



Between civic and legal constitutionalism: Dynamics of Poland's constitution-making projects of the 1990s

OÑATI SOCIO-LEGAL SERIES VOLUME 10, ISSUE 4 (2020), 903-931: INVESTIGATIONS –

INVESTIGACIONES – IKERLANAK

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1142](https://doi.org/10.35295/OSLS.IISL/0000-0000-0000-1142)

RECEIVED 30 MARCH 2020, ACCEPTED 07 JULY 2020

EMILIA T. KOWALEWSKA * 

Abstract

This study explores the way in which the notion of competing constitutionalisms illustrates and explains the evolution of Poland's institutional landscape during and following the transition from communist rule. The paper considers the impact of variants of constitutionalism on constitution-making processes. While recent threats to the rule of law in Poland illustrate challenges to the consolidation of democratic constitutionalism several decades after political transformation, this paper traces processes by which citizens and political elites accept or reject the legitimacy of proposed constitutional frameworks, institutions and norms. The constitution-drafting project supported by the Solidarność trade union facilitates an original and comparative examination of these topics. Applying the concept of competing constitutionalisms to the analysis of previously unstudied archival, text, narrative interview and survey data, the study exposes the tension between the politics of constitution making on the one hand, and the symbolic, substantive and axiological aspects of constitutionalism on the other.

Key words

Constitutionalism; post-communism; constitution making; democratic legitimacy; Poland; civic constitutionalism; legal constitutionalism; legal culture

In addition to thanking two anonymous reviewers for their thoughtful feedback, I would like to thank Antoni Z. Kamiński, Helena Chmielewska-Szlajfer, Agnieszka Dudzińska and Monika Gabriela Bartoszewicz as well as Martin Škop, Paul Blokker, Adam Czarnota, Bogdan Iancu, Jiří Příbáň and Silvia Suteu (participants of the July 2018 workshop at the Oñati Institute for the Sociology of Law) for their comments on earlier versions of this paper. Participation in the workshop was partially supported by the Institute of Philosophy and Sociology, Polish Academy of Sciences.

* Institute of Political Studies, Polish Academy of Sciences. Polna 18/20 00-625 Warszawa (Poland). Email address: e.kowalewska@isppan.waw.pl

Resumen

Este artículo examina la manera en que la noción de constitucionalismos en competencia ilustra y explica la evolución del panorama institucional de Polonia durante y después de la etapa comunista. El artículo toma en consideración el impacto de variaciones del constitucionalismo en los procesos constitucionales. Si bien las amenazas recientes al constitucionalismo, décadas después de la transformación política, este artículo rastrea los procesos por los cuales la sociedad y las élites políticas aceptan o rechazan la legitimidad de los marcos constitucionales y sus instituciones y normas. El proyecto de redacción de un borrador de constitución apoyado por el sindicato Solidarność favorece un examen original y comparativo de esos temas. Al aplicar el concepto de constitucionalismos en competencia al análisis de datos de archivo, texto, narrativa de entrevistas y encuestas, el estudio pone de manifiesto la tensión entre las políticas de elaboración constitucional, por un lado, y los aspectos simbólicos, sustantivos y axiológicos del constitucionalismo, por el otro.

Palabras clave

Constitucionalismo; poscomunismo; redacción de la constitución; legitimidad democrática; Polonia; constitucionalismo cívico; constitucionalismo jurídico; cultura jurídica

Table of contents

1. Introduction	906
2. Conceptualisation: Theories and Assumptions	907
3. Data and Methods	909
3.1. Case selection	909
3.2. Data collection	910
3.3. Analysis	910
4. Results	911
4.1. Aspects of constitution-making processes	911
4.2. The Civic Constitutional Project in comparative perspective	916
5. Concluding Discussion	920
References	924
Primary sources cited	929
Annex: Interviews cited	931

1. Introduction

Drawing on a republican tradition of civic responsibility (Kamiński 2018) and persistent national struggles for a sovereign nation-state (Chmielewska-Szljajfer 2018), Poland's political transformation towards liberal democracy in the 1980s and early 1990s catalysed the disintegration of the communist system within countries of the former Soviet bloc. The reawakening of Poland's civil society took the form of the non-violent *Solidarność* (Solidarity) workers' rights movement that numbered ten million members by September 1981. Yet, despite the state's constitutional heritage – symbolised by proud commemorations of the adoption of Europe's first written national constitution on 3 May 1791 – and the reaffirmation of fundamental rights and democratic values by civil society during the 1980s (Słodkowska 2006), Poland's democratic constitutional framework has, in recent years, become the subject of aggressive political contestation and intensive external scrutiny. Controversies over threats to the rule of law and separation of powers – particularly those concerning the legitimacy of judicial appointment and disciplinary procedures – have called into question the condition of liberal constitutional democracy in the largest of Central-Eastern European states. This article draws attention to causal processes that shape and legitimate the institutional landscape in the context of an evolving political and legal culture.¹ The notion of constitutionalism as it has been interpreted in Poland over the groundbreaking process of transition from communist rule forms the core of the research problem under investigation. Contributing to explorations of the way in which constitutionalism has been operationalized in the post-communist countries of East-Central Europe (see further: de Raadt 2009), the article presents one particular attempt at constitution-making in its institutional context. An examination of this case study illustrates the dynamics of processes by which citizens and legislators accept or reject proposed constitutional frameworks and norms. This in turn sheds light on the extent to which “competing constitutionalisms” can impact upon the institutional landscape through the processes of formation and legitimation of key institutions within evolving legal cultures.

By exploring aspects of constitution-making that have previously been overlooked by scholars in the field – not least the causal determinants of strong and sustained ambivalence towards the 1997 Constitution on the part of a large proportion of the population – the present study fills an important gap in the literature detailing constitution-making processes and the evolution of constitutionalism in Poland. The theoretical and substantive contribution of this exploratory study is enhanced by its timing: tracing the consequences of various approaches to constitutionalism may reveal root causes of what may be described as *liberal democratic fatigue* in several new member states of the European Union and the rise of a populist, anti-establishment narrative in both East and West.

The article is structured as follows. First it introduces the reader to the theoretical inspirations for the study, the state of the art and operationalization of the research problem. Second it introduces the data and methods chosen to explore the research

¹ Pierre Legrande (1997, p. 646), defines *culture* as “the framework of intangibles within which a community operates, which has normative force for this community (even though not completely and coherently instantiated), and which determines the identity of a community as *community*”.

objective and provides justification for the chosen case study. It subsequently outlines the research questions used in content analysis and measurement. Fourth, it presents the results of the study, drawing on data gathered in interviews and documents as well as relevant local studies as yet unknown to an international audience. It concludes with a discussion of the implications of the findings for the relevant research fields and recommendations for future research in the field of the sociology of constitutionalism.

2. Conceptualisation: Theories and Assumptions

This study is inspired by a rich body of scholarship (Grudzinska-Gross 1994, Přibáň and Young 1999, Czarnota *et al.* 2005, Sadurski *et al.* 2006, Skąpska 2011, Sadurski 2012, Kamiński 2014) on challenges to the rule of law, democracy and constitutionalism in postcommunist legal orders. While each of these terms deserves explication, my focus is on the concept of constitutionalism examined from the sociological perspective and in reference to the process of constitution making (described by Zakrzewska 1993, Graczyk 1997, Osiatyński 1997, Wyrzykowski 1998, Chruściak and Osiatyński 2001).

What is the relation between new constitutions and constitutionalism? In one of his many contributions to this field, Martin Krygier noted that no constitution is self-enforcing. Rather, a constitution – in order to be interpreted – depends both on institutions and on a “spirit of constitutionalism” (Krygier 1997, p. 22). Few scholars have attempted to define and explore the possible forms that this “spirit of constitutionalism” might adopt. The theoretical inspiration for the present study comes from David Sciulli’s exploration of the notion of societal constitutionalism. This American sociologist’s theory revolves around the relationships that subsist between four basic sets of institutions of internal/external and substantive/procedural restraint on purposeful or inadvertent/systemic exercise of collective power (Sciulli 1991). Combining this perspective with the rich tradition of socio-legal reflection in Poland (see further: Kurczewski 2001, Skąpska 2019b) opens up a whole field of transdisciplinary scholarship that has helped draw the contours of constitutionalism well beyond its legal parameters. The overlapping fields of socio-legal studies and political sociology concerned with constitutions and constitutionalism rightly pay attention to the social aspects of constitutionalism. While acknowledging the significance of legal cultures (Nelken 1997, 2004) as well as doctrines, texts, decisions and modes of reasoning, authors in this tradition define constitutionalism as “above all a web of social values, attitudes, meanings and actions of professionals and lay persons, which contributes to the distribution of power, effectiveness of social control and possibilities of attaining social integration” (Winczorek 2012a, p. 117). In line with this tradition, represented by authors as diverse as Grażyna Skąpska, Christopher Thornhill and Chantal Mouffe, the constitution is considered to be a social and political phenomenon that facilitates the symbolic ordering of social relations (Mouffe 1993, p. 11, in Sajó 2019).

The present study likewise assumes a socially embedded definition of constitutionalism as an authoritative body of ideas, political values, and practices that express the principle that government authority is based on and limited by

constitutional rules.² Contributing to theoretical and empirical work considering the social nature of law and the underlying causes of the challenges to constitutional consensus-building and democratic consolidation in Poland (c.f. Skąpska 2011, 2019a), this study builds upon an expanding body of literature that takes up the question of whether the dominance of judicially-enforced and higher-order law over politics diminished the potential for democratic consolidation in the new democracies of Central and Eastern Europe. It makes a unique contribution to the literature exploring the enabling function of constitutions with respect to democratic practices in the context of disillusionment with democratic politics (Blokker 2013).

Poland's constitutional institutional landscape has been severely tested in the years following the publication of Paul Blokker's (2013) comparative-empirical study in which the author examines constitutional structures of five new democracies of Central and Eastern Europe with reference to core features of so-called legal constitutionalism. Complementing socio-legal research that has classified problems with postcommunist constitutionalism in terms of legal resentment, Blokker's overall claim is that his model of civic constitutionalism may provide an antidote to a one-sided legal constitutionalism that emphasises pre-commitments and strong judicial review over possibilities for civic engagement and participation (Blokker 2013, p. 164, p. 9).³

Blokker's much-discussed study predated the constitutional controversies that have affected Poland since the change of government in 2015. Being a comparative study it provides merely an overview of the Polish case in historical perspective. The assumption of this article is that my notion of competing constitutionalisms provides a timely and appropriate conceptual framework within which to explore and understand the dynamics of constitutional development and constitution making in Poland during and after transition. This assumption is tested with reference to a relatively unknown attempt at constitution making initially supported by the *Solidarność* trade union in the early-mid 1990s, and subsequently endorsed by over one million citizens. The project is analysed in light of Blokker's claim about the emergence of constitutionalist discourse and practice in the later days of communism,⁴ and his claim about the shortcomings of the model of constitutionalism ultimately pursued.⁵

The present focus on variants of constitutionalism, while engaging with recent reflection in the field, also builds upon earlier scholarly reflection on the concept of legal culture. While definitions of legal culture vary (see Winczorek 2012b), the concept is usually associated with the work of Lawrence Friedman and encompasses the attitudes of legal professionals and the general population towards legal frameworks,

² Following Legrand (in Bell 2003 p. 271) constitutional rules form "part of the symbolic apparatus through which entire communities try to understand themselves better".

³ Constitutional politics, direct forms of democracy, and decentralized forms of democracy are all considered to indicate possible dimensions of more democratic forms of constitutionalism (Blokker 2013, p. 10).

⁴ Blokker (2013, p. 11) suggests that, "in most cases, dimensions of dissident discourse indicated a republican view of democracy, including ideas of civic engagement and the civic scrutiny of formal politics, notions of civic association, and endorsements of (local) self-rule and autonomy".

⁵ In more recent work, Blokker observes that "the legal-constitutionalist template that has been prominent in the East-Central European transformation processes suffers from potential defects that might produce perverse effects with regard to the institutionalization of constitutional democracy and the rule of law (as arguably has become visible in Poland...)" (Blokker 2017, p. 20).

and the interactions between law, legal systems, and different social groups. However, the term legal culture has also attracted criticism. Jan Winczorek (2012b, p. 110) claims that “the decision on the exact limits of legal culture is arbitrary and intuitive, not theoretical, and the explanatory power of the term is limited”. Roger Cotterrell (2003) prefers the notion of legal ideology and draws attention to various forms of relations of community and the network arrangements in which they exist. This study provides an opportunity to revisit reflections on and challenges to the concept legal culture with reference to the conceptual frame offered by the notion of competing constitutionalisms.

3. Data and Methods

3.1. Case selection

An original case study discussed in this paper is the constitution-making attempt supported by the *Solidarność* trade union in the early 1990s. Despite being well known to the legal academics involved in constitution-making process in Poland (Osiatyński 1997, Wyrzykowski 1998, Chruściak and Osiatyński 2001), the chosen case study has been overlooked in the international literature on democratic transition and consolidation in the new democracies of Central and Eastern Europe. This gap merits filling for a number of reasons.

First of all, from the perspective of the sociology of institutional change and the characteristics of negotiated transition, this process of constitution-making provides a lens through which to explore many intriguing features of Poland’s political transition, including timing, delay, and the significance of “constitutional moment”.⁶ Moreover the case study represents the last significant attempt of *Solidarność* to codify⁷ its approach to the “ultimate symbolic issues” (Kubik 1989, p. 40) that were central in the conflict between the Party-state and society in the momentous years of 1979-1981. These include but are by no means limited to issues of national identity and sources of political legitimacy – matters of obvious relevance to competing understandings of constitutionalism.

Second, the case study provides an important counterpoint to the later constitution-making effort that resulted in the adoption in 1997 of Poland’s current Constitution. It is helpful to consider possible reasons for significant popular support and the consequences this may have had on the (perceived) legitimacy of the text ultimately adopted.

Third, the case study illustrates an instance of civic involvement and mechanisms for both achieving and undermining grassroots support considered against the backdrop of the interests of political elites. In order to understand the goals, values,

⁶ Antoni Z. Kamiński has observed that a “constitutional moment” appears when the *window of opportunity* opens up, i.e. during moments of deep political instability when forces sustaining the existing constitutional regime find themselves in disarray and unable to protect it. See: Kamiński and Kamiński 2018, p. 118.

⁷ C.f. Příbání (2004, p. 415), who claims that, “[b]ecause of its absence during the Communist period, civil society could reenter only as a specific tradition that had to be codified, promoted, and protected by the post-1989 constitution-making processes.”

characteristics and possible implications of the whole endeavour, relevant historical context will be presented. This allows the study to bridge a gap that often exists between theoretical models of democratic transition and empirical studies that lack potential for generalizability (see further: Markoff 2005).

3.2. *Data collection*

Drawing on the approach of earlier studies of multiple political cultures and their impact upon the emergence of democratic regimes in selected new member states of the EU (Blokker 2010), this study takes up an original analysis of constitutional politics, political discourse and constitutional texts. In contrast to previous studies it combines textual and interview data with analysis of survey data related to public opinion and voting behaviour. Important contextual data is drawn from detailed studies of constitutional politics in Poland in the period immediately following transition from communist rule, with a focus on the years leading up to the adoption of the 1997 Constitution. Data has been collated and contextualised with reference to transitions literature highlighting the role of elite agreements in shaping future institutional developments, as well as literature more specifically focused on post-communist constitutionalism in Poland, analysed with reference to aspects highlighted within process tracing methodology (George and Bennett 2005). Text data analysed using methods of qualitative text analysis (Kuckartz 2014) based on content analysis and coding were drawn primarily from archived materials including memos and legislative and political party documents and proposals, as well as contending drafts of the Constitution itself. Data also included written and oral statements made during or immediately following the period under examination, as well as interviews that have been transcribed and collected in specialised repositories and archives (including 'Archiwa Przełomu 1989–1991'), published in special collections (Bujak 2017), or conducted by the author for the purposes of the present study. The results of public opinion polls related to competing draft constitutional texts are also evaluated and integrated into the results.

3.3. *Analysis*

Research questions posed mirrored those taken up by Martin Krygier and colleagues (Sadurski *et al.* 2006) immediately following EU enlargement. Analogous research questions were applied to the case study of constitution making in Poland: What were the goals and underlying values of constitution-making processes in post-communist Poland? What were the major challenges these processes faced and (may) continue to face? What was the character of the process? In particular, what characterises the means employed to achieve it? Furthermore, the chosen case study was examined using as a frame of reference competing models of constitutionalism proposed within the relevant literature of recent years (following Blokker 2013): legal constitutionalism; civic constitutionalism; political constitutionalism; and populist (or popular) constitutionalism.

4. Results

4.1. *Aspects of constitution-making processes*

The results of this exploratory study are presented below with reference to the above-mentioned interrelated aspects of initial constitution-making processes, namely their 1) goals and values; 2) major challenges; and 3) character. The analysis of data related to the chosen case study is presented as a follow on from this largely historical and descriptive overview, facilitating a comparison between particular approaches to constitutionalism observed in the study.

4.1.1. Goals and values

Examination of early accounts of constitution-making processes reveal that the *goals and underlying values* of such processes in post-communist Poland were shaped by particular characteristics of its political transition. The proportional electoral law and semi-presidential system that were adopted as hallmarks of the constitutional arrangements in the early 1990s appear to be the direct result of the logic of power-sharing agreements that characterised the transition as a whole. The *determining logic* of the outgoing elites was well described by Tworzecki (1996, pp. 20-21, following Arend Lijphard), who noted that the communists in 1989 agreed to share power on the condition that Jaruzelski would retain the presidential office. Moreover, in addition to insisting on a contract model for the 1989 elections that would guarantee the communists a constitutional majority in the Sejm, the outgoing elites, among others, also later insisted on proportional representation for fear of losing all of their seats under any other electoral system. Once these arrangements were in place they were difficult to amend as other parties too had vested interests in maintaining the status quo. This kind of determining logic originating in the interests of the communist elite distinguished Poland from the former Czechoslovakia, whose outgoing elites were not in a position to demand such concessions following rapid internal changes of 1989 (Lijphart 2012). However, they highlight the dominance of short-term interests in the early days of political change.⁸

While the goals of the government side are easy to comprehend, the particular interests of the Solidarity side also deserve explanation. Linz and Stepan claim that “Solidarity did not believe that a full transition to democracy was then possible, but they did believe that they could use elections to get Solidarity relegalized and to start the process of free political campaigning” (Linz and Stepan 1996, p. 267). In short, the “power sharing” features of Poland’s institutional development were rooted in the short-term instrumental goals and underlying conciliatory values of constitution-making processes at that time.

Similar observations can be made regarding the adoption of the so-called “Little Constitution” in October 1992. The adoption of this law was apparently the most significant achievement of the Sejm of the first term (Dudek 2013). It signified a

⁸ Zbigniew Brzeziński (1991, cited by Kamiński 2014 at p. 152) claimed the Poland’s complicated internal situation was caused by an inappropriate and badly thought-through choice of electoral system. He claimed that proportional representation would diffuse the will of the nation and would deny a democratic majority the possibility to exercise their choice.

compromise between President Lech Wałęsa's attempt to establish a Presidential model of power, and the various political parties from across the political spectrum that were opposed to such a model (inter alia SLD (Alliance of the Democratic Left), PSL (Polish Peasant Party), UD (Democratic Union), RdR (Coalition for the Republic) and PC (Centre Agreement party)). While formally the Little Constitution was seen to facilitate the "normal" functioning of state organs (Zakrzewska 1993, p. 8; Tworzecki 1996, p. 89), the division of competencies between the President and the government remained unclear.⁹ Archives suggest that the Little Constitution was also used to limit the influence of the democratically elected Senate on the ongoing political transformation (Andrzejewski (interview) 2010).

Overall, corroboration of various independent eye-witness accounts reveals that dominant actors in the formal constitution-making processes were primarily concerned about maintaining their share of power and influence, shielding themselves from political defeat, and upholding prior agreements. Key players were less concerned with strengthening the system of governance understood as a common public good (Kamiński 2014). In the absence of a state-oriented strategic vision for how the political system should be organised (Zakrzewska 1993), short-term instrumental goals had disproportionate causal impact.

4.1.2. Major challenges

Major challenges affecting the constitution-making processes included problems of legitimacy – particularly for the (post-)communists, as well as volatility, fragmentation and plurality of the political scene – particularly visible in the post-Solidarność camp.

The problem of legitimacy was not a new problem for the ruling elites. The 1980s saw proposals from the democratic opposition for introducing institutions such as the State Tribunal, Constitutional Tribunal, or later the Ombudsperson/Human Rights Defender. Emphasis was placed on those institutions that establish traditional guarantees of individual rights within a democratic state governed by the rule of law. Paradoxically these institutions were introduced into the constitution in March 1982 by the same parliament that two months earlier had approved the decree of Martial law. Likewise, demand for a new constitution initially came from within the government structures in 1985-1988 as party leaders hoped to incorporate the opposition into a liberalised form of communist system (Sanford 2002). Parliament was seeking legitimation in the eyes of society – but failed to secure it (c.f. Suchocka 1995, p. 17).

While in the 1980s it was commonly understood that the non-democratically-elected parliament lacked the necessary legitimacy to adopt a new constitution (Suchocka 1995, pp. 16-17), different civic initiatives began to spring up and, in addition to discussions of constitutional reforms in the underground press (Stępień (interview) 2009), civic committees started forming with the aim of working on a new constitution. While the Civic committee movement enjoyed legitimacy, its potential long-term legacy was cut short by the second major challenge – fragmentation.

⁹ C.f. Czajkowski (1993) cited by Dudek 2013, p. 260.

Archived materials indicate that the “war at the top” which began to gain momentum from September to December 1989¹⁰ was one of the most significant features of the early years of the new democratic order, resulting in the fragmentation of the democratic opposition. While its details are typically overlooked in the English-language literature, understanding the “war at the top” is essential to illustrate and explain the volatility and fragmentation that negatively affected democratic consolidation and constitution making. This fragmentation/differentiation is described further in the paragraphs that follow.

4.1.3. Character

As regards the character of the constitution-making processes explored in this study, a review of early accounts illustrates that—despite a civil society initiated transition underpinned by the collective action of *Solidarność* movement members—it was the ruling elites that remained the decisive actor in the determination of the shape of constitutionally significant institutions, including the Constitution itself. This points to the important dichotomy (Czarnota 2008, p. 574) of revolutionary constitutionalism versus continuity (Přibáň 2007). The establishment of the Constitutional Tribunal and Ombudsinstitution by the communist government in the 1980s – ultimately motivated by that government’s self-interested quest for legitimacy – was a good predictor for future pragmatic developments.¹¹ Despite the unquestionable achievements of representatives of the democratic opposition in the process of negotiating necessary political reforms in 1989, *Solidarność* movement representatives did not play a dominant role in voicing societal demands within the official constitution making process during the 1990s.

In addition to being elite-driven, analysed records also reveal that parliamentary-led constitution-making processes were mismanaged and drawn out.¹² Ralph Dahrendorf in 1991, Bruce Ackerman in 1992 and Janina Zakrzewska (1993)¹³ – together with other external experts – immediately understood the delay in enacting a new constitution to be a grave problem.¹⁴ The results of this exploratory study allow us to trace causes and consequences of this delay on prospects for constitutionalism in Poland.

First and foremost, the Roundtable negotiations (discussed in regional perspective in Přibáň 2007) played a major role in determining the shape and speed of political reforms, including those undertaken in the name of a new, democratic constitutionalism. It was as a result of these negotiations that the 1985-1989 Parliament, on 8 April 1989, thoroughly amended the constitution by re-establishing the second

¹⁰ For an overview of the “war at the top” i.e. the breakup of Solidarity into two factions with different visions of systemic change led by Wałęsa and Mazowiecki respectively, see: Tworzecki 1996, pp. 52-55; Dudek 2013, pp. 103-119.

¹¹ Suchocka (1995, p. 26) contrasts pragmatic constitutions to programmatic constitutions. The first deals mainly with mechanisms of governance while the latter expresses a certain idea of the state and philosophical orientation.

¹² New or radically altered constitutions were adopted by Bulgaria, the Czech Republic, Estonia, Hungary, Romania, and Slovakia between 1989 and 1992. See: de Raadt 2009.

¹³ All three experts are cited by Antoni Z. Kamiński (2014, p. 149).

¹⁴ By contrast, Osiatyński (1999/2011, p. 8), who had previously been “convinced that there was no need to hurry” only later admitted the shortsightedness of allowing such a delay.

chamber, the Senate, as well as the institutions of the President¹⁵ and National Council of the Judiciary. During this period, key representatives of the democratic opposition such as Tadeusz Mazowiecki (who later became prime minister) demonstrated his commitment to refraining from actions that would not simultaneously serve the interests of the outgoing elites (Andrzejewski 2010). According to Suchocka (1995, p. 18), it was the Roundtable negotiations that provided this Parliament with legitimacy in the absence of free democratic elections. Moreover, those involved in negotiating processes knew that certain agreements had to be upheld in order not to undermine a delicate consensus that had been reached well before the fall of the Berlin Wall (Andrzejewski 2010).

The Roundtable agreements included a tasking for a newly elected (1989-) Parliament to create a new democratic constitution and electoral system. The sides of the agreement undertook to ensure that the make-up of the next parliament would fully reflect the will of the electorate (Pietrzak 1994). However, in the so-called “Contract Sejm”¹⁶ established following the elections of June 1989, only 35% of available seats were reserved for the “civil society side” of the Roundtable while 65% of available seats were reserved for representatives of the ruling parties and those associated with the *ancien régime*. Despite this contractual arrangement and limited democratic mandate, most observers agree¹⁷ that this Parliament was perceived in 1989 to have sufficient legitimacy to adopt a new constitution.¹⁸ Expectations were raised with the creation of a constitutional commission.

Eye-witness accounts indicate the emergence of a constitutional moment in late 1989, when despite major uncertainty it was clear that the political system had ruptured from within. Former Senator Andrzejewski (2010, p. 7) recalled that everything – including fear on the side of the communist elites – signified that this was a special moment in which transformation had to take place, a crisis that signified the irreversible disintegration of the communist system. However, in the autumn of 1989

¹⁵ Pietrzak (1994) claims that the Solidarność-opposition side of the roundtable negotiations saw the most important and urgent tasks for the democratic state to be those of changes in the judiciary, mass media and reinstatement of local self-government structures. Changes to the government/administrative system were deferred till later. The government-PZPR party side of the roundtable negotiations initiated and insisted upon a quick change in the system of government through reinstatement of the institutions of President and Senate. No doubt this was motivated by a need to legitimize its policy in the eyes of the nation. Pietrzak recalls the accounts of General Władysław Pożoga (Deputy Minister of Internal Affairs) according to whom the communist authorities already in 1988 proposed – in contact with the Episcopate – changes in the Constitution including the reintroduction of the Presidency, as an office with significant power, reinstatement of an elected Senate (with the Speaker of the Senate having the function of Vice-President) and widening the competencies of territorial national councils (*terenowe rady narodowe*). Ultimately the Sejm of the IX term did in April 1989 amend the Constitution, reintroducing the Presidency and Senate – but limiting the role of the Senate compared to what had been agreed.

¹⁶ Seats in the contract Sejm were allocated following the partially free elections of 4 June 1989 on the basis of a prior agreement between the Polish United Workers’ Party (“PZPR”) and the Solidarność movement.

¹⁷ Suchocka 1995, p. 18. Antoni Kamiński shares this view.

¹⁸ Skąpska (2011, pp. 31-32) notes in reference to this period, that “[o]ne can assume that the reformist or moderate members of the communist parties were not only concerned in finding a new basis for legitimation and gaining financial and moral support from the West in order to protect themselves against the more rigid old guard, but, in both countries, they became vividly interested in the new opportunities which the economic and political liberalization of the regime was offering and had initiated, in Hungary and Poland, through the pre-1989 privatization of the national economy.”

Bronisław Geremek, Chair of the Citizens' Parliamentary Party (Obywatelski Klub Parlamentarny, OKP),¹⁹ advocated an approach to constitution making based on mere amendment of the existing constitution in anticipation of work on a new Constitution, the adoption of which was said to be the goal of the Sejm and the Senate. While most OKP members shared this approach, the more "radical" members were decidedly opposed to the continued applicability of the 1952 ("Stalinist") constitution (Pietrzak 1994). Geremek's approach seemed to change with time: towards the end of the year, both he and Hanna Suchocka began to express the view that it was impossible in practice to amend the 1952 text sufficiently so as to improve it. Suchocka proposed that certain provisions that were at odds with the present reality should simply be removed from the text. By contrast, in mid-December 1989 Senate Speaker Andrzej Stelmachowski stepped up with an initiative to adopt a temporary constitutional law. This proposal foresaw the suspension of the (1952) Constitution with the exception of provisions on the structure and operation of the main government institutions. Stelmachowski also proposed to bring back the name "Rzeczpospolita Polska" i.e. Respublica or "Republic of Poland".²⁰ The idea of a temporary constitutional law lost out to the more moderate approach based on amending rather than suspending the 1952 Constitution (Pietrzak 1994).

Counter to the general sentiment of other parliamentarians—including those of the OKP, Geremek in December 1989 expressed his opposition to far reaching amendments to the existing Constitution. However, this approach changed again after Christmas when it was decided (within the OKP) that the nation should receive an amended constitution as a consolation prize in time for the New Year (Pietrzak 1994). Insistence on the change of name of the state and the change of the national symbol in some sense catalyzed further changes that would make the amended Constitution worthy of its new name (Pietrzak 1994): the Polish United Workers' Party, PZPR, was no longer ascribed a leading role, and Poland was no longer self-defined as a socialist state with a centrally planned economy (Suchocka 1995, p. 18). The resulting draft, adopted by the Sejm on 29 December 1989 and reviewed the following day by the Senate, consisted of far-reaching changes to the character of the constitutional system (Pietrzak 1994). While no one questioned the legitimation of Parliament to make these changes at that time, some expressed the view that such changes should conclude rather than initiate the process of constitutional change (Suchocka 1995, pp. 18-19).

Meanwhile constitutional commissions in the Sejm and the Senate had been formed. Geremek chaired the Sejm commission and Alicja Grześkowiak chaired the Senate commission, formed on the same day, 7 December 1989. Geremek expressed his strong opposition to the formation of the Senate commission in a letter to Grześkowiak, which claimed that promulgation of a new constitution was a task exclusively for the Sejm (Pietrzak 1994). This tension between the contractually imposed Sejm and freely

¹⁹ The OKP, i.e. "Civic Parliamentary Club" or "Solidarity Caucus" was the institutional reflection of Solidarność leaders' belief in a new form of democracy tied to civil society rather than political parties. See: Osiatyński 1999/2011, p. 9.

²⁰ In Polish the word *Rzeczpospolita* denotes both Commonwealth and Republic (Sanford 2002, p. 8).

elected Senate²¹ led to the refusal by some parties to acknowledge the legitimation of the Sejm for the process of adopting a new constitution.²²

By the start of 1990 the “war at the top” was underway.²³ According to Suchocka (1995, p. 19) this marked the start of the process of differentiation of post-Solidarność political groups that in turn became one of the major causes disabling the consolidation of these groups around the common project of adopting a new constitution. Political declarations denying Parliament legitimation²⁴ became more explicit. While Jon Elster (1991) affirmed the importance of technical competence in the constitution-making process – over and above the role played by a democratically elected Senate, the Contract Sejm dominated by former communists ultimately failed to adopt a constitution during its term. In short, the best moment for adopting a new Constitution had passed.

Finally, the following comparative examination of the chosen case study in light of the official parliamentary constitution making process illustrates the dominance within the latter of political pragmatism over conscious deliberations related to the nature of the state and democratic constitutionalism. This political pragmatism – which also resulted in the elimination of post-Solidarność groups from the new Parliament following the 1993 elections – was one of the characteristic features of Poland’s constitution making-process from its earliest stages right up until 1997.

4.2. *The Civic Constitutional Project in comparative perspective*

The civic project, or “Citizen’s Draft”,²⁵ was initiated far from parliament by a group of friends – among them students, lawyers, social activists and philosophers – who formed what they named the *Kosarzyski Club*. While in the 1980s the informal group would meet to discuss political philosophy and social ethics, in 1989 some of its members began to debate the need to adopt a new Constitution that would reflect axiological, philosophical and legal continuity with the First and Second Polish Republic.²⁶ Foreseeing the imminent collapse of the communist system, hope was expressed for a new Constitution to be adopted by 1991 to mark the bicentennial of the historic Third of May constitution of 1791. Nevertheless, several years passed before these individuals came together to form the “Social Constitutional Commission” (*Spoleczna Komisja Konstytucyjna*). One of the major catalysts of conceptual discussions

²¹ “Contrary to expectations on the part of communist reformers, on 4 June 1989, the Poles voted almost exclusively for candidates of the opposition, and with the exception of one senator, only candidates of the opposition were chosen to the Polish Senate” (Skąpska 2011, pp. 31-32).

²² This may have been avoided by the immediate creation of a joint Commission of the National Assembly, but such close cooperation seems hard to imagine given the contrasting make-up of both chambers, one freely elected and one predominantly post-communist.

²³ The “war at the top” of Solidarność seems to have been sparked by Wałęsa’s decision in September 1989 to appoint Jarosław Kaczyński as Tadeusz Mazowiecki’s successor in the post of Editor-in-Chief of the *Solidarność Weekly* – a decision that was immediately criticized by the intellectual milieu affiliated with *Gazeta Wyborcza* daily newspaper.

²⁴ Recalling the legitimacy problems of the post-1989 Constitutional framework, Mark Brzeziński (1998, in Cole 1999, p. 2098) notes the particular problem with the Sejm’s Constitutional Commission that was tasked with drafting a constitution even though it failed to represent the full spectrum of political views.

²⁵ Known in the Polish original as *Obywatelski Projekt Konstytucji Rzeczypospolitej Polskiej*.

²⁶ Interview 1.

on the shape of a new constitution was the *I Polish Conference of the Centre Right on the matter of a new Constitution for the III Republic* (Majchrowski 2018) organised by Judge Kazimierz Barczyk on 5 December 1993 in the town hall in Kraków (Interview 1).

While parliament made slow progress on adopting a new Constitution following the electoral victory of the postcommunist SLD in 1993, civil society efforts soon picked up pace: the newly formed Social Constitutional Commission worked in parallel to the coalition government-led efforts. The constitutional act of 23 April 1992 as amended on 22 April 1994 foresaw a range of possibilities for putting forward official constitutional projects for consideration. The law allowed for such drafts to be put forward by the Constitutional Commission of the National Assembly (*Komisja Krajowa Zgromadzenia Narodowego*), KKZN, as well as by a group of 56 members of the KKZN, by the President of Poland and/or by a group of civil society who manage to obtain the support of 500,000 signatories (citizens eligible to vote). These “barriers of entry” rationalized the number of projects that ultimately made it to the Constitutional Commission for consideration (Wawrzyniak 1997, pp. 193-4). Seven draft constitutional projects fulfilled the criteria laid down in article 2 of the law (Mazurek 2001, pp. 177-184). The analysed minutes of the special commission meetings discussing amendments to the law suggest that the amendments were incorporated in direct response to the civic project, suggesting that the project was considered to be a serious competitor.

This civil society project, coordinated by the Social Constitutional Commission, enjoyed the expert involvement of several legal practitioners, Senators and Warsaw-based advocates known for their human rights work and defense of members of the democratic opposition during communist times. Key figures included Andrzej Rościszewski, Chair of the Regional Bar Council, judge Kazimierz Barczyk, and advocates Zbigniew Romaszewski, Piotr Andrzejewski and Jan Olszewski. While experts played the main substantive role, the *Solidarność* trade union National Commission (*Komisja Krajowa*) supported financially and managed the work of the Social Constitutional Commission. The support of *Solidarność* structures also facilitated the gathering of around 1,300,000 signatories (Krzaklewski 1994) under the Citizens’ Draft.

In contrast to the Parliamentary draft, analysis of obtained documents and interview transcripts reveals that deliberations on the shape of the Citizens’ Draft were relatively resistant to the impact of short-term political and pragmatic considerations. Exceptions to this general rule were the result of the engagement of *Solidarność* activists within the commission.²⁷

In terms of substantive content, the civic project built on a draft constitutional text developed by Alicja Grześkowiak and her Senate constitutional commission made up

²⁷ *Solidarność* activists ultimately fought *against* the first-past-the-post electoral system proposed by Senator Romaszewski and Senator Olszewski within the civic project. The activists’ stubborn fight to maintain proportional representation was apparently motivated by plans to form a political party (the later named Electoral Action *Solidarność*, AWS). An electoral system based on proportional representation would ensure that party activists would remain dependent on and accountable to party leadership. In the end a compromise was made within the Social Constitutional Commission (Interview 1).

of members nominated to the Senate by the Solidarity Civic Committee.²⁸ The main feature that distinguished the civic project from the parliamentary proposal ultimately adopted by the National Assembly in 1997 was its explicit invocation of axiological principles and of patriotic values upon which it was grounded. Solidarność National Commission chairperson Marian Krzaklewski (1994) presented the project to members of the National Assembly as follows:

The Civic Constitutional Project is firmly grounded in values that constitute the foundation of a Polish worldview. These values form an integral whole and are mutually complementary: some without others are incomplete and under threat. Three main values upon which we based our work are:

- 1) Christian values, which find their expression in the primacy of the human person, extensive human and family rights, and in the grounding of systemic solutions on the principles of Catholic social teaching,
- 2) Patriotic and national values, which find their expression in a reference to Polish tradition and in systemic mechanisms designed to guard the independence of the country and the subjectivity of its citizens
- 3) Social values, which find their expression in social rights and in a political system based on dialogue and solidarity of social partners. [Translation by author]

The parliamentary process on the other hand continued to be highly reactive. In 1994, during earlier stages of the Parliamentary Constitutional commission's (KKZN's) work, the Chair of the commission – future President Aleksander Kwaśniewski – was criticized for incompetence and for the chaotic nature of the commission's work. Subcommissions were asked to work out concrete proposals for the text before the KKZN had decided upon its overall structure (Drozdek 1994).

Furthermore a number of parliamentary subcommission members complained about the pace of work imposed on them at the end of 1994, claiming that it did not allow them to work thoroughly or to consult interested parties – including other subcommission members who were at that time of year preoccupied with legislative/budgetary matters. According to journalist observers, this pace of work was imposed by the KKZN chair in fear of a possible dissolution of Parliament by the President in the New Year (February 1995). Kwaśniewski apparently preferred to see an imperfect constitutional text adopted rather than to leave the work to the next parliament (Drozdek 1994, p. 5).

Further criticisms of the parliamentary project were – as earlier – grounded in concerns over legitimacy and transparency of the drafting process.²⁹

Some phrases adopted by specific parliamentary subcommissions were lifted directly from the Citizens' Draft. Amongst them was a clause on preventing proscription of

²⁸ Archives of the Senate of the Republic of Poland of the I term: <http://ww2.senat.pl/k1/senat/komisje/KK.htm> (last accessed 4 February 2020).

²⁹ For a contrasting view, see the defense of the procedural aspects of the parliamentary project offered by Wawrzyniak (1997, p. 196), who claims that the axiological foundations of the 1997 Constitutional Referendum included values related to *national sovereignty* as well *rationalised democratic* values (“wartości demokracji zracjonalizowanego”). Wawrzyniak asserts that *pluralism* was one of the values that permeated both the work of the parliamentary Constitutional commission and the fruit of that work in the form of the current Constitution.

crimes that were not previously investigated for political reasons. However, language adopted in the relevant subcommission was occasionally amended completely or reframed as one of several choices at the stage of editing in the editorial subcommission (Drozdek 1995b).

By early 1995 supporters of the civic project were preparing to reject the Constitutional draft being developed within the KKZN (Osiatyński 1999/2011). From the earliest stages of the parliamentary project, criticisms emerged based on the conviction that the project rested on an “undefined axiological basis”. In the opinion of those involved in the civic initiative, the new constitution should have been the cornerstone of a state that was both modern and rooted in tradition and of a nation based on a shared hierarchy of values, strengthened by personalistic principles that provide a balance between individualism and collectivism (Drozdek 1995a).

By April 1995, in response to the character of the parliamentary work, it was suggested that the ruling coalition should enable citizens to vote on (alternative) constitutional drafts that had at least 1.5 million signatories. Enabling such a vote would – in the eyes of its proponents – result in a Constitution that had the genuine support of the majority of the population. Public opinion polls carried out almost two years later show popular support for this suggestion (OBOP 1997a).³⁰

In February 1997 support for the civic project (34%) was significantly higher than support for the draft of the KKZN (25%) – measured in terms of proportions of voters voting for one or the other if given a choice. Twenty-five percent of voters were undecided about which they would choose. A smaller number (16%) indicated that they would vote for neither (OBOP 1997a). The parliamentary text gained support in the last months in comparison to the civic text. It seems that a televised Parliamentary debate helped to influence this change in voter orientation. However, the debate failed to raise the general level of interest in the constitution and therefore seems not to have been an exclusive factor affecting the change (OBOP 1997c).

Likewise, while the majority of Poles continued to prefer the option of a choice between two alternative projects at Referendum up until a month before the vote, the number was not as high as two months earlier. This may have been due to the fact that many of the concerns of the opposition and the Church had been incorporated into the KKZN project since that time – making the difference between the two main contenders less significant (OBOP 1997d).

Meanwhile concerns continued to be raised by observers of parliamentary commission proceedings. Shortly before the Referendum, some expressed dismay at the reluctance of the commission drafters to include reference to the “nation” while proposing the phrase “We, citizens of Poland” into the preamble. While the concept of nation was ultimately incorporated into this section of the draft as a result of significant societal pressure, its definition in terms of “all Polish citizens” was interpreted by some as undermining the character of the nation as a moral community with historical and

³⁰ Earlier calls for a “pre-constitutional referendum” in which the public would have the chance to resolve particular issues before actual adoption of the constitution were made by the Union of Labour (UL) in an attempt to win popular support before municipal elections that were expected to accompany such a referendum (Osiatyński 1999/2011, p. 7).

cultural underpinnings. Moreover, during the final stages of parliamentary work, amendments were introduced with the apparent aim of retaining political control over key institutions of the state – financial, tribunals, supervisory/auditing institutions and the armed forces (Drozdek 1997, p. 2).

The parliamentary draft of the Constitution was also criticized for being too verbose and disjointed. Apparently many experts considered the civic project, the “Citizens’ Draft”, to have been more professionally drafted (Drozdek 1997). This judgement seems fair considering the nature of the drafting process: while the parliamentary effort was pragmatic but disjointed, the civic project was idealistic but grounded in a common vision and vigorous deliberation. Ultimately, even the *Solidarność* trade union itself appeared to adopt a pragmatic approach in abandoning its own “Citizens’ Draft” amidst fears that its rejection in a vote would damage the future political prospects of its sponsors.³¹ However, eyewitnesses recall the significant impact of the civic draft on the final parliamentary draft of the Constitution.³²

Just before the 1997 Referendum an OBOP survey revealed political preferences of those who planned to vote for or against the parliamentary (KKZN) project. Those with centre-right or right-wing views planned to vote against, as did *Akcja Wyborcza Solidarność* (AWS, Electoral Action *Solidarność*) and *Ruch Odbudowy Polski* (ROP) voters. By contrast, eighty percent of potential SLD (Alliance of the Democratic Left) voters planned to vote for the proposed Constitution (OBOP 1997e).

In the end, only the text adopted by the National Assembly was put to popular vote. Despite President Kwaśniewski’s initiative to send out 11.5 million pamphlets aimed at encouraging voters to endorse the draft produced by the National Assembly, only 22% of those eligible to vote voted for its adoption, with only 42.86% participating in the Referendum. What is more, around the time of the Referendum, over half of those surveyed by CBOS believed that, following the adoption of the constitution, citizens would have no more influence over public affairs and that Poland would not be better governed (Gebethner 1997, p. 142). These facts should be considered when assessing levels of broad-based social acceptance needed to stabilize and consolidate a constitutional framework (c.f. Cirtautas 1996, p. 19), and possible consequences of failing to reach appropriate levels of such acceptance.

5. Concluding Discussion

While sociological reflections on Poland’s systemic transformation of the 1980s resulted in major contributions to social science literature (Bernhard and Jasiewicz 2015, p. 311) they are often overlooked today despite their relevance to contemporary concerns over prospects for democratic constitutionalism in the region. As noted above, the problem of legitimacy was and remains at the core of challenges affecting processes of

³¹ Interview 2.

³² Mazowiecki (cited in Bujak 2017, p. 158) explains how, thanks to the intervention of Senator Andrzejewski, many elements of the civic project were reflected in the parliamentary project. Marek Borowski, also a member of the KKZN, recalled the significance of the *Solidarność* project on the parliamentary draft. He claimed that the *Solidarność* side denied its impact for tactical reasons, while an analysis of the Office of Expert Opinions of the Sejm had demonstrated that 70% of the first two chapters had been lifted from the civic project (Bujak 2017, p. 165. See also: Wyrzykowski 1998).

constitutional consolidation in postcommunist Poland. Key institutional elements of Poland's political system – including the proportional electoral system – were put in place as a result of the circumstances and power-sharing features of negotiated transition and against the advice of external advisors concerned for prospects of democratic consolidation.³³ The subsequent differentiation of post-Solidarność parliamentary factions was an important feature of the constitution-making process and a key variable affecting its delay. The constitution finally adopted in 1997 was the result of certain compromises and followed approval in a Referendum by a narrow margin.

The constitution-drafting project supported by the Solidarność trade union in the early-mid 1990s – being the main alternative to the Constitution ultimately adopted – provides an interesting case study for an original examination of the impact of various forms of constitutionalism on an evolving institutional landscape. A context-sensitive interpretation of survey data suggests that had the “Citizens’ Draft” been put to referendum together with the finally adopted (“parliamentary”) text, it may have gained greater citizen support (OBOP 1997a).

The concept of *competing constitutionalisms* enhances our understanding of Poland's constitution-making processes by drawing attention to certain goals, values and characteristics of these processes and encouraging reflection on their underlying causes. This reflection may prove critical in terms of understanding the consequences of certain underlying factors affecting democratic consolidation in the region, particularly in face of the prospect of democratic fatigue.

While recent scholarship is receptive to the idea of various types of constitutionalism, this study reveals previously understudied aspects of institutional development in postcommunist Poland.³⁴ While some accounts tend to view the Polish case through rose-tinted glasses,³⁵ others tend to overemphasise one aspect of constitutionalism or liberal democracy over others. Most authors are reluctant to enter into a critical assessment of the constraints on constitutionalism posed by the Roundtable agreements that shaped the transition as a whole and, as “preconstitutional contract” (Skąpska 2011) impacted significantly upon the evolution of the institutional landscape.

While the Polish Roundtable talks were distinct among others in the region as the only talks that involved the full complement of actors (Elster 1991), their impact in terms of the particular transitional trajectory that they set into motion should not go

³³ Z. Brzeziński (1991, cited by Kamiński 2014 at p. 152) claimed the Poland's complicated internal situation was caused by an inappropriate and badly thought-through choice of electoral system. He claimed that proportional representation would diffuse the will of the nation and would deny a democratic majority the possibility to exercise their choice. Likewise, according to one interviewee, Jan Nowak Jeziorański also opposed this choice of electoral system (Interview 1).

³⁴ For a compelling overview that does not rely on the notion of constitutionalism, see Kamiński 2014.

³⁵ Sanford (2002) may be an example here. He concludes his otherwise useful study with the following claim: “The other main factor in Poland's success has been the evolutionary and compromise process (...) which has defined the respective powers of key institutions and the relationships between them. The successful working of constitutional politics has thus been the key factor in entrenching and consolidating democracy in the Polish Third Republic” (Sanford 2002, p. 234). For a contrasting view that takes account of enduring institutional and administrative weaknesses, see Kamiński 2014.

underestimated. As Skąpska (2011, p. 26) notes, “[f]rom the perspective of institutional theory – especially the “path dependence” theory – roundtables were important events that decided not only on the change, but also on the continuation, and they determined the development of the future constitutional orders (North 1993).” To put it another way, “because the institutions and forces of the old system were still very much alive, the change in the system was evolutionary. This limited the potential for deep structural reforms” (Osiatyński 1999/2011, p. 5).

Process tracing offers further evidence for Kamiński’s (2014, p. 150) claim that the attitude towards constitution-making processes is a good litmus test for the priority given to state reconstruction by postcommunist governments (*cf.* Kamiński and Kamiński 2018). Likewise, while the rule of law tradition laid the basis for constitutionalism and rights protection in Poland (Krygier 1997), this study provides support for the claim that constitutionalism cannot be equated with a self-enforcing procedure, particularly when the constitutional moment is overlooked and instrumental-rational interests start to gain an upper hand over sober institutional analysis. This conclusion complements the findings of de Raadt’s (2009) comparative study that showed that it is not constitution-making *procedure* per se that determines the legitimacy of constitutions among political elites, but rather ambiguity in the allocation of formal competences or intra-party conflict.

The analysis of gathered data demonstrates that *values, challenges* and *characteristics* of constitution-making processes (rather than procedures) may indeed be understood with reference to *societal* or *civic* notions of constitutionalism. Such models assume constitutionalism to be grounded in a network of social values, attitudes, meanings and actions – phenomena often assumed into the notion of legal culture –, in the interaction of professional experts and citizens, and in reflection on the conditions needed to achieve democratic consolidation, social integration and effective rights protection. The extent to which these processes reflect the above aspects varies greatly and is correlated with distinct aspects of legal culture and legal community. The cases show that cultural and symbolic issues of participation and identity as well as rights can and should be incorporated fully into the application of the notion of constitutionalism, particularly in postauthoritarian contexts,³⁶ where a formalist pragmatic approach may become an obstacle to fundamental changes in the political system.

The study also shows that more attention should be given to the task of developing and applying an adequate typology of competing constitutionalisms. In his spectrum conceptualizing the constitutional codifications of Central European postcommunist democracies of the 1990s, Jiří Příbáň categorized the Polish model as “a patriotic

³⁶ Skąpska claims that postcommunist constitutionalism is challenged by “a temptation to implement institutions, principles and rules borrowed from the developed liberal democracies and liberal constitutional semantics in their most unquestioned sense, instead of implementing reflective, context-sensitive and careful change of postcommunist reality with due consideration of the existing resources, assets, and liabilities” (Skąpska 2011, p. 20). Her own study focuses on “social aspects of constitutionalism as embedded in culturally shared norms and expectations, and with its stress on the communicative and symbolic aspects of a constitution – is part of a long East Central European tradition of socio-legal studies, denoted by such names as Eugen Ehrlich or Leon Petrażycki” (Skąpska 2011, p. 15).

mixture of civil and ethnic" (Přibáň 2004, p. 428). This categorization³⁷ seems to overlook the fact that, beyond the Preamble, ethnic elements do not feature in the 1997 Constitution and its definition of nationhood in terms of citizenship. Přibáň's application of the term "civil" could be replaced by the notion of legal or liberal constitutionalism, while his use of the term "ethnic" could be supplanted by reference to societal or civic models of constitutionalism developed by Sciulli, Skąpska and Blokker.

Both the legal and civic models of constitutionalism are reflected in the constitution-making efforts explored in this article. While analysed documents demonstrate the influence of the civic initiative on the parliamentary constitution-making project³⁸, the legitimation of the new 1997 Constitution was relatively weak (Gebethner 1997, p. 124) and the low turnout at the Referendum indicates the *disinterest* and *disengagement* felt by many citizens as a consequence of the character of implemented processes (Mazowiecki 1997 cited by Gebethner 1997, p. 124). The entire trajectory of the parliamentary project discussed above reflects a top-down legal or liberal model of constitutionalism rather than a (grassroots inspired and endorsed) civic model. The competing civil-society and parliamentary-led cases highlight the importance of official behaviour and institutional setting in determining the impact of legal culture on the legal system (c.f. Blankenberg and Guarnieri in Nelken 1997). By exposing distinct characteristics of the communities in which law is developed,³⁹ the study also draws attention to the diverse sets of relationships that exist between law and social communities and the variety of factors that impact upon constitutional development (c.f. Bell 2003, p. 271).

What is more, the data shows that the competing constitutionalisms reflected in these contrasting models of constitution-making were *internalised* by voters and expressed in voter preference: an overwhelming majority (75%) of supporters of the civic constitutional-drafting project expressed their preference for an "axiological" conception of the constitution, whereas the majority of supporters of the parliamentary project preferred for it to be a "purely legal" act⁴⁰ (OBOP 1997b). In addition to highlighting the salience of the internal/external legal culture distinction attributable to Friedman, the results invite us to reflect on the extent to which preference for a "purely legal" act reflects a post-authoritarian civil-code legal culture⁴¹ that stresses the

³⁷ Czarnota (2008) also questions Přibáň's (2007) use of the civil-ethnic distinction, suggesting it is relevant above-all to the Czech case.

³⁸ C.f. fn. 35.

³⁹ The presented case illustrates the relevance of Cotterrell's typology of community: community of belief, affective community, instrumental community and traditional community. This typology mirrors Weber's four types of social action: traditional, affective, purpose rational and value rational (Cotterrell 2001).

⁴⁰ This is not to presume the actual possibility of enacting a "purely legal" act. The survey asked participants to choose between two contrasting proposals for a constitutional text: one as a purely legal act ("The constitution should be a strictly legal document and not contain any solemn themes or phrases referring to values like God, Nation, Fatherland or History") and the alternative as a solemn text constituting a foundation of the state ("The Constitution is a solemn text, a foundation of the state, and its content should refer to such values as God, Nation, Fatherland, History"). OBOP 1997b.

⁴¹ Zdeněk Kühn (2004, p. 560, citing Mirjan Damaška 1986) notes that "Continental judges, including their post-communist colleagues, operate within a judicial culture which approaches the hierarchical ideal of state authority, based on a strictly hierarchical ordering, specialization and a logically legalistic attitude, in contrast to the less hierarchical, more pragmatic and more substance-oriented common law judges".

authority or autonomy of law, or its self-referential autopoietic status. Likewise, the correlation of the “axiological” versus “purely legal” division with cleavages previously identified by scholars studying voter behaviour in Poland (Jasiewicz 2009, p. 494) merits further investigation. Competing attempts to pursue constitutionalism in Poland reflect various *attitudes* of the subjects of law that prompt us to take up Friedman’s attempt to situate the *legal* within the culture of the community in which law operates. Constitution making projects demonstrate that legal reasoning and ideals of justification may be understood as *cultural ideas* that belong to the culture of law; they illustrate that sources (*formants*) of legal norms help explain constitutionalism as a normative and conceptual phenomenon (Bell 1998, pp. 247-248) that depends on its own legitimacy within distinct communities.

Finally, while demonstrating the applicability of the legal and civic models of constitutionalism presented by Blokker as the main protagonists of his 2013 study, the presented case study sheds light on aspects of constitutionalism and legal culture that might further usefully be incorporated into a mapping of constitutionalism’s competing forms. The notion of *competing constitutionalisms*, while incorporating phenomena typically taken up by analysts of *legal culture*, overcomes some of the criticisms of the latter notion by shifting the focus from *culture* to *constitutionalism*. In this paper the *civic*, *axiological* and *programmatic/substantive* aspects of constitutionalism are highlighted in one case of constitution making. By contrast, and cutting across traditional distinctions between civil law and common law legal cultures, both *pragmatic-instrumental* and “*purely legal*” aspects⁴² of constitutionalism are paramount in the better known case of parliamentary constitution-making that resulted in the present Constitution of Poland adopted in 1997.

References

- Bell, J., 1998. “Comparing Legal Cultures” by David Nelken [Review]. *The International and Comparative Law Quarterly* [online], 47(1), pp. 246-248. Available from: <https://www.jstor.org/stable/761501> [Accessed 19 July 2020].
- Bell, J., 2003. “Adapting Legal Cultures” by David Nelken and Johannes Feest [Review]. *The International and Comparative Law Quarterly*, 52(1), pp. 270-272.
- Bernhard, M., and Jasiewicz, K., 2015. Whither Eastern Europe? *East European Politics and Societies and Cultures* [online], 29(2), 311–322. Available from: <https://doi.org/10.1177/0888325415587919> [Accessed 19 July 2020].
- Blokker, P., 2010. *Multiple Democracies in Europe*. London: Routledge.
- Blokker, P., 2013. *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London/New York: Routledge.

⁴² For a celebration of the “pragmatic” and “rational” nature of the constitution-making process, see Wawrzyniak (1997). By contrast, David Nelken has observed that, “in some civil law legal regimes, as compared to the Anglo-American pragmatic-instrumental view of law, law may be deliberately treated as more of an ideal aspiration than as a blueprint for guiding behaviour, either because of deference to the state project of representing the collective will, or under the influence of religious traditions and philosophical idealism” (Nelken 2004, p. 11).

- Blokker, P., 2017. The Evolution of Constitutionalism in Post-Communist Countries. In: R. Petrov and P. Van Elsuwege, eds., *Post-Soviet Constitutions and Challenges of Regional Integration*. London: Routledge, pp. 5-27.
- Bujak, Z., 2017. *Konstytucja starsza, niż myślisz*. [The Constitution, older than assumed]. Milanówek: ZB Publishing.
- Chmielewska-Szlajfer, H., 2018. *Reshaping Poland's Community after Communism*. London: Palgrave Macmillan.
- Chruściak, R., and Osiatyński, W., 2001. *Tworzenie konstytucji w Polsce w latach 1989-1997* [Constitution making in Poland in 1989-1997]. Warsaw: Instytut Spraw Publicznych.
- Cirtautas, A.M., 1996. Constitutional Development in Post-Communist Poland. *Polish Sociological Review*, n° 113, pp. 17-24.
- Cole, D.H., 1999. From Renaissance Poland to Poland's Renaissance. *Michigan Law Review* [online], 97(6-Survey of Books Related to the Law), pp. 2062-2102. Available from: <https://doi.org/10.2307/1290243> [Accessed 19 July 2020].
- Cotterrell, R., 2001. Is There a Logic of Legal Transplants? In: D. Nelken and J. Feest, eds., *Adapting Legal Cultures*. Oxford: Hart, Oñati International Series in Law and Society, pp. 70-92.
- Cotterrell, R., 2003. Law in Culture. *Ratio Juris* [online], 17(1), pp. 1-17. Available from: <https://doi.org/10.1111/j.0952-1917.2004.00251.x> [Accessed 19 July 2020].
- Czarnota, A., 2008. "Legal Symbolism: On Law, Time and European Identity", by Jiří Příbáň [Review]. *Journal of Law and Society* [online], 35(4), pp. 571-575. Available from: https://doi.org/10.1111/j.1467-6478.2008.00450_4.x [Accessed 19 July 2020].
- Czarnota, A., Krygier, M., and Sadurski, W., eds., 2005. *Rethinking the Rule of Law After Communism*. Budapest: CEU Press.
- de Raadt, J., 2009. Contested Constitutions Legitimacy of Constitution-making and Constitutional Conflict in Central Europe. *East European Politics and Societies* [online], 23(3), 315-338. Available from: <https://doi.org/10.1177/0888325409333192> [Accessed 19 July 2020].
- Dudek, A., 2013. *Historia Polityczna Polski 1989-2012* [A political history of Poland 1989-2012]. Krakow: Wydawnictwo Znak.
- Elster, J., 1991. Constitutionalism in Eastern Europe: An Introduction. *The University of Chicago Law Review* [online], 58(2-Approaching Democracy: A New Legal Order for Eastern Europe), pp. 447-482. Available from: <https://doi.org/10.2307/1599963> [Accessed 19 July 2020].
- Gebethner, S., 1997. Referendum konstytucyjne – uwikłania społeczne i prawnoustrojowe. [The constitutional referendum – social and legal-political considerations]. In: M. Staszewski, ed., *Referendum Konstytucyjne w Polsce*. Warsaw: Institute of Political Studies Polish Academy of Sciences/Friedrich Ebert Stiftung. pp. 93-143.

- George, A.L., and Bennett, A., 2005. *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT Press.
- Graczyk, R., 1997. *Konstytucja dla Polski. Tradycje, Doświadczenia, Spory* [A Constitution for Poland. Traditions, Experiences, Debates]. Krakow: Społeczny Instytut Wydawniczy Znak.
- Grudzinska-Gross, I., ed., 1994. *Constitutionalism and Politics*. IV Bratislava Symposium 1993, Slovak Committee of the European Cultural Foundation.
- Jasiewicz, K., 2009. "The Past Is Never Dead" Identity, Class, and Voting Behavior in Contemporary Poland. *East European Politics and Societies* [online], 23(4), 491-508. Available from: <https://doi.org/10.1177/0888325409342114> [Accessed 19 July 2020].
- Kamiński, A.Z., 2014. Stracony moment konstytucyjny w pokomunistycznej Polsce: skutki dla jakości rządu dwadzieścia lat później. *Dezercja Elit* [Desertion of the Elites]. Warsaw: ISP PAN, pp. 141-179.
- Kamiński, A.Z., 2018. Etos Dworu i „Ludzi Dobrze Wychowanych”: Epitafium Dla Inteligencji [The ethos of the manor and “well raised people”: Epitaph for the Intelligentsia]. *Kultura i Społeczeństwo*, 62, pp. 47-70.
- Kamiński, A.Z., and Kamiński, B., 2018. Źródła ułomności ładu konstytucyjnego w pokomunistycznej Polsce: dziedzictwo przejścia ustrojowego? [Sources of Imperfection of the Constitutional Order in Post-communist Poland: The Legacy of the Systemic Transformation?]. *Studia Polityczne*, 46(4).
- Krygier, M., 1997. Is There Constitutionalism After Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law. *International Journal of Sociology* [online], 26(4), pp. 17-47. Available from: <https://doi.org/10.1080/15579336.1996.11770146> [Accessed 19 July 2020].
- Krzaklewski, M., 1994. *Przemówienie przewodniczącego Krzaklewskiego promujące Obywatelski Projekt Konstytucji* [Speech of Chairman Krzaklewski promoting the Citizens' Draft of the Constitution]. Speech delivered in the Polish Parliament National Assembly.
- Kubik, J., 1989. *Social and Political Instability in Poland: A Theoretical Reconsideration* [online]. College of Wooster. Program on Central & Eastern Europe Working Paper Series #1. Available from: https://ces.fas.harvard.edu/uploads/files/Working-Papers-Archives/CEE_1.pdf [Accessed 19 July 2020].
- Kuckartz, U., 2014. *Qualitative Text Analysis*. London/Thousand Oaks: Sage.
- Kühn, Z., 2004. Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. *American Journal of Comparative Law* [online], 52(3), pp. 531-567. Available from: <https://doi.org/10.2307/4144478> [Accessed 19 July 2020].
- Kurczewski, J., 2001. Sociology of Law in Poland. *The American Sociologist* [online], 32(2-The Sociology of Law), pp. 85-9. Available from: <https://doi.org/10.1007/s12108-001-1022-7> [Accessed 19 July 2020].

- Legrand, P., 1997. "Comparing Legal Cultures" by David Nelken [Review]. *Cambridge Law Journal* [online], 56(3), pp. 646-649. Available from: <https://doi.org/10.1017/S0008197300098718> [Accessed 19 July 2020].
- Lijphart, A., 1992. Democratization and Constitutional Choices in Czecho-Slovakia, Hungary and Poland 1989-1991. *Journal of Theoretical Politics* [online], 4(2), p. 214. Available from: <https://doi.org/10.1177/0951692892004002005> [Accessed 19 July 2020].
- Linz, J.J., and Stepan, A., 1996. *Problems of Democratic Transition & Consolidation*. Baltimore/London: The John Hopkins University Press.
- Majchrowski, J., ed., 2018. *Konstytucja Solidarności* [The Solidarność Constitution]. Warsaw: Sejm.
- Markoff, J., 2005. Transitions to Democracy. In: T. Janoski et al., eds., *The Handbook of Political Sociology*. New York: Cambridge University Press, 384-403.
- Mazurek, F., 2001. *Godność Osoby Ludzkiej Podstawą Praw Człowieka* [The dignity of the human person, foundation for human rights]. Lublin: KUL.
- Nelken, D., 2004. Using The Concept of Legal Culture. *Australian Journal of Legal Philosophy* [online], 29, pp. 1-28. Available from: <http://www.austlii.edu.au/au/journals/AUJILegPhil/2004/11.pdf> [Accessed 19 July 2020].
- Nelken, D., ed., 1997. *Comparing Legal Cultures*. Aldershot: Dartmouth.
- OBOP 1997a. *OBOP 1997-02 Konstytucja i Referendum Konstytucyjne* [The Constitution and the Constitutional Referendum] (online). Available from: http://tnsglobal.pl/archiw_files/022-97.pdf [Accessed 3 February 2020].
- OBOP 1997b. *OBOP 1997-02 Treść przyszłej konstytucji w opinii Polaków* [The content of the future constitution in the opinion of Poles] (online). Available from: http://tnsglobal.pl/archiw_files/023-97.pdf [Accessed 3 February 2020].
- OBOP 1997c. *OBOP 1997-03 Opinie o nowej Konstytucji* [Opinions on the new constitution].
- OBOP 1997d. *OBOP 1997-04 Opinie o Konstytucji* [Opinions on the constitution].
- OBOP 1997e. *OBOP 1997-05 Opinie o konstytucji i referendum* [Opinions on the constitution and the referendum] (online). Available from: http://tnsglobal.pl/archiw_files/063-97.pdf [Accessed 26 March 2020].
- Osiatyński, W., 1997. *Twoja konstytucja* [Your Constitution]. Wydawnictwa Szkolne i Pedagogiczne.
- Osiatyński, W., 1999/2011. A Brief History of the Polish Constitution. In: M. Wyrzykowski, ed., *Constitutional Essays*. Warsaw. Reproduced in: P. Korzec, J. Urbanik and M. Wyrzykowski, eds., *Polish Constitutionalism: A Reader*. University of Warsaw, pp. 3-24.
- Pietrzak, J., 1994. *Problemy konstytucyjne w programie i działaniu OKP. Uwagi wstępne*. Stowarzyszenie "Klub Senatorski" – V Rocznica Powstania OKP. [On the fifth anniversary of the establishment of the Civic Parliamentary Club], pp. 40-49.

- Přibáň, J., 2004. Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making. *Law & Society Review* [online], 38(3), pp. 407-432. Available from: <https://doi.org/10.1111/j.0023-9216.2004.00052.x> [Accessed 19 July 2020].
- Přibáň, J., 2007. *Legal Symbolism: On Law, Time and European Identity*. Aldershot: Ashgate.
- Přibáň, J., and Young, J., 1999. *The Rule of Law in Central Europe*. London: Routledge.
- Sadurski, W., 2012. *Constitutionalism and the Enlargement of Europe*. Oxford University Press.
- Sadurski, W., Czarnota, A., and Krygier, M., 2006. *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*. Springer Netherlands.
- Sajó, A., 2019. Society, Constitutionalism and Democracy. *Polish Sociological Review*, 208(4).
- Sanford, G., 2002. *Democratic Government in Poland: Constitutional Politics Since 1989*. Basingstoke: Palgrave Macmillan.
- Sciulli, D., 1991. *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*. Cambridge University Press.
- Skapska, G., 2011. From “Civil Society” to “Europe”. A Sociological Study on Constitutionalism after Communism. *International Studies in Sociology and Social Anthropology*, vol. 118. Leiden: Brill.
- Skapska, G. 2019a. Abuse of the Constitution as a Means of Political Change: Sociological Reflections on the Crisis of Constitutionalism in Poland. *Polish Sociological Review* [online], 208(4), 421-438. Available from: <https://doi.org/10.26412/psr208.03> [Accessed 19 July 2020].
- Skapska, G., 2019b. Socio-legal Studies in Poland: Great Heritage, Empirical Accomplishments, Contemporary Challenges. *Journal of Law and Society* [online], 46(3), pp. 476-96. Available from: <https://doi.org/10.1111/jols.12171> [Accessed 19 July 2020].
- Słodkowska, I. 2006. *Spółeczeństwo Obywatelskie na tle Historycznego Przełomu. Polska 1980–1989*. [Civil Society against the backdrop of a Historical Breakthrough. Poland 1980–1989]. Warsaw: Instytut Studiów Politycznych.
- Suchocka, H., 1995. Polityczny kontekst nowej konstytucji [The political context of the new constitution] In: P. Kaczanowski, *Konstytucja i Transformacja* [Constitution and Transformation]. Warsaw: Fundacja ATK, pp. 15-26.
- Tworzecki, H., 1996. *Parties and Politics in post-1989 Poland*. Boulder/Oxford: Westview Press.
- Wawrzyniak, J., 1997. Axiology of the Constitutional Referendum. In: M.T. Staszewski, *Referendum Konsytycyjne w Polsce*. Warsaw: ISP PAN/Friedrich Ebert Stiftung, pp 189-198.

- Winczorek, J., 2012a. Review of: "From 'Civil Society' to 'Europe'". A Sociological Study on Constitutionalism after Communism. *International Studies in Sociology and Social Anthropology*, Volume 118 by Grażyna Skąpska. *Polish Sociological Review*, n^o 177, pp. 117-121.
- Winczorek, J., 2012b. Systems Theory and Puzzles of Legal Culture, *Archiwum Filozofii Prawa i Filozofii Społecznej* [Polish Section of the International Association for Philosophy of Law and Social Philosophy (IVR)] (online), 1(4), pp. 106-125. Available from: <https://doi.org/10.36280/AFPiFS.2012.1.106> [Accessed 19 July 2020].
- Wyrzykowski, M., ed., 1998. *Constitution Making Process*. Warsaw: Institute of Public Affairs.
- Zakrzewska, J., 1993. *Spór o Konstytucję* [The debate over the Constitution]. Warsaw: Sejm.

Primary sources cited

Memos from private archive

- Drozdek, M. 1994. [December 1994. Memo for the Bulletin].
- Drozdek, M. 1995a. 19950423_Informacja o pracach KKZN. [Information about the work of the of the Constitutional Commission of the National Assembly]. Memo dated 23 April 1995.
- Drozdek, M. 1995b. *Porównanie zapisów dotyczących praw człowieka w Obywatelskim Projekcie Konstytucji i projekcie Podkomisji Praw i Obowiązków Obywateli Komisji Konstytucyjnej Zgromadzenia Narodowego*. [A Comparative analysis of provisions concerning human rights in the Citizens' Draft Constitution and the draft of the Subcommittee on Civic Rights and Responsibilities of the Constitutional Commission of the National Assembly]. Memo dated 18 January 1995. Subsequently reproduced in Majchrowski (2008), pp. 362-4.
- Drozdek, M. 1997. 199704-DLA-ROP2_Porównanie projektów konstytucji. [Comparison of constitutional drafts]. Memo dated April 1997.

Legal texts

- Citizens' Draft of the Constitution (*Obywatelski Projekt Konstytucji Rzeczypospolitej Polskiej opracowany w 1994 roku przez Społeczną Komisję Konstytucyjną na zlecenie NSZZ "Solidarność" przy współpracy Sekretariatu Ugrupowań Centroprawicowych i Niepodległościowych*) [The Civic Project of the Constitution of the Republic of Poland drafted in 1994 by the Social Constitutional Commission on the request of Independent Trade Union „Solidarność” with the cooperation of the Secretariat of Centre Right and Independence Parliamentary Groups].
- The Constitution of the Republic of Poland of 2 April 1997 [online]. Available from: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [Accessed 20 July 2020].

*Ustawa konstytucyjna z dn. 23 kwietnia 1992 roku o trybie przygotowania i uchwalenia
Konstytucji Rzeczypospolitej Polskiej (Dz.U. 67 z 1992 r.) [The constitutional act of 23
April 1992 as amended on 22 April 1994].*

Annex: Interviews cited

Interview 1: Author's interview with representative of the Social Constitutional Committee, Warsaw, 30 April 2018.

Interview 2: Author's interview with representative of the Social Constitutional Committee, Warsaw, 2 May 2018.

Andrzejewski, P. 2010. *Rozmowa z Senatorem Piotrem Łukaszem Juliuszem Andrzejewskim: stenogram rozmowy z dnia 14.1.2010. Archiwa Przełomu AP-11-2-1-1. Wspomnienia Senatorów I kadencji; Źródło pozyskania: Biuro Komunikacji Społecznej Kancelarii Senatu/ Anna Jaguścik-Litniewska* [Interview with Senator Piotr Łukasz Juliusz Andrzejewski: transcript of the conversation of 14 January 2010. Archives of the Breakthrough. Memoires of the Senators of the First Term. Source: Office of Social Communicatoin of the Senate / Anna Jaguścik-Litniewska]. Warsaw.

Stępień, J. 2009. *Rozmowa z Senatorem Jerzy Stępiem: stenogram rozmowy z dnia 08.10.2009. Archiwa Przełomu AP-11-2-1-1. Wspomnienia Senatorów I kadencji; Source: Biuro Komunikacji Społecznej Kancelarii Senatu/ Anna Jaguścik-Litniewska* [Interview with Senator Jerzy Stępień: transcript of the conversation of 8 October 2009. Archives of the Breakthrough. Memoires of the Senators of the First Term. Source: Office of Social Communication of the Senate/Anna Jaguścik-Litniewska]. Warsaw.