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THE INFLUENCE OF THE JUDICIARY UPON THE DEVELOPMENT
OF THE RULE OF LAW IN POST-COMMUNIST POLAND

DISTRIBUTION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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*****

The Ohio State University
1998

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ABSTRACT

This work examines the development of the rule of law in post-communist Europe through a case study of Poland (1989 - 1997) that includes focused comparisons with other Eastern European states. The rule of law is an important subject for study because it is essential for democratic stability. This work shows that Poland and other Central European countries have made significant progress toward the rule of law and this raised two puzzles for investigation: What proximate factors were essential for the development of the rule of law? Why have the Central European countries made more extensive progress in the development of constitutional government than other post-communist states?

Addressing the first question, this work shows that democratization and judicial oversight of the state were essential proximate factors in the development of the rule of law. Democracy, through the separation of powers, checks and balances, judicial independence, and elections,
created institutional oversight of the state and the accountability of public officials. Judicial oversight, principally by Constitutional Courts with the power of judicial review, contributed to the rule of law by establishing the legal accountability of state officials, by enforcing the constitution as the supreme prescriptive law, and by protecting human rights. This expansion of judicial authority in post-communist Europe may be viewed as part of an international trend that has alternately been labeled the "judicialization of politics" or the "due process revolution."

In addressing the second question, this work shows that the Central European countries made greater progress toward the rule of law than those in the Balkans as a result of their more comprehensive democratization and because of their judiciaries' more vigorous oversight of the state. They did so because the process of political change in Central Europe was controlled by democratic movements while in the Balkan countries it was the ex-communists who dominated this process, often to the detriment of democracy, judicial independence, and the rule of law.
Dedicated to my parents
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CHAPTER 1

INTRODUCTION

"...laws, when good, should be supreme..."

For a people that governs and is well regulated by laws will be stable, prudent, and grateful, as much so, and even more, according to my opinion, than a prince, although he be esteemed wise... (Niccolo Machiavelli, The Discourses, Book 1: Chapter 58).

Can post-communist states overcome the "Leninist legacy" (Jowitt, 1992) of non-democratic government, arbitrary and particularistic state administration, and communist political socialization in order that they may establish the rule of law? This question is very significant both for democratic stability in post-communist Europe and for democratic theory because the rule of law is an essential element of contemporary democratic government (Linz and Stepan, 1996, O'Donnell, 1996, O'Donnell and
I agree with the many analysts (Amnesty International Annual Reports 1990 - 1996; Freedom House, 1997; Ludwikowski, 1996; Pehe, 1992:10; Sabbat-Swidlicka, 1992:25; Oltay, 1992:16; Zielonka, 1994:88) who not only answer this question affirmatively but who also note that several post-communist countries have already made significant progress in the development of constitutional government. These authors have identified the Central European countries (Poland, Hungary, and the Czech Republic), Lithuania, and Slovenia as the vanguard of democratization and marketization. In its most recent global analysis of human rights and political liberty, Freedom House (1997) awarded each of these countries its highest rating for their degree of political rights and its second highest score for their protection of civil liberties. Western states, transnational organizations, and the international business community already have recognized and responded to the political and economic changes occurring in Central Europe. Signs of this recognition include these states' accession to the Council of Europe and the Organization for Economic Cooperation and Development (OECD), their attainment of European Union Associate status, and their membership in
the North Atlantic Treaty Organization (NATO). They have also received a substantial amount of aid from Western states, transnational actors such as the European Union and the International Monetary Fund, and investment from multinational corporations (Pinder, 1994:123-4).

The development of the rule of law in post-communist Europe generates two puzzles that will be explored here: What proximate factors account for its development? Why has Central Europe experienced greater progress toward constitutional government than the Balkan states? Examining the establishment of the rule of law in post-communist Europe through a case study of Poland (1989 - 1997) which includes focused comparisons with Hungary, Czechoslovakia and its successor states, Bulgaria, and Romania, I argue that democratization and judicial oversight of the state were causal factors in its development. Barry Weingast (1997) observed that democracy is a necessary condition for the rule of law because the public accountability of state officials fostered by competitive elections limits their authority and encourages them to abide by the law. Democratization also includes the restoration of judicial independence and, during the post-war era, has been associated with an expansion of
judicial authority (Shapiro and Stone, 1994:397, Vallinder, 1994:96). Judicial oversight establishes the legal accountability of state officials and when judiciaries have the power of judicial review as they do in post-communist Europe they can enforce the constitution as the supreme prescriptive law and protect human rights (Vallinder, 1994:93, Shapiro and Stone, 1994:397, Tate and Vallinder, 1995:16, Holland, 1991:2, Stotzky and Nino, 1993:10). The Central European countries made greater progress toward the rule of law than did those in the Balkans due to their more comprehensive democratization. This was because the process of political change and institutionalization in Central Europe was controlled by democratic movements while in the Balkan countries it was the ex-communists who dominated these processes, often to the detriment of democracy, judicial independence, and the rule of law (Munck and Leff, 1997:343, Bruszt and Stark, 1992:15, Zielonka, 1994:92, Freedom House, 1997, Ramet, 1996:99, Vachudova and Snyder, 1997:1). A second factor in Central Europe's development of the rule of law was that the region's judiciaries reestablished their independence early in the process of political change and they were more vigorous in their oversight of the state.
Section 1.1: Confronting The Leninist Legacy

Post-communist Europe was a particularly difficult context for the development of the rule of law due to the effects of single party rule and Soviet-domination upon the state, society, the economy, and the legal system (Letowska and Letowski, 1996:10, Bunce, 1991, Schopflin, 1990). In his thought-provoking essay "The Leninist Legacy," Kenneth Jowitt (1992) cautioned against the optimistic view of scholars such as Giuseppe di Palma (1990) who have argued that post-communist states could in the near term develop stable democracy. Jowitt instead focused his attention upon the dangers communist political socialization and inherited state structures posed to the democratization and constitutional development of Eastern Europe. For Jowitt, the revolutions of 1989 had not razed the remnants of Leninism nor had they left a cleared field from which the fledgling democracies could grow. He (Jowitt, 1992:216) argued that in post-communist Europe the attempt is being made to graft democratic government upon state structures that were developed during the communist era and, despite the regime changes, essentially retain their non-democratic character. In the absence of wholesale purges, the newly democratic states are largely staffed with personnel from
the prior regime, many of whom were members of the
"nomenklatura," the Communist Party elite that controlled
the state. These people are used to disregarding the law
in the exercise of their power (Letowska and Letowski,
1996:152). The attempt to mesh the dissimilar elements of
electoral democracy with authoritarian state institutions
will, in Jowitt’s view, undermine the stability and
persistence of democracy in post-communist Europe.

Jowitt also astutely recognized dangers to
democratization posed by the unreformed post-communist
state. For example, long-standing traditions of
particularism, inefficiency, and corruption threatened the
legal equality of citizens and democratic stability
(Letowska and Letowski, 1996:10). Therefor, the post-
communist states also required extensive structural reform
and personnel changes (Taras, 1993:13). They would need,
for instance, to develop new regulatory institutions
appropriate to the market economy and a social welfare
system (Kulesza, 1993:39). Most post-communist governments
promised to decentralize the state by developing local
government structures. The legal codes also needed to be
extensively rewritten and state agencies would have to
reformulate their regulations. Public administration
reform required the development of new systems of behavior that emphasize attitudes of service, openness, legality, and efficiency (Letowski, 1993:7-8, Kulesza Interview, May 1997). Recognizing the small size and poor quality of the civil services that the post-communist states had inherited, Toonen (1993:158) concluded that they needed to expand their size and to be professionalized through extensive administrative training.

In addition to this institutional "Leninist legacy," Jowitt (1992:211) expressed his concern for the effects of the inherited communist political culture upon the new democracies of Eastern Europe. Distinct from authoritarian rule, the Soviet-imposed Leninist regimes were based upon a totalistic ideology (Schopflin, 1990:241, di Palma, 1991:50). They, therefore, tried to destroy civil society in order to monopolize public discourse, social mobilization, and economic activity. The party-states used their monopolization of education and mass communication to promote political values that were conducive to both single Party rule and Soviet hegemony (Frentzel-Zagorska, 1990:761, di Palma, 1991:64). Czech President Vaclav Havel (1987) explained that this socialization enabled the regime to create an invisible "outpost" within each person.
Specifically, people who lived under communism learned to practice self-censorship, remain passive in political matters, conform to accepted norms of behavior, and retreat into privativism and consumerism. The result was social anomie (Schopflin, 1990:235).

Many scholars worried that the atomized and weak nature of civil society in Eastern Europe limited the region’s ability to institutionalize democracy (Schopflin, 1990:235, Bunce, 1991, Havel, 1987, di Palma, 1991:64). Schopflin (1990:240) referred to the development of civil society as “the thorniest and most problematical aspect of the post-communist condition.” Jowitt (1992:215) argued that societies characterized by widespread anomie will have great difficulty in becoming civil societies, populated by “citizens” who are concerned with and involved in public matters. Due to the totalitarian states’ leveling of civil society in Eastern Europe, Jowitt (1992:216) asserted that post-communist societies lack shared public identities and traditions of inclusive public debate. He explained that the sense of public-spirited citizenship is underdeveloped because politics is popularly viewed as a dirty business focused upon self-enrichment. Given these conditions, Jowitt forecasted that post-communist societies were likely
to fragment into a number of mutually exclusive and antagonistic groups.

Schopflin (1990:239), Bunce (1991:401), and Jowitt (1992) all posited that the low level of civil society’s organizational development would also seriously weaken its ability to limit the state and hold public officials accountable. They noted that, unlike western democracies, post-communist Europe lacked the labor unions, business associations, and other civic organizations capable of mobilizing public support to affect government policy, drawing attention to public issues and problems, and influencing public discourse.

Communist political socialization and the Party’s monopolization of power also influenced the attitudes of the post-communist political leadership development (Jowitt, 1992:216). Jowitt explained that the Communist Parties’ monopolization of political and economic power, as well as its control of the mass media and organizational life, prevented the development of democratic counter-elites, particularly ones that were strongly linked to social bases of support. Schopflin (1990:239) posited that weak links between political parties and society creates the potential for volatile politics as parties chase after
a floating electorate with demagogic slogans. Jowitt shared this view, forecasting the rise to power of nationalist or traditionalist demagogues. Schopflin felt that personalistic or charismatic politics would undermine the new regimes’ institutional and legal development.

Jowitt (1992:213) predicted that the post-communist elites, even self-professed democrats, will not know how to behave democratically because of their communist political socialization. He posited that they will find it particularly difficult to accept the supremacy of laws and constitutional limitations upon their power. Jowitt made a prescient observation in that the style if not the substance of past communist political behavior may shape the current behavior of post-communist elites. The principle of limited government may be a difficult one to learn, particularly for government leaders who can claim an electoral mandate as the basis for their right to rule. Democratic majoritarianism, or ruling in a way that tests or oversteps constitutional limitations in the name of majority rule, has been a problem in the post-communist period (Zielinski, 1995b:60-3). Former Ombudsman Tadeusz Zielinski noted the prevalence among the post-communist
political elite of an instrumentalist attitude toward the law, a product of communist political socialization.³

Democratic stability and the rule of law in post-communist Europe faced other serious obstacles. In contrast to the democratic transitions in Southern European or Latin American countries, the post-communist states needed to reestablish their sovereignty. Linz and Stepan (1996:17) observed that state sovereignty is a prior condition for democratization. When the regime transitions began in 1989, the Central European countries were still Soviet satellite states. Although the Soviet Union had publicly proclaimed its intention of non-intervention in the domestic affairs of its Warsaw Treaty Organization (WTO) allies in the so-called “Sinatra Doctrine” of the late 1980's, there was still a great deal of uncertainty about how much political change it was willing to tolerate (Gross, 1992:64). This was particularly evident in Poland where Solidarity accepted the Roundtable Agreement with its limited competitive elections and a strong presidency to be filled by General Jaruzelski. Even after its overwhelming electoral triumph and the defection of the satellite parties from their alliance with the Communist Party, Solidarity’s members of parliament helped to elect
Jaruzelski as President and the first Solidarity government selected communists as Ministers of Defense, Foreign Affairs, and the Interior. Jan Gross (1992:64) observed that the Polish transition, and in particular the Soviet Union’s willingness to accept the electoral results and the subsequent formation of the Solidarity government, allowed the transitions in East Germany, Hungary, and Czechoslovakia to transform the political system more rapidly. However, the instability of the Soviet Union and then its successor states presented a grave threat to the sovereignty of post-communist Eastern Europe and it was only NATO’s 1997 decision to accept Poland, Hungary, and the Czech Republic for membership that finally assured their sovereignty.

Another potential threat to democratic legitimacy and stability was the economic situation. Bunce (1991:419) pointedly observed that as the political transitions began in the Eastern European countries their economies were “a mess.” Before the regime changes had even begun, the state socialist economies had already experienced a decade of economic decline and countries such as Hungary and Poland were deeply in debt (Ramet, 1996:97). The intractable nature of the economic problems had fueled social

Unlike the post-authoritarian regimes in Latin America or Southern Europe, these governments would be attempting to transform command into free market economies. No regime had attempted simultaneous democratization and marketization. The early transition governments faced difficult economic choices. Privatization caused widespread unemployment at a time when social welfare was only beginning to be constructed and state funds were scarce. Price liberalization, particularly with so many monopolies remaining intact, produced rampant inflation. Eight years after marketization began in Central Europe, we know that it led to a serious economic decline from 1990 to 1993, runaway inflation, unemployment rates of between 15 to 20%, class inequality, and budget deficits (Ramet, 1996:97-100, Taras, 1996:127). It was not until 1995, for example, that Polish industry regained its pre-transition production levels.

The deep economic crisis exacerbated by the process of marketization threatened the stability of democracy (Bunce,
Declining living standards had the potential to undermine the legitimacy of the democratic system and to encourage the public to support anti-liberal demagogues. Bunce (1991:421) was also concerned that the infant democratic institutions would not be able to effectively handle all the demands placed upon them by interest groups, nor would they be able to address all the social problems caused by the economic transformation.

For Jowitt (223), the Leninist legacy of inherited state structures and political culture raised the grim possibilities of social fragmentation, political chaos, and even fascism. Under these conditions, liberal democracy and constitutionalism seemed unlikely. In contrast to post-authoritarian Southern Europe and Latin America, the post-communist governments of Central Europe needed to simultaneously reestablish their state sovereignty, reform the state, transform their command economies into market systems, and institutionalize a democratic regime. Fearing for the region's stability, he advocated the creation of 19th century-style liberal authoritarian regimes that would provide security and establish market economies.
Section 1.2: The Puzzles and Explanatory Factors

Despite these problems, the Central European states have made significant progress in establishing the rule of law (Freedom House, 1997, Zielonka, 1994, Ramet, 1996, Ludwikowski, 1997). This development brings us back to the two puzzles that were raised at the beginning of this chapter: First, what proximate factors were essential for Central Europe's development of the rule of law? Second, why have the Central European countries made more extensive progress in the development of constitutional government than other post-communist states?

Addressing the first puzzle concerning the proximate factors that catalyzed the rule of law, I argue that democratization and judicial oversight of the state were causal factors in its development. Democracy is a necessary condition for the rule of law because it establishes the public accountability of state officials (Weingast, 1997). Judicial oversight ensures the state's legal accountability (Holland, 1991:2, Stotzky and Nino, 1993:10). The primary institution of judicial oversight in post-communist Europe has been the constitutional courts. They have the authority to review the legality or constitutionality of administrative regulations, executive
policies and actions, statutes, and to adjudicate jurisdictional disputes between state institutions. The more activist courts, such as the Polish, Hungarian, and, to lesser extent, Bulgarian ones, helped to establish the prescriptive character of the constitution, protected civil liberties, and upheld the supremacy of the law.

Addressing the second puzzle concerning the different levels of progress toward the rule of law in post-communist Europe, I argue that, in Central Europe, democratization was quicker and more comprehensive and judicial activism was greater than in the rest of post-communist Europe (Bruszt and Stark, 1992:15, Zielonka, 1994:92, Freedom House, 1997, Ramet, 1996:99, Ludwikowski, 1996). Central Europe democratized more rapidly because the process of political change and institutionalization was controlled by democratic movements while in the Balkan countries it was the ex-communists who dominated these processes, often to the detriment of democracy, judicial independence, and the rule of law.

While it is argued here that democracy is a necessary condition for the rule of law, most democratic theorists agree that the rule of law is also essential for democratic governance and stability (O'Donnell, 1996, Linz and Stepan,
1978, Walker, 1988, Weingast, 1997, Cappalletti, 1985, Elster and Slagstad, 1988, Henkin, 1994). Despite its importance, democratic theorists have not examined the institutionalization of the rule of law. In the following chapter, I will present a more detailed analysis of the rule of law. Here, I will simply introduce my definition in order to orient the present discussion. Synthesizing the works of others, (most notably Walker, 1988, Bax and van der Tang, 1993, Monahan, 1987, Rosenfeld, 1994, and Elster and Slagstad, 1988), I define the rule of law as:

A political condition wherein elected officials and administrative bureaucrats exercise the power of the state predominantly in accord with universalistic laws. These laws conform to a prescriptive constitution that sits at the top of the hierarchy of laws. The constitution also recognizes and protects the legal and civil equality of all citizens.

Within the rule of law literature, most authors (e.g. Ackerman, 1992, Elster and Slagstad, 1988, Hutchinson and Monahan, 1987, Klani, 1985, Shapiro, 1994, Thomas and Thomas, 1975, and Walker, 1988) examine its conceptual nature or trace its growth as a political idea but very few analyze its empirical development. Some theorists delineate its presence in the history of western political
thought (Sejersted, 1988, Sklar, 1987, Thomas and Thomas, 1975, and Weinrib, 1987), while others emphasize its Anglo-American character (de Haan, et. al., 1991, the authors in the Shapiro volume, 1994, and Walker, 1988). This latter group questions the suitability of the rule of law for states that do not share the Anglo-American tradition and cannot account for its development in countries that are outside the Anglo-American cultural sphere.


Unlike the democratization literature that treats democracy as a dependent variable, Barry Weingast (1997) presented a generalizable game theoretic model that emphasized democracy as the crucial causal factor for the rule of law. He (1997:245) argued that democratic
elections create a strong incentive for state officials to engage in self-limiting behavior. His model demonstrated that in a democratic political system state officials choose to obey the law and respect the rights of citizens because these are necessary conditions for them to retain their political offices. In the model, the threat of civil society's mobilization during elections to punish political officials who violate the rule of law creates a "self-enforcing equilibrium" that upholds the supremacy of the laws and encourages self-restraint on the part of public officials.

Public accountability is a cornerstone of western democratic political theory and Weingast's game theoretic model illuminated that the incentive structure of the democratic political system makes it potentially the most effective means of limiting the power of the state (e.g. Aristotle, The Politics, and BK 5:25-30, Madison, Federalist #10). However, Weingast may be too optimistic in his appraisal of democracy's ability to foster the rule of law. Guillermo O'Donnell (1996:36) observed that in many countries with competitive democratic elections the behavior of state officials systematically diverges from the statutes, the constitution, and organizational
regulations. O'Donnell posited that in these democracies the formal rules and institutions have been undermined by patterns of clientelism, particularism, corruption, and other abuses of power. These abuses also weaken civil and political rights and the legal equality of citizens (O'Donnell, 1996:44). When the behavior of state officials significantly diverges from the formal rules and informal practices and institutions become the predominant manner in which the state operates, the rule of law is either weak or absent (Walker, 1988:1). Although it is principally the "newer polyarchies" of the "Third Wave" (1975 - present) that struggle with these problems, O'Donnell identified the long-standing democracies of India, Italy, and Japan as particularly egregious examples of democratic states where the rules are subverted by widespread particularism. O'Donnell (1996:45) posited that the combination of elections, particularism, and the gap between formal rules and actual practices will tend to produce delegative and not representative democracy. That is, democratically elected officials will come to see the authority of their office as a personal possession and begin to exercise power in an arbitrary manner. When combined with conditions of deep socio-economic inequality, policy-making will be
skewed in favor of the economically powerfully and it is possible for "authoritarian practices to reassert themselves."

Democracy, with its system of public accountability, would seem then to be a necessary, but not sufficient, condition for the establishment of the rule of law. What additional factors facilitate the development and persistence of the rule of law? Andrzej Rapaczynski (1995:92-3) suggested that the state administration is more likely to be efficient, reasonable, and to uphold the legal equality of citizens when public officials have a fair amount of discretion to interpret the law and their interests have been "aligned with those of the organization," i.e. their actions are in accord with the goals and interests of their agencies. Laws, in his (1995:91) view, receive their practical content through the interpretations of bureaucrats and legal professionals. The rule of law, therefore, depends upon the professionalism of state bureaucrats.

Rapaczynski makes a valid point that standing between laws and their implementation are the state officials who must interpret them and it is, therefore, important to develop a professional civil service. He does not,
however, explain how public officials' interests become “aligned” with those of their organization, nor how this alignment is maintained over time. He could also be criticized for his reliance upon the personal integrity of state officials. Political history alerts us to be cautious in placing too much faith upon the beneficence of those in power. As James Madison remarked in the Federalist Papers, “we are discussing a government of men and not angels”. In their book on the rule of law in post-communist Poland, Letowska and Letowski (1996:41) disparaged the “naive faith in personnel turnover” shown by the early Solidarity governments. These governments believed that bringing “good people” into the state administration would improve the quality of its performance. This was not, however, always the result.

Having recognized that electoral accountability by itself may be inadequate to prevent abuses of power, O’Donnell (1996:44) argued that within “consolidated polyarchies”, i.e. democracies with the rule of law, electoral accountability is complemented by “horizontal accountability.” “Horizontal accountability” refers to a system of oversight of the state wherein certain state institutions exercise control over other state agencies.
O'Donnell, in contrast to Weingast, argued that electoral democracy is insufficient to generate the rule of law and must, therefore, be combined with an extensive and effective system of state oversight.

The basic idea is that formal institutions have well-defined, legally established boundaries that delimit the exercise of their authority, and that there are state agencies empowered to control and redress trespasses of these boundaries by any official state agency (O'Donnell, 1996:44).

While O'Donnell may seem to be reinventing the wheel by arguing for a system of checks and balances and mutual oversight among state institutions, the weakness of institutions and the prevalence of particularism in many of the newer democracies suggests otherwise. Even within the older and more institutionalized democracies, concerns have been expressed about the increased power of the state (Shapiro and Stone, 1994:401). Prompted by the post-war expansion of the welfare/regulatory state, the advanced democracies have sought to strengthen oversight and expand the legal accountability of state officials through such institutions as constitutional courts, administrative courts, ombudsman’s offices, and independent auditing agencies (Holland, 1991, Tate, 1994). This is in addition
to such traditional oversight bodies as the cabinet, parliament, and parliamentary committees.

Section 1.2.1: The Role Of The Judiciary

Irwin Stotzky and Carlos Nino (1993:10) wrote that, "the consolidation of the rule of law requires strengthening the independence, reliability, and efficiency of the judicial process." They posited that the judiciary may foster the rule of law by, "monitor(ing) and affect(ing) the way the state's coercive power is used," enforcing due process, and by "provid(ing) legal remedies and assistance" in situations where the laws are silent or the state fails to take equitable action." Comparative judicial scholars have identified a post-war trend of increased judicial authority among democracies and labeled it the "judicialization of politics" or the "due process revolution" (e.g. Vallinder, 1995, Shapiro and Stone, 1994, Kommers, 1994). The "judicialization of politics" literature links increased judicial oversight and the rule of law in democratic states. A similar trend of increased judicial authority is occurring in post-communist Europe.
A judiciary's effectiveness in providing oversight is influenced by its degree of impartiality and independence. Judicial impartiality exists when, "the courts are bound to the law and they will resist those in other positions who would have the judge violate this" (Becker, 1970:145). Judicial independence refers to the scope of subjects upon which the judiciary may adjudicate and the depth to which it may scrutinize the rules of the political system (Blondel in Tate, 1987:17). Judiciaries vary in their authority to review the legality and constitutionality of administrative regulations, executive policies, and statutes, to examine domestic legislation in light of international law, and in their power to overrule the executive and legislative branches. Those that are impartial and have the independence to examine fundamental political issues are more likely to provide effective state oversight (Shapiro and Stone, 1994:402).

While judiciaries vary in their authority, a "judiciary" is itself composed of discrete bodies with distinct powers and tasks, and, thus, they may contribute to the rule of law in different ways. Regular courts may do so by protecting due process and upholding the legal equality of all people. Appellate courts, particular a
The judiciary, particularly administrative courts, can establish the legal accountability and liability of state officials and thus encourage their adherence to the law (Iglesias, 1993:271, Palmier, 1996:142, Srvastava, 1995:3, Stronik, 1995:81). Brown (1997:242) observed that the degree of judicial authority over the executive “has been the most accurate gauge of the extent of liberal legality.” S.S. Srvastava (1995:3) wrote that, “The rule of law requires that wrongs should not remain unredressed,” and central to this is judicial enforcement of the state’s liability. Judiciaries, and perhaps more specifically administrative courts, may provide both oversight of the state bureaucracy and a means of relief for those who think that they have been harmed by the state. Administrative courts may also apply due process rights to citizens’ interactions with the state bureaucracy (Stone and Shapiro, 1994:402, Holland, 1991:5).

Judiciaries also catalyze the rule of law by enforcing constitutions as the supreme prescriptive law (Stone, 1994:447). Former President of Argentina Raul Alfonsin
(1993:42) posited that the rule of law required that the judiciary ensure that the state's actions and policies are congruent with the constitution and the other laws. In the positivist legal tradition, constitutional courts alone have the power of judicial review, the authority to examine the constitutionality of administrative regulations, executive actions, and/or statutes. Judicial review is essential for establishing the supremacy of the constitution because it allows the judiciary to examine and nullify any regulations or statutes that, in its opinion, contravene the basic law.

In addition to fostering constitutionalism, constitutional courts contribute to the development of the rule of law by protecting civil and political rights and ensuring equality before the law (Alfonsin, 1993:43). Vallinder (1995:15), Shapiro and Stone (1994:399), and Holland (1991:5) have all noted that the increased activism of the courts in democratic states has enhanced the protection of human rights and others have observed an increase in the level of due process in civil and criminal proceedings (Iglesias, 1993:271, Edelman, 1994:182).

Constitutional courts foster the rule of law and democratic stability by clarifying the institutional
outlines and powers of state agencies and, through its binding interpretations of legal acts, promote the internal coherence of the law (Stotzky, 1993:347, Vallinder, 1994:93, and Edelman 1994:179). Donald Kommers noted (1994:475) that in political systems where the Constitutional Court plays a prominent role, such as in Germany, the threat of judicial review makes legislators sensitive to constitutional norms and encourages them to negotiate and compromise. Commenting on Italy's post-war transition to democracy, Volcansek (1994:498) observed that the newly created Constitutional Court facilitated the development of the rule of law by invalidating fascist era statutes and regulations. By purging the legal code, the Court not only removed laws that violated democratic norms, it improved the coherence of Italian law. The Polish Supreme Court has similarly recognized the incoherence of Polish law due to the continued presence of communist-era statutes and has resolved to use its authority to restore the law's consistency (Annual Report of the Polish Supreme Court, 1990:3, and 1991:2).

A judiciary that is impartial and has sufficient independence to scrutinize the most fundamental political issues contributes to the rule of law by enforcing the
constitution, protecting civil liberties and equality before the law, promoting the internal coherence of the law, and enforcing the state’s legal accountability. Stotzky and Nino (1993:8) stressed that the absence of judicial oversight, and therefore of the rule of law, was an important factor in Latin America’s oscillation between authoritarianism and democracy. Letowska and Letowski (1996:117) noted the existence of a popular “craving for judge-made law” in Poland and the other post-communist states due to the legal nihilism of the communist period. This enhanced the status the region’s judiciaries and, as a result, they, particularly the constitutional courts, emerged as significant political actors adjudicating the most fundamental and contentious issues of democratization and marketization (Zielonka, 1994:90).

DEMOCRACY & JUDICIAL OVERSIGHT→RULE OF LAW

UNCONSOLIDATED DEMOCRACY→WEAK CONSTITUTIONALISM/ARBITRARY RULE

Figure 1.1: The development of the rule of law.
Section 1.3: Case Study Methodology

This dissertation presents a case study of post-communist Poland (1989 - 1997) containing focused comparisons with other former party-states. Harry Eckstein (1975) and Alexander George (1979:47 & 62), among others, observed that the problem with the case study methodology is that social scientists and historians often describe their cases "in idiosyncratic terms," thereby developing case specific explanations that do not contribute to the cumulation of knowledge or the development of more generalized theories. Despite this, Eckstein and George did not dismiss the case study methodology recognizing that such studies, particularly those that contain focused comparisons, can still contribute to the development of generalized theory and offer a level of complexity and specificity that large N statistical studies and deductivist approaches such as game theoretic models cannot provide. George (1979:59) noted that in examining phenomena in greater detail, focused comparative case studies can identify intervening variables and types of conditions that shape the causal nexus and, in this way, refine theories by making them more explicit.
To increase the ability of case studies to yield cumulation and theory development, Harry Ecktein (1975:99) proposed "disciplined configurative case studies" in which the basis of case interpretation "should always be established theories, or lacking them, provisional ones, and such interpretations can be sound only to the extent that their bases are in fact valid as general laws." By conducting case studies this way, social scientists examine theoretically-relevant questions and empirically test the validity of general theories.

Building upon Ecktein, Alexander George (1979:54-9) created an approach for conducting focused comparative case studies. In the first phase, the researcher identifies the phenomenon for study, any relevant theories, the dependent and independent variables, intervening factors, the causal nexus between variables, and factors that will be held constant. Having identified all these factors, the analyst then selects appropriate cases and formulates his data requirements. In the second phase, the case study is performed with the social scientist first establishing the value of the dependent variable. He then generates an explanation for the case and, finally, "transform(s) the specific explanation into the concepts comprising the
conditions, the independent and intervening variables of the theoretical framework" (George, 1979:57). In the final phase, the analyst, in light of the results of the case study, "assess(es), refine(s), and/or elaborate(s) the theory stated in Phase 1."

Following the work of Eckstein and George, this dissertation identifies the rule of law, specifically its development, as the phenomenon it will examine. This is a theoretically important question because the democratization literature identifies the rule of law as an essential element of stable democracy (O'Donnell, 1996, Linz and Stepan, 1978, Walker, 1988, Weingast, 1997, Cappalletti, 1985, Elster and Slagstad, 1988, Henkin, 1994). Unfortunately, there is little theoretical literature on the development of the rule of law. The comparative judicial literature, however, identified judicial activism as a causal factor and so the judiciary, the Ombudsman, and democracy will be treated here as the independent variables (Holland, 1991, Tate, 1994, Vallinder 1995, Shapiro and Stone, 1994, Stotzky, 1993, Tate and Valliner, 1995). The focused comparisons of post-communist countries holds constant, in most relevant aspects, the
pre-democratic regime type but varies on the dependent variable, the development of the rule of law.

The complexity of the rule of law, the intricate relationship between it and judicial oversight, and the dearth of empirical examinations of its development make the focused case study the appropriate method of investigation. The rule of law and judicial oversight are largely examined on the basis of qualitative data such as interviews with legal experts and political actors and reports by judicial institutions and the Ombudsman's Office. This work does use some quantitative data such as Freedom House's civil and political rights' scores because they suggest the general level of civil and political rights' protection in a country and they allow for national comparisons. These scores are supplemented with country-specific information that identifies particular problems and issues. Quantitative data were also used to assess judicial oversight, including caseloads, and the number of investigations, legal acts annulled, and cases decided against the state. These judicial data are supplemented by information on types of cases and court decisions in order to understand the scope and depth of the judiciary's oversight of the state.
Field research considerations also favored a case study approach. Most of the essential information, such as interviews and government reports, was obtained only through field research. Financial limitations made it impossible to conduct research in more than one country.

Section 1.3.1: Case Selection

Following George (1979:58), after the dependent and independent variables, the relevant theory, and the conditions to be held constant have been identified, the cases are then selected (George, 1979:58). Post-communist Europe presents an interesting context for the study of the rule of law for the economic crisis, the weakness of civil society, the influence of communist political socialization upon elite political culture, the fragility of state sovereignty, and the lack of a democratic tradition seemed to be impassable obstacles to its development. The emergence of effective judicial oversight was equally unlikely because the region’s courts lacked impartiality and independence for over forty years and none of them had a tradition of judicial activism (Letowska and Letowski, 1996:124, Utter and Lundsgaard, 1994). The emergence of judicial oversight in post-communist Europe and its
promotion of the rule of law suggests its robustness as a causal factor.

Although this work presents focused comparisons of post-communist Poland, Hungary, Czechoslovakia and its successor states, Bulgaria, and Romania, it is principally a case study of Poland. The main criterion in selecting a case from amongst the post-communist Eastern European countries was the level of progress in the institutionalization of a democratic system and the development of the rule of law. Because there have been so few empirical studies of the rule of law, it was important to select a country that had been fairly successful in this regard in order to get a better understanding of the processes that were involved with its development. Freedom House (1997) labeled Hungary, the Czech Republic, and Poland as "consolidated democracies" and these countries have been consistently identified by scholars as the vanguard of democratization, marketization, and the protection of civil and political rights (Amnesty International Annual Reports 1990 - 1996, Pehe, 1992:10, Sabbat-Swidlicka, 1992:25, Oltay, 1992:16, Zielonka, 1994:88, Ramet, 1996:99). I excluded the Czech Republic because it has only existed as a political state for a few
years and because of the complicating factor of Czechoslovakia's collapse. That left Hungary or Poland, either one of which would have been a valid choice.

Poland was chosen primarily because of the availability of data and language considerations. Reliable data are available for the superior courts and the Ombudsman's Office. Poland is also the only post-communist state that has an Ombudsman's Office. The Annual Reports of the Commissioner for Civil Rights Protection Office provided invaluable analysis and insight into bureaucratic reforms, the state's adherence to the law, the legal and constitutional quality of regulations, human rights problems, and the performance of such institutions as the police, prosecutors, and the judiciary.

A secondary factor favoring Poland was its greater political significance in comparison with that of Hungary. Poland occupies a more strategic location and its population is three times as large as that of Hungary. Its GDP is twice the size of Hungary's economic output and it has a much larger military (International Yearbook, 1997:508-9 & 512-3). Hence, Poland's political development should have a greater influence upon the future stability of Central Europe.
Section 1.3.2: The Case Of Poland

If we could project ourselves back to the time of the December 1981 declaration of martial rule and the virtual capture of the state by the military, we would be unlikely to predict that Poland would democratize within a decade. With the Communist Party rapidly collapsing, the military responded to the political situation by declaring martial law, outlawing Solidarity, imprisoning thousands of activists, and purging the state of those sympathetic to the independent union (Swidlicki, 1988). Frankowski (1988:740) observed that after martial law was terminated in 1982, General Jaruzelski pursued a "carrot and stick policy" that combined significant structural reform designed to improve the state's respect for the law with repression of the more radical anti-communist opposition (Sabbat-Swidlicka, 1992:25: Rapaczynski, 1993:95). Structural reforms included the establishment of a Supreme Administrative Court which was given the power to review many, but not all, decisions, policies, and regulations of the state bureaucracy (Schweisfurth, 1990:101). Though it remained inactive for a decade, a Tribunal of State was created in 1982 and given the power to adjudicate jurisdictional conflicts between state agencies and to
examine charges against high-ranking government officials (Sabbat-Swidlicka, 1992:30). Three years later, a Constitutional Tribunal was statutorily established and granted the authority to review the legality and constitutionality of most types of statutes and regulations. In 1987, the party-state created the Office of the Commissioner for Civil Rights Protection (Ombudsman’s Office), which was given the authority to investigate citizen complaints about the violation of their rights by the state bureaucracy. Law Professor Ewa Letowska's activism as the first Ombudsman brought a great deal of prominence and popularity to the office (Letowska and Letowski, 1996: 144). Brzezinski and Frankowski (1995:28) posited that although these new institutions were limited by the Communist Party’s monopolization of political power, they “introduced into Polish political culture the notion that government authority derives from its adherence to the rule of law.”

At the 10th Plenum of the Polish United Workers Party (PZPR) in December 1988, the creation of a Rechtsstaat was highlighted as a goal (Schweisfurth, 1990:102). Within three months, the Roundtable Negotiations resulted in an agreement to begin liberalization of the regime. Elections
followed in June of 1989, the first Solidarity government was formed in September, and the first article of the Constitution was amended in December to declare, "The Republic of Poland is a democratic state based on the rule of law and implementing the principle of social justice" (Sabbat-Swidlicka, 1992:25). Having declared a commitment to the rule of law, the newly democratic regime would need to establish the supremacy of the constitution, establish and protect civil rights, institutionalize and expand oversight of public administration, establish the legal liability of officials, and reform the state's legal framework.

Poland emerged from communism with one of the strongest civil societies and a few significant institutions of state oversight and was, therefore, more likely than the other post-communist states to quickly institutionalize a democratic system (Freedom House, 1997). Despite this, the case study of Poland is generalizable for the rest of post-communist Europe because of their recently shared political and economic history that included Leninist single party rule, state socialism, and Soviet hegemony. Poland faced the same severe political and legal obstacles to the rule of law and needed to undertake the
same reforms to establish constitutional government. Specifically, they needed to establish the supremacy of the constitution, rewrite the entire legal code, establish and protect civil liberties, and reform the state administration (which was largely populated by ex-communists). Although Chapter Four shows that democratization proceeded more rapidly and comprehensively in Central Europe than in the Balkans, it also reveals that all of the post-communist countries have experienced some degree of liberal democratic constitutional development.

Section 1.4: Data

The data used in this project include primary materials collected during field research in Warsaw from April through May 1997 and secondary sources gathered in the United States. While in Warsaw, I conducted 20 one-hour long interviews that focused upon Poland’s legal history, its current efforts to establish the rule of law, and the significance of the judiciary as well as other factors in its contemporary legal development. Interviewees included law professors, human rights activists, members of the Sejm (lower house of the Parliament) Chancellery and the Senat (upper house)
Research Bureau, a law professor who served as a judge during the communist era, former Solidarity activists who were members of the Suchocka government (1992 - 1993) and the Walesa administration (1991 - 1995), the President of the Constitutional Tribunal, officials in the Ombudsman’s Office, and members of the Constitutional Commission. Although the number of interviews was relatively small, the degree of expertise and political experience of the interviewees was extensive and, therefore, their judgements are an invaluable component of this dissertation’s assessment of how the rule of law developed in Poland.

The most essential data I gathered during field research in Warsaw are the annual reports of government agencies that have a role in state oversight and the protection of constitutionalism. These include the Supreme Court, the Supreme Administrative Court, the Constitutional Tribunal, and the Office of the Commissioner for Civil Rights Protection. My assessment of the judiciary’s role in the establishment of the rule of law is based mainly upon the information contained in the former three sources. The Courts’ reports contain caseload figures including breakdowns of the types of cases and the decisions of the courts. The Constitutional Tribunal reports are a little
less systematic in reporting these figures. Each court’s reports describe its current jurisdiction and noted any legal changes in its authority. They also present written analyses of the courts’ work in the preceding year and examine the most significant cases. The reports also contain administrative information such as personnel changes.

The Annual Reports of the Office of the Commissioner for Civil Rights Protection is the primary source of data concerning the state administration’s degree of conformity with the law and the constitution. These reports are particularly insightful because they are written by officials who daily oversee, examine, and interact with the state administration. As Guillermo O’Donnell noted (1996:39-40), it is difficult to assess the degree of congruence between the laws and the behavior of state officials. Fortunately for those who study Poland, the annual reports of the Ombudsman’s Office provide comprehensive analyses of the state bureaucracy’s effectiveness and its adherence to the law. The reports identify improvements in public administration, problems still lingering from the communist era, and those newer difficulties that have resulted from marketization and
other systemic changes. Officials from the Ombudsman's Office also analyze the legality and constitutionality of regulations, statutes, and bills in the Diet.

The Ombudsman's annual reports provided information on other aspects of this project. Through its investigations and interactions with the state bureaucracy, the Office has gained extensive first-hand knowledge of the human rights situation. This experience provides insights beyond constitutional guarantees or statutes to the reality of the state's respect for the rights of private citizens. The Ombudsman's reports also provided important information about the judiciary. The Office works closely with the courts. It is, for example, the primary source of appeals received by the Constitutional Tribunal. The Ombudsman's reports were, therefore, important in assessing the judiciary's influence upon the rule of law.

These primary materials were supplemented by secondary sources. Most notable among these were the annual reports of Amnesty International, Freedom House, and the Organization for Security and Cooperation in Europe (OSCE) which were used to assess civil liberties. East European Constitutional Review provided information as well as analysis by legal experts on constitutionalism, civil
liberties, and the performance of the judiciary. Foreign Broadcast Information Services (FBIS) was the most comprehensive source of daily political events.

Measuring the rule of law is difficult because it is a complex qualitative phenomenon. The data should indicate that the hierarchy of law has been established with the constitution at its apex. The constitution should establish a democratic political system with a separation of powers, and it should also contain self-executing articles that guarantee a number of basic civil and political rights. The constitution should also establish the legal equality of all people. Freedom House scores and other qualitative data should manifest a dramatic improvement in the protection of rights and any violations that do occur should not appear to be systematic patterns but rather isolated incidents.

In examining the state’s adherence to the law, I would expect that the nomenklatura was broken and that reforms had been implemented to professionalize the civil service. The political and legal accountability of all state officials should be established. There should also be evidence of a deconcentration of decision-making authority in the state and an increase in the transparency of public
administration. As a result of these reforms, analysts, such as the Ombudsman, should report an improvement in the quality of public administration and an end to the state bureaucracy's systematic abuse of the law.

For the data to show that judicial oversight had been established and was affecting the rule of law, I would expect to see during the post-communist period a significant increase, around 50%, in the caseloads and decisions of the superior courts. I would expect to see a similar increase in the number of investigations and appeals undertaken by the Ombudsman's Office. A significant increase in their activity suggests that the judiciary is putting the state under greater constitutional and legal scrutiny and public officials are being held accountable for their actions and policies. Along with this quantitative increase in their decisions, the data should show a qualitative increase in the willingness of the superior courts to adjudicate constitutional issues, establish the legal accountability of state officials, protect civil and political rights, defend due process, enforce constitutional principles, and render judgements that limit the power of the state.
Section 1.5: Summary

Allow me... to suggest that in this setting it will be demagogues, priests, and colonels more than democrats and capitalists who will shape Eastern Europe’s general institutional identity (Jowitt, 1992:220).

It would seem that Central Europe’s post-communist institutional identity has been more decisively shaped by democrats, capitalists, economists, jurists, lawyers, and even the odd historian or playwright than by the authoritarian figures suggested by Jowitt. The post-communist Central European countries have established democratic systems with civil and political rights, undertaken constitutional and legal reform, and begun to reform their state bureaucracies (Zielonka, 1994, Sabbat-Swidlicka, 1992, Brzezinski and Garlicki, 1995). This work shows that democratization and judicial oversight were crucial factors in that region’s development of the rule of law.

Chapter Two provides a theoretical orientation for this work by providing a delineation of the concept of the rule of law and an exploration of its relationship with democracy. Chapter Three then examines the rule of law during the period of the Polish People’s Republic (1947 – 1989), highlighting obstacles to the rule of law that were
inherited by the post-communist government and also scrutinizing the post-martial law institutional reforms. It also takes a comparative look at civil society across communist Eastern Europe and examines its effects upon the 1989/90 political transitions. Chapter Four explores the legal establishment of civil and political rights, constitutional and legal reform, and the reform of the state in post-communist Poland. Post-communist Poland’s political development has earned Freedom House’s highest score for political rights and its second highest for civil liberties (Freedom House, 1997). Chapter Four also presents a comparative analysis of the development of the rule of law in post-communist Eastern Europe and finds it to be more advanced in Central Europe than in the Balkans.

Chapter Five provides systematic evidence that the judiciary and the Ombudsman’s Office were crucial factors in Poland’s constitutional development as they both experienced significant increases in their authority and their level of activity. The data show a marked increase in the willingness of the superior courts to adjudicate constitutional issues, establish the legal accountability of state officials, protect civil and political rights, defend due process, enforce constitutional principles, and
render judgments that limit the power of the state.

Chapter Five also assesses the autonomy and performance of the judiciaries in post-communist Europe and finds a significantly increased level of judicial activism across the region.

Section 1.6: Endnotes

1 Huntington (1991:7) wrote that a democratic system may be defined as democratic to the extent that:

"its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote."

2 Frentzel-Zagorska (1990:759) defined civil society as:

"a structure of the self-organization of society outside though not disconnected from the institutional framework of the state."

Bruszt and Stark (1992) wrote that civil society "under state socialism (here) refers to the self-organization of society in spheres of activity relatively autonomous from the state." Borrowing from Markus (1984), Frentzel-Zagorska identified the basic function of civil society as linking the goals of the state with those of the independent population through different mechanisms of mediation. This involves:

a) the elaboration of those normative structures through which groups identities and interests are defined

b) elaborations and expressions of the encompassing collective identities of (a) given society including the
definition of its traditions, its hierarchy, and its norms of social behavior.

3 The work of noted Polish sociologist Jadwiga Staniszkis (Adam and Heinrich, 1987:117) suggests that in the case of Poland these instrumentalist and majoritarian political attitudes may also result from the experience of opposition to the communist regime. Examining members of Solidarity, she found a prevailing “us versus them” attitude, a strong sense of political moralism, and a crusader mentality. Staniszkis (Adam and Heinrich, 1987:117) observed that these attitudes weakened pluralism and tolerance within a Solidarity whose members exhibited a strong faith in leadership but placed much less value upon institutions and the law. Political moralism and a crusader mentality may be necessary for an opposition movement within a Leninist regime, but these attitudes are not conducive to democratization. A willingness to compromise and a tolerance of pluralism are important for democratic stability (Almond and Verba, 1963). A crusader mentality may easily lead to legal instrumentalism in the pursuit of some perceived greater good.

4 Bruszt and Stark (1992) and Freedom House (1997) argued that the dynamic of each post-communist transition was shaped by the strength of civil society relative to that of the Communist Party. Bruszt and Stark, (1992:14-5) wrote that, “Civil society would be more or less strong depending upon the level of development of social and economic autonomy, independent political organization, and civic values.” They explained that the strength of a civil society must be understood “in relation to the forces obstructing (or promoting) change inside the ruling elite. In other words, civil society’s degree of strength and the Communist Party’s perception of this strength influenced the dynamics of each post-communist country’s political development. Bruszt and Stark characterized the Party-states as “cumbersome but weak bureaucracies, ineffective for achieving the goals of economic growth and social integration, headed by demoralized leaders whose belief in their own ideologies had withered apace with the exhaustion of their political and economic programs.”

Stronger civil societies in Central Europe produced democratic movements that early in the transition process took control of political development. In the Balkan
countries, civil society was relatively weak, and the reform communists maintained political control of the state and the process of political change.

Institutions are relatively coherent and autonomous entities with their own goals and interests (March and Olsen, 1984:738). March and Olsen posited that their coherence is generated by their "standard operating procedures and structures that define and defend their interests." They are autonomous to the degree that they establish and pursue their own collective goals independently of other political agents and social forces.

Burton, Gunther, and Higley (1992:5) defined an unconsolidated democracy as one "where the trappings of procedural democracy exist and there is substantial mass participation, but where there is no real elite consensus about democratic rules of the game and institutions, and where elites are instead disunified in that they distrust and have little traffic with each other." Linz and Stepan (1996:15-6) noted that the presence of "reserve domains" or areas of the state that are beyond the control of elected officials indicates that a regime is not fully democratic. O'Donnell and Schmitter (1986:9) observed that limited democracies may also be characterized by limitations upon political participation.

"Weak constitutionalism"/"arbitrary rule" refers to states whose behavior can be characterized by either systematic violations of civil and political rights and equality before the law, or serious violations of the constitution.

De Haan, Silvis, and Thomas (1991:351) wrote that the concept of "Rechtsstaat" developed in German legal philosophy and denoted "the sovereignty of the law and the state without the backing of a sovereign parliament." Gwizdz and Zawadzki (1984:29 - 31) explained that in a "socialist rechtsstaat" the working class and, therefore, the Communist Party, would remain sovereign but the state would exhibit strict observance of the laws. In addition, representative bodies would be superior to administrative ones and civil and social rights would be respected by the state.
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CHAPTER 2

THE RULE OF LAW

This chapter defines the rule of law and highlights characteristics that in the succeeding chapters will be examined in the context of communist and post-communist Europe. Democratic theorists largely agree that the rule of law is an essential condition for the stability and the persistence of democratic government (Holmes, 1988:232, Huntington, 1991:213, Linz and Stepan, 1978, O’Donnell, 1996:44, O’Donnell and Schmitter, 1986:7, Sejersted, 1988:131, Stotzky, 1993, Sunstein, 1988:327). The rule of law exists when the state predominantly exercises its authority in accord with the laws and when all statutes, regulations, and government policies are congruent with the democratic constitution.

The concept of the rule of law has its roots in Western antiquity. The ancient Greeks and Romans accepted the existence of "natural law," a philosophical belief
system that had as its core the proposition that a higher and more just law than the positive law created by man exists in nature (Maritain, 1951:84-5). Aristotle argued the virtues of constitutional government wherein the positive law is limited by the principles of natural law (The Politics, Book VII, Chapters XII-XV).

Despite its ancient pedigree, Hannu Tapani Klani (1985:2) and Geoffrey Walker (1988:1) observed that the modern rule of law is an expression of liberalism and a description of the legal order in a liberal democracy. Carl Schmitt (quoted in Slagstad, 1988:106) posited that underlying this liberal constitutionalism is the desire to replace "ruling" or the arbitrary will of leaders with governance based upon impersonally valid norms. Ronald Dworkin (Walker, 1988:4) argued that supporting this desire for limited government is "the presupposition that people have moral rights prior to positive enactment (by the state)." Dworkin meant that people have inherent rights and the state's legislative power in the area of these rights should be constitutionally restricted. Limitations upon the state's authority ensure the existence of a private realm of personal autonomy (Walker, 1988:11).
Section 2.1: Defining The Rule of Law

Synthesizing the works of others, (most notably Walker, 1988, Bax and van der Tang, 1993, Monahan, 1987, Rosenfeld, 1994, and Elster and Slagstad, 1988), I define the rule of law as:

A political condition wherein elected officials and administrative bureaucrats exercise the power of the state predominantly in accord with universalistic laws. These laws conform to a prescriptive constitution that sits at the top of the hierarchy of laws. The constitution also recognizes and protects the legal and civil equality of all citizens.

For this project, I distinguish two aspects of the rule of law: constitutionalism and the state under the law. Constitutionalism encompasses the supremacy of the constitution, the congruence of laws and the constitution, and the presence of civil liberties. The state under the law refers to the congruence between the exercise of the authority by state officials and the laws, the transparency of the exercise of state authority, and the legal accountability of state officials.
Section 2.1.1: CONSTITUTIONALISM

Constitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed (Elster, 1988:2).

The whole wretchedness of so-called actually existing socialism can basically be traced back to a reckless disdain for the principles of the constitutional state (Jurgen Habermas quoted in Cotterrel and Bercusson, 1988:2).

Constitutionalism is the most basic element of the rule of law for, as Jon Elster (1988:2) noted, it creates fundamental limitations upon the executive and legislative authority of the state. Bruce Ackerman (1992:47) argued that it was important for the new governments in post-communist Europe to take advantage of the “revolutionary moment” of the early 1990’s to establish constitutionalism and thereby distinguish themselves from their communist predecessors. He (1992:21) observed that constitutions can serve as a strong legitimating device for new democracies and, as in the Bonn Republic, they can become a focus of patriotism (Finn, 1991:182). Stephen Holmes (1994:232) referred to this as an opportunity for the regime founders to express their “precommitments,” or the cardinal principles that will guide the political system, including
those that recognize the fundamental rights and liberties of all individuals.

Unlike the Stalinist constitutions of the party-states which were primarily ideological statements of principles and exhaustive lists of goals that the party-states did little to bring into reality, liberal democratic constitutions function as prescriptive law (Henkin, 1994:41). Prescriptive laws have a determinative influence over matters that are covered by their substantive content. Communist constitutions were not prescriptive law because they contained provisions that subordinated them to the Communist Party and most of their provisions were not self-executing but required further legislation to become effective (Ackerman, 1992:61). A prescriptive constitution is not subordinated to any political party and most of its provisions are self-executing. It also establishes the authoritative rules of the political system, binding the state to a set of norms and principles, which collectively define and limit its authority (Sejersted, 1988:133).

The constitution, as the supreme prescriptive law, creates procedural and substantive limitations upon the state’s legislative power, and, in some sense, upon the will of the majority. Dominique Rousseau (1994:273) argued
that although this may seem to limit or even violate democracy, the "general will" is not usually expressed through majoritarian parliamentary institutions. Walker (1988:367) pointed out that, "party discipline, elite manipulation, and the influence of pressure groups intervene between the voter and the legislator." In order to protect the basic principles of the regime, the prescriptive constitution makes the legislator "an object of its own power," hence limiting the exercise of his power (Sejersted, 1988:144). H.L.A. Hart (in Hampton, 1994:24) referred to these norms as "metarules" ("metanorms" in Sejerestad, 1988:140) which are "rules of recognition" identifying what constitutes valid law. In other words, all statutes, regulations, and other legal norms must be congruent with the constitution in order for them to be considered legally valid. Sub-statutory laws should also be consistent with the statutes that they supplement, and their substantive content must not be broader than stipulated in the originating legislation (Letowski and Letowska, 1996:69).

The discriminatory function of metarules facilitates the development of consistency, congruence, and uniformity within the body of the law because they reflect the same
basic principles (Letowska and Letowski, 1996:16, Sejersted, 1988:144). This is important because people bind themselves to rules to interact with, and be understood by, others (Finn, 1991:26). In the contemporary period, laws have become increasingly salient because increased social and economic interdependence has generated a need for extensive legal norms to ensure regularized interaction (Klani, 1985:1). Observing the confusion caused by the presence of laws from the interwar, communist, and contemporary periods, the Polish Supreme Court (Supreme Court Annual Report, 1990:3) recognized the need for a new a democratic constitution that would catalyze and guide the homogenization of the legal code.

Andrew Arato (1994:171) reasoned that to ensure the stability of the constitution’s substantive content constitutionalism requires that the constitutional amending process should be "more democratic" than normal politics. The amending process should require super-majoritarian support, such as the assent of two-thirds of the legislature and, perhaps, the holding of a popular referendum (Ackerman, 1992:14). This check prevents simple legislative majorities from affecting the fundamental character of the regime and ensures the stability of its
constitutional principles. Conditions for suspending the constitution should be highly specific in nature, limited in duration, and some mechanism outside of the emergency authority should exist to review any extensions of its duration (Finn, 1991:26).

Liberal political theorists are largely in agreement that civil liberties are an important component of constitutionalism and the rule of law (Ackerman, 1992:12, Walker, 1988:11, Rosenfeld, 1994:13, Elster and Slagstad, 1988:4). Ackerman (1992:24) noted that rights create “a rich set of techniques for collaboration in the pursuit of individual interests and, according to Ulrich Preuss (1991:363), they allow civil society to “drive history.” Equally important, they recognize and protect the freedom and legal equality of all citizens (Walker, 1988:25). They create a "framework for the individual to plan and choose a lifestyle" that will fulfill his or her human potential (Walker, 1988:11).

The post-war rebirth of natural law philosophy within the European legal community has popularized the view that rights inhere in personhood and not on the basis of citizenship (Finn, 1991:33, Vallinder, 1994:96). This view of rights is reflected in the United Nation’s Declaration
of Human Rights (1948) and has become particularly prominent in European constitutional adjudication. The state, therefore, is not normatively in a position to deprive individuals of these rights, although it may define their content and means of expression. Rights are superior to positive law (Walker, 1988:4) and therefore their substantive content should be primarily defined by constitutional articles and not statutes. Freedom House (Ryan, 1994:10-1) identified civil liberties as:

1) Freedom of expression which includes the independence from the state of the mass media, literature, and other cultural expressions.
2) Freedom of public and private discussion.
3) Freedom of political and non-political organization, including trade union, professional organizations, civic associations, etc.
4) Equality before the law, due process, and guaranteed access to an independent judiciary.
5) Equal protection of all people from torture, exile, or other forms of violence.
6) The right of private property, and the right to own business enterprises and to carry out commercial activities.
7) Freedom of religion including the rights to build religious institutions and of public and private religious expression.
8) Personal social freedoms including gender equality, freedom of movement, choice of residence, choice of marriage, and size of family.
9) Equality of opportunity including the freedom from exploitation and denigrating obstacles to a share of legitimate economic gains.
For the preservation of civil liberties, it is important that laws be reasonably clear in their meaning (Walker, 1988:25). If laws are to guide human interaction and create behavioral expectations, then they must be intelligible to a cross-section of society. Ambiguous laws create the potential for their instrumental use to serve the goals of the state or an economic elite (Weinrib, 1987:61). Legislation of this type has a "chilling effect" on society as people become more circumspect in their behavior. Croatian journalist Slavenka Drakulic (1991:81), for one, noted that the communist governments used vague censorship laws to create uncertainty and self-censorship amongst writers.

Section 2.1.2: The State Under The Law

Succinctly expressed by Juan Linz and Alfred Stepan (1996:19), the rule of law exists when the "discretionary powers (of state officials) are defined and increasingly limited" and "citizens can turn to courts to defend themselves against the state and its officials." Linz and Stepan have captured the essence of the rule of law: government in accord with the law and not the discretion of individual state officials. Pelle (1993:119), however,
argued that arbitrariness, not discretion, is the prime obstacle to the rule of law. Discretion is, in fact, an essential component of modern public administration. With the dramatic post-war expansion of the state’s regulatory and distributive functions, state officials are encountering novel situations to which they must respond guided at least in part by their own personal judgments.

If discretion is a necessary element of public administration in a modern state, how can a democratic regime prevent the abuse of power and protect the legal equality of all people? The answer for Pelle is the establishment of “state control” or the accountability of public officials. Pelle (1990:199) wrote that control of the state bureaucracy means, “being informed about, checking, judging, and possibly redressing the way in which a competence has been or will be made use of...”

Bax and van der Tang (1993:87) explained that the key ingredients for establishing the accountability of the state administration are universalistic and general laws, procedures based upon due process, and the presence of independent oversight agencies. Universalistic and general laws apply equal standards and responsibilities to all similarly situated peoples (Sejersted, 1988:134; Macedo,
1994:149; Walker, 1988:24; Weinrib, 1987:59). They also provide a framework for public administration to implement policy. Public administration procedures, such as hearings, investigations, assessments of fines, should operate on the basis of due process. Procedural safeguards of citizens' rights should condition the state's exercise of power and allow people to challenge administrative decisions. The state, for example, should not be able to assess fines, confiscate property, or confine people to a mental institution in the absence of formal proceedings that operate on the basis of due process.

Oversight takes the form of either political or legal control (94-5). Political control of the state bureaucracy is performed by the legislature, the executive cabinet, and the executive's public administration appointees. Legal control, enforcing the legal accountability of state officials, is performed by the Ombudsman's Office and the judiciary. The establishment of the legal accountability of state officials makes them more aware of the laws and more willing to abide by them because they fear the threat of judicial sanctions (Jan Malec Interview, April 1997). Justice Janusz Letowski of the Polish Supreme Court (1993:7-8) felt that the increased accountability of public
officials would also encourage a higher degree of professionalism, greater transparency of its operation, and the development of an attitude of public service among state functionaries.

Chapters Three and Four compare the state under the law during the communist and post-communist periods in Poland by looking at: Systematic violations of the law, the degree of state officials' legal and political accountability, the level of due process in administrative proceedings, the concentration of power within the state, the presence of corruption, and the quality and efficiency of public service.

Section 2.2: Summary

The rule of law is characterized by the predominance of regularized law-bound state behavior and the laws' conformity with the constitution. This facilitates the autonomy of civil society and the individual. Prescriptive constitutions, universalistic laws, procedures based upon due process, and institutions of oversight also protect the fundamental integrity of the democratic system, ensure minority rights, and thus contribute to the legitimacy of a democracy. The following chapter examines legality during
the Polish People’s Republic (1947 - 1989), highlighting
the absence of both constitutionalism and a state under the
law.

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CHAPTER 3

THE LENINIST LEGACY AND THE DEVELOPMENT OF THE RULE OF LAW

This chapter examines constitutionalism and the state under the law during the Polish People’s Republic (1947 - 1989) with a particular view to identifying obstacles to the rule of law that were inherited by the post-communist regime. In the area of constitutionalism, these obstacles included the lack of a prescriptive constitution and the absence of an institution that could enforce the basic law (Brzezinski, 1993a:168). Many of the constitution’s provisions were not self-executing, and their implementation required further legislation, which left the Communist Party (PZPR) free to define and amend the constitution. In addition, civil liberties and other individual rights such as due process were not securely established by law and were regularly violated by the Party-state (Stefanowicz, 1989:175). Finally, the body of Polish law was also an incoherent blend of statutes and

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regulations that were not consistent with each other 
(Lopatka and Szklenik, 1990).

Obstacles to the state under law included the 
Communist Party's monopolization of state authority 
("nomenklatura system"), state officials' lack of legal and 
public accountability, the highly centralized nature of the 
Polish state, and the inefficient and arbitrary style of 
public administration (Letowska and Letowski, 1996:11).

Chapter Three also examines the post-martial law creation 
of oversight institutions such as the Constitutional 
Tribunal, the Supreme Administrative Tribunal, the Tribunal 
of State, and the Ombudsman's Office. It is important to 
examine the establishment and early development of these 
institutions because, in the post-communist period, they 
were all significant factors in Poland's development of the 
rule of law.

The chapter concludes with a focused comparison that 
puts the "Leninist legacy" into comparative perspective. 
This shows that over the course of the communist period the 
Central European countries had experienced greater 
liberalization, including a more advanced degree of 
legality and civil and social rights, than the Balkan 
states (Freedom House, 1985 & 1986, Sharlet, 1989,
Frentzel-Zagorska, 1990). By the end of the 1980’s, civil society in Central Europe was relatively developed and produced democratic opposition movements that defeated the communists, entered into government, and controlled the process of political development (Bruszt and Stark, 1992, Vachudova and Snyder, 1997, Munck and Leff, 1997). The weakness of civil society in the Balkans, relative to the region’s Communist Parties, allowed the communists to weather the regime changes and, thereby, control the process of political institutionalization.

Section 3.1: Constitutionalism

Constitutional norms.... [are] unsuitable for direct practical application in (the) everyday life of society without being expanded in ordinary statutes and other normative acts. (1955 Decision of the Polish Supreme Court quoted by Brzezinski, 1993a:168).

Constitutionalism, the supremacy of constitutional norms and principles, is a fundamental component of the rule of law (Sejersted, 1988:144). The Communist Party’s monopolization of political power was, however, incompatible with constitutional government. Mark Brzezinski (1993a:168) observed that communist constitutions could not function as supreme prescriptive
law because many of their provisions were not self-executing and, consequently, their implementation required further legislation, which left Communist Parties free to define and amend their constitutions. Executive bodies such as the Council of State, the Council of Ministers, and even administrative agencies could interpret and amend the basic law through their decrees because the Sejm always approved these substatutory legal norms. The supremacy of the Communist Party over the constitution is a reflection of the Marxist constitutional principle "the unity of power," which is the concentration of all power in the vanguard of the working class, the Communist Party (Rigby, 1982:13).

The first source of constitutional law in Soviet-occupied Poland was the 1944 "July Manifesto" which was issued by the Political Committee of National Liberation, an interim executive body whose members were selected by Soviet Premier Josef Stalin (Kos-Rabczewicz-Zubkowski, 1970:264). The Manifesto reestablished the democratic 1921 Polish Constitution but with certain revisions (Gwizdz and Zawadzki, 1984:14). The authors of the Manifesto, for example, declared that the working people had seized the state and would rule through local and industrial
assemblies called “People’s Councils.” The proletariat, and by implication its vanguard the Communist Party, was declared to be the primary source of constitutional law.

The “Little Constitution,” adopted on February 19, 1947 by a Sejm that was compromised by the electoral machinations of the Polish Communist Party (PZPR), affirmed the 1921 Constitution with the additions of the July Manifesto (Kos-Rabcewicz-Zubkowski, 1970:264). The Little Constitution gave the Council of State, a collective executive body, the authority to legislate via decrees between sessions of the Sejm. The Council of State was controlled by the PZPR and it used the collective executive’s decree power to establish a Leninist regime that clearly diverged from the representative system envisioned by the Little Constitution (Lopatka and Szklennik, 1990:325).

As part of the Stalinization of the Polish state, the PZPR promulgated a new constitution in 1952 that reflected the substance and language of the 1936 Soviet Constitution. Its first Article declared Poland to be a “people’s republic.” Basic principles of the document included the sovereignty of the working class, social ownership, the greater importance of equality over individual rights,
parliamentary sovereignty, citizen obligations, and social and economic rights (Stefanowicz, 1989:177-8; Gwizdz & Zawadzki, 1970:25 & 28). It said nothing about the constitutional role of the Communist Party. The Party was, however, the representative and leader of the working classes, and the constitutional principle of the sovereignty of the proletariat meant that in theory the Communist Party held sovereign authority (Brzezinski and Garlicki, 1995:25). The Communist Party's leading role was given constitutional recognition belatedly in a 1976 amendment. But even this failed to clearly specify the role of the Communist Party and, therefore, its relationship to the other institutions of the regime remained ambiguous (Gwizdz & Zawadzki, 1970:17; Brzezinski & Garlicki, 1995:26).

Brzezinski and Garlicki (1995:21) observed that the 1952 Constitution did not function as the supreme prescriptive law and, therefore, constitutional principles were not really the foundation and source of state behavior. For them, an indication of its weakness is that in only thirty-six years it was amended seventeen times. This frequent amending also created a constitution in which many of the articles contradicted each other.
Section 3.1.1: The Morass of Polish Law

As a result of the Constitution's inability to function as the supreme prescriptive law, statutes, regulations, and other administrative laws often did not conform to the basic law (CCRP, 1988:10). The congruence of all legal acts with the constitution is a characteristic of constitutionalism and, therefore, the rule of law. Law Professors Adam Lopatka and Anna Szklennik (1990:335-6) argued that because Poland lacked both a clearly specified hierarchy of legal norms and a definitive statute or constitutional provision to clarify the legislative process, the body of law became an incoherent mix of statutes, decrees, ordinances, instructions, ministerial regulations, and circulars. Walker (1988:25) noted that if the law is to be a guide for the state and a limitation upon its authority, then it must be internally consistent and relatively clear in its meaning. The Polish Supreme Court (1990:3) recognized that the post-communist regime inherited an incoherent mix of legal norms and this was an obstacle to the rule of law.

Lopatka and Szklennik (1990:325) identified the executive bureaucracy as the primary cause of the law's incoherence. The Sejm often delegated its legislative

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authority to the Council of Ministers or an individual minister or ministry (Piekalkiewicz, 1970:374). The substance of “delegated legislation” was supposed to be restricted to matters of policy implementation but they usually had a substantive scope that was characteristic of original legislation since their boundaries were never adequately established. It was also problematic for the rule of law that administrative agencies were essentially writing the laws that were supposed to guide and limit their behavior (Lopatka and Szklennik, 1990:336). Lopatka and Szklennik (1990:335) observed that administrative regulations were generally poorly written. Polish legal scholar Christopher Stefanowicz (1989:177) added that, “the most remarkable obstacles or direct violations of civil rights can be found in administrative regulations.” The coherence of the body of law and the rule of law were also undermined by the abundance of “circulars” issued by central state ministries which omitted the texts of laws and instead presented an interpretation of them to be applied by administrators (Lopatka and Szklennik, 1990:335). Much of the regulations created by the administrative bureaucracy remained unpublished, and therefore, unknown to the public (Piekalkiewicz, 1970:376).
The Council of Ministers frequently bypassed the Sejm in creating national legislation by simply instructing all of the presidia of the People’s Councils, the local legislatures, to approve the exact same version of a bill (Piekalkiewicz, 1970:375-6). People’s Councils also added to the legal morass by issuing binding injunctions and opinions upon local organs of state administration (Rybicki, 1984:88-90).

Section 3.1.2: Civil Liberties

The weakness of the 1952 Constitution and the incoherence of the law enfeebled constitutional and statutory guarantees of political, social, economic, and cultural rights. Furthermore, the executive bureaucracy’s ability to legislate without reference to the constitution or statutes resulted in the creation of numerous regulations that undermined basic human rights (CCRP, 1989:85).

The weakness of individual rights in the party-states was rooted in socialist legal theory. Soviet Ambassador to the UN Andrei Vyshynski explained that the rights of individuals vis-a-vis the state were irrelevant in a classless society because the Party ruled in the interests
of the proletariat and, therefore, citizens did not need legal protection from the state (Baehr, 1990:186).
Adhering to the Soviet position, Poland was one of a handful of countries that abstained during the 1948 vote on the United Nations' Declaration of Human Rights (Baehr, 1990:187).

Despite their theoretical opposition to the concept of rights, communist leaders included political, economic, social, and cultural rights in their constitutions. The 1944 July Manifesto and the 1952 Constitution both included a list of personal rights; however, these rights were conditioned by clauses that, in practice, limited their exercise. For example, a clause in the July Manifesto stipulated that individual rights were not to be exercised "in the service of the enemies of democracy," was used by the PZPR and its Soviet "advisers" in the Interior Ministry and the Military courts to limit and deny the civil and political liberties of their opponents (Chrypinski, 1970:182, Gwizdz & Zawadzki, 1984:15). Similarly, none of the articles in the 1952 Constitution covering civil, economic, social, or cultural rights was self-executing; taken together, therefore, they required further statutes and regulations to define their scope (Frankowski,
argued that these rights were simply statements of policy goals and they did not entitle individuals or groups to make claims against the state (Frankowski, 1988:743). Stefanowicz (1989:178) agreed that the list of rights held an "aspirational declarative meaning." Constitutional obligations were as important as rights for they were often used by the authorities to undermine the exercise of civil liberties (Stefanowicz, 1989:49). The obligation not to "abuse freedom of conscience," for example, was employed by the Leninist state to harass practicing Catholics and the clergy (Gwizdz & Zawadzki, 1984:18-9).

Given the legally ambiguous nature of individual rights, it is not surprising that the party-state regularly violated both international standards of human rights and those guaranteed by the 1952 Constitution (Amnesty International Annual Reports, 1980 - 1989). The totalitarian period (1947 - 1953) was, in particular, characterized by the ruthless suppression of both individual and social freedom. Nationalization of industry, commerce and even service businesses, along with the collectivization of agriculture, destroyed private property (Chrypinski, 1970:183). The law barring "abuse of
freedom of conscience" resulted in the arrest of over 1,000 Catholic clerics, including the Primate of Poland Cardinal Stefan Wyszynski. Wasek and Frankowski (1995:285) maintained that in the late 1940's and early 1950's the number of political prisoners exceeded 100,000 out of a total population of just under 25 million; 65,000 people were sentenced for anti-state offenses and 12,000 people were executed. Adam Zamoyski (1995:370) estimated that there were 16,000 executions.

Liberalization of individual and social rights began with Wladyslaw Gomulka's accession to power in 1956 and continued over the course of the communist period (Zamoyski, 1995:380). This liberalization catalyzed a rebirth of Polish civil society, which, in turn, became a force that pressured the party-state for further liberalization. As a result, Polish civil society, along with that in Hungary, was the most highly developed within the communist bloc (Frentzel-Zagorska, 1990:759, Bunce, 1991:408-9, Schopflin, 1990:242-3, Sharlet, 1989:164-5, Freedom House, 1985).

Liberalization and the rebirth of civil society began with the decollectivization of agriculture in the late 1950's. Although socialist forms of property were given
greater protections and privileges under the law, private agriculture flourished and created a large class of people who maintained a degree of economic independence from the state (Los, 1988:77). Party officials had to consider their interests and consult with them on agricultural policy. The presence of private property was also an obstacle to the communist regime's transformation of Polish law. Much of the interwar codes, particularly the Civil Code, had to be retained and judges and lawyers needed to be conversant with its contents (Chrypinski, 1970:180).

Like the decollectivization of agriculture, the reestablishment of religious freedom and the autonomy of the Catholic Church, within limits, were both significant steps in the regime's liberalization as well as policies that contributed to civil society's redevelopment. Robert Sharlet (1989:165) wrote that, "The Polish contra-system (civil society) is the most highly developed in the European communist states, in large part because of the temporal prestige and spiritual power of the Catholic Church in Poland." Limitations upon religious freedom included the state's surveillance and periodic harassment of the clergy and practicing Catholics and the Department of Religious Affairs' attempts to neutralize the Church as
a social and political force (Swidlicki, 1988:307). Until the constitutional amendments of 1976, "abuse of freedom of conscience" remained a potential weapon the authorities could use against the clergy and religious believers (Gwizdz & Zawadzki, 1970:18). Despite this, the Catholic Church emerged from the totalitarian period as one of the most powerful institutions in Poland. The Church published newspapers and journals, maintained hospitals, ran the Catholic University of Lublin, and fulfilled its spiritual responsibilities (Chrypinski, 1988).

The political implications of the Church's autonomy were severalfold. As with the landholding peasantry, state officials frequently had to negotiate with Church officials. Cardinal Wyszynski and after him Cardinal Glemp represented, and lobbied for, the interests of the Church and oftentimes for those of Polish society. During the major crises and upheavals of the communist era of 1956, 1968, 1970, 1976, 1980/81, and finally in 1989 the Church leadership was brought into negotiations by regime officials (Chrypinski, 1988:253-4).

Themes of human rights protection with their implicit criticism of the government were articulated by the Church. As early as 1946, the episcopate issued pastoral letters.
and appeals condemning censorship, the deprivation of rights, and the use of torture (Chrypinski, 1988:252). In its pastoral teachings, the Catholic Church promoted humanism and stressed that the inherent dignity of the individual was a reflection of God (Chrypinski, 1988:253). Cardinal Wyszynski condemned the government's 1968 anti-Semitic policies. Within the Catholic intelligentsia, a number of groups formed that concerned themselves with the protection of human rights.

Along with its political visibility and concern with human dignity, the Catholic Church also possessed material resources and a mass membership that could be mobilized in support of a cause. Its resources included the University of Lublin, printing presses, journals and newspapers, buildings, and a disciplined structure that was both supranational in nature and yet reached down into the smallest village. In addition, its reputation was immaculate since, unlike the Catholic Churches in Croatia or Slovakia, it had not collaborated with the Nazis. The Church was a national symbol that had successfully defended Polish culture since the era of partition (1794 - 1918) (Chrypinski, 1988:248).
The restoration of the Catholic Church's autonomy, the reestablishment of the independent peasantry, and the development of a labor movement in the late 1960's and early 1970's signaled the rebirth of Polish civil society. Civil society pressured the regime for further liberalization and, as a result, the exercise of civil liberties was more widespread and society had more autonomy in Poland than in the other post-totalitarian countries, with the possible exception of Hungary (Frentzel-Zagorska, 1990:759, Bunce, 1991:408-9, Schopflin, 1990:242-3, Sharlet, 1989:164-5, Freedom House, 1985). Samizdat literature and "flying universities" flourished in Poland by the 1970's. Associational life also began to develop at this time. Despite the presence of a state censorship inspectorate, Freedom House (1985:327, 1986:155) found that by the mid-1980's the press was "partly free" as private underground newspapers were published and independent radio stations were sporadically broadcasting. Freedom House (1985) recognized the growth of Polish civil society and the increased level of civil rights and so in the late 1970's it raised Poland's score for civil liberties from "6" (the second worst) to "4" (the middle of the range). As the party-state grew weaker in the 1980's, it had to
tolerate greater social autonomy, though it occasionally cracked down upon political dissidents, imprisoning a relatively small number of them (usually less than 100) (Amnesty International Annual Reports, 19890 – 1989, Sharlet, 1989: 201, & 208-9). Administrative policies and regulations regularly violated the rights of individuals and groups within society. The regime, however, could not halt the development of civil society.

Section 3.1.3: Due Process

Due process is an important civil liberty. The level of due process in judicial and administrative procedures affects people’s ability to validate their rights and to protect their basic physical personhood from being violated by the state (Holland, 1991:21). In communist Poland, this level was quite low as the judiciary lacked the independence and authority to uphold due process (Stefanowicz, 1989:181).

In the immediate post-war period, due process was vigorously attacked in a series of decrees and a 1949 statute (Chyrpinski, 1970:186). Most of the procedural safeguards that were part of the 1932 Criminal Procedures Code were dropped and the pretrial detention and
investigatory powers of the procurator were expanded (Wasek & Frankowski, 1995:285-6). The anti-nazi law was also abused to target the Catholic and peasant opposition and bring them before military tribunals. During the Stalinist era, summary proceedings and military trials were systematically utilized (Murzynowski, 1984:321). Under these circumstances, the accused lacked counsel and all other due process rights and trials were conducted at an accelerated pace (Swidlicki, 1988:52-3).

Although many aspects of due process were restored in the Criminal Procedural Code after the Stalinist period, the reality of criminal proceedings regularly varied from the law.4 Poland did not have an exclusionary rule concerning evidence and so the police had extremely broad powers of search and seizure (Stefanowicz, 1989:181). Searches, surveillance, and arrests often occurred without an order from the procurator or a judge (Swidlicki, 1988:331 & 333). Legal scholar Andrzej Murzynowski noted (1984:318) that a “high number” of those under investigation were held in “preventive detention,” usually upon the decision of the procurator. There was no maximum limit on the length of detention, but the court was
supposed to review these decisions after three to six month intervals.

During the pre-trial phase, the procurator's powers were quite broad. He could deny defendants access to an attorney and he had the right to attend any defense meetings (Swidlicki, 1988:181; Gajewska-Kraczykowska, 1992:1128). The defense counsel's participation in the collection and review of evidence in the pre-trial stage depended upon the consent of the procurator (Murzynowski, 1984:321). Advocates rarely had contact with witnesses prior to the trial (Gajewska-Kraczykowska, 1992: 142). During the period of detention, external body searches were considered obligatory (Murzynowski, 1984:328). Swidlicki (1988:181) noted that the lack of safeguards during the pretrial stage was particularly damaging to an individual's defense because trials were inquisitorial in nature and no practical distinction was made between the pretrial and trial stages. This reduced the trial to a formality. 

Although the accused in regular criminal proceedings had the right to present a defense, obtaining adequate legal counsel was difficult because the Ministry of Justice used its oversight of the Polish Bar to limit the number of advocates (Gajewska-Krajczkowska, 1992:1130). It also used
its disciplinary powers to punish independent-minded advocates. The right to appeal was also limited by a number of obstructions (Piekalkiewicz, 1970:380; Andrzejewski & Nowicki, 1991:84), including a small number of days within which to file an appeal, the types of cases appellate courts could review, and limitations on who could file an appeal.

The judiciary could not protect due process because the communist regime had destroyed its impartiality and independence (Frankowski, 1987:1325; Wasek & Frankowski, 1995:285). Article 58 of the 1952 Constitution declared that the judiciary served the aims of the Polish People's Republic (Frankowski, 1987:1324). All judges took a loyalty oath to the People's Republic before assuming their duties on the bench (Frankowski, 1987:1331). They also received ideological instruction, both during their legal education and while they were on the bench (Brzezinski, 1993a:167).

Constitutionally, all regular court judges were to have been popularly elected (Piekalkiewicz, 1970:371). They were, in practice, appointed by the Council of State, the collective executive body (Swidlicki, 1988:396; Piekalkiewicz, 1970:371). Supreme Court justices were also...
appointed for five year terms by the Council of State (Frankowski, 1987:1332). After 1957, judges were guaranteed life tenure but the government could use disciplinary measures, recall procedures and transfers to apply political pressure and remove independent judges (Piekalkiewicz, 1970:371; Swidlicki, 1988:395).

The judiciary not only faced these pressures but it was also subject to interventions by political authorities during trials. The practice of "telephone justice," or advice to judges by Communist Party officials, was a common abuse of judicial impartiality. In a 1986 poll, 44 percent of all judges revealed that they were subject to intervention from above, 28 percent acknowledged that they tried to please their superiors with their decisions, and 25 percent of them admitted to accepting bribes (Frankowski, 1987:1334). Almost 40 percent believed that their decisions were unjust. A 1984 judicial poll revealed that 77 percent of those asked were hesitant to reveal their profession to strangers (Adam & Heinrich, 1987:142).

The judiciary's ability to make impartial decisions was hampered by the binding instructions that were produced by the Ministry of Justice, the Supreme Court, and the Procuracy (Andrzejewski & Nowicki, 1991:79; Piekalkiewicz,
1970:385). These instructions presented guidelines for certain types of cases as well as orders for the handling of particular ones presently before the court. The Ministry of the Interior issued instructions for the local Criminal Administrative Kolegia (Swidlicki, 1988:393). The Judicial Minister could also ask for "clarifications" and "rectifications" of judicial decisions (Frankowski, 1987:1332).

Due process was also poor in the Criminal Administrative Kolegia, local courts that annually adjudicated 500,000 misdemeanors and administrative disputes. Personnel for these courts were semi-professional as only their chairman and vice-chairman were required to hold law degrees. Andrzejewski & Nowicki (1991:74) found that of the 35,000 members of the kolegia only 2,500 had legal training and only 12 percent had any higher education. Judges, attorneys, and Procuracy officials could not serve on the Kolegia and so a preponderance of its members were administrative officials (Piekalkiewicz, 1970:382-3). Andrzejewski and Nowicki (1991:80-2) also observed that these courts generally often employed summary procedures. Their largely non-judicial staff often assumed intent and uncritically accepted the
evidence and testimony of the police, security officers and the prosecutor.

Section 3.1.4: Summary of Constitutionalism

Constitutional government could not coexist with the Communist Party’s monopoly of political power. The 1952 Constitution did not function as the supreme prescriptive law as most of its provisions were not self-executing and, consequently, their implementation required further legislation. This allowed the Party to define and amend its constitution. The frequent amending of the basic law also created a constitution in which many of the articles contradicted each other. Because the supremacy of the Constitution was not established, statutes and regulations regularly lacked congruence with the basic law. The absence of a hierarchy of legal norms and a definitive statute or constitutional provision to clarify the legislative process generated an internally inconsistent body of law. Like other constitutional provisions, articles guaranteeing civil liberties and other rights were not self-executing and they were also limited by constitutional obligations.
However, liberalization after the Stalinist period led to the rebirth of civil society that pressed the regime for further liberalization. As a result, Poland, along with Hungary, enjoyed the highest level of social autonomy and civil liberties within the communist bloc. Of course, state violations of rights was still widespread and systematic, particularly by state administrators and police officers (Stefanowicz, 1989:183).

Although the communist regime did not establish constitutional government, there were those within the Party who wanted to establish “socialist legality,” which referred to the “strict observation of the laws that are in force,” the greater security of citizen rights, and the independence of the judiciary (Heller, 1982:58-9, Gwizdz and Zawadzki, 1984:18, 20, & 29). While individual and social autonomy and the independence of the judiciary all expanded during the forty years of Communist Party rule in Poland, institutional reforms prior to the 1980’s were ineffectual in promoting constitutionalism (Gwizdz and Zawadzki, 1984:29). A 1976 constitutional amendment, for example, gave the Council of State, the de facto primary legislator, the authority to review legislation and provide instructions to parliament in order to promote
constitutionality, which it did on only one occasion (Brzezinski, 1993:171). No independent institution existed that could uphold constitutional principles. Letowska and Letowski (1996:11) concluded consequently that the steps to build "socialist democracy" were a "waste of effort and paper." Post-communist Poland, therefore, had to overcome a number of inherited obstacles to establish constitutionalism.

Section 3.2: THE STATE UNDER THE LAW

Given the weakness of the Constitution, the incoherence of the law, and the political domination of the Communist Party, it is not surprising that the party-state regularly violated the law during the communist period. Public administration exhibited a number of serious problems such as the inefficient and arbitrary exercise of power, decision-making authority that was highly concentrated within the central ministries, endemic corruption, and an absence of legal and public accountability (Letowski, 1980, Gwizdz and Zawadzki, 1984, Laba, 1988, Zamoyski, 1995, Taras, 1993, Commissioner for Civil Rights Protection Annual Report 1988 - 1989). This chapter has already examined the executive bureaucracy's
abuse of its legislative authority and in particular the large number of administrative regulations that limited or abridged civil liberties and equality before the law (Stefanowicz, 1989).

These problems obstructed the state's operation upon the basis of the law and were the results of an absence of legal and public accountability (Letowski, 1980, Gwizdz and Zawadzki, 1984). State officials were not held accountable by an independent and impartial judiciary or by publicly elected officials. Rather, the "nomenklatura system" ensured that they answered solely to the Communist Party. In the nomenklatura system, the Communist Party appointed and dismissed all significant officials in the state administration and these officials (the "nomenklatura") were usually exempt from their agency's internal disciplinary regulations and procedures and accountable only to the Party. Letowski (1993:8) observed that the nomenklatura system obstructed the development of professionalism in the public sector and led to systematic bureaucratic high-handedness and arbitrariness. The nomenklatura also developed into a socio-economic elite that was clearly distinct from the rest of society (Swidlicki, 1988:389, Adam and Heinrich, 1987:117).
Although the 1932 Administrative Code existed throughout the era of communist rule, state officials were not legally accountable as the Code was not vigorously enforced, in part because there was no administrative court until 1980 (Piekalkiewicz, 1970:379-80). The judiciary and the Sejm could not hold the state administration accountable because with the Communist Party’s monopolization of political power they were not independent institutions. The Procuracy was given the authority to supervise local administration, along with all professional, cooperative and self-governing organizations, and certain actions of government ministers (Frankowski, 1987:1320). It was, however, a pillar of the party-state and its oversight was geared to ensuring that the state served the interests of the Communist Party.

In the absence of legal and public accountability, the state administration systematically violated the law. In addition, it was inefficient and decision-making power was highly concentrated within the central agencies. Post-communist Poland inherited these problems. To establish the rule of law in the post-communist period, the democratic leadership had to establish the legal and public
accountability of public officials, decentralize the state, and improve the quality of administrative personnel.

Section 3.3: Post-Martial Law Reforms

In the early 1980's, the PZPR created a number of oversight institutions that in the post-communist period significantly contributed to the development of the rule of law. Most of these institutions were created after Martial Law as part of a "carrot and stick policy" by General Jaruzelski that combined institutional reforms with periodic repression focused upon the more radical anti-communist opposition (Frankowski, 1988:740). Letowska and Letowski (1996:146) described the reforms as "a chain of concessions (to international and domestic forces) allowed by the authorities of a weakening political regime." They created institutions that were ostensibly capable of performing oversight and increasing the party-state's legal accountability. Letowska and Letowski (1996:145) revealed that the communist officials did not fully understand the implications of the institutions that they had agreed to establish. Although regime officials limited the jurisdiction of these new institutions and the Communist Party's monopolization of power hampered their functioning,
Brzezinski and Garlicki (1995:28) wrote that the legal oversight they provided "introduced into Polish political culture the notion that government authority derives legitimacy from its adherence to the rule of law." Their pre-democratic existence also gave these oversight bodies time to institutionalize and develop their authority and consequently they were prepared to shape the legal and constitutional development of post-communist Poland.

In 1982, General Jaruzelski reestablished the interwar institution of the Tribunal of State. The Tribunal of State functions as a judicial body attached to the Sejm with the authority to conduct impeachment hearings of high state officials accused of malfeasance or constitutional infringements (Garlicki, 1988:721). The Communist Party prevented it from hearing a single case.

Another interwar institution, the Supreme Administrative Court, was reestablished in 1980 and continues to function today as an appellate court for administrative controversies with the authority to set aside administrative decisions if it is determined that the state authorities had not applied the proper statute (Brzezinski, 1993a:171-2). The Supreme Administrative Court may award compensation to those harmed by state
actions (Letowski, 1980:214). During the communist era, the public prosecutor or representatives of public organizations were the only parties that could file an appeal with the Court (Rybicki, 1984:112).

There were policy areas outside of the Supreme Administrative Court’s jurisdiction and the party-state used these exemptions to shield itself from cases that addressed the fundamental nature of the communist regime. These included security, public order, taxation, as well as defense and foreign policy (Brzezinski, 1993a:172). Despite these strictures, the Court increasingly managed to establish its authority and by the late 1980’s it was adjudicating an average of 14,000 cases per year (Supreme Administrative Court Annual Report, 1988, Brzezinski and Garlicki, 1995:27, Koziell-Poklewski Interview, April 1997). Professor Wyrzykowski (Interview May 1997), a former section chief in the Ombudsman’s Office, observed that the Court’s operation drew the bureaucracy’s attention back to the Administrative Code and thus helped to reestablish its importance.

Wishing to establish the importance of the Constitution, Solidarity, the Polish Bar, the Democratic Party (a puppet party), and eventually the PZPR supported
the creation of a constitutional court in the early 1980's (Brzezinski, 1993a:173-4). On March 26, 1982 in the depths of Martial Law, an amendment was promulgated to establish the Constitutional Tribunal. It took a further three years for the regime to pass a statute that prescribed its structure and jurisdiction.:

The communist regime placed strict limitations upon the Tribunal's jurisdiction. It could not review acts that were promulgated before March 26, 1982 (Brzezinski, 1993a:184). This put the Martial Law decrees and all the statutes that created the party-state beyond the Tribunal's purview. The Court could not review acts of local government and municipal administration, parliamentary procedures, constitutional amendments, and legislation prior to its promulgation ("abstract review"). The regime also barred it from reviewing domestic legislation in light of international treaties. This was done to prevent the Tribunal from incorporating into its jurisprudence the international human rights agreements that Poland had signed. The Constitutional Tribunal began to operate in 1986, and in 33 decisions prior to the regime transition it found 13 regulations to be inconsistent with statutes and
part of one law to be unconstitutional (Brzezinski, 1993a:193).

To enhance the protection of individual rights, the Sejm in 1987 created the Commissioner For the Protection of Citizens’ Rights. The Commissioner ("Ombudsman") and her agency enjoy legal immunity and are independent from all state bodies except the Sejm that appoints her for a four year term (Letowska, 1995:63). Responding to people’s complaints or acting upon its own initiative, the Ombudsman’s Office investigates alleged abuses of power that infringe upon citizen rights. If the Ombudsman’s Office concludes that an abuse has occurred, then it may respond by filing appeals with the offending agency, the Minister in charge of that institution, the Council of Ministers, or the President. It also has the power to initiate legal proceedings in the regular courts as well as in the Supreme Administrative Tribunal, the Supreme Court, and the Constitutional Tribunal. The Commissioner annually addresses the Sejm and presents a comprehensive report on the state of civil rights.

The communist regime hoped to weaken the Ombudsman by appointing a political unknown, law professor Ewa Letowska, as the first ombudsman (Letowska and Letowski, 1996:146).
Much to everyone's surprise, Professor Letowska quickly consolidated the authority of her office through her vigorous and well-publicized activity. She refused to compromise the political neutrality of the Commissioner's office and she showed no reluctance to publicly expose officials who abused their authority (Letowska and Letowski, 1996:147, Wyrzykowski Interview, May 1997).

In its first year of operation (1988), the Ombudsman's Office received 49,000 citizen complaints (Annual Report, 1988:10). Letowska and Letowski (1996:146) noted that 80% of the letters it received were outside the Commissioner's competence as most sought the Ombudsman's help in obtaining a material interest, not in protecting their civil rights. The Ombudsman's Office did, however, initiate over 3,000 investigations (Annual Report, 1988). It also lodged five appeals to the Constitutional Tribunal, eighty to the Supreme Administrative Court, and nine to the Sejm to amend legislation (Annual Report, 1988:16-9). Commissioner Letowska in her annual report to the Sejm revealed numerous abuses of power and publicly named those responsible for these problems. Professor Wyrzykowski (Interview, May 1997) noted that an early success of the Ombudsman's Office was the attention that it brought to the conditions of
military service and prisons as it worked particularly hard to establish and protect the rights of soldiers and inmates. Appeals by the Office induced the government, for example, to reduce prison overcrowding (Annual Report, 1988:20).

In addition to inheriting a number of obstacles to the development of the rule of law, post-communist Poland also gained a few significant oversight institutions. Their establishment in the communist period gave these oversight bodies time to institutionalize and develop their authority and consequently they were prepared to shape the legal and constitutional development of post-communist Poland.

Section 3.4: PUTTING THE LENINIST LEGACY INTO A COMPARATIVE PERSPECTIVE

The examination of the People's Republic of Poland has identified a number of significant obstacles to the rule of law that were inherited by the post-communist state. The most fundamental obstacle to constitutionalism was the Communist Party's monopolization of political power for it prevented any independent institution from enforcing the constitution and upholding the supremacy of the law. As a result, the constitution did not function as the supreme
prescriptive law. In the absence of a clear hierarchy of legal norms, statutes and regulations often diverged from the constitution and from each other and, consequently, Polish law was not internally consistent. Civil liberties were regularly violated by the party-state. Constitutional rights’ guarantees were not self-executing provisions and, consequently, the Communist Party used its control over the legislative process and the state administration to define and circumscribe the exercise of these rights. In addition, civil liberties were limited by constitutional obligations. State officials were neither publicly nor legally accountable and consequently they systematically violated individual rights, were inefficient, and did not abide by the laws.

Inheriting all of these obstacles to constitutional government, it is clear that the post-communist setting was a difficult one for the development of the rule of law, particularly in comparison with other post-authoritarian regimes. Linz, Stepan, and Gunther (1996:133) observed that democratization in Southern Europe was easier than in Eastern Europe because Portugal, Spain, and Greece had well-developed civil societies and market economies with private ownership. In contrast with the post-totalitarian
countries, the rule of law was "reasonably well established" during the final years of authoritarianism in Southern Europe and "the professional norms of the state bureaucracy were compatible with democratic control of public administration." Unlike the other post-communist states, Poland inherited a constitutional court, an ombudsman, and a supreme administrative court. While these were significant reforms, their authority was circumscribed and they were unable to foster the degree of legality that existed during the twilight of authoritarianism in Southern Europe.

Despite the "Leninist Legacy" of arbitrary government, weak civil societies, and the lingering effects of communist political socialization, post-communist Central Europe and the Baltic countries have experienced significant democratization and relative political stability. This suggests that over the course of the communist period the Central European countries had experienced greater liberalization, including a more advanced degree of legality and civil and social rights, than the Balkan states (Freedom House, 1984 & 1985, Sharlet, 1989, Frentzel-Zagorska, 1990). By the end of the 1980's, civil society in Central Europe was relatively
developed and produced democratic opposition movements that defeated the communists, entered into government, and controlled the process of political development (Bruszt and Stark, 1992, Vachudova and Snyder, 1997, Munck and Leff, 1997). The weakness of civil society in the Balkans, relative to the region's Communist Parties, allowed the communists to weather the regime changes and, thereby, control the process of political institutionalization.

Democracy is a necessary precondition for the rule of law and, therefore, Central Europe's more rapid democratization was important for its development of the rule of law (Weingast, 1997). Public accountability encourages state officials to adhere to the law and to respect civil and political rights. Institutions of oversight, such as Constitutional Courts, function much more effectively within a democracy (Schanbly, 1993:179). The Central European transitions also brought people into positions of state authority who had at least a philosophical commitment to constitutional government and, as Putnam (1993:11) observed, an increase in the number of officials obeying the law creates a demonstration effect upon others to follow the law.
Poland illustrates the thesis that democracy is the more likely outcome when civil society is strong relative to the pre-democratic regime, i.e. the Party-state. The Polish Communist Party (PZPR) was weakened by the fact that it had enjoyed little social support throughout the history of the "People's Republic" (Frentzel-Zagorska, 1990:764-5, Sharlet, 1989:166). The failed economic policies of First Secretaries Władysław Gomułka and Edward Gierek and the privileges of the nomenklatura galvanized social opposition to the regime and popularized an "us versus them" view of society's relationship to the party-state. Frentzel-Zagorska observed that fewer reformist intellectuals joined the Communist Party than in Hungary, and those that did did not remain members for long as most gravitated to the well-founded alternative intellectual circles. The Party nearly collapsed during 1981 and remained feeble throughout the 1980's (Swidlicki, 1988:5).

In contrast with the weakness of the PZPR, Polish civil society grew steadily after the Stalinist period, and, along with Hungary, exhibited the highest degree of autonomy and strength within the communist bloc (Frentzel-Zagorska, 1990:760). The rebirth of civil society began with the decollectivization of agriculture which
reestablished an independent land-holding peasantry. The Polish Catholic Church enjoyed a significant degree of autonomy running its own university, operating its own print presses and radio stations, and placing its representatives in the Sejm (Chrypinski, 1988:263). The Catholic Church on many occasions acted as an intermediary for the workers/political opposition with the Communist Party (Laba, 1991). Polish labor was also a strong force and repeatedly displayed its ability to organize and pressure the regime to make concessions (Laba, 1991). Civil society quickly rebounded after Martial Law's termination in 1983 and the threat of wildcat strikes in 1988/9 led the party-state to agree to the 1989 Round Table Negotiations. The Communist leadership was aware of civil society's strength and, therefore, it negotiated a compromise agreement that provided the Party with certain guarantees of power regardless of the electoral outcomes (Bruszt and Stark, 1992:20). Despite these restrictions, Solidarity's ability to organize within four months and obliterate the communists in the elections changed the character of the political opening from limited liberalization to democratization (Gross, 1992:63). Within
five months, Solidarity had formed the first predominantly non-communist government in Eastern Europe in forty years.

Like Poland, Hungary had a strong civil society, however, its Communist Party (HSWP) enjoyed a reputation for reformism under the long reign of First Secretary Janos Kadar (1956 - 1988) (Frentzel-Zagorska, 1990:761). The progressive policies that had created a cooperative economic sector and a relatively autonomous civil society generated social support for the HSWP (Frentzel-Zagorska, 1990:763). But the Party’s fortunes changed in the mid-1980’s as it became deeply factionalized over how to respond to the looming economic crisis and to calls for political liberalization (Bruszt and Stark, 1992:27). After 1988, a political struggle ensued between conservatives led by Karoly Grosz and reformists whose popular figures included Imre Poszgay, Miklos Nemeth, and Reszo Nyers. Members of the reformist wing openly met with the leaders of newly emerging democratic movements and even attended their meetings. The HSWP entered the 1989 negotiations for the regime transition deeply divided.

While Poland and Hungary had the most well developed civil societies in communist Eastern Europe, Hungarian civil society was principally organized around the economic
sector and did not display the same type of autonomous organization designed to confront the political authorities that was characteristic of Polish civil society (Frentzel-Zagorska, 1990:759, Bruszt and Stark, 1992:15). The progressive HSWP managed to stay ahead of civil society's demands for reform and thus avoided the type of convulsive crises that periodically occurred in Poland (Frentzel-Zagorska, 1990:763). The failed 1956 Hungarian Revolution was also a deterrent to overt political mobilization. Freedom House (1985:327, 1986:157) noted that private property was widespread and that Hungary's economy among the party-states was most like its pre-communist predecessor. It also found that Hungary was fairly open to foreign media, the state did not use psychological confinement, and kept very few political prisoners (1985:327, 1986:158-9). In 1985, Hungary also had competitive, though not multiparty, parliamentary elections.

Although civil society had not been as overtly politicized or as confrontational as in Poland, it would be inaccurate to view Hungary's political transformation as a regime change initiated from above (Bruszt and Stark, 1992:20). Bruszt and Stark observed that reform communists
only began to act when they were faced with organized anti-Communist opposition. The mobilization of the opposition contributed to the defeat of the HSWP hard-liners during negotiations, and later to the rejection of a measure by the reform communists that might have allowed them to control the presidency. Parliamentary elections in the spring of 1990 resulted in a victory for the Hungarian Democratic Forum and a resounding defeat for both the reformist Hungarian Socialist Party and the hard-line HSWP.

Civil society in Czechoslovakia was less developed than in Poland or Hungary and, in contrast to the HSWP, the leadership of the Czechoslovak Communist Party was described by Tony Judt (1992:97) as "neo-Stalinists" that were isolated even within the communist bloc after Gorbachev's ascension to power (Bruszt and Stark, 1992:15, Schopflin, 1991:244). The leadership of the Party had been installed by the Soviet Union as part of the "normalization process" that followed its 1968 invasion. Given its origin, its repressive nature, and its aversion to reform, the Czechoslovak Communist Party was isolated from society and lacked popular support. In the late 1980's, it was also increasingly divided over how to respond to the stagnation and decline of the economy (Judt, 1992:97-8).
These divisions deepened over the issue of how to respond to the massive protest demonstrations in late 1989 that called for political change.

As a consequence of the "normalization" policies of the Communist Party, Czechoslovakia differed from its Central European neighbors in that after 1968 it did not experience any period of sustained liberalization (Judt, 1992:96). Czechs and Slovaks did not enjoy the economic freedom held by Hungarians and the Polish peasantry, nor did they experience the level of social autonomy that existed in those countries. Despite the repression, an alternative society with a highly visible intellectual opposition emerged in Czechoslovakia (Schopflin, 1991:244). In addition to the human rights movement Charter 77, Democratic Initiative developed as a mass organization with an overtly political character (Judt, 1992:97). The 1989 petition for liberalization and democratization, "Just a Few Sentences," was signed by over 40,000 people. Civil society was quite prominent in Czechoslovakia's "velvet revolution" as the November and December 1989 mobilization of students, workers, and the general public grew to one-quarter million people in Prague (Judt, 1992:98-9). The factionalized Communist Party,
isolated within the bloc and lacking social support, was paralyzed and, after brief negotiations, handed over the government to the opposition movement Civic Forum/Public Against Violence, which won a narrow majority in the 1990 federal elections (Judt, 1992:107). Civic Forum won the republican elections in the Czech Republic and, in Slovakia, Public Against Violence formed a coalition government with the Slovak Christian Democrats.

Unlike in Central Europe, the communists in Bulgaria, Serbia, and Romania weathered the political changes of 1989/90 due to their unity and level of social support as well as the weakness of their civil societies (Szelenyi, 1992:228, Freedom House, 1997). Maria Todorova (1992:165) observed that unlike the Central European Communist Parties, the Bulgarian Communist Party was not identified with foreign domination but with the industrialization of the country and the increased living standards. Todorova also asserted that egalitarianism is an element of Bulgarian culture and this contributes to the popularity of socialism and socialist parties. The Bulgarian Communist Party, like those in Romania and Serbia, also used nationalism to gain popular support (Vachudova and Snyder, 1997:1).
Civil society in Bulgaria, as in Albania and Romania, was weaker than civil society in Central Europe (Bruszt and Stark, 1992:15, Vachudova and Snyder, 1997:1, Munck and Leff, 1997:343, Freedom House, 1997, Todorova, 1992:161-2). Maria Todorova (1992:161-2) went so far as to argue that it had a "total lack of political culture." By this, she meant that the intelligentsia had only recently developed as part of the socio-economic modernization achieved by the communist state and, therefore, it had not had time to develop a tradition of independent thought or a "culture of protest." Todorova (1992:163) noted, for example, that perestroika/glasnost existed in Bulgaria for only one month: from the November 1989 fall of long-standing strongman Todor Zhivkov to the December 1989 announcement of competitive elections. In his study of the Bulgarian intelligentsia, Daskalov (1996:74) described it as a fairly docile class that was dependent upon the state for its economic perks and social status. The absence of a counter-culture, with the exception of the ethnic Turks, and the intelligentsia’s dependence upon the largesse of the party-state made Bulgarian society incapable of producing "a civic movement of the size and impact of Charter 77 in Czechoslovakia" (Daskalov, 1996:79).
The weakness of civil society allowed the "reform" communists in Bulgaria (Bulgarian Socialist Party), as well as in Romania (National Salvation Front - NSF) and Serbia (Serbian Socialist Party), to control the state and the process of institutionalizing the post-communist political system (Szelenyi, 1992:228, Bruszt and Stark, 1992:54, Freedom House, 1997, Bunce, 1991:411, Zielonka, 1994:92, Munck and Leff, 1997:356, Vachudova and Snyder, 1997:33, Daskalov, 1996:79). Despite the late-1989 formation of the Union of Democratic (UDF), an umbrella organization which united ecological movements, parties, and the labor union "Podkrepa", Munck and Leff (1997:356) labeled Bulgaria's political transition as a "revolution from above" because the ruling elite "lacked pressure from a strong opposition and was unreceptive to a political opening until the regional collapse of Communist power." The political opening in Bulgaria began as a conflict within the leadership of the Bulgarian Communist Party and the role of the masses was much less significant (Todorova, 1992:163-4, Vachudova and Snyder, 1997:33). The subsequent political liberalization preempted the demands for political reform by the UDF and created the image of the leaders of the BSP as reformers (Munck and Leff, 1997:356, Todorova, 125
In the Spring 1990 elections, the anti-communists were ill-prepared to effectively challenge the Bulgarian Socialist Party as they lacked leaders with the moral standing of a Lech Walesa or Vaclav Havel, organizational structures, and media resources (Todorova, 1992:164, Daskalov, 1996:74). The Bulgarian Socialist Party took full advantage of the opposition's weakness and trounced them in the 1990 parliamentary elections and were thus able to control the process of political development.

As in Bulgaria, former-communists remained in control of post-communist Romania because of the strength of the nomenklatura and the weakness of civil society. Under the leadership of Nicolae Ceausescu, Romania had earned the reputation as "the maverick" in the socialist bloc because of its strident nationalism and its willingness to pursue a foreign policy line that was independent of and at times in conflict with the interests of the Soviet Union. Belying its popular image in the West, Romania by the late 1980's had become one of the most repressive countries in Eastern Europe (Freedom House, 1986:161, Marga, 1993:15). While political and economic power was officially controlled by the Romanian Communist Party, it was in reality monopolized by Nicolae Ceausescu, his wife Elena, and other members of
the Ceausescu family (Gilbert, 1988:344). Reminiscent of the Stalinist era, a cult of personality was built around the Ceausescus and an extensive security force (Securitate) terrorized society (Freedom House, 1986:162; Amnesty International, 1987:212). The cult of personality, the Securitate, and the regime’s strident nationalism buttressed the dominance of the Ceausescu clique and facilitated its abusive and arbitrary exercise of power.

The extremely repressive nature of the Ceausescu dictatorship prevented the development of civil society (Freedom House, 1986:161, Marga, 1993:17, Tismaneanu, 1993:346). Throughout the 1980’s, people arrested for alleged political crimes numbered in the hundreds and they were held not only in prisons but also in mental institutions (Amnesty International, 1987:211). Amnesty International also reported the state’s systematic use of torture. There was no significant independent media presence (Freedom House, 1985:66). The regime also targeted the Magyar minority for abuse (Freedom House, 1985:371). Hungarian schools were closed, clerics were harassed, and hundreds of villages in which Magyars were the majority were bulldozed and replaced with agro-industrial complexes. Romania, like Bulgaria, lacked a
period of liberalization before the change of regime, and Romanian civil society entered the post-communist era poorly developed and lacking in significant autonomous organizational development (Tismaneanu, 1993:309, Marga, 1993:17, Vachudova and Snyder, 1997:1).

Although the regime change in Romania began with popular demonstrations in Timisoara and Bucharest, the events of December 1989 have the character of a coup more so than a popular revolution. Armed conflict between factions of the military and the Securitate and political maneuvering within the nomenklatura were far more significant factors for the outcome than was popular mobilization (Marga, 1993:16, Vachudova and Snyder, 1997:24). Former communists dominated the provisional government and after the Romanian Communist Party was disbanded, ex-communists, and particularly state officials, joined the National Salvation Front (Marga, 1993:25, Tismaneanu, 1993:309-310). Verdery and Klingman (1992:126) posited that Ceausescu’s monopolization of power allowed the former communists of the NSF to disassociate themselves from the slain dictator and to gain popular approval for his overthrow. Reminiscent of Ceausescu, the NSF combined an authoritarian political style with paternalism and a
xenophobic nationalism to gain popular support (Marga, 1993:27, Tismaneanu, 1993:309-310). The anti-communist political movements, in contrast, were in "complete disarray" due to the suddenness of Ceausescu's fall and the absence of any prior liberalization; and consequently they performed poorly in the initial elections (Verdery and Klingman, 1992:123). Quite revealing of civil society's weakness after the revolution was the two largest anti-Communist parties' nomination of Romanian émigrés as their presidential candidates. As a result, former communists, many of whom had a questionable commitment to democracy and the rule of law, controlled Romania's political development in the early 1990's.

The focused comparison has shown that liberalization in Central Europe fostered the development of civil society, which in turn produced democratic movements that drove the process of political change. They defeated the Communist Parties, gained control of the government, and began the institutionalization of democracy. Due to the weakness of civil society in the Balkan countries, the former-communists maintained control of the state and directed the process of political change. In sum, democracy, a necessary prior condition for the rule of law,
was institutionalized quicker and more fully in Central Europe than in the Balkan countries.

The following chapter looks at how these differential rates of democratization affected the development of the rule of law in post-communist Europe. It examines how Poland addressed the legal and constitutional legacies of communism, focusing upon the need to write a prescriptive democratic constitution and to establish its supremacy, to secure civil liberties and other basic rights, to reform the legal codes, and to establish the political and legal accountability of the state administration. The next chapter also compares the drafting of constitutions and the protection of civil liberties in post-communist Europe.

Section 3.5: Endnotes

1 For a historical overview of constitutionalism in pre-communist Poland, see Wenceslaw Wagner’s *Polish Law Throughout the Ages* (1970) and Adam Zamoyski’s *The Polish Way* (1995).

2 Zamoyski (1995:370) observed that during the 1947 elections, the Communist Party used its control over the Interior Ministry and the judiciary to disqualify anti-communist candidates and over one million voters. Scores of anti-communist political activists and candidates were imprisoned or killed during the electoral campaign and half of those who managed to get elected were barred from taking their seat in the Sejm. The democratic legitimacy of the 1947 Sejm was thus completely undermined.
3 Poland's score for civil liberties dropped to "5" after Martial Law (Freedom House, 1986:40).

4 According to the Criminal Code, people could only be accused of a crime upon the basis of an indictment (Murzynowski, 194:317). Client-attorney privilege was guaranteed and advocates could not be compelled to testify against current and former clients (Gajewska-Kraczykowska, 1992:1139-40). During the trial, the defendant could introduce motions and evidence, cross-examine witnesses, and testify (Murzynowski, 1984:321-3). The accused was presumed innocent until proven guilty, had the right to an attorney, and the state would provide legal counsel if the defendant could not afford it.

5 In addition to the regular criminal proceedings, there were special procedures with very weak standards of due process. "Accelerated procedures," introduced in 1958 and expanded thereafter, quickened the pace of proceedings and limited the right to present a defense (Swidlicki, 1988:57). Under "simplified procedures," the Procurator could gain an indictment without any substantiation of the charges (Swidlicki, 1988:59). The defendant received a copy of the indictment and had seven days to present evidence of his innocence to the court, otherwise he was convicted. Simplified procedures were used for crimes punishable by up to two years in prison and accounted for 30% of all cases initiated by the Procuracy in the 1980's. "Command procedures" were used until 1969 and then again after 1985 (Swidlicki, 1988:60). Under command procedures, there was no formal hearing as the court issued a decision and a sentence.

6 Gostynski & Garfield (1993:279) observed that by the end of 1945 half of the judges who had survived the Second World War were pressured by Soviets and the Polish Communist Party to quit the bench.

7 In addition to interference by Party officials, judicial independence was limited by the institution of "lay assessor." In order to further limit the discretion of judges and increase the "popular" nature of justice, the Communist regime created the position of "lay assessor," citizens selected by the local executive and sitting on judicial panels in courts of first instance (Murzynowski,
The composition of the judicial panel was usually two lay assessors and one professional judge and each member had an equal vote in the decision. Lay assessors were chosen for their political loyalty and the majority of them were members of the Communist Party (Los, 1988:63; Andrzejewski and Nowicki, 1991:74).

Over the course of the communist era, the Sejm developed a limited state oversight role. It maintained twenty standing committees to oversee the executive bureaucracy (Gwizdz and Zawadzki, 1984:37). The committees held hearings, questioned ministers, and sponsored investigations in conjunction with the Supreme Board of Control. They issued non-binding requests and desiderata that obliged state officials to reply within thirty days. While the committees never rejected the government's legislation, they were successful in having proposed bills withdrawn by the executive (Letowski, 1980:190).

With administrative decisions it found legally questionable, the Procuracy could lodge an objection with the offending agency or appeal to the authority immediately superior to it (Letowski, 1980:204-5). It could also be a party to any case concerning an administrative decision, and could appeal any verdict (Piekalkiewicz, 1970:381). The Procuracy provided administrative oversight through its ability to draw the attention of competent authorities to objectionable bureaucratic decisions and practices. It could not, however, compel compliance with its dictates.

The Sejm elects the 12 member Tribunal in staggered elections, six justices at a time, and the justices serve for non-renewable terms of eight years. Members are usually not judges but they are required to have a law degree and 10 years of legal experience. Justices are usually drawn from academia (Sokolewicz Interview, May 1997). The court is empowered to review the constitutionality of statutes and substatutory acts as well as the congruence of regulations and existing statutes (Brzezinski, 1993a:177). Proceedings are initiated on the motion of either the Prime Minister, a petition by Sejm deputies, the Ombudsman, lower courts, local organs of government, the President of the Tribunal, and, beginning in 1989, the President (Brzezinski, 1993b:38). Hearings are adversarial and open to the public.
In examining substatutory acts, the Tribunal has had the authority to order state agencies to amend their regulations and ordinances if the justices find that they violate existing statutes or the constitution (Brzezinski, 1993b:39). The Tribunal may offer guidelines for this amending. If the state agency fails to amend the act in the manner specified by the Tribunal, then the Tribunal can annul the regulation. The Constitutional Tribunal has had the power to rule statutes partly or wholly unconstitutional. Tribunal decisions concerning statutes are reviewed by the Sejm, which can amend the legislation in line with the Tribunal’s suggestions. It can override the Tribunal’s decision by a two-thirds vote. The Sejm can also fail or refuse to take action and after three months of inaction the Tribunal’s decision is considered to have been upheld.

Bruszt and Stark, (1992:14-5) wrote that, “Civil society would be more or less strong depending upon the level of development of social and economic autonomy, independent political organization, and civic values.” They explained further that the strength of a civil society must be understood “in relation to the forces obstructing (or promoting) change inside the ruling elite. In other words, civil society’s degree of strength and the Communist Party’s perception of this strength influenced the dynamics of each post-communist country’s political development. Bruszt and Stark characterized the Party-states as “cumbersome but weak bureaucracies, ineffective for achieving the goals of economic growth and social integration, headed by demoralized leaders whose belief in their own ideologies had withered apace with the exhaustion of their political and economic programs.”

Freedom House (1986) found that by 1984 Poles were producing 400 underground papers and in the following year they published 950. In 1984, underground publishers produced 284 books with editions numbering as high as 35,000 to 40,000 copies. Twelve independent radio stations operated sporadically in addition to the Church’s stations. Though Solidarity had moved its headquarters to Brussels, the organization continued to exist in Poland and employed 100 full-time and 10,000 part-time workers. Frentzel-Zagorska (1990:771) posited that the difficulties of maintaining Solidarity as an underground organization on a
national scale gave local branches a degree of autonomy and this in turn promoted pluralism and differentiation within the movement. In addition to Solidarity, the Confederation for an Independent Poland emerged in the 1980's as an overtly political organization with a nationalist and right of center orientation.

Two-thirds of the Sejm were reserved for the Party and its allies. The Sejm was likely to be controlled by the Party and this was important because it would elect the newly established President. The Senat was the only body whose entire membership was to be determined by competitive multiparty elections.

Reform communists supported the creation of a popularly elected president. Preliminary public opinion polling in mid 1989 suggested that the Party would capture a "decisive plurality" of the vote and that reform communists such as Poszgay and Nemeth were the most popular politicians and would probably win any national elections for a position such as president. After June 1989 negotiations with the HSWP, a part of the fledgling opposition, the Association of Free Democrats and the Federation of Young Democrats, were able to mobilize civil society support for a referendum that the president would be elected by parliament and not by the general public. By greatly weakening the status of the president, the democratic opposition removed an office from which the reform communists might have been able to shape the transition process.

In addition, Czechoslovakia had a tradition of civil society and social mobilization that was apparent during the "Prague Spring" of 1968, and had its roots in the period of interwar democracy.

Although the December 1989 revolution overthrew First Secretary Nicolae Ceausescu and the provisional National Salvation Front government subsequently banned the Romanian Communist Party, Verdery and Klingman (1992:126) observed that the revolution was primarily anti-Ceausescu, but not necessarily anti-communist for all those involved. Although the National Salvation Front government began dismantling the party-state, albeit slowly, many former-
communists joined the Front and received leading positions in the state.

Section 3.6: List of References


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CHAPTER 4

THE RULE OF LAW IN POST-COMMUNIST POLAND

It is necessary to introduce a government of law, to accord every citizen rights compatible with international treaties, agreements, and conventions (Prime Minister Tadeusz Mazowiecki, FBIS, 8/25/89:31).

This chapter examines how Eastern Europe, burdened with the legal and constitutional legacies of communism, struggled to develop the rule of law. The case study of Poland explores the establishment of constitutionalism including the restoration of civil liberties, legal reform, the creation of interim basic laws, and the protracted and contentious process of drafting a new constitution. It also looks at state reform, noting the establishment of the state’s legal and political accountability and problems such as the slow pace of decentralization and the administration’s continued abuse of its legislative authority. This chapter concludes with a comparison of
constitutional drafting and the protection of civil liberties in post-communist Europe and shows that Central Europe experienced greater progress in the development of the rule of law than the Balkans.

Section 4.1: The Reestablishment of Democracy

O'Donnell (1996) and Weingast (1997) have both noted that democracy is an essential precondition for the development of the rule of law. This is because political competition obstructs the concentration of power and public accountability is a barrier to the government’s abuse of its authority. The establishment of democracy was an important step in Poland’s development of the rule of law.

The process of political change began in the spring of 1988 as the government’s introduction of austerity measures unleashed a wave of wildcat strikes. Faced with Solidarity’s call for a general strike on September 1, 1988, Interior Minister General Kiszczak announced the regime’s intention to hold negotiations with labor in October (Zamoyski, 1995:395-6). Negotiations did not take place in October as Lech Walesa and the Catholic Church insisted that they address constitutional issues and the regime refused. After the December Communist Party
Congress, General Jaruzelski authorized negotiations on Poland's economic and political liberalization. Jan Gross (1992:59) wrote that the resultant 1989 Round Table Agreement was, "the foundation of a new era - the era of a Rechtsstaat, of a state based upon law..."

The Round Table Agreement legalized Solidarity, committed the regime to the legal restoration of pluralism and basic rights, began the reestablishment of the judiciary's independence, and established semi-competitive elections for Parliament (Gross, 1992:60). Despite this political liberalization, the communists still expected to maintain control of the government and a key element in their strategy was the creation of a president who would be chosen by the compromised Sejm in which the communists and their allies would hold at least a two-thirds majority (Gross, 1992:61). The president was given very broad powers including the authority to appoint and remove the Ministers of Defense, the Interior, and Foreign Affairs. Everyone knew the first president would be Jaruzelski.

The June electoral landslide by Solidarity undermined the Communist Party's plan for limited liberalization. Solidarity's leadership was unsure of how to respond to its electoral mandate and eventually decided to uphold the
Round Table Agreement, even assisting in the election of Jaruzelski as president (Gross, 1992:262-3). As part of his "Sinatra policy," Gorbachev refused to intervene in Polish domestic politics and this cleared the path for the September 1989 formation of a largely non-communist government under the premiership of Tadeusz Mazowiecki, a Catholic intellectual who was selected by Lech Walesa. The landslide electoral victory of Solidarity and the concomitant weakness of President Jaruzelski transformed Poland's liberalization into democratization. Jaruzelski recognized that he lacked legitimacy and exercised his presidential powers circumspectly (Gross, 1992:61). He resigned in 1990 and Lech Walesa won the now popularly elected presidency. Fully competitive parliamentary elections occurred for the first time in 1991.

The establishment of democracy was essential for the establishment of the rule of law in post-communist Poland. However, the new regime still had to overcome a number of obstacles to constitutional government that it had inherited from the Leninist regime. The most serious of these impediments, the Communist Party's monopolization of political and economic power, was removed by Solidarity's electoral victory and the subsequent formation of the
Mazowiecki government (Letowska and Letowski, 1996:11, Gross, 1992:59). To establish the rule of law, the new regime still needed to reform the constitution and the legal codes, secure the hierarchy of law, and establish and protect civil liberties. To create a state under the law, it needed to establish the legal and public accountability of state officials, decentralize the state, professionalize the civil service, and improve the quality and efficiency of public administration.

**Section 4.2: Constitutionalism**

This section examines the development of constitutionalism beginning with the amending of the 1952 Constitution, the creation of an interim basic law, "the Little Constitution," and the protracted process of constitutional drafting that culminated in the 1997 Constitution. It explores efforts to reform the legal codes and analyzes the restoration and protection of civil liberties.

**Section 4.2.1: The 1952 Constitution**

The establishment of democracy in 1989 necessitated immediate changes to the 1952 Stalinist Constitution.
foster the rule of law, the constitution needed to establish checks and balances, the separation of powers, and civil and political rights.

The Round Table Agreement initiated constitutional reform, including the recognition of political pluralism and the establishment of checks and balances (Ludwikowski, 1996:150). Brzezinski & Garlicki (1995:30) contended that after Solidarity formed the government, the presidency was transformed from a "reserve domain" (see footnote 2) to an institution that broke the unity of executive power and was thus part of the reintroduction of checks and balances.

Following Solidarity’s assumption of governmental authority, amendments in December 1989 (the "December Amendments") radically altered the 1952 Constitution. Signifying this change, Poland ceased to be the "Polish People’s Republic" and became simply the "Republic of Poland." The first article of the constitution declared that, "The Republic of Poland is a democratic state ruled by law and implementing the principles of social justice." Parliament deleted all references to socialism and expunged the article concerning Poland’s fraternal alliance with the Soviet Union. The Communist Party’s "leading role" was also removed from the Constitution and Article 2 identified
the nation as the source of all sovereign authority. To foster the rule of law, Article 3 made the observance of law, "the fundamental duty of every state organ." Articles 60 - 63 reestablished judicial independence and made judges subject only to the laws. The Constitution was also amended to accommodate multiparty democracy.

Section 4.2.2: The Little Constitution of 1992

Although the early Solidarity governments were able to extensively amend the 1952 Constitution to create the foundations of a democratic polity and a market economy, they could not write a new single comprehensive basic law. This was in part because Solidarity was an ideologically heterogeneous movement and its fragmentation began as early as the 1990 Presidential campaign that pitted Prime Minister Mazowiecki against Lech Walesa (Frentzel-Zagorska, 1990:771). Parliamentary elections in the following year brought 27 parties into the Diet. The new constitution was being drafted by a committee in the Diet and not by a Constituent Assembly and, therefore, political fragmentation, conflict amongst the post-Solidarity parties, and governmental instability obstructed progress toward a new constitution. Furthermore, the Sejm and
Senate each had its own constitutional committee and they produced very dissimilar drafts (Ludwikowski, 1996:155).

Concerned with the effects of political instability upon the institutionalization of democracy and sensing the difficulty of creating a single constitutional document, President Walesa decided to pursue the passage of a series of constitutional documents, each substantively limited, that together would constitute the fundamental law (FBIS, 7/8/91:16, Falandysz Interview, May 1997). Lech Falandysz, former advisor to President Walesa, explained that this was all part of a strategy for institutionalizing democracy and buttressing presidential authority. President Walesa and his advisors believed that a strong presidency would provide Poland with the political stability that she had been lacking to that point.

After a political crisis that resulted in President Walesa’s dismissal of Prime Minister Olszewski and the subsequent collapse of the short-lived Pawlak government, stability was restored in the summer of 1992 with the formation of the Suchocka government. Negotiations between the presidential Chancellery and the government led to the drafting of a constitutional document that outlined the basic operation of the political system. In October, the
Sejm passed the "Little Constitution" which went into effect in December (Osiatynski, 1994:30).

The Little Constitution created a semi-presidential system and, although Poland remains a unitary state, it also granted broader powers to local government. Article 1 formally established the separation of powers and the rest of the document created a system of checks and balances among the president, the government, and parliament.\textsuperscript{5}

Contemporaneous with the passage of the "Little Constitution," Parliament enacted a law on the drafting and promulgation of a new constitution. The statute created the Constitutional Committee, a body of 46 Sejm Deputies, 10 Senators, and a number of non-voting advisors and representatives of the Constitutional Tribunal, the President, and the Council of Ministers. The Committee did not have the authority to draft a new constitution. Rather, it reviewed drafts submitted by the President or those that had been sponsored by 56 members of Parliament and harmonized them into a single document. Once a single draft was composed, the Committee, Parliament, and the President were able to offer amendments (EECR, Winter 1995:18, Osiatynski, 1994:29). The final draft had to be approved by a two-thirds majority of the National Assembly.
and the President could exercise a suspensive veto. Following Parliament’s approval, a national referendum was to be held on the constitution. The Constitutional Committee met for the first time in October 1992, and was so preoccupied by its own procedural matters that by the May 1993 dissolution of Parliament it had not even begun to review constitutional drafts (Osiatynski, 1994:30).

Section 4.2.3: The Charter of Rights and Freedoms

According to Lech Falandysz (Interview, May 1997), President Walesa intended that the Charter of Rights and Freedoms, a bill of rights, would be the next constitutional document passed after the Little Constitution. The passage of a Bill of Rights was important because Chapter Eight of the amended 1952 Constitution was still the only constitutional source of rights and many of its provisions were not self-executing (Osiatynski, 1992:29).

The Charter of Rights and Freedoms was written principally by Andrzej Rzeplinski and Marek Nowicki of the Polish branch of the human rights organization, Helsinki Watch. Rzeplinski (1993:28) explained that the document was to be “consistent with the values of European nations
recognized by Polish society.” The guiding principles were human dignity, individual freedom, and equality before the law within the framework of a minimalist state. The Charter allowed citizens to sue the state for alleged rights and to seek pecuniary compensation. It also included social rights such as free education, health care, and social security (Rzeplinski, 1993:29).

The Charter was submitted to Parliament in the winter of 1992 but the extraordinary committee working on the Charter of Rights and Freedoms had only agreed upon 12 of the proposed 49 articles before the May 1993 fall of the Suchocka government. Although the Charter never became law, Lech Falandysz (Interview, May 1997) counted its creation among the achievements of the Walesa administration. He believed that the document influenced public and elite opinion, as well as that of the judiciary. He is correct in this because the Charter served as the template for the section on rights in the 1997 Constitution (Rzeplinski Interview, May 1997).

Section 4.2.4: The 1997 Constitution

Work on a new constitution resumed after the 1993 elections. However, these efforts became captive to a
political conflict between President Walesa and the Democratic Left Alliance (SLD)/Polish Peasant Party (PSL) government. The left-agrarian alliance had been critical of marketization and had advocated the creation of a purer parliamentary system. Professor Wiktor Osiatynski (1994:37), Director of the Center for the Study of Constitutionalism in Eastern Europe and an advisor to the Constitutional Committee, however, observed that, “Polish constitution-making is not driven by a conflict of rival theories of constitutionalism nor by a clash of economic interests” but rather by “personal political rivalries” and “vested institutional interests.” Both sides in the conflict supported democracy and the rule of law, but their conflicting political ambitions delayed the creation of a new constitution.

Following their electoral victory, the SLD and the PSL took control of the Constitutional Committee and elected as its Chairman SLD leader and future President of the Republic Alexandr Kwasniewski. The Committee was given the authority to review seven drafts that had been submitted by a 1994 deadline (EECR, Summer/Fall 1995:15). A majority of Committee members were beginning their first term in the Diet and, unlike the composition of the preceding
Committee, few of them were lawyers (Osiatynski, 1994:31). The extensive turnover in Committee members, their inexperience, and their lack of legal expertise slowed the pace of the Committee's work.

Centrist and conservative parties along with the Catholic Church were deeply dismayed over the composition of the Constitutional Committee (Osiatynski, 1994:32, EECR, 1995:20). These groups questioned the legitimacy of the Sejm to create a constitution, claiming that it was not representative of society.⁶

Already faced with the opposition of centrist and conservative forces, the Constitutional Committee alienated President Walesa when it supported the creation of a purer parliamentary system. The President favored the creation of a presidential democracy and so a struggle ensued between the coalition government and Walesa. Each side tried to define and to expand their constitutional authority and thus to shape the nature of the new democratic system. They battled over control of the Ministries of Defense, Foreign Affairs, and the Interior, the Radio and TV Board, the President's power to dissolve Parliament, the new tax system, and the constitutional drafting process (Osiatynski, 1995a:41, EECR, Summer 1994,
It was fortunate for the rule of law in Poland that most of these political conflicts were resolved by the Constitutional Court upon the basis of the law.

In December 1993 with the legitimacy of the Constitutional Committee’s drafting in question, the Union of Labor introduced a motion for a referendum to be held prior to the constitutional drafting process concerning the basic principles of the new democracy (Osiatynski, 1994:34). Aware of the criticism that the Constitutional Committee lacked representativeness, the coalition government was forced to consider the proposal even though it did not like it. President Walesa proposed an alternative that was accepted by the government after an initial rebuff and an ensuing political tempest in which Walesa threatened to dissolve parliament: Any group of 100,000 citizens could submit a draft constitution to the Constitutional Committee. The reformed Solidarity Trade Union took advantage of the initiative to develop a constitutional draft, the so-called “citizens’ constitution,” which the Constitutional Committee accepted for review. This document proposed the establishment of a
semi-presidential system and it included the Charter of Rights and Freedoms.

Solidarity and the Catholic Church began a campaign in favor of the “citizens’ constitution.” The Catholic Church participated because it was dismayed by the Constitutional Committee’s draft. Although it had negotiated with the Committee and the government, the Church could not reach an agreement on Church-state relations and such issues as religious education and abortion (EECR, Winter 1995:19). The Church also objected to the absence of references to God, without which, it reasoned, human dignity could not be secure. Following Solidarity Chairman Marian Krzaklewski’s call for a referendum on its draft, the Church set up booths in every parish to gather signatures. Solidarity and the Church together obtained 1.5 million signatures. There was, however, no provision for a referendum on a constitution that had not first been approved by the Constitutional Committee and the National Assembly, and so the initiative failed to achieve its goal.

President Walesa in late 1994 withdrew his representative, Lech Falandysz, from the Constitutional Committee, decrying the “bad lawyers who have prepared for me a bad socialist draft” (EECR, Summer 1995:17). The
President endorsed the Solidarity Constitution and proclaimed his support for a referendum on the "citizens’ constitution." Osiatynski (1995:37) viewed this as a part of Walesa’s effort to court the support of Solidarity and the Church for the upcoming 1995 presidential election.

In addition to the governing parties’ conflicts with Solidarity, President Walesa, the Catholic Church, and center and right wing political groups, tensions within the SLD/PSL coalition hampered the work of the Constitutional Committee (Osiatynski, 1995:42, EECR, Winter 1996:18, Fall 1995:20, Summer 1995:17, Osiatynski, 1995a:36). After entering office, the PSL abandoned its “leftist rhetoric” and “embraced traditional Polish Catholic values” (Osiatynski, 1995a:42). The coalition partners battled over such issues as privatization, Church-state relations, agricultural policy, and EU integration (Osiatynski, 1995a:35, EECR, Fall 1995:20). Emblematic of the coalition’s internal tension and its subsequent inactivity was the chronic absence of a quorum of the Constitutional Committee to vote on constitutional articles (Falandysz and Rzeplinski Interviews, May 1997).

The 1995 Presidential campaign increased the level of conflict between the coalition partners as each ran its own
candidates, and exacerbated tensions between the government and President Walesa (EECR, Fall 1995:20). The need for parties and candidates to distinguish themselves and to appeal to specific constituencies made compromise, essential for constitutional drafting, more difficult (Osiatynski, 1994:37). Following his announcement as a candidate for the Presidency, Aleksandr Kwasniewski was pressured to step down as Chairman of the Constitutional Committee and was succeeded by future Prime Minister Włodzimierz Cimoszewicz (SLD).³ After Kwasniewski’s narrow victory in December 1995, the political atmosphere remained charged due to the accusations against Prime Minister Oleksy that led to his resignation in February 1996. Although the SLD controlled the Presidency and was the senior coalition partner, work on the constitution continued to proceed slowly and a final draft was only approved in the Spring of 1997.

Weeks before the vote on the Constitution in 1997, the Church hierarchy stated it had “moral reservations” in regards to the proposed basic law and left it to the people and their consciences to decide how they would vote in the referendum. Solidarity remained opposed to it.
The Constitution was narrowly approved in the May 1997 referendum. The Constitution was approved by 58.6% of those who voted but only 43% of the total registered voters participated in the referendum. The Confederation for an Independent Poland challenged the validity of the referendum based upon an article in the Little Constitution that stipulated that at least 50% of all registered voters must participate in a referendum before it may be considered valid. The Supreme Court ruled that that particular restriction did not apply to the constitutional referendum and, therefore, it was valid (Keesings Record of World Events, May 1997:41656-7, July 1997:41750-1).

The 1997 Constitution declares that Poland is a “state ruled by law” (Article 1) and that public authority can only be exercised within the law (Article 7). It also recognizes the separation and balance of powers (Article 10).

The new constitution contains not only an extensive list of rights, but also a chapter entitled, “Means For The Defense Of Freedoms And Rights,” which ensures everyone’s access to the courts (Article 74) and anyone claiming that his or her rights had been violated can directly petition the Constitutional Tribunal and be awarded compensation.
(Article 75). Article 76 guarantees every citizen access to the Ombudsman.

The Constitution was recognized as the basic law (Article 82). The procedure for the promulgation of international law was detailed (Article 86) and its superiority to domestic law, with certain exceptions, was recognized (Article 86). The Constitution also limited the scope for administrative regulations (Article 87), thus establishing the hierarchy of legal norms.

After a protracted political struggle, Poland had successfully promulgated a new democratic constitution. The composition of the Constitutional Committee, the political conflict surrounding its creation, the opposition by Solidarity and the Church, and the low voter turnout in the constitutional referendum raise the question of whether the 1997 Constitution will have sufficient legitimacy to function as the supreme prescriptive law.

Section 4.2.5: Laws of The Third Republic

An important aspect of constitutionalism is that all statutes and regulations are congruent with the constitution and with each other (Sejersted, 1988:140). The rule of law requires that laws recognize the equality
of all persons, be relatively clear in their meaning, and they should not violate the principle of non-retroactivity (Walker, 1988:25). Furthermore, the law must be internally consistent. The previous chapter showed that during the communist period, there was no hierarchy of legal norms and, therefore, statutes, regulations, and the constitution were not consistent with one another. The law was an incoherent mix of legal acts, many of which violated the principles of equality before the law and non-retroactivity. Fundamental legal reform was necessary for the establishment of the rule of law.

Upon taking office in September 1989, Prime Minister Tadeusz Mazowiecki made clear his government’s intention to uphold all existing laws. He stated that he would lead a "legal revolution" as his government would transform Polish law within the legal framework inherited by the new Republic. The June 1989 elections had already restored pluralism to the legislative process (Professor Adam Lopatka, Interview, May 1997). The period of Solidarity governments (1989 – 1993) was a time of feverish lawmaking as Poland moved decisively away from its communist past toward the creation of a market economy and a democratic state (Taras, 1996:128). During the 1990’s, Poland has
harmonized over one-quarter of its laws with those of the European Union as part of a process of European integration (Gebethner Interview, May 1997).

Although pluralism and public accountability have been restored in the legislative process, the quality of legislation in the post-communist period has been roundly criticized by legal scholars (Lopatka, Gebethner, Stefanowicz, and Szklennik Interviews, Taras, 1993:14), judges (Annual Report of the Supreme Court, 1990:3, Sokolewicz Interview, May 1997), the Ombudsman’s Office (CCRP, 1991:14, 1993:5, 1994:104, 1995:6), and politicians such as former President Walesa (FBIS, 1/23/92:28), ex-Foreign Minister Skubiszewski (FBIS, 5/22/92:13), and former Prime Minister Hanna Suchocka (FBIS, 7/16/93:16). The most systematic problems noted by these people are that the statutes have lacked precision and clarity, have not been sufficiently comprehensive in their substantive coverage of an issue, and often do not address the specifics of their implementation. This is problematic, as Walker (1987:19) noted, the rule of law is based upon clearly defined comprehensible laws.

Problems with legislation stemmed from a few causes. Professor Szklennik of the Senat Research Bureau
(Interview, April 1997) and others have posited that the enormity of the legislative agenda was a primary factor (Lopatka and Gebethner Interviews, May 1997, Letowski, 1993:1, CCRP, 1994:12). In the space of a few years, legislators created a market economy and built the foundations of a democratic state. In their haste, they passed statutes with serious substantive and procedural omissions, and these pieces of legislation had to be resubmitted to parliament for extensive amending. Statutes sometimes went through this process three and even four times (Odrowaz-Sypniewski Interview, April 1997). Frequent amending was also caused by government turnover (CCRP, 1994:85). New governments adjusted statutes to suit their interests and policy goals. Ombudsman Tadeusz Zielinski (1994:19) denounced this instrumental approach to the law as a relic of the communist period. Professor Gebethner of the Legislative Council (Interview, May 1997) believed that another factor was the absence of lawyers in Parliament.

The feverish pace of lawmaking that characterized the period of Solidarity governments and which contributed to the poor quality of legislation slowed considerably with the 1993 formation of the PSL-SLD government (CCRP, 1993:5, 1994:86). Jacek Michalowski, head of the Senat Research
Bureau, observed that ideological tensions and policy differences between the coalition partners restricted the government's legislative agenda. The Ombudsman's Office (1994:22) noted that, as a result, the pace of work on the new legal codes was "sluggish." Legislation in the areas of social welfare, housing, health care, reprivatization, and taxation proved to be inadequate, and yet the PSL-SLD government delayed making the necessary legal rectifications (Zielinski, 1994:51-4).

Despite the delays in rectifying problems and the fair quality of the legislation of the Third Republic, contemporary law is distinctly better than that of the People's Republic (Lopatka, Stefanowicz, Michalowski, and Gebethner Interviews, May 1997). The hierarchy of legal norms has been reestablished (Lopatka Interview, May 1997). The constitution has been recognized as the most fundamental source of law and as a limitation upon all other legal norms. The Ombudsman's Office (CCRP, 1995:20) asserted that, "With few exceptions, the legislation of the Third Polish Republic is in conformity with the principle of equality before the law..." Statutes no longer violate the principle of non-retroactivity, though there have been some exceptions in the areas of personal income taxes and
pensions (CCRP, 1993:15 & 53, 1994:85). This problem still occurs in administrative regulations. There are problems with "vacatio legis," the legal principle that there should be a sufficient interval between the promulgation of a law and the time it enters into force (CCRP, 1994:104, Nowicki Interview, May 1997). Financial and social welfare laws, for example, regularly enter into effect close to the date of their passage and this does not allow people to adjust their behavior to the new standards. Bureaucratic lawmaking will be examined later in this chapter, but here it is noted that the improvement of statutes created tighter restrictions upon the content of administrative regulations (Lopatka and Stefanowicz Interviews, May 1997).

Section 4.2.6: Civil Liberties

guarantees of rights were weak and civil liberties were systematically violated by the state.

The Round Table Agreement legalized Solidarity and created the framework for the return of political pluralism and reestablishment of civil liberties (Gross, 1992:5, Ludwikowski, 1996:150). The Jaruzelski government abolished Articles 282a and Article 52a of the Penal Code that had prohibited the formation of independent political and social organizations (Amnesty International, 1990:197). The government rescinded the law on the "abuse of religious freedom" and since then it has not abridged religious freedom (Wasek & Frankowski, 1995:298, Letowska and Letowski, 1996:167).

While Solidarity reformed the Interior Ministry and the police, it also passed legislation to establish individual and social freedom. The December 1989 amendments created political and social pluralism, the independence of the judiciary, and the freedom of the press (Brzezinski and Garlicki, 1995:30). At that time, the laws on "social parasitism," which had been aimed at political dissidents and union activists, were repealed (Wasek & Frankowski, 1995:299). The 1990 Passport Law removed restrictions upon the freedom of movement and obligated the Supreme Administrative Tribunal to review all incidences in which restrictions were imposed (Letowska and Letowski, 1996:161). The July 5, 1990 Law on Public Assemblies guaranteed freedom of assembly and defined its exercise (Rzeplinski, 1993:26). Former Ombudsman Ewa Letowska (1996:172) observed that, since 1989, violations of the rights of association and assembly have not occurred. The Mazowiecki government continued reforms in the area of due process that had begun in the May 1989 as part of the Round Table Agreement (Holda, 1995:395, FBIS, 8/14/89:46, Wasek and Frankowski, 1995:302). Stefanowicz (Interview, May 1997) observed that due process is generally observed and the following chapter examines its development.
Under the Solidarity governments, a free market was reestablished and private property rights were once again guaranteed (Karatnycky, 1997). Initiated in November 1989, the "shock therapy" policies of Finance Minister Leszek Balcerowicz (1989-1992) caused runaway inflation, high unemployment and underemployment, and exacerbated the state's already existing budget crisis; but it also succeeded in creating the foundations of the free market (Taras, 1996:127-8). Constitutional amendments in December 1989 deleted all references to socialism and established the freedom of economic activity and the protection of private property and ownership. (Meyer, 1991:453). The Sejm passed an additional 11 constitutional acts in January 1990 in order to further the development of a capitalist economy (Meyer, 1992:453). The July 1990 Ownership Transfer Legislation initiated the mass privatization of state assets and, in 1991, the Bielecki government chose the former Communist Party headquarters to be the home of the new stock exchange.

When the post-communist-agrarian coalition took control of the Sejm in 1993, privatization slowed, though nearly 800 enterprises were still sold in 1993 and 1994 (FBIS, 10/5/94:30; 3/21/95:17). Further privatization was
delayed due to debates over foreign investment and ownership, a struggle for control of the agency that oversees privatization, and the Peasant Party’s ambivalence toward the market (CCRP, 1993:5). The law for the second round of mass privatization was passed in July 1995 (OMRI).

Despite the slower pace of privatization after 1993, Poland has established a free market.11 The Ombudsman has concluded (1995:18) that the state does not violate the right of private property, although property laws contain many ambiguities (CCRP, 1994:86).12 Poland did not have comprehensive laws covering the areas of securities and stocks, investment, and consumer protection and these legal gaps have left private citizens and business concerns vulnerable to fraud.13

Viewing these legal reforms and the state’s observance of civil liberties, Helsinki Watch (1991:346), the human rights organization founded in 1979 to monitor compliance with the Helsinki Agreement, noted that in 1989 and 1990, Poland established a democratic political system with civil liberties. The U.S. State Department and Freedom House (1992 & 1997) concurred with this judgment, and the latter gave Poland the highest score for political rights and the second highest for civil liberties (Ludwikowski, 1996:161).
Amnesty International (1990 - 1995) reported that after 1989 Poland has not had any political prisoners. Poland’s dramatic human rights improvement received further international recognition when, in 1991, Poland was accepted as a member of the Council of Europe and successfully negotiated an Association Agreement with the European Community (Rzeplinski, 1993:26).

Section 4.2.7: Freedom of Speech And The Pluralization of The Mass Media

Freedom of speech is a particularly important civil liberty because it is an essential element of democracy (Holmes, 1988:232). Its establishment and protection was crucial not only for the rule of law, but also for the character of democracy in post-communist Poland. Poland had great success in reestablishing free speech and fostering pluralism in the mass media. In a report on post-communist Poland (1994:18-9), the Organization for Security and Cooperation in Europe (OSCE) concluded that freedom of expression had been reestablished and its print media is uncensored and independent. The press laws were revised in the wake of the Round Table negotiations and official approval was no longer needed before publication.
The regime rescinded laws that required the registration of printing and copying equipment and liberalized the registration process for periodicals and newspapers. The Censorship Inspectorate remained intact though inactive until its abolition in April 1990 (FBIS, 6/7/90:45). The secrecy of correspondence was restored in 1989/90 but there is widespread monitoring of telephone calls by the State Protection Office (UOP) (Letowska and Letowski, 1996:166, FBIS, 8/21/91:22).

There are few legal limitations upon freedom of speech. The most significant are Criminal Code Articles 270 and 273 which prohibit slander against the President, the Polish nation, the Republic, the political system, and the major organs of the state. According to the OSCE (1993:10-1), 15 people since 1989 have been prosecuted for slandering the President. The regular courts in almost all of these cases have only fined defendants and the appellate courts have overturned most of these fines. In 1994, the Oleksy government began to amend these articles in order to comply with the European Convention on Human Rights (OSCE, 1994:19).

While largely respecting freedom of expression, post-1989 governments have struggled with the problems of ending
the state's monopoly of the mass media and equitably dividing its media resources. The 1990 privatization of the Worker's Publishing Cooperative (RSW), the monopoly publishing agency, was particularly controversial and some charged that the former nomenklatura had used their position on editorial boards to take over papers and amass more than their fair share of the resources (FBIS, 11/1/90:27). Publication distribution was demonopolized in 1991, but the Treasury-owned corporation "Ruch" controls 70% of the distribution market (Warsaw Voice, 1/7/96:9). Ruch, which has recently encountered greater domestic and foreign competition, was slated for privatization in 1996.

The Polish media have become quite diversified. From 1987 to 1992, the number of daily newspapers increased from 45 to 72 (Europa World Book, 1990:2106; 1994:2415). While the number of magazines has remained stable at around 3,000, new titles have appeared and communist publications have ceased. The number of magazines and newspapers from 1993 through 1995 has doubled (World Press Review, 1995:29). Significantly, half of these have foreign ownership, principally American, German, and Italian.

The 1990 Telecommunications Bill abolished the state's monopoly of television, radio, telephone service, postal
services, and other telecommunications industries (FBIS, 11/1/90:29). Private Radio and TV stations had already begun to broadcast prior to the passage of this law (FBIS, 3/13/90:51 & 11/22/91:26-7). By 1993, there were 161 independent TV stations operating without licenses and 110 independent radio stations, 60 of which were run by the Catholic Church. State radio expanded to four national channels and TV to two and, in 1994, National Radio was split into 19 public companies (OSCE, 1993:48, FBIS, 12/6/93:31-2).

The 1992 Law on Broadcasting and TV established not only the framework for the operation of the broadcast media but also addressed the contents of programming. The statute created the National Radio and TV Board to regulate the media, appoint the management of the public stations, and to handle licensing. Parliament, the President, and the Constitutional Tribunal appoint members of this independent body. The Constitutional Tribunal nullified President Lech Walesa’s dismissal of the Board’s Chairman in 1994 and, thereby, upheld the independence of the Board (EECR, 1995:18).

A particularly controversial Senat amendment to the law in December 1992 created the requirement that
broadcasting respect "Christian values" (EECR, Winter 1993:8). Violators of this vague standard could be fined by the Board up to half of their annual broadcasting fee and lose their license. This clause was challenged in court but was upheld by the Constitutional Tribunal which explained that respect for Christian values does not require their propagation. The Conference of Bishops has written a pastoral letter on the nature of "Christian values" as a guide to the state (Grudzinska Gross, 1993:53). Irene Grudzinska Gross asserted that the standard of Christian values encourages self-censorship and thus diminishes the pluralism of the mass media.

Despite the controversy surrounding the law on Christian ethics, Poland's electronic media and press have experienced radical pluralization. Freedom of speech was firmly grounded in the constitution and statutes and the state has largely observed these laws.

Section 4.2.8: Social Rights

Along with western civil liberties, the 1952 Stalinist Constitution contained an extensive set of social rights. The governments of the Third Republic were, therefore,
constitutionally obligated to provide them and the public had come to expect them.

In the opinion of the Ombudsman (1994:92), the social welfare budget was often sacrificed during marketization for budgetary savings. The Ombudsman’s Office has repeatedly pointed out that the Social Welfare Act has not been fully implemented (CCRP, 1993:13). It (CCRP, 1994:5) also reported that social matters are the largest source of complaints they receive, and among these, pensions are the most widespread concern. It has found a pattern of unequal access to unemployment insurance, as poorer regions have been unable to meet demand (CCRP, 1995:10).

Despite children’s right to a free education, education has been a casualty of the state’s budget crisis, since per capita spending has declined since democratization (CCRP, 1995:12). Kindergarten, primary, and secondary education have felt the cutbacks and education in rural areas has been dramatically reduced (CCRP, 1995:14-5). Deficiencies in primary and secondary education have also translated into unequal access to higher education as students from poorer or more rural areas cannot compete with those from the wealthier provinces. Along with the decline in educational spending,
funds for scientific research and culture have been substantially reduced.

Health care was also a victim of the budget crisis. As the quality of health care declined, so too did equal access to it as poorer regions could not provide free service (CCRP, 1995:13). Orphanages and mental hospitals have been starved for funds. The Ombudsman (1993:17) described mental hospitals as "terrifying pictures of poverty and the violation of law." The government in 1994 passed the Psychiatric Law to protect the rights of the mentally ill. Its only shortcoming was a lack of procedural safeguards regarding the commitment process (CCRP, 1995:86).

Social rights suffered during the marketization due to the state's budgetary crisis. As a result of this, many social rights problems were brought to the courts, often by the Ombudsman. The following chapter observes that Constitutional Tribunal reached many of its most significant decisions in cases concerning social rights. It used such cases to establish the principles of equality before the law and the non-retroactivity of law.
Section 4.2.9: Overview of Constitutionalism

In the immediate wake of the collapse of communism, the Sejm extensively amended the 1952 Constitution to reestablish democratic government, the free market, and political, civil, and social rights. The hierarchy of law was established with the constitution at its apex. It was more difficult for the democratic regime to promulgate a new constitution. Political fragmentation delayed its creation during the early Solidarity governments and conflict between President Walesa and the SLD/PSL coalition stalled constitutional drafting during the mid-1990's. The 1997 Constitution created a democratic system, guaranteed an extensive list of rights, and broadened judicial oversight of the political system.

Legal reform began even prior to the June 1989 elections. The Solidarity governments passed an enormous amount of legislation as it transformed Poland into a democratic state with a free market. Although Polish law is increasingly congruent with that of the European Union, its quality is still uneven. The internal coherence of the law is also negatively affected by the presence of laws from the present, communist, and interwar periods.
Civil and political rights were restored by the Mazowiecki government in late 1989 and early 1990. Freedom of speech, assembly, religion, etc. have been grounded in the constitution and statutes. A free market economy with private property was also created in the early 1990's. The state has largely respected civil and political rights, but its budgetary crisis limited its ability to honor social rights.

Section 4.3: The State Under The Law

The administration, whether it is from Solidarity or the post-communists, is the number one obstacle to reform and a state of law (Lech Falandysz Interview, May 1997).

As with the establishment of constitutionalism, the development of a state under the law faced a number of serious obstacles inherited from the communist regime. Public administration exhibited a number of serious problems such as the inefficient and arbitrary exercise of power, decision-making authority that was highly concentrated within the central ministries, endemic corruption, and largely unaccountable state officials. Solidarity needed to destroy the nomenklatura, improve the quality of
administrative personnel, establish the accountability of state officials, and decentralize decision-making authority.

Section 4.3.1: Administrative Personnel

The Communist Party's monopolization of political power and the nomenklatura system were the most significant obstacles to a state of law during the party-state era. While Solidarity's assumption of governmental authority in September 1989 ended the Communist Party's political monopoly, the nomenklatura was still intact. The new regime needed to break the power of the nomenklatura and improve the quality of public administration. Upon assuming office in September 1989, Prime Minister Tadeusz Mazowiecki resisted popular calls for a general purge of communists in the state administration declaring that a "thick black line" ("gruba kreska") had been drawn between the communist era and the contemporary democratic one (Gross, 1992:67). Higher state officials in the military, security forces, police, judiciary, and the Procuracy were, however, screened ("lustration") for involvement in human rights abuses
and those who had violated people's rights were not returned to office. In this way, the Mazowiecki government avoided a policy based upon collective guilt, but still managed to remove key members of the nomenklatura.

Although Poland did not have a general policy of decommunization, there was extensive personnel turnover in the state administration during the early years of the Third Republic (Taras, 1993:29). The permanent civil service is, in comparison with those in Western Europe, relatively small and so a large proportion of those in administrative positions are political appointees (Toonen, 1993:158). Ewa Letowska and Janusz Letowski (1996:43) observed that during the early phase of democratization, Solidarity exhibited an almost "naive faith" that personnel turnover would bring "good people" into public administration and they would make the state serve the common interest. The Ombudsman's Office (CCRP, 1993:15) criticized the resultant widespread personnel changes for their lack of formal procedures. The Commissioner questioned whether the personnel turnover associated with party patronage violated the due process rights of those who had been dismissed. While that issue has not been
resolved, it is true that the extensive personnel turnover in the initial years of democratization combined with the political fall of the Communist Party to destroy the nomenklatura.

Party patronage abuses have, however, become a problem in post-communist Poland and this was exacerbated by the instability of the early Solidarity governments (Letowski, 1993:1, Taras, 1993:28). This volatility undermined the internal stability of state ministries and hampered the development of an experienced and competent body of administrators who understand and abide by the law (Letowski, 1993:2). Party patronage abuses reached their height under the SLD/PSL government (1993-7). The Peasant Party (PSL) replaced most incumbent local administrators with its party members (Osiatynski, 1995a:36). The coalition also slowed down privatization and packed the boards of state-owned companies with their own supporters (Osiatynski, 1995a:40).

In addition to party patronage, the quality of public administration personnel was negatively affected by other factors. The low pay offered by the state, a consequence of the state’s budgetary crisis, has hampered its ability to recruit qualified people into the civil service (Jens
The state has a particularly acute shortage of professional lawyers, and this is a serious problem with the renewed importance of the law and, in particular, the Administrative Code (Letowski, 1993:10). Many public officials receive insufficient training, and this also contributes to the low level of legal knowledge among state officials (Taras, 1993:29, Stefanowicz Interview, May 1997).

As a result of the low wages, much of the state was chronically understaffed as annual personnel turnover reached as high as 20% in many sectors of the state bureaucracy (Taras, 1993:30). Taras observed that understaffed state agencies are more likely to be inefficient, less able to deliver social goods, and less likely to observe citizens' rights.

Partisan recruitment, low wages, understaffing, and insufficient training have contributed to the persistence of a mentality of procrastination and opportunism that had characterized the communist state (Letowksi, 1993:3). Examining the post-communist state bureaucracy, Letowski (1993) found a "lack of imagination" and a refusal to cooperate with other agencies or even other departments within the same organization. Jens Hesse (1993:245) argued
that, despite massive personnel turnover, the quality of public sector officials has remained quite low. Piotrowski described (Interview, May 1997) bureaucratic culture as "high handed, inefficient, and opportunistic."

While Solidarity destroyed the nomenklatura, it had limited success in improving the quality of public administration personnel. A significant step toward the creation of a competent civil service, however, was the opening in 1991 of the National School for Public Administration. Modeled on the French School of National Administration, the Polish equivalent is beginning to place well-trained people in positions of authority. Another school has also been opened to train people to fill lower-level clerical positions.

Section 4.3.2: Bureaucratic Lawmaking

Along with administrative personnel problems, the poor quality of bureaucratic regulations hampered the development of a state under the law. Democratization and marketization entailed a prodigious legal transformation and the Solidarity governments created much hastily prepared legislation (Szklennik Interview, May 1997). Many of these statutes gave the bureaucracy broad discretion to
create the regulations for implementing the laws and for filling in the "gaps." This broad authority was often abused and resulted in discrepancies between the statutes, regulations, and implementation (CCRP, 1993:60, Taras, 1993:16).

The continued delegation of legislative authority to the bureaucracy encouraged agencies to rely upon their own ministerial instructions in their treatment of citizens rather than the appropriate statute (Toonen, 1993:16). State officials also relied upon "copy machine law," ministerial circulars that contained interpretations of existing statutes or legal instructions (CCRP, 1994:105). Ministerial law was itself unstable due to governmental instability as new ministers amended and changed their institutions' regulations. Furthermore, the publishing of ministerial regulations was often haphazard (CCRP, 1994:104-5). The result was legal uncertainty.

According to Marek Nowicki (Interview, May 1997), head of Helsinki Watch, bureaucratic regulations often lack procedures for citizens to claim their interests and procedural safeguards for protecting their rights. The laws on education, for example, contain numerous student rights but they do not, however, specify how these rights
may be obtained nor do they include appellate procedures to protect them against abuses. Former Ombudsman Tadeusz Zielinski (CCRP, 1994:54) observed that the absence of such procedures in social welfare has left people vulnerable.

In addition to the problem of the quality of regulations, delays in drafting substatutory acts created legal uncertainty. The Ombudsman estimated (CCRP, 1994:22) that by 1994, this backlog surpassed 50 ordinances, orders, and resolutions. This deficiency was particularly acute in the areas of social welfare, health care, housing, child welfare, and taxation (CCRP, 1993:57; 1994:19; 1995:91, 101-3). The lack of stable and well-drafted regulations meant that the rights and obligations of citizens were not clearly defined and this gave individual bureaucrats the power to determine these things.

Adam Lopatka (Interview, May 1997) thought that the problem of poor administrative regulations is declining due to a combination of improvements in the legislative process and the post-1993 deceleration in the pace of law making. Better statutes are establishing clearer limits for regulations and other substatutory or lower legal norms. According to Lopatka, the lawmaking authority of the bureaucracy is much more limited than that which it enjoyed
during the communist era. Stefanowicz (Interview, May 1989) concurred with this view, and added that the democratic regime has discontinued the communist practice of using "secret regulations." Furthermore, the increased scrutiny by the Ombudsman's Office and the courts has helped to identify and correct flawed regulations.

Section 4.3.3: Establishing The State's Accountability

Personnel turnover could not by itself generate a state under the law. Solidarity needed to establish the accountability of state officials. During the communist period, the state was only accountable to the Communist Party and state officials were able to ignore or to violate people's rights (Jowitt, 1992:210). With the restoration of democracy, the highest state officials, and indirectly their appointees, were publicly accountable for the way in which they exercised their power. The executive bureaucracy is also accountable to the Diet as the Sejm and the Senat maintain a number of standing committees that oversee specific ministries including one that supervises the state administration as a whole (Odrowaz-Sypniewski Interview, April 1997).
The rebirth of judicial independence has been critical to the institutionalization of the state’s legal accountability. The following chapter examines how the judiciary has established the state’s legal accountability. During the 1990’s, the Supreme Administrative Court and the Supreme Court annually adjudicated over 20,000 cases that involved the state and through them they have established the due process rights of citizens in dealing with the state bureaucracy (Letowska and Letowski, 1996:69-70, 1990-5 Annual Reports of the Supreme Court and the Supreme Administrative Court). Professor Jan Malec of the Ombudsman’s Office (Interview, April 1997) stated that the Supreme Administrative Court has “put the administration on notice” and the result has been greater care for the law on the part of bureaucrats. The Court’s power to oversee the executive bureaucracy was enhanced by a 1995 statute that extended due process rights to cover all interactions between citizens and the executive bureaucracy and guaranteed the right of citizens to initiate judicial proceedings against public administration officials (CCRP, 1995:84). The Constitutional Court has also examined the legality and constitutionality of regulations and executive actions (Brzezinski, 1993a:186).
The Ombudsman's Office is probably the most active institution investigating the state and protecting the rights of citizens. From 1989 to 1995, the Office received nearly one-quarter of a million letters from citizens involving one hundred and sixty eight thousand legal matters (CCRP, 1989 - 1995). It investigated approximately ten thousand new cases each year and managed to achieve a positive or partly positive result for petitioners in about a third of the cases.

The restoration of the mass media's freedom and pluralism has allowed it to perform a watchdog function over the state. Papers like Gazeta Wyborcza and magazines like Wprost, Nie, and Polityka have distinguished themselves for their investigative journalism, particularly in regards to the problem of government corruption.

Section 4.3.4: THE CREATION OF LOCAL GOVERNMENT

Michal Kulesza, former Plenipotentiary for Public Administration Reform (1992-4), stated that Solidarity viewed the development of local government as a "parallel revolution" to the changes that were occurring at the top of the political system as well as a means of increasing the accountability of the state administration. Solidarity
believed that the way to reform the highly centralized state was the creation of genuine local government (Kulesza Interview, May 1997). Kulesza thought that devolution and decentralization would reduce the workload of central ministries and create "room for the central government to govern" without being involved in the minutiae of policy application. Along with increasing the accountability of the state, Solidarity believed that local government would be more accessible and responsive to the people.

The Sejm passed the Local Government Act in March 1990 which initiated local democracy and created a basis for the decentralization of government functions (Jens Hesse, 1993:231). The Procurator and the Ministry of the Interior lost their supervisory power over local government as this authority passed to provincial governments, the Council of Ministers, and the Supreme Board of Control. The Act also abolished the People's Councils and replaced them with elected bodies called "Sejmiks." It also recognized 2,400 different units of local government, granting them greater autonomy in implementing policy in such areas as social assistance, education, sewage, and physical planning.

During the Suchocka government (1992-3), Plenipotentiary Kulesza increased the autonomy of local
government in the implementation of statutes and government policy (Toonen, 1993:153). The development of local government was, however, accompanied by many problems and difficulties. In Kulesza’s estimation, local government did not develop as an independent policymaker. Taras (1993:19) agreed, and added that local government should be viewed more as an implementing agency with limited discretion due to the “fairly specific nature of legislation.” Formal policy-making structures are underused and weakly developed as local politicians rely upon traditional practices and informal decision-making methods (Taras, 1993:26, Piotrowski and Wyrzykowski Interviews, May 1997). The state’s budget crisis and the weak condition of the economy hampered the performance of local government as it received the authority to implement policies but it often lacked sufficient financial resources to do so (CCRP, 1995:117). Local government has very limited taxing powers and receives most of its money from the central government. The Ombudsman’s Office asserted (1995:119) that the central government continues to devolve more responsibilities to the communes, mandating certain policies, but fails to provide them with adequate levels of revenue to accomplish these tasks.
The 1993 elections which returned the post-communists (SLD) and their agrarian allies (PSL) to power was, for Michal Kulesza, the psychological end of the 1989 revolution. Kulesza resigned his office in May 1994 when it became apparent to him that the government did not support the development of local government. The Ombudsman’s Office (CCRP, 1995:116) concurred with Kulesza, stating that after 1993 local government reform “has clearly slowed down.” The Democratic Left Alliance (SLD) and Peasant Party (PSL) Minister for Local Administration Michal Strak halted the reform of local government begun under Michal Kulesza and replaced almost all incumbent local officials with PSL members (Osiatynski, 1995a:35).

Democratic Poland remained a centralized state as, constitutionally, local government remained a part of the executive branch without independent status. However, significant decentralization and devolution of decision-making authority occurred under the Solidarity governments. Genuine local government developed despite budgetary and personnel problems. While the early performance of local government has been mediocre, these reforms were still important steps in fostering smaller and more accessible government. Professor Zawadzki (Interview, May 1997)
observed that decentralization and the development of local government have taken the "small" issues that people really care about, such as school lunch programs, and transferred them to the local community.

Section 4.3.5: Overview of the State Under the Law

The development of the rule of law in post-communist Poland required comprehensive reform of the state. The early Solidarity governments succeeded in destroying the nomenklatura. They also devolved a significant degree of decision-making authority to local government. The public and legal accountability of state officials was established. The Ombudsman's Office, the Supreme Administrative Court, and the Constitutional Tribunal provided effective oversight of the state bureaucracy.

Although important reforms have occurred, the improvement in the quality of public administration has been limited. The mediocre performance of local government may just be the result of its newness. Personnel quality suffered from partisan recruitment, low wages, and insufficient training. The state is also understaffed and does not have enough lawyers. This dearth of well-trained people with legal knowledge has affected the state's
adherence to the law. It has also affected the state’s ability to produce well-written administrative regulations. The poor quality of ministerial law has generated legal uncertainty and, in some instances, arbitrary policies.

Section 4.4: The Rule of Law In Post-Communist Europe

This section presents a comparative overview of the establishment of the rule of law in post-communist Eastern Europe. It examines the post-communist constitutions and the establishment and protection of civil liberties and argues that Central Europe has made greater progress toward the rule of law than the Balkan countries. This is because democratic movements controlled the process of political development in the former, while the ex-communists retained power in the latter.
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<td>BULGARIA</td>
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<td>5.38</td>
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<tr>
<td>ROMANIA</td>
<td>3.88</td>
<td>4.63</td>
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<td>TURKMENISTAN</td>
<td>6.94</td>
<td>6.38</td>
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Table 4.1: Freedom House democratization and marketization scores (1996/7).

Scores are based on an ordinal scale from 1 to 7 with 1 denoting the greatest degree of democracy/economic freedom and 7 being the least.\textsuperscript{19}
The USAID/Freedom House Survey in Table 4.1 revealed that the Central European Countries followed by the Baltic states are in the vanguard of democratization and marketization in the post-communist world. The Central European and Baltic countries have also experienced significant progress toward the institutionalization of the rule of law (Freedom House, 1997, Karatnycky, 1997, Zielonka, 1994:88, Ramet, 1996:99, Ludwikowski, 1996:191). Freedom House (1997) categorized Hungary, Poland, the Czech Republic, Lithuania, Latvia, Estonia, and Slovenia as "consolidated democracies" because these countries have political systems that are characterized by competitive multiparty politics within a system of checks and balances, and their states respect and protect the civil and political rights of their people. Karatnycky (1997) observed that the survey scores suggest the correlation of democratization, marketization, the security of human rights, and the development of the rule of law. Democracy is a necessary condition for the rule of law, and its quicker institutionalization in Central Europe facilitated that region’s development of constitutional government (O’Donnell, 1996, Weingast, 1997).
While the Balkan countries and those of the former Soviet Union are generally viewed as "laggards" in the creation of a democratic system and a market economy, almost all of the post-communist countries have experienced some degree of political and economic liberalization (Carrothers, 1996:118). Freedom House (1997) identified the exceptions to this general trend as Azerbaijan, Belarus, Kazakhstan, Turkmenistan, Tajikistan, and Uzbekistan. The successor states of the former Yugoslavia and many former Soviet republics have been engulfed by ethnic warfare and genocide and this has prevented democratization and the establishment of the rule of law.

Constitutionalism is an element of the rule of law, and post-communist Europe has experienced a period of constitutional politics. Reforming the basic law and drafting a new constitution in Poland was an incremental process that was hampered by political instability and conflict. Hungary did not write a new democratic constitution but, unlike Poland, this was not due to political instability. Negotiations between the communist government and the democratic opposition in 1989 and those in 1990 between the governing Hungarian Democratic Forum (HDF) and the liberal opposition generated basic elite
consensus on most of the fundamental constitutional issues (EECR, Spring 1992:3). As a result of this consensus, the last communist parliament in 1989 and the first democratic one in 1990 extensively amended the 1949 Constitution to such a degree that legislators claimed that the only sentence that remains unchanged is the one that identifies Budapest as the capital (EECR, Summer 1992:4). The amended constitution creates a democratic system in which parliament holds most of the state's authority (EECR, Spring 1992:3, Tanchev, 1995:143, Oltay, 1992:16). It also created a relatively weak president with ambiguous powers, a powerful Constitutional Court, and an extensive list of citizen rights (EECR, Spring 1992:3, O'Neill, 1996:136). The HDF government was satisfied with the constitutional situation after 1990 and believed that economic and political reform could be carried out within the framework of the amended constitution. After the electoral victory of the Hungarian Socialist Party and its subsequent coalition with the Alliance of Free Democrats, the new government proposed the drafting of a new constitution. Although parliament established a Constitutional Drafting Commission in 1995, it has not to date produced a document for the legislature's consideration.


The constitutional process in Czechoslovakia, as in Poland, was disrupted by an unstable political environment.
Political instability was caused by the collapse of the broad anti-communist organization, Civic Forum/Public Against Violence and by the conflict between the Czechs and Slovaks over the nature of the state (Leff, 1996:129, Pehe, 1992:11). Post-communist Czechoslovakia, like Hungary, rapidly took steps to institutionalize a democracy and the rule of law (Pehe, 1992:10, Cutler and Schwartz, 1991:513, EECR, Spring 1992:3). In the immediate wake of the overthrow of the communist regime, political prisoners were released in late 1989 and early 1990. The new democratic regime abolished the death penalty in 1990, rescinded laws and regulations that violated human rights, and began to bring its political institutions and laws in line with those of Western Europe (Pehe, 1992:11). During the summer of 1990, Parliament passed a statute on the rehabilitation and compensation of the victims of the communist era courts. In January 1991, the government promulgated the Bill of Fundamental Rights and Liberties, a constitutional charter that guaranteed civil and political rights and equality before the law (EECR, Spring 1992:3).

The first post-communist federal legislature functioned also as a Constituent Assembly. As the conflict between the Czechs and the Slovaks deepened, constitutional
politics became stalemated and the constitutional committee was unable to present the legislature with a draft. The constitutional process received a further blow when Slovak nationalists insisted that a state treaty between the two republics was a necessary precondition for drafting a constitution, and Czech politicians initially rejected this. The constitutional process collapsed after the electoral victory of the Slovak nationalists (MDS) who advocated independence and the Czech Civic Democratic Party (CDP) that was more than happy to have the Slovaks establish their own state. The so-called "velvet divorce" negotiated by the leadership of the Czech and Slovak Republics facilitated the peaceful dissolution of Czechoslovakia. This was in stark contrast to the genocidal violence that occurred in Yugoslavia.

Prior to the January 1, 1993 dissolution of the Czechoslovakia, the Czech and Slovak Republics each drafted new constitutions. The Czech constitution created a parliamentary system with a president acting as the largely symbolic head of state (EECR, Winter 1993:4). It also created a Constitutional Court whose authority would be defined by statute (EECR, Summer 1993:7). The basic law included the Charter of Rights and Freedoms that had been
part of the Czechoslovak constitution (EECR, Fall 1992:4). Parliament can amend the constitution by a three-fifths majority.

Until the late 1990's, the Czech Republic remained at the forefront of political and economic reform having established a stable democratic political system, a burgeoning market economy, and a pluralistic and free media (Ramet, 1996:99, Leff, 1996:133). Czechoslovakia was accepted as a full member of the Council of Europe in February 1991 and in 1993 its successor states were given separate seats on the Council (Amnesty International, 1992). In November 1995, the Czech Republic became the first post-communist country accepted as a full member in the Organization of Economic Cooperation and Development (OECD).

The Slovak constitution was principally drafted by the nationalist MDS in the Fall of 1992 (EECR, Fall 1992:10). The President was given broad legislative powers and under certain conditions he can dissolve the government. Despite his extensive authority, the president is elected by the legislature, which can remove him even for political reasons (Hollander, 1992:16). The Prime Minister and the cabinet are responsible to the legislature, but they can
veto legislation that it has passed. Pavel Hollander (1992:17) criticized the Slovak constitution for both the haste with which it was written and for its lack of clarity and legal consistency. Zielonka (1994:101) noted that the constitution is “one of the most easily alterable in the world” because parliament may pass amendments by a three-fifths vote. For Hollander, the weakness of the constitution revealed the etatist tendencies of the governing MDS and its desire to create an authoritarian system.

After the “velvet divorce,” the Slovak Republic experienced political instability, strained international relations, and prolonged delays in designing and carrying out economic reform (Leff, 1996:133). The independence and pluralism of the media have not been established (Ludwikowski, 1996:178-9). Slovakia has a significant Hungarian minority, and the nationalist governments under Prime Minister Vladimir Meciar have received condemnation from the European Union, the Council of Europe, and the United States for their violations of minority rights. Issues such as educational policy, bilingualism in official proceedings, and local autonomy have caused tensions not only between the government and the Hungarians in Slovakia,
but also with the Hungarian state. The conflict between Prime Minister Meciar and President Michal Kovac, which was exacerbated by the ambiguous and muddy constitution, caused political instability (Leff, 1996:134). President Kovac objected to what he perceived as Prime Minister Meciar's abuses of power, violations of minority rights, and his damaging of Slovakia's international reputation. Prime Minister Meciar responded by trying to limit presidential authority and his party (MDS) tried to impeach President Kovac. Amidst this struggle, Meciar used the police for political purposes and his control of the state media has been exercised in a way that has violated its independence.

Unlike Central Europe, the constitutional drafting process in Bulgaria and Romania was dominated by the former communists (EECR, Spring 1992:3-4). In Bulgaria, the ruling Socialist Party (BSP) began amending the constitution in December 1989 with little input from the democratic opposition. The first post-communist legislatures in Bulgaria and Romania served as Constituent Assemblies, and the poor showing of the democratic forces limited their influence over the constitutional drafting processes (Todorova, 1992, Klingman and Verdery, 1992). Troubled by the BSP's domination of the drafting, a bloc of
the democratic opposition's deputies staged a walkout (EECR, Spring 1992:4). Jon Elster (1991:463) observed that in Romania the former-communists of the NSF produced "one of the most illiberal constitutional drafts" and in response, the opposition parties boycotted the constitutional referendum. The Bulgarian Socialist Party refused to agree to a national referendum for fear of a similar boycott.

While both constitutions guarantee civil rights and equality before the law, they have provisions that in practice limit and condition these rights (Elster and Holmes, 1992:11). Ludwikowski (1996:127) observed that the Romanian constitution lacks "sophisticated safeguards" for the protection of human rights, and the exercise of these rights are limited by the ambiguous standard of "public morality" and "national security" (Mihai, 1995:59). Mihai (1995:62) observed that people are not guaranteed access to the courts in order to protect their rights. Equally evocative of the communist era, their constitutions contain extensive social rights whose implementation the judiciary is obligated to enforce. The Bulgarian judiciary is, for example, constitutionally obligated to ensure that the government is fostering the participation of youth in
Poorly drafted and unenforceable provisions such as this may undermine the prescriptive character of the constitution.

Elster and Holmes (1992:23–4) observed that the Romanian and Bulgarian constitutions create very weak systems of checks and balances as their parliaments are predominant. Parliament in neither country is required to pass a constructive vote of no confidence to remove the government. By a majority vote in both chambers, the Romanian National Assembly can pass “organic laws” that affect the fundamental nature of the political system (Mihai, 1995:63). The Presidents of both countries are popularly elected and yet have weak powers such as a suspensive veto that can be overridden by a simple majority vote. The Bulgarian and Romanian Presidents do, however, have the power to declare a state of emergency and rule by executive decree (Elster and Holmes, 1992:12). Constitutional Courts were established in both countries, but in Romania the parliament may override its decisions by a two-thirds majority vote. Ludwikowski (1996:128) observed that access to the Romanian Constitutional Court is almost entirely restricted to members of the parliamentary majority. Local government remains weak and
dependent upon the central authorities. This decision has nationalist overtones given the regional concentration of ethnic minorities. In a similar vein, the Bulgarian constitution bans ethnically, racially, or religiously based political parties (Ludwikowski, 1996:119-120).

Romania's flawed constitution is symptomatic of its limited progress toward the rule of law (Ramet, 1996:99, Freedom House, 1997). Thomas Carrothers (1996:119) argued that Romania's post-communist political change has been affected by "democratic deficits." He was referring to the dominant presence of ex-communists in the government and the state, the transformation of the National Salvation Front (NSF) and its successor the Party of Social Democracy in Romania (PSDR) into a political machine that controlled the state, and the strength of nationalist parties that were a part of the governing coalition from 1994 through 1996. After the December events that overthrew Nicolae Ceausescu, the National Salvation Front (NSF), a group dominated by former high-ranking communists, held government power. Zielonka (1994:92) found that there was a high percentage of members of parliament who had served in that institution during the communist era. The National Salvation Front controlled executive, legislative, and
judicial authority, and this obstructed the institutionalization of oversight, (O’Donnell’s “horizontal accountability”), that is essential for the development of the rule of law. Michael Shafir (1992:34-5) observed that the “post-communist” political elites paid very little attention to the issue of the rule of law.

In the wake of the violent overthrow and execution of Nicolae and Elena Ceausescu, the ex-communist leadership of the NSF freed all political prisoners and abolished the death penalty (Amnesty International, 1990:200). The regime outlawed torture in October 1990 and in the following month it began to establish due process with the right to counsel and the requirement of a warrant for the detention of suspects (Shafir, 1992:36). Romania also signed the UN Convention Against Torture (Amnesty International, 1991:191). The democratic credibility of the NSF government was, however, seriously damaged in June 1990 when, faced with growing crowds demanding its resignation, it brought thousands of miners to Bucharest, armed them, and allowed them to attack the crowds (Klingman and Verdery, 1992:134-5). In the aftermath of the miners’ attack, hundreds of people were detained and there were

The NSF continued the communists' discrimination against the Roma and Magyar minorities (Freedom House, 1992 & 1997, Amnesty International, 1990-5, Ludwikowski, 1996:134). Roma were, for example, disproportionately the subject of public disorder trials upon the basis of "parasitic lifestyle" charges (Amnesty International, 1991:192). The Magyar minority (DAHR) in Transylvania also vociferously complained about the violation of its rights and the failure of the regime to grant it greater local autonomy. The issues of local autonomy, and educational and cultural policy have been very contentious, and have strained relations between Romania and Hungary. From 1992, the Party of Social Democracy (formerly NSF) minority government relied upon the tacit support of extreme nationalist parties. The 1994 inclusion of the extreme nationalist parties in the government polarized the situation, particularly when the government began recalling elected mayors who were either Magyar or members of the political opposition. The DAHR left the National Minority Council in 1993 complaining that the government was not seriously committed to protecting the rights of minorities.

The development of full freedom of expression has also been slow and difficult. Klingman and Verdery (1992:144) noted that the NSF/PDSR used its appointment powers to control the electronic mass media. News was reported from a pro-government perspective and the opposition's access to state radio and TV was tightly restricted. Although the press has become free, its independence has been limited by the government's control over paper, distribution, and the unions (Verdery and Klingman, 1992:145, Ludwikowski, 1996:133). Carrothers
(1996:118 & 121) found that during the 1990’s the Romanian media has become more varied, but the independence of state radio and TV remained compromised, particularly by the government’s domination of the State Audiovisual Council, a body that was established to manage the state media and was supposed to be politically neutral. While independent stations have begun to broadcast, Carrothers noted that their owners were either connected to the Party of Social Democracy or they realized that they had to remain on good terms with the government, and so they refrained from criticizing it.

The reform of the Romanian state was not far-reaching (Carrothers, 1996:120). Carrothers wrote that the Party of Social Democracy, “has increasingly used the state bureaucracy as a patronage park for party hacks.” He added that under Prime Minister Nicolae Vacariou (1992 - 6), “a quiet reconsolidation of the old state apparatus has occurred.” The return of the old guard after a brief period of institutional change has kept the state administration unresponsive to reform and ineffective in the carrying out its functions. Corruption is also an endemic problem.
Among the state institutions that weathered the political transition with little change was the internal security force (Klingman and Verdery, 1992:127). The Securitate was a hated symbol of the Ceausescu regime and the initial accounts of the December 1989 revolution were that it had been defeated by the military. The real story is more complex and may never be revealed to the public, but it is certain that most members of the Securitate remained within the security forces of the new regime. A parliamentary commission report revealed that the Romanian Information Service (SRI), the renamed secret police, continued to maintain surveillance on thousands of citizens, including those in the political opposition (FBIS, 9/3/93). In addition, there has been a proliferation of security forces. The existence of the eighth one was only revealed to parliament in early 1995 (FBIS, 3/17/95). This is particularly troubling for only the SRI was monitored by parliament.

Democratization in Romania received a positive spark with the democratic opposition's 1996 victories in parliamentary and presidential elections. The new government has sought to restart privatization, state reform, and to settle disputes with Hungary and the Magyars
in Romania (International Yearbook, 1997). Prior to the opposition’s electoral victories, Carrothers (1996:122) noted the “promising growth of civil society,” as independent unions, public interest groups, ecological organizations, civic education associations, etc. began to emerge.

The post-communist period in Bulgaria largely mirrors that of Romania, except that president, Zhelu Zhelev, was a member of the Union of Democratic Forces (UDF) and the UDF did form the government from 1991 through 1992 and again in 1997. As in Romania, Bulgarian civil society was quite weak when the political opening began in late 1990 and this allowed the reformed Communist Party, renamed the Bulgarian Socialist Party, to win the first competitive elections and control the process of political change (Todorova, 1992:163-4). According to Freedom House (1997), Bulgaria is a “transitional state” that has made some progress toward the establishment of democracy and human rights, but has not yet institutionalized the rule of law. Marketization has proceeded very slowly. The Turkish minority, like the Magyars and Roma in Romania and Slovakia, still experience discrimination (Todorova, 1992:155, Ludwikowski, 1996:119-120). However, freedom of
association, religion, and travel are secure. Beginning in 1992, the Conference on Security and Cooperation in Europe (CSCE) and the U.S. Department of State also recognized that the human rights situation improved dramatically. Media pluralism developed over the course of the 1990's, although state radio and TV struggled to establish their independence (Ludwikowski, 1996:121-2).

While all of Eastern Europe has experienced some degree of political and economic liberalization, the post-communist leadership of Hungary, Poland, Slovenia, and the Czech Republic have democratized their political systems and established the rule of law (Freedom House, 1997, Zielonka, 1994). The authors of Freedom House's 1997 Annual Report argue that the distinctiveness of the Central European countries lies in their clearer break with the communist era. In the Balkan countries, former communists were able to control the political openings in the late 1980's and early 1990's and their dominance prevented a more thorough democratization of the government and the state, hampered the development of checks and balances, and limited the independence and authority of oversight institutions.
The following chapter examines the influence of oversight institutions, particularly the judiciary and the Ombudsman's Office, upon the development of the rule of law. Within the democratic political system, these actors emerged as effective and popular checks upon the power of the state. They helped to secure the supremacy of the constitutional documents and to clarify their substantive content. The judiciary and the Ombudsman established the legal accountability of state officials, and, therefore, the importance of the law in public administration. Judicial institutions have also protected civil, political, and economic rights and the autonomy of civil society.

Section 4.5: Endnotes

1 The Round Table Agreement stipulated that only 35% of the seats in the lower house, the Sejm, were to be filled through competitive elections. The other 65% of the Sejm's membership were apportioned to the National List, candidates from the Polish United Worker's Party (PZPR) and its allied puppet parties. These National List candidates ran unopposed and needed only a certain percentage of the vote in order to obtain a seat. The Agreement also created the Senat, a 100 seat upper chamber whose entire composition was determined by competitive elections.

2 In the terminology of democratic theorists Juan Linz and Alfred Stepan (1996), the communist's control of the Presidency and the three "power" Ministries was designed to create "reserve domains." These are state institutions that are beyond the control of government. Their internal affairs are free from government oversight and they retain
the ability to intervene in the public affairs. Their autonomy creates the tacit threat to democracy. General Jaruzelski's assumption of the presidency was intended to guarantee the stability of the regime's fundamental character.

3 Many of the National List parliamentary candidates failed to get the required percentage of votes as people crossed out their names. Solidarity took 99 seats in the Senat and the 35% of the seats in the Sejm that were contested. Following the election, the puppet parties declared their autonomy from the Communist Party and consequently it could not form a government.

4 The first Parliament of the post-communist era (1989 - 1991) had attempted to write a new constitution. Many questioned the legitimacy of this body to do because it had been selected through semi-competitive elections (Osiatynski, 1994:30). The Sejm produced a draft for a more pure parliamentary system with most authority in the lower house while the Senat's version envisioned a semi-presidential democracy. No means existed for harmonizing the documents and this stalled the constitutional project. Although the 1991 elections fully restored Parliament's democratic legitimacy, their results severely fragmented its composition increasing the difficulty of reaching agreement on constitutional matters. Every governmental crisis, furthermore, halted its work on the Constitution.

5 The Little Constitution created a strong presidency. The President has nearly unlimited power to dissolve the Diet (Article 4). He is the "supreme representative of the Polish state in internal and international relations" (Article 28). The President can initiate legislation (Article 15, Section 1), challenge bills and statutes before the Constitutional Tribunal (Article 23, Section 6), veto legislation (Article 18, Section 3), and declare a state of emergency (Article 36). The President appoints the Prime Minister, and on the motion of the latter, the rest of the Council of Ministers (Article 57).

The government and the parliament control the legislative process (Article 17) and the budgetary process (Article 21). The Sejm may also dissolve the government through a vote of no confidence (Article 64). It also reviews a state of emergency after 3 months and it alone
has the power to extend it a further 3 months (Article 37). The Council of Ministers was given authority over all policy matters that are not reserved to the President by statutes (Article 52). The Council also directs the state bureaucracy (Article 56).

6 The fragmentation of the center and the right during the 1993 elections prevented several of their parties from crossing the five percent threshold to claim seats in the Diet. This left at least 28 percent of the population without representatives in parliament (Political Handbook of the World, 1994). The forfeited seats were awarded to the government parties inflating their electoral totals, a combined 36 percent, to a two-thirds majority in Parliament. Professor Osiatynski (1994:32) noted that the concern for political stability which had been the motivation for the restrictive electoral law weakened the representativeness of the constitutional drafting process. In his view, political stability and representativeness could have been achieved if the constitutional drafting had been removed from the Diet and given to a Constituent Assembly selected by more representative electoral laws.

7 Presidential Adviser Lech Falandysz often relied upon legally questionable interpretations in order to enhance presidential authority and this led Gazeta Wyborcza to coin the term “falandazation” to denote twisting the law to achieve some short-term political goal (Osiatynski, 1995a:41, EECR, Summer 1994, 16, Winter 1995:18, Spring, 1995:19). Political casualties of this conflict included Prime Minister Waldemar Pawlak (PSL), who the coalition jettisoned under pressure from the President, and Prime Minister Jozef Oleksy (SLD), who resigned after Interior Minister Milczanowski, a Presidential appointee, revealed that he may have had improper contacts with Soviet/Russian agents.

8 Prior to offering his resignation, Kwasniewski had begun favor greater authority for the president in the new constitution because he realized that he could become the next president (Osiatynski, 1994:31).

9 The Communist Party lost control of the Council of Ministers in September 1989 as the formerly docile satellite parties declared their independence and formed a
coalition government with Solidarity. Although the governments from 1989 through 1993 consisted almost exclusively of post-Solidarity parties, they exhibited varying political orientations including the Christian Democratic governments of Tadeusz Mazowiecki (1989-90), and Hana Suchocka (1992-3), the Liberal government of Jan Krzysztof Bielecki (1990 - 1), and the right/nationalist administration of Jan Olszewski (1992). Waldemar Pawlak of the former puppet party, the PSL, failed to form a government in 1992, but in the following year he managed to create a coalition with the SLD. He was succeeded in office by Jozef Oleksy (SLD 1995 - 6) and Wlodzimierz Cimoszewicz (SLD 1996 - 7).

Parliament’s rules have been rewritten to increase its openness and efficiency and the resources of its committees have been expanded (Odrozaw-Sypniewski Interview, April 1997). All bills submitted to the Diet are accompanied by a written analysis from the Sejm Chancellery or the Senat Research Bureau, as well as reports from independent experts (Szklennik Interview, May 1997). The Sejm and Senat have also become initiators of legislation. Professor Gebethner, a member of the Legislative Council, noted (Interview, May 1997) that one-quarter of all legislation and amendments are initially proposed by members of parliament.

Although the powers of the Senat have remained vague (Lopatka Interview, May 1997) and its elimination was debated during the recent constitutional process, it survived as the weaker of the two chambers playing an “oversight role” in the legislative process (Szklennik and Lopatka Interviews, April and May 1997). It may introduce bills to the Sejm and propose amendments that can be overridden by the Sejm through an absolute majority vote. Professor Szklennik of the Senat Research Bureau stated that one-half of all bills and amendments originate in the Senat.

On June 27, 1995, the Parliament ratified the “White Paper,” a series of 87 agreements detailing Poland's legal harmonization with the European Union. Before their submission to the Sejm, all government bills are brought into accord with existing Union law and legislators are supplied with information about the relevant European standards (Odrozaw-Sypniewski Interview, April 1997).
By 1995, private enterprises accounted for 56 percent of Poland's GDP (Ramet, 1996:97). In the retail trade, 92 percent of all employees were in the private sector (OMRI, 10/26/93). Matching figures for the building sector were 85 percent and in industry the figure was 46 percent. By 1993, 60 percent of all employment was in the private sector (FBIS, 6/15/94:17).

At the urging of the Ombudsman in 1995, the government issued new housing regulations (CCRP, 1995:86). Real estate and housing matters, however, still lack procedures with due process and often involve years of effort getting through the state bureaucracy (CCRP Materials, 1994:54).

The Ombudsman's Office (CCRP, 1993:59) has referred to consumer rights as a "dead field."

Another part of the law that had the potential to threaten the pluralism of the media was the limitation on advertising time. The law capped the broadcast of commercials at 15 percent of the total broadcast time (Jakubowicz, 1993:46). While public stations collect license fees paid by TV and radio subscribers and they may run advertising, the private stations rely solely upon advertising. The limitation on the amount of commercials puts them at a marked disadvantage vis a vis the public stations. Jakubowicz noted that in the assessment of annual fees, public stations may receive an advantage for the Board is allowed to consider the merits and nature of broadcasting when making this calculation. By nature of their programming, public stations can claim to be serving the public good and therefore entitled to a lower rate.

Party patronage, like the nomenklatura system, emphasizes party loyalty in the selection of state administrative personnel and this may result in unqualified people holding positions of authority. Despite this similarity, party patronage abuses are not nearly as toxic for a state of law because unlike the nomenklatura, today's officials are legally accountable and are subject to the disciplinary regulations of their ministries.

Ryszard Kucinski of the Warsaw Procurator's Office (Interview, May 1997) said that many of the younger and
more educated members of that office leave after a few years for more lucrative positions in banking or finance.

\footnote{It has, for example, broad authority over education but the dearth of funds has led to the closing of 60\% of all kindergartens (CCRP, 1995:117).}

\footnote{After surveying local government, the Ombudsman’s Office (1995:117-9) found that the flow of money from the center to the communes is quite irregular and most often it is in amounts insufficient for local government to meet its responsibilities.}

\footnote{A survey of 46 questions regarding democracy, civil liberties, civil society, and marketization was distributed to regional analysts and the scores above reflect the average score of the total that they assigned for each country (Karatnycky, 1997).}

Section 4.6: List of References


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CHAPTER 5

THE RESTORATION OF JUDICIAL OVERSIGHT AND ITS INFLUENCE UPON THE RULE OF LAW

The judges’ work consists not only in deciding on somebody’s guilt in criminal cases. It is also essential in assisting reform, the progress of which will determine Poland’s position in Europe (President Lech Walesa, FBIS, 7/24/91:18-9).

This chapter examines the establishment of judicial independence and impartiality in post-communist Poland and analyzes the how oversight by the judiciary and the Ombudsman’s Office catalyzed the development of the rule of law. It also explores the rebirth of judicial independence across post-communist Europe and compares the activism and political influence of the Eastern European constitutional courts.

This work has noted Weingast’s (1997) observation on the link between democracy and the rule of law, and the preceding chapter examined Poland’s contemporaneous
democratization and development of the rule of law. Guillermo O'Donnell (1996) contended, however, that democracy is a necessary but not sufficient precondition for the rule of law. He posited that the establishment of "horizontal accountability," the institutionalized oversight of the state, is essential for the rule of law. This oversight, particularly by the judiciary, renders the state legally accountable and protects people's rights and their equality before the law.

The judiciary and the Ombudsman's Office contributed to the rule of law in Poland by clarifying and promoting constitutional principles, establishing the legal accountability of all state officials, securing the importance of administrative law in public administration, promoting the internal consistency of the body of Polish law, and protecting civil and political rights. In their recent book on the rule of law in post-communist Poland, Ewa Letowska and Janusz Letowski posited (1996:114 & 117) that there is a growing public "craving for judge-made law" for two reasons: the lawlessness of the communist era and "the breakdown of confidence in the honesty and reliability of legislators" in the contemporary democratic period. In their (1996:119) view, it has been primarily the
performance of judicial institutions in the post-communist era which "has generated public trust and confidence in the state of law with its limits upon the legislature and the executive." Letowska and Letowski noted that it is for this reason that the Polish Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court are among the most trusted public institutions (CBOS, 1994, FBIS, 4/2/92:21, 11/16/93:23).

Section 5.1: The Independence and Impartiality of The Judiciary

Legal scholar Theodore Becker (1970:144) explained that judicial independence is the authority of the court to freely adjudicate in line with its interpretation of the law. Jean Blondel (Tate, 1987:17) suggested that independence refers to the scope of subjects upon which the judiciary may adjudicate and the depth to which it may scrutinize the rules of the political system. Later on, this chapter examines the independence of the Polish judiciary and its effects upon the rule of law.

Judicial impartiality exists when, "the courts are bound to the law and they will resist those in other positions who would have the judge violate this (Becker,
Comparative judicial scholars agree that insulation is a necessary condition for the judiciary's impartiality (Weinrib, 1988:61; Becker, 1970:26). "The rationality of the judicial office depends not just on the rational quality of its decisions but also upon its aloof place in the political order" (Sklar, 1987:16). The Communist Party's monopolization of political power had undermined judicial impartiality and independence and, therefore, democratization was necessary for the restoration of judicial authority.

The government of Tadeusz Mazowiecki moved quickly to reform the judiciary and to reestablish its impartiality. The November 1989 Law on the Judiciary required judges to suspend their Party memberships and restrict their political activities (FBIS, 11/1/89:53). The law also precluded the appointment and recall of judges on a political basis. Article 62 of the 1952 Constitution was amended in 1989 to uphold the impartiality of the judiciary and Article 60 barred the removal of judges for any reasons except those established by law (Brzezinski & Garlicki, 1995:41; Rzeplinski, 1993:26). Four constitutional articles that limited judicial independence were also repealed. Subsequent legislation ended the Judicial
Ministry’s supervision of judges (Sabbat-Swidlicka, 1992:26). Amendments to the law on the Supreme Court established the life tenure of its judges (Brzezinski and Garlicki, 1995:45).

Amendments to the Criminal Code in 1989 removed the obligation of judges to interpret the law in accord with “socialist morality” or the interests of the political system (FBIS, 11/1/89:53). Judges were obligated to adjudicate cases solely upon the basis of existing law. Articles 169 and 174 of the 1997 Constitution uphold the judiciary’s impartiality and independence.

In February 1990, the National Judicial Council, an independent and non-partisan body, was established to oversee the management of the judiciary (Amnesty International, 1991:189). Composed of representatives of all three government branches, it has the exclusive power to nominate judges who are then appointed for life by the President of the Republic (Brzezinski and Garlicki, 1995:45; Gostynski and Garfield, 1993:275). Appointment and recall procedures are based upon professional criteria. Recall procedures include a hearing and the right to appeal to the Supreme Court.
The early Solidarity governments succeeded in establishing judicial impartiality. Judicial observers have noted that there has been a cessation of the practice of "telephone justice" and other types of interference in judicial matters (Stefanowicz, Malec, and Kucinski Interviews, May 1997, Letowska and Letowski, 1996:119). One of the few challenges to the insulation of the judiciary was a clause in a vetting law that would have allowed for the removal of "compromised" judges (Sabbat-Swidlicka, 1992:27). This referred to judges who blatantly twisted the law to serve the interests of the communist regime. The clause in the vetting law was struck down by the Constitutional Tribunal on the ground that it violated judicial independence (EECR, Fall 1993/Winter 1994:15).
### Section 5.2: Judicial Personnel Turnover

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<td>13</td>
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</table>

Table 5.1: Judicial appointments and the number of judges.

SC - SUPREME COURT  
SAC - SUPREME ADMINISTRATIVE COURT  
REG - REGULAR COURTS  
APPEL - APPELLATE COURTS  
APPT - APPOINTMENTS  
TOTAL - # OF JUDGES

Personnel turnover during the 1980's and early 1990's renewed the judicial bench and virtually transformed the composition of the higher courts, thus facilitating a clearer break with the communist era judiciary (Table 5.1). Although the judiciary was included among the offices subject to vetting, there was no general post-1989 purge of the Judicial Ministry or of the judicial bench (Sabbat-Swidlicka, 1992:27). The high rate of turnover resulted from the voluntary retirement of what Anna Sabbat-Swidlicka described as the "old guard." For the regular courts, annual turnover during the early 1990's remained steady between 10 - 16% of the total number of judges.

Reorganization of the judiciary and the expansion of judicial authority also contributed to an increased number of new judges (Table 5.1). The National Judicial Council controls judicial appointment and, therefore, party patronage abuses have not affected the staffing of the judicial bench the way they have the rest of the state administration. As part of the Round Table Agreement, the Sejm in 1989 replaced half of the Constitutional Tribunal's justices. The Mazowiecki government later appointed a new leadership team for the Judicial Ministry and selected new Presidents for the four chambers of the Supreme Court.
The bench of the Supreme Court, which was almost totally changed in 1987, was again almost completely revamped (75% new judges) in 1990 to coincide with extensive changes in its jurisdiction. The authority of the Supreme Administrative Tribunal has similarly expanded and this has been accompanied by a net increase of 52 new judges. The appellate courts were almost completely renewed in 1990 as 180 out of the total of 211 judges were newly appointed.

Professor Christopher Stefanowicz (Interview, May 1997) observed that middle-aged judges are retiring and the judiciary is steadily becoming younger. The current bipolar age distribution amongst judges will disappear over the next few years and the judiciary will become even more youthful. As the composition of the judiciary changes, the habits and mentalities of the communist era will disappear.

Section 5.3: The Influence of the Judiciary Upon The Rule of Law

The judiciary significantly influenced post-communist Poland's development of the rule of law. Its influence has been pervasive in that it has affected every aspect of the rule of law. The term "the judiciary" refers to a number
of discrete judicial bodies each of which perform different
tasks and, thus, each affect the rule of law in unique
ways. Regular court judges have been given greater
authority to protect due process and the rights of
prisoners. The Supreme Administrative Court has worked to
place the state under the law by enforcing the
Administrative Code and the legal accountability of state
officials. It has also protected civil liberties,
including the due process rights of individuals involved in
administrative matters, from encroachments by the state
bureaucracy. The Supreme Court has brought greater
coherence and internal consistency to the law and was the
first Polish court to utilize international human rights
standards in its decisions. This increased coherence is
very important as Walker (1988:25) noted that the
legitimacy of law rests upon its intelligibility. The
Constitutional Tribunal contributed to a state of law by
clarifying and defining the legal and constitutional
competencies of government agencies and by settling
jurisdictional disputes between state institutions
(Sokolewicz, 1997). The Tribunal has transformed the
constitution into the supreme prescriptive law by enforcing
the conformity of statutes, regulations, and government
policies with the basic law. It has also protected civil liberties and provided expansive interpretations of constitutional articles covering individual rights.

Section 5.3.1: The Regular Courts And The Establishment of Due Process

Inverting the relationship that existed during the communist period, the democratic regime expanded the authority of regular court judges and reduced the Procuracy’s formal powers. These changes enhanced the ability of the judiciary to protect due process. The reestablishment of due process began in May 1989 as the judiciary regained control over the issuance of arrest warrants (Wasek and Frankowski, 1995:301). The courts were given the authority to review the temporary detention of criminal suspects and the pretrial detentions of criminal defendants (Wasek and Frankowski, 1995:302 & 358). They also gained the authority to order the release of those who had been unjustly incarcerated and grant them compensation.

The 1983 law governing the rights of suspects was liberalized and the Procurator was limited to 48 hours in which to question suspects (Malec Interview, April 1997). The Procurator must inform the suspect in writing of the
reason for his detention and his of right to appeal to the court (FBIS, 8/14/89:46). He cannot deny the defendant’s request to meet with an attorney though he can still attend any attorney-client meetings, subject to review by the court. Pretrial detention beyond 3 months is now subject to automatic court review and only the judge may extend it (Wasek & Frankowski, 1995:302; FBIS, 8/14/89:46).

Adhering to the Roundtable Agreement, the Jaruzelski government repealed 11 sections of the criminal code, another five sections of minor offenses, changed the content of five other sections, and reclassified some misdemeanors as minor offenses (FBIS, 8/14/89:46). Under the Solidarity governments, the Justice Ministry began to reform the Penal and the Criminal Procedural Codes. Breaking with the past, the draft Penal Code was changed to uphold the presumption of the innocence of suspects (Wasek & Frankowski, 1995:304-5). Article One also upholds “nullum crimen sine lege,” the Roman legal principle that an act cannot be considered a crime if it is not covered by a law (Polish Penal Code). The violation of this principle, which was so common during the communist era, has virtually disappeared (Letowska and Letowski, 1996:164). Professor Jan Malec of the Ombudsman’s Office
(Interview, April 1997) explained that the emphasis upon harsh sentences and penalties is being replaced by one which stresses fines and community service, shorter sentences, and rehabilitation. Professor Malec elaborated that the Penal and Criminal Procedural Codes are being written to meet European standards.

Parliament on May 25, 1995 passed a set of amendments to the Criminal Code (EECR, Summer 1995:19). The appeals system was streamlined and the courts assumed exclusive authority over temporary arrests. Suspects must now be read their rights (Wasek & Frankowski, 1995:305). Mr. Ryszard Kucinski of the Warsaw Procuracy (Interview, May 1997) explained that, although Poland does not currently have an exclusionary rule, proposed changes will tighten evidentiary standards. The “anonymous witness” was introduced with the proviso that defendants have the automatic right to appeal any verdict based upon such testimony. The Sejm declared a five-year moratorium on the death penalty. It also passed a packet of laws on the police in July 1995 that augmented their powers (EECR, Summer 1995:19). The law clarified permissible police surveillance and investigatory practices.
Professor Stefanowicz (Interview, May 1997) noted that post-1989 legal reforms and the new Codes have augmented the importance of criminal trials, which have become more adversarial in nature because of the increased ability of the defense to introduce and examine evidence and witnesses (Wasek and Frankowski, 1995:305, Stefanowicz Interview, May 1997). Equally important has been the increased willingness of judges to consider the defense’s evidence and their greater skepticism toward that of Procuracy.

Although reforms have dramatically improved due process, there have been some problems with their implementation. The Ombudsman’s Office (CCRP, 1993:8) reported that the state’s budgetary crisis affected the protection of due process rights. The police, the judiciary, and the Procuracy are all severely understaffed (Kucinski, Stefanowicz, and Malec Interviews, April and May 1997). The poor wages of these institutions contributed to high personnel turnover and an increase in the number of relatively young and inexperienced personnel who are less familiar with due process standards. A huge backlog of cases developed due to this understaffing. The dramatic increase in crime (65%) since the beginning of democratization exacerbated this situation (Ciemelecki,
Prolonged pretrial detention has become the norm as suspects wait for months and even years for their court appearance. Professor Malec of the Ombudsman's Office (Interview, April 1997) stated that a person accused of murder must wait in prison an average of eight months before making his first court appearance. The backlog of cases has diminished the ability of regular court judges to consistently and effectively oversee the Procuracy (Stefanowicz Interview, May 1997). The Procuracy has similarly found it difficult to control the police, half of whom have less than three years of experience (Perlez, 1995:A5).²

Although the accused has the right to an attorney, the Ombudsman's Office (1995:85) noted that financial factors may undermine the effectiveness of this right. The government regulates the remuneration of public defenders and, according to the Ombudsman, these fees are extremely low, and provide little encouragement for attorneys. The result for those who must rely upon public defenders has been the presentation of an inadequate defense. In addition, appellate and other higher court costs must be borne solely by those bringing suit. For many, this is an effective barrier against lodging an appeal. Stefanowicz
noted that this is unfortunate given the uneven quality of judges on the lower bench and the very limited time they can give to any one case.

In addition to problems caused by the state's financial crisis, the Ombudsman's Annual Reports and Letowska and Letowski (1996:124) have argued that due process has been hampered by the reluctance of the regular judiciary to adapt to its new expanded role. Stefanowicz explained that many judges are just learning to adjust to the new conditions and so they rely on old habits, including deferring to the Procurator.

The post-communist period has been a challenging one for the regular courts. Their resources have been inadequate for their increased caseloads and many of the older judges found it difficult to adapt to their new expanded role. The residual effect of socialist law and Poland's tradition of legal positivism were legal cultural barriers to activism by regular court judges. However, lower court judges, as a group, have become increasingly more active in the defense of due process and in protecting the quality of the criminal process. In addition, three factors suggest that this judicial activism will continue and even expand in the near future. One is the trend to a
younger judiciary that is more likely to be influenced by the increasing activism of civil law courts in Western Europe. Second, the 1997 Constitution grants all courts the right to petition the Constitutional Tribunal to review the constitutionality of laws and state actions (Article 187). This encourages lower courts to raise constitutional issues. Third, if in the near future Poland enters the EU and accepts the jurisdiction of the European Court of Justice, then Polish lower courts will have the ability to appeal to it. This provides them with another forum within which to challenge Polish legal norms and state actions.

Section 5.3.2: The Supreme Administrative Court: Establishing The State’s Accountability

The Supreme Administrative Court (SAC) has contributed to the development of the rule of law by establishing both the legal accountability of state officials and the importance of the Administrative Code in public administration. The SAC has also protected civil liberties, including the due process rights of citizens in administrative matters. Due process is usually thought of in terms of criminal and civil judicial procedure, but it may also apply to the interaction between the public and
state institutions (Holland, 1991:6). The modern state, through its regulatory and social welfare functions, increasingly affects and shapes people's lives. It is, therefore, important that the state, in carrying out these tasks, observe procedural regularities so that people are protected from illegal or unjustified actions by public officials (Bax and van der Tang, 1993:94).

Over the course of the 1990's, the SAC's jurisdiction was expanded and its bench was increased by 52 judges (Sabbat-Swidlicka, 1992:32, Table 5.1). The most significant legislation in this regard was the May 11, 1995 Act on the Supreme Administrative Court which formally extended due process rights to cover all interactions between citizens and the executive bureaucracy (CCRP, 1995:84). The law guaranteed the right of citizens to initiate judicial proceedings against public administration officials. The Ombudsman's Office (1995:84) commented that, "This law creates an airtight system for controlling all high-handed forms of external actions of the administration and brings Polish regulations more in line with West European ones..."
Table 5.2: Cases before the Supreme Administrative Court (1988 - 1995).

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<td>13304</td>
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<td>18851</td>
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<td>33.4</td>
<td>33.3</td>
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<td>34.2</td>
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</tr>
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</table>

STL - Cases settled by the Court
%PL - Percentage of cases decided in favor of the plaintiff
%DF - Percentage of cases decided in favor of the defendant (the state)
%TR - Percent of cases involving territorial organs
%CT - Percent of cases involving central organs


Table 5.2 illuminates the dramatic expansion of the Supreme Administrative Court’s caseload between 1988 and 1995. The number of cases it settled annually has increased by 133%. Using the 1992 figure for state employment, there was one case settled per 8.4 state officials. Despite democratization and the greater independence and authority of the Court, the percentage of decisions against the state has shown only a slight increase. With the growth in the volume of cases, however, the number of decisions against the state has more than doubled, from 4,544 in 1988 to 11,560 in 1995.
Table 5.2 also reveals a doubling in the percentage of suits brought against central state agencies. This is quite a significant change from the prior era when the central ministries were subject to very little oversight, particularly by the judiciary. Decision-making authority in this unitary political system is concentrated in the central ministries and, therefore, the establishment of judicial oversight of the central ministries, was essential for making the state accountable.
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Table 5.3: Major Types of Supreme Administrative Court Cases (1989 - 1994).

*Included tax and customs matters

CEC - Communal economic matters
AG - Agricultural matters
BLD - Building
TAX - Tax
PRP - Property matters
SS - Social Security
CUS - Customs
TOT - Total

Marketization and the socio-economic changes associated with it have modified the types of cases heard by the SAC (Table 5.3). It was important for the rule of law that the SAC expanded its jurisdiction into new areas of litigation and public concern that resulted from the establishment of capitalism. Communal economic matters, such as disputes involving collective farms, declined by over 20%, while private property matters have increased nearly five-fold. Due to the growth of disputes between private landlords and tenants and the surge in home ownership, cases involving building matters increased by 60%. As people begin to pay personal income and local taxes for the first time, the number of tax cases doubled. Poles have also regained the freedom to travel and so customs matters became a significant source of litigation. There was a substantial increase in the number of social security cases due in large part to the social welfare crisis of the early 1990's. The increase in the number of tax, customs, housing, and social security cases was also caused by the underdeveloped nature of law in these areas.

In addition to their adjudication, SAC judges and officials have contributed to the rule of law by helping to improve the overall quality of legal acts. They have, for
example, provided technical assistance to the Council of Ministers in the drafting of statutes, consulted with parliamentary committees, and aided administrative agencies with the creation of regulations (SAC Annual Report, 1989-95). From 1989 through 1994, they provided technical assistance on 674 legal acts, including 208 statutes, on such matters as local government, customs, telecommunications, property rights, anti-monopoly laws, and the civil procedural code (SAC Annual Report, 1989-95).

The Supreme Administrative Court’s main contribution to the development of the rule of law was its enforcement of the state’s legal accountability. A fundamental element of the rule of law is that the state functions primarily upon the basis of the law. Jan Malec (Interview, April 1997) of the Ombudsman’s Office, observed that the Court’s increased activism drew the attention of state bureaucrats back to the law and, thereby, restored the importance of the Administrative Code. The Supreme Administrative Court also protected due process and provided a means for people to protect their civil rights from the encroachment of state officials.
Section 5.3.3: The Supreme Court: Bringing Coherence To The Legal Codes

Unlike the docket of the Supreme Administrative Court, the Supreme Court's caseload dramatically declined in post-communist Poland as its jurisdiction was modified. Although the Supreme Court retained its four-chamber structure (civil, criminal, military, labor/social insurance/administrative), beginning in 1991, it no longer examined all appeals from courts of first instance, as the it began to function as a court of final appeal that focused upon particularly complex legal issues (Annual Report of the Supreme Court, 1992:1). The Supreme Court performs "extraordinary revision," the review of a court decision based upon a question of law. Upon petition by the lower courts or state officials, it may offer a binding interpretation of a law or resolve problems caused by a lack of agreement between existing legal norms. The Court may examine the legality of parliamentary acts and regulations even in the absence of a live controversy. The reformed Supreme Court has used its authority to foster the internal consistency of the law.
Table 5.4: Activity of the Supreme Court (1989 - 1994).

*1991 - Jurisdiction changed

CVL - Civil Law MIL - Military Law
CRM - Criminal Law TOT - Total
AWS - Administration, Labor, and Social Security


Table 5.4 shows a 65% decline in the number of Supreme Court Cases from 1989 to 1994 which had resulted from the transformation of the Court’s jurisdiction. In the wake of these changes, extraordinary revision has become the largest part of the Supreme Court’s work, and functions as a check upon the power of the regular and appellate courts that promotes uniform judicial interpretations of the laws. Parties to a legal suit, the Minister of Justice, the Ombudsman and appellate courts may file petitions for extraordinary revision.

Over the course of the early 1990’s, settling "problems of law," providing binding interpretations of
laws, became a much more significant aspect of the Supreme Court’s work (Supreme Court Annual Report, 1995:1). The Court (1991:2) asserted that ensuring a uniform interpretation of law is a "particularly important role in a democratic state," especially during the transition process as Polish law contained statutes from the interwar, communist, and contemporary periods (Supreme Court Annual Report, 1990:3). Faced with such incoherence in the law, the Supreme Court responded by using the constitution and its ancillary principles as the basis of its legal interpretations (Supreme Court Annual Report, 1991:3). The Court cited the rule of law as another principle that guided its interpretations. Unlike the Constitutional Tribunal, the Supreme Court was, in a limited fashion, willing to judge domestic law upon the basis of international law, with the result that Polish law is being made consistent with European and international standards. (Annual Report, 1992:3). The Supreme Court has, for example, applied international agreements such as the European Covenant on Human Rights (Letowska and Letowski, 1996:125).

In the post-communist period, the Supreme Court recognized that the internal consistency of the law needed
to be restored if Poland was to achieve a rule of law.
Walker (1988:25) posited that the edifice of the rule of law rests upon laws that are relatively clear in their meaning and consistent with one another. Through "extraordinary revision" and in settling "problems of law," the Supreme Court has provided binding interpretations that clarify and harmonize the law.

Section 5.3.4: The Constitutional Tribunal: Establishing The Supremacy of The Constitution

While the Supreme Court offers binding interpretations of statutes and regulations, the Constitutional Tribunal clarifies the basic law and oversees the conformity of lower legal acts with the constitution. The Constitutional Tribunal has had a significant influence upon the development of the rule of law. By clarifying and defining the legal and constitutional competencies of government agencies and by settling jurisdictional disputes between state institutions, by enforcing the conformity of statutes, regulations, and government policies with the basic law, and by protecting civil liberties the Tribunal has transformed the constitution into the supreme prescriptive law.
Like the Supreme Administrative Court, the Constitutional Tribunal's jurisdiction expanded throughout the post-communist period. A December 1989 constitutional amendment gave the Constitutional Tribunal the power of "abstract review," or the ability to examine laws and administrative regulations in the absence of a live controversy (Brzezinski, 1993b:40). The Tribunal acquired the authority to issue binding interpretations of statutes and to review the constitutionality of presidential, ministerial, and governmental decrees (Schwartz, 1993a:167, EECR, Winter 1993:8). The December 1989 amendment also gave it the competence to evaluate political parties to ensure that they are not anti-system in their orientation.

The Constitutional Tribunal Act of 1992 stipulated that the Sejm must review Tribunal decisions concerning statutes within six months (Article 7). If within that time period the Sejm fails to correct the statute or override the Tribunal's decision, then the act loses its force (Article 10). The 1992 Act also enhanced the independence of the Court by restricting the state's ability to prosecute Tribunal justices and to recall them from the bench (Article 17)."
The 1997 Constitution strengthened the role of the Constitutional Tribunal. Andrzej Rzeplinski (Interview, May 1997) noted that, over the course of the constitutional drafting process, support for parliamentary sovereignty declined in favor of a Tribunal that was capable of checking the legislature's power. Article 186, Section 1 of the 1997 Constitution declares that, "Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final." Article 186, Section 3 stated that the Tribunal may decide when its decisions will go into effect within 18 months of handing down its verdict. The Tribunal also gained the authority to review statutes, legal norms, and executive actions in light of international agreements (Article 184 Sections 1 - 3). The Constitution expanded the number of people with the right to petition the court to include any other court, certain social organizations, and citizens who believe their rights have been violated (Article 187).

Section 5.3.5: General Activity of The Tribunal

With its expanded authority, President of the Constitutional Tribunal Wojciech Sokolewicz (Interview, May 1997) stated that the Constitutional Tribunal has been
interpreting Article One of the amended 1952 Constitution ("Poland is a state of law") in a "daring way" in order to foster constitutional development in the direction of the rule of law. Justice Sokolewicz explained that the Tribunal's reliance upon this article has directly affected its jurisprudence in five ways: First, it has encouraged the Tribunal to explicate the juridical meaning of the constitution and to transform it into prescriptive law. Second, the state of law requires that the hierarchy of legal norms be maintained and regulations should be consistent with statutes. Third, human rights must be guaranteed. Fourth, organs of public power may only be established and operate upon the basis of statutory law. Fifth, the Tribunal must maintain and protect the separation of powers.
<table>
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<tr>
<th>YEAR</th>
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Table 5.5: Activity of the Constitutional Tribunal (1986 - 1996).

@Figure is only for first half of 1994

MOTIONS - Motions requesting Tribunal action
OWN - Motions brought by the Constitutional Tribunal
MATTERS - Includes all cases examined, those terminated during examination, and those that remained for the next session
DECS - Formal decisions issued by the Tribunal
QUESTS - Legal questions forwarded by other courts or state officials

Source: Janusz Trzcinski, Informacja Dotyczaca Dzialaności Oraz Problemow Wynikajacych Z Orzecznictwa Trybunalu Konstytucyjnego 1986 - 1996
Table 5.6: Results of Constitutional Tribunal activity (1986 - 1996).

@Figure is only for first half of 1994

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BINDING - Binding interpretations of laws
SIGNAL - Instances that the Tribunal signaled the Sejm or Council of Ministers that legislation is flawed
REGS - Regulations annulled by the Tribunal
STATS - Statutes annulled either wholly or in part
CHANGED - Regulations annulled or amended by the state agency that issued them during or immediately after examination by the Tribunal

From its creation in 1986 to 1996, the number of motions to the Tribunal tripled while the number of matters it handled and the decisions it made increased by a factor of five (Table 5.5). By the mid-1990's, the Tribunal annually conducted over thirty examinations of legal norms. The majority of the Constitutional Tribunal’s decisions were abstract reviews of statutes or regulations, as were, for example, twenty-six of the thirty-three decisions in 1995 and twenty-three of twenty-six in 1996 (Trzcinski, 1997:2). In addition to the dramatic increase in its activity following democratization, the Constitutional Tribunal also displayed a much greater willingness to find legal acts unconstitutional and regulations incompatible with statutes (Table 5.6). From 1986 until the initiation of democratization, the Tribunal only one provision of a statute and a dozen regulations (Trzcinski, 1989; Brzezinski, 1993b:193). In 1989 alone, the Constitutional Tribunal annulled 7 statutes and 6 regulations (Table 5.6). Although the data are incomplete, Table 5.7 indicates that during the 1990’s the Constitutional Tribunal annually annulled over 10 statutes.
Table 5.7: Major sources of motions to the Constitutional Tribunal (1988 - 1995*).

*Figures for 1992 were unavailable

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</table>

OMB - Ombudsman
SAC - Supreme Administrative Court
PRS - President
LCL - Local government
SC - Supreme Court
MPS - Members of Parliament
UNS - Unions
PRG - Procurator General
OWN - Own initiative

During the 1990's, the most prolific source of motions to the Tribunal was the Ombudsman (Table 5.7). Through its frequent appeals to the Tribunal, former Commissioner Ewa Letowska (1991:21) explained that the Ombudsman’s Office sought to “activate the legal system.” That is, it encouraged the Tribunal to apply constitutional principles, as well as the norms of international law, and thereby “constitutionalize” a judicial system that had traditionally deferred to the legislature by not challenging its statutes. The Supreme Administrative Court was also a significant source of motions to the Tribunal. This suggests that constitutional norms began to shape public administration.

Section 5.4: Significant Issues Adjudicated By The Tribunal:

Section 5.4.1: The Separation of Powers

Maintaining the separation of powers, even within a parliamentary system, is essential for preserving the rule of law. The Communist Party dictatorships illustrated that the concentration of power and a state of law cannot coexist. The Polish Constitutional Court has recognized this and ruled that the separation of powers doctrine is
"immanently contained within the principle that Poland is a democratic state governed by law" (Sokolewicz, 1997:18). For the Tribunal, the doctrine implied separation, balance, and cooperation among the three branches.

When addressing judicial authority, the Tribunal emphasized the separateness and distinctiveness of judicial power. Justice Sokolewicz (1997:18) argued that insulating the judiciary was essential for rebuilding its independence and was consistent with Article 62 of the amended 1952 Constitution. In a case involving an executive order for the recall of "compromised judges," the Tribunal ruled that the removal of judicial personnel by the executive violated judicial independence and the separation of powers (Sokolewicz, 1997:18). In a similar case challenging the power of the Minister of Justice to appoint regular court presidents, the Tribunal ruled that presidents could only be recalled under certain specified conditions and upon the motion of the National Judicial Council. The Tribunal cautioned the Minister that he may only "exceptionally interfere with absolute judicial independence," and only on the basis of "substantial justification." The Tribunal recommended that the Minister confine himself to administrative matters. The Tribunal also struck down

The Constitutional Court has also ruled on its powers. Responding to the Sejm’s habitual failure to review Tribunal decisions within the six month period specified by law, the Ombudsman appealed to the Court seeking an interpretation of the legal consequences of this negligence (CCRP, 1993:60). The justices upheld the six-month period within which the Sejm must review court decisions and either take remedial action or overrule the Tribunal’s decisions. The Court decided that if the Sejm failed to take action, the statute or its provisions would be considered annulled to the extent specified by their decision. In 1995, the Tribunal also ruled that its decisions are to be considered binding from the time the law was promulgated, not when it reached its decision (OMRI, 4/6/95).

In examining executive-legislative relations, the Tribunal recognized overlapping competencies between these branches, particularly in creating the annual budget (Sokolewicz, 1997:26). The Court has, however, sought to preserve Parliament’s "exclusive power to issue binding
law," and to this end has tried to place strict limitations upon executive regulations and norms. Regulations must conform to the originating statute as well as to the Constitution. The Tribunal has set aside many regulations for being inconsistent with statutes. In a 1995 decision, the Tribunal explained that statutes may grant legislative power to the executive, but executive regulations cannot supplement legislation. They may only make them "more precise in a manner laid down by the legislator." The Tribunal's efforts in this area are important for the rule of law, for as the two prior chapters have noted, abuses of bureaucratic lawmaking have weakened legality.

Scrutinizing the legislative process, the Court recognized the right of the Diet to establish its own rules, provided that these are within constitutional limits (Sokolewicz, 1997:26). As a result, when the Tribunal reviewed the rules of the Sejm, it struck down only a few provisions. The Tribunal has helped to clarify the legislative role of the Senat, particularly in the character of amendments it may offer. In a 1992 decision, the Tribunal explained that Senat amendments must be substantively related to the statute. It also established
a ban on "overloading the budget act" with unrelated amendments.

Section 5.4.2: Social Rights and Equality Before the Law

While the Tribunal has been very circumspect in ruling upon the legislative process, it have been quite active in the defense of social rights, which were guaranteed by the amended 1952 Constitution and are in the 1997 Constitution. According to Leszek Garlicki (1997:126), many of the Tribunal’s decisions have been related to issues of social rights. Tadeusz Zielinski (1995g:22) concurred that, “the concept of social justice was devoted much attention by the Constitutional Tribunal in its decisions.” The Tribunal’s decisions have not only emphasized considerations of social justice, they have also stressed the principle of equality before the law, an essential element of the rule of law. Its consistent defense of social rights has generated enormous controversy as well as conflict with the Sejm. Critics argue that the Court has usurped legislative power by making decisions that affect the state budget (Osiatynski, 1997:12). Garlicki (1997:123) noted that the Tribunal has also been criticized for protecting rights that were part of the 1952 Constitution and which the
party-state itself regularly failed to uphold. In Garlicki's view, it was unjust for the Constitutional Court to burden the financially-imperiled democratic state with these rights.⁷

According to Justice Sokolewicz (Interview, May 1997), in creating and upholding a state of law, the Court was bound to uphold these constitutional rights. Article One of the Constitution not only declares that Poland is a state of law, but also that it "implements principles of social justice". Justice Sokolewicz confided that the judges who were appointed by Solidarity were particularly concerned with social justice. Although this concern with social justice led to conflict with the government, a clear majority of the public supports social rights and they were included in the 1997 Constitution (CBOS, May 1997).

The first statutory provision ever struck down by the Tribunal was a 1988 law that would have doubled the required length of employment before those over forty and working for the first time would be vested with pension rights (Garlicki, 1997:125). In its decision, the Court cited two constitutional provisions upon which it has continued to base its support for social rights. The first was Article 70 of the 1952 Constitution that enjoined the
state to foster the development of social insurance. The second was the principle of equality before the law.

Despite the budgetary crises caused by marketization, the Tribunal rejected the government's argument that the economic emergency justified the limitation of certain constitutional rights (CCRP, 1993:7). In a series of cases in 1991 and 1992 on the indexation of pensions, the justices found no constitutional grounds for the government's refusal to make cost of living adjustments.

In social rights cases, the Constitutional Tribunal increasingly emphasized the legal principle of equality before the law (Garlicki, 1997:127). The Court consistently argued that equality before the law required that the budget crisis should not disproportionately harm the rights of any specific group and that financial burdens must be borne equally by all, not only by such groups as pensioners, the unemployed, students, or the mentally impaired. They also reasoned that equality before the law also implied that all those legally eligible for a right cannot be denied it. For example, the Court in case No. K.7/92 explained that the principle of equality before the law means that all sharing the same legally relevant characteristic should be treated equally (CCRP, 1994:14).
On April 6, 1993, the Tribunal ruled that a provision of the unemployment compensation law was unconstitutional (EECR, Spring 1993:11). The law denied unemployment compensation to those whose spouses earned a certain percentage over the national income average. The Tribunal decided that this violated equality before the law because it refused equivalent benefits to people who met the legally specified criteria. The Court similarly struck down part of the 1990 Farmers' Social Security Act that had denied compensation to the wives of farmers in cases of work-related accidents (CCRP, 1994:122).8

In addition to equality before the law, the Tribunal ruled that the principles of the non-retroactivity and vacatio legis impose constitutional constraints upon legislation, particularly in the area of social welfare (Zielinski, 1995e:50). In three decisions during the communist era, six during the regime transition, and thirteen under the Third Republic, the Tribunal has reiterated this principle. The Court, for example, struck down amendments to the tax law published in April 1993 that were to be applied to the period beginning in January of that year (Zielinski, 1995e:51). Two years later, it invalidated revisions of the Tax Code that would have
applied new tax brackets during a fiscal year that had already begun (EECR, Spring 1995:12). In these cases, the Court has consistently held that the violation of these principles in the area of social welfare leaves people with an insufficient amount of time to make adjustments to their changing material circumstances (Zielinski, 1995e:53).

The Tribunal has also emphasized that laws cannot be malleable because their certainty is an essential element of their legitimacy. In decision No. K.1/88, it (CCRP, 1993:73) wrote that when a statute remains relatively stable it “serves certain functions under the rule of law in the area of legal reliability and protection of basic rights and liberties of the individual.” The Court added that, “numerous and frequent changes can cause a lack of stability of the law, and consequently can weaken confidence in the existing legal system and in (the) state...”

Section 5.4.3: Civil Liberties

The Constitutional Tribunal has been as strident in its defense of civil liberties as it has been in its protection of social rights. Brzezinski and Garlicki (1995:34 & 40) observed that one of the most fundamental
contributions of the Constitutional Tribunal has been its
development of due process standards and the protection of
individual rights. The Tribunal has ruled as
unconstitutional any discrimination based upon gender,
race, religion, or education (Brzezinski, 1993b:41).
Constitutional Tribunal President Sokolewicz explained
(Interview, May 1997) that the Court has interpreted civil
liberties guarantees and procedures “in a most generous
manner.”

Freedom of speech is a fundamental civil liberty
(United Nations Declaration of Human Rights) and, in this
era of mass telecommunications, the protection of this
right requires the autonomy of the mass media from the
state. All of the post-communist states inherited
monopolies over the means of mass communication, and,
therefore, the disposition of these monopolies
fundamentally affected the degree of free speech and the
level of pluralism that existed in the media. While free
speech has flourished in post-communist Poland, the
political independence of the state-run media has been a
contentious issue. One of the Constitutional Tribunal’s
most politically significant decisions concerned the Radio
and TV Council which is an independent nine member body
appointed by the President and given the power to license stations and monitor their compliance with the Law on the Media. President Walesa in March 1994 fired Council Chairman Marek Markiewicz after a license was granted to Polsat for a national private TV station (EECR, Spring 1994:15-6). Walesa objected to this because he believed that Polsat's chairman was a "shadowy figure" with multiple passports and an inability to account for how he acquired much of his wealth. The Ombudsman and Parliamentary Deputies appealed this dismissal, arguing that the President only had the right to appoint, not remove, the chairman and, therefore, Walesa's dismissal of Markiewicz threatened the independence of the Council. The Tribunal agreed with this line of reasoning, and thus ensured the independence of the Council and, indirectly, the mass media (EECR, Summer/Fall 1994:16).

While the struggle over the TV and Radio Council had significant implications for the rule of law and generated substantial controversy, the issue of religious freedom created great controversy and stirred popular passions. In post-communist Poland, religious freedom is no longer about the state's repression of religious expression, but the proper role of religion and moral values in public life.
Clericals and anti-clericals have struggled over abortion, the political role of the Church, religious education, and the electronic media's respect for Christian values.

Herman Schwartz (1993b:31) noted that generally the Tribunal has avoided confronting the Church. In reviewing eight Ministry of Education regulations regarding the introduction of religious instruction in public schools that had been challenged by the Ombudsman, the Tribunal largely accepted religious education in public schools (EECR, Spring 1993:11). The Tribunal did find that three of the regulations infringed upon religious freedom and struck them down and placed limitations on two others.

The Tribunal had initially deferred to the legislature to determine the legality of abortion. In May 1997, the Tribunal struck down the liberalized abortion law that had been written by the SLD/PSL government (New York Times, 5/29/97:A6). The Court reasoned that the law was unconstitutional because it violated the right to life.

Vetting or "lustration" was another controversial area that raised civil liberties issues, particularly in regards to due process rights." It also raised the question whether communist era officials shared a collective guilt for the
crimes of the party-state, irregardless of their individual involvement in such crimes.

During the Jan Olszewski government in May 1992, the Sejm hastily adopted a contentious resolution for the vetting of its membership and other state officials based upon their collaboration with the secret police. The Interior Minister created and distributed a list of collaborators. The haphazard nature of the list, growing Parliamentary opposition to the procedure, and President Walesa’s negative reaction to further vetting led to the fall of the Olszewski government.

Deputies of the party Freedom Union appealed the resolution to the Constitutional Tribunal, and the Court ruled that the resolution was contrary to the principles of a “democratic state ruled by law” and invalidated it (EECR, Summer 1992:28). The justices argued that it violated the State Secrets Law and the Sejm’s rules which call for two readings of resolutions of “great social importance.” Furthermore, they questioned the lack of standards regarding the preparation and contents of the Interior Minister’s reports. The decision also upheld the legal norm that citizens’ rights cannot be legislated through resolutions, but only through statutes.
Far less controversial than vetting or religious freedom, the freedom of movement is another basic civil liberty that is guaranteed in both Polish and international law (CCRP, 1993:52). Despite the absence of controversy, freedom of movement has been hampered by the frequent amending of customs law. One amendment, for example, removed the standard customs allowance for those who were abroad for more than six months in connection with study, medical treatment, or employment. The Ombudsman petitioned the Tribunal to review this provision, challenging it as a violation of acquired rights (CCRP, 1993:52). The Constitutional Court agreed and struck down the amendment.

Section 5.4.4: Delegated Legislation

While many of its most significant decisions upon such matters as social rights, the independence of the media, and religion have involved statutes, the Tribunal has also examined "delegated legislation," the regulations that supplement statutes. The Ombudsman’s Office recognized that delays in delegated legislation, executive regulations and orders that supplement statutes, were a particularly serious problem as it hampered the effective execution of the law, created legal uncertainty, and encouraged the
practice of "photocopier law" (CCRP, 1995:56). As a result, state officials were regularly not operating upon the basis of the law.

The Ombudsman sent an appeal to the Tribunal that addressed the problem of delegated legislation in connection with land management legislation. Although the statute went into effect in 1990, the necessary regulations had still not been written more than a year later (CCRP, 1993:56). The Tribunal criticized these delays and instructed the Council of Ministers that its regulations should come into force at the time of the statute. It noted that these delays create legal uncertainty and undermines the rule of law. Delays in delegated legislation have, however, continued throughout the post-communist period and the Ombudsman has noted delays of up to three years in the creation of appropriate regulations (CCRP, 1994:20).

Section 5.5: Assessing The Constitutional Tribunal

Three external factors must be taken into consideration in any assessment of the influence of the Constitutional Tribunal upon post-communist Poland's development of the rule of law. The first is the imprecise
constitutional situation. Justice Sokolewicz (Interview, May 1997) emphasized that the ambiguity caused by the presence of multiple basic documents hampered the Court’s work. The second is the Tribunal’s inability to review domestic legislation in light of international law. Commissioners for Civil Rights, Ewa Letowska (1996:124) and Tadeusz Zielinski (CCRP, 1995:21) were particularly critical of the Tribunal’s “timidity” in applying human rights covenants (the ECHR, or the UN’s International Covenant on Civil and Political Rights), which Poland had ratified. Sokolewicz countered that the initial act creating the Tribunal and all subsequent amendments failed to provide the Court with this power. He admitted that he and the other justices would like to be able to use this power and are satisfied that it is included in the 1997 Constitution. The third external limitation upon the Tribunal’s effectiveness is the Sejm’s ability to override Tribunal decisions, and its habit of failing to take remedial action within the specified six month period. Statistics are not kept on the number of times the Sejm has overruled the Tribunal or simply ignored its decisions. The Ombudsman’s Annual Reports regularly remark upon the problem and note a backlog of remedial action dating back
three years (CCRP, 1994:19, Zielinski, 1995e:55). Former Justice Bakalarski (Gillis, 1995:151) noted that, through the end of 1989, the Tribunal had sent twenty-two separate statutes to Parliament for remedial action, but it had responded to only two of them.

Within these limitations, the Constitutional Tribunal effectively promoted the rule of law as it utilized an expansive interpretation of Article One of the 1952 Constitution to develop and apply "immanent" liberal constitutional norms and principles of the rule of law. According to Professor Gebethner (Interview, May 1997), a member of the Legislative Council, the Court made Article One and its interpretation of the rule of law into a set of guiding principles for those involved in the legislative process. Professor Wyrzykowski (Interview, May 1997) agreed that the Tribunal had an educational effect upon the legislature and the executive and "pushed politicians to do the right thing, which is what they need." Gebethner stressed that this learning process has taken, and will continue to require, time not only because politicians and officials are adjusting to a new role for the law and the courts, but also because they must learn to balance popular demands with a respect for the law.
The jurisprudence of the Constitutional Tribunal has included a wide variety of issues that are related to the rule of law. This section examined the Court’s vigorous defense of social and civil rights, its clarification of democratic principles such as the rule of law, and its adjudication of disputes between government branches. In cases concerning social rights, the Tribunal has established the principles of equality before the law, the non-retroactivity of law, vacatio legis, and the stability of law. These principles are all constituent elements of the rule of law and their establishment in Polish law was a significant step in Poland’s liberal democratic constitutional development (Walker, 1988).

Given sufficient constitutional support, the Tribunal has shown a willingness to abrogate regulations, provisions of Acts, and statutes, including the budget. Yet, it has also displayed a flexible and cooperative attitude in dealing with the executive and legislative branches. U.S. Federal Judge Robert Utter and David Lundsgaard (1994:247) observed that a “well-developed dialogue” has been created between the Constitutional Tribunal and the Sejm. With the clarification and expansion of its powers in the 1997
Constitution, the Constitutional Tribunal will become an even more effective check on the power of the state.

Section 5.6: The Tribunal of State

Although the Tribunal of State is not a part of the judiciary, it does function as a judicial body investigating charges of malfeasance brought against the highest state officials. It is elected by the Sejm for the duration of that Parliament's term (Wiatr, 1996:44). Investigations of senior state officials are initiated upon a motion that is supported by 115 parliamentary deputies, a Sejm Committee, or the President. The Sejm Committee on Constitutional Accountability investigates the grounds for an indictment and, if it concludes that these exist, the Diet votes on whether to send the case to the Tribunal (Wiatr, 1996:44). A law passed in 1992 made the president liable to the Tribunal, and this institutionalized that office's legal accountability.

Although the Committee of Constitutional Accountability received 47 motions through the mid-1990's, it has only conducted six investigations and brought very few indictments (Wiatr, 1996:44). As a result, the Tribunal, despite its potential power, has remained
relatively inactive. Jerzy Wiatr (1996:45) observed that the process became a political weapon and many of the motions lacked sufficient legal grounds to merit an investigation. This politicization has weakened the legitimacy of the motions, the Committee and its investigations, and, by association, the Tribunal of State.

Section 5.7: The Ombudsman’s Office

Like the Tribunal of State, the Ombudsman’s Office is not a judicial institution, but an independent agency. In contrast to it, the Ombudsman has been a very vigorous and effective oversight institution. It has contributed to the development of the rule of law through its protection of civil and social rights, its investigations which regularly uncover illegal or unconstitutional practices as well as other legal problems, and its appeals to state agencies and the superior courts to rectify legal problems.
From 1989 through 1995, the number of letters to the Ombudsman’s Office increased by 56% and the motions by 63% (Table 5.8). Deriving per capita figures based upon 1992 when there were 158,000 state employees (Taras, 1993:29) and the Ombudsman received 24,540 letters, there was an average of one petition per 6.44 officials, or one petition per 1,549 people. Putting the number of petitions into comparative perspective, Spain, like Poland, has about 38 million people, yet the Spanish Ombudsman receives only a third of the number of petitions that were received by his Polish counterpart (CCRP, 1989:5). This disparity may result from the high percentage of letters that are outside of the Polish Ombudsman’s competence and it may also

Table 5.8: Petitions received by the Ombudsman’s Office (1988 - 1995).

<table>
<thead>
<tr>
<th>Year</th>
<th>LTS</th>
<th>MTS</th>
<th>%OJ</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>52826</td>
<td>44936</td>
<td>80#</td>
</tr>
<tr>
<td>1989</td>
<td>29031</td>
<td>17895</td>
<td>58</td>
</tr>
<tr>
<td>1990</td>
<td>22764</td>
<td>18114</td>
<td>57</td>
</tr>
<tr>
<td>1991</td>
<td>22340</td>
<td>16581</td>
<td>61.4</td>
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<tr>
<td>1992</td>
<td>35236</td>
<td>24540</td>
<td>67.1</td>
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<tr>
<td>1993</td>
<td>43193</td>
<td>29273</td>
<td>64.4</td>
</tr>
<tr>
<td>1994</td>
<td>51013</td>
<td>33047</td>
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</tr>
<tr>
<td>1995</td>
<td>45423</td>
<td>29260</td>
<td>65.6</td>
</tr>
</tbody>
</table>

Table 5.8: Petitions received by the Ombudsman’s Office (1988 - 1995).

LTS - Letters received  
MTS - legal motions/issues raised by the letters  
%OJ - Percentage of issues received by the Commissioner’s Office that are outside of its competence.  
# The Source for this figure is Letowska and Letowski (1996:147).

reflect the numerous systematic problems that have plagued Polish state administration during the economic and political transitions.

The Ombudsman's Office noted that during the mid-1990's there was a sharp increase in the number of letters it received (CCRP, 1993:20-1, 1994:50). It argued that political conflict in 1992 and 1993 had caused instability within the state and stalled the drafting of necessary delegated legislation. In the absence of explicit regulations, state administrators often relied upon their own discretion and many times violated people's rights. This was a particularly acute problem in such areas as social welfare, property ownership, tenancy, taxation, and education. After the cessation of the political crisis and the formation of the SLD/PSL government, the Ombudsman (CCRP, 1993:55, CCRP, 1994:19 & 22, 1995:5) observed "sluggishness in reform," continued delays in drafting delegated legislation, and a "paralysis in the execution of rights." The Office (CCRP, 1994:22-3) concluded that "noncompliance with the law has not been this high since 1989."
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</tr>
</thead>
<tbody>
<tr>
<td>INV</td>
<td>3286</td>
<td>4101</td>
<td>4838</td>
<td>3760</td>
<td>7697</td>
<td>7583</td>
<td>8398</td>
<td>9463</td>
</tr>
<tr>
<td>PDG</td>
<td>3533</td>
<td>5928</td>
<td>5226</td>
<td>6589</td>
<td>9637</td>
<td>9463</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLT</td>
<td>1015</td>
<td>3311</td>
<td>3748</td>
<td>1983</td>
<td>2562</td>
<td>6703</td>
<td>6344</td>
<td>7257</td>
</tr>
<tr>
<td>SC</td>
<td>10</td>
<td>31</td>
<td>50</td>
<td>60</td>
<td>65</td>
<td>72</td>
<td>63</td>
<td>71</td>
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<tr>
<td>CT</td>
<td>5</td>
<td>5</td>
<td>26</td>
<td>-</td>
<td>36</td>
<td>27</td>
<td>24</td>
<td>23</td>
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<tr>
<td>EXA</td>
<td>89</td>
<td>123</td>
<td>164</td>
<td>424</td>
<td>202</td>
<td>249</td>
<td>232</td>
<td>240</td>
</tr>
<tr>
<td>%RC</td>
<td>33</td>
<td>33</td>
<td>22.7</td>
<td>16.9</td>
<td>20.2</td>
<td>19.4</td>
<td>23.4</td>
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</tr>
</tbody>
</table>


INV - Cases under investigation
PDG - Cases still pending a resolution
CLT - Completed cases
SC - Appeals to the Supreme Court
CT - Appeals to the Constitutional Tribunal
EXA - Extraordinary appeals to state agencies to change administrative procedures or regulations in light of Citizen’s rights
%RC - Percent of cases resolved in favor of the citizen

There has been a steady increase in the number of investigations conducted by the Ombudsman's Office (Table 5.9). This is because democratization removed limitations upon the Commissioner's Office and its staff tripled in size. As a result, the number of cases annually under investigation tripled and the number of completed cases increased seven-fold. Professor Letowska (1996:152) observed that through its investigations, the Office not only attempted to protect the rights of petitioners, but also to educate administrators as to the law, the constitution, and international human rights standards.

The Ombudsman's investigations regularly uncover illegal practices and policies or unconstitutional regulations and its authority to initiate judicial action has become one of its most effective means to rectify these problems. The Ombudsman is the primary source of cases for the Constitutional Tribunal and is among the leaders for appeals to the Supreme Court and Supreme Administrative Court (Table 5.9, Sokolewicz Interview, May 1997, Annual Reports of the Supreme Court, Supreme Administrative Court, and the Constitutional Tribunal, 1988 - 1995). The cases it brought to these superior courts had a potentially systemic effect on the protection of rights. Former
Commissioners Letowska (1996:151) and Zielinski (1994:44-5) revealed that judicial appeals were designed not only to protect the rights of citizens but to "constitutonalize" the jurisprudence of these courts. Letowska wanted the courts to abandon their legal positivism and make frequent use of liberal constitutional principles in order to establish a jurisprudence of rights that could be utilized by lower courts. The Commissioners also hoped to encourage the courts to include international law in their decisions.

The Ombudsman’s Office annually lodged over 200 Extraordinary Appeals with bureaucratic institutions in order to encourage them to bring their regulations or procedures into line with citizens’ rights (Table 5.9). In about 25% of the completed cases, the matter was resolved in favor of the private citizen. Poland’s financial crisis hampered the Ombudsman’s ability to achieve positive results as state institutions often agreed with the Commissioner’s assessment of an issue, but they lacked the resources to make the necessary changes (CCRP, 1994:34).

In order to prevent rights abuses from occurring, the Ombudsman’s Office, under the leadership of Tadeusz Zielinski (1992-6), began to review draft legislation (Zielinski, 1994:40-1). Although the Office did not have
the formal authority to do this, it involved itself in the legislative process and its participation was frequently requested by Sejm and Senat Committees and the Council of Minister’s Legislative Council (Szklenik Interview, April 1997).

The work of the Commissioner’s Office was not only directed to state officials, it also sought to educate the public about its rights (Zielinski, 1994). It conducted numerous public seminars with state officials as well as those for the general public. Members of the Office published columns and articles that regularly appeared in numerous newspapers and magazines. The Office also had its own television show.

The Ombudsman’s contribution to the rule of law were severalfold: Over the course of the 1990’s, the number of its investigations tripled and the number of cases it completed increased by 700%. The work of the Ombudsman increased the transparency and the public scrutiny of the state administration. Through its appeals to state agencies and to the superior courts, the Ombudsman’s Office enhanced the political and legal accountability of state officials. It has been argued earlier that this accountability is essential for ensuring that the state
administration will adhere to the law. The Ombudsman has become a leading source of cases for the Constitutional Tribunal, the Supreme Administrative Court, and the Supreme Court, and through its appeals it has brought to them cases that had systematic effects upon the protection of rights. Through its investigations, lobbying, and appeals, it annually resolved about 25% of all cases in favor the citizen. While this may seem to be a small amount, it signifies that in nearly 1700 cases in 1995, for example, the petitioner’s rights were upheld. While statutes and constitutions may guarantee civil liberties, the Ombudsman’s Office regularly compelled state officials to respect these rights. The Commissioner’s Office also educated state officials and the public about constitutionalism, the rule of law, and international standards of human rights.

Section 5.8: Summary:
The Judicialization of Post-Communist Politics?

This section examines the establishment of judicial independence in post-communist Hungary, Czechoslovakia, the Czech Republic, Slovakia, Romania, and Bulgaria and compares the judicial activism of their constitutional
courts. It will be shown that the Constitutional Courts in many of these countries became significant actors and positively influenced the development of the rule of law. The Hungarian Constitutional Court was the most active Court in post-communist Europe, and its activism fostered constitutional government. By the mid-1990’s, the Bulgarian and Slovak Constitutional Courts became more assertive in their defense of constitutionalism although this led to conflict with governments that were led by former communists. The National Salvation Front’s domination of the Romanian state during the early and mid-1990’s obstructed the development of judicial independence and, consequently, the Romanian Constitutional Court was largely ineffectual.

The expansion of judicial authority in post-communist Europe may be viewed as part of an international trend that has alternately been labeled the "judicialization of politics" or the "due process revolution," because it shares with this global phenomenon similar origins and characteristics. Also significant for this work is that the "judicialization of politics" has been linked with the rule of law (Vallinder, 1994, Tate and Vallinder, 1995, Shapiro and Stone, 1994, Stotzky and Nino, 1993).
The "judicialization of politics" has two main features. The first is the judiciary's more critical attitude to the statutes that it applies (Holland, 1991:5). In France (Shapiro and Stone, 1994:401), Austria, and Germany (Kommers, 1994:476), specialized judicial bodies, constitutional courts, may exercise "judicial review," the examination of the constitutionality of statutes as well as of executive regulations. In other states such as Israel (Jacobsohn: 1991:195) and India (Brunello and Lehrman, 1991:284), the superior appellate court performs this function. Some supreme judicial bodies such as the German Constitutional Court or the French Constitutional Council also exercise "abstract review," the power to review legal norms in the absence of a live controversy (Landsfried, 1994:114).

The second element of the judicialization of politics is the judiciary's increased scrutiny of administrative regulations and government actions (Shapiro and Stone, 1994:402). In countries such as the Netherlands (Ten Kate and van Koppen, 1994:143) and the United Kingdom (Waltman, 1991:36), the courts examine the conformity of administrative regulations with statutes. The German Constitutional Court may also examine the constitutionality
of administrative regulations and policies (Landfried, 1994:113). Expanded judicial examination of the state bureaucracy has been accompanied in some countries by the court's willingness to scrutinize administrative regulations in terms of their compliance with supra-national or international law (Ten Kate and van Koppen, 1994:147).

The "judicialization of politics" positively affects the development of the rule of law. Examining the consequences of judicial activism, many scholars (Tate and Vallinder, 1995:21; Volcansek, 1994:493; Stone, 1994:447; Cappalletti, 1985:553; Holland, 1991:5; Shapiro and Stone, 1994:404; Ten Kate and van Koppen, 1994:144) have noted that Constitutional Courts' exercise of judicial review has increased the authority of constitutions and slowly transformed them into supreme prescriptive laws. Even in the established parliamentary democracies of Western Europe, the judiciaries have progressively increased the scope of their legal and constitutional oversight of the executive and legislative branches of government (Volcansek, 1994:493; Stone, 1994:447; Cappalletti, 1985:553; Holland, 1991:5; Shapiro and Stone, 1994:404; Ten Kate and van Koppen, 1994:144). C. Neal Tate (1992:5)
observed that judicial activism has also facilitated the establishment of the legal accountability of state officials. Stone and Shapiro (1994:409) and Vallinder (1994:97) also noted that it leads to an expansion in the scope and protection of civil rights.

Although judicial activism began in the United States, the international trend of the "judicialization of politics" had its origins in the post-war era when the civil law democracies of Western Europe began to diverge from their adherence to legal positivism (Shapiro and Stone, 1994:401, Shapiro, 1994:101). The totalitarian experience of the 1930's and 1940's led to great concern among post-war political elites with ensuring the certainty of the rule of law (Vallinder, 1994:96). The failure of Weimar Germany and other interwar democracies undermined the faith of many in the ability of legislatures to both protect and abide by liberal constitutionalism (Cappalletti, 1989: 117). The desire to ensure the survival of democracy led many European post-war elites to enhance the status of their constitutions (Preuss, 1991:354, Melossi, 1994:11, Shapiro and Stone, 1994:401). In the Federal Republic of Germany (Kommers, 1994) and in Japan, the allies established constitutional courts which

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perform oversight of the state. The dismantling of the fascist state in Italy was also largely due to the work of the Italian Court whose jurisdiction was expanded after the Second World War (Volcansek, 1994:498). During the decolonization era, Supreme Courts with the power of judicial review were established in the Philippines (Tate, 1994), India (Brunello and Lehrman, 1993), and Israel (Edelman, 1994).

Since 1975, there has been a "third wave" of democracy. In many of these new democracies, judiciaries with broad jurisdiction and the power of judicial review were been established, beginning in Southern Europe with Spain, Portugal, and Greece, spreading to Latin America in the 1980's, and continuing in the 1990's in Eastern Europe (Shapiro and Stone, 1994:397). For most countries that have experienced a "judicialization of politics," a period of totalitarian or authoritarian rule immediately preceded its development. The experience of authoritarian government led democratic elites in numerous countries to enhance the power of the judiciary as a check on the state, to protect the constitution, and to foster political stability. Letowska and Letowski (1996:144) observed that in post-communist Europe there is a "craving for judge made
law" that is rooted in a widespread desire for security after forty years of abusive and arbitrary Party-state rule.

Like Western Europe and the other new democracies of the "Third Wave," all of the post-communist countries established Constitutional Courts that have the power of judicial review, even in the absence of a live controversy ("abstract review") (Schwartz, 1993b:28). With the exception of Poland and Romania, the Eastern European Constitutional Courts issue binding verdicts (Bach and Benda, 1995:49). The Courts are all empowered to review the constitutionality of statutes and administrative regulations and to resolve jurisdictional conflicts between branches of government (Report of the Constitutional Court of Hungary, 1996:1-2, Bach and Benda, 1995:49, Schwartz, 1993b:30-1, Brzezinski and Garlicki, 1995:45-7, Kolarova, 1993:48). With the exception of Poland, they all have the authority to examine domestic law in light of supranational and international law.\(^1^8\)

During the early 1990's, the Hungarian judiciary emerged as one of the most influential in post-communist Europe. Through constitutional and statutory amendments in the fall of 1989, Hungary established the independence and
impartiality of the judiciary (Oltay, 1992:19). While the Ministry of Justice creates the judiciary's budget, sets judicial salaries, and controls judicial personnel policy, all of these things must be approved by the independent National Judicial Council, which is composed of senior judges (Oltay, 1992:22). Following a ruling by the Constitutional Court, the Hungarian Judges' Association gained a role in the judicial appointment process (EECR, Summer 1993:10). The Constitutional Court writes its own budget and is free to set its own procedures (Oltay, 1992:20). The National Judicial Council administers all disciplinary procedures for regular court judges. Hungary accepted the norms of the International Court of Justice in 1990 and, in the following year, the Hungarian Judges' Association was accepted into the International Association of Judges.

The Hungarian Constitutional Court is regarded as the most active of constitutional court in post-communist Eastern Europe (Schwartz, 1993b:31). Constitutional Court Justice Laszlo Solyom asserted that the Court is the primary agent of the transition to European norms and the rule of law (Klingberg, 1993:44). The Court began to function in January 1990 and, in just over a year, it
received over 2000 petitions (Oltay, 1992:20). During the 1990’s, the Constitutional Court annually received an average of 1700 petitions and 80% of these were from private citizens (The Constitutional Court in Hungary, 1996:1). From 1990 to 1995, it received 9549 petitions, initiated 3279 cases, and adjudicated 2673 cases (The Constitutional Court in Hungary, 1996:22). The Constitutional Court has not been reluctant to strike down unconstitutional acts. From 1990 to 1993, it annulled 31% of all the legal norms that it reviewed. This figure increases to 35% for legal acts passed before May 1990, the date of the first democratic elections.

From 1990 through 1995, the Constitutional Court reached 126 decisions directly related to the rule of law, and a further 53 were concerned with the principle of equality before the law (The Constitutional Court of Hungary, 1996:22). In 80% of its cases during that time period, the Court reviewed the constitutionality of statutes or administrative regulations and many of these involved the most controversial issues that confronted the new republic. The Constitutional Court had an auspicious beginning when in its first case it ruled that the National Assembly had the authority to amend the Constitution.
regarding the procedure for the election of the President (FBIS, 2/14/90:48). The Court's decision not only upheld the power of the legislature, it also frustrated the ambitions of the Communist Party which hoped to use the popularly elected presidency to shape the political transition in its own tenor.

In its first few years of existence, the Hungarian Constitutional Court struck down the death penalty and the abortion law as unconstitutional (Oltay, 1992:18). It invalidated all provisions of a popular statute on crimes committed during the communist era for violating the principle of the non-retroactivity of law (Busch, Molnar, and Margitan, 1995:238, EECR, Fall 1993/Winter 1994:10). Upon the basis of international law, the Court upheld those portions of the act that punished "crimes against humanity." The Court in that case also claimed that its power of abstract review applied to the examination of domestic legislation in light of international law. In other significant decisions, the Hungarian Constitutional Court ruled that the National Assembly cannot be dissolved by a referendum, it struck down provisions in the criminal code regarding the "defamation of public officials" which may have limited free speech, and it limited restrictions
on the public's access to state information (EECR, Winter 1993:5, Summer/Fall 1994:10-11). On the issue of media freedom, the Court ruled that the government's firing of the heads of Hungarian National TV and Radio was unconstitutional, as was the power of the government to examine and set the budgets of these two institutions (EECR, Winter 1995:15). The Court embroiled itself in controversy by striking down much of the so-called "Bokros Package," an austerity program that was designed in consultation with the International Monetary Fund (EECR, Summer 1995:10, Fall 1995:12). In the Court's opinion, many of the laws' provisions violated people's social rights, and the timetable for implementation violated the principle of "vacatio legis."

Unlike the Hungarian Constitutional Court, the Czechoslovak Court did not begin to function early on in the transition process, and, consequently, never emerged as a significant political actor. The Court began to operate only eight months before the collapse of the state, issuing two significant decisions, one of which upheld the extensive lustration law and was criticized by the International Labor Office and human rights groups (Schwartz, 1993b:30).
Although the Czechoslovak Constitutional Court did not distinguish itself, the Supreme Administrative Court was quite active, particularly in the defense of individual rights (Cutler and Schwartz, 1996:515-6). It also reviewed the legality of government decrees and regulations.

Following the "Velvet Divorce," the Czech Republic and Slovakia both established the formal legal independence and non-partisan character of their judiciaries (Cibulka, 1995:112-3, EECR, Summer 1994:7). In Slovakia, however, Parliament elects judges upon the government's recommendation for an initial four-year term, after which they can be reappointed for an indefinite period. Slovak Procurators are appointed and recalled by the President.

The Czech Republic and Slovakia also established their own Constitutional Courts. Ludwikowski (1996:175) observed that the provisions on the Constitutional Court in the Czech Constitution were hastily drafted and incomplete and therefore further legislation was necessary. Although the Czech Court was established in 1993, all its justices had not been appointed and its internal organization had not been clarified over a year later (EECR, Summer 1993:7, Fall 1993/Winter 1994:6). Given the delays in its establishment, it is not surprising that the Constitutional
Court did not emerge as an influential actor. It was, in fact, quite timid as, for example, in its first year it excluded 90% of the petitions that it received on procedural grounds (EECR, Winter 1995:8). On the two most controversial matters it adjudicated, the restrictive citizenship law and the claims of Sudeten Germans, the Court upheld the government’s position (EECR, Winter 1995:8, Spring 1995:9). The Czech Supreme Administrative Court, like its Czechoslovak predecessor, has continued to hear civil rights cases and review the legality of administrative regulations and government decrees (Cutler and Schwartz, 1996:515-6, Ludwikowski, 1996:175).

In contrast to the relative obscurity of the Czech Constitutional Court, its Slovak counterpart was drawn into a conflict between Prime Minister Vladimir Meciar (Movment for a Democratic Slovakia - MDS) and then President Michal Kovac.\textsuperscript{19} This conflict and Meciar’s attacks on the Constitutional Court stimulated its development as the Constitutional Court was initially more favorable to the MDS government. For example, it upheld the government’s restrictive minority policies, which the EU had criticized as violating European standards of minority rights. In its decision the Court ruled that EU recommendations on
minority rights “do not and cannot have...legal implications for the state organs of the Slovak Republic” (EECR, Fall 1993/Winter 1994:18).

The Constitutional Court’s relation with the government changed as political events created a rift between Prime Minister Meciar and the Court’s President, Milan Cic (EECR, Spring 1994:28-9). Tensions mounted after the Constitutional Court supported President Kovac’s position that he was not obliged to recall cabinet ministers upon the request of the Prime Minister (Zifcak, 1995:62). The Court then struck down a Ministry of Health regulation that would have required people to pay for certain types of medical care and the government responded by removing Cic’s bodyguards and his state automobile. The Ministry of Health stated that it would not comply with the Court’s decision, and Justice Cic responded that its decisions are binding upon the state administration.

The Slovak Constitutional Court prevented Prime Minister Meciar’s cancellation of the prior government’s privatization program, ruling that this action violated both the rights of those who gained property and the non-retroactivity of the law (EECR, Summer 1995:29). The Court also found unconstitutional the attempt to establish a
Parliamentary commission to investigate the 1994 no-confidence vote that toppled Prime Minister's Meciar's first government (EECR, Fall 1995:30). The political purpose of the commission was to gather evidence to substantiate the charge that President Kovac had committed treason by conspiring against the government. In response to the Court's decision, the MDS proposed amendments to the Constitutional Court Act that would require a four-fifths majority on the bench in order to declare a law unconstitutional, and a unanimous vote for the Court to offer an interpretation of the Constitution (EECR, Fall 1995:30).

Although the Court occasionally overturned the government's unconstitutional policies, it was inconsistent in its defense of constitutionalism. In a crucial decision, it helped Prime Minister Meciar's centralization of state power when it ruled that parliament by a simple majority vote could determine which state agencies were "central bodies" (EECR, Summer 1995:29). The Constitution states that the President may appoint and dismiss the heads of central bodies, and so the Meciar government has been redefining the status of state agencies in order to remove them from the president's control.
The record of the Slovak Constitutional Court is a mixed one. It emerged as an independent body that on occasion stalemated Prime Minister Meciar's authoritarian ambitions and protected private property but it also permitted the government's centralization of the Slovak state. Public opinion polls did, however, reveal that it was the most trusted state institution (EECR, Winter 1996:26).

Like the Slovak judiciary, the Bulgarian judiciary, and in particular the Constitutional Court, emerged from conflicts with a government dominated by ex.communists as a stronger oversight institution. Although the Bulgarian Socialist Party (BSP) controlled the early process of political change, it did establish the legal independence and non-partisan character of the judiciary (Engelbrekt, 1992:5). The 1990 Law on Depoliticization required all judges to resign their political Communist Party memberships and refrain from political activity (Engelbrekt, 1992:9). Until the democratic opposition, the Union of Democratic Forces (UDF), formed the government in October 1991, there was little turnover of judges but, after that, the judiciary was evenly split between former-communists and those who are unaffiliated/democrats. The
1991 Constitution created the Supreme Judicial Council which is an independent body of professional jurists that supervises the judiciary, and controls the appointment, replacement, and transfer of all judges and prosecutors. During their initial three year term, all judges and prosecutors may be removed by the Council but are subsequently irremovable.

The Constitutional Court was created by the 1991 Constitution. It was initially composed of six jurists selected by the UDF and an equal number by the post-communists. In its first year and a half, the Court made 27 decisions and overruled the parliamentary majority six times. Its most significant early decisions included its refusal to declare unconstitutional the Turkish Movement of Rights and Freedoms and its prevention of a no confidence vote against the fragile UDF government (EECR, Summer 1992:2, Fall 1992:3).

Bulgarian legal scholar Rumyana Kolarova (1993:49) posited that the Bulgarian Constitutional Court has acted as a "second chamber of parliament" because the parliamentary minority regularly turned to it to resolve the most pressing political issues. This was particularly the case from 1994 to 1997 when the Bulgarian Socialist
Party had a majority in the National Assembly (EECR, Spring 1995:7). This role put the court at odds with the BSP governments. At this time, the Court’s composition changed from the even split of ex-communist justices and UDF supporters that had often produced deadlock to a majority of democratic justices (EECR, Winter 1995:6-7).

Just prior to the election of the new justices, the Court was embroiled in a controversy that threatened the integrity of the judicial system. The BSP-sponsored 1994 Judiciary Act declared that all members of the Supreme Judicial Council must have fifteen years of experience as either a judge or a prosecutor, with the result that only former-communist officials would be eligible to serve (EECR, Summer/Fall 1994:6). The Constitution only stipulated that Council members have sufficient legal experience and in a prior case the Constitutional Court had ruled that this included experience as a private attorney, but the 1994 Act ignored this. The Judiciary Act also provided for the dismissal of judges whose “behavior destroys the prestige of the judiciary or evidences systematic disregard of their professional duties.” The editors of EECR (Summer/Fall 1994:6) observed that the act was designed to remove anti-communist judges and
procurators. President Zhelev (UDF) vetoed the law, was overridden by the National Assembly, and then the opposition brought the law to the Constitutional Court. The Court struck down the removal of incumbent judges and Council members as unconstitutional and a violation of the principle of the non-retroactivity of law. The National Assembly ignored the Court’s decision and elected 11 new Council members and the BSP argued that this was legal because the election occurred prior to the publication of the Constitutional Court’s decision. In subsequent decisions, the Court annulled this election as unconstitutional and also struck down the clause allowing the removal of judges for violating ethical and professional rules (EECR, Winter 1995:6). The editors of EECR observed that in these decisions the Constitutional Court buttressed judicial independence by setting the precedent that parliamentary majorities cannot change the composition of the bench or the Procuracy.  

The Constitutional Court continued to defend judicial independence in the face of continued attacks by the Socialists. The BSP proposed amendments to the Constitutional Court Act to cut the justices’ salaries and abolish their pensions and it also announced deep cuts in
the budgets of the judiciary and the Supreme Judicial Council. The Constitutional Court ruled unconstitutional
the government's attempt to slash judicial salaries (EECR, Fall 1995:8). It also upheld the Supreme Court's authority
to examine and annul all administrative acts that affect individual rights (EECR, Winter 1996:6).

The reliance of the anti-communist political opposition on the Constitutional Court increased after the December 1994 landslide victory of the BSP (EECR, Spring 1995:7). The BSP from 1995 through 1997 tried to repeal much of the legislation that had been created by the UDF government (EECR, Summer 1995:5). It also sought to undermine the authority of the President and to centralize power in the cabinet. The Constitutional Court appeared to be undaunted by these tactics and responded by protecting presidential authority and obstructing the BSP's legal onslaught. It refused to allow the BSP cabinet to dismiss a lawsuit against the former Bulgarian Communist Party that had been initiated by a prior government and prevented the government from halting investigations of embezzlement by former communist officials (EECR, Fall 1995:7). It also guarded presidential authority, upholding his status as head of the National Guard and preventing the development
of parliamentary limitations upon his power to appoint ambassadors (EECR, Fall 1995:7). The Court struck down 18 of the 30 government amendments to the Land Law that would have slowed privatization and weakened property rights. The Court annulled amendments to the restitution law that sought to weaken it. The government tried to restrict the access of the Constitutional Court justices, as well as opposition parties, to the state media. The Court declared that this was illegal and struck down many of the amendments that limited the pluralism of the state media (EECR, Winter 1996:5). Although the government passed the same restitution and media amendments, the Court again struck these down (EECR, Winter 1996:6). The government responded to the Court's decision by trying to evict the Constitutional Court from its present building (EECR, Fall 1995:7). The Court declared that the government's authority to manage state property could not be used in a manner that undermined the prestige and operation of the judiciary or the president.

The Bulgarian Constitutional Court distinguished itself and contributed to the rule of law by defending judicial independence and thwarting the authoritarian policies of the Bulgarian Socialist Party. The Court has
protected such civil liberties as free speech and private property, and upheld the right of the Turkish minority to form its own party. It also defended the integrity of the system of checks and balances by defending presidential authority from the BSP-governments' encroachments.

Unlike the Bulgarian judiciary which developed its independence despite being threatened by the former communists, the Romanian judiciary has been largely submissive to the National Salvation Front/Party of Social Democracy in Romania. An important difference in this regard may be that the Romanian democratic opposition did not have a majority in the National Assembly until 1997 and, therefore, could not affect the appointment of judges. By contrast in Bulgaria, the UDF appointed half of the judicial bench. Former communists in Romania maintained a firm grip upon the government during the process of political change and this limited the independence and effectiveness of the judiciary.

The first National Salvation Front (NSF) government carried out a judicial purge dismissing 90% of all county tribunal presidents, 80% of all vice-presidents, and 170 judges (Shafir, 1992:38). Shafir observed that this was not a break with the past because most of the personnel
that were appointed in their place were former communist judges. The 1991 Constitution created the Superior Council of the Magistracy to supervise the judiciary, and to appoint, promote, or demote judges and prosecutors. The National Assembly elects Council members for non-renewable four-year terms (EECR, Winter 1995:22). The editors of EECR observed that the Council's election by the Assembly for four-year terms ensured that its composition reflects that of the parliament and indirectly allowed the legislature to influence the composition of the judiciary. The President, upon recommendation of the Council, selects the members of the Supreme Court and former President Iliescu's first choice was a veteran communist judge (Shafir, 1992:39, FBIS, 3/15/90:56). The Constitution stipulates that judges and prosecutors are "irremovable" but they are also subject to law and, by statute, the Justice Minster can recall them (EECR, Winter 1995:22). The NSF and its successor, the Party of Social Democracy in Romania (PDSR), used this power to chasten judicial officials who displeased them (EECR, Winter 1995:22). The democratic press was very critical of the executive's interference in judicial matters and in 1994 a vote to impeach President Iliescu over this issue was narrowly

As was the case in Bulgaria, the Romanian Constitutional Court was not created until later in the process of political development. The foundation of the Court was laid in the 1991 Constitution and then with the 1992 Constitutional Court Act. The Romanian Constitutional Court has the power of abstract review of statutes, but has to exercise this prior to their promulgation (Mihai, 1995:68, Bach and Benda, 1995:49). The exception to this is that lower courts may request the Court to resolve a constitutional issue. The Constitution does not explicitly grant the Court the authority to review domestic legislation in light of international law; it may not initiate its examinations; and its decisions can be overridden by a two-thirds vote in either parliamentary chamber (Howard, 1993:167). The Romanian Constitutional Court is, therefore, among the weakest constitutional courts in post-communist Eastern Europe.

The Romanian Constitutional Court has made very few decisions that have challenged the government. Characteristic was the Court’s decision regarding the government’s right to rule by decree during parliamentary
holidays (EECR, Spring 1994:17). The PDSR passed a slew of far-reaching decrees during the 1994 Christmas holiday and the parliamentary opposition challenged the constitutionality of the government's use of decree power as well as the specific decrees. The Court upheld the government's use of decree power and struck down only one of the new ordinances, a tax on Romanians who travel abroad (EECR, Spring 1995:23). The Romanian Constitutional Court did show a surprising assertiveness in examining the new parliamentary rules, striking down 25 of 213 rules in the Chamber of Deputies and 29 of 184 in the Senate (Bach and Benda, 1994:50).

Because of the National Salvation Front's dominance of the state, the Romanian judiciary remained largely subservient to the government. The Constitutional Court rarely challenged the National Assembly or the cabinet and, therefore, it had little effect upon Romania's political development.

This comparative section reinforces the observation of earlier research (Oltay, 1992, Sabbat-Swidlicka, 1992, Zielonka, 1994, Schwartz, 1993a & 1993b, Frankowski and Stepan, 1995, and Ludwikowski, 1996) that post-communist Europe has experienced a dramatic expansion in judicial
authority. Political actors across the region, particularly those in the parliamentary minority, regularly appeal to the Constitutional Courts to adjudicate the most contentious political issues (Schwartz, 1993a:166, Zielonka, 1994:94, and Kolarova, 1993:48). The judiciary has, in many instances, provided the "horizontal accountability" that O'Donnell (1996) argued was essential for the development of the rule of law.

The Constitutional Courts contributed to the rule of law by interpreting and enforcing the constitutions (Zielonka, 1994:94-5, Schwartz, 1993b:32). Judicial activism cultivated the prescriptive character of the constitutions and established the hierarchy of laws. The Constitutional Courts, with the exceptions of the Czech and Romanian ones, have shown a willingness to strike down statutes, regulations, and administrative actions as unconstitutional. The Hungarian Constitutional Court, for example, annually struck down over 30% of the laws that it reviewed (Report of the Constitutional Court, 1996). The Bulgarian and Slovak Courts grew more assertive in this regard over the course of the 1990's as a result of their conflicts with socialist governments.
The Constitutional Courts also contributed to the rule of law and democratic stability by clarifying and protecting the fundamental rules and principles of the democratic system (Zielonka, 1994:95). For example, this chapter examined the Polish, Bulgarian, and Slovak Courts' defense of the separation of powers. The latter Courts upheld this principle when they defended presidential authority from the encroachments of their socialist governments. The Polish and Bulgarian Courts have also made significant decisions concerning judicial independence. The Polish Constitutional Tribunal consistently emphasized the separateness and distinctiveness of judicial authority and thus enhanced its insulation (Sokolewicz, 1997:18). The Bulgarian Constitutional Court protected the independence of the Judicial Council and it struck down provisions of the 1994 Judicial Act that would have increased the ability of the government to remove judges. In response to direct government intimidation, the Court also defended its own authority.

The Constitutional Courts have defended civil liberties and other individual rights. Herman Schwartz (1993b:32) observed that, "most decisions of the
Constitutional Courts have been supportive of civil rights and liberties." For example, the Bulgarian Constitutional Court protected the rights of the Turkish minority. This chapter examined the Polish Constitutional Tribunal's defense of civil liberties, social rights, and the principle of equality before the law. Sixty-percent of the Hungarian Constitutional Court's decisions during 1994 and 1995 were cases that involved civil liberties' issues (Report of the Hungarian Constitutional Court, 1996).

Although the rule of law is just developing in post-communist Europe, the judiciaries have contributed to this by enforcing the constitutions, clarifying the democratic rules of the game, establishing the hierarchy of laws, and protecting civil liberties. Judicial activism has been most pronounced in Hungary and Poland but, by the mid-1990's, the Bulgarian and Slovak Constitutional Courts had become significant actors. The Czechoslovak, and later the Czech Supreme Administrative Court, was fairly active in its protection of civil liberties and its review of government decrees and administrative regulations. In Romania, the NSF/PDSR dominated the political system during the 1990's and used this power to limit judicial
independence. Consequently, the Romanian Constitutional Court did not function as much of a check upon the state.

As in Western Europe, judicial activism in post-communist Europe catalyzed the rule of law and contributed to democratic stability. By protecting constitutionalism and civil liberties, the Courts also supported the development of political, economic, and social pluralism. As Alexander Hamilton observed in Federalist #78,

"(constitutional) rights or privileges, (or any constitutional provision), would amount to nothing" without judicial oversight of the state.

Section 5.9: Endnotes

1 As part of due process reforms, prisoners' rights were improved. As Poland entered the 1990's, its jails were overcrowded and it had the highest percentage of people incarcerated in Europe (Holda, 1995:366, CCRP, 1993:5). Because of its high incarceration rate, Poland has difficulty meeting the European standard of 3 square meters of space per prisoner (CCRP, 1993:15). Prisoners were also exploited as a cheap source of labor (Holda, 1995:353). In February 1990, they gained the right to appeal disciplinary sentences to penitentiary courts (Holda, 1995:361-2). Labor laws were extended to cover the prisoners, though they were denied full employee status. Legal changes were also accompanied by a tremendous turnover in the prison staff bureaucracy. In May 1989, the Minister of Justice submitted liberalized prison and pretrial rules (Holda, 1995:359). The Ombudsman's Office (1993:15) remained highly critical of the penal system and declared that, "the present condition of the broadly defined penal law and penitentiary law is most unsatisfactory." Amnesty
International observed that overcrowding and custodial abuse remained as problems (Amnesty International Annual Reports, 1990 - 5). The Minister of Justice in 1991, for example, received 756 complaints of abuse and 33 cases led to the prosecution of 52 prison officers (Amnesty International, 1992:220). The state budgetary crisis, the persistence of old methods, insufficiently trained personnel, and the steep rise in crime all contributed to the prison overcrowding. Upon recommendation of the Ombudsman, the government introduced legislation amending aspects of the Penal code to facilitate parole in order to ease prison-crowding (CCRP, 1994:101).

A Spokesperson for the Warsaw Procuracy, Ryszard Kucinski (Interview, May 1997), expressed exasperation with some of the younger police officers who are often encouraged by their emotions and frustrations to violate the rights of suspects and thus endanger the prosecutor’s cases.

Parties to a legal suit, the Minister of Justice, the Ombudsman and appellate courts may file petitions for extraordinary revision. There were two very politically significant and controversial sources of extraordinary revision cases: The first was the rehabilitation of persons who from 1944 to 1988 were punished by the state for human rights’ activism or activity promoting the independence of the state. The second was lustration which was the process of screening public officials and Parliamentary candidates for collaboration with the secret services, the violation of citizen’s rights, or compromising the independence of the state (Supreme Court Annual Report, 1990:3; 1993:24). The number of lustration cases doubled from 1992 to 1993 to a total of 930 (Supreme Court Annual Report, 1993:24).

Tribunal justices may only be removed due to disability, a criminal conviction, or departing from their oath and may only be arrested if they are caught in the act of committing a crime. Despite the Tribunal’s enhanced powers as a result of the 1992 Act, access to the Tribunal remained limited to state officials such as the President of the Republic, the President of the Supreme Court, the Ombudsman, Sejm Committees, and groups of parliamentary deputies. The 1997 Constitution allows anyone who feels that the state has violated his or her rights to petition directly to the
Constitutional Tribunal (Article 75). The Tribunal was not given the power to review domestic legislation in light of international agreements and the Sejm maintained the ability to override its decisions.

5 The only limitation upon this power is contained in Article 234 which stipulates that the Tribunal's decisions will only become final after a two-year period following the promulgation of the Constitution. Professor Wyrzykowski (Interview, May 1997) explained that this was done to create a grace period during which the parliament will bring legislation into conformity with the new Constitution.

6 Examinations may lead to formal decisions and binding resolutions on the constitutional meaning of a statute. They may also end without a formal resolution due to the issue becoming moot, or the Tribunal may discover upon further investigation that the motion lacked sufficient legal standing.

7 This shows the difficulty of conducting what former Prime Minister Tadeusz Mazowiecki called a "legal revolution," that is one that accepts the legal framework of the prior regime and attempts to change that system from within that framework.

8 The Constitutional Tribunal struck down a provision of the pension law on November 3, 1993 which denied benefits to those who had moved abroad (CCRP, 1993:47). It ruled that this violated the principle of equality before the law. The Court on at least five others occasions struck down statutory provisions for similar reasons. Although the Tribunal has been zealous in the defense of equality before the law, it has ruled that this constitutional principle does not require strict egalitarianism. In decision No. K 7/90, the Tribunal quoted John Rawls that justice may require the differentiation of people based upon their socio-economic circumstances (CCRP, 1994:14). The Court, for example, has decided that different levels of pensions based upon work experience (one's contribution to society) are consistent with social justice. Examining the right of female miners (Letowska, 1991:6) to social services that are available to all miners, the Tribunal decided that they should be vested
after a shorter period of time than their male counterparts. The justices reasoned that in light of the physical differences between the sexes, equal treatment necessitated positive discrimination in favor of women, i.e., earlier access to social services. In a substantively similar case (K.4/93), the Tribunal declared that "justice is contrary to arbitrariness, hence it requires that differentiation of subjects of rights should correspond to differences in their circumstances (Zielinski, 1995g:23)."

The Tribunal reiterated this principle in 1992 when it struck down an article of the 1991 Pension Act that radically affected the material situation of retired people. The law would have taken effect in 1992 and but would have expired by the end of 1993. The Court judged that the extent of change and the depth of the law's influence upon the material situation of retired people required greater legal stability than the one-year period proposed by the law.

The Tribunal had, however, adjudicated a conflict that stemmed from two standards regarding abortion. Prior to revisions under the left-agrarian government, the abortion statute allowed for the procedure only in cases of rape or incest. The Medical Ethics Code, created by the Polish Medical Association, penalized doctors who performed abortions regardless of the circumstances (EECR, Spring 1993:11; CCRP, 1993:69). The Tribunal ruled that the statute takes precedence over the regulations of a self-governing professional organization and, therefore, the Polish Medical Association cannot impose sanctions for behavior that complies with an existing Act. This decision was also significant in that it upheld the hierarchy of legal norms.

The original vetting procedure involved a review of high state officials for collaboration during the communist period with the security forces or the violation of individual rights. The vetting law based culpability solely upon individual acts and thus rejected the principle of collective guilt. This restrictive standard of review seemed unjust to many Poles for it allowed numerous former state officials, even those in the national security organs, to survive the regime transition. The most significant advocate of this position was the third Prime
Minister of the Republic, Jan Olszewski, who came to power promising to “purify” the state.

In another vetting decision concerning an amendment to the electoral law, the Tribunal ruled that the government had no right to investigate the background of parliamentary candidates, even if they had lied in a sworn statement that they had not collaborated with the secret police (EECR, Summer 1993:13-4).

The Committee of Constitutional Accountability lacks subpoena power. Witnesses, such as President Walesa, have simply refused to appear before the Committee. After it has conducted an initial investigation, the Committee is also unable to return motions to their initiators for clarifications and corrections (Wiatr, 1996:44).

In addition to the judiciary, this chapter focused on the Polish Ombudsman as an effective institution of state oversight. Although other Central European constitutions provide for an Ombudsman, no state besides Poland has a functioning Ombudsman’s Office. While Hungary (1993), Romania (1992), and the Czech Republic (1996) have all passed legislation for its creation, they have not appointed anyone to the office (EECR, Summer 1993:10, ECCR, Winter 1996:8, Shafir, 1992:38).

The judicialization of politics also includes two phenomena that generally occur as the result of increased judicial activism but are not themselves judicial actions. The first is the adoption of quasi-judicial procedures by administrative agencies (Vallinder, 1994:91). This refers to the creation of administrative tribunals that utilize judicial methods and administrative law to resolve disputes with the general public, with employees, or those that arise between agencies. According to Alec Stone (1994:446) the second related phenomenon is that, “politics is pursued at least partly through the medium of legal discourse.” With the presence of an activist court, the "constitutionalization" of the policy-making process often occurs when the threat of judicial action leads legislators to pay closer attention to constitutional norms while crafting legislation (Shapiro and Stone, 1994: 404).
Under civil law, the judiciary is the weakest of the three branches with its role confined to the mechanistic application of voluminous legal codes. The doctrine of parliamentary sovereignty prevents the judiciary from examining the constitutionality of statutes and other legal norms. Shapiro and Stone (1994:406) wrote that within legal positivism, "the law is itself subjugated to the political authorities." In a non-democratic regime, the judiciary will lack independence and will probably be used as a tool of the regime. In Western Europe, the increase of judicial power has also been linked to the decline of the power of legislatures, the concentration of policy-making power in the cabinet, and the dramatic growth of the welfare state (Shapiro and Stone, 1994:402, 405). European integration also contributed to the expansion of judicial power by endowing member judiciaries with the authority to review domestic statutes in light of European Union law (Vallinder, 1994:97).

The 1997 Constitution made the decisions of the Polish Constitutional Tribunal final.

The 1997 Constitution gave the Polish Constitutional Tribunal the authority to examine domestic legislation in light of international law.

Academic observers, states such as Germany and the U.S., and transnational actors such as the Council of Europe and the EU have expressed concern with Meciar's disregard for constitutionalism (Hollander, 1992:17, Leff, 1996:134).

The Constitution gave the Court the authority to offer binding interpretations of the Constitution, to review the constitutionality of all statutes and executive acts, to resolve jurisdictional disputes between state institutions, to judge the constitutionality of political parties and associations, to assess the compatibility of domestic legislation with international law, and to review all impeachments (Kolarova, 1993:48). The decisions of the Court are binding and cannot be suspended. Given these powers, the Bulgarian Constitutional Court had the potential to become a powerful institution.

The Constitution stipulates that after a failed vote of no confidence, no subsequent ones can be held for six
months. In this case, a vote of no confidence had just failed and the BSP tried to call for another one.

This deadlock was broken at the end of 1994 as the President, the Supreme Court, and the National Assembly elected four new justices, all anti-communists. A cabinet crisis had allowed the parliamentary opposition to put its candidates on the Court and thus decidedly tip the balance of the Court in favor of the anti-communists.

The Court did allow the rest of the Judicial Act to stand and this created a situation in which two judicial systems existed in Bulgaria: The older functioning system and the new one mandated by the law but which lacked procedural rules specifying its operation.

The Superior Council can also transfer and demote judicial officials and this power was used to limit judicial independence (Mihai, 1995:66, Shafir, 1992:39). The Superior Council of the Magistracy was elected in 1992 and ended its first session the following year (EECR, Winter 1995:22). However, a new Council was not elected as a result of a dispute concerning the qualifications of candidates and this caused the deadline to be missed for the appointment of 1000 first level and county court judges. The courts are understaffed and carry heavy caseloads (Dianu, 1995:266). Tiberiu Dianu also observed that the Procuracy remained the dominant figure in criminal proceedings.

Section 5.10: List of References


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Can post-communist states overcome the "Leninist legacy" (Jowitt, 1992) of non-democratic government, arbitrary and particularistic state administration, and communist political socialization in order that they may establish the rule of law? This question is significant both for democratic stability in post-communist Europe and for democratic theory because the rule of law provides a legal framework for the functioning of stable democratic government that ensures its institutional arrangements (Holmes, 1988:232, Linz and Stepan, 1996, O'Donnell, 1996, O'Donnell and Schmitter, 1986, Weingast, 1997). This work has shown that Poland and other post-communist countries have made significant progress toward the rule of law. Although Central Europe, the Baltic states, and Slovenia have comprehensively democratized their political systems and established the rule of law, most post-communist
countries have experienced some degree of political and economic liberalization, (Freedom House, 1997, Zielonka, 1994). This raised two puzzles that were investigated in this work: What proximate factors were essential for the development of the rule of law? Why have the Central European countries made more extensive progress in the development of constitutional government than other post-communist states?

Through a case study of Poland (1989 - 1997) which included focused comparisons with other post-communist states in Eastern Europe, this work showed that democratization and judicial oversight of the state were essential factors in their development of the rule of law. Democracy is a necessary condition for the rule of law because the public accountability of state officials fostered by competitive elections is a limitation upon their authority that encourages them to abide by the law (Weingast, 1997). Democratization also included the establishment of judicial independence, the separation of powers, and the introduction of checks and balances, all factors that foster institutional oversight and enhance the accountability of public officials. Judicial oversight contributed to the rule of law by establishing the legal
accountability of state officials, enforcing the constitution as the supreme prescriptive law, and protecting human rights (Vallinder, 1994:93, Shapiro and Stone, 1994:397, Tate and Vallinder, 1995:16, Holland, 1991:2, Stotzky and Nino, 1993:10). The Central European countries made greater progress toward the rule of law than those in the Balkans as a result of their more comprehensive democratization and their judiciaries' more vigorous oversight of the state.

Section 6.1: Inherited Obstacles To The Rule of Law

Post-communist Europe was a particularly difficult context for democratization and the establishment of the rule of law. Most fundamentally, these states had to reestablish their sovereignty after forty years of Soviet hegemony and, as Linz and Stepan (1996:17) observed, sovereignty is a necessary prior condition for democratization. Kenneth Jowitt (1992) also noted that the post-communist countries inherited weak civil societies, political cultures that had been shaped by the party-state, and communist state structures. As the political transitions began, their economies were in crisis and they needed to introduce market reforms that included
potentially politically destabilizing austerity measures (Bunce, 1991:419, Przeworski, 1991:136). Furthermore, no country had ever undergone simultaneous democratization and marketization.

In addition to these fundamental political and economic problems, Chapter Three revealed that the post-communist states inherited a number of legal and constitutional obstacles to the rule of law. During the communist era, the Communist Parties’ monopolization of political and economic power was the most serious impediment to constitutional government because it prevented party-state officials from being publicly or legally accountable for their actions (Letowska and Letowski, 1996:11, Gross, 1992:59). While the political revolutions of 1989/90 ended this monopolization of power, the new democratic regimes still need to eradicate the structural and behavioral legacies of communist rule. Freedom House (1997) and scholars, such as Vachudova and Snyder (1997), Leff and Munck (1997), and Bruszt and Stark (1992), have all noted that the political defeat of the ex-communists during the transitions in Central Europe was correlated with democratization and marketization, while,
in the Balkan countries, their continued rule was a barrier to systemic political and economic reform.

In addition to removing the communists and dispelling the lingering political attitudes and behaviors of the communist era, the post-communist regimes had to establish constitutionalism. Constitutionalism requires that the constitution functions as the supreme prescriptive law, but communist constitutions did not function in this way as most of their provisions were not self-executing and their implementation required further legislation (Brzezinski, 1993a:168). Therefore, the post-communist governments needed to either draft new prescriptive democratic constitutions or to extensively amend the inherited communist ones so that the fundamental law established democracy, the hierarchy of laws, the legal equality of all people, and the inviolability of human rights.

Because communist constitutions neither functioned as the supreme prescriptive law nor established the hierarchy of legal acts, they permitted the development of an incoherent body of law. In the absence of a hierarchy of laws, the state bureaucracy abused its law making authority creating regulations that had the substantive scope of statutes and were frequently inconsistent with these higher
acts (Lopatka and Szklennik, 1990). Statutes often contradicted each other and violated the constitution as well. As a result of this uncoordinated law making, the post-communist states inherited incoherent and inconsistent bodies of law, and this threatened the establishment of the rule of law because it requires coherent and lucid laws (Letowska and Letowski, 1996:65, Walker, 1988:21).

Therefore, the new regimes needed to extensively reform their legal codes.

The post-communist regimes also needed to establish independent judicial institutions with the authority to enforce and explicate the new democratic constitutions. During the communist period, no independent institution existed to enforce constitutionalism and the supremacy of the basic law and, as a result, the party-states regularly violated its provisions, including its guarantees of rights (Stefanowicz, 1989, Gajewska-Krajczkowska, 1992:1130).

Given the weakness of communist constitutions, the incoherence of the law, and the political domination of the Communist Parties, it is not surprising that the party-states regularly violated the law during the communist period (Letowska and Letowski, 1996:11). The post-communist regimes, therefore, needed to reform the
structure of their states in order to ensure the state’s adherence to the law. They also needed to institutionalize independent oversight of the state so that state officials could be held accountable for their actions and policies. State reform also required the professionalization of the civil service and the improvement of the quality of public administration. During the communist era, the state was staffed through the “nomenklatura system” in which the Communist Party appointed and dismissed all significant state officials. Letowski (1993:8) observed that the nomenklatura system obstructed the development of professionalism in the public sector and led to systematic bureaucratic high-handedness and arbitrariness. Even after the fall of communism, many of the “nomenklatura” remained in the state administration, thus creating a potential obstacle to structural state reforms (Kulesza, 1993:33).

The communist states were also highly centralized with decision-making authority concentrated within the central ministries, and this contributed to the arbitrariness and inefficiency of the state administration. The new regimes needed to decentralize decision-making authority and establish more transparent policy making procedures (Kulesza, 1993:36).
Although post-communist Poland and Hungary inherited all of these obstacles to the rule of law, they also had the most well-developed civil societies in Eastern Europe due to extended periods of liberalization prior to the 1989/90 regime changes (Frentzel-Zagorska, 1990:760). In Poland, the Catholic Church, the independent peasantry, the labor movement, and dissident groups pressured the regime for liberalization and, as a result, the exercise of civil liberties was more widespread and society had a certain degree of autonomy. Poland also inherited such oversight institutions as the Constitutional Tribunal, the Supreme Administrative Tribunal, the Tribunal of State, and the Ombudsman’s Office. Their establishment in the communist period gave them time to institutionalize and develop their authority and consequently they were prepared to shape the legal and constitutional development of post-communist Poland. Brzezinski and Frankowski (1995:28) posited that although these new institutions were limited by the Communist Party’s monopolization of political power, they “introduced into Polish political culture the notion that government authority derives from its adherence to the rule of law.”
The survival of civil society in Central Europe was crucial for its rapid democratization (Bruszt and Stark, 1992). Central European civil societies produced democratic movements that early in their political transitions defeated the communists, entered into government, and crafted the institutions and fundamental rules of the new democratic regimes (Freedom House 1997, Vachudova and Snyder, 1997, Munck and Leff, 1997). Under the direction of democrats in Central Europe, democratization was quicker and more comprehensive than in the Balkan countries where ex-communists dominated the process of political change, often to the detriment of democracy, judicial independence, and the rule of law (Bruszt and Stark, 1992:15, Zielonka, 1994:92, Freedom House, 1997, Ramet, 1996:99).

Section 6.2: The Rule of Law in Post-Communist Europe

The democratization of Central Europe established a necessary condition for the development of the rule of law and made possible constitutional and legal reforms. In the immediate wake of communism's collapse, the new democratic governments in Poland, Hungary and Czechoslovakia extensively amended their constitutions to establish
democratic systems with checks and balances, the free market, judicial independence, and political, civil, and social rights (Helsinki Watch, 1990, Freedom House, 1992). Poland passed a few interim constitutional documents and, after protracted political conflict, a new constitution in 1997. While Romania, Bulgaria, and Slovakia promulgated new constitutions, their drafting processes were dominated by ex-communists. Although their constitutions established democratic systems, they also created weak systems of checks and balances, and, reminiscent of the socialist era, the provisions concerning rights are vaguely worded (Elster and Holmes, 1992:23-4, Ludwikowski, 1996:119-20, Hollander, 1992:16). Furthermore, the Romanian constitution did not contain sufficient safeguards for the protection of rights. It also did not securely establish judicial independence, and made it relatively easy for the parliament to amend the constitution, including the fundamental nature of the political system (Mihai, 1995:63, Ludwikowski, 1996:128, Elster and Holmes, 1992:12). Similarly, the Slovak constitution allows for a highly centralized system under the prime minister and it is one of the easiest constitutions in the world to amend (Hollander, 1992:16).
Constitutional reform in Central Europe provided a securer foundation for the rule of law than in the Balkans and it also facilitated the process of legal reform. During the early 1990's, Poland, Hungary, and Czechoslovakia established the hierarchy of law with the constitution at its apex as the supreme prescriptive law. They also passed an enormous amount of legislation that transformed them into democratic states with free markets. The case study of Poland, however, revealed that as a consequence of the breakneck pace of legislative process, the quality of legislation has been uneven (Lopatka and Szklenik Interview, April and May 1997). Furthermore, the internal coherence of the law has also been negatively affected by the presence of laws from the present, communist, and interwar periods (Polish Supreme Court Annual Report, 1990:3). Poland's efforts at European integration, however, are beginning to help it overcome these problems, because it is rewriting its legal codes to meet the standards of the European Union. In contrast to Central Europe, legal reform in the Balkans has proceeded much more slowly and much less comprehensively (Ludwikowski, 1996, Todorova, 1992, Verdery and Klingman, 1992, Zielonka, 1994, Freedom House, 1997).
As part of constitutional and legal reform, civil and political rights were established across post-communist Europe. Freedom House (1992 & 1997) scores for the Czech Republic, Hungary, Poland, Slovenia, and the Baltic countries are equivalent to those for the Western European democracies. The Council of Europe, the U.S. State Department, and the CSCE have all recognized that civil and political rights are largely protected in these countries (Ludwikowski, 1996:121-2). Although there have been difficulties in establishing the independence of state-owned radio and television from the government, media independence and pluralism have been established in Central Europe.

Political rights are less secure in Bulgaria, Romania, and Slovakia (Freedom House, 1997, Ramet, 1996, Carrothers, 1996, Amnesty International, 1990 – 5). A major problem for all three has been the protection of the rights of their sizeable minorities. Former communists have gained popular support by implementing nationalist policies that limit minority rights (Vachudova and Snyder, 1997, Munck and Leff, 1997). The development of the independence and pluralism of the media in these countries has also been uneven. Nevertheless, they have experienced significant
liberalization in the area of personal liberties and they have all been accepted as members of the Council of Europe (Ludwikowski, 1996:119 & 133-4, Freedom House, 1997, Tismaneanu, 1993:333).

In addition to the establishment of constitutionalism, post-communist Europe has experienced reforms that encourage the state to adhere to the law. As part of democratization, the public accountability of state officials was established. The separation of powers and checks and balances were also established and these reforms have facilitated oversight and accountability. In Central Europe, the newly democratic regimes broke the power of the nomenklatura through extensive personnel changes. The vetting laws in these states did not impute collective guilt to all former communist officials, but they did allow for the removal of state functionaries who had violated human rights. In Romania, and to a lesser extent in Slovakia and Bulgaria, the ex-communists have dominated the state bureaucracy and this has hampered their development of the rule of law (Carrothers, 1996, Todorova, 1992, Marga, 1993, Tismaneanu, 1993, Daskalov, 1996).

In addition to the establishment of public accountability and personnel changes, many post-communist
regimes have institutionalized state oversight (O'Donnell's "horizontal oversight"), including the legal accountability of state officials. Judicial enforcement of the state's legal accountability has become an important check upon the power of the state in Poland, Hungary, the Czech Republic, and, to a lesser extent, Bulgaria.

Structural state reform, particularly decentralization and the development of local government, was viewed by many of the post-communist states as an essential part of democratization. The Solidarity governments (1989 - 1993) also linked these reforms with the development of the rule of law (Kulesza Interview, May 1997). Former-Plenipotentiary for Administrative Reform Michal Kulesza revealed that Solidarity saw the development of local government as a "parallel revolution" to the one at the top of the system that would make government more transparent, accessible, and accountable to the people. While Poland and Hungary remained unitary political systems, they both established genuine local government. However, the authority of these new governmental entities is continuing to be defined by the central and local authorities in an ad hoc fashion as practical matters arise.
While fundamental reform of the state has occurred in Central Europe, the case study of Poland has shown that this process has been one of the more protracted tasks confronting the new regimes in establishing the rule of law. Improvement in the quality of public administration has been limited by the Polish state’s financial crisis, the mediocre quality of personnel, governmental instability, and the persistence of institutional practices from the communist era (Taras, 1993, CCRP, 1990 - 6). The quality of personnel in public administration suffered from partisan recruitment, low wages, and inadequate training (Letowski, 1993, Taras, 1993, Jens Hesse, 1993). The Polish state is also understaffed and does not have enough lawyers (Taras, 1993:30, Letowski, 1993:10). This dearth of well-trained people with legal knowledge has negatively affected the state’s ability to produce well-written administrative regulations. The poor quality of ministerial law has generated legal uncertainty and, in some instances, arbitrary policies.

Fundamental constitutional reform has occurred in post-communist Europe, particularly in Central Europe. Civil liberties have been established, new democratic constitutions have been promulgated, and the process of
legal reform is ongoing. Post-communist states, like Poland and Hungary, have also established the legal accountability of public officials and created genuine local government.

Section 6.3: The Influence of Judicial Oversight

Democratization facilitated constitutional and state reforms. Although democratization is a necessary prior condition for the development of the rule of law, Guillermo O'Donnell (1996) observed it is not, by itself, a sufficient condition. He posited that the establishment of "horizontal accountability," the institutionalized oversight of the state, is also essential for the rule of law. In post-communist Europe, therefore, the establishment of institutionalized oversight was necessary for the development of the rule of law. The judiciaries in many of these countries are providing this "horizontal accountability."

Chapter Five showed that in most post-communist countries the independence and impartiality of the judiciary has been established and in some, such as Poland and Hungary, this has been accompanied by a dramatic increase in judicial activism. The case study of Poland
examined the judiciary as a number of discrete judicial bodies each of which performs different tasks and, thus, affects the rule of law in unique ways. Regular court judges, for example, are slowly becoming more active in protecting due process, overseeing the Procuracy, and making trials more adversarial (Stefanowicz Interview, May 1997). Early in the political transition, the Supreme Court (1990:3) recognized the problem of the internal incoherence of the law and, through "extraordinary revision" and in settling "problems of law," has worked to remedy this problem by providing binding interpretations that clarify and harmonize the law. The Supreme Administrative Court contributes to the development of the rule of law by enforcing the state's legal accountability. During the 1990's, there was a doubling in both the caseload of the Supreme Administrative Court and the number of decisions against the state. The number of cases brought against central state agencies also doubled over the 1990's, and this was a significant change from the prior era when the central ministries were subject to very little oversight. Jan Malec (Interview, April 1997) of the Ombudsman's Office observed that the Court's increased activism forced the attention of state bureaucrats back to
the law and, thereby, restored the importance of the Administrative Code. The Supreme Administrative Court also protected due process and provided a means for people to protect their civil rights from the encroachment of state officials.

Like the other superior courts, the activity of the Polish Constitutional Tribunal significantly increased during the post-communist period, and its activism fostered the rule of law. With its independence restored by the democratic regime, the Constitutional Tribunal helped to establish the constitution as the supreme prescriptive law. During the 1990’s, the number of its examinations tripled, and the Tribunal displayed an increased willingness to strike down, completely or in part, administrative regulations and statutes (Trzcinski, 1986 - 1996). In 1989 alone, it struck down 20 acts. The Tribunal’s broad interpretation of civil and social rights upheld equality before the law, free speech, due process, and other civil liberties (Sokolewicz, 1997, Gulczynski, 1997). Its decisions clarified the separation of powers and protected the authority of the three branches of government, particularly judicial independence. They also contributed to legal reform by establishing the hierarchy of the law
with the constitution at its apex, by enforcing the principle of the non-retroactivity of law, and by enjoining the state administration to avoid delays in the creation of regulations that supplement legislation.

The Polish Tribunal's activism was not unique in post-communist Europe, as constitutional courts throughout the region emerged as significant actors, and, as in Poland, this has had a positive effect upon the development of the rule of law (Oltay, 1992, Sabbat-Swidlicka, 1992, Zielonka, 1994, Schwartz, 1993a & 1993b, Frankowski and Stepan, 1995, and Ludwikowski, 1996). Herman Schwartz (1993b:32) observed that, "most decisions of the Constitutional Courts have been supportive of civil rights and liberties."

Chapter Five showed that the Courts have also consistently upheld the supremacy of the constitutions, defended the separation of powers, and protected judicial independence (Zielonka, 1994:94-5).

The Hungarian Constitutional Court developed into the most active one in post-communist Europe. It adjudicated over 2600 cases from 1990 through 1995, and annulled 31% of the acts that it reviewed (The Constitutional Court of Hungary, 1996). In its decisions, the Hungarian Court struck down the death penalty and the abortion law,
defended the media’s independence, protected the public’s right to criticize public officials, upheld the separation of powers, and struck down many provisions of the 1994 agreement with the International Monetary Fund (IMF) (EECR, Fall 1993/Winter 1994:10, Winter 1995:15, Busch, Molnar, and Margitan, 1995:238, Oltay, 1992:18). By the mid-1990’s, the Bulgarian Constitutional Court had become a “second chamber of parliament” because the parliamentary minority, the Union of Democratic Forces (UDF), regularly turned to it to resolve the most important political issues (Kolarova, 1995:7). The Bulgarian Court upheld the separation of powers in a series of decisions that protected presidential authority and judicial independence from the socialist governments’ depredations (EECR, Summer/Fall 1994:6, EECR, Fall 1995:7). The Court also protected privatization, media independence, and the Turkish minority party’s right to exist (EECR, Summer 1992:2, Fall, 1995:7, Winter 1996:7). While the Czechoslovak Constitutional Court did not emerge as an important actor due to the rapid collapse of that state, the Supreme Administrative Court reviewed the legality of government decrees and administrative regulations and was quite active in the defense of individual rights (Cutler
and Schwartz, 1996:515-6, Ludwikowski, 1996:175). It continued to function in the Czech Republic. The Slovak Constitutional Court was inconsistent in its defense of constitutionalism. Although it upheld the authority of the president and the separation of powers, it was less strenuous in its defense of minority rights and it allowed Prime Minister Meciar to centralize control of the administrative bureaucracy in the cabinet (Zifcak, 1995, Cibulka, 1995, EECR, Summer 1994:7, Winter 1995:9). The Romanian Constitutional Court did not provide much judicial oversight of the state due to the fact that its authority was more limited than that of other such courts in post-communist Europe, and because of the political dominance of the ex-communist National Salvation Front/Party of Social Democracy in Romania government.

While Constitutional Courts were established across post-communist Europe, only Poland has had a functioning Ombudsman’s Office. Established in 1987, it has the authority to investigate citizen allegations that state officials violated their rights and, thus like the Constitutional Court and the Supreme Administrative Tribunal, it provides effective state oversight. The Ombudsman’s contribution to the rule of law are
severalfold: Over the course of the 1990’s, the number of its investigations tripled and the number of cases it completed increased by 700%, and this significantly increased the transparency and public scrutiny of the state administration (CCRP, 1988 - 1995). Through its appeals to state agencies and to the superior courts, the Ombudsman’s Office enhanced the political and legal accountability of state officials and this accountability is essential for ensuring that the state administration will adhere to the law. During the 1990’s, the Ombudsman’s appeals to state agencies increased by 170%, its appeals to the Constitutional Tribunal by 360%, and those to the Supreme Court by 700% (CCRP, 1988 - 1995). Judicial appeals had potentially systematic effects upon the protection of rights. Through its investigations, lobbying, and appeals, it annually resolved about 25% of all cases in favor of the citizen. The Commissioner’s Office also educated state officials and the public about constitutionalism, the rule of law, and international standards of human rights.

Section 6.4: Summary and The Direction of Future Research

There are several areas for future research because political scientists have done very little empirical
research on the rule of law and, as a result, we have a limited understanding of its development and persistence. This is a significant gap in our knowledge because the rule of law is the cornerstone of stable democracy.

This research lends support to the work of Barry Weingast (1997) and Guillermo O’Donnell (1996). It has shown that democracy is a necessary prior condition for the rule of law, as, for example, the slower democratization in the Balkan countries hampered their development of the rule of law. The uneven development of the rule of law in post-communist Europe not only underscores the importance of democracy, but highlights the importance of civil society upon democratization and, indirectly, upon the rule of law. This work has also upheld O’Donnell’s observation that democracy must be complemented by “horizontal oversight” in order to foster the rule of law. Judicial oversight, and in Poland that by the Ombudsman’s Office, helped to establish the legal accountability of state officials. Judicial oversight also fostered constitutionalism, including the protection of civil liberties and the defense of such principles as the separation of powers and equality before the law. Similar to the international trend that has alternately been labeled the “judicialization of
politics" or the "due process revolution," the expansion of judicial authority in post-communist Europe has helped to establish the supremacy of the constitution, protect civil liberties, and to establish the legal accountability of state officials (Tate and Vallinder, 1995, Volcansek, 1994, Stone, 1994, Cappalletti, 1985, Holland, 1991, Shapiro and Stone, 1994).

The reliability of these conclusions should be tested through further research, particularly by comparing the development of the rule of law and the influence of the judiciary in post-communist Europe with that of post-authoritarian Latin America or Southern Europe. Such a study could illuminate how political history, particularly the differing pre-democratic regimes, affected the development of the rule of law. It could also reveal what effect, if any, the form of democracy, parliamentary in Europe and presidential in Latin America, had upon this process.

In addition to cross-regional studies that test the reliability of the conclusions reached here regarding the judiciary's significance in the development of the rule of law, it is important for future research to examine aspects of the institutionalization of rule of law that have not
been examined in this work. Specifically, it has not systematically investigated the politics of comprehensive state reform or the effects of other oversight institutions and international actors upon the rule of law. Furthermore, this work has largely focused upon the development of the rule of law at the level of the national or central government and did not explore its growth at the provincial or local levels.

In examining constitutional and legal reform, more attention should be paid to how politics shapes this process. Chapter Four observed that Poland’s drafting of new constitution was delayed first by the political instability of early Solidarity governments and then by the political conflict between President Walesa and the SLD/PSL government. It also noted that this political instability and conflict, along with party patronage abuses, weakened the structural reform of the state. It is, therefore, important for future research to identify the conditions that facilitate the development and persistence of the rule of law. It should, for example, identify how political coalitions for constitutional and state reform are created and sustained and how such coalitions gain and maintain the support of the public and the state bureaucracy. The
politics of implementing such legal and state reform should also be examined because state bureaucrats are often able to limit, reshape, and even derail government reform policies. Institutional change requires the cooperation of at least some segment of the administrative bureaucracy, and it is an interesting question how the government gains this support.

Although this work has not systematically examined the effects of politics upon the development of the rule of law, it has emphasized the causal significance of the institutionalized state oversight provided by the judiciary and the Ombudsman’s Office. However, in democratic systems, these are not the only institutions that perform such oversight. One institution that is worth examining in this regard is the legislature. Traditionally, the legislature functions as a countervailing force that checks the power of the executive (Federalist #47, Bax and van der Tang, 1993:95). While scholars such as Shapiro and Stone (1994:405), Tate, (1995:31), and Vallinder (1995:13) have all noted that the power of the legislature has declined in most of the advanced democracies, Lowenberg and Patterson (1979) have suggested that legislative committees can still provide effective state oversight. They observed that
standing committees in the German Bundestag and the U.S. Congress perform effective oversight due to their specialization, financial resources, extensive support staffs, and their legal tools, such as subpoena power. Legislative committees with these resources are able to hold state institutions accountable for their actions and policies. They may also participate in the drafting and review of administrative regulations and, thus, ensure that these regulations conform to statutory law.

While domestic factors such as democratization, legislative committees, the judiciary, and the Ombudsman's Office are crucial for the development of the rule of law, future research should examine the effects of international actors such as the European Union or other states, like the U.S., upon the constitutional and legal development of newly democratic countries. Samuel Huntington (1991:86-7) observed that in the last quarter of the Twentieth Century, the international environment has been much more conducive to democratization and marketization. International actors such as the European Union, the Organization of American States, the International Monetary Fund (IMF), and the Conference on Cooperation and Security (CSCE) in Europe have provided incentives for democratization and extended
technical and economic assistance to new democracies. Human rights concerns are increasingly influencing the foreign policies of advanced democracies and countries such as the United States and Germany have extended assistance to newer democracies. Laurence Whitehead (1986) observed that the European Community in the late 1970’s promoted and supported democratization in Southern Europe, while the United States played a similar role during the 1980’s in Latin America, though it was less effective because of its willingness to sacrifice democratization for security concerns. John Pinder, Eric Herring, and George Sanford (1994) observed that international actors were crucial in the fall of communism and post-communist Europe’s subsequent political development. The European Union, the Council of Europe, the CSCE, the International Monetary Fund, and Western states such as Germany and the U.S. have provided monetary aid and technical assistance in such areas as economic, political, constitutional, and legal reform. The Council of Europe and the European Union (EU), for example, have influenced minority rights policy in Romania and Slovakia through a combination of political and economic pressure and mediation between those states and the Magyar minorities (FBIS, 3/31/94:13, 6/3/94:15,
Throughout post-communist Europe, legal codes are also being re-written to conform to EU standards, as the post-communist states hope to join the Union in the next decade. The influence of the EU and other international actors upon constitutional and legal reform in post-communist Europe makes it imperative to study their effects upon the region’s development of the rule of law.

In addition to examining additional causal factors, future research could shift the level of analysis from the national to the provincial/local government. This case study of post-communist Poland has focused almost entirely upon the national government, which was appropriate for a unitary system undergoing a political transition from a highly centralized communist regime. However, as countries like Poland have begun to institutionalize local government, it is important to examine the extent of change at this level. Following Putnam’s (1993) work, one may contrast the level of legal reform and the performance of various units of local government within a single country. Regional differences may illuminate important intervening or causal factors that affect the rule of law.
Furthering our understanding of the rule of law is not only important because of its relationship with stable democracy but also because it is essential for the expression and protection of individual freedom. The rule of law limits the authority of the state, even when the state acts in the name of "the majority," and thereby establishes a realm of personal and social autonomy within which people may fulfill their individual potential (Walker, 1988:11).

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