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Constitution Making, Peace Building, and National Reconciliation

The Experience of Poland

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The history of the Polish parliament dates back to the fifteenth century. Poland's first written constitution—the first constitutional instrument in Europe—was adopted on May 3, 1791, but unfortunately, it was never implemented due to the collapse of the Polish state in 1795. Nevertheless, it became a symbol of independence and progress referred to by historians as well as politicians.

It was the rebirth of a fully independent Poland after World War I that allowed the creation of a modern constitution. The so-called March Constitution, adopted on March 17, 1921, was inspired by concepts underlying the constitution of the Third French Republic. It provided for a system of government based on the preeminent position of the parliament, especially its first chamber, traditionally referred to as the Sejm. The parliamentary system failed, however, to secure proper functioning of the state machinery. A coup d'état in 1926 was followed by the so-called April Constitution, adopted on

May 23, 1935. It established the supremacy of the presidency over the other branches of government, leaving only residual powers to the parliament. World War II broke out four years later, and Poland lost its independence once again.

After World War II, effective control over the Polish territory passed to the Soviet-controlled government, which imposed a Soviet-style constitution on July 22, 1952. Theoretically, it granted quite formidable powers to the unicameral parliament (the Sejm), but in reality, the Communist Party (Polish United Workers Party) monopolized power. The party's totalitarian grip on Poland relaxed after the social unrest of 1956, but the 1952 constitution remained intact. It was significantly amended in 1976, but even then, its Soviet-oriented nature was preserved. In summer 1980, the Solidarity movement, led by Lech Walesa, started the final decline of the communist system, but another seventeen years passed before the first democratic constitution in two centuries was adopted.

***1989: Round Table Agreement
and April Amendment***

Poland's democratic constitution entered into life on October 17, 1997, but the real beginning of the end of the communist system began in 1980. The shipyard strikes in summer 1980 found their conclusion in so-called agreements signed between the workers' representatives and the government. The *Porozumienie Gdanskie* (Gdansk Agreement) is the best-known example. This agreement provided not only for social and economic changes but, at least to some extent, intervention in the very essence of the structure of government: While it confirmed the "leading role of the Communist Party," it allowed the establishment of independent trade unions. None of the agreements ever found a translation into constitutional law, but they exemplified conflict resolution through peaceful means. In effect, the opposition—centered around the Catholic Church and the Solidarity trade union—gained sixteen precious months of legal existence. Even if the imposition of martial law in December 1981 disrupted attempts at compromise and reconciliation, the idea of political dialogue had not been discredited and would be revived toward the end of the 1980s, in a completely different international and domestic setting.

With the idea of political dialogue intact, the idea of a roundtable, gathering both the quasi-illegal opposition and representatives of the official regime, found understanding and acceptance on both ends of the political spectrum in summer 1988, even though there was no sign of economic recovery in sight and strikes were sweeping the country. The economic crisis led the moderate wing within the Communist Party, led by General Wojciech Jaruzelski and General Czeslaw Kiszczak, to seek cooperation with the opposition. The parties then spent six months negotiating organizational aspects of the Round Table. These negotiations were held in secret, with the Catholic Church mediating talks involv-

ing some of the most sensitive issues. Finally, the Round Table was convened in February and early April 1989, and a compromise on most issues was reached and formulated into what became colloquially known as the Round Table Agreement.¹ The Round Table as such met only a few times; the real work was conducted in smaller committees (so-called subtables) and working groups, and the most important decisions were made by agreement of the leaders of both camps.

The April agreement provided for several important political changes. First, the existing parliament, the Sejm, would be dissolved and new partly democratic² elections would be held in June 1989. Second, the 1952 constitution would be amended to create the second chamber of parliament, the Senate, as well as a new and powerful office of the president. Because it was assumed that General Jaruzelski would hold that office, the Communist Party felt assured that it would preserve control over the executive branch. Thus, the president was given important independent state powers at the expense of parliament, which the party no longer regarded as reliable.

In implementing the agreement, the first step was for the Sejm, still in its old composition, to amend the constitution. On April 7, 1989, the so-called April Amendment transformed the structure of both political branches of government.³ While the Sejm formally adopted it, the amendment was the product of political compromises concluded at the Round Table; the role of the members of parliament was limited to voting for what was submitted to them. The amendment was designed to satisfy both sides, and for this reason, it was much easier to see it as a temporary compromise mechanism than it was to appreciate its later role in restoring democratic constitutionalism in Poland. Most people in April 1989 anticipated a long period of cohabitation between the old regime and new political forces. Only a few could

sense that the entire communist system in Eastern Europe would collapse within the next nine months.

1989–91: Transitory Parliament and Constitution Writing

The Round Table Agreement and April Amendment, as originally conceived, functioned only for a very short time. By summer 1989, it was clear that the Communist Party could no longer maintain control over the newly elected Sejm, and consequently, Tadeusz Mazowiecki, one of the Solidarity leaders, became the prime minister. Six months later, the Communist Party ceased to exist⁴ and the amended constitution began to operate in a completely new setting. Political parties used the democratic potential of the April Agreement to construct rules of parliamentary government. While Jaruzelski kept the presidency until the end of 1990, he never attempted to use his constitutional prerogatives. Thus, the April Agreement ceased to guarantee the political distribution of power, its originally intended principal function.

At the same time, it became clear that the old constitution had to be replaced with a new document.⁵ The existing constitution was adopted in 1952, at the peak of the Stalinist regime in Poland. It was drafted in language redolent with communist slogans and lacked sufficient guarantees and procedures to be judicially enforceable. While some important improvements were introduced in the 1980s—particularly the 1982 amendment providing for the establishment of a constitutional court—there was no way to adjust the old text to new conditions and no reason to keep the old constitution alive.

Already in autumn 1989, both chambers of parliament separately appointed constitutional committees and entrusted them with the task of preparing full drafts of the new constitution. Both committees were composed of members of the respective houses,

and each of the committees established several subcommittees and working groups, inviting the advice of numerous Polish and foreign experts. The idea was to adopt a new constitution on May 3, 1991, to commemorate the anniversary of Poland's first democratic constitution, voted on May 3, 1791.

But the parallel existence of two constitutional committees resulted in a political struggle. As Wiktor Osiatynski relates,

political ambitions and institutional rivalries surfaced at this point and have remained central to the entire constitution-making process . . . Initially, the Senate committee was willing to cooperate with the freely elected 35 percent of the Sejm committee, but as the relationship between the two houses gradually deteriorated, cooperation between the two committees ceased. The Sejm and the Senate eventually produced two different drafts. The versions were basically irreconcilable and no arbiter existed who could decide which draft should be submitted to a referendum. Constitutional momentum was thus dissipated even before the first transitory Parliament dissolved itself in the Fall of 1991.⁶

Nevertheless, the process of constitution writing had begun, and the drafts prepared and published by both committees delivered a starting point for further discussion. At the same time, several political parties and private persons submitted their own drafts or theses for the new constitution.⁷

Already in autumn 1989, political elites as well as most scholars realized that some changes should be introduced immediately into the existing constitution. Therefore, another method of constitution writing emerged: fragmented amendments that removed most of the obsolete provisions of the 1952 constitution and introduced new institutions and concepts into its text.⁸ Toward the end of 1989, the so-called December Amendment deleted the first two chapters of the constitution and introduced new principles of constitutional order, mainly following Western concepts of the rule of law, political pluralism, and protection of property.

This time, the constitutional amendment was meant as an instrument of change and not of compromise. This courageous attempt to rewrite the axiological foundations of the constitution proved to be successful, as it encouraged the constitutional court to look at its role in a new light and develop several new concepts and ideas. During the following years, the December Amendment—particularly its rule-of-law provision—served as a vehicle for several key judicial decisions that filled gaps in the existing constitutional texts.⁹ Another amendment adopted in March 1990 provided for a new system of local government, and within the next two years, parliament adopted three less important amendments.

All amendments were elaborated within parliament, where the Sejm political elite was the real center of decisions, but all were understood as temporary solutions to the most pressing problems. Therefore, not much attention was given to the amendments' coherence with the original text. Implementing and interpreting such a constitutional patchwork soon became a major challenge.

1991–93: Parliamentary Elections and the Small Constitution

The first stage of the political transition was completed in autumn 1991, when new parliamentary elections took place (Walesa had assumed the presidency of Poland earlier, at the end of 1990). The new parliament was elected by undoubtedly democratic rules,¹⁰ but more than twenty political parties were represented in the first chamber, and the parliament's political fragmentation did not allow too much optimism for the constitution-making process. Thus, the parallelism of constitutional preparations had been maintained: On one hand, the writing of the full constitution had continued; on the other hand, some most pressing changes had to be introduced into the old constitution for the government to function.

The most important amendment was labeled the Small Constitution: On October 17, 1992, a new set of rules concerning the legislative and executive branches was adopted, replacing most provisions of the 1989 April Amendment.¹¹ The main idea was to eliminate ambiguities in the April Amendment and to limit the powers of the president of the republic. President Walesa had presented first drafts in autumn 1991. The Council of Ministers and some political parties presented drafts later. In spring 1992, a special Sejm committee was created with the task of preparing a final draft of new rules for the separation of powers between the legislative and the executive branches. The committee's final discussions took place after the fall of Olszewski's cabinet¹² and were marked by an open clash between representatives of the president, who was not ready to allow limitations of his powers, and the parliamentary majority, centered around the Democratic Union (UD) and the Alliance of Democratic Left (SLD). In effect, a compromised version of so-called rationalized parliamentarism was adopted, but the president maintained several important portfolios, particularly the armed forces and foreign policy.¹³ Parliament, meanwhile, was too fragmented to survive the full term; in May 1993, a vote of no confidence in the Suchocka cabinet prompted Walesa to dissolve both houses. But the left won the new elections held in September, making a confrontation with Walesa unavoidable.

At the same time, the 1991 parliament continued preparations for the full constitution. Having learned that the parallel existence of two constitutional committees in the Sejm and Senate was counterproductive, parliament members agreed to establish a joint committee. On April 23, 1992, the Constitutional Law on the Procedure for Preparing and Enacting of the Constitution was adopted. The law provided for the establishment of a constitutional committee com-

posed of forty-six Sejm members and ten Senate members—10 percent of the parliament's entire composition. Representatives of the president, cabinet, and constitutional court were included in the committee, but without the right to vote. The right to submit drafts of the constitution was given to the committee itself, to the president, and to any group of at least fifty-six parliamentary members. Drafts had to be submitted within six months of the committee's inauguration. After all drafts were submitted, the Sejm would hold a general debate on the principal constitutional issues, as suggested by the committee. Then the committee would prepare the consolidated draft of the constitution and submit it for a first reading in a national assembly—that is, the Sejm and the Senate convened as one body. The assembly had a choice between rejecting the draft and directing it back to the committee to prepare a final version. Once such a version had been completed, a second reading in the national assembly would take place. At this stage, individual deputies could propose amendments to the committee's draft. Then the vote would take place. Incorporating individual amendments and enacting the constitution would require a two-thirds majority of votes and the presence of at least 50 percent of the members of the national assembly. The president could submit his amendments within sixty days; in such a case, a third reading would take place. After debate, the assembly would first vote on each of the presidential amendments (an absolute majority being sufficient to incorporate them into the final text) and then on the final version of the constitution (a two-thirds majority of votes needed and a quorum of at least 50 percent required). The last stage in the proceedings would be a referendum, to take place within four months of the final national assembly vote. The constitution would then be accepted by more than 50 percent of voters participating in the referendum. No participation minimum was required.

Professor Osiatynski—who at that time was one of the experts of the constitutional committee—indicated later that

this constitution-making procedure was the result of a heated debate and compromise between Parliament and the president. The procedure's purpose was to prevent solutions from being imposed by a temporary majority and then over-turned when a new majority emerged. The constitutional status of the 1992 Law (it could be changed only by a two-thirds majority in both houses of Parliament) was meant to guarantee the durability of rules governing the constitution-making process. Unfortunately, these rules did not prove adequate to overcoming the formidable obstacles to the creation of the new Constitution.¹⁴

The members of the constitutional committee were elected separately by both houses. The committee inaugurated its proceedings on October 30, 1992. The deadline for submitting drafts of the constitution ended on April 30, 1993. Thus, parliamentary drafting of the constitution was suspended for more than a year. Until the end of April 1993, the committee met seven times. On January 13, the committee adopted a standing order providing for the establishment of a coordinating council, composed of representatives of all parliamentary groups and acting as advisory body for the chairmen of the committee. Further, the standing order provided for six standing subcommittees on drafting, general matters, and introductory provisions; foundations of the political and socio-economic system; sources of law; the legislative and executive branches and local government; protection of law and administration of justice; and rights and duties of citizens. The committee, as well as all subcommittees, could appoint permanent experts and also invite other state agencies or nongovernmental bodies to prepare opinions and participate in the proceedings. On March 24, the committee appointed all six standing subcommittees and their chairpersons from among its members.

The constitutional committee accepted seven drafts: the so-called Senate draft of March 24, 1993, submitted by fifty-eight members of parliament and repeating most of the draft prepared by the Senate constitutional committee of the former parliament; the SLD draft of April 28, submitted by members representing the Alliance of the Democratic Left; the UD draft of April 29, submitted by members representing the Democratic Union; the Peasant Party (PSL)-Union of Labour (UP) draft of April 30, submitted mostly by members of those parties; the presidential draft of April 30; the Confederation of Independent Poland (KPN) draft of April 30, submitted by members representing the Confederation of Independent Poland; and the Center Alliance (PC) draft of April 30, submitted by members mostly representing the Center Alliance. Four further drafts were submitted by parties and organizations that did not have sufficient parliamentary representation. They could not be officially accepted by the committee and were regarded as sources of information.

In May, the committee decided first to discuss all drafts. It managed to discuss four before the president dissolved parliament on May 29, 1993.

1993–97: Drafting the New Constitution

New elections were held on September 19, 1993.¹⁵ In the Sejm, the SLD-PSL coalition gathered a clear majority. Thus, it became obvious that the speed and substance of constitutional drafting would now depend on the postcommunist wing of the parliament.

Immediately after the parliament's inauguration on October 14, 1993, both houses appointed their members of the constitutional committee. On November 9, the new committee was inaugurated, conferring the chairmanship to Aleksander Kwasniewski, who at the time was the leader of the SLD

parliamentary group and later (December 1995) became the president of Poland. On January 18, 1994, the committee adopted its new standing order, identical in most provisions to the standing order of 1993. During the same meeting, the committee appointed all six permanent subcommittees and their chairpersons.

However, because the 1992 constitutional law provided that constitutional drafts could be submitted within six months of the inauguration, no substantive discussion would start before May 9, 1994. At the same time, the new coalition agreed that the 1992 constitutional law should be amended. The political background of this decision was the realization that several center and right parties had lost elections and were not represented in parliament. Thus, new procedures were proposed to gain more legitimacy for the parliamentary decisions. The amendment was finally adopted on April 22, 1994. It allowed the possibility to submit popular drafts of the constitution, if they were signed by at least 500,000 voters; continuous validity of the drafts submitted to the former parliament; and the possibility to conduct a prerferendum on principles of the future constitution.¹⁶

Three new drafts were submitted to the constitutional committee before May 9, 1994: the presidential draft of May 6, the UD draft of May 9, and the SLD draft also of May 9. All these replaced drafts submitted in spring 1993. Four other 1993 drafts retained their validity, but the authors of the PC draft decided to withdraw it from further proceedings. In June, the committee attempted to discuss all drafts¹⁷ but could not go beyond that because of the April 22 amendment, which established a deadline of September 5 to submit popular drafts to the committee. Only one draft was submitted, signed by almost one million voters and politically sponsored by the Solidarity trade union and its leader, Marian Krzaklewski.¹⁸

In the meantime, the committee decided on the list of organizations and groups to be invited to participate permanently in its deliberations. The standing order gave the right to participate to the authors of all drafts submitted to the committee or inherited from the former term of parliament. Beyond that, it was agreed that invitations would be sent to all political parties that presented national lists in the last elections, independently of their electoral results.¹⁹ Furthermore, invitations were sent to twelve trade unions and professional organizations and to eleven churches and religious groups.²⁰ There was no separate representation of the military.²¹ The committee agreed also on a list of permanent experts: Five law professors were appointed and participated actively in all committee meetings as well as the work of subcommittees. Initially, in June 1994, the group of experts was composed of professors: Kazimierz Działocha (chairman), Osiatynski, Paweł Sarnecki, Piotr Winczorek, and Leszek Wiśniewski. In March 1996, due to the resignation of Osiatynski and the election of Działocha to the Senate, two other professors—Maria Kruk and Marian Grzybowski—joined the expert group, and Winczorek became its chair. Together with representatives of the president, the council of ministers, and the constitutional court, the participation of which was mandated by the 1992 constitutional law, this was a group of about twenty outside persons actively participating in writing the constitution and enlarging the political spectrum of discussions.

Having received all drafts of the constitution, the committee sought to act promptly and, according to the declarations of Kwasniewski, its chairman, hoped to have the consolidated version ready by December 1994. On September 21–23, 1994, the national assembly convened for the first reading of all submitted drafts. The debate did not move far beyond mere formal presentation of all drafts. In conclusion, the assembly prelimi-

narily accepted all drafts, not using its power to reject any of the drafts at this time. It was then a matter for the constitutional committee to produce a final draft of its own.

But creating the draft proved quite difficult for the committee. Already in autumn 1994, it became clear that the constitution would be an important issue in the coming elections, for president in autumn 1995 and parliament in autumn 1997. The SLD-PSL coalition had a safe majority in both the constitutional committee and the national assembly, but it still needed support from at least two other parliamentary groups to build the two-thirds majority necessary in the assembly for the final enactment of the constitution. The UP and the UD—later renamed the Union of Liberty (UW)—were two potential allies, but their support would require several compromises, and particularly for the UW, some compromises could be rather costly. At the same time, the constitution had to be accepted by popular referendum, and this was the stage at which the right wing of the political scene hoped to play an important role. It was also clear to the SLD that no referendum could be won if the Catholic Church openly disapproved of the new constitution. Thus, the role of some opposition groups, particularly the Church, went far beyond their formal positions in the constitutional committee.

At first, the committee tried to clarify some of the more difficult issues before writing the final version of the constitution. In the beginning of October 1994, the commission selected several problems to be discussed by the Sejm, as the 1992 constitutional law provided that after all drafts had been submitted, the Sejm would hold a general debate on the principal constitutional issues.²² Deputies also received a large publication, *Basic Constitutional Dilemmas*, prepared by committee experts. The Sejm debate took place on October 21, but was mostly limited to declarations supporting particular drafts.

In the end, no resolutions or conclusions were adopted. Thus, the debate was of no help to the committee. Politicians were simply not ready to discuss constitutional questions; most of the questions that the committee submitted seemed too technical for most Sejm members.

At the same time, two procedural controversies already indicated that it would not be easy to get the opposition to accept the constitution. The first was related to the prerferendum provided by the 1994 amendment to the 1992 constitutional law. The opposition demanded such prerferendums on several major issues, hoping to gain an opportunity to obtain political support among the voters. For exactly the same reason, the majority did not want any prerferendum campaign. From a more technical perspective, it was determined that it would be extremely difficult to draft short questions to be submitted to the people. Thus, no prerferendum was held under the pretense that the constitution's final draft was too advanced to return to basic questions.²³

The second controversy was related to the question of how the so-called popular draft of the constitution should be treated. Already in autumn 1994, Krzaklewski demanded that this draft be submitted to a national referendum as an alternative to the draft prepared by parliament. This would require amending the 1992 constitutional law, as it would place the Solidarity draft at a higher level than all remaining drafts and would transform constitutional discussion into a political confrontation between the current majority and the emerging extraparlimentary opposition.

Nevertheless, the constitutional committee managed to conclude the first stage of its proceedings with only a brief delay. On January 26, 1995, the committee adopted the "Uniform Draft of the Constitution." The draft prepared by the subcommittee for drafting, general matters, and introductory provisions

on January 20 was discussed, revised, and adopted by the committee on that day. Meant to merge the seven submitted drafts into one, the draft was composed of 215 articles and eleven chapters. Further committee proceedings would concentrate on this unified draft. Thus, it was clear that the committee did not want to accept Solidarity's idea to grant special treatment to the popular draft. The Uniform Draft did not solve all problems, however; in almost all controversial matters, the committee presented alternative proposals. Thus, it was clear that the constitution-writing process would not end in the immediate future. Nor had the general political situation suggested any compromises.

In the beginning of 1995, the conflict between President Walesa and the parliamentary majority reached its climax. A shaky compromise was finally reached in April.²⁴ Leading politicians had neither time nor interest to think about the new constitution, and the constitutional committee remained inactive during the four months of crisis. In late spring, politicians began to focus on the upcoming presidential elections and did not want to open debates by presenting a final draft of the constitution. Aleksander Kwasniewski—then chairman of the constitutional committee—won the presidential election, but the losing side undertook a last attempt to launch espionage accusations against the prime minister and, indirectly, other leading SLD politicians. It took another two months before the political situation stabilized and the new cabinet, led by Włodzimierz Cimoszewicz, was formed.

The presidential election and the subsequent crisis affected the constitutional committee in a double sense. Kwasniewski had to devote most of his time to the presidential campaign and, after his election, had to be replaced. In December 1995, his position was taken by Cimoszewicz, but two months later, Cimoszewicz accepted the position of prime minister and the committee again had

to find a new chairman. In February 1996, Marek Mazurkiewicz, a professor of law, was elected to chair the committee until the end of its existence. In the meantime, leading politicians were so occupied with current political problems that they neglected their committee duties. Thus, there were problems obtaining a quorum, which often made it impossible to make any decisions. Nevertheless, the committee tried to do its best. It was difficult to reach a political consensus, but still possible to work on detailed problems. This allowed more room for experts, who played an important role in this period of constitution writing.

The constitution-writing process finally accelerated in spring 1996, as the coalition—particularly the SLD—understood that successfully completing the constitution might increase its chances in parliamentary elections. Over the next three months, the committee managed to conclude preparation on subsequent chapters of the document. On June 19, 1996, the committee adopted the Uniform Draft, now composed of 221 articles and thirteen chapters.²⁵ This time the committee decided not to include any alternative proposals in the text. According to Ryszard Chrusciak,

the period between January 26, 1995 and June 19, 1996 constituted the most important part of the constitutional preparations. . . . It would not be an exaggeration, if we assume that active participation in the constitution writing had been undertaken only by a dozen members of the Committee. They were supported, in a competent and effective way, by the Committee's experts who prepared proposals of subsequent articles and delivered the necessary information. They were also real authors or co-authors of many amendments submitted by the Committee members.²⁶

The Uniform Draft was submitted to another group of experts who were asked to edit it technically for language coherence and other editorial matters. On August 27, 1996, the subcommittee for drafting, general

matters, and introductory provisions adopted a new version of the Uniform Draft, accepting most of the experts' suggestions. This material was submitted to the constitutional committee for final preparation. Over the next five months, the committee discussed all the constitution's chapters again. This time, there was no possibility of adjourning decisions on controversial matters, and the committee—or rather, the politicians who led its work—had to make final decisions. A constitutional coalition of four parliamentary parties, the SLD, PSL, UP, and UW, emerged; the two smaller partners, the UP and UW, knew quite well that without their support, it would be impossible to obtain a two-thirds majority. Thus, they sought more concessions than their numerical strength suggested they could.²⁷ On the other hand, it was clear that other parliamentary parties and, more important, Krzaklewski's Solidarity group, which was about to form Electoral Action Solidarity (AWS), had already chosen confrontation and would not support anything short of the full acceptance of the 1999 popular draft. Thus, for the constitutional coalition, the position of the Catholic Church was crucial: Without at least friendly neutrality, the referendum would be lost. Several amendments introduced to the Uniform Draft at the end of 1996 and beginning of 1997 were intended to give necessary concessions to the Church and divert it from supporting the so-called anticonstitutional coalition led by the AWS.²⁸

The committee intended to conclude its debates on December 19, 1996. But at the last moment, the PSL—technically still a coalition partner of the SLD—submitted still more amendments and declared that it would not support the new constitution unless these amendments were included in the final version. After one month of discussion, a compromise was reached, and on January 16, 1997, the committee adopted its ultimate version of the new constitution, now 237 ar-

ticles in thirteen chapters. One of the most important last-minute changes was to introduce a preamble referring to God, adopted to soften the Catholic Church's criticism of the constitution. The committee also submitted forty-seven so-called minority motions to be voted by the national assembly.²⁹

January–April 1997: Conclusion of the Parliamentary Procedure

On January 24, the national assembly began its second reading of the constitution. As chairman of the constitutional committee, Mazurkiewicz presented the draft. Later, representatives of the parliamentary groups expressed their positions. While the constitutional coalition—the SLD, PSL, UP, and UW—supported the draft, the parties on the right declared their opposition to the proposed version of the constitution. The floor was also given to Krzaklewski, who was not a member of parliament, on behalf of the popular draft. He criticized the committee's draft proposal and asked to conduct an alternative referendum on both drafts. It became open season for constitutional amendments. In further discussions held February 25–28, over two hundred members took the floor and submitted almost five hundred amendments, some of a quite substantial character.

The constitutional committee discussed the amendments together with the minority motions that committee members had submitted in March. Because some amendments had been withdrawn by their authors, the committee decided on 362 amendments, recommending 113 amendments for adoption.

The second assembly reading continued on March 21. The assembly adopted almost one hundred amendments (i.e., not all the amendments that the committee recommended) and two minority motions. Aside from the preamble, 70 articles were amended and 5 new articles added to the constitution. The constitutional committee checked

the final text yet again, submitting another 5 amendments). On March 22, the assembly adopted the constitution—now 242 articles in thirteen chapters. Out of 560 members, 497 took part in the vote: 461 voted for it, 31 against it, and 5 abstained.

The president then had sixty days to submit his amendments to the constitution. However, because time was running out,³⁰ on March 24, the president submitted amendments relating to forty-one articles of the constitution. Most of the important amendments dealt with church-state relations, presidential powers to appoint the highest judicial officers, and military appointments. On March 26, the constitutional committee examined the amendments and recommended that the assembly adopt thirty-one of them.

The national assembly's third reading took place on April 2, 1997. It first voted on the presidential amendments and later took the final vote on the constitution. Out of 497 members who took part, 451 voted for it, 40 against it, and 6 abstained. Thus the constitution was adopted: Its final version had 243 articles in thirteen chapters. The parliamentary stage of the proceedings was now complete, and the constitution faced a national referendum.

May 1997: Constitutional Referendum

The 1992 constitutional law provided that the president should set the date for a referendum on the constitution within fourteen days of the national assembly adopting it. The referendum also had to take place within four months of the constitution's passage in parliament. To seize the moment, Kwasniewski issued the referendum order on April 2, setting the referendum for May 25. Each voter had a choice between voting for or against the entire text of the constitution.

The referendum offered the AWS-led anticonstitutional coalition a last chance. While the AWS had no chance at all to win any

votes within the national assembly, it could still convince the majority of voters to reject the constitution. The AWS had no alternative but to condemn the constitution and ask Poles to vote against it. The referendum was preceded by an extensive information campaign, sponsored and coordinated mainly by the state electoral commission,³¹ intended to acquaint the public with the substance of the new constitution and the main arguments for and against it. This effort largely descended into an electoral campaign in the nature of propaganda rather than education. Opponents of the constitution used rather unsophisticated arguments against its authors.³²

The state electoral committee strictly regulated television coverage of the campaign and decided that two deputies and two senators, representing views for and against the constitution, would host programs. In addition to public television programs, private radio and television stations, newspapers, and periodicals presented discussions and debates. President Kwasniewski's staunch support of the new constitution and active promotion of it, not only during the television programs stipulated by the electoral commission, but also during his extensive travels around the country, provoked the greatest controversy.³³ On April 23, the AWS filed a formal complaint with the state electoral commission, claiming that the president should discuss the constitution neutrally without stating his opinion. On April 30, the commission issued a reply in favor of the president.³⁴

The debate's tone largely ignored substantive constitutional issues. Opponents of the constitution accused its authors of intending to deprive Poland of its sovereignty, because Article 90 provided for the possibility of a transfer of powers of the national government in certain areas to an international organization or an international agency; of intending to take children away from their parents, because Article 48 stipulated that parents should consider their children's ma-

turity as well as their freedom of conscience and beliefs; and of giving state finances to a powerful agency beyond anyone's control, because Article 227 established the Monetary Policy Council, which was to determine annual monetary policy guidelines. Opponents also criticized the preamble for failing to condemn communist rule and for promoting a New Age god rather than the Catholic god. The debate also had a more serious dimension, though it was significantly less prominent. Most constitutional and legal experts pointed out that the new constitution represented important progress in rights and liberties, that most of its provisions met European standards, and that, whatever its shortcomings, it would serve its purpose very well.³⁵

The Catholic Church's position on the constitution was not fully clear. While initially the Church refused to follow AWS invitations to condemn the new constitution, the final statement of the Episcopate of Poland was reserved³⁶; it could be interpreted as a suggestion to vote against the constitution.

The referendum took place on May 25, 1997. The campaign's intensity did not convince voters to mass participation: Only 42.86 percent (i.e., 12,137,136) of eligible voters decided to cast a ballot. Thus, the constitution had to gather at least 6,068,569 affirmative votes. It received 6,396,641 supporting votes, or 52.7 percent. This was enough to have the constitution confirmed, but the result demonstrated the mounting support for the AWS.³⁷

On July 15, 1997, after having examined 433 challenges, the Supreme Court decided that the referendum had been valid, and on July 16, the president ceremonially signed the constitution. It was published in the *Journal of Laws* on the same day. According to Article 243, the constitution became effective three months later, on October 17, 1997. Thus, almost eight years after the Sejm and Senate had appointed the first constitutional

committees, the constitution-writing process in Poland came to a successful conclusion.

Constitution Writing and the Reconciliation Process

General Issues

The Function of the Constitution-Writing Process

To a large extent, a constitution-writing process depends on the nature, duration, and intensity of the political conflict, and on the role that a constitutional amendment or new constitution should play in solving that conflict. Sometimes, a new constitution is understood as a vehicle of transformation; such was the intent of those who wrote Poland's 1791 constitution, though in the existing political circumstances and international setting, this constitution had to fail. To a lesser extent, those who wrote the 1921 constitution also had transformation in mind, and they used it quite successfully to breathe new life into the Polish state. The aims of the three constitutional documents that emerged between 1989 and 1997, however, were less ambitious.

The 1989 April Agreement was the best example of a constitutional change that was closely related to the "peace negotiations"—that is, the Round Table talks—and was understood as one of the implementation tools of the agreement concluded between the ancien regime and new revolutionary movement. But the connection between political agreement and constitutional amendment was so close that the constitution-writing process lost its authenticity. As most of the amendment was agreed to and even written during the Round Table negotiations, parliamentary participation in the proceedings was rather formal and did not leave any room for discussion or change. The real decisions were made elsewhere. This was easily explained by the limited level of legitimacy of the existing Sejm. It not only subordinated constitu-

tion writing to political negotiations but also agreed to numerous compromises that could hardly coexist in one constitutional document. The April Amendment played a very important role during the first months of transformation—it paved the way for democratic elections and allowed the opposition to enter the parliament—but by autumn 1989, the whole structure of the Round Table agreement had disintegrated and the amendment, with its strong presidency, became an obstacle to the normalization process.

The 1992 Small Constitution thus emerged as a type of peace instrument, but the dimension of the conflict was completely different than in 1989. While the 1989 amendment was included in a resolution fundamental to the future of Poland, the 1992 Small Constitution was intended to end a conflict within the ruling elites and to create the possibility of cohabitation between President Walesa and the parliamentary majority. Thus, the constitution-writing process was concentrated within parliamentary committees that served as forums for reaching compromises. But the process of transformation was already advanced in Poland, and it was not crucial whether the Small Constitution would come into life at all, nor what its content would be.

The 1997 constitution was understood as an instrument of normalization, but the conclusion of its writing process was not intended to solve any immediate crisis. A new constitution was necessary to give the transformation process a modern framework, but probably nothing would have changed if the constitution had been adopted in 1996 or 1998. Of course, enacting the new constitution was regarded as a success, particularly for the SLD. The SLD understood, however, that because the new constitution would significantly weaken the presidency—held at that time by Kwasniewski—it could better help the AWS in case the party won parliamentary elections. Thus, the SLD attempted

to rewrite presidential powers at the last moment and rather unsuccessfully. In sum, the long-term effects of the 1997 constitution were understood as prevailing over short-term effects. At the same time, the last stage of constitution writing opened the floor for a serious political conflict between the constitutional coalition, which was identified with 1989 Round Table partners, and the new AWS movement, which represented a more radical approach to the past. Thus, in the short term (summer 1996 to spring 1997), the constitution-writing process not only failed to resolve existing conflict, but was used as a pretext to mount a political conflict of major dimensions. This conflict was resolved once the AWS won parliamentary election. Only a few months later, both sides understood that some degree of cohabitation would be necessary and that it could be done within the rules that the new constitution provided.

Enacting the 1997 constitution was detached, in time and political context, from concluding the “peace agreement” at the 1989 Round Table. The constitution-writing process incorporated into the peace agreement had been clearly visible in drafting the April Amendment, but it was absent in the second half of the 1990s, when the 1997 constitution was drafted. That time, the drafting process was concentrated within parliament and mostly interested only a small group of politicians and experts, and there was no external peace agreement to be incorporated into the constitution.

Constitution Writing and the Old Constitution

From the very beginning of the transformation process, it was clear that the 1952 constitution could not survive the fall of communism; a new constitution was required. In late autumn 1989, it also became clear that the new constitution would follow Western examples, departing sharply from the tradition of socialist constitutionalism. Therefore,

there was an almost immediate opening of the constitution-writing process. The initial idea, supported mainly by Mazowiecki and Bronisław Geremek, was to enact the new constitution promptly, preferably for the two-hundredth anniversary of the 1791 constitution. But political developments, in particular the so-called war at the top,³⁸ made it impossible to agree on the constitution.

Hence, parallel paths of constitutional change evolved, including the writing of a new “full” constitution and an effort to revise fragments of the old constitution through an amendment process. Such an approach meant that the old constitution would continue its existence, at least for the immediate future. Some portions of the constitution had been revised already in the 1980s (the establishment of the constitutional court was the most important change), and it was simply impossible to ignore its existence. At the same time, the problem of the old law was much broader and had to be solved for all statutes and regulations adopted under the communist system. Some supported a so-called zero option—that is, declaring the total invalidity of communist laws—but it was obvious that such a move would produce legal chaos and the population would not accept it. The zero-option would have invalidated most of the social entitlements legislation in place and affected the structure of agricultural private property, a major concern in Poland. Thus, old laws had to be regarded as valid. It was the task of the parliament and cabinet to replace them as soon as necessary. In the meantime, it was the task of the judiciary to reinterpret old laws according to a new situation.

The same approach applied to the constitution. Some of its provisions had already been revised by April 1989, but several remained unchanged. Amendments modified mainly structural parts of the constitution; only the 1989 December amendment enumerated new constitutional principles. The

courts also did not enforce some of the old constitutional provisions. Instead, judges, particularly in the constitutional court, referred to the new constitutional principles, mainly the Rechtsstaat principle, and in some cases, rewrote them using both new constitutional principles and provisions of the European Convention on Human Rights. In this way, the judicial branch civilized and modernized the old constitution and prepared a relatively smooth transition to the post-1997 constitutional order.

Structure of the Process

There are numerous possibilities regarding the authority that can be given constitution-making power. In Poland, theoretically, the constitution could have been drafted by a specially elected constitutional convention or by the parliament itself. Another possibility would have been a combination of executive-branch drafting and popular referendum confirming the draft; such a procedure was used in France in 1958 and Russia in 1993. However, the latter procedure would have bypassed the parliament and contradicted the Polish constitutional tradition. Also, a constitutional convention would not have been practicable in the specific conditions of Polish political developments. It would have been premature to establish such a convention in spring 1989. Later, it was the timing and manner of parliamentary elections that became the main political issue. Once a new, democratically elected parliament emerged in 1991, it had full legitimacy and competence to write the constitution. Because all Polish constitutions in the past had been drafted within the legislative branch, another way could hardly be regarded as legitimate.

The choice between parliament and constitutional convention did not exist in spring 1989, when the April Amendment was drafted. There was no time to convene any

conventions and no possibility of having a democratically elected convention before establishing a constitutional foundation for democratic elections. Besides, the amendment was regarded only as a temporary solution: As already mentioned, it was drafted within the Round Table structure and with the assistance of Round Table experts. The role of the (old) parliament was limited to its formal approval and enactment. From 1991 on, when full democratic elections came into being, new parliaments enjoyed a sufficient level of legitimacy to draft the constitution. Hence, no serious proposals concerning separate constitutional conventions were ever submitted.

After the unfortunate experience of parallel constitutional committees in the Sejm and Senate (1989–91), it was agreed that the only way to conclude constitutional preparations successfully would be to fix rigid procedural rules and create a joint parliamentary committee. This explains how the 1992 constitutional law and the constitutional committee of the national assembly came into being. Although the committee was formally subordinated to the parliament, it enjoyed a considerable degree of autonomy; most of Poland's leading politicians became committee members, and members of the committee were designated by all parliamentary groups, according to their strength. It was clear that the new constitution would be drafted mainly within the committee.

Committee membership was a mix of pure and expert politicians. As mentioned before, at least a dozen members were active in the actual writing process. Most of the writing was done in subcommittees, usually with considerable participation by committee experts, all leading scholars in constitutional law, none of them directly involved in political activity.³⁹

There were no specific provisions regarding judicial review of the actions of the

constitution-making bodies, and it remains an open question as to what extent the constitutional court has jurisdiction over constitutional laws and amendments. As none of the Polish constitutions has ever had any unchangeable provisions (e.g., Article 79, Section 3 of the 1949 German basic law or Article 89, Section 5 of the 1958 French constitution), no substantive review of constitutional amendments is permitted. But it is not impossible that the court would accept its jurisdiction with regard to procedural review if the procedure to enact a constitutional amendment were not followed. No challenges have been raised to the drafting process of the 1997 constitution.⁴⁰

Public Participation in the Process

In Poland, constitution writing took place in parliament (1992 and 1997) or within the Round Table talks (1989). The level of democratic representation in deciding or co-deciding actual content was crucial for legitimizing the process (see next section). At the same time, direct and indirect participants in the drafting process had to maintain at least some contact with the general public. Thus, public participation played an input and an output role. The input role invited the general public to influence the writing process by communicating suggestions and demands to the political decision makers and parliamentary drafters (active input) as well as forcing the drafters to calculate in advance whether their decisions would be accepted in the referendum. The real chance that different groups' and organizations' suggestions and proposals would be adopted depended on the political strength of their authors. In this respect, the crucial role belonged to the Catholic Church. The output role permitted the use of drafting discussions to educate the general public in constitutional matters, encourage the active return of comments and

suggestions, and gain votes for the next parliamentary elections.

Public participation requires a certain degree of transparency and information about the drafting process. This was the role of the drafting body, but it could not be reasonably achieved without the press and electronic media. An independent media was one of the crucial prerequisites for genuine participation in the constitutional deliberation. Generally speaking, public participation further requires certain avenues of bottom-to-top communication that are the purview of not only an independent media but also political parties and other interest groups. A genuine constitutional discussion can take place only after civil society has reached a certain level of maturity. In Poland, modern civil society began to emerge during the first Solidarity era (1980–81) and the period of martial law. By 1988–89, both an organized opposition and an active general public were in place when the Round Table ideas were prepared and discussed. The following years completed the initial stage of shaping an emerging civil society. When constitutional discussions entered their final stage (1996–97), all the necessary components of a civil society were in place.

A distinction should be made between the constitutional education of the general public and constitutional advocacy. The latter resulted from the necessity to have the constitution confirmed in the popular referendum. That was why all political decision makers became very interested not only in informing the general public about the constitution but also to convince it to vote for or against the draft. Another distinction relates to education (advocacy) and participation. The general public had only one formal avenue of participation: the referendum. Participation in the drafting process had to be exercised through different bodies, in which active members of the public were organized: political parties, including those not

represented in parliament; trade unions; and many other similar organizations.

The April 1989 amendment was written during closed sessions of the Round Table's subcommittees, and agreement on the most important parts was reserved for a small group of leaders acting outside the Round Table structure. Except for regular press and television information on the progress of talks, the general public was never formally involved. At that time, all media were still controlled by the Communist Party and the public did not trust them. Solidarity politicians demanded and received certain access to radio and television, but their access remained limited and controlled by the government. However, this represented enormous progress compared to the situation in the past. For most people who had an interest in politics, there were other ways to keep informed, as the Polish general public has always been quite smart in receiving and passing on information by word of mouth.

In 1992, the situation changed. On one hand, drafting of the Small Constitution remained in the hands of a small group of politicians and experts, and unlike in 1989, the general public did not perceive the process as crucial for the future of Poland. Thus, there was relatively limited interest in it. On the other hand, free media had already emerged in Poland by that time, and again unlike in 1989, there was no problem in communicating or obtaining information. Nevertheless, the writing process remained concentrated within parliament, and public input was limited.

Public participation gained importance during the drafting process of the 1997 constitution. There were three contributing factors. The first was time, as the drafting process lasted long enough for public discussions to take place. The second was the referendum, as the requirement to have the constitution confirmed by a popular vote made the general public a necessary partner in enacting

the document. Therefore, both proponents and opponents of the constitution had an interest in communicating with the general public. The third was politics, as the drafting process became closely connected with parliamentary elections in its final stage. The constitution thus played an important role in electoral campaigns. The constitutional coalition tried to use enacting the constitution as an asset in its preelection propaganda. The anticonstitutional opposition did its best to criticize the constitution and especially those who had drafted it.

For the above reasons, constitutional problems were constantly present in political discussions and mass media at least until the May 1997 referendum. While the constitutional committee as such had no responsibilities for public education, the task was undertaken partly by President Kwasniewski and partly by political parties and other groups. Thus, it was not regarded as necessary to organize any formalized constitutional discussion, led by the committee.⁴¹ Nevertheless, every household received a copy of the constitution, mailed by the president's office, with an encouragement to read and support it in the referendum. Political actors did their best to attract the general public and convince voters of their ideas and proposals. This did not mean, however, that their attempts were successful. Low participation in the referendum (42.86 percent) demonstrated that the majority of the general public was neither interested in the constitutional discussions nor attracted by the political controversies surrounding them. While there was a general trend of political passivity in Poland, it was not accidental that participation in the constitutional referendum was lower than in the parliamentary elections of 1997 (47.93 percent) and 2001 (46.29 percent).⁴²

Generally speaking, public participation in the constitution-drafting process has had different levels and dimensions. While its effect was not particularly evident between

1992 and 1996, the situation changed once political parties understood that they could use constitutional discussions to rally citizens around their programs. Unfortunately, in many cases, constitutional discussions were a tool to achieving other political goals and were not intended to modify the constitution meaningfully.

Regarding the usefulness of the referendum requirement, three remarks should be made. First, the referendum was conducted only after the final text of the constitution had been adopted. Thus, there was no possibility of modifying its text; the only choice was to approve or reject it. Because most voters had been unwilling or unable to study the entire text, their decisions were influenced mainly by political sympathies. Second, the drafters well understood the necessity of winning the referendum. Thus, the (passive) effect of public opinion was that the drafters had to concede to powerful social groups and avoid solutions that could provoke public opposition. This was also well understood by some social partners of the drafting process, especially trade unions and the Catholic Church. Third, the constitution's confirmation in the referendum legitimized the document and contributed to the public's accepting it.⁴³

The question remains whether a prereferendum, conducted in the early stages of the drafting process, would enrich public participation in the drafting process. We do not know the answer, but given the political realities of the mid-1990s, it is very probable that such a referendum would soon have been transformed into another political campaign, in which constitutional problems would be used only as a pretext for political confrontation.

Democratic Representation

A legitimate constitution can only be the product of a democratically legitimate assembly. Thus, the easiest way to legitimize

a constitution is to start with democratic elections and draft a new constitution afterward. But who should create the rules to conduct the first democratic election if no truly representative institutions existed under the departing regime? Poland had to answer this question in spring 1989. As the existing Sejm, "elected" in 1986, was not sufficiently legitimate, it was necessary to create an extraparlimentary body—the Round Table—to launch the transition process. The Round Table had a bipolar structure of representatives of the existing government versus representatives of the opposition because it resulted from a peaceful agreement, not a revolution. There was no problem in defining who should represent the opposition. As the illegal Solidarity trade union had survived martial law, it was clear that Walesa and his advisers would appoint the oppositional representation. Finally, the Church's representative officially sat at the Round Table, and several key decisions resulted from Church-arranged political mediation. This gave some legitimacy to the Round Table agreement and, consequently, to the April Amendment and June parliamentary election. But it was very clear that this legitimacy was temporary, and by autumn 1989, a legitimacy conflict erupted between both houses that prevented the 1989 parliament from adopting a new constitution.

The 1991 and 1993 parliamentary elections produced democratic legislatures. Hence, the legitimacy problem ceased to exist. There was no doubt that constitution drafting could take place within the existing parliament—that is, that the task should be given to political parties represented in parliament. This was finally decided in the 1992 constitutional law providing for establishment of the national assembly's constitutional committee. The committee was composed exclusively of members of parliament, as all parliamentary groups had proportional representation. The choice of the parliamentary process—a pro-

cess controlled by political parties—resulted from the sufficient legitimacy of the existing parliament; the relative strength of the existing political parties, as at least the partners of the constitutional coalition have managed to survive to this day; and the relative homogeneity of Polish society. With no major ethnic, religious, or regional conflicts, it was possible to link the constitution-drafting process almost exclusively to the political preferences of Polish voters.

Since 1993, the constitutional committee has been controlled by postcommunist parties, the SLD and PSL, whereas the political right has had very weak parliamentary representation. It could not negate the legitimacy of the 1993 Sejm because the underrepresentation of the right had resulted from its inability to attract voters as well as from the operation of the 1993 electoral law⁴⁴—a law was adopted by the 1991 parliament, in which the majority belonged to those center-right parties that were to lose the next elections and disappear from the 1993 parliament. However, it still produced a certain feeling of uneasiness among the majority parties. Thus, several efforts were made to enlarge the representative character of the constitutional committee. The new committee accepted drafts submitted to the former committee, even if the drafts' authors were no longer represented in parliament. Permanent invitations to participate in committee proceedings were issued to extraparlimentary parties, particularly Solidarity and its political emanation, the AWS. The possibility of submitting popular drafts was opened to large groups of citizens. Also, the committee recognized the specific role of the Catholic Church, as its representatives received a permanent invitation to participate. The Church accepted this invitation, and played a significant role in drafting the constitution. Thus, the decision-making process led to establishing compromises on three levels: first, within the SLD-PSL majority (and the

PSL was not an easy partner), which was strong enough to control committee decisions; second, within the constitutional coalition, in which two other parties—the UP and UW—were necessary to reach the two-thirds majority required in the national assembly); and third, outside the coalition, to win the referendum.⁴⁵

Of course, not all minority interests found full access to the constitutional coalition. For many of them, the supermajority requirement in the national assembly and the subsequent referendum constituted sufficient guarantees to be heard, but other interests remained too weak to attract the support of political parties. Additional guarantees, however, were provided by international law, particularly from the European Human Rights Convention.

The lustration (vetting) problem surfaced in Poland in summer 1992, but necessary statutes were not adopted before spring 1997. Thus, the constitution had been drafted and adopted before the lustration process started. The lack of a prior lustration process did not affect the substance or the quality of the constitution. The later experience with the lustration process in Poland could hardly be evaluated as positive. Had it started earlier, it would have only provided another field of political controversy.

The Timing and Sequencing of the Constitution-Making Process

Constitution writing in Poland took a relatively long time—nearly eight years. There were three separate stages to this process: enactment of the April Amendment (February–April 1989), writing of the Small Constitution (December 1991–October 1992), and writing of the final constitution (October 1992–April 1997). In the first stage, a provisional regulation was adopted quickly. It allowed parliamentary elections to be held in June 1989 and a constitutional dimension to

the transition process to begin. Once Solidarity had built a majority coalition within the Sejm, in August 1989, its initial idea was to proceed fast and adopt a new constitution on May 3, 1991. Political developments in 1990 made this impossible, and the constitutional moment was lost. Another provisional regulation was thus adopted—the Small Constitution—while preparations for the full constitution continued with deliberate speed.

The longevity of the constitution-drafting process was due to several circumstances. First, it was impossible to predict the political dynamics affecting developments in Poland and Europe. The April Amendment originally intended to allow a peaceful cohabitation of the Communist Party and Solidarity political forces. In spring 1989, no one could have known that six months later, the Warsaw Pact would disintegrate and communist rule in Poland would cease. Also, in fall 1989, no one could have known how fast Solidarity would split into new political groups or how fast postcommunist parties would be able to win democratic elections. Thus, no time limits could have been set in the beginning, and the target date of May 3, 1991, became completely unrealistic.

Most of the constitution writing took place in the 1993 parliament, with the legislature setting the time limit of completion by September 1997. The parliament managed to beat the deadline by several months, but the new constitution entered into effect only two days before the inauguration of the next parliament.

The longevity of the constitution-writing process had some clear advantages as well as some disadvantages. Of course, the process looks different from today's perspective than it appeared in 1991 or 1993. Many authors regretted then that the "constitutional moment" had been definitely lost.⁴⁶ The absence of a full constitution caused several problems. However, all these problems were solved under various interim constitutional provisions,

and at the same time, important experiences were gathered and lessons learned. It was particularly important that the Walesa presidency demonstrated the need for very precise regulation of the relations between the executive and legislative branches. But what became clear in 1996 and 1997 was not clear at all in 1990 and 1991. Therefore, gradual writing of the constitution allowed Poland to introduce significant institutional and procedural guarantees that checked the power of the political branches of government.

A similar observation relates to Poland's bill of rights. The 1997 constitution was drafted after Poland had ratified the European Convention on Human Rights and other important international documents. The constitution drafters had no alternative than to accept and repeat the convention's provisions on personal and political freedoms. In the area of social and economic rights, the authors of the 1997 constitution knew that the social cost of transition could be much higher than predicted in 1990. They also knew that the constitutional court could not be expected to ignore constitutional provisions concerning social and economic rights. Thus, the 1997 constitution was careful in promising those rights. The 1997 constitution also had been drafted after the Concordat treaty with the Vatican had been signed.⁴⁷ While the SLD-PSL majority postponed the Concordat's ratification, it was clear that new constitutional provisions had to be adjusted to the treaty. Finally, the 1997 constitution was drafted in an international situation that allowed Poland to integrate into the North Atlantic Treaty Organization (NATO) as well as with the European Union. Accordingly, appropriate provisions were inserted into the constitution's text.

Generally speaking, the eight years of transition allowed the 1997 constitution to be drafted in a more mature way than would have been the case in 1990–91. The experience of the following years (1997–2002)

demonstrated that this constitution could function as both a vehicle for the peaceful change of parliamentary majorities and Poland's advancement toward integration into the Western world.

It would be difficult to draw any general lessons from the time and sequencing of constitution writing in Poland. But at least three conclusions can be made. First, at the beginning of the transition process, it was necessary to promptly produce an interim constitutional document allowing democratic elections. This document could be considered a peace agreement. Second, it is usually impossible to predict the dynamics of any future transition process; setting time limits and target dates might not be productive. Third, it may be risky to live under an interim constitution, particularly if the executive branch tries to expand its powers. However, if a country and its democracy are lucky enough to survive a longer period of interim constitutions, it becomes easier to draft a constitution for the twenty-first century. Such a constitution could be regarded not as a peace agreement, but an instrument of normalization and stabilization, allowing for a robust political, social, and economic climate. Hungary's experience suggests similar conclusions.

There is always the danger that a prolonged process of constitution writing would allow some factions—in Poland, the postcommunist faction—to gain an unfair advantage and consolidate power before a democratic constitution can be adopted. Poland managed to avoid this danger. Even if the 1997 constitution had been adopted by a parliament dominated by postcommunist parties, its enactment did not save those parties from losing parliamentary elections in 1997 and did not help the center-right parties not to lose the 2001 elections. In short, the constitution has allowed a smooth trading of places of parliamentary majority and opposition. Given

Poland's turbulent history during the past century, this is no small achievement.

The Role of the International Community

The international community played a crucial role in supporting the first Solidarity movement (1980–81) and in encouraging the Round Table talks in 1988–89, as well as in helping to organize the process of transition. Foreign experts have been present constantly in the parliament, significantly contributing to the process of rewriting communist legislation. They also participated in the constitution-drafting process, particularly in the 1989 parliament. At the same time, however, some factors limited the foreign experts' role. First was the language problem. Only a few foreign experts spoke Polish well enough to be able to take part in the meetings and discussions. Only a few of them were experts in constitutional law. Second, because most of the experts were invited personally (or at least confirmed) by the administration of the parliament or directly by political parties, many experts were associated with definite political sympathies. Nevertheless, the participation of foreign experts in drafting the constitution was very useful. Most of them did their best not to show political sympathies and acted as neutral advisers, providing comparative information. The number of foreign experts began to diminish in the mid-1990s, perhaps due to limited financial resources. Once Poland became recognized as a stabilized country, most of the foreign aid was shifted further to the East. Finally, there was also a considerably large group of Polish scholars who could deliver the necessary information on comparative law and foreign constitutions. Liberalization of academic contacts with Western universities had already begun in Poland in the 1970s. Thus, the pool of Polish experts with considerable Western experience was deeper

than in many other emerging democracies. In fact, international organizations frequently included Polish constitutionalists in consultative missions to countries of the former Soviet Union seeking constitutional change.

Essential Issues of Substance

The concept of immutable principles has never been adopted in Poland, and there were no serious proposals to include such principles in the 1997 constitution. However, international standards relating to the substance of the constitution, particularly its human rights standards, act as quasi-immutable principles because it would be extremely difficult to ignore or reject them. But care must be taken in developing a list of immutable principles beyond that. Declaring too many principles untouchable could soon produce a conflict with changing social and political context and a document that risks becoming quickly obsolete.

Conclusion

At this point in time, the longevity of the 1997 constitution allows for three general conclusions. First, the constitution has proven to be particularly stable. Its 1997 text has never been amended, and there was no serious attempt to do so until 2006. In spring 2006, the president introduced a proposal to amend Article 55, Section 1 of the constitution to harmonize it with European Union legislation on the so-called European Arrest Warrant.⁴⁸ Parliament adopted the amendment on September 8, 2006; it entered into life on November 7 of the same year.

Second, the constitution's stability resulted not only from the stability of Poland's internal and foreign position but also from numerous judicial decisions, particularly those of the constitutional court, which

has developed and reinforced the constitution's written text.

Finally, the constitution has proven to be effective as a framework for political change. After the constitution was adopted, on April 2, 1997, three parliamentary elections took place. Each time, the former majority became a minority, and each time, that change was conducted smoothly, in full respect of constitutional rules. On two other occasions, in 2000 and 2004, the parliamentary majority disintegrated and the cabinet lost clear parliamentary support. Despite the inability to create a new majority in the House, the (now minority) governments managed to survive until the end of the parliament's four-year term. Constitutional provisions on relations between the legislative and the executive contributed to resolving the crises peacefully. Also, the next crisis, in 2007, was solved peacefully and entirely within the framework provided by the 1997 constitution. This time, the disintegration of the parliamentary majority prompted Prime Minister Jarosław Kaczyński to dissolve the 2005 parliament. The November 2007 elections shifted Kaczyński's party into the opposition benches, and the new cabinet was formed by a coalition led by Donald Tusk.

Thus, the 1997 constitution can be regarded as a success and a demonstration that the long time spent on its drafting was not wasted. It can be said that the constitution contributed to developing a stable democracy, or at least to the recognition that there are certain rules of political process and change. However, that assessment, generally shared among scholars and (less unanimously) among politicians, remains restricted to Poland's political and intellectual elites. The constitution is still too young to become a symbol of national reconciliation, and the storminess of Polish politics may prevent it from becoming such a symbol in the future.

Notes

1. See Mark F. Brzezinski and Lech Garlicki, "Polish Constitutional Law," in *Legal Reform in Post-Communist Europe: The View from Within*, eds. S. Frankowski and P.B. Stephan III (London: Kluwer, 1995), pp. 29–30.

2. It was agreed that while the Senate seats would be open to free election, the Sejm seats would be preassigned, so the opposition could gain no more than 35 percent of seats in the First House.

3. See Brzezinski and Garlicki, "Polish Constitutional Law," pp. 30–32; L. Garlicki, "The Development of the Presidency in Poland: Wrong Institutions or Wrong Persons?" in *Poland in a World in Change: Constitutions, Presidents, and Politics*, ed. K.W. Thompson (Lanham, MD: University Press of America, 1992), pp. 80–91.

4. One of the first challenges of the transition process was to establish political parties capable of functioning in the new political environment.

The Solidarity trade union could not be transformed into a political party, but its politicians organized at first the Democratic Union (Unia Demokratyczna, or UD), led by the first non-Communist prime minister, Mazowiecki, that later was transformed into Union of Freedom (Unia Wolności, or UW). Later, the liberal wing of that group organized the Civic Platform Party (PO) that won the parliamentary elections in 2007. Another group of Solidarity activists established, in 1990, the Center Alliance (Porozumienie Centrum, or PC), led by the brothers Kaczynskis. In 1996, the Center Alliance and several other political organizations formed the Electoral Action Solidarity (AWS), and this organization won the 1997 parliamentary elections but disintegrated four years later, giving way to the creation of the Law and Justice Party (PiS), led by the Kaczynskis, that won the 2005 parliamentary elections. Another party that emerged from the opposition movement was the Confederation of Independent Poland (KPN), more to the right in the political spectrum.

In the beginning of the 1990s, the more liberally oriented group of former Communist Party activists organized the Alliance of the Democratic Left (SLD), the party led initially by Kwasniewski (from 1995–2005, the president of Poland) that won parliamentary elections in 1993 and 2001. Another smaller political party of the left was the Union of Labour (UP), cooperating with the SLD in the second half of the 1990s.

Finally, there was the Peasant Party (PSL), situated more in the center and participating in the parliamentary majority on several occasions.

5. See Andrzej Balaban, "Developing a New Constitution for Poland," *Cleveland State Law Review*, vol. 41, no. 3 (Summer 1993), pp. 503–09.

6. Wiktor Osiatynski, "Poland's Constitutional Ordeal," *East European Constitutional Review*, vol. 3, no. 2 (Spring 1994), p. 30.

7. The total number of drafts reached eleven (for all texts see *Projekty konstytucyjne 1989–1991*, ed. M. Kallas (Warsaw: Wydawnictwo Sejmowe, 1992)).

8. It was too early to have any comprehensive view on the constitutional issues that had to be handled immediately; the first priority was economic reform (later known as Balcerowicz's Plan). To avoid conflicts with the Communist Party, reforms of relations between the parliament and the executive branch had to be put off. Therefore, the first priority was rewriting the general principles of the constitution; its symbolic expression was the restoration of the crown on the head of the Polish white eagle.

9. See M.F. Brzezinski and L. Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?" *Stanford Journal of International Law*, vol. 31 (1995), p. 35; H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000), p. 49.

10. The 1991 Sejm Electoral Act introduced the proportional system: Political parties and other organizations submitted lists of candidates for about fifty multiseat constituencies. The seats were allocated within each constituency following the Saint Lague method (slightly modified). In addition, sixty-nine seats were allocated on the national level, proportionally to the electoral results of competing parties. This system gave preference to small and medium-size parties and led to political fragmentation of the parliament. See M.T. Grzybowski, *Electoral Systems of Central Europe* (Krakow: Kielce, 1996), p. 43.

11. The Small Constitution did not contain any bill of rights; appropriate provisions of the 1952 constitution still remained in force. They clearly did not fit to the new system of government, and the task of adjusting them to new realities had been undertaken by the judicial branch, particularly by the constitutional court. By the end of 1992, Poland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, President Walesa submitted a draft bill of rights proposed as a constitutional law, supplementing gaps in the Small Constitution. See W. Osiatynski, "A Bill of Rights for Poland," *East*

European Constitutional Review, vol. 1, no. 4 (Fall 1992), p. 29. An interesting discussion developed among scholars, but the politicians were not particularly interested in supporting presidential initiatives, and the dissolution of the parliament in June 1993 ended the life of the presidential draft as well.

12. In May 1992, the Olszewski cabinet sought to disclose some alleged secret service files, demonstrating that many current politicians had ties with the Communist political police. It provoked a serious political crisis. Olszewski was dismissed by the Sejm (upon the motion of Walesa), and a new cabinet, led by Suchocka, was appointed in late July. See L. Garlicki, "The Polish Interim Constitution of 17 October 1992," in *The Presidency and Governance in Poland: Yesterday and Today*, ed. K.W. Thompson (Lanham, MD: University Press of America, 1984), pp. 68–69.

13. See Brzezinski and Garlicki, "Polish Constitutional Law," pp. 39–45.

14. Osiatynski, "Poland's Constitutional Ordeal," p. 29.

15. The old parliament managed, in May 1993, to adopt the new Sejm Electoral Act. The principle of proportional representation was maintained, but one of the goals of the new act was to prevent an excessive fragmentation of the chamber. The Saint Lague method of allocating seats was thus replaced by the d'Hondt method and a so-called electoral threshold, by which seats could be allocated only among parties that obtained at least 5 percent of the votes at the national level. In effect, only six parties were able to obtain seats in the Sejm—see Grzybowski, *Electoral Systems*, p. 49.

16. Writing the amendment was surrounded by sharp political controversies. Two drafts were submitted initially (by the KPN and the UP); later President Walesa made another proposal. "The president proposed to extend the right to submit drafts of the constitutions to groups of 100,000 citizens, who would thereby have the 'public initiative.' Representatives of the citizens' groups could participate actively in the work of the constitutional committee and would have the right to submit motions. The presidential proposal stirred severe criticism among the deputies, and on the motion of the UP, the Sejm rejected the presidential draft amendment on the first reading. After the draft was rejected, the president said that he would now 'stop cooperating with Parliament in the creation of the Constitution.' Subsequently, he also withdrew his representative from the constitutional committee. See "Constitution Watch: Poland," *East European Constitutional Review*, vol. 3, no. 2 (Spring 1994),

p. 15. The SLD politicians, however, did not want an open confrontation with Walesa. They proposed another version of the "public initiative," raising the threshold to 500,000 citizens' signatures. President Walesa unwillingly accepted, and his representatives returned to the committee.

17. "Unfortunately . . . only 16 of 56 Committee members bothered to attend the presentation ceremony. Absent a quorum, the Committee could not dispose of even the formalities and preliminary items of business" See "Constitution Watch: Poland," p. 15.

18. For the English translation of the draft, see *Constitution-Making Process*, ed. M. Wyrzykowski (Warsaw: Institute of Public Affairs, 1998), pp. 143–90.

19. Invitations were sent to eight parties, but none of them actually participated in the committee proceedings. See R. Chrusciak, *Przygotowanie Konstytucji RP z dnia 2 kwietnia 1997 r. Przebieg prac parlamentarnych* (Warsaw: Dom Wydawniczy Elipsa, 1997), p. 25.

20. As far as trade unions were concerned, they systematically participated through representatives of two major unions: OPZZ and Solidarnosc. More sporadic was attendance by representatives of the Solidarnosc 80 trade union, Confederation of Polish Employers, and the Central Council of Physicians. As far as the churches were concerned, representatives of the Catholic Church (as well as of two smaller churches) attended regularly, and the representatives of two other churches attended sporadically (Chrusciak, *Przygotowanie Konstytucji*, p. 25).

21. The Polish military had been important in preparing and executing martial law in the 1980s. Even if General Jaruzelski had been prime minister (1981–86) and chairman of the Council of State (1986–89), mainly his fellow generals ran the country. Generals like Jaruzelski and Kiszczak, supported by the liberal wing of the Communist Party, were also architects of the Round Table talks in 1989. But from 1990 on, the role of the military returned to its normal dimension, and there was no suggestion to include the military in either political decision making or the constitution-writing process.

22. The committee submitted questions related to three general areas. First was the political system: what version of the separation of powers should be adopted; whether the parliament should be composed of one or two chambers; what the position of local government should be; and how relations between the state and churches should be regulated. Second was social rights: whether the constitution

should focus on individual rights or state goals; and whether social rights should be guaranteed at the constitutional or statutory level. Third was sources of law: what the fundamental sources of law should be and what the place of international law in the domestic legal order should be.

23. The motion to conduct a prereferendum was submitted by the UP members of the committee on September 27, 1995, and discussed in the constitutional committee during the fall of 1995. Initially, it seemed that it would gain support of the main political forces in the committee. In October, the committee appointed a subcommittee to examine the motion. On December 6, 1995, the subcommittee supported the motion and proposed four questions related to the structure of parliament (one or two chambers); the structure of local government; the mode of presidential elections (popular vote or parliamentary appointment); and church-state relations. As another referendum, related to property matters, had already been scheduled for the spring of 1996, the idea was to conduct both referendums simultaneously. On December 20, the constitutional committee accepted the subcommittee's proposals, but decided to limit its recommendation to general support of the prereferendum and abstained from submitting concrete questions to the national assembly. This suggests that not all committee members were fully convinced of the political usefulness of the prereferendum. The assembly discussed the matter twice—on December 22, 1995, and January 19, 1996—when the discussion was rather unexpectedly adjourned. Two days later, the assembly voted to reject the committee's proposal to conduct the prereferendum (222 members voted to reject, 131 to accept, and 18 abstained). The main argument, raised by the SLD, was that because the constitutional committee had already prepared the uniform draft of the constitution, it was too late to return to basic choices. See Chrusciak, *Przygotowanie Konstytucji*, p. 91.

24. Osiatynski, "A Letter from Poland," *East European Constitutional Review*, vol. 4, no. 2 (Spring 1995), p. 35.

25. M. Mazurkiewicz, "The Draft of the Constitution of the Republic of Poland (1996)," in *Constitution-Making Process*, p. 115. For the English translation of the draft, see pp. 191–250.

26. Chrusciak, *Przygotowanie Konstytucji*, pp. 89, 91.

27. One example relates to the role of the new presidency. Until the end of 1995, all parties of the constitutional coalition were of the opinion

that presidential powers should be substantially reduced. There were frequent conflicts with Walesa, and the possibility that he would be elected for a second term was quite real. This convinced the parliamentary parties that the future constitution should strengthen the position of the prime minister at the presidency's expense. After Kwasniewski's victory in December 1995, the SLD, realizing that it might not win parliamentary elections in 1997, quickly rediscovered the virtues of a strong presidency. But the UW and the UP, as well as the PSL, did not share this view and successfully defended the original draft of the constitution.

28. At the time, there was no alternative to the constitution adopted within the assembly and the AWS draft. The Church leadership realized that if the new constitution were rejected in the referendum, no new draft would emerge in the foreseeable future. Thus, the real alternative was either to accept the new constitution as submitted by the constitutional committee or to live with the old 1952 constitutional provisions, which were not particularly friendly toward religion.

29. Among them were the so-called Senate's draft and the so-called popular draft.

30. Two important events should be considered. On one hand, parliamentary elections had to take place in September, and it would be impossible to hold the electoral and the referendum campaigns simultaneously. On the other hand, the Pope's visit to Poland was scheduled to begin in the end of May, and it would be highly improper to carry out the referendum campaign during his stay. Thus, the referendum had to take place before the Pope's visit. The electoral campaign would start immediately after his departure.

31. This body is composed of nine members, appointed in panels of three by the chief justice of the Supreme Court, chief justice of the High Administrative Court, and president of the constitutional court from among judges of each court.

32. "Constitution Watch: Poland," *East European Constitutional Review*, vol. 6, nos. 2–3 (Spring–Summer 1997), p. 26.

33. It should not be forgotten that Kwasniewski was instrumental in the constitution-writing process, as both the chairman of the constitutional committee and the president later. Thus, his degree of identification with the new constitution seemed to be more visible than in the case of some other SLD leaders.

34. "Constitution Watch: Poland" (Spring–Summer 1997), p. 26.

35. Ibid., p. 26.

36. "We call on everyone to make in their conscience a decision expressing their responsibility before God and nature, because the text of the Constitution rouses serious moral reservations." See "Constitution Watch: Poland" (Spring–Summer 1997), p. 26.

37. The success of the May referendum did not save the SLD-PSL coalition from losing the September parliamentary elections. The AWS emerged as a big winner and, together with the UW, constructed the Sejm majority and the cabinet. However, because Kwasniewski held the presidency, some kind of cohabitation had to be adopted. This was the moment in which the AWS understood some virtues of the new constitution. Had the 1997 constitution been rejected in the referendum, the AWS would have had to confront a more powerful president, as shaped by the 1992 Small Constitution. The 1997 constitution, with its strong prime minister and weaker president, offered more to the parliamentary majority. Ironically, the AWS did not regret acting under the new constitution, which it had attacked so sharply before the referendum. Hence, criticism of the constitution was soon abandoned, and the AWS never made any serious attempt to revise the constitution thereafter.

38. This was the slang term for the conflict between Walesa and Mazowiecki, which meant the end of the unity of the Solidarity movement.

39. That said, it was easy to detect the political sympathies of most experts. Only the first chairman of the expert group, Działocha, a former justice of the constitutional court, later entered the political field, becoming a member of parliament. Another expert, Grzybowski, became a justice of the constitutional court four years after the constitution had been enacted.

40. However, in 1992, when the Small Constitution was enacted, it had been preceded by an amendment to the Sejm Standing Order. The amendment changed the rules of voting on the Senate's amendments to constitutional laws, making it easier for the Sejm to reject such amendments. It was challenged before the constitutional court, but, in a judgment on November 17, 1992, the court decided that the amendment to the Standing Order was constitutional. Thus, indirectly, the court declared that the Small Constitution had been correctly enacted.

In 1997, the validity of the constitutional referendum was challenged on the grounds that the participation in the referendum did not exceed 50

percent. Because no minimum participation had been required by the 1992 Constitutional Law, the Supreme Court did not have any problems dismissing the challenge (judgment of June 15, 1997).

41. Any formalized discussion could also evoke unpleasant associations with the past. It should be remembered that such discussions were typical in the process of constitution writing in Communist countries. In Poland, "constitutional discussions" took place in 1952. According to the official data, more than 11 million citizens took part in more than 200,000 meetings within nine weeks. Needless to say, there was no room for any criticism, and the whole campaign had a purely decorative character. That was why, forty-five years later, any attempt to copy such a procedure would produce more distrust than support among the electorate. Poland's general public has always been very sensitive to historical comparisons, particularly in the negative sense.

42. But participation was much higher than in the property restitution referendum held on February 18, 1996, when only 32.4 percent of voters participated.

43. See J. Wawrzyniak, "Aksjologia referendum konstytucyjnego," in *Referendum konstytucyjne w Polsce*, ed. M.T. Staszewski (Warsaw: Friedrich Ebert Stiftung, 1997), pp. 189–93.

44. The Sejm Electoral Law provided for a proportional system with threshold requirements of 5 percent for parties and 8 percent for coalitions. Since the parties on the right had been fragmented, they did not manage to form sufficiently strong coalitions and most of their lists did not reach required thresholds. In effect, more than 30 percent of the votes were lost.

45. See Osiatynski's distinction between internal and external compromises in "Kilka uwag na temat trybu uchwalania Konstytucji III Rzeczypospolitej," in *Tryby uchwalania polskich konstytucji*, ed. M. Wyrzykowski (Warsaw: Instytut Spraw Publicznych, 1998), p. 91.

46. See, e.g., R. Chrusciak and W. Osiatynski, *Tworzenie konstytucji w Polsce w latach 1989–1997* (Warsaw: Instytut Spraw Publicznych, 2001), p. 62; Osiatynski, "Poland's Constitutional Ordeal," p. 30.

47. The Concordat is an international treaty, concluded with the Holy See, that regulates the position of the Catholic Church in a given country. In Poland, the Concordat was already signed in 1993 by the Suchocka cabinet, but the subsequent change in parliamentary majority delayed the ratification process (ratification of treaties is made by the president upon a consenting statute adopted

by parliament), and formal ratification took place much later, in December 1997. Nevertheless, it was clear to the constitutional committee that any attempt to negate the Concordat provisions would be suicidal, as it would prompt the Catholic Church to join the anticonstitutional opposition and to suggest to Poles to vote no in the referendum.

48. Art. 55, sec. 1 provides that “the extradition of a Polish citizen shall be forbidden.” The procedure of the European Arrest Warrant, adopted in the beginning of the current decade, requires all EU member states to deliver their citizens if so requested

by judicial authorities of any other EU member. In Poland, the parliament decided initially that delivery did not equal extradition and, hence, was not covered by the constitutional prohibition. However, in April 2005, the constitutional court held this interpretation to be unconstitutional and invalidated portions of the code of the criminal procedure on the European Arrest Warrant implementation. The court indicated that to comply with EU obligations, Poland’s constitution had to be amended within eighteen months.

