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Individualism and Communitarianism in a Contemporary Polish Legal System: Tensions and Accommodations

Miroslaw Wyrzykowski*

I. THE STARTING POINT: POLAND’S LANDSCAPE AFTER THE BATTLE

Legislators do not act in a social, political, or psychological vacuum. Their projects, plans, and successes depend on their recognizing the possible application of legal methods to solve social problems and to prevent conflicts from arising. However, before one can understand the scope of the problems faced by Poland’s legislators, it is essential to understand the elements of the past that have created the landscape of possibilities and necessities now confronting those legislators.

The socialist state left its legacy. The so-called “socialist democracy” deprived Polish society of its political freedom. The one-party state denied basic civil and political rights and liberties. Consequently, any current concepts of “individualism” or “communitarianism” must reflect the legacy of the past. The communist slogan declared: “The masses are all, the individual is nothing.” This slogan reveals a system of thinking about the relationship between individuals and their society. Society was understood as a society organized in the state. Individuals were totally subordinated to the state, and the public interest took priority over individual interests. Anything considered “social” had and still has either consciously or subconsciously, socialist connotations. Likewise, anything considered “communitarian” had and still has communist connotations.

Also important is the understanding that socialism as an ideology, despite being imposed by revolution and military pressure, brought with it an attractive set of promises, at least for major sections of society. This ideology promised, among

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other things, to reverse the trend of social development by creating a new type of society known as a *Gesellschaft* respecting all the values of a *Gemeinschaft.*

Furthermore, contemporary Polish society may be characterized by a specific mentality called "homo sovieticus." Two features of "homo sovieticus" seem especially relevant to the relationship between individualism and communitarianism. The first feature is the "claim attitude" which is based on the perception that the equal distribution of goods is a worthy social ideal. The "claim attitude" causes people to demand equal distribution of goods. Moreover, the individual is not an independent, free creator of goods. Because everyone participates in the process of production, everyone also demands to participate in the process of redistributing the results of their work. A. Podgorecki described this attitude as follows:

Another side-effect of the sovietization of Polish society is the tendency to set up claims. Everybody, whether or not they have the legal justification, demands from others, institutions, organizations, and the state, to be given what they claim. These claims may be related to their most basic needs but they may also at times be quite esoteric. They are usually excessive. By making such claims people not only try to be visible. [sic] When contending with each other over justified demands it is important to be sufficiently dynamic and aggressive in the process. People believe that if they demand a lot they will receive at least part of what they want.

The second feature of "homo sovieticus" involves the subordination of the individual to the state. A result of the promised, but only apparently exercised, participation of the "working class" in the power of the state is the resulting feeling of dignity gained through that participation. The enterprise

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was collective property, and every member of the enterprise became "social property." The negative effect that resulted from the restriction of (political) liberty, however, was offset by the positive feelings of security that arose through group membership.

In addition, socialism gave people, especially the "working class," a feeling, but only a feeling, of participation in the political process. This feeling of participation in political power was substituted for property rights. In other words, the dilemma "to have" or "to be" was replaced by a "choice" to have neither property rights nor property but to "have" apparent access to political power. In reality, the feeling of dignity resulted largely from an overestimation by the "working class" of their own power in the political process.4

The "homo sovieticus" mentality was constructed according to primitive behavioral rules: action-reaction. The individual's action was only a reaction to different political, economic, social, and other impulses. The effect of the system was to destroy the individual's autonomy and personal responsibility for any kind of behavior.5 Although never achieving total enslavement of the social and individual mentality, the systematic "Marxist training system" (which lasted almost half a century6) built "thought muzzles" into official and lay modes of thinking.

The change in the concept of individualism was also felt in the local communities. Polish society consisted of "quasi-local communities" that possessed no real financial or legal means to solve local problems and conflicts. At the community level, the concept of socialism replaced the original notion of "local interest" with group interests and, ironically, with individual interests in some cases. Local communities became extraneous structures which were more susceptible to special interests, corruption of civil servants, and "dirty partnerships."

Perhaps the legacy of the past is best explained by Podgorecki:

[The most characteristic feature of the post-totalitarian system is the duality of current social life. On the one hand we have pluralists, political reforms, open public discussions, liquidation of state censorship of the news, anti-totalitarian

4. Tischner, supra note 2.
6. Podgorecki, supra note 3, at 95.
totalitarianism, the lack of means or efficient "transmitters" capable of passing on the outcomes of public discussions to those centres which have real influence on social life and, most important, the systematic perpetuation of the social heritage of the totalitarian system.7

Among other things, in this climate the new democratic power must try to create optimum legal circumstances for the development of the individual, while at the same time supporting the concept of communitarianism.

II. CIVIL SOCIETY AS A PROPER RESPONSE?

The new program adopted in 1989 pursues a new goal—"less a state, more a society." The hope of substituting society for the state seems to be a response to the discredited concept of the absorption of the society by the state.8 This new program is based partly on a social myth (primarily the myth of a civil society) that consciously creates a market economy, and partly on a democratic political system that readily avoids identification with individual and group interests in the pursuit of social solidarity.9

In the 1970s and 1980s, the democratic political opposition in Poland, as well as in other Eastern European countries, used the notion of "civil society" as a very attractive, but not very precise, term for a basic alternative to the real structure of a state and the situation of a "captive" society. The civil society seems a natural first response for any democratic opposition to the ideology and politics of a one-party state. Thus, it is no wonder that, according to Timothy G. Ash, civil society played a "central role in opposition thinking."10

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7. Podgorecki, supra note 3, at 98.
9. Id. at 266.
10. Quoted in RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 100 (1990). Dahrendorf also quotes a sentence from Adam Michnik: "When we realized that we were slaves, we knew that we had become citizens." Id. at 101. But for the communist ideologies, the attractiveness of the notion of a "civil society" remained significant. Sociological and political theory used the Hegelian and Marxist concepts of a "civil society" to create a concept of a "socialist civil society." But the most relevant elements of Hegel's "civil society"—private ownership and its relationship to work—changed the concept of the "socialist civil society." See Tadeusz Pluzanski, SPoleczenstwo obywatelskie socjalizmu, STUDIA FILOZOFICZNE, No. 9, 1987, at 128.
It seems paradoxical that building a civil society in the new democracies in Eastern Europe should take place without a profound theoretical reflection on the "civil society." After 1989, the concept of a "civil society" was not a subject of widespread discussion because it had become obvious that a free society must be a civil society. Although the concept of a "[c]ivil society [was at one time] fashionable in East Central Europe," immediately following the political changes, constitutional and other legal changes took precedence. The most important tasks of the parliaments at this time were to constitutionalize the concept of the individual and to secure economic freedom. It became especially evident that any general notion of civil society demanded concrete legal and political fulfillment. It also became clear that freedom required the acceptance of a variety of types of individual and group behavior. Finally, it became apparent that society had to create a state as a political organization.

In this situation, the experiences of Western democracies, and an almost unlimited reception of their concepts and legal institutions, created an intellectual and emotional foundation for constitutional and political reform. Parliaments, governments, and societies wanted to find relatively easy answers to the extremely difficult question of what should constitute the basis of a new society organized in a state. The almost universal answer was the democratic concept of the rule of law (demokratischer Rechtsstaat). The intellectual and legal content of this notion was realized by the legislators in Eastern Central Europe in a surprisingly quick and reasonable way. The concept of rule of law adopted by the constitutions of the Eastern Central countries provided a constitutional guarantee of individual freedom with its corresponding effects in the organization of their societies.

III. THE ESSENCE OF CONSTITUTIONAL CHANGES

The first step towards peaceful constitutional changes took place in the Spring of 1989. The results of the Roundtable Talks led to the semi-free election of the Seym, one of the

11. DAHRENDORF, supra note 10, at 100.
two chambers of Parliament. The election of the Senate, a second chamber, was fully free and democratic. As a result, the first noncommunist government in a still communist country was elected.

The second stage of peaceful constitutional change in the Polish political system took place following the constitutional amendment of December 29, 1989. This amendment abolished the Preamble of the Constitution, Chapter I (regarding the political system) and Chapter II (regarding the social and economic system). In addition, the amendment did away with the constitutional provisions concerning the planned economy and the role of state organs in that area. The provisions concerning the procurator were also amended. Lastly, the amendment changed the name of the state and the national emblem.

Eight new articles were established as Chapter I ("Foundations of the Political and Economic System") in substitution for the Preamble and the two abolished chapters of the previous Constitution. These articles, in conjunction with the provisions of Chapter VIII of the Constitution ("Fundamental Rights and Duties of Citizens"), create a constitutional basis for legal freedom that allows the realization of values and interests of both individualism and communitarianism.

A. The Redefinition of the Character of the Polish State

The previous definition of the character of the Polish State provided that "[t]he Polish People's Republic shall be a socialist state." Parliament adopted a new definition in the first article of the Constitution that proclaimed, "The Polish State shall be a democratic state, ruled by law and implementing principles of social justice." This change has some important consequences. First, the state's form as a "republic" is announced. However, the form of the republic is unclear: Is it parliamentary, presidential, or mixed? Second, Parliament clearly rejected the con-
cept of “socialist democracy” and recognized the concept of the rule of law (demokratischer Rechtsstaat) as an element of European political, historical, and cultural heritage. Third, Parliament decided to maintain the principle of social justice as a goal of state activity and as a criterion for evaluating the activities and omissions of all state organs and authorities.

B. The Redefinition of the Sovereignty of Political Power

Parliament also redefined the sovereignty of political power by making it clear that “[t]he supreme power is vested with the Nation.” The supreme power of the state is no longer vested with “the working people of town and country,” but with the “Nation.” The “Nation” should no longer be understood as an ethnic group, but as a political definition of all citizens living together within the same political boundaries. This definition captures the traditional democratic concept of internal sovereignty of state power and, in certain historical circumstances, the rejection of the Marxist class-based approach.

C. The Constitutional Guarantee of Political Pluralism and a Multi-party System

The rejection of a one-party state, a main feature of the communist system of state power, was combined with the implementation of a constitutional guarantee of a multi-party political system. Article IV of the Polish Constitution regulates political parties as a specific form of association: “Political parties shall associate citizens of the Republic of Poland according to the principles of voluntariness and equality, and with the purpose to influence the formation of state policy by democratic means.” According to Article IV, Section 2 of the Constitution, the Constitutional Tribunal adjudicates the constitutionality of the proclaimed aims and activities of a political party.

Even so, the provisions laid down by the Constitution and the Political Parties Act of July 1990 have to be extended by the Electoral Act to the local governments, Parliament (Seym and Senate), and the Presidency. These provisions, characteristic of many countries transforming from authoritarian to democratic systems of government (like Spain and Greece), specify the real role and meaning of political parties.
D. The Change of the Concept of Political Representation: A Model of Parliamentary Democracy and the Role of Local Self-Government

The Parliament prevails as the representative institution and helps create the parliamentary democracy. Additionally, the people can exercise their supreme power directly through referenda. No other form of direct democracy, like the citizen initiative, has been adopted in Poland.

The specific role of local government and local elections was established and regulated in the constitutional amendment of March 8, 1990. According to Article V of the Constitution, the Republic of Poland shall guarantee that local governments have the power of self-government. The Articles of the new Chapter VI of the Constitution regulate the goals and structure of local government by providing that local government shall be the main organization for public life in the commune which satisfies the collective needs of the local population.

Additionally, the Articles provide that the commune shall have a legal personality and shall implement the public tasks in its own name according to the principles determined by the law. The commune is thus vested with the rights of ownership and other property rights. These rights are communal property. The revenues of the communes shall be supplemented by budgetary subsidies according to the principles determined by the law. In the sphere regulated by the law, the commune implements the delegated tasks of governmental administration. The deciding organ of the commune shall be the council elected by the commune's inhabitants. The principles and procedures governing the election shall be determined by the

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15. A referendum provision was introduced into the Constitution in 1987 and was used once that same year. The communist government wanted to introduce an unpopular program that would have resulted in dramatic price increases and a fall in living standards during the "second" stage of economic reform. As "compensation," the government offered some political reforms, especially democratization and liberalization of political structures. However, this government initiative was rejected by the people.


Furthermore, the council shall elect the executive organs of the commune.

E. The Constitutional Safeguard of the Freedom of Economic Initiative and the Full Protection of Ownership

One of the important elements of the socialist system was the privileged position of the state with collective state ownership and its special system of protection. According to Article VII of the Constitution, the Republic of Poland shall protect the individual's rights of ownership and inheritance and guarantee the complete protection of personal property. Expropriation is allowed only for a public purpose and requires just compensation. This provision should be analyzed in the context of the guarantee of freedom to engage in economic activities and the equality of all forms of economic activity without regard to the form of ownership. This freedom can only be restricted by the law.

IV. INDIVIDUALISM V. COMMUNITARIANISM: THREE CASES

If the "secret of the United States" is to put civil society before the state, "by the grace of civil society as it were," the paradoxical secret of newly emerging democracies in Eastern Central Europe is to create civil society by decisions of state organs, especially those of Parliament. By the adopted law, Parliament establishes an organizational framework of activity for groups or societies. As will be suggested later, Parliament provides for the "compulsory freedom" of, for example, professional associations. The social passivity of the last two generations should be turned into full participation in the political, social, and economic processes of transforming both society and the state. The next section of this paper analyzes how Parliament has tried to "extort" local governments as well as social and professional groups into becoming "free" organizations. Three cases will be presented.

A. The First Case: Local Government

In Poland, local government was liquidated in 1950, and the notion of self-government was reduced to some forms of

20. See Pol. Const. art. VI.
participation in the local government and state enterprises. This limited self-government had no element of legal subjectivity, no aspects of ownership, and no power to decide matters affecting the local community.\textsuperscript{22}

In 1990, the Parliament did not "reform" the system of "local councils" as representative organs in the system of political power, but rather created an entirely new model for the organization of political power at the community level. The new regulatory scheme of 1990\textsuperscript{23} is characterized by several important features.

First, the citizens of a local community are recognized by the law as forming a legal entity, possessing under civil law the rights of ownership in local property. In addition, the local community itself is responsible for the activities of the community that are of a local nature and not reserved by law for other organs. In Article 1 of the Local Community Law (LCL), the notion of "community" is placed in the following two contexts: 1) the citizens create, as a consequence of legal regulation, the community; and 2) a commune as defined by the LCL means a local government community and a certain territory.

Second, citizens of a local community are given the full right to create their own budget as a foundation of local financing activities. Third, the community is given supervision over state organs, limited only by the law. Finally, the community is granted judicial control over the legality of all supervisory measures taken by the state organs and other measures which could restrict the legal independence of the local community.\textsuperscript{24}

The social and economic life in the community, and the plan for fulfilling the needs and goals of its members, demonstrate that a certain level of decentralization, deregulation, and democratization (together with local independence and the organs of a local community) has a very positive effect on the behavior of the local citizens. The creativity of a local community depends on the level of its political, economic, and legal competencies.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{22} M. Kulesza, \textit{Niektore zagadnienia prawne definicji samorządu terytorialnego}, PÅœST. PRAWO 1/1990 at 16.
\item \textsuperscript{24} A. Piekara, \textit{Wartości i funkcje społeczne samorządu terytorialnego}, PÅœST. PRAWO 8/1990, at 4-5.
\item \textsuperscript{25} Id. at 7.
\end{itemize}
The model of self-government created in 1990 tried to deregulate and "socialize" public administration in the state. The authors of this model looked for an optimum method for economic management to realize the public goals and tasks of a local community and to expedite development. But the reality of the new local democracy is markedly different than the dreams of its "founding fathers." For the moment, a major problem with local structures (as well with the central structure of the state) seems to be the partition of competencies between a local community and a local governmental organ.\(^{26}\) The fundamental intent of regulation, as stated in the LCL of 1990, is increasingly restricted by continuing regulations. Article IV stated a presumption of competence for the local community in all public affairs not reserved by law for other legal entities. But soon after the adoption of this law, Parliament adopted Article 53 of the Law of the Competence, which was similarly constructed, but differed as to the presumption of competence for the local governmental organs. Because of this regulation and the partition of competence between local communities and local governmental organs, a relatively small local community performs the public tasks in its own sphere of competence. On the other hand, a very large community is obligated to perform the tasks of governmental administration while being supervised by the governmental organs. Two areas are especially excluded from the competence of a local community: education and health care. Together, they amount to seventy-five percent of the expenditures in local community matters.

The legal institution that provides for a judicial guarantee of a local community's independence in public law can be analyzed as follows: 1) The local community has a judicially guaranteed degree of independence from supervisory intervention of state administrative organs; 2) institutions with judicial guarantees of independence can exercise their own competencies as well as delegated functions. It is a guarantee of the competencies created by the law.\(^{27}\)

The supervisory role of judicial control guarantees the independence of the local community. According to Article II of

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27. B. Adamiak & J. Borkowski, Instytucje prawne sadowej ochrony samodzielności gminy, SAMORZAD TERYTORIALNY 1-2, at 38.
the LCL, the local community first undertakes public tasks in its own name, taking full responsibility for its actions. Also, the local community is a legal entity, suffering the consequences of free activity in the civil law framework.

Both kinds of independence, in private law and in public law, are protected by the courts. In the sphere of private law, the general principles governing legal entities provide that a local community is empowered to initiate a court proceeding in any court of law. In the public law sphere, the protection of a local community’s independence is regulated by the LCL and involves a right to lodge a complaint with the administrative court. Often, the subject of complaint is an administrative act promulgated by the supervisory administrative organ. The right to lodge a complaint protects that part of the independence of local communities which could be violated by the supervisory administrative state organ. However, the local community’s independence should not be abused by an illegitimate expansion of the community’s tasks and goals in the spheres of activity of other units. Other units also have the right to lodge a complaint with the administrative court if a local community intrudes upon the rights of other units and the spheres of their competence.

The subjectivity of the local community needs to be understood not only in a sociological or political dimension, but also in a legal dimension. The local community is an element of the vertical separation of power that exists when the political power is decentralized. This vertical separation of power was meant to parallel the attempt to establish a new horizontal separation of power between the parliament and the presidency. Even if the vertical separation of power is not yet satisfactory, it is still much more advanced than the attempts to provide a legal basis for the structure of competence and procedure on the horizontal level.

B. The Second Case: Worker Participation in Management

Structural changes in the ownership of state enterprises that had basic economic and social potential in Poland required alteration of the managerial framework. These changes provided for participation of the “workers” in the management of a state enterprise. In 1981, the Law on Worker Participation in Management of a State Enterprise provided the scope of

28. Ustawa z dnia 25 września 1981 o samorządzie załogi przedsiebiorstwa
competence for the General Assembly of Employees as well as for the Employee Council in their capacity as the two basic organs of the worker participation in management. In 1981, the wide scope of competencies of worker participation in management had a purely political character. On the one hand, it was intended as an element of democratization of the political-social system supported by the necessity of eliminating alienation of the workers in their "own" enterprise. It was also a fulfillment of the essence of the worker political and legal participation in an enterprise. On the other hand, no doubt exists that the worker participation in the economic, financial, and social aspects of an enterprise was compensation for the lack of a parliamentary democracy and mechanisms for real participation of the society in the political process. The workplace, which was easy for the state (the owner of the enterprise) and communist party units to organize and control, was also a platform for realizing the political aspirations and demands. Thus, democracy in Poland could only be realized in the workplace and not in the home.

Beyond their advisory character, the organs for worker participation in management also had a decision making capacity. The important elements of the decision making competence of the General Assembly of Employees are 1) the right to adopt the statutes of enterprises, 2) the right to make decisions concerning division of the profits of an enterprise, 3) the right to make annual evaluations of the activity of the Employee Council and the directors of enterprises, 4) the right to adopt long-term programs for the economic activity of enterprises, 5) the right to adopt statutes for worker participation in the management of enterprises, and 6) the right to express opinions about any problem concerning an enterprise.

The Employee Council, as the second organ of worker participation in the management of an enterprise, has the decision making competence to 1) adopt and change annually the program of activity of an enterprise, 2) accept the annual report and financial statements of the director of an enterprise, 3) choose the investments of an enterprise, 4) give permission to make a contract creating a joint-venture, 5) approve the division or merger of an enterprise or enterprises, 6) make deci-
sions concerning employee housing and other social matters, 7) approve changes in the profile of economic activities of an enterprise, 8) make decisions concerning the use of funds of an enterprise, 9) enter into agreements concerning the sale of non-usufructuary machinery and tools of an enterprise, and 10) make decisions about the organization of referenda and the election of representatives to the Employee Council of a group of enterprises.

Another decisive power of the Employee Council is the right to nominate and recall a director or other person holding a key position in an enterprise. According to article 33, paragraph I of the Law on State Enterprises,30 directors of an enterprise are nominated by the Employee Council.31 The Council, after obtaining an opinion from the founding organ, is competent to recall any officer of the enterprise.

The broad competencies of worker participation in enterprise management was an element of Poland's political landscape in the 1980s. But after 1989, the question of ownership became one of the basic issues of political and economic change in all Eastern European countries. The privatization of the state economy, especially in state enterprises, had begun.

According to article 1 of the Law on Privatization of State-Owned Enterprise,32 privatization involves the distribution to third parties of shares of a company33 created upon the transformation of a state-owned enterprise into a company wholly owned by the State Treasury, the distribution of a state-owned enterprise's assets to third parties, or the sale of a state-owned enterprise. In these instances, a state-owned enterprise may be transformed into a company or liquidated in accordance with the provisions of the Act.

30. Ustawa z dnia 25 września 1981 o przedsiebiorstwach państwowych, DZIENNIK USTAW, No. 18, at 80 (with amendments).
31. In a few cases, a director is nominated by the founding organ. For example, this occurs if the Employee Council does not nominate a director within six months or if there is a newly established enterprise.
33. The term “spółka” (hereinafter a “company”) is used in the Act to denote two types of business forms in the Polish Commercial Code: a “limited liability company” and a “joint stock company.” Both types, roughly equivalent to the German forms of GmbH (Gesellschaft mit beschränkter Haftung, or Limited Liability Company) and AG (Aktiengesellschaft, or Joint Stock Company), respectively, provide for limited liability of shareholders.
1. Transformation of a state-owned enterprise

The Ministry of Ownership Transformation may transform a state-owned enterprise into a company either upon the request of the enterprise's Managing Director and Employee Council, or upon the request of the Founding Organ. In either case, according to article 5, the request is made following an opinion of the General Assembly of Employees. The transformation is linked with certain privileges for the employees, including preferential shares. According to article 24 of the Act, employees of a previously state-owned enterprise that is transformed into a company have the right to purchase, on preferential terms, up to twenty percent of their company from the State Treasury. These employees may acquire additional shares on general availability terms. Shares sold to employees on these preferential terms are sold at a fifty-percent discount from the price at which they are generally offered to Polish natural persons on the first day of the offer. Moreover, the price may not be changed during the year after such shares are first offered.

The potential increase in the rights of employees as owners of the company is linked to a real restriction of their competence as employees. According to article 17 of the Act, the company's employees shall elect one-third of the company's Supervisory Council. Provisions of the company's charter that regulate the election of the members of the Supervisory Council may not be abrogated or modified as long as more than fifty percent of the company's shares are owned by the State Treasury, unless consent is given by a majority of those members of the Supervisory Council who have previously been elected by the employees.

2. Liquidation of an enterprise

The second method of privatizing a state-owned enterprise is liquidation. The Founding Organ, with the consent of the Minister of Ownership Transformation, may liquidate a state-owned enterprise for the purpose of 1) selling "all or an organized part" of the assets of such an enterprise; 2) contributing "all or an organized part" of the assets of such an enterprise to

34. The Managing Director and Employee Council is an organ of state administration that established the company and is usually run by a branch minister.
a company; or 3) leasing for limited periods, for consideration, "all or an organized part" of the assets of such an enterprise to a third party. The scope of decisive authority of the Employee Council is restricted in this case. The Employee Council may request liquidation, but if the decision to liquidate the enterprise was made by the Founding Organ upon its own initiative, the Employee Council may challenge that decision in accordance with the Law on State Enterprises.

Because of the relationship between individualism and communitarianism, the process of transformation cannot be evaluated unequivocally. The privatization of state enterprises is evidence of a general trend to restore an appropriate status to the individual in the political and economic sphere. However, such attempts to elevate the individual's status often collide with the restrictions on individual rights of participation and the realization of interests in the sphere of worker participation in management. In other words, the values of the political transformation can collide with the values and effects of the economic transformation into a market economy. This creates an area of conflict that is especially dangerous in situations where the relatively large professional groups cannot see a reasonable benefit accruing from the transformation. An example of a lost benefit is state-guaranteed employment.

C. The Third Case: Professional Self-Management

In Poland a tendency exists to create, by parliamentary statutory regulation, self-managing associations of those professions for which ethical principles have an important meaning. In 1982, barrister self-management was confirmed by a new regulation. Since 1989, the following professionals have been granted a professional self-management status: medical doctors, veterinary surgeons, public notaries, stock-brokers, nurses and midwives, and pharmacists.

37. Ustawa z dnia 21 grudnia 1990 o zawodzie lekarza weterynarii i izbach lekarsko-weterynaryjnych, Dziennik Ustaw, No. 8, at 27.
40. Ustawa z dnia 19 kwietnia 1991 o samorządzie pielęgniarek i położnych,
1. The self-managing association is a public law corporation created to perform the tasks and functions of the "public administration" provided by the law.

The tasks and functions of self-management, granted by the Constitution or by laws (the so-called "specific" functions and tasks of the self-management), are excluded from the scope of activities of other public organs and institutions. These tasks and functions are recognized by the state as important state functions but are granted to the self-managing association and have the status of "public tasks and functions."

Membership in the appropriate self-managing association is a precondition for practicing a profession. In the various legislation, compulsory membership in the self-management group is expressed in different ways; nevertheless, compulsory membership for the professional is one of the most significant features of this law. The primary goal of self-management is to recognize the professional, social, and economic interests of certain professions. The law specifies the main duties of self-management as follows: 1) caring for and supervising the proper and scrupulous exercise of responsibility within the profession; 2) preserving professional dignity and good image within the profession; 3) creating and spreading ethical principles within the profession; 4) articulating the standards and qualifications for the profession, as well as the requirements for improvement within the profession; 5) representing, protecting, and integrating the profession; 6) presenting opinions concerning the tasks and functions of the professional self-management; and 7) cooperating with scientific units and universities in Poland and abroad.

These duties of self-management shall be contained in a statement of the right to be a professional. The statement should include such things as the profession’s right to control its membership, to pass judgment in cases of dissension and inability to perform in the profession, to negotiate general work and salary conditions, to give opinions concerning drafts of the normative acts regulating the profession, to present opinions concerning matters required by law, and to defend individuals...

DZIENNIK USTAW, No. 41, at 178.
and the collective rights of the members of the profession.

2. The law guarantees the independence of the professional self-management group and its subordination only to the law

Self-management groups have a number of possibilities in regulating their own structure and may use numerous principles of organization and procedure in so doing. Regulation of each association is the responsibility of its directors. For example, the organs of the self-management group may adopt certain norms regarding principles of professional ethics, regulate the activities of different branches, or regulate the professional tribunals which may decide on the right to be admitted into the profession.

Tasks and functions of the self-management groups are carried out in a way that requires respect for the law. The lawmaking function of a self-management group is one of the more important elements in the concept of self-management and denotes the group's independence. 42

Additionally, state organizations shall exercise supervisory competencies which have a juridical character. Members of certain state associations are empowered to appeal, before the Supreme Court, unlawful decisions of the self-management group's officers. All administrative procedures, including appeal to an administrative court, shall be made available to members of the association in cases where the association has suspended a member's right to practice the profession.

3. The Medical Ethical Code demonstrates a “clinical” case of misunderstanding of the principal rules of the contemporary law

On December 13, 1991, the Country Assembly of Physicians (CAP), the highest organ of the self-management group of physicians, adopted a resolution entitled “The Medical Ethical Code” (MEC). Some of the provisions of the MEC were received with substantial reservations by members of the public, significant groups of physicians, and organizations within the field of civil rights protection. The Polish Ombudsman pointed out an inconsistency between certain provisions of the MEC and provi-

42. R. Hendler, Das Prinzip der Selbstverwaltung, in IV HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 1150 (Isensee & Kirchof eds., 1990).
sions of other binding statutes; he then lodged a motion to the Constitutional Tribunal, asking it to examine the constitutionality of these provisions. The Ombudsman identified three inconsistencies between the MEC and the statutes.

First, article 37 of the MEC provides that "medical activities which are combined with the risk of the loss of life of the fetus are allowed only to save the life and health of the mother or if a pregnancy is the result of a crime." But article 1, paragraph 1 of the Abortion Law of April 27, 1956, provides that an abortion can take place if 1) medical advice or a difficult social life condition necessitates an abortion, or 2) there is a suspicion that the pregnancy is the result of a crime. The MEC restricted the term "medical advice" used in the Abortion Law to a situation where an abortion is necessary "to save the life and health of the mother," and precluded an abortion in "difficult social life conditions."

Second, article 77 of the MEC prohibits a physician from "participating in the act of taking one's life." But, according to article 11(2) of the Punishment Execution Code, the presence of a physician is compulsory at all capital executions. Of course, the physician assisting in the execution of a prisoner found guilty of a capital offense does not participate directly; nevertheless, he or she does participate. Although no one has been executed since 1989, and although the new Polish Constitution is expected to abolish capital punishment, the inconsistency between the provisions of the MEC and the Punishment Execution Code should not be allowed to persist.

Finally, the Ombudsman identified an inconsistency between the MEC provisions concerning the physicians' professional privilege of confidentiality and the provisions of the Polish Penal Code. According to article 25 of the MEC, "exemption of the physician from [professional confidentiality] is allowed, if the patient should agree to [the disclosure] or if the observation of such secrecy would, to an important degree, threaten the health or the life of the patient or other persons. A physician should not observe medical secrecy against his conscience." Article 24 of the MEC states, "[T]he death of a sick person does not exempt [the physician] from the duty of preserving ... medical secrecy. Nevertheless, the physician has a right, according to his own conscience, to ... [disclose any]"

43. The motion lodged by the Ombudsman has not yet been examined by the Constitutional Tribunal.
violation of human rights.” Further, article 28 of the MEC states that “transmission of the results of medical examination made [in] accordance [with an] order of a legally competent state organ is not a violation of medical secrecy.”

On the other hand, according to the Physicians Profession Law of October 28, 1950, the physician is exempt in four cases from the duty to preserve medical secrecy: 1) if he or she, according to the specific laws, is obliged to inform the state organs about a certain circumstance; 2) if the patient, or his or her legal representative, will allow the physician to waive medical secrecy; 3) if the observation of the medical secrecy could cause a real threat to the patient or the environment; or 4) if the physician is obliged to inform a certain state organ or institution about the result of the medical examination because the examination was performed under an order of such a body. Despite these exemptions from secrecy, the Polish Penal Code provides that a physician’s violation of medical secrecy is punishable by fine.44

Moreover, the MEC allows a wider scope than the Penal Code for “scientific research and medical experiments.” The MEC does not distinguish between therapeutic experiments and those conducted to collect new scientific information. Unlike the Penal Code, the MEC does not require, for example, a physician to obtain the patient’s consent or to ensure the legality of an experiment.

In these situations, conflict exists between a physician’s proper behavior under statutory law (like the abortion law or the Penal Code) and under the MEC provisions. As a consequence, a physician’s legally permissible behavior can be punished by professional sanction according to the MEC.45

44. POL. PENAL CODE art. 264. The provisions of the Penal Code only relate to physicians who are working in a public health service unit and who are linked with that unit by a professional relationship.

45. For example, if a physician performs an abortion in a case allowed by the abortion law, but forbidden by the MEC (deformation of the fetus, for example), he or she can be professionally sanctioned by the officers of the self-management association. This sanction might even include a ban on future practice in the profession. In many cases after May 3, 1992 (the day the MEC provisions became binding), physicians in public hospitals refused to perform abortions because they feared sanctions from the MEC despite the “medical advice” provisions. The Ombudsman asked the public attorney’s office to take appropriate measures in such cases.

As a further example, a physician exempted by a court of law from preserving medical confidentiality can be the subject of a professional responsibility inquiry if a disclosure of the secrecy was not linked to a “real threat to the life or health of
Accordingly, the first question raised by the Polish Ombudsman's motion to the Constitutional Tribunal was whether the constitutional controls on the normative acts adopted by self-management organizations apply under the MEC. According to the Physician Chamber Law, the decisions taken by the District and Country Chamber of Physicians (but not the decisions of the Country Assembly—the highest organ of the self-management group) are controlled by the MEC.

The second question arising from the motion focused on the Constitutional Tribunal Act of 1985. The Act specifies that the Constitutional Tribunal determines the conformity of all statutory laws with the Constitution. In making this determination, the Tribunal compares the statutes and decrees confirmed by the Parliament (before their signature by the President) with the Constitution and other normative acts creating legal norms that are issued by the President, the central administrative ministers and other central state organs. Because the Constitutional Tribunal may decide the constitutionality of a normative act, the Tribunal controls the substance of the act, an association's competency to issue the act, and the procedures by which the act is passed. The decision of the Constitutional Tribunal can refer to either the entire act or any portion thereof.

The Ombudsman recognized that the MEC is not a normative act as defined by the Constitutional Tribunal Act. Nevertheless, he stressed that the professional self-management association should be subject to the same minimum rules of legality as the acts of the state organs because it is a legal structure created as part of the state administration and its lawmaking acts. The standards issued by the professional association are its normative acts, and the acts of the application of

the patient or other persons" or "a violation of human rights." An analogous conflict can occur in a situation provided by article 254 of the Penal Code, which requires full disclosure of information relating to a crime. The MEC stipulates, however, that the physician is obliged to protect the patient's right to medical secrecy if the physician received information while exercising the duties of her profession. The physician is faced with a dilemma: either be punished under the Penal Code's civil disobedience provision for failure to make the disclosure or be punished by the association of professional self-management for making the disclosure. In any case, she will be responsible for her behavior under either the Penal Code or the MEC.

As a final example, a physician may experience conflict in performing a medical experiment on a child or mentally ill person. Such a procedure is forbidden by the Penal Code, but allowed by the MEC.
this law are similar to administrative acts. If the association's administrative functions involve a function of state administration, the function must be subject to the same principles and standards of the lawmaking process as state agencies. According to the Ombudsman, "The Constitution of the Republic of Poland does not state sufficient ground[s] to create... an exemption of the constitutionality of the lawmaking process [for] the organs of professional self-management, if it is [acting in a] function of the state administration."  

The Ombudsman also states that if the MEC is a normative act directly governing not only physicians' behavior, but also the legal status of the group's members (and their rights and liberties as provided in the statutes), then as a normative act it must be subjected to the rules of legal structure as well as lawmaking procedure. The lawmaking processes of these self-management organizations must respect the principle that any regulation of rights and liberties can be exercised only by a statute adopted by the Parliament. Further, such regulation must respect and be consistent with the valid system of law.

V. CONCLUSIONS

The novel problems concerning individualism and communitarianism in the transformed societies of Eastern Europe resulted in published guidelines of limited usefulness. In a transforming society, the primary reason for this limited usefulness seems to be the lack of many aspects of individualism and communitarianism characteristic of stable democratic societies. This illustrates the gap between emerging democracies and traditional democracies, as well as the difficulty of transforming post-communist societies and their legal systems.

An analysis of the problems linked with individualism and communitarianism should respect the different "starting points" in post-communist countries and countries with a democratic tradition. Only the structures and mechanisms of democracy contain premises for the treatment of individualism and communitarianism as necessary, natural, and equally legitimate phenomena, linked with a set of values and interests specific to each. These values and interests became the material and procedural provisions used to create a structure of ag-

gregation and articulation of these values and interests in the democratic state. The structures include a rational procedure for solving the natural and never-ending conflicts between individualism and communitarianism. This is why questions of individualism and communitarianism are linked to the system of democracy, especially to the system of the democratic state under the rule of law. The political and lawmaking processes in a democracy exclude the predominance of either individualism or communitarianism.

The relationship between individualism and communitarianism illustrates a permanent tension that is characterized by constant attempts to find a reasonable balance. In this balancing process, it is first necessary to find a point of acceptance of legitimate values and interests of individualism and communitarianism. This is a starting point for rationalization and compromise of values and interests.

For Poland and the other Eastern European countries, the most characteristic feature in 1992 seems to be a total disorganization of society. This disorganization is the result of a lack of clear and valid rules and principles: the rules and principles of the “new order” became an element of the system of the “old order.” In the political sphere, one observes a “pendulum effect”: an answer for the current questions of public life is to be found in whatever is directly contrary to the existing system of values and interests. If the model of a socialist society is dominated in the totalitarian state to begin with, the reaction to this past is the creation of necessary conditions for unlimited individualism (especially in the economic sphere of activity) without sufficient recognition of the values of public interest.

If the public interest was previously understood as the autonomous interest of a bureaucracy, the restoration of the value of individual interests has to recognize the mutual interdependence of individual and public interests as two legitimate values in society. A society in a period of basic transformation from one form of organization into another does not have much chance for a positive transformation without the urgent and precise “discovery” and acceptance of a reasonable balance between the values of individualism and communitarianism. The social transformation, in which a legal system is one of the

important and inevitable elements, has a chance to be positive if it does not succumb to the real danger of becoming "a transformation persistently temporary."

The organization of a society based on the principles of a democratic state of rule under the law means, among other things, the creation of a system that guarantees a certain level of political and civil rights to individuals and an optimum realization of the separation of powers principles, both horizontal and vertical, in the state structure. The vertical separation of power is decisive for the individual and his status in the local or professional community. Vertical separation of power, with its necessary results in the spheres of local government and professional organizations, is linked with being a subsidiary of state power. But the "subsidiary" notion is not frequently used in theoretical and political discussion in Poland.

The process of fundamental change took place in two stages. The first stage involved the values of democracy, human rights, and freedom. This conflict between society (or some groups of the society) and the state was a conflict concerning the existence of a political system and a conflict on the level of the state itself. The second stage, taking place now, is a conflict of different interests. The shifting of the sphere of social activity from the level of values to the level of interests is causing the conflicts of interests to shift to the local level. The existing tension between the individual and the state, long viewed as particularly characteristic of totalitarian states, is now shifting to the lower level of society: the tension is now between the individual and the local government or specific professional self-governmental organization. The reduction of the sphere of relations between the individual and the state was caused by the creation of real freedom in which the behavior of an individual no longer depends on a state authority's decision. For example, a decision concerning a passport is now issued once in ten years, and not, as before, each time a citizen wishes to cross a border. The foundation of an association is no longer dependent on the permission of an administrative authority; it merely requires notification of the court register.

In response to this change, the state has progressively lost its role and function as a "party" to conflicts and has become, through the use of proper organs and procedures, an arbiter in the conflicts between individuals and groups. This trend has a significant effect on the function of certain state organs. In the past, the most important role in the politics of the state was
played by the administrative organs. A state now limits its functions to control, by the courts of law, of the legality of activities of administrative authorities, individuals, or groups. Nevertheless, the state still continues in its role as a "creator" of conflicts, not only by legislation, but often in its almost unintentional process of applying the law.

Paradoxically, although the state has withdrawn from the economic sphere as an owner (first due to the privatization of the economy, but also as a regulator of detailed rules of economic activity), the process of privatization started with "more state" in the creation of a new ministry (the Ministry of Privatization). The task of this ministry is to liquidate a certain sphere of state activity. In another case, a newly created representative of government, a quasi-minister, is responsible for the preparation of local government reform.

The state is not excluded from the phenomena of public life because its constitutional organs are obligated to protect the values of both individualism and communitarianism. In the relationship between the state and individual or social groups, one of the more challenging problems has been to create an effective mechanism for the protection of individual rights. But, the common denominator of the three cases presented above seems to be the relatively weak status of the individual versus an organized structure which expresses a certain element of communitarianism. A citizen is often subordinated to the local community and has a very limited possibility to exercise local power or to exert influence on the local political process.

Paradoxically, the local community has a greater right to defend its status than does the individual. A worker in a state enterprise, who yesterday decided the most important questions regarding the enterprise's existence and functioning, now sees that his right to participate in decisions has been limited and that communication between himself and the enterprise has become a "one-way street"—for example, an enterprise informs a worker about his dismissal as a result of bankruptcy. In the third case, a professional group of physicians adopted a resolution which concerns physicians and patients. Under this resolution, patients whose fundamental rights and liberties guaranteed by law have been violated cannot efficiently protect their rights.

The "pendulum effect" also means that interest groups have an eagerness to create binding norms in the professional structures. These norms, however, are something more
characteristic of a totalitarian state than of a democratic society. Observing the process of vertical separation of power, it is easy to find at least one aspect of the stamp of imagination and behavior that originated in the totalitarian state reflected in those of today. One is the prevailing attitude, as the Medical Ethical Code illustrates, toward the law in general, and toward the rights and freedoms of individuals in particular. This kind of legal nihilism seems to echo the old slogan “power is vested in the working people of the towns and villages.” This slogan was used to legitimize the political power of the communists.

Today, “power” is vested in the Physician’s Chamber, which regulates basic questions concerning human rights with similar unconcern. It is legitimate to express the following paradoxical observation: An individual has many reasons to stop being afraid of a totalitarian state, but also has many reasons to fear the totalitarian attitude of many newly organized professional groups and associations.

From the point of view of the relationship between individualism and communitarianism, the process of transformation cannot be evaluated unequivocally. A general trend to restore an appropriate status to the individual in the political and economic sphere collides—as an effect of the privatization of state enterprises—with the restriction of individual rights and realization of individual interests in the sphere of the worker participation in management. In other words, the values of the political transformation can collide with the values and effects of the economic transformation into a market economy. This collision is especially dangerous in areas where large professional groups cannot see a reasonable compensation for that which they are losing in the transformation. All elements of the political, social, and economic process prove that the transformation has become irreversible. Nevertheless, the risks characteristic of all modern societies are dangerous and potentially explosive for a society in transformation.48

The first step in the creation of a civil society is complete. The basic amendments of the Polish Constitution in 1989 and

48. Marody, supra note 1, at 248. A risk of a crisis to the system exists because of delayed resolution of increasing conflicts, risk of illegitimacy in the face of a public desire for justice and equity in the social order, and a risk of motivational decline caused by the change of a social-cultural system in which the former attitudes and behavior of the members of a society become dysfunctional to the demands created by the new system.
1990 made possible the spontaneous creation of a network of institutions, groups, and organizations in both spheres of public life—political and economic. Thus, Dahrendorf’s postulate of an “anchorage for the constitution of liberty, including its economic ingredients” is basically fulfilled. However, this is only the first step. It is impossible to divide into specific stages the development of a living society in the process of transformation. It is much easier to describe institutional, social, economic, and psychological preconditions that must be fulfilled to bring about basic changes in the development of a society.

The reconstruction of state and society and the redefinition of the status of individuals and of their role and functions in different communities (Gemeinschaften) take place in the specific circumstances of a rupturing process with the “old regime” (characteristic of the revolutionary process) and the creation of a “new regime.” Those two regimes, founded on substantially different philosophical, moral, and political ideas, exist in parallel: parts of the old legal system still “cohabit” with the new one. The “normative mixture” embodied in the old, basically amended Constitution (not only in Poland, but also in Czechoslovakia and Hungary) permeates the whole legal system and creates an obstacle to the process of an optimum transformation. This mixture, necessary and inevitable during the transition period, is linked with the risk of an accumulation of the negative aspects of the old and new structures, absent any positive effects caused by the existence of new regulations and structures. The cumulative effect of negative aspects may outweigh the positive effect of the changes.

The transformation of society into a new political, legal, and economic order takes place between the Scylla of individualism and the Charybdis of communitarianism. The way is narrow and the temptation of the Sirens to find and adopt easy, fast, and valid “once and for all” solutions is real. The opportunity to incorporate to good use the values of individualism and communitarianism seems to be one of the fundamental problems of the governmental transformation of post-communist countries and societies. Thus, it is not surprising that responsible politicians recall the Biblical example of Moses’ forty-year pilgrimage from Egyptian slavery to the free, promised land. A free civil society cannot be built with a slavery consciousness.

49. DAHRENDORF, supra note 10, at 103.