
Poland

Claudia-Y. Matthes

Abstract

This chapter analyzes constitutional politics in post-socialist Poland from 1989 until 2014. Until the new constitution was enacted in 1997, this process was mainly shaped by the politicians' struggles to form political identities and political parties. Most conflicts centered on fundamental cleavages, especially on the role of the presidency, the meaning of national sovereignty, and religious beliefs. These conflicts prolonged the process of constitution-making and explain the choice for an interim solution, the Small Constitution of 1992. In contrast to these difficulties on the discursive level, each of the amendments rather corrected and improved the institutional conditions for policy-making. Overall, most Polish politicians strongly believe in the impact of formal rules.

Keywords

Abortion law • Constitutional politics • European arrest warrant • Fast-track legislation • Poland • Post-socialism • Semi-presidentialism

C.-Y. Matthes (✉)

Institut für Sozialwissenschaften, Humboldt-Universität zu Berlin,
Unter den Linden 6, 10099 Berlin, Germany
e-mail: claudia.matthes@sowi.hu-berlin.de

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1 Introduction

Poland was one of the forerunners within the socialist camp with regard to the process of political liberalization. It started back in the late 1970s with the formation of an organized political opposition (see Holzer 1985) and ended with the transition to democracy after 1989. The country's constitutional changes occurred equally gradually and consisted of three steps: First, from February 6 to April 5, 1989, the Polish Socialist Workers' Party (*Polska Zjednoczona Partia Robotnicza*—PZPR) and the main oppositional force, the Independent Self-governing Trade Union 'Solidarity' (*Niezależny Samorządny Związek Zawodowy 'Solidarność'*) gathered for the so-called Round Table. The PZPR was not aiming for going ahead with democratization, but rather for appeasing the opposition with certain economic and social reforms. Nevertheless, the outcome of these talks was the end of socialism, substantiated by e.g. a comprehensive amendment of the socialist constitution of 1952 and a revision of the electoral law in order to hold semi-free elections in June 1989 (Ziemer 1989). The second step was the enactment of the so-called Small Constitution, passed in October 1992. It contained a new text body on political institutions and preserved a number of revised old articles on basic state structures, political rights and liberties. Finally, in May 1997, the work on a full-fledged new constitution was concluded.

Over these 8 years, several actors and committees presented their drafts for a new constitution and several attempts to amend the existing texts were undertaken as well. The majority of amendment proposals was rejected or withdrawn, but a certain number was indeed successful: six amendment laws were passed between 1989 and 1992, and four between 1992 and 1997. The 1997 constitution, in contrast, has been amended only twice up until 2014 (see appendix). Hence, Polish political actors have unfolded a high degree of activity in the field of constitutional politics over the last 25 years, which declined in frequency after the enactment of the new constitution.

In the following analysis, I will describe the pre-1992 changes to the socialist constitution only in order to illustrate to what extent they established a path-dependency effect for subsequent constitutional debates and revisions. The main study will commence with the enactment of the Small Constitution. It will focus on the characteristics of the successful amendments, but will also consider failed amendment attempts, particularly ones that pertained to the 1997 constitution and achieved a wider public and political attention. In contrast to these amendment laws, the process of designing the 1992 and 1997 constitutions is extensively

covered by Polish and international scholars. My discussion of these processes only serves the purpose of setting the overall political-constitutional context.

One main reason for it taking so long to arrive at a final constitution was that political actors heavily debated on matters such as the relation between political institutions and the meaning of religion and the nation. Hence, it was to be expected that these conflicts found their way into the ‘revision arena’ and that defeated actors in the ‘constitutional design arena’ used amendment politics to revisit lost issues. However, this analysis will show that despite the generally conflictual nature of Polish politics, the successful amendments can be considered as rather sensible changes. Another finding is that constitutional politics in Poland were mainly shaped by domestic struggles. External actors, such as the EU, did not play a relevant role. The case of Poland demonstrates that post-socialist constitutional politics fulfilled two functions: shaping the political transition and resolving conflicts between political institutions and parties. The transition to democracy constitutes one explanatory factor, especially for the early 1990s. However, the constitutional debates were also fueled by more fundamental cleavages in Polish society such as over religion and the nation state. From today’s perspective, the 1997 constitution achieved sufficient legitimacy to provide a stable framework for democratic politics and the prolonged process of constitution-making proved productive in the end.

2 Constitution-Making After 1989 I: The Way to the Small Constitution (1992)

The Round Table Agreement of April 4, 1989, which was ratified by the *Sejm*—the Polish parliament—later on, implied the following understanding of the constitution: a stepwise shift to a parliamentary system of governance, with the state party remaining in power and the introduction of two new institutions, namely the president’s office and the Senate (*Senat*) as a second chamber of parliament (Ziemiński 1989, 961; Dziennik Ustaw 1989). The presidency replaced the State Council, but was to secure the continuity of the old system. Therefore, the PZPR wanted to fill this post with the outgoing Chairman of the State Council, General Wojciech Jaruzelski (Maćków 1989). The president was given veto powers in law-making that the *Sejm* could only override by a two-thirds majority and a decisive role in government formation. Furthermore, he could dissolve parliament under certain conditions. The list of competencies was impressive and the borders with parliament and government were not clearly formulated (Osiatyński 1991, 30). *Solidarność* then considered this to be an asset, as they thought this

overlap would help diminish Jaruzelski's room for maneuver, whose victory everyone expected (Vinton 1992, 19). Initially, the president was not directly elected. The extent of his competencies implied a semi-presidential system that created a strong legacy for future constitutional politics (Garlicki 1997, 82).

In order to gain the acceptance from the opposition to the installation of the presidential office, the Senate was reintroduced (Osiatyński 1991, 21). Having a history in the institutional setting of Poland since 1493 (see Kulisiewicz 1993), it was to represent the 49 *voivodships* (regional administrative units) which were each able to elect two—Warsaw and Katowice each three—senators in direct elections. The Senate was to take part in the law-making process (Gebethner 1992, 61f.). It could approve the *Sejm*'s bills, suggest changes or impose a veto, which the *Sejm* could initially only override by a two-thirds majority. In addition, the Senate was able to propose its own legal initiatives. Another function of the Senate was to form, together with the *Sejm*, the National Assembly (*Zgromadzenie Narodowe*). This institution had to elect the president with an absolute majority, and is entitled to request an impeachment procedure against him in case he acts against the law. Furthermore, the National Assembly had to decide on changes to the constitution (Osiatyński 1991, 21).

Although both the presidency and the Senate had existed in pre-socialist times, constitutional traditions were less relevant for their reintroduction than the negotiation situation at the Round Table (Janicki 1995, 208f). These debates also produced an imbalance regarding democratic legitimacy, since only the Senate was supposed to be elected freely. For the *Sejm*, the participants agreed upon semi-free elections in which only 35 % of the seats were appointed by an open competition (Zubek 1991; Olson 1993, 418ff.). Surprisingly, the elections on June 6, 1989 brought a representative of Solidarność, Tadeusz Mazowiecki, into the office of the prime minister. After Solidarność had won all freely elected seats in both chambers, the socialist bloc parties—the United People's Party (*Zjednoczone Stronnictwo Ludowe*—ZSL) and the Democratic Party (*Stronnictwo Demokratyczne*—SD)—cut their ties with the PZPR and agreed to elect Mazowiecki. According to a compromise made beforehand, the National Assembly then voted Wojciech Jaruzelski for president on July 19, 1989, although with the narrowest majority of one vote. Nevertheless, the change in government opened the path towards real reforms, which allowed the transition to democracy and market economy to gain full speed.

Up until the first fully free parliamentary elections on October 27, 1991, the constitution was amended on five more occasions. The first set of amendments was passed on December 18, 1989 and mainly deleted all references to socialism. The state was renamed the 'Republic of Poland' with its old coat of arms, the 'leading role' of the PZPR was withdrawn and political freedoms were fully regained

(see Balaban 1993, 505ff.). Three further amendment laws in March 1990, April 1991 and October 1991 also aimed to democratize the constitution, whereas the fifth one modified the mode of electing the state president (see below).

In parallel, work on a new constitution was taking place. The initial plan was to adopt it on May 3, 1991, the 200 anniversary of the first constitution of Poland (Mohlek 1993, 9).¹ The new constitution was to be adopted by a two-thirds majority of the National Assembly and subsequently by a national referendum. The *Sejm*'s and the Senate's constitutional committees started working on December 7, 1989. Although they generally agreed on maintaining the strong position of the state president and the two-chamber system, their proper balance of power was an issue of conflict. Since *Solidarność* split into several political parties and camps, this political fragmentation made it impossible to work out a commonly accepted final draft that would receive a two-thirds majority. In addition, the *Sejm* members started to question their own legitimacy, as they had not been elected freely (Kallas 1992; Rapaczyński 1993; Balaban 1993, 508). Claiming that its open election in 1989 made it more authorized to express the popular will, the Senate condemned the *Sejm*'s constitutional committee and efforts to form a joint commission were fruitless (Mohlek 1993, 9).

Due to these conflicts, the next step that political actors agreed upon in autumn 1990 was to amend the existing constitution on September 27, 1990. Partly because of the lacking legitimacy of the *Sejm*, and partly based on strategic interests, all parties agreed on holding direct presidential elections already in December of that year. Each side thought they would profit from that change and that the new president would provide a democratically legitimate counterweight to parliament. After most political actors agreed to hold new elections for the presidency, Jaruzelski stepped down deliberately. Since tensions within *Solidarność* had grown, Prime Minister Mazowiecki ran against Lech Wałęsa but lost in the first round. The latter unexpectedly had to defend himself against an independent candidate, the millionaire Stanisław Tymiński, who had come back from abroad and gained 23.1 % in the first round. Wałęsa won the runoff by a clear 74.3-to-25.7 % majority on December 9, 1990 and became the first freely elected president of Poland (Jasiewicz 1992; Millard 1994, 128ff.).

As the president, Wałęsa presented his own constitutional draft with the purpose of further strengthening the presidential office. However, later on he withdrew it

¹The first Polish constitution was enacted before the French one and thus the first in Europe. However, it lasted only until 1793, when Poland was partitioned among Russia, Austria and Prussia (see Kusber 2004).

from the discussion, as he had not been able to find enough support. The parliamentary commissions produced drafts that borrowed heavily from various Western constitutions—mainly from Germany and France—and integrated the two series of amendments passed in 1989 and 1990 (Bos 2004, 168). The conclusion of the constitutional debate was delayed by the frequent changes in government, from Jan Bielecki (December 1990–December 1991) to Jan Olszewski (December 1991–June 1992) and Waldemar Pawlak (June 1992), who were all unable to achieve a consensus. In addition to the post of the prime minister the partisan composition of government kept changing. Only Prime Minister Hanna Suchocka's (July 1992–May 1993) party, the Democratic Union (*Unia Demokratyczna*—UD), managed to present a commonly accepted constitutional draft on August 1, 1992. The party leaders agreed to finalize an interim text,² and the National Assembly had to form a new commission to work on a final constitution. The *Sejm* passed the text with 241–110 votes, transferred it to the Senate, and later rejected most of the Senate's suggestions for amending it. The final version was then passed on October 17, 1992, and enacted on December 8, 1992 (Matthes 1999, 95; Bos 2004, 171; *Dziennik Ustaw* 1992).

The Small Constitution contained 78 articles, entailed a revision of the setting of political institutions, and annulled large parts of the socialist constitution. About two thirds of the old constitution, however, remained valid in a non-incorporated addendum of another 61 articles. They included the Bill of Rights, regulations on central state institutions such as the Constitutional Tribunal (*Trybunał Konstytucyjny*) or the judiciary, the constitutional symbols and the amendment rules. Poland's new constitutional order was thus based on three documents: (1) the constitutional law of April 23, 1992 on the procedure of preparing and passing a new constitution (in force since September 22, 1992); (2) the constitutional law of October 17, 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government (i.e. the Small Constitution); and (3) the above-mentioned articles of the 1952 constitution (Mohlek 1993, 11).

The new arrangement preserved the semi-presidential character and some overlapping competencies between president, government and parliament. Nevertheless, since Suchocka's government had had enough stability to resist Wałęsa's ideas on concentrating more power in his office, the Small Constitution at least clarified some rules. It introduced a more precise mode of selecting the government, slightly strengthened the government by making a vote of non-confidence

²This idea of a Small Constitution is common in Poland's constitutional history; it had already been used in 1919 and 1947 (see Bos 2004, 171).

more difficult, reduced the oversight function of the Senate towards the *Sejm*, since the latter could now overrule a former's veto with an absolute majority, and enabled the government to use fast-track legislation in law-making in order to speed up decision-making in parliament (Vinton 1993, 20). There was no state body to regulate or mediate possible conflicts, since the powers of the Constitutional Tribunal had not been expanded. In essence and similarly to the outcome of the Round Table talks, the Small Constitution was not a compromise between normative constitutional concepts, but rather an outcome of existing power relations between the defenders and opponents of a strong presidency.

3 Constitutional Politics from 1992 Until 1997: Amending the Small Constitution

Although Prime Minister Suchocka had successfully contributed to the preliminary completion of the constitutional debate, her government shortly after fell victim to political turbulences. After a series of miners' strikes and conflicts with the president on the state budget, she was confronted with a vote of non-confidence on May 28, 1993. As the *Sejm* parties were not able to form a new government, President Wałęsa called early elections for September 11, 1993. The new government, a coalition of the Democratic Left Alliance (*Sojusz Lewicy Demokratycznej*—SLD) and the Polish People's Party (*Polskie Stronnictwo Ludowe*—PSL), had a stable majority. Thus, a period of cohabitation started, since these two post-socialist parties did not match the political color of President Wałęsa (Matthes 1999, 206ff.). The government was successively led by three prime ministers: Waldemar Pawlak (PSL, October 1993–February 1995), Józef Oleksy (SLD, February 1995–February 1996) and Włodzimierz Cimoszewicz (SLD, February 1996–September 1997). Due to the tense political climate, the political parties and the president remained quite active in introducing changes to the constitution. During the 3 years between passing the Small Constitution and the next presidential elections in November 1995, no less than 14 amendments were proposed, in addition to another three bills to amend the law on the procedure of constitution-making. In contrast, after the end of cohabitation in late 1995, only two amendment proposals to the constitution were tabled until 1997.³

³All proposed, successful and failed draft amendments and the respective parliamentary votes can be found in the Archive of the *Sejm* organized according to each legislative term (Sejm 2015).

3.1 Successful Amendments

Article 15 of the Small Constitution defined the procedure to amend the constitution, according to which individual deputies, the Senate, the president and the government had the right to issue such a motion. In order to adopt amendments, a two-thirds majority in the *Sejm* was needed, with at least half of all *Sejm* members being present in the vote (Art. 106, still valid from the 1952 constitution). A possible veto of the Senate could be overruled by the *Sejm* with an absolute majority. Amendments to the Small Constitution were passed on four occasions.

3.1.1 The Introduction of the State Council on Radio and TV (1992)

A first amendment was agreed upon even before the Small Constitution had finally been passed. On October 15, 1992, a supervisory body for state-owned media—the State Council on Radio and TV (*Krajowa Rada Radiofonii i Telewizji*—KRRiT)—was established (Art. 36b; Dzennik Ustaw 1993). Its task was to guarantee the freedom of speech and the equal and free access to information. Its members were to be appointed by the *Sejm*, the Senate and the president and their concrete functions and duties were regulated in a specific law. The intention of the *Sejm* Committee on Culture and Media that introduced the bill was to depoliticize the media and to get rid of censorship practices pursued in socialist times. The Senate vetoed the bill, since it had lost influence during the process of law-making. While an earlier draft had allowed the *Sejm* and the Senate to nominate four Council members each, the Senate's number had now been reduced to two (Voltmer 1999, 16). However, the *Sejm* overrode the Senate's veto by the then still necessary two-thirds majority with 227 against 143 votes and nine abstentions, so the original version of the *Sejm*'s bill was enacted. Notwithstanding the initial intentions, the KRRiT later on suffered a great deal from partisan interests and pressures (see Voltmer 1999, 17ff.; Maliszewski 2006, 278f.).

3.1.2 Defining the End of Legislative Terms and Reducing Fast-Track Legislation (1995)

The frequent changes in government during the first half of the 1990s always resulted in an interruption of the law-making process. In addition, when Prime Minister Suchocka's government was brought down by a vote of non-confidence in May 1993, parliament was dissolved by the president and its legislative term ended as well (Art. 4, Sec. 1). Suchocka still served until the new government took office in October 1993, but since parliament did not work, about two thirds of the

legislative projects remained unfinished. Hence, one aim of this amendment law was to prolong the duration of the legislative term until a new parliament was convened (Matthes 1999, 228ff.). The bill was introduced by the *Sejm* and accepted by a broad 401-to-3 majority with four abstentions and modified Art. 4 and Art. 10, Sec. 2; the latter regulated the term of office of the parliamentary president accordingly. President Wałęsa's veto was overruled by a 303-to-11 majority with 21 abstentions and the law was enacted on March 17, 1995 (Dziennik Ustaw 1995a).

The amendment bill also defined the conditions for fast-track legislation more precisely. Fast-track legislation meant that the government could shorten the time for discussing bills in the *Sejm*, the Senate, and the president's office from 30 to 7 days each (Art. 16, Sec. 4). Parliament had suggested the amendment, because the Polish governments had begun to use the instrument of fast-track legislation against the instable parliamentary majorities quite intensively and many deputies complained that they had no time to consider bills properly. This speedier manner of law production had led to low legal quality, which in turn had made amendments of these laws necessary again. The amendment (Art. 16, Sec. 1) explicitly named certain topics that could not be handled under that procedure: basic civil rights, constitutional amendments, the budget, the tax system, the elections, and the organization, the jurisdiction or the functions of state bodies or bodies of local self-administration. The constitutional change yielded an immediate effect: The number of bills under the fast-track procedure decreased from 57 % in 1994 to 12 % in 1995 (Matthes 1999, 228ff.).

3.1.3 Constraining the President's Competencies (1995)

The revision of Art. 18, Sec. 2 initiated by parliament was supposed to regulate the period in which the president had to sign a bill. Before, he had often used this procedure for political conflicts. Whenever President Wałęsa held opposing views on certain pieces of legislation, he delayed the process. In addition, he tried to shift the responsibility for this to the government. This was especially the case after 1993, when the PSL-SLD coalition formed the government (Matthes 1999, 232). From November 1995 onwards, the president was obliged to sign a normal law within 30 days and—this was new—a budget law within 20 days after having received it. He then immediately had to proceed with the publication of the law in Poland's legal gazette, *Dziennik Ustaw Rzeczypospolitej Polskiej* (Dziennik Ustaw 1995b).

A similar problem had existed regarding Art. 21, Sec. 4, which concerned the right of the president to dissolve the *Sejm* if no budget law was passed within a period of 3 months after the respective bill had been introduced to parliament. President Wałęsa had often used this provision in order to blackmail the parliament

in cases in which the budget law did not fit his ideas or even in order to provoke a new government formation. He argued that the constitutional provision would mean that the parliament would not only be forced to pass the budget within 3 months, but also to enact it in this period. Although this understanding was denied by the constitutional court (Matthes 1999, 211, 232f.; Garlicki 1996, 307), the *Sejm* approved a clarifying amendment with a 239-to-53 majority with four abstentions, which was also accepted by the Senate and the president. This amendment, which clearly restricted the president's room for maneuver, went through due to the presidential elections taking place in the same month; the third reading of the bill took place on November 9, 4 days after the first round of the presidential elections. Hence, Wałęsa did not use his veto right for political reasons. On November 19, 1995, the SLD leader, Aleksander Kwaśniewski, won the runoff against Lech Wałęsa with a slight 51.7-to-48.3 majority (Juchler 1996, 274) and the cohabitation period ended.

3.1.4 Increasing the Prime Minister's Leverage on the Ministers (1996)

On April 25, 1996, the *Sejm* tabled an amendment to Art. 53, Sec. 1 and 4, and Art. 56. The idea was that the ministers should lose their right to issue statutes and directives. The suggestion was made in a period when the government and the president belonged to the same party, the SLD, and the Prime Minister Włodzimierz Cimoszewicz—in office since February 1996—wanted to streamline the cabinet's work by disciplining the ministers. An overwhelming majority of 352 votes, with two rejections and six abstentions, passed the bill in the third reading. Neither the Senate nor the president formulated any objections. Another amendment made only a terminological change in Art. 52, Sec. 2, No. 3 (Dziennik Ustaw 1996).

3.2 Unsuccessful Amendment Attempts

In addition to the four successful amendment laws, 12 further amendment proposals to the Small Constitution were submitted between December 1992 and May 1997, eleven of which by the *Sejm* and one by the Senate. Of these 12 bills, two were rejected, one withdrawn, and nine were abandoned or left uncompleted until the end of the legislative period. Both rejected bills were introduced by deputies. The initiators of the first one, tabled on October 12, 1994, aimed for removing the provision on the length of the arrest warrant from the constitution to the penal law. The *Sejm* rejected the bill with 261–41 votes and 51 abstentions. The other rejected bill was introduced on February 14, 1996 and intended to transform the office of a

senator into a lifetime position. This proposal was rejected with 216–120 votes and 34 abstentions. Another bill introduced by the *Sejm* on November 10, 1993 wanted to require the prime minister to report formally to the parliament once a year as a regular procedure. The proposal was withdrawn on February 19, 1994.

Among the amendment proposals that were not voted on were some that concerned parliamentary procedures. The bill from December 22, 1994, introduced by the Senate, aimed to prolong the period to check fast-track legislation from seven to 14 days. It was abandoned after first reading. The bill introduced by parliament on July 6, 1995 aimed to ease the lifting of parliamentary immunity by restricting it to activities connected to the parliamentary work. The *Sejm* introduced another attempt to facilitate the lift of immunity on September 29, 1995. It was abandoned after the first reading on March 15, 1996.⁴

4 Constitution-Making After 1989 II: The 1997 Constitution

The just mentioned unsuccessful amendments did not achieve much political (and academic) attention, since the process of drafting a final constitution went on in parallel. According to the law of April 23, 1992 on designing and passing a new constitution, the following groups were allowed to introduce drafts: the constitutional committee of the National Assembly (which consisted of 46 *Sejm* and 10 Senate members), a group of at least ten percent of all deputies or senators, the president, and 500,000 citizens.⁵ The task of the constitutional committee was to unify all the drafts it had received—which were seven documents by April 30, 1993—in order to develop one coherent text.⁶ Conflicts similar to those in the years up until 1992 shaped the debate. Instead of decreasing, they rather increased with the ongoing differentiation of the political spectrum. The conflicts centered around the competencies of the president and the type of semi-presidential system (as only few actors opted for pure parliamentarism), the level to which social rights should be made explicit in the constitution, and the church-state relations, which

⁴Between 1991 and 1993, deputies introduced another five amendment bills, which were abandoned; unfortunately, their contents are not recorded by the *Sejm*.

⁵The option for citizens' proposals was included by an amendment of April 22, 1994. The *Sejm* took this decision in order to enable those center-right parties not represented in parliament after the 1993 election to participate (Garlicki and Garlicka 2010, 396).

⁶A citizens' draft, collected by the trade union *Solidarność* and center-rights parties, was introduced in 1994 (Ziemer 2013, 24).

were explicitly addressed in the preamble of the new constitution, the wording of which had been highly debated (Bos 2004, 174f.; Ziemer 2013, 25; Garlicki and Garlicka 2010, 395f.). Unintentionally, the whole process took 5 years.

This long and troublesome work involved the ideas and opinions from non-parliamentary actors, such as law professors, representatives from trade unions, the churches and the constitutional court, as well as the government and the presidency. After discussing many amendment proposals and committee suggestions (Garlicki and Garlicka 2010, 397ff.), the National Assembly adopted the final version of the constitution on April 2, 1997, with 451 against 40 votes and six abstentions. The new basic law was mainly opposed by conservative members of parliament (Garlicki and Garlicka 2010, 400; Bos 2004, 174ff.). Only 42.86 % of all eligible voters took part in the subsequent obligatory referendum on May 25, 1997, of whom only a slight majority of 52.7 % approved the constitution. The low participation had several reasons. First, other than for ordinary referendums, no quorum was necessary for this vote; second, the controversial discussions among politicians alienated many people from the whole project, since they considered other social and economic matters more pressing; and third, after 8 years of transition, they could easily imagine continuing their lives without a new constitution (Łętowska 1997, 80).

The new constitution (Poland 2009) clarified the relationship of political institutions to quite an extent. It generally kept the semi-presidential character with a relatively strong and directly elected president, but decreased his executive powers in favor of the government. The latter was made the core of the executive, with a stronger position towards the parliament. The president is still in charge of appointing the government, but he no longer has a say in selecting the defense, foreign and interior ministers. In peacetime, the defense minister exercises the command of the military. Other powers of the president were made more concrete in order to prevent abuse or over-interpretation of the constitution. This was a clear reaction towards the previous quarrels between the president and the government and can be considered an outcome of political learning. The position of the prime minister compared to the president and the cabinet was strengthened, as only he—and not the ministers—was entitled to countersign acts of the president. The *Sejm* can vote the government out of office solely by a constructive vote of non-confidence and the right of the president to dissolve the parliament was reduced to cases in which the *Sejm* either did not pass a budget law within the given frame of 4 months or did not elect a government. In addition, the president can neither veto the parliament's budget, nor submit a bill to the Constitutional Tribunal after the *Sejm* has blocked a presidential veto. To override the presidential veto now a three-fifths majority (until 1997: two-thirds) in the *Sejm* suffices (Garlicki 1997, 85f.; Freytag 1998).

5 Constitutional Politics in the Post-1997 Period

After 8 years of continuous constitutional debates, the question of constitutional changes became less prominent among politicians for a while (see Bos 2004, 210). Moreover, other issues occupied the political agenda, such as the 1999 pension, health and education reforms and a reorganization of the regional administrative structure (Ziemer 2013, 86). During Poland's EU accession negotiations no changes to the constitution were necessary, because EU legal norms had already been considered and the constitution addressed the transfer of sovereignty to international institutions in Art. 90. Only two clauses were missing: an option to transfer competencies from the Polish National Bank to the European Central Bank in order to introduce the Euro, and the right to vote for EU citizens in local elections (Diemer-Benedict 1997, 226; Freytag 1998, 9f.).⁷

In addition to the fact that the long-lasting process of constitution-making had come to an end by 1997, the political climate had also changed. In general, party politics calmed down, the relations between president, government and parliament were more peaceful and both the prime ministers and the major parties in the governmental coalitions managed to stay in office for their full legislative periods. It was only after the elections of 2005 and another reshuffle among the right-wing, national conservative party spectrum—which brought the Law and Justice party (*Prawo i Sprawiedliwość*—PiS) in charge of the government—that the field of constitutional politics gained new attention. The PiS firstly formed a minority government, tolerated by two other, even more populist and nationalist parties: the Self-Defence of the Republic of Poland (*Samoobrona Rzeczpospolitej Polskiej*—Samoobrona) and the League of Polish Families (*Liga Polskich Rodzin*—LPR). In May 2006, the three forces formed a formal coalition, which lasted until the summer of 2007. The PiS constantly questioned the legitimacy of the 1997 constitution and demanded a more explicit break from the socialist past than the negotiated transition had achieved in 1989. The party promoted the idea of the need to establish a 'IV Republic'.⁸

⁷For transferring sovereignty, a two-thirds acceptance by the Senate is needed. This was a concession to conservative forces in Poland who feared a loss of national independence (Freytag 1998, 10). After lengthy discussions, local voting rights for EU citizens were integrated *explicitly* only in the amended Election Code of January 5, 2011.

⁸After the 'I Republic' in the 18 century, the 'II Republic' during the interwar period, the 'III Republic' was established in 1989/1990. Although high-rank PiS politicians had also been *Solidarność* members in the past, they had never really accepted the compromises of the Round Table talks. Therefore, they started to call their coming into power in 2005 the beginning of the 'IV Republic' and tried to establish this 'break' through several institutional

The PiS' relations to other political parties, especially to the Civic Platform (*Platforma Obywatelska*—PO), were very hostile and tensions increased after the PiS was voted out of office in 2007 and the PO formed a coalition with the PSL under Prime Minister Donald Tusk (PO). In particular, several conflicts occurred with Lech Kaczyński (PiS), president since 2005. In the field of foreign and security policy, Kaczyński claimed more rights for his office and did not abide by the practice that his predecessor Kwaśniewski had developed to leave the main executive decision-making to the prime minister. This led to the absurd situation that, for a meeting of the European Council in October 2008, both Prime Minister Tusk and President Kaczyński wanted to represent Poland and an argument developed about who would be allowed to go and use the only available government airplane. Tusk addressed the Constitutional Tribunal, which refused to make a clear decision but asked for cooperation between the two (Ziemer 2013, 126).

Thus, the constitutional arena again became a more relevant field for political power plays, until this cohabitation phase ended in 2010 with the election of Bronisław Komorowski (PO) for president. However, as I will demonstrate below, no strategically motivated attempts to amend the constitution turned out successful and the only two amendments that were adopted had a rather functional nature. Nevertheless, they reveal a lot about the underlying conflicts within Polish politics and society and the then political climate.

5.1 Successful Amendments

According to Art. 235, Sec. 1, one fifth of the deputies, the majority of the senators and the president are allowed to introduce an amendment to the constitution. A citizens' initiative, as it was included in the Small Constitution, is no longer possible. The *Sejm* has to approve an amendment by two-thirds of the votes with an absolute majority of all deputies present. Subsequently, the Senate has to decide with an absolute majority of the votes, with at least half of its members present (Art. 235, Sec. 4). Although the new constitution can thus be considered as relatively flexible, there is an entrenchment clause that protects the chapters I (The Republic), II (Freedoms, Rights and Duties of the citizens) and XII (Constitutional Amendments, Art. 235). In addition to a slightly longer minimum period between

(Footnote 8 continued)

changes (Ziemer 2013, 23ff.). For a similar case in Central and Eastern Europe that actually led to a new constitution-making process; see the chapter on Hungary in this volume.

the first reading and the final decision in the *Sejm* (60 instead of 30 days), *Sejm* and Senate members can request an additional referendum in case of an amendment to the respective chapters.

5.1.1 The European Arrest Warrant (2006)

The first amendment to the new constitution fell into the reign of the PiS and was not motivated by party-political interests. Nevertheless, it provides insights on the different attitudes towards national sovereignty and European integration in Poland. Article 55 had to be amended in order to bring the constitution in line with the conditions of the European Arrest Warrant (EAW). The amendment allowed other EU member states or courts to ask for Polish citizens suspected of having committed a crime in their country to be transferred back to their territory, under the condition that this is also a crime according to Polish penal law (Dziennik Ustaw 2006).

The amendment became necessary after the Polish Constitutional Tribunal had ruled in April 2005 that the introduction of such a clause into the Penal Code, as made in March 2004, was against Art. 55, Sec. 1 of the constitution, which explicitly preempted any extradition of a Polish citizen. Therefore, the parliament was asked to pass an amendment on that issue in order to comply with EU law. Two proposals were introduced, one by President Lech Kaczyński and one by the oppositional PO. The latter's draft was rejected by the *Sejm*'s majority, although legal experts considered it as being more in line with the ruling of the court than the president's bill (Baińczyk 2008, 260). Accordingly, the debate in the *Sejm* repeated the Constitutional Tribunal's considerations regarding the definitions of 'extradition' versus 'surrender' (Weigend and Sakowicz 2007).

Finally, the *Sejm* accepted the president's draft by a 344-to-48 majority with 29 abstentions on May 15, 2006; the Senate had no objections. By introducing two new paragraphs to Art. 55, the EAW declared a particular form of extradition acceptable within the EU. However, several government deputies and senators feared a loss of national sovereignty. The concerns they brought forward show that they rather felt the need to protect Polish citizens against EU law or the law of other member states than to protect citizens of other member states from criminal Poles. This discussion is also an example of the claim that the idea of national sovereignty is still an issue for many Polish politicians—not only from the political right wing—resulting from the historical experience of frequent losses of statehood (Baińczyk 2008; Wiącek 2007, 182).

5.1.2 The Disenfranchisement of Passive Electoral Rights for Persons with Criminal Records (2009)

Another amendment was adopted three years later, when the PO was in charge of the government and PiS' Lech Kaczyński still held the presidency. To Art. 99, a new Sec. 3 was added, according to which a person loses his or her passive electoral right to the *Sejm* and the Senate in case of a conviction for an 'intentional indictable offense', i.e. a criminal offense liable to public prosecution. This proposal was closely related to the attempts to modify the parliamentary immunity provisions, which had already been discussed several times. The draft, introduced on February 27, 2008, was aimed at several politicians from *Samoobrona*, especially its leader Andrzej Lepper, who all held previous convictions or were facing trials. Politicians from other parties therefore feared for the reputation of Poland's political institutions (Ziemer 2013, 88). Although some PiS and PO politicians criticized this amendment as either too extensive (PiS) or too soft (PO), the *Sejm* accepted it on May 2, 2009 by an overwhelming majority of 404 deputies without any rejections and only three abstentions (Dziennik Ustaw 2009).

5.2 Unsuccessful Amendments

From 1997 until the end of 2014, 16 unsuccessful attempts to amend the constitution were recorded, 14 of which were initiated by the *Sejm* and two by the president. With regard to their date of introduction, it becomes quite obvious that no politician felt a major need or interest to introduce amendments shortly after the enactment of the new constitution. In the first legislative term after 1997, only two bills were initiated: On November 21, 1997, several deputies of the then governing Solidarity Electoral Action (*Akcja Wyborcza Solidarność*—AWS) introduced a bill on reforming the regulations regarding the principle of immunity (Art. 105). The bill received a result of 222 to 189 votes in favor and 23 abstentions in the first reading, but then the draft was abandoned in the committee. The other proposal, which AWS made on April 27, 2000 regarding Art. 227 on the law-making competencies for the National Bank, was also abandoned later on.

The question of possible amendments to the constitution re-emerged only about one decade later. In the two years of the conflict-laden PiS-LPR-*Samoobrona* government (2005–2007), six unsuccessful amendment attempts were made, while in the 7 years after their reign—which, until 2010, marked a period of cohabitation between a PiS president and a PO prime minister—another eight attempts were undertaken. This shows that the higher political tensions in the period after 2005

led to greater activity in the constitutional arena; in other words, constitutional politics became a relevant field of political struggle again.

Of the six bills introduced in the period before September 2007, one was rejected and five were abandoned. The rejected bill aimed at introducing the protection of life from the moment of conception (see below). Of the abandoned bills, one was introduced in March 2007 by president Kaczyński and addressed Art. 179, aiming for reforms for the term of office for judges. It received a positive vote of 193–179 without abstentions in the first reading, but was later abandoned in the committee. The other four bills again addressed parliamentary immunity. Two were introduced by the PiS. They aimed for lifting immunity for cases in which a deputy or senator has committed a crime. Additionally, a respective conviction had to ban candidates from standing for parliamentary elections. Similarly, PO introduced bills on the same issue in December 2006 and again in May 2007. Since the PiS-LPR-*Samobrona* coalition collapsed in August 2007, however, none of these draft amendments was finished during the legislative term.

The PiS was defeated in the parliamentary elections of October 2007 and succeeded by the PO, which resumed government. Being in opposition, the PiS tried to achieve political changes, including through the amendment of the constitution. Three attempts were made: In 2008, the party introduced a proposal to change several articles of the constitution in order to remove provisions that the party considered to be remaining communist legacies. This bill was rejected by the *Sejm* with 271–152 votes and one abstention. One year later, the PiS introduced a bill that aimed at changing the competencies of the Constitutional Tribunal and the Citizens' Advocate (*Rzecznik Praw Obywatelskich*). This draft amendment was abandoned in the committee. Finally, in 2013, the PiS tried to reintroduce the citizens' initiative in constitutional matters, as it had existed until 1997. This bill did not meet a two-thirds majority in the *Sejm* either and was rejected by 221–216 votes with three abstentions. The PO was also active in the constitutional arena. It introduced a bill in 2008 that again attempted to reform the principle of immunity. However, the party withdrew this bill later on. An amendment introduced in late 2014 aimed to regulate the commercial use of forest. It did not find a sufficient majority either and was rejected with 291–150 votes and two abstentions in the third reading.

Compared to the period 1992–1997, the content of all these proposals no longer addressed fundamental constitutional questions, but rather aimed for cautious modifications of the institutional order or the system of constitutional values. In contrast, there were three more topics, addressed in four unsuccessful amendment attempts that were heavily debated in society and among political actors. These amendments will be examined more closely in the following: (1) a bill proposing

the unconditional protection of unborn life, (2) a proposal to reorganize the tasks and competencies of the president, and (3) two draft amendments on the procedures necessary to adopt the Euro.

5.2.1 The Protection of Unborn Life (2007)

The issue of abortion had been a topic of continued debate since 1989. The Catholic Church and several national-conservative parties demanded a stricter regulation on abortion after it had been legal in socialist times. A law on abortion was passed in January 1993 under the government of Hanna Suchocka (UD). It stated that abortion is illegal, except for cases in which the pregnancy poses a danger to the life and health of the mother, an incurable disease threatens the fetus' life, or the woman was a victim of rape. In 1994, an amendment to this law included a social indication, i.e. allowing abortion when the woman is in a difficult life situation, but the then President Wałęsa successfully vetoed the bill. Two years later, parliament introduced the social indication again, but this time conservative deputies addressed the Constitutional Tribunal. The court declared the social indication illegal on May 28, 1997, identifying a violation of the principles of motherhood and family, which were protected by the Small Constitution, but with references to the not yet valid new Constitution and its Art. 38, which mentions the duty of the state to ensure every person's "legal protection of life" (Wiącek 2007, 166). Since quite a number of illegal abortions had been practiced every year—the numbers differ greatly, from the 10,000–15,000 issued by 'pro-life' organizations to the 80,000–200,000 published by 'pro-choice' organizations (Ignaciuk 2007, 56), the topic remained an issue of public debate.

Whereas physicians mainly aimed for ensuring legal certainty, some right-wing parties often articulated that they considered the original law of 1993 too liberal. In September 2006, the nationalist LPR introduced a proposal to amend the constitution (Art. 30 and 38) in order to completely ban abortion. The preferred phrase was that the Polish state should "protect the life of its citizens from the moment of conception" (Ignaciuk 2007, 51). Several actors involved themselves in the debate. For instance, Archbishop Józef Michalik backed this bill and sent a supporting letter to the *Sejm* Marshall. The clerical radio station *Radio Maryja* also favored a complete ban on abortion. In contrast, Poland's leading newspaper *Gazeta Wyborcza* covered a debate from November 2006 until April 2007 that argued in favor of re-legalizing abortion and was supported by women's organizations and some leftist political parties. PiS representatives and President Kaczyński tried to formulate a compromise, such as in the choice of words; the Polish citizen's 'dignity' instead of their 'right to live'. However, the PiS and several PO

representatives in the *Sejm* were split over the matter of how to vote on the amendment (Ignaciuk 2007, 51f.).

On April 13, 2007, after a heated debate, finally the amendment bill failed to achieve the necessary two-thirds majority in the third reading. Although 269 deputies voted in favor of PiS' draft, 27 more votes would have been needed to pass the bill. The 121 negative votes mainly came from the SLD and PO, while 53 deputies abstained. The debate on the legality of abortion has continued since then. In sum, the ongoing discussion shows how deeply the topic of abortion touches upon fundamental values of the Polish society.

5.2.2 Reorganizing the Tasks and Competencies of the President (2010)

Despite the compromise found on the president's office with the new constitution in 1997, the role of the head of state remained a constant cause of debate between the two major parties PO and PiS. A first move to change this was made by the PiS when they intended to reduce the powers of the Constitutional Tribunal and the Ombudsman in 2009 (see above) and thereby shift power to the president. When the PO-PSL coalition came into office in September 2007 and another period of cohabitation with President Lech Kaczyński commenced, the government made a new attempt to amend the constitution. In November 2009, it presented a proposal to revise several constitutional provisions in order to reduce the influence of the president, to change the responsibilities of the Senate, and to modify the electoral law (Winczorek 2010, 24f.; Vetter 2009, 3).

The Polish think tank Experience and Future (*Doświadczenie i Przyszłość*) also prepared a bill that backed the PO's ideas. It provided the *Sejm* with the right to override a president's veto with an absolute majority and deprived the president of the option to deny the signature below international treaties. Furthermore, it reduced his powers in the appointment of certain posts such as judges. Finally, it proposed an indirect election of the president through the National Assembly. In sum, it argued for a complete parliamentarization of the Polish governmental system. The PO favored these suggestions (Zoll 2010, 4), but there was not much political and public support for the proposal when Tusk opened the discussion to the broader public and asked President Kaczyński and his predecessors, Wałęsa and Kwaśniewski, to back his initiative. Nevertheless, Tusk introduced a comprehensive reform proposal to the *Sejm* in February 2010. The bill recommended the re-introduction of the indirect election of the president by the National Assembly, reducing the president's veto powers, downsizing the number of *Sejm* and Senate seats, and changing the electoral law. Although the bill received a

positive vote in the first reading with a 218-to-173 majority with one abstention, it later lacked a reasonable chance of getting a two-thirds majority in the *Sejm*. Thus, it was finally abandoned in the committee (Vetter 2009, 3).

5.2.3 The Introduction of the Euro and Poland's Relation to International Institutions (2011)

On November 12, 2010, the newly elected President Bronisław Komorowski (PO) submitted a draft for amending the constitution regarding EU matters (Art. 227), which he had already prepared during his time as *Sejm* Marshall. The bill addressed in particular the institutional preparation of Poland for the introduction of the Euro. This step would result in the abolishment of the National Council for Monetary Policy and a transfer of responsibilities from the Polish National Bank to the European Central Bank. The bill also included provisions to harmonize the constitution with the Lisbon Treaty facilitating the *Sejm*'s involvement in the process of European law-making and to allow Polish citizens to vote for the European Parliament from abroad (Ziemer 2013, 89). On many of these issues, the previous President Lech Kaczyński had already had severe conflicts with Prime Minister Tusk. The PiS introduced their own, more restrictive bill on the same issue on November 26, 2010. Although some compromises were found throughout the discussion, e.g. making further shifts of competencies to the EU level dependent on a vote in the *Sejm* with two-thirds majority, it became clear that there would be no sufficient majority, neither for Komorowski's nor for the PiS' proposal. Hence, both bills were abandoned in the committee after their second reading in the plenary on August 30, 2011. The discussion among experts and within society is still highly pronounced, but in recent years public opinion has become more and more sceptic towards the Euro (see Visvizi and Tokarski 2014). Therefore, the PO did not make any further attempts to continue pressing the issue. Thus, as matters stand at the end of 2015, Poland would not be able to introduce the Euro on the current constitutional basis.

6 Conclusion: The Polish Constitutional Order a Quarter Century After 1989

Both processes of writing the constitution—that in 1992 and in 1997—reflected the general political debates on the central political institutions and the fundamental values of the constitutional order. These debates did not only mirror the specifics of the transition from socialism to democracy, but also resembled general cleavages within society. Despite the ongoing struggles among the political elites, however, the 1997 constitution has become a source of political legitimacy, not least due to

the rulings of the Constitutional Tribunal, which has backed the principles of democracy and strengthened the powers of parliament (Banaszak 2009; Ziemer 2013, 26).

In contrast to the debates that dominated the design of the constitution, the successful amendments to both constitutions rather provided functional improvements for everyday politics and helped the work of politicians go more smoothly. In particular, the conflict-laden parliaments of the early 1990s passed amendments to the Small Constitution that clarified the relations between political institutions, strengthened the government, and kept parliament involved on a considerable level. While the constitutional committees that tried to design the new constitution were loaded with and paralyzed by conflicts, the same did not always apply for amendments. In addition, political actors seemed to have quite a realistic assessment of their powers, as the proposals that were unlikely to receive a majority were abandoned or withdrawn, while efforts to find a decision through voting and risking a rejection were made rather rarely. The two amendments to the 1997 constitution were equally relevant to the functioning of political institutions. However, they did not regulate the relations between political institutions. The unsuccessful amendment bills show a different pattern insofar as they have often tried to solve political struggles by constitutional means. Addressing the issue of abortion or that of national sovereignty corresponded to previous value-driven battles in the process of drafting the constitution. Only the frequent attempts to modify the principle of immunity implied an interest in functional capabilities, although it also helped to tackle political opponents.

Most amendment proposals came from the deputies—either acting individually or as representatives of their political parties. Only in few cases, the president or the Senate used their right to introduce amendments, while the former was much more active than the latter. The involvement of the public was not a relevant matter for most politicians. As the suggestion to foster the participation of citizens by enabling them to introduce amendments was not successful, the model of representative democracy seems to outweigh the idea of public involvement. Only once, in the course of the drafting of the 1997 constitution, was a proposal introduced ‘bottom-up’. Nevertheless, this had been prepared and introduced by the trade union branch of *Solidarność* in close cooperation with right-wing parties that were not represented in parliament in those days. The influence of external actors was hardly visible when the general design of the constitution was debated. The European Arrest Warrant, which many Polish politicians received as being more than a technicality, is the sole exception (Wojtyczek 2010, 54).

To conclude, the amendments decided upon in Poland, including most of the unsuccessful amendments, show that the principle of legality has a high value for

most politicians. The struggle over the constitution reveals that they believe in the power of rules and processes of democratic learning are clearly visible. To that extent, constitutional politics in Poland is a reflection of the successful democratization process and constitutional design was an instrument to shape the political and legal transition to democracy. From today’s perspective, one can argue that the long duration of the constitution-making was worth it. At the same time, constitutional amendments became a field of policy-making whenever a period of cohabitation emerged and politicians tried to use this arena to sort out their political conflicts. This was enhanced due to the fact that these debates, including those at the Round Table and how to overcome the socialist past, are not only a mirror of the democratization process, but also overlapped with historical constitutional models and pre-socialist experiences of a strong presidency and a strong parliament. Hence, constitutional politics in Poland is more than a matter of post-1989 democratization. It is also rooted in long-term societal and institutional cleavages in the country and an expression of political power plays that do not have their roots solely in the system change.

Appendix: Constitutional Politics in Poland 1992–2014

Dates of amendment and implementation	Articles	Constitutional subfields	Short analysis of the reform process
10/15/1992 / 10/29/1992	Art. 36b (new)	• Other control/oversight agencies	• Regular amendment: approved by two-thirds majority in the <i>Sejm</i> (final vote: 225-to-60 majority with 46 abstentions); after rejection by the Senate, finally approved by the <i>Sejm</i> (final vote: 227-to-143 majority with 9 abstentions) • Main actors: <i>Sejm</i>, Senate, president • Duration: about 6 months

(continued)

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03/17/1995 / 03/31/1995	Art. 4, 10, 16	• Legislature • Executive-legislative relations	• Approved by broad two-thirds majority in the <i>Sejm</i> (final vote: 401-to-3 majority with 4 abstentions); approved by Senate; presidential veto overridden by the <i>Sejm</i> (303-to-11 majority with 21 abstentions) • Main actors: <i>Sejm</i>, Senate, president • Duration: about 2 months
11/09/1995 / 11/25/1995	Art. 18, 21	• Executive-legislative relations	• Approved by two-thirds majority in the <i>Sejm</i> (final vote: 239-to-53 majority with 4 abstentions) approved by Senate and president • Main actors: <i>Sejm</i>, SLD-PSL government, president, Constitutional Tribunal • Duration: about 2 months
06/21/1996 / 07/05/1996	Art. 52–53, 56	• Executive	• Approved by broad two-thirds majority in the <i>Sejm</i> (final vote: 352-to-2 majority with 6 abstentions), approved by Senate and president • Main actors: <i>Sejm</i> (SLD and PSL), Senate, president • Duration: about 2 months
04/02/1997 / 07/16/1997	New constitution	–	• Regular constitution-making by the National Assembly with broad two-thirds majority (final vote: 451-to-40 majority with 6 abstentions), approved in a referendum (final vote: 52.7 % “yes”, 45.9 % “no”; 42.9 % of the electorate took part) • Main actors: president, <i>Sejm</i>, Senate, citizens • Duration: about 4½ years

(continued)

(continued)

09/08/2006 / 11/07/2006	Art. 55	• Human and civil rights	• Approved by two-thirds majority in the <i>Sejm</i> (final vote: 344-to-48 majority with 29 abstentions), approved by Senate and president • Main actors: Constitutional Tribunal (whose ruling made the amendment necessary), president, <i>Sejm</i> and Senate • Duration: about 4 months
05/07/2009 / 10/21/2009	Art. 99	• Elections	• Approved by broad two-thirds majority in the <i>Sejm</i> (final vote: 404-to-0 majority with 9 abstentions), approved by Senate and president • Main actors: <i>Sejm</i> (PO), Senate, president • Duration: about 15 months

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