



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 20 | Number 3

Article 2

3-1-1998

Constitutionalism and Post-Communist Polish Politics

Mark F. Brzezinski

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Mark F. Brzezinski, *Constitutionalism and Post-Communist Polish Politics*, 20 Loy. L.A. Int'l & Comp. L. Rev. 433 (1998).

Available at: <https://digitalcommons.lmu.edu/ilr/vol20/iss3/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Constitutionalism and Post-Communist Polish Politics[†]

MARK F. BRZEZINSKI*

Most commentators express confidence in Poland's democratic direction. Commentators also express optimism about Poland's successful institutionalization of a functioning democracy. General Wojciech Jaruzelski, Poland's last communist leader, found the legal and political changes "fundamental and irreversible" and recognized the entrenchment of four hallmarks of constitutions: democracy, the market, the rule of law, and free speech.¹

Most political elites assume that the Constitution plays a particular role in Polish society. Professor Ewa Letowska found "there is generally an endorsement of the notion among political elites that the constitution should take root as a relatively impersonal independent and institutionalized practice and medium for the exercise and restraint of power."² Political elites desire not simply a constitution, but *constitutionalism* and the rule of law. The post-1989 reform of the Polish Constitution, and the establishment and development of new institutions, such as the Constitutional Tribunal, offer hope to those yearning for constitutionalism in post-communist Poland.

The passage of the 1989 and 1990 constitutional amendments, and the passage of the 1992 Small Constitution laid the foundations of constitutionalism. The establishment of institutions, such

† This Article is adapted from the author's recent book, see MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1997).

* Mark Brzezinski is an attorney at Hogan and Hartson, LLP. He received his B.A., Dartmouth College, 1987; J.D., University of Virginia, 1991; D.Phil., Oxford University, 1996. Between 1991-94, the author was a Fulbright Scholar at the Polish Constitutional; Soros Lecturer at the University of Warsaw; and a research associate at a Warsaw based Helsinki Foundation for Human Rights.

1. Flora Lewis, *In Poland, Changes Will Stick and Communists are Pale Pink*, INT'L HERALD TRIB., Oct. 13, 1995, at 8.

2. Interview with Professor Ewa Letowska, Former Ombudsman for Citizens' Rights, in Warsaw, Pol. (July 5, 1994).

as the Constitutional Tribunal, has also helped entrench constitutionalism in post-communist Poland. The Constitutional Tribunal actively limits the lawmaking of the new state. It also enforces the new constitutional rules and procedures over political authorities.

This article examines four challenges to constitutionalism and the rule of law in post-communist Poland. Part II describes the difficulties of Poland's ongoing socio-economic transition from communism. It illustrates how these difficulties have led certain political elites to become impatient with constitutional restraints, thus, promoting stronger executive governance. Part III examines the dangers that decommunization and lustration initiatives posed to constitutional order. Part IV examines the strong political role of the Polish Catholic Church and how its role affects Poland's constitutional evolution. Part V describes how xenophobia and the state's reliance on anachronistic laws to control criticism of the government mar Poland's post-communist record in the area of individual rights.

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

Every government confronts the need for expedient governance, and respect for constitutionalism and the rule of law. Political elites tend to believe their actions are too important, unprecedented, and urgent to be hampered by legal and political procedures as defined by the constitution. For political elites in post-communist Poland, urgency has sometimes threatened to overwhelm the importance of the governing process when it comes to addressing deep and general dilemmas of the transformation process.³

The challenges of the transformation process tempt political elites to overlook important constitutional rules and processes. The words of Jan Maria Rokita, Chief Council of Ministers' Office during the Suchocka government (1992-93), reflect this view.

3. *Wspomagajace Aktywnosc Obywateli*, Nowa Res Publica, Feb. 3, 1993, at 11. Jacek Kuron, the former Minister of Labor, in an interview finds that:

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

Id.

Rokita states:

The conception of law as a guarantor of individual rights was strongly present in my thinking until the moment when I came into contact, in reality, with the process of making law in the Sejm in 1989. In these new circumstances, I found myself in a situation where my youthful convictions about the rule of law had—under the pressure of reality—to undergo a complete change. Since a more important goal, much more important from my point of view, was the effectiveness of the reform in Poland.⁴

According to Rokita, the transition will succeed only by strengthening the institutions of the state.⁵ Additionally, the success of the reform will eventuate the development of civil society and limited government.⁶

Substantial barriers to implementing the economic and political transition exist, including intransigent bureaucracies, shifting political dynamics, outdated and ambiguous laws, and an unpredictable electorate. The restraint of governmental power, however, represents the most fundamental challenge for Poland's nascent democracy. Democracies have continually struggled with this problem of restraint. Constitutionalism and the rule of law attempt to address precisely this challenge. Fledgling democracies need to be particularly vigilant in developing legal traditions as well as a social consciousness that law and legal process matters. Additionally, the means of achieving reform and reform itself are equally important.⁷

While Poland made its commitment to constitutionalism after 1989 evident, the difficulties of the transition led certain political elites to rhetorically advocate strong state authority to expedite reform. Since 1989, the Confederation for an Independent Poland (KPN), a political party, and President Walesa represent the two most vocal proponents for a stronger state. Both have emphasized

4. Martin Krygier, *Four Visions of Post-Communist Law*, XL AUST. J. POL. & HIST. 5 (1994). Containing an interview by Martin Krygier with Jan Maria Rokita, Chief Council of Ministers' Office.

5. *See id.*

6. *See id.*

7. *See, e.g.,* Ewa Letowska, *Human Rights and the Post-Communist Order: The Case of Poland*, 3 E. & CENT. EUR. BULL. 6 (1992). Letowska warns: "The general inefficiency of the state during the transition period creates the temptation to adopt means that appear simple . . . good intentions cannot prevent backsliding, which can come rather easily." *Id.* at 6.

the need for a strong state to overcome barriers to reform.

For example, Miroslaw Lewandowski, a KPN spokesman, argued that Poland's seemingly chaotic political condition, which he described as "nightmarish" and "unimaginable," create the need for a strong state. Lewandowski argues:

[P]erhaps it is necessary that a new President . . . one with a strong personality, and on the basis of constitutional and unconstitutional means which are available to him, simply through a certain constitutional practice, impose a presidential system on this country.⁸

Lewandowski insists that such a system would not endanger the rule of law.⁹

President Walesa, relying on a similar rationale to justify strong state authority, went even further by exhibiting an unfortunate lack of sensitivity to the rule of law. In 1990, as an aspiring presidential candidate, reporters asked Walesa whether he could "steer a ship through a stormy sea in a wholly democratic way."¹⁰ Walesa responded, "In [Poland's state of transition]—to put in order the most important things—the country should be governed for some time by a decisive, strong hand. For you cannot 'democratically' catch a thief."¹¹

At times, President Walesa's rhetoric displayed a lack of sensitivity to established constitutional arrangements and principles, particularly when he felt political developments impeded his programs. On several occasions, Walesa threatened to assume the post of Prime Minister to expedite reforms. This action would have violated the constitutional separation of powers. After the

8. Krygier, *supra* note 4, at 13.

9. Lewandowski believes:

If the President strengthened the authority of the state in the political system, and introduced a presidential system, in my opinion this would not overstep the narrow boundary between law and lawlessness because it would be making order out of chaos. Making order with unconventional means, rather than breaking a legal order, because such an order does not exist in the political system in Poland And if he has social legitimacy, social support, this would be a solution which satisfied both democracy and Polish reasons of state. While this may break the present constitutional order, I believe that if it serves Polish reasons of state, he should do it.

Id. at 13.

10. T. GARTON ASH, *THE MAGIC LANTERN, THE REVOLUTION OF '89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE* 34 (1990) (quoting Lech Walesa).

11. *Walesa Holds Press Conference in Gdansk*, BRIT. BROAD. CORP., BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1990, at 3.

1993 parliamentary elections, Walesa declared that he would rely on the "Yeltsin option"¹² if the victorious post-communist parliamentary coalition threatened his economic reforms or his presidential powers.¹³ In 1993, responding to a question about his proposal to create a National Guard, Walesa stated:

[I]t will be ZOMO [communist security service] of a kind, but what counts at this point is efficiency and order. There have been enough robberies, enough innocent victims. I am a democrat as far as planning is concerned, but I am all for a [strong] regime as far as implementation goes If the parliament does not give me the National Guard, I will call on the nation to give it to me.¹⁴

Even more ominous were Walesa's words in June 1994, "When the time comes to introduce a dictatorship, the people will force me to accept this role and I shall not refuse. Most likely that is where we are heading."¹⁵

Walesa's rhetoric, while damaging to the development of a constitutional culture, was not followed by action. In the post-1989 political struggles, the new holders of power maintained their commitment to the rule of law principle despite their diverse ideological and political commitments. President Walesa, often thought to harbor authoritarian tendencies and to concentrate executive power in his own hands, did not act illegally or unconstitutionally. Instead, he sought to expand his power through the legal order.¹⁶

Every government balances its needs for both efficiency and adherence to the rule of law. In Poland's state of transition, however, pressing needs often threaten prudent actions. Considering the novelty and fragility of Poland's institutions, political elites must nurture the rule of law, regardless of Poland's urgent and complex problems.

12. "Yeltsin Option" refers to Russian President Boris Yeltsin's dissolution and ultimate attack on the Russian Parliament in the Fall of 1993.

13. See *Metafora czy ostrzezenie. Walesa jak Jelcyn* [Metaphor or warning sign. Walesa like Yeltsin], RZECZYSPOLITA, Sept. 29, 1993, at 1.

14. *Wkolejce do Walesy* [On the road to Walesa], GAZETA WYBORCZA, Feb. 27, 1993, at 2.

15. Jane Perlez, *Walesa, Once Atop a High Pedestal, Seems to Stand on a Slippery Slope*, N.Y. TIMES, July 6, 1994, at A10.

16. Both President Walesa and successive governments, including the controversial Olszewski Government, yielded power peacefully.

While politically the more difficult choice, the rule of law should not be compromised for executive expedience. In a fluid environment, such as Poland, where urgent policy needs place tremendous strain on the legal system, leaders must build restraint earlier rather than later. As Professor Bruce Ackerman has argued, it is important to focus the nation's attention toward the construction of an enduring constitutional order, "the window of opportunity for constitutionalizing liberal revolution is open for a shorter time than is generally recognized. Unless the constitutional moment is seized to advantage, it may be missed entirely."¹⁷

III. DECOMMUNICIZATION, LUSTRATION AND THE RULE OF LAW

Three fundamental challenges to constitutionalism and the rule of law in Poland include: (1) the threat of arbitrary or politically motivated programs of "decommunization"; (2) the banning of higher communist office-holders from public positions; (3) and "lustration," the exposing of alleged former agents of the secret police.¹⁸

Although popular support for decommunization and lustration existed after 1989, leaders found it impossible to initiate any programs immediately after the collapse of communism. The Mazowiecki government included communist generals Czeslaw Kiszczak, as Minister of Interior, and Florian Siwicki, as Minister of Defense, both of whom shared loyalties with then-President Wojciech Jaruzelski.

Mazowiecki wished to expedite a peaceful transition from communist rule and to avoid internal conflict which might undermine the country's shaky consensus on the "shock therapy" economic reform. As a result, in September 1989, Mazowiecki announced the drawing of a *gruba kreska* (thick line) separating Poland's communist past from its democratic future. As Mazowiecki argued, "Let's be frank. There were two million Party members in this country, not including family members. We could start a civil war in this country by attempting to remove them. Where would that have led us?"¹⁹ Mazowiecki initiated some symbolic prosecutions of former high-ranking communist leaders.

17. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46 (1992).

18. *Id.*

19. Wiktor Osiatynski, *Decommunization and Recommunization in Poland*, E. EUR. CONST. REV., Summer/Fall 1994, at 36, 37 (quoting Tadeusz Mazowiecki).

Nevertheless, he did not implement any far-reaching decommunization and lustration programs.

Supporters of decommunization and lustration argue that such programs aim to prevent those who could be blackmailed with information about their connections with the former security service from holding state offices. They also insist, as a matter of justice, that collaborators with the communist regime must answer for crimes committed against society. Opponents note, however, that the implementation of effective and responsible decommunization and lustration programs poses tremendous obstacles.

First, much of the security service, *Sluzba Bezpieczenstwa* (SB) archive was destroyed. What remains of the archives consists of materials that agents deliberately distorted to exaggerate their achievements. The prosecution of the innocent remains a substantial danger due to the incomplete and unreliable archives. Prosecution of the guilty would inevitably prove arbitrary because whole categories of the collaborators' files were destroyed, thus, effectively absolving them.

Second, decommunization and lustration programs raise questions of collective guilt, retroactive justice, and equal protection of law. For example, the government could purge many people simply for being part of a group or class, such as former officials of the Communist Party, or for having obtained high administrative positions. Professor Bruce Ackerman argues that establishing the rule of law based upon "victor's justice," especially when applied to an arbitrary subset of the guilty, proves difficult.²⁰ Even when done properly, lustration always imposes some form of collective punishment on a group of people.

Third, state officials may use lustration and decommunization programs to intimidate political opponents and to win political battles. The major political crisis caused by the government of Prime Minister Jan Olszewski manifested this danger. For example, Olszewski, in an attempt to remain in power, used a parliamentary mandate for lustration.

On May 28, 1992, the Sejm passed a resolution requiring the then-Minister of Interior Antoni Macierewicz to "submit to the Sejm complete information about current state officials at the level of Voivodship head and above as well as about deputies to the Sejm, senators, judges and public prosecutors who had cooperated

20. ACKERMAN, *supra* note 17, at 66-69.

with the communist security service between 1945 and 1990.”²¹ The resolution did not specify how the Minister of Interior should prepare the information or to whom he should submit this information. Passage in the form of a resolution rather than a statute effectively eliminated the Senate and the President from the legislative process.

Critics raised doubts about the legality of the resolution as soon as the Sejm adopted it. Moreover, the Olszewski government was urged to proceed slowly and responsibly on the lustration resolution. Macierewicz, however, hastily put together an inexperienced team of investigators. An astronomy student led the team which compiled a list of alleged collaborators within six days. A motion of no-confidence in the Olszewski government motivated Macierewicz's haste. The motion was scheduled for debate in the Sejm the following month.²²

On June 4, 1992, Macierewicz delivered a list of 64 deputies, senators, and executive branch officials, including President Walesa to the Sejm. The Ministry of Interior's archive “identified” those on the list as former SB collaborators. Despite being officially labeled as secret, the public immediately learned about the list and the press published it widely. The list contained the names of many political opponents of the Olszewski government, including most of the Democratic Union (UD) and Liberal Democratic Union, *Kongress Liberalno Demokratyczny* (KLD) parliamentary leadership. As a result, the purely political aim of the lustration program became transparent. Macierewicz and Olszewski had attempted to use lustration to create the impression that those demanding the resignation of the Olszewski government acted out of fear of being named as collaborators. The list was later exposed as full of inaccuracies and falsifications.

The orchestration of an intimidation campaign by Macierewicz and Olszewski galvanized the opposition parties into a powerful anti-governmental coalition. On June 4, 1992, Olszewski gave a televised plea, claiming that former agents of the communist security apparatus were attempting to overthrow his govern-

21. The Union of Real Politics, a small libertarian right-wing party, initially proposed the resolution.

22. See Jacek Karpinski, *Agencji i lustracja-politycy i przeszlosc*, RZECZPOSPOLITA, July 15, 1992, at 4. In connection with the “Parys affair,” on May 29, 1992, parliamentary leaders motioned no confidence in the Olszewski government. See BRZEZINSKI, *supra* note 1, ch. 4.

ment. That night, the Parliament dismissed the Olszewski government by an overwhelming majority. The next morning, Walesa proposed Waldemar Pawlak as the new Prime Minister. Parliament accepted Pawlak, however, he ultimately proved unsuccessful in forming a government. On June 19, 1992 the Constitutional Tribunal held that the lustration resolution violated the Constitution and, specifically Article 1, the "democratic state of law" provision.²³

Political arrangements prevented Macierewicz's screening campaign and Olszewski's subsequent television statement from turning into a constitutional crisis. By using lustration for partisan political purposes, the Olszewski "files affair" showed the dangers of lustration and decommunization to a democratic polity based on the rule of law. Days after the dismissal of the Olszewski government, the *Gazeta Wyborcza* crystallized the problems of lustration:

For base reasons of short-term political expediency, what actually happened on the night of June 4 was a power struggle that the government waged not only with the President but with the very concept of democratic standards and legal state. By making use of police files, the government defied democracy and legitimacy, and essentially attempted to change the principle of government in this state. Had such conduct been accepted, Poland would no longer be governed by the President or the head of Government. Instead, it would be the Minister of Internal Affairs who would be wielding genuine power²⁴

After the Olszewski lustration affair, Parliament could not reach an agreement regarding lustration laws, despite strong support from certain right-wing groups. With the September 1993 electoral victory of the post-communist successor parties Democratic Left Alliance (SLD) and Peasant Party (PSL), initiatives for the enactment of lustration and decommunization legislation lost momentum.

Although the SLD and PSL likely will remain major forces in Parliament, right-wing parties may gain parliamentary seats in the future, and lustration and decommunization efforts may regain momentum. Certain intransigent right-wing leaders currently outside Parliament, such as former Prime Minister Jan Olszewski

23. Judgment U 8/92 of June 19, 1992, 1992 ORZECZNICTWO TRYB. KONST. 117 (Pol.).

24. Adam Michnik, *Thursday Sejm Debate: Nightmare Comes True*, GAZETA WYBORCZA, June 6, 1992, at 6, available in LEXIS, News Library, PNBUL File.

and his party, the RdR (Movement for the Republic), remain deeply committed to purging Poland of the remnants of communism. This now represents a minority view in Poland and, as time passes, these voices carry less conviction. If, however, right-wing parties decide to reintroduce the issues of decommunization and lustration, and if they find broad social support for their programs, the dangers of lustration and decommunization to the rule of law will once again be present. One observer, however, has suggested that the anti-Communist right-wing's loss in 1993 partly resulted from their insistence on decommunization and lustration. According to Australian journalist Robert Manne, "all Poles are anti-Communist, but no one [is] so disliked as the staunch anti-Communist."²⁵

IV. THE ROLE OF THE POLISH CATHOLIC CHURCH, AND ITS VIEW OF THE POLISH STATE

The separation of church and state represents a basic principle of modern constitutional governance. The Polish Catholic Church, however, has asserted a significant role in politics and exerted powerful influence over public policymaking. Over ninety percent of Poles belong, at least nominally, to the Catholic Church. The Church, as a result of its catalytic role for the opposition during the communist era, emerged in 1989 with enormous authority and prestige. Since the collapse of communism, the Church has been concerned about the formalistic, procedural, and value-free nature of the Western democratic political system. The Church maintains that its new role requires it "to guide Poland through democracy to morality."²⁶

Empowered by its institutional stability and virtual monopoly over religion, the Church has attempted to suffuse its ethical and religious values into the political sphere through legislative and other initiatives. It has had several successes in this endeavor, as evidenced in the mandatory religion teaching in schools and the restrictive abortion legislation. In both cases the Church actively participated in the legislative process, aggressively pressuring the Parliament to adopt the legislation. As Constitutional Tribunal Justice Wojciech Sokolewicz wrote in 1992:

25. Robert Manne, *Poland: The Polish Cow is Being Unsaddled Slowly*, THE AGE, Jan. 5, 1994, at 3.

26. *Poland: Church Influence in Democratic Election*, ABORTION REP., Oct. 30, 1991, at 3, available in LEXIS, LEXIS Library, Omni File.

A peculiarity of Polish public life is the extensive participation of the Catholic Church and its ambition to influence legislative and constitutional questions. The system of "Christian values"—interpreted authoritatively by the Church hierarchy—is to serve as the only foundation of the entire system of law, the constitution as the crowning of that system.²⁷

Early on, the Church became directly involved in electoral politics and state affairs. For example, during both the 1990 presidential elections and the 1991 parliamentary elections, Catholic bishops urged Polish citizens to vote for "credible, competent, trusted, righteous, conscientious and diligent people."²⁸ Before the September 1993 parliamentary elections, the Polish bishopry issued a pastoral letter reflecting the Church's involvement: "Catholics cannot elect candidates or support programs which . . . do not comply with the Christian moral principles."²⁹ The letter warned parishioners of "an attack of lay forces against the Christian and national values. In the face of consolidation of the post-communist forces, one cannot forget about the painful experiences of the recent past."³⁰ The Church's prestige suffered from its energetic involvement in politics.³¹ Nevertheless, the Church continues to have control over a substantial segment of the electorate, particularly the rural electorate, and thus political elites recognize it as a mighty force.

The Church's activist role in politics and its view of state also have strong proponents among the political elite. As seen in the words of Deputy Prime Minister Henryk Goryszewski (ZChN) in February 1993, "It is not important whether there will be capitalism in Poland, it is not important whether there will be welfare—the most important thing is that Poland should be Catholic."³² Several months later, Goryszewski went on to instruct the voters regarding forthcoming parliamentary elections. He stated, "It is a

27. Wojciech Solcolewicz, *The Relevance of Western Models For Constitution Building in Poland*, 20 INT'L J. SOC. L. 29 (1992).

28. *Bishops on Elections*, GAZETA WYBORCZA, June 21, 1993, at 1, available in LEXIS, News Library, PNBUL File.

29. *Id.*

30. *Id.*

31. *Report z Badania: Najwazniejsze problemy kraju i obawy Polakow*, CENTRUM BADANIA OPINII SPOLECZNEJ, Mar. 1993, at 3. In 1993, after Parliament passed the new restrictive abortion bill, an opinion poll gave the Church an approval rating of only 46%, compared to 67% for the police, and 72% for the army. *See id.*

32. *Interview with Henryk Goryszewski*, WSPOLCZESNA GAZETA, Feb. 1, 1993, at 1, available in LEXIS, News Library, PNBUL File.

Catholic's duty to elect another Catholic. We, in our overwhelming majority, want a Catholic Poland, such that will not sell the Lord for material goods."³³

Political elites justify the strong role of the Church and religion in politics, arguing that law and public policy must reflect morality, as manifested by the "Christian system of values." Senator Alicia Grzeskowiak, a Professor of Law and former Chairperson of the Senate's Constitutional Committee, stresses her deep commitment to the rule of law. Grzeskowiak calls it "a central feature of democratic government [however, it] is not merely the letter of the law but its content which must be consistent with our inborn human rights and certain values. If that does not exist, then it is not law."³⁴

Thus, while some politicians are committed in principle to the rule of law, when presented with a conflict between the Church's view of state and the integrity of an autonomous legal order, they opt for the former.³⁵

Political elites adhering to the Church's agenda have had success in legislating Christian values into public policy. For example, on December 28, 1992, the Sejm approved an amendment to the Broadcasting Law. The Amendment required all radio and television programming, public or private, to "respect the religious feelings of the audience and in particular respect the Christian system of values."³⁶ The nine member National Broadcasting Council was charged with enforcing the law through its power to license or to revoke the licenses of radio and television stations on the basis of the moral content of a station's programming.³⁷

33. *Goryszewski seeks Catholic Electorate*, GAZETA WYBORCZA, July 19, 1993, at 3, available in LEXIS, News Library, PNBUL File.

34. Interview by Martin Krygier with Senator Grzeskowiak, former chairperson of the Senate's Constitutional Committee, Warsaw, Pol (Jan. 12, 1993) [hereinafter Grzeskowiak].

35. *See id*; see also Interview by Martin Krygier with Stefan Niesolowski of the Christian National Union, Warsaw, Pol. (Jan. 8, 1993). Niesolowski has indicated that, "For me the root of morality is God . . . as a representative of a Christian party [I] represent the view that the principles of morality are eternal, unchanging and people are not permitted to change them. We have to adjust law to them." Interview by Martin Krygier with Stefan Niesolowski of the Christian National Union, Warsaw, Pol. (Jan. 8, 1993).

36. *Sejm Passes Broadcasting Bill*, RZECZPOSPOLITA, Oct. 16, 1992, at 1, available in LEXIS, News Library, PNBUL File.

37. Four members are appointed by the Sejm, two by the Senate, and three by the President.

People immediately criticized the “Christian value” amendment to the Broadcasting Law as a restriction on speech, which state authorities imposed under the guidance of the Catholic Church. The international human rights organization, Helsinki Watch, stated that the amendment “will chill legitimate speech as broadcasters are forced to censor themselves to fit within the undefined boundaries of the law.”³⁸ In an important 1994 decision, the Constitutional Tribunal limited the scope of the “Christian values” clause. The Tribunal held the clause may not be interpreted as giving the National Broadcasting Council the right to prospectively evaluate radio and television programs because all forms of prior censorship are unconstitutional.³⁹

Because the Broadcasting Law did not define the term “Christian values,” the Polish Catholic Church undertook the task. At its annual Bishops’ Conference in May 1993, the Church issued a declaration defining Christian values as “all broad, consensus-based values.”⁴⁰ The Council quickly adopted this definition, although clearly giving a monopoly on morality to the Catholic Church. The Church’s action demonstrates its active and open participation in shaping the new legal system. Responding to the assertion that the definition of Christian values still lacks precision and is too subjective, Grzeskowiak emphasizes that the “flaw makes use of many conceptions which require interpretation. So this accusation cannot only be dragged out about Christian values. . . . Otherwise you merely use this argument for particular provisions not wanted on ideological grounds.”⁴¹

Some public officials criticized the Church’s imposition of its values on public policy. Ombudsman Tadeusz Zielinski, one of the Church’s most vocal critics, wrote in a 1992 article that Poland is on the brink of becoming a “para-religious state”:

As opposed to a theocracy, which is a political system where there is near total rule by the clergy . . . a para-religious state is a political system in which there exists formal differentiation between church and secular authority and in which the Church has no intention to replace civil governments, but claims pretenses in

38. *Threats to Press Freedoms*, HELSINKI WATCH, Nov. 1993, at 13 [hereinafter *Threats to Press Freedoms*].

39. Judgment W 3/93, 1994 ORZECZNICTWO TRYB. KONST. 154.

40. Irena Grudzinska-Gross, *Broadcasting Values*, E. EUR. CONST. REV., Summer 1993, at 51, 52-53.

41. Grzeskowiak, *supra* note 34.

the control of all its doings if these have moral significance, and in moral judgment it is the highest arbiter. In such a state the church authorities demand that law impose under the threat of penalty the observance of all the rules that the Church demands of its faithful, and also that which is a sin in the eyes of the church also be an offense according to state law⁴²

Public officials willing to criticize the Church's political role have paid a price. In 1993, for example, using language reminiscent of the communist era, the ZChN and other Christian parties branded Zielinski as an "enemy of the Church" because of his willingness to take cases involving "particularly vital interests of the Catholic Church."⁴³ On April 16, 1993, deputies of the PC party, joined by over eighty other Sejm deputies, made a motion calling for the removal of Zielinski. The deputies of the PC party objected to Zielinski's warnings that Poland was becoming a para-religious state. Moreover, they objected to Zielinski's willingness to challenge the constitutionality of the restrictive abortion law.⁴⁴ No legislative action was taken on the motion because the 1987 Law on the Ombudsman limits the grounds for dismissal to health reasons and violations of an oath of office. Following these attacks, Zielinski protested that the Church continued to "interfere" in the government sphere.⁴⁵ Indeed, Zielinski feared that Poland was becoming a "confessional state."⁴⁶

From a constitutional perspective, it is disturbing that the Church uses Poland's moral and ethical condition as a pretext for its own political goals. After 1989, the Church went beyond the sphere of religion and became deeply involved in politics and law. Moreover, certain political elites cannot foresee the potential pitfalls of commingling secular and religious authority.

A basic premise in a democratic constitutional polity holds that the rule of law takes precedence over religious conviction. As

42. Tadeusz Zielinski, *A Para-religious State*, RZECZPOSPOLITA, Aug. 24, 1992, at 3, available in LEXIS, News Library, PNBUL File.

43. Barbara Radzikowska, *Praktyka Rzecznika Praw Obywatelskich II Kadencji w sprawach dotyczących stosunków między jednostką, Kościołem i Państwem* [*Practice of the Ombudsman of Civil Rights in Matters Concerning Relations Between the Individual, Church and State*], 15 BIULETYN RPO: MATERIAŁY 33 (1992).

44. *Czy Rzecznik Praw Obywatelskich Pragnie Dobra Młodzieży?*, SŁOWO POWSZECHNE, Sept. 8, 1992, at 3; Henryle Kuligowski, *Wojna Religijna* [*Religious War*], POLITYKA, Oct. 17, 1992, at 5.

45. *See id.*

46. Interview with Tadeusz Zielinski, *Zycie Warszawy*, May 5, 1994, at 3, available in LEXIS, News Library, PNBUL File.

Konstanty Gebert, a journalist and former Solidarity leader, stated, “[T]he question is, whose state is this going to be? Did we achieve democracy to build a state imbued with Polish national and religious values, or a pluralistic state that provides rights of citizenship to people of all traditions?”⁴⁷

From a political perspective, the Church’s involvement in postcommunist Polish politics has resulted in a backlash against the Church. The secular, if not anti-clerical, SLD emerged victorious in the 1993 parliamentary elections, and SLD leader Kwasniewski was elected to the presidency in 1995. Despite the rout of right-wing parliamentary parties in the 1993 parliamentary elections and the victory of the left, which had been openly critical of Church influence on public policy, the Church remains a powerful political force. The Church will likely to continue its intense political role, as evidenced by its involvement in the 1995 presidential campaign, where it openly campaigned against Kwasniewski.

V. INDIVIDUAL RIGHTS AND FREEDOMS

Ironically, while the anti-Communist opposition greatly cherished the realm of individual rights, the new democratic rule has neglected reform in this area. The post-1989 reforms did not include changes to the existing constitutional framework of individual rights and freedoms. As a result, provisions from Chapter VIII of the 1952 Constitution still regulate rights and freedoms in Poland.

The lack of individual rights protection represents a fundamental defect of Poland’s present constitutional framework. Until Poland adopts a new rights framework, along with the new constitution, the old chapter on rights and freedoms will remain in force. While fewer complaints about human rights violations emanate from Poland than from any other country in the region, Poland does not have an exemplary human rights record. For example, on several occasions, the post-communist state relied on anachronistic laws to control dissent and criticism of the government, thereby blatantly violating private citizens’ freedom of speech. Moreover, emergence of ethnocentric and xenophobic political movements clash with the spirit of open society and pluralism, characterizing the opposition movement during the communist era.

47. Stephen Engelberg, *Poland Faces Choices on Economic Austerity and the Character of the State*, N.Y. TIMES, Nov. 11, 1990, at A16 (quoting Konstanty Gebert).

A. Freedom of Expression

With the dawn of democracy, one would expect the Polish state to repeal laws imposing penalties for "insulting the honor" of the nation, the state, or its leaders. The communist era specifically promulgated such laws to inhibit criticism and dissent that threatened the regime. Unfortunately, the post-communist Polish state has, on several occasions, relied on the same anachronistic laws to inhibit dissent and criticism of political elites.⁴⁸ The most notorious of these provisions is article 270(1) of the Polish Penal Code.⁴⁹ This law makes "publicly insulting the Polish Nation or State or its system of supreme bodies" a criminal offense, punishable by fines or imprisonment.⁵⁰ The new political authorities have shown themselves to be as willing as the old regime to use defamation laws to protect their position. For example, they occasionally use this provision to restrict objectionable and "insulting" expression.

Moreover, these political authorities even go so far as to violate constitutionally-grounded freedoms. For example, on March 18, 1993, a court in Brzeg, Poland found two university students guilty and fined them, albeit modestly, for "slandering" President Walesa.⁵¹ Both students admitted to shouting "Down with Walesa-Communist Agent" at political rallies in 1992.⁵² The Voivodship court judge recognized that the president should expect to have adversaries and fervent political opponents, but admonished that the defendants' actions "cannot be seen as anything but an attack on the presidency."⁵³

Another case showing the constitutional violation of personal freedoms involved a private conversation between two private citizens. Stanislaw Bartosinski uttered a number of rude and vulgar statements critical of President Walesa, including calling the President a "son of a bitch" while standing at the bus stop in a small Polish town.⁵⁴ A third party reported this conversation to the local prosecutor, who charged Bartosinski under Penal Code Article

48. *See id.*

49. POLISH PENAL CODE art. 270(1).

50. *Id.*

51. *See* Jakub Kaminiski, *Two Students Fined in Brzeg*, GAZETA WYBORCZA, Mar. 19, 1993, at 3.

52. *See id.*

53. *Threats to Press Freedoms*, *supra* note 38, at 11.

54. BREZINSKI, *supra* note 1, at 202.

270(1) with “publicly insulting a supreme body of the state.”⁵⁵ The court did not consider this a private conversation between two individuals. The prosecutor described the crime as entailing the use of “vulgar words” in a “very public place.”⁵⁶ The court convicted the defendant for this offense in 1992. The court gave Bartosinski a one year prison sentence, suspended on the condition that he not break the law again for three years. Additionally, the court fined Bartosinski three million zlotys, a sum exceeding the average monthly salary of most Poles.⁵⁷

In another example, the court imprisoned Ryszard Zajac, a journalist, for violating Penal Code Article 270. Zajac published an article in a Katowice daily in which he referred to the local voivodship council and to nine Solidarity trade union officials as “dopes” and “small-time politicians and careerists.”⁵⁸ He also stated that the council aspired to become a “Communist Party committee.” Solidarity leaders filed a libel suit, and the regional prosecutor brought criminal charges. The court fined Zajac and sentenced him to ten months in prison, which would be suspended if he agreed to apologize in two newspapers. The Court sent him to jail because he refused to apologize. Zajac was finally released after his case was taken up publicly by the Ombudsman for Citizens’ Rights, the Polish Helsinki Committee, members of the Senate, and others.⁵⁹

The state bureaucracy has also shown a tendency to revert to its old habits. For example, on June 2, 1993, agents of the State Protection Office (UOP) tore down and confiscated posters announcing a demonstration in Warsaw and calling for early presidential elections, lustration, and decommunization. The UOP acted on the grounds that the posters were illegal because they insulted state authorities. The posters showed pictures of several prominent politicians, including President Walesa, accusing them of having collaborated with the communist secret police.⁶⁰ Petitioned by the Ombudsman, the Constitutional Tribunal subsequently admonished the UOP for exceeding its statutorily defined

55. *Id.*

56. *Id.*

57. AUDRZEJ RZEPLINSKI, *PRAWA I WOLNOSCI CZLOWIEKA* 93 (1993).

58. *See id.*

59. *Threats to Press Freedoms*, *supra* note 38, at 11.

60. *Right of Center Parties to Demonstrate Today*, *GAZETA WYBORCZA*, June 4, 1993, at 1, available in LEXIS, News Library, PNBUL File.

authority and for violating the demonstrators' freedom of speech.

During the five years following the collapse of communism, Poland occasionally suffered flashbacks of the communist-era repression of dissent. The hazards of criticizing the government or its officials are not limited to Central and Eastern Europe. Even in the most liberal democracies, governments may use the law to discourage the full and free airing of complaints about government and its actions. The incidents related here, however, represent the innocuous, trivial sort that most Western democracies protect. Poland still deems it illegal to insult or offend leaders. The government can bring charges against virtually any critic due to the vague definitions of insult or offense. This offers a vivid reminder of the importance of protecting the free marketplace of ideas in the course of building a constitutional democracy.

B. Xenophobia

Compared to the countries of Central and Eastern Europe today, Poland seems like an oasis of ethnic peace. As a result of genocide, ethnic cleansing and mass migration during and after World War II, Poland represents a relatively homogeneous national state. Despite the relative homogeneity, minorities—Jews and Germans in particular—seem to have attracted the attention of small chauvinistic, nationalistic, right-wing political parties, none of which hold a seat in the current Parliament.

After 1989, a number of right-wing parties emerged, such as the National Party (*Stronnictwo Narodowe* or SN), National Party "Szczerebiec" (*Stronnictwo Narodowe "Szczerebiec"*), and the National Party "Fatherland" (*Stronnictwo Narodowe "Ojczyzna"*).⁶¹ Today, these groups number over twenty. The nationalistic parties have similar ideologies. For example, they oppose integration with Europe, claim that European unity "has become the eternal aim of the Masons," and express particular sensitivity to the "German threat," "Judeo-communism" and "global Jewish conspiracy."⁶²

The Polish National Community-Polish National Party (*Polska Wspolnota Narodowa-Polskie Stronnictwo Narodowe*

61. AUDRZEJ GARGAS & M. MARCIN WOJCIECHOWSKI, *PARTIE POLITYCZNE W POLSCE* 19-23 (1991).

62. John Micgiel, *The Radical Right and Skinheads in Contemporary Poland: Cause for Concern*, 3 *NEW EUR. POL. SCI. Q.* 9 (1993). Since the seventeenth century, anti-Semitism has frequently been used in Poland as an instrument of political provocation. Unfortunately, this has not changed with the fall of communism. *See id.*

PWN-PSN) merits special attention. Its anti-Semitic publication, Polish National Thought (*Polska Mysl Narodowa*), devotes much space to the so called "Jewish Question" and has even printed guidelines on "how to detect Jews through biological and spiritual methods."⁶³ According to the journal, Jewish political elites comprise most of the moderate and left-wing parties.

Professor John Micgiel writes that these nationalist groups have had little influence on post-communist Polish political life.⁶⁴ The ethnification of politics in Central and Eastern Europe, however, has been one of the most disquieting consequences of the fall of communism. Although a tragedy even remotely approaching what has happened in the former Yugoslavia would not likely occur in Poland, one cannot simply dismiss the dangers of internal unrest and violence. One should not ignore such dangers because some elements of Polish society exhibit a tendency towards populist democracy or majoritarianism, and they assume that the numerical strength of the majority provides a monopoly for political initiatives and legal regulation. The former Deputy Prime Minister, Henryk Goryszewski (ZChN) voiced such a position most distinctively on Polish television in September 1992:

To whom does freedom, tolerance, human rights and democracy apply? For our enemies, the communists, the anarchists, for enemies of the church, for immoral people? No! We have won, we have swept away totalitarianism, and now it is our sole discretion to decide how the new Poland will look. We are the majority, hence we hold the power and the authority to rule. The minority should remain silent and obey.⁶⁵

Goryszewski's mind-set becomes even more frightening with the emergence of nationalistic and chauvinistic groups. It illustrates why Poland's nascent democracy requires strong and enduring constitutional structures protective of discreet and insular minorities.

As seen in the above discussion, despite the promulgation of new constitutional provisions and the emergence of judicial review, Polish constitutionalism has been confronted by challenges both universal to all democratic polities and unique to Poland's transitional circumstances. First, all democratic polities share the

63. *Id.* at 8 (quoting *POLSKA MYSL NAROTOWA* 9 (1991)); PAWAL DYMNY, *ANTYSEMITYZM HANBA CZY NADZIEJA* 25, 32 (1991).

64. See Micgiel, *supra* note 62.

65. *WPROST*, Feb. 14, 1992, at 7, available in LEXIS, News Library, PNBUL File.

challenge that as a nation undergoes rapid social and economic change, and as a government confronts restructuring of significant magnitude, commitment to standing constitutional rules may not be politically desirable or expedient. Certain political elites become impatient with constitutional restraints and promote, rhetorically at least, stronger executive governance. While any democratic polity concerns itself with lack of commitment to procedures or process, post-communist countries especially have this concern, given the absence of any recent tradition of restraint.

Second, the threat of arbitrary or politically motivated programs of decommunization and lustration presents an additional challenge to Poland's transition. As seen in the Olszewski lustration crisis of 1992, state officials can use lustration and decommunization programs to intimidate political opponents and fight political battles.

Third, the Polish Catholic Church has ventured beyond the sphere of religion. It has become deeply involved in politics and law in post-communist Poland, challenging the constitutional separation of church and state.

Fourth, in the area of individual rights the post-communist state has occasionally relied on anachronistic laws to control dissent and criticism of the government, blatantly violating private citizens' freedom of expression. Moreover, the emergence of ethnocentric and xenophobic political movements since 1989 has clashed with the spirit of open society which so characterized the opposition movement during the communist era. While most commentators express confidence in Poland's democratic development, these challenges illustrate why Polish constitutionalism must continue to be reinforced by institutional reform and practice.

VI. CONCLUSION

Polish society now recognizes respect for and observance of the principles of constitutionalism, limited government, and the rule of law as essential bases for social legitimacy. In a 1994 public opinion poll, 73% of respondents stated that the Constitution should be a durable element of the political system and should not be subject to easy change.⁶⁶ Moreover, 74% of those polled felt

66. *Raport z Badania Konstytucja w Swiadomosci Polakow*, CENTRUM BADANIA OPINII SPOLECZNEJ, Jan. 1994, at 4.

that the Constitution has “big significance in the daily lives of the inhabitants of the country. It is the source of all rights and individual freedoms, and it is a legal act of the highest rank.”⁶⁷ Most of the new political elites seem to have many of the same principles in mind when referring to a *rzady prawa* (state of law); they believe politics should be subordinate to law, law should be relatively clear and stable, legal institutions-particularly the courts-should be independent of political interference.

67. *Id.*

