion and debate, a draft was finally promulgated into law on 17 March 1921. The 1921 Constitution disappointed those who felt that the first Polish republic needed a constitutional system balancing powers equally among the branches of the state. Instead, an impotent 'sejmocracy' was implemented, giving parliament virtual supremacy in the public policy-making process.[37]

The constitutional commission modeled the new Polish document in part on the French Constitutional Laws of 1875, which to the majority of its members manifested the essence of democracy, popular

will represented in a directly elected Parliament which stands at the head of the state. In addition, as most center-right Polish political elites were wary of implementing a strong presidency (because of Pilsudski) and were reluctant to experiment with a mixed presidential-parliamentary system, the French Constitutional Laws provided a convenient and tested model for most of the parliamentary clubs developing constitutional drafts, with its strong Parliament, weak President, and a Government responsible before the Parliament.[38]

The preamble proclaimed that Poland would continue 'the great traditions of the glorious Constitution of May the Third [1791]', and like the 1791 Constitution, the 1921 Constitution provided for parliamentary governance and formally adopted a system of tripartite separation of powers.[39] Article 2 of the 1921 Constitution declared that 'supreme power belongs to the nation' and is divided among the legislative, executive and judicial branches.

But from an allocation of powers standpoint, Poland reconstituted itself as a democratic republic with a bicameral legislature having much more power than the executive branch. Apparently not learning from its past, the separation of powers provided in the new constitution did not amount to equality of power. Poland once again developed an inefficient and ineffective system of government whereby most elements of the executive and judiciary depended to a certain extent upon the will of the lower chamber of the legislative branch; the resulting inefficiency led some to label Poland 'an almost decapitated state'.[40]

Of the two parliamentary chambers, the Sejm and the Senate, article 3 of the Constitution emphasized that the Sejm, or 'lower chamber', possessed the dominant role in the formulation of government policy: 'No law shall be passed without the authorization of the Sejm.'[41] The 444-member Sejm, now popularly elected by a proportional electoral system for five-year terms, was charged with exclusive responsibility over the national budget, making constitutional amendments, raising the army, and levying and collecting taxes. While the Sejm shared the right of legislative initiative with the President, a simple majority vote of the Sejm could force a single minister, the entire executive cabinet, or even the President, to resign. The Sejm could dissolve itself by a two-thirds vote of its own members; alternatively, the President, acting in conjunction with a three-fifths vote of the Senate, could dissolve the Sejm.[42] Such a vote would also dissolve the Senate, however, making it unlikely that the Senate would accede to such joint action with the President.

The 111-member Senate did not play a very influential role in governance. Popularly elected, the Senate reviewed legislation passed by the Sejm and could reject proposed measures by majority vote. By an eleven-twentieths vote, however, the Sejm could override Senate amendments, and article 35 committed the President to sign such a bill into law.[43]

The 1921 Constitution, for the first time in Polish history, rejected royal rule. As in the French Constitutional Laws, the President was chosen by a vote of both chambers of Parliament for a seven-year term. While the President was theoretically head of state, in reality presidential authority was limited to formal duties, such as convening and adjourning sessions of the Sejm and Senate. The President possessed no veto power over legislation. According to Article 46, the President, upon a declaration of war, could not assume the role of Commander-in-Chief himself, but instead had to appoint a military commander following the recommendation of the Council of Ministers. And while the President appointed ministers and executive officers, these officials were, as provided by article 43, 'responsible to the Sejm'. All the President's acts had to be countersigned by the Prime Minister and appropriate minister. Thus, the 1921 Constitution severely restricted the powers of the executive branch, with the Polish President's powers more limited than any other post-World War I European executive.

The 1921 Constitution implemented a weak presidency primarily because the largest Polish political party at the time, the center-right National Democratic Party (*Narodowa Demokracja* or ND), feared that a strong presidency would allow a single dynamic leader, specifically Pilsudski (whom the National Democrats perceived to be a socialist), to dominate the government. Consequently, in the presidential elections of 1922, Pilsudski declined to become a candidate for the presidency, which he considered to be a 'gilded cage'.[44]

The 1921 Constitution provided for an independent judiciary as well as a 'Supreme Tribunal for Civil and Criminal cases', but left the exact organization of the judiciary to be determined by the Sejm.[45] The courts' responsibilities included the review of the legality of administrative regulations, but not of parliamentary statutes. As Article 81 stated: 'The Courts of Justice shall not have the right to challenge the validity of Statutes legally promulgated.' By restricting judicial review to administrative measures, the power of the National Assembly was further enhanced, reinforcing the French concept of 'supremacy of statute' in the new polity.

The system of local government was modelled on the French system of that time, with a governor administering each of Poland's seventeen provinces, called voivodships (*wojewodztwa*). Article 66 proclaimed that '[t]he administrative organization of the State shall be based upon the principle of decentralization . . . '; Poland would base 'its organization on the principle of broad territorial local self-government.' Accordingly, voivodships were divided into districts (*powiaty*), each one administered by a territorial subprefect. But as Antony Polonsky writes, 'the constitutional provision framing a system of local government was not reflective of reality, with the autonomy of local government systems in many important ways dependent on the Sejm.'[46]

Thus, the 1921 Constitution resurrected some of the themes of historical Polish constitutional development, themes suppressed during the era of partition. This Constitution incorporated a parliamentary system and the principle of separation and limitation of state power. On the other hand, this Constitution also provided a political structure that sowed the seeds of ineffective government, reminiscent of pre-1791 Poland.

Exacerbating the weaknesses of the national government were regional and political differences harking back to the period of partition. The country was further fragmented on ethnic lines, with Jews, Lithuanians, Ukrainians, and Germans constituting important ethnic blocs in the reborn state. The adoption of an electoral system of extreme proportionality allowed parliamentary representation of minor groups, resulting in a great number of parliamentary parties – a situation similar to that in the French Third Republic. By 1925 Poland had ninety-two recognized political parties, thirty-two of which had seats in the Sejm. This political fragmentation made it impossible to achieve a concrete majority, and the government was paralyzed by constantly changing parliamentary coalitions.

In this way, the extreme parliamentary form of government instituted by the 1921 Constitution failed to provide a strong and effective administration or consistent policies. The political crisis was exacerbated by other serious problems which the new state had to face. It proved a difficult task to overcome the effects of war-time destruction and to weld the disparate parts of the country into an economic unit. As a result Poland was plagued by an increasingly uncontrollable inflation and other economic problems, which were in turn intensified by the rapidity with which governments rose and fell. Finally, the parliamentary system was considerably discredited by

reports of widespread corruption among Sejm deputies. As Antony Polonsky writes, '[i]n these circumstances, it is easy to see why the highly democratic constitution of March 1921 functioned so badly. Some action against it seems in retrospect to have been almost inevitable.'[47]

(ii) Creating Effective Government: Pilsudski's Influence

Because of the political crisis discussed above, and because the National Democrats crafted the 1921 Constitution with a view 'to curb the power of Pilsudski', Pilsudski and his numerous supporters never viewed it as a legitimate document, despite the fact that it was promulgated by a democratically-elected Parliament.[48] Pilsudski felt that the 1921 Constitution's creation of a strong parliament caused in large part the subsequent political chaos and government corruption. The failure of the Grabski Government's policies to effectively address the economic crisis of 1925, which resulted in the collapse of the new Polish currency, the *zloty*, made some call for Pilsudski to assert leadership over the state.

In 1925, President Wojciechowski rejected Pilsudski's call for tighter executive control over the tumultuous Sejm. Pilsudski responded by leading a coup d'etat which toppled the government on 11 May 1926. Pilsudski quickly restructured the state, placing much more power in the executive branch. The Sejm was allowed to remain in power, and subsequently offered Pilsudski the presidency, which he refused, preferring the formation of a 'government of experts' led by eminent scientist Ignacy Moscicki.[49] The new government saw as its principal tasks the rejuvenation of the economy and the strengthening of the executive branch so that effective governance could be achieved.

Formal constitutional changes after the *coup d'état* were promulgated by the Sejm in August 1926 in the form of amendments known as the 'August novels'. To protect the national budget from continuing quagmire in the Sejm, the amendments allowed the Government to spend at the same rate as the previous year if the legislature did not agree on a budget before adjourning. In the name of inhibiting corruption, the August novels buttressed Article 22 of the Constitution by providing for the automatic dismissal of legislators found by the Supreme Court to have used their office to earn income or benefits outside of their regular salary. The Sejm ceased to have the right to dissolve itself.

To allow the executive to govern unimpeded by the legislature, the amendments gave the Government the power to issue decrees with the force of law during times the legislature was not in session. Decrees could not change the constitution nor the voting regulations of Parliament. Government decrees had to have the endorsement of all ministers of government and were published in the official *Dziennik Ustaw* (*Journal of Laws*). Once Parliament reconvened, it could confirm or reject these decrees by majority vote. In this way, a parliamentary system of government was retained after the coup d'etat.

Despite their undemocratic origin, for a time the August novels appeared to stabilize the system of government. In addition, in 1927 the economic health of Poland improved. Even at this time of stability and prosperity, however, budget issues created antagonisms between the executive branch and the legislature. After the parliamentary elections of 1928, the Sejm became acutely divided and sessions were abruptly adjourned over questions of economic reform; as a result, budgetary discussions and other legislative matters were left incomplete. The government party, Non-Party Bloc for Cooperation with the Government (*Bezpartyjny Blok Wspolpracy z Rzadem* – BBWR), considered the August novels inadequate as they did not give the executive branch the powers needed to address the economic reform effectively. The global economic problems visited upon Poland in the winter of 1929–30 exacerbated the pre-existing political problems, contributing to the 'general radicalization of politics'.[50]

As early as 1928 Pilsudski identified the complete reformulation of Poland's constitution as one of his primary objectives. After having watched the evolution of ineffective government that followed the enactment of the 1921 Constitution, Pilsudski concluded that 'in a powerless nation grown feral in bondage, liberty produces an abuse of liberty.'[51] He wanted to place much greater power in the presidency relative to the other branches of government. Even the August novels of 1926 did not satisfy Pilsudski, because according to him they did not give the presidency ample authority to act effectively and decisively. To Pilsudski, who had become Prime Minister, the ideal form of government was a state 'governed by a man of the highest moral authority ... who should stand above all the parties and above all the state authorities, and be able to intervene when it is necessary for the public good.'[52]

The elections of 1930, partly manipulated by Pilsudski's supporters, created a parliamentary majority that favored the creation of a strong

executive. This gave Pilsudski the parliamentary control needed to alter the structure of government in accordance with the terms of the constitution, if not its intent. In February 1931, the BBWR presented a draft of the new constitution to the Sejm; a Constitutional Committee consisting of Sejm deputies and Senators was convened, and four years later, on 23 March 1935 the final version of the new constitution was promulgated.

(iii) The 1935 Constitution

The 1935 Constitution substantively differed from the 1921 Constitution primarily in its deemphasis of the role of the Sejm and its elevation of the presidency above all other state authorities. The key position was held by the President, who was to exercise functions of supervision and control over the whole governmental apparatus. 'The President of the Republic', stated article 11, 'being the highest authority in the State, co-ordinates the activity of the superior organs of the State.' This change reflected Pilsudski's desire for the presidency to be superior to other powers.

The President was elected by 50 electors designated by the Sejm, 25 designated by the Senate, and five electors ex officio (Marshall of the Sejm, Marshall of the Senate, Prime Minister, President of the Supreme Court and Inspector General of the Armed Forces). The President had a seven-year term of office, with the opportunity for reelection.[53]

After 1935 the President possessed a number of powers not enjoyed by his predecessors. For example, the 1935 Constitution gave the President the right to appoint and dismiss, on the advice of the Prime Minister, government ministers, as well as the power to dissolve both chambers of the National Assembly and call new parliamentary elections. For official acts the President had the power to issue decrees with the force of law if he obtained the countersignature of the minister who supervised that area of government. These changes flowed from Pilsudski's belief that ' "[t]he law... has as its goal the satisfaction of the most pressing needs, the necessity of which [had] become evident in the years since the adoption of the Constitution of... 1921." '[54] Article 12 made the President the supreme head of the armed forces, and denied to military commanders the power to act independently without the consent of the President. The framers of 'Pilsudski's Constitution' also gave the President the right to veto laws passed by the Sejm. Proposed constitutional amendments originating

from the President required 'only ordinary majorities in the Sejm and Senate' for passage, while proposed amendments originating in Parliament required two thirds majority support for passage. At the same time, the President could postpone parliamentary consideration of amendments proposed by the Sejm.

While the 1935 Constitution clearly enhanced the executive branch's role in the Polish political structure, certain checks and balances between the executive and legislative branches were maintained. For example, government ministers politically responsible to the President were also constitutionally accountable to Parliament. Article 29 provided that a Sejm majority could vote no confidence in a government minister, as long as the Senate also approved of the removal by majority vote. This parliamentary power was offset by the power of the President, in the case of a vote of no confidence, to either recall the Government or minister in question or to dissolve the Sejm. But if the Senate confirmed the no-confidence vote, the President was obligated either to recall the minister involved or dissolve the Parliament. In addition, the Sejm continued to share the right of legislative initiative with the Government.

According to article 53, upon review of a bill passed by the Sejm, the Senate could accept or reject the bill, or alternatively amend it. The Sejm retained the power to override any Senate decision by a three-fifths majority. In the area of the budget, the Sejm was to hold an ordinary session annually for four months to vote on a budget. If the Sejm did not adopt a budget, the Government's proposal automatically gained the force of law for the following year. While these checks and balances reenforced the constitutional separation of powers, in order to wrest Poland out of its self-perpetuating state of political and economic crisis, Pilsudski's 1935 Constitution gave the executive branch, and in particular the presidency, broad powers, elevating this branch above all other state authorities.

But the undemocratic nature of the new system of governance was clearly manifest in the parliamentary electoral law of 8 July 1935, which reduced the number of Sejm deputies from 444 to 208. A severe blow to opposition parties was the new system of nomination of candidates to the lower house. The proportional system was abandoned, and candidates were to be nominated exclusively by regional electoral assemblies (*zgromadzenia okregowa*) placed under the chairmanship of an electoral commission appointed by the Minister of Interior. The assemblies were composed predominantly of elected local officials and representatives of local economic organizations,

such as chambers of commerce. In addition, any group of 500 persons in a region was entitled to one representative on the assembly. Regarding the Senate, the new electoral law provided for 96 senators, one third of which were to be chosen by the President; the remaining two-thirds were to be chosen by Provincial Electoral Councils, composed of representatives of elected local government bodies and economic organizations. Thus, the President would be able to exert strong influence over the composition of the Senate, and the Government over the composition of the Sejm. While the electoral reform culminated the backlash against the numerous political parties that had hampered the functioning of government, the free selection of candidates was made virtually impossible, a decisive break with liberal parliamentarism.

In the area of individual rights, the 1935 Constitution retained most features of the 1921 Constitution. Important protections, such as freedom of religion, freedom of conscience, and the inviolability of domicile, carried over into the 1935 document. But despite these provisions, the situation of Jews and national minorities deteriorated in the last years before World War II. Anti-semitism and ethnocentrism began to play an ever increasing role in the political stance of right-wing political groups, both as a means of winning over younger nationalists and to divert attention from other social problems.

The 'guided democracy', as the new constitutional system was described, did not live up to the expectations of its framers. Antony Polonsky writes that '[i]n theory, its attempt to combine popular control with firm government seemed a reasonable answer to [Poland's] problems. . . .'[55] But while the framers had drafted the 1935 Constitution with Pilsudski's leadership in mind, Pilsudski died three weeks after the Constitution's ratification. The presidential system provided by this constitution assumed that a charismatic person of national stature would hold the presidency and maintain the social legitimacy of such a one-sided distribution of power. Pilsudski was such a figure; his death left a vacuum in the new Polish state, and his supporters became polarized into groups that 'favoured a return to a [more balanced democratic] constitutional system and [groups that] favoured open authoritarianism.'[56] Demonstrating the dangers of framing a constitution around a particular individual, it is ironic that while the 1921 Constitution was formulated with the intention of curbing the domineering aspirations of Pilsudski, the 1935 Constitution was created to fit his leadership abilities, only to have his death

occur three weeks after its ratification. After Pilsudski's death, while the 1935 Constitution functioned to provide the political foundation of the country, no charismatic leader occupied the executive branch who could smooth relations with the constitutionally alienated legislative branch, resulting in further political polarization.

The political bickering that took place after Pilsudski's death did not last long. In September 1939 both Germany and the Soviet Union invaded Poland, once again placing that nation under foreign control and subverting Polish constitutional development. The 1935 Constitution was kept in force to provide governmental and state continuity during the war, through special provisions legitimizing presidential continuity without a territorial base. A new Polish government, the 'Government in Exile', was able to operate first from France and then from Britain during World War II.[57]

In reviewing Polish constitutional history, at first glance it might seem that effective constitutional government was not established in Poland up to World War II. Indeed, the 1791 Constitution provided for a system of government that was a far cry from genuine popular sovereignty. During the inter-war period, the Polish state oscillated between a populist but ineffective and thus short-lived parliamentary government established by the 1921 Constitution, and a 'guided democracy' with very strong executive authority working to secure a unified state.

But further consideration of Polish constitutional history up to World War II reveals increasing experimentation with, and appreciation of, certain principles of limited government. During the successive periods of Polish constitutional history the concept of limited government slowly evolved, resulting in the provision of a tripartite, but not necessarily equal, separation of powers, enforced by a system of checks and balances. Even under Pilsudski in a limited sense, the Constitution provided for a system whereby state power was distributed among the branches of government, and mechanisms of checks and balances existed to prevent branches from usurping power.

3 From Constitutionalism to Totalitarianism: Communist Constitutional Practice and its Polish Application (1944–89)

This chapter examines constitutional theory and practice in communist Poland. Part A briefly describes the institutionalization of a communist 'people's democracy' in Poland after World War II. Part B examines the theoretical and practical underpinnings of the communist constitution promulgated in Poland in 1952. Part C discusses the constitutional reform of a liberal democratic nature which occurred in communist Poland following the 'Solidarity period' of 1980.

A INSTITUTIONALIZATION OF A COMMUNIST 'PEOPLE'S DEMOCRACY' (1944–51)

After World War II, external forces again denied the Polish nation self-government. Newly 'liberated' areas were implanted with cells of the Soviet-sponsored 'Polish Committee of National Liberation' (*Polska Komitet Wyzwolenia Narodowego* – PKWN), headquartered in the eastern Polish city of Lublin. The manifesto of the PKWN, issued in July 1944, invalidated the Polish 1935 Constitution and declared the PKWN's power to issue binding decrees with the force of law. The 1935 Constitution had provided an institutional basis for the Polish 'Government-in-Exile' in London, which the PKWN wanted to alienate from post-war Poland.

While the PKWN manifesto professed to establish a democratic form of government protecting individual freedoms, its provisions revealed the authoritarian nature of the state to be imposed on Poland: 'Democratic freedoms may not serve as the enemies of democracy.'[1] The PKWN liberally exercised its law-making powers, particularly in its efforts to nationalize private property. On 31 December 1944 the PKWN changed its name to the 'Provisional Government of the Polish Republic' (*Rzad Tymczasowy Rzeczypospolitej Polskiej*) [hereinafter Provisional Government] and officially claimed the status of Poland's first post-war government.

In the spring and summer of 1945, the Yalta and Potsdam agreements effectively guaranteed Poland's subordination to the Soviet Union by recognizing the Soviet-sponsored Provisional Government, acting under the Polish 1921 Constitution, as the basis for the establishment of a legitimate democratic republic. January 1947 was chosen as the target date for, as the Yalta agreement stated, 'free and unfettered elections . . . on the basis of universal suffrage and secret ballot' to establish a new Parliament under a permanent constitutional system.[2]

The Provisional Government quickly provided the framework for communist rule, rapidly assuming a totalitarian character modeled on the Stalinist regime in the Soviet Union. Stalin initiated a campaign of repression in Poland, and Soviet security forces branded opponents of the Soviet presence, particularly those united around the former Prime Minister of the Polish Government-in-Exile, Stanislaw Mikolajczyk, as 'bandits' and killed or intimidated all who could conceivably mount organized resistance.

It became obvious that the promises of free elections made by Stalin at Yalta and Potsdam were worthless. Stalin, who in 1944 acknowledged that imposing communism on Poland was like 'fitting a saddle to a cow', prohibited many of the established Polish political parties from taking part in the elections under the pretext that they were associated with fascist elements. The parliamentary electoral process was blatantly and coercively manipulated, with thousands of voters associated with parties opposed to the Soviet presence 'disqualified' from voting, and many others harassed and arrested on their way to the polls. The outcome of these puppet elections was easily predictable: the coalition led by the Polish communist party favored by Stalin, the 'Polish Worker's Party' (*Polska Partia Robotnicza* – PPR), easily 'won' the majority of seats in the re-established Sejm in 1947, even though their membership was one-tenth the size of the leading opposition party. In this way, the PPR acquired the legal means to run the Polish government, and a pro-Moscow puppet government, headed by President Boleslaw Bierut and Prime Minister Jozef Cyrankiewicz, was formed. In an ideological act with historic significance, the newly-convened and communist-controlled Sejm voted to remove the royal crown from the head of the Polish national emblem, the white eagle, the symbol of Polish sovereignty since the fifteenth century.

On 19 February 1947 the Sejm adopted a 'Small Constitution', loosely based on the principles of the Polish 1921 Constitution and

formally providing for a tripartite separation of powers and a parliamentary system. The Small Constitution was intended to define temporarily the various organs of government until a more permanent and comprehensive constitution could be completed. As its primary innovation the Small Constitution created the Council of State, a collective body elected by the Sejm that would eventually replace the presidency and function as the premier law-making body of the government, able to issue decrees with the force of law during the substantial periods between sessions of the Sejm. The Council of State, comprised primarily of members of the PPR, steadily accumulated 'special powers' of government, including the power to issue legally binding 'interpretations of law', thereby eliminating any hope that the Polish government would run on the basis of popular consent.[3]

In order to be perceived as the legitimate successor of the pre-war Polish state, the drafters of the Small Constitution claimed to rely on the 1921 Constitution as a model. But it was obvious that the document's democratic norms would not be applied in the new political conditions. The Small Constitution required important matters of state policy to be regulated by parliamentary statute, but from the beginning of the Stalinist period many vital issues were addressed with internal instructions promulgated by bureaucrats and ministries, often unpublished and issued by unauthorized officials.

Moreover, although not provided by the Small Constitution, a Soviet-style 'procuracy' was established as a separate and hierarchically organized agency to serve as the Party's most trusted arm of government and to play a vital role in eradicating all remaining democratic forms of sociopolitical life in Poland. The procuracy, separate from the courts, was formally charged with controlling the legality of actions of all state organs below the central government level. The Procurator General was appointed and recalled by the Council of State, and all candidates for the procuracy were preliminarily selected by and totally dependent on the Communist Party. As Professor Wojciech Sokolewicz wrote, the procuracy was 'not prepared nor designed by law to defend the citizen against the State.... As a part of the state apparatus, it constitute[d] an instrument of the regime, not of justice.'[4] The procuracy became de jure the sole master of judicial proceedings, protecting first and foremost the political interests of the communist regime. Thus, the primacy of politics over law became one of the most pronounced features of the Stalinist period.

After adopting the Small Constitution, the Sejm promulgated a 'Declaration of Rights and Liberties', ostensibly guaranteeing, among other rights, the equality before the law, the freedom of religion and the freedom of publication, speech and association. But the self-limiting character of these rights was apparent; the Declaration proscribed the exercise of these rights and freedoms 'when directed against the political systems of the state.'[5] The declaration stated that legislative acts would settle the range of and limits on an individual's rights.

Through their newly acquired powers, the Polish communist regime imposed Stalinism on every level of Polish life. The country was militarized under the rationale that American imperialism had acquisitive designs on the communist bloc. In the economic sphere, a centralized planned economy was imposed through a policy mandating the nationalization of industry, the expropriation of all large landholdings and the collectivization of agriculture. A 'Six Year Plan' was adopted to transform the nation's largely agrarian economy to an industrialized one based on heavy industry. Polish culture was manipulated to incorporate the 'benefits' of Stalinism and glorify the infallibility of the 'Great Leader'. In the area of religion, the state consistently attacked the Roman Catholic Church, which historically had opposed the central tenets of Marxism, and engaged in extensive efforts to factionalize the Church. To justify its policy of religious oppression, the Party emphasized in one of its decrees that 'in a real people's state, there is no room for any ''competition'' of organs.'[6]

In 1948 the Stalinist policy of 'organic unification' eliminated all opposition parties, including those with representation in Parliament, either by subordinating them to, or by forcing them to merge with, the PPR, and thereby creating the 'Polish United Workers' Party' (*Polska Zjednoczona Partia Robotnicza* – PZPR).[7] Organic unification, in contravention to democratic political pluralism, provided the last step in the subjugation of Polish political life to Stalin's designs. After subsuming the internal opposition, Poland's occupiers slowly began the process of 'socialist construction', leading Poland down a path towards full-scale totalitarianism.

Discarding all pretenses of legality, the regime purged the judiciary of 'unreliable' pre-war judges. By the end of 1949, over 800 pre-war judges had been dismissed as politically unreliable and were replaced by a new breed of Party activists, who usually lacked a thorough legal training. To dispel any illusion of judicial independence, in a 1948 editorial the Minister of Justice called on the courts to join the class

struggle to build socialism: 'While during the first period we were satisfied with a mere declaration of loyalty . . ., today loyalty is not enough. Today active participation [in building socialism] is required.'[8] A new Department of Judicial Supervision was created within the Ministry of Justice to allow the executive branch to watch over the formally independent and separate judiciary.[9] In 1951, a top Ministry of Justice official instructed the judiciary that the principle of judicial independence must be interpreted to mean that 'judges . . . are required to act in accordance with the law, with the Party's directives and the policy of the Government.'[10]

Thus, during the first years of Poland's Stalinist era the institutional basis for totalitarian rule was established. The state was centralized so that Party policies could be expeditiously applied; political pluralism was rejected, with a single-party system imposed; and the possibility of institutional opposition was precluded, as all branches of the state apparatus were subordinated to the interests of the ruling Communist Party.

B COMMUNIST CONSTITUTIONAL PRACTICE (1951–80)

In 1951, the Sejm established a commission to draft a replacement for the Small Constitution. When the draft was completed in 1952, in keeping with Stalin's claims that the working people were 'masters of the land', a nationwide 'public discussion' was called 'to elicit suggestions, corrections and comments from the broadest people's masses.' While 11 million people were claimed to have participated in the framing of this document, a comparison between the draft and the final version reveals few changes.

On 22 July 1952 the new Soviet-style constitution was promulgated into law, and the Republic of Poland was renamed 'the Polish People's Republic' (*Polska Rzeczpospolita Ludowa* – PRL). The communist regime declared that the document gave 'legal validity to the political and societal changes occurring in the country.'[11] Predictably, the promulgation of the document was linked to developments in the Soviet Union. As Polish President and Party leader Boleslaw Bierut declared on presenting the draft constitution to the Sejm on 18 July 1952, 'the shaping of our national, popular Polish constitution, independent of bourgeois cosmopolitan models, was made possible by that turning point in human history, the Great October Socialist Revolution.'[12]

The 1952 Constitution was patterned on the Soviet Constitution of 1936, retaining much of the original language of that document and reflecting major inputs by Soviet constitutional theorists. As a result, the document shared all the fundamental characteristics of communist constitutions adopted throughout the Soviet bloc. Faithfully reflective of Stalin's wish that the Soviet Union be invoked as the model for Poland, the preamble of the Constitution urged that Poles learn from the 'historic experience of the victorious building of socialism in the Union of Soviet Socialist Republics.' Guaranteeing that the Communist Party would be able to impose its agenda on the public policy-making process, the preamble also declared that '[t]he present Government of the people in Poland rests on the alliance of workers and working peasants. In this alliance the leading role belongs to the workers, who are the leading class of society.'[13]

Effectively an imposition from abroad, the new constitution subverted Polish constitutional development. Given the reality of political terror in the country, the enactment in 1952 of a Polish language equivalent of the Soviet Constitution symbolized the Soviet conquest of Poland and was an important part of the process of communist institutionalization ongoing in the country.

(i) The 1952 Constitution: An Ideological Roadmap

The 1952 Constitution institutionalized the Stalinist system of 'socialist democracy' in Poland and declared Poland a 'people's democracy'. In the Soviet lexicon the people's democracy represented the first stage in a society's march toward a full communist state, with the Communist Party, allegedly the representative of the broad coalition of the working class, retaining near limitless power. The 1952 Constitution declared that the 'working people of town and countryside' – the 'leading class' – possessed the power in a people's democratic state and, as one leading Party scholar put it, were 'of a superior character in relation to the highest organs of the state.'[14]

The state machinery, including the Parliament, functioned under general Party guidance to implement the interests of the working people, and as the Party allegedly represented the dominant sociopolitical forces, no conflict of significant magnitude between the working people and the state could arise. In reality, however, the concept of the people's democracy served as a device to bring Poland into the Soviet orbit under the veil of democracy. The people's democracy centralized political control and allowed those at the top

of the political pyramid to impose their will under the pretext of popular rule. Through this construct, the elite of the Polish Communist Party, accountable to no one within Poland's borders, held uncontrolled and arbitrary power over the whole Party apparatus, over the whole state machinery, and over the whole nation.

In contrast to the division of state power characteristic of constitutional democracies, the principle of 'democratic centralism' provided the thematic foundation for the governmental structure of the people's democracy. Democratic centralism originates from Leninist theory: it denotes a system based on centralized authority, in which the Communist Party holds all the power.[15] The term democratic centralism theoretically comprised two democratic elements – the electivity of all bodies of state authority and their accountability to the people; and one centralist element – the obligation of lower bodies to obey the directives of higher ones. Communist theorists added another centralist element – the strict subordination of the minority to the majority. Once a decision had been taken, no minority insubordination was permissible. This approach rested on the assumption of pre-existing unity of objectives, outlook and method within the organizations involved and within society at large. The 'dictatorship of the proletariat' and (later) 'the leading role of the Party' were terms used in an attempt to legitimize the Communist Party's monopoly of power.

But the concept of a people's democracy, although intimating broad participation and popular influence on the administration of government, ostensibly required the centralization of power in the Party leadership for purposes of political coordination, social control, and economic management. Totalitarianism was concealed behind the veil of a people's democracy, and the constitutional basis of government that Poland had nurtured through the centuries was replaced by a document devoid of any real meaning.

In the communist system, a constitution was not a delicate legal document defining the parameters of state authority, but an ideological and doctrinal roadmap with which to further transform society toward communism, subject to change to accommodate the immediate political agenda. Professors Mauro Cappelletti and William Cohen stress the 'declaratory' character of communist constitutions:

> [T]here has existed in the communist legal systems a concept of "constitution" which differs greatly from Western theory. In Western Europe the constitution is conceived as a body of more or less permanent rules and principles which express the fundamental

> value norms of the state and establish a program for their realization. In [communist] countries, the constitution has traditionally been conceived as a 'superstructure' over the economy and a reflection of the actual socioeconomic results achieved.[16]

In addition to defining the current position on the path toward socialism (and ultimately to classless, stateless communism), communist constitutions were also conceived as mechanisms of legitimation, confirming the 'democratic' nature of the regimes, as opposed to the 'spurious' bourgeois democracy of the capitalist states. Gordon Skilling wrote that the 'main purpose of [communist constitutions] was ideological rather than legal, setting forth the prevailing theory of state and party at the time of their enactment, and requiring periodic alteration as doctrine changed.'[17] The Soviet-controlled Polish state thus used the 1952 Constitution as merely one of many structural tools employed, as its preamble stated, 'to put into effect the great ideals of Socialism.'

(ii) Communist Constitutional Provisions

While theoretically the most important source of law was the constitution, as statutes were promulgated by Parliament to facilitate the transformation of the state from a 'popular anti-imperialist revolution into a socialist one', the 1952 Constitution remained de facto subordinate to these acts of legislation. Ordinary law under communism did not bow to constitutional law, nor was constitutional law in any way 'higher' than ordinary law. Communist courts rarely mentioned constitutional provisions in their case law and were much more likely instead to refer to statutes, Party pronouncements or Supreme Court guidelines in settling judicial matters. It was assumed that the simple passage of a statute by the Sejm or promulgation of a regulation by a bureaucracy imputed constitutionality on that act. Without extra-parliamentary or extra-Party means of constitutional control, constitutional provisions were simply political-philosophical declarations, even if they were asserted to be legally binding norms. As Professor Jan Triska concludes: 'Communist Party-state constitutions [did] not limit the respective governments; instead, they [were] themselves limited by the ruling party's decision-makers, whether in government or not.'[18]

The text of the 1952 Constitution was deliberately ambiguous and general, and while Party scholars stressed the 'dynamic character' of

the Constitution, the document left many basic issues concerning the operation of the state, such as the procedures by which state organs were to make law, to be determined by subsequent parliamentary legislation. The Polish Supreme Court repeated this fundamental rule in a 1955 decision: 'Constitutional norms . . . [are] unsuitable for direct practical application in everyday life of the society without being expanded in ordinary statutes and other normative acts.'[19] This resulted in unfettered law-making on the part of administrative agencies and arbitrary creation of legal norms by state authorities.

(iii) Communist Structure of Government

In keeping with its ideological goal of consolidating state authority, the 1952 Constitution did not implement a system of tripartite separation of powers, instead establishing a hierarchy of governmental authority. The communist principle of 'unity of state power' recognized the unicameral Sejm as the highest authority in the state apparatus, with the executive and judicial branches subordinate to the Sejm and bound by its decisions. The theoretical underpinning of the unity of state power was the notion that there is no need for a separation of powers, nor any limitations on the legislature's supreme power, because elected representatives to the legislative branch are chosen by the people, and the 'will of the working people' is the source of all power. The Sejm was specifically designated by the Constitution's article 20 as 'the supreme organ of state power' through its representation of the working people. The traditional bicamerality of the Polish Parliament was rejected on the premise that such a system 'diluted' the representation of the people, and therefore '[wa]s incompatible with the principles of true democracy.'[20]

The primary function of the executive branch was to enforce and administer statutes enacted by the Sejm. In order to carry out this function, executive agencies were authorized to issue rules, regulations, and other executive orders having the force of law. By the same token, the function of the judiciary was to enforce laws and regulations adopted by the Sejm and the executive branch. No mechanism for judicial review of the constitutionality of statutes was created in communist countries, as the legislature was conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint.

In contradiction with the concept of constitutionalism, the 1952 Constitution subordinated the infrastructure of the state to the

whims of the Party elite. Because the Party claimed to represent the interests of the working people, the state apparatus operated under 'general Party guidance' in the execution of those interests. Regarding the legislative branch, the Party selected in advance all candidates for 'election' to the Sejm, eliminating the possibility that 'the working people of town and countryside' would possess any influence over their representatives. Fifty of the Sejm's 460 seats were not to be subject to general election, but were to be filled through 'election' by the leadership of the Communist Party. In the executive branch, the Party's control over the state infrastructure was guaranteed by the infamous 'nomenklatura' system of privilege and promotion. The Party leadership approved all government appointees and all those desiring to become candidates for elective state positions; all state ministries were accountable to the appropriate division in the Party.

The 1952 Constitution formally provided the Sejm with a number of far-reaching functions. According to article 20, the Sejm had the authority to create law and state policy 'determining the fundamental directions of activity of the state', supervise public administration and all other state organs, discuss and amend drafts of laws suggested by executive organs of the state, supervise the national budget and long-term economic planning, and appoint and dismiss all bodies of government. But as the principle of unity of state power mandated that all segments of the communist state, including the Sejm, work together under the leadership of the Party and in accordance with its recommendations, Party policies were channelled directly to the Sejm for enactment into general legislation.

While formally the sole source of law and state policy, in reality the Sejm was not an effective deliberative body. The Constitution required the Sejm to convene only twice a year and it did not specify the duration of each session. The Sejm typically met for two to five days each session, and perfunctorily confirmed the work of the Council of State, the permanent executive organ of the Sejm. Recorded votes tended to be unanimous. In the period 1952–76, for example, the Sejm met an average of 42 days per four year term, which amounted to just over ten days per year.[21] Thus, the Sejm, the traditional cornerstone of popular government, was transformed into a rubber stamp for Party policies as promulgated by the Council of State.

In Poland, as in every communist system, there existed a permanent executive organ of the legislative branch created by and in theory responsible to the legislature. The Council of State (*Rada Panstwa*),

the executive organ of the Polish Sejm (not to be confused with the executive branch of the Polish government) which replaced the office of the President and assumed most of its authority, was the most powerful body in the system of state organs, and the Party used the Council of State as its primary political arm to carry out its policy objectives. The Sejm elected from among its own members the seventeen member Council of State from a list of candidates approved by the Party leadership.

This institutionally unaccountable body possessed substantial legislative, executive and judicial authority, including the power of legislative initiative, the authority to call elections, the authority to convene the Sejm, the ability to issue legally binding interpretations of law, the authority to appoint judges and to oversee local people's councils and, most importantly, the power to issue decrees having the force of law without limitation as to subject-matter during the long time periods between sessions of the Sejm. A substantial amount of legislation originated in the form of Council of State decrees, as in practice the Sejm never exercised its power to invalidate these decrees. Thus, the Council of State, formally defined as 'an emanation of the Sejm', in fact replaced the Sejm as the supreme body of state power. This development precluded the realization of the constitutional principle of parliamentary supremacy and was consistent with the model imposed in all the communist states of the Soviet bloc. In this way, the 1952 constitution advanced the 'sovietization' of Poland's political form in that it became more consistent with the constitutions of the USSR and other Soviet bloc nations.

As the executive branch of government, the 1952 Constitution established the Council of Ministers (*Rada Ministrow*) and 49 People's Councils (*Rady Ludowe*). The Council of Ministers was constitutionally designated the highest state administrative body. The Polish government, like all communist governments, was based on a parliamentary system and members of the executive branch were selected by, responsible to, and could be recalled by the Sejm and, between its sessions, the Council of State. The Council of Ministers, individual ministers, and other heads of central government organs executed the wishes of the legislative branch and were entitled to issue normative substatutory acts and ministerial regulations having the force of law on the basis of Sejm statutes or Council of State decrees. In practice during the communist era, delegation of legislative authority to the Council of Ministers or to individual ministers was quite common, and, as Sejm legislation tended to be ambiguous and open-ended, the

Council of Ministers often had substantial latitude to make state policy. Both the Sejm and the Council of State could revoke normative acts of the Council of Ministers or individual ministers.

The Council of Ministers was directly connected to the Communist Party by an umbilical cord known as the Government Presidium, comprised of the Prime Minister and other members of the Council of Ministers, most of whom were also members of the Party's Politburo. The Presidium continuously monitored the country's economic and political situation and made policy recommendations for execution by the Council of Ministers. It also controlled the process of bureaucratic appointments through the nomenklatura system. The Presidium guaranteed that no institutional opposition to the interests of the Party would emerge in the executive branch.

The People's Councils, under the direct control of the Council of State, constituted the local administrative bodies of Poland at the commune and municipal level, providing such services as law enforcement and budget management. The People's Councils were supposed to exemplify the democratic principle in the socialist state and article 46 of the Constitution entrusted them with 'direct[ing] the cultural and socio-economic development' of their respective regions of the country and bestowed upon them the authority to 'influence' all regional and administrative units. But instead of decentralizing power, these local entities served merely as extensions of central control. Through the People's Councils, the Party maintained control of society at the local level. While they were designated 'self-governing units', the Constitution's article 54 provided that all acts of People's Councils were subject to review and direction by the Council of State. As Professors Kolankiewicz and Lewis wrote, 'this left little room for self-government.'[22]

The judiciary was the weakest branch in the hierarchy of government authority and, like other organs of state power, could not avoid promoting the political interests of the Party. The Supreme Court, appointed by the Council of State for fixed terms of five years, was constitutionally designated the highest appellate body. While article 8 of the Constitution directed 'all organs of State authority' to 'work according to law', the doctrine of judicial review was rejected as a 'restriction motivated by distrust of the people's representation.'[23] Supervision over the observance of statutes and laws was vested in the Procurator-General, who was appointed by and accountable to the Sejm and the Party. Accordingly, the activities of political bodies were left unchallenged.

The communist regime rejected the notion of an independent, politically neutral judiciary, and judges constituted part of the state's coercive apparatus. While article 62 of the Constitution stated that '[j]udges are independent and subject only to the law', article 58 required courts to be 'custodians of the social and political system of the Polish People's Republic.' The judiciary was charged with the responsibility of protecting the system of people's democracy and encouraging its development toward socialism. That the judiciary would be relegated to being just another tool in the extension of communist rule was reflected with particular clarity by a research scholar from the Party-affiliated Polish Academy of Social Sciences: 'Judicial organs . . . implement those tasks which are formulated by the ruling class, that is, by the working class, through the Polish United Workers' Party, the leading political force within the state.'[24] Judges were appointed and could be recalled at any time by the Council of State for 'misdeeds' such as ruling contrary to 'socialist legality'. In 1951, a top Ministry of Justice official instructed the judiciary that the principles of judicial independence must be interpreted to mean that 'judges . . . are required to act in accordance with the law, with the Party's directives and the policy of the Government.'[25] All candidates for judicial office had to be approved by the Communist Party, and all Polish judges received legal indoctrination and ideological training to maximize the political reliability of the judiciary. As a former Chief of the Polish secret police put it, the judges' first responsibility was 'to conscientiously fulfill their duties to the Party'.[26]

Stalin believed in harnessing the legal system to enhance the intensity of the class struggle, and consequently turned the criminal justice system into an instrument of political power. The Party used the criminal justice system as a tool to achieve short-term political goals and to accomplish the following two long-term goals: to reform Polish society to orthodox Marxism-Leninism, and to protect the communist power structure. Individuals asserting the slightest opposition to the communist system labeled 'enemies of the working people' were treated as criminals, and the administration of justice became little more than the execution of political power. One Party scholar explained that the role of the judiciary was to impose criminal responsibility for any attempts to disorganize state and economic life of Poland, or to impede progress toward socialism: 'The courts must be perceived as a weapon in the class struggle.'[27]

Thus, in the structure of government established by the 1952 Constitution, no politically impartial institutions existed capable of chal-

lenging the political will of the Party or of enforcing constitutional rules. The constitution was simply a useful decoration adopted to disguise the real, unconstitutional distribution of power, and the principles contained within were merely legal fictions. As a result, despite the presence of a constitution, neither constitutionalism nor constitutional government developed in communist Poland.

(iv) Individual Rights

In the area of individual liberties, the list of rights contained in the 1952 Constitution espoused the traditional individual freedoms characteristic of Western liberal democracies. While the Constitution textually guaranteed the freedoms of speech, press and association, no mechanism was provided for the individual to enforce these rights and freedoms. The government claimed that no need for an enforcement mechanism existed because the essential interests of those governing and those governed were identical. Moreover, in many cases the formulations of rights were self-limiting. To clarify the limited context in which citizens could exercise these freedoms, article 72 stated that '[t]he setting up of, and participation in, associations the aims or activities of which are directed against the political or social system or against the legal order of the Polish People's Republic are forbidden.' Moreover, the Constitution's notorious article 70 made it a criminal act to 'abuse freedom of conscience and religion for purposes of undermining the interests of the Polish People's Republic.' These admonitions had to be kept in mind when construing the remaining provisions of the Constitution's chapter on individual rights.

Thus, constitutionally specified rights and liberties could not be exercised contrary to the interests of the Polish state. Professor Adam Lopatka, Director of the Institute of State and Law of the Polish Academy of Sciences, reflected this orthodox line: 'There has never been and simply cannot be a law which would precede the state and would be independent of it. This is also true with respect to human rights and political rights.'[28] In 1956, one Professor of Law at the University of Warsaw, Kazimierz Biskupski, wrote in desperation, 'What practical meaning have these [constitutional] provisions guaranteeing rights and freedoms? Literally none! They mean that these matters will be regulated in future legislation, obviously not bound by anything in the Constitution . . . .'[29]

The Constitution also provided for a number of aspirational socioeconomic 'guarantees' typical of all communist constitutions,

including the right to work, the right to health protection, and the right to a clean environment.[30] In Marxist theory, social and economic rights took priority over personal and political rights and collective rights took priority over individual rights. This 'communitarian' approach to individual rights allowed the regime to condition all constitutional rights to the interests of the state, and state policy, as the manifestation of 'socialist democracy', took precedence over law. Professors Lopatka and Wieruszewski wrote: 'The allowable level of the development of the rights and freedoms of the citizens is decided, first of all, by the possibilities of the economy, the level of social consciousness of society, and also by the international situation.'[31]

In sum, the promulgation of a communist constitution in 1952 resulted in the rejection of the fundamental themes of constitutionalism. First, a rigid centralized system of government dominated by the Party replaced the model characterized by checks and balances. Second, the concept of a government system operated by the will of the Party precluded the notion of government existing by the will of the people. Third, any principles of individual liberty espoused by the 1952 Constitution were limited by the primary importance of the state and the prerogatives of the Party elite. In this way, Poland's communist phase was marked by the unbridled exercise of state power, the adverse consequences of which marked nearly every facet of life.

The most oppressive period of Polish Stalinism ended in the fall of 1956. A political upheaval in October 1956 brought to power a more liberal and nationally inclined communist leadership.[32] Polish political life gradually began to revive, eventually assuming authentic national forms. Moreover, in 1956, a new electoral system was introduced that allowed for more candidates, albeit from the same party, than there were seats available, instituting limited competition for the electorate, resulting in some degree of accountability of members of the Sejm.[33] But, as always, the PZPR retained control over who might be listed as candidates, and left no possibility that political pluralism could emerge.

After 1956, while the fictional condition of the constitution remained unchanged, certain positive developments did occur with regard to the functioning of the state machinery: the Sejm became more visible and active in government policy-making (and in fact was the most active of the communist Central European parliaments until the end of the 1980s), and the Council of State passed fewer decrees. The real power of the state became divided between the Communist Party apparatus and the government bureaucracy; at times (as under Gomulka's leadership, 1956–70), the Party controlled the entire poli-

tical decision-making process, and at other times (as under Gierek's leadership, 1970–80), the Party yielded some authority to the Prime Minister and 'his' group. However, the outward constitutional veneer remained unchanged, and in some respects it assumed even more ideologically orthodox forms.

(v) 1976 Constitutional Amendments

In February 1976, the Sejm amended the 1952 Constitution, further discrediting the document in the eyes of the Polish people, who viewed it as a clear break with the nation's constitutional tradition. The amendments institutionalized the 'leading role' of the Party in all government affairs and 'in building socialism', and thus formally recognized the Party's political monopoly over the government apparatus. The amendments also enshrined Poland's fraternal ties with the Soviet Union.

On one level these amendments simply constitutionalized the status quo and made Poland's 1952 Constitution consistent with those of other Eastern European countries. As Professors Andrzej Gwizdz and Sylwester Zawadzki wrote:

> Inclusion of [the provision providing for the Party's leading role] in the Constitution . . . was not designed to bring any changes to the Party's position within the system, but was rather intended to assure full harmony between the Constitution and the realities of the system, to reflect the actual role of the Party in the political and socio-economic system of the socialist state.[34]

But on another level they ensured that the ruling communists could attack as unconstitutional any future effort to sever the Party or the Soviet Union from the governance of Poland. The constitutionalization of Poland's ties to Moscow and the Warsaw Pact was especially troubling because it seemed to undermine the very sovereignty of the country.

C COMMUNIST CONSTITUTIONAL DOCTRINE IN CRISIS (1980–9)

By 1980 Poland had evolved into a society conditioned to reject government propaganda and more attuned to Western ideas. Although

the inclusion in other East bloc constitutions of amendments similar to the ones promulgated in Poland in 1976 had caused no repercussions, in Poland, vigorous protests came from two distinct groups: the lay intelligentsia and the Church. The intelligentsia vehemently opposed the 1976 amendments, reasoning that such legitimation of Party power signified a major step toward 'mental enslavement'. The Church, which by this time had become a quasi-political, anti-Marxist force in Poland, attacked the amendments in two Sunday masses aired over *Radio Free Europe*, reaching the ears of the Polish nation, 95 per cent of which is Catholic.[35] The criticism of these amendments represented the first time that the totalitarian foundations of the regime, rather than its individual policies, were openly attacked.

Previously fragmented opposition groups began to realize the benefits of working together against the regime. In 1977, after workers were imprisoned for openly defying the regime, two dissimilar groups, workers and the intelligentsia, came together into a political alliance called the 'Workers' Defense Committee' (*Komitet Obrony Robotnikow* – KOR), united in their opposition to Party dictatorship.[36] The KOR and other opposition groups comprehensively and dramatically expressed their views in the late 1970s in Poland, as the government slowly began to tolerate the views of the opposition. Never before had the Party been confronted by a united and nationally-based organization making fundamental political and economic demands extending beyond localized interests.

(i) The Solidarity Period and Martial Law

Popular discontent increased as a result of the economic crisis in the summer of 1980, which had caused food prices to skyrocket. On 14 August 1980 Lech Walesa, a dismissed electrical fitter, led a strike in the Lenin Shipyards in Gdansk to protest the dismissal of a co-worker. The government, recognizing the potential magnitude of the strike, signed an agreement, the 'Gdansk Agreement', with the workers on 31 August that promised the creation of free and independent trade unions as well as the right to strike and that guaranteed access to the media and freedom of expression and publication. By signing the Gdansk Agreement, the communist authorities implicitly acknowledged that they were not the vanguard of the working class. The new Solidarity trade union, the first of its kind in any communist state, began an intense set of talks with the government to discuss mutual grievances.

The 'Solidarity period' of 1980–1 provided a degree of openness and freedom not felt in Poland since before World War II. As a consequence, the people began to demand change, to reject the repressive features of communism and to insist on the adoption of institutions found in Western democratic countries. On 8 October 1980 the 1952 Constitution was amended in an effort by the regime to create the perception of greater popular control over state policy-making. The amendments mandated that the Supreme Chamber of Control (*Najwyzsza Izba Kontroli* – NIK), the economic planning arm of the state responsible for the administration of cooperative organizations, which had been subordinate to the Council of Ministers, operate directly under the auspices of the Sejm to make it more accountable.

But Polish society demanded genuine democratic change; the programmatic declaration of the First National Congress of Solidarity, the first post-war democratically elected national assembly, declared in October 1981: 'The State must serve man, not overpower him; the state machinery must serve society and should not be identified with one political party. The state must become the common property of the whole nation.'[37] The Solidarity program called for the development of civil society and demanded the return of political and personal freedoms and rights. The reemergence of authentic political life undid almost 40 years of emulating the Soviet experience and heralded the beginning of the end of totalitarianism and a substantial defeat to communism in Poland.

The regime finally stiffened against the pervasive demands for change, and on 13 December 1981 the Council of State, emerging from a long period of inactivity and claiming to rely on the provisions of the 1952 Constitution, declared a 'state of war' against those elements perceived to be 'eroding' the foundation of Party power. The government imposed martial law, outlawing Solidarity and its sister union, Rural Solidarity, and declaring that there would be no return to the 'chaos and anarchy' of the Solidarity era. General Wojciech Jaruzelski (who became Party leader in the fall of 1981) and his military associates in the Party leadership ruled Poland between 1982–3 as the Military Council of National Salvation (*Wojskowa Rada Ocalenia Narodowego* – WRON).

In an effort to legally ground the state of martial law, the Council of State's declaration was duly ratified by the Sejm on 25 January 1982. Because the 1952 Constitution did not provide the Council of State with the power to declare martial law in cases of internal danger to the system of government, and instead permitted it to declare

martial law only in cases of 'external danger' (*zewnetrzne zagrozenie*), in July 1983 article 33 of the Constitution was amended to empower the Council of State to impose martial law when confronted by 'threats to internal security' (*wewnetrzne bezpieczenstwo*). The new martial law clause was intended to remove the ambiguity surrounding the previous formulation, and its ex post facto creation demonstrated the unconstitutionality of the events of 13 December 1981.

During the martial law period, the Jaruzelski government pursued a 'carrot and stick' policy toward Polish society. On the one hand, in dealing with the most radical opposition figures, highly repressive measures were used and were especially prevalent in the first months following the imposition of martial law. For example, in early 1982 those members of the judiciary, including a Supreme Court justice, who had been active in the Solidarity movement were dismissed by the Council of State, and several were interned by the security service. The legal grounding for these actions was found in the 1964 Law on the Courts of General Jurisdiction, which allowed for the dismissal of a judge when there was no guarantee that he would 'properly fulfill his duties as a judge.' This provision was later relied upon in the process of general 'verification' of all judges.[38]

On the other hand, the government tried to co-opt the generally hostile masses by presenting the regime as the true defender of Polish national aspirations and as a buffer between Poland and the forces of Soviet imperialism. The government also attempted to gain popular support by relaxing censorship and, in September 1986, by releasing all remaining political prisoners.

(ii) Constitutional Reform: The Post-Martial Law Period

Martial law was finally lifted on 31 December 1982, but the Party was never able to monopolize political life as it had in the past, and its 'leading role' was never reassumed.[39] That a 'state of war' had to be declared to uphold the communist system demonstrated that the system was close to collapse. In an effort to achieve social legitimacy, the regime subjected the 1952 Constitution to several popularly demanded changes of a liberal democratic nature, signifying the gradual disintegration of communist constitutional practice.

On 26 March 1982 the 1952 Constitution was amended to provide for two institutions characteristic of Western democratic constitutionalism. First, article 33a provided for the creation of a Constitutional Tribunal to review the constitutionality of parliamentary statutes and

substatutory acts (regulations promulgated by executive agencies pursuant to statutes). The introduction of a limited form of judicial review ostensibly would begin the process of bringing laws, executive decrees, and administrative regulations into line with the Constitution. In order to ensure that the judicial review function resided solely in the hands of the Tribunal, article 30 was amended to remove from the Council of State the duty 'to watch over the constitutionality of the laws.'

However, the Constitutional Tribunal's scope of review, as finally delineated by the Constitutional Tribunal Act of 1985, was severely restricted. For example, in matters of 'state security', only a few carefully selected state organs, such as the Council of State, could petition to initiate Tribunal review. Moreover, the Tribunal was limited to reviewing laws and statutes that came into existence only after the promulgation of the constitutional amendment in 1982. This placed many clearly unconstitutional state acts, such as the 1981 Martial Law Decree and its accompanying laws, beyond the Tribunal's reach. Finally, while the Tribunal's rulings on administrative regulations were final, its decisions on the constitutionality of parliamentary statutes could be rejected by a vote of the Sejm, leaving the Sejm as the final arbiter of the constitutionality of its actions. This limitation preserved the principles of parliamentary supremacy and the unity of state power in the system of government, and precluded the authentic practice of judicial review. This limitation also had obvious political overtones, in that the Party-controlled Parliament could prevent the Tribunal from overstepping politically acceptable limits when deciding fundamental and politically sensitive issues.

Despite the limitations on its scope of review, the Tribunal, after commencing operation in 1986, issued a number of important decisions addressing bureaucratic and executive branch arbitrariness, formulating general constitutional guidelines of executive branch lawmaking powers. In general, the Tribunal's activities during the final years of the communist era resulted in greater observance of basic principles of good government and legal norms by organs of the executive branch. Most importantly, the creation of the Tribunal introduced into Polish political life the notion that governmental authority derives legitimacy from its adherence to the rule of law (for a detailed discussion on the emergence of judicial review in communist Poland, see Chapters 5 and 6).

A second constitutional amendment in March 1982 created a Tribunal of State, a quasi-judicial 'impeachment court' separate from

regular judicial structures. Elected by the Sejm, and presided over by the President of the Supreme Court, the Tribunal of State was to adjudicate criminal responsibility for constitutional and statutory infringements by state officials committed under the color of office. For the first time since the Communist Party assumed power, the highest state officials were to be held accountable to Parliament for abuses and misdeeds committed while in office. Like the Constitutional Tribunal, however, the Tribunal of State's jurisdiction was constricted. For instance, the Tribunal of State could not review acts committed by deputies of the Sejm or by Party members who did not occupy state posts, which further reduced the accountability of those bodies.[40]

The Tribunal of State was an inspiration of the Solidarity period, when the regime was subjected to intense scrutiny in order to determine the cause of the economic crisis of 1980. In practice, it was difficult to imagine the Party creating an independent body to hold its own leaders accountable for crimes committed while in office, and the viability of the Tribunal of State was seen in subsequent events. In February 1984, a former Prime Minister, Piotr Jaroszewicz, and his three deputies, all of whom held office in the late 1970s, were indicted on charges of corruption and mismanagement by a special Sejm Commission for Constitutional Responsibility and were scheduled to be tried by the Tribunal of State. Less than half a year later, however, the General Amnesty Law of 1984 was promulgated by the Sejm, barring further proceedings in the case. Thus, while in theory the creation of the Tribunal of State was revolutionary in the communist world as the very idea of accountability of power holders had been previously rejected, in the end the Tribunal of State did not contribute to any substantial modification of communist political arrangements.[41]

On 20 July 1983, the electoral system was subjected to constitutional reform. The Sejm passed constitutional amendments emphasizing the value of an alliance between political parties and 'societal organizations', allowing the two PZPR fellow traveler parties, the ZSL and the SD, to 'cooperate' with officially accepted labor and religious organizations to further the 'strengthening of the socialist State and the all-around development of the country.' The amendments, implicitly accepting limited political pluralism, also tacitly expanded the political realm to include associations of Catholic laymen and other Christian organizations. This marked a change in communist philosophy, which had previously mandated atheism.

Indeed *Nowe Drogi*, the official ideological journal of the Polish Communist Party, recognized this dogmatic shift when it stated that 'religion has a sufficient number of points in common with socialism [to conclude that] a religious world outlook [is] favorable to socialism.'[42] Political pluralism thus began to replace the communist single-party system, but article 3 of the Constitution remained in force, providing that 'the Polish United Workers Party [PZPR] shall be the guiding political force of society in building socialism.'

Even more constitutional changes were on the way. On 15 July 1987 the Sejm approved legislation creating an Ombudsman for Citizens' Rights (*Rzecznik Praw Obywatelskich* – RPO), the first independent position in the communist bloc designed to protect citizens from abuses of government power and violations of their constitutional rights by state officials. First proposed in 1981 by the Solidarity National Congress, in September 1986 the Council of State reviewed a proposal attaching the Ombudsman's office to the executive branch, giving the Ombudsman, as one commentator put it, 'the opportunity to cooperate with procuratorial bodies and to use their assistance.' Needless to say, this suggestion evoked considerable criticism.[43] The final structure of the Ombudsman's office was the result of political compromise between the regime and opposition leaders. As the first Ombudsman Professor Ewa Letowska, wrote, '[c]reation of the office was, in effect, one more concession by the collapsing regime. By establishing this institution, the communists clearly aimed to improve their credibility and image at home and abroad.'[44]

Appointed by the Sejm for a fixed term of four years, the Ombudsman acts independently of other state institutions. The Ombudsman was not given the power to actually compel state authorities to comply with her recommendations; instead, upon complaints of human rights violations by citizens and organizations against specific state entities, the Ombudsman may submit to the Sejm proposals for legislative changes. In addition, the Ombudsman may petition the Constitutional Tribunal to review state action that does not conform with the Constitution. The Ombudsman also may initiate criminal, civil, or administrative proceedings in the regular courts on behalf of individual citizens or organizations, or even, when a remedy is not forthcoming from lower courts, appeal to the Supreme Court.[45] In this way, the Ombudsman was empowered to work with existing state institutions to compel state observance of human rights. In large part, the structure and procedures of the Polish Ombudsman's office was modelled on the Swedish office of ombudsman.

Until the creation of the Ombudsman's office, there was no judicial or political structure entrusted with the protection of citizens' rights in communist Poland. The procuracy was perceived as one of the most repressive state agencies while the judiciary was seen as totally subordinate to the political branches. The opening of the Ombudsman's Office in January 1988 signaled the beginning of a return to the constitutional concept that individual rights exist independent of state power. In 1988 alone, the first Ombudsman received more than 50,000 complaints involving a multitude of controversial social and political matters.[46] Soon after she began work, the Ombudsman began to aggressively push for constitutional and political reforms. In 1988, the Ombudsman called for Polish courts to apply international human rights standards in their decisions.[47] The Ombudsman also vigorously challenged unconstitutional state acts before the Constitutional Tribunal.

Thus, in the course of the 1980s Poland began to reject the most repressive features of communism as it had developed under Stalin in the Soviet bloc, and several external features of Western-style democracy were adopted (albeit in a limited way) as concessions to the democratic opposition. According to Professor Kazimierz Dzialocha, during this period while the Constitutional Tribunal and the Ombudsman 'could not change the very essence of the political system, nevertheless they acted as checks against the most flagrant abuses of power by the government.'[48]

While these changes made Poland unique in the communist bloc and contributed to a significant liberalization in political and social life, the essence of the political power structure would remain unshaken until the collapse of communism. The ruling Party elite refused to implement any institutional reform that might undermine the basically undemocratic foundation of the system: the constitutionally sanctioned leading role of the Communist Party. As Dr. Jacek Kurczewski wrote:

> [In Poland there were] insurmountable limitations of even the most liberal and far-reaching internal reforms within the frame of the communist system of government. Throughout most of the 1980s, General Jaruzelski was attempting . . . fundamental reform without challenging the sacred principle of ultimate political power residing in the Communist Party. . . . More and more legal institutions were introduced by the Communist government, but still the current state of political life, state, law, and justice was widely held to be

> unsatisfactory. One may introduce, as Polish communists did under the anaesthesia of martial law, a Constitutional Court, a Tribunal of State, an office of the Ombudsman, and so on and still the results will be felt to be unsatisfactory, because the public knows by experience that the invisible 'leading role' of the Party is of decisive character.[49]

Poland's deepening political and economic crisis continued through the decade and by 1989, when it became clear that the 'second phase of reform' would not revive the economy, the internally divided and substantially weakened Party was no longer able to effectively control the growth and strength of the opposition movement. The regime at first attempted to share power by offering to form a governing coalition with representatives of the Catholic Church and other opposition groups outside of Solidarity. But when it became clear that Solidarity was too powerful to be left out, and that the underground leaders of the union were prepared to make reasonable compromises, General Jaruzelski's regime resolved to include Solidarity as well.

In sum, by 1989 the demise of communist constitutional practice was at hand. It is noteworthy that by 1989 the 1952 Constitution had been amended seventeen times. The cavalier fashion with which the Polish basic law was treated during the communist era demonstrated that it was never intended to be a serious foundation for the governance of the state, but rather a tool for totalitarian rule. During the 1980s constitutional development experienced a gradual reawakening in Poland, as the 1952 Constitution was subjected to several changes implementing institutions characteristic of Western democratic constitutionalism: the notion of constitutional supremacy through the Constitutional Tribunal's limited practice of judicial review; legal accountability and the rule of law symbolized by the institution of the Tribunal of State; electoral reform allowing for limited political pluralism; and protection of individual liberties by the Ombudsman for Citizens' Rights. But while these developments reflected a certain degree of liberalization, up to 1989 Party structures and not the constitution provided the key to understanding politics and state policy-making in Poland.

4 Democratic Rebirth and Constitutional Reform (1989–97)

This chapter examines the constitutional reform that accompanied Poland's democratic rebirth in 1989 and discusses the political structures and institutions that were created to provide a framework within which democratic political processes operate. During the first eight years of the post-communist era, Poland operated with a 'hybrid' constitutional framework based in part on original provisions of the 1952 Constitution, in part on constitutional amendments adopted in 1989–90, and in part on constitutional legislation promulgated in November 1992, colloquially known as the 'Small Constitution.' Only in May 1997 was an entirely new constitutional framework formally promulgated.

Considering Poland's rich constitutional heritage, at first glance it may seem surprising that a comprehensive constitution was not enshrined by the new political leadership soon after the collapse of communist power. While apparent consensus on the fundamentals of a new system prevailed for a short period, conflicts rapidly emerged over both the means to these ends as well as over substantive constitutional choices. But the hybrid framework which did emerge provided institutional stability during a period of extraordinary politics and created the groundwork for a modern Polish polity based on notions of limited government. Part A of this chapter examines the democratic reconstruction implemented by the Round Table Agreement and by the constitutional amendments enacted in 1989–90, and describes initial efforts to pass a new constitution. Part B discusses the drafting and promulgation of Poland's 1992 Small Constitution and the new institutional framework it created. Part C traces efforts towards passage of an entirely new constitution and assesses Poland's post-communist constitution-making process.

A DEMOCRATIC RECONSTRUCTION THROUGH CONSTITUTIONAL AMENDMENT (1989–91)

The formal transition from communism to democracy in Poland took place before the fall of the other regimes in Central Europe and was initiated by the Round Table talks between the communist leadership

and the Solidarity-led opposition in the spring of 1989.[1] The talks initially were undertaken to negotiate the official recognition of Solidarity, at the time still an illegal organization, in exchange for the opposition's support of the regime's economic policies. However, once the future legal status of the Solidarity trade union was settled, opposition negotiators began to push for a bargain that would enable Solidarity to participate meaningfully in the country's political institutions. Throughout the negotiations, the specter of Soviet intervention influenced both the communists and Solidarity leaders, impacting directly on compromises agreed to at the Round Table.[2]

(i) The Round Table Agreement and the 'April Amendments'

By early April, agreement on most issues was reached. On 7 April 1989 the Round Table Agreement was promulgated into law and the 1952 Constitution was amended (the 'April Amendments'), providing for important political changes. First, the Sejm officially lifted the ban placed on the Solidarity movement seven years earlier and gave the organization and its sister union, Rural Solidarity, full legal status. The passage of a new electoral law guaranteeing 'political pluralism' and independence for all political groups and parties marked the end of the authoritarian phase of Polish political life.[3]

Second, it was agreed that the Sejm would be dissolved and that new elections would be held in June 1989. The pre-existing electoral system, fully controlled by the Communist Party, was abandoned. Under the new electoral formula, 65 per cent of Sejm seats would be reserved for the PZPR and its allies (the SD and ZSL). Solidarity would be permitted to compete in genuinely free elections for the remaining 35 per cent of Sejm seats. In this way, Solidarity would have representation in the Sejm, but only as an opposition party; the communists were ensured of at least 299 of the 460 Sejm seats, giving them the numerical majority needed to thwart any challenges by the new opposition and to control the formation of the Government. The compromise further provided for the restoration of the 'upper' house of Parliament, the Senate, which the communists had abolished in 1951. With all 100 members freely elected, the Senate was to have considerable legislative powers, including legislative initiative and the right to veto or amend Sejm legislation, which the latter could override with a two-thirds majority.[4] With the reintroduction of parliamentary bicamerality, Sejm legislation would now be scrutinized and checked within the legislative branch, thus ending the Sejm's legislative monopoly.

Third, the April Amendments replaced the Council of State with a new, formally quite powerful presidency, elected for a renewable five-year term by the Sejm and Senate sitting together as a National Assembly. As it was assumed that this office would be occupied by General Wojciech Jaruzelski, then-Party First Secretary, the presidency was seen as an important guarantee of the Party's preservation of control over the executive branch and as a safeguard of the interests of the nomenklatura. As Jaruzelski himself explained in an interview, '[a]lthough Gorbachev was in power, nobody knew how the situation would develop [in the Soviet Union]. So the presidency was conceived primarily as an external guarantee. Hence the specific prerogatives of the president in the area of foreign policy, military and internal affairs.'[5] The presidency was given important independent state powers at the expense of Parliament, which was no longer regarded as 'reliable' by the Party. In this way, the constitutional restoration of the presidency allowed executive powers formerly held by the Council of State to be retained in the executive branch.

The Constitution's new article 32 assigned the President three very broad responsibilities: (i) 'to watch over the observance of the Constitution'; (ii) 'to protect the security and sovereignty of the state and the inviolability and indivisibility of its territory'; and (iii) 'to implement political and military alliances with foreign countries.' The language used was very general, intentionally granting broad discretion to the President to define the real dimensions of his powers. But not all these provisions were unambiguous and there was scope for conflict within the executive branch. The relationship between President and Prime Minister remained unclear and some of their functions in foreign and defense policy were shared. According to one commentator present at the Round Table, negotiators had left executive powers 'deliberately vague on the assumption, current in early 1989, that a communist president would use whatever prerogatives he saw as necessary, since he could rely on the backing of the army, security forces and his Soviet sponsors.'[6]

While not head of government, the President had the exclusive power to propose candidates for Prime Minister and – in concurrence with the Prime Minister – for the position of minister. The Sejm could reject the President's nominees, but it was not able to nominate members of the Government on its own. The President could dissolve the Sejm if it failed to adopt a state budget or to form a government for more than three months, or if the Sejm adopted a statute or resolution that 'prevents the President from executing his constitutional res-

ponsibilities.'[7] This last provision gave the President broad discretion (or potential for abuse) in deciding when to dissolve the Sejm.

Fourth, the Round Table Agreement provided guarantees for judicial independence, which it described as 'fundamental for a state based on the rule of law and for the protection of citizens' rights and interests.'[8] The new guarantees were predicated on the assumption that the judiciary must be politically neutral and accorded a considerable degree of self-governance to secure its independence from the other branches of government. Accordingly, the April Amendments resolved that a new National Judicial Council (*Krajowa Rada Sadownictwa* – KRS), composed of representatives from all three branches of government (including twelve judges elected by their peers, two senators and four Sejm deputies, the Minister of Justice, and the President's representative), would be entrusted with protecting 'the integrity and independence of the judiciary'.[9] The KRS was given the exclusive power both to select judicial candidates and to propose their candidacy to the President, who may designate as judges only those candidates submitted by the KRS. The KRS also resolves all motions concerning the transfer or removal of judges, and decides on principles of professional ethics of judges. In essence, without the Council's consent, no legislative or executive decision on the functioning of the judicial system may be made, thus insulating the judiciary from political influences.

Finally, in order to underline the strictly judicial nature of the Supreme Court, the April Amendments provided life tenure for Supreme Court justices (all other judges had had life tenure since 1957) and abolished the Supreme Court's power to promulgate binding directives.[10] Further steps were taken to depoliticize the judiciary by precluding direct contacts between political officials and members of the judiciary. For example, the Ministry of Justice was deprived of all supervisory power over the judiciary, and judges were prohibited from joining political parties or engaging in any kind of political activity.[11] Importantly, the omnipotent Soviet-style procuracy was abolished and its prosecutorial functions were taken over by the Ministry of Justice under the auspices of the executive branch, as had been the case during the inter-war period.[12]

In a political sense, the Round Table Agreement guaranteed the communists, through the presidency, effective control over the executive branch and the army. But Solidarity retained a possible veto over communist initiatives through its presence in parliament. In an institutional sense, the Round Table Agreement and the April

Amendments together contributed to the restoration of basic elements of the doctrine of separation of powers within a parliamentary system by transforming the unicameral Parliament into a bicameral body composed of the Sejm and Senate, replacing the Council of State with the presidency as part of the executive branch, and providing guarantees of independence to the judicial branch. Moreover, instead of the communist principle of a hierarchy of state authority, checks and balances were developed to equalize power between the three branches of government. As one commentator wrote, 'an equilibrium of state power between the Sejm, the Senate, the presidency and the judiciary is to develop, with each of those bodies holding important governmental authority.'[13] In this way the April Amendments, grudgingly agreed to by communist Sejm deputies fighting for political survival, signified the demise of the Soviet-style governmental system of entirely centralized state authority.

But while the April Amendments abrogated the 1952 Constitution's previous emphasis on the 'unity of state power', elements of this principle continued to emanate from the amended Constitution. First, the April Amendments did not specifically provide for the principle of separation of powers, as certain political elites, including many members of the former opposition, continued to adhere to the notion that in a genuine parliamentary system only the legislative branch represents the democratic will. As a result, a provision for three separate, overlapping, and mutually reinforcing powers – legislative, executive and judicial – was not specifically incorporated into the Constitution. Second, despite the restoration of the presidency and of parliamentary bicamerality, the amendments did not remove the Constitution's definition of the Sejm as the 'supreme organ of state authority' and 'the incarnation of the will of the Nation.'[14] Thus, in the legislative branch political power remained concentrated in the Sejm. Third, the President was to be elected by a vote of both legislative chambers, limiting the autonomy of the President vis-a-vis Parliament.

Implementing the Round Table Agreements and the April Amendments, on 4 June 1989 Poland held its first free national elections since World War II. Solidarity candidates won sweeping victories both in the races for the Senate (99 out of 100 seats) and in the races for the minority of seats open to free election in the Sejm. The ZSL and SD, once loyal and obedient allies of the PZPR, could not overlook this landslide. Upsetting the communist-led coalition that the Party had hoped to use to control the Sejm, the ZSL and SD switched their

allegiance to Solidarity, giving it an effective majority in the Parliament. With this new political equation, the previously rubber stamp Sejm began to obtain a life of its own. Several influential members of Solidarity demanded the leadership of the Government as the price of their support for Jaruzelski's presidency.

On 4 July 1989 General Jaruzelski, the only presidential candidate, was elected by the National Assembly to the presidency by a humiliating majority of one vote (after four recounts), a 'victory' which the Solidarity leadership had to engineer in order to uphold the Round Table bargain.[15] Shortly afterwards, Jaruzelski designated another communist general, former Interior Minister Czeslaw Kiszczak, as Prime Minister. But without the support of the ZSL and SD, Kiszczak was unable to form a government. A Solidarity-led parliamentary coalition, including the ZSL and SD, eventually formed a Government around Tadeusz Mazowiecki, a Catholic journalist and longtime advisor to Lech Walesa, who was then the undisputed leader of the coalition. While Mazowiecki allowed the communists to join the new Government and to retain control over the Ministries of Defense and Interior (Solidarity retained the important economic ministries), the monolithic communist rule in Poland had come to an end. The new Solidarity-led majority in Parliament soon began to work toward comprehensive constitutional reform.

The April Amendments became outdated by the rapid emergence of the new political order; its patchwork approach to solving fundamental flaws in the 1952 Constitution left many important institutional areas cloudy and ill-defined. As Professor Sokolewicz commented at the time: 'The April Constitutional amendments are not the realization of a consciously planned long-term project of constitutional reform and still must be melded into an entirely new constitution.'[16]

While the dominant long-term goal was to promulgate an entirely new constitution, Solidarity leaders agreed to continue the operation of the Polish state during the period of transition under the amended 1952 Constitution. However, with the disintegration of the Soviet bloc and the dissolution of the PZPR, the 1952 Constitution, which still explicitly proclaimed 'friendship' with the Soviet Union and extolled the 'leading role' of the Communist Party, had to be changed.[17]

(ii) The 'December Amendments'

On 29 December 1989, the Sejm adopted the so-called 'December Amendments' to provide a legal basis for the functioning of

democratic institutions and to purge the Constitution of the symbolic remnants of the Stalinist legacy. The December Amendments deleted the Constitution's preamble and its first two chapters on the political and socioeconomic system of the Polish People's Republic. They also eliminated the anachronistic clause declaring the Party's 'leading role', expunged the reference to Poland's alliance with the Soviet Union, deleted the clause describing Poland's economy as based on 'socialized means of production' and introduced the principle of the equality of diverse forms of ownership, thus providing a constitutional foundation for private property and the emerging market economy. The original name of the Polish state, the 'Republic of Poland', was restored and, attacking the heart of Marxist-Leninist phraseology, the term 'working people', for whom the 1952 Constitution was allegedly framed, was deleted from article 2. The new article 2, modeled on provisions of the Polish 1921 Constitution, states that 'Supreme authority in the Republic of Poland is vested in the... Nation.'[18] Symbolizing Polish tradition and self-emancipation, the crown was placed back on the head of the Polish national emblem – the eagle – where it had been since the fifteenth century.

Finally, the most important change introduced by the December Amendments is found in the new article 1, which proclaims that '[t]he Republic of Poland is a democratic state ruled by law, implementing principles of social justice.' This provision, and particularly the phrase 'state ruled by law', is based on the 'Rechtsstaat' principle found in West European constitutionalism. The Rechtsstaat principle hails from nineteenth-century German legal culture and holds that the State has an obligation to be guided by certain principles of justice, fairness and equity in its relations with individuals. As with the concept of 'substantive due process' in America, the constitutional courts of Germany, Spain, Austria, and other European countries have developed a rich jurisprudence through their enforcement and interpretation of their respective Rechtsstaat clauses. Poland's new article 1 was modeled on the Rechtsstaat clause of the German constitution, and it became possible for the judicial branch to look to German and other West European interpretations of the clause. Opportunities to introduce reform measures through this provision were quickly exploited by the Constitutional Tribunal (see Chapter 6 for a discussion of the Tribunal's Rechtsstaat jurisprudence).

With the April and December Amendments, the 1952 Constitution was unrecognizable. As Solidarity leader Bronislaw Geremek noted, with the amendments 'virtually all attributes of so-called ''real social-

ism'' were removed from the Stalin Constitution.'[19] Poland's constitutional framework was now closer to a liberal democratic one, with legislative and executive power genuinely checked, and with the judicial branch provided genuine independence. For most of the forty years of communist rule in Poland, it was not the state institutions but Party structures which provided the key to understanding politics. Now the formal institutions of government and constitutional provisions regulating their relations would provide the basic framework within which democratic political processes would operate.

The first stage of constitutional reform was relatively swift and expeditious not only because of the existing political consensus following the Round Table Agreement, but also because communist deputies in the Sejm had been concerned to demonstrate their own 'democratic credentials' by producing constitutional changes toward liberal democracy. Unfortunately, expediency would not continue to characterize the Polish constitution-making process.

(iii) The Constitutional Committees

Despite the substantial changes, the 1952 Constitution as amended was never intended by those on the forefront of Poland's political renewal to be the nation's final constitutional structure. The December Amendments, like the April Amendments, were intended to be temporary and no effort was made to transform the old document into a permanent basic law of the newly-free Poland. As one Solidarity leader (and future Prime Minister), Hanna Suchocka, stated: 'Full cohesion can be reached only in the new constitution, and not on the road of ad hoc changes.'[20]

It was assumed at the time that the 1952 Constitution, a primary symbol of the communist regime, would soon be replaced by a new document establishing the permanent legal foundation of democratic governance. As Wojciech Sokolewicz wrote: '[T]he 1952 Constitution cannot possibly perform the function of underpinning democratic society, which still remembers its atrocious provenance. It is burdened with the ''original sin'' of having been promulgated undemocratically, when the Stalinist terror was most severe and with a personal contribution by Stalin himself. This constitution, even as amended, cannot become the symbol of reborn and sovereign Poland.'[21]

In the fall of 1990, the Parliament took the first step toward this end by passing a law providing for a new constitution to be adopted by two-thirds of both houses of Parliament sitting together as a National

Assembly and then submitted to a national referendum. To create drafts of the new charter, in December 1989 separate constitutional committees were formed in the Sejm and Senate.

From the very beginning, however, controversy over legitimacy plagued the Polish constitution-making process. In particular, controversy surrounded the Sejm Constitutional Committee, which was chaired by Bronislaw Geremek and composed of 46 Sejm deputies from all parliamentary parties, including the PZPR. Even though Solidarity deputies dominated the Constitutional Committee, a number of Solidarity leaders, including Prime Minister Mazowiecki and Lech Walesa, asserted that because the Round Table Sejm was not the product of fully-free elections, it simply did not have the 'democratic pedigree' to promulgate a new constitution. The Chairman of the Senate Constitutional Committee, the right-of-center Alicja Grzeskowiak, claimed that her committee had greater legitimacy to draft the new constitution as it represented a body that was 'more freely' elected. Parliamentary leaders initially hoped to complete the drafting process by 3 May 1991, the bicentennial anniversary of the promulgation of Poland's first Constitution. However, fundamental differences over how to achieve legitimacy in the constitution-making process and over substantive constitutional choices soon made this schedule unrealistic.

In addition, while passage of a constitution was a dominant political motivation for the new political leadership, Dr Zbigniew Pelczynski, Expert Advisor to the Sejm Constitutional Committee (1989–91), noted three additional factors which contributed to the lethargic pace of drafting in the Sejm: (i) The parliamentary leadership did not realize that unity among the new political elite would prove so fleeting, and that the spirit of cooperation and consensus which characterized relations among the diverse groups under the umbrella of Solidarity would dissipate so quickly; (ii) the Sejm Committee approached the drafting process less as a practical endeavor and more as an academic exercise, with working groups considering constitutional choices from a theoretical and 'axiological' perspective against the interest of time; (iii) in 1990 the Sejm Constitutional Committee was additionally assigned the task of drafting a new electoral law (the existing one had been tailored to the Round Table Agreement), and this highly divisive project (with smaller parties favoring strict proportionality and larger parties favoring percentage thresholds) considerably slowed the drafting process.[22]

In the fall of 1991, both the Sejm and Senate Constitutional Committees finally produced constitutional drafts. The Sejm draft, inspired in part by the German Basic Law of 1949, envisaged a parliamentary system, with a relatively weak president acting as an arbiter of executive power rather than a chief executive. The Senate draft, inspired in part by the French 1958 model, favored a semi-presidential form of government, vesting the President with full Government appointment powers. Both drafts specifically provided for the separation of powers and asserted the supremacy of the Constitution and of the decisions of the Constitutional Tribunal over ordinary legislation. While the Sejm draft contained a broad range of social and economic rights, the Senate draft contained only negative rights.[23]

By 1991, however, there had emerged a consensus among political elites that the Round Table Sejm, although fully prepared both politically and intellectually to draft a constitution, nevertheless lacked the social legitimacy to promulgate the new constitution because it was the product of a contract with the previous regime and because former communists continued to form a majority in the Sejm. Bronislaw Geremek argued in vain that the adoption of the new constitution was a vital immediate practical matter because of the lack of clarity in the relations among the main organs of the state. He also insisted that circumstances were uniquely propitious, as the communists were still demoralized and Solidarity still unified.[24] Despite this logic, Geremek could not persuade other political elites and it was eventually decided that the adoption of a new constitution would have to wait until the Round Table Sejm was replaced with an entirely democratically-elected body.

When the Round Table Parliament was formally dissolved in September 1991, both constitutional drafts were put aside. The new Parliament elected in October 1991 would have to begin the drafting process anew and would have to decide once again how to proceed with work on a new constitution.

While the October 1991 parliamentary elections seemed to negate the initial question of social legitimacy, the results mirrored the breakup of Solidarity into numerous political groupings; both the Sejm and the Senate emerged highly fragmented, with 29 political parties represented in the Sejm and 13 in the Senate (Table 4.1 identifies the main political parties in Poland after 1989, their leadership, and provides a notion of their policy orientations; Table 4.2 lists the results of the 1991 parliamentary elections). An electoral system of strict proportionality (modelled on that used in post-World War I

Table 4.1 Political Parties, Programs, and Leaders (1990–4)

Party	*Policy Orientation*	*Leaders*
Democratic Union (UD) (now UW) split into:	• centrist, market-oriented, intellectual	Hanna Suchocka
1) Liberal wing (ROAD)	• State intervention, anti-clerical	Jacek Kuron
2) Social-liberals	• market-oriented, social democratic	Zofia Kuratowska
3) Moderates	• ethical, anti-populist	Tadeusz Mazowiecki
4) Right wing	• nationalist	Aleksander Hall broke away in 1992 to form the Conservative Party
Liberal Dem. Congress (KLD) (now part of UW)	• laissez-faire, supply-side, libertarian, secular	Jan Krzysztof Bielecki Donald Tusk
Christian Nat'l Union (ZChN)	• right-wing, nationalist, clerical, economic interventionist	Wieslaw Chrzanowski Jan Lopuszanski
Polish Peasant Alliance (PSL)	• combines former communist satellite party (ZSL) with postwar PSL; protectionist, interventionist, secular	Waldermar Pawlak
Democratic Left Alliance (SLD) (SdRP & OPZZ)	• third way welfarism, secular	Aleksander Kwasniewski
Center Alliance (PC)	• capitalist, Christian Democratic, formerly pro-Walesa, interventionist	Jaroslaw Kaczynski Jacek Maziarski
Confederation for an Independent Poland (KPN)	• anti-communist, ultranationalist, law & order, Keynesian, anticorruption	Leszek Moczulski Krzysztof Krol
Peasant Accord (PL) in alliance with Christian Peasant Party (SChL) and rural Solidarity	• Catholic, small family farm support, nationalist re. foreign investment	Jozef Slisz Henryk Bak
Solidarity (Solidarnosc)	• interventionist, mixed economy	Marian Krzaklewski
Movement for the Republic (RdR)	• post-election group for accelerated decommunization	Jan Olszewski Jan Parys
Non-Party Reform Bloc (BBWR)	• Solidarity, business community, local government	Lech Walesa (unofficially)

Table 4.2 Major Parties in the Sejm after the 1991 Parliamentary Elections

Party	*% of Vote*	*Seats Won*
Democratic Union (UD)	12.31	62
Democratic Left Alliance (SdRP & OPZZ)	11.98	60
Catholic Election Action (WAK)	8.73	49
Center Alliance (PC)	8.71	44
Polish Peasant Alliance (PSL)	8.67	48
Confederation for an Independent Poland (KPN)	7.50	46
Liberal Democratic Congress (KLD)	7.48	37
Peasant Accord (PL)	5.46	28
Friends of Beer (PPP)	3.27	16
19 other parties	11.86	43

Poland), without a percentage threshold to keep smaller parties out of the Parliament, had been used to enhance the body's 'representativeness'. The largest party in the Sejm, the Democratic Union (UD), controlled a mere 13 per cent of the seats. To complicate the equation, the SdRP, the successor party of the former Communist Party, emerged with 12 per cent of the vote and was the second largest party in the Sejm. The Senate was somewhat less divided (it had used the first-past-the-post rather than a proportional electoral system), but eleven national parties, Solidarity, and the German minority gained seats, along with 14 independent or regional candidates. With this political makeup, it would be difficult to consolidate a stable constitutional majority, and the passage of a new constitution would need a two-thirds majority in both houses of Parliament. By the end of 1991, it was plain that the promulgation of an entirely new constitution would be a long and drawn-out process.

B THE 1992 'SMALL CONSTITUTION'

(i) Background: Institutional Dilemmas After 1989

After the dissolution of the PZPR in January 1990, the Solidarity Union and two new political parties, the Center Alliance (*Porozumienie Centrum*–PC) and the Liberal Democratic Congress (*Kongres Liberalno Demokratyczny*–KLD), led a successful movement to replace General Jaruzelski as President. Presidential elections were scheduled

for the fall of 1990, and the institution of the presidency was fundamentally strengthened on 27 September 1990 by a constitutional amendment introducing direct popular election for the office (for the first time in Polish history), making the presidency autonomous vis-a-vis Parliament and giving the elected President an independent legitimacy.[25]

While Jaruzelski as President had been unobtrusive (he made no use of his right of legislative initiative, and vetoed only one piece of legislation, concerning the sale of state land to foreigners), Lech Walesa had assumed he would be a strong activist President (he had used the image of a 'flying Dutchman' travelling around the country making the necessary repairs). But Walesa discovered soon after being elected that while presidential powers were formally rather broad, they did not provide ready tools with which to exert control over the nation's affairs. The sweeping powers implied by the Constitution, particularly in the areas of foreign policy, defense, and national security, were not complemented by specific mechanisms necessary to exercise them in practice. The Constitution also provided for foreign policy-making to be shared with the Government, as the Ministers of Defense and Foreign Affairs had overlapping prerogatives. This cloudy articulation of practical executive powers suited President Walesa's opponents, who were anxious to limit what they saw as the President's unpredictability and thirst for power.

An early indication of conflicts within the executive branch and between the executive and legislative branches was the controversy over the President's staff. Walesa proposed a new 200–member Political Council (*Rada Polityczna*) attached to his office to function, as he envisioned it, as a consultative body to ensure continuation of the government's economic reform program. The Sejm leadership expressed fears that the proposed Council would become a 'super-government' or a 'super-parliament' and encroach upon the executive authority of the Prime Minister.[26] The issue did not become an immediate point of contention because Walesa eventually agreed to create a smaller Presidential Advisory Committee, but it served as a harbinger of questions to come concerning the powers of the President, the Prime Minister, and the Sejm.

In 1991 the need for a constitutional remedy to address ambiguities in the provisions defining the respective powers within the executive branch became increasingly obvious. For example, in April 1991 Janusz Lewandowski, Minister of Ownership Transformation, presented the Government's views on reprivatization (the restoration

of property to its previous owners). The Government declared itself in favor of limited reprivatization of property which had been illegally confiscated, with compensation in the form of capital shares. The next day President Walesa's representative presented a draft document proposing the physical return of all possible property with few exceptions, while industrial enterprises would secure 20 per cent of shares to their workers. The Government had rejected such an approach as impractical and too costly. Right up to the parliamentary elections in October 1991, Walesa continued to return to his own schemes for distributing wealth to the people.

Walesa's tendency to issue statements directly counter to the policies of the Bielecki Government and his animosity toward the 'contract Sejm' highlighted the need to redefine the relationships among the key political institutions. Constitutional change became a key item of the parliamentary agenda. Discussion of the constitutional options centered on the persona of President Walesa himself, with his supporters, especially the Center Alliance and Aleksander Hall, the leader of the new 'Conservative Party' (*Partia Konserwatywna*), pushing for a 'French-style presidency' based on the De Gaulle Constitution of 1958, and his opponents leaning toward a classical parliamentary democracy modelled on the 1921 Polish Constitution, which they saw as effectively curbing Walesa's seemingly boundless ambition.

The need for a new constitutional framework became even more pressing in the fall of 1991. After the fully-free parliamentary elections of October 1991 had created a Parliament with legitimacy equal to that of the President, the formation of a government coalition over Walesa's objections became possible, and the potential for open conflict within the executive branch emerged. Considering that the amended 1952 Constitution did not provide any guidance for executive branch cooperation, a working relationship between president and prime minister was the *sine qua non* for effective government. As personal animosity between Prime Minister Jan Olszewski and President Walesa grew, the lack of a precise constitutional division of power proved destabilizing. The selection of a new government after the 1991 parliamentary election became symbolic of the growing conflict between president and prime minister over their respective prerogatives.

President Walesa's initial selection on 8 November 1991 of Geremek (UD) as his candidate to form the new government was rejected by center-right parties in Parliament. In November and December 1991, using his constitutional prerogative to nominate the Prime

Minister, Walesa delayed for weeks the nomination of Jan Olszewski (PC), despite Olszewski's ability to consolidate the backing of a minority center-right parliamentary coalition. In late December 1991, Walesa finally yielded and nominated Olszewski, but he still described the new government as 'inappropriate for the country's needs'.[27]

The Olszewski Government responded by attempting to end Walesa's role as coordinator of security and defense policy. When the President tried to maintain contact with high-ranking officers in his capacity as supreme commander of the armed forces, the Defense Minister, Jan Parys, accused him of an unconstitutional attempt to subvert control over defense policy-making. On 6 April 1992 Defense Minister Parys charged in a speech to the General Staff (broadcast over television) that the army was being used by 'certain politicians' to bring down democracy in Poland.[28] Parys alleged that high-ranking army officers had been approached by the President's advisors with a promise of promotions if they joined the conspiracy. Walesa denied the allegations and counter-charged that, as the constitutionally-designated commander-in-chief of the armed forces, it was natural for him to have frequent contact with the military. The confrontation quickly escalated to symbolize the extent of presidential prerogative versus powers of government, with the authority to control the armed forces, including key personnel decisions, at stake.

The uproar in parliament and the media over Parys' statements forced Olszewski to place his defense minister on leave of absence. At the same time, Olszewski raised the stakes in the confrontation by remarking to the press that the Parys affair 'reflected a struggle among the President, the Government, and the Parliament for leadership of the Polish army'.[29] By the time the Olszewski Government was ousted over the 'lustration affair' in June, feuding between the Government and the President over control of defense policy had brought executive branch operations virtually to a halt (see Chapter 7 for a discussion of the Olszewski 'lustration affair').

The paralysis of government during the final months of 1991 and the first half of 1992 brought home the urgent need for a new constitution. In a poll taken by the Center for the Study of Public Opinion (CBOS), 65 per cent of respondents expressed dissatisfaction with the 'political chaos' that accompanied democratic transformation in Poland, while only 27 per cent were pleased with the changes.[30] The government crisis also undermined public confidence in the political system. In a July 1992 CBOS poll, 72 per cent of respondents stated

that the Government was unable to govern because it was prevented from doing so by the excessively fragmented Sejm.[31] These figures reflect the growing fatigue of the population with the protracted constitutional deadlock.

(ii) Drafting and Promulgation of the Small Constitution

While the fragmentation of political alliances during this period complicated work on a new constitution, the need for a clear delineation of power between branches of government, and particularly within the executive branch, became greater. In early 1992, parliamentary leaders decided to adopt a two-track approach to constitutional reform: (i) the National Assembly (both chambers of Parliament sitting together) would appoint a Constitutional Commission entrusted with the task of preparing the new, final constitution; (ii) the Sejm alone would appoint a separate 'Extraordinary Commission' to prepare an interim 'Small Constitution' (an act having Polish precedents dating back to 1919 and 1947) through a series of amendments to the existing constitutional framework.

In February 1992, the specially-appointed Sejm Extraordinary Commission under the chairmanship of former Prime Minister Mazowiecki began to consider draft legislation for a Small Constitution which had been submitted by the Democratic Union, the largest party in the Parliament at the time.

By the end of July 1992, the Extraordinary Commission completed its work on the draft of the Small Constitution, which was entitled 'Constitutional Act on Mutual Relations between Legislative and Executive Powers of the Polish Republic'. The Commission's work coincided with and was undoubtedly influenced by the various political crises in late 1991 and early 1992 which had resulted in the fall of the Olszewski Government. The political gridlock that slowed the formation of a new Government in late 1991 had also demonstrated the need to depart from traditional 'parliamentary' mechanisms of nominations and dismissals. Accordingly, important decisions on the Small Constitution were made with a keen awareness of those areas where the new document could play a constructive role in clarifying the divisions of power within the executive branch as well as between the executive and legislative branches.

On 1 August 1992, less than one month after the formation of a Government based upon a diverse yet solid coalition (ranging from the right-of-center ZChN to the left-of-center UD) headed by Hanna

Suchocka, a constitutional law scholar from the UD, the political parties in the Sejm, still shocked by the events leading to the fall of the Olszewski Government, mustered a rare two-thirds majority and approved the draft of the Small Constitution that had been submitted by the Extraordinary Commission in late July.[32] On 17 October the Sejm, having rejected most of the Senate's proposed amendments (which had strengthened the Senate's position in the legislative branch), adopted a final version of that document. Although President Walesa initially claimed that the Small Constitution excessively limited presidential powers, on 17 November he signed the document into law. On 8 December 1992, the Small Constitution became effective as a 'provisional measure' until a full constitution could be agreed upon.

The goal of the Small Constitution was both to strengthen the executive branch and to delineate the respective powers of the Government and the President in order to prevent a repetition of the conflicts that had erupted between President Walesa and former Prime Minister Jan Olszewski. Although ill will and political ambition also fueled this antagonism, much blame for the conflicts within the executive branch rested with the ambiguities that surrounded the role of the President in Poland's amended constitution. The framework of government established by the Small Constitution finds its basic model in the German Constitution of 1949, although it gave more power to the President than does the German Basic Law.

From the standpoint of constitutional law, the Small Constitution represented a compromise between presidential and parliamentary systems of government. However, as the drafters wanted to remedy the political paralysis that emerged from the conflicts within Poland's political elite, political practice as well as constitutional theory shaped the terms of the document, with the persona of President Walesa being an important point of reference for the document's authors. In this way, the Small Constitution was intended to provide a formula for productive cooperation and equilibrium among the three top state authorities.

(iii) The System of 'Rationalized Parliamentarism' under the Small Constitution

The Small Constitution preserved the post-1989 framework of constitutional structures, including the bicameral parliament composed of the Sejm and Senate, which could sit together as the National Assembly; the President and the Government headed by the Prime Minister;

the courts of law and the Supreme Court; the Constitutional Tribunal; the Ombudsman; and the Tribunal of State. However, the Small Constitution altered the relationship between the legislative and executive branches and introduced elements of the concept of 'rationalized parliamentarism' into the political structure. This concept has as its fundamental underpinning the application of 'rewards and punishments': the Sejm would be able to exercise important constitutional powers only if there existed a strong and stable legislative majority. As long as such a majority existed, the Sejm would be able to dominate the process of government and the ability of the President and the Government to effectively challenge parliamentary decisions would be restricted. But if no such majority existed, the Sejm's powers were constricted and other state organs would have the opportunity to impose their will on the Parliament. The aim of 'rationalized parliamentarism' was to inhibit so-called 'negative majorities' (for example, parliamentary coalitions created only to dismiss the sitting Government) as well as the fragmentation of parliament into many small groups.

The most important systemic change introduced by the Small Constitution was its elimination of the Sejm's former status as the 'highest institution of state authority.' Instead, the Small Constitution enshrined in Article 1 the principle of separation and balance of power between the three branches of government. But while the Constitution continued to vest legislative power in the Parliament, this legislative power was no longer absolute.

The Small Constitution granted the Government the right to obtain from Parliament the power to issue decrees with the force of law that could address all areas of public policy with the exception of personal and political freedoms, budgetary matters, and labor issues.[33] Both the Bielecki and Olszewski Governments had complained that the cumbersome nature of the legislative process threatened economic initiatives. Indeed, the programs of both governments had been frustrated by substantial backlogs of parliamentary work, leading both to urge that special powers be granted to the Government to legislate by decree in the crucial sphere of the economy. According to the Small Constitution, Parliament would decide, through a special statute, the areas of legislation that were subject to government decrees and how long these powers were in force. But in those areas in which the Government was granted the right to issue decrees, that right was exclusive; no other body could submit legislation in those areas when the decree power was in force. Parliamentary confirmation was not

required for Government decrees, but, to be valid, each decree had to be signed by the President.[34] A decree remained in force unless repealed by parliamentary statute. In addition, the Government could also request 'expedited legislative process' from the Sejm for Government bills.[35] Each of these legislative mechanisms was designed to prevent legislative deadlock from hampering the public policy-making process, especially in the area of economic reform, and to facilitate government legislative initiatives.

As another adjustment to the legislative branch, the Small Constitution transformed the symbiotic relationship between the Senate and the Sejm, particularly in the legislative process. Senate amendments to parliamentary legislation could now be rejected by the Sejm through an absolute majority vote (and not by the two-thirds vote as required by the 1989 Amendments). However, if the Sejm failed to muster an absolute majority to reject the Senate's amendments, they were considered adopted; under the previous constitutional framework, such failure resulted in deadlocking parliamentary legislation.

With regard to the executive branch, the Small Constitution provided for direct popular election of the President for a five-year term; reelection was permitted only once. The President was held responsible for any breach of the Constitution (and parliamentary statutes) and could be tried by the Tribunal of State upon an indictment brought by the National Assembly through a two-thirds majority vote. The President's veto power over parliamentary legislation was preserved, as was the Sejm's power to override such a veto by a two-thirds majority vote. The presidential dissolution power would be another important check on Parliament, but the President could dissolve the Sejm only in certain constitutionally-enumerated circumstances, including the failure of the Sejm to adopt the state budget within three months, the failure of the Sejm to form a Government, or when the Sejm voted no-confidence in a sitting Government without simultaneously nominating a new Prime Minister. Thus, in practical terms only a weak or fragmented parliament that failed to fulfill its constitutional duties faced dissolution. Most importantly, the President lost the very broad (and subjective) power provided by the April Amendments to dissolve Parliament if it adopted legislation that 'prevents the President from executing his constitutional responsibilities.'

The Small Constitution did not alter the basic responsibilities of the presidency: the President 'shall ensure observance of the Constitution, safeguard the sovereignty and security of the state, the inviolability

and integrity of its territory, as well as uphold international treaties.'[36] The President retained legislative initiative and could subvert the Sejm by calling a referendum with the consent of the Senate. At the same time, the Small Constitution clearly articulated those presidential prerogatives that were previously ambiguous. Under the April Amendments, the sweeping powers reserved for the presidency, particularly in the areas of foreign and defense policy, were defined equivocally, and therefore were difficult to exercise. The Small Constitution explicitly provided for presidential stewardship over foreign and defense policy. Guaranteeing presidential supervision in this area, the Small Constitution required the Prime Minister to seek the President's opinion before appointing foreign, defense and interior ministers, effectively giving the President control over these ministries.[37]

While the wording 'in consultation with' left room for interpretation, and while several subsequent prime ministers, in particular Jozef Oleksy, resisted presidential control over the appointment process, presidential prerogative in selecting the ministers of foreign affairs, defense and interior became the established convention, as intended by the framers of the Small Constitution. Moreover, the President would unequivocally be the Supreme Commander of the armed forces and had the right to appoint (in agreement with the Defense Minister) the Chief of the General Staff of the armed forces. In this way, the presidential prerogatives articulated in the Small Constitution were belated constitutional confirmation of Walesa's political victory in his struggle with Defense Minister Parys and Prime Minister Olszewski.

However, under the new rules the President was not considered the head of Government and, apart from foreign and defense policy, was unable to impose his will on the Prime Minister or the Council of Ministers unless the Government lacked an adequate parliamentary basis. While the President was given an important role in the formation of a new Government, the office did not have the power to dismiss a duly appointed Government. Moreover, certain presidential acts became valid only if countersigned by the Prime Minister or an appropriate Minister, who in so doing took parliamentary responsibility for the act. Thus, as stated in article 53, 'the Council of Ministers shall make decisions in all matters relating to the policy of the State which have not been reserved to the President or to another organ of state.' This definition reflects a preference for a parliamentary system in the Small Constitution.

The Small Constitution established an entirely novel procedure for choosing a Prime Minister and forming a Government. The procedure reinforced the interdependence of the President and Parliament while limiting the possibility that Poland would be without a Government for long periods of time. Under the April Amendments, the President had the exclusive right to nominate the Prime Minister, and the Sejm was responsible for voting the nominee into office. Such a division of responsibility led to conflict when the Sejm objected to a nominee preferred by the President (for example, the nomination of Bronislaw Geremek in 1991) or when the President objected to a nominee preferred by a Sejm coalition (for example, Walesa's reluctance to nominate Jan Olszewski in 1991). The new procedure shifted the burden of choosing a Prime Minister back and forth between the President and the Sejm. The President was given the first opportunity to name a Prime Minister, but his nominee's cabinet would have to receive a 'vote of confidence' by an absolute majority of the Sejm within 14 days. If such a vote was not forthcoming, the responsibility to form a Government and choose a Prime Minister shifted to the Sejm, which would have to muster absolute majority support for its own candidate. If the Sejm was successful, the President would have to accept the Prime Minister and the Government chosen by the Sejm majority. The President and the Sejm would have four alternating chances to nominate. In case of a deadlock, the President could either appoint an 'interim government' for a six month period or dissolve the Parliament and call new elections.

Finally, the Small Constitution made it more difficult for a sitting Government to be dismissed. Previously, both the Prime Minister and Ministers could be dismissed by a simple resolution of the Sejm. Now the process of dismissing the Government had several new procedural requirements. A motion for dismissal would have to be signed by at least 46 members of the Sejm (10 per cent of the chamber) and adopted by an absolute majority of the Sejm. If rejected, the motion could not be resubmitted within three months unless it was signed by at least 115 members of the Sejm (25 per cent of the chamber). The Small Constitution also established two versions of the 'no-confidence' vote: (i) a 'simple' vote of no confidence, which would occur when the Sejm (with an absolute majority of its members present) required the dismissal of a sitting Government; and (ii) a 'constructive' vote of no confidence, which would occur when the Sejm simultaneously dismissed a sitting Government and nominated a new Prime Minister.[38] Only the latter would be binding for the

President, who had to accept the designated Prime Minister. In the case of a 'simple' no-confidence vote, the President could choose between dismissing the Government and dissolving the Sejm (and – in May 1993 – President Walesa chose the latter alternative). In this way, while the Government remained politically responsible solely to the Sejm, it was less vulnerable to volatile parliamentary behavior; the constructive vote of no-confidence in particular made the Government less dependent on the purely negative powers of the Sejm.

In this new balance of power, the notion of 'rewards and punishments' functioned as the theoretical underpinning for almost all of the processes and procedures established in the Small Constitution. As long as the Sejm was able to muster an absolute majority, it had broad powers to replace a sitting Government with a new one, and the President had to comply with the Parliament's decision. As the continued existence of the Government in this context depended on continued parliamentary support, it had to conduct policy-making in a way acceptable to the Sejm majority, even over the President's objections. Further, the Government had important controls over the President, as its members could refuse to countersign presidential acts. However, if the Sejm became too fragmented to form an absolute majority, its powers were much more constricted. The President was able to form his own Government, the Government countersignature did not have political importance, and no-confidence votes would allow the President to dissolve Parliament, leaving the country with the President and 'his' Government.

Through this system of rationalized parliamentarism, a network of checks and balances was established in the Polish system of government by the Small Constitution. The President had important checks on the Sejm, with its veto power, and on the Government, with its veto over decrees; however, there were important limits on the President *vis-à-vis* the other branches. In his attempt to bypass the Sejm by means of referendum, the President was required to gain the cooperation of the Senate. The Sejm had checks on the President with countersignature requirements, and on the Government through no-confidence measures. While the Government had some measure of freedom from both the President's and the Parliament's direct interference in the operation of the state, it could never act without restraints.

The Small Constitution was a compromise document firmly rooted in the Polish political realities of the early 1990s. *Gazeta Wyborcza* commentator Dawid Warszawski observed sardonically that 'other democratic constitutions in history were generally the result of a

compromise between what is and a vision of what, in the opinion of various political forces, should be. Poland's Small Constitution is a compromise between what is and what is.'[39] Warszawski went on to argue, however, that the Small Constitution was a positive development if viewed in the proper perspective, 'as a giant rule book for solving conflicts'.

The Small Constitution constituted a rejection of President Walesa's ambitious plans to create a 'French-style' political system centered on the presidency. However, the Small Constitution also constituted a qualified gesture of confidence in both the institution of the presidency and in President Walesa. While the President's powers did not expand, neither were they reduced, which is surprising considering that immediately after the October 1991 elections the Parliament seemed destined to constrict the presidency and to maintain a classical parliamentary system as long as Walesa was in power. The terms of the Small Constitution, creating a parliamentary government with more extensive presidential powers than is usual in parliamentary systems, suggested that the Sejm was willing to accept Walesa's activist role as President.

Importantly, the passage of the Small Constitution confirmed the return to political balance and a spirit of cooperation demonstrated in the formation of Prime Minister Hanna Suchocka's seven party government in July 1992. From the start, Suchocka (UD) emphasized the need for the Government to cooperate with President Walesa to reinvigorate the public policy-making process; during its existence the Suchocka Government achieved an impressive array of policy successes, including the passage of an austerity budget in keeping with the nation's economic reform program and the passage of the Mass Privatization Program in the spring of 1993. The Sejm's activity, despite its political fragmentation, was also impressive. Between August 1992 and May 1993 it passed 62 laws, including vital taxation and banking measures. These and other successes demonstrated the viability of the new institutional arrangements.

After the parliamentary elections of 1993, resulting in a victory for the post-communist SLD–PSL coalition, the Small Constitution provided the institutional basis for a cooperative relationship between the President and the Government and the President and the Parliament, an impressive achievement considering that these institutions were occupied by politicians from opposite sides of the political spectrum. Indeed, between the beginning of 1993 and the end of 1994 Poland had three Governments, two of which were antipodal ideologically

with the President. But throughout this period both the new and the (relatively) old holders of power maintained their commitment to the principle of the rule of law and carefully followed constitutional procedures. As Wiktor Osiatynski wrote, 'the clever compromise of the Small Constitution constitutes one of the greatest successes of the Polish democracy. This is proof that compromise, despite the representation of interests, can be reached.'[40]

Table 4.3 Parties in the Sejm after the 1993 Parliamentary Elections

	% of Vote	*Seats Won**	*% of Seats*
SLD	20.4	171	37.2
PSL	15.4	132	28.7
UD (UW)	10.6	74	16
UP	7.3	41	8.9
KPN	5.8	22	4.8
BBWR	5.4	16	3.5

Note:
* Special arrangements also generated four seats for minorities

The shortcoming of the checks and balances arrangement provided by the Small Constitution is that it was limited to reform of the executive and legislative powers. The Small Constitution did not address constitutional rights and liberties, nor did it establish new instruments to protect them. As a result, the 1952 Constitution's chapter on rights and liberties, and the chapter on the Polish Constitutional Tribunal promulgated in 1982 and establishing a limited form of judicial review, remained in force. Criticizing these omissions, Senator Ryszard Bender (ZChN) stated: 'While the Small Constitution formally invalidates the 1952 Constitution, it retains a number of its chapters. This resembles throwing the devil out the window only to let him in through the door.'[41] The Small Constitution made the largely symbolic gesture of invalidating the 1952 Constitution, but the old approaches to constitutional rights and judicial review were continued. Political elites stated that these questions would be resolved in a 'final' constitution.

(iv) The Judicial Branch After 1989

The Small Constitution did not change the basic framework of the Polish judiciary, but after 1989 the independence of the regular

judiciary was secure. In addition, the Constitutional Tribunal served to safeguard the legal and constitutional order (see Chapter 6 for a discussion of the Tribunal's practice of judicial review).

At the top of the system of regular courts is the Supreme Court, which consists of 70 justices, divided into four separate chambers: civil, criminal, military and administrative/labor/social insurance.[42] The Supreme Court does not adjudicate cases like a trial court, but rather exercises supreme supervision over judicial decisions: it reviews valid regular court decisions through the process known as 'extraordinary revision'; such proceedings may only be initiated by the First President of the Supreme Court or by the Minister of Justice. The second fundamental competence of the Supreme Court is to promulgate 'interpretations of law', which are general remarks on the correct interpretation of particular statutes and regulations to provide direction for regular courts and other state bodies in the application of the law. Interpretations of law may be promulgated either on the basis of a legal question presented before the Court emerging from a concrete case and controversy heard in a regular court or, in an abstract way, on the basis of a motion from the First President of the Supreme Court or from the Minister of Justice.

In stark contrast to the practice during the communist era, when constitutional provisions were deprived of normative content, under the new leadership of the widely respected Professor of Law, Adam Strzembosz, the Supreme Court after 1989 began to refer directly to the Constitution in its decisions. In a September 1991 decision, the Supreme Court interpreted the Constitution's article 1 (Poland is a 'democratic state ruled by law') as prohibiting laws from being retroactive.[43] This decision, explicitly referring to a constitutional provision, reflected the new approach to the Constitution as a direct source of law. Since this decision, the Supreme Court has regularly referred to constitutional provisions to support its decisions, but generally has interpreted the Constitution according to precedents set by the case law of the Constitutional Tribunal.

(v) Individual Rights and Freedoms

The Small Constitution also did not change the existing framework of individual rights and freedoms. As a result, rights and freedoms continued to be based on the provisions of the 1952 Constitution (with the 1976 amendments). While this was an obvious deficiency of Poland's post-communist constitutional framework, it was initially

assumed that this area would be radically transformed with the adoption of an entirely new constitution. However, as work on the new constitution was delayed, the pre-existing chapter on rights and freedoms remained in force. Professor Rzeplinski noted two reasons why the Constitution's chapter on rights was not immediately amended after 1989. First, as the chapter was widely considered to be so steeped in the 'spirit of Stalinism', political elites felt that amendments to it were pointless. Second, the drafting of a new bill of rights was postponed because political elites knew that the process would be extremely long and divisive over the substance of rights, such as whether to include a right to life, positive rights, and binding validity for rights contained in international agreements.

This situation inspired President Walesa to introduce in Parliament on 12 November 1992 constitutional legislation known as 'the Charter of Rights and Freedoms' (*Karta praw i wolnosci*) that was to replace the old chapter on individual rights in its entirety. The Charter contained twenty-two basic civil and political rights common to all liberal democracies, such as the rights to information and privacy (including a ban on obliging anyone to 'declare his convictions, opinions, religion or nationality'). The structure of these rights' provisions was based on the model of the European Convention on Human Rights and on other international documents. The Charter would have been directly binding on public authorities, providing an important step away from the previous approach to the constitution as a set of programmatic goals. Importantly, the Charter provided several new rights enforcement mechanisms, all directly available to individuals, the most basic of which was court action in defense of rights. Not only would rights be directly enforceable in regular courts by individual complaint; if the state violated the rights of an individual, the victim retained the right to claim compensation from both the perpetrator and the state.

While the introduction of the Charter in the Sejm came as a surprise, 'a bolt from the blue to the political circles', as Dawid Warszawski wrote, the initial reaction of most members of Parliament was positive.[44] Supporting the draft Charter in a plenary discussion, a Sejm deputy, Donald Tusk (KLD) stated: '[The Charter] offers protection against the threats that are typical of democratic societies, in particular against the tyranny of the majority.'[45]

By May 1993, the special Sejm Commission entrusted with reviewing the draft Charter had agreed on only 5 of its 49 articles when work was suspended by the dissolution of the Sejm at the end of

that month. In April 1994, after a new parliamentary Constitutional Commission had been convened, President Walesa resubmitted the Charter as part of a comprehensive constitutional draft. Thus, unlike in 1993, no separate legislative track for the Charter was established.

As a result, during the first eight years of the post-communist era Poland lacked a new comprehensive framework protecting individual rights and freedoms, but this deficiency was counter-balanced, even if only partially, by four developments. First, in early 1989 Chapter I of the 1952 Constitution concerning 'basic principles of the political structure' was changed in its entirety, and important constitutional principles were added to advance certain individual rights. In particular, the clause contained in the Constitution's new Article 1 describing Poland as a 'democratic state ruled by law' became in practice, with assistance from the courts and especially from the Constitutional Tribunal, a crucial element in applying and enforcing individual rights. Where the new interpretation of constitutionally-based individual rights proved difficult, the Constitution's new 'Grundnormen' facilitated their application. While this situation was not optimal, it allowed for the protection of individual rights (see Chapter 6 for a discussion on the Tribunal's interpretation of Article 1 to enhance individual rights).

Second, in November 1992 Poland ratified and incorporated the European Convention on Human Rights and Fundamental Freedoms, introducing into the legal system a series of norms of a direct, immediate, straightforward, binding and enforceable character. All regular courts in Poland now have the prerogative to enforce the Convention over indigenous legal norms. Moreover, Polish citizens may approach the European Court of Human Rights in Strasbourg with complaints of violations of the Convention. An unprecedented Supreme Court decision in 1991 showed the new importance of international conventions when the Court explicitly relied on the 'United Nations Covenant on Civil and Political Rights', ratified by Poland in 1977, to overturn a lower court decision.[46] The Court also declared that when domestic law is in conflict with a ratified international treaty, the latter prevails.

Third, while work on the new constitution was slow, numerous statutory changes were made by Parliament in the area of individual rights and freedoms. Immediately following the Round Table Agreement in 1989, the Parliament passed a series of laws enhancing political rights (for example, the freedoms of association and

assembly and the right to form political parties). In May 1989, the Penal Code provision which had criminalized 'the abuse of religious freedom to the detriment of the Polish state' was repealed.[47] Moreover, article 282a of the Penal Code, which had criminalized 'organizing or directing unlawful protest action' or 'acting with the aim of causing public disquiet or disorder' and which had been used extensively during the communist era to repress the democratic opposition, was repealed.[48] Subsequently, changes were made in the area of criminal procedure, particularly to enhance guarantees of due process of law.

Fourth, the Polish Ombudsman for Citizens' Rights, created in 1987, has been very active in protecting individual rights and freedoms by investigating whether the actions or omissions of state bodies are in accordance with law and the Constitution. The Ombudsman has wide-ranging investigative powers, and has liberally exercised its right to demand redress of grievances resulting from maladministration and to refer legislation for review by the Constitutional Tribunal. While the first Polish Ombudsman, Ewa Letowska, wrote that 'at the very beginning even lame dogs didn't take me seriously', she became one of the most respected figures in Polish political life.[49] This prestige undoubtedly increased the compliance of state bodies with her findings (the office has few powers to compel adherence).

Like the Constitutional Tribunal, the Ombudsman has become a major safeguard of liberal democratic principles. The Ombudsman tackled issues involving prisoners' rights, gender discrimination, discrimination on grounds of political belief and property rights, among others. Further, the Ombudsman investigated many complaints concerning procedural propriety; Letowska questioned the disqualification of the infamous Party X in the 1991 parliamentary elections on numerous procedural grounds, including the use of outdated information and failure to justify the decision by the State Electoral Commission.[50] Many of the Ombudsman's decisions attracted major criticism, both of Letowska and of the institution itself; this criticism continued into the term of her successor, Tadeusz Zielinski (see Chapter 7 for a discussion of the collision between the Ombudsman and the Polish Catholic Church). Critics of the Ombudsman regard procedural concerns as empty formalism and the protection of minorities as violating the rights of the majority. The nature of this criticism alone shows how the Ombudsman is providing a vital function in the nascent Polish democracy.

Thus, in the area of personal and political rights, an entirely new system of law emerged, providing genuinely effective procedures to challenge official transgression of due process guarantees.

(vi) The Character of Institutional Change: 1989–92

During the communist era, it was not state institutions but party structures which provided the key to understanding politics. Therefore, the major task for those wishing to create a set of democratic institutions was to bring political relationships back within the framework of the state.

Hopes that a unified vision of the desired political structures would quickly result in a new comprehensive constitutional settlement proved unfounded. Nonetheless, the first stage of constitutional change, the amendment of the 1952 Constitution in 1989–90, provided the basis for further evolution of the polity by eliminating the essential features of the communist system. The April and December Amendments also took steps to transform the 1952 Constitution into a liberal democratic one, with legislative and executive powers genuinely checked and with the judicial branch provided genuine independence. With the passage of the Small Constitution, the formal institutions of government and a basic law regulating their relations provided the framework within which democratic political processes would operate in Poland.

The Small Constitution provided specific solutions to the institutional dilemmas which emerged in the first two years of post-communist government. The document clarified and institutionalized a presidential-parliamentary system of government. It also reaffirmed the division of power between legislative and executive branches of government while recognizing the special role of the presidency that had become apparent after the 1991 parliamentary election. In effect, it represented a compromise between Lech Walesa's desire to build a system centered on the President and the insistence of the dominant Sejm parties on the primacy of Parliament.

The Small Constitution also reflected growing awareness that the Government had to be strengthened and made less susceptible to shifting parliamentary majorities if the country was to continue on the path to democracy and reintegration with Europe. The Small Constitution was clearly a compromise, arguably the best one that political conditions in post-communist Poland could produce. As such, it went far in dispelling popular fears following the 'war at the

top' in the spring of 1992 that the country could become ungovernable.

In practice, not only did the Small Constitution assist in the Suchocka government's survival, but it facilitated a more cooperative relationship between President and Government and between executive and legislative branches following the 1993 parliamentary elections, when executive branch offices were occupied by politicians who were ideologically antipodal. The Small Constitution provided a framework with which to avoid governmental deadlock by defining clearly the powers and prerogatives of the three branches of government.

The Small Constitution did not remove all areas of uncertainty and ambiguity. There remained important areas for constitutional reform, especially in the sphere of individual rights and the constitutional framework for judicial review. While conflicts over the nature of the state were not yet settled, the April and December Amendments and the Small Constitution combined to provide the fundamental groundwork for a modern and institutionally stable Polish polity based on notions of limited government and reflective of European constitutional norms. Moreover, the ambiguities and omissions of Poland's hybrid constitutional framework were to a large extent addressed by the activist jurisprudence of the Constitutional Tribunal, which developed constitutional doctrine and principles to complement the existing arrangements (see Chapter 6 for a discussion of the Tribunal's jurisprudence). While the Small Constitution was initially described as an 'interim' document, fundamental political and substantive differences in the constitution-making process meant that it would have to provide the constitutional basis for Polish governance for some time to come.

C TOWARDS A NEW 'FINAL' CONSTITUTION?

Following the promulgation of the Small Constitution, work continued in the National Assembly's Constitutional Commission to prepare a new, final constitution. However, it was obvious that a unified vision of the political structures in a new comprehensive constitutional arrangement would be difficult to achieve. Agreement between political elites was also stymied by continued differences over how to give legitimacy to the constitution-making process and by fundamental ideological and substantive differences over constitutional choices.

(i) The Draft Constitutions

After months of controversy, the procedure to adopt Poland's 'final' constitution was established on 23 April 1992. The Law On the Mode of Preparation and Adoption of the Constitution of the Republic of Poland [hereinafter the 1992 Law] was designed to include as many political groupings and institutional interests in the process of constitution-making, with the Parliament, rather than a specially-appointed constituent assembly, serving as the principal forum for consideration of constitutional issues.[51] The intent of the drafters of the bill was to prevent the constitution from being imposed by a temporary political majority, only to be overturned when a new majority emerges.

According to the 1992 Law, the draft constitution would be prepared by a Constitutional Commission (Commission) consisting of 46 Sejm deputies and 10 Senators (10 percent of the membership of each chamber), making decisions by simple majority in the presence of at least half of all members. In addition, to balance institutional interests, representatives of the President, the Government, and the Constitutional Tribunal would participate in Commission proceedings with the right to propose motions but without the right to vote. The constitution-making process would involve eight steps: (i) drafts could be submitted by the Commission itself, by any group of 46 Sejm deputies (10 per cent of the chamber), by the Senate, and by the President; (ii) after drafts are submitted, debate over certain principal constitutional issues identified by the Commission would occur in the National Assembly; (iii) on the basis of submitted draft constitutions, the Commission then would prepare a uniform text, which it would present to the National Assembly for a first reading; (iv) the National Assembly would consider the provisions of the draft, and could amend the draft on the basis of a two-thirds majority vote with at least half of the members present; (v) the final draft would be adopted by a two-thirds majority of the National Assembly in the presence of over half its members; (vi) the President then would have the right to propose amendments to the draft, which could be rejected by a two-thirds majority vote of the National Assembly; (vii) following its final reading, the draft would again have to be passed by a two-thirds majority vote of the National Assembly; (viii) finally, to give the document 'downstream legitimacy', the constitution would have to be submitted for ratification in a nationwide popular referendum. The referendum would contain only one question: 'Do you support the constitution as adopted by the National Assembly?' A simple majority

of those voting would ratify the constitution; there would be no participation threshold. If the draft was rejected in the referendum, the entire constitution-making procedure would be repeated.

In October 1992, the Commission's membership was elected by the Sejm and Senate. As Commission membership reflects the political makeup of Parliament, each major party in the Parliament elected in 1991 chose representatives for the Commission. The resulting ideological diversity within the Commission's membership led its leadership to decide that the Commission itself would not produce a constitutional draft. Instead, in accordance with the 1992 Law, they would wait six months for drafts to be submitted by parties and institutions. Six draft constitutions were eventually submitted before the final deadline of 30 April 1993 by the following institutions and political parties: the President's office, the Senate, the Democratic Left Alliance (SLD), the Confederation for an Independent Poland (KPN), the Democratic Union (UD), and the Polish Peasant Alliance (PSL) acting together with the Union of Labor (UP) (Table 4.4 provides a comparative survey of certain provisions of these draft constitutions).

Regarding the division of power at the national level of government, drafts submitted by the President, the Senate, and the KPN envisioned a strong presidency along the lines of the Fifth French Republic and provided the President with the power to choose members of the Government and lay down guidelines for Government policy.[52] The UD (subsequently UW) draft called for a presidential-parliamentary system similar to that provided by the Small Constitution. The SLD and PSL drafts called for parliamentary systems and a ceremonial presidency. All the drafts accepted the President's power to veto Sejm bills, and all granted the President the power to challenge the constitutionality of such bills before the Constitutional Tribunal.

While the Commission convened several times during May 1993 to consider the drafts, ultimately all were invalidated by the President's dissolution of the Sejm on 30 May 1993. By dissolving the Sejm, the President appeared to hope that a less fragmented and more productive Parliament would emerge from the September 1993 elections. Poland's new electoral law, passed in June 1993 and inspired largely by German electoral law, was designed to preclude the severe fragmentation that had plagued the previous Sejm by introducing high thresholds for representation and the so-called d'Hondt counting system, which rewards larger groups and penalizes smaller ones during the distribution of seats. The new law retained proportional representation, but requires a political party to receive more than 5

Table 4.4 Survey of Constitutional Drafts Before Constitutional Commission (1993)

Origin	*Positive Rights*	*Presidential Power to Dissolve Parl.*	*State & Church*	*Procedure to appoint PM*	*Judicial Review*
Solidarity	Pos. rts. protected by state, including rt. to work	If Parl. does not produce budget b/f end of term; if Parl. votes no-conf. in Government	'Autonomous', status defined by Concordat	Same as Small Const.	Const. Tr. has power to nullify all uncon. acts
Confed. Ind. Pol. (KPN)	Pos. rts. protected, 'Freedom of Work Guaranteed'	If Parl. fails to produce budget b/f end of term; if Parl. votes no-conf. in Gov.	Primus inter pares	Exclusive pwr. of Pres. to appt. & dismiss PM	Council of St. (COS) reviews constitutionality; Pres. reviews COS dec's.
Peasant Party (PSL)	Pos. rts. protected; rt. to work, to minimum wage; nobody, 'can be deprived of work'	If parl. unable to produce budget w/in deadline; if Parl. votes no conf. in Gov.	'Autonomy, mutual respect & cooperation'	Same as Small Const.	Const. Tr. (CT) dec's are final; ind. right to petition CT
Dem. Left All. (SLD)	Like PSL plus state under obligation to provide 'socio-econ. grds' for rt. to work.	If Parl. votes no-conf. in Gov.	Secular state; rel. tolerance; all churches equal.	Pres. proposes candidate PM to Sejm, who must receive vt. of conf.	CT dec's on statutes referred to Sejm; ind. rt. to pet.
Freedom Union (UW)	Pos. rts. protected; 'Employment guarant'd'; basic health care free.	If parl. fails to produce budget b/f end of term; if Parl. votes no conf. in Gov.	Independence, mutual respect, state coop. w/Church	Same as Small Const.	CT dec's are final & binding; citizen rt. to pet. CT

Senate	Few pos. rts; 'Rt. to prot. of work by state'	If parl. fails to produce budget; if Parl. votes no conf. in Gov. 3X/1 year	Autonomous, independent, mutual respect, may cooperate; relations with Church defined in Concordat; with other churches – by domestic law	Pres. proposes candidate PM to Sejm.	CT dec's are final & binding
President	Positive rts. in in Const. are 'state goals' and not enforceable in ct.	May if parl. fails to produce budget or votes no conf. in Government. Pres. may not dissolve Parl. during last 6 mo's of Pres's term and 1st year of Parl. term.	State & churches 'autonomous', relations with Church subject to Concordat	Exclusive pwr. of Pres. to appt. & dismiss PM	CT & reg. cts. have pwr. to nullify unconst. acts

per cent of the national vote (8 per cent for party coalitions) before it may obtain seats in the Sejm, although national minority-based parties are exempt from this threshold. To further accentuate parliamentary dominance of the larger parties, 69 of the 460 Sejm seats are allocated proportionally to parties gaining at least 7 per cent of the national vote. These provisions were intended to reduce the fragmentation of the new Sejm by deliberately favoring larger parties. The Senate continued to be elected by the first-past-the-post electoral ordinance.

The new electoral law turned out to be more 'efficient' than its drafters had envisioned. As a result of the representation hurdles, only six political parties (as opposed to 29 in 1991) received seats in the Sejm during the 1993 elections, with the left-wing (or 'post-communist') SLD and PSL enjoying decisive victories (see Table 4.3 for the results of the 1993 election). The combination of the new electoral law's high threshold and d'Hondt counting system resulted in SLD and PSL receiving slightly less than two thirds of the seats in Parliament, even though they won only 36 per cent of the popular vote. Of the Solidarity-successor parties, only the Democratic Union (in 1993 renamed Freedom Union – *Unia Wolnosci* or UW) was able to preserve a considerable representation of about 60 members in the Sejm, and thus could introduce a constitutional draft under the 1992 Law. Failing to form coalitions, virtually all right-of-center parties were precluded by the electoral threshold from gaining parliamentary seats, even though these parties received collectively over one-third of the popular vote. The SLD–PSL parliamentary coalition, combined with their ally the Union of Labor (UP), constituted over 75 per cent of both the Sejm and the Senate after the elections, well over the two-thirds required to pass a new constitution. When the new governing coalition overwhelmingly confirmed Waldemar Pawlak (PSL) as Prime Minister in November 1993, hopes were raised that work on the new constitution would gather momentum.

(ii) Questions of Legitimacy

Soon after the new Constitutional Commission commenced its operations in 1993, many right-wing and Christian parties, which were prevented from submitting drafts as they did not hold seats in Parliament, along with President Walesa claimed that the Parliament lacked the legitimacy necessary to frame a constitution because one-third of the voters were not represented. The SLD–PSL leadership dismissed

such arguments as contradicting the very essence of democracy: citizens cast their votes knowing the threshold and d'Hondt bonus rules of the new electoral system. Even if the Commission did not include representatives of every group, they argued, it still reflected a democratic decision. But facing continued opposition and criticism by non-parliamentary groups, in 1994 the governing coalition amended the drafting procedure in three ways in order to enhance the representativeness of the Commission, making it more accessible to non-parliamentary groups.

First, in early 1994 the Parliament adopted a proposal to enlarge the Constitutional Commission to include representatives of non-parliamentary groups. While this proposal was criticized as recruiting Commission members without electoral legitimacy, the leaders of the ruling coalition felt compelled to enhance popular participation in constitution-making, and in January 1994, the 1992 Law was amended to allow representatives of non-parliamentary political parties, churches and nationwide trade unions to be invited to the Commission's proceedings 'in order for them to express their opinions', but prohibited from making motions.

Second, in May 1994 the Parliament amended the 1992 Law to give the electorate the right to submit draft constitutions to the Commission during the summer of 1994, as long as the draft is supported by the signatures of at least 500,000 voters. Proponents of this initiative emphasized that a more inclusive definition of those entitled to submit draft constitutions would provide the best guarantee that the constitution eventually adopted by the National Assembly will be in compliance with the wishes of the nation and accepted in a final referendum. Representatives of citizens' groups would sit on the Commission with the power to make motions but without voting rights.

Third, in May 1994 Parliament amended the 1992 Law to provide that all constitutional drafts submitted to the previous Parliament (1991–3) be automatically reconsidered by the Commission, even if the party which had initially submitted the draft did not have representation in the current Parliament. The amendment also gave the right to participate in the Commission's proceedings and submit motions, but without voting rights, to the authors of the old projects now outside Parliament.

Thus, as a constitution must be acceptable to the people of the state it regulates, questions of 'upstream', 'downstream', and 'process' legitimacy loomed large over the Polish constitution-making process. The victorious SLD–PSL coalition leadership attempted after 1993 to

enhance the legitimacy of the constitution-making process by allowing representatives of groups outside Parliament to participate in the Commission's work, by allowing the consideration of draft constitutions submitted to the previous parliament and by allowing groups of citizens to submit draft constitutions. Clearly non-parliamentary groups could not now claim that they were unable to participate in the drafting of the new constitution. But by increasing the number of participants involved and the number of drafts to be considered, the efficiency of the process was diminished. Moreover, as Professor Leszek Leszczynski wrote, these changes to the process show that 'even the rules of the game are not established. [The changes] not only caused delay but created the perception that the process may be prolonged and the rules changed.'[56] This inevitably meant that the drafting process of Poland's 'final' constitution would be slow.

(iii) Substantive/Ideological Differences over Constitutional Choices

By the fall of 1994, the Commission was considering seven draft constitutions: the six drafts that had been previously submitted to the Commission in 1993 and a draft submitted at the initiative of the members of the Solidarity trade union on 5 September 1994. This draft was signed by nearly one million citizens, thus meeting the requirements for the 'citizens' constitutional initiative'. The so-called 'Solidarity draft' called for a parliamentary system and large-scale social protection through enforcement of socioeconomic rights (see Table 4.4 for a survey of certain provisions of the Solidarity draft).

On 21 October 1994, the National Assembly debated the fundamental issues of the political system to be established by the new constitution. The debate highlighted the deep divisions which exist among the Polish political elite over three fundamental substantive issues:

(a) Parliamentarism vs Presidentialism

A fundamental choice facing all new democracies is that between a parliamentary and a presidential form of government. A parliamentary regime in the strict sense is one in which the only democratically legitimate institution is parliament; in such a regime, the government's authority is completely dependent upon parliamentary confidence. As Juan Linz notes, although the growing personalization of party leadership in some parliamentary regimes has made prime ministers seem more like presidents, it remains true that barring

dissolution of parliament and a call for new elections, prime ministers cannot appeal directly to the people over the heads of their representatives.[57] Parliamentary systems may include presidents who are elected by direct popular vote, but they usually lack the ability to compete seriously for power with the prime minister.

In presidential systems an executive with considerable constitutional powers – generally including full control of the composition of the cabinet and administration – is directly elected by the people for a fixed term and is independent of parliamentary votes of confidence. The President is not only the holder of executive power but also the symbolic head of state and can be removed between elections only by the drastic step of impeachment. In practice, as the history of the United States shows, presidential systems may be more or less dependent on the cooperation of the legislature; the balance between executive and legislative power in such systems can thus vary considerably.

Experts on democratic transition like Juan Linz and Alfred Stepan believe that a parliamentary system holds more promise for successful democratic transition than a presidential regime.[58] They note two principal drawbacks of presidentialism. The first is that it is not conducive to the emergence of a multiparty system, since presidentialism promotes a two-party system. This limits considerably the post-communist political field. Second, presidentialism is vulnerable to authoritarian and populist temptations. In contrast, the rise of Stanislaw Tyminski would be impossible in a parliamentary system. As for Yeltsin-style presidentialism, there is the considerable danger that the supposed champion of democracy could become a 'Bonapartist' if confronted with a recalcitrant parliament.

But scholars such as Donald Horowitz note that parliamentary systems produce negative outcomes as often as presidential systems do, and emphasize that 'abuse of power is hardly a presidential monopoly.'[59] Parliamentary regimes in Asia and Africa have produced more than their share of abuses of power. In Latin America and southern Europe, abuse of power has been made possible principally by military coup or growth of single-party hegemony.

In post-communist Poland, formal constitutional design conspired with less finely calibrated political and social forces to make the presidency relatively strong. While in office, Walesa, through force of personality and prestige, put his stamp on a presidency originally designed for General Jaruzelski by asserting powers ambiguously defined in the amended 1952 Constitution. During the Sejm consideration of the Small Constitution in August 1992, the objection of the

Centrum Party (by then having broken with Walesa) to additional powers for the president (promoted by the UD) resulted in a compromise creating a hybrid parliamentary-presidential system. After 1993, the left-of-center parliamentary coalition favored the adoption of a purely parliamentary system, but they were reluctant to challenge Walesa directly in any attempt to limit his constitutional powers.

During the constitutional debate after 1993, political elites continued to divide over whether the Polish polity should have a presidential or parliamentary system. Those favoring a presidential system argued that it was especially needed during the post-1989 period of national renewal to formulate coherent public policy and to supervise its execution. President Walesa, the chief proponent of a presidential system, appealed to the nation on 27 October 1994 to support a constitution only if it provides for a presidential system:

> I ask you for a vote in favor of the presidential system of government... I do not ask it for myself, but for the future president, whoever he may be. Only in a presidential system will the president be able to assist and protect the political equilibrium and impede factious desires.[60]

But it was Walesa's powerful personality and alleged ambitions that were commonly held as the central reasons for concern about the extent of executive power. Walesa's opponents depicted him as lacking an understanding or respect for democratic institutions and insisted that if Walesa were given strong presidential powers a dictatorship would emerge. Similar to the motivations of the drafters of the 1921 Polish Constitution, the new constitution was seen as potentially a very effective instrument for preventing Walesa's future dominance over Parliament and the Government.

Moreover, most moderates in the parliamentary leadership argued that the Parliament, as the most direct representative of the people, should be the supreme organ of government and determine the policy of the nation. As Professor Bronislaw Geremek stated: 'I believe that a parliamentary democracy, and not a presidential one, is necessary in our countries because such a system allows for greater participation of citizens in public life.'[61] A public opinion poll in 1993 revealed that 68 per cent of Poles felt that the Parliament should have 'the most influence over affairs of state'.[62]

This debate did not subside with the election of President Kwasniewski in November 1995. Proponents of a presidential system

argued that the presidential aspects of the 1958 French Constitution might provide an appropriate model in the interest of expediting Polish economic reform.

The weak presidential powers as provided in the draft constitution considered by the Commission in 1996 became the subject of consternation for Poland's new President. During a 21 May 1996 meeting of the Commission, President Kwasniewski's representative put forward a proposed modification of the draft, increasing the scope of presidential authority over external and internal state security. The proposals were criticized by members of the opposition, who noted that when Alekander Kwasniewski was chairman of the Commission and Lech Walesa was president, President Kwasniewski had vehemently opposed shifting the center of state security decision-making from the Council of Ministers to the president. In June 1996 the Commission rejected Kwasniewski's proposal.

(b) Positive vs Negative Rights

While the practice of judicial review ostensibly would seem to obviate the question of whether to include positive rights in constitutional text, the drafters faced strong political pressures to include a number of provisions not readily judicially enforceable. Poles had no experience with unemployment during the forty years of communist rule and economic inequality, although present, was always both hidden and officially disparaged under the communist regime. With rising unemployment and decreasing social security, a growing segment of society began to demand constitutional guarantees of social policies. According to a 1993 public opinion poll, 63 per cent of Poles felt that the constitution should provide for positive rights, and in particular for at least some form of commitment to full employment.[63] Proponents for inclusion of positive social and economic rights, especially the 'unholy alliance' of Catholic nationalist parties (aspiring 'Catholic economics') and post-communist left-wing parties, emphasized that the basic needs of the population are a value which needs to be protected from the market and from a democratic majority.

But many scholars insisted that a constitution must be very sparing in guaranteeing positive socio-economic rights, as it would be difficult for a court to ensure that the government observes rights of this kind without taking on the role of a super-legislature (reallocating resources and reshuffling governmental priorities to a degree that healthy democratic systems ordinarily reserve for the legislature and

executive). Moreover, if a constitution is to be essentially a legal document and not a programmatic set of empty promises, it must primarily include provisions that courts can enforce. As austere economic reforms make enforcement of positive rights in Poland virtually impossible, Jon Elster warned 'that the inclusion of symbolic rights in the constitution creates a danger that other, more traditional rights might also be interpreted as mere symbols or aspirations.'[64] But it was not certain whether the new constitution would have popular support without social and economic rights; leaving them out could be interpreted as a betrayal by political elites.

(c) The Future Role of the Catholic Church in the Polity

With the collapse of communism, the Church has regained a strong voice in political life and has achieved several legislative successes in the areas of abortion and the teaching of religion in public schools (see Chapter 6 for a discussion on the Constitutional Tribunal's jurisprudence in this area). What some see as a legitimate return to the supremacy of 'Christian values' after decades of external repression, others perceive as evidence of an impending theocracy and a trampling of minority rights (see Chapter 7 for a discussion on differences over the Church's role and its view of state). Former Prime Minister Tadeusz Mazowiecki stated that the traditional separation of church and state is inapplicable in Poland, and that there is a need for the two institutions to find 'a third way to work together.... this debate cannot be solved with a one sentence formula ''the separation of Church and the State.'' In Poland, where the Church historically has played, and still plays, an important role, there should be a profound discussion in which we resist,... denial of the important historical role of the Church in the public life of this country.'[65]

All the submitted drafts except that of the SLD proposed either an 'autonomous' (as opposed to *separate*) relationship between church and state (which presumes at least some symbiosis in public policy-making), or for future state relations with the church to be governed by the Concordat, a yet-to-be-ratified treaty between the Polish government and the Vatican which provides for a closer 'cooperative relationship' between state and church.[66] Only the SLD draft called for a definitive separation of church and state.

Disagreement over these issues and others demonstrated that creating the political consensus necessary for the passage of a new consti-

tution would be difficult. Even with the election of President Kwasniewski in November 1995, giving SLD primacy in both the executive and legislative branches, reconciling the differing positions between political elites on the substance of the new constitution seemed highly unlikely, and the Church and right-wing politicians promised to campaign against the new constitution in the national referendum if a draft was presented that was inconsistent with their core positions. Within the SLD/PSL governing coalition, substantial differences existed over constitutional choices. For example, the PSL called for a much closer relationship between the church and state, the opposite of the SLD.

(iv) A New 1997 Polish Constitution

After being elected Chairman of the Constitutional Commission, SLD leader Aleksander Kwasniewski stated that the passage of a new constitution was a top priority of the new governing coalition. But during the spring of 1994 the process of constitution-drafting continued its lethargic pace. Because the dissolution of Parliament had automatically invalidated the previously submitted drafts, six more months passed before new drafts had been submitted to the Commission. Moreover, significant questions concerning the popular legitimacy and 'representativeness' of the new Parliament's Constitutional Commission, as well as serious differences over substantive constitutional choices, continued to thwart the process of passing a new constitution.

On 18 June 1996 the Constitutional Commission finally completed its draft constitution, adopting the final article which defines constitutional amending procedures. The entire project had taken four years, and the draft proceeded to Parliament for consideration in the fall of 1996. Marek Markiewicz (SLD), who had replaced Aleksander Kwasniewski as the Commission Chairman in 1995, accelerated deliberations after President Kwasniewski met with the Commission in May 1996 (on the 205th anniversary of the May 3 Constitution) and stressed the need to finish the drafting process because '1996 is a year free from election campaigns.'[53] The draft contained 243 articles.

The draft would establish a strong parliamentary system of government, and states explicitly in article 79 that '[t]he Sejm exercises control over the activities of the Council of Ministers and the Government.' The procedure for appointing the Council of Ministers and a

new Prime Minister is patterned on that provided by the Small Constitution, and according to Article 137 '[t]he Prime Minister presents to the Sejm, not later than on the 14th day after his appointment, the program of action of the Council of Ministers along with a request for a vote of confidence.' The Sejm then has the prerogative to pass a vote of confidence by an absolute majority, in the presence of at least half of the total number of deputies. According to Article 142, the Sejm may by majority vote no confidence in the Government based on a motion of at least 46 deputies, with the motion naming the new candidate for Prime Minister. Legislative initiative belongs to Sejm deputies, the Senate, the president, and the Council of Ministers. According to Article 127, official acts of the president require the signature of the Prime Minister to be valid, who by signing 'becomes answerable to the Sejm.' The new charter would also allow a presidential veto to be overruled by a three-fifths vote of the Sejm rather than the two thirds mandated by the Small Constitution. The Sejm also decides 'on behalf of the Republic of Poland on the declaration of war.'

In foreign affairs and defense, the President is recognized in the draft as the 'supreme representative of the Republic of Poland'. The President, 'as the representative of the state in foreign relations', exercises his role in foreign affairs in cooperation with the Prime Minister and the appropriate ministers. The President is also recognized as the supreme commander of the armed forces, and has a National Security Council as an advisory body on domestic and foreign security.

Members of the Council of Ministers are held answerable before the Tribunal of State for violating the Constitution. A resolution to make a member of the Council of Ministers appear before the Tribunal of State is made by the Sejm on the motion of at least 115 deputies.

The Parliament's enhanced institutional strength is also seen in the chapter addressing the controversial matter of public finance. The draft would give the Sejm control over levying taxes and determining the laws governing tax exemptions. Moreover, the president would not have the right to veto any budget passed by Parliament. But within two months of receiving the budget from the Sejm, the president may send it to the Constitutional Tribunal to rule on its constitutionality. If the Tribunal questions only certain provisions of the act, which are not inseparably connected with the budget as a whole, then the president is obliged to promulgate the act, the questionable provisions excepted (see Chapter 6 for a discussion on the draft's

provisions on the powers of the Tribunal). By giving the Sejm the 'power of the purse', its institutional strength *vis-à-vis* the other branches of government would be strengthened.

Catering to popular sentiment, several economic and positive rights, as well as numerous political rights and liberties, are contained in the draft. The draft guarantees freedom to form political parties, trade unions, freedom of assembly, speech and religion, the right to obtain information on the activities of government agencies, among other political rights. While there is no provision for the right to work, article 53 provides that 'every person has the right to choose his profession and place of work' and that it is the obligation of the state to promote employment. Article 54 provides for the 'right to safe and hygienic working conditions.' Every person would also have the right to free education until the age of 18 and to free basic health care provided by the public health service.[54] All Polish citizens have the right to government welfare in the event of work disability or upon reaching retirement age. This catalogue of social rights was not as great as expected from the left-wing parliamentary majority.

The constitutional amendment procedure is relatively easy. Amendments can be proposed by the president, the Senate or 92 deputies (one-fifth) of the Sejm. Article 218 provides that a first reading of an amendment must take place within 30 days following its introduction in Parliament. Adoption of an amendment requires Sejm confirmation by a two-thirds majority of a quorum, followed by an absolute majority of a Senate quorum.

The draft is a compromise between the parties elected to parliament in 1993, but also reflects the views of non-parliamentary organizations, most notably the Catholic Church. The draft's preamble invokes God as the 'source of truth, justice, goodness and beauty', but the draft also states that non-believers can draw those universal values from other sources. The Church's demand that the charter recognize natural law as supreme to man-made, or 'positive', law was rejected. But in a gesture to the Church, the draft does not legalize homosexual marriages and provides guarantees for religious instruction in schools.

Regarding Poland's communist past, the draft reflects the sentiment of UW, the leading opposition party to the governing coalition, by stating that democracy returned to Poland in 1989, after a long period in which the former communist regime violated 'fundamental freedoms and human rights'. It also enshrines the market economy as the

basis of the country's economic system, but emphasizes the need for social welfare.

In June 1996 the draft proceeded to the editorial subcommittee of the Constitutional Commission to examine its legal terminology. Debate over the more than 200 articles of the draft, as well as the preamble, continued through December 1996.

Several of the commission's changes strengthened executive power. For example,upon motion of the undersecretary of state in the Presidential Chancellery, Krzysztof Janik, the commission adopted a proposal that would allow the Sejm to override a presidential veto with a two-thirds majority. While Article 18 of the Small Constitution required the same, the draft had proposed that only a simple majority be required for a veto override.

The Commission also adopted Article 19.3 which states that 'the relationship between the state, churches, and religious organizations shall be based on the principle of respect for their autonomy and mutual independence of each in their respective field, as well as on the principle of cooperation for human well-being and the common benefit'. The amendment left out the phrase which stipulated that relations between the state and church be based on 'mutual autonomy'. Poland's Cardinal Jozef Glemp said that Catholics would accept this compromise solution, and that it was time for Poland to take the historic step of passing a new national charter.

Article 24 was broadened by the Commission to state that 'the inherent and inalienable dignity of the person is the source of the freedoms and rights of all persons and citizens. Dignity shall be inviolable and the respect and protection thereof shall be the obligation of the public authorities'. Article 26.2 states that 'No one shall be discriminated against in political, social or economic life for any reason.' The Commission chose not to list the grounds on the basis of which people may be discriminated against and replaced the relevant article with a provision stating that 'rights and liberties originate from the inalienable right of human dignity'.

On 22 March 1997, the National Assembly voted in favor of the completed draft. Of the 460 Sejm deputies and 100 senators, 461 voted for the new basic law, 31 against, and five abstained. The following day, President be was presented with the draft. Kwasniewski had 60 days to offer to the National Assembly amendments on the draft, but he formally presented his amendments to the National Assembly two days later.

President Kwasniewski's amendments focused on limiting the criminal immunity of members of parliament, and called for presidential prerogative in nominating members of the Supreme Court, the Chief of the General Staff and the commanders of the army, navy and airforce. On 2 April 1997, the National Assembly approved the draft by an overwhelming majority, accepting most of President Kwasnienski's amendments, including presidential right to nominate Supreme Court judges and military leaders. But the Assembly rejected limiting the criminal immunity of parliamentary deputies.

Commenting on the draft, former Prime Minister Tadeusz Mazowiecki said the proposed charter is 'perhaps not ideal, but not bad'. He said the intention of the drafters of the document was 'to unite rather than divide Poles'.[55] On 25 May 1997, Poles voted in a nationwide referendum to promulgate the draft constitution into law. While fewer than 40 per cent of eligible voters cast ballots, 57 per cent of voters backed the charter. Following eight years of political and economic transition, Poland now has a new constitution that will provide stability in politics and the rule of law. The draft was clearly a compromise between competing groups, but it will provide the groundwork for a modern and stable Polish polity based on notions of limited government.

(v) Observations on the Constitution-Making Process

Several observations may be drawn from the halting Polish constitution-making process. First, the debate over the new constitution reflected rival theories of constitutionalism and constitutional rights and substantive differences over views of state. It also reflected the ambitions of political leaders and vested institutional interests in the power structure. For example, on the question of the scope of presidential powers, constitutional arguments about the proper role of the presidency in a system of checks and balances were accompanied by a clash of institutional interests between the legislative and executive branches, as well as within the executive branch, with the persona of President Walesa being a central point of reference.

Second, after 1990 constitutional reform slowed as a highly pluralist party system emerged from the fragmentation of the Solidarity movement. Cooperation and unity among political elites was replaced by dispute and conflict. Ironically, some commentators feel that in hindsight the Round Table Sejm, which had PZPR functionaries among its members, was the most efficient body for constitutional reform.

Professor Andrzej Rapaczynski, Expert Advisor to the Sejm Constitutional Committee, observed: 'The dubious legitimacy of the position [of the unelected Sejm members] made them exercise great care in opposing the Solidarity-dominated government and its parliamentary leadership, at least so long as the latter was itself united and basking in the glow of popular approval.'[67] Unfortunately, the Sejm Constitutional Committee failed to make use of this opportunity.

Third, since 1989 questions of legitimacy have plagued the constitution-making process. The first parliamentary constitutional committees were adjourned, and their work discarded, because they lacked 'upstream legitimacy'; they were the product of the Round Table Sejm and thus considered as not having been convoked in a legitimate way. The 1991 parliamentary elections addressed initial questions of social legitimacy, but its electoral system of extreme proportionality created a highly fragmented Parliament that easily deadlocked on divisive constitutional questions. The 1993 parliamentary elections were conducted on the basis of a new electoral law that in the interest of governance applied a 5 percent threshold and a d'Hondt counting system, but which ultimately precluded a large number of political parties from obtaining seats in Parliament. The Constitutional Commission convened in 1994 was subsequently criticized as lacking 'process legitimacy', as the absence of representatives of non-parliamentary parties meant the exclusion of a wide range of voices from the constitution-making process, particularly those from the center-right.

To enhance both the 'process' and 'downstream' legitimacy of the Commission's work, the ruling SLD–PSL parliamentary coalition created possibilities for pre-constitutional referenda and a 'citizens' constitutional initiative', included representatives of non-parliamentary groups in its proceedings, and allowed drafts previously submitted by non-parliamentary parties to be considered again. These changes naturally diminished the efficiency of the proceedings. But if the SLD–PSL coalition had used its ephemeral parliamentary majority to impose a partisan constitution (or had even been perceived to do this), the likelihood of establishing a durable constitutional culture would have been diminished. While cumbersome and inefficient, the new drafting process went a long way toward ensuring that any new constitution that was passed would not be subject to revision or replacement by new coalitions formed in the future.

Considering that the passage of a new constitution was the dominant political motivation of Solidarity leaders from the moment

of the collapse of communist power, at first glance it may seem surprising that a new comprehensive framework was not quickly enshrined by the new political leadership. But the hybrid framework created by the April and December Amendments and by the Small Constitution provided the groundwork for a modern Polish polity as well as institutional stability during a period of extraordinary politics. Moreover, the democratic norms of Poland's hybrid constitutional framework were reinforced by the activist jurisprudence of the Constitutional Tribunal, which developed constitutional doctrine and principles to complement existing arrangements.

5 The Emergence of Judicial Review in Poland

In addition to the promulgation of new constitutional provisions, central to the development of constitutionalism in Poland, and to the success of the transition from communist constitutional practice to a culture of normative constitutionalism, has been the emergence of the doctrine and practice of judicial review. In communist theory the constitution did not present a constraint on the state, nor was it a meaningful source of individual rights. But in the spring of 1982, following the declaration of martial law, the communist regime announced its intention to create an 'independent' judicial body to review the constitutionality of all legal acts. The Constitutional Tribunal, entrusted with the responsibility to 'adjudicate on the conformity of laws with the Constitution', was a unique creation in the Soviet bloc and a radical departure from orthodox communist constitutional practice. With the creation of the Tribunal, communist Poland seemed to move one step closer toward joining those European nations that since World War II have empowered judicial bodies to enforce their national constitutions as the fundamental law of the state.

Since 1989, the Constitutional Tribunal has been actively involved in delimiting the law-making of the new state and defining and protecting a new understanding of rights and separation of powers. The transition from an unenforced constitution to one that is enforced manifests a turn away from communist constitutional practice towards adoption of a constitutional system characteristic of liberal democracies.

This chapter examines the roots of judicial review in Poland. Part A traces the early strains of the doctrine of judicial review in Poland before World War II. Part B examines the theoretical and practical aspects of the rejection of judicial review by the Polish communist regime. Part C discusses the surfacing of a progressive dynamic calling for the implementation of judicial review in communist Poland, leading to incremental concessions on the part of the regime. Part D examines the establishment of a limited form of judicial review in communist Poland through the creation of the Tribunal. Part E provides a detailed description of the organization and structure of the Tribunal. Part F describes the significant limitations placed on

Tribunal's jurisdiction and scope of review to ensure that the Tribunal would not overstep politically acceptable boundaries.

A EARLY STRAINS OF JUDICIAL REVIEW IN POLAND (1918–39)

Following World War I, Poland reemerged an independent nation after almost a century of partition. During the inter-war period, the 1921 and 1935 Constitutions provided the institutional framework for two Polish republics; however, the doctrine of judicial review was not applied. In Poland, as in other European countries, the constitution united the people behind fundamental democratic principles, distributed power between the branches of government, provided rules to guide the state and guaranteed individual rights, but the document did not function as a legally enforceable enactment in the American sense. In particular, while regular courts were to enforce constitutional provisions in the adjudication of cases and controversies, they were not permitted to invalidate conflicting legislative acts of Parliament. The reliance of the reborn Polish state on the French Third Republic's theory of parliamentary supremacy precluded implementation of a constitutional court and the empowerment of the judiciary to review the constitutionality of parliamentary statutes. In Poland as in France, it was feared that the power of judicial review would allow judicial bodies to dominate the other branches of government, limiting the democratic will of the people by controlling elected institutions. This fear may have been a reaction to the perceived institutional strength of the American Supreme Court, which was viewed by a number of Polish political elites as creating a 'government of judges'.

Despite these reservations, there were several initiatives during the 1919–21 constitution-making process to create a system of judicial review in the new constitutional order. Those at the forefront of constitution-making were familiar with the systems of judicial review emerging in Austria and Czechoslovakia at the time. While no public discussion concerning the creation of a system of judicial review was held during the period of drafting the 1921 Constitution, a draft chapter was submitted to the Constitutional Commission by a Sejm deputy, Henryk Lutoslawski, providing for a procedure whereby the bench of the Supreme Court would examine the constitutionality of statutes with the power to annul them; however, the author subse-

quently withdrew his proposal. Moreover, in 1920 the draft constitution submitted to the Constitutional Commission by the sitting Polish Government included a provision to create a 'Guard of Laws' (*Straznych praw*), a quasi-parliamentary body to review for consistence with the constitution legislation passed by Parliament but not yet promulgated into law. The Guard of Laws would then 'authorize' the President to exercise his right of veto over the unconstitutional legislation. In addition, another parliamentary initiative called for the creation of a Constitutional Court to adjudicate the conformity of laws with the constitution. Neither of these initiatives was adopted, and the 1921 Constitution entrusted only the legislative branch to ensure that no constitutional provision was violated by parliamentary legislation.

Reflecting the Rousseauian notion of parliamentary supremacy, the 1921 Constitution specifically asserted that parliamentary statutes are supreme and not subject to judicial review. While article 38 declared that '[n]o statute shall be in disagreement with the present Constitution or contradict its provisions', article 81, following the French model, institutionalized the proscription of judicial review: '[t]he Courts of Justice shall not have the right to challenge the validity of Statutes legally promulgated.'

Polish legal academia criticized the absence of a provision for judicial review in the 1921 Constitution. Professor Waclaw Komarnicki of Wilenski University reflected this criticism when he wrote that the proscription on judicial review results in 'article 38 [of the 1921 Constitution providing that no statute shall be inconsistent with the Constitution] lacking any legal guarantee, being a provision with no sanction, a lex imperfecta.'[1] In 1924, after regular courts had been confronted with cases and controversies involving legislative acts clearly inconsistent with the Constitution, creating obvious practical difficulties, a prominent Polish legal scholar, Professor Wladyslaw Jaworski, called for the creation of a 'Constitutional Tribunal' to review the constitutionality of legislation passed by Parliament but not yet signed by the President. According to Professor Jaworski, this would address some of the 'conflicts arising between ordinary legislation and the Constitution.'[2]

By the mid-1920s, a small but vocal dynamic developed promoting the concept of judicial review of the constitutionality of laws. Well-known Polish law professors, such as Stanislaw Glabinski, Ludwik Ehrlich and Edward Dubanowicz among others, publicly called for the introduction of judicial review. This development paralleled grow-

ing Polish appreciation of the Kelsenian notion of a hierarchy of sources of law. In 1925, Professor Andrzej Peretiatkowicz of the University of Poznan insisted that '[t]he resolution of disputes between the constitution and lower legal acts by a court is becoming a normal procedure in the modern democratic republics ruled by law.'[3] Because judicial review was seen as a specialized power requiring great understanding of the workings and process of democratic government, most Polish legal scholars favored the establishment of a separate constitutional court as opposed to empowering the regular judiciary to strike down unconstitutional laws. Despite these developments, political elites remained opposed to the creation of an extra-parliamentary judicial mechanism empowered to nullify parliamentary acts.

Although the 1921 Constitution did not provide for judicial review of parliamentary statutes, a Supreme Administrative Tribunal was established by statute in 1922 to review the legality and constitutionality of regulations promulgated by administrative authorities, ministers, and the Council of Ministers. Modeled on the 1920 Austrian Supreme Administrative Court, the Supreme Administrative Tribunal had a judicial status equal to the Supreme Court, and its judges were fully independent from all other authorities. During the inter-war period, the Supreme Administrative Tribunal invalidated many arbitrary administrative acts. Individual citizens could petition the Administrative Tribunal, and the Tribunal's judgments were binding on administrative authorities. However, the Administrative Tribunal was not entitled to examine the constitutionality of parliamentary statutes.

The dynamic supporting judicial review grew stronger after Jozef Pilsudski restructured the state by *coup d'état* in 1926, placing much more power in the executive branch. The fear that, as Professor Starszewski wrote in 1927, the 'new government might start to "improve" the constitution through legislation' was reflected in the many legislative proposals to create a constitutional court in Poland.[4] Between 1926–8, legislation to establish a constitutional court was initiated by the parliamentary clubs of the People's National Union (*Zwiazek Ludowo-Narodowy* – ZL-N), the Christian Democracy (*Chadecja*), and jointly by the People's National Union, Christian Democracy, and the Christian National Party. Another legislative bill, initiated in 1929 under the title 'Constitutional Review: Opinion of a Group of Parliamentary Lawyers', called for the creation of a constitutional court, known as 'the "Tribunal to Guard the Laws" . . . to decide about the consistence with the Constitution of statutes and decree-laws.'

> It shall proclaim an unconstitutional statute invalid wholly or in part . . . A statute or decree-law found invalid shall lose its legal validity according to the Tribunal's decision wholly or in part on the day of publication of that decision unless otherwise resolved, but not later than one year after the decision has been published.[5]

Professor Andrzej Peretiatkowicz attempted to alleviate the fears of those who felt that such a mechanism would 'dominate' the Parliament: 'Some opponents of the Constitutional Tribunal argue it might be superior to the legislature. This is a misunderstanding. The legislature has at all times the power of genuine interpretation and amendment of legislative provisions, of the constitution and of ordinary statutes.'[6]

These proposals were rejected by Pilsudski's supporters, who felt that implementing an institution to apply judicial review would hinder their efforts to reconstitute and revitalize the Polish state. During the constitutional reform following Pilsudski's coup d'etat, Professor Wladislaw Makowski, Chairman of the Constitutional Committee of Pilsudski's political party, the BBWR, argued that empowerment of the judiciary with judicial review in the new constitution would be repetitive: 'the Senate may review statutes in all respects, from the viewpoint of their constitutionality as well, and the President has the right to veto legislation. Thus, there is no reason why a Constitutional Tribunal should be established serving those same aims.'[7] The consolidation of political power by Jozef Pilsudski and his supporters in the late 1920s precluded development of a system of judicial review.

The 'Pilsudski Constitution' of 1935, which differed from the 1921 Constitution primarily in its deemphasis of the role of the Sejm and its elevation of the presidency above all other state authorities, did not provide for judicial review. Even though Article 49 of the 1935 Constitution stated that '[n]o legislative act may be contrary to the Constitution', Article 64 declared that '[t]he courts have no right to examine the validity of legislative acts, duly promulgated.'

Thus, during the interwar period in Poland, initiatives to implement a system of judicial review to control the constitutionality of parliamentary statutes were ultimately unsuccessful. Nonetheless, as Professor Andrzej Gwizdz wrote, in Polish legal culture the concept of judicial review applied by a constitutional court was 'germinating during the period of the First and Second Republics.'[8]

B CRITICISM OF JUDICIAL REVIEW IN POLISH COMMUNIST THEORY

While a number of West European polities implemented constitutional courts after World War II, the communist regimes of Central and Eastern Europe rejected the doctrine of judicial review as a 'reactionary institution'. Poland's leading legal theorist of the Stalinist period, Professor Stefan Rozmaryn, expressed the official position on the concept of judicial review:

> The constitutional control of statutes by extra-parliamentary bodies, particularly judicial and quasi-judicial, is a reactionary institution and because of that, there is no room for it either in a socialist State or in a State of people's democracy, which trusts the people's justice and the will of the people.[9]

In the communist theory of the unity of state power, Parliament had supremacy over all other governmental branches and no governmental branch or agency could curtail its supremacy. Polish communist legal scholars insisted that court review of parliamentary statutes would amount to a limitation of the sovereign rights of the people and would impermissably elevate the judiciary above Parliament. As Parliament was presumed to supervise the constitutionality of state actions, non-parliamentary bodies neither needed to, nor were permitted to, exercise any form of judicial review.

As described in Chapter 3, the 1952 Constitution reflected this theory by creating a hierarchy of government authority that made Parliament 'the supreme organ of State authority' and the embodiment of the will of the people. But in fact the PZPR, claiming to represent the interests of 'the working people', controlled Parliament and ran the state to execute its own interests. Given this centralization, no non-parliamentary bodies, especially not the courts, could challenge the validity of enacted laws. Instead, the judiciary became a political tool harnessed to enhance the intensity of the 'class struggle'.

Courts in communist Poland were discouraged from directly applying or interpreting constitutional provisions. Courts could apply published statutes but could not interpret them liberally. The 1952 Constitution did not even create a cause of action for constitutional violations because communist legal doctrine assumed that individual constitutional claims could be filed with the appropriate office of the Prosecutor General or with the executive body supervising the agency

accused of the violation. In addition, constitutional provisions were not self-executing but rather needed separate laws to define their specific application. In this way, the Constitution became subordinated to parliamentary statutes which conclusively determined the scope of imprecise constitutional clauses.

One of the first institutional victims of the process of communist institutionalization was the Supreme Administrative Tribunal, which had operated during the inter-war period. On the basis of the Soviet model then in force, it was decided that the Supreme Administrative Tribunal would not be reinstated and that legality in administration would be ensured through other legal instruments and through activities of the Prosecutor General. While in fact the regime did not want administrative review to challenge its centralized political control, it justified the proscription on administrative jurisdiction with the following arguments: (1) such power 'may cause the courts to interfere with powers reserved for the administration, eliminating the necessary scope of flexibility for conducting an effective administration'; (2) 'the adjudication of administrative cases requires . . . technical knowledge which judges do not possess'; (3) that 'adjudication of administrative cases will cause an unbearable burden on the courts'; (4) 'the existing system of supervision over the legality of administrative decisions conducted by [the Prosecutor-General] produces effective results.'[10] All institutions relating to the judicial review of administrative actions were subsequently rejected in principle and were proclaimed to be alien to the communist system of government.

C DEVELOPMENT OF JUDICIAL REVIEW IN COMMUNIST POLAND

Despite the totalitarian state imposed upon Poland after World War II, the idea of constitutional review never died. In 1946, the Congress of the SD included in its legislative program an initiative to create a Constitutional Tribunal to oversee the constitutionality of the laws. Even as late as 1947, during discussions on the content of Poland's future constitution, one participant, Professor Julian Makowski, stated that 'the new constitution should either give regular courts the right to examine the constitutionality of statutes and other normative acts, or charge another independent agency . . . with that task.'[11] However, as the Communist Party quickly consolidated its control, these initiatives were labeled by the Party 'a "triviality" of the opposition'

and were abandoned.[12] With the onset of full-scale Stalinism and the adoption of a communist-style constitution, fear and a sense of futility paralyzed the anti-communist opposition and ended any official discussion of judicial review of the constitutionality of state action.

The deaths of Stalin (1953) and Polish Communist Party leader Boleslaw Bierut (1956) reignited opposition to Stalinist orthodoxy to such an extent that the Party even admitted that serious abuses of the 'people's legality' had taken place. A 1955 editorial in *Panstwo i Prawo* reflected this development by acknowledging that the constitutional principle of judicial independence had 'often been violated' during the Stalinist era. The editorial supported the independence of the justice system and declared that no other state body could replace the judiciary in its function 'as an independent decision-maker'.[13]

After Khrushchev's condemnation of Stalinism and the accompanying criticism of the distortion of the concept of democratic centralism, Polish legal theorists began to argue for the implementation of judicial review over state administration to regenerate socialist democracy. For example, during discussions on systems of constitutional review in Western countries at the Conference of the Institutes of Constitutional Law in Kazimierz, Poland in 1961, a number of Polish legal scholars emphasized that judicial review would be helpful in communist Poland. They conceded, however, that such review would have to be carefully limited to encompass only legal – 'and not political' – aspects of laws.[14]

Around this time, several leading constitutional law experts cautiously suggested that even in communist states judicial review might be useful for protecting the constitution. Two influential law professors, Andrzej Burda and Feliks Siemienski, were at the forefront of this early movement. They argued that it was possible to combine the concept of judicial review and communist theories regarding the centralized organization of the state apparatus. As Professor Burda wrote, judicial review of the constitutionality of statutes can 'be introduced in a socialist state without belittling the role and authority of parliamentary representation.'[15]

In the early 1970s, the dynamic supporting the introduction of judicial review grew, and in Polish legal academia few dissenting voices were heard. Even Professor Stefan Rozmaryn, the leading critic of judicial review in Poland during the Stalinist era, stated that it was an 'absurd and harmful fiction' to deny the possibility that parliamentary statutes or other regulations could violate the Constitution.[16] Professor Jerzy Kowalski accurately reflected the predominant view

when he wrote: '[T]he arguments against [introducing a form of judicial review] that have been put forward are based either on a misunderstanding [of legal concepts] or on legal sophistry.'[17]

Despite these developments, the communist regime continued to insist that no extra-parliamentary body could encroach upon Parliament's legislative supremacy. By precluding the control of the constitutional consistency of state action, the Party was able to maintain its monopoly on state power.

(i) Council of State as Guardian of the Constitution?

By the mid-1970s, the regime felt the need to accommodate popular demands for control of the constitutionality of state action and began to consider different forms of judicial review that might be effectively incorporated into the power structure without at the same time threatening its political supremacy. In 1976, Parliament amended the 1952 Constitution's article 30 to empower the Council of State, the principal executive organ of Parliament and the primary political arm of the Communist Party, to enforce the constitutionality of laws. Thus, Poland followed the pattern adopted in other communist Eastern European countries; the Presidial Council in Hungary and the Presidium of the Supreme Soviet in the USSR had also been empowered to review the constitutionality of legal acts.

Constitutional experts initially hailed the amendment as evidence that 'there can be no law but that which is consistent with the constitution.'[18] But although the new function of the Council of State departed from traditional communist constitutional theory, it was never executed in a meaningful way. No formal procedures were established for the Council of State to review the constitutionality of legislative acts, and only once during the six years that the Council of State retained this responsibility, in 1979, did it issue a special instruction concerning the constitutionality of a parliamentary act. One frustrated commentator later complained that 'no official explanation was even offered publicly as to why this original attempt [to give the Council of State the task of controlling constitutionality] was made and why the Council of State simply never undertook this task.'[19] But by creating an intra-parliamentary 'guarantee' against unconstitutional legislation, the regime was able to continue to exercise total and arbitrary power over the whole state apparatus. The failure of the Council of State to genuinely control the constitutionality of state action led to renewed calls for greater protection of constitutional rights.

(ii) Creation of the High Administrative Court in 1980

In 1980, the regime granted a second concession to the judicial review movement. As the democratic opposition increasingly demanded greater legality on the part of the bureaucratic administration, the regime began to consider closely the successful implementation of judicial review of administrative decisions in other communist East European countries as examples of how administrative jurisdiction might be implemented in Poland. In 1952, Yugoslavia had been the first communist state to reinstitute review of administrative decisions, followed by Hungary in 1957, Romania in 1967 and Bulgaria in 1970.

On 31 January 1980 the Polish Parliament amended the Code of Administrative Procedure to create the High Administrative Court (*Naczelny Sad Administracyjny* – NSA) which could apply a limited form of judicial review of administrative actions.[20] With a structure and procedure corresponding largely to that of the pre-war Supreme Administrative Tribunal, the NSA was empowered to review administrative regulations for conformity with statutes and the Constitution, and to review administrative decisions to determine whether agencies properly applied parliamentary statutes in individual cases. Before seeking NSA review, individuals must exhaust all appeals to superior administrative agencies. The NSA 'sets aside' a regulation or decision if it finds 'substantive' or 'procedural' non-compliance with the law. With substantive review, the NSA reviews an administrative decision to determine whether it has sufficient statutory basis. With procedural review, the NSA reviews a decision to determine whether procedures imposed by statute have been observed by the administrative agency. The NSA has exclusive jurisdiction over administrative cases, and the judges of the NSA are independent and bound only by statute.

Despite limitations on its jurisdiction (which remained in force until 1990), precluding review of administrative decisions 'relating to the defense and security of the state' and 'the maintenance of public order', the NSA quickly assumed an active role in protecting individual rights against arbitrary administrative actions; it often supported individuals challenging decisions of governmental agencies. Between 1980–9, over 14,000 motions were made to the High Administrative Court and over 50 per cent of its decisions were rendered in favor of citizens during that period. Because state agencies at times disregarded the NSA's decisions, the NSA began to rely directly on the Constitution to support its rulings. In its very first decision, that of 6 February

1981, the NSA referred to the Constitution to limit the power of ministers to issue 'independent resolutions' that imposed duties and obligations on citizens.[21] Moreover, during its first years of operation, the NSA directly dealt with other constitutional problems, particularly concerning the constitutional parameters of executive branch law-making. In this way, the NSA acted as a custodian of the Constitution and created an atmosphere favorable to the further development of mechanisms of constitutional protection.

D CREATION OF THE CONSTITUTIONAL TRIBUNAL

In the summer of 1980, Polish society reacted against the communist regime's monopoly on state power, forcing it to agree to the establishment of free labor unions. The guiding tenet of the Solidarity Programme, issued in October 1981, read as follows: 'Our union was born out of protest over the fact that Polish society has experienced violations of human and civil rights for over three decades; . . . It was a rebellion against the existing system of government. . . . We are not only concerned with living conditions. . . . We are also concerned with justice, democracy, truth, and the rule of law.'[22] The Solidarity movement's leadership also criticized the arbitrary law-making practices that had so characterized the communist regime.

But during the following year, the government issued numerous inconsistent and seemingly arbitrary executive decrees and ministerial instructions to quell the growing social unrest. The Council of State and the High Administrative Court were either unwilling or unable to remedy the numerous violations of the Constitution. This prompted stronger popular demands for greater control over the constitutionality of state action, going beyond the powers given to the High Administrative Court. As Justice Janina Zakrzewska described, '[during the Solidarity period] the state often took action by way of executive decrees as opposed to the constitutionally prescribed manner, by having Parliament promulgate parliamentary statutes. In this way, the notion of protecting and strengthening the Constitution became popular not just with legal associations but with political forces alike.'[23]

By 1981, the concept of judicial review began to gain official acceptance. In March 1981, the Congress of the SD resolved to support the establishment of a Constitutional Tribunal. Soon thereafter, a resolution of the Ninth Extraordinary Congress of the PZPR

officially sanctioned the concept of a Constitutional Tribunal and authorized its establishment. The resolution provided 'that a Constitutional Tribunal be established or its functions be assigned to the Supreme Court.'[24] In the autumn of 1981, the Solidarity Congress also passed a resolution calling for the creation of institutions that would ensure the legality of the activities of political bodies. Other officially recognized civic groups and associations, such as the Congress of the Polish Bar (*Ogolnopolski Zjazd Adwokatury*), also offered support for judicial review.[25]

In reaction to the growing public pressure, in November 1981 the Presidium of the Parliament (the political leadership) appointed a seven member 'committee of experts' (consisting of leading law professors from Polish universities) to study the possibility of incorporating a constitutional court into the communist power structure without substantially modifying existing political arrangements. Because of its official sanction, the committee continued to function even during the martial law period which began on 13 December 1981.

After the imposition of martial law, the communist regime, while using repressive measures against the most visible figures of Solidarity, attempted to achieve social legitimacy by introducing several 'democratic' policies. However, while taking steps toward 'liberalization', the regime was careful not to adopt any institutional reforms that might undermine the basic totalitarian underpinnings of the system. As Professor Izdebski noted, viewed against this background 'the constitutional amendment to create the Constitutional Tribunal was simply an ''illusion of democratization'', part of the government strategy aimed at lowering the level of public frustration.'[26]

On 5 February 1982 the committee submitted to the Parliament a formal draft of a constitutional amendment, which the Parliament passed into law on 26 March 1982. The Constitution's new article 33a provided for the formation of a Constitutional Tribunal 'to review the constitutionality of parliamentary acts and other normative acts passed by the supreme and central State organs.' While the amendment also divested the Council of State of the duty to enforce the constitutionality of laws, it was highly uncertain whether the Tribunal would be able to transcend the power of the Party and serve effectively as a custodian of the national constitution. Indeed, independent commentators reflected on the obvious difficulties of incorporating a system of judicial review, a mainstay of liberal democracy, into a communist power structure:

> Effective monitoring of the constitutionality of laws in Poland requires a solution to one essential problem – reconciling diverse political and social inspirations with the leading role of the Party; this role of the Party is a basic feature of our political system, but one unknown in the states where this institution [of judicial review] originally developed.[27]

Article 33a created only a general framework for the Constitutional Tribunal, but it provided that future legislation would elaborate the specific organization, jurisdiction and procedures of the Tribunal. The process of drafting the law detailing the Tribunal's powers and procedures was slow; fourteen different drafts were prepared before the final legislative bill was submitted to Parliament on 27 February 1985. The Austrian and German constitutional court systems provided basic models, but as Miroslaw Wyrzykowski stated, 'these models had to be adapted to the specific political realities of the Polish state.'[28]

While the regime wanted to present the illusion of constitutional legality, it did not intend to implement a judicial mechanism that could check the constitutionality of its actions, particularly when fundamental and politically sensitive interests were at stake. In particular, Professor Izdebski emphasizes that the regime did not want to give the Tribunal substantial autonomy because it feared that the Tribunal would assert itself as the High Administrative Court had done. According to Professor Izdebski:

> The assertiveness of the High Administrative Court, particularly with regard to constitutional issues, had conditioned the ruling elite to be very wary of granting substantial power to governmental bodies beyond its reach. The experience with the High Administrative Court convinced the regime that a Constitutional Tribunal, if instituted, had to be strictly limited in every area.[29]

Moreover, as recently recalled by Tribunal Justice Zdzislaw Czeszejko-Sochacki, other more conservative communist regimes in Central Europe were critical of the establishment of a Constitutional Tribunal in Poland. Justice Czeszejko-Sochacki reports that in 1982 the Academy of Sciences of the German Democratic Republic prepared a document entitled 'The Analysis of the Establishment in Poland of the Constitutional Tribunal and the Tribunal of State', which criticized the creation of the Constitutional Tribunal in Poland and 'supported the conservative elements in the Polish Communist

regime which aimed to delay the implementation of the Constitutional Tribunal.'[30]

In a paper given in 1991, Tribunal Justice Janina Zakrzewska reflected on the reasons why it took so long to promulgate the legislative underpinnings of the Tribunal, and on why an institution designed to protect civil rights and the Constitution was created during the period of martial law. She said that the historical circumstances surrounding the evolution of the Tribunal explained its limited power of judicial review:

> In 1982, the authorities were under tremendous popular pressure, which was constrained . . . but not destroyed by martial law, to create certain institutions that would make the state accountable to the constitution and the people. On the other hand, as the regime did not want to relinquish its monopoly of power and its lack of accountability, they agreed to realize certain popular demands in form rather than in substance. This was the context that explains the establishment . . . of the Constitutional Tribunal. The pressure of 1980 and 1981 was too strong to be totally ignored, and the regime agreed to introduce new institutions into the Constitution in the hope that such concessions would easily fulfill the society's democratic ambitions. . . . The sluggishness displayed in the actual implementation of the new institutions confirms this conclusion.'[31]

Although the main problem for the drafters was reconciling the theory of the unity of state power with judicial review, the resolution of several other questions slowed the drafting process: (i) Should the Tribunal apply 'preventive review' (review of legislation passed by the Parliament but not yet promulgated into law) or 'subsequent review' (review of statutes and other normative acts already promulgated)? (ii) Should the Tribunal be able to review the constitutionality of international agreements? (iii) Should judicial review be 'abstract' only (for example, only authorized state bodies may ask the Tribunal to review the constitutionality of specific normative acts) or 'incidental' as well (for example, constitutional questions encountered by regular courts in cases and controversies may be submitted to the Tribunal)? (iv) Who should have standing, or be permitted to, initiate Tribunal review and should there be an 'actio popularis' or an individual right of petition? Justice Czeszejko-Sochacki stated:

> The solutions to the problems surrounding the implementation of the Constitutional Tribunal had to meet the political conditions of

> its days and, like any other legislative decision, was an inevitable compromise between the theoretically desirable model on the one hand, and what was actually feasible in the given political conditions on the other hand.... The dispute about the establishment and position of the Constitutional Tribunal no doubt went beyond that agency alone: it was the symptom and element of the ripening of profound political changes.[32]

On 29 April 1985, three years after the 1952 Constitution was amended, Parliament finally approved the Constitutional Tribunal Act of 1985 (1985 Act).[33] As was the practice in all communist states with regard to the passage of major legislative acts, 'the 1985 Act was submitted to public consultation' as well as supposedly to 'consultations with political and civic organizations'.[34] Once the Tribunal was created, the regime attempted to portray its existence as a logical part of the communist agenda. For example, on the day the 1985 Act was introduced to the Sejm, Deputy Edward Szymanski, one of the drafters of the bill, stated the following:

> The Party's firm commitment to the cause of strengthening the socialist rule of law was expressed by the 9th Extraordinary PZPR Congress, which called for the creation of a [Constitutional Tribunal]... The [1985 Act] must be viewed in the context of the total body of political and legislative measures undertaken by the PZPR... to improve the functioning of the socialist state.[35]

Reflecting popular expectations regarding the role of the Constitutional Tribunal, an article in *Prawo i Zycie*, a Polish law journal, proclaimed:

> The establishment of the Tribunal creates altogether a new law structure. The Constitution, which is at the top of this structure, will now be almost directly applicable, as it will be possible to check if nearly every newly issued legal act agrees with the Constitution. The Constitution thus starts to resemble other acts directly influencing the rights and duties of citizens and the operation of state institutions.... Generally speaking, it is hoped that the Constitutional Tribunal will ensure that a coherent legal system exists in Poland.[36]

However, in 1986, the regime's ideological intentions were exposed with particular clarity by a Party scholar: 'The Party rejects all

attempts aimed at excluding certain elements of the state machinery from its political influence. This pertains also to judicial organs.'[37]

E ORGANIZATION, STRUCTURE AND SCOPE OF REVIEW OF THE CONSTITUTIONAL TRIBUNAL

(i) Organization and Structure

Separate from the system of regular courts, the Tribunal is composed of a President, a Vice President, and ten justices. Justices are elected by the Sejm to sit for terms of eight years, a time period chosen to tie the Tribunal to more than one Sejm term of office. Reelection is prohibited, which enhances the independence of the Tribunal since justices have less motivation to cater to political forces. Elections are staggered so that half of the bench is elected every four years.

To begin this staggered process, half of the Tribunal's first bench was elected to terms of four years while the other half was elected to regular terms of eight years. Between 1989–93, the Tribunal consisted of six 'Solidarity justices' elected in November 1989 and six justices elected in 1985, when the communist regime was still in power. While the 'communist justices' were replaced through regular Tribunal elections in late November 1993, in the fall of 1992 the right-wing Christian National Union (ZChN) in the Sejm spearheaded an attempt to remove those justices who had been elected in 1986. The initiative died after being rejected by the Sejm's Legislative Commission, which maintained that shortening the term of office of certain Tribunal justices would be inconsistent with the constitutional principle that Poland is a 'democratic state ruled by law.'[38]

Article 33a states that candidates for the Tribunal's bench must be 'persons distinguished by their legal knowledge' and must possess the numerous qualifications required of Supreme Court and High Administrative Court justices. Accordingly, candidates must have at least ten years' experience in any of the following professions: prosecutor, professional judge, member of the State Arbitrazh, advocate, jurisconsult or senior legal officer in an administrative agency. Professors of law are exempt from the experience requirement, and the current Tribunal is composed of 9 professors of law and 3 former regular court judges.

Article 33a states that '[m]embers of the Constitutional Tribunal are independent and subject to the Constitution only.' During their term

of office, Tribunal justices are 'irremovable within limits of good behavior.'[39] Justices enjoy the privileges and immunities granted to Supreme Court justices, such as immunity from criminal responsibility for their decisions. Until the Tribunal as a body agrees to allow one of its members to be subject to judicial proceedings, no legal action can be undertaken against that justice. To prevent conflicts of interest, the 1985 Act prohibits justices from combining their position on the Tribunal with a seat in the Sejm or with any other state position. Moreover, to preclude any external pressure on justices, the 1985 Act states that upon completion of his term, 'a member of the Constitutional Tribunal shall have the right to take his previous state office or to be given an office equal to that previously held.'[40]

(ii) Proceedings

Tribunal proceedings have the characteristics of a trial. Hearings before the Tribunal are open to the public and are adversarial in nature.

The Tribunal's docket is set by the Tribunal's President with the assistance of the Vice-President. Once the Tribunal agrees to examine a motion or a question of law, the party which initiated the motion, the government body which promulgated the challenged act, and the Prosecutor-General must be notified. During hearings, the officials or representatives of the organ which filed the petition or inquiry, as well as the officials or representatives of the organ which issued the challenged normative act, must be present. The government body which adopted the challenged normative act may be represented by the Prosecutor General.

Arguments and evidence necessary for the clarification and consideration of the matter are presented during hearings by the parties appearing before the Tribunal. The Tribunal examines witnesses and experts and may 'demand that State organs and institutions as well as social organizations present files and documents, and also provide other evidence which it finds indispensable to adjudicate the case.'[41] In addition, unusual for constitutional court systems, 'experts in law' may be examined by the Tribunal, and often leading law professors and practitioners are summoned to the Tribunal to provide their expert opinion on legal interpretation and comparative law.

The Tribunal seldom sits *en banc*. Instead, provisional panels are created. Panels of five judges hear petitions and inquiries which challenge the constitutionality of statutory acts. Cases concerning

substatutory acts are heard by panels of three judges. In a given case, the Tribunal's President determines the composition of the panel (linking the legal specialization of respective justices with the legal nature of the case at hand), the chairman of the panel and the reporting judge. The Tribunal sits *en banc* only when, by the determination of the Tribunal's President, a particularly precedential case is to be heard.

The main task of the Tribunal is to determine whether parliamentary statutes conform with the Constitution and whether substatutory acts (regulations issued by national executive agencies and Cabinet ministers on the basis of, and pursuant to, statutes) conform with the Constitution and with statutes. In the course of its review, the Tribunal examines whether the substance of a challenged act conforms with the Constitution or a particular statute, and whether the state body adopted the challenged act in accordance with jurisdictional and procedural requirements. A Tribunal decision may concern the act as a whole or its individual provisions.

Statutes are subject to constitutional review from the moment of publication in the official register of statutes, the *Journal of Laws* (*Dziennik Ustaw*). Substatutory acts may be reviewed from the moment of their adoption by the appropriate agency or organ, even if those acts are to enter into force at a later date. The 1985 Act prohibited review of draft substatutory acts that had not yet been passed, and if a legal act under review loses force, Tribunal proceedings must be discontinued.

The chairman of the panel adjourns a hearing when the panel agrees that the case has been sufficiently clarified. Having adjourned, the chairman presides over the deliberation of the case. The panel determines its verdict by majority vote and issues a decision accompanied by an opinion explaining the judicial reasoning behind the Tribunal's interpretation of the constitution. The justices in the minority may, before the announcement of the verdict, draft dissenting opinions to be noted in the decision. The Tribunal's first dissent was issued in January 1991, and since that time dissents have become frequent, particularly in those cases considered by the full bench of the Tribunal.[42] Decisions and opinions are drafted by the reporting justice of the panel. All the justices on the panel sign the verdict, including the justices of the minority opinion. The written verdict is presented to the parties to the proceeding, and the chairman of the bench presents the main reasons behind the verdict, providing the

basis for the judicial reasoning of the Tribunal in its interpretation of the Constitution and the law.

A Tribunal decision on the unconstitutionality of a legal act may affect former judicial decisions taken on the basis of the changed or invalidated act. Civil proceedings in such cases may be reopened by a proper petition if submitted within five years from the date the court's original decision acquired legal force; for arbitration proceedings the limitation period is three years; criminal cases may be annulled within three years from the date they came into force; and decisions in administrative proceedings may be invalidated immediately upon a finding of unconstitutionality.

(iii) Access to the Tribunal

Proceedings before the Tribunal may be initiated in one of three ways: by petition from authorized organs and officials ('abstract initiative'), by the courts through an official judicial inquiry ('incidental initiative'), or by the Tribunal on its own initiative.

(a) Abstract Initiative

First, with 'abstract initiative', similar to that found in West European constitutional court systems, certain authorized state organs and officials, including the President of the Republic, the Prime Minister, groups of Sejm deputies, and the Ombudsman for Citizens' Rights, may petition the Tribunal to review the constitutionality of any legal act within the Tribunal's jurisdiction. These authorized petitioners may approach the Tribunal either on their own initiative or as a result of complaints or requests from citizens. The majority of petitions received by the Tribunal are submitted by the Ombudsman on the basis of citizen complaints. The very first case considered by the Tribunal provides an example of abstract initiative on the basis of citizen complaints. The Voivodship People's Council in Wroclaw, a local governing organ, challenged the constitutionality of a government regulation (changing the formula for calculating maintenance rates of privately owned apartments in state-owned buildings) after receiving over 110,000 citizen complaints concerning the regulation.[43]

Up to 1989, if a disputed regulation concerned matters of 'state defense or security', initiative for review was vested exclusively in the Presidium of the Parliament, the Council of State, the Committee for National Defense, and the Council of Ministers. These were the organs most

closely connected with the leadership of the Communist Party. This provision was amended out of the Constitutional Tribunal Act in 1989.

The 1985 Act also vested a limited right of abstract initiative in certain local government bodies. Voivodship councils, regional councils, and officially sanctioned trade organizations may file petitions challenging only those legal acts which pertain directly to their statutorily defined activity. Petitions from this group are subject to preliminary examination by a single justice appointed by the President of the Tribunal. The Tribunal quashes the proceedings if a motion fails to meet the requirements set by provisions of the Act or when it is obviously unfounded or misaddressed.

(b) Incidental Initiative

Second, with 'incidental initiative', similar to that found in West European constitutional court systems, Tribunal review occurs in connection with concrete cases or controversies pending before regular courts. If an inconsistency between a law and the Constitution is discovered during a regular court proceeding, the proceeding is suspended and the regular court judge prepares a 'legal question' for the Tribunal. However, regular courts may not apply directly to the Tribunal for review. They may only send their legal questions to certain 'higher' judicial bodies authorized to 'certify' them to the Tribunal, such as courts of appeal, the High Administrative Court, and the Supreme Court. These judicial bodies must consider the regular courts' legal question, and the decision to initiate Tribunal review is completely within their discretion.

That only higher judicial bodies may submit legal questions to the Tribunal, based on the presumption that regular courts need 'guidance' from higher judicial bodies when considering constitutional matters, was criticized at the time of the passage of the 1985 Act: 'The exclusion of the courts [from being able to directly petition the Tribunal] does not accord with their role as independent bodies of justice protecting the interests of citizens as well as those of the state.'[44] In practice, regular courts have been very reluctant to forward legal questions to the Tribunal. This reluctance is due to two factors: (i) the Polish judiciary during the communist era was instructed to avoid addressing constitutional questions; (ii) in continental civil law systems, regular court judges do not normally look to the constitution in an interpretive sense and thus rarely feel the prerogative to challenge the constitutionality of a parliamentary act.

A legal question submitted to the Tribunal through incidental initiative must be 'relevant' to the specific case before the regular court; that is, the decision in the case must be contingent on the legal question being decided by the Tribunal. Suspension of judicial proceedings following the raising of a legal question lasts until the question of constitutionality is decided. If the challenged act is found to be illegal or unconstitutional, the suspended proceedings are restarted only after the act is made to conform to law by the legislative or administrative body which promulgated it or after the act loses its binding force. Tribunal decisions on legal questions are binding not only for the lower court in which the legal question was raised, but for the entire Polish legal system.

(c) Tribunal Initiative

Third, the Tribunal itself may initiate constitutional review of a particular statute or substatutory act. Such review originates from a Tribunal decision made at a closed hearing based on a motion submitted by the President of the Tribunal. This motion may be formulated on the basis of complaints from individual citizens, information provided by the mass media or the press, information received from other state bodies, including the legislature, or Tribunal opinions from previous cases.[45] The panel of justices making the decision on whether to initiate Tribunal review is of a size proper for considering the given type of legal act (three justices for substatutory acts, five justices for statutes). When deciding to initiate Tribunal review, the panel's decision does not have to be unanimous.

Importantly, there is no procedure for individuals to petition for Tribunal review. In attempting to justify this omission, official reasons included: (1) that such a right would lead to a flood of petitions to the Tribunal; (2) that authorized petitioners serve as 'appropriate vehicles' for citizen concerns. The omission of an individual right of petition was criticized by the Solidarity opposition when the Tribunal began its operation. One opposition weekly, *Tygodnik Powszechny*, published the following commentary at the time of promulgation of the 1985 Act:

> The striking absence of citizens and citizens' organizations, whose constitutional rights have been violated, from the list of those empowered to institute proceedings before the Tribunal . . . arouses the fear that the Tribunal may be reduced to being a forum for resolving conflicts between state bodies and other selected institu-

> tions. Safeguarding the Constitution also means safeguarding individual rights; without this, the legal system is flawed. The possibility that state bodies will represent the interests of citizens before the Tribunal is only a possibility . . .[46]

By proscribing an individual right of petition, the regime was able to deny the democratic opposition the opportunity to benefit from the establishment of judicial review in Poland. The 1985 Act ensured that Tribunal review would be initiated only by official state organs and officially sanctioned (and thus politically reliable) civic organizations.

F LIMITATIONS ON THE TRIBUNAL'S PRACTICE OF JUDICIAL REVIEW

The Tribunal was incorporated into a communist power structure reluctant to institute a judicial mechanism that could authentically check the constitutionality of its actions, particularly when fundamental and politically sensitive interests were at stake. To ensure that the Tribunal would not overstep politically acceptable boundaries, the 1985 Act limited the Tribunal's scope of review and the validity of its decisions.

(i) Substantive Limitations on the Tribunal's Scope of Review

The Tribunal could not review many legislative acts, such as regulations and ordinances issued by local government or municipal administrative agencies (a rapidly growing area of law in Poland). Judicial review by the High Administrative Court was considered sufficient.

In addition, contrary to the hopes of many groups in Poland, the Tribunal was precluded from reviewing domestic legislation for conformity with international agreements. This limitation prevented the Tribunal from ruling on any alleged violations of international human rights agreements that communist Poland had ratified, such as the United Nations' International Covenant on Civil and Political Rights. During the parliamentary debates over the passage of the 1985 Act, the prevailing opinion of the PZPR stressed that 'the legal status of an international agreement is not regulated by constitutional law'[47] and that the Tribunal is limited to controlling acts which are 'adopted' not 'contracted'.[48]

While international agreements theoretically had the binding force of statutes in the hierarchy of sources of law, the regime rejected the notion that the provisions of international agreements were an integral part of the domestic legal order and as such constituted a direct source of law. Party scholars insisted that international treaties bound the Polish state only in the international arena, and that it was the state's sovereign decision whether to implement treaty provisions domestically. As Professor Lopatka argued: 'Human rights formulated in the Covenant [on Civil and Political Rights] may be recognized as citizen rights of a given state only through state action . . . Only then do they become a direct foundation upon which the state and its citizens may rely in their actions.'[49]

These remarks masked the actual motivations of the regime; international agreements were placed outside the Tribunal's scope of review to prevent the Tribunal from attempting to enforce the conformity of internal state action with the international human rights agreements to which communist Poland was a party. As Tribunal Justice Zakrzewska wrote: '[W]hen the authorities founded the Constitutional Tribunal, they wanted to limit its capacity and hence did not allow it to examine the conformity of domestic laws with the many international legal standards to which communist Poland was a signing member calling for respect and enforcement of human rights.'[50]

(ii) Procedural Limitation of the Tribunal's Scope of Review

The 1985 Act placed a significant time limitation on the Tribunal's ability to review laws and regulations. Tribunal proceedings cannot be initiated more than five years after the issuance of the challenged provision. Official reasons for this five year limitation were that the Tribunal must not be allowed to 'undermine the stability of the law', and that the Tribunal's activities should be 'directed toward the future'.[51] But this temporal limitation also removed any temptation to review certain politically important laws of questionable constitutional validity, such as the Martial Law Decree of December 1981 and its accompanying laws. Reopening these issues would have amounted to political suicide.

(iii) Legal Validity of the Tribunal's Decisions

Most important, the validity of a Tribunal decision would depend upon the hierarchical level of the act under review. In the case of

substatutory acts, a decision of unconstitutionality or illegality would be final and binding. If the executive agency did not amend the act within three months as directed by the Tribunal, the act would become *de jure* invalid. After issuing its decision, the Tribunal could on its own discretion suspend the act on the day of the decision.

However, in the case of parliamentary statutes, a decision of unconstitutionality would not be binding and did not automatically invalidate the statute. Instead, the Tribunal would have to submit its decision to the Sejm for further consideration; the Sejm then had six months to decide on the Tribunal's ruling. If the Sejm accepted the Tribunal's decision by a qualified two-thirds majority vote, with at least half of the deputies present, the statute must be repealed. If the Sejm rejected the Tribunal's decision, then the parliamentary resolution was final and binding. The Tribunal's decision would then be dismissed, and the Tribunal could not reconsider the issue.

Thus, when a parliamentary statute was at issue, only the Parliament's decisions would be final; a ruling of unconstitutionality by the Tribunal would only act as a veto. During the communist era, this framework had obvious political overtones, as the Party-controlled Parliament could prevent the Tribunal from overstepping politically acceptable limits. By making Parliament the final arbiter of the constitutionality of statutes, the Parliament and, during communist times, the Party were able to maintain their legislative supremacy.

The limited validity of Tribunal decisions concerning parliamentary statutes guaranteed Parliament's supremacy over the Tribunal and that the Tribunal's principal sphere of interest would be the review of substatutory acts. This in turn protected parliamentary statutes against infringement by organs of the executive branch that establish legal regulations. In this way, the Tribunal effectively operated to protect Parliament's legislative powers and to assist in its supervision of the administration. This framework corresponded well with the model assumption articulated in 1988 by Leszek Garlicki, that 'the Polish Tribunal assists rather than supervises Parliament and helps Parliament maintain its position as the country's supreme legislator.'[52]

During the communist era, these substantive and procedural limitations guaranteed that the Tribunal would not substantially modify the totalitarian political framework. After the collapse of the Polish communist regime in 1989, Parliament amended the 1985 Act, expanding the Tribunal's scope of review. But the amendments did not change the limitations described above, which continued to ensure that

political bodies could challenge the Tribunal whenever it addressed matters of fundamental importance.

(iv) Expansion of the Tribunal's Scope of Review in 1989

On 29 December 1989, Parliament amended the Constitution, expanding the Tribunal's scope of review. First, the amendment allowed the Tribunal to adjudicate upon the 'non-conformity with the constitution of the aims or activities of a political party.'[53] Upon the motion of a regular court or the Ministry of Justice, the Tribunal may determine whether a political party's goals or activities advocate 'change of the system of government of the Republic of Poland by violence.' If such a determination is made, the Tribunal will restrain the activity of the party by revoking its legal status. In late 1991, the Tribunal refused to exercise this power when the constitutionality of the infamous 'Party X', the political party of the eccentric presidential candidate Stanislaw Tyminski, was challenged.

Second, the 1985 Act was amended to allow the President, prior to signing a statute into law, 'to move to the Constitutional Tribunal for adjudication on the conformity of that statute with the constitution.'[54] After reviewing the President's motion, the Tribunal presents to the President and to the Sejm its comments on the consistency of the parliamentary legislation with the Constitution, as determined by a bench of five justices. The first 'presidential inquiry' occurred in August 1990, when then-President Jaruzelski asked the Tribunal to review the constitutionality of legislation that had lowered the pension privileges of former Party officials.

Third, a 1989 law gave the Tribunal the power to provide 'universal binding interpretations of statutes' (*powszechnie obowiazujaca wykladnia ustaw*).[55] This power had previously belonged to the Council of State. Universal binding interpretations provide general declarations by the Tribunal explaining or interpreting ambiguous provisions of particular statutes, without the need for a specific case or controversy; they do not change existing law, but are meant to provide accurate legal interpretation of statutes binding on all regular courts and other state bodies. The President of the Republic, the Prime Minister, the Presidents of the Supreme Court and the High Administrative Court, the Ombudsman for Citizens' Rights and the Prosecutor General may file motions with the Tribunal requesting a universal binding interpretation. The full bench of the Tribunal establishes by way of

resolution the universal binding interpretations, which are published in the official *Dziennik Ustaw*.

The above are the most distinctive features of the Polish Constitutional Tribunal as implemented in 1986. The Tribunal's organization, jurisdiction, and procedure were generally patterned on the models provided by Austrian and German constitutional court systems. Nevertheless, as the Tribunal was implemented by a communist power structure in 1986, and as totalitarian regimes reject the notion of an independent judicial body that checks the constitutionality of their actions, the jurisdiction and operation of the Tribunal were significantly limited to ensure that the Tribunal's practice of judicial review was congruent with, and not a challenge to, the concept of parliamentary (and Party) supremacy. That the Tribunal was subservient to, and not a control on, the physical will of Parliament was symbolized by the physical location of the Tribunal in the basement of Parliament.

Thus, despite the optimism which accompanied the establishment of the Tribunal, that Tribunal decisions could be subjected to political control diminished the contribution made by its creation to the development of separation of powers and checks and balances in communist Poland.

6 Constitutional Interpretation and Enforcement

This chapter analyzes the constitutional jurisprudence of the Tribunal. Part A traces the Tribunal's evolution from an initially unadventurous body to an increasingly activist judicial institution willing to challenge political bodies, build constitutional doctrine, and give normative effect to the Constitution. Part B examines the Tribunal's interpretation of the Polish Constitution's *Rechtsstaat* clause and its enforcement of the constitutional 'principle of equality' which bans discrimination on the basis of race, sex, education, or religion. This part also analyzes the Tribunal's protection of substantive rights arising from the due process and equal protection guarantees of the Constitution. Part C considers the increasingly political role of the Tribunal's jurisprudence as it addresses controversial constitutional issues and more aggressively reviews parliamentary statutes. Part D concludes by identifying several procedural and jurisdictional changes that would strengthen the role of judicial review in democratic institutionalization in Poland.

A THE TRIBUNAL'S PRACTICE OF JUDICIAL REVIEW

Parliament elected the first bench of twelve Tribunal justices in November 1985. The Tribunal commenced operation on 1 January 1986 and decided its first case on 28 May 1986. During its first eight-and-a-half years, from 1 January 1986 to 1 July 1994, the Tribunal issued over 240 rulings in various proceedings. The Tribunal reviewed substatutory acts in 93 of those rulings and found 35 of the challenged substatutory acts to be unconstitutional or illegal. The government discontinued another 50 proceedings by repealing the challenged acts before the Tribunal rendered a decision. In 75 rulings, the Tribunal reviewed the constitutionality of parliamentary statutes and found 48 of the challenged statutes to be unconstitutional (see Tables 6.1 and 6.2 for surveys of the origin and ultimate disposition of Tribunal cases in the period 1986–94).

The Tribunal was not very active during its first three years of operation, but following the collapse of the Polish communist regime in 1989, the Tribunal began to aggressively review cases submitted byauthorized petitioners, most of which were initiated by the

Table 6.1 Origin of Constitutional Tribunal Cases (January 1986–July 1994)*

	1986	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*	*Total*
Tribunal reviews of statutes	1	1	1	8	10	5	15	25	9	75
Presidential Inquiry	—	—	—	0	1	1	0	1	1	4
Tribunal review of substatutory acts	5	5	19	17	12	10	11	12	2	93
Generally Binding Law Interpretations	—	—	—	0	7	12	4	8	7	38
Unconstitutional political parties	—	—	—	—	0	0	0	0	0	0
Impeachment requests	0	0	0	0	0	0	1	0	1	2
*Signalization***	—	—	—	7	2	6	0	7	7	29
Total	6	6	20	32	32	34	22	53	27	245

* *Notes*:
* Calculated on the basis of the reports of the Tribunal (*Orzecznictwo Trybunalu Konstytucyjnego*). The Tribunal has also promulgated a number of generally binding law interpretations; the Ombudsman has initiated almost 80 per cent of all interpretation requests.
** Until 1989, Tribunal 'signalizations' were not included in the Reports.

Table 6.2 Review of Laws by the Constitutional Tribunal (January 1986–July 1994)*

Between 1986 and July 1994, the Tribunal reviewed 168 legal acts, including seventy-five parliamentary statutes and ninety-three substatutory regulations.

Statutes	1986	1987	1988	1989	1990	1991	1992	1993	1994	Total
Unconstitutional	0	0	1	7	3	3	10	20	4	48
Constitutional	1	1	0	1	3	1	3	1	4	15
Review	0	0	0	0	4	1	2	4	1	12
Discontinued										
Total	1	1	1	8	10	5	15	25	9	75

Substat. Acts	1986	1987	1988	1989	1990	1991	1992	1993	1994	Total
Contrary to Constitution/ Statutes	4	2	6	6	2	4	5	5	1	35
Conforming with Constitution/ Statutes	0	0	1	0	1	2	0	3	1	8
Review Discontinued	1	3	12	11	9	4	6	4	0	50
Total	5	5	19	17	12	10	11	12	2	93

Note:
* Calculated on the basis of the reports of the Tribunal (*Orzecznictwo Trybunalu Konstytucyjnego*).

President of the High Administrative Court and the Ombudsman for Citizens' Rights. Two distinct periods thus characterize the Tribunal's activities. First, from 1986 until 1989, when the very existence of the Tribunal conflicted with the fundamental assumptions of the communist regime, the Tribunal was relegated to resolving issues of little political and constitutional importance. Even in this period, however, the Tribunal managed to control the scope of the law-making powers of executive agencies, and this was not without political significance. Second, after the collapse of the communist regime in 1989, the Tribunal assumed an active role in constitutional matters, instilling normative characteristics into Polish constitutionalism and developing constitutional doctrine in accordance with its understanding of the suprapositive principles of a state ruled by law. Throughout its existence, the Tribunal's practice of judicial review has been curbed by limitations included in the 1985 Act to ensure that the Tribunal would not emancipate itself nor overstep politically acceptable limits.

(i) 1986–9: The Limited Role of the Tribunal

During this initial period of relative inactivity, the Tribunal focused on reviewing substatutory acts, particularly regulations issued by administrative agencies and ministries. Of the 33 cases the Tribunal reviewed in the period 1986–9, only three involved parliamentary statutes. Of these three cases, the Tribunal found only one statute 'partially inconsistent' with the 1952 Constitution.[1]

During this period, the Tribunal did not challenge the constitutionality of parliamentary acts but rather protected them from executive

branch administrative decisions or actions that infringed upon them. In this way, Parliament was the main beneficiary of constitutional review, as parliamentary statutes were a point of reference rather than the object of review. The cautious nature of these early decisions was not entirely unexpected; as Leszek Garlicki wrote: 'The Tribunal was initially conceived to be a ''guardian'' of the Parliament's powers in its relations with the executive branch. Thus, it was no surprise that the Tribunal was initially very cautious in its decisions concerning the constitutionality of parliamentary statutes.'[2] This relationship with the communist power structure rendered the Tribunal nearly impotent as a protector of the Constitution. Indeed, Professor Mauro Cappelletti notes that 'no effective system of judicial control is compatible with, and tolerated by, antilibertarian, autocratic regimes.'[3]

The Tribunal's activity during this early period, however, was not entirely meaningless. Although it did not challenge Parliament in its early decisions, it did significantly limit the often arbitrary law-making practices of executive agencies by focusing on the enforcement of so-called 'delegation clauses' in parliamentary statutes. Under Polish law, executive agencies may issue regulations only to implement parliamentary statutes. The relevant statute must contain a special delegation clause to authorize executive agencies to enact regulations for a specifically defined subject matter.

Although involving politically unimportant cases, the early decisions of the Tribunal struck down a number of executive regulations which lacked sufficient statutory basis, exceeded the scope of the statute's delegation clause, or contravened the provisions of other statutes. The Tribunal adopted a narrow construction of an executive agency's right to issue regulations, and held that only explicit statutory delegations authorize the issuance of regulations. The Tribunal specifically rejected the idea of 'implied delegations' and held that if an executive agency is not expressly given the power to regulate in a given area, statutory delegation may not be presumed.

The Tribunal's first case illustrated this narrow interpretation of executive branch law-making powers.[4] The case involved the review of a regulation promulgated by the Council of Ministers establishing apartment maintenance rates. A parliamentary statute passed in 1961 permitted tenants of state-owned apartment buildings to purchase their apartments from the state, but required the new apartment owners to pay 'building maintenance fees' to the state. The statute contained the following delegation clause regarding these maintenance rates: '[t]he Council of Ministers shall issue a general administrative

regulation . . . which establishes . . . the specific rate requirements and procedures for owners of apartments purchased from the state.'[5] On the basis of this delegation clause, in 1970 the Council of Ministers issued a regulation setting the maintenance fee at a percentage of the apartment's original price. In 1985, the Council of Ministers issued a new regulation which changed the formula for calculating the fees, setting rates at an amount equal to the rent paid by tenants in the same building who had not purchased their apartments from the state. This new formula was applied retroactively to apartments purchased before 1985.[6]

The 1985 regulation was challenged before the Tribunal in the spring of 1986 by the executive council of the Wroclaw voivodship government (which petitioned the Tribunal after receiving complaints from over 110,000 apartment owners). The voivodship argued that although the delegation clause of the 1961 statute permitted the Council of Ministers to establish maintenance fees, it had not given it the power to modify them.[7] The Tribunal agreed. Because the delegation clause did not explicitly permit modifications of validly concluded contracts between apartment owners and the state, the Tribunal ruled that authority for such modifications could not be presumed. Like the High Administrative Court in its early period, the Tribunal, by nullifying the 1985 regulation, successfully challenged the discretionary law-making powers of the executive branch and won a clear victory – a development unexpected by the Tribunal's founders.

Another case illustrating the Tribunal's strict interpretation of executive powers involved a 1982 statute promulgated to combat alcoholism, that limited consumer access to alcohol.[8] The statute directed the Council of Ministers to regulate the number of liquor shops in certain regions of Poland.[9] In applying this statute, the Council of Ministers issued regulations that reduced the number of liquor shops by 10 per cent. In a 'subdelegation' of authority not explicitly provided for by the statute, the Council of Ministers authorized the Minister of Trade to further reduce the permitted number of liquor shops in a certain region.[10] When the regulations were challenged before the Tribunal, it held that the Constitution permitted subdelegation of authority only when it is explicitly provided for by a statute's delegation clause. Because the 1982 statute did not contain such a provision, the Tribunal found the challenged regulation unconstitutional.[11]

The Tribunal's early decisions established the important precedent that executive agencies may only issue regulations expressly permitted

by statute, and executive actions exceeding statutory delegations were illegal and void. By 1989, the Tribunal had struck down with the same rationale almost all of the substatutory acts brought before it. As the Tribunal developed a reputation for strict review of these substatutory acts, government agencies modified or abolished such acts as soon as anyone challenged them before the Tribunal in order to avoid an unfavorable ruling.

By 1989, after almost forty decisions, the Tribunal's jurisprudence had distinguished several guidelines for judging the law-making powers of the executive branch. First, executive agencies were permitted to issue regulations only with explicit statutory authority and in conformity with the specific subject matter of the statute; agencies could not act on the basis of 'implied delegations'. Second, an executive agency could not delegate regulatory powers to other bodies without explicit authorization in the statute's delegation clause. Third, substatutory acts had to conform not only with the statute containing the delegation clause, but to all parliamentary statutes.

Despite the development of its own body of decisions interpreting the law-making powers of the executive branch, the Tribunal was not politically involved during its initial years. Indeed, the democratic opposition, knowing the pervasive power of the Party and the intractability of its leading role, had no illusion that it could benefit from the creation of judicial review. But because the Tribunal decided no politically contentious cases, the communist leadership was not interested in intervening in the Tribunal's decisions, and the Tribunal was able to develop its own interpretation of the law-making powers of the executive branch, and this jurisprudence was not entirely without political significance. The Tribunal successfully limited the well-established law-making practices of state bureaucrats while gaining acceptance (or at least tolerance) of other political actors. This initial success suggested great potential for the Tribunal's role in enforcing the rule of law and further eliminating bureaucratic arbitrariness.

(ii) 1989–94: Strengthening of the Tribunal

In the spring of 1989, significant democratic changes signaled the end of the totalitarian phase of Polish political life. With the collapse of the communist regime, the Tribunal was freed from having to operate under the Party's 'leading role'. For the first time, the Tribunal was able to genuinely serve as a custodian of the national constitution and to review the constitutionality of legal acts without the possibility of

'guidance' from the Communist Party. With the reconstruction of the presidency and a bicameral legislature, and with the regular courts given genuine independence, for the first time since before World War II the structure of the Polish state began to move away from the theory of unity of state power and toward a framework for separation of powers. As Tribunal Justice Zakrzewska stated: 'The year 1989 was a year of fundamental change with regard to the constitutional organization of the state, and these changes influenced the competence and position of the Constitutional Tribunal. . . . The first elements of the principle of separation of powers were re-introduced.'[12]

The year 1989 was important for the Tribunal in an institutional sense as well. As discussed in Chapter 4, the 1952 Constitution was amended, providing the Tribunal with new constitutional principles to interpret and enforce. Moreover, amendments to the 1985 Act expanded the Tribunal's jurisdiction to allow it to issue the universal binding interpretations of statutes and to review legislation passed by Parliament but not yet signed by the President. The composition of the Tribunal also changed. Half of the justices completed their terms of office and were replaced by six new ones, elected by the Sejm in November 1989. The Solidarity movement took advantage of this opportunity and packed the Tribunal with its own candidates. Among the new justices were Professor Janina Zakrzewska, a well-known constitutional law expert and a vigorous advocate for the development of normative constitutionalism in Poland; Professor Andrzej Zoll, a constitutional law expert from the University of Warsaw who had been very outspoken in calling for the strengthening of the powers and jurisdiction of the Tribunal; and Professor Wojciech Laczkowski, a leading public international law professor and an advocate for expanding the Tribunal's jurisdiction to include review of the conformity of domestic legislation with international agreements. Because not all of the earlier justices had been staunch allies of the communist regime, it was relatively easy for the two groups to work together to apply the 1952 Constitution (as amended in 1989) more rigorously.

Despite these changes, political authorities rejected a sudden departure from the pre-existing legal order and prevented automatic invalidation of existing statutes. Legal scholars such as Professor Ewa Letowska, the first Ombudsman for Citizens' Rights, felt that total destruction of old laws would be contrary to the essence of a democratic revolution. These legal theorists felt that the gradual replacement of statutes and regulations was the only feasible way

to mend the legal system. Even laws passed during the communist era by illegitimate bodies would remain valid unless specifically repealed by the Constitutional Tribunal or the High Administrative Court.[13]

Strengthened by the 1989 amendments, the Tribunal assumed an increasingly active role in constitutional matters, demonstrating a determination to instill normative characteristics into Polish constitutionalism. First, it became much more aggressive in its review of parliamentary statutes. Of the 23 cases the Tribunal reviewed in 1989, eight concerned the constitutionality of statutory acts. In seven of these cases, the Tribunal declared the statute it reviewed to be unconstitutional. This development marked a decisive turning point for the Tribunal's practice of controlling statutes. Not only did this control have an impact on a great number of laws, but the Tribunal also departed from its previous reluctance to find statutory non-conformity. This trend continued after 1989, and in 1990–91 over two-thirds of the statutes reviewed by the Tribunal were held unconstitutional or were hastily modified by Parliament to avoid an unfavorable Tribunal decision. Ombudsman Ewa Letowska initiated most of these cases, and the Tribunal decided in favor of the ombudsman in almost all of the 56 cases brought by her in 1988–91.

When the major political actors realized the potential power of the Tribunal to advance political interests through its decisions, they began to contribute to the growth of the Tribunal's docket. The docket grew to approximately 30 cases annually with roughly equal numbers of statutes and substatutory acts being examined. Symbolizing its new independence and autonomy, the Tribunal moved from the basement of Parliament to its own wing of the parliamentary building in 1990.

Second, through its jurisprudence the Tribunal began to enforce the constitutional separation of powers. In a November 1993 decision, the Tribunal declared unconstitutional a parliamentary statute passed in 1990 that would have allowed the President to dismiss regular court judges who had collaborated with the regime during the communist era and who 'had been unfaithful to the principle of judicial independence in their proceedings.' The Tribunal based its decision both on the Constitution's principle of judicial independence (article 62) and on its 'Rechtsstaat' state-ruled-by-law clause (discussed below).[14] This decision symbolized Poland's transition out of the Soviet-style governmental system of entirely centralized state power to a system of separated powers.

Third, the Tribunal began to address more controversial constitutional issues, including the most politically charged constitutional questions confronting the post-communist Polish state. For example, the Tribunal reviewed for constitutionality a regulation promulgated by the Ministry of Education allowing the teaching of religion in public schools,[15] an amendment to the Medical Code of Professional Ethics prohibiting medical doctors from performing abortions except in cases of 'a direct threat to a woman's life',[16] a parliamentary resolution authorizing the Ministry of the Interior to investigate the possible collaboration of state officials with the secret police during the communist era,[17] and the 'Christian values' clause of the 1992 Law on Radio and Television.[18]

With these and other politically charged cases, the Tribunal's role became increasingly controversial after 1990. But Justice Janina Zakrzewska supported this development:

> In 1991, the Constitutional Tribunal was severely criticized several times for addressing certain issues. However, because this criticism related to those heated issues which are in dispute in many countries, such as the teaching of religion in public schools or the availability of abortion, this criticism of... the Tribunal should not be surprising. What is important is that the Tribunal have this role in developing the rules and principles of legal decision-making, which meet the expectations of the critical times in which we live.[19]

Fourth, the Tribunal expanded its review into the previously proscribed area of international law. For example, in a 1992 case the Tribunal found that a parliamentary statute was incompatible both with the 1952 Constitution (as amended) and the International Covenant on Civil and Political Rights (which Poland signed in 1977) – the first time that the Tribunal found a statute in violation of international law.[20] In this case, a statute passed by the Sejm in October 1990 precluding border guards from appealing transfers and dismissals to regular courts was found inconsistent not only with the Constitution but also with the Covenant of Civil and Political Rights.[21] In its opinion, the Tribunal noted that although the 1985 Act (as amended) technically precludes it from reviewing Polish law for conformity with international treaties, such treaties are directly binding on Polish state institutions. This binding force results from their ratification by the Polish Parliament which effectively incorporates the treaty into Polish domestic law unless it is clear from the treaty's language that it is not

self-executing. Although the Tribunal has never directly applied international law to invalidate domestic law, it has increasingly referred to international agreements in its decisions to interpret or expand domestic law.[22]

Thus, after 1989 the Tribunal emerged as an institution quite different from the unadventurous and somewhat compliant body which it had appeared during the first three years of its existence and became less of an 'ally' of Parliament and less of a 'protector' of its legislative powers. Through its activist judicial review, the Tribunal became a more meaningful check on the other branches of government and began to play a crucial role in forging post-communist constitutionalism.

B THE TRIBUNAL'S CONSTITUTIONAL JURISPRUDENCE

In its recent decisions, the Tribunal has endeavored to enforce constitutional provisions and principles that characterize normative constitutionalism in liberal democracies. As former Tribunal Justice Lukaszuk explained, 'the new inventory of precedent created by the Tribunal through its decisions has invigorated and strengthened certain constitutional clauses by surrounding them with binding legal doctrine.'[23] Recent Tribunal decisions have, for example, expanded protection of property rights and clarified the relationship between statutes and substatutory acts.[24] But in terms of the development of constitutionalism, the Tribunal's most important decisions have been the ones protecting substantive rights based on the Polish Constitution's general 'Rechtsstaat' principle (article 1) and its 'principle of equality' (article 67, sect. 2). These provisions are in many ways analogous to the American Due Process and Equal Protection clauses.

(i) The 'Rechtsstaat' Clause

The Rechtsstaat ('state ruled by law') principle, rooted in nineteenth century German legal culture, maintains that positive law should be consistent with fundamental rules of justice, fairness, and equity. The concept of the Rechtsstaat assumes that the state operates within the clear framework of hierarchically arranged legal acts, with the constitution recognized as the apex of the legal system. It also assumes submission of the state to law, and provides for constitutional guarantees of the observance of law. In its interaction with individuals, the State thus has an overarching obligation to abide by written as well as

certain unwritten rules of justice. The Rechtsstaat principle forms a fundamental feature of West European democratic constitutionalism; the constitutional courts of Germany, Spain, Austria, and other European countries have produced a rich jurisprudence through the interpretation and enforcement of their respective Rechtsstaat clauses, ensuring the conformity of positive law and state action with fundamental rules of justice, fairness and equity.

No Rechtsstaat clause existed in Poland's communist 1952 Constitution; the Polish Rechtsstaat provision was introduced into article 1 by constitutional amendment in 1989. It provides that '[t]he Republic of Poland is a democratic state ruled by law, implementing principles of social justice.' As explained by Michal Pietrzak, a legal historian from the University of Warsaw, the promulgation of a Polish Rechtsstaat clause 'responded to the necessities of Poland's post-communist transition, as it allowed the Tribunal to define limits on law-making particularly in those areas untouched by constitutional reform.'[25] Because the new provision was modeled on the Rechtsstaat clause of the German Constitution, the Tribunal is able to look for guidance to existing West European Rechtsstaat jurisprudence.

The Tribunal quickly used the new clause to develop unwritten due process standards. In a landmark August 1990 decision, the Tribunal held that legislative enactments that infringe upon the 'principle of nonretroactivity of laws' and the 'principle of vested rights' violate the Rechtsstaat clause, and thus may be invalidated by the Tribunal.[26] The case involved then-President Jaruzelski's constitutional challenge to the 1990 Pension Act which reduced the pensions of former high-ranking officials of the communist regime.[27] During the communist era high-ranking state and Communist Party officials awarded themselves special pensions that were much more generous than those received by regular civil servants. The 1990 Pension Act provided that former Party and state political elites who had not yet reached regular retirement age and had been awarded higher pensions would lose them, and would instead receive pensions of the lowest category.

In its decision, the Tribunal stated that: '[n]onretroactivity of law is one of the basic components of the principle of a state based on the rule of law.... Another important aspect is citizens' confidence in the State, which requires... that vested rights be protected from the retroactive application of the law.[28]

Applying these principles to the case at hand, the Tribunal nevertheless found the 1990 Pension Act to be constitutional. The Tribunal determined that the Act did not violate the principle of

nonretroactivity, as the loss of pension privileges was only prospective. The principle of nonretroactivity would have been violated only if the law had required that previously paid sums be returned to the state treasury. The Tribunal also distinguished protected vested rights from privileges obtained 'in an unfair manner', holding that the special pensions granted during the communist era to Party and state officials did not deserve protection as a 'vested right' under the Rechtsstaat clause. As the Tribunal wrote:

> This case involves specific privileges granted to a distinct group. It . . . assumes that . . . certain persons belonging to certain groups should be treated as exceptional and deserving of certain privileges. Such classifications have nothing in common with those preferences granted to groups to compensate for their societal harms or handicaps. . . . [The challenged] legislation conforms with the constitution . . . because it separates the right to a pension from any consideration of previously held positions of power.[29]

By reasoning from principles not articulated in the written text of the Constitution, the Tribunal established the prohibition against retroactive laws and the protection of 'vested rights' as important components of the Rechtsstaat clause, thus imbuing them with constitutional rank. Since the 1990 Pension Act decision, the Tribunal has consistently applied this jurisprudence, developing and elaborating the general provision for a 'state ruled by law' with specific legal doctrine and standards for the legislative and executive branches.[30]

In a 1991 case, the Tribunal further developed the contours of the Rechtsstaat clause's nonretroactivity component by finding exceptions to it in a series of cases challenging parliamentary statutes adopted to address crimes committed during the Stalinist era. Between 1944 and 1956, the secret police, acting under the authority of the communist government, killed or imprisoned thousands of innocent people. Since 1989, an important political concern has been the creation of penal liability for former state and Party functionaries who criminally abused their power during communist times. The current provisions of the Polish Penal Code would suffice to indict those officials, but the Code's statute of limitations bars criminal prosecution if more than twenty years have elapsed from the time that a crime was allegedly committed. Because the statutory period for Stalinist crimes has long since expired, in April 1991, Parliament amended the 1984 Law on the Main Commission for the Investigation of Nazi

Crimes in Poland to allow for the prosecution of Stalinist crimes as well. The statute defines Stalinist crimes as 'crimes against individuals or groups of individuals, committed by authorities of the communist state, or tolerated and instigated by those authorities', and provides for prosecution if those crimes took place before 31 December 1956. The provision of the law that was later challenged declared that the statute of limitations would not apply to Stalinist crimes that amounted to 'crimes against humanity', such as genocide and 'other serious persecution' on the basis of race, religion, nationality, and other characteristics.[31]

In its September 1991 opinion, the Tribunal recognized the general prohibition against retroactive criminal laws, but distinguished the egregious crimes committed between 1944–56 as justifying a different approach:

> The Constitutional Tribunal is aware of the unusual historical nature of the recent [political] transformation. The Tribunal is equally well aware that the unlimited application of the principle of nonretroactivity to those guilty of Stalinist crimes would be incompatible with basic principles of justice.... In particular, this refers to those crimes which the communist government has precluded the possibility of prosecution (through amnesty or abolition) that were committed during its tenure. Nevertheless, it is the opinion of the Tribunal that any departure from the principle of lex retro non agit [nonretroactivity of law] in order to achieve justice demands a very precise definition of the specific crimes addressed. This requirement is not satisfied [in this case] because the term 'serious persecution' allows unrestricted discretion in its interpretation.[32]

The Tribunal issued an 'advisory opinion' holding that several of the crimes addressed by the law were not defined precisely enough to meet the requirements of the narrow exception to the otherwise strict principle of nonretroactivity. In particular, the Tribunal found that the term 'Stalinist crime' was not sufficiently delineated, leaving too much prosecutorial discretion to police and judicial authorities. Parliament subsequently modified the law.[33]

The Tribunal has further developed the second component of the Rechtsstaat clause – the principle of vested rights. The stream of legislation aimed at reducing comprehensive state pensions, one of socialism's expensive legacies, has provided a rich context for fleshing out the subtleties of the principle. The Tribunal 'discovered' the prin-

ciple of vested rights in its review of the Pension Act of 1990 discussed above, where it stated that '[t]he constitutional protection of vested rights applies particularly to rights fairly obtained through the system of social insurance.'[34] In an important case challenging the Pensions Act of 1991, the Tribunal invoked the principle of vested rights to invalidate several of the Act's provisions.[35] Parliament had passed the Pensions Act in the fall of 1991 in response to intense pressure to alleviate the government's budget deficit. By changing the treasury's pension calculations from a fixed-base algorithm to one that considered previous wages and work tenure, and by additionally restricting old age and disability benefits for employed pensioners, the Act significantly reduced the pensions of some citizens. The Ombudsman challenged the constitutionality of the statute before the Tribunal, alleging that it violated the Constitution's 'Rechtsstaat principle'.[36]

In a 1992 decision, the Tribunal relied on the Rechtsstaat clause to find the statute unconstitutional. The Tribunal stated in its opinion that 'in democratic states based on the rule of law, the possibility to revoke benefits once granted is very restricted, regardless of the financial situation of the state.'[37] The Tribunal stated that while the principle of vested rights applied only to rights acquired in a legitimate manner, it provided a particularly strong presumption of security for pension rights and similar social insurance rights.

Notwithstanding this presumption, the Tribunal has not been able to ignore Poland's dire economic situation and the crisis of the state's finances. While the Tribunal has confirmed the constitutional rank of the principle of vested rights, particularly as applied to pension rights, it has indicated that it is willing to accept necessary departures from this principle.[38] In a recent decision, it upheld legislation restricting the adjustment of state employees' wages and pensions for inflation; the system is known as 'indexation' of wages.[39] In a case concerning the 1992 Budget Act, the Tribunal held that ceasing to index the pay of state workers (previously statutorily guaranteed) was prohibited only where the challenged law operated retroactively. Prospective limitations on indexation were held to be permissible, despite the fact that they constituted a direct interference with the principle of vested rights. To measure when economic circumstances necessitate such a sacrifice, the Tribunal developed the 'drastic breakdown of the balance of the budget' test, which enumerated two requirements for limitations on valid indexation of wages. First, the limitations 'may not unjustly place on particular professional groups the burden resulting from the economic recession.' Second, such limitations are

permitted only 'after the legislature has unequivocally verified that the distribution of budgetary assets was correct and fair . . . and has exhausted all possibilities of increasing the budgetary income.'[40]

In developing the principle of vested rights, the Tribunal inevitably has had to make normative decisions, separating the protectable from the unprotectable. Thus, while the Tribunal was willing to extend Rechtsstaat protection to pension rights, it has been unwilling to give vested rights protection to the property of the former Communist Party, which according to the Tribunal was not necessarily obtained in a 'lawful and morally unquestionable manner'. As part of the transition from communist to democratic governance, in the fall of 1990 the Parliament promulgated a statute which provided for the transfer to the state treasury of all of the Party's assets in existence as of 24 August 1989 (except funds generated by membership dues).[41] The law further declared that all legal transactions concluded after that date that were intended to reduce the assets of the Party (to avoid nationalization) were null and void. The law provided for no compensation.

In a highly publicized case, a group of SdRP Sejm deputies challenged the legislation before the Tribunal.[42] They argued that nationalization of Party assets without just compensation violated article 1 of the Constitution by infringing vested property rights, which the petitioners argued were acquired in good faith both by the Party and by those who had purchased Party assets. Despite the breadth of the principle it had so recently found in the Rechtsstaat clause, the Tribunal was unwilling to extend vested rights protection to Communist Party property: 'With respect to the alleged violation of the principle of protection of vested rights, the Tribunal finds . . . the claim to be unjustified.' The Tribunal expressed doubt about 'the legal capacity of the Party' to acquire certain legal rights, and had substantial reservations as to the propriety of the Party's acquisition of its assets. The Tribunal concluded that the principle of vested rights could be

> enforced only with regard to those rights acquired in a lawful and morally unquestionable manner. We are convinced that no reservations can be raised with regard to those assets raised from dues paid by Party members. While dues paid by Party members between 1961 and 1989 were free from taint, such dues only amounted to approximately 30 percent of the Party's total revenues; thus, these dues could at best only cover the salaries of the Party employees, leaving the remaining assets legitimately subject to nationalization.[43]

Thus, by the end of 1992, the Tribunal had established and reaffirmed two important due process elements of the Rechtsstaat clause: the prohibition against retroactive laws and the protection of vested rights. The Tribunal also distinguished certain areas not protected by the Rechtsstaat clause, for example 'rights' obtained in an unfair manner and crimes committed during the Stalinist period. Since then the Tribunal has developed additional procedural and institutional components of the Rechtsstaat clause.

First, the Tribunal held that individuals' access to justice through independent courts is a fundamental assumption of a democratic state of law, expressed in the Rechtsstaat clause.[44] A year later, the Tribunal broadened the right of access, holding that the '[r]ight to a procedurally fair judicial hearing in matters relating to the defense of an individual's legal interests is found within the context of the principles of a democratic state of law.'[45] Second, in 1993 the Tribunal held that the independence of the judiciary is an important component of the Rechtsstaat clause. The Tribunal invalidated legislation permitting 'extraordinary dismissal' by the President of regular court judges who during the communist era had collaborated with the regime.[46] It found the challenged legislation to be an unconstitutional infringement of the 'principle of judicial independence, a fundamental element of article 1', possibly allowing the threat of 'extraordinary dismissal' to pressure judges who make politically unpopular decisions.

The great potential of article 1 in forging post-communist constitutionalism has already become manifest through the Tribunal's jurisprudence, allowing the Tribunal to protect principles inherent in a state ruled by law. The Rechtsstaat clause is now considered a central element of Polish constitutional jurisprudence, and is an important tool used by the Tribunal to guarantee that state bodies operate on the basis of justice, fairness, and equity, particularly when addressing the unique legal and political issues related to the dismantling of the former communist regime in Poland. The Tribunal now regularly relies on the Rechtsstaat clause to support its constitutional jurisprudence; every 1993 decision declaring a parliamentary statute unconstitutional invoked this clause.

(ii) The Principle of Equality

The Polish Constitution's principle of equality is found in article 67, section 2, which states that '[c]itizens of the Republic of Poland shall have equal rights irrespective of sex, birth, education, profession,

nationality, race, religion, origin and social status.' This principle has become one of the most oft-cited clauses in the Tribunal's jurisprudence. It has been cited in over thirty cases and found to be violated by challenged legislative acts in ten of them.

In its jurisprudence, the Tribunal has adopted the following definition in applying the principle of equality: '[E]quality before the law... means that all those subject to legal norms must be treated equally.... [that is] according to the same criteria without differentiation of a discriminatory or privileging nature. The classifications enumerated in Article 67, section 2 are fundamental but not exclusive features which may not serve as the basis for legal differentiation of citizens.'[47] Numerous Tribunal decisions have reaffirmed this definition.[48]

In further developing the principle of equality, the Tribunal has found it to support both a negative and a positive conception of liberty, that is, to (i) forbid unfair discrimination between classes equal *before* the law and thus to require that laws be applied equally, and (ii) to require differential treatment of socially different classes in order to create equality *in* the law. According to the Tribunal, equality before the law means equal application of a given law to all persons regardless of differences among them. Equality in the law refers to the need to apply laws differently to certain categories of people in order to accomplish a just legal system.[49]

First, the Tribunal held that the list of forbidden classifications enumerated in article 67, section 2 (sex, birth, education, and so on) is not exhaustive, but that the principle of equality should be applied in 'all other situations where we address the rights of individuals belonging to the same category.'[50] Accordingly, the Tribunal has found unconstitutional unfairly discriminatory laws differentiating pension rights according to whether employment occurred after 1945 (in communist Poland) or before 1945,[51] statutory provisions discriminating against owners of apartment houses occupied by employees of the Ministry of Interior,[52] and classifications imposing regionally disparate tax burdens.[53] In the latter case, the Tribunal found a statute imposing an additional sales tax in 'tourist regions' unconstitutional. That tax discriminated unfairly between classes equal before the law (citizens of different regions) because it applied not only to tourists but to all inhabitants of the region, while the inhabitants of other regions were not so taxed.

Second, the Tribunal held that the principle of equality sometimes *requires* differential treatment to ensure 'equality in the law'. For

example, the Tribunal found unconstitutional a law changing the early retirement guarantee for miners to require 25 years of employment for both male and female miners.[54] Earlier statutes had distinguished between men and women, establishing a lower, twenty-year minimum for female miners. The Tribunal found that a mechanistically equal application of the laws would not always be a sufficient condition for a just legal system.

The Tribunal elaborated a three-part test to determine whether a classification adopted by the legislature comports with the requirements of equality in the law. First, there must be a reasonable correlation between a group's characteristics and its disparate treatment under the law. Second, the criteria for differentiation must be 'objective', 'justified', and 'fair'. As the Tribunal wrote in the miners' pensions cases:

> The . . . principle of equality questions whether given criteria for classification can be regarded as justified and equitable. The criteria in this case are biological and social differences between females and males. Allowing female workers to retire at an earlier age reflects the legislature's intent to alleviate negative results of the de facto difference between males and females.[55]

Third, even if the creation of a privilege is justified or required for equality in the law, the exercise of that privilege may not be made mandatory. In a 1991 case, the Tribunal invalidated a provision of the 1990 Universities Act which mandated retirement at the age of sixty for female instructors and at the age of sixty-five for male instructors. In its decision, the Tribunal emphasized that the law could not transform privileges into obligations, at least for jobs where 'biological and social differences' between the genders are irrelevant. The Tribunal's opinion stated: 'The principle of equality is one of the fundamental principles of our constitution. It is a basic rule which pertains to all rights, freedoms and duties of citizens. Any limitations of this principle are prohibited unless they result from an effort to achieve de facto equality.'[56]

The Tribunal's equality jurisprudence has emerged as an effective tool for evaluating the fairness and reasonableness of legislative classifications, and the Tribunal has applied the Constitution's equal protection clause to strike down an impressive variety of measures, ensuring that the state observes fundamental human rights standards. Particularly during the first eight years of Poland's post-communist era, when

the rights provisions of the 1952 Constitution remained in force, the activist jurisprudence of the Constitutional Tribunal responded to the necessities of the post-communist transition, defining parameters of law-making in areas untouched by constitutional reform. The Tribunal's activist judicial review and its development of the idea that there are unwritten yet enforceable substantive rights in the Constitution is an important contribution to democratic institutionalization in Poland and, as Justice Zakrzewska noted, 'to the entrenchment of the notion that human rights are inherent to the system of the rule of law.'[57]

Thus, through its activist judicial review, the Constitutional Tribunal is playing a defining role in forging post-communist constitutionalism and delimiting the lawmaking of the new state. Since 1989, the Tribunal has facilitated the transition from communist constitutional practice to a normative constitutional culture defining and protecting rights and the separation of powers. In particular, the turn to judicial review for enforcement of individual rights reflects a view of the rule of law as defined and protected by the judiciary.

Moreover, in the new political environment the Tribunal's case law has had a strong educational role in grounding constitutionalism into political life. For example, the Sejm Legislative Council, the parliamentary committee which receives all newly submitted legislative bills, now reviews and comments on all parliamentary legislation not only from a political and economic standpoint but also as to whether or not the legislation conforms with constitutional provisions and with the decisions of the Constitutional Tribunal; this marks a dramatic change in the legislative process, which used to operate with no consideration for constitutionality. The former Chairman of the Sejm Legislative Commission, Jerzy Jaskiernia, states that due to the Tribunal's activities:

> the level of consciousness of constitutionalism among members of the Sejm and other political elites has grown. In the past, when there was a difficult problem confronting politicians in the Sejm or in Government, a political solution was searched for, either through the administration or through the PZPR. Now each time there is a difficult constitutional problem, political elites go to the Constitutional Tribunal. For political elites, there has accrued confidence in the role of the Constitutional Tribunal and its place in the political system. In situations of political conflict which have legal or constitutional overtones, the Tribunal has become the 'natural oracle',

> even if the issue is controversial. I think this is the case because the Tribunal is composed of knowledgeable academic experts on constitutional law who are considered wise and fair.[58]

Polish political elites generally accept the Tribunal's 'activist' jurisprudence, which they see as responding to the necessities of Poland's post-communist transition, in particular the functions of interpreting general constitutional provisions and defining ambiguous areas. As Deputy Jaskiernia noted, 'the Tribunal's constitutional jurisprudence is received by political elites as constituting what we know as the constitution. This jurisprudence becomes the "contents" of the constitution.'[59]

But as discussed below, the Tribunal's decisions have not universally received a positive reception from political elites, and on certain particularly politically important issues the Tribunal has been seen to be willing to bend for the sake of political expediency.

C THE TRIBUNAL AND POST-COMMUNIST POLISH POLITICAL CULTURE

Professor Ewa Letowska, Poland's first Ombudsman for Citizens' Rights, wrote:

> In a socialist state the domination of politics over law was a virtue.... The law was an instrument of politics and was subject to political circumstances both in the moment of its creation and in everyday practice.... [However, in the current relationship] of law and politics, the ghosts of the past still haunt us. The saturation of law with politics is the first obstacle on the way to building a state of law [in Poland].[60]

Her statement captures the essence of the dilemma that confronted the Constitutional Tribunal up to the spring of 1997. As the Tribunal asserted itself, addressed controversial constitutional questions, and reviewed more parliamentary statutes, its jurisprudence naturally became increasingly politicized. At the same time, the Tribunal's limited final authority allowed Parliament to prevent judicial review from overstepping politically acceptable limits. The Tribunal's lack of complete autonomy and the susceptibility of its jurisprudence to 'political review' by the legislature had two negative effects: (i) parlia-

mentary resolutions to uphold or reject Tribunal decisions on the constitutionality of parliamentary statutes were almost always based on non-constitutional considerations; and (ii) when addressing particularly contentious constitutional questions, the Tribunal at times seemed to bow to political expedience at the expense of constitutional coherence.

(i) 'Political Review' of the Tribunal's Jurisprudence

Parliamentary debate over whether to uphold or reject Tribunal invalidations of parliamentary statutes were often distorted by non-constitutional considerations. For example, Parliament's consideration of the Tribunal's February 1992 judgment finding the Pension Act of 1991 unconstitutional was marked by explicitly political issues.

Pursuant to the 1985 Act, the Tribunal's decision was sent to the Parliament for consideration within six months. The ensuing political controversy demonstrated that non-constitutional criteria would determine the fate of the Tribunal's decision. Members of Parliament attacked the Tribunal for meddling with the country's economic reform program and claimed that the Tribunal was trying to subsume 'the Parliament's role in undertaking social evaluations and fixing economic preferences.'[61] The battle pitted political blocs against one another. Debate frequently degenerated into wrangling over compromise solutions, with parliamentary caucuses offering to uphold parts of the Tribunal's ruling in exchange for rejection of others.

The government quickly became enmeshed in the controversy and, emphasizing the state's lack of funds, aggressively lobbied parliamentary deputies to reject the Tribunal's decision. Prime Minister Jan Olszewski declared that upholding the Tribunal's decisions 'would mean ruining the state'.[62] The Minister of Finance Andrzej Olechowski told Parliament that '[u]pholding the Constitutional Tribunal ruling is bound to lead to a catastrophe in public finances, halt the reforms, aggravate the recession, delay work on this year's budget, as well as shatter the efforts to restore Poland's credibility in international relations.'[63] The Minister of Finance threatened to resign, and the Prime Minister vowed that his entire cabinet would step down, if the Tribunal's decision was not overturned.

On 6 May 1992, after a dramatic final debate, Parliament voted to uphold the Tribunal's decision and decided to repeal most provisions of the Pension Act. On the day of the decision, the Minister of

Finance resigned in protest, declaring that he would return to his position only when 'a political system able to revoke the Constitutional Tribunal's rulings is created.'[64]

In 1994, after the Tribunal found certain provisions of the Tax Law of 1993 unconstitutional,[65] Parliament mustered a two-thirds vote and rejected the Tribunal's decision. During the parliamentary debates, deputies did not challenge the legal rationale behind the Tribunal's decision, but they generally believed that were the base for assessing income tax changed in accordance with the Tribunal's decision, the state's dramatic loss of income would cause a complete budgetary collapse.[66]

Particularly in the area of the national budget, political elites who normally support the Tribunal's new activist judicial review are wary of any judicial intervention of economic policy, especially during this transitional time. As Bronislaw Geremek himself stated in a 1994 interview:

> The Constitutional Tribunal supervises only the constitutionality of state actions. But the Tribunal should not be in a position to order the state to take actions for which Parliament does not have the economic resources. We should distinguish purely juridical articles of the constitution actively protected by the Constitutional Tribunal from the tasks of the state.... This means that the Constitutional Tribunal should make no decisions having budgetary consequences. In budgetary matters, decisions belong to Parliament.[67]

In this area the constitutional balance of power must still be delineated.

Thus, while the Tribunal's new assertiveness suggests great potential for its role in nurturing the growth of democracy in Poland, up to 1997 the ability of Parliament to accept or reject the Tribunal's decisions on political grounds threatened the Tribunal's legitimacy. The limited validity of the Tribunal's decisions allowed its jurisprudence, and its position as the principal protector of the national constitution, to become diluted by non-constitutional considerations. If fundamental constitutional provisions could be modified, manipulated, or ignored by the legislature, then both the concept of a state ruled by law and the position of the Tribunal as its guardian might be undermined.

At the same time, equally astonishing is how infrequently the Sejm second-guessed the Tribunal's decisions: only two overrulings in the

first ten years of the Tribunal's existence, despite the many times that the Tribunal annulled part or all of a statute. Even when the fiscal consequences of a Tribunal decision were drastic, as with the 1992 Pension Act decision, the Sejm could not muster the necessary two-thirds majority. Instead, political elites grudgingly accepted Tribunal decisions, acknowledging mistakes in the transformation process. By late 1995, the Sejm had accepted Tribunal-created obligations to compensate almost 10 million Poles in the amount of nearly $2.84 billion. Because the government does not have sufficient funds to pay this huge sum, it will be paid out in government bonds.

(ii) Political Expediency Over Constitutional Coherence

Polish political culture is strongly democratic, but the traditional desire to unite society around common beliefs and moral values, which can verge on a tyranny of the majority, has intensified because of the country's severe economic crisis. Worldly necessity has put pressure on the Tribunal both to find certain legislative acts constitutional despite their questionable validity and to extend its jurisdiction to enter political frays that it has traditionally avoided. In several politically weighty cases the Tribunal has departed from its usual strict standards of independence for the sake of political expediency.

The first such case involved a 1990 Ministry of Education regulation allowing the teaching of religion in public schools which appeared to transgress the constitutional clause on the separation of church and state. The Polish Constitution's separation clause, as well as its guarantee of the freedom of conscience, are found in article 82. Article 82, section 1, states: 'The Republic of Poland shall guarantee freedom of conscience and religion to its citizens. . . . No one may be compelled to participate in religious activities or rites.' Article 82, section 2 provides that '[t]he Church shall be separate from the State. The principles of the relationship between State and Church and the legal and property rights of religious organizations shall be defined by laws.'

During the communist era, religious instruction in public schools was restricted,[68] but in August 1990, the Ministry of Education issued two controversial 'instructions' directing all public schools to permit the Catholic Church and 'other interested churches' and religious organizations to offer religion classes in state schools.[69] Teachers of religion classes were to be appointed by Church authorities but renumerated by the State. The instructions further provided that

parents had to 'positively declare' their interest to school authorities to enroll their children in religion classes. The Ombudsman challenged the instructions as inconsistent with article 82 of the Constitution, mandating separation of church and state and freedom of conscience, and with the 1989 Law on the Relations of the State to the Catholic Church, which also mandates the separation of church and state.[70] The Ombudsman argued that the Ministry of Education did not have the authority to issue such instructions because only statutes may regulate religious issues.

In January 1991, the Tribunal upheld (with three justices dissenting) the constitutionality of the instructions.[71] It interpreted the separation clause as a limited prohibition on state administration of religious instruction (for example, appointing teachers or formulating curricula), but held that simple assistance to existing churches was not unconstitutional. The Tribunal also decided that the Constitution's freedom of conscience clause did not prohibit open declaration by citizens of their religious preferences and that parents could, therefore, register their children for religion classes through positive declarations of religious affiliation. The Tribunal held that the Constitution only forbade the State from requiring such declarations from those who do not wish to publicly express their religious beliefs. The Tribunal further held that the challenged instructions did not invade the domain 'reserved' for parliamentary statutes, but its opinion failed to articulate any rationale for this finding.

Each of the three dissenting opinions, however, strongly emphasized that the instructions, being substatutory acts adopted without proper statutory authorization, were unconstitutional. The majority failed even to address this argument, possibly because it did not want to have to retreat from its previous position that constitutionally limited the law-making power of the executive branch.

Thus, the Tribunal allowed religious instruction even though the Constitution and its own accepted precedent was clearly adverse. A well-known legal commentator characterized the decision as 'legal suicide', stating that 'by following blindly the Minister's problematic interpretation of the parliamentary acts, the Tribunal negated its reason to be'.[72] Two weeks after the decision was issued, the Tribunal held a closed hearing and decided to send a message to Parliament, stating that the Religious Education Act of 1961 (which established the secular school system) 'is not compatible with the legal system of the Republic of Poland – especially with the Constitution, the 1989 Law on the Relations Between the State and the Roman Catholic

Church, and the Law on Guarantees of Conscience and Religion.'[73] The Tribunal stated that it was 'necessary [that Parliament] pass a new bill on the system of education and upbringing . . . which would definitively remove from the law current inconsistencies which are elaborated in the decision of the Constitutional Tribunal' finding constitutional the regulation instituting the teaching of religion in public schools.[74] Parliament subsequently replaced the criticized 1990 instructions with an amendment to the 1961 Education Act, permitting religion classes in public schools and – through a delegation clause – authorizing the Ministry of Education to regulate the matter.[75]

A second case in which the Tribunal validated a constitutionally suspect legal act involved a governmental regulation that limited access to abortion.[76] In this case, the Tribunal once again abandoned strict standards of review and found constitutional a questionable regulation of fundamental political importance. During the communist era, abortion was widely available in Poland under a 1956 law that permitted the performance of abortions for both medical and social reasons.[77] Following the collapse of communism in 1989, there were numerous legislative and regulatory initiatives to restrict abortion. Parliament, under pressure from the politically strong Catholic Church, debated and rejected several draft abortion laws, most of which were highly restrictive.[78]

In 1990, the Ministry of Health adopted a regulation which allowed physicians to refuse to perform or assist in the performance of abortions.[79] The Ombudsman challenged the regulation before the Tribunal, arguing that the Ministry did not have the power to regulate this area. The Ombudsman did not question the ministerial regulation on its substantive merits, but claimed that in the absence of proper statutory delegation, a ministerial regulation could not regulate matters already governed by statute. In upholding the regulation, the Tribunal interpreted the law on the medical profession and the freedom of conscience clause of the Constitution (article 82) to already provide the basis for a physician's right to refuse to perform an abortion. According to the Tribunal, the new regulation merely reaffirmed a pre-existing legal norm and did not contradict existing law.[80] Therefore, despite the absence of a statutory delegation clause that would permit the Ministry to regulate abortion, the regulation was not unconstitutional. As in the case of religion, so in this case, the holding clearly departed from the Tribunal's earlier jurisprudence limiting the law-making powers of the executive branch.

The Tribunal faced another abortion controversy in the fall of 1992. In December 1991, the Congress of the National Medical Association, the governing body of the Polish medical profession, amended its Code of Medical Ethics (a set of internal regulations binding on all physicians practicing in Poland) to authorize abortions only in cases of rape or threat to a woman's life or health. The amended Code also specified that pregnancies could not be terminated simply because the fetus suffered from a genetic disorder or a hereditary disease. Physicians who violated these rules could be subject to disciplinary proceedings and could have their medical licenses revoked.

The Code's amended stance on abortion was thus more narrow than permitted by Polish law. In January 1992, the Ombudsman for Citizens' Rights petitioned the Tribunal to declare the most important provisions of the amendments unconstitutional and inconsistent with the Polish Penal Code and with the 1956 Abortion Act.[81] However, in October 1992 the Tribunal, by a slim majority, rejected the Ombudsman's petition on procedural grounds. The majority held that the challenged provisions of the Code of Medical Ethics did not have a normative character, thus did not constitute a legal act, and fell outside the Tribunal's jurisdiction.[82] The Tribunal held that while it could review regulations adopted by non-governmental bodies, it could only review regulations containing legal norms; yet the provisions of the Code were of a purely 'ethical' rather than legal character. The majority did issue an advisory opinion, however, which stated that certain parts of the Code conflicted with existing laws on abortion and on the medical profession. The four dissenting opinions criticized the majority for failing to decide the case on its merits, and the case provoked strong public reactions. The Ombudsman was sharply attacked by pro-life groups and the Catholic Church for petitioning the Tribunal.[83]

After heated debate, on 7 January 1993, Parliament replaced the 1956 Abortion Act with a more stringent law regulating termination of pregnancy.[84] The Act's opening articles declare that 'every human being has an inherent right to life from the moment of conception', and that the 'life and health of an unborn child shall be protected by law'.[85] The 1993 Act permits abortion, however, when a woman's health is in danger, when the fetus is severely deformed, or when the pregnancy results from rape or incest. In March 1993, the Ombudsman renewed his challenge to the Code of Medical Ethics, which was still more stringent than the new law. The Tribunal reviewed the

Code, despite its earlier holding that it did not have jurisdiction over non-governmental acts, and held that the 1993 Abortion Act superseded the Code.[86] Abortion, Poland's most wrenching social issue, inevitably will reappear on the Tribunal's docket in the future.

Thus, decisions on religion in schools and abortion indicate that the post-communist Tribunal has been susceptible to popular and political pressures. Several Tribunal decisions reveal a clear political orientation: the Tribunal has avoided confronting the Catholic Church on any issue; it does not consistently challenge Parliament; and it permits some of its decisions to be influenced by prevailing political opinion. As noted by Professor Herman Schwartz, the Tribunal 'is considered by some to be too sympathetic to Parliament and not sufficiently independent.'[87] At the same time, Bruce Ackerman notes in *The Future of Liberal Revolution* that constitutional courts in nascent democracies must be cautious in confronting political branches and in becoming overly enmeshed in political controversies, as their incipient legitimacy is vulnerable, and the courts can be quickly suspended by political authorities.[88]

While the Tribunal has slowly built its authority and become known to all participants in the political process, this occasional sacrifice of constitutionality for political expedience is particularly troubling at a time when Poland is in the process of building a state based on the rule of law. Such sacrifices, even if rare, allow the Tribunal to be perceived as politically partisan, which compromises the independence of the judiciary, threatening the construction of a constitutional culture and the rule of law. But as Professor Lech Falandysz noted, the

> willingness of Tribunal justices to bend to political pressure stems from their lack of assurance that the Tribunal is an autonomous body independent of the other highest powers of the state. This lack of assurance is based on the limitations placed on the Tribunal's jurisdiction and the finality of its decisions.[89]

D REFORM OF THE TRIBUNAL

After 1989 the Tribunal's justices and a number of Polish political elites called for Parliament to discard the procedural and jurisdictional limits on the Tribunal's power of judicial review.[90] Although

political reality necessitated compromises to make the creation of the Tribunal possible in 1985, these limitations were overtaken by Poland's democratic evolution and had to be discarded. In Poland's new democracy, the Tribunal must be competent to assert the legal and political supremacy of the Constitution. As long as the Tribunal had no final say on the constitutionality of parliamentary statutes, it would be difficult for it to develop a fully legitimate and independent jurisprudence.

Following the collapse of the Polish communist regime, those at the forefront of Poland's constitutional renewal generally agreed that the limitations on the Tribunal's procedure and jurisdiction had to be abandoned and that the Tribunal had to be transformed into a body with genuine power to ensure the constitutional consistency of all legal acts. Only then would the Tribunal be entirely immune to the inevitable political pressures that accompany controversial cases. According to former Tribunal Justice Leonard Lukaszuk, this transformation should closely follow the models provided by European constitutional court systems: 'The basic structure of the Polish Constitutional Tribunal is a reflection of the constitutional court structures found in Western Europe. Our hope is to bring the structure and operation of the Polish Tribunal even closer to those of Western constitutional courts.'[91]

In 1992, Parliament's Constitutional Commission asked the Tribunal to submit proposals for the Tribunal's restructuring.[92] The December 1992 resolutions adopted by the General Assembly of the Tribunal (an annual meeting of all the justices) provided direction as to the Tribunal's evolution. The Assembly resolved that 'the Tribunal was established in a profoundly different political situation, and that its current structure does not reflect the country's democratic transformation or the new status which the Tribunal recently managed to achieve.'[93] While advocating preservation of the essential structure of the current Tribunal, the Assembly made the following recommendations:

> (i) Access to the Tribunal should not be restricted to authorized state agencies; there should be an individual right of petition for Tribunal review. Justice Zakrzewska stated that individual standing is 'essential to protecting civil rights. The introduction of an individual right of petition... would contribute significantly to the protection of citizens.'[94]

(ii) The Tribunal's scope of review should be broadened to include review of the constitutionality of international agreements entered into by the Polish government. The Tribunal should also be able to review domestic legislation for conformity with international agreements, such as the European Convention on Human Rights which the Polish Parliament incorporated in November 1991.
(iii) All statutes of limitations on Tribunal review should be eliminated. This would allow the Tribunal to address statutes and regulations issued prior to 1989 as well as those norms of law which were passed or issued during the communist era in an undemocratic way and which have an undemocratic content.
(iv) All Tribunal decisions should be final and binding, including those reviewing the constitutionality of Parliamentary statutes. The General Assembly of the Tribunal noted: 'Parliamentary decisions as to whether to uphold a Tribunal ruling are frequently guided by non-constitutional factors, even though the consistency of a law with the constitution is a legal and not a political question.'[95]

In May 1997, each of these recommendations was realized in the new constitution passed by popular referendum. Poland now has a modern system of judicial review with which to enforce the rule of law and inhibit the political and bureaucratic arbitrariness which so characterized the previous era.

This year marks the tenth anniversary of the Polish Constitutional Tribunal. At the time of its inception, as Justice Zakrzewska notes, 'the Tribunal was undoubtedly an ''unwanted child'' of the former regime and certainly an institution forced on political authorities.'[96] Yet even during its first years of existence, when it was relegated to resolving issues of little political importance, the Tribunal established several important limits of the law-making powers of the executive branch, as it gradually gained acceptance by other state political bodies.

Since 1989, the Tribunal has assumed an active role in constitutional adjudication, and has increased the importance of the Constitution by supporting it with binding legal doctrine. Most of the Tribunal's opinions reflect considerable independence and contain broad language that reveals a desire not only to settle the case at hand, but also to establish general constitutional precedent. The Tribunal has become much more aggressive in reviewing the constitutionality of Parliamentary statutes and has abandoned its initial reluctance to address controversial issues.

Importantly, the Tribunal is endeavoring to create a normative constitutional jurisprudence characteristic of liberal democracies. It has interpreted the new Rechtsstaat clause, a very general, open-ended constitutional provision, to protect additional substantive rights, a practice common in countries with well-established doctrines of judicial review. In addition, recent decisions interpreting the principle of equality reflect the Tribunal's willingness to develop and uphold general concepts of equality from the limited language of the Constitution. Over the past five years, the Tribunal has become decidedly more activist, developing constitutional principles and substantive rights seen as essential in a society based on justice, fairness, and equity.

While the Tribunal played a central role in forging post-communist constitutionalism, up to May 1997 it remained susceptible to popular and political pressures because its power of judicial review continued to be constrained by communist-era legislation. In several decisions, the Tribunal seemed to bow to political expediency at the expense of constitutional coherence. The new President of the Tribunal, Andrzej Zoll, commented that '[l]aw must be superior to politics; any other way would be inconsistent with a state ruled by law.'[97] Until the Tribunal's jurisdiction was expanded, and until its decisions had the force of finality, the Tribunal could not be fully immune to political pressures that accompany controversial cases, and it could not serve as a complete check on the other branches of government.

The importance of judicial review in modern Poland can be seen in the debates over the 1997 draft constitution. While there was much disagreement in the National Assembly over a number of areas (such as the future relationship of the church with the state), it is important that there was virtual unanimity on the future powers of the Tribunal. The new consititution expands the Tribunal's jurisdiction to review laws for conformity with international agreements, a necessary step as Poland is now a member of the European Convention on Human Rights. Most important, all Tribunal decisions, including those on statutes, are now final and binding.

7 Constitutionalism and Post-Communist Politics

Most commentators are confident of Poland's democratic direction and of the success of the processes designed to institutionalize a functioning democracy. General Wojciech Jaruzelski, Poland's last communist leader, himself recently stated: 'The change is fundamental and irreversible, and I say that as a man of the old regime. There are four established pillars: democracy, the market, the rule of law, and free speech.'[1]

Indeed, respect for and observance of the principles of constitutionalism, limited government, and the rule of law are now recognized in Polish society as essential bases for social legitimacy. In a 1994 public opinion poll, 73 per cent of respondents stated that the Constitution should be a durable element of the political system and should not be subject to easy change. Moreover, 74 per cent state that the Constitution has 'big significance in the daily lives of the inhabitants of the country. It is first of all the source of all rights and individual freedoms, and it is a legal act of the highest rank.'[2] Importantly, most of the new political elites seem to have many of the same principles in mind when referring to a 'rzady prawa' ('state of law'): Politics should be subordinate to law, law should be relatively clear and stable, legal institutions – particularly the courts – should be independent of political interference.

With the constitutional amendments of 1989–90 and with the passage of the Small Constitution in 1992, a measure of institutional stability was achieved and the basis for constitutionalism was laid. The emergence of institutions such as the Constitutional Tribunal, which have been actively involved in delimiting the law-making of the new state and enforcing the new constitutional rules and procedures over political authorities, has been essential in grounding constitutionalism in post-communist Polish political life. President Walesa, himself often criticized for having an instrumental and cavalier approach to the constitution, had this to say during a 1993 interview:

> And what did the Constitution mean for you during the shipyard strike in 1980? Walesa: 'Just a piece of paper.' And during the Round Table Talks in 1989? 'The same.' And now?

> 'Now it means something more important, because the forces and institutions to enforce it are already there. The Constitution sets limits to democracy. The basic framework is there to safeguard the rights of minorities and individual citizens, to safeguard their right of ownership and other rights. This is where the foundations of the state are laid down.'[3]

Most political elites genuinely assume that the constitution has a particular role and significance in Polish society, a role and significance that it did not have under communism. As Ewa Letowska put it, 'there is generally endorsement of the notion among political elites that the constitution should take root as a relatively impersonal, independent and institutionalized practice and medium for the exercise and restraint of power.'[4] They hope, therefore, not just for a constitution but for constitutionalism and the rule of law. Such hopes lie behind the post–1989 reform of the constitution, and the establishment and development of new institutions, such as the Constitutional Tribunal.

As discussed in Chapter 6, particularly in relation to the Tribunal, a new constitutionalism seems to be developing in Poland. While it has not seeped into the conduct of every politician, Professor Lena Kolarska-Bobinska, Director of the Polish Center for the Study of Public Opinion (CBOS), has observed:

> Appreciation of constitutional rights and everything that goes along with freedom and democracy is not only a declaratory thing. Poles are learning to make use of democratic institutions, of the possibilities and limits which they provide. Instead of throwing stones, they understand that institutions now exist which they can approach to defend their rights. Among all government institutions, Poles most respect: the Tribunal's willingness to challenge unconstitutional political action and the Ombudsman's willingness to complain on their behalf.... The institutions of the Constitutional Tribunal and the Ombudsman have become enduring features of our political life, and the Constitution is treated extremely seriously.[5]

Recent polls have confirmed Kolarska-Bobinska's remarks. A 1994 poll showed that over 80 per cent of society feels that political elites must observe every provision of the national constitution if they are to retain social legitimacy, 'even if this means addressing national

problems later.'[6] Moreover, institutions serving to safeguard the legal order, the Constitutional Tribunal, the Ombudsman and the High Administrative Court, lead the list of government institutions in terms of citizen trust and confidence. These polls suggest a truly novel element in the post-communist Polish political dynamic: A new and significant general respect precisely for those institutions most clearly associated with the defense of the constitution and constitutionalism.

But during the communist era, Poles were famous for 'living around the law', and as Martin Krygier cautions, '[t]he challenges to building the rule of law in post-communist societies are great: communism taught powerful negative lessons.'[7] Since 1989, on a number of occasions impatience with legal restraint and a lack of sensitivity for enduring constitutional arrangements has been manifest in Polish politics and public policy-making.

This chapter examines four challenges to constitutionalism and the rule of law in post-communist Poland. Part A describes how the difficulties of Poland's ongoing socio-economic transition have led certain political elites to become impatient with constitutional restraints and to promote stronger executive governance. Part B examines the dangers posed by decommunization and lustration initiatives to constitutional order. Part C examines the strong political role of the Polish Catholic Church and how this role affects Poland's democratic constitutional evolution. Part D describes how xenophobia and the state's reliance on anachronistic laws to control criticism of the government mar Poland's post-communist record in the area of individual rights.

A A STRONG LEADER AND A STRONG STATE: MAKING ORDER OUT OF CHAOS?

The dilemma between expedient governance and respect for constitutionalism and the rule of law is faced by every government. The rule of law is threatened by political elites who believe that what they must do is too important, unprecedented and urgent to be hampered by legal restraint. For political elites in post-communist Poland, the urgent sometimes has threatened to overwhelm the important in the process of governing when it came to addressing deep and general dilemmas of the transformation process.

The tension between expedient governance and the rule of law during Poland's transition period is embodied in the words of veteran Solidarity leader and former Minister of Labor Jacek Kuron:

> In the Polish situation today, particularly in the activities of the state, in the administration and in the Parliament, there is ceaseless conflict of the urgent with the important. That there is a conflict between the urgent and the important is presumably generally true of all state activity. With [Poland], however, it is particularly intensified because of the process of transformation, changes of old structures into new ones.[8]

That the challenges of the transformation process tempt political elites to overlook important constitutional rules and processes are reflected in the words of Jan Maria Rokita, Chief of the Council of Ministers' Office during the Suchocka government (1992–3):

> The conception of law as a guarantor of individual rights was strongly present in my thinking until the moment when I came into contact, in reality, with the process of making law in the Sejm in 1989. In these new circumstances, I found myself in a situation where my youthful convictions about the rule of law had – under the pressure of reality – to undergo a complete change. Since a more important goal, much more important from my point of view, was the effectiveness of the reform in Poland . . .[9]

According to Rokita, only by 'strengthening the institutions of the state' will the transition succeed, and the success of the reform will eventuate the development of civil society and limited government.

Of course, the barriers to implementing the economic and political transition are large: intransigent bureaucracies, shifting political dynamics, outdated and ambiguous laws, and an unpredictable electorate. But a basic challenge for Poland's nascent democracy is to restrain governmental power, which is a problem democracies have wrestled with through the ages and which is what constitutionalism and the rule of law are meant to address. Because nascent democracies in particular need to be vigilant in developing legal traditions and a social consciousness that law counts, the means of achieving reform are just as important as the ends. As former Ombudsman Ewa Letowska warns: 'The general inefficiency of the state during the transition period creates the temptation to adopt means that appear

simple.... Good intentions cannot prevent backsliding, which can come rather easily.'[10]

While such backsliding did not occur after 1989, the difficulties of the transition led certain political elites to rhetorically advocate strong state authority in order to expedite reform. The two most vocal proponents for a stronger state since 1989 have been the political party Confederation for an Independent Poland (KPN) and President Walesa. Both emphasized the need for a strong state in order to overcome barriers to reform.

For example, Miroslaw Lewandowski, a KPN spokesman, argued that Poland's seemingly chaotic political conditions, which he described as 'nightmarish, unimaginable; things that don't even enter one's head in any normal state', create the need for a strong state: 'Perhaps it is necessary that a new President,... one with a strong personality, and on the basis of constitutional and unconstitutional means which are available to him, simply through a certain constitutional practice, impose a presidential system on this country.' Lewandowski insisted that this would not endanger the rule of law:

> If the President strengthened the authority of the state in the political system, and introduced a presidential system, in my opinion this would not overstep the narrow boundary between law and lawlessness because it would be making order out of chaos. Making order with unconventional means, rather than breaking a legal order, because such an order does not exist in the political system in Poland... And if he has social legitimacy, social support, this would be a solution which satisfied both democracy and Polish reasons of state. While this may break the present constitutional order, I believe that if it serves Polish reasons of state, he should do it.[11]

President Walesa, relying on a similar rationale to justify strong state authority, took such rhetoric even further. Such inclinations were manifest in an interview Walesa gave in the first issue of *Gazeta Wyborcza*, when he asked rhetorically, 'Can you steer a ship through a stormy sea in a wholly democratic way?'[12] As an aspiring presidential candidate in 1990, Walesa directly attacked the 'eggheads' of the Polish intelligentsia who wanted to restrain his power; during his presidency he defended the need for a strong, decisive leader unconstrained by inconvenient democratic procedures: 'In [Poland's state of transition] – to put in order the most important things – the country

should be governed for some time by a decisive, strong hand. For you cannot "democratically" catch a thief.'[13]

During his presidency, Walesa's rhetoric at times displayed a real lack of sensitivity to established constitutional arrangements and principles, particularly when he felt his program was impeded by political developments. On several occasions, President Walesa threatened to assume the post of Prime Minister in order to expedite reforms, even though this would have violated the constitutional separation of powers. In addition, after the 1993 parliamentary elections, Walesa declared that he would rely on the 'Yeltsin option' if the economic reforms, or his presidential powers, were threatened by the victorious post-communist parliamentary coalition.[14] In 1993, responding to a question about his proposal to create a National Guard, Walesa stated:

> [I]t will be ZOMO [communist security service] of a kind, but what counts at this point is efficiency and order. There have been enough robberies, enough innocent victims. I am a democrat as far as planning is concerned, but I am all for a [strong] regime as far as implementation goes.... If the parliament does not give me the National Guard, I will call on the nation to give it to me.[15]

His proposal was subsequently defeated, and Walesa took no action. Even more ominous at the time were Walesa's words in June 1994: 'When the time comes to introduce a dictatorship, the people will force me to accept this role and I shall not refuse. Most likely that is where we are heading.'[16]

Fortunately Walesa's rhetoric, while damaging to the development of a constitutional culture, was not followed by action. In the political struggles after 1989 the new holders of power, despite their diverse ideological and political commitments, maintained their commitment to the principle of the rule of law. President Walesa, often judged to harbor authoritarian tendencies and undoubtedly motivated to concentrate executive power in his own hands, cannot be accused of illegal or unconstitutional actions. Rather, he sought to expand his power through the legal order. It is also worth emphasizing that both President Walesa and successive governments, including the controversial Olszewski Government, yielded power peacefully.

While the dilemma between expedient governance and respect for the rule of law is faced by every government, in Poland's state of transition the urgent often threatens to overwhelm the important in

the process of governing. But nascent democracies need to be particularly vigilant in developing legal traditions and a social consciousness that law counts in society. The novelty and weakness of institutions of restraint in Poland make it more rather than less important for political elites to attend early on to fostering and nurturing the rule of law, regardless of the urgency and difficulty of the problems Poland faces.

While politically the more difficult choice, as the dilemmas of the post-communist transition are serious, the rule of law should not be compromised for executive expedience. In fluid circumstances, such as those of Poland, where strong demands are constantly placed on the legal system by urgent policy needs, the moment to build a culture of restraint is earlier rather than later. As Professor Bruce Ackerman writes, it is important to 'channel energy toward the construction of enduring constitutional order' in the new, democratic states of Central Europe, and even to 'set[] this priority above all others .... The window of opportunity for constitutionalizing liberal revolution is open for a shorter time than is generally recognized. Unless the constitutional moment is seized to advantage, it may be missed entirely.'[17]

B DECOMMUNIZATION, LUSTRATION AND THE RULE OF LAW

A second fundamental challenge to constitutionalism and the rule of law in Poland, a challenge that has already produced a political crisis, is the threat of arbitrary or politically motivated programs of 'decommunization', the banning of higher communist office-holders from public positions, and 'lustration', the exposing of alleged former agents of the secret police.

Although popular support for decommunization and lustration existed after 1989, it was impossible to initiate any programs immediately after the collapse of communism because the Mazowiecki government included communist generals Czeslaw Kiszczak as Minister of Interior and Florian Siwicki as Minister of Defense, both of whom shared loyalties with then-President Wojciech Jaruzelski. Instead, to expedite a peaceful transition from communist rule, and to avoid an internal conflict which might have undermined the country's shaky consensus on the 'shock therapy' economic reform, Mazowiecki announced in September 1989 the drawing of a

'thick line' (*gruba kreska*) separating Poland's communist past from her democratic future. As Mazowiecki argued: 'Let's be frank. There were two million Party members in this country, not including family members. We could start a civil war in this country by attempting to remove them. Where would that have led us?'[18] While some symbolic prosecutions of former high-ranking communist leaders were initiated, far-reaching decommunization and lustration programs were not undertaken.

In the debate over decommunization and lustration, supporters argue that the purpose of such programs is to prevent people from holding state offices who could be blackmailed with information about their connections with the former security service. They also insist as a matter of justice that collaborators with the communist regime must be brought to answer for crimes committed against society. But opponents note that the implementation of effective and responsible decommunization and lustration programs has tremendous obstacles. First, much of the security service (*Sluzba Bezpieczenstwa*–SB) archive was destroyed, while what remains contains materials deliberately distorted by agents seeking to exaggerate their achievements. Because the archives are incomplete and unreliable, there exists the danger of prosecuting people who are entirely innocent. Prosecution would also be inevitably arbitrary, as whole categories of collaborators are effectively absolved simply because their files were destroyed.

Second, decommunization and lustration programs raise questions of collective guilt, retroactive justice and equal protection. Many people could be purged simply for being part of a group or class, such as former officials of the Communist Party, or for having obtained high administrative positions, even if they did nothing wrong. As Professor Bruce Ackerman argues, it is difficult to found a rule of law system on the basis of the 'victor's justice', applied to an arbitrary subset of the guilty.[19] Even when lustration is done properly, such a program always imposes some form of collective punishment on people not as individuals but as members of a group.

Third, lustration and decommunization programs could be used by state officials to intimidate political opponents and win political battles. This danger was clearly manifest in the major political crisis caused by the Government of Prime Minister Jan Olszewski, which used a parliamentary mandate for lustration to attempt to remain in power.

On 28 May 1992 the Sejm passed a resolution (initially proposed by the Union of Real Politics, a small libertarian right-wing party) requiring then-Minister of Interior Antoni Macierewicz 'to submit to the Sejm complete information about current state officials at the level of voivodship head and above as well as about deputies to the Sejm, senators, judges and public prosecutors who had cooperated with the communist security service between 1945 and 1990.' The resolution did not specify how the information should be prepared or to whom it should be submitted.[20] Passage in the form of a resolution rather than a statute effectively eliminated the Senate and the President from the legislative process.

While significant doubts were raised about the legality of the resolution as soon as it was adopted, and while the Olszewski government was urged to proceed slowly and responsibly on the lustration resolution, Macierewicz hastily put together an inexperienced team of investigators led by an astronomy student, and within six days compiled a list of alleged collaborators. Macierewicz's haste was motivated by a motion of no-confidence in the Olszewski government which was scheduled to be debated in the Sejm on 5 June.[21]

On 4 June Macierewicz delivered to the Sejm a list of 64 deputies, senators and executive branch officials, including President Walesa, 'identified' from Ministry of Interior archives as former SB collaborators. Despite being officially labelled as secret, the list became known almost immediately and was published widely. As the list contained the names of many political opponents of the Olszewski government, including most of the UD and KLD parliamentary leadership, the purely political aim of the lustration program became transparent. Macierewicz and Olszewski had attempted to use lustration to create the impression that those demanding the resignation of the Olszewski government were acting out of fear of being named as collaborators. The list was subsequently exposed as full of inaccuracies and falsifications.

The orchestration of this campaign of intimidation by Macierewicz and Olszewski galvanized the opposition parties into a powerful anti-governmental coalition. Despite a televised plea by Olszewski on 4 June that his government was being overthrown by former agents of the communist security apparatus, whose files his government had had the courage to disclose, the Parliament dismissed the Olszewski government by an overwhelming majority that same night. The next morning, Walesa proposed Waldemar Pawlak as the new Prime Minister, who was accepted by Parliament but ultimately was unsuc-

cessful in forming a government. On 19 June 1992 the Constitutional Tribunal held that the lustration resolution violated the Constitution, and in particular the 'democratic state of law' provision (article 1).[22]

While existing political arrangements prevented Macierewicz's screening campaign and Olszewski's subsequent television statement from turning into a constitutional crisis, by using lustration for partisan political purposes, the Olszewski 'files affair' showed the dangers of lustration and decommunization to a democratic polity based on the rule of law. Adam Michnik's comment in *Gazeta Wyborcza* several days after the dismissal of the Olszewski government captured the essence of the problems of lustration:

> For base reasons of short-term political expediency, what actually happened on the night of June 4 was a power struggle that the government waged not only with the President but with the very concept of democratic standards and legal state. By making use of police files, the government defied democracy and legitimacy, and essentially attempted to change the principle of government in this state. Had such conduct been accepted, Poland would no longer be governed by the President or the head of Government. Instead, it would be the Minister of Internal Affairs who would be wielding genuine power.[23]

After the Olszewski lustration affair, Parliament was unable to agree on lustration laws, despite strong support for such laws from certain right-wing groups. With the September 1993 electoral victory of the post-communist successor parties SLD and PSL, initiatives to enact lustration and decommunization legislation lost momentum.

Although the SLD and PSL are likely to remain major forces in Parliament, right-wing parties probably will gain parliamentary seats in the future and the dynamic calling for lustration and decommunization may regain momentum. Indeed, certain intransigent right-wing leaders now outside Parliament, such as former Prime Minister Jan Olszewski and his party, the RdR (Movement for the Republic), remain deeply committed to 'purging Poland of the remnants of communism'. While this is now a minority view in Poland and as time passes these voices carry less conviction, if they are willing and able to reintroduce the issues of decommunization and lustration, and find broad social support for their programs, the dangers of lustration and decommunization to the rule of law will once again be present.

But one observer has suggested that part of the reason the anti-communist right lost so badly in 1993 was their insistence on decommunization and lustration. According to Australian journalist Robert Manne, 'all Poles are anti-communist, but no one [is] so disliked as the staunch anti-communist'.[24]

C THE ROLE OF THE POLISH CATHOLIC CHURCH, AND ITS VIEW OF STATE, IN POLISH POLITICS

A basic principle of modern constitutional governance is the separation of church and state. But in Poland the Polish Catholic Church has asserted a significant role in politics and exerts powerful influence over public policy-making. Over 90 per cent of Poles are at least nominally Catholic and the Church, as a result of its role as a catalyst for the opposition during the communist era, emerged in 1989 with enormous authority and prestige. Since the collapse of communism, the Church has been concerned about the formalistic, procedural, and value-free nature of the Western democratic political system, and maintains that its new role is 'to guide Poland through democracy to morality'.[25]

Empowered by its institutional stability and virtual monopoly over religion, the Church has attempted to suffuse its ethical and religious values into the political sphere through legislative and other initiatives. It has had several successes in this endeavor, as seen in the mandatory religion teaching in schools and the restrictive abortion legislation. In both cases the Church actively participated in the legislative process, aggressively pressuring the Parliament to adopt the legislation. As Constitutional Tribunal Justice Wojciech Sokolewicz wrote in 1992:

> A peculiarity of Polish public life is the extensive participation of the Catholic Church and its ambition to influence legislative and constitutional questions. The system of "Christian values" – interpreted authoritatively by the Church hierarchy – is to serve as the only foundation of the entire system of law, the constitution as the crowning of that system.[26]

Going well beyond merely expressing opinions on proposed legislation, the Church early on became directly involved in electoral politics and state affairs. For example, during both the 1990 presidential

elections and the 1991 parliamentary elections, the Church instructed Polish citizens to vote for politicians most friendly with the Church. A pastoral letter issued by the Polish bishopry before the September 1993 parliamentary elections reflects the Church's involvement: 'Catholics cannot elect candidates or support programs which . . . do not comply with Christian moral principles.' The letter warned parishioners of 'an attack of lay forces against the Christian and national values. In the face of consolidation of the post-communist forces, one cannot forget about the painful experiences of the recent past.'[27] The Church's energetic involvement in politics has caused its prestige to suffer,[28] but the Church continues to have control over a substantial segment of the electorate, particularly the rural electorate, and is thus recognized by political elites as a mighty force to be reckoned with.

The Church's activist role in politics and its view of state also has strong proponents among the political elite, as seen in the words of Deputy Prime Minister Henryk Goryszewski (ZChN) in February 1993: 'It is not important whether there will be capitalism in Poland, it is not important whether there will be welfare – the most important thing is that Poland should be Catholic.'[29] Several months later, Goryszewski went on to instruct the voters regarding forthcoming parliamentary elections: 'It is a Catholic's duty to elect another Catholic. We, in our overwhelming majority, want a Catholic Poland, such that will not sell the Lord for material goods.'[30]

Political elites justify the strong role of the Church and religion in politics with the argument that law and public policy must reflect morality, as manifested by the 'Christian system of values'. Senator Alicja Grzeskowiak, Professor of Law and former Chairperson of the Senate's Constitutional Committee, insists that she is deeply committed to the rule of law, 'a central feature of democratic government, . . . But I am not a positivist. Law is not merely the letter of the law but its content which must be consistent with our inborn human rights and certain values. If that does not exist, then it is not law.'[31]

Stefan Niesolowski, a leader of the Christian National Union (ZChN), a party which supports Church proposals to eliminate the constitutional separation of Church and State, continues this argument that Christian values should be universally applied in public policy and law:

> I demand respect for Christian values in public life because otherwise the state will become possessed by other ideologies. There are

> no moral alternatives to Christianity. Of the other ideologies I have in mind in particular liberal ideology, aiming to build a morally relativist state, a completely secular humanist state, where clericalism is treated as an enemy .... I fear precisely that. I guard against that.[32]

While emphasizing the importance of the separation between law and politics ('law must be respected ... whether it supports or goes against the interests of a particular political group or interest. Law must go above politics'), Niesolowski commented on law and other values:

> Regarding morality, I think that law depends on an axiology. There is a positivist attitude that ethics comes from law, that law is, as it were, prior .... that parliament is the root of morality. I do not share this opinion. For me the root of morality is God. This is a great conflict in Poland .... Is the will of the people primary or are certain ethical principles primary which people are not permitted to change? ... I as a representative of a Christian party represent the view that the principles of morality are eternal, unchanging, and people are not permitted to change them. We have to adjust law to them.[33]

Thus, while both Grzeskowiak and Niesolowski are rhetorically committed to the principle of the rule of law, given any conflict between the Church's view of state and the integrity of an autonomous legal order, they would opt for the former.

Political elites adhering to the Church's agenda have had success in legislating Christian values into public policy. For example, on 28 December 1992 the Sejm approved an amendment to the Broadcasting Law to require all radio and television programming, public or private, to 'respect the religious feelings of the audience and in particular respect the Christian system of values.'[34] The nine-member National Broadcasting Council (four members appointed by the Sejm, two by the Senate and three by the President) was charged with enforcing the law through its power to license, or to revoke the licenses of, radio and television stations on the basis of the moral content of a station's programming. The 'Christian values' amendment to the Broadcasting Law was immediately criticized as speech restriction imposed by state authorities under the guidance of the Catholic Church. The international human rights organization Helsinki Watch stated that the amendment 'will chill legitimate speech as

broadcasters are forced to censor themselves to fit within the undefined boundaries of the law.'[35] Importantly, a 1994 Constitutional Tribunal decision limited the scope of the 'Christian values' clause. The Tribunal held that the clause may not be interpreted as giving the National Broadcasting Council the right to prospectively evaluate radio and television programs because all forms of prior censorship are unconstitutional.[36]

As the Broadcasting Law did not define the term 'Christian values', the Polish Catholic Church undertook to do so and at its annual Bishops' Conference in May 1993 issued a declaration defining Christian values as 'all broad, consensus-based values'.[37] This definition, although clearly giving a monopoly on morality to the Catholic Church, was quickly adopted by the Council, showing the Church's active and open participation in the shaping of the new legal system. Responding to the assertion that the definition of Christian values still lacks precision and is too subjective, Grzeskowiak emphasizes that '[l]aw makes use of many conceptions which require interpretation. So this accusation cannot only be dragged out about Christian values .... Otherwise you merely use this argument for particular provisions not wanted on ideological grounds.'[38]

Some public officials have criticized the Church's imposition of its values on public policy. Ombudsman Tadeusz Zielinski, one of the Church's most vocal critics, wrote in a 1992 article that Poland is bordering on becoming 'a para-religious state':

> As opposed to a theocracy, which is a political system where there is near total rule by the clergy..., a para-religious state is a political system in which there exists formal differentiation between church and secular authority and in which the Church has no intention to replace civil governments, but claims pretences in the control of all its doings if these have moral significance, and in moral judgment it is the highest arbiter. In such a state the church authorities demand that law impose under the threat of penalty the observance of all the rules that the Church demands of its faithful, and also that which is a sin in the eyes of the church also be an offense according to state law....[39]

But public officials willing to criticize the Church's political role have paid a price. For example, in language redolent of the communist era, in 1993 Zielinski was branded as an 'enemy of the Church' by the ZChN and other Christian parties because of his willingness to

take up cases involving 'particularly vital interests of the Catholic Church'.[40] On 16 April 1993 deputies of the PC party, joined by over 80 other Sejm deputies, motioned for the removal of Zielinski. They objected to Zielinski's warnings that Poland is becoming a para-religious state and his willingness to challenge the constitutionality of the restrictive abortion law.[41] But because the 1987 Law on the Ombudsman limits the grounds for dismissal of the Ombudsman to health reasons and violations of oath of office, no legislative action was taken on the motion. Following these attacks, Zielinski protested that 'the Church is interfering in the sphere of the three branches of government: legislative, executive and judicial. I do not want to be a pessimist, but I fear that we are standing at the gateway to a confessional state.'[42]

From a constitutional perspective, it is disturbing that the Church has made Poland's moral and ethical state its political goal. Going beyond the sphere of religion, the Church after 1989 became deeply involved in politics and law. Moreover, certain political elites do not see that their wish to write their faith into the law might compromise, or even endanger, the rule of law. A basic principle in a democratic constitutional polity holds that the rule of law takes precedence over religious convictions. As Konstanty Gebert, a journalist and former Solidarity leader, stated: 'The question is, whose state is this going to be. Did we achieve democracy to build a state imbued with Polish national and religious values, or a pluralistic state that provides rights of citizenship to people of all traditions?'[43]

From a political perspective, the Church's involvement in post-communist Polish politics has resulted in a backlash against the Church, with the secular, if not anti-clerical, SLD emerging victorious in the 1993 parliamentary elections and SLD leader Kwasniewski elected to the presidency in 1995. Despite the rout of right-wing parliamentary parties in the 1993 parliamentary elections and the victory of the left, which had been openly critical of Church influence on public policy, the Church remains a powerful political force and is likely to continue its intense political role, as seen in its involvement in the 1995 presidential campaign, openly campaigning against Kwasniewski.

D INDIVIDUAL RIGHTS AND FREEDOMS

Ironically, while the realm of individual rights was one of the most cherished values of the anti-communist opposition, reform in this area

has been relatively neglected under the new democratic rule. As discussed in Chapter 4, the post–1989 reforms did not include changes to the existing constitutional framework of individual rights and freedoms. As a result, rights and freedoms in Poland are still regulated by provisions found in Chapter VIII of the 1952 Constitution.

The lack of a modern framework for the protection of individual rights is a fundamental deficiency of Poland's present constitutional framework. Until a new rights' framework is adopted along with the new constitution, the old chapter on rights and freedoms will remain in force. While fewer complaints about human rights violations emanate from Poland than from any other country in the region, the country's human rights record is not exemplary. For example, on several occasions the post-communist state has relied on anachronistic laws to control dissent and criticism of the government, and in so doing has blatantly violated the freedom of expression of private citizens. Moreover, the emergence of ethnocentric and xenophobic political movements clashes with the spirit of open society and pluralism that so characterized the opposition movement during the communist era.

(i) Freedom of Expression

It would be expected that with the dawn of democracy, the Polish state would repeal laws imposing penalties for 'insulting the honor' of the nation, the state, or its leaders. Indeed, such laws had been specifically promulgated during the communist era to inhibit criticism and dissent that threatened the regime. Unfortunately, in post-communist Poland the state has on several occasions relied on the same anachronistic laws to inhibit dissent and criticism of political elites. The most notorious of these provisions still in force today is article 270(1) of the Polish Penal Code, which makes a criminal offense 'publicly insulting the Polish Nation or State or its system of supreme bodies', punishable by fines or imprisonment. By occasionally using this provision to restrict objectionable and 'insulting' expression, the new political authorities have shown themselves to be as willing as the old regime to use defamation laws to protect their position, even if it means violating constitutionally-grounded freedoms.

For example, on 18 March 1993, two university students were found guilty and fined, albeit modestly, by a regular court in Brzeg, Poland for 'slandering' President Walesa. Both had admitted to shouting 'Down with Walesa – Communist Agent' at political rallies

in 1992. The voivodship court judge recognized that it is 'normal for the president to have adversaries and fervent political opponents', but admonished that the defendants' actions, however, 'cannot be seen as anything but an attack on the presidency'.[44]

In a case involving a private conversation between two individuals, a private citizen, Stanislaw Bartosinski, was standing at the bus stop in a small Polish town when he uttered a number of rude and vulgar statements critical of President Walesa (including calling the President a 'son of a bitch'). Another citizen reported this conversation to the local prosecutor, and Bartosinski was charged under the Penal Code's Article 270(1) with 'publicly insulting a supreme body of the state'. It did not matter that the conversation, between two individuals, was the kind that could take place almost anywhere when the subject of politics surfaces. The prosecutor described the crime as entailing the use of 'vulgar words' in a 'very public place'. For this offense, the defendant was convicted in 1992, given a one-year prison sentence (suspended on the condition that Bartosinski not break the law again for three years), and fined three million zlotys, a sum which exceeded the average monthly salary of most Poles.[45]

In yet another example, a journalist, Ryszard Zajac, was actually imprisoned for violating the Penal Code's Article 270. Zajac published an article in a Katowice daily in which he referred to the local voivodship council and to nine Solidarity trade union officials as 'dopes' and 'small-time politicos and careerists'. He also stated that the council aspired to become a 'Communist Party committee'. Solidarity leaders filed a libel suit, and the regional prosecutor brought criminal charges. Zajac was fined and sentenced to ten months in prison, suspended if he agreed to apologize in two newspapers. Refusing to apologize, he was sent to jail. After his case was taken up publicly by the Ombudsman for Citizens' Rights, the Polish Helsinki Committee, members of the Senate, and others, Zajac was finally released.[46]

The state bureaucracy has also shown a tendency to revert to its old ways. On 2 June 1993, agents of the State Protection Office (UOP) tore down and confiscated posters announcing a demonstration in Warsaw and calling for early presidential elections, lustration, and decommunization. The UOP acted on the grounds that the posters were illegal because they insulted state authorities. The posters showed pictures of several prominent politicians, including President Walesa, accusing them of having collaborated with the communist secret police.[47] Petitioned by the Ombudsman, the Constitutional Tribunal subsequently admonished the UOP for exceeding its stat-

utorily defined authority and for violating the demonstrators' freedom of speech.

During the five years following the collapse of communism, Poland occasionally suffered flashbacks to communist era thinking about dissent. The hazards of criticizing the government or its officials are, of course, by no means limited to Central and Eastern Europe. Even in the most liberal democracies, the law is sometimes used to discourage the full and free airing of complaints about government and its actions. But the incidents related here are of the innocuous, trivial sort that most Western democracies protect. That it still is illegal to insult or offend leaders, and that the definition of insult or offense is so vague that the government can bring charges against virtually any critic, offers a vivid reminder of the importance of guarding against cutting off the flow of ideas, however bothersome those ideas may be to officeholders, in the course of building a constitutional democracy.

(ii) Xenophobia

In the context of the countries of Central and Eastern Europe today, Poland seems like an oasis of ethnic peace. As a result of genocide, ethnic cleansing and mass migration during and after World War II, Poland is a relatively homogeneous national state. But Poland's minorities, particularly her Jewish and German minorities, seem to have attracted the attention of the small chauvinistic, nationalistic political parties of the right, none of which are represented in the current Parliament.

After 1989, a number of right-wing parties emerged, such as the National Party (*Stronnictwo Narodowe*–SN), National Party 'Szczerbiec' (*Stronnictwo Narodowe 'Szczerbiec'*), and the National Party 'Fatherland' (*Stronnictwo Narodowe 'Ojczyzna'*).[48] Since then their number has grown to over twenty groups. The ideologies of these nationalistic parties are similar; they oppose integration with Europe, claim that European unity 'has become the eternal aim of the Masons', and are particularly sensitive to the 'German threat', 'Judeo-communism' and 'global Jewish conspiracy'.[49]

One party which merits special attention is the 'Polish National Community–Polish National Party' (*Polska Wspolnota Narodowa–Polskie Stronnictwo Narodowe*–PWN-PSN). Its antisemitic publication, *Polish National Thought* (*Polska Mysl Narodowa*), devotes much space to the so-called 'Jewish Question' and has even printed guidelines on 'how to detect Jews through biological and spiritual

methods'.[50] According to the journal, most political elites in the moderate and left-wing parties are Jewish.

Professor John Micgiel writes that these nationalist groups have had little influence on post-communist Polish political life,[51] but the ethnification of politics in Central and Eastern Europe has been one of the most disquieting consequences of the fall of communism. Although it is unlikely that a tragedy even remotely approaching what has happened in the former Yugoslavia could occur in Poland, the dangers of internal unrest and violence cannot be simply dismissed. This is particularly the case as some elements of Polish society exhibit a tendency towards populist democracy or majoritarianism and assume that the numerical strength of the majority provides a monopoly for political initiatives and legal regulation. The former Deputy Prime Minister, Henryk Goryszewski (ZChN) voiced such a position most distinctively on Polish television in September 1992:

> To whom does freedom, tolerance, human rights and democracy apply? For our enemies, the communists, the anarchists, for enemies of the church, for immoral people? No! We have won, we have swept away totalitarianism, and now it is our sole discretion to decide how the new Poland will look. We are the majority, hence we hold the power and the authority to rule. The minority should remain silent and obey.[52]

Goryszewski's mind-set becomes even more frightening with the emergence of nationalistic and chauvinistic groups, and illustrates why strong and enduring constitutional structures protective of discreet and insular minorities are vital in Poland's nascent democracy.

As seen in the above discussion, despite the promulgation of new constitutional provisions and the emergence of judicial review, Polish constitutionalism has been confronted by challenges both universal to all democratic polities and unique to Poland's transitional circumstances. First, a challenge shared by all democratic polities is that as a nation undergoes rapid social and economic change, and as a government is confronted with tasks of significant magnitude, commitment to standing constitutional rules may not be politically desirable or expedient, leading certain political elites to become impatient with constitutional restraints and to promote, rhetorically at least, stronger executive governance. While lack of commitment to procedures or process are matters of concern in any democratic polity, it is particularly worrying in post-communist countries, given the absence of any

recent tradition of restraint. A second challenge is the threat of arbitrary or politically motivated programs of decommunization and lustration. As seen in the 'Olszewski lustration crisis' of 1992, lustration and decommunization programs can be used by state officials to intimidate political opponents and fight political battles. Third, the Polish Catholic Church, going beyond the sphere of religion, has become deeply involved in politics and law in post-communist Poland, challenging the constitutional separation of church and state. Fourth, in the area of individual rights, on several occasions the post-communist state has relied on anachronistic laws to control dissent and criticism of the government, blatantly violating the freedom of expression of private citizens. Moreover, the emergence of ethnocentric and xenophobic political movements since 1989 has clashed with the spirit of open society that so characterized the opposition movement during the communist era. While most commentators are confident of Poland's democratic development, these challenges illustrate why Polish constitutionalism must continue to be reenforced by institutions designed to make it not just an operational reality but a genuinely pervasive institution.

8 Conclusion: Law vs Power in Post-Communist Poland

At first sight, it might seem that the recent emergence of constitutional rule in Poland represents a discontinuity from the nation's earlier constitutional experience. It may be argued that effective constitutional government did not exist in Poland until 1990. Up to 1791, while Polish constitutional development resulted in greater freedoms and democracy for the szlachta, the Polish state remained a far cry from genuine popular sovereignty. During the inter-war period, the Polish state oscillated between a populist but ineffective and thus short-lived parliamentary government established by the 1921 Constitution, and a 'guided democracy' with strong executive authority working to secure a unified state.

But further consideration of Polish constitutional history reveals certain links between Poland's new institutional arrangements, particularly those reflecting the principle of limited government, and the nation's long-term constitutional heritage. As discussed in Chapter 2, from the thirteenth century, the Polish state evolved toward an increasingly decentralized political structure, whose functioning resulted in a de facto separation of powers, enforced by a network of checks and balances. The 1791 Constitution formalized the dominant constitutional themes addressing Poland's pressing need to build a credible nation-state and preserving many of the democratic political gains that had evolved earlier in the szlachta's 'democracy of the gentry'. Throughout the inter-war period a tripartite, though not necessarily equal, separation of powers existed, enforced by checks and balances. Even Pilsudski's 1935 Constitution provided a system where different political branches remained accountable to each other.

During Poland's communist era, constitutionalism was rejected and the institutional basis for totalitarian rule was established. A rigidly centralized government dominated by the Party replaced the earlier checks and balances model. In the structure of government established by the 1952 Constitution, no politically impartial institutions existed capable of challenging the Party's political will or enforcing constitutional rules. Principles of individual liberty espoused by the 1952 Constitution were limited by the primary importance of the state and the prerogatives of the Party elite. During the 1980s an unyielding popular movement incrementally achieved constitutional change in a

Western democratic sense, marking the beginning of the end of communist constitutional practice.

The collapse of communist power in 1989 led to the renewal and development of principles of limited government emanating from Poland's constitutional heritage, contributing to the emergence of constitutionalism. First, the 1989–90 constitutional amendments provided a basis for further evolution of the polity by eliminating the essential features of the communist system and by taking steps to transform the 1952 Constitution into a liberal democratic one, with legislative and executive powers genuinely checked and with the judicial branch provided genuine independence. Amendments also created political structures and institutions to provide a framework within which democratic political processes could operate. With the promulgation of these amendments, for the first time since before World War II a set of democratic institutions existed to bring political relationships back within the framework of the state.

Second, the adoption of the Small Constitution in November 1992 both clarified and institutionalized a presidential-parliamentary system of government, and provided specific solutions to institutional dilemmas which had emerged during the first two years of post-communist governance. The Small Constitution was clearly a compromise between President Walesa's desire for a strong presidency and the Sejm's desire for a classical parliamentary democracy; as such it defined the division of power between legislative and executive branches of government while recognizing the presidency's special role that had become apparent after the 1991 parliamentary elections. The document also reflected growing awareness that the Government had to be strengthened and made less susceptible to shifting parliamentary majorities if the country was to continue on the path to democracy and a successful market economy. While the Small Constitution failed to modernize the chapters on individual rights and judicial review, it went far in dispelling popular fears following the 'war at the top' in the spring of 1992 that the country could become ungovernable. The formal institutions of government and the procedures regulating their relations established by the Small Constitution provided a comprehensive framework within which democratic political processes could operate in Poland until the passage of a new, final constitution in the spring of 1997.

Third, in addition to the promulgation of new constitutional provisions, central to the development of constitutionalism in Poland has been the innovative judicial decision and precedent of the Constitu-

tional Tribunal. Since 1989, the Tribunal's activist judicial review has been crucial in forging post-communist constitutionalism, strengthening Polish constitutional arrangements by surrounding them with binding legal doctrine. Despite significant limitations on its jurisdiction and scope of review, the Tribunal created a normative constitutional jurisprudence characteristic of liberal democracies; it interpreted the new Rechtsstaat clause, a very general, open-ended constitutional provision, to protect additional substantive rights, a practice common in countries with well-established doctrines of judicial review. In addition, decisions interpreting the principle of equality reflect the Tribunal's willingness to develop and uphold general concepts of equality from the basic language of the Constitution.

It is in the realm of judicial review that modern Polish constitutional development diverges sharply from the nation's constitutional history. For the first time, the constitution is more than a charter for government and the source of individual rights but has become a legally enforceable enactment interpreted by the Constitutional Tribunal to develop principles of justice, fairness and equity. Particularly in Poland, where the 1952 Constitution's chapter on individual rights remains in force, the activist jurisprudence of the Tribunal has responded to the necessities of the post-communist transition, establishing principled parameters of government action in areas otherwise untouched by constitutional reform.

During the first eight years of Poland's post-communist era, completion of a new 'final' constitution was stymied by ideological and substantive differences over constitutional choices. But the April and December Amendments, the Small Constitution and the Tribunal's constitutional jurisprudence provided the fundamental groundwork for a modern Polish polity based on notions of limited government and reflective of European constitutional norms:

- a meaningful separation of powers, with legislative and executive powers constrained and with the judicial branch guaranteed independence, has been restored;
- effective checks and balances have been introduced into the Polish system of government, preventing any branch of government from usurping power;
- a centralized system of judicial review exists to decide on the constitutionality of state actions, to delimit the law-making of the new state, and to define and protect individual rights and the separation of powers.

Each of these norms became manifest in Poland's post-communist constitutional framework. First, the transformation of the unicameral Parliament into a bicameral body composed of the Sejm and Senate, the replacement of the Council of State with the presidency, the provision of new guarantees of independence to the judicial branch through the implementation of the National Judicial Council (KRS) and other procedures, have made the separation of powers part of the system of government. By restoring this essential doctrine of limited government, the Polish polity is now checked internally by autonomous power centers with developed institutional interests. This diffusion of authority is the antithesis of totalitarianism. Each independent branch of government may act as a check on the exercise of arbitrary power by the others, and each branch, because it is restricted to the exercise of its own function, will be unable to exercise undue control or influence over the others.

Second, through the Small Constitution's system of rationalized parliamentarism, real checks and balances were introduced into the Polish system of government. Presidential veto powers provide important checks on the Sejm and on the Government. Likewise, the other branches have important checks on the President. The Senate must agree before the President can initiate a referendum. The Sejm has checks on the President with countersignature requirements, and on the Government through no-confidence measures. While the Government has some measure of freedom from both the President's and the Parliament's direct interference in the state's operation, it can never act without restraints. Checks and balances protect constitutional values by ensuring that there exist three separate, overlapping and mutually reinforcing remedies – legislative, executive, and judicial – against unconstitutional government conduct. By blending and overlapping the functions of the branches of government, institutions are prevented from usurping power.

Third, the Constitutional Tribunal, through its power of judicial review, decides on the constitutionality of executive and legislative acts. The turn to judicial review for enforcement of constitutional principles and individual rights reflects a view of rule of law as defined and protected by the Tribunal. During the communist era the constitution did not constrain the state, nor was it a meaningful source of individual rights. Since 1989, the Tribunal, by actively delimiting the law-making of the new state and defining and protecting the new understanding of rights and separation of powers, has pursued meaningful and effective adherence to constitutional norms of democratic

organization and the protection of individual liberty. In addition, the Tribunal's emergence reveals a radical development in the transition out of the Soviet-style governmental system of entirely centralized state power, as the Tribunal itself constitutes a division of state power and enables enforcement of a new governmental system of separated powers.

While the Tribunal's role contributed to democratic institutionalization in Poland, until the constitutional change of May 1997 limitations on its scope of review and on the validity of its decisions made its practice of judicial review susceptible to populist political pressures. In several decisions in 1990–2, the Tribunal seemed to bow to political expediency at the expense of constitutional coherence. Until the Tribunal's jurisdiction was expanded, and until its decisions were given the force of finality, it was not fully immune to the political pressures inevitably accompanying controversial cases, and it could not serve as a complete check on the other branches of government.

Poland's new constitutionalism, increasingly infused in the habits of political actors, manifests tremendous potential to engender the principles and institutions of limited government. While challenges to constitutionalism exist, most post-communist actors – both among elites and in society at large – have a greater, more constitutional ambition, and politicians have tended to stay within constitutional parameters, even when it is inconvenient. But it is still too early to determine whether the constitutionalism developing in Poland will become an enduring part of the political system. Time is needed to determine whether constitutional norms of democratic organization and individual liberty will be adhered to when it involves continued sacrifice over the long-term of what seems temporarily expedient. Indeed, successful constitutional democracy in the West, particularly in the United States and Britain, did not sprout all at once. It grew, with sporadic freedom-enhancing measures, over centuries. Poland's constitutional history has similarly taught powerful lessons, particularly of the need for balanced government and for constitutional mechanisms to preclude political and bureaucratic arbitrariness. The challenges described in Chapter 7, both those universal to all democratic polities and those unique to Poland's transitional circumstances, illustrate why Polish constitutionalism must continue to be reenforced by institutions designed to make it not just an operational reality but a genuinely pervasive and enduring institution.

In a comparative perspective, the development of Polish constitutionalism has been reflected elsewhere in Central Europe. John

Hawgood, in his seminal work *Modern Constitutions Since 1787*, noted that the different historical waves of constitution-making produced 'families' of constitutions with similar goals and institutional features.[1] For example, the constitutions which emerged in 1848 in Europe tried to provide a practical underpinning for liberalism. The post-World War II wave of constitution-making focused on creating institutions to prevent the recurrence of fascism.

Similarly, the constitutional reform that has occurred in Central Europe since 1989 has responded to the region's legacy of communist constitutional practice and Soviet-style centralized government authority. The new Central European constitutions have decentralized and separated state authority and created overlapping checks and balances to limit political power. Moreover, to ensure that constitutional principles and individual rights are genuinely enforceable, new systems of judicial review have been established.

The following comparison will help place the development of constitutionalism in Poland in a regional context. It is based on a review of the newly adopted or fundamentally changed constitutions of the following formerly communist Central European countries: Hungary (text of amended constitution published 24 August 1990), Bulgaria (new constitution promulgated 13 July 1991), Romania (new constitution promulgated 23 December 1991), Slovakia (new constitution promulgated 1 September 1992), and the Czech Republic (new constitution promulgated 1 December 1992).

Generally, constitutional reform in the region has drawn on Western models, particularly modern French and German constitutional arrangements, which were promulgated in part to prevent the reemergence of the fascist dictatorship and authoritarian governance of the World War II era. Moreover, the fledgling Central European democracies desire to join the European Union and NATO and feel that legal and constitutional congruence with West European arrangements will enhance their chances of eventual integration.

The transformation in Central Europe from communist rule to liberal democracy is best manifested by the changes in the constitutional descriptions of the new states. The communist rhetoric describing the countries as 'socialist democracies' or 'people's republics' has been removed from the new basic laws and replaced by references to popular sovereignty, political independence, and territorial integrity. Similar to Poland's new Rechtsstaat clause, each of the constitutions also describe their polity as either a 'democratic state ruled by law' (Romania, the Czech Republic and Slovakia) or a 'juridical state'

(Hungary and Bulgaria). These provisions were included to provide a version of the German 'Rechtsstaat' or the French 'etat de droit' in the new constitutions, giving new constitutional courts a general provision to provide constitutional guarantees of the observance of law and to ensure that the state operates within the clear framework of hierarchically arranged legal acts, with the constitution recognized as the apex of the legal system.

Like Poland, the drafters of the new Central European constitutions have rejected both the pure presidentialism of the US model as well as the 'parliamentary supremacy' that so characterized communist constitutional theory. Each of the new documents provides for a tripartite separation of powers, reinforced by overlapping checks and balances. Each has adopted a 'higher law' approach to constitutionalism, and each has implemented a centralized system of judicial review to enforce the constitution over political forces. Each has also fundamentally strengthened the independence of their regular judiciary.

The new Central European constitutions feature a wide range of configurations in distributing power among branches of government, as well as in terms of government machinery (see Table 8.1 comparing presidential powers in six Central European countries). Mainly ceremonial Presidents are chosen by popular election (Bulgaria) while Presidents endowed with strong executive powers are chosen by the Parliament (Czech Republic and Slovakia). While all are parliamentary systems, in the Czech Republic, Slovakia and Romania, as in Poland, the presidency retains certain strong powers, while in Hungary and Bulgaria the President is largely ceremonial, with Parliament retaining significant powers.[2] As in Poland, in Romania and Bulgaria the President is chosen in direct popular elections, which gives the administration greater legitimacy than one chosen indirectly by Parliament, as is the case in the Czech Republic, Hungary and Slovakia.

In Romania, the Czech Republic and Slovakia, the President has a strong role in appointing the Government, which must be subsequently approved by Parliament on the basis of a vote of confidence. In Bulgaria and Hungary, the President plays less of a role in the formation of Government. Like the Polish President in certain areas, the presidents of the Czech Republic, Slovakia and Romania have the right to meet the Government and to request reports from it. On the other hand, the Bulgarian and Hungarian Presidents have less interaction with a sitting Government, and play a much smaller role in executive branch policy-making.

Table 8.1 Survey of Presidential Powers in Central Europe

	Bulgaria	*Czech Republic*	*Hungary*
Electoral Body	Citizenry	Deputies & Senators	Parliament
Length of Term	Five Years	Five Years	Five years
Role in Appointing Government	Entrusts formation of Government to PM-designate nominated by party holding highest number of seats; if unsuccessful, entrusts PM designate from party with second highest number of seats; if again unsuccessful, entrusts PM-designate from minority party; if unsuccessful, Assembly elects PM-designate.	Two opportunities to appoint PM and Government that can win confidence of deputies; shall appoint members of government based on nomination of PM.	Parliament elects PM; ministers proposed by PM and appointed by president.
Dismiss Assembly	Dismisses Parliament when no confidence can be gained in a newly appointed Government.	May dissolve Assembly of Deputies if (i) Assembly does not give confidence vote to newly appointed Government; (ii) if Assembly fails to reach decision within 3 months on Government bill; (iii) if Assembly is adjourned for a longer period than permissible.	President may dismiss Parliament once each session for no more than 30 days; may dissolve parliament if (i) confidence is revoked from Government on 4 occasions within 12 months; (ii) if PM Candidate appointed to serve during an interim does not receive confidence vote within 40 days.
Veto Power (Override Requirements)	Yes, Override: More than half of all members	Yes, Override: Absolute Majority of all Deputies.	May return legislation to Parliament for reconsideration
Appoint Constitutional Court?	President appoints 1/3 of justices with countersignature	With Senate Consent; appoints all justices	Parliament appoints and confirms
Legislative Initiative	Yes	Yes	Yes

	Poland	*Romania*	*Slovakia*
Electoral Body	Citizenry	Citizenry	National Council
Length of Term	Five Years	Four Years	Five Years
Roll in Appointing Government	President Makes First Nomination of Prime Minister and on motion this nominee appoints Council of Ministers; if Confidence is not gained, Sejm nominates; no confidence gain, President makes other appointment	Designates PM candidate on basis of parliamentary composition; appoints Government on basis of vote of confidence from Parliament	President Appoints PM and at PM's Proposal Appoints the Other Ministers of Government
Dismiss Assembly	May dissolve if the Budget has not been passed within 3 months after its introduction; after 4 attempts to form a new Government which can gain confidence vote, may either dissolve Sejm or make one additional attempt; may dissolve if Sejm has passed no confidence vote without choosing new PM	Absent a vote of confidence on the formation of a Government, President may dissolve Parliament after consulting with the Presidents of the 2 chambers	President may dissolve National Council when it fails to approve the program Declaration of the Government 3 times
Veto Power (Override Requirements)	Yes; Override: 2/3 Majority; President may refer statute to Constitutional Trib.	Yes; May refer Law to Constitutional Court	Yes, Override: Simple Majority of Members Present
Appoint Constitutional Court?	No	1/3 of Members appointed by President	President appoints Court from among 20 candidates nominated by National Council
Legislative Initiative	Yes; may amend and withdraw proposed Bills	Yes	Yes

The legislative branches of the new polities also differ. The Czech Republic, Poland, and Romania are the only countries that chose to have bicameral parliaments; bicamerality serves the function of slowing down and checking the legislative process. But in the countries with unicameral parliaments, such as Hungary and Slovakia, the President may refuse to sign parliamentary bills and may submit them for reconsideration to the Parliament or to the constitutional court for consideration of constitutionality. Like Poland, in the Czech Republic and Romania presidential vetoes of parliamentary legislation may be overridden only by either absolute or two thirds majorities. The Czech Parliament is most susceptible to presidential dissolution, while the Bulgarian and Hungarian assemblies are comparatively much less vulnerable.

To protect and interpret their new constitutions, the Central European states, like Poland, have created centralized systems of judicial review (see Table 8.2 comparing constitutional courts in five Central European countries). But the new courts vary in subject-matter jurisdiction and standing requirements. Regarding subject-matter jurisdiction, each constitution explicitly grants their constitutional court authority to determine the constitutionality of laws and other legal acts of the state. Except for the Romanian Constitution, each also authorizes review of executive decrees and regulations. Only the Czech, Slovak and Romanian courts are explicitly authorized to review the constitutionality of local government acts. Hungary and the Czech Republic give their courts the authority to review the constitutionality of treaties, either proposed or adopted. The Czech Republic, Slovakia, Hungary and Bulgaria consider treaties superior to domestic law, whereas the Romanian Constitution does not explicitly authorize its court to compare domestic law with international treaties or international law.[3] Thus, the subject-matter jurisdiction of the Polish Constitutional Tribunal is more limited in comparison to Poland's Central European neighbors.

The constitutions of the Czech Republic, Slovakia and Hungary specifically grant courts human rights jurisdiction, allowing them to consider the conformity of laws with international human rights agreements. Like Poland, the constitutional courts of Romania, Bulgaria, the Czech Republic and Slovakia have authority beyond an adjudicative function. Constitutional courts may outlaw political parties and political associations for 'unconstitutionality' in Romania and Bulgaria, or for illegal 'activities' in the Czech Republic and Slovakia.

Table 8.2 Survey of Constitutional Courts in Central Europe

Country	*Number of judges*	*Term of office*	*Renewal of bench*	*Possibility of reelection*	*Creating organ*
Bulgaria	12	9 years	1/4 every 3 years	No	1/3 National Assembly; 1/3 President; 1/3 Assembly of Supreme Ct. and High Admin. Ct.
Czech Republic	15	10 years	No	Yes; 1 additional term	President appoints all with Senate consent
Hungary	15	9 years	No	No	Parliament appoints and confirms
Romania	9	9 years	1/3 every 3 years	No	1/3 President; 1/3 Chamber of Deputies; 1/3 Senate
Slovakia	10	7 years	No	Yes; 1 additional term	President appoints justices from among candidates nominated by National Council

On questions of standing to initiate constitutional review, the Bulgarian provisions are the most restrictive of the Central European polities: Standing is given only to the President, a fifth of the national legislature, the government, the chief prosecutor, both the Supreme Court and the Supreme Administrative Court, and under certain circumstances municipal councils; no direct private access nor access by non-governmental bodies is available. While standing requirements have been more open in Poland, in the Czech Republic and Slovakia challenges to laws and decrees as violative of constitutional, international or statutory law may be filed by national, regional and local officials as well as by regular courts in specific cases and controversies, and if involving human rights, by private citizens. The Hungarian Court's approach is the most generous. In Hungary, any-

one can challenge 'legal rules and other legal means of state guidance' as well as human rights violations. There are no standing restrictions for any legal rule that has become effective, thereby allowing challenges to all existing as well as newly enacted legislation. Similar to the Polish Constitutional Tribunal, the Romanian and Hungarian courts can in some cases initiate actions on their own, without a complaining party.[4]

Unlike the Polish system, until recently the decisions of most of these constitutional courts are final and binding on the entire judicial and political system. However, in Romania decisions on the constitutionality of statutes passed by Parliament but not yet promulgated into law may be rejected by a two-thirds vote of either legislative chamber. As was the case of Poland, the possibility that Parliament may reject the decisions of the Romanian Court intrudes on the validity of constitutional decisions, except that in Romania it applies only to pre-promulgation enactments, not to enacted laws.

As with the jurisprudence of the Polish Tribunal since 1989, several of these courts, in particular the Hungarian and Bulgarian courts, have been very active and have operated with real independence, forcefulness, and insistence on protecting human rights and the rule of law. In Hungary, two sets of decisions that demonstrate the resolve and independence of the Court concern the constitutionality of legal acts passed during the communist era. Regarding the constitutionality of laws providing for restitution of nationalized land to pre-communist owners, the Hungarian Court held, despite strong political pressure to the contrary, that there must be no retroactivity of law and that the only basis for returning land to former landowners is to facilitate the transition to a market economy. Otherwise such restitution may not occur. In another politically controversial decision, the Hungarian Court declared unconstitutional a parliamentary statute extending the statute of limitations for crimes committed during the old regime that were never prosecuted.

The Bulgarian Constitutional Court has been similarly resolute in defending minority rights against majoritarian political movements, refusing to declare illegal Turkish minority parties despite heavy political pressure to do so. Constitutional courts in the Czech Republic and Slovakia were formed only in 1993, but they too are becoming important instruments for the protection of rights.

As for individual rights, unlike in Poland entirely new charters guaranteeing fundamental rights and freedoms have been promulgated in each of the Central European countries. The character of

the new rights and freedoms differs from the communist concept of rights, which held that rights originated with the state and are granted by the state to its citizens. The new charters reflect a liberal Western approach, holding that rights are innate, that they originate with the individual and that the state is merely the guardian of rights. For example, the Czech Charter of Fundamental Rights and Freedoms declares that '[e]verybody may do what is not prohibited by law and nobody may be forced to do what the law does not command.'[5] The same provision is incorporated into the Slovak Constitution. Although the Hungarian Constitution does not contain such a provision, the decisions of the Constitutional Court leave no doubt about the primacy of freedom in Hungary as well.

The development of constitutionalism in each of these states faces many of the same dilemmas confronting Poland. Both President Havel of the Czech Republic and President Goncz of Hungary have resisted parliamentary crusades for decommunization and lustration. As in Poland, a central challenge to constitutionalism is that as these renewed nations undergo rapid social and economic change, commitment to constitutional rules may not be politically desirable. In addition, ugly nationalist and ethnocentric tendencies have emerged in each of these countries, threatening ethnic and national minorities.[6] These challenges demonstrate why the new democratic political arrangements must continue to be reenforced by strong constitutional institutions.

In conclusion, notwithstanding continuing challenges to constitutionalism, in Poland a new socio-political order, based on the ideas of modern Western-style democracy, has smoothly emerged from the collapse of the communist system of power. Poland's constitutional framework now delineates the permissible scope and limits of governmental power, and the Constitutional Tribunal, with its power of judicial review, decides on the allocation of powers, functions, and duties among the agencies and officers of government, defining the relationships between these bodies and the public. This framework has proven stalwart and enduring through an era of extraordinary politics. Since 1989, six Governments have stood and fallen according to constitutional rules following free and fair elections. Nothing could have been more volatile than Poland's political cohabitation of the 1993–5 period, in which the leader of the former opposition movement shared power with a Government consisting of former communists and a Parliament dominated by a post-communist majority.

While conflicts over the nature of the post-communist state are by no means settled, the groundwork for constitutional governance has been laid, experience has been accumulated, and an impressive measure of institutional stability has been achieved.

Only time will show whether Poland's new constitutionalism will remain an enduring feature of political life. But as the late Tribunal Justice Janina Zakrzewska, who passed away in the spring of 1995, put it:

> In 1989 we entered a new era of Polish political life, an era in which we had the chance to establish a new political and constitutional order. While the process of grounding democracy has been fragile and fraught with danger, nevertheless it has been only through this process that a state could be constructed that its citizens truly regard as their own.[7]

Notes and References

Introduction

1. A. Bikont, 'Co nalezaloby zmienic w konstytucji', *Gazeta Wyborcza*, 29 Aug. 1989, p. 2.

Chapter 1

1. For an analysis of the problems posed by this simultaneous transition, see A. Przeworski, *Democracy and the Market – Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University, 1991) ch. 4.
2. E. Barker (trans.), *The Politics of Aristotle*, Bk. III (Oxford: Clarendon Press, 1948) ch. VI, sect. 1.
3. Ibid., Bk. IV, ch. I, sect. 10.
4. For an excellent discussion on the general topic of constitution-making during a transition to democracy, see A. Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making* (London: Westview, 1987) ch. 1.
5. S. Finer, V. Bogdanor and B. Rudden (eds), *Comparing Constitutions* (Oxford: Clarendon Press, 1995) p. 1.
6. G. Sartori, *Comparative Constitutional Engineering* (New York: New York University Press, 1994) p. 202.
7. G. Sartori, 'Constitutionalism: A Preliminary Discussion', *American Political Science Review*, LVI (1962) 862–5.
8. C. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn, 1941) p. 121.
9. K. Loewenstein, 'Reflections on the Value of Constitutions', in A. Zurcher (ed.), *Constitutions and Constitutional Trends Since World War II* (New York: New York University Press, 1951) pp. 205–6. For a discussion on typologies of constitutions, see Bonime-Blanc, *Spain's Transition*, p. 9–11.
10. Sartori, 'Constitutionism', at 862.
11 Finer *et al*., *Comparing Constitutions*, pp. 1–5.
12. Bonime-Blanc, *Spain's Transition* pp. 11.
13. R. Neumann, 'Constitutional Documents of East Central Europe', in A. Zurcher (ed.), *Constitutions and Constitutional Trends* pp. 175–6.
14. Bonime-Blanc, op. cit. p. 12.
15. Aristotle divided political science into two parts – legislative science and executive action. Barher (trans.), *The Politics of Aristotle*, Bk. III, ch. VI, sect. 1.
16. J. Lefranc (ed.), *Montesquieu, De l'esprit des lois*, Bk. XI (Paris: Nathan, 1994) p. 83. But Montesqueiu did not give the judiciary the position they

were soon to achieve in American thought, an exactly equal status with the legislative and executive branches.

17. M. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon, 1967) p. 13.
18. However, in several parliamentary democracies the personnel of government have to relinquish their parliamentary seats; for example, the French Fifth Republic and Norway.
19. C. Rossiter (ed.), *The Federalist Papers* (no. 51, J. Madison) (New York: New American Library, 1964).
20. Ibid. (no. 48, J. Madison).
21. Ibid. (no. 78, A. Hamilton).
22. 5 US (1 Cranch) 137, 180 (1803) (emphasis in original).
23. Ibid., at 177.
24. H. Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitutions', *Journal of Politics*, XXIII (1942) 183–200.
25. M. Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"', *Catholic University Law Review*, XXXV (1985) 16.
26. Ibid., at 7.
27. Const. of 1948, arts. 134–7 (Italy); The Basic Law 1949, arts. 92–4 (Germany); Const. of 1975, art. 100 (Greece); Const. of 1976 (Portugal); Const. of 1978, arts. 159–65 (Spain); in A. Blaustein and G. Flanz (eds), *Constitutions of the Countries of the World* (New York: Oceana, 1987).

    Judicial review did not take root in England. The English Revolution of 1688 affirmed the principle of the absolute supremacy of parliament, and since then parliament has been seen as the embodiment of the democratic will and thus immune from judicial control.
28. For a comparison of European constitutional court systems, see E. McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Toronto: University of Toronto Press, 1986).
29. J. Beardsley, 'Constitutional Review in France', *Supreme Court Review*, XI (1976) 193.
30. The decision is excerpted in D. Kommers, *Judicial Politics in West Germany* (Beverly Hills: Sage, 1976) pp. 349– 55.
31. A. Vyshinsky, *The Law of the Soviet State* (London: Macmillan, 1948) pp. 339–40. A communist constitution, based on the Stalinist 1936 Constitution, was implemented in each of the Soviet bloc nations and each document shared the same fundamental features.
32. L. Grigoryan and Y. Dolgopolov, *Fundamentals of Soviet State Law* (Moscow: Foreign Languages Publishing House, 1971) p. 113.
33. J. Triska, *Constitutions of the Communist-Party States* (Stanford: Hoover, 1968) p. xi.
34. A. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) pp. 236–7. In 1990, when ethnic conflict broke out in former Yugoslavia, the Constitutional Court was dissolved.

35. K. Kuss, 'New Institutions in Socialist Constitutional Law: The Polish Constitutional Tribunal and the Hungarian Constitutional Council', *Review of Socialist Law*, XII (1986) 343, 352.
36. W. Sokolewicz, 'Democracy, Rule of Law, and Constitutionality', *Droit Polonais Contemporain*, II (1990) 5–6.
37. J. Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat In The Open Sea', in J. Hesse (ed.), *Administrative Transformation in Central and Eastern Europe* (Oxford: Blackwell, 1993) p. 178.
38. Ibid., pp. 178–9.
39. Ibid., p. 179.
40. E. McWhinney, *Constitution-making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981) p. 6.
41. J. Elster, 'Constitutionalism in Eastern Europe: An Introduction', *University of Chicago Law Review*, LVIII (1991) 477.
42. P. Merkl, *The Origin of the West German Republic* (New York: Oxford University Press, 1963) p. 81.
43. Przeworski, *Democracy and the Market* p. 26.

Chapter 2

1. T. Cooley, *The General Principles of Constitutional Law* (Boston, 1891) p. 21.
2. K. Wheare, *Modern Constitutions* (London: Oxford University Press, 1951) p. 10.
3. O. Halecki, *History of Poland* (London: Kegan Paul, 1976) pp. 65–130. King Kazimierz had no male successors, and during his reign he obligated the succession of the Polish throne to the Hungarian Dynasty of D'Anjou. Kazimierz's sister, Elizabeth, married the Hungarian King, Karl Robert, during Kazimierz's lifetime, and, upon the death of Kazimierz in 1370, the crown was designated to Kazimierz's nephew, Louis D'Anjou.
4. K. Koranyi, *Powszechna Historia Panstwa i Prawa* (Torun: Nakladem Towarzystwa Naukowego, 1966) pp. 180–1.
5. S. Kutrzeba, *Unia Polski z Litwa w Stosunsku Dziejowym* (Lwow: B. Poloniecki, 1913) pp. 17–19.
6. H. Olszewski, *Sejm Rzeczypospolitej Epoki Oligarchii* (Poznan: Uniwersytet Adama Mickiewicza, 1962) p. 25.
7. W. Wagner, 'Introduction', in W. Wagner (ed.), *Polish Law Throughout the Ages* (Stanford: Hoover, 1970) p. 5.
8. K. Grzybowski, *Teoria Reprezentacji w Polsce epoki Odrodzenia* (Warsaw: Wydawnictwo Akademii Nauk, 1959) p. 145.
9. W. Goslicki, *The Accomplished Senator* (Miami: American Institute of Polish Culture, 1992) p. 51.
10. Ibid. pp. 51–2. Goslicki asserted that the same rule applied to the judiciary and the legislature. Id. at 54, 237.
11. Ibid., at 237.
12. Ibid., at 241.
13. The relatively weak bargaining position of King Louis and King Jagiello, who both desired to set up new dynasties in Poland, resulted in the

transformation of Poland from a hereditary monarchy into an elective kingdom. Monarchs were at first elected within the Jagiellonian dynasty and later elected for life mostly from foreign, royal households. W. Reddaway (ed.), *The Cambridge History of Poland* (London: Cambridge University Press, 1951) pp. 52–3.

14. Wagner, 'Introduction' pp. 3–4. As the Sejm gained in power and prestige, local government, the traditional cornerstone of the decentralized state, began to emerge. The more advanced rural districts created provincial diets, or 'sejmiki', which were given substantial responsibilities, including the collection of all taxes.
15. J. Maciszewski, 'Szlachta polska i jej panstwo', in W. Krajewski (ed.), *O dialektyce marksistowskiej – Wiedza Powszechna* (Katowice: Wydawnictwo Popularne Nauk, 1986) p. 139. The possibility of civil disobedience against the King in the case of his noncompliance with the rules of his office was known as the 'articulus de non protestanda oboediantia.' Such action could occur only upon the clear failure of the King to execute his duties responsibly, and then only after providing him with notice and an opportunity to rectify the transgression. S. Szczaska, 'Pierwsza ustawa zasadnicza Rzeczypospolitej Polskiej', in M. Kallas (ed.), *Konstytucje Polski. Studia monograficzne z dziejow polskiego konstytucjonalizmu* (Warsaw: Wydawnictwo Sejmowe, 1990) p. 19.
16. M. Ludwikowski and R. Ludwikowski, 'Stanislaw Orzechowski – Prekursor Szlacheckiego Anarchizmu', *Czasopismo Prawno-Historyczne*, XVI (1980) 1 (quoting S. Orzechowski).
17. J. Bystron, *Dzieje Obyczajow w Dawnej Polsce, wiek XVI–XVIII* (Warsaw: Panstwowy Instytut Wydawniczy, 1976) pp. 191– 200.
18. B. Lesnodorski, *Dzielo Sejmu Czteroletniego* (Wroclaw: Ossolineum, 1951) p. 63.
19. R. Ludwikowski and W. Fox, *The Beginning of the Constitutional Era* (Washington, DC: The Catholic University of America Press, 1993), pp. 101–2 (quoting Kollataj, unpublished essay, 'O Konstytucji w Ogolnosci i w Szczegolnosci').
20. Lesnodorski, op. cit. pp. 61–2.
21. W. Smolenski, *Przewrot Umyslowy w Polsce Wieku XVIII* (Warsaw: Ksiazka i Wiedza, 1979) pp. 65–9.
22. A. Ajenkiel, *Polskie Konstytucje* (Warsaw: Wydawnictwo Akademii Nauk, 1983) p. 60.
23. Ustawa Rzadowa 3 Maja 1791, art. 7 [hereinafter 1791 Const.], reprinted in *New Constitution of the Government of Poland* (London: Debrett, 1791).
24. Plenipotentiaries were to be elected by the burgher class to work with Sejm commissions on municipal issues. 1791 Const., art. 2.
25. Ibid., art. 7.
26. Ibid., art. 6.
27. Ibid., arts. 6, 7.
28. In the Senate, the King had one vote, and a second in the case of a tie. Ibid., art. 6.
29. A. Mycielski, *Polskie prawo polityczne* (Warsaw: Wydawnictwo Literackie, 1946) pp. 40–1.

30. 1791 Const., art. 4. The 1791 Constitution did little to change the social position of the Polish serf. Servitudes remained in effect, making the Polish peasant personally dependent on the szlachta and subject to the szlachta's authority.
31. A. Zahorski (ed.), *Konstytucja Majowa* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1991) p. 20.
32. J. Hawgood, *Modern Constitutions Since 1787* (London: Macmillan, 1939) p. 9.
33. B. Dembinski, *Polska na Przelomie* (Warsaw: Societe polonaise d'histoire, 1913) p. 4.
34. J. Jedruch, *Constitutions, Elections, and Legislatures of Poland, 1493–1977* (Washington, DC: University Press of America, 1982) pp. 247–8.
35. N. Davies, *God's Playground: A History of Poland*, vol. I (New York: Columbia University, 1982) p. 299.
36. A. Ajnenkiel, 'Polskie Reprezentacje w Cialach przedstawicielskich panstw Zaborczych y Latach 1848–1918', *Czasopismo Prawno-Historyczne*, XXXVI (1984) 155–80.
37. K. Krukowska, 'Konstytucja Rzeczypospolitej Polskiej 1921 r.', in M. Kallas (ed.), *Konstytucja Polski* pp. 70–108.
38. B. Sarnecki, 'Konstytucja marcowa na tle konstytucji wspolczesnych', *Panstwo i Prawo*, XLVI (1991) 6.
39. Const. of 1921, arts. 2, 3 [hereinafter 1921 Constitution], reprinted in *The Polish Handbook* 13 (1925).
40. Hawgood, *Modern Constitutions* p. 336 (citation omitted).
41. The 1921 Constitution applied the name 'Sejm' to the lower chamber only, while in the pre-partition Kingdom of Poland the name Sejm had been applied to the whole legislative branch.
42. Ibid., arts. 4–6, 11, 26.
43. Ibid., arts. 11, 35, 36.
44. H. Roos, *A History of Modern Poland* (London: Eyre & Spottiswoode, 1966) p. 103.
45. 1921 Const., arts. 75, 84. The President appointed members of the judiciary on the recommendation of the Minister of Justice. Ibid.
46. A. Polonsky, *Politics in Independent Poland 1921–1939* (London: Oxford University Press, 1972) p. 48.
47. Ibid., p. 100.
48. Ibid., pp. 99–100.
49. Reddaway (ed.), *The Cambridge History of Poland*, pp. 588, 602. With Moscicki as President, Pilsudski was Prime Minister between 1926 and 1928.
50. Polonsky, op cit., at 283.
51. J. Pilsudski, *Pisma Wybrane* (Edinburgh: Edinburgh University Press, 1943) p. 412.
52. H. Izdebski, 'Constitutional Developments in France and Poland since 1791: A Comparative Analysis', in K. Thompson and R. Ludwikowski (eds), *Constitutionalism and Human Rights: America, Poland and France* (New York: University Press of America, 1991) p. 173.

53. Const. of 1935, arts. 16, 17, 20, reprinted in *Constitution of the Republic of Poland* (London: Polish Commission for International Law Cooperation, 1935).
54. Polonsky, op. cit., p. 181.
55. Ibid., p. 389.
56. Ibid., p. 512.
57. Ibid., p. 513. The innovative value of some aspects of the 1935 Constitution was further evidenced by Charles de Gaulle's adoption of certain elements of the document into the French Constitution of 1958. Roos, *A History of Modern Poland*, p. 141.

Chapter 3

1. The PKWN manifesto was quickly passed into law. See Ustawa z dnia 31 grudnia 1944 r., *Dziennik Ustaw*, no. 1, item 3 (1944).
2. R. Staar, *Poland 1944–1962: The Sovietization of a Captive People* (Westport: Greenwood Press, 1975) p. 45.
3. N. Davies, *God's Playground: A History of Poland*, vol. II (New York: Columbia University Press, 1982) pp. 570–1.
4. W. Sokolewicz, 'Instytucje prawnoustrojowe Ludowej', *Panstwo i Prawo,* XLI (1986) 18.
5. 'Declaration of Rights and Liberties', in A. Peaslee (ed.), *Constitutions of Nations* (Concord: The Rumford Press, 1950) p. 822.
6. *Zagadnienia Prawne Konstytucji Polskiej Rzeczypospolitej Ludowej* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1954) p. 166.
7. Poland's communist party system was a hegemonic type, with Communist Party dominance over two reliable satellite parties, the United Peasant Alliance (*Zjednoczone Stronnictwo Ludowe* or ZSL) and the Democratic Alliance (*Stronnictwo Demokratyczne* or SD), respectively representing the peasantry and the intelligentsia.
8. 'Na nowym etapie rozwojowym', *Demokratyczny Przeglad Prawniczy*, X (1948) 1.
9. A. Rzeplinski, *Sadownictwo w Polsce Ludowej* (Warsaw: Wydawnictwo Polskiej Akademii Nauk, 1989) p. 57.
10. A. Rek, 'O roli i zadaniach sadow powszechnych w walce o utrwalenie ludowej praworzadnosci', *Nowe Prawo*, IX (1951) 12.
11. A. Burda, *Introduction to Constitution of the Polish People's Republic* (Warsaw: Polonia Publishing House, 1964) p. 11.
12. B. Bierut, *O konstytucji Polskiej Rzeczypospolitej Ludowej* (Warsaw: Ksiazka i Wiedza, 1952) p. 35.
13. Const. of 1952, preamble [hereinafter 1952 Const.], reprinted in *Constitution of the Polish People's Republic* (Warsaw: Polonia Publishing House, 1953).
14. W. Skrzydlo, 'Z Problematyki Genezy i Istoty Partii Politycznych', *Annales Universitatis Marie Curie-Sklodowska*, V (1958) 64.
15. Within the Party, important policy decrees were formulated by the Politbureau, and only then formally filtered by the Secretariat of the Party, which oversaw the work of the state organs, to the legislature for official

action. The emergence of a leading group within the Party was a central purpose of democratic centralism; it was intended to maximize Party unity by quelling internal dissent that, if left unchecked, might lead to the formation of factions.

16. M. Cappelletti and W. Cohen, *Comparative Constitutional Law* (New York: Macmillan, 1979) p. 21.
17. H. Skilling, *The Governments of Communist East Europe* (New York: Crowell, 1966) p. 50.
18. J. Triska (ed.), *Constitutions of the Communist Party-States* (Stanford: Hoover, 1968) p. xi.
19. Orzeczenie z dnia 4 czerwcu 1955 r., *Orzecznictwo Sadu Najwizszego* 93 (1955).
20. S. Rozmaryn, *The Seym and People's Councils in Poland* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1958) p. 13.
21. D. Olson and M. Simon, 'The Institutional Development of a Minimal Parliament: The Case of the Polish Sejm', in D. Nelson and S. White (eds), *Communist Legislatures in Comparative Perspective* (London: Macmillan, 1982) pp. 47, 51, Table 3.1.
22. G. Kolankiewicz and P. Lewis, *Poland: Politics, Economics and Society* (London: Pinter, 1988) p. 89.
23. S. Rozmaryn, 'Kontrola konstytucyjnosci ustaw', *Panstwo i Prawo*, III (1948) 13.
24. S. Walczak, 'Przewodnia rola partii a wymiar sprawiedliwosci', *Nowe Prawo*, XLI (1986) 4.
25. Rek, op. cit., 12.
26. Statement of Jakub Berman, quoted in T. Toranska, *"Them": Stalin's Polish Puppets* (London: Collins Harvill, 1987) p. 331.
27. L. Lernell, 'Rola i zadania organow wymiaru sprawiedliwosci na tle uchwal Plenum KC PPR', *Demokratyczny Przeglad Prawniczy*, X (1948) 17–18.
28. A. Lopatka, 'Socjalistyczna a burzuazyjna koncepcja praw i obowiazkow obywatelskich', in J. Letowski (ed.), *Prawa Obywatelskie i administracja Panstwowa* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1983) p. 11.
29. K. Biskupski, *Wladza i Lud* (Warsaw: Ksiazka i Wiedza, 1956) p. 21.
30. 1952 Const., arts. 58, 60.
31. A. Lopatka and R. Wieruszewski, *Podstawowe prawa i obowiazki obywateli PRL w okresie budowy rozwinietego spoleczenstwa socjalistycznego* (Warsaw: Ksiazka i Wiedza, 1976) p. 17.
32. In June 1956, the legitimacy of communist theory in Poland was shaken by the regime's crushing of worker protests in Poznan. This led to a crisis of identity within the Party, which precipitated a change in leadership. In October 1956, Wladyslaw Gomulka was unanimously elected Party First Secretary 'on the platform of reasserting genuine Leninist principles in state and party life.' The election of Gomulka, himself a victim of Stalinist practices, symbolized the rejection of the Stalinist model of communism based on terror. The PZPR, determined by the Kremlin in 1956 to have 'achieved maturity', was allowed to take direct control of the People's Republic without direct Soviet supervision. Of course, the underlying

ideological foundations of the system, above all the Party's monopoly on power, remained intact. 2 Davies, *God's Playground*, pp. 585–6.

33. R. Sakwa and S. Crouch, 'Sejm Elections in Communist Poland: An Overview and a Reappraisal', *British Journal of Political Science*, VIII (1978) 404–6. The three legal parties, the PZPR and its two subordinates, ZSL and SD, were grouped in a super-party organization called the Front for National Unity (*Front Jednosci Narodu*). The Front, and not the parties separately, presented the program and the list of candidates to the electorate.
34. A. Gwizdz and S. Zawadzki, 'Constitutional Law', in L. Kurowski (ed.), *General Principles of Law of the Polish People's Republic* (Warsaw: Polish Scientific Publishers, 1984) p. 25.
35. The election in 1978 of Pope John Paul II intensified the political role of the Church in Poland and galvanized the people against their communist oppressors. Solidarity directly identified itself with the Catholic Church, incorporating religious symbols into many of its activities. Likewise, the Church mediated negotiations between the government and Solidarity.
36. J. Lipski, *KOR: A History of the Workers' Defense Committee in Poland* (Berkeley: University of California Press, 1985) pp. 21–36.
37. 'Kim jestesmy i dokad dazymy', *Tygodnik Solidarnosc*, 16 Oct. 1981, p. 1.
38. Rzeplinski, op. cit., p. 94.
39. However, the restrictions imposed during martial law continued in force, including those laws banning Solidarity, the right to strike and permitting total censorship.
40. The political implications of such an arrangement were obvious: Many high-ranking Party officials became immunized by the fortuitous event of not having been assigned by the Party to perform any state function.
41. J. Wroblewski, 'Trybunal Stanu a Trybunal Konstytucyjny – zwiazky instytucjonalne i problemy wspolne', *Panstwo i Prawo*, XLI (1986) 16–17.
42. M. Reykowski, 'Czy socjalizm jest psychologicznym nieporozumieniem?', *Nowe Drogi*, XLII (1987) 50, 52.
43. In August 1986, Stanislaw Podemski, a well-known legal commentator of *Polityka* (a weekly oriented toward the more liberal wing of the Communist Party), reflected society's skepticism, stating that the Ombudsman 'might be built into the existing bureaucratic system and will become only one more effective component of the system.' S. Podemski, 'Ostre widzenie', *Polityka*, 9 Aug. 1986, p. 3.
44. E. Letowska, 'The Ombudsman and Basic Rights', *East European Constitutional Review,* IV (Winter 1995) 63, 65.
45. Ustawa z dnia 15 lipcu 1987 r. o Rzeczniku Praw Obywatelskich, *Dziennik Ustaw*, no. 21, item 123 (1987).
46. 'Kierunki Dzialalnosci Rzecznika Praw Obywatelskich', *Biuletyn RPO Materialy,* XIV (1989) 21–2. In 1988 alone, the Ombudsman brought 14 extraordinary appeals to the Supreme Court, lodged 2 motions with the Constitutional Tribunal, and brought more than 20 joint recommendations to various central organs of government.
47. E. Letowska, 'Zagadnienie rownosci w praktyce polskiego ombudsmana', *Biuletyn RPO Materialy,* XVII (1991) 17–19.

48. K. Dzialocha, 'Panstwo Prawne w warunkach zmian zasadniczych systemu prawa', *Panstwo i Prawo*, XLVII (1992) 27.
49. J. Kurczewski, *The Resurrection of Rights in Poland* (Oxford: Clarendon Press, 1993) p. 18.

Chapter 4

1. The Round Table negotiations took place between 6 February and 5 April 1989, and resulted in a unique political plan: a transitional period in which the opposition would function legally within the communist system and accept the hegemony of the Communist Party. In return, it would play a constructive role in helping the government tackle the economic crisis. But the unexpected political victory for Solidarity in the June 1989 parliamentary elections greatly accelerated the decay of communism.
2. For example, Bronislaw Geremek, one of the opposition negotiators, rejected a proposal for completely free Sejm elections on the ground that it was too radical for the Soviets.
3. Ustawa z dnia 11 kwietnia 1989 r., *Dziennik Ustaw*, no. 37, item 41 (1989).
4. Two senators were to be chosen by the first-past-the-post system in each of the national voivodships. Both chambers are elected for four-year terms.
5. W. Osiatynski, 'An Interview with General Wojciech Jaruzelski', *East European Constitutional Review*, III (Winter 1994) 47.
6. Z. Sarnecki, 'Zalozenia konstytucji', *Panstwo i Prawo*, XLV (1990) 5.
7. Amended Constitution of the Republic of Poland, in A. Blaustein and G. Flanz (eds), *Constitutions of the Countries of the World* (New York: Oceana, 1991) [hereinafter Amended Const.] art. 30.
8. W. Salmonowicz (ed.), *Porozumienia Okraglego Stolu* (Olsztyn: NSZZ Solidarnosc, 1989) p. 5.
9. Amended Const., art. 60.
10. Ustawa z dnia 20 grudnia 1989 r., *Dziennik Ustaw*, no. 73, item 436 (1989).
11. This clause, modeled on pre-war legislation, provoked considerable controversy. Some claimed that judges would be unfairly deprived of their right to participate in the nation's political life. Krassowska, 'Zaufac sedziom', *Gazeta Prawnicza*, 16 Feb. 1990, p. 3.
12. Ustawa z dnia 22 marzec 1990 r., *Dziennik Ustaw*, no. 20, item 121 (1990).
13. Wasilkowska, 'Czas realizacji dawnych idei', *Gazeta Prawnicza*, 1 Feb. 1990, p. 5. Further decentralizing state power, local government reform was recognized as a priority. On 8 March 1990, a new chapter (Chapter VI) was incorporated into the Constitution, entitled 'Local Self-government', and on 27 May 1990 free local elections were held for 52,000 new local 'councilors' who were given exclusive control over municipal administrative matters.
14. Amended Const., art. 27.

15. Several Solidarity senators and deputies had to abstain from voting in order to offset ZSL and SD defections.
16. W. Sokolewicz, 'Kwietniowa Zmiana Konstytucji', *Panstwo i Prawo*, XLIV (1989) 3.
17. In 1990, the PZPR disbanded and reformed on the model of social democratic parties in France and Germany in the hope that it would have a better chance of winning power in democratic Poland. The new party, named the Social Democracy for the Republic of Poland (*Socjaldemokracja Rzeczpospolitej Polskiej* or SdRP), condemned the ideology and practices of the Stalinist era.
18. Ustawa z dnia 29 grudnia, 1989 r. o zmianie konstytucji Polskiej Rzeczypospolitej Ludowej, *Dziennik Ustaw*, no. 75, item 444 (1989).
19. B. Geremek and J. Zakowski, *Rok 1989: Geremek Opowiada, Zakowski Pyta* (Warsaw: Plejada, 1990) p. 376.
20. 'Seym Debates Changes', *Warsaw PAP, Foreign Broadcast Information Service* (Daily Report, Eastern Europe) 46 (2 January 1990).
21. W. Sokolewicz, 'The Relevance of Western Models for Constitution-Building in Poland', in J. Hesse and N. Johnson (eds), *Constitutional Policy and Change in Europe* (Oxford: Oxford University Press, 1995) p. 78.
22. Interview with Dr. Zbigniew Pelczynski, Former Expert Advisor to the Sejm Constitutional Committee (1989–91), in Oxford, England (21 March 1995).
23. For both constitutional drafts, see M. Kallas (ed.), *Projekty Konstytucyjne 1989–1991* (Warsaw: Wydawnictwo Sejmowe, 1992).
24. Professor Geremek notes that the Round Table Sejm, perhaps in part because many of its deputies knew that they held their seats by historical accident and should 'redeem' themselves by good behavior, were actually more cooperative than the next, democratically elected Sejm, given the absence of a developed party system and the likely combination of inexperience and anarchic enthusiasm among the new deputies. Geremek and Zakowski, op. cit., p. 31.
25. Ustawa z dnia 27 wrzesnia 1990 r., *Dziennik Ustaw*, no. 38, item 73 (1990). The presidential campaign yielded two political groupings out of Solidarity – the beginning of a genuine multi-party system. One, the PC, supported Walesa for president and was identified with workers and the Solidarity Union in Gdansk. The other, known by the acronym 'ROAD' (*Ruch Obywatelski Akcja Demokratyczna* or Movement for Citizens' Democratic Action), backed Mazowiecki and was associated with intellectuals and the government in Warsaw. For an excellent discussion of the events leading to the passage of the Small Constitution, see F. Millard, *The Anatomy of the New Poland: Post-Communist Politics in its First Phase* (London: Elgar, 1993).
26. W. Beres and K. Burnetko, *Gliniarz z 'Tygodnika': Rozmowy z bylem ministrem spraw wewnetrznych Krzysztofem Kozlowskim* (Warsaw: BGW, 1991) p. 110.
27. Rogulski, 'Poparcie dla Jana Olszewskiego', *Rzeczpospolita*, 18 December 1991, p. 1. Walesa's concerns centered on Olszewski's criticism of Poland's economic austerity program.
28. W. Fikus, 'Incydent wojskowy', *Rzeczpospolita*, 9 April 1992, p. 1.

29. Groblewski, 'Wiceministrowie odchodza i wracaja', *Rzeczpospolita*, 20 August 1992, p. 3. A parliamentary commission subsequently found the charges of conspiracy unfounded.
30. 'Polacy niezadowoleni z rozwoju demokracji', *Rzeczpospolita*, 19 December 1991, p. 1.
31. 'Nuzaca demokracja', *Gazeta Wyborcza*, 11 August 1992, p. 1.
32. 'Mala Konstytucja Uchwalona', *Gazeta Wyborcza*, 17 Oct. 1992, p. 1. The Small Constitution was supported by the seven coalition parties plus the communist successor parties, the PSL and SLD.
33. *Ustawa Konstytucyjna z Dnia 17 Pazdziernika 1992 o Wzajemnych Stosunkach Miedzy Wladza Ustawodawcza i Wykonawcza Rzeczypospolitej Polskiej oraz utrzymane w mocy przepisy konstytucyjne* (Warsaw: Wydawnictwo Sejmowe, 1993)[hereinafter Small Const.] art. 23.
34. The decree power has not yet been granted to a government in Poland.
35. On 28 March 1993, the Government for the first time requested expedited legislative process when it submitted a modified version of Mass Privatization Program legislation, which had been previously rejected by the Sejm. The resubmitted version was approved by the Sejm on 30 April 1993.
36. Small constitution art. 28, sect. 2.
37. Ibid., art. 35.
38. The 'constructive vote of no confidence' hails from German constitutional theory, particularly from that of C. J. Friedrich as applied in the German Constitution of 1949.
39. D. Warszawski, 'Regulamin', *Gazeta Wyborcza*, 4 August 1992, p. 5.
40. W. Osiatynski, 'Skazani na oryginalnosc', *Gazeta Wyborcza*, 29 Aug. 1992, p. 8.
41. Semprich, 'Senate Commission Criticizes Small Constitution', *Rzeczpospolita*, 4 Sept. 1992, p. 2, available in *NEXIS, NEWS Library, PNBUL File*.
42. Included in the system of regular courts are regional courts, voivodship courts and appeals courts, which hear appeals from voivodship courts.
43. Orzeczenia z dnia 20 wrzesznia 1991 r., *Orzecznictwo Sadu Najwyzszego* 43 (1992).
44. D. Warszawski, 'Belwederska karta obywatelska', *Gazeta Wyborcza*, 18 Nov. 1992, p. 3.
45. *Sprawozdanie stenograficzne z posiedzenia Sejmu RP z dnia 21, 22, i 23 stycznia oraz 3 i 4 lutego 1993 r.* (Warsaw: Wydawnictwo Sejmowe, 1993) p. 20 (statement of D. Tusk).
46. Orzeczenie z dnia 17 pazdziernika 1991r., *Orzecznictwo Sadu Najwyzszego* 96 (1992).
47. Ustawa z dnia 17 maja 1989 r. o stosunku Panstwa do Kosciola Katolickiego, *Dziennik Ustaw*, no. 29, item 154 (1989).
48. Ustawa z dnia 29 maja 1989 r. o zmianie niektorych przepisow prawa karnego, *Dziennik Ustaw*, no. 34, item 180 (1989).
49. E. Letowska, *Po co ludziom konstytucja* (Warsaw: Helsinki Foundation for Human Rights, 1995) p. 11.
50. 'Sprawozdanie Rzecznika Praw Obywatelskich za okres 1 XII 1990 r.-19 XI 1991 r.', *Panstwo i Prawo*, XLVII (1992) 3–16.

51. Ustawa z dnia 23 kwietnia 1992 r., *Dziennik Ustaw*, no. 41, item 176 (1992).
52. For the six drafts prepared in 1992–3, see *Projekty Konstytucji, Komisja Konstytucjyna Zgromadzenia Narodowego* (Warsaw: Wydawnictwo Sejmowe, 1993).
53. 'Projekt konstytucji', *Rzeczpospolita*, June 21, 1996, p. 1.
54. 'Projekt konstytucji z 19 czerwcz 1996 r.', *Rzeczpospolita*, June 21, 1996, p. 16 (articles 55 and 57).
55. J. de Weydenthal, 'Poland to vote on New Constitution', *Radio Free Europe/Radio Liberty Newsline*, No. 8, Part II, 10 April, 1997.
56. L. Leszczynski, 'Delay Problems in the Polish Constitution-Making Process', *Journal of Constitutional Law in Eastern and Central Europe*, I (1994) 238.
57. J. Linz, 'The Perils of Presidentialism', *Journal of Democracy*, I (Winter 1990) 52.
58. J. Linz, 'Transitions to Democracy', *Washington Quarterly*, XIII (Summer 1990) 153–4; A. Lijphart (ed.), *Parliamentary versus Presidential Government* (Oxford: Oxford University Press, 1992).
59. D. Horowitz, 'Comparing Democratic Systems', *Journal of Democracy*, I (Fall 1990) 78.
60. E. Rosolak, 'Sukces – to prezydent, porazki – to my', *Trybuna*, 16 Nov. 1991, p. 1.
61. W. Osiatynski, 'Bronislaw Geremek on Constitution-Making in Poland', *East European Constitutional Review*, IV (Winter 1995) 44.
62. 'Raport z Badania 'Oceny wplywu kluczowych instytucji i organizacji oraz ich glownych przedstawicieli na sprawy kraju'', *Centrum Badania Opinii Spolecznej* (January 1993) 3.
63. 'Raport z Badania 'Opinii publiczna o projekcie Karty Praw i Wolnosci',' *Centrum Badania Opinii Spolecznej*, (March 1993) 2.
64. J. Elster, 'Human Rights and the Constitution-Making Process', in A. Rzeplinski (ed.), *Constitutionalism & Human Rights* (Warsaw: Helsinki Foundation for Human Rights, 1992) p. 25.
65. I. Grudzinska-Gross (ed.), *Constitutionalism in East Central Europe* (New York: American Council of Learned Societies, 1994) p.43 (statement of T. Mazowiecki).
66. To have force, the concordat must be ratified by the Sejm and signed by the President, and in July 1994 Parliament passed a resolution postponing ratification until after the passage of a new constitution.
67. A. Rapaczynski, 'Constitutional Politics in Poland: A Report of the Constitutional Committee of the Polish Parliament', *University of Chicago Law Review*, LVIII (1991) 604.

Chapter 5

1. W. Komarnicki, *Polskie Prawo Polityczne* (Warsaw: Nakladem Ksiegarni F. Hoesicka, 1922) p. 471.
2. W. Jaworski, *Trybunal Konstytucyjny* (Krakow: Nakladem Krakowskiej Spolki Wydawniczej, 1924) p. 58.

3. 'Ankieta w sprawie rewizji konstytucji polskiej i ordynacji Wyborczej, opinja A. Peretiatkowicza', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, VI (1925) 438.
4. W. Starszewski, 'Srodki zabezpieczenia', *Ruch, Prawniczy, Ekonomiczny i Socjologiczny*, V (1925) 248.
5. E. Zwierzchowski, 'Geneza oraz organizacja i funkcjonowanie sadowej kontroli konstytucyjnosci aktow normatywnych w Polsce', *Studia Juridica Silesiana*, VII (1990) 8.
6. A. Peretiatkowicz, *Reforma konstytucji polskiej* (Warsaw: Nakladem Ksiegarni F. Hoesicka, 1927) p. 37.
7. M. Krol, 'Zmiany i przeksztalcenia zwyczajowe konstytucji', *Rocznik Prawniczy Wilenski*, XXXII (1931) 86 (quoting W. Makowski).
8. A. Gwizdz, 'Trybunal Konstytucjyny', in *Kontrola konstytucyjnosci prawa* (Warsaw: Wydawnictwo Sejmowe, 1987) p. 134.
9. S. Rozmaryn, 'Kontrola Konstytucyjnosci ustaw', *Panstwo i Prawo*, III (1948) 20.
10. M. Wierzbowski, 'Administrative Procedure in Eastern Europe', *Comparative Law Year Book*, I (1977) 226–7.
11. J. Makowski, 'Materialy do projektu przyszlej konstytucji', *Panstwo i Prawo*, II (1947) 43.
12. J. Zakrzewska, 'Prezentacja Trybunalu Konstytucyjnego', in *Polsko-Holenderskie Kolokwium* (Warsaw: Trybunal Konstytucyjny, 1991) pp. 4, 5.
13. 'Niektore zagadnienia polityczno-prawne w swietle III Plenum KC PZPR', *Panstwo i Prawo*, X (1955) 369. The intellectual opposition did not intend to depart from Marxism; its proponents made attempts at 'purging Communism of abuses', 'reforming Marxism', and 'going back to sources'. See L. Kolakowski, *Main Currents of Marxism: Its Rise, Growth, and Dissolution* (Oxford: Clarendon Press, 1978).
14. 'Sesja naukowa katedr prawa panstwowego', *Panstwo i Prawo*, XVI (1961) 1054.
15. A. Burda, 'Kontrola Konstytucyjnosci Ustaw', *Panstwo i Prawo*, XX (1965) 867; F. Siemienski, *Organy Przedstawicielskie w systemie organow panstwa socjalistycznego* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1964) pp. 265–71.
16. S. Rozmaryn, *Konstytucja jako ustawa zasadnicza Polskiej Rzeczypospolitej Ludowej* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1967) p. 202.
17. J. Kowalski, 'Problemy reformy systemu politycznego Polskiej Rzeczypospolitej Ludowej', *Panstwo i Prawo*, XXXVI (1981) 6.
18. A. Gwizdz, 'Trybunal Konstytucyjny', *Panstwo i Prawo*, XXXVIII (1983) 7–8.
19. J. Stembrowicz, 'Trybunal Konstytucyjny', *Tygodnik Powszechny*, 7 April 1985, p. 3.
20. See Ustawa o Naczelnym Sadzie Administracyjnym oraz o zmianie ustawy – Kodeks Postepowania Administracyjnego, *Dziennik Ustaw*, no. 4, item 8 (1980).
21. Orzeczenie z dnia 6 luty 1981 r., *Orzecznictwo Naczelnego Sadu Administracyjnego w 1981 r.* 27 (1981).
22. 'Kim jestesmy i dokad dazymy', *Tygodnik Solidarnosc*, 16 Oct. 1981, p. 1.
23. Zakrzewska, op. cit., p. 7.

24. 'Uchwala IX Nadzwyczajnego Zjazdu' in *IX Nadzwyczajny Zjazd Polskiej Zjednoczonej Partii Robotniczej: 14–20 lipca 1981* (1983).
25. 'Uchwala Ogolnopolskiego Zjazdu Adwokatow z dnia 4 stycznia 1981' (art. 14), in *Palestra*, XXV (1981) 198.
26. Interview with Hubert Izdebski, Professor of Legal History, University of Warsaw, in Warsaw, Poland (June 3, 1993).
27. J. Stembrowicz, 'Trybunal Konnstytucyjny', *Tygodnik Powszechny*, 7 April 1985, p. 3.
28. Interview with Miroslaw Wyrzykowski, Professor of Constitutional Law, University of Warsaw, in Warsaw, Poland (23 May 1993).
29. Interview with Hubert Izdebski, Professor of Legal History, University of Warsaw, in Warsaw, Poland (25 Nov. 1991). Professor Izdebski has argued that the addition of article 33a into the Constitution was done 'almost exclusively for foreign consumption. The regime hoped to repeat Czechoslovakia's "creation" in 1968 of a constitutional court, simply passing a constitutional amendment without ever actually implementing it. However, after the declaration of martial law, the opposition grew stronger and even more vocal, and the regime had to concede.' Ibid.
30. Z. Czeszejko-Sochacki, *Trybunal Konstytucjyny PRL* (Warsaw: Ksiazka i Wiedza, 1986) pp. 46–9.
31. Zakrzewska, op. cit., pp. 6–7.
32. Czeszejko-Sochacki, op. cit., pp. 20–1.
33. Ustawa z dnia 29 kwietnia 1985 o Trybunale Konstytucyjnym, *Dziennik Ustaw*, no. 22, item 98, (1985)[hereinafter 1985 Act].
34. 'Trybunal Konstytucjyny', *Rzeczypospolita*, 28 Feb. 1985, p. 1.
35. Statement by Deputy Edward Szymanski, *Rzeczpospolita*, 15 March 1985, p. 5.
36. A. Kruszewski, 'Straznych naszych praw', *Prawo i Zycie*, 16 March 1985, p. 4.
37. R. Walczak, 'Przewodnia rola partii a wymiar sprawiedliwosci', *Nowe Prawo*, XLI (1986) 4.
38. After 1989, the process of selecting Tribunal justices became more politicized, as the potential political role of the Tribunal became apparent. In the 1993 election of Tribunal justices, opposition parties tried to force the majority parties (SLD and PSL) to place at least some of their candidates on the Tribunal bench. But the majority parties refused.
39. 1985 Act, supra n. 33, art. 6.
40. Ibid., art. 19. Until 1989, the oath taken by Tribunal justices was heavily laden with communist rhetoric, committing them to 'furthering the ideals of the socialist state'. The six new 'Solidarity justices' elected in 1989 refused to take this oath, and the functioning of the Tribunal was halted for two months until Parliament drafted and passed a new Tribunal oath.
41. 1985 Act, art. 26.
42. Judgment U 8/90 of 15 January 1991, 1991 *Orzecznictwo Tryb. Konst*. 134.
43. Judgment U 5/86 of 6 Nov. 1986, 1986 *Orzecznictwo Tryb. Konst*. 7.
44. Stembrowicz, op. cit., p. ix.
45. Despite the absence of an individual right of petition, the Tribunal receives numerous constitutional complaints from citizens. In 1989

alone, 794 complaints were submitted to the Tribunal by citizens. So far, all cases initiated by the Tribunal have been based on constitutional complaints received from citizens.
46. Stembrowicz, op. cit., p. ix.
47. Opinion of Deputy A. Klafkowski, quoted by Z. Czeszejko-Sochacki, op. cit., at 55.
48. Opinion of Deputy W. Zakrzewski, in the report from a meeting of the Sejm on 29 April 1985, in Czeszejko-Sochacki, op. cit., at 57.
49. A. Lopatka, 'Socjalistyczna a burzuazyjna koncepcja praw i obowiazkow obywatelskich', in J. Letowski (ed.), *Prawa Obywatelskie i Administracja Panstwowa* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1983) pp. 14–15.
50. Zakrzewska, op. cit., at 17.
51. 'Wchodzi w zycie ustawa o Trybunale Konstytucyjnym', *Zycie Warszawy*, 2 Jan. 1986, pp. 1, 6.
52. L. Garlicki, 'Constitutional Politics in Poland', *Saint Louis University Law Journal*, XXXII (1988) 725.
53. Ustawa z dnia 29 grudnia 1989 o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej, *Dziennik Ustaw*, no. 75, item 444 (1989).
54. Ustawa z dnia 29 maja 1989 o prekazaniu dotychczasowych kompetencji Rady Panstwa Prezydentowi Polskiej Rzeczypospolitej Ludowej i innym organom panstwowym, *Dziennik Ustaw*, no. 34, item 178 (1989).
55. Ustawa z dnia 29 maja 1989, *Dziennik Ustaw*, No. 34, item 178 (1989).

Chapter 6

1. Judgment K 1/88 of 30 Nov. 1988, 1988 *Orzecznictwo Tryb. Konst.* 72.
2. L. Garlicki, 'Constitutional Developments in Poland', *Saint Louis University Law Journal*, XXXII (1988) 734.
3. M. Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice" ', *Catholic University Law Review*, XXXV (1985) 8.
4. Judgment U 5/86 of 6 Nov. 1986, 1986 *Orzecznictwo Tryb. Konst.* 7; Judgment U 1/86 of 28 May 1986, 1986 *Orzecznictwo Tryb. Konst.* 32.
5. Ustawa z dnia 14 lipca 1961 r. o gospodarce terenami w miastach i osiedlach, *Dziennik Ustaw*, no. 22, item 156 (1961).
6. Rozporzadzenie Rady Ministrow z dnia 16 wrzesnia 1985 w sprawie szczegolowych zasad i trybu oddawania w uzytkowanie wieczyste gruntow i sprzedazy nieruchomosci panstwowych, *Dziennik Ustaw*, no. 47, item 239 (1985).
7. Judgment U 5/86, at 6.
8. Judgment U 3/86 of 16 June 1986, 1986 *Orzecznictwo Tryb. Konst.* 59.
9. Ustawa z dnia 26 pazdziernika 1982 o wychowaniu w trzezwosci i przeciwdzialaniu alkoholizmowi, *Dziennik Ustaw*, no. 35, item 230 (1982).
10. Rozporzadzenie Rady Ministrow z dnia 28 pazdziernika 1983 w sprawie okreslenia liczby punktow sprzedazy napojow alkoholowych, *Dziennik Ustaw*, no. 60, item 273 (1983).
11. Judgment U 3/86, supra n. 8, at 72.

12. J. Zakrzewska, 'Prezentacja Trybunalu Konstytucyjnego', in *Polsko-Holenderskie Kolokwium* (Warsaw: Trybunal Konstytucyjny, 1991) p. 19.
13. For example, this was true about the Land Reform Decree issued in 1944 by the PKWN, which nationalized property in eastern Poland. Although the PKWN is illegitimate today, invalidation of the Land Reform Decree would disrupt the current system of land ownership. Recognizing this problem, the Constitutional Tribunal upheld the Land Reform Decree despite its questionable legal origin. Judgment W 3/89 of 19 Sept. 1990, 1990 *Orzecznictwo Tryb. Konst.* 173.
14. Judgment K 11/93 of 9 Nov. 1993, 1993 *Orzecznictwo Tryb. Konst.* 356–7. In another separation of powers case, in August 1995 President Walesa challenged the constitutionality of a privatization bill before the Tribunal. He asserted that the legislation violated the separation of powers between executive and legislative branches by giving the members of Parliament too much control over privatization. The Tribunal agreed and declared unconstitutional the provisions of the privatization bill giving the Sejm a veto over sell-offs of key industries.
15. Judgment K 11/90 of 30 Jan. 1991, 1991 *Orzecznictwo Tryb. Konst.* 27; Judgment U 12/92 of 20 April 1993, 1993 *Orzecznictwo Tryb. Konst.* 92.
16. Judgment U 1/92 of 7 Oct. 1992, 1992 (II) *Orzecznictwo Tryb. Konst.* 157.
17. Judgment U 6/92 of 19 June 1992, 1992 (I) *Orzecznictwo Tryb. Konst.* 196.
18. The law required all radio and television broadcasters to respect 'Christian values' in the contents of their programs. Judgment W 3/93 of 6 July 1994, 1994 *Orzecznictwo Tryb. Konst.* 154 (holding that the Christian values clause may not be interpreted as giving the National Broadcasting Council the right prospectively to evaluate radio and television programs because all forms of prior censorship are unconstitutional).
    Other controversial Tribunal decisions include Judgment W 7/94 of 14 Oct. 1994, 1994 *Orzecznictwo Tryb. Konst.* 204 (holding that the President of Poland may dismiss the chairman of the National Radio and Television Council only if the chairman committed a gross violation of law and if this violation is confirmed by a regular court decision); Judgment K 11/94 of 23 Sept. 1994, 1994 *Orzecznictwo Tryb. Konst.* 93 (holding that an electoral statute's requirement that all candidates submit written statements indicating whether they have ever been a collaborator with security organs may not provide grounds for subsequent revocation of a parliamentary mandate if a candidate lies on the written statement).
19. Zakrzewska, op. cit., p. 15.
20. Judgment K 8/91 of 7 Jan. 1992, 1992 (I) *Orzecznictwo Tryb. Konst.* 76, 84.
21. Ustawa z dnia 12 pazdziernika 1990 o Strazy Granicznej, *Dziennik Ustaw*, no. 78, item 462 (1990).
22. See, for example, Judgment W 3/93, at 157–8 (referring to the European Convention on Human Rights to condemn any form of prior restraint censorship in radio and television); Judgment K 17/92 of 29 Sept. 1993, 1993 (II) *Orzecznictwo Tryb. Konst.* 297, 309 (quoting the European Convention on Human Rights to invalidate a statute limiting access to the courts in certain unemployment benefits disputes).

23. Interview with Leonard Lukaszuk, Former Justice of the Polish Constitutional Tribunal, in Warsaw, Poland (21 July 1994). The Tribunal often refers to its own previous decisions to support its verdicts.
24. Judgment K 7/89 of 22 Sept. 1989, 1989 *Orzecznictwo Tryb. Konst.* 112; Judgment U. 2/89 of 3 July 1989, 1989 *Orzecznictwo Tryb. Konst.* 205.
25. M. Pietrzak, 'Demokratyczne panstwo prawne', *Gazeta Prawnicza*, 16 May 1989, p. 9.
26. Judgment K 7/90 of 9 August 1990, 1990 *Orzecznictwo Tryb. Konst.* 51–2.
27. Ustawa z dnia 24 maja 1990 o zmianie niektorych przepisow o zaopatrzeniu emerytalnym, *Dziennik Ustaw*, no. 36, item 206 (1990). President Jaruzelski, for the first time exercising the 'presidential inquiry' procedure of initiating Tribunal review, insisted that the Pension Act was unconstitutional because it abrogated retirement pensions already established or 'vested' by law. The Tribunal rejected this claim, but at the same time stated in very clear terms that it recognized the constitutional importance of this principle.
28. Judgment K 7/90, at 51–2.
29. Ibid., at 53–4.
30. See for example Judgment P 2/92 of 1 June 1993, 1993 (II) *Orzecznictwo Tryb. Konst.* 217, 227 (finding that the 'principle of social justice' requires the state to provide unemployment benefits and invalidating legislation that 'unjustly' limited such benefits).
31. Ustawa z dnia 4 kwietnia 1991 o zmianie ustawy o utworzeniu Glownej Komisji Badania Zbrodni Hitlerowskich w Polsce, *Dziennik Ustaw*, no. 45, item 195 (1991).
32. Judgment S 6/91 of 25 Sept. 1991, 1991 *Orzecznictwo Tryb. Konst.* 290, 294.
33. Stalinist crimes are defined as crimes against humanity. Importantly, the Tribunal held that the law did not violate the principle of nonretroactivity by allowing the punishment of criminal acts which had occurred beyond the statute of limitations or which had been the subject of previously promulgated amnesty laws.
34. Judgment K 7/90 of 22 August 1990, 1990 *Orzecznictwo Tryb. Konst.* 42.
35. Ustawa z dnia 17 pazdziernika 1991 o rewaloryzacji emerytur i rent, *Dziennik Ustaw*, no. 104, item 450 (1991).
36. Judgment K 14/91 of 11 Feb. 1992, 1992 (I) *Orzecznictwo Tryb. Konst.* 93.
37. Ibid., at 119, 128. The Tribunal also held that not every modification of pension rights was automatically unconstitutional, as economic crisis could warrant modifications. It stated, however, that it was Parliament's duty to adopt the least restrictive method to avoid the crisis, and that failure to do so renders the legislation unconstitutional.
38. See for example Judgment K 6/91 of 23 March 1992, 1992 (I) *Orzecznictwo Tryb. Konst.* 58, 66–7 (upholding legislation that suspended nursing benefits for those living in state nursing homes, and noting that '[t]here is a close link between social benefits and the social-economic situation of the nation').
39. Judgment K 18/92 of 30 Nov. 1993, 1993 (II) *Orzecznictwo Tryb. Konst.* 396.
40. Ibid., at 403.

41. Ustawa z dnia 9 listopada 1990 o przejeciu majatku bylej Polskiej Zjednoczonej Partii Robotniczej, *Dziennik Ustaw*, no. 16, item 72 (1990).
42. Judgment K 3/91 of 25 Feb. 1992, 1992 *Orzecznictwo Tryb. Konst.* 9.
43. Ibid., at 21–3. The petitioners also urged that this form of nationalization was alien to Polish law, but the Tribunal rejected this argument as hypocritical, noting the Party's own nationalizations after World War II. 'As is well known, the communist state often engaged in such nationalization. . . . The plaintiffs ignored this historic fact when they claimed that this type of transfer of property to the State Treasury was alien to Polish law.' Ibid., at 17–18.
44. Judgment K 8/91 of 7 Jan. 1992, 1992 (I) *Orzecznictwo Tryb. Konst.* 76, 81–2 (invalidating legislation depriving Border Guards access to courts to seek remedies for service-related rights violations, because 'access to courts' is a fundamental component of the 'democratic state of law').
45. Judgment K 17/92 of 29 Sept. 1993, 1993 (II) *Orzecznictwo Tryb. Konst.* 297, 309 (invalidating legislation precluding access to courts for individuals defending unemployment benefits).
46. Judgment K 11/93 of 9 Nov. 1993, 1993 (II) *Orzecznictwo Tryb. Konst.* 350, 356–63. In 1991, the Tribunal declared that legal acts passed by the state must be officially published to be enforceable. Judgment S 2/91 of 27 Feb. 1991, 1991 *Orzecznictwo Tryb. Konst.* 119–28.
47. Judgment U 7/97 of 17 Sept. 1988, 1988 *Orzecznictwo Tryb. Konst.* 14.
48. See for example Judgment K 7/92 of 6 April 1993, 1993 *Orzecznictwo Tryb. Konst.* 75, 81–2 (holding that the provision of the unemployment law, which prevented the unemployed from getting benefits if their spouse earned twice the average national salary, violated the principle of equality); Judgment U 2/91 of 17 Dec. 1991, 1991 *Orzecznictwo Tryb. Konst.* 149, 159 (holding that a special tax for environmental repair in polluted provinces violated the principle of equality before the law).
49. See for example Judgment K 6/89, at 107–8.
50. Judgment K 1/91 of 28 May 1991, 1991 *Orzecznictwo Tryb. Konst.* 81, 94.
51. Judgment Kw 1/89, of 9 May 1989, 1989 *Orzecznictwo Tryb. Konst.* 59.
52. Judgment K 1/91, at 94.
53. Judgment K 3/89 of 26 Sept. 1989, *Orzecznictwo Tryb. Konst.* 84, 93.
54. Judgment K 6/89, at 110.
55. Ibid., at 108.
56. Judgment Kw 5/91 of 24 Sept. 1991, 1991 *Orzecznictwo Tryb. Konst.* 96, 103. On 6 April 1993 the Tribunal decided that the right to unemployment benefits should be granted irrespective of the spouse's income. Under the 1991 law an individual was not entitled to unemployment benefits if his or her spouse received income greater than twice the national average. The Tribunal found this regulation to violate the principle of equality. Judgment W. 3/93 of 6 April 1993, 1993 *Orzecznictwo Tryb. Konst.* 161, 168.
57. Zakrzewska, op. cit., p. 21.
58. Interview with Jerzy Jaskiernia, Former Chairman of the Sejm Legislative Commission, in Warsaw, Poland (18 July 1994).
59. Ibid.
60. E. Letowska, 'Five Obstacles to Building a State of Law', *Commissioner for Civil Rights Protection: Materials*, XIX (1991) 40.

61. J. Kroner, 'Kosztowny triumf prawa', *Rzeczpospolita*, 12 Feb. 1992, p. 1.
62. J. Koral, 'Rzad twardy Sejm sie waha', *Gazeta Wyborcza*, 25 April 1992, pp. 1, 4.
63. 'Miedzy budzetem a dramatem', *Gazeta Wyborcza*, 24 April 1992, p. 1.
64. J. Kroner, 'Sejm czesciowo przyjal orzeczenia TK', *Rzeczpospolita*, 7 May 1992, p. 1. The Tribunal's decision added $2.2 billion to Poland's $4.7 billion deficit and jeopardized a $2.5 billion loan from the International Monetary Fund.
65. Judgment K 13/93 of 3 May 1994, 1994 *Orzecznictwo Tryb. Konst.* 45, 45–50.
66. See 'Abortion Veto Stands', *Gazeta Wyborcza*, 3 Sept. 1994, p. 1, available in *NEXIS, NEWS Library, PNBUL File* (discussing the session at which Parliament rejected the Tribunal's tax rulings as burdensome; Parliament also debated a new abortion law). Of over 100 Tribunal decisions declaring parliamentary statutes unconstitutional, only four have been subsequently rejected by Parliament. Each of these 'resurrected' statutes concerned the national budget and taxation issues. For example, the Sejm in 1994 raised top personal income tax rates for 1995 from 40 to 45 per cent. President Walesa vetoed the bill, but was overridden by the Sejm. Although the law did not go into effect until 20 January 1995, it had been made applicable to all of 1995. President Walesa referred the law to the Constitutional Tribunal, which promptly declared it unconstitutionally retroactive. The Tribunal added that it also undermined legal stability and citizens' confidence in state actions, additional constitutional imperatives drawn from the Rechtsstaat principle. Judgment Uw. 20/88 of 14 February 1995, 1995 *Orzecznictwo Tryb. Konst.* 109. When the Tribunal's decision was sent back to the Sejm, that body overrode the decision by a 303–130 vote.
67. W. Osiatynski, 'Bronislaw Geremek on Constitution-Making in Poland', *East European Constitutional Review*, IV (Winter 1995) 42.
68. Between 1956–61, the PZPR, in an attempt to appeal to national sentiment, permitted limited religious instruction in public schools. At all other times during the communist era, religious instruction in public schools was prohibited.
69. 'Notatka w sprawie orzeczenia Trybunalu Konstytucyjnego', *Biuletyn RPO: Materialy*, X (1991) 89–90.
70. Ustawa z dnia 17 maja, 1989 o stosunku Panstwa do Kosciola Katolickiego, *Dziennik Ustaw*, no. 29, item 154 (1989).
71. Judgment K 11/90, supra n. 15, at 35–40.
72. S. Podemski, 'Prawnicze samobojstwo', *Polityka*, 9 Feb. 1991, at 3.
73. 'Notatka w sprawie orzeczenia Trybunalu Konstytucyjnego'.
74. Judgment S 1/91 of 13 Feb. 1991, 1991 *Orzecznictwo Tryb. Konst.* 274–5.
75. 'Notatka w sprawie orzeczenia Trybunalu Konstytucyjnego', at 90.
76. Judgment U 8/90 of 15 Jan. 1991, 1991 *Orzecznictwo Tryb. Konst.* 134.
77. Ustawa z dnia 27 kwietnia 1956 r. o warunkach dopuszczalnosci przerywania ciazy, *Dziennik Ustaw*, no. 12, item 61 (1956).
78. E. Zielinska, *Przerywanie ciazy: warunki legalnosci w Polsce i na swiecie* (Warsaw: Wydawnictwo Prawnicze, 1990) pp. 68–70. However, most Poles do not favor a repressive approach to abortion and over two-thirds

would permit abortion even when the principal justification is negative economic conditions. S. Podemski, 'Raz tak, raz inaczej', *Polityka*, 21 Nov. 1992, p. 7.
79. Rozporzadzenie Ministra Zdrowia i Opieki Spolecznej z 30 kwietnia 1990, *Dziennik Ustaw*, no. 28, item 178 (1990).
80. Judgment U 8/90, at 137–9.
81. S. Podemski, 'Konstytucja a etyka lekarska: uniki zamiast werdyktu', *Polityka*, 18 April 1992, p. 7.
82. Judgment U 1/92, supra n. 16, at 157, 164.
83. B. Radzikowska, 'Praktyka Rzecznika Praw Obywatelskich II Kadencji w sprawach dotyczacych stosunkow miedzy jednostka, Kosciolem i Panstwem', *Biuletyn RPO: Materialy*, XV (1992) 34.
84. Ustawa z dnia 7 stycznia 1993 o planowaniu rodziny, ochronie plodu ludzkiego i warunkach dopuszczalnosci przerywania ciazy, *Dziennik Ustaw*, no. 17, item 78 (1993).
85. Ustawa o planowaniu rodziny.
86. Judgment W 16/92 of 17 March 1993, 1993 *Orzecznictwo Tryb. Konst.* 156, 164.
87. H. Schwartz, 'The New East European Constitutional Courts', *Michigan Journal of International Law*, XIII (1992) 780.
88. B. Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992) pp. 46–88. This is what occurred in Russia in 1993.
89. Interview with Lech Falandysz, Chief Constitutional Advisor to the Polish President and Professor of Law, University of Warsaw, in Warsaw, Poland (28 June 1994).
90. D. Wielowieyska, 'Trybunal nad Sejmem', *Gazeta Wyborcza*, 2 Dec. 1992, p. 11.
91. Interview with Leonard Lukaszuk, Former Vice-President of the Polish Constitutional Tribunal, in Warsaw, Poland (17 January 1992).
92. 'Nowa konstytucja za rok', *Gazeta Wyborcza*, 24 April 1992, p. 2.
93. 'Constitutional Tribunal Judges Meet', *Rzeczpospolita*, 2 Dec. 1992, p. 1, available in *NEXIS, NEWS Library, PNBUL File*.
94. Zakrzewska, op. cit., at 13.
95. 'Constitutional Tribunal Judges Meet'.
96. Zakrzewska, op. cit., at 14.
97. 'O prymacie prawa nad polityka', *Rzeczpospolita, 12 April 1994, p. 5.*

Chapter 7

1. F. Lewis, 'In Poland, Changes Will Stick and Communists are Pale Pink', *International Herald Tribune*, 13 Oct. 1995, p. 8.
2. 'Raport z Badania 'Konstytucja w Swiadomosci Polakow',' *Centrum Badania Opinii Spolecznej* (January 1994), 4.
3. W. Osiatynski, 'An Interview with President Lech Walesa', *East European Constitutional Review*, II (1993) 45.
4. Interview with Professor Ewa Letowska, Former Ombudsman for Citizens' Rights, in Warsaw, Poland (5 July 1994).

5. L. Kolarska-Bobinska, 'A jednak warto bylo!', *Wiadomosci Polskie*, 25 April 1994, p. 5.
6. 'Raport z Badania 'Co Polacy Wiedza o Konstytucji?',' *Centrum Badania Opinii Spolecznej* (February, 1994) 2.
7. M. Krygier, 'Four Visions of Post-Communist Law', *Australian Journal of Politics and History*, XL (1994) 5.
8. Interview with Jacek Kuron, 'Wspomagajace aktywnosc obywateli', *Nowa Res Publica*, 3 Feb. 1993, p. 11.
9. Interview with Jan Maria Rokita by Martin Krygier, op. cit., 16.
10. E. Letowska, 'Human Rights and the Post-Communist Order: The Case of Poland', *The East & Central Europe Bulletin*, III (1992) 6.
11. Krygier, op. cit., 13.
12. T. Garton Ash, *The Magic Lantern, The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin, and Prague* (New York: Vintage, 1990) p. 34 (quoting Lech Walesa).
13. 'Walesa Holds Press Conference in Gdansk', *The British Broadcasting Corporation, Summary of World Broadcasts*, 24 Sept. 1990, 3.
14. 'Metafora czy ostrzezenie. Walesa jak Jelcyn', *Rzeczpospolita*, 29 Sept. 1993, p. 1.
15. 'W kolejce do Walesy', *Gazeta Wyborcza*, 27 Feb. 1993, 2.
16. An Interview with Lech Walesa, *Wprost*, 17 June 1994, pp. 17–18, available in *NEXIS, NEWS Library, PNBUL File*.
17. B. Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992) p. 46.
18. W. Osiatynski, 'Decommunization and Recommunization in Poland', *East European Constitutional Review*, III (Summer 1994) 37 (quoting Tadeusz Mazowiecki).
19. Ackerman, op. cit., pp. 66–9.
20. The report was published in *Gazeta Wyborcza*, 27 June 1992, p. 6.
21. In connection with the 'Parys affair' (see Chapter 4), on 29 May 1992 parliamentary leaders motioned no confidence in the Olszewski government. Karpinski, 'Agencji i lustracja-politycy i przeszlosc', *Rzeczpospolita*, 15 July 1992, p. 4.
22. Judgment U 8/92 of 19 June 1992, 1992 *Orzecznictwo Tryb. Konst.* 117.
23. A. Michnik, 'Thursday Sejm Debate: Nightmare Comes True', *Gazeta Wyborcza*, 6 June 1992, p. 6, available in *NEXIS, NEWS Library, PNBUL File*.
24. R. Manne, 'Poland: The Polish Cow is Being Unsaddled Slowly', *The Age*, 5 Jan. 1994, p. 3.
25. 'Poland: Church Influence in Democratic Election', *Abortion Rep.*, 30 Oct. 1991, at 3, available in *LEXIS, Nexis Library, Omni File*.
26. W. Sokolewicz, 'The Relevance of Western Models For Constitution-Building in Poland', *International Journal of the Sociology of Law*, XXI (1992) 29.
27. 'Bishops on Elections', *Gazeta Wyborcza*, 21 June 1993, p. 1, available in *NEXIS, NEWS Library, PNBUL File*.
28. In 1993, after the new restrictive abortion bill was passed, an opinion poll gave the Church an approval rating of only 46, compared to 67 for the police and 72 percent for the army. 'Raport z Badania 'Najwazniejsze

problemy kraju i obawy Polakow',' *Centrum Badania Opinii Spolecznej* (March 1993) 3.
29. Interview with Henryk Goryszewski, *Wspolczesna Gazeta*, 1 February 1993, p. 1, available in *NEXIS, NEWS Library, PNBUL File*.
30. 'Goryszewski seeks Catholic Electorate', *Gazeta Wyborcza*, 19 July 1993, p. 3, available in *NEXIS, NEWS Library, PNBUL File*.
31. Interview with Senator Grzeskowiak by Martin Krygier (12 Jan. 1993), supra n. 7, at 7.
32. 'Respektujace wartosci Chrzescijanskie', Interview with Stefan Niesolowski, *Nowa Res Publica*, XXI (February 1993) 17.
33. Interview with Deputy Niesolowski by Martin Krygier, 8 Jan. 1993, supra n. 7, at 10.
34. 'Sejm Passes Broadcasting Bill', *Rzeczpospolita*, 16 Oct. 1992, p. 1, available in *NEXIS, NEWS Library, PNBUL File*.
35. 'Threats to Press Freedoms', *Helsinki Watch*, XXI (November 1993) 13 [hereinafter 'Threats to Press Freedoms'].
36. Judgment W 3/93, 1994 *Orzecznictwo Tryb. Konst.* 154.
37. I. Grudzinska-Gross, 'Broadcasting Values', *East European Constitutional Review*, II (Summer 1993) 52–3.
38. Interview with Senator Grzeskowiak by Martin Krygier (12 Jan. 1993), supra n. 7, at 9.
39. T. Zielinski, 'A Para-religious state', *Rzeczpospolita*, 24 August 1992, p. 3, available in *NEXIS, NEWS Library, PNBUL File*.
40. B. Radzikowska, 'Praktyka Rzecznika Praw Obywatelskich II Kadencji w sprawach dotyczacych stosunkow miedzy jednostka, Kosciolem i Panstwem', *Biuletyn RPO: Materialy*, XV (1992) 33.
41. See for example, 'Czy rzecznik praw obywatelskich pragnie dobra mlodziezy?', *Slowo Powszechne*, 8 Sept. 1992, p. 3; H. Kuligowski, 'Wojna Religijna', *Polityka*, 17 Oct. 1992, p. 5.
42. Interview with Tadeusz Zielinski, *Zycie Warszawy*, 5 May 1994, p. 3, available in *NEXIS, NEWS Library, PNBUL File*.
43. S. Engelberg, 'Poland Faces Choices on Economic Austerity and the Character of the State', *The New York Times*, 11 Nov. 1990, p. A16 (quoting Konstanty Gebert).
44. 'Threats to Press Freedoms', *Helsinki Watch*, at 11.
45. A. Rzeplinski, *Prawa i wolnosci czlowieka* (Warsaw: Wydawnictwo Polskiej Akademii Nauk, 1993) p. 93.
46. 'Threats to Press Freedoms', *Helsinki Watch*, at 11.
47. 'Right of Center Parties to Demonstrate Today', *Gazeta Wyborcza*, 4 June 1993, p. 1, available in *NEXIS, NEWS Library, PNBUL File*.
48. A. Gargas and M. Wojciechowski, *Partie Polityczne w Polsce* (Gdansk: Krajowa Agencja Wydawnictwo, 1991) pp. 19–23.
49. J. Micgiel, 'The Radical Right and Skinheads in Contemporary Poland: Cause for Concern?', *New Europe Political Science Quarterly*, III (1993) 9. Since the seventeenth century, anti-semitism has frequently been used in Poland as an instrument of political provocation. Unfortunately, this has not changed with the fall of communism.

50. Micgiel, op. cit., at 8 (quoting *Polska Mysl Narodowa* V (July 1991) 9); P. Dymny, *Antysemityzm. Hanba czy nadzieja* (Warsaw: Wydawnictwo AWA, 1991) 25, 32.
51. Micgiel, op. cit., 12.
52. Quoted in *Wprost*, 14 February 1992, p. 7, available in *NEXIS, NEWS Library, PNBUL File*.

Chapter 8

1. J. Hawgood, *Modern Constitutions Since 1787* (London: Macmillan, 1939) pp. 21–57.
2. In Hungary and Bulgaria, the opposition in 1989 gave the presidency few powers on the assumption that it would be filled by a communist candidate. In both cases, leading opposition politicians subsequently filled the seat.
3. H. Schwartz, 'The New East European Constitutional Courts', *Michigan Journal of International Law*, XIII (1992) 748–52.
4. Ibid., 753–5.
5. G. Glos, 'The Constitution of the Czech Republic of 1992', *Hastings Constitutional Law Quarterly*, XXI (1994) 1049.
6. For an overview of the region's cultural, ethnic and religious differences, see H. Bogdan, *Histoire des pays de l'Est* (Louvain: Institute de recherches de l'Europe Centrale, 1990) ch. 1.
7. J. Zakrzewska, *Spor o Konstytucje* (Warsaw: Wydawnictwo Sejmowe, 1993) p. 219.

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