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## The Protection of Human Rights in the New Polish Constitution

Ryszard Cholewinski\*

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Ryszard Cholewinski

## Abstract

This Article examines the extent of human rights protection under the Constitution of the Republic of Poland of April 2, 1997 ("new Polish Constitution" or "Constitution"), adopted on April 2, 1997, by the Polish National Assembly and approved by the Polish people in a referendum on May 25, 1997. The Constitution, a lengthy document composed of 243 articles, came into force on October 17, 1997, and is one of the last constitutions to be adopted in Central and Eastern Europe since the start of the political and socio-economic transformations of the post-communist era. This Article emphasizes the importance of the new Polish Constitution in light of the long tradition of constitutionalism in Poland. Part I surveys some of the earlier constitutional texts, with particular focus on the provisions concerning the protection of human rights. After briefly discussing the difficulties encountered in drafting the new Polish Constitution, Part II analyzes the protection of rights and freedoms in the Constitution in light of the most recent developments. This part focuses on the general principles underlying rights and freedoms in the Constitution, certain prominent civil and political rights of particular importance in their specific Polish context, the debate surrounding the constitutionalization of economic and social rights, the protection of so-called "third-generation rights" such as the right to a clean and healthy environment, and limitations on rights and freedoms. One section is also devoted to the mechanisms adopted for the implementation and enforcement of these rights. This Article concludes that the system of protecting human rights in the new Polish Constitution is innovative and far-reaching and can serve as a useful model for developments elsewhere.

## ARTICLES

# THE PROTECTION OF HUMAN RIGHTS IN THE NEW POLISH CONSTITUTION

*Ryszard Cholewinski\**

### INTRODUCTION

This Article examines the extent of human rights protection under the Constitution of the Republic of Poland of 2 April 1997<sup>1</sup> (“new Polish Constitution” or “Constitution”), adopted on April 2, 1997, by the Polish National Assembly and approved by the Polish people in a referendum on May 25, 1997.<sup>2</sup> The Con-

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\* Lecturer in Law, Faculty of Law, University of Leicester, England. This Article uses the following Polish abbreviations for Polish political parties: AWS – Akcja Wyborcza Solidarnosc [Election Action Solidarity]; ROP – Ruch Odbudowy Polski [The Movement to Rebuild Poland]; SLD – Sojusz Lewicy Demokratycznej [Democratic Left Alliance]; PSL – Polskie Stronnictwo Ludowe [Polish Peasant Party]; UW – Unia Wolności [Freedom Union]; UP – Unia Pracy [Labour Union]; BBWR - Bezpartyjny Blok Wspierania Reform [Non-party Coalition Supporting Reforms]; KPN - Konfederacja Polski Niepodległej [Confederation for an Independent Poland]; PC - Porozumienie Centrum [Understanding of the Center]; PP - Porozumienie Prawicy [Understanding of the Right]; PPS – Polska Partia Socjalistyczna [Polish Socialist Party]; NSZZ Solidarnosc [Solidarity Senators]; and KSN - Klub Senatorów Niezależnych [Club of Independent Senators]. The English translations provided in brackets above are mainly based on those used in the University of Chicago journal, EAST EUROPEAN CONSTITUTIONAL REVIEW [hereinafter EECR].

1. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of 2 April 1997] *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 78, Item 483 (1997) [hereinafter POL. CONST. (1997)]. The official Polish text of the Constitution of the Republic of Poland of 2 April 1997 (“new Polish Constitution” or “Constitution”) and an English translation is published in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* at binder XV (Albert P. Blaunstein & Gisbert H. Flanz eds., 1997).

2. The Constitution was adopted by the Polish National Assembly—both the Lower House (“Sejm”) and Upper House (“Senate”) of Parliament sitting together—on April 2, 1997, by a vote of 451 to 40. The parties voting in support of the Constitution were the SLD, UW, PSL, and UP. See 4-te Posiedzenie Zgromadzenia Narodowego, 2 kwietnia 1997 r., Nr 162 (285) II kadencja [Fourth Session of the National Assembly, 2 April 1997, No. 162 (285), 2nd Term] [hereinafter Fourth Session of the National Assembly]; M. Tanska, *25 Maja Referendum Konstytucyjne* [Constitutional Referendum of the 25 May], *ZYCIE WARSZAWY*, Apr. 3, 1997 (visited Oct. 2, 1998) <<http://www.zw.com.pl/>> (on file with the *Fordham International Law Journal*) (English translation is the author's own); *Constitution Watch: Poland*, 6 EECR No. 1, 20, 20 (1997). The Constitution was approved in a referendum on May 25, 1997, gaining the support of 52.7% of voters, with 45.9% voting against the adoption of the basic law. Of more significance, however, was the low turnout, with only 42.9% of those eligible to vote taking part in the referen-

stitution, a lengthy document composed of 243 articles,<sup>3</sup> came into force on October 17, 1997, and is one of the last constitu-

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dum. Gisbert H. Flanz, *The Republic of Poland: Introductory & Comparative Notes*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 1, at vii. Sejm Deputy Tadeusz Mazowiecki (UW), a chief architect of the new basic law, attributed the general lack of interest surrounding the Constitution to its belated adoption, arguing that it would have received speedier societal approbation and would have been met with enthusiasm if it had been adopted in the years 1989 to 1990. 3-cie Posiedzenie Zgromadzenia Narodowego, 24-28 lutego 1997 r., Nr 157 (280) II kadencja [Third Session of the National Assembly, 24-28 February 1997, No. 157 (280), 2nd Term] [hereinafter Third Session of the National Assembly]; see Wiktor Osiatynski, *A Brief History of the Constitution*, 6 EECR Nos. 2-3, 66, 68 (1997); Ewa Letowska, *A Constitution of Possibilities*, 6 EECR Nos. 2-3, 76, 77 (1997). Connected to this view is the argument that the politicization of the constitution-making process stimulated neither the interest of citizens in the basic law nor trust in its framers and resulted in a reluctance to participate. See P. Aleksandrowicz, *Nie łatwo mówić o wygranych* [Difficult to Talk about Winners], RZECZPOSPOLITA, May 26, 1997 (visited Oct. 2, 1998) <<http://www.rzeczpospolitica.pl>> (on file with the *Fordham International Law Journal*) (English translation is the author's own).

The low turnout led politicians to the right of the political spectrum to question the referendum's legitimacy because it did not secure the participation of at least 50% of voters. Indeed, an action to invalidate the referendum on this ground was considered but rejected by the Polish Supreme Court. A. Lukaszewicz, *Referendum jest ważne* [The Referendum is Valid], RZECZPOSPOLITA, July 16, 1997. Moreover, these politicians contended that the final text, drawn up by the Constitutional Commission of the National Assembly—dominated by the SLD-PSL left-wing coalition, UP and UW—did not come about as a result of a genuine compromise because no account was taken of the views of those groups outside of the Sejm. See, e.g., Senator Alicja Grzeskowiak (NSZZ Solidarnosc) and Sejm Deputy Adam Słomka (BBWR and KPN), Third Session of the National Assembly, *supra* (statements of Sen. Alicja Gizeskowiak (NSZZ) and of Sejm Deputy Adam Słomka (BBWR). Moves, however, to include an alternative draft in the May 1997 referendum to the one prepared by the Constitutional Commission, known as the Citizens' Draft (*projekt obywatelski*), were unsuccessful. See Third Session of the National Assembly, *supra* (statement of Slavian Krzaklewski, representative of the authors of the Citizens' Draft). Marian Krzaklewski, the leader of the trade union NSZZ, is now also the leader of Akcja Wyborcza Solidarnosc (AWS), the largest party in the Polish Sejm, composed of a plethora of centre-right and rightist parties.

3. The new Polish Constitution is unusually long compared with other post-communist constitutions. See Flanz, *supra* note 2, at viii. In introducing the final constitutional draft, the Rapporteur of the Constitutional Commission, Sejm Deputy Marek Mazurkiewicz (SLD), recognized that it was extensive, but only moderately so when compared to the fundamental laws of other European countries. Third Session of the National Assembly, *supra* note 2. However, others viewed the Constitution as too "wordy" or "talkative" and argued that it should have been shorter, more concise, and restrained. See, e.g., Krzysztof Kozłowski (KD) and Piotr Chojnacki (PSL), Third Session of the National Assembly, *supra*; M. Nowicki, *Straz praw* [The Guardian of Rights], ZYCIĘ WARSZAWY, Oct. 18, 1997; Prof. Ryszard Malajny, Faculty of Law, University of Leicester, Faculty Seminar, *General Characteristics of the New Polish Constitution*, Oct. 27, 1997. Moreover, Professor Malajny argues that some constitutional provisions are so vague that they contain little if no legal value. See Malajny, *supra* (referring to Article 1 of the new Polish Constitution, which reads: "The Republic of Poland is the common good of all its citizens".).

tions to be adopted in Central and Eastern Europe since the start of the political and socio-economic transformations of the post-communist era.<sup>4</sup> This Article emphasizes the importance of the new Polish Constitution in light of the long tradition of constitutionalism in Poland. Part I surveys some of the earlier constitutional texts, with particular focus on the provisions concerning the protection of human rights. After briefly discussing the difficulties encountered in drafting the new Polish Constitution, Part II analyzes the protection of rights and freedoms in the Constitution in light of the most recent developments. This part focuses on the general principles underlying rights and freedoms in the Constitution, certain prominent civil and political rights of particular importance in their specific Polish context, the debate surrounding the constitutionalization of economic and social rights, the protection of so-called "third-generation rights" such as the right to a clean and healthy environment, and limitations on rights and freedoms. One section is also devoted to the mechanisms adopted for the implementation and enforcement of these rights. This Article concludes that the system of protecting human rights in the new Polish Constitution is innovative and far-reaching and can serve as a useful model for developments elsewhere.

I. *HISTORICAL BACKGROUND: THE PLACE OF HUMAN RIGHTS IN POLISH CONSTITUTIONS FROM 1791-1989*

A. *The Polish Constitution of May 3, 1791*

Polish constitutionalism has a lengthy and rich, but arduous history.<sup>5</sup> The first Polish constitution, the Act of Governance of

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4. Constitutions were adopted in the other central and eastern European countries on the following dates: Bulgaria, July 12, 1991; the Czech Republic, December 16, 1992; Romania, November 21, 1991; Slovakia, September 1, 1992; and Slovenia, December 23, 1991. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 1, at binders III, V, XVI, XVII. The only country in this region still to adopt a brand new constitution is Hungary. The basic law of Hungary is Act XX of 1949, which was amended substantially in 1990 and 1994. *Id.*, at binder VIII. For an overview of the position in Hungary with particular reference to the constitutional protection of fundamental rights, see Gabor Halmai, *The Protection of Human Rights in Poland and Hungary*, in HUMAN RIGHTS IN EASTERN EUROPE 149, 157-65 (I. Pogany ed., 1995).

5. For an excellent overview, see Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49 (1991). For the purpose of this Article, constitutionalism is understood broadly as the mechanisms existing within a state that

3 May 1791<sup>6</sup> ("1791 Polish Constitution"), is often compared to other famous constitutions of that epoch, namely the U.S. and French constitutions.<sup>7</sup> While the practical impact of this document was severely limited by the loss of Polish independence shortly after its adoption, its importance as a symbol of Polish identity and sovereign nationhood, enabling Poles to retain their culture and values during the long years of oppression, is generally emphasized.<sup>8</sup>

Although a rudimentary notion of rights and freedoms<sup>9</sup> as a means of limiting governmental power took early root in Poland, particularly in relation to the landed gentry (*szlachta ziemianie*), it took some time for other social classes to be granted comparable protection. Clearly, this gradual process was hardly assisted by the 125 years of foreign occupation to which the country was subjected between 1793 and 1918, partitioned among Austria, Prussia, and Russia.<sup>10</sup> In contrast to the U.S. and French constitutions, in which rights were proclaimed with much fanfare after

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controls or limits the organs of government. See A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 8 (8th ed. 1997).

6. Ustawa Rzadowa z dnia 3 Maja 1791 [Act of Government of 3 May 1791] [hereinafter POL. CONST. (1791)].

7. Indeed, it is traditionally regarded as the first modern European constitution, preceding by four months the French Constitution of September 3, 1791. See Hubert Izdebski, *Constitutional Development in France and Poland Since 1791: A Comparative Analysis*, in *CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND, AND FRANCE* 163, 164 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991) [hereinafter *CONSTITUTIONALISM AND HUMAN RIGHTS*]. For a more negative assessment of the Act of Government of 3 May 1791 ("1791 Polish Constitution"), see M. Hillar, *The Polish Constitution of May 3, 1791: Myth and Reality*, 37 *POLISH REV.* 185, 185 (1992) (stating that it was "a last effort to save the old feudal system").

It is a mistake to put the Polish Statute on the same level with the American Constitution, with its Bill of Rights, or the French, with its Declaration of the Rights of Man and the Citizen. The latter documents broke with traditional feudal ways, abolished a hereditary class structure of society, broke with ecclesiastical domination by separating state and church, and introduced absolute freedom of conscience.

*Id.* at 187.

8. See, e.g., Wenceslas J. Wagner, *May 3, 1791, and the Polish Constitutional Tradition*, 36 *POLISH REV.* 383, 395 (1991); Brzezinski, *supra* note 5, at 69.

9. For an overview of the protection of human rights in Poland from 1791 to 1988, see Leslaw Kanski, *Human Rights in Poland from a Historical and Comparative Perspective*, in *CONSTITUTIONALISM AND HUMAN RIGHTS*, *supra* note 7, at 121.

10. One commentator writes: "External forces, notably the unfortunate tendency of Poland's neighbours to occupy it, have precluded a smooth and consistent constitutional history in Poland." Andrzej Balaban, *Developing a New Constitution for Poland*, 41 *CLEV. ST. L. REV.* 503, 503 (1993).

bloody revolutions,<sup>11</sup> and which are recognized as the forerunners of modern bills of rights, the 1791 Polish Constitution was a product of evolution rather than revolution<sup>12</sup> and thus took a more guarded approach to the protection of rights and freedoms. With the exception of religious freedom, which was granted to everyone,<sup>13</sup> the only genuine rights, as understood in the modern sense, were conferred upon the landed gentry (*szlachta ziemianie*),<sup>14</sup> the ruling class in Poland at the time. Some limited entitlements were also granted to the townspeople or burghers (*mieszczanie*),<sup>15</sup> and to the peasantry (*chłopi włościanie*).<sup>16</sup> It should be noted, however, that the 1791 Polish Constitution was heralded as the first step in an evolutionary process to be completed by the adoption of three other “national consti-

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11. See U.S. CONST. amends. I-X; Declaration of the Rights of Man and the Citizen, (France 1789), reprinted in JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 261 (1992).

12. See Hubert Izdebski, *Konstytucja Trzeciego Maja wśród konstytucji swojego wieku* [*The Constitution of May 3rd 1791 Amongst the Constitutions of the Period*], 46 *PANSTWO I PRAWO*, No. 5, at 3, 9-10 (1991). The English translations of the article titles are those provided by the journal. Professor Izdebski observes that this process was described by Hugo Kollataj, one of the framers of the 1791 document, as the “gentle revolution” (*lagodna rewolucja*), *id.* at 5, and argues that an important value of this document was its attempt to create a state structure, within the framework of the “gentle revolution,” that sought more to rationalize rather than to discard national traditions, *id.* at 6.

13. See Article I of the 1791 Polish Constitution, which nonetheless also made it clear that Roman Catholicism was to be the dominant religion. POL. CONST. (1791) art. I. With regard to Catholics who wished to change their faith, the provision declared that “[p]assage from the dominant religion to any other confession is forbidden under penalties of apostasy,” which at that time meant banishment. See Hillar, *supra* note 7, at 200. Hillar goes on to provide a critical review of so-called “traditional Polish tolerance.” *Id.* at 200-02. The prevalent view, however, would appear to be that persecution of other creeds was never as widespread in Poland as in other countries. See Brzezinski, *supra* note 5, at 67 n. 108 (citing ADAM ZAMOYSKI, *THE POLISH WAY* 90-91 (1987)).

14. POL. CONST. (1791) art. II (rights to personal security, liberty, and property). The landed gentry (*szlachta ziemianie*), made up 10% of the Polish population at the time. It is noteworthy that the *szlachta ziemianie* had already been guaranteed rights to personal liberty as far back as 1430 by means of the Cracovian Privilege, which prevented the King from detaining or sentencing a member of the *szlachta ziemianie* before a court could rule on the matter. This doctrine, known as *neminem captivabimus*, preceded by over 200 years the essentially similar English Habeas Corpus Acts of 1679 and 1816. See Brzezinski, *supra* note 5, at 53.

15. POL. CONST. (1791) art. III (rights to personal liberty and the inviolability of town property) (incorporating earlier law passed by same Sejm entitled, “Our free Royal Cities in the states of the Republic” [*Miasta Nasze Krolewskie wolne w panstwach Rzeczypospolitej*] of April 18-21, 1791); see Izdebski, *supra* note 12, at 15. Hillar observes, however, that this law did not apply to non-royal towns, which predominated in Poland at the time. Hillar, *supra* note 7, at 203.

16. POL. CONST. (1791) art. IV (urging respect for agreements reached between landowners and peasants).

tutions,” including an “economic constitution,” which would have moved Poland away from a feudal society towards a modern state extending additional rights to those who were not members of the ruling class, and in particular to the peasantry.<sup>17</sup>

B. *The Years of Partition and the Polish Constitutions of  
March 17, 1921 and April 23, 1935*

Rights and freedoms were bestowed equally upon everyone by the Constitution of the Duchy of Warsaw of 22 July 1807<sup>18</sup> (“1807 Polish Constitution”), which was imposed by Napoleon after his defeat of Prussia in 1807 in setting up a Polish state in the part of Prussia that had previously belonged to Poland.<sup>19</sup> The genuine constitutional protection of rights and freedoms, however, only became firmly established in the Constitution of the Republic of Poland of 17 March 1921<sup>20</sup> (“1921 Polish Constitution”), two and one half years after Poland had regained her

17. See Izdebski, *supra* note 12, at 13, 15. The other two “national constitutions” were to be the moral (educational) and the legal (codification of the Polish and Lithuanian law) constitutions. Izdebski, *supra* note 7, at 165. Indeed, a broad range of individual rights was extended to peasants in the Polaniec Manifesto of May 7, 1794, drawn up by Tadeusz Kosciuszko, with the aim of encouraging the peasantry to participate in the uprising of that year, which failed in November. See Brzezinski, *supra* note 5, at 69-70 (citations omitted).

18. Ustawa Konstytucyjna Księstwa Warszawskiego z dnia 22 lipca 1807 r. [Constitutional Law of the Duchy of Warsaw of 22 July 1807] DZIENNIK PRAW [JOURNAL OF LAWS] Nos. 1, 2, 16 (1807-1810) [hereinafter POL. CONST. (1807)].

19. The Constitutional Law of the Duchy of Warsaw of 22 July 1807 (“1807 Polish Constitution”) ensured the equal application of laws and abolished the serf class as a legal institution. POL. CONST. (1807) art. 4. Although this constitution was short-lived due to Napoleon’s defeat by Russia, it has been argued that “the egalitarian principles inherent in the Napoleonic system would remain an important part of Polish constitutional thought.” See Brzezinski, *supra* note 5, at 70-71 (footnotes omitted). A new constitution was imposed by Russia in 1815. See Ustawa Konstytucyjna Królestwa Polskiego z dnia 27 listopada 1815 r. [Constitution Law of the Kingdom of Poland of 27 November 1815], DZIENNIK PRAW [JOURNAL OF LAWS] 1815-1816 T.1 No. 1, 1824-1825 T.9 No. 37 [hereinafter POL. CONST. (1815)]. This constitution also contained a relatively liberal set of rights that were, however, effectively ignored in practice. See Kanski, *supra* note 9, at 124 (citation omitted).

20. Konstytucja Rzeczypospolitej Polskiej z dnia 17 marca 1921 r. [Constitution of the Republic of Poland of 17 March 1921], DZIENNIK USTAW [JOURNAL OF LAWS] No. 44, Item 267, No. 52, Item 334 (1921) [hereinafter POL. CONST. (1921)]. For an overview of the Constitution of the Republic of Poland of 17 March 1921 (“1921 Polish Constitution”) and its place in the context of constitutions adopted after World War I, see P. Sarnecki, *Konstytucja Marcowa na tle konstytucji współczesnych (w siedemdziesiątą rocznicę)* [The Constitution of the Republic of Poland of March 17, 1921 against a Background of Contemporary Constitutions], 46 PANSTWO I PRAWO, No. 3, at 5 (1991).



independence. This constitution guaranteed a host of human rights and freedoms, including a range of economic and social rights.<sup>21</sup> The 1921 Polish Constitution, however, also opted for a strong parliamentary system of government, conferring the most significant powers upon the legislative branch,<sup>22</sup> a formula that was largely blamed by the President, Marshal Józef Pilsudski, for the government corruption and the political and economic chaos that followed. This state of affairs led to a presidential *coup d'état* on May 11, 1926, after which the 1921 Polish Constitution was amended on August 2, 1926, to strengthen the executive branch of government. The 1921 Polish Constitution was eventually replaced by the Constitutional Law of 23 April of 1935<sup>23</sup> ("1935 Polish Constitution"), in which presidential powers were increased considerably and in which fundamental rights and freedoms, though present, received far less prominence.<sup>24</sup>

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21. See POL. CONST. (1921) § V (General Duties and Rights of Citizens). For economic and social rights, see Articles 102 to 103 of the 1921 Polish Constitution (employment and social security rights) and Articles 117 to 119 (educational rights). As noted by Kanski, the insertion of these rights into the 1921 Polish Constitution followed the introduction of extensive social legislation. Kanski, *supra* note 9, at 125. Kanski concludes that the "regulations concerning social and economic rights [reveal] . . . that the stress laid on the so-called economic rights was not characteristic only of socialist states" and argues that the emphasis on these rights was a result of the adoption in Poland of the social teachings of the Roman Catholic Church. *Id.* at 125-26. Sarnecki observes, however, that the inclusion of some economic and social rights in the 1921 Polish Constitution was rather modest in comparison to the broader conception of these rights found in other constitutions adopted at that time, such as those of the new Weimar Republic (1919), Yugoslavia (1921), and Lithuania (1922). Sarnecki, *supra* note 20, at 8.

22. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report of the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 623-24 (1991) (describing traditional preference of Polish people for powerful legislature). This preference was first manifested in the existence of the *liberum veto*, which enabled a single member of the Sejm to veto proposed legislation and which was abolished by Article VI(2) of the 1791 Polish Constitution. Although the *liberum veto* was often considered as an example of Polish disorder and anarchy, Prof. Bronislaw Geremek, the renowned historian and presently Polish Minister for Foreign Affairs, has argued that for 200 years this principle worked well and that it underlines the existence of a long parliamentary tradition in Central Europe. *Parliamentarism in Central Europe: A Speech by Bronislaw Geremek*, 4 EECR No. 3, 43, 44 (1995) (delivered at University of Chicago Law School on December 1, 1994).

23. Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r. [Constitutional Law of 23 April 1935], *DZIENNIK USTAW* [JOURNAL OF LAWS], No. 30, Item 227 (1935) [hereinafter POL. CONST. (1935)].

24. Article 5(2) of the Constitutional Law of 23 April 1935 ("1935 Polish Constitution") guaranteed the right of citizens to develop their personal values and rights to freedom of conscience, speech, and association. See Brzezinski, *supra* note 5, at 72-86

C. *The Communist Constitution of July 22, 1952*

After World War II, the Interim Constitution of February 19, 1947<sup>25</sup> was based to some extent on the 1921 Polish Constitution, but did not incorporate the chapter on citizens' rights. The Sejm, instead, issued a declaration respecting the basic rights and freedoms of citizens, which stipulated rather ominously in its final provision that these rights and freedoms could not be used against the state's political system.<sup>26</sup> Although human rights, including civil and political rights, did find a place in the Soviet-style constitution adopted on July 22, 1952, the Constitution of the Polish People's Republic of 22 July 1952<sup>27</sup> ("1952 Polish Constitution"), they were phrased in a vague and programmatic manner and could not be judicially enforced by individuals. Moreover, statutes were to determine the extent of the restrictions to which these rights could be subject.<sup>28</sup>

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(providing overview and assessment of inter-war period in Poland from constitutional standpoint); see also Leszek L. Garlicki, *The Presidency in the New Polish Constitution*, 6 EECR Nos. 2-3, 81, 81 (1997) (providing overview of Polish Presidency from its inception in 1921 to its present place in new Polish Constitution).

25. Ustawa konstytucyjna z dnia 19 lutego 1947 r. o ustroju i zakresie działania najwyższych organów Rzeczypospolitej Polskiej [Constitutional Law of 19 February 1947 relative to the Organization and Scope of Activity of the Supreme Authorities of the Republic], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 18, Item 71 (1947) [hereinafter *POL. CONST.* (1947)] (also known as "Small Constitution").

26. See Kanski, *supra* note 9, at 129. The Declaration of Rights and Liberties, approved by the Sejm on February 22, 1947, stated that "the abuse of the civil rights and liberties for the purpose of overthrowing the democratic form of government of the Republic of Poland, shall be prevented by law." *Id.*

27. Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 r. [Constitution of the Polish People's Republic of 22 July 1952], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 33, Items 232, 233 (1952), ch. VIII (Basic Civil Rights and Duties) [hereinafter *POL. CONST.* (1952)]. One commentator, writing in 1987, observed that "[t]he location of the chapter indicates the low significance attached to its subject matter; the chapter is followed only by three others dealing with issues of marginal importance." See Stanislaw Frankowski, *The Procuracy and the Regular Courts as the Palladium of Individual Rights and Liberties—The Case of Poland*, 61 *TULANE L. REV.* 1307, 1313 (1987). Moreover, the following important rights and freedoms were omitted from the Constitution of the Polish People's Republic of 22 July 1952 ("1952 Polish Constitution"): the right to be free from torture and slavery; the right to privacy; the right to freedom of movement and travel, including the right to choose one's place of residence; the right to property; the right to organize trade unions and the right to strike; the right to information; the right to citizenship; the right to participation in government and self-government; and the right to an effective remedy for the violation of basic rights and freedoms. See Wiktor Osiatynski, *A Bill of Rights for Poland*, 1 EECR No. 3, 29 (1992); Frankowski, *supra*, at 1314.

28. See Brzezinski, *supra* note 5, at 95; Kanski, *supra* note 9, at 129-30. As Frankowski observed in 1987: "The language used [in Chapter VIII of the 1952 Polish Constitu-

Indeed, it has been noted that “the progression from the socialist concept of rights to post-communist constitutionalism lies primarily in the realm of protection.”<sup>29</sup> Most importantly, however, the enumeration of these rights in the 1952 Polish Constitution could hardly have been a meaningful exercise given “the reality of political terror” in Stalinist Poland.<sup>30</sup> In 1976, amendments to the 1952 Polish Constitution recognized the prevailing political reality in Poland at the time by inscribing into the text the “leading role” of the Communist Party and the special role of the Soviet Union in Polish affairs.<sup>31</sup>

#### D. *The Constitutional Reforms of the 1980s*

The need to give more effective protection to human rights and civil liberties was sharply illustrated in the rise of the trade union movement—“Solidarity”—the origins of which were deeply rooted in the denial of a whole range of human rights and freedoms. A declaration of the movement explained that:

Our union was born out of protest of the Polish society which experienced violations of human and civil rights for over three decades; [it was born] from the protest against discrimination on the basis of inner convictions and against the system of economic exploitation. It was a rebellion against the existing system of governing. . . . We were not only concerned with living conditions. . . . History has taught us that there is no bread without freedom. We were also concerned with the justice, democracy, the truth, the Rule of Law,

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tion] clearly suggests that constitutional rules are not intended to recognize or confer any enforceable rights to the citizens of Poland, but are meant to express purported policy goals.” Frankowski, *supra* note 27, at 1313

29. Wiktor Osiatynski, *Rights in the New Constitutions of East Central Europe*, 26 *COLUM. HUM. RTS. L. REV.* 111, 111 (1994).

30. Rapaczynski, *supra* note 22, at 596. In this context, see also Article 84(3) of the 1952 Polish Constitution (as amended), which effectively prevented the exercise of rights and liberties in a manner contrary to the interests of the Polish state, which reads: “Creation of and participation in associations whose aim or activities are directed against the political and social system, or against the legal order, of the Polish People’s Republic are forbidden.” *POL. CONST.* (1952) art. 84(3), *cited in* Frankowski, *supra* note 27, at 1314.

31. *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 7, Item 36 (1976), arts. 3(1), 6(2), cl. 2; *see* Rapaczynski, *supra* note 22, at 596-97. The amendments also introduced additional economic and social rights, such as the right to “leisure and rest” (art. 69) and the right to education (art. 72), as well as a so-called “third-generation right,” namely the right to benefit from the natural environment (art. 71). *See* Rapaczynski, *supra*, at 597.

human dignity, the freedom of thought, . . . not only with bread, butter, and sausage. All basic values were too degraded to believe that without their being restored, anything could be changed for the better. An economic protest had to be at the same time a social protest; a social protest had to be also a moral one.<sup>32</sup>

Although the "Solidarity" era was short-lived, and the union was banned with the introduction of martial law on December 13, 1981, the momentum for change remained relentless, and the Polish Communist government introduced some democratic reforms in the 1980s. Western-type liberal institutions were superimposed upon the existing socialist structures<sup>33</sup> such as the High Administrative Court,<sup>34</sup> the Constitutional Tribunal<sup>35</sup> (or "Tribunal"), the Tribunal of State,<sup>36</sup> and the Commissioner for

32. Extracts from the Declaration, *Kim jesteśmy i dokąd dążymy?* [What Is Our Platform?], adopted during the first Solidarity National Congress in October 1981, reproduced in TYGODNIK SOLIDARNOSC [SOLIDARITY WEEKLY], 1981, cited in Frankowski (1987), *supra* note 27, at 1310; see Brzezinski, *supra* note 5, at 98 n.345.

33. For a good succinct description of the role of these institutions, see Brzezinski, *supra* note 5, at 99-103, and Mark F. Brzezinski & Leszek Garlicki, *Polish Constitutional Law*, in LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 21, 27-29, 44-46 (Stanislaw Frankowski & Paul B. Stephan III eds., 1995). The following institutions are now endorsed by the new Polish Constitution: the High Administrative Court (arts. 184-85); the Constitutional Tribunal (or "Tribunal") (arts. 188-97); the Tribunal of State (arts. 198-201); and the Commissioner for Citizens' Rights (or "Commissioner") (arts. 208-12).

34. Ustawa z dnia 31 stycznia 1980 r. o Naczelnym Sadzie Administracyjnym oraz zmianie ustawy—Kodeks Postępowania Administracyjnego [Law of 31 January 1980 on the High Administrative Court and on Amending the Code of Administrative Procedure], DZIENNIK USTAW [JOURNAL OF LAWS] No. 4, Item 8 (1980). The High Administrative Court has the power to review individual administrative decisions, but not parliamentary statutes. See Brzezinski & Garlicki, *supra* note 33, at 27.

35. Constitutional Amendment of 26 March 1982, art. 33a. The Constitutional Tribunal, however, only began to function at the beginning of 1986 after legislation implementing Article 33a was adopted. See Ustawa z dnia 29 kwietnia 1985 o Trybunale Konstytucyjnym [Constitutional Tribunal Act of 29 April 1985], DZIENNIK USTAW [JOURNAL OF LAWS] No. 22, Item 98 (1985); Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L L. 13, 24 (1995) (providing in-depth analysis of Constitutional Tribunal and its growing influence in Poland). For an earlier analysis, shortly after the introduction of the Tribunal, see Leszek Garlicki, *Constitutional Developments in Poland*, 32 ST. LOUIS U. L.J. 713 (1988). The Tribunal, including its more expansive role under the new Polish Constitution, is discussed in more detail below in Part III, Section G on Implementation and Enforcement.

36. Constitutional Amendment of 26 March 1982, art. 33b. This body has been described as a "quasi-judicial impeachment court," whose members are elected by the Sejm and presided over by the President of the Supreme Court. It adjudicates criminal responsibility for constitutional and statutory violations committed by state officials in

Citizens' Rights (*Rzecznik Praw Obywatelskich*).<sup>37</sup> Despite these reforms, the status of rights and freedoms in Poland in the second half of the 1980s was described very skeptically by Prof. Stanislaw Frankowski. He wrote that "Communist Poland is not a country governed by the rule of law in the Western sense. Citizens' political rights and liberties are illusory. Consequently, effective mechanisms for their enforcement have no *ratio existendi*."<sup>38</sup> The same author, however, also observed somewhat prophetically that these new institutions had the potential to take on a democratic life of their own,<sup>39</sup> and indeed, this appears to have occurred. The relevance and role of these bodies for the enforcement of the rights and freedoms of individuals under the new Polish Constitution, particularly the Constitutional Tribunal and the Commissioner for Citizens' Rights, is discussed below in Part III, Section G on Implementation and Enforcement.

## II. DRAFTING RIGHTS IN THE NEW POLISH CONSTITUTION: 1989-1997

The collapse of communism in Central and Eastern Europe left economic and social devastation in its wake. This devastation has been eloquently described by historian, Prof. Norman Davies:

The legacy of Soviet-style economies was dire. Despite initial successes, such as the currency reform and the conquest of hyperinflation under Poland's Balcerowicz Plan (1990-91), it became painfully clear that no overnight remedy was to

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their official capacities. Brzezinski & Garlicki, *supra* note 33, at 28; see Garlicki, *supra* note 35, at 721-24.

37. Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich [Law of 15 July 1987 on the Commissioner of Citizens' Rights], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 21, Item 123 (1987); see Ewa Letowska, *The Ombudsman and Basic Rights*, 4 *EECR* No. 1, 63 (1995) (overview of work of the Commissioner for Citizens' Rights, written by first such commissioner (1988-1992)); see also Ewa Letowska, *The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)*, 39 *INT'L & COMP. L.Q.* 206 (1990). The present Commissioner is Adam Zielinski, a professor of law at Warsaw University, who replaced Tadeusz Zielinski (1992-1996) on May 8, 1996. *Constitution Watch: Poland*, 5 *EECR* No. 16, 18 (1996). The term of service of the Commissioner has been increased to five years under the new Polish Constitution. *POL. CONST.* (1997) art. 209(1).

38. Frankowski, *supra* note 27, at 1337.

39. *Id.* at 1338 ("It is conceivable that in a different political climate, the guardian [ombudsman] (and some other institutions created by General Jaruzelski's government, such as the Constitutional Tribunal) may be transformed into genuinely autonomous bodies protecting the citizen from state power.").

hand. All the former members of the [Eastern] bloc faced decades of agonizing reorganization on the way to a viable market economy. . . .

Everywhere, the social attitudes engendered by communism persisted. Embryo civil societies could not rush to fill the void. Political apathy was high; petty quarrels ubiquitous; residual sympathy for communism as a buffer against unemployment and surprises was greater than many supposed. The decades 'under water' had conditioned the masses to disbelieve all promises and to expect the worst. The cynical idea that someone loses if someone else is gaining was all but ineradicable. No one could have guessed the dimensions of the devastation.<sup>40</sup>

Given this legacy, the construction of a democratic culture in the former Eastern Bloc was, and continues to be, a very difficult task, and the success of this process is by no means assured. Consequently, this "lack of certainty as to the success of the process of building democracy in a post-communist world" is one important reason that has been posited for the need to entrench human rights protections in East Central Europe swiftly as a means of limiting the power of future authorities, whether democratic or dictatorial.<sup>41</sup> Poland, however, did not adopt a new constitution as quickly as many of the other central and eastern-European countries.<sup>42</sup> Indeed, it took eight years for the final

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40. Norman Davies, *Europe: A History* 1125 (1996). The particular economic obstacles facing Poland were described as follows: "The noncommunist governments that ruled Poland from 1989 to 1993 faced the formidable task of restructuring the national economy under two handicaps: first, the huge external debt, amounting to 65% of GNP, left by the Communist elite of the 1970s; second, the general recession in the world economy that prevented the mass economic assistance needed when Communism surrendered." See Jacek Kurczewski, *The Politics of Human Rights in Post-Communist Poland*, in *HUMAN RIGHTS IN EASTERN EUROPE*, *supra* note 4, at 125.

41. Osiatynski, *supra* note 29, at 114. For the dangers of majority democratic rule to the protection of individual and minority rights in this region, see generally Jon Elster, *On Majoritarianism and Rights: Today, as in the 18th Century, Constitutions Must Protect Individual Rights from the Excesses of Democracy*, 1 *EECR* No. 3, 19 (1992).

42. As observed by Rapaczynski, "the experience of the drafting [in Poland] brings to the fore the most fundamental problem facing the constitution makers of Eastern Europe: the fact that the new constitution must be prepared at a time of profound and rapid changes in the political and economic structure of the country." Rapaczynski, *supra* note 22, at 630. In the light of this statement, it is somewhat paradoxical, therefore, that constitutions were adopted quickly in countries such as Bulgaria and Romania where the political and economic difficulties require the most significant transformations. See Halmaj, *supra* note 4, at 151.

Indeed, it has been argued that there are inherent advantages in delaying the con-

document to be adopted in a referendum.<sup>43</sup> "The mingling of the Constitution with ordinary politics was the cardinal reason for its repeated delays in Parliament. Because the drafting process took place in the lion's den of daily politics, the very legitimacy of the framers was repeatedly called into question."<sup>44</sup>

A number of other reasons, both political and practical, have also been put forward for this delay.<sup>45</sup> Moreover, three

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stitution-making process under such conditions. See Stephen Holmes, *Back to the Drawing Board: An Argument for Constitutional Postponement in Eastern Europe*, 2 EECR No. 1, 21, 22 (1993) (stating that "there are good reasons to think that a drawn-out process of constitution-making, with false starts and half steps, where constitutional committees proceed by trial and error and go periodically back to the drawing board, has great advantages under present conditions"). Indeed, this view was echoed by the Polish President Aleksander Kwasniewski, who stated that the initial failed attempts to adopt a new constitution in Poland after 1989 had enabled the constitution-makers to prepare a better and more mature text because they were in a position to take into account the positive and negative experiences of the previous eight years of political and economic transformations. Fourth Session of the National Assembly, *supra* note 2 (speech by Pres. Kwasniewski to National Assembly).

43. For a fascinating account of the work of the Constitutional Committee (1990-1991) of the first post-1989 Sejm, see Rapaczynski, *supra* note 22. For an account of the painstaking constitutional drafting process up to Spring 1994, see Wiktor Osiatynski, (*Special Report*), *Poland's Constitutional Ordeal: Avoidable and Unavoidable Detours on the Path to Reform*, 3 EECR No. 2, 29 (1994). The procedure for adopting a new Polish Constitution was laid out in Ustawa konstytucyjna z dnia 23 kwietnia 1992 o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej [Constitutional Act of 23 April 1992 on the Procedure, Preparation and Adoption of a Constitution for the Republic of Poland], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 67, Item 336 (1992). This act created a Constitutional Commission (or "Commission"), composed of 46 Sejm deputies, ten Senators, and non-voting representatives of the President, Government, and the Constitutional Tribunal. The function of the Constitutional Commission was to consider drafts submitted to it, to draw up its own draft, and then to send this document to the National Assembly. After considering the Commission's draft in two readings, the National Assembly could adopt the constitution if it obtained the support of a two-thirds majority in the presence of at least half of the members. If the President proposed amendments, however, a third reading would have to take place. Adoption of presidential amendments required an absolute majority of votes in the presence of at least half the members. The National Assembly could then adopt the constitution as a whole by a two-thirds majority. See *Interim Constitution Approved in Poland*, 1 EECR No. 2, 12 (1992); Ryszard Malajny, *The Constitution Making Processes in Eastern European Countries*, *PRAWA CZLOWIEKA - HUMANISTYCZNE ZESZYTY NAUKOWE* [HUMAN RIGHTS-HUMANISTIC SCIENTIFIC FASCICLES] No. 4, at 18-19 (1997).

44. Osiatynski, *supra* note 2, at 66.

45. Professor Malajny identifies the following six reasons for constitutional delay, which can be applied not only to Poland, but also to the other central and eastern-European countries: the passing of significant amendments to old constitutions profoundly changing the political and socio-economic system; the overloading of Parliaments with essential legislation; the weakness of the democratic forces after the overthrow of Communism, the lack of talent of their political leaders, and the general political immaturity of central and eastern-European societies; the fragmentation of

elections in the burgeoning democracy<sup>46</sup> and unexpected changes in government<sup>47</sup> were hardly conducive to the climate of constitution-making. Significant constitutional measures, however, were passed earlier so that the correct conditions could be created in Poland for political and economic reform. These measures were adopted in the form of amendments to the socialist 1952 Polish Constitution. The most important amendments were passed on April 7, 1989, December 29, 1989, and the interim "Small Constitution" of October 17, 1992.<sup>48</sup> In summary, the 1989 constitutional changes introduced a two-chamber Parliament consisting of the Sejm and the Senate, instituted the office of the President, and removed the formulations of communist ideology, replacing them with the principles of a democratic state of law and freedom of economic activity.<sup>49</sup> The "Small Constitution" clarified the relations between the legislative and executive branches of government. The Sejm ceased to be the supreme body in the state and became, together with the Senate, merely the national legislature. The executive was divided between the Cabinet, which gained a number of powers, and the President, with the latter playing the role of a strong umpire. A compromise was also reached between the President and the

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parliaments leading to counterproductive factional disputes; the dilemma over the most appropriate system of government (whether it should be presidential or parliamentary); and the problem of adequate socio-economic rights. Malajny, *supra* note 43, at 14-17; see Part III.D (Economic, Social, and Cultural Rights).

46. Malajny, *supra* note 3.

47. For example, the downfall of the government in December 1995, after it was alleged that the Prime Minister, Józef Oleksy, had collaborated with Russian intelligence services and further delayed the work of the Constitutional Commission. See *Constitution Watch: Poland*, 5 EECR No. 1, 16-17 (1996).

48. Ustawa z dnia 7 kwietnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Law of 7 April 1989 Amending the Constitution of the Polish People's Republic], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 19, Item 101 (1989); Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Law of 29 December 1989 Amending the Constitution of the Polish People's Republic], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 75, Item 444 (1989); Ustawa konstytucyjna z 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym [Constitutional Act of 17 October 1992 on the Relations Between the Legislative and Executive Branches in the Republic of Poland and on Local Self-Government], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 84, Item 426 (1992) [hereinafter Constitutional Act of 17 October 1992].

49. See Anna Michalska & Jan Sandorski, *Remarks on the Place of International Human Rights in the Constitution of the Republic of Poland*, 19 *POLISH YBIL* 101, 102 (1991-1992).



Sejm in regard to the appointment of the Cabinet.<sup>50</sup>

None of these changes, however, contained a bill of rights. Consequently, the rights catalogue in the 1952 Polish Constitution remained in force,<sup>51</sup> a position described at the time as "a fundamental deficiency of Poland's . . . constitutional framework."<sup>52</sup> This lacuna was all the more troubling given the significance of human rights to the Polish opposition to communist rule.<sup>53</sup> There were, however, attempts to introduce a bill of rights during this period. A Charter of Rights and Freedoms ("draft Charter of Rights" or "draft Charter") was submitted to the Sejm as a draft constitutional enactment by the former President, Lech Walesa, on November 12, 1992.<sup>54</sup> The draft Charter has secured praise as making an important contribution to the

50. See Special Report, *Poland Has a New Constitution as Conflict Between Two Chambers of Parliament Continues*, 1 EECR No. 3, 12, 12 (1992).

51. Constitutional Act of 17 October 1992, *supra* note 48, art. 77. As noted by Halmi, however, the amendments to the 1952 Polish Constitution in December 1989 did introduce a provision protecting private property (art. 7), which was recognized both as being an integral aspect of the transition to a market economy and as a fundamentally important requirement for attracting foreign investment. Halmi, *supra* note 4, at 153-54.

52. Brzezinski & Garlicki, *supra* note 33, at 47. As noted by Brzezinski and Garlicki, however, this lack of a new comprehensive framework to protect individual rights and freedoms was mitigated somewhat by three developments: the December 1989 changes to the first chapter of the 1952 Polish Constitution on "Basic Principles of the Political Structure" to include basic democratic principles; ratification by Poland of the European Convention on Human Rights ("ECHR"); and the many legislative changes introduced by Parliament affecting individual rights and freedoms, such as laws improving political rights and changes to criminal procedure enhancing due process guarantees. *Id.* at 48-49.

On January 19, 1993, Poland ratified the ECHR, which was signed on November 4, 1950, and which entered into force on September 3, 1953, and accepted the right of individual petition (art. 25) on May 1, 1993. See Halmi, *supra* note 4, at 153.

53. Osiatynski, *supra* note 29, at 122.

54. For overviews of this document, see Osiatynski, *supra* note 27; Andrzej Rzeplinski, *The Polish Bill of Rights and Freedoms: A Case Study of Constitution-making in Poland*, 2 EECR No. 3, 26 (1993); Michalska & Sandorski, *supra* note 49, at 126-31; Halmi, *supra* note 4, at 152-57; and Brzezinski & Garlicki, *supra* note 33, at 47-48. The bill of rights had its origins in the work of three members of the Helsinki Committee for Human Rights—Marek Nowicki, Marek Antoni Nowicki, and Andrzej Rzeplinski—a non-governmental organization ("NGO") monitoring the Polish government's compliance with the Helsinki Final Act since 1982. The text of the Helsinki Final Act is reproduced in *From Helsinki to Vienna: Basic Documents of the Helsinki Process* 43-100 (A. Bloed ed., 1990). The original authors were later joined by Ewa Letowska, Poland's first Commissioner for Citizens' Rights, and Wiktor Osiatynski. See Osiatynski, *supra* note 27, at 30. A competing draft Charter on Social and Economic Rights, sponsored by SLD, was rejected by the Sejm. See *Constitution Watch: Poland*, 2 EECR No. 1, 8, 8 (1993). Both charters were considered by the Sejm at the beginning of 1993. For an interesting analysis of the

debate in Poland on the constitutionalization of rights,<sup>55</sup> and significant aspects of the draft Charter make their mark in Chapter II of the new Polish Constitution.

### III. THE NEW POLISH CONSTITUTION

#### A. Human Rights in Context

Despite the political bickering and intrigue surrounding the adoption of the new Polish Constitution, what all political parties seemed to agree upon was the need to protect human rights.<sup>56</sup> The part of the Constitution concerned with the protection of human rights and freedoms is Chapter II. The importance accorded to rights and freedoms in this constitution is reflected in the proportion of articles in Chapter II to the Constitution as a whole. This chapter is the largest section in the Constitution with fifty-six out of 243 articles.<sup>57</sup> It is important to place Chapter II in its context within the Constitution. The concept of human rights permeates the whole document. The Preamble contains three paragraphs accenting the bitter human rights experiences of the past, making a firm commitment for the future, and underlining the fundamental significance of human rights principles to the Polish constitutional framework. The Preamble states that:

Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Fatherland,

Desiring to guarantee the rights of the citizens for all time and to ensure diligence and efficiency in the work of public institutions, . . .

We call upon all those who will apply this Constitution for the good of the Third Republic, to do so paying respect to the inherent dignity of the person, his (or her) right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakable foundation of the Republic of Poland.<sup>58</sup>

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ideological differences that emerged during the debate, see Kurczewski, *supra* note 40, at 113-17.

55. Osiatynski, *supra* note 29, at 122.

56. P. Spiewak, *The Battle for a Constitution*, 6 EECR Nos. 2-3, 89, 96 (1997).

57. See Malajny, *supra* note 3.

58. POL. CONST. (1997) pmb., ¶¶ 12, 13, 16.

Moreover, in Chapter I of the Constitution, entitled "The Republic" (*Rzeczpospolita*), which expounds the principles on which the Polish state is to be based, there are two further general provisions of relevance to human rights. A very important clause is Article 2, which states, "The Republic of Poland is a democratic state governed by law implementing the principles of social justice." This simple but nonetheless powerful statement encompasses in essence the *raison d'être* for including human rights in the constitution of a democratic state, namely to protect individuals against the excesses of government by ensuring that the actions of the latter are in accordance with the law and the pursuit of social justice, which can be identified with the whole panoply of human rights guarantees, but particularly economic and social rights.<sup>59</sup> It should be noted that an identical provision was inserted into Article 1 of the 1952 Polish Constitution by constitutional amendment in 1989, modeled on the so-called *Rechtsstaat* principle in the German Constitution.<sup>60</sup> The Constitutional Tribunal has already had the opportunity to interpret this principle widely by developing unwritten due process standards. It has upheld the prohibition against retroactive laws, the protection of vested rights, the principle of access to justice through independent courts, and the right to a procedurally fair judicial hearing.<sup>61</sup> More recently, as discussed below in Part III, Section C, Subsection 1, on the Right to Life, the Tribunal relied on this principle in ruling that abortion legislation permitting the termination of a pregnancy for social reasons was unconstitu-

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59. The concept of social justice was defined by the Rapporteur of the Constitutional Commission of the National Assembly, Sejm Deputy Marek Mazurkiewicz (SLD), as the obligation of state authorities to adopt a limited form of social interventionism, with the aim of equalizing the opportunities of citizens with respect to their lives and social aspirations. Third Session of the National Assembly, *supra* note 2.

60. See Brzezinski & Garlicki, *supra* note 35, at 35-36 (defining *Rechtsstaat* (or "state ruled by law") principle, as principle "rooted in nineteenth-century German legal culture, [and principle that] maintains that positive law should be consistent with fundamental rules of justice, fairness, and equity. In its interaction with individuals, the State thus has an overarching obligation to abide by certain unwritten rules of justice.").

61. *Id.* at 36-42. This jurisprudence has continued with the adoption of the new Polish Constitution. For example, Judgments K22/96 of 17 Dec. 1997 and U11/97 of 27 Nov. 1997, in which the Constitutional Tribunal, upholding applications by the Commissioner for Citizens' Rights, ruled, *inter alia*, that laws with retroactive force breached Article 2 of the new Polish Constitution. Polish summaries of these recent judgments are available from the Tribunal's home page on the internet: <<http://www.trybunal.gov.pl/>>.

tional.<sup>62</sup>

The commitment of the Constitution to supporting a broad range of human rights is exemplified by the reference to the principles of social justice in Article 2 and reiterated in Article 5, which states that “[t]he Republic of Poland safeguards the independence and integrity of its territory and safeguards the freedoms and rights of persons and citizens, the security of the citizens, safeguards the national heritage and ensures the protection of the natural environment based on the principles of balanced development.”<sup>63</sup>

### B. General Principles

#### 1. The Natural and Inalienable Dignity of the Human Being

Chapter II, Articles 30 through 37, begins with an enunciation of general principles. Article 30 is concerned with the source of rights and freedoms and declares that “[t]he natural and inalienable dignity of the human being constitutes the source of the freedoms and rights of man and citizen. It is inviolable and its respect and protection is the obligation of public authorities.”<sup>64</sup> That human rights are derived from the dignity of the human being has been described as a very powerful concept, i.e., “a source of human rights conceived in such a way puts them above the state power which should only recognize and protect, but has no creative competencies in this field.”<sup>65</sup> Similarly, Article 31(2) places everyone under an obligation “to respect the freedoms and rights of others,” but no one can be “compelled to do that which is not required by law.”<sup>66</sup> The past assumption in the socialist concept of rights that freedom was

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62. In response to criticism that the *Rechtsstaat* principle has been relied on too frequently by the Constitutional Tribunal, with the result that some judgments have acquired a “political character” and have thus infringed upon the competence of Parliament, Prof. Andrzej Zoll, the former President of the Tribunal, contends that the Tribunal has been forced to resort to this principle because it was the only norm that conformed to the new legal order. With the entry into force of the new Polish Constitution, however, the Tribunal will be able to benefit from new principles. See Andrzej Zoll, *Ostatni moment na poprawienie ustawy [The Last Chance to Amend the Statute]*, RZECZPOSPOLITA, July 28, 1997; Symposium: *Constitutional ‘Revolution’ in the Ex-Communist World: The Rule of Law, September 26, 1996*, 12 AM. U. J. INT’L L. & POL’Y 45, 93 (1997) [hereinafter *Constitutional Symposium*].

63. POL. CONST. (1997) art. 2.

64. *Id.* art. 30.

65. Michalska & Sandorski, *supra* note 49, at 118 (footnote omitted).

66. POL. CONST. (1997) art. 31(2).

granted by the state and, consequently, that "everything which was not permitted by law was prohibited" is therefore reversed.<sup>67</sup>

## 2. Equality

Articles 32 and 33 of the Constitution are concerned with the principle of equality. The former provision asserts in its first paragraph that "[a]ll persons are equal before the law. All persons have the right to equal treatment by public authorities."<sup>68</sup> Clearly, the second sentence circumscribes the equality principle to treatment by public bodies with the result that horizontal equality in the private sphere is not constitutionally protected.<sup>69</sup>

There appears, however, to be no such distinction in the latter provision, which applies the equality principle to men and women.<sup>70</sup> Moreover, the prohibited areas and grounds of discrimination are not specified, which suggests, in theory, that a broad approach to outlawing discrimination is possible. Article 32(2) does not enumerate a list of specific grounds, merely stating that discrimination is prohibited in "the political, social or economic life on any grounds."<sup>71</sup> Article 33(1) reads broadly that "men and women in the Republic of Poland have equal rights in family, political, social and economic life."<sup>72</sup> This approach differs from the position in the previous constitutional

67. See Osiatynski, *supra* note 29, at 123 (referring to draft Charter of Rights).

68. POL. CONST. (1997) art. 32.

69. In this respect, it is noteworthy that the draft Charter was also to apply only on the vertical plane. See Rzeplinski, *supra* note 54, at 28; Halmi, *supra* note 4, at 154. Note, however, an earlier Sejm draft provision proclaimed explicitly that: "Constitutional rights and freedoms apply to the relationships between private parties according to their nature." See Osiatynski, *supra* note 29, at 128 n.72 (observing that this provision was also included in 1993 draft submitted by PSL (art. 17)).

70. However, the principle of equality between men and women does not find expression in the terminology of the Constitution, which persists in using non-inclusive language. Third Session of the National Assembly, *supra* note 2 (comments of Sejm Deputy Jádwiaga Bloch (SLD)). Moreover, a suggestion to include formal constitutional mechanisms, in the form of a Commissioner and Commission on Equal Status, the function of which would be to combat discrimination against citizens on the ground of gender, was not taken up. See *id.* (comments by Sen. Zdzisława Janowska (KSN)).

71. The drafting process reveals that the Constitutional Commission decided to avoid drawing up a list of prohibited grounds of discrimination when it withdrew a proposal to include specifically a provision on sexual orientation after protests from the Catholic Church and a number of conservative parties. See *Constitution Watch: Poland*, 5 *EECR* No. 4, 17, 18 (1996); Osiatynski, *supra* note 2, at 71.

72. A non-exhaustive definition of this principle, however, is found in the following paragraph: "Men and women have equal rights, in particular, with respect to education, employment and promotions and have the right to equal compensation for work

provision on equality, which listed the prohibited grounds,<sup>73</sup> but seems to be in keeping with the jurisprudence of the Constitutional Tribunal holding that this list was not exhaustive.<sup>74</sup> Moreover, the Tribunal has already developed a broad conception of equality, which goes beyond the mere equal application of the laws.<sup>75</sup> It is therefore likely that the new expansive provisions on equality will enable it to develop its reasoning under the new Polish Constitution in a similar fashion.

### 3. The Protection of Minorities, Aliens, and Citizenship

The remainder of the section on General Principles in Chapter II is concerned with membership in the Polish state, including the nature of citizenship,<sup>76</sup> the rights of Polish citizens belonging to national or ethnic minorities,<sup>77</sup> and the rights of

of equal value, to social security, to hold offices, and to receive public honors and decorations." POL. CONST. (1997) art. 33(2).

73. *Id.* art. 67(2). "Citizens of the Polish People's Republic shall have equal rights irrespective of sex, birth, education, trade or profession, nationality, race, religion, social origin and status." *Id.*

74. Judgment K1/91 of 28 May 1991, ORZECZNICTWO TRYBUNALU KONSTITUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 81 (1991) (holding that equality principle should be applied to "all situations where we address the rights of individuals belonging to the same category"); see Brzezinski & Garlicki, *supra* note 35, at 43.

75. *Constitutional Symposium, supra* note 62, at 93; Brzezinski & Garlicki, *supra* note 35, at 44, (citing Judgment K6/89 of 24 October 1989, ORZECZNICTWO TRYBUNALU KONSTITUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 100 (1991) (finding in favour of women miners by declaring laws that permitted both men and women miners to retire with full pension after 25 years of employment unconstitutional)). The Tribunal held that women should be able to retire at an earlier age because of the physical and biological differences between the sexes.

76. Article 34 of the new Polish Constitution concerns the acquisition and loss of citizenship. POL. CONST. (1997) art. 34. Article 34(1) proclaims that the *jus sanguini* principle of citizenship acquisition is to apply in Poland—by birth to parents who are Polish citizens—with the proviso that other methods of acquiring citizenship are specified by law. Article 34(2) asserts that Polish nationality can only be lost by renunciation. Article 36 confers upon Polish citizens abroad the right to protection by the Polish State. *Id.* art. 36

77. *Id.* (1997) art. 35. This provision appears to contain a concept of "group rights." Article 35(1) is phrased in terms of individual rights by obliging the state to ensure "to Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions and to develop their own culture." Consequently, it mirrors to some extent the wording in Article 27 of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. On the other hand, Article 35(2) grants the right to "national and ethnic minorities . . . to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to

aliens within Poland's jurisdiction, who are to enjoy the same rights and freedoms as those guaranteed by the Constitution to citizens unless otherwise specified by law.<sup>78</sup> Aliens are to benefit from most civil and political rights enjoyed by citizens, with the exception of the traditional political rights such as the right of access to the public service and the right to vote.<sup>79</sup> They may also benefit from most economic and social rights, although it is rather disconcerting that the right to social security is restricted to Polish citizens.<sup>80</sup> Moreover, the full enjoyment of rights to health, education, and housing is also limited to Polish citizens.<sup>81</sup> Such an approach is clearly at odds with the universality of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which grants these rights to everyone.<sup>82</sup>

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participate in the solution of matters connected with their cultural identity." POL. CONST. (1997) art. 35(2). There is, however, no explicit constitutional entitlement to state assistance for minority activities. An inherent limitation on such activities is also contained in the section on duties in Article 82, which declares that "[l]oyalty to the Republic of Poland, as well as concern for the common good, are the duty of every Polish citizen." *Id.* art. 82. Moreover, it is noteworthy that the introduction of the preambular phrase, "*We, the Polish Nation*—all citizens of the Republic," gave rise to objections from Henryk Kroll, the Sejm representative of the German minority. Third Session of the National Assembly, *supra* note 2 (emphasis added).

78. POL. CONST. (1997) art. 37. Presumably, the reasons for restricting the rights and freedoms of aliens would have to conform to those set out in Article 31(3) concerned with limitations. *See* Part III.F (Limitations on Rights).

79. POL. CONST. (1997) arts. 60, 62. The right to obtain information on the activities of public authorities and public officials is also restricted to citizens. *Id.* art. 61.

80. *Id.* art. 67. Indeed, this approach mirrors the one taken under the amended Hungarian Constitution, where social security rights are also restricted to citizens. A MAGYOR KÖZTÁRSARÁG ALKETMÁNYA [Constitution] art. 70E(1)(Hung.). The Czechoslovak Charter of Fundamental Rights and Freedoms, which retains constitutional standing in both countries, restricts a broader range of economic and social rights to citizens, such as social security, free medical care, and free elementary and secondary education. ÚSTAVNÍ ZÁKON ČESKÉ REPUBLIKY [Constitution] arts. 30(1), 31, 33(2) (Czech Rep.). Osiatynski notes the concerns of Dona Gomien with respect to those Polish constitutional drafts that discriminated explicitly between citizens and aliens in the area of social rights. Osiatynski, *supra* note 29, at 126-27 n.66 (citing Dona Gomien, *General Report of the Conference, in CONSTITUTIONALISM AND HUMAN RIGHTS* 192 (A. Rzeplinski ed., 1992)).

81. Although both Articles 68 and 70 grant the right of "everyone" to the protection of health and education, "equal access to health care services, financed from public funds," POL. CONST. (1997) art. 68(2), and "universal and equal access to education" is to be ensured by public authorities to citizens only. *Id.* art. 70(4). Similarly, under Article 75(1), public authorities are under an obligation to "pursue policies conducive to satisfying the housing needs of citizens." *Id.* art. 75(1) (emphasis added).

82. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. For example, Article 9 of the International Covenant on Economic, Social

#### 4. The Place of International Law

A very important source of rights and freedoms is international law as manifested in the various international human rights instruments ratified by Poland.<sup>83</sup> The place that international law, including international human rights standards, should occupy in the Constitution generated considerable academic debate during drafting.<sup>84</sup> The relation of international law to domestic law under the socialist 1952 Polish Constitution was hardly clear. In legal theory, the prevalent view was that international treaties were binding and enforceable within the domestic legal order, *ex proprio vigore*,<sup>85</sup> although the courts applied this doctrine rarely in practice, and in one important decision the Polish Supreme Court ignored it by emphasizing that international agreements could only have binding effect within the country if they were incorporated into domestic law.<sup>86</sup> More-

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and Cultural Rights ("ICESCR") reads: "The States Parties to the present Covenant recognize the right of *everyone* to social security, including social insurance." *Id.* art. 9, 993 U.N.T.S. at 7, 6 I.L.M. at 362-63 (emphasis added).

83. See generally Osiatynski, *supra* note 29, at 161 (citing numerous international human rights instruments).

84. See, e.g., Krzysztof Skubiszewski, *Przyszła konstytucja RP a miejsce prawa międzynarodowego w krajowym porządku prawnym* [A Future Constitution of the Republic of Poland and the Position of International Law in the Municipal Legal Order], 49 PRAWO I PRAWO No. 3, at 11 (1994); Anna Wyrozumska, *Zapewnianie skuteczności prawa międzynarodowemu w prawie krajowym w projekcie konstytucji RP* [Making International Law Effective Under a Draft Constitution of the Republic of Poland], 51 PRAWO I PRAWO No. 11, at 16 (1996); Zdzisław Kedzia, *The Place of Human Rights Treaties in the Polish Legal Order*, 2 EUR. J. INT'L L. 133 (1991); Michalska & Sandorski, *supra* note 49, at 103-16.

85. Kazimierz Działocha, *The Hierarchy of Constitutional Norms and its Function in the Protection of Human Rights* (Polish Report to the 8th Conference of European Constitutional Courts, Ankara, 7-10 May 1990), 13 H.R.L.J. 100, 110 (1992); Kedzia, *supra* note 84, at 133-34. Kedzia also observes that this doctrine was applicable under the inter-war constitutions of 1922 and 1935. Kedzia, *supra*, at 136.

86. Kedzia, *supra* note 84, at 134-35 nn.6-7, (citing Case I PRZ 8/87, Decision of the Supreme Court of 25 Aug. 1987, published in ORZECZNICTWO SADU NAJWYWSZEGO [DECISIONS OF THE SUPREME COURT] 12/1987 (Pol.)). This case concerned the refusal of district courts to register the trade union "Solidarity," which had been banned after the imposition of martial law. *Id.* The union relied on Article 22 of the International Covenant on Civil and Political Rights ("ICCPR"), which safeguards "the right to freedom of association with others, including the right to form and join trade unions." See ICCPR, *supra* note 77, art. 22, 999 U.N.T.S. at 178, 6 I.L.M. at 374. Along with the ICCPR, the union relied on the ILO Convention, and both the ICCPR and the ILO Convention were ratified by Poland. See ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17. The Polish Supreme Court adopted a radical conception of the dualist approach to international law and ruled that because these instruments, though ratified, had not been incorporated into Polish law, they only bound Poland externally. *Id.* The Court based its opinion on



over, international law was not afforded priority over domestic law unless expressly specified in the statute.<sup>87</sup>

Although the section on general principles in Chapter II does not make any reference to international law, Article 9, in Chapter I on the "Republic," proclaims that "[t]he Republic of Poland respects international law binding upon it."<sup>88</sup> The place of international law in the Constitution is described in Chapter III entitled "Sources of Law."<sup>89</sup> Article 87 recognizes that ratified international agreements constitute one of the sources of "universally binding law" of Poland, together with the Constitution, statutes, and regulations.<sup>90</sup> This formulation is open to criticism because it only refers to one aspect of international law ignoring customary international law, and decisions of international organizations.<sup>91</sup> In this regard, it is pertinent to note that a presidential amendment to ensure that rights and freedoms in the draft constitution conformed to the Universal Declaration of Human Rights ("UDHR") was rejected by the Polish National Assembly.<sup>92</sup> Therefore, if the UDHR is regarded as having acquired the status of customary international law,<sup>93</sup> it can only be concluded that the UDHR cannot amount to a source of "universally binding law" of Poland.

The Constitution stipulates that international treaties are

Article 61 of the socialist Constitution, which stated: "Judges are independent and subordinated only to parliamentary statutes." See R. Kwiecien, *Transformacja umów międzynarodowych jako forma stanowienia prawa w państwie (z uwzględnieniem praktyki polskiej)* [*The Incorporation of International Agreements as a Form of Law-Making in the State (with Reference to Polish Practice)*], 52 *PANSTWO I PRAWO* No. 4, at 3, 11-13.

87. Działocha, *supra* note 85, at 110.

88. POL. CONST. (1997) art. 9.

89. *Id.* ch. III.

90. *Id.* art. 87.

91. See Wyrozumska, *supra* note 84, at 33-34 (referring to project of draft Constitution dated June 19, 1996); see also Michalska & Sandorski, *supra* note 49, at 107 (referring to exclusion of customary norms of international law as source of Polish system of law in Sejm's draft constitution drawn in 1991).

92. Fourth Session of the National Assembly, *supra* note 2; see *Constitution Watch: Poland*, 6 *EECR* No. 1, 20, 22 (1997). Indeed, the 1992 draft Charter of Rights contained a comparable clause to the proposed amendment, requiring the rights and freedoms in the Charter "to be interpreted in accordance with the Universal Declaration of Human Rights and the international agreements on rights and freedoms ratified by the Republic of Poland." See Michalska & Sandorski, *supra* note 49, at 129; Halmi, *supra* note 4, at 156.

93. See MYRES S. McDOUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 273-74, 325-27 (1980).

ratified by the President,<sup>94</sup> but the ratification of an international agreement concerning, *inter alia*, “freedoms, rights or obligations of citizens, as specified in the Constitution” must also be approved in the form of a statute passed by a two-thirds majority in both the Sejm and the Senate.<sup>95</sup> Once approved in this way, Article 91(1) provides that the agreement becomes part of the domestic legal order and is to apply directly, in other words, is self-executing, “unless its application depends on the enactment of law.”<sup>96</sup> The subsequent provision, Article 91(2), makes it clear that ratified international agreements are to prevail over statutory law: “An international agreement ratified upon prior consent granted by law shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.”<sup>97</sup> This is a significant development in contrast to the previous position explained earlier.

The Constitution, however, is silent on the status of ratified international agreements *vis-à-vis* the highest law itself and it must therefore be assumed that constitutional provisions will take precedence.<sup>98</sup> Such an interpretation is buttressed further by the expanded mandate of the Constitutional Tribunal, considered in Part III, Section G, Subsection 3, which adjudicates on the conformity of international agreements to the Constitution.<sup>99</sup> In practice, however, such adjudication is only likely to occur before agreements are ratified<sup>100</sup> or before their ratification is approved by the Sejm.<sup>101</sup> In one respect, therefore, this power may operate to further human rights because if the Tribunal finds that the international agreement safeguards human

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94. POL. CONST. (1997) art. 133(1), ¶ 1.

95. *Id.* arts. 89, 90(2).

96. *Id.* art. 91.

97. *Id.* art. 91(2).

98. This interpretation would conform to the position adopted by most of the draft constitutions submitted in 1993, providing that international law would be subordinate to the constitution but superior to legislation. See Osiatynski, *supra* note 29, at 164. It also appears to satisfy the view of Polish international lawyers that international treaties should be put between the constitution and parliamentary statutes. See Kedzia, *supra* note 84, at 139.

99. POL. CONST. (1997) art. 188, ¶ 1.

100. Before ratifying an international agreement, the President can refer it to the Constitutional Tribunal. *Id.* art. 133(2).

101. See Władysław Czaplinski, *Prawo międzynarodowe a prawo wewnętrzne w projekcie konstytucji RP (Uwagi na tle artykułu Anny Wyrozumskiej)* [*International Law and Domestic Law in the Draft Constitution (Comments in the light of the article by Anna Wyrozumska)*], 52 PANSTWO I PRAWO No. 2, at 99, 101 (1997).

rights more effectively than the Constitution, then a constitutional amendment might follow. Although the drafters clearly intended Chapter II of the Constitution to be compatible with international human rights standards,<sup>102</sup> it must nonetheless be concluded that the subordination of international norms to the Constitution weakens, in theory at least, the protection of human rights in Poland in those instances where already ratified international human rights instruments might provide stronger guarantees.<sup>103</sup>

Given the supremacy of constitutional norms over international law, it is perhaps somewhat surprising to find an unambiguous provision such as Article 90(1), which states that “[t]he Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State in some matters.”<sup>104</sup> Clearly, the purpose of this clause is to prepare for Poland’s future accession to the North Atlantic Treaty Organization (“NATO”) and the European Union. Consent for ratification of such an international agreement is subject to stringent safeguards requiring either the passing of a statute with the support of a two-thirds majority in both the Sejm and the Senate in the presence of at least half of the Deputies and Senators respectively, or the approval of the people in a nationwide referendum, which is only binding if more than half of the eligible voters participate.<sup>105</sup> In spite of these safeguards, the generality of this provision has been criticized by some as constituting a threat to Poland’s sovereignty and independence, particularly in the light of the country’s tragic past.<sup>106</sup>

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102. See Osiatynski, *supra* note 2, at 73. Osiatynski also notes that some rights, such as those concerned with information, go beyond the scope of international standards. *Id.*; see Part III.C.2 (Right to Information).

103. In practice, however, the Constitutional Tribunal is likely to continue to resort to international norms to assist it in the interpretation of the human rights guarantees in the new Polish Constitution. As observed by Professor Zoll, after 1989 the Tribunal managed to employ international legal norms in its jurisprudence by relying on the *Rechtsstaat* clause (incorporated into the new Polish Constitution in Article 2 discussed above), which enabled the Tribunal to argue in certain cases that “international norms constitute the basis of any rule-of-law system.” See Irena Grudzinska-Gross, *Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal*, 6 EECR No. 1, 77 (1997).

104. POL. CONST. (1997) art. 90(1).

105. *Id.* arts. 90(2)-(3), 125(3).

106. See, e.g., Third Session of the National Assembly, *supra* note 2 (comments by

### C. *Civil and Political Rights*

Civil and political rights, as understood in the context of international human rights agreements, are widely protected under the new Polish Constitution and are found in two sections in Chapter II entitled "Personal Freedoms and Rights," Articles 38 through 56, and "Political Freedoms and Rights," Articles 57 through 63. Most of the rights and freedoms in these sections are found in two international human rights treaties ratified by Poland, namely the International Covenant on Civil and Political Rights<sup>107</sup> ("ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Some of these rights in the Constitution, however, possess their specific Polish dimensions, while others are broader in scope than the rights outlined in these international instruments. The objective of this section is to highlight these differences rather than to provide an overview of the whole range of protected rights.

#### 1. Right to Life

The right to life is proclaimed in Article 38, which states that "[t]he Republic of Poland shall ensure the legal protection of the life of every human being guarantees to everyone the legal protection of life."<sup>108</sup> The draft Charter of Rights contained a similar broadly-worded provision on the protection of the right to life. The deliberately vague wording in Article 38 reflects a compromise,<sup>109</sup> with the result that the responsibility for the regulation of abortion is passed effectively to the Sejm.<sup>110</sup> As written, the provision would arguably seem to permit a restrictive law on abortion as well as a liberal law. In this regard, it should be noted that proposals to protect human life explicitly from the

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Sen. Piotr Andrzejewski (NSZZ 'Solidarnosc') and Sejm Deputy, Janusz Dobrosz (PSL)).

107. Poland ratified the ICCPR on March 18, 1977, but it only accepted the right of individual petition under the Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302, 6 I.L.M. 383 (1967), when it acceded to the Protocol on November 7, 1991. See <<http://www.unhchr.ch/>> (internet site of United Nations High Commissioner for Human Rights).

108. POL. CONST. (1997) art 38.

109. *Constitution Watch: Poland*, 4 EECR No. 2, 21 (1995).

110. As noted by Rzeplinski, the intention of the draft Charter was to leave "controversial questions," such as the regulation of the right to life, "for future constitutional practice to settle." Rzeplinski, *supra* note 54, at 28; see Malajny, *supra* note 3.

moment of conception were not accepted.<sup>111</sup>

The Constitutional Tribunal's restrictive view of abortion, culminating in its recent decision in May 1997, however, appears to have considerably limited the Sejm's competence to legislate in this area. In January 1991, the Tribunal upheld a Ministry of Health regulation permitting doctors to refuse or to assist in carrying out abortions as being in conformity with the freedom of conscience clause of the amended 1952 Polish Constitution.<sup>112</sup> In October 1992, the Tribunal dismissed on procedural grounds a petition of the Ombudsman challenging the amended Medical Code of Ethics ("Code"), adopted by the Polish Congress of the National Medical Association, which restricted the performance of abortions by doctors to cases of rape or threat to a women's life or health.<sup>113</sup> In March 1993, however, the Tribunal did review the Code and found it to be superseded by the less stringent but nonetheless fairly restrictive Abortion Act of 1993, passed in January 1993, which effectively prohibited "abortion on demand."<sup>114</sup> In June 1994, the newly composed Sejm and Senate, controlled by the left-wing SLD-PSL coalition, passed an amendment to the Polish Penal Code, liberalizing abortion rights considerably. This amendment was vetoed by President Walesa,

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111. See Article 17(1) in the project on the Constitution drafted by the Solidarity-dominated Senate of 1990, which is referred to in an overview of the early drafts by Zdzisław Czeszejko-Sochacki, *Projekty nowej konstytucji (Przegląd zagadnień wstępujących)* [*Bills of the New Constitution (A Review of Basic Problems)*], 46 PANSTWO I PRAWO No. 7, at 6 (1991); see Osiatynski, *supra* note 29, at 129 (referring to Article 9(1) of 'Solidarity' draft).

112. Judgment U 8/90 of 15 Jan. 1991, ORZECZNICTWO TRYBUNALU KONSTYTUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 134 (1991), *cited by* Brzezinski & Garlicki, *supra* note 35, at 51.

113. Judgment U 1/92 of 7 Oct. 1992, ORZECZNICTWO TRYBUNALU KONSTYTUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 157 (1992(II)), *cited by* Brzezinski & Garlicki, *supra* note 35, at 51-52.

114. Judgment W 16/82 of 17 Mar. 1993, ORZECZNICTWO TRYBUNALU KONSTYTUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 156 (1993), *cited by* Brzezinski & Garlicki, *supra* note 35, at 52-53. The Abortion Act declared the right to life of every human being from the moment of conception and only permitted abortions in cases when the women's health is in danger, when the fetus is severely deformed, or when the pregnancy results from rape or incest. Brzezinski & Garlicki, *supra*, at 52 (citing Ustawa z dnia 7 stycznia 1993 o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży [Law of 7 January 1993 on Family Planning, Protection of the Human Foetus, and Conditions Under Which Abortion Is Allowed], DZIENNIK USTAW [JOURNAL OF LAWS] No. 17, Item 78 (1993)). In short, the legislation prohibited "abortion on demand" because it only allowed abortion for medical reasons and not "for important social reasons." See Osiatynski, *supra* note 29, at 129 n.77.

however, who opposed abortion, and the Sejm failed to obtain the necessary two-thirds majority in order to override the veto.<sup>115</sup>

With the presidential election of Aleksander Kwasniewski, another amendment, permitting abortion in difficult financial and personal circumstances in the first trimester of pregnancy, was introduced into Polish Parliament in 1996.<sup>116</sup> Although it passed through the Sejm twice, overriding the Senate's rejection of the amendment, and was signed by the President, the new legislation was challenged before the Constitutional Tribunal by a group of "Solidarity" Senators in December 1996. On May 27, 1997, the Tribunal ruled that the law was unconstitutional. The Tribunal's principal argument was that the concept of the democratic state ruled by law, as articulated in Article 1 of the amended 1952 Polish Constitution, presently Article 2 of the new Constitution, held human beings and their most valuable goods, to be the supreme value. According to the Tribunal, life was such a good that it had to be afforded constitutional protection in all stages of its development in a democratic state. While the Tribunal accepted that constitutional goods can conflict and that one good can be limited by another, it considered that the protection of a pregnant woman's right to shape her life conditions freely and to satisfy her material needs and those of her family could not be implemented so far as to interfere with a fundamental good such as human life.<sup>117</sup> Because the law on abortion pre-dated the new Polish Constitution, the judgment of the Tribunal was not final and was subject to consideration by the Sejm, which was within its power to overturn the ruling by a

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115. *Constitution Watch: Poland*, 2-3 EECR Nos. 3-4, 15, 16 (1994).

116. Ustawa z 30 sierpnia 1996 o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz o zmianie niektórych innych ustaw [Law of 30 August 1996 Amending the Law on Family Planning, Protection of the Human Foetus, and Conditions Under Which Abortion Is Allowed, as well as Amending Other Laws], *DZIENNIK USTAW [JOURNAL OF LAWS]* No. 139, Item 646 (1996), art. 4a(2). For a detailed discussion of this amendment as well as its predecessor, see John Majewski, *Karalność aborcji w Polsce w świetle ostatnich zmian legislacyjnych [The Punishment of Abortion in Poland in the Light of Recent Legislative Changes]*, 52 *PANSTWO I PRAWO* No. 4, at 65 (1994).

117. Judgment K26/96 of 27 May 1997 <[http://www.Rzeczpospolita.pl/pub/polka\\_aborcja.html](http://www.Rzeczpospolita.pl/pub/polka_aborcja.html)> (on file with the *Fordham International Law Journal*) (containing full Polish text of judgment). Three judges issued dissenting opinions: Zdzisław Czeszejko-Sochacki, Lech Garlicki, and Wojciech Sokolewicz. For a brief overview of the decision, see *Constitution Watch: Poland*, 6 EECR Nos. 2-3, 25, 28 (1997).

two-thirds majority vote.<sup>118</sup> The election of the rightist AWS in September 1997, however, ensured that there was a majority in the Sejm supporting further restrictions on abortion, and the ruling of the Tribunal was approved on December 17, 1997.<sup>119</sup>

## 2. Right to Information

Articles 51 and 61 of the Constitution contain fairly extensive provisions dealing with the right to information<sup>120</sup> and guarantee, according to Prof. Marek Nowicki, that there will be no rebirth of totalitarianism in Poland.<sup>121</sup> Article 51 ensures that "[n]o one can be obliged, except on the basis of statute, to disclose information concerning his person," prohibits public authorities from collecting or making accessible information on citizens "other than that which is necessary," and provides the individual with the right to access any information collected.<sup>122</sup> These clauses confirm that the authorities cannot interfere too intrusively in people's lives. This is the essence of totalitarian power, which interferes in the whole of every individual's life.<sup>123</sup> Article 61, placed in the section on "Political Freedoms and Rights," proclaims the right of the citizen "to obtain information on the activities of organs of public authority as well as persons discharging public functions."<sup>124</sup>

## 3. Religious Freedom

Article 53 is concerned with religious freedom. Because of the historically important and influential position of the Roman Catholic Church in Poland, this provision is rather different than those usually shorter statements of principle found in inter-

118. For more information, see Part III.G.2.

119. See *Aborcja zakazana* [*Abortion Prohibited*], RZECZPOSPOLITA, Dec. 18, 1997. The Sejm approved the Tribunal's decision by a vote of 231 to 160 with 11 abstentions. *Id.*

120. The right to information first found its expression in Article 10 of the draft Charter of Rights submitted to Parliament by President Walesa in November 1992. See Rzeplinski, *supra* note 54, at 28.

121. Nowicki, *supra* note 3.

122. POL. CONST. (1997) art. 51(1)-(3).

123. Nowicki, *supra* note 3.

124. POL. CONST. (1997) art. 61(1). Note the specific limitations clause in Article 61(3), however, which states that limitations on this right "can be imposed by law solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State." *Id.* art. 61(3).

national human rights instruments.<sup>125</sup> This does not mean, however, that there is no separation of church and state under the new Polish Constitution nor that the Roman Catholic faith is necessarily accorded constitutional supremacy over other religions and beliefs in Poland.<sup>126</sup> Rather, the relationship between the state and churches, and other religious organizations is “based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.”<sup>127</sup> This spirit of compromise is also reflected in the Pre-

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125. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(1), 213 U.N.T.S. 221, 230.

126. It is noteworthy that two draft projects on the Constitution proposed legitimating the supremacy of the Roman Catholic faith. *See* Mariusz Gulczynski, *Zasady ustrojowe w projektach konstytucji RP [Social, Political and Economic Foundations of the Polish Constitutional Bills]*, 49 PANSTWO I PRAWO No. 4, at 13 (1994) (referring to projects submitted by PC and KPN). Professor Gulczynski notes, however, that the latter proposal also contained a statement that membership of a specific church or religious organization did not grant persons any additional rights to those possessed by persons who are members of another religious organization or who do not belong to any religious group. *Id.*

127. POL. CONST. (1997) art. 25(3). Article 25(3) is found in the first section of the Constitution entitled, “The Republic.” The avoidance of a direct reference to “separation” was a far-reaching concession to the Roman Catholic Church. *See Constitution Watch: Poland*, 4 EECR No. 2, 18, 21 (1995). This provision appears also to be broadly in agreement with the position of the Polish Roman Catholic bishops, who stressed the principles of autonomy as well as the co-operation of church and state for the good of the human person. *See* K.H. Jablonski, *Problematyka wyznaniowo-swiatopogladowa w projektach konstytucji RP [Ideological and Religious Issues in Drafts of the Polish Constitution]*, 47 PANSTWO I PRAWO No. 2, at 75, 77 (1992). However, during the Third Session of the National Assembly, Sejm Deputy Izabella Sierakowska (SLD) argued that autonomy should not have the same meaning as sovereignty, implying that otherwise the State would be limiting its own sovereignty by entering into relations with other churches and religious organizations. Third Session of the National Assembly, *supra* note 2. The Constitutional Commission then proposed to delete the reference to the autonomy principle, an amendment rejected by a later gathering of the National Assembly. 3-cie Posiedzenie Zgromadzenia Narodowego, 21-22 marca 1997 r., Nr 161 (284) II kadencja [Third Session of the National Assembly, 21-22 March 1997, No. 161 (284), 2nd Term]; *see* POL. CONST. (1994) art. 25(4) (stating that “[t]he relations between the Republic of Poland and the Roman Catholic Church are determined by international treaty [otherwise known as ‘the Concordat’] concluded with the Holy See, and by law”). The existence of this provision led some politicians to argue that the Constitution clearly favors the Catholic Church at the expense of other churches and religious organizations. *See, e.g.*, Third Session of the National Assembly, *supra* note 2 (including comments by Sejm Deputies Jan Zaborowski (PKND) and Izabella Sierakowska (SLD)). The Concordat, signed by the Government of Hanna Suchocka, the present Minister of Justice, and the Holy See on July 28, 1993, was finally approved by the Sejm on January 8, 1998, by a vote of 273 to 161, with 2 abstentions, and by the Senate on January 22, 1998. It was signed by the President three days later. The Concordat was ratified on February 23,



amble of the Constitution, which mentions God but also protects the rights of non-believers. The following provision was crafted by Tadeusz Mazowiecki, the first Prime Minister of post-communist Poland and a member of UW:<sup>128</sup>

We, the Polish Nation—all citizens of the Republic,  
Both those who believe in God as the source of truth, justice,  
good and beauty,  
As well as those who do not share such faith but respect those  
universal values arising from other sources . . . .  
[E]stablish this Constitution of the Republic of Poland.<sup>129</sup>

This issue threatened to torpedo the whole constitutional project because this allusion to God, or *invocatio Dei*, was opposed by left-wing groups and criticized by those who wanted a more forceful reference to God in the Constitution.<sup>130</sup>

Article 53 contains a somewhat lengthy, though not exhaustive, definition of religious freedom.<sup>131</sup> In an obvious concession

1998, and came into force one month after the exchange of ratification documents, which took place at the Vatican on March 25, 1998. See RZECZPOSPOLITA, Jan. 9, 1998, Jan. 23, 1998, Jan. 26, 1998, Feb. 14, 1998, Feb. 24, 1998, Mar. 26, 1998.

A unilateral declaration explaining the previous Government's understanding of the interpretation of some of the Concordat's provisions had already been adopted on April 15, 1997. The declaration provides a fuller definition of the principle of autonomy referred to in Article 25(3) of the Constitution and Article 1 of the Concordat: "It is a conferment of legal status to a practice which has developed in Poland over the last several years. It implies the rejection of an interpretation of constitutional norms expressing an antagonistic relationship in favour of interpretation presuming co-operation for the human development and the common good." Constitution Watch: Poland, 6 EECR Nos. 2-3, 25, 27 (1997) (quoting paragraph one of declaration). The Polish texts of the Concordat and Declaration are reproduced in RZECZPOSPOLITA, Apr. 16, 1997.

128. See Third Session of the National Assembly, *supra* note 2 (comments by Sejm Deputy Tadeusz Mazowiecki); *Constitution Watch: Poland*, 6 EECR No. 1, 20, 21 (1997).

129. POL. CONST. (1997) pmbl., ¶¶ 3-5, 15.

130. This group was of the view that the Constitution should have reflected Poland's Christian, and moral, roots more concretely and that God had been invoked in a tentative and forced way. See Third Session of the National Assembly, *supra* note 2 (comments by Sen. Barbara Lekawa and Sen. Jadwiga Stokarska (NSZZ 'Solidarnosc')). The reference to God has also been referred to as a "decoration." See Spiewak, *supra* note 56, at 92, (citing Cardinal Henryk Gulbinowicz of the Polish Episcopate). Indeed, the apparent compromise between the drafters and the church on the Constitution waned considerably in the weeks leading up to the referendum when, during the Conference of the Episcopate of Poland (April 30 to May 2, 1997), a statement was issued expressing "serious moral reservations" about the text of the Constitution. See *Constitution Watch: Poland*, 6 EECR Nos. 2-3, 25, 26 (1997).

131. POL. CONST. (1997) art. 53(2). Article 53(2) states:

Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion individually or

to the Roman Catholic Church, the provision asserts, in Article 53(4), that “[t]he religion of a church or other legally recognized religious organization may be taught in schools, but other peoples’ freedom of religion and conscience shall not be infringed thereby.”<sup>132</sup> This proviso is effectively reiterated in two further provisions prohibiting compulsion “to participate or not to participate in religious practices” and compulsion of the individual by organs of public authority “to disclose his philosophy of life, religious convictions or belief.”<sup>133</sup> The tenet of these provisions conforms to a Constitutional Tribunal judgment in 1991. This decision upheld a Ministry of Education regulation, which directed public schools to permit the Catholic Church and other churches to offer religion classes in schools and required parents to declare their interest to school authorities when registering their children in such classes. The Tribunal drew a distinction between open positive declarations by citizens of their religious preferences, which were permissible, and the requirement by the State for such declarations, which were prohibited by the freedom of conscience clause in the Constitution.<sup>134</sup>

#### 4. Right to Freedom of Expression

Article 54 is another response to the pre-1989 communist period concerned with the right to freedom of expression. This article explicitly prohibits in its second paragraph “[p]reventive censorship of the means of social communication and the licensing of the press.”<sup>135</sup> Constitutional standing is bestowed upon a

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collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.

*Id.*

132. POL. CONST. (1997) art. 53(4).

133. *Id.* art. 53(6), (7).

134. Judgment K 11/90 of 30 Jan. 1990, ORZECZNICTWO TRYBUNALU KONSTITUCYJNEGO [DECISIONS OF THE CONSTITUTIONAL TRIBUNAL] 27 (1991), cited by Brzezinski & Garlicki, *supra* note 35, at 48-49. The relevant clause in the amended 1952 Polish Constitution reads as follows: “The Republic of Poland shall guarantee freedom of conscience and religion to its citizens . . . . No one may be compelled to participate in religious activities or rites.” POL. CONST. (1952) art. 82(1).

135. In its second sentence, however, Article 54(2) adds that “[s]tatutes may require the receipt of a permit for the operation of a radio or television station.” POL. CONST. (1997) art. 54(2).

specific institution with the task of protecting media expression. In Chapter IX, entitled "Organs of State Control and for the Defense of Rights," the National Council of Radio Broadcasting and Television, *Krajowa Rada Radiofonii i Telewizji*, is given the mandate to "safeguard the freedom of speech, the right to information as well as [to] safeguard the public interest regarding radio broadcasting and television."<sup>136</sup> Members of the Council are to be appointed by the Sejm, the Senate, and the President,<sup>137</sup> and are to be politically independent.<sup>138</sup> There is, however, no broader definition of freedom of expression in Article 54 beyond the following statement: "To everyone is guaranteed the freedom to express opinions, to acquire and to disseminate information."<sup>139</sup> This position is in contrast to the preceding provision on religious freedom and the more detailed rendition of the right to freedom of expression in Article 19(2) of the ICCPR.<sup>140</sup>

### 5. Right to Freedom of Association

The right to freedom of association is contained in Articles 58 and 59 in the section, "Political Freedoms and Rights." Not surprisingly, its concept is drawn rather widely in recognition of the important role this right has played in Poland in recent history, particularly in the context of the rise of the Solidarity trade union from 1980 to 1981. Article 58 guarantees this right to everyone, while Article 59, in its first paragraph, ensures the right specifically "in trades unions, socio-occupational organizations of farmers, and in employers' organizations."<sup>141</sup> Article 59(3)

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136. *Id.* art. 213(1). By virtue of Article 213(2), the Council is empowered to "issue regulations and, in individual cases, [to] adopt resolutions." *Id.*

137. *Id.* art. 214(1). Objections to the involvement of the Sejm in the appointment process were raised during the latter stages of drafting. See, e.g., Third Session of the National Assembly, *supra* note 2 (comments by Witold Grabos (SLD)).

138. POL. CONST. (1997) art. 214(2) (stating that "[a] member of the National Council of Radio Broadcasting and Television shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function").

139. *Id.* art. 54(1); see *id.* art. 14 ("The Republic of Poland shall ensure the freedom of the press and other means of social communication.").

140. ICCPR, *supra* note 77, art. 19(2), 999 U.N.T.S. at 178, 6 I.L.M. at 374 (stating that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.").

141. POL. CONST. (1997) arts. 58, 59; see *id.* art. 12 (stating that "[t]he Republic of

safeguards the right of trade unions “to organize workers’ strikes or other forms of protest subject to limitations specified by statute.”<sup>142</sup> This provision also permits laws to limit or to forbid the conduct of strikes by specified categories of workers or in specific fields “[f]or protection of the public interest.”<sup>143</sup> Moreover, Article 59(4) declares that “[t]he scope of freedom of association in trade unions and employers’ organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party.”<sup>144</sup> A rather controversial provision is Article 58(2), which prohibits the establishment of “[a]ssociations whose purposes or activities are contrary to the Constitution or statutes.”<sup>145</sup> Although it is the courts that ultimately decide “whether to permit an association to register or to prohibit an association from such activities,” the rather vague and general reference to “statutes” in this provision was criticized during the latter stages of drafting as introducing too burdensome a limitation on the right to association.<sup>146</sup>

#### D. *Economic, Social, and Cultural Rights*

The question whether to include economic, social, and cultural rights in the post-1989 constitutions of Central and Eastern European countries was the subject of an absorbing debate among constitutional law scholars.<sup>147</sup> Economic, legal, and

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Poland shall ensure freedom for the creation and functioning of trades unions, socio-occupational organizations of farmers, societies, citizens’ movements, other voluntary associations and foundations”).

142. A proposed amendment to extend the right to organize strikes to organizations other than trade unions was not accepted. This amendment was proposed by Sejm Deputy Jan Rulewski (UW). Third Session of the National Assembly, *supra* note 2. An explicit, though circumscribed, reference to the right to strike is found in Article 8(1)(c) of the ICESCR: “The States Parties to the present Covenant undertake to ensure: . . . (c) the right to strike provided that it is exercised in conformity with the laws of the particular country.” ICESCR, *supra* note 82, art. 8(1)(c), 993 U.N.T.S. at 6, 6 I.L.M. at 362.

143. POL. CONST. (1997) art. 59(3).

144. *Id.* art. 59(4).

145. *Id.* art. 58(2).

146. Third Session of the National Assembly, *supra* note 2 (comments by Sejm Deputy Henryk Wujec (UW)).

147. See, for example, the exchange of views between Prof. Herman Schwartz, supporting the inclusion of these rights, and Prof. Cass Sunstein, an advocate of the contrary position. Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution*, 10 AM. U.J. I.L. & POL. 1233 (1995); Herman Schwartz, *In Defense of Aiming High: Why*

moral arguments were raised against their inclusion.<sup>148</sup> The need to constitutionalize such entitlements, however, has been put forcefully by Prof. Herman Schwartz:

What the nation believes to be indispensable to [its] general welfare belongs in a constitution, whether these are negative prohibitions on government conduct or positive entitlements financed by the common treasury. . . . Social and economic rights belong in the constitution because *functionally* a constitution removes such indispensables from the vicissitudes of majority rule. It imparts a degree of stability and near-permanence to what it establishes. What should therefore go into a constitution are those provisions that the founding generation deems so fundamental and irreplaceable that they should be made very difficult to alter, unless there is a very strong consensus for a change.<sup>149</sup>

Indeed, all the constitutions adopted in the region entrench economic, social, and cultural rights to some degree.<sup>150</sup> In Poland, attachment to the concept that public authorities are

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*Economic and Social Rights Belong in the New Post-communist Constitutions of Europe*, 1 EECR No. 3, 25 (1992); Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong to the New Constitutions of Post-communist Europe*, 2 EECR No. 1, 35 (1993); Cass Sunstein, *Something Old, Something New: Rights, Aspirations and State Action in Eastern European Constitutions*, 1 EECR No. 1, 18 (1992).

148. The economic argument relates to the existence of extremely limited financial resources in the region during the period of transition to market economies and the need for state restraint. The legal argument emphasizes that these rights are essentially unenforceable in the courts. Finally, the moral contention is based on the need to overcome the propensity of people in Central and Eastern Europe to depend on state provisions and to encourage individual initiative. See Osiatynski, *supra* note 29, at 139; see also Schwartz, *supra* note 147, at 26-28; Sunstein, *supra* note 147, at 36-37.

149. Schwartz, *supra* note 147, at 25-26 (emphasis original). Moreover, it is argued that economic and social rights cannot be excluded from a modern constitution regardless of the economic system adopted by the government concerned: "[C]onstitutionalization of socio-economic rights is inevitable, independently of the ideology professed, either social democratic or capitalist. A civilized state at the end of the twentieth century can only be a welfare state, i.e., a state which guarantees a reasonable minimum of socio-economic rights. They are particularly necessary in a period of stormy economic transformation leading to a market economy." Malajny, *supra* note 43, at 17 (citing S. Geberthner, *Modele systemów rządów a ich regulacja konstytucyjna* [*The Models of the Systems of Government and Their Constitutional Regulation*], paper delivered at the XXXVI Conference of the Polish Chairs of Constitutional Law, Jachranka, June 9-11, 1994 at 3, and Zygmunt. Ziembinski, *Wartosci Konstytucyjne* [*Constitutional Values*] at 71 (1993)).

150. Osiatynski observes that all constitutions in East Central Europe decided on the solution to enforce some economic, social, and cultural rights judicially and to have different safeguards for others. Osiatynski, *supra* note 29, at 140.

under an obligation to provide basic economic and social entitlements remained strong during the initial period of political and economic transformation.<sup>151</sup> Juxtaposed against these aspirations were the prevailing difficult economic conditions. The dilemma in deciding whether to constitutionalize economic and social rights was described as follows:

[P]eople in Poland took these rights for granted. Leaving them out could be interpreted as a betrayal of the people by the elites. On the other hand, leaving these rights intact would undermine the enforceability of the entire document, for no one can miraculously implement social rights with an empty budget and a bankrupt economy.<sup>152</sup>

In October 1994, the Constitutional Commission raised the following questions for discussion in respect of the relationship between social rights and the socio-economic system:

First, are social rights to be entrenched as constitutional rights, or should they be formulated only as important goals of state policy? Second, should social rights be constitutional or only statutory? Third, should social and economic rights, as well as the leading principles of the economic policy, appear in the section enumerating the general principles of the constitution, or, in the Charter of Human Rights and Freedoms?<sup>153</sup>

A number of factors, however, made the constitutionalization of such rights in Poland inevitable. These factors include the tradition of state intervention in the economy, which pre-

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151. In surveys carried out in 1988 and 1990, 91% and 71% of Poles, respectively, were of the view that the state had a duty to secure permanent employment for everyone in accordance with his or her skills. Similarly, 93% in 1988 and 95% in 1990 of Poles believed that state authorities were under a duty to guarantee to everyone a minimum survival income, pension, or benefit. See JACEK KURCZEWSKI, *THE RESURRECTION OF RIGHTS IN POLAND* 426 (1997).

152. Osiatynski, *supra* note 27, at 31; see Balaban, *supra* note 10, at 508-09. In 1993, Balaban wrote that:

The problem will be matching popular expectations regarding individual rights with the economic resources available. . . . The new constitution must deal with the inconsistencies among these expectations and current liberal policy and economic forces. If the constitution guarantees these social rights, it will create a significant problem for future government; if it does not announce these rights, many citizens of the country will be disappointed and reluctant to fully recognize the validity of the constitution.

Balaban, *supra*.

153. See *Constitution Watch: Poland*, 4 EECR No. 1, 18 (1995).

dates the communist regime and which is also evident in the 1921 Polish Constitution briefly discussed earlier; the questionable commitment of the Polish people to the market economy after experiencing forty years of full employment; and the profound union tradition in recent Polish politics on which the "Solidarity" governments, from 1989 to 1993, were based.<sup>154</sup> Moreover, as argued by Prof. Zbigniew Salwa in 1990, the formulation of the fundamental social rights of citizens in the Constitution would illustrate the importance that the State assigns to these rights and to their realization, emphasize the aims that illuminate the government's actions, and give these rights the value of permanence.<sup>155</sup> Consequently, the principal question did not really concern whether these rights should be excluded from the fundamental law of the country, but rather the form that they should take.<sup>156</sup>

The proposals in the draft Charter of Rights and Freedoms, submitted to Parliament by President Walesa in November 1992, envisaged the separation of economic, social, and cultural rights into two distinct categories: those justiciable or enforceable in the courts regardless of the prevailing economic conditions and those that the state was obliged to realize but that were non-justiciable. The former category comprised the following rights and freedoms: the right to education (including eight years free public education); freedom of employment (not the right to

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154. See Rapaczynski, *supra* note 22, at 612.

155. Zbigniew Salwa, *Praca oraz prawa socjalne obywateli w przyszłej konstytucji* [*Problem of Labor and the Social Rights of Citizens in the Future Constitution*], 45 PANSTWO I PRAWO No. 9, at 13, 14 (1990). Salwa argued that although most social rights are already realized in practice, particularly those relating to workers, and are concretized in ordinary regulations, their removal from the rank of constitutional norms would have not only a legal meaning, but also above all a socio-political expression; such an action would signify the position of the state towards the place and role of work in the new legal structure and its lack of interest in protecting those making a living from wage-earning labor. *Id.* at 16. He observed that the omission of these rights from many constitutions of Western countries could not be an argument for marginalizing them in the new Polish Constitution, and he also noted that many of the new Western constitutions, such as the Spanish Constitution of December 27, 1978, devote considerable attention to this issue. *Id.* at 15. Moreover, contended Salwa, the ratification by Poland of international instruments, such as the ICESCR, constituted an acceptance of the ideas in these instruments, and their legal elucidation should be confirmed in the highest law. *Id.*

156. See Rapaczynski, *supra* note 22, at 612-13 (referring to debates in 1990-1991 Constitutional Committee of Sejm); see also Osiatynski, *supra* note 29, at 140 (observing that "[t]he real issue is not the inclusion of social and economic rights in constitutions but the enforcement offered for such rights").

work, but the freedom to choose a place of work and a profession); the right to safe working conditions; the right to free basic medical care; and the right to social security. The latter category was removed from rights language altogether and placed in a separate chapter entitled, "Economic, Social and Cultural Tasks of Public Authorities." This latter category included such benefits as improvement of working conditions, full employment, assistance to families, health care beyond the basic level, education beyond the elementary level, protection of cultural heritage, protection of consumers, and protection of the environment.<sup>157</sup> Prof. Wiktor Osiatynski argued at the time that the message conveyed by this category was that "the Bill acknowledges the importance of these benefits but does not offer them judicial protection. The emphasis is on the active role of the state, which is held responsible by political, not legal means for the fulfillment of these tasks."<sup>158</sup>

The orientation of the new Polish Constitution towards the protection of economic, social, and cultural rights is effectively enshrined in Article 2 of the Constitution, discussed earlier, which ordains the Republic of Poland to be "a democratic state governed by law implementing the principles of social justice."<sup>159</sup> According to Prof. Andrzej Zoll, the former President of the Constitutional Tribunal, this principle is the development of the normative thought found in paragraph sixteen of the Pre-

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157. See Osiatynski, *supra* note 27, at 31; Osiatynski, *supra* note 29, at 143-44; Halmi, *supra* note 4, at 155-56. These rights and freedoms can be found in Chapter III (arts. 29-33) and Chapter V (arts. 41-47) of the draft Charter.

158. Osiatynski, *supra* note 27, at 31. This approach was also justified by Professor Geremek:

Social rights can be divided into enforceable rights that every citizen may claim in court and the social tasks of the state. . . . The tasks of the state should be carried out by all organs of the state, but above all by Parliament. Parliament creates the government, evaluates it, and passes the budget. The social tasks of the state belong to this sphere . . . . [T]he [Constitutional] Tribunal should not be in a position to order the state to take actions for which Parliament does not have economic resources.

See Wiktor Osiatynski, *Bronislaw Geremek on Constitution-making in Poland: An Argument Against Popular Ratification and for Chancellor Democracy*, 4 EECR No. 1, 42, 43 (1995). Article 48 of the draft Charter of Rights contained an obligation upon the government to submit an annual report on the performance of each of these tasks. See Osiatynski, *supra* note 29, at 144-45; Rzeplinski, *supra* note 54, at 29.

159. POL. CONST. (1997) art. 2. As observed above, this *Rechtsstaat* clause was inserted into the former socialist Constitution in 1989. See *supra* notes 59-62 and accompanying text.



amble, which obliges all those applying the Constitution to do so "paying respect to . . . [*inter alia*] the obligation of solidarity with others . . . ." <sup>160</sup> Moreover, the requirement that lawmakers undertake an active social policy can be supported by the principle in Article 30, which obliges public authorities to respect and to protect the natural and inalienable dignity of human beings.<sup>161</sup> It is not surprising, therefore, to find a fairly comprehensive catalogue of economic, social, and cultural rights in Chapter II, Articles 64 through 76 of the Constitution.

The division of these rights into two categories in the draft Charter of Rights is replicated, to some extent, in the new Polish Constitution. Although, in principle, all these rights are enforceable, Article 81, in the section entitled "Means for the Defense of Freedoms and Rights," Articles 77 to 81, stipulates the economic, social, and cultural rights that "can be asserted subject to limitations specified by law."<sup>162</sup> This provision, therefore, enables the legislature to restrict access to the constitutional complaint mechanism in respect of a broad range of economic and social rights.<sup>163</sup> Most of the rights concerned are phrased in terms of constitutional directives to public authorities, and thus it will not normally be possible to lodge a complaint arguing that a policy is inappropriate. It has been argued, however, that in extreme cases, for example if Parliament were to pass a law precluding the constructing of social housing, the relevant constitutional norm should be justiciable before the Constitutional Tribunal.<sup>164</sup>

The new Polish Constitution adopts the approach of the draft Charter of Rights to the concept of the right to work.

160. POL. CONST. (1997) pmbi., ¶ 16.

161. Andrej Zoll, *Bieda jako problem konstytucyjny* [*Poverty as a Constitutional Problem*], RZECZPOSPOLITA, Sept. 29, 1997.

162. POL. CONST. (1997) arts. 77-81.

163. These rights include: Article 65(4), the right to a minimum level of remuneration for work; Article 65(5), the state obligation to pursue policies aiming at full and productive employment; Article 66, the right to safe and hygienic conditions of work and the right to specified days free from work as well as annual paid holidays; Article 69, the obligation of public authorities to provide aid to disabled persons; Article 71, the right of families to special assistance from public authorities and the right of a mother, before and after birth, to special assistance from public authorities; Article 74, the protection of the environment; Article 75, the obligation of public authorities to pursue policies conducive to satisfying the housing needs of citizens; and Article 76, the protection of consumers.

164. Zoll, *supra* note 161.

There is no specific constitutional formulation of this concept from the standpoint of the individual citizen. Only "the freedom to choose and to pursue an occupation and to choose a place of work" in Article 65(1) is recognized explicitly in this manner.<sup>165</sup> The "right to work," as addressed in Article 65(5), is subsumed in the state progressive obligation to aim at "full, productive employment by implementing programs to combat unemployment . . . as well as public works and economic intervention."<sup>166</sup> The formulation of the right to education in the Constitution engendered lively discussion. Although the Constitution guarantees a right to free education in public schools, the imposition of "payments for certain services provided by public institutions of higher education" in Article 70(2) is permissible if specified by law.<sup>167</sup> This approach was criticized in a number of quarters, particularly by members of PSL and UP who wished to see the introduction of an unambiguous provision safeguarding the right to publicly-funded education at all levels, including higher education.<sup>168</sup>

The introduction, however, of a similarly watered-down provision concerning equal access to health care was thwarted. Article 68(2) reads: "Equal access to health care services, financed from public funds, shall be assured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by law."<sup>169</sup> Originally, this provision only guaranteed equal access to "basic" health care services, a position criticized as avoiding the real issue of very expensive specialist care that could not be

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165. POL. CONST. (1997) art. 65(1).

166. A state obligation merely to take action in order to combat unemployment was viewed by some as rather weak in contrast to an individual right to work. *See, e.g.*, Third Session of the National Assembly, *supra* note 2 (opinion of Sejm Deputy, Piotr Ikonowicz (PPS)); *id.* (comments by Sejm Deputy Mieczyslaw Piecka (SLD), arguing for stronger guarantees relating to right to work and curbing of unemployment).

167. *Id.* art. 70(2).

168. *Id.* (comments by Waldemar Pawlak, Ireneusz Skubis, Tadeusz Slawewski (PSL), Ryszard Bugaj (UP), Piotr Ikonowicz (PPS), and Wladyslaw Adamski (SLD)). In the view of Sejm Deputy Adam Szczesny (PSL), the introduction of payment for higher education conflicted with Article 65(1), which provides for the freedom [of everyone] to choose and to pursue their occupation and to choose their place of work, because access to the more lucrative professions, which demanded a more expensive education, would depend on the affluence of the family. *Id.*; *see Constitution Watch: Poland*, 6 EECR No. 1, 20, 21 (1997).

169. POL. CONST. (1997) art. 68(2).

afforded by any citizen without recourse to public funds.<sup>170</sup>

E. "Third-generation Rights": A Right to a Clean and Healthy Environment?

In addition to protecting traditional civil and political rights, as well as economic, social, and cultural rights, the Constitution purports to safeguard an increasingly-important, so-called "third-generation right," namely the human right to a clean and healthy environment. Although agreement on the existence of such a right in international law has yet to find definitive expression,<sup>171</sup> the urgency to include effective provisions concerning the protection of the environment in the new Polish Constitution was understandable given the ecological degradation suffered by Poland during the period of communist rule.<sup>172</sup> While such a reference was inserted into the communist Constitution in 1976, it was viewed, in accord with other basic laws in communist countries at the time, as a goal to be achieved rather than as an enforceable right.<sup>173</sup>

The specific provision concerned with the protection of the environment is Article 74. It should be read together with Article 5, discussed earlier in Part III, Section B, on General Principles, which obliges the Republic of Poland to protect "the natural environment pursuant to the principles of sustainable development."<sup>174</sup> Although located in Chapter II of the Constitution dealing with rights under the heading "Economic, Social and Cultural Freedoms and Rights," Article 74, in line with some of

170. See Third Session of the National Assembly, *supra* note 2 (opinion Sen. Zbigniew Religa (KSN)); see also *id.* (comments by Sejm Deputy Marek Balicki (UW), arguing for formulating more precisely in Constitution that state health policy should aim to guarantee equal access to medical care of appropriate quality).

171. For an overview of environmental rights, see M. SHAW, *INTERNATIONAL LAW* 587-89 (4th ed. 1997).

172. For an overview of the protection of environmental rights in Eastern European Constitutions and an argument that such rights should be enforceable, see Elizabeth F. Brown, *In Defense of Environmental Rights in East European Constitutions*, U. CHICAGO LAW 1993 SCHOOL ROUNDTABLE 191.

173. *Id.* at 193-94. Article 71 of the 1952 Polish Constitution reads: "Citizens of the Republic of Poland shall have the right to benefit from the natural environment and it shall be their duty to protect it." POL. CONST. (1952) art. 71.

174. POL. CONST. (1997) art. 5. "Balanced" or sustainable development has been defined by the World Commission on Environment and Development, appointed by the United Nations General Assembly, as "development that meets current needs without compromising the ability of future generations to meet their own needs." Brown, *supra* note 172, at 192, (citing STEPHAN SCHMIDHEINY, *CHANGING COURSE* 5-6 (1992)).

the economic and social entitlements, is not phrased in individual human rights language, but rather in the terminology of State duties.<sup>175</sup> Article 74 begins, in its first paragraph, with the following general statement: "Public authorities shall pursue policies ensuring the ecological safety of current and future generations."<sup>176</sup> Article 74(2) underlines that the "protection of the environment shall be the duty of public authorities."<sup>177</sup> The only direct reference to a "right" is found in the subsequent paragraph, Article 74(3), ensuring the right of everyone "to be informed of the quality of the environment and its protection."<sup>178</sup> A further duty is incumbent on public authorities in Article 74(4) to "support the activities of citizens to protect and improve the quality of the environment."<sup>179</sup> It should be emphasized, however, that judicially compelling public authorities to protect the environment might prove to be a difficult task given that Article 74 falls into the category of rights' provisions in Article 81, which may be asserted subject to limitations specified by statute.<sup>180</sup> Article 74 does not specify the kind of environment that public authorities are obligated to protect. The link between en-

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175. In contrast, other constitutions in the region clearly refer to environmental protection as a "right." For example, Article 16 of the Hungarian Constitution states that "[t]he Republic of Hungary recognises and implement's everyone's right to a healthy environment." A MAGYOR KÖZTÁRSASÁG ALKETFÁNYA [Constitution] art. 16 (Hung.). Article 35 of the Czech Republic Charter of Fundamental Rights and Freedoms states that "[e]veryone has a right to a favourable environment." ÚSTAVANÍ ZÁKON ČESKÉ REPUBLIKY [Constitution] art. 35 (Czech Rep.). Article 55 of the Bulgarian Constitution states that "[c]itizens shall have the right to a healthy and favourable environment corresponding to the established standards and norms." Konstitutiia [Constitution] art. 55 (Bulg.); see Brown, *supra* note 172, at 196, 198, 201.

176. POL. CONST. (1997) art. 74.

177. *Id.* art. 74(2).

178. *Id.* art. 74(3).

179. *Id.* art. 74(4).

180. POL. CONST. (1997) art. 81. In this respect, it is also worth noting that the protection of the environment was included in the second category of non-justiciable entitlements in the draft Charter of Rights. See Osiatynski, *supra* note 27, at 31. It has been argued that conceiving environmental rights as economic and social rights leads to doubts as to their justiciability, a problem that would be avoided if the former were viewed as property rights. Indeed, this approach has been adopted in the United States where environmental rights have evolved as property rights under the public trust doctrine, which provides that "citizens own or have a 'right' to those things committed to the trusteeship of the state" and that "the state has a fiduciary duty as trustee to preserve and protect this right." Brown, *supra* note 172, at 204 (citing A.E.D. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 199 (1972)); see Note, *Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 59 TUL. L. REV. 1557, 1560 (1985).

vironmental rights and health, however, is made in the Article 68(4) State duty to “prevent the negative health consequences of degradation of the environment,”<sup>181</sup> a clause to which Article 81 does not refer.

The importance of protecting the environment is also accentuated elsewhere in the Constitution. Continuing the theme of duties with reference to environmental matters, the final provision in Chapter II, Article 86, in the Section on Duties, declares that “[e]veryone shall care for the quality of the environment and shall be held responsible for causing its degradation . . . .” Finally, it is clearly recognized that the importance assigned to environmental protection may require the imposition of restrictions on other rights. The general limitations clause in Article 31(3) permits legal limitations on rights and freedoms where necessary for, *inter alia*, “the protection of the natural environment,” a ground that was not specified in the general limitations provision in the 1992 draft Charter of Rights.

As observed during the latter stages of drafting, the constitutional provisions concerned with the protection of the environment are far-reaching; they are in accordance with the demands of the twenty-first century and are likely to serve as a model for draft constitutions in other countries.<sup>182</sup> Whether this optimistic assessment will be realized will depend on whether the courts

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181. POL. CONST. (1997) art. 68(4). In examining the provisions protecting the environment in state constitutions in the United States, and the Illinois Constitution in particular where the word “healthful” is used, Brown observes that:

The term ‘healthful’ was chosen over ‘clean’ because it describes the environment in terms of its direct effect on human life and because it was more flexible than a description in terms of physical characteristics which could be made obsolete by the discovery of new pollutants. The phrase ‘healthful environment’ is meant to describe ‘that quality of physical environment which a reasonable man would select for himself were a free choice available.’ This definition provides a standard that is easier for the courts to interpret than clean, favourable or safe.

Brown, *supra* note 172, at 211-12. Brown also notes, however, that “the standard of ‘healthful’ is perhaps the least stringent of various qualifiers employed in U.S. state constitutions. Substantial environmental degradation can occur before it begins to directly affect the health of human beings.” *Id.* (citing Robert A. Helman, *Constitutional Commentary*, III, Const. art. XI, at §1, §2 (1970), and Richard J. Tobin, *Some Observations in the Use of State Constitutions to Protect the Environment*, 3 BC ENVIR. AFF. 472, 479 (1974)). Contrast also to comparable constitutional provisions in Bulgaria and Hungary, *supra* note 175, which use the term “healthy.”

182. Third Session of the National Assembly, *supra* note 2 (comment by Sejm Deputy Radoslaw Gawlik (UW)).

and Constitutional Tribunal are ready to recognize the right to a clean and healthy environment as an enforceable right.<sup>183</sup> The very general terms, however, in which this right is expressed, its conceptualization in terms of duties, the specific provision for limiting its justiciability by statute, coupled with political pressure to give priority to pressing economic concerns, seem to constitute the ideal ingredients for a watered-down and less-effective interpretation.<sup>184</sup>

#### F. *Limitations on Rights*

It is well-recognized, both conceptually and in international human rights law, that rights and freedoms are not absolute and that limitations upon their exercise can be justified. It is the way such limitations are formulated, however, that is important. Osiatynski outlines the criteria necessary to ensure that limitations are not too widely drawn:

Principles of law require that such limitations not be arbitrary. The principle of constitutionalism demands that the constitution itself must include the possibilities for such limitations as well as state the reasons for which they can be imposed. It is also important that the limitations imposed on the individual right in question be the least drastic method needed to protect the societal value for which the limitation is imposed.<sup>185</sup>

The provision in the new Polish Constitution permitting limitations on rights and freedoms is Article 31(3), which states:

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when

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183. Brown, *supra* note 172, at 214. Brown writes that:

a constitutional environmental provision would be most enforceable if it is placed in a Bill of Rights, if it codifies the public trust doctrine, if it uses language which provides guidance to courts seeking to balance the environmental rights proclaimed against other rights and interests, and if it explicitly declares its intention to grant the public standing to sue the government.

*Id.*

184. See Brown, *supra* note 171, at 194-96 (referring to October 1991 draft of Constitution drawn up by Sejm's Constitutional Committee, which characterized this right in Article 48 as universal duty to protect environment). Brown observes that the drafters made the provision deliberately vague, as support for strong environmental measures declined in the wake of economic reforms resulting in unemployment and other hardships. Brown concludes that such a provision contains none of the criteria and would be "least likely to be enforced." *Id.* at 215.

185. Osiatynski, *supra* note 29, at 152.

necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedom and rights.

Article 31(3) conforms to the criteria described above. It is narrowly drawn. Limitations may only be imposed by statute, when necessary in a democratic state and on a number of specified and exhaustive grounds.<sup>186</sup> Moreover, this clause would only appear to apply to those provisions in Chapter II containing references to permissible limitations by statute. Provisions that contain no such references cannot be limited.<sup>187</sup> These include "fundamental rights" that are considered non-derogable in international human rights law, such as the right to life and the right to be free from torture or cruel, inhuman, or degrading treatment or punishment.<sup>188</sup> Furthermore, the Constitution, in Chapter XI on Extraordinary Measures, specifies a broad range of rights that cannot be derogated from in times of martial law and states of emergency.<sup>189</sup>

Limitations on rights are also inherent in the Section on Duties, found in Articles 82 through 86 in Chapter II of the Constitution.<sup>190</sup> This emphasis on duties has been criticized on the ground that it harks back to the socialist understanding of rights, which makes rights conditional on the performance of duties, and thus, that it is contrary to the very idea of natural or inher-

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186. This list is longer than the one proposed in Article 5.2 of the draft Charter of Rights, which did not include the grounds of protection of the "natural environment" and "public morals." See Osiatynski, *supra* note 27, at 31; Rzeplinski, *supra* note 54, at 28.

187. See Osiatynski, *supra* note 29, at 156 (regarding earlier draft Charter of Rights).

188. POL. CONST. (1997) arts. 38, 40.

189. *Id.* art. 233(1). The following rights and freedoms cannot be limited in such situations: the dignity of the person, *id.* art. 30, citizenship, *id.* arts. 34, 36, protection of life, *id.* art. 38, humane treatment, *id.* arts. 39, 40, 41(4), ascription of criminal responsibility, *id.* art. 42, access to a court, *id.* art. 45, personal rights, *id.* art. 47, conscience and religion, *id.* art. 53, petitions, *id.* art. 63, and family and children, *id.* arts. 48, 72. Article 233(2) prohibits outright discriminatory practices under conditions of martial law or states of emergency; forbidden are "[l]imitations of the freedoms and rights of persons and citizens by reason of race, gender, language, faith or lack of it, social origin, ancestry or property." *Id.* art. 233(2).

190. *Id.* arts. 82-86. These duties are incumbent upon both citizens and aliens, with the exception of the duty to defend the homeland, including the performance of military service, which is limited to citizens. *Id.* art. 85.

ent rights. A proposal was made, therefore, to draw a clear distinction between rights and duties by placing the latter in a different chapter of the Constitution, but this suggestion was rejected.<sup>191</sup>

### G. Implementation and Enforcement

#### 1. Judicial Review

The concept of judicial review is usually understood by reference to the U.S. constitutional tradition whereby the judiciary is given the power to declare legislation and other official enactments invalid on constitutional grounds. In Europe, however, this concept did not really take hold until well into the twentieth century<sup>192</sup> because European countries historically viewed their constitutions as symbolic documents rather than legal norms.<sup>193</sup>

As discussed in Part I, Section D, limited judicial review in Poland was only introduced in the 1980s<sup>194</sup> in the creation of judicial bodies such as the Constitutional Tribunal and the High Administrative Court, and was perceived by some observers at the time largely as a lip-service response of the ruling Communist Party to demands for greater reform.<sup>195</sup> Nonetheless, the

191. See Osiatynski, *supra* note 29, at 127 (referring to his own suggestion to Senate's Constitutional Commission during 1990-1991 sessions).

192. Garlicki, *supra* note 35, at 713. The first Constitutional Tribunal in Europe was introduced in Austria in 1920, but similar tribunals in other Western European countries became only prevalent after World War II. These tribunals were based on the Austrian model. *Id.* at 713-14. For the distinction between the Western European constitutional tribunal and the U.S. (Anglo-Saxon) model of judicial review, see Garlicki, *supra* note 35, at 714-15.

193. Rapaczynski, *supra* note 22, at 608-09.

194. As noted by Garlicki, there was no judicial review in Poland before World War II because the constitutional system in Poland was based on the French tradition, which accorded supremacy to Parliament and precluded constitutional review of statutes by the judiciary. Garlicki, *supra* note 35, at 715, 717.

195. See, for example, the following view expressed by Frankowski in 1988:

How . . . may one explain the establishment of the Constitutional Tribunal in Communist Poland? The explanation is fairly simple: due to the existing political environment and the resulting extremely limited powers of the Tribunal, the newly created body will never stand up in defense of a citizen against the state power when fundamental and politically sensitive interests are at stake. In short, the Tribunal is designed as a mechanism to improve the internal efficiency of the system, but not to challenge its most fundamental assumptions.

Stanislaw Frankowski, *A Comment on Professor Garlicki's Article "Constitutional Developments in Poland": The Lyrics Sound Familiar, But Are They Really Playing Our Song?*, 32 ST. LOUIS U. L.J. 737, 741 (1988).



gradual introduction of judicial review in Europe, particularly since World War II, its inception in Poland in the 1980s, though in a limited form, and the stark disjunction between constitutional rights and freedoms and their enforcement during the communist era were factors that convinced the drafters of the Constitution that a stronger form of judicial review was necessary.<sup>196</sup> As noted by the first Commissioner for Citizens' Rights, Prof. Ewa Letowska, the new Polish Constitution marks a watershed in constitutional progress in Poland "because there has been a sharp shift in emphasis from declaring rules to creating mechanisms and guarantees."<sup>197</sup>

## 2. The Constitutional Tribunal: The First Ten Years

The increasing influence of the Constitutional Tribunal since its inception is described in detail by Brzezinski and Garlicki.<sup>198</sup> The Constitutional Tribunal came into being in 1985, during the last few years of communist rule. It is not surprising, therefore, that its scope of judicial review was deliberately limited for political reasons. First, it was prevented from reviewing many legislative acts, such as local authority regulations and ordinances. Moreover, it was unable to examine domestic legislation with a view to assessing its compatibility with international legal instruments, such as those concerned with the protection of human rights. Second, the Tribunal could only consider laws that came into force after the 1982 constitutional amendment that brought it into being, a restriction effectively preventing the review of past acts of questionable constitutional validity, such as the Council of State Martial Law Decree of December 13, 1981. Finally, only regulations issued by executive agencies or ministers were subject to final and binding rulings by the Tribunal. Parliamentary statutes, on the other hand, could not be automatically invalidated. The Tribunal could only register a negative decision with the Sejm, which then had to decide on the ruling within six months. By mustering a two-thirds majority in the presence of at least half of the Deputies, the Sejm could overturn the decision by passing a resolution to that effect.<sup>199</sup>

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196. Rapaczynski, *supra* note 22, at 609-10.

197. Letowska, *supra* note 2, at 79.

198. Brzezinski & Garlicki, *supra* note 35.

199. *Id.* at 25-26; see Mark F. Brzezinski, *Constitutionalism Within Limits: The New*

From 1986 to 1989, the Tribunal's role was limited essentially to ensuring that regulations issued by executive agencies conformed to what was permissible under the Constitution and parliamentary statutes.<sup>200</sup> In 1989, however, the Tribunal's scope of review was expanded by constitutional amendments to the 1985 legislation implementing the Tribunal. These amendments, *inter alia*, enabled the President, prior to signature, to submit a statute to the Tribunal in order to test its conformity with the Constitution and permitted the Tribunal to provide "universal binding interpretations of statutes," *powszechnie obowiązująca wykładnia ustaw*, the power to interpret ambiguous legal provisions without the need for a specific case to arise.<sup>201</sup> Between 1989 and 1994, the Tribunal increased its activity by interpreting statutes more aggressively, addressing controversial constitutional issues such as religious instruction in schools and abortion, and resorting to international law to assist it in the interpretation of domestic law.<sup>202</sup> Despite this more prominent and active role, some of the Tribunal's controversial decisions were inevitably plagued by politics. Parliamentary resolutions to overrule or to uphold Tribunal rulings on the conformity of statutes with the Constitution were frequently based on non-constitutional considerations, a position exacerbated by Poland's difficult economic situation.<sup>203</sup>

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*Constitutional Courts: Poland*, 2 EECR No. 2, 38, 40 (1993); Garlicki, *supra* note 35, at 725-26, 728.

200. Brzezinski & Garlicki, *supra* note 35, at 27-30; Garlicki, *supra* note 35, at 729 (examining period from January 1, 1986 to March 15, 1988).

201. Brzezinski & Garlicki, *supra* note 35, at 24 n.54, 31 n.93 (citing Ustawa z dnia 29 maja 1989 o przekazaniu dotychczasowych kompetencji Rady Państwa Prezydentowi Rzeczypospolitej Ludowej i innym organom państwowym [Law of 29 May 1989 on the Transfer of the Powers of the Council of State to the President of the Polish People's Republic and to Other State Organizations], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 34, Item 178, at 549, 553-54 (arts. 19 and 19(3)) (1989)).

202. *Id.* at 32-34.

203. *Id.* at 46-47. Professor Zoll argues that the retention of the Sejm's power to overturn Tribunal decisions after the changes of 1989-1990 was a remnant of a totalitarian system characterized by its doctrine of uniform state law as well a violation of the separation of powers principle. Andrej Zoll, *Po referendum [After the Referendum]*, *RZECZPOSPOLITA*, June 2, 1997. It should be noted, however, that this deference to parliamentary sovereignty was not only a result of the dominant position accorded by socialist doctrine to Parliament, but also reflected a legal tradition based upon the French model, which asserted the supremacy of parliamentary acts. Garlicki, *supra* note 35, at 715.

### 3. The Constitutional Tribunal Under the New Polish Constitution

The new Polish Constitution has expanded the standing of the Constitutional Tribunal considerably.<sup>204</sup> First, the Tribunal may now measure the conformity of statutes with ratified international agreements provided that ratification of these agreements has first been consented to by Parliament in the form of a statute.<sup>205</sup> Second, in adjudicating on the conformity of statutes and other legal provisions with the Constitution,<sup>206</sup> there is no longer any time limit precluding the Tribunal's consideration of laws passed before a certain date. Third, Article 190(1) stipulates that "[j]udgments of the Constitutional Tribunal shall be of universally binding application and shall be final."<sup>207</sup>

The effect of Article 190(1), however, is weakened considerably by virtue of Article 239(1), which asserts that judgments of the Tribunal in respect of statutes passed before the adoption of the Constitution shall not be final for a period of two years. In such cases, the former rules continue to apply and a decision of the Tribunal declaring that such statutes violate the Constitution may still be overturned by a two-thirds majority in the Sejm.<sup>208</sup> The justification for this provision was to ensure that Tribunal decisions would not interfere with the government's work of preparing draft laws implementing the Constitution. Under Article 236(1), the Council of Ministers is obliged, within two years of the Constitution's entry into force, to present "to the Sejm such bills as are necessary for the implementation of the Constitu-

204. The constitutional provisions are implemented by Ustawa z dnia 1 sierpnia 1997 r. o Trybunale Konstytucyjnym [The Constitutional Tribunal Act of 1 August 1997], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 102, Item 643 (1997) [hereinafter Constitutional Tribunal Act 1997]. The great majority of the changes discussed below were recommended in December 1992 by the General Assembly of the Tribunal (an annual meeting of all the judges) at the request of Parliament's Constitutional Commission. See Brzezinski & Garlicki, *supra* note 35, at 56-57.

205. POL. CONST. (1997) art. 188(2).

206. *Id.* arts. 188(1), (3).

207. *Id.* art. 190(1).

208. Under the Constitutional Tribunal Act of 1 August 1997 ("Constitutional Tribunal Act of 1997"), a decision of the Tribunal referring to the non-conformity of a statute to the Constitution is required to be considered by the Sejm within six months. If the Sejm does not consider such a judgment or if it does not introduce amendments to or repeal the provisions that are in non-conformity to the Constitution, the judgment shall be final and result in the repeal of the provisions in question. Constitutional Tribunal Act 1997, *supra* note 204, art. 89(2), (4).

tion.”<sup>209</sup> This argument was criticized, however, by Professor Zoll, who reasoned that immediately binding judgments of the Tribunal, by eliminating laws in conflict with the Constitution, can only have played a constructive role by speeding-up this process.<sup>210</sup> A proposed amendment by the President to remove this two-year period was not accepted by the National Assembly.<sup>211</sup>

Although Article 190(3) declares that Tribunal judgments are to take effect from the day of their publication, this provision also contains an built-in delay mechanism enabling the Tribunal to defer the effect of its judgments for up to eighteen months in the case of a statute, and up to twelve months in the case of any other normative act.<sup>212</sup> It has been argued that this delay mechanism, based on the Austrian model, is a useful tool where the effect of a judgment is to leave a gap in the law or has serious consequences for the state budget.<sup>213</sup> The power of delay, however, should not be exercised where it might adversely affect a concrete case, namely an interested party or individual against whom constitutional complaint proceedings have been taken or a question of law raised by a court.<sup>214</sup>

A fourth development concerns access to the Tribunal, which has been expanded considerably.<sup>215</sup> In addition to a number of state bodies and officials, including the President and the Commissioner for Citizens' Rights,<sup>216</sup> who may apply to the

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209. POL. CONST. (1997) art. 236(1).

210. Zoll, *supra* note 203.

211. Fourth Session of the National Assembly, *supra* note 2. This proposed amendment was justified by the need to remove Poland from the small group of states where the rulings of the Constitutional Court are not final. *Id.* (comments of Ryszard Kalisz, the President's representative in the Constitutional Commission of the National Assembly); see *Constitution Watch: Poland*, 6 EECR No. 1, 20, 22 (1997). According to Sejm Deputy Tadeusz Mazowiecki (UW), the introduction of Article 239(1) of the new Polish Constitution was without any basis given the existence of the possibility to defer Tribunal judgments for up to 18 months. Fourth Session of the National Assembly, *supra* note 2.

212. POL. CONST. (1997) art. 190(3).

213. Zoll, *supra* note 203. In the case of judgments that have financial consequences not provided for in the budget, a political involvement is explicitly prescribed by Article 190(3), whereby the Tribunal is obliged to consult with the Council of Ministers before specifying the date on which the normative act in question is no longer to apply.

214. *Id.*

215. For the previous position, see Garlicki, *supra* note 35, at 726-27 and Frankowski, *supra* note 195, at 749.

216. POL. CONST. (1997) art. 191(1). Previously, the Commissioner was the most

Tribunal, access is also granted to national organs of trade unions, national authorities of employers' organizations and occupational organizations, churches and religious organizations,<sup>217</sup> and individuals.<sup>218</sup> Despite these broad *locus standi* rules, no right of access to the Tribunal is granted explicitly to non-governmental organizations ("NGOs") that are not occupationally or religiously based. It would seem, therefore, that an opportunity to extend the democratic base for constitutional challenge has been missed.<sup>219</sup>

Clearly, the new Polish Constitution makes the Constitutional Tribunal central to the implementation of its provisions. In the expanded role of the Tribunal, however, one important aspect of its previous mandate has been removed, namely the power to deliver "generally binding interpretations of statutes," *powszechnie obowiązująca wykładnia ustaw*.<sup>220</sup> The removal of this power has been criticized by Professor Zoll, who argues that its availability was necessary to resolve doubts regarding the meaning of a binding law, particularly if there was no uniform judicial interpretation.<sup>221</sup>

Another criticism relates to the method by which judges are appointed to the Constitutional Tribunal. In this respect, Article 194(1) reads: "The Constitutional Tribunal is composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of

active among all the institutions empowered to submit petitions to the Constitutional Tribunal. See Letowska, *supra* note 37, at 64.

217. POL. CONST. (1997) art. 191(4)-(5).

218. *Id.* art. 191(6); see *id.* art. 79.

219. It has been argued that the need to liberalize standing rules, particularly in the case of NGOs, constitutes an important strategy in overcoming the traditional political limitations of public interest law in post-communist societies. See D. Petrova, *Political and Legal Obstacles to the Development of Public Interest Law: Postcommunist Challenges to Legal Advocacy and Reform*, 5 EECR No. 4, 62, 70-71 (1996). Compare the standing rules in Poland to the broad rights of access to the activist Constitutional Court in Hungary. Article 32A(3) of the amended Hungarian Constitution reads simply: "In the cases defined by the law, anyone may initiate proceedings at the Constitutional Court." See Hungarian Constitution, *supra* note 175, art. 32A(3); *Constitutional Symposium*, *supra* note 62, at 98.

220. See POL. CONST. (1997) art. 239(3) (stating that "[o]n the day on which the Constitution comes into force, resolutions of the Constitutional Tribunal on interpretation of statutes shall lose their universally binding force"); see also Spiewak, *supra* note 56, at 94; Zoll, *supra* note 203.

221. Andrej Zoll, *Kłopoty z wykładnią [Difficulties with Interpretation]*, RZECZPOSPOLITA, Nov. 24, 1997.

the law. No person may be chosen for more than one term of office.”<sup>222</sup> Therefore, judges are to be appointed by the Sejm and do not receive tenure for life. On one hand, this provision may be viewed as playing into the hands of a Sejm, wishing to exert political influence on the composition of the Tribunal.<sup>223</sup> Indeed, the political bickering that erupted over whether three new judges should be elected before or after the September 1997 parliamentary elections is an example of the continued politicization of the Constitution in Poland.<sup>224</sup> On the other hand, it may be argued that this provision also ensures that a Sejm dominated by one particular political ideology cannot exert its influence beyond a prescribed period of time.<sup>225</sup>

#### 4. Individual Challenges to Rights' Violations

An impressive and distinguishing feature of Chapter II is the number of diverse mechanisms by which individuals can as-

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222. POL. CONST. (1997) art. 194(1); see Constitutional Tribunal Act 1997, *supra* note 204, art. 5(4) (adding that candidates for office of judge are to be nominated by at least 50 Sejm deputies or Presidium of Sejm). A simple majority of votes in the presence of at least half of the total number of deputies is required for their election.

223. See Spiewak, *supra* note 56, at 94.

224. The new Polish Constitution increases the membership of the Tribunal from 12 to 15 judges. The former SLD-PSL ruling coalition wished to appoint the three new judges before the elections to ensure that the Tribunal would be operating at optimal capacity when the Constitution came into force on October 17, 1997. If this had occurred, it would have meant that most of the Tribunal's judges—11 out of 15—today would have been appointed by the previously leftist-controlled Sejm. See J. Pilczynski, *Dyktat czy zgoda [A Dictate or Consensus]*, RZECZPOSPOLITA, Aug. 20, 1997. In the end, the new judges were elected by the newly constituted Sejm with the result that they all obtained the approval of the AWS-UW governing coalition. *Trzej nowi sędziowie [Three New Judges]*, RZECZPOSPOLITA, Nov. 13, 1997.

225. Originally, the Sejm was also to have control over the appointment of the Tribunal's President and Vice-President. The Sejm's role in this respect was seen as constituting an unnecessary political intrusion into the principle of judicial independence, and a presidential amendment to transfer this task to the Presidency was accepted by the National Assembly in Article 194(2) of the Constitution. Fourth Session of the National Assembly, *supra* note 2; see *id.* (comments of Sejm Deputy Longin Pastusiak). The amendment was justified by Ryszard Kalisz, the President's representative in the Constitutional Commission, as forming part of the Presidential duty to act as the guardian of the Constitution. This duty could only be fulfilled if it included the instruments necessary for its realization, hence the need for the prerogative to appoint persons exercising key judicial powers. *Id.* On the other hand, it was also argued that this transfer would not necessarily free the decision on appointments from politics because a President could never be politically neutral. See *id.* (comments by Sejm Deputy Jerzy Gwizdz (PP)). The President is also responsible for appointing the presidents of the Supreme Court and the High Administrative Court from candidates proposed by the respective General Assemblies of judges. POL. CONST. (1997) arts. 183(3), 185.

sert their rights, outlined in the section "Means for the Defense of Freedoms and Rights" (Articles 77-81).<sup>226</sup> This process is assisted greatly by Article 8(2), which declares that "[t]he provisions of the Constitution apply directly, unless the Constitution provides otherwise."<sup>227</sup> First, by virtue of Articles 77 and 78 respectively, any person can pursue a claim alleging an infringement of rights and freedoms in the ordinary courts, including the right to claim compensation for any harm done by a public authority, and every party in a court action is given the right to appeal against judgments and decisions made at first instance. Second, with the exception of aliens applying for asylum under Article 56, a final appeal lies to the Constitutional Tribunal under Article 79:

Anyone whose constitutional freedoms or rights have been infringed, has the right to appeal in accordance with principles specified by law to the Constitutional Tribunal for its judgment on the conformity with the Constitution of a law, or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.<sup>228</sup>

The right of individuals to bring a constitutional complaint has been described as a revolution in the Polish legal system.<sup>229</sup> This right, however, is circumscribed in a number of ways. First, it can only be exercised after the court or administrative organ in question has reached a final decision, which is often a long and drawn-out process.<sup>230</sup> Second, if interpreted literally, it is only the right to complain about the unconstitutionality of a legal act rather than the unconstitutionality of its legal interpretation by another judicial decision.<sup>231</sup> Third, the complaint must be

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226. POL. CONST. (1997) arts. 77-81. Similar mechanisms were found in the draft Charter of Rights (arts. 34-38). See Osiatynski, *supra* note 27, at 32; Rzeplinski, *supra* note 54, at 29.

227. POL. CONST. (1997) art. 8(2); see Osiatynski, *supra* note 2, at 74.

228. POL. CONST. (1997) art. 79.

229. Third Session of the National Assembly, *supra* note 2 (comment by Sejm Deputy Janusz Niemcewicz (UW)).

230. L. Falandysz, *Zbyt silny Sejm [A Too Powerful Sejm]*, *ZYCIE WARSZAWY*, Oct. 18, 1997.

231. Letowska, *supra* note 2, at 80; see Spiewak, *supra* note 56, at 94. The narrower interpretation is supported by Zoll. See Andrej Zoll, *Jeszcze o skardze konstytucyjnej [On the Subject of the Constitutional Complaint Once More]*, *RZECZPOSPOLITA*, Oct. 27, 1997.

brought within two months of this final decision and must be drawn up by a lawyer.<sup>232</sup> Finally, a judgment of the Constitutional Tribunal finding a legal measure not in conformity with the Constitution does not automatically invalidate a judicial or administrative decision based on that measure. Proceedings will have to be reopened before the appropriate forum.<sup>233</sup>

Another mechanism by which individuals may assert their rights and freedoms is the right to bring a complaint to the Commissioner for Citizens' Rights, under Article 80, "for assistance in protection of [the] freedoms or rights infringed upon by organs of public authority."<sup>234</sup> The retention of the right to complain to the Ombudsman was seen as an invaluable tool to those vulnerable persons "who, on their own, lack the ability or the means to protect themselves against injustice and abuse from state authorities."<sup>235</sup> Clearly, the adoption of the new Polish Constitution will increase the importance of the role of the Con-

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232. Constitutional Tribunal Act 1997, *supra* note 204, arts. 46(1), 48(1); *see* Zoll, *supra* note 231.

233. POL. CONST. (1997) art. 190(4). The Constitutional Tribunal Act 1997 requires that an application to reopen administrative or civil proceedings be made within one month from the day the Tribunal's decision comes into force. Constitutional Tribunal Act 1997, *supra* note 204, arts. 82(2), 83(2). *See* Zoll, *supra* note 231. However, this requirement does not apply to criminal cases. Zoll has argued that in the case of a constitutional complaint the right to reopen proceedings should have been restricted to the complainant. Otherwise, the Tribunal's judgment might lead to a flood of applications to reopen proceedings in respect of judicial and administrative decisions made on the basis of the measure that was declared unconstitutional. *Id.*

234. POL. CONST. (1997) arts. 80. The Constitution also refers to a Commissioner for Children's Rights. Article 72(4), which is located in the section on economic and social rights in Chapter II, reads simply: The law defines "the competence and procedure for [the] appointment of the Commissioner for Children's Rights." *Id.* art. 72(4). The brevity of this provision and its deference to statute suggest that it is unlikely that the Commissioner, when created, will be able to initiate constitutional complaints on behalf of children. It has been argued that this clause is vague and hollow because it does not define the mandate and functions of the post and may undermine the authority of other institutions, such as the Ombudsman, if its role replicates the work of the latter. *See* Nowicki, *supra* note 3; P. Winczorek, *Bez rewolucji [No Revolution]*, ZYCIE WARSZAWY, Oct. 18, 1997.

235. Osiatynski, *supra* note 2, at 74. The important role played by the Commissioner for Citizens' Rights regarding the protection of rights and freedoms in Poland was underlined by the former Commissioner, Tadeusz Zielinski (1992-1996), who reported that his office received 178,000 letters between February 13, 1992 and March 22, 1996. During this period, the Commissioner lodged 69 motions before the Constitutional Tribunal, receiving favorable rulings in 25 out of 36 cases considered on their merits. *Wystąpienie Rzecznika Praw Obywatelskich przed Sejmem RP [The Speech Delivered by the Commissioner for Citizens' Rights Before the Sejm of the Republic of Poland]*, 51 PANSTWO I PRAWO No. 6, at 3, 9 (1996).



stitutional Tribunal, and is expected to result, at least initially, in a flood of litigation.<sup>236</sup> The instigation of the right of individual complaint and the need to interpret broad provisions such as Article 20, which declares that the basis of the economic system of Poland is to be a "social market economy," as well as detailed provisions in what is an extensive basic law, means that the task facing the Tribunal is a considerable one.<sup>237</sup>

### CONCLUSION

The results of the Polish parliamentary elections on September 21, 1997, mean that the political climate in the country has changed yet again. The SLD-PSL alliance has been replaced by a new coalition ("AWS-UW"), with common roots harking back to the Solidarity Labor Union. Promises have been made, particularly by AWS, the dominant coalition partner, to amend the Constitution.<sup>238</sup> The number of seats held by the coalition partners,<sup>239</sup> however, is insufficient to gain the two-thirds majority in the Sejm that would be required to pass constitutional amendments.<sup>240</sup>

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236. See Letowska, *supra* note 2, at 81 (noting that judicial system in Poland is presently overburdened with cases). Clearly, if no steps are taken to resolve this problem, the Constitutional Tribunal might experience difficulties in performing its function. Professor Spiewak observes that "judicial protection of the rights of individuals will be very difficult and time-consuming because of the current inefficiencies of courts. The Constitution fails to address this in any respect." Spiewak, *supra* note 56, at 94-95.

237. A. Bisztyga, *Nowa Konstytucja*, Spotkanie z Wicemarszalkiem Sejmu RP Markiem Borowskim (Górnoslaska Wyzsza Szkola Handlowa, Katowice, 16.05.1997 r.) [*New Constitution*, Meeting with the Vice-Marshall of the Sejm, Marek Borowski (Upper Silesia Higher School of Business, Katowice, 16 May 1997)], *Prawa Czlowieka – Humanistyczne Zeszyty Naukowe* [Human Rights – Humanistic Scientific Fascicles] No. 4 (12), 194, 194 (1997).

238. *Constitution Watch: Poland*, 6 EECR Nos. 2-3, 25, 26 (1997).

239. AWS and UW won 261 and 60 seats, respectively, whereas the former governing coalition obtained 191 seats (SLD-164; PSL-27). *RZECZPOSPOLITA*, Sept. 26, 1997.

240. See POL. CONST. (1997) art. 235. Article 235 of the new Polish Constitution is located in Chapter XII, entitled "Amending the Constitution." Under this provision, before an amendment can be adopted, a two-thirds majority in the Sejm in the presence of at least 50% of the Deputies is required and the amendment also has to secure an absolute majority in the Senate in the presence of at least 50% of the Senators within 60 days. *Id.* art. 235(2)-(3). Amendments can only be proposed by one-fifth of Sejm deputies, the Senate, or the President. *Id.* art. 235(1). Furthermore, it should be noted that if amendments concern provisions in Chapters I (The Republic), II (Rights), or XII (Amendments), the proposer may apply to the Marshal of the Sejm for a referendum to be held. The amendment is then accepted if a majority of those voting approve it. *Id.* art. 235(6). In each case, the amendment has to be signed by the President. *Id.* art. 235(7). As noted by Osiatynski, the possibility of holding a referendum before

The circumstances under which the Constitution was adopted resemble, at least in one respect, those of 1791 Polish Constitution. That earlier constitution marked the beginnings of an evolutionary process that would have probably peacefully led Poland in its transition from a feudal to a modern society but for the forceful intervention of foreign powers. In that sense, it differed markedly from the revolutionary French Constitution of that era. Similarly, the evolutionary process underlining the present text, which delayed its adoption, may well also turn out to be its savior. Certainly, as far as the domain of human rights is concerned, the letter of the constitutional document is innovative and far-reaching. But it would be advisable to wait first and to see how the protection of human rights in the new Polish Constitution works out in practice. For the time being at least, it remains a "Constitution of Possibilities."<sup>241</sup>

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embarking on changes to Chapter II ensures that "the rights and freedoms of citizens are better protected against parliamentary changes than the rest of the Constitution." Osiatynski, *supra* note 2, at 76.

241. Letowska, *supra* note 2, at 79. Letowska writes that "the Constitution eludes immediate evaluation. It remains a *Constitution of Possibilities* and is not yet the last word in Polish constitutionalism. It gives hope for the future, but remains a constitution of possibilities 'only.' Evaluating whether this mechanism-oriented approach will work in practice can be done only tentatively." *Id.*