

## TOWARDS A NEW CONSTITUTION OF THE REPUBLIC OF POLAND

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1. Poland does not yet have a new, fully democratic and modern constitution. Preparations have been dragging despite Poland being the first country in the former block of socialist states in Europe to start democratic and free-market reforms.

It has been said on several occasions that Polish political elites should be ashamed of the protracted work on a new constitution, which began as early as in 1989. But it is even more important to provide an answer to the question why Poland has not yet framed a new constitution, though it is the country with the longest constitutional traditions in Europe: its Constitution of 3 May 1791 was the first modern European constitution.

In my view, the most important reasons include: 1) the absence of an adequately stable political scene in the form of a fully developed party system: hence no clear system of ideological and political preferences exist conducive to arriving at coherent constitutional decisions; 2) the short duration of the first two post-1989 Parliaments, which could not conclude their work on the constitution; 3) excessive importance attached to political and personal considerations in constitutional discussion and in the present work done on legal and political issues; 4) last but not least, the work on a future constitution since mid-1992, is weighed down by the complex and protracted procedure of drafting and adopting a constitution under the Constitutional Act of 23 April 1992. It consists of three basic stages: a) delivering a consolidated draft Constitution by the Constitutional Committee of the National Assembly, appointed by both houses of Polish Parliament, on the basis of the drafts put forward by entitled bodies (*i.e.* the Constitutional Committee itself, 56 members of the National Assembly, the President of the Republic, 500 000 citizens); b) the adoption of a constitutional bill by the National Assembly in a second reading by a two-thirds majority in the presence of at least half the total number of Assembly members; c) the consideration by the General Assembly of any proposals to modify the constitution's text that may be put forth by the President of the Republic within 60 days following the submission of the constitution bill; d) the approval of the constitutional bill in a national referendum by a majority of those taking part.

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The present Parliament, elected in September 1993, has a clear majority of the two coalition parties (the Democratic Left Alliance and the Polish Peasants Party). Nevertheless, due to this highly complex procedure, the preparatory work on a draft constitution, by the Constitutional Committee of the National Assembly, though making progress are only at the first stage of the official process leading to the adoption of a new Constitution.

2. Following the “round table” decisions of April 1989, an intensive process of democratic transformations began during which attempts were made on three occasions to draft and adopt a new constitution.

The first was in the Sejm (Lower House of Parliament) and the Senate between 1989 and 1991. Each House appointed its own Constitutional Commission, which presented a draft constitution. Other drafts were prepared by political parties and individuals, mainly constitutionalists. There were some 10 drafts in public circulation.

Today, in historical perspective, it is commonly believed - and I also share this opinion - that the turn of 1989 was the best period to adopt a new constitution. That was a propitious moment to reach consensus on constitutional solutions appropriate for a democratic state ruled by law and for the period of transformations in the political, social, and economic systems. But the opportunity to adopt a constitution - though it remains an open question whether it would have been a durable constitution - was soon gone because of the prevailing idea that the Parliament elected in 1989, in a not fully democratic manner (the so-called “contract” Sejm) should not adopt a new constitution.

A second attempt to draft a constitution was made by the Parliament chosen in the November 1991 free elections. A constitution was to be enacted under the Constitutional Act adopted by that Parliament in April 1992, which I have already mentioned. The Constitutional Committee set up by both Houses of Parliament under this Act formally commenced work in January 1992. Seven drafts were laid before the National Assembly within the prescribed period of six months after the Committee was established. They were authored by the main political parties and by the President of the Republic. Unfortunately, soon after the inception of essential constitutional work, President Lech Wałęsa dissolved Parliament in May 1993 after it had passed a vote of no confidence in the government.

A new stage of constitutional work began - and has been going on - since the parliamentary elections of 19 September 1993, and won by the leftist-central parties. The Constitutional Committee of the National Assembly, as well as the Assembly itself, focused attention on six out of seven drafts laid before the former Assembly because the above-mentioned, partly amended Constitutional Act, regulating the mode of work on a constitution, abolished the discontinuation principle. This enabled any drafts submitted during the previous parliamentary term of office to be considered. Moreover, a seventh draft prepared by the “Solidarity” Trade Union, and supported by almost a million citizens, was laid before the General Assembly.

It would be unfeasible to describe all these proposals at any length. In a nutshell, the drafts prepared by the Democratic Left Alliance and by the Polish Peasants Party (offered for consideration jointly with the Labour Union) are based on the concept of

a democratic law-abiding state, and on a parliamentary system of government. The draft prepared by the Liberty Union, the third party in Parliament, is liberally-oriented in its socio-economic aspects. President Wałęsa's draft and that made in 1991 by the Senate Constitutional Committee, promote a system of government based on the overriding role of the President of the Republic. The civic draft of the "Solidarity" Trade Union, conceptually heterogenous, contains strong social and corporate elements and demands "accountability for past activities".

Each draft was presented by its author to the Constitutional Committee of the National Assembly. Next, in September 1994 the drafts were debated during a first reading in the National Assembly, which sent them to the Constitutional Committee to prepare a single, final version of the draft. A month later a debate was conducted in the Sejm (the lower House) on basic political, social and economic issues, indicated by the Committee.

All the controversies, present in the previous post-1989 constitutional discussions, and the discrepancies between particular drafts, appeared during those two debates. The main issues could be boiled down to three issues expressed in the form of basic socio-political dilemmas.

The first one refers to the nature of the Republic of Poland as a state. The point is whether it should be a state ruled by the law (and this was generally taken for granted), or a state which is "social" or "implementing the principles of social justice". The latter expression required a definition of the role which the state would play in the economy and of the scope and nature of economic and social rights of the citizen.

The second issue is that of the system of government, conceived as the mutual relations between Parliament, President and Government. The question was whether it should be a parliamentary system, a presidential system, or some kind of a mixed system.

The third issue is that of the State's attitude towards religion, and the relations between the Church (Churches) as well as Denominations and the State. The divergence of opinions lies in whether the Republic is to be defined as a "lay" state, or "neutral as to philosophy of life", and if the State - Church (Churches) relations ought to be based on the formula of disestablishment of Church and State, or on that "autonomy and independence as well as collaboration", or any similar one (but not disestablishment).

In practice, the dispute on the third issue proved the longest and the most difficult to settle, and any solutions adopted after lengthy discussions, and any attempts to split the difference, did not fully satisfy any party. The strong resistance on the part of the Catholic Church, on the one hand, and the firm lay options, on the other, will likely bear heavily upon future constitutional labours, coinciding partly with political considerations indirectly supported by the Catholic Church.

The search for optimal solutions relating to the social, political and economic system of the Republic of Poland, highlighted the following factors during debates in Parliament and in the Constitutional Committee:

- constitutional arrangements and experience of modern democratic states (*inter alia* the principles of the separation of powers, a democratic state ruled by law, a social state);
- international standards with respect to the rights and liberties of the individual, binding also on Poland;

- Polish constitutional traditions, especially the Constitution of March 1921;
- constitutional achievements and experience gained during the post-1989 transformations, taking into account both positive and negative aspects of the Little Constitution of 1992.

3. Up till now (*i.e.* 23 August 1995), the Constitutional Committee has prepared six basic chapters of the consolidated text of the draft Constitution: I. Principles of the Political System, II. Rights, Freedoms and Duties of Man and Citizen, III. Sources of Law, IV. Sejm and Senate, V. President of the Republic of Poland, VI. Courts and Tribunals.

The decisions reached on the fundamental principles of the political system of the Republic of Poland are the major part of the work done by the Constitutional Committee. The results have been incorporated mainly into Chapter I of the draft, entitled "Principles of the political, economic and social system". All the provisions of the draft Constitution will be important for the description of the constitutional set-up of the Republic, yet the principles of the political, economic and social system, accepted by the Constitutional Committee, are of special significance. In any constitution such fundamental principles establish guidelines for other arrangements and contents of more specific state institutions operating within this system. Moreover, they provide a basis for interpreting any constitutional provisions. That is why I shall confine this description of the proposed political, economic and social system of the Polish State to presenting these fundamental principles.

a) According to the final text of the draft Constitution, the political system of the Republic of Poland is based on the following principles: 1) a democratic law-abiding state, implementing the principles of social justice (Article 1), 2) supreme power of the Nation (Article 4), 3) political pluralism and a civic society (Articles 5 - 6), 4) constitutionalism (Article 9) and legality (Article 8), 5) the separation of powers and a rationalised parliamentary system (Article 11), 6) a positive attitude of the Republic towards international law and the integrative processes shaped by it, 7) self-government and the participation of local government in exercising public authority (Article 12), 8) State impartiality in religious, ideological and philosophical convictions, and the shaping of relations between the State and Churches as well as religious grouping enjoying equal rights, upon the principle of respect for their autonomy and independence and collaboration for the benefit of man and for common benefit (Article 16).

The principle of a democratic state ruled by law - taken over in its general form from the presently valid constitutional provision now in force - embodies the acceptance of a democratic version of such a state prevailing in Polish constitutional thought since 1989, and consolidated by the decisions of the Constitutional Tribunal. It does not mean the rule of law reduced to its formal elements, but implies a state is ruled by democratically made law, *i.e.* enacted by a democratically elected Parliament as statutes, embodying a certain system of socially acceptable values. According to the draft, the law ought to be guided by the following fundamental values: social justice, "common benefit of all the citizens" (Article 2) basic objectives, which under Article 3 of the draft, the Republic ought to safeguard (guarantee or ensure). Freedoms and rights based

on the inviolable, inherent and inalienable human dignity of man (Article 20) are mentioned among the objectives to be respected and protected by the Republic.

In the proposed formula of the principle of supreme power of the people, typical of a democratic state, the subject endowed with supreme power is the Nation, which under Article 3 means "all the people" ("Nation" in a political sense). The Nation is to exercise supreme power through its democratically elected representatives or indirectly. The first form of implementing the Nation's supremacy is - as in all modern states - a basic form, expressed through the activity of organs of representation of the Nation endowed with legislative and supervisory powers. The Sejm is such an organ, and the Senate is such an organ but to a limited extent, being deprived of supervisory powers. In turn, a direct democracy - not specified in Chapter I of the draft - according to other parts of the draft Constitution is to assume the form of civic legislative initiative (Article 105.4) and a legislative referendum.

The principle of political pluralism has been expressed in the draft as the freedom of establishing political parties and of their operation; citizens have equal rights freely to join them so as to influence State policy by democratic means (Article 5.1). To avoid the accusation of accepting only a "party" state, the Constitutional Committee has introduced a complementary principle of a civic society, the general idea of which consists in the freedom to set up voluntary organisations "acting under the law to promote the interests and to express the opinions of citizens" (Article 6). The said Article lists the most important organisations (Trade Unions, associations, civic movements, foundations), and Articles 43 - 44 in Chapter II regulate the basic and requisite limits of the right of association.

The principle of constitutionalism consists in making a constitutional act the highest law in the state; moreover, its provisions are as a rule directly applicable. Nevertheless, the constitution cannot always be applied directly because its numerous provisions ought to be specified in ordinary statutes. That is why the draft states that the constitution is not applied directly when "the Constitution provides otherwise". The extent to which the principle of direct applicability is limited follows either from the provisions referring to certain constitutional matters to be regulated in statutes, or from the fact that certain constitutional provisions cannot be made a basis of a court judgement or of an administrative decision because the norm of conduct contained in the provision has not been adequately specified. As regards social rights, the draft adopts the formula according to which any claims under most of them "may be made within the limits defined by statute" (Article 62.1), thus reducing their direct applicability.

The principle of legalism is closely connected with the principle of constitutionalism, but is of a more general nature. It assumes the form of the constitutional duty of all public authorities (state and local government) to act "on the basis and within the law" (Article 8). It means that these authorities (their organs) may undertake acts obliging relevant subjects to a certain conduct if they are entitled to do so by a clear provision concerning competence. As a result, the provisions which specify functions (or tasks) or particular State organs include some according to which such functions are to be exercised "within the scope and according to rules specified in the Constitution and statutes (compare, for example, Article 111.3 relating to the President of the Republic

of Poland). Such a wording is to prevent the general description of the function (role) of State organs to be used as the basis for issuing authoritative acts, against the rule of legality.

The principle of the separation of powers in the draft Constitution has been formulated as follows: “the structure of the Republic of Poland shall be based on the separation and counter-poising of the legislative power, executive power, and judicial power”. The said provision does not specify state organs belonging to the three powers and exercising relevant functions. Which organs are which follows from other chapters of the draft Constitution that ascribe certain functions and powers to specific organs, without, however, naming them either legislative, or executive, or judicial organs.

It is clear from specific provisions regulating the structured scope and mutual relations between State organs that the separation of powers has been implemented in the draft as a modified (limited) division. For example, the relatively wide powers of the President of the Republic under today’s law have been reduced to the advantage of the Sejm and the Senate. The President retains the right of legislative veto and the right to refer a bill to the Constitutional Tribunal, but only as an alternative; moreover, an absolute majority of votes in the Sejm is needed to reject a Presidential veto instead of the present qualified majority. It has been suggested that this step has been taken under the influence of critical experience of the Little Constitution in this domain, yet it does not imply that a system of classical parliamentary government with the clear supremacy of Parliament has been adopted as the basis of mutual relations between the supreme authorities of the republic of Poland.

The draft adopts the principle that the Republic of Poland observes international law binding on it, thus filling the present gap in the constitutional law. This principle does not define the relationship of international law to municipal law either as the primacy of the former, or as equality. This will be regulated by the provisions of Chapter III concerning the sources of law and the powers of the Constitutional Tribunal with respect to legal norms control. Procedures of introducing international law norms into the domestic legal order are to be regulated by specific provisions contained in the chapters on Parliament, President and Government. The above-quoted general provision, however, is in keeping with the rule that the State as a member of the international community ought to fulfil - entirely and in good faith - the international obligation it has assumed.

The draft Constitution affirms the option of Poland’s integration within the European Union (and broader structures). The principle adopted here is similar to those known in other newer European constitutions, namely: “The Republic of Poland may by virtue of an international agreement transfer to an international organisation or to an international organ the exercise of certain powers of State authorities” (Article 10.2).

The principle of self-government is embodied in the formula which states that the Republic of Poland ensures to various forms of self-government the right to operate (Article 12.1). Local government is highlighted within this principle by guaranteeing to it, by virtue of the Constitution, participation “in wielding public authority” (Article 12.1). The principles and scope of public authority to be exercised by local government, as well as by units resulting from the territorial division of the country, in which

local government will operate, will be regulated in a separate chapter (IX) of the draft, devoted to this matter. Nevertheless, the whole of Chapter I of the draft generally accounts for the role of local government within the State organisation, applying the notion of public authority (organs of State authority) and the mode of its exercise both in the domain of State activity and to local government, yet keeping both these notions separate in other cases.

As I have already said, the State's attitude towards convictions of its citizens in religious, ideological and philosophical matters, as well as the general basis for State and Church (religious groups) relations, have been the most controversial issues tackled during the work of the Constitutional Committee. The principle of State authorities' "impartiality" was accepted with respect to the first issue (Article 16.2), while the principles of "ideological neutrality" and of a "lay" nature of the State were rejected by a majority vote. With respect to the second issue, the principle accepted was that of "respect for mutual autonomy and independence of each in its scope of activity, as well as collaboration for the benefit of man and for common benefit" (Article 16.3).

The solutions adopted by the Committee with respect to either of these issues do not satisfy - as became obvious at a later date - any political option represented therein, as evidenced both by the announcement of formal amendments to be made to the final version of the text of the draft Constitution, and by the stand taken by the Episcopate of the Catholic Church. The forms of legal regulation of State-Churches relations (to be regulated by an international agreement compatible with municipal law) proved to be less controversial; there were no objections as to the principle of equal rights to be enjoyed by churches and religious groups (Article 16.1 and 16.4 - 5).

The provisions of the draft Constitution concerning the socio-economic system are narrower as to the subject matter and less specific than those relating to the principles of the political system. This is due to the different nature of social and economic matters, hardly amenable to constitutional regulation, which as a rule is stable; on the other hand, there is no clear and generally accepted vision of certain elements of the socio-economic system in a period of transformations. That is why there is no provision concerning the structure of the rural economy, especially the protection of the family-run farm, following the pattern set in the legislation of West European States; this question - in view of announced amendments - is likely to return in future constitutional work. Moreover, some important elements of economic matters are to be regulated in another chapter of the draft (X), devoted to public finance and, separately, to the central bank.

Nevertheless, protection of property (Article 13), and liberty ("freedom") of economic activity (Article 14), belong in fact to uncontested principles of the socio-economic system adopted in the draft. These principles were formulated following the present constitutional provisions with but one exception: a uniform concept of property was made an object of the same kind of protection, rejecting a special formula ("full guarantee"), which still applies to the protection of personal property under Article 7 of the constitutional provisions now in force.

The draft also establishes the principle of work protection which includes a separately declared "control over its implementation" by the State (Article 15). The consequences of this rule, as a systemic rule for specific provisions of Chapter II, dealing

with fundamental rights and freedoms, remain somewhat obscure. In particular, the question arises if the only consequence of this principle is to be “the right to safe and hygienic conditions of work” (Article 50.1).

According to modern constitutional theory, fundamental regulations relating to the status of man and citizen in the state belong to the principles of the political system of that state. These issues are regulated using categories of fundamental rights, freedoms, and duties of man and citizen in Chapter II of the draft.

Without going into any detailed description of this part of the draft Constitution, attention will be focussed on more important points of the regulation proposed by the Constitutional Committee.

The proposed provisions take for granted inherent, inalienable human dignity, and individuals human dignity (Article 20). The public authorities have a constitutional duty to observe and to protect them, which should be interpreted as accepting human dignity as the very source of rights and freedom only protected by the State.

There are common grounds to regulate all rights and freedoms, namely: the principle of trust, defined in Article 21 of the draft; the principle of equality in and before the law (Article 22), including equal rights for men and women (Article 23); the protection of rights of national and ethnic minorities (Article 25), giving aliens who are under the jurisdiction of the Polish State rights and freedoms guaranteed by the Constitution, with possible exceptions which are in keeping with international law (Article 26).

A detailed list of rights is based on the division of rights and freedoms into personal, political, as well as economic, social and cultural (to be referred to in this paper as “social”). Some of them have been hitherto absent directly in constitutional provisions, for example, the right to be tried by court (Article 33), to protection of privacy, family, honour and reputation (Article 35.1), the right to personal data protection (Article 36) and some others.

Social rights have been construed in a new way, mostly conceived in the form of the State’s duties (tasks), not as individual rights.

The system of safeguards for the protection of personal and political rights has been increased in comparison with present arrangements. These include in particular the right to claim compensation for damage caused by an act infringing the law, the right to trial by court, the right to a constitutional complaint to be lodged with the Constitutional Tribunal (Article 60). Safeguards of social rights - according to their new conception - “may be claimed within the limits specified by statute”, which - as a rule - excludes any claims by constitutionally defined means, following the same rules as with respect to other fundamental rights. Nevertheless, the performance by executive bodies of their tasks with respect to implementing social rights is subject to parliamentary control (Article 62.2).

b) Any limitations of rights and freedoms are allowed only according to and within the scope defined in the Constitution. They remain within the recognised international standards binding on Poland. These are: restrictions necessary for the sake of State security or public order, health, public morality, rights and freedoms enjoyed by other persons, protection of the natural environment (listed mainly in Article 21.3 of the draft.



They refer, *inter alia*, to the freedom of the individual, which is thus not absolute (compare Article 21).

The political, economic and social system had not been fully regulated, and some doubts and objections were raised after the vote taken in the Constitutional Committee. A full regulation will be made by the Committee in the course of its discussions on the full version of the draft when it comes up for a second reading in the National Assembly and more amendments are likely to be considered. The results of the work done so far by the Constitutional Committee, discussed in this paper, are a remarkable achievement on the road to word a new Constitution of the Republic of Poland and lay a sound foundation for its future activity. This work may be disrupted by the attitude of the extraparlimentary opposition, which - judging by certain circumstances - is likely to advocate the "Solidarity" draft as an alternative to the final draft prepared by the Constitutional Committee despite the fact that the "Solidarity" draft was formally sent to the National Assembly and is one of the materials taken as the basis of the Constitutional Committee's work. There are no legal grounds to make an object of a referendum any other draft but the one delivered by the Constitutional Committee and officially approved by a National Assembly vote. The opposition can also - in collaboration with President L. Wałęsa - strive to prepare yet another draft Constitution in the hope of having it adopted by a future National Assembly. Evidently, Poland's troublesome one road towards a new Constitution is not devoid of potential new obstacles, however optimistic are the results of present work on this Constitution.

4. Pending the adoption of a new Constitution, the present Constitution consists of a differentiated block of constitutional documents, equal as to legal force. These documents date from various periods of post-war Poland, but most of them were enacted after the political turning point in 1989 and are typical of the transformation period leading to a democratic State and a free market economy.

The first part of the block of constitutional norms now in force consists of the provisions of Chapter I of the Constitution of 22 July 1952, entitled "Foundations of the political and economic system", radically amended on 29 December 1989. Accordingly, the political system of the Republic of Poland is based on the principles of: the supreme power of the Nation (Article 2), political pluralism (Article 4), a democratic state ruled by law implementing the rules of social justice (Article 1), local government, and unrestricted operation of other forms of self-government.

Several principles establish the foundations of the economic system of the Republic of Poland. These are: the principle of economic activity regardless of type of ownership involved (any restrictions of this freedom may be imposed only statutorily in the judicial decisions taken by the Constitutional Tribunal, admissible limitations being conceived very restrictively); and the principle of protection of property rights and the right of succession. Expropriation is allowed only for public purposes and for fair compensation.

The second part of the block of constitutional norms now in force is composed of regulations concerning the fundamental civic freedoms, rights and duties. They are contained in Chapter 8 of the Constitution of 1952, which is still in force. No substan-

tial changes were made to it after 1989 because it was in fact the most democratic part of that Constitution. It contains a standard list of personal freedoms, political rights, and relatively broad social rights. Nevertheless the transformations within the constitutional law and its post-1989 theory in practice have lead to a reinterpretation of this part of constitutional provisions. Personal freedoms and political rights have developed through ordinary legislation primarily by expanding the formal safeguards of rights, especially of the right to an independent court. On the other hand, social rights, which clash with the principle of a market-driven economy and with limited intervention by the State in the economy, are now interpreted narrowly in the judicial decisions of the Constitutional Tribunal. Formally, as a rule only Polish citizens have fundamental rights but this limitation is modified both by legislation and by court decisions towards covering any person who is under the jurisdiction of the Polish State, according to international standards applicable in this matter.

The third part of the constitutional law block comprises regulations concerning the structure and the scope of activity of State organs and of local government. These are, first and foremost, the provisions of the Constitutional Act of 17 October 1992 on the mutual relations between the legislative and executive authorities of the Republic of Poland and on local government. Amended provisions of relevant chapters of the 1952 Constitution, concerning courts, the Constitutional Tribunal, The Tribunal of State, the Supreme Chamber of Control, the Commissioner for Civil Rights Protection, the National Council for Radio Broadcasting and Television, and the principles of electoral law, are still in force. The structure of the highest State organs is based on the principle of the separation of powers with the parliamentary system of government but harmonise with the substantial powers vested in the President of the Republic.

In practice, this system is not devoid of conflicts on the line between Parliament, the Government accountable to it, and the President. Profiting from present experience, the Constitutional Committee will strive in its constitutional work to ensure closer co-operation between the highest State organs within the division of powers.

The Constitutional Committee of the National Assembly in June 1996 concluded preparatory work on the draft Constitution. Chapter X on public finance and chapter XI on states of emergency were approved. The first established the principles of collecting and spending funds for public purposes in accordance with legal regulations. The manner of adopting and implementing the national budget and the independence of the central bank responsible for national financial policy were defined.

All international standards on protecting human rights were included in the chapter on states of emergency.

The Constitutional Committee also drew up provisions regulating revision of the Constitution (chapter XII).

The final editing of the draft is presently under way.