the state: in so doing, it greatly reinforced the inclusive power of the state and it contributed substantially both to the internal structuring of the state and to the consolidation of the state as the primary bearer of political authority. Of particular significance in this was the fact that the court adjudicated in contests over competence between the central government and the regions (Arts. 161–162), and it did much to weaken the traditional potentials for extreme political conflagration that resided in region/centre antagonisms.

Overall, the emergence of a new constitutional reality in Spain after 1975 brought substantial structural advantages for the state order, and, in using a rights apparatus to split many activities from the state, it facilitated a significant simplification and inclusionary intensification of state power. The societalization of the diffuse regulatory functions previously ascribed to the state, for instance, meant that the state, although still bound to certain corporate functions, was less extensively compelled to incorporate the conflictual dimensions of society, and it could relieve itself at once of the programmatic obligations, the ideological requirements and the attendant conflicts involved in extensive societal planning. Primarily, this had the result that the state was not expected to generate absolutely monopolizing ideological patterns to support all its political acts, and the ideological pluralization of the political landscape established through the constitutional transition meant that societal conflicts could be articulated in a number of different procedures and registers, which did not invariably necessitate direct or centric conflict over state power. Furthermore, crucially, the fact that the reforms also severed the direct link between the state executive and criminal law meant that contested legal cases were referred to separate courts, the law was less widely subject to politicization, and the resources of legitimacy possessed by the state were not incessantly implicated in everyday judicial findings. Additionally, the fact that the new constitution sanctioned independent party-political activity and recognized a number of different parties as protected under law had similar consequences. This meant that the state acquired a legal structure that enabled it increasingly to rotate power and to ensure that its power was distinct from the persons and milieux in which it was temporarily invested. In turn, this had the consequence that the state was not required to condense all its legitimacy into solitary manifestos or highly exclusive political programmes, that it obtained flexibility and adaptivity in responding to new contents or themes in society, and that it assumed new capacities for proposing and legitimizing points of policy. The

principle of rights-based *societal pluralism* so fundamental to the laws of the post-1975 democratic transition in Spain thus acted, like more formal elements of the new constitutional system, dramatically to intensify the usable power of the state. The acceptance of society as an aggregate of private exchanges, delineated by rights, outside the state effectively decreased the pluralism and the quasi-privatistic use of political resources within the state itself, and it acted as a precondition for the adaptive and effective use, and indeed the heightened positive production, of political power.[24]

The third wave of transition: constitutional transformation in the 1990s

In Russia and other countries in eastern and central Europe in the late 1980s and 1990s a related set of adaptive processes of state building and political abstraction through constitutional formation was observable. In this context, the process of constitutional transition again reflected functional exigencies within different states and it adjusted the political power of states to a new level of articulation. Indeed, although the constitutions of the east European communist states founded in the aftermath of 1945 were in many ways created in antithesis to fascist governance, the fact that they were marked by weak systems of political rotation, by the absence of an independent parliamentary opposition and by a lack of judicial autonomy meant that these one-party states also began to degenerate into a condition of highly interlocked political privatism. As in other settings, they eventually used constitutional remedies to extricate their power from this condition.

Poland

When analysing the constitutional dimensions of the third wave of democratic transition, it is helpful to focus first on Poland, which in many respects both initiated the longer period of reform and established a legal template that legitimized the subsequent reform process in different countries. The Polish state began a long process of reaction against its post-1945 constitutional structure in the second half of the 1970s. The Polish constitution of 1952 (approved personally by Stalin) reflected the Leninist constitutional doctrine that favoured a highly

[24] On the commitment to pluralism in Spain during the transition see Cotarelo (1992: 169–70).

integrated executive/legislative structure, and in which the parliament (Sejm), dominated by one party, monopolized all legislative and executive powers and subordinated constitutional laws to statutory legislative acts. In this constitution, as mentioned above, a catalogue of rights, providing for partial political inclusion of economic activity, was appended as a body of normative rules or *programmatic aspirations* to be objectively applied by the state. As in other Soviet-influenced nations, however, these rights were not placed externally to the state, and they were not applied by an independent judiciary: Article 52 of the constitution stated that judges were independent, yet Article 48 maintained that courts were 'custodians of the social and political system' of the People's Republic of Poland. By the later 1970s, however, the high structural density and inclusionary social centricity of the Polish state made it vulnerable to very diverse social protest. Actors in the executive began progressively to respond to increasingly intense sociopolitical unrest and, especially, to independent trade-union activity by implementing constitutional reforms that gradually transformed and disarticulated the more densely integrated elements of the political system. In particular, primary actors in the state reacted to the social pressures of the late 1970s by accepting (tentatively and in limited fashion) principles of judicial independence and so altering the factual constitution of the state both to incorporate an acknowledgement of human rights as institutes external to the legislature and to endorse a partial separation of powers. This was influenced by the (at least notional) acceptance of the Helsinki Accords throughout eastern Europe, and by the resultant recognition of formally normative standards in human-rights legislation (Procházka 2002: 22).

The reform of the Polish constitution began with measures in the 1970s that assigned to the Council of State responsibility to oversee the constitutionality of new laws. This was followed in 1980 by laws establishing a High Administrative Court, which was designed normatively to review administrative regulations. In 1982, the 1952 Constitution was modified to establish a separate Constitutional Tribunal, which was authorized to ensure the constitutional compatibility of statutes and other normative acts issued by parliament and other state organs. This tribunal was not originally conceived as a horizontal check on the legislature. However, after protracted dispute, the position of the tribunal was established under legislation of 1985, and it began to adjudicate cases in 1986. After 1987 it was supplemented by the powers of an Ombudsman for Citizens' Rights, and in 1989 it began to assert itself

more fully as a body empowered concretely to review statutes in the light of provisions for rights, and to restrict both legislative and executive powers: it struck down seven statutes in that year, and by then it had struck down almost all substatutory acts that it reviewed.[25] Finally in 1989, the 1952 Constitution was again amended, and the scope of the review powers held by the court was significantly expanded.

In Poland the separation of judicial power from combined legislative and executive power by means of the Constitutional Tribunal was, in its functional dimensions, a reaction to the difficulties encountered by the pre-1989 state in its attempts to police a large mass of social exchanges. It was one aspect of a process in which the state utilized legal-constitutional reform to reduce its conflictual intensity, to increase its options for policymaking and more effectively to control its societal position and its intersection with other social spheres. In the first instance, the tribunal, increasingly patterned on the Austro-German model of the Constitutional Court, acted as a mechanism that allowed the state to deflect and defuse deeply controversial questions. As in similar transitional settings, rights-based judicial review of statutes enabled the state to place objects of legal inclusion outside the state, and to displace and depoliticize many conflicts previously requiring resolution through highly condensed use of state power. Generally, the tribunal began to operate as a filter through which a unified state could transfer highly charged political conflicts into a legal dimension and utilize the law to reduce the controversy attached both to these conflicts and to its own reactions to them. In addition, however, the fact that actors in the state began to explain their actions through reference to stable juridical norms meant that the state could gradually use the law to release itself from its dense administrative integrity with a single political party, and that the law began to articulate normatively constructed boundaries to determine the state's integrity and consistency. In the Polish setting, and in eastern Europe more generally, the emergence of a tribunal with powers of constitutional review brought about a deep functional division within the state, in which the state could gradually account for itself as normatively distinct from single persons or party officials, and in which it could imagine itself, in distinct normative categories of public law, as an independent positive bearer of power. As a result, these changes in the judicial provisions of the Polish constitution ultimately created an

[25] For analysis see Brzezinski and Garlicki (1995: 22); Schwartz (1998: 103; 2000: 56). Generally, see Brzezinski (2000).

environment in which, in 1989, a fundamental recasting of the constitution could be undertaken. In mid 1989 the existing electoral system, strongly favouring one party, was abandoned. In 1992 a new provisional constitutional package was established for Poland: this, although lacking a distinctive catalogue of rights,[26] endorsed full provisions for conventional rights and for constitutional review of statutes, and it accepted a fully pluralistic party landscape (Arts. 18, 23). This was ultimately replaced by the full Polish constitution of 1997, which preserved extensive powers of judicial review (Arts. 79, 122).

In the constitutional interim between 1992 and 1997, the Polish Constitutional Tribunal assumed extensive functions in preserving and securing the transitional apparatus of state, and it played a key role in bringing stability to the state despite the incomplete and at times ambiguous fabric of the legal/constitutional order prior to the final constitution and the catalogue of rights introduced in 1997.[27] In this period, the Constitutional Tribunal interpreted the 1989 constitutional amendments and then the 1992 provisional constitution as instituting a factual commitment to the preservation of a legal state (*Rechtsstaat*), and it construed itself as entitled to apply this presumption to check and at times overrule parliamentary statutes. In this respect, the court served during the transition to insulate the legislative process, to generate normatively stabilizing filters to secure the actions of legislators in an uncertain legal terrain, at once to project and to consolidate continuous guidelines for a transitional constitutional order, and to construct a consistent legal identity for the state, which separated it from its particular acts and positively authorized its legislative rulings.[28] Indeed, in a societal environment marked by relatively weak legislative-democratic legitimacy, the Constitutional Tribunal acted as a legitimating pillar for the state, in reference to which the state could, both functionally and symbolically, increase and incubate its autonomy. The institution of a Constitutional Tribunal provided a vital mechanism for initiating and presiding over longer-term processes of reform, and the devolution of key functions of normative control to the Constitutional Tribunal, even before a fully sanctioned constitution was in place, enabled the Polish state to remove existing legislation, to legislate with externally protected

[26] Lech Walesa in fact tried to introduce a Bill of Rights in 1992.

[27] On the weak constitutional position of rights during the interim in Poland, see Osiatynski (1994: 121, 114, 150).

[28] For commentary see Procházka (2002: 207, 209–10); Weber (2008: 275).

legitimacy and to increase the probability of acceptance for new legislation. In this process of transition, therefore, the separation of the judicial apparatus from the executive and the creation of a strong Constitutional Tribunal allowed the state flexibly to isolate its power from highly entrenched interests and personal groups, it enabled the state to produce and preserve a sphere of relative autonomy and positive legitimacy to support its everyday decisions, and it distinctively augmented the *effective power* of the state.

The Polish Constitutional Tribunal was not the first constitutional court to be founded in an east European state. Yugoslavia established constitutional courts in 1963. Czechoslovakia also pursued a short-lived experiment with a constitutional court in 1968, although the court never became fully operative.[29] In the 1980s, the move towards judicial review became more widespread. In 1983 a Constitutional Law Council, with rather more limited powers than in Poland, was established in Hungary. However, the Polish tribunal assumed exemplary significance at a crucial transitional juncture, and it impacted substantially on the widening reformist policies of other east European states, which also began to relinquish the highly integrated constitutions obtained under post-1945 communist regimes. By 1989, for instance, in Hungary, the constitution was amended (or effectively refounded) so that it adopted a Constitutional Court with extremely far-reaching powers of review. Soon the powers of the Hungarian Constitutional Court outreached those of other transitional states: the Constitutional Court defined itself specifically as a guardian of the agreements supporting the peaceful transition in Hungary,[30] it committed itself to the powerful enforcement, in concrete individual cases, of principles of legal statehood, and it struck down a substantial number of the laws that came before it. As in Poland, the Hungarian Constitutional Court was able to oversee the process of transition, solidly to entrench normative/democratic principles, to absorb contest over most controversial aspects of new rights-based legislation, and – where required – to suspend existing laws through reference to core invariable rights (Sólyom 1994: 223, 228). In Bulgaria, similarly, the 1991 Constitution established an important Constitutional Court enjoying full judicial independence. The Czechoslovakian Republic established a Constitutional Court in 1992. Even Latvia, which reverted in part to its constitution of 1922, progressively

[29] On the failure of the Czechoslovakian court see Cutler and Schwartz (1991: 519–20); Hartwig (1992: 451, 464).

[30] Scheppele has described Hungary in transition as a 'courtocracy' (2003: 222).

amended the original constitution to create provisions for constitutional review. Throughout the east European transition, the institution of a constitutional court thus played a vital normative and functional role in the process of democratic consolidation (Brunner 1993: 883, 865).

Notable in the third wave of constitutional transition, further, was the importance of international human-rights norms in cases brought before the constitutional courts. In this respect, first, the transitions were driven, in part, by an increasing recognition of transnationally binding human-rights agreements, and standards concerning human rights first promoted in the Helsinki Accords formed a repository in which demands for political de-concentration could be expressed and enacted. Indeed, the increasing consolidation after the 1970s of an international legal domain, which placed emphasis both on singular/personal rights and rights of judicial integrity, acted as a normative matrix to which reformists could refer in order to obtain legitimacy for reforms, to separate the interlocked elements of party-led regimes and, above all, to prise apart judicial and executive functions of statehood and generally to separate the apparatus of state power from its intersection with private actors. During the transitions of the 1980s and early 1990s, then, most new states brought their constitutions into line with international treaties in respect of human rights, and they were keen to obtain legitimacy from the growing international legal order by signing the European Convention on Human Rights. None of this, naturally, is to suggest that each of the transitional post-communist regimes spontaneously implemented a full apparatus of guaranteed human rights. In many transitional states, certain basic freedoms, such as freedom of speech, assembly and conscience, were subject to restrictions, and in more nationally conflictual societies, such as Romania and Bulgaria, many particular minority rights were exposed to constraint (Elster 1991: 465–7). Nonetheless, these societies shared a broad tendency to borrow strict norms from international conventions in respect of human rights. Through this, standard provisions over rights acted clearly to simplify processes of political reorientation and to enunciate guidelines and precedents for rescinding old, and implementing new, acts of legislation. This allowed emergent democratic political systems to unburden themselves of much legislative/constitutional controversy, and, in settings where existing statutes were unreliable and legislative-democratic reserves of legitimacy were fragile, to draw legitimacy and heightened autonomy from acceded general norms over rights. International legal standards exercised a potent unifying function in the consolidation of transitional states

after 1989,[31] and international provisions over rights, normally internalized and applied by constitutional courts, once again acted to limit the number of social objects that states internalized, to intercept social conflicts before they entered the state apparatus or required legislative resolution, and to augment the reserves of publicly constructed, usable power contained within the state. Indeed, the central position of international catalogues of rights in post-1989 constitutions was vital for their ability to separate many aspects of political exchange from the state, and, as in Spain in the 1970s, the legal salience of rights even allowed a rights-based 'civil society' to emerge, in which political activities, freed from the concentration around the state, could be performed outside the state and at a lower degree of political intensity.[32] The civil-political pluralism arising through the implementation of normative rights structures was thus also one dimension in a process in which state power was concentrated at a manageable and specified level, and it eliminated excessive or internal pluralism in the state itself and was normally correlated with a rise in state autonomy.

In addition to promoting state legitimacy through courts and international legal standards, most post-1989 constitutions in eastern Europe opted to include extensive provisions for positive social and material rights, and they widely dispensed the 'maximum number of constitutional rights' in respect of socio-economic state performance (Sadurski 2002: 233). For example, the amended Hungarian Constitution of 1989–90 carried many material rights from the post-1945 constitution. The amended Czechoslovakian constitution, replaced in 1992, preserved rights of material security fo those unable to work. The Bulgarian Constitution of 1991 enshrined the right to work, the right to welfare and the right to material support (Arts. 48, 51). The Polish constitution of 1997 then placed work under state protection (Art. 24). These rights performed varied legitimating functions for emergent democratic states. In the first instance, they brought symbolic legitimacy as they committed states to recognition of partly embedded societal values and, in transitions marked by extreme economic adversity, they preserved stability by perpetuating definitions of state legitimacy in material categories. However, these rights were not uniformly enforceable and,

[31] See for example Cutler and Schwartz (1991: 534, 537); Sólyom (2003: 144).

[32] On this account, civil society is formed as a result of the political system's need for pluralism. Note my simultaneous critique of and agreement with theories that see rights as institutes protecting 'civil society' (Sunstein 1993: 919).

unlike general civil rights, they were not accorded evenly justiciable status. Most constitutions were in fact endowed with restrictive clauses to ensure that material rights could only be claimed subject to exemptions specified by law (Rapaczynski 1991: 610–11; Sadurski 2002: 235). Many such rights were phrased as general directives to governmental institutions, and they were not easily usable as a basis for litigation or action. To be sure, exceptions to this are identifiable, and some courts took pains to apply weaker positive rights, such as environmental rights, and to insist on environmental duties (Halmai 1996: 352). In general, however, even those rights that aimed to secure transitional state legitimacy by preserving a high degree of societal convergence between the state and other spheres of society served to police and limit the inclusivity of the state, and they reinforced the legitimacy of the political system through a restrictive specification of its operations.

Russia

It was in the Soviet Union under Gorbachev that, in the third wave of democratic transition, the functionally adaptive state-building elements of legal/constitutional transition were most comprehensively observable. The era of *perestroika* as a whole was a period in the Soviet Union in which both the constitution and the legal system were reformed, and this acted to reduce, or restrictively to focus, the mass of power that, owing to the one-party political monopoly established under the Soviet constitutions, had accrued around the state. Indeed, one key cause of the reforms was that the executive apparatus around the Communist Party had become overburdened by the extent and dimensions of its power, and the constitutional monopoly of coercive force granted to one set of actors under the Soviet regime conferred an excessively personalistic form on political power: this, at different levels, drained the reserves of legitimacy in the state, and it diminished the volume of *usable power* possessed by the state. The process of legal reform in the Soviet Union was thus conceived as a means for reducing private/personal control of power, for hardening the procedures for the use of state power against 'centrifugal forces' (i.e. actors in administrative bureaucracies and party hierarchies) incorporated within the political system through its dense attachment to one political party (Hausmaninger 1992: 330), and for liberating the state from the 'network of informal alliances' that had attached to it under the Soviet system (Devlin 1995: 38). In the *perestroika* era, in other words, a strategy of reform was pursued to raise the

positive autonomy and the general capacity of the state by using the law to separate it from parasitic semi-private centres of power and to clarify its limits and functional objectives.[33] Central to this was the introduction of a more ordered legal system, which was designed to suppress the structurally hypertrophic corruption in the Soviet Union, to create a barrier against the quasi-patrimonial transacting of public offices, and in so doing to heighten the operative power of the state.

The first decisive point in the *perestroika*-era constitutional reforms in the Soviet Union occurred at the end of 1988, when fifty-five of the 174 articles of the Soviet Constitution of 1977 were amended (Smith 1996: 72–3). This act of reform, effectively creating a new constitution, coincided with provisions for an elected multiparty national parliament in the Soviet Union, and it was flanked by legislation that altered the position of the Communist Party under the Soviet constitution and cemented a functional fissure between state and party. It was declared at this juncture that a stricter 'division of labour' between the party and the state was required, and that the party should assume less responsibility for providing direction in political affairs (White 1990: 33). These measures were in fact accompanied by a proposed amendment to Article 6 of the 1977 Constitution – which had defined the Communist Party as the guiding force of society – thus envisaging an end of one-party rule. This was finally enacted in 1990, in legislation that ended the party's monopoly of state power.

Alongside these most prominent events, however, the reforms in Russia were strongly focused on the legal and judicial dimensions of the political system. As early as 1986 the Communist Party of the Soviet Union passed a resolution 'On the Further Strengthening of Socialist Legality and Legal Order', which was designed to restructure the courts and protect rights of citizens. The year 1987 saw the introduction of a Law on Appeals, enabling citizens to appeal against actions of court officials. In 1988, Gorbachev committed himself at the annual party conference to the implementation of a legal revolution of the existing political apparatus, to the building of a socialist state based in the general rule of law and to the consolidation of judicial independence (Kahn 2002: 87). The year 1989 then saw the introduction of laws enabling judicial review of administrative acts, laws designed to ensure the independence of the courts and a Law on the Status of Judges, to increase

[33] On the pre-1989 Soviet Union as a weak state with restricted policy-making autonomy, see McFaul (1995: 221, 224); Easter (1996: 576).

the material independence of judges (Quigley 1990: 67). In the same year, a system for trial by jury was created for the most serious criminal cases. Moreover, the legal reform brought a crucial reduction in the scope of criminal law, so that many activities related to economic exchange and production were removed from criminal-law statutes. The political import of criminal law characteristic of totalitarian regimes was substantially reduced at this time, and the number of political or political/economic crimes was diminished.[34] In parallel, these legal changes included provisions both for the curtailment of political encroachment on judicial functions and for the establishment of a Constitutional Supervision Committee (1989–91), which was designed to promote judicial integrity and to perform constitutional review of normative acts. Members of the committee were elected in 1990, and it assumed functions analogous to those of a constitutional court. Throughout, these pieces of legislation were designed to place a legal apparatus above the everyday acts of the state and to guarantee greater accountability of state officials. At the same time, however, these processes were also intended to prise apart the conventional privatistic attachment between singular persons and political and judicial offices, and to distil the power of the Soviet state as distinct from, and positively usable against, those incumbent in office. The formation of a separate parliamentary legislature and the reform of the judiciary and the state administration were thus designed, in conjunction, to raise the autonomy of the state and, above all, to curtail the centrifugal power exercised by actors obtaining public office by private or clientelistic means, mediated through the party (see Solomon 1990: 185). In many respects, in fact, the legal reforms in the Soviet Union under Gorbachev bear comparison with functional dimensions of much earlier processes of reform, and their basic function was to reduce the privatism of the state apparatus by separating structures of office holding from personal control.[35]

Furthermore, the early move towards constitutional rule under Gorbachev involved, centrally, an expansive concession of rights of economic autonomy, and it was driven by far-reaching goals of economic reform. By 1990, a raft of legislation was introduced in respect of

[34] On these changes in criminal law see Feldbrugge (1993: 30).

[35] For a good recent study of patrimonialism and weak statehood in the Soviet Union see William Tompson (2002: 936–8). For brilliant analysis, stressing weak central control and neo-patrimonial brokering of public office as features of the Soviet system, see Anderson and Boettke (1997: 38, 43–4).