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From the Façade to Solid Foundation?

The Evolution of the Polish Constitutional Law Discourse in 1944–1989

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15.1 INTRODUCTION

In the contemporary Polish constitutional law discourse, the beginnings of modern constitutionalism in the Third Polish Republic (from 1989) are usually associated with the last decade of the Polish People's Republic (1944–1989) (*Polska Rzeczpospolita Ludowa – PRL*). In this widely accepted narrative, modern constitutional thought emerged as a response to the painful experience of socialist authoritarian rule. On the contrary, the constitutional law thought developed in PRL is treated as non-existent or, at best, as invaluable and useless. It is simply assumed that the socialist constitutional theory – due to the absence of PRL's sovereignty and this regime's authoritarian character – was radically ideologized and subordinated to the realm of politics. Thus, the traditions and roots of genuine constitutionalism are traced back to the Second Polish Republic (1918–1939),[1] the Napoleonic Duchy of Warsaw (1807–1815)[2] or the First Polish Republic (1569–1795).[3] The European constitutional discourse goes even

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[1] See for example, Tomasz Stawecki, 'Wykładnia konstytucjijako przedmiot analiz teoretycznych, porównawczych oraz badań empirycznych' in Tomasz Stawecki and Jan Winczorek (eds.), *Wykładnia konstytucji: Inspiracje, teorie, argumenty* (Wolters Kluwer Polska, 2015), 20; Paweł Sarnecki, 'Stan nauki prawa konstytucyjnego w Polsce' (2010) (No 7) *Państwo i Prawo* 5, 6, 10.

[2] See, Sarnecki, 'Stan nauki prawa konstytucyjnego w Polsce', 5.

[3] See for instance, Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (reprint, Palgrave MacMillian, 2000), 1, where the author described the Polish Constitution of 1952 as 'imposition from abroad, a socio-political anachronism, and alien to Polish constitutional heritage' and contrasted it with 'rich, indigenous constitutional heritage' of the First Polish Republic (1569–1795) that was reflected in the enactment of the 1791 Constitution, which made Poland the second country in the world history to adopt a written constitution.

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further in this regard. According to a quite popular narrative, the aspiration for a constitutional rule in Central Eastern Europe (CEE) had not emerged until the 1990s, and its emergence was stimulated and structured, above all, by the process of EU accession.[4]

Both narratives are problematic. A one-sided and negative assessment of the Polish constitutional law thought of 1944–1989 overlooks its important features.[5] First of all, the authors expressing this assessment treat the entire period of PRL as consistent and uniform,[6] disregarding that post-1956, after the failed attempt to install Stalinism, the Polish academia began to enjoy at least some autonomy to pursue scientifically valuable discussions. Secondly, they overlook that any constitutional discourse is entangled with political ideology, which does not render it invalid. Thirdly, they reject the entire constitutional law thought of that period, without considering whether some parts of it could be potentially valuable and, as such, worth preserving. Not only does the European constitutional law discourse overlook the pre-1989 struggle for constitutional rule in the CEE countries, but it also ignores the pre-1944 constitutional traditions of these countries.

In this chapter, I argue that the role of constitutional law discourse in PRL was more complex and ambiguous than it is usually assumed and that the assessment of this discourse should give justice to its complexity and ambiguity. The way the Polish constitutional law discourse went through in the period of real socialism might be characterised as a path from a façade to the foundation for constitutional democracy.[7]

[4] This is the common reading of Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2015). This reading is attractive as it explains the emergence of the rule-of-law crisis as resulting from the unsuccessful transplant of 'Western' constitutionalism. However, Blokker's argument is more complex. The author – despite not including in his analysis the pre-1944 constitutional traditions of the region – acknowledges that the aspirations in the Central Eastern Europe for a constitutional rule emerged prior to 1989 and that they were an important part of the dissident movements across the region (ibid., 56–74, 81–98). His claim is that the specific *type* of constitutionalism that emerged in the 1990s in the region ('legal constitutionalism') was determined by the external factors (a 'legal-constitutionalist bias of the EU') against alleged local aspirations of dissidents for something that might be described as 'civic constitutionalism'. In other words, according to Blokker, it was the specific subtype of constitutionalism, not the very idea of a constitutional rule, that was imposed on the Central Eastern Europe. See ibid., 165.

[5] Note, however, that speaking of 'constitutional law' in the context of PRL is an ahistorical simplification. In fact, until the 1970s, it was common to speak of 'State law' rather than 'constitutional law'. See, Mirosław Granat, *Prawo konstytucyjne: Pytania i odpowiedzi*, 10th ed. (Wolters Kluwer, 2021), 26–27. For the sake of simplicity, however, hereinafter I use the notion of 'constitutional law' to denote the whole discipline as it evolved over the years.

[6] See Brzezinski, *The Struggle for Constitutionalism in Poland*, passim, where the author described the entire reality of PRL as 'totalitarian', not differentiating between the truly totalitarian Stalinist period (1944–1956) and post-Stalinist authoritarianism (from 1956 onwards).

[7] Alternatively, one may argue that it was a path from 'State law' to 'constitutional law', as the very idea of 'constitutional law' displays the aspiration of law to a greater autonomy and reflects the idea that a State in its operations, including legislative ones, is not absolutely sovereign but

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Legal academia, by developing a doctrine of constitutional review from the late 1960s, enabled the subsequent transformation towards constitutional democracy. It prompted domestic political elites – remaining under internal and external pressure – to become the precursor of institutional changes in the CEE. The most essential element of these changes, the Constitutional Tribunal (*Trybunał Konstytucyjny – TK*), made Poland the only country in the Warsaw Pact with constitutional review. Despite the original intention of making the TK just another façade, it in fact played a crucial role in the constitutional transformation. From this perspective, the reforms of the 1980s should not be considered a rejection but, rather, an institutionalisation of the Polish constitutional law theory as it evolved over the previous decades. Consequently, the contemporary negative assessment of the constitutional legal thought from this period is oversimplified and unjustified.

15.2 CONSTITUTIONAL LAW THOUGHT IN THE POLISH PEOPLE'S REPUBLIC

15.2.1 *Introduction*

Considering the negative assessment of the PRL's constitutional scholarship, one would expect that constitutional law theory of that time was theoretically flawed and incompatible with modern constitutional law thought. Considering the likely influence of Soviet constitutional theory (as founded originally by Lenin and later developed by prominent lawyers of the regime – Evgeny Pashukanis and Andrey Vyshinski),[8] one would especially expect some reflections of the Marxist idea of the withering away of law or the primacy of politics over law.[9] This tendency would particularly concern the Stalinist period of 1944–1956, perceived as totalitarian in

subjected to external standards. Thus, the very shift from 'State' to 'constitutional' law in the self-identification of the discipline, which could be observed in the 1970s, sheds some light on the evolution of the constitutional law in PRL.

[8] See, for example, Andryi Vyshinsky, *The Law of the Soviet State* (Macmillan, 1948), 339–340, who claimed that in capitalist states constitutional review 'is broadly used by monopolist cliques of exploiters to obtain a declaration of "unconstitutionality" as to laws running counter to their interests'. On the Soviet constitutional theory in general, see, Alec Nove, 'Some Aspects of Soviet Constitutional Theory' (1949) 12 *The Modern Law Review* 12.

[9] The relation between Marxism and post-war Polish legal science is a topic itself worth to investigate. Elsewhere, I have argued that the relation between Marxism – as either a philosophical tradition or ideology (Marxism-Leninism) – was of complex nature. In the Stalinist period (1944–1956) it was a leading tradition, structuring the content of theoretical programs developed in legal science. After October 1956 most legal scholars shifted towards more positivist approaches, meanwhile they were still trying to appear as they were inspired by Marxist tradition. In the post-1968 era, Marxism practically disappeared as a methodological orientation in legal science, remaining – if at all – just an ornament to purely positivistic considerations. I try to explain it briefly below (see point 2.4.1). For more see, Wojciech Zomerski, *W kierunku demokratycznej nauki prawa? Dogmatyka, edukacja, postanalityczność* (Wydawnictwo Naukowe Scholar, 2023).

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contrast to the post-1956 authoritarian rule in the region. However, these intuitions do not withstand close scrutiny. Although the primacy of politics over law, especially in the Stalinist period, was a social fact, the constitutional law discourse from the very beginning put much effort into portraying itself as committed to the ideals of legalism. I argue that its aim was to legitimise rather than describe or reform the surrounding reality. In this sense, it had a purely façade character. As we would see, however, this character of constitutional law discourse was slowly changing, along with the advent of a new generation of constitutional scholars who, starting from the late 1960s, attempted to take constitutional theory seriously and actively advocated for bridging the gap between the theory of the regime's political system and its practice.

To grasp the evolution of the constitutional law discourse over 1944–1989, I confront it with relevant socio-political events. I will examine this evolution in four conventional periods:

a. The Stalinist period (1944–1956) – a totalitarian period between the installation of the regime in 1944 and the October Thaw of 1956, in which the basis of socialist constitutionalism was formed.
b. The stabilisation period (1956–1968) – a period in which the regime stabilised, socialist constitutionalism emerged in its mature form and the first critique of the socialist constitutionalism was raised; the end date of this period is March 1968, when the regime started to lose its support among the intellectuals.
c. The correction period (1968–1979) – a period in which, due to institutional reforms that took place in other socialist countries in the 1960s and the heated internal atmosphere following the events of 1968 and 1970, the constitutional law discourse started to treat its doctrine seriously and openly demanded changes, which resulted in institutional reforms of the 1970s concerning especially the introduction of constitutional review.
d. The decline period (1979–1989) – a period in which the hitherto purely academic demands for the institutionalisation of the fully-fledged constitutional judicial review became a political demand widely-spread among social actors, including political and social movements, which ultimately resulted in setting up the Constitutional Tribunal.

15.2.2 *The Stalinist Period (1944–1956): Laying Down the Foundations of Façade Constitutionalism*

After the communist government came to power in July 1944, one of its first decisions was to invalidate the pre-war 1935 Constitution and to act temporarily on the basis of the 1921 Constitution, the latter being based on the idea of parliamentary supremacy. The main aim was to adopt a new constitution that would

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institutionalise and stabilise the newly established regime.[10] On 17 February 1947, the Polish parliament (the *Sejm*) adopted a transitional 'Small Constitution' (*Mała Konstytucja*), based on the 1921 Constitution and providing at least formally for the separation of powers and a parliamentary system. After the adoption of the Small Constitution, some limited discussions concerning the shape of the future constitution flared up. Seemingly, the biggest controversy concerned the problem of constitutional review, the institutionalisation of which began at that time in West Europe.[11] But the Small Constitution of 1947 continued the pre-war traditions of the II Republic of Poland,[12] explicitly prohibiting constitutional judicial review. This prohibition was justified with a principle of parliamentary supremacy. Consequently, its decisions could not be challenged by the courts. Controversies surrounded the question of whether the future constitution of the Polish People's Republic would reproduce this prohibition or – to the contrary – whether it would provide for some form of constitutional review.

Earlier, before the enactment of the Small Constitution, the establishment of a constitutional court that would examine the conformity of laws with the constitution was backed by the First Congress of the Democratic Alliance in 1946 (*Stronnictwo Demokratyczne – SD*; a satellite, non-Marxist ally of the communist Polish United Workers' Party).[13] This idea also found some limited support in legal academia. Makowski, a professor of international law (Jagiellonian University), drawing from Kelsen's works, argued that constitutional review, either in its centralised or diffuse version, was a necessary component of a State governed by the rule of law, as it allowed to secure the effectiveness and sustainability of constitutional norms.[14]

[10] The aspiration of the socialist government for the constitutional rule was in line with the post-war trends on both sides of the Iron Curtain and with the pre-war constitutional traditions of Poland, which, in the interwar period, had two constitutions and its first constitution was adopted as early as in 1791.

[11] In the interwar period, constitutional courts were operating only in Austria and Czechoslovakia. In the post-war period, the first constitutional court was established in 1947 in Italy and the Federal Republic of Germany, later in Greece (1975), Spain (1978) and Portugal (1982). For this reason, the post-war emergence of constitutional courts, as a reflection of a general rejection of the concept of parliamentary supremacy, is explained with the experience of fascism or – to put it more universally – authoritarianism. In this regard see, for instance, Mauro Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"' (1985) 35 *Catholic University Law Review* 1, 16–17.

[12] Both pre-war Polish constitutions ruled out judicial constitutional review. This was in line with the constitutional tendencies at that time as the pre-war European constitutionalism was in general dominated by the French concept of parliamentary supremacy, which precluded constitutional judicial review.

[13] One of the peculiarities of the Polish real socialism was a limited political pluralism, which the multi-party system was a most visible reflection of. Interestingly, the SD managed to sustain its non-Marxist orientation, being one of a few non-Marxist parties in the Eastern Bloc.

[14] Julian Makowski, 'Materiały do projektu przyszłej konstytucji' (1947) (No 11) *Państwo i Prawo* 32, 42–43.

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Makowski saw constitutional judicial review as indispensable in the reality of people's democracy[15].

This idea was challenged by another prominent jurist of the newly established regime, a professor of constitutional law, Rozmaryn (University of Warsaw).[16] Rozmaryn justified the rejection of judicial constitutional review in socialist constitutionalism with the concept of parliamentary supremacy. As he argued, from the perspective of socialist legal thought, the idea of a constitutional court is a restriction motivated by a distrust of people's representation. As such, it is a distinctive feature of the capitalist states. It restrains the representation of the people through instruments lacking democratic legitimacy.[17] Interestingly, the rejection of constitutional review did not prevent Rozmaryn from declaring commitment to the doctrine of constitutional supremacy.[18] He saw the Sejm as the supreme authority of the people and, consequently, the only body competent to ensure the conformity of laws with the constitution.[19] In this view, the prohibition of judicial review was not a contradiction but the institutional consequence of the idea of people's democracy.[20]

Considering the subordination of the post-war regime to the Soviet Union, as well as the fact that Rozmaryn was the president of the committee preparing the draft of the constitution, his ideas unsurprisingly prevailed over those expressed by Makowski. The Constitution of the Polish People's Republic adopted on the 22 July 1952, based on the socialist principle of the unity of State power, provided for the supremacy of the Sejm and did not provide any basis for judicial review.[21]

This discussion was not particularly elaborate due to the historical moment in which it occurred. In the totalitarian pre-1956 period, there was no atmosphere for

[15] Interestingly, Makowski saw the absence of constitutional review in the tradition of European constitutionalism as a remnant of the monarchic ideas. In this perspective, constitutional review was seen as a democratic 'development' against the post-monarchic traditions of the Second Republic of Poland (1918–1939). Note, however, that Makowski, as a pre-war professor educated in Antwerp, Paris and other pre-war Polish universities, was himself a 'remnant' of a non-socialist legal tradition.

[16] See Stefan Rozmaryn, 'Kontrola konstytucyjności ustaw' (1948) (No 11) *Państwo i Prawo* 36 (part 1) and Stefan Rozmaryn, 'Kontrola konstytucyjności ustaw' (1948) (No 12) *Państwo i Prawo* 3 (part 2).

[17] See, Rozmaryn, 'Kontrola konstytucyjności ustaw' (part 2), 20: 'The constitutional control of statutes by extra-parliamentary bodies, particularly judicial and quasi-judicial, is a reactionary institution and because of that, there is no room for it either in a socialist State or in a State of people's democracy, which trusts the people's justice and the will of the people'.

[18] Stefan Rozmaryn, *Polskie prawo państwowe*, 2nd ed. (Książka i Wiedza, 1951), 301.

[19] Ibid., 301–302.

[20] Ibid., 302, note 42.

[21] At the same time, the Constitution of 1952, in contrast to the previous Polish constitutions, did not include an explicit prohibition of constitutional judicial review, which made room for the further discussions in this regard. As we will see, the discussions on the admissibility of constitutional review under the Constitution of 1952 were continued almost through the entire period of PRL and ceased only in the 1980s, when the constitutional court was eventually established.

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public discussions on the legal and political matters and any opposite claims in this regard were made only for propaganda purposes.[22] However, that discussion defined the character of constitutional law theory for the two post-war decades (i.e. that of 'façade constitutionalism'). On the one hand, it offered legalistic views in constitutional theory (such as the supremacy of the constitution). On the other hand, it affirmed the institutional arrangements that undermined the purported legalism in practice (such as the thesis on the inadmissibility of judicial review). In order to see it more clearly, it is worth moving now to 1956 and subsequent years.

15.2.3 *The Stabilisation Period (1956–1968): The Façade Constitutionalism and Its Twilight*

15.2.3.1 The Polish October 1956 and Its Consequences

The end of the totalitarian period in Poland is usually associated with the events that took place in 1953–1956, first in the Soviet Union (the Khrushchev Thaw) and then in Poland (the Polish October 1956). The Khrushchev Thaw was prompted by the death of Stalin and the subsequent condemnation of the Stalinist rule by the new Soviet leader – Nikita Khrushchev. The Polish United Workers' Party (*Polska Zjednoczona Partia Robotnicza – PZPR*) allowed for the circulation among the society of the Khrushchev's so-called Secret Speech, critical of the Stalinist regime, which was an exception in the Eastern Bloc. This decision led to social unrest, only strengthened by the death of the Polish communist leader, Bierut, in March 1956. This unrest culminated in the workers' protests of June 1956 that demanded liberalisation and a more nation-centred and independent rule from the Soviet Union.

The new communist leader, Gomułka, addressed some of these demands. He was a reformist. At least initially, he wished to pursue a more independent path, known as 'the Polish way to socialism'. The changes in the socio-political realm stirred up discussions about the functioning of the State, which were part of a broader phenomenon known as a 'period of dealing with the mistakes and deviations' of the pre-1956 period. An editorial in *Państwo i Prawo* – the most important legal journal of that time – openly acknowledged that constitutional principles had often been violated during the Stalinist period,[23] signalling an official consent for limited criticism. In the subsequent volumes of *Państwo i Prawo*, legal scholars

[22] It is commonly said that the draft of the Constitution of 1952 – despite the alleged subjection to the public discussion – was created by the narrow group of lawyers that were under strong influence of the Party. The final draft was allegedly prepared by Joseph Stalin himself, who introduced fifty amendments on the project prepared by the committee led by Rozmaryn. See Andrzej Garlicki, 'O mój Rozmarynie' (2014) *Polityka*, www.polityka.pl/pomocnikhistoryczny/1527195,1,o-moj-rozmarynie-czyli-konstytucja-prl.read.

[23] See, Editorial, 'Niektóre zagadnienia polityczno-prawne w świetle III Plenum KC PZPR' (1955) (No 10) *Państwo i Prawo* 361, 369.

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acknowledged that, in the pre-1956 period, there were abuses in the exercise of power and advocated for changes in this regard.

The very idea behind the concept of 'mistakes and deviations' implied that the unlawful character and brutality of the regime were not the consequences of socialist theory, but solely a matter of practice that, for various reasons, deviated from the theory. Undoubtedly, however, the very fact that academic discourse could challenge social reality signalled deeper changes in the socio-political system in the post-1956 period, in which the academia would enjoy at least some autonomy. The legal literature from that period started to resemble – in contrast to pre-1956 ideological writings – a classic positivistic discourse. This change was clearly visible in legal theory and constitutional law. In particular, the latter emphasised the significance of the rule of law for the proper functioning of people's democracy. However, the constitutional law discourse remained a façade, as evidenced in the remainder of this section.

15.2.3.2 Dispute over Judicial Review

Inspired by demands to subject people's democracy to the rule of law, Biskupski, a constitutional law professor, called for introducing the constitutional review of parliamentary statutes by courts.[24] Although this call found some support from political actors,[25] it was again rejected by the legal academia, just like in 1946, and abandoned for another decade. The idea of judicial review and a constitutional court was denounced by Grzybowski (a professor of history of law from Jagiellonian University) as a bourgeois one.[26] One should be careful – as he argued – not to replace the diktat of administrative bureaucracy (with which the abuses of power in the pre-1956 era were explained) with the diktat of the judiciary that would place itself above the Sejm.[27]

Other authors reflected on the idea of judicial review on the margins of their reflection on the restoration of the rule of law in the post-1956 era. The idea of the rule of law, understood through the lenses of the sovereignty of the people, was – according to these authors – not compatible with the concept of constitutional judicial review of legislative acts. In this vein, a professor of international law, Izdebski (Lodz University), argued that, in a socialist State the classic concept of the separation of powers is rejected and replaced with the principle of unity of State power exercised by the parliament designed as the 'supreme organ of State

[24] Kazimierz Biskupski, 'Niektóre problemy socjalistycznego parlamentaryzmu' (1956) (No 10) *Państwo i Prawo* 545, 547.

[25] Note that the call for the institutionalisation of constitutional judicial review was expressed again in the resolution of the Central Committee of SD from 10 October 1956.

[26] Konstanty Grzybowski, 'Stalinizm w socjalistycznym prawie konstytucyjnym' (1957) (No 6) *Państwo i Prawo* 1053, 1063.

[27] Ibid.

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authority'.[28] As a consequence, in a socialist State, the legislature should have control over the remaining branches of power, in particular, the executive power. The supreme position of the parliament could justify the idea of administrative courts (that would be empowered to invalidate individual administrative decisions issued by administrative authorities) and the judicial review of executive acts for compliance with legislative statutes,[29] but, at the same time, it ruled out the judicial review of legislative acts. This position was expressed in even more explicit terms by a prominent philosopher of law of that time, Ehrlich (University of Warsaw), who rejected the constitutional judicial review of statutes, but advocated for the judicial review of executive and administrative acts.[30] Underlying the calls for the rule of law of 1956 was, at best, the intention to eliminate abuses of the executive branch and to revindicate the constitutional position of the Sejm as the supreme State authority, rather than providing for complex institutional changes in the realm of rule-of-law safeguards.

The gap between the theory and practice of the political regime of that time was so striking, however, that one may doubt whether the quoted authors really aimed at a change or, perhaps, their sole aim was to legitimise the status quo. The arguments concerning the alleged supremacy of the Sejm should be assessed against the political practice in which the Sejm was not a real place of making political decisions, either in the pre-1956 or in the post-1956 period.[31] The real power was in the hands of the Party leadership, not necessarily holding any official posts.[32] The judicial review of administrative decisions and executive acts – which could be justified by the supreme position of the Sejm – remained fiction until the late 1980s, when the Supreme Administrative Court and the Constitutional Tribunal began to operate. The political elites were effectively ruling by means of executive acts that in practice enjoyed primacy over statutes, as the former frequently determined the latter's practical meaning.[33] Most importantly, however, the weak position of the Sejm resulted from constitutional arrangements. The Constitution required the Sejm to convene only twice a year, without specifying the duration of each session. This arrangement might be contrasted with the setup of the Council of State (*Rada Państwa*), the permanent executive organ of the Sejm, which was equipped with substantial legislative, executive and judicial powers. As Brzezinski noted, as typically the officially recorded votes of the Sejm were unanimous, 'the Sejm, the traditional cornerstone of popular government, was transformed into a rubber stamp

[28] See, Zygmunt Izdebski, 'Rewizja teorii podziału władz' (1957) (No 11) *Państwo i Prawo* 787.
[29] Ibid., 799–800.
[30] Stanisław Ehrlich, 'Uwagi o praworządności socjalistycznej' (1958) (No 8–9) *Państwo i Prawo* 233, 244–246.
[31] Brzezinski, *The Struggle for Constitutionalism in Poland*, 67.
[32] See ibid., 135.
[33] See ibid., 68–69.

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for Party policies as promulgated by the Council of State'.[34] Thus, the Council of State, in theory subordinated to the Sejm, in practice replaced the Sejm as the supreme organ of State authority.[35] This did not change until the fall of real socialism in Poland. One may therefore argue that the Sejm was not even meant to be the place in which the political decisions were to be taken.

One could expect that the reality that contradicts the theory to such an extent would trigger either a reformulation of the theory or an open critique of the reality. Nothing like that occurred. By the late 1960s, the above-discussed gap between the theory and practice had not been acknowledged in the legal scholarship. The normative theory was perceived as a description of reality. However, its only function was to legitimise the status quo.[36] The Sejm and any argumentation built on its allegedly supreme position had a façade character. The practical consequence of façade constitutionalism was political (declarative) rather than legal (normative) character of the constitution.

15.2.3.3 Towards the Complex Theory of Socialist Constitutionalism

Constitutional debates that emerged in 1956 concerned specific issues, such as the admissibility of constitutional review in a socialist regime. At the same time, a complex theory of socialist constitutionalism was offered in 1961 in Rozmaryn's *Constitution as the basic law of PRL*.[37] Its content and wide reception in the constitutional law discourse reflected the stabilisation of the post-war socio-political formation. It was also a reflection of deeper changes in the academia. Although Rozmaryn clearly remained under the strong influence of socialist thought, he justified his theoretical assertions in a purely positivistic manner, namely by reference to the content of the written constitution. Interestingly, not only the manner of justification but also the content of Rozmaryn's theory in principle did not deviate much from modern legal constitutionalism. The author advocated for recognising: (1) the supremacy of the constitution, (2) the fully binding character of the entire constitution, (3) a universal – not particular – model of the interpretation of the constitution,[38] (4) the direct application of the constitution by the ordinary judiciary,

[34] Ibid., 67.

[35] Ibid., 68. See, Nove, 'Some Aspects of Soviet Constitutional Theory', 12, who in the context of constitutionalism of the Soviet Union argued that it is a common failing of both 'friends and enemies of the USSR', to mistake the avowed purpose of constitutional institutions with its actual functioning.

[36] On the legitimizing rather than normative character of socialist constitutions see, Harold G. Skilling, *The Governments of Communist East Europe* (Crowell, 1966), 50.

[37] Stefan Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, 1st ed. (Państwowe Wydawnictwo Naukowe, 1961).

[38] In the Polish constitutional law theory, the distinction between 'universal' and 'particular' models of the interpretation refers to the controversy, whether the constitution should be interpreted as any other piece of legislation or in a specific manner different from the interpretation of ordinary laws. Meanwhile, the 'universal' theory of constitutional

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and (5) the co-application of the constitution and pro-constitutional interpretation of legislative and other legal acts.[39] Regardless of how revolutionary these calls might sound at that time, Rozmaryn remained a zealous opponent of constitutional judicial review, explaining that, in the case of an unconstitutional provision, the court should limit itself to declare this unconstitutionality, but it should consider itself bound by the provision in question. It was the exclusive role of the Sejm to eliminate this provision from the system of law.[40]

Rozmaryn put much effort into showing that his position was not normative but descriptive.[41] Although the Constitution of 1952 did not explicitly prohibit constitutional judicial review, it made the Sejm the supreme organ of State authority, remaining beyond the control of any other authorities.[42] Therefore, for Rozmaryn, an explicit prohibition of constitutional review in the constitution was simply redundant. Also, according to the Constitution, the judges in adjudication were to be subject only to parliamentary statutes. Moreover, to Rozmaryn, there was 'absolutely nothing' in the Constitution that would have been subject to a nationwide discussion and that would reflect the intent to depart from the rejection of constitutional judicial review, typical for the tradition of Polish constitutionalism. In view of this tradition, the adoption of constitutional judicial review would have needed an explicit constitutional basis.[43]

Anticipating the allegation of the 'façade' character of his constitutional theory, Rozmaryn openly argued that the Constitution – despite the rejection of constitutional judicial review – provides for various safeguards of economic[44] and legal character. In particular, the proper fulfilment of Sejm's tasks and the conformity of Sejm's acts with the Constitution is secured with the constitutional subordination of the elected members of the Sejm to the will of voters[45]. Eventually, however, the author – exceptionally and meaningfully departing from his positivist outlook – admitted that the safeguard of the highest resort is the politics of the Party 'that holds the view that without strict observance of the laws of the Polish People's Republic one may not speak of the rule of law'.[46]

interpretation seems to go hand in hand with legal constitutionalism, the 'particular' theory of constitutional interpretation might be associated with its political counterpart.

[39] See Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, passim.

[40] Ibid., 268–269.

[41] Ibid., 185–186.

[42] Ibid., 183–184.

[43] Ibid., 186–187.

[44] According to Rozmaryn, the distinctive feature of socialist constitutionalism is the institutionalisation of material (economic) safeguards of the rule of law. According to him, such safeguards are necessary if one wants to ensure the effectiveness of constitutional rights and freedoms. Ibid.

[45] Ibid., 193. By the subordination of parliamentary members to the will of the voters, Rozmaryn understood the constitutionally enshrined imperative mandate that obliged MPs to pursue policies that agreed with the voters and provided for the right to recall MPs that failed to act in such manner.

[46] Ibid., 213.

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Rozmaryn's reflection on the alleged constitutional safeguards appears somewhat shallow and not entirely consistent. On the one hand, he argued that the socialist constitution is effective thanks to the subordination of the Sejm to the voters (which was not executed in practice at all). On the other hand, he explicitly stated that the real and only guarantee of the Constitution's social importance is the Party and its politics (admitting explicitly that the Party has the last word on the constitutionality of its own actions).

15.2.3.4 The Twilight of Façade Constitutionalism?

As for 1961, the façade character of socialist constitutionalism was beyond any discussion. However, that the constitutional theory did not correspond to the reality did not render it entirely meaningless. Crucially, the Polish doctrine of constitutional law declared a firm commitment to legalistic ideals. The theory was not flawed, but it could not be materialised because of existing institutional arrangements and authoritarian politics. Therefore, the evolution of PRL towards constitutional democracy did not require a rejection or replacement of the existing constitutional law doctrine but, above all, changes within the institutional framework that could be reconciled with this doctrine. Interestingly, this part of sociopolitical reality later became the subject-matter of the main constitutional debates, culminating in the reforms of the 1970s and 1980s, including the setting up of the Constitutional Tribunal and other essential constitutional institutions.

The first voices challenging the theoretical rejection of constitutional review were expressed in the very year of Rozmaryn's book publication.[47] At the annual meeting of the constitutional lawyers of 1961, Sobolewski, a professor of constitutional law from Jagiellonian University, while commenting on a paper regarding the alleged inadmissibility of constitutional judicial review in a socialist State, argued that the paper 'provides much material for the hypothesis that constitutional judicial review, might be eventually, after its thorough transformation, usefully applied also in a

[47] Simultaneously, one may observe in this period the emergence of scholarship that supported the inadmissibility thesis. Particularly active in this regard was Janina Zakrzewska, who, discussing the function of the constitutional court in the Western countries, denounced it as an instrument of class violence. See, Janina Zakrzewska, 'Kontrola Konstytucyjności ustaw w powojennej Francji' (1961) (No 12) *Państwo i Prawo* 922; Zakrzewska, 'Trybunał Konstytucyjny a zabezpieczenie zgodności ustaw z Konstytucją we Włoszech' (1963) (No 11) *Państwo i Prawo* 705; Janina Zakrzewska, *Kontrola konstytucyjności ustaw (we współczesnym państwie burżuazyjnym* (Wydawnictwo Prawnicze, 1964), 167; Janina Zakrzewska and Marek Sobolewski, 'Instytucja kontroli konstytucyjności ustaw w współczesnych państwach Europy Zachodniej' (1965) (No 1) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1. Interestingly, in the 1980s, Zakrzewska joined the opposition to become eventually, in 1989, a judge of the Constitutional Tribunal. In this regard, see also note 123.

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socialist state'.[48] This view has been expressed also by other constitutional law professors reviewing Rozmaryn's book.[49]

Further discussions were stimulated by institutional developments in other socialist countries. In 1963, Yugoslavia – as the first socialist country – decided to establish the Federal Constitutional Court, as well as constitutional courts at the level of each republic. Five years later, in 1968, Czechoslovakia changed its constitution that, along with the implementation of a federal structure of the state, provided a framework for the institutionalisation of the federal constitutional court. Although the Czechoslovak constitutional court never began to operate, this turn of events provided arguments for the supporters of constitutional review and posed a challenge to their opponents. Until that moment, the opponents justified their stance by pointing out that constitutional courts characterise capitalist states and, as such, it cannot be reconciled with the foundation of people's democracy, e.g. the principle of the people's sovereignty.

Following these events, other constitutional law academics started to argue in favour of some sort of the constitutional review of legislative acts: Siemieński (Adam Mickiewicz University),[50] and a prominent professor Burda (Maria Curie-Skłodowska University), who argued that judicial review of the constitutionality of statutes can be 'introduced in a socialist State without belittling the role and authority of parliamentary representation'.[51] Eventually, even Rozmaryn shifted away from the strict inadmissibility thesis.[52] As we would later see, the perspective of a fully-fledged constitutional court was still distant. Moreover, constitutional review at that time was justified in the Kelsenian manner as an instrument to secure

[48] Jan Ziembiński, 'Sesja naukowa katedr prawa konstytucyjnego' (1961) (No 12) *Państwo i Prawo* 1051, 1053–1054.

[49] Karol M. Pospieszalski, 'Recenzja: S. Rozmaryn Konstytucja jako ustawa zasadnicza PRL, Warszawa 1961' (1962) (No 1) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 305, 309. The author, in order to challenge the main Rozmaryn's argument referring to the position of Sejm as the supreme State authority, argued that if, according to the Constitution each authority, including Sejm, shall strictly observe the law, the notion of 'supreme authority' cannot be interpreted in such manner that would result in the exemption of Sejm from the force of system, created by the former. The supreme is not the authority itself – argued Pospieszalski – but the constitution adopted by such authority.

[50] Feliks Siemieński, *Organy przedstawicielskie w systemie organów państwa socjalistycznego* (UMCS, 1964), 265–271.

[51] Andrzej Burda, 'Janina Zakrzewska: Kontrola konstytucyjności ustaw (we współczesnym państwie burżuazyjnym), Warszawa 1964, Wyd. Prawnicze' (1956) *Państwo i Prawo* 865, 867. See also in this regard: Andrzej Burda, *Praworządność w systemie demokracji socjalistycznej* (Instytut Nauk prawnych IPN, 1967), 112.

[52] In the second edition of his book, published in 1967, he admitted that under the Constitution of 1952 some limited form of constitutional review is admissible (exercised either by a special committee of the Sejm or by the Supreme Court, provided that the opinions or rulings of these bodies would not be binding upon the Sejm). He even suggested that the introduction of a fully-fledged constitutional court would have been theoretically possible, provided that the Constitution had been amended accordingly. See, Stefan Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, 2nd ed. (Państwowe Wydawnictwo Naukowe, 1967), 215.

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the separation of powers and hierarchy of law rather than the guardian of individual rights. In any case, the shifts that might be observed in the Polish legal discourse at that time[53] were a clear sign that the theoretical dispute over the admissibility of constitutional review was open and its outcome was not yet sealed.

15.2.4 *The Correction Period (1968–1979): Taking Constitutional Law Theory Seriously*

15.2.4.1 March 1968 and Its Consequences

In the mid-1960s the situation in Poland was gloomy. The disparity between the expectations raised by the Polish October and the reality of life in the post-1956 era was striking.[54] The political elites were faced with domestic and international economic problems. To unload the growing disappointment within the society, the Party – following the conflict of the Soviet Union with Israel in June 1967 – decided to launch an anti-Jewish campaign. Not only were the Jews used as scapegoats for the disappointments of the post-1956 period but they also served the Polish communist leader, Gomułka, as an excuse to combat revisionism among the intelligentsia and the political establishment.

These developments were followed by the series of protests among students and intellectuals, culminating in the events known as March 1968. The protests were brutally quelled and student strikes suppressed. Thousands of Poles of Jewish origin – including, above all, academics, professionals and party officials – had to leave Poland. Paradoxically, however, as one author noted, these events were tantamount to the end of Marxism as a living theoretical and philosophical phenomenon.[55] On the one hand, it was the simple consequence of the expulsion of Marxists thinkers. On the other hand, the very fact of launching the anti-Jewish campaign undermined and compromised the ideological underpinnings of the socialist regime, which had built its legitimacy on the alleged ethical superiority over fascism and Nazism.

Following trends present in other social sciences,[56] Marxism practically disappeared as a methodological orientation in legal science. The alleged commitment to Marxism, if made at all, was merely a formal declaration. Its sole purpose was to facilitate the given work to pass the censorship but it had no consequences for the

[53] According to Janusz Trzciński, *Funkcja prawna konstytucji socjalistycznej* (Wydawnictwo Uniwersytetu Wrocławskiego, 1978), 128–129, Poland was one of the only countries, along with Yugoslavia and Czechoslovakia, where constitutional judicial review became a subject of broader academic discussions.

[54] Dariusz Stola, *Kampania antysyjonistyczna w Polsce 1967–1968* (Instytut Studiów Politycznych PAN, 2000), 13–27.

[55] Marek J. Siemek, 'Filozofia i społeczeństwo w powojennej Polsce', in Marek J. Siemek (ed.), *Wolność, rozum, intersubiektywność* (Oficyna naukowa, 2002), 320.

[56] Ibid.

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merits. This development is clearly visible in the Polish theory of law but also in the constitutional law discourse of that time, which was additionally challenged by the institutional developments in the Eastern bloc that undermined the basic principles of the socialist constitutional doctrine, such as the emergence of constitutional courts. Initially, the authors who had been sceptical about constitutional judicial review modified the inadmissibility thesis. They argued that constitutional review was inadmissible under the socialist constitution as a matter of principle, but with an important exemption of the federal states.[57] Eventually, even this assertion did not fully correspond to reality.[58] Thus, the inadmissibility thesis became more and more difficult to defend.

15.2.4.2 The Revival of the Constitutional Law Discourse in the Late 1960s and Early 1970s

At that time, one may speak of a revival of the constitutional law discourse.[59] Discussions from that period concerned, among other things, the possibility of changing the character of the socialist constitution from the 'constitution of state' to the 'constitution of and for the society'.[60] They also concerned increasing the significance of the rule of law principle and its institutional safeguards in the post-1956 period.[61] Some authors had openly criticised the reality of real socialism as failing to realise the ideal of rule of law.[62] Above all, the main interest of the constitutional law theory shifted towards the ways to ensure the conformity of laws with the constitution.[63] This shift was openly explained by the disparity between the doctrine of constitutional supremacy and the practice of State authorities.[64] It was also noted that, in socialist constitutionalism, there was a visible trend of institutionalising some form of constitutional review, which was explained by the tendency to

[57] See Brzezinski, *The Struggle for Constitutionalism in Poland*, 25, who noted that 'the establishment of the Constitutional Court was a radical departure from the theory of unity of State power, and the Soviet regime legitimised this development by maintaining that Yugoslavia, as a federal system, required a limited form of judicial review to settle disputes between republics'.

[58] On this, see note 77.

[59] See Blokker, *New Democracies in Crisis?*, 65, who argued that 'from the 1970s onwards, a heightened interest in constitutionalism and constitutionality could be noticed in communist Poland'.

[60] This change was understood as an ongoing process of constitutionalisation of the social sphere, meanwhile the traditional 'constitution of state' was associated with solely legal and political realm. See, Jerzy Stembrowicz, 'Konstytucja a ustrój państwowy i społeczny' (1971) *Państwo i Prawo* 231; Witold Zakrzewski, 'Konstytucja państwa a konstytucja społeczeństwa' (1969) (No 11) *Państwo i Prawo* 778; see also: Kazimierz Działocha, 'Konstytucja PRL po nowelizacji z 10 II 1976 (Uwagi o zmianie koncepcji konstytucji)' (1977) (No 2) *Państwo i Prawo* 5, 7.

[61] Andrzej Burda, 'Instytucjonalne gwarancje praworządności i ich rola w państwie socjalistycznym' (1971) (No 8–9) *Państwo i Prawo* 215, 215.

[62] Ibid., 227, as well as Andrzej Gwiżdż, 'Główne kierunki rozwoju współczesnego konstytucjonalizmu socjalistycznego' (1971) (No 8–9) *Państwo i Prawo* 244, 248.

[63] Burda, 'Instytucjonalne gwarancje praworządności', 227–228.

[64] Gwiżdż, 'Główne kierunki rozwoju', 248.

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strengthen the constitution as a legislative rather than a purely political act.[65] Further discussions in this regard were stimulated by political actors. In December 1971, the Sixth General Assembly of the PZPR announced preparations for an amendment of the Constitution. This event provoked constitutional law theoreticians to discuss the desired direction of this change. They put particular emphasis on ensuring the conformity of laws with the constitution.[66]

The most important contribution was published by Siemieński, who openly challenged the inadmissibility thesis.[67] He started from an observation that the problem of conformity of laws with the constitution arises only in those legal systems that differentiate between ordinary legislative acts (statutes) and acts enjoying a superior status (the constitution, basic law). In this sense, the problem of constitutional review is inherently associated with those legal systems that have written constitutions and in which there is a basis for differentiating between the constitution-maker (i.e. the State authority that adopts the constitution, such as the constituent assembly) and the ordinary law-maker (e.g. a state authority that adopts ordinary statutes, such as the parliament).[68] Siemieński argued that, as a consequence, the problem of constitutional review arises in all socialist states as all of them bear such features, regardless of whether they are of a federal or unitary structure.[69]

This observation allowed the author to challenge the main argument of the opponents of constitutional review in socialist states, namely its alleged incompatibility with the character of the Sejm as the supreme organ of state authority. The parliament – argued Siemieński – cannot be equated with the Sovereign.[70] No constitution defines the parliament as a Sovereign. In modern constitutionalism the Sovereign is 'the nation', 'the people' or 'the monarch'. This is accurate also when it comes to socialist constitutions, including the Constitution of 1952, according to which the 'working people' are the holder of the supreme power. If so, the constitution-maker, while empowering the legislature to adopt legislative acts, might simultaneously set up an authority that would evaluate the conformity of legislative acts with the constitution. If it would have been otherwise, one could not claim that the constitution-maker is in its actions 'sovereign'.[71]

Having argued that a constitutional court by no means limits the supremacy of the Sejm, Siemieński also challenged the idea that the absence of provisions allowing

[65] Ibid.

[66] See Zbigniew Witkowski, 'Rada Państwa jako organ czuwający nad zgodnością Prawa z Konstytucją' (1977) *Państwo i Prawo* 37, 37. See also: Bogusia Puchalska, *Limits to Democratic Constitutionalism in Central and Eastern Europe* (Ashgate, 2011) 42, who spoke of a 'fundamental turn in constitutional thinking by the main political powers' that were happening at that time.

[67] Feliks Siemieński, 'Problem kontroli konstytucyjności ustaw w państwie socjalistycznym' (1972) (No 4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1.

[68] Ibid., 1–4.

[69] Ibid., 25.

[70] Ibid., 18.

[71] Ibid., 20.

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explicitly for judicial review in the constitution excludes the admissibility of such a mechanism. The author referred in this regard to the case of the United States[72], where judicial review was established by the means of constitutional interpretation.[73] Thus, according to Siemieński, what mattered was that the constitution did not rule out judicial review explicitly. The main argument in favour of the constitutional court was the very existence of the legally binding constitution. If such a document was to impact reality, institutional safeguards for its observance needed to be established.[74]

As the constitutional law theory became pluralistic at that time, Siemieński did not become such an influential figure as Rozmaryn in the 1950s and 1960s. Nevertheless, it is clear that his distinction between the superior constitution-maker and the 'ordinary' law-maker challenged the main theoretical argument underpinning the inadmissibility thesis. Thus, he offered a theoretical justification for institutional changes that began in the region in the 1960s and that were to happen also in Poland in the 1970s and 1980s.

15.2.4.3 Institutional Reforms of the 1970s

The shifts in constitutional theory were followed by institutional reforms that aimed to meet growing demands for limited constitutional review. In March 1972, the Parliamentary Legislative Work Committee (*Sejmowa Komisja Prac Ustawodawczych*) was established. Its main task was to evaluate the drafts of statutes for compliance with the principles of legislative technique and the binding legal provisions. Its establishment was positively received by constitutional law scholars, who saw it as the institutionalisation of the intra-parliamentary model of the constitutional review of draft laws. Due to its non-binding character, this model was deemed compatible with the principle of the sovereignty of the people.[75] As one may guess, however, the establishment of the Committee was of marginal significance as a safeguard of the rule of law.[76] To provide for the legal rather than only the declarative supremacy of the Constitution, further institutional reforms were needed. On the 10 February 1976, four years after the Sixth General Assembly of PZPR announced that a constitutional amendment was being prepared, the Constitution was eventually amended. The February Amendment, co-drafted by constitutional law professors, empowered the State Council (the principal executive authority of the Sejm) to 'supervise the compliance of law with the Constitution'. Assigning such a competence to the State Council, as an authority subordinated to

[72] This fact alone demonstrates how the constitutional law discourse evolved over the years. Back in Rozmaryn's era, the case of the USA was only cited to depict the flaws of the Western bourgeois constitutionalism. See for example: Rozmaryn, *Polskie prawo państwowe*, 301–302 or Rozmaryn, 'Kontrola konstytucyjności ustaw' (part 1), 52–60.

[73] Siemieński, 'Problem kontroli konstytucyjności ustaw', 12.

[74] Ibid., 26.

[75] Witkowski, 'Rada Państwa jako organ czuwający', 40.

[76] See Leszek Garlicki, 'Reforma wymiaru sprawiedliwości a kontrola konstytucyjności ustaw' (1982) (No 1–2) *Państwo i Prawo* 34, 36.

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the Sejm, was in line with the tendencies in other socialist countries[77] and, as such, it was generally positively received in the constitutional law discourse.[78]

At the same time, the amendment led to controversies, thereby reviving the Polish constitutional law discourse. The constitutional law academics generally assessed the new constitutional provision as too general and, as such, causing interpretative problems. It was argued that the law-maker should adopt a statute that would allow the State Council to exercise its new competence. The main controversy concerned the scope of this competence, in particular, whether the State Council was entitled to control the compliance of legislative acts with the constitution. Opponents of such an interpretation of the amendment argued that the amendment's authors 'unluckily' used a too broad notion of 'law'. To them, it was clear that the State Council, as a body subordinated to the Sejm, lacked the competence to control the compliance of legislative acts with the constitution. Rather, the new competence was to cover only the legal acts issued by the other state authorities, excluding the Sejm.[79] In contrast, the proponents of the 'full' constitutional review relied on the linguistic meaning of the amendment and argued that the extension of the competence of the State Council to all normative acts did not undermine the supreme position of the Sejm.[80]

The concretisation of the State Council's competence took place three years later, through the adoption of the resolution of 14 July 1979.[81] The resolution was well received in the legal scholarship.[82] However, the State Council's new competence, similarly to that of the Parliamentary Legislative Work Committee, had no practical significance for safeguarding the rule of law.[83] Nevertheless, it was an important step towards the fully-fledged constitutional judicial review.[84]

[77] Earlier, similar developments took place in Romania (1965) and Hungary (1972). In GDR the State Council was entitled to review the constitutionality of laws under the Constitution of 1949 in its original content.

[78] See Andrzej Gwiżdż, 'Trybunał Konstytucyjny' (1983) (No 1–2) *Państwo i Prawo* 3, 7–8, who praised the amendment as the reflection of the rule that 'there can be no law but that which is consistent with the constitution'.

[79] See, Witkowski, 'Rada Państwa jako organ czuwający', 42 and Stembrowicz, 'Konstytucja a ustrój państwowy i społeczny', 63.

[80] See Stanisław Gebert, 'Czuwanie przez Radę Państwa nad zgodnością prawa z Konstytucją' (1980) *Państwo i Prawo* 26, 28 and 34; Andrzej N. Wróblewski, 'Kontrola konstytucyjności prawa w państwach socjalistycznych' (1978) *Państwo i Prawo* 47, 52.

[81] The resolution provided for the very limited model of constitutional review, as regards its scope (non-parliamentary acts, international agreements and draft of statutes) as well as its legal consequences (the state organ that issued the act that was later found as violating a statute or the constitution, was only obliged to inform the State Council about the steps that it undertook to eliminate 'irregularities' found by the State Council). Not surprisingly, the State Council had never exercised its competence in this regard.

[82] See for instance: Gebert, 'Czuwanie przez Radę Państwa', 41.

[83] See Garlicki, 'Reforma wymiaru sprawiedliwości', 36; Tadeusz Ereciński, 'Aktualne problemy ustroju sądownictwa' (1981) *Państwo i Prawo* 18, 30; Wróblewski, 'Kontrola konstytucyjności', 60.

[84] See Działocha, 'Konstytucja PRL po nowelizacji', 14; Wróblewski, 'Kontrola konstytucyjności', 56.

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15.2.5 *Decline Period (1979–1989): Towards Fully-Fledged Constitutional Review?*

15.2.5.1 From the Emergence of Civil Society to the Institutional Reforms of the Early 1980s

In the late 1970s, civil society began to emerge in Poland. The Amendment of 1976 also brought other constitutional changes. The one that attracted the greatest public interest emphasised Poland's 'fraternal ties with the Soviet Union' and enshrined the leading role of the Party. Although similar amendments were introduced in other countries of the Warsaw Pact at that time, in the case of Poland, the amendment – exceptionally and surprisingly – caused vigorous protests, coming from the intelligentsia and the Church.[85] The amendment was seen as undermining the very sovereignty of the country and as something that could be used in the future as an excuse for military intervention in Poland.[86]

Simultaneously, the regime suffered from serious and structural economic problems. As the government presented a plan for a sudden increase in the price of many basic commodities, a series of protests and demonstrations took place, known in the history of PRL as June 1976. The protests were quelled again. However, they turned out to be successful to some extent. The plan for the price increase was shelved and the Prime Minister dismissed. In the aftermath, intelligentsia founded an opposition organisation, the Workers' Defence Committee (*Komitet Obrony Robotników – KOR*), whose aim was to provide legal and financial support to the workers persecuted after June 1976. The emergence of KOR is usually considered as the beginning of civil society in Poland, which made space for further developments in this regard, particularly the emergence of Solidarity in the 1980s.

Subsequently, in the attempt to accommodate further demands for the safeguards of the legality of the state apparatus, the regime considered the introduction of the judicial review of individual administrative decisions and executive regulations,[87] as was already the case in other socialist countries.[88] On 31 January 1980, the Sejm amended the code of administrative procedure and established the Supreme Administrative Court (*Naczelny Sąd Administracyjny – NSA*). The NSA has been empowered to apply a limited form of judicial review as regards the executive regulations and individual administrative decisions. As it has been noted, despite

[85] See Garlicki, 'O mój Rozmarynie'. The regime realised that 'some part of the society treats the constitution seriously'. See also Brzezinski, *The Struggle for Constitutionalism in Poland*, 74, who underlined the exceptional character and importance of the criticism of this amendment. In his view, this 'criticism … represented the first time that the totalitarian foundation of the regime, rather than its individual policies, were openly attacked'.

[86] Brzezinski, *The Struggle for Constitutionalism in Poland*, 73.

[87] Note that the call for the introduction of judicial review of administrative decisions, as it was noted earlier, was expressed in the constitutional law doctrine as the aftermath of October 1956.

[88] Earlier, the administrative judiciary was successfully implemented in Yugoslavia (1952), Hungary (1957), Romania (1967) and Bulgaria (1970).

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the limitation of its jurisdiction, 'the NSA quickly assumed an active role in protecting individual rights against arbitrary administrative actions'.[89]

Although the establishment of the NSA played a crucial role in the increase of the legality of administrative actions, it could not remedy to the PRL's economic problems. These problems led to massive workers' protests in the Lenin Shipyard in Gdańsk in August 1980. The protests ended on 31 August 1980 with the conclusion of the Gdańsk Agreement between the Solidarity trade union and the government. The Gdańsk Agreement secured a right to strike and officially recognised the Solidarity as an independent trade union, the first in the whole Eastern Bloc. The Solidarity – not only a trade union but a broad social movement – represented at some point one-third of the country's working-age population. It played a key role in the reforms of the 1980s that heralded the end of the real socialism in the region and prompted a liberalisation of the regime, which, however, only lasted until December 1981, when the regime introduced the Martial Law.[90]

In this period, the institutionalisation of constitutional judicial review became a matter of broad consensus within legal academia,[91] including leading constitutional law scholars, such as the already mentioned Burda, Siemieński[92] and Leszek Garlicki,[93] later to be joined by Andrzej Gwiżdż[94] and others.[95] The arguments supporting the inadmissibility thesis of constitutional judicial review, as one author

[89] See Brzezinski, *The Struggle for Constitutionalism in Poland*, 139–140, where the author noted that 'NSA was directly relying on Constitution to support its rulings, and were dealing with many constitutional problems, particularly concerning the constitutional parameters of executive branch law-making'. 'In this way' – argued Brzezinski – 'the NSA acted as a custodian of Constitution and created an atmosphere favourable to the further development of mechanisms of constitutional protection'.

[90] In view of further developments, it seems justified to claim that Martial Law only constrained but did not destroy the public demand for the democratisation of the regime. On the role of the Gdansk agreement, as well as the importance of the discourse of rights in the Solidarity's struggle for the constitutional rule, see Jarosław Kuisz, *Charakter prawny porozumień sierpniowych 1980–1981* (Warszawa, 2009), 469–478.

[91] Garlicki, 'Reforma wymiaru sprawiedliwości', 35, who argued that, although the call for institu tionalisation of constitutional judicial review in the Polish socialist doctrine was present from the late 1960s, it was the 'August breakthrough' that allowed for the rearticulation of this call and made space for its potential realisation.

[92] From that time, see, Feliks Siemieński, 'Pozycja ustrojowa i właściwość Trybunału Konstytucyjnego' (1985) 4 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 7.

[93] It is worth noting, however, that Garlicki supported the idea of empowering the Supreme Court with the judicial review of conformity of laws with the constitution, rather than the setting up of a separate specialised constitutional court. See Garlicki, 'Reforma wymiaru sprawiedliwości', 35.

[94] Gwiżdż, 'Trybunał Konstytucyjny', 9.

[95] See Trzciński, *Funkcja prawna konstytucji socjalistycznej*, 127–139; Hanna Suchocka, *Konstytucyjne gwarancje praworządności w europejskich państwach socjalistycznych* (Wydawnictwo Naukowe UAM, 1979), 35; Michał Domagała, *Kontrola zgodności prawa z konstytucją w europejskich państwach socjalistycznych* (Wydawnictwo prawnicze, 1986), 4; Jerzy Bafia, *Praworządność* (Książka i Wiedza, 1985), 102–105.

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argued, were at that moment deemed to be 'based either on a misunderstanding or on legal sophistry'.[96]

Most importantly, the support for the establishment of a constitutional court at that time went way beyond academic circles and was shared by prominent social and political actors. This idea was initially proposed by the National Congress of the Bar (*Ogólnopolski Zjazd Adwokatury*) in January 1981.[97] Two months later, in March 1981, the Twelfth Congress of SD, expressed its support for deep institutional reforms, advocating for the establishment of the Tribunal of the State, the Ombudsman, the Senate and the constitutional court, also providing an outline for the institutional arrangement of these new bodies. Surprisingly, this time the SD was backed by the PZPR. The Ninth Extraordinary Assembly of PZPR obliged the PZPR's parliamentary club to consider either the establishment of a constitutional court or to empower the Supreme Court to examine the compliance of laws with the Constitution. Eventually, the idea of a constitutional court was also supported by the Solidarity on its First National Congress that took place in October 1981.[98] Thus, this idea united the opposing political and social actors, such as the legal academia, legal practitioners, the socialist government and the democratic opposition.

Whether at that time we can speak of any significant change as regards the justification of the constitutional review is not clear. On the one hand, as early as in the mid-1970s. there were some political and legal developments that were indicating the future emergence of a language of rights in the region.[99] This was followed with the emergence of civil society, including Solidarity, that certainly picked up the language of rights, but at the same time continued to think of a constitutional court as above all the guarantor of formally understood legality and compliance of ordinary laws with constitution.[100] In any case, the shift towards right-based justification of constitutional review was not reflected in the constitutional law discourse, and more importantly in the practice of the Constitutional Tribunal, that, as discussed in the reaminder of this section, in its first years of operation secured the

[96] Jerzy Kowalski, 'Problemy reformy systemu politycznego Polskiej Rzeczypospolitej Ludowej' (1981) *Państwo i Prawo* 3, 6.

[97] Resolution of the Ogólnopolski Zjazd Adwokatury from 4 January 1981 (1981) 3–4 *Palestra* 198. On the role of the bar in the institutionalisation of the constitutional court, see Zdzisław Czeszejko-Sochacki, 'Trybunał Konstytucyjny a adwokatura' (1986) (No 2) *Palestra* 1.

[98] See *Resolution of the First National Congress of Solidarity no. 28/81*, especially the thesis no. 23, available at www.solidarnosc.org.pl/ws/wp-content/uploads/2010/10/1-KZD-I-tura-Gda%C5%84sk-1981.pdf.

[99] In 1975, Helsinki Final Act was signed by PRL and other socialist countries. Subsequently, on 3 March 1977 UN International Covenants on Human Rights were ratified. On the importance of the latter for the changes in the Polish legal system, see Ereciński, 'Aktualne problemy ustroju sądownictwa', 19.

[100] See Resolution no. 28/81 (n 98), thesis no. 23, where the need for higher protection of the individual rights and freedoms was stressed, and institutionalisation of the constitutional court was in fact deemed as one of the means to achieve this aim, but, on the other hand, in the excerpt devoted to the constitutional court itself, its role was explained in a purely Kelsenian manner.

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constitutional role of the Sejm rather than protected rights of individuals. In this sense, one may claim that, despite some developments in this regard, eventually the right-based justification of the constitutional review was not reflected in the constitutional law discourse, that till the end of communist regime remained under classic Kelsenian imaginary in this regard.

15.2.5.2 The Establishment of the Constitutional Tribunal and Other Institutional Reforms

Following this broad and exceptional consensus, in November 1981, the Sejm appointed the Committee of Experts consisting of constitutional law professors from the leading law faculties that would examine the possibility of setting up a constitutional court in a socialist State.[101] The Committee carried on its task despite the announcement of Martial Law in December 1981, which aimed to combat and curb the growing democratic opposition centred around Solidarity. In January 1982, the idea of a constitutional court was confirmed by the new communist leader, Jaruzelski.[102] Eventually, a draft constitutional amendment was submitted to the Sejm in February 1982 and adopted in March 1982. The March Amendment provided for the creation of the Constitutional Tribunal and the State Tribunal.[103] Interestingly, the amendment was negatively received in other socialist countries, and there were voices that the Party should 'delay' the setting up of the Constitutional Tribunal, like in Czechoslovakia.[104]

Ordinary legislation was needed to operationalise the constitutional amendment, leading again to discussions in the constitutional law doctrine.[105] The Committee of Experts prepared a dozen drafts in three years. The main theoretical challenge for the Committee was to reconcile the concept of constitutional judicial review with the basic principles of socialist constitutionalism, such as the idea of the parliamentary supremacy and the unity of State power. The main practical challenge was to reconcile the idea of a constitutional court with the lack of political will to implement a judicial mechanism that would effectively examine the constitutionality of governmental actions.[106]

The statute creating the Constitutional Tribunal was eventually adopted on 29 April 1985. Unsurprisingly, the constitutional review was to be limited in scope

[101] The Committee consisted of professors from leading Polish law faculties elected by: PZPR (A. Burda from Maria Curie-Skłodowska University and L. Kubicki from Polish Academy of Sciences), SD (J. Jodłowski from University of Warsaw and A. Gubiński from University of Warsaw) and Zjednoczone Stronnictwo Ludowe (H. Groszyk and J. Ziembińskim, both from Maria Curie-Skłodowska University), to be joined by non-partisan A. Gwiżdż (University of Warsaw).

[102] Gwiżdż, 'Trybunał Konstytucyjny', 4.

[103] The State Tribunal (*Trybunał Stanu*) was an impeachment court deciding on the criminal liability for constitutional and statutory infringements by high State officials. These officials were to become accountable for abuses committed while in office for the first time.

[104] See Zdzisław Czeszejko-Sochacki, *Trybunał Konstytucyjny PRL* (Książka i Wiedza, 1986), 46–49.

[105] See for example: Gwiżdż, 'Trybunał Konstytucyjny'.

[106] On this see notes 123–125.

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and as regards the access to the TK. The TK was entitled to review laws and statutes that came into power only after the adoption of the 1982 Amendment, and it generally could not review international agreements.[107] Its rulings were final only with regard to executive regulations, whereas its decisions regarding the constitutionality of statutes could be rejected by the Sejm. Moreover, the statute ruled out *actio popularis* (the individual right of petition), providing that constitutional review might be only initiated by official State authorities, which meant that the democratic opposition centred around the Solidarity could not benefit from the new institution.

This limited constitutional review received mixed reactions. In the legal scholarship, it was mainly praised, first and foremost, for its due regard to the principles of socialist constitutionalism.[108] Such a position was taken surprisingly even by Siemieński, seemingly a zealous supporter of the idea of a fully-fledged constitutional court.[109] It was also shared by one of the members of the Committee (Gwiżdż), who praised the Polish lawmakers for solving the problem of constitutional review in a socialist State in the 'correct and only possible manner'.[110] However, in an interview published in a nation-wide newspaper, the other members of the Committee (Ziembiński) admitted that, as drafters, they were not fully satisfied with the final outcome of their cooperation with the parliament. Ziembiński stated that, although the TK might be considered a 'child' of professors Gwiżdż, Groszyk and Ziembiński, the final draft of the statute only partially reflected their propositions.[111] The main flaws of the TK, according to the quoted author, were the already mentioned limited scope of review, the limited access to it and the only partially binding character of its rulings in the case of statutes.[112] This led Ziembiński to a somewhat bitter conclusion that the statute on the TK, as drafted by the Sejm, was a 'compromise between the needs and possibilities', which would

[107] In view of the ratification of international human rights treaties in the late 1970s (see, n 99) it was a clear sign that the Tribunal was not designed to become a guardian of individual rights.

[108] See Domagała, *Kontrola zgodności prawa*, 102–110, who affirmatively discussed the institutional set-up of the TK as the reflection of the supremacy of parliament over the Tribunal. Interestingly, the subordination of the Tribunal towards the Sejm also had a symbolic character, as its initial seat was located in the basement of the Sejm.

[109] See Siemieński, 'Pozycja ustrojowa i właściwość Trybunału Konstytucyjnego', 12, where the author affirmatively discussed the supremacy of the Sejm over the Tribunal and ibid., 34–35, where the author in the conclusion described the institutional set-up of the Tribunal as 'optimal'.

[110] Gwiżdż, 'Trybunał Konstytucyjny', 10–11.

[111] Stanisław Jadczak, 'Dobrze, że będzie' – interview from 20 January 1985 with Jan Ziembiński, professor of law from Marie Skłodowska-Curie University (1985) 29 Polityka, https://trybunal.gov.pl/fileadmin/content/dokumenty/pierwsza-rozprawa/Dobrze_ze_bedzie_wywiad_z_Janem_Ziembinskim.pdf.

[112] See ibid., where Ziembiński described this feature of the adopted model of constitutional review as its 'shortcoming' and stated that 'it is the most courteous solution in the contemporary law, as the parliament would decide whether the statute, adopted by this parliament, is in compliance with the Constitution or not'. This feature of the TK was also negatively assessed by Leszek Garlicki, *Ewolucja polskiego prawa państwowego w latach 1980–1982* (IOZiDK, 1983), 38, who argued that, in the view of this limitation, the Tribunal 'is not a constitutional court in the appropriate meaning of this notion'.

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result in the 'original Polish model of the Constitutional Tribunal', of which the biggest advantage was that 'it would exist', and which was truly needed in a country in which the legality of State actions was often a fiction.[113]

15.2.5.3 The Functioning of the Constitutional Tribunal: Between Dependency and Independency?

Despite the mixed assessment of the newly created body in the legal scholarship, it should be stressed that, with its establishment in 1985, PRL became the only country in the Warsaw Pact with a constitutional court. The Tribunal was filled mainly with legal academics.[114] That was a clear sign that the Tribunal – addressing in this regard normative claims present in legal scholarship[115] – was going to build its epistemic authority on the idea of scientificity as the guarantee of objectivity and the apoliticality of the constitutional adjudication.[116] As I have tried to show elsewhere, this legitimation strategy was strictly related to the general legitimation strategy characteristic for Polish jurisprudence, which is based on the ideas of scientificity, objectiveness and apoliticality.[117]

The TK began to operate on 1 January 1986. Its very first ruling of 28 May 1986 (U 1/86), just as most of its further cases from the period 1986–1989,[118] concerned the conformity of executive regulations to parliamentary legislation.[119] Although the case itself was of little political importance, the TK managed to make out of it a case of constitutional significance, using it to curb the scope of the law-making powers of the executive authorities. The TK underlined that, under the Constitution of 1952, the executive authority must exercise its rule-making powers in strict compliance with the statutory delegation clause. This meant that the law could no longer be created by executive authorities to the detriment of the Sejm's prerogatives. Therefore, 28 May 1986 might be treated as a symbolic end date of the façade

[113] Jadczak, 'Dobrze, że będzie'.

[114] Out of the original twelve judges of the Tribunal, nine were professors closely related to the academia (including former deans and rectors) and the remaining three had a more judicial background. The field of expertise of the 'academic' judges varied from criminal law (K. Buchała, S. Pawela), through administrative (A. Kabat) and financial law (N. Gajl), to international (A. Klafkowski, H. de Fiumel, L. Łukaszuk) and constitutional law (K. Działocha), as well as the theory of State and law (H. Groszyk).

[115] The postulate that the TK should be an expert, apolitical and scientific body has been present in the doctrine of constitutional review from its emergence. In this regard see, above all, Siemieński, 'Problem kontroli konstytucyjności ustaw', 22–24.

[116] On this topic see, Hanna Dębska, 'Trybunał Konstytucyjny w poszukiwaniu legitymizacji. Szkic z socjologii prawa' (2015) 4 *Studia prawnicze* 23.

[117] Zomerski, *W kierunku demokratycznej nauki prawa?*

[118] See Brzezinski, *The Struggle for Constitutionalism in Poland*, 158, who noted that in the years 1986–1989, of the 33 cases reviewed in this period, only three involved parliamentary statutes, of which only one statute has been found 'partially inconsistent' with the Constitution of 1952.

[119] On this judgement and its constitutional significance, see Leszek Garlicki, 'Pierwsze orzeczenie Trybunału Konstytucyjnego (Refleksje w 15 lat później)', in Adam Jankiewicz and Ferdynand Rymarz (eds.), *Trybunał Konstytucyjny: Księga XV-lecia* (Biuro Trybunału Konstytucyjnego, 2001).

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constitutionalism: the theoretical principle of the alleged supremacy of the parliament over the executive power, repeated like a mantra in the constitutional law doctrine from 1944 onwards, eventually became a normative standard that the state authorities needed to observe. That meant that the biggest beneficiary of constitutional review, as it was expected in the legal scholarship,[120] became the Sejm, as the TK in its first years of operation assumed a role of a guardian of the parliamentary prerogatives rather than a guardian of the constitution and rights of individuals.[121] This changed in 1989, when the TK assumed a more active role in the shift towards a fully-fledged constitutional democracy.[122]

The TK did not subdue to the intents of its authors who tried to make it a weak and façade body. This surprising development led commentators in the 1990s to describe it as an 'unwanted child of the previous regime' that was only forced on political authorities.[123] According to this narrative, the reforms of the 1980s, including the establishment of the TK, the State Tribunal, and the Ombudsman in 1987, were made only to legitimise the regime in the eyes of foreign countries rather than truly rebuilding the structure of State power.[124] As such, they were never considered as being able to change the very essence of the political system: the leading role of the Party.[125] But the regime lost control over the course of events. The institutions introduced to strengthen the legitimacy of the regime in decline, acting as checks against the most striking abuses of power by State authorities, managed to reform it from the inside and push towards further changes that eventually ended the socialist authoritarian rule. Although the analysis of factors that allowed TK for such a reform from the inside goes beyond this chapter, it seems that the efficiency of this process confirms the above-mentioned autonomy of academia in PRL and, at the same

[120] See Gwiżdż, 'Trybunał Konstytucyjny', 15, who in the conclusion stated that in the view of the institutional set up of the Tribunal 'it would be to the lesser extent the organ of judiciary control over the activities of the parliament, but rather the organ of the parliamentary control over the activities of the administration'.

[121] Brzezinski, *The Struggle for Constitutionalism in Poland*, 159.

[122] About this shift, see ibid., 161–165.

[123] See Janina Zakrzewska, 'Trybunał Konstytucyjny – konstytucja – państwo prawa' (1992) (No 1) *Państwo i Prawo* 3, 6–7, who, discussing the context of the establishment of the TK, claimed that in 1982 the authorities were 'under tremendous popular pressure' to increase the accountability of the regime, which was only constrained but not destroyed by Martial Law. At the same time, however, the regime did not want to resign from its monopoly of power and the lack of accountability. In consequence, the regime agreed to address 'certain popular demands' in form rather than in substance. By doing so, the regime hoped that it would satisfy the society's democratic ambitions, meanwhile the structure of power would remain unchanged.

[124] Such a view was expressed among others by a professor of legal history – Zygmnut Izdebski, as quoted by Brzezinski, *The Struggle for Constitutionalism in Poland*, 141. According to Izdebski, the regime introducing changes for the 'foreign consumption only' initially hoped to repeat Czechoslovakia's 'creation' of a constitutional court in 1968, that had never started to operate.

[125] Kazimierz Działocha, 'Państwo prawne w warunkach zmian zasadniczych systemu prawa' (1992) (No 1) *Państwo i Prawo* 13, 27. See also: Jacek Kurczewski, *The Resurrection of Rights in Poland* (Clarendon Press, 1993) 18, who argued that the introduction of all these bodies was deemed to be unsatisfactory, as the public knew by experience that 'the invisible "leading role" of the Party is of decisive character'.

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time, it proves that building epistemic authority of TK on the scientificity, apoliticallness and objectivity, occurred to be, at least in the period of transition, an effective legitimisation strategy.

15.3 CONCLUSION

In this chapter, I argued that the domestic constitutional law theory, as it evolved in 1944–1989, played an essential role in pushing Poland towards the direction of constitutional democracy which it eventually became in the post-1989 era. Is it naïve to assume that, in the authoritarian reality of PRL, the academia had any social agency? After all, one may claim, all the decisions were made by political elites that did not have to take into consideration the views present within the society. The political elites themselves were not even independent in their actions, as they had remained under a strong influence of the Soviet Union, were they? Perhaps, one may add, the changes in Poland were only a reflection of the greater changes in the whole Eastern Bloc that, starting from the 1980s, was in decline, caused mainly by economic problems.

It is important to stress, first and foremost, that the interplay between the events in the socio-political realm and the development of domestic constitutional law thought is beyond any doubt. Most important events in the history of PRL (October 1956, March 1968, December 1970, June 1976, August 1980), which all together gave birth to the civil society centred in the 1980s around the Solidarity, were accompanied and followed by the shifts in the constitutional law doctrine. The intellectual evolution was also possible thanks to the emergence of the new generation of constitutional law professors. Despite the initially façade character of the constitutional law doctrine, they had taken its substance seriously, namely not only as a legitimising tool of the socio-political and legal regime, but as a normative ideal that should be observed by State authorities. What facilitated this shift conceptually was the inclusion in the constitutional law theory from the first decades after the WWII theoretical claims compatible with the modern constitutionalism, such as the supremacy of constitution, its fully justiciable and binding character and its direct applicability. For all these reasons, tracing the evolution of the post-war Polish constitutional law theory, we speak of shifts and the evolution rather than raptures and the revolution.[126]

The conceptual easiness of this shift should not obscure its exceptional character. Poland – apart from Yugoslavia, that remained independent from the Soviet Union – was the only socialist country with an operating constitutional court in the

[126] See Blokker, *New Democracies in Crisis?*, 50, where the author claimed that the guiding principle of the Polish transformation was 'legal continuity' or ibid., 64, where he argued that in the Polish case it is more justifiable to speak of 'creeping constitutionalization' rather than 'constitutional revolution', as the main steps towards enhancing a constitutional dimension to the Polish political regime were already taken from the 1970s onwards.

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region. Its establishment did not necessarily engender positive reactions in other socialist states. Thus, it is not possible to explain the emergence of the TK as a reflection of a broader tendency in the socialist bloc, as there was simply no such tendency. Or, to put it differently, in the absence of external factors that would explain the emergence of a constitutional court in socialist Poland, it is hard to downplay the role of internal factors. As I have demonstrated, the crucial role in this regard was played legal academia, which, starting from the late 1960s, developed a doctrine of constitutional review which eventually led to the establishment of a constitutional court – thanks to the emergence and efforts of the civil society in the 1980s.

Certainly, the decision to establish the TK was taken by the political elites rather than by professors of law. The representatives of legal academia, however, made this decision possible, as they delivered theoretical foundations for this decision. They also actively participated in setting up the Constitutional Tribunal. Subsequently, academics assumed the role of constitutional judges. As it has been noted in the literature, the epistemic authority of academia played a considerable role in building the authority of the TK as an objective and apolitical arbiter of State actions, which allowed the TK to push for the changes of the regime from within. These dynamics allowed for the transformation towards constitutional democracy, in which the TK played a crucial role. Thus, the constitutional law theory, which emerged in the 1950s as a façade legitimising the authoritarian rule, eventually became a solid foundation for the democratisation of the PRL. The role of constitutional law doctrine in PRL was more complex and ambiguous than it is usually admitted nowadays. Post-1989 constitutionalism did not appear out of nowhere, but – as in the case of many other European countries – from the internal demand to curb the authoritarian rulers.[127] This development was possible thanks to the pre-war constitutional traditions of the region,[128] as well as

[127] Consider that, in the context of many European countries, the institutionalisation of constitutional review was a reaction to the authoritarian past and was thought of as a vehicle from authoritarian rule to constitutional democracy or at least the safeguard of the latter. This observation seems to be accurate in the case of post-Nazi or post-fascist Western Germany and Italy (that institutionalised their constitutional courts in 1947), as well as post-authoritarian Greece (1975), Spain (1978) and Portugal (1982). Similarities between these countries do not stop here. They do concern not only the starting point (authoritarian past) but also the ending point: return to the family of European democracies. In this regard, note that the creation of a constitutional court in each of the said countries preceded the accession to the European structures (Italy and Western Germany – 1957, Greece – 1981, Spain and Portugal – 1986).

[128] Note that Poland, along with other countries from the region, such as Czechoslovakia, Hungary and Yugoslavia, had pre-1944 constitutional traditions. As examples of these traditions might serve pre-war constitutions of each of these countries (dating back in case of Poland to the Constitution of 1791, being the first such document in the European history) and Czechoslovakian constitutional court (being along with its Austrian counterpart the only such body in the pre-war period in Europe).

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the survival of the non-socialist legal thought in the local constitutional imaginary.[129]

The argument presented here nuances the widely accepted narrative of the peculiarity and novelty of the emergence of constitutional rule in early 1990s in Central Eastern Europe. There are more similarities than differences between the countries of Western and Eastern Europe that wished to reject their authoritarian past through constitutionalism at different points in time. The similarities concern the aim of the reforms (a transition from authoritarianism to constitutional democracy seen as 'the return to Europe'), but also their theoretical foundations (the non-socialist legal thought, namely Kelsenism) as well as the institutional means implemented to achieve this aim (the constitutionally entrenched rule of law implemented and guarded by the specialised constitutional court). This observation, on the one hand, sheds some light on the normative value of the post-1989 Central Eastern European constitutionalism[130] but, on the other, it might imply that the emergence of the rule of law crisis in the region demands further explanations than those explaining it in terms of the alleged unsuccessful transplant surgery.[131] As addressing this issue in detail goes beyond the scope of this chapter, further discussions in this regard, especially investigating specific regional socio-political and economics factors, are needed.[132]

[129] It seems that there was nothing 'socialist' in the socialist constitutional law theory as it evolved in the 1970s and 1980s, even if authors put much effort to appear as they were deriving their theoretical views from the socialist legal tradition. Although it is hard to trace it with the scientific precision, as the scholars writing at that time were not explicitly referring to non-socialist authors, usually – due to the historical bounds of the region with Austria – it is assumed that it was Kelsenism that remained a tradition structuring regional legal minds. The internal logic of this tradition naturally led to the question of the conformity of higher laws with lower laws, which eventually brought about the institutionalisation of constitutional review.

[130] Note that the post-2015 subordination of the TK to ruling political elites was justified by domestic political actors as necessary due to the alleged post-communist and post-authoritarian origin of this body. See for example: Jarosław Kaczyński, 'Wykład na Uniwersytecie Jagiellońskim' (2010) 24 *Pressje* 222, 227, where the leader of Law and Justice party, holding a PhD degree in law, explained the emergence of TK, NSA as well as Ombudsman as the reflection of far-reaching phenomenon of 'juridification' of the socialist regime that allegedly allowed socialist elites to remain in power despite the breakdown of the socialist regime.

[131] Such a conclusion does not exclude that there was something peculiar in the emergence of constitutionalism in the region that would explain its further fatigue. Such a thesis should, however, be proved rather than simply assumed. One possible line of argument would be that the experience of fascism and Nazism – regarded as 'own', in contrast to socialism, which was imposed or at least perceived as such – had different implications for the constitutional sphere and the European integration project. See: Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84(3) *Modern Law Review* 477.

[132] Luckily, such discussions are already taking place. See, for instance, Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds.), *Anti-constitutional Populism* (Cambridge University Press, 2022), especially part 3, on the socio-political and economical roots of the crisis of rule of law in Poland and Hungary, including the chapters of Gabor Halmai, Paul Blokker and Michał Stambulski. See also: Wojciech Zomerski, 'Populism: What, Where and Why?' (2023) 175(1) *Thesis Eleven* 126.

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