



Constitutional Heritage and Renewal: The Case of Poland

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NOTES

CONSTITUTIONAL HERITAGE AND RENEWAL: THE CASE OF POLAND*

INTRODUCTION

In the summer of 1989, following the rebirth of democratic Polish political life, a prominent Solidarity leader had this to say about the existing Polish constitution: “[F]rom the point of national honor, the present constitution is an insult; from the point of law, it is a monstrosity and an oddity; from the point of substantive politics, it is a document devoid of all meaning. . . .”¹ His statement captured the essence of Poland’s present constitutional reality: The existing constitution is an imposition from abroad, a sociopolitical anachronism, alien to Polish constitutional heritage. What many westerners do not recognize is that Poland, through the centuries, has had its own rich constitutional legacy. The recent collapse of communist power necessarily has led to the renewal of that tradition.

Poland’s constitutional legacy has its roots in the twelfth century. Seven centuries of constitutional development culminated in the creation of the 1791 constitution, the enactment of which made Poland only the second nation in history to adopt a written constitution.² Two tragic events interrupted this long constitutional tradition: the 125 year partition of Poland by Russia, Prussia, and Austria; and the more recent occupation of Poland by the USSR.

The 1952 communist constitution espoused democratic ideals, but was in practice a meaningless document ignored by the Polish leadership. A series of amendments in 1976 made the document even more repugnant to the Polish people because the amendments advocated a unified brotherhood with the Soviet Union. During the 1980s an unyielding popular movement incrementally obtained constitutional revisions leading toward a liberal west-

* The Note’s author has provided parenthetically translations of article titles, journal names, book names, and passages of text for some Polish sources. Where appropriate, the Note indicates the extent of such translations.

¹ Bikont, What to Change in the Constitution, *Gazeta Wyborcza*, Aug. 29, 1989, at 2 (statement of J. Rokita), reprinted in U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Sept. 5, 1989, at 42.

² Ludwikowski, Two Firsts: A Comparative Study of the American and the Polish Constitutions, 8 *Mich. Y.B. Int’l Legal Stud.* 117, 117 (1987).

ern democracy, signifying the beginning of the end of Soviet-imposed constitutionalism.

Today Poland stands at the forefront of political and economic change in the communist (or post-communist) world. This Note examines the roots and direction of Poland's quest for a genuinely effective, truly democratic, and historically grounded constitutional system. Part I discusses early Polish constitutional history. Part II analyzes the Polish constitution of 1791, probably the most important and enduring document in Polish history. In Part III the Note examines important political changes that occurred during Poland's years of partition. Part IV then discusses the reemergence of constitutionalism in Poland after World War I, focusing specifically on the 1921 and 1935 constitutions. This Part highlights the influence of Josef Pilsudski on the constitutional changes that occurred in Poland during the post-World War I period. Part V examines the rise and fall of communist influence on Poland and its constitutional development. Part VI discusses the recent democratic rebirth in Poland that has accompanied constitutional reform. Finally, Part VII synthesizes the historical analysis and looks to the future of democratic constitutionalism in Poland.

This Note focuses on three themes that have dominated Poland's rich, indigenous constitutional tradition:

1. The Polish state through the ages has been characterized by a decentralized political structure, whose functioning has invariably resulted in a de facto separation of powers, enforced by a complex network of checks and balances;
2. The notion of the contractual state, in which state power emanates from the will of the people, has consistently characterized Poland's political system, with the ruling party having both rights and duties to the "common wealth"; and
3. Polish constitutionalism has historically retained strong principles of individual liberty.

These themes have survived during Poland's times of trial and tribulation due primarily to the enduring readiness of the Polish people to make costly sacrifices to defend national identity, tradition, and liberty—even when the political struggle seemed to offer little hope for success.³

Solidarity's leadership has chosen May 3, 1991 as the target date for the adoption of a new Polish constitution. This date marks the two hundredth anniversary of the adoption of Poland's first formal written constitution.

³ Id. at 156. See generally R. Ludwikowski, *Polska Kultura Polityczna: Mity, Tradycje i Współczesność* (Polish Political Culture: Myths, Traditions and Contemporary Times) (1980) (discussing the ways in which contemporary Polish political culture has been shaped by Poland's historical struggle to achieve national identity) (translation of book name by author).

The new Solidarity government has pledged to frame a constitution reflective of Poland's constitutional legacy. The direction of Poland's constitutional renewal will depend largely on the resolution of tensions between Poland's traditional constitutional values and the last half-century's imposed totalitarianism.

I. THE ORIGINS OF POLISH CONSTITUTIONALISM

A. *Early Developments*

A nation's constitutional history begins when it creates institutions and procedures to limit the power of government.⁴ "[T]he term 'constitutional government' is only applied to those [governments] whose fundamental rules or maxims . . . impose efficient restraints on the exercise [of power] for the purpose of protecting individual rights and privileges. . . ."⁵ Professor A. E. Dick Howard has stated that constitutionalism is found in a "government [that] derives from the people and exists by their consent."⁶

On May 3, 1791 Poland enacted Europe's first written constitution.⁷ *Ustawa Rządowa*, or "Form of Government," culminated over seven centuries of constitutional evolution in Poland. Beginning in the twelfth century, most of this evolution focused on limiting the power of the King and enhancing the power of the people.

By the thirteenth century the principle of government by consensus and representation, an important characteristic of Polish constitutionalism, was entrenched among the duchies that constituted Poland. Delegates elected by individual districts attended provincial parliamentary sessions or, "Sejms," to discuss and remedy local problems. These delegates represented the various interests of the Polish nobility, or "szlachta."⁸ The provincial unification of Poland, motivated in large part by the Tatar invasions of Europe in 1241, emerged through discussions and agreements within these Sejms.⁹ By

⁴ Ludwikowski, *supra* note 2, at 118.

⁵ T. Cooley, *The General Principles of Constitutional Law in the United States of America* 21 (2d ed. 1891).

⁶ A. Howard, *The Essence of Constitutionalism* 18 (Apr. 10, 1989) (unpublished paper presented to the Conference on Constitutionalism and Human Rights in Poland, France, and America) (available in Miller Center for Public Affairs, University of Virginia). "Constitutionalism requires the open society. There must be freedom to believe what one will, to follow what religious beliefs one chooses, to engage in spirited and full debate, to weigh competing ideas, to understand the past, take stock of the present, and imagine the future." *Id.* at 21.

⁷ A. Zamoyski, *The Polish Way* 248 (1987).

⁸ *Id.* at 51.

⁹ *Id.* at 27, 34-35.

the coronation of Przemysl II of Gniezno in 1295,¹⁰ when Poland was consolidated into one nation, the Seyms were no longer ad hoc assemblies but vital bodies, important to the governance of Poland's provincial matters.¹¹

Significant constitutional advances occurred in Poland shortly after the coronation of Louis d'Anjou of Hungary.¹² Because he ruled from afar, the szlachta had great leverage with which to place restraints on Louis's leadership. In 1372 Louis, who lacked male descendants, tried to solidify his daughter's right of succession to the Polish throne. The Polish szlachta forced him to grant them several liberties in exchange for their allegiance. First, Louis granted a tax reduction to the szlachta. An agreement requiring the King to obtain the szlachta's consent before raising taxes followed.¹³ These limitations on the Polish King's power resembled those in the Magna Carta Liberatum of 1215, which conditioned the ability of the English King to levy taxes on the prior consent of the Royal Council.¹⁴ Further demands on royal power for the benefit of the szlachta ensued.¹⁵

Louis's successor, King Jagiello, also not a Pole, never truly secured his grip on royal power. As with Louis d'Anjou, the szlachta forced Jagiello to make concessions to secure his dynastic interests.¹⁶ In 1422 the King

¹⁰ Id. at 35.

¹¹ Id. at 51; see also A. Gieysztor, S. Kieniewicz, E. Rostworowski, J. Tazbir & H. Wereszycki, *History of Poland 144-46* (1968) [hereinafter *History of Poland*] (discussing the historical progression from the land diets in each region to a parliamentary Seym).

¹² See A. Zamoyski, *supra* note 7, at 42-43; Ludwikowski, *supra* note 2, at 120. King Kazimierz had no male successors, and during his reign he obligated the succession of the Polish throne to the Hungarian Dynasty of D'Anjou. Kazimierz's sister, Elizabeth, married the Hungarian King, Karl Robert, during Kazimierz's lifetime, and upon the death of Kazimierz in 1370 the crown was designated to Kazimierz's nephew, Louis D'Anjou. Id. at 120 n.12.

¹³ Ludwikowski, *supra* note 2, at 120. For additional sources discussing the privileges granted by the Polish kings, see id. at 120 n.13.

¹⁴ Id. at 120.

¹⁵ For example, in 1374 Louis accepted as a royal obligation the responsibility to fight for the release of members of the szlachta taken prisoner in foreign lands. L. Kanski, *Human Rights in Poland from a Historical and Comparative Perspective 2* (Apr. 10, 1989) (unpublished paper presented to the Conference on Constitutionalism and Human Rights in Poland, France, and America) (available in Miller Center for Public Affairs, University of Virginia). Louis's grant of the Privilege of Kosice (limiting the King's patrimony to his immediate family) foreshadowed the eventual grant to the szlachta of the responsibility for choosing the royal successor. A. Zamoyski, *supra* note 7, at 43.

¹⁶ Ludwikowski, *supra* note 2, at 120-21; see also A. Zamoyski, *supra* note 7, at 52-53 (discussing the impulses leading King Jagiello to grant various privileges to the factions able to control the eventuality of his son's succession to the throne). Jagiello was Lithuanian, formerly the Grand Duke of Lithuania before becoming part of Polish royalty through his marriage to Hedwige, the youngest daughter of Louis d'Anjou of Hungary. Before being allowed to marry Hedwige, Jagiello had to promise to unite the Lithuanian lands under the

pledged not to confiscate property of a member of the *szlachta* without prior judicial determination, thus establishing a right to private property.¹⁷ Even more significant was the Cracovian Privilege of 1430, which in practice came to be known as the doctrine of “*neminem captivabimus*.”¹⁸ This doctrine, substantively similar to the English Habeas Corpus Acts of 1679 and 1816, mandated that the King could not detain or sentence a member of the *szlachta* without a prior judicial determination of guilt, effectively giving the Polish *szlachta* a right to due process centuries before their Western European counterparts.¹⁹ The King’s inability to hold a member of the *szlachta* without trial reduced his tools for reprisal when the *szlachta* opposed royal decrees.²⁰

As the nobility proceeded to limit the power of distant rulers, the authority of the Polish Sejms began to blossom. Though the Polish *szlachta*, a class consisting of ten percent of the population, exclusively possessed this authority, the whole nation identified with the *szlachta* and considered the rights of the *szlachta* as their own.²¹ The Polish nation identified with the *szlachta* in large part because of the great diversity that existed in regards to

Polish crown forever, and to convert his native land to Catholicism. Ludwikowski, *supra* note 2, at 120.

¹⁷ L. Kanski, *supra* note 15, at 2.

¹⁸ *Id.*

¹⁹ A. Zamoyski, *supra* note 7, at 52; L. Kanski, *supra* note 15, at 2. While the English Magna Carta of 1215 contained a clause stating that “no man should be punished except by the judgment of his peers or the law of the land,” no protection similar to the doctrine of *neminem captivabimus* existed in England until the promulgation of the Habeas Corpus Acts of 1679 and 1816. Ludwikowski, *supra* note 2, at 121; see also E. Wade & G. Phillips, *Constitutional and Administration Law 455-57* (9th ed. 1977) (discussing the history of habeas corpus). Moreover, while Poland had its due process clause by the beginning of the 15th century, French subjects had no protection from arbitrary incarceration, or the infamous “*lettres de cachet*” (blank, royal orders of arrest given to favored subjects, allowing them to obtain the arrest of personal enemies), until the end of the 18th century. Ludwikowski, *supra* note 2, at 121 (quoting Wagner, Coleman & Haight, *Laurentius Grimaldus Goslicius and His Age — Modern Constitutional Law Ideas in the Sixteenth Century, in Polish Law Throughout the Ages 97, 98* (W. Wagner ed. 1970)).

²⁰ A. Zamoyski, *supra* note 7, at 52.

²¹ L. Kanski, *supra* note 15, at 3.

[The *szlachta*] . . . extended from the top to the bottom of the economic scale, and right across the board in religion and culture[;] they represented a wider cross-section as well as a greater percentage of the population than any enfranchised class in any European country until the nineteenth century. To be a member of the *szlachta* was like being a Roman Citizen. The *szlachta* were the nation, the *populus Romanus*, while the rest of the people inhabiting the area were the *plebs*, who did not count politically.

A. Zamoyski, *supra* note 7, at 92.

religion, culture, level of education, and financial base among the szlachta.²² Aside from Poland, popular rule was unheard of in Europe at this time; the major European countries retained absolutist forms of government until near the beginning of the eighteenth century.²³

The general willingness of the crown to concede privileges to the szlachta enhanced and regularized the role of the general and provincial Seyms.²⁴ By the end of the fifteenth century the provincial Seyms met annually with the King's Council. This meeting was known as the "Sejm Walny," or General Diet.²⁵ In 1493 the national Sejm divided into two chambers: the Senate as the higher, more elite chamber; and the House of Delegates.²⁶ As the national Sejm began to play a major role in the governance of Poland, it assumed control over two important areas of domestic governance: the budget and the process of royal succession.²⁷ The development of Polish parliamentarism not only decreased autocratic power in Poland, but served to lay a firm foundation for subsequent constitutional developments.

In 1501 the Sejm exacted from Aleksander the power of legislative initiative in return for allowing him to succeed his brother to the throne.²⁸ More-

²² A. Zamoyski, *supra* note 7, at 106-07. Zamoyski emphasized that the lifestyle and culture of the szlachta were "imitated by the lower orders" of Poland. *Id.* at 107.

Although Poland was a predominantly Catholic nation from its inception, the myriad of minorities that flocked to Poland during the periodic religious crackdowns in other European countries adhered to a number of other faiths. See *id.* at 105-07; Sila-Nowicki, *The Role of the Catholic Church in Polish Independence*, 6 N.Y.L. Sch. J. Int'l & Comp. L. 703, 704-05 (1986). The Act of the Warsaw Confederation of 1573 "proclaimed the rule of religious peace among the followers of various faiths," thus providing the inception of religious freedom in Poland. L. Kanski, *supra* note 15, at 2. Such tolerance of diversity must have reinforced the general population's identification with the szlachta.

²³ Wagner, Coleman & Haight, *Laurentius Grimaldus Goslicius and His Age — Modern Constitutional Law Ideas in the Sixteenth Century*, in *Polish Law Throughout the Ages* 97, 98 (W. Wagner ed. 1970).

²⁴ *History of Poland*, *supra* note 11, at 145-46; Ludwik Kos-Rabcewicz-Zubkowski points out in his article on Polish constitutional law that the Polish Sejm in the 15th century convened more frequently than any other Western European parliament. "For example, during 24 years of the reign of Henry VII there were in England only seven sessions of parliament, and during the thirty-year reign of Henry VIII there were nine parliaments, of which one, elected in 1529, held eight sessions. The Estates General did not convene in France between 1484 and 1561, after which time it only met in 1576-77, 1588-89 and 1593." Kos-Rabcewicz-Zubkowski, *Polish Constitutional Law*, in *Polish Law Throughout the Ages*, *supra* note 23, at 215, 233; see also Ludwikowski, *supra* note 2, at 122 (discussing the role of the King's privileges in enhancing the power of land diets).

²⁵ Ludwikowski, *supra* note 2, at 122. Convenience would later mandate that the Sejm meet six weeks every two years for a general diet. *Id.*

²⁶ A. Zamoyski, *supra* note 7, at 52-53.

²⁷ Ludwikowski, *supra* note 2, at 121. During the Jagiellonian dynasty, the hereditary monarchy in Poland was transformed into an elective monarchy. *Id.* at 121.

²⁸ A. Zamoyski, *supra* note 7, at 53.

over, the doctrine of “*nihil novi*,” or “nothing new without the Diet’s permission,” was introduced during Aleksander’s reign.²⁹ This doctrine prohibited the King from creating new laws without the express advice and consent of the Sejm,³⁰ thus giving the *szlachta* a direct role in the governance of the nation.

By 1573 the *szlachta* had institutionalized the notion of an elected monarchy, or “*electio virilim*,” under which the *szlachta* as a class chose the nation’s ruler, regardless of the existence of a natural heir.³¹ Upon the death of the King, the Sejm established the terms of the new King’s election, and then held an “Election Sejm,” in which every member of the *szlachta* participated.³² The Sejm’s increasing power made it an integral part of Poland’s constitutional monarchy. Power no longer resided in a single individual nor a particular branch of government; rather, by the end of the sixteenth century an elaborate balance of power had developed, enforced by a sophisticated network of checks and balances.³³

As the Sejm gained in power and prestige, local government, the traditional cornerstone of the decentralized state, also began to grow in importance and effectiveness. The more advanced rural districts created provincial diets, known as “*sejmiki*,” or land diets. The King gave these land diets substantial responsibilities, among them the collection of all “extraordinary” taxes.³⁴

By 1600 the contractual state concept had developed into a Polish institution; each new King had to swear an oath of loyalty to his subjects, pledging to protect their interests. Moreover, a newly elected King had to agree to abide by the restrictive stipulations contained in two important documents, the “*Acta Henriciana*” and the “*Pacta Conventa*.”³⁵ Both documents were in essence bilateral contracts between the King-elect and the *szlachta*, setting out obligations requiring the new King’s assent before he could take office.³⁶

²⁹ L. Kanski, *supra* note 15, at 1; Ludwikowski, *supra* note 2, at 124.

³⁰ I N. Davies, *God’s Playground: A History of Poland* 141 (1982); J. Kasparek-Obst, *The Constitutions of Poland and of the United States* 29 (1980).

³¹ *The Cambridge History of Poland* 52-53 (1971).

The relatively weak bargaining position of King Louis and King Jagiello, who both attempted to set up new dynasties in Poland, resulted in the transformation of Poland from a hereditary monarchy into an elective kingdom in which the kings were at first elected within the Jagiellonian dynasty and later (since 1573) elected for life mostly from various foreign, royal households.

Ludwikowski, *supra* note 2, at 121.

³² A. Zamoyski, *supra* note 7, at 95-96.

³³ *See id.* at 98.

³⁴ Ludwikowski, *supra* note 2, at 122.

³⁵ N. Davies, *supra* note 30, at 334-35; A. Zamoyski, *supra* note 7, at 96, 98.

³⁶ N. Davies, *supra* note 30, at 334-35; A. Zamoyski, *supra* note 7, at 104.

While the *Acta Henriciana* was an immutable document setting forth the standard responsibilities of each Polish King, the *Pacta Conventa* was a flexible contract specifically tailored to the needs and obligations of a particular King-elect.³⁷ The King, in pledging his obedience to the two documents, agreed that his violation of any provision of the documents would automatically release his subjects from their oath of loyalty to him.³⁸ While never actually invoked, this refusal clause did restrain arbitrary assertions of royal power.³⁹

Reforms of the Polish legal system accompanied these constitutional developments. An independent, interprovincial legal system replaced the manorial court system in which individual landowners had dispensed justice to their tenantry as they had seen fit.⁴⁰ Moreover, consistent with the system of checks and balances that had developed between the legislature and the King, the Sejm delegated to an independent judicial body the functions previously assigned to the jurisdiction of the throne's Supreme Crown Court.⁴¹

The seventeenth century body of political thought known as "Sarmatianism" reinforced Poland's appreciation for the constitutional reforms that had evolved over the past five centuries. Sarmatian ideology glorified the romantic stereotype of the gentleman-warrior—the defender of God and country.⁴² Sarmatians opposed arbitrary assertions of power and considered the *szlachta* class to be a "true defender" of democracy.⁴³ Through deft manipulation of these Sarmatian ideals, the *szlachta* assumed complete administrative, spiritual, and financial dominance over Poland by the middle

³⁷ A. Zamoyski, *supra* note 7, at 96, 98. The *Pacta Conventa* was not an exclusively Polish invention; other examples of this institution were seen in Germany and Sweden. The Cambridge History of Poland, *supra* note 31, at 52.

³⁸ A. Zamoyski, *supra* note 7, at 98. The possibility of civil disobedience against the King in the case of his noncompliance with the rules of his office was known as the "articulus de non protestanda oboedientia" rule. L. Kanski, *supra* note 15, at 3.

³⁹ These two documents and other legislation that had developed by the 17th century formalized the constitutional innovations that had occurred thus far in Poland. A. Zamoyski, *supra* note 7, at 98-104. The constitutional right to refuse obedience to the King if he violated his contractual duties was refined in 1609. Refusal could occur only upon the clear failure of the King to execute his duties responsibly, and then only after providing him with notice and an opportunity to rectify the transgression. The Cambridge History of Poland, *supra* note 31, at 54.

⁴⁰ A. Zamoyski, *supra* note 7, at 53.

⁴¹ *Id.*

⁴² Ludwikowski, *supra* note 2, at 128.

⁴³ *Id.* The Sarmatian concept emphasized that the roots of the Polish *szlachta* originated in the ancient Slavic province of Sarmatia. The Sarmatian tradition portrayed the true Sarmatian as a brave warrior, preferring an austere lifestyle, and willing to give his life to protect the noble principle of democracy. A man of rigid morality, the Sarmatian knight strongly adhered to Catholic religious principles. The *szlachta*'s Sarmatian background convinced them that

of the seventeenth century.⁴⁴ Sarmatianism also mandated that the nobility protect the elevated position of the Catholic Church in Poland, linking the forebears of Poland's constitutional heritage to the nation's primary religion and creating a bond that would have broad repercussions centuries later.⁴⁵

In sum, by the seventeenth century the themes that would characterize Poland's constitutional tradition had become crystalized in the system of state authority. First, the development of parliamentarism and a system of checks and balances institutionalized a constitutional system of government. Second, the distribution of governmental authority to state and local levels limited the power of the central government. Third, the *Acta Henriciana* and the *Pacta Conventa* formalized the notion of the contractual state. Finally, the beginnings of inherent individual liberties, or, more precisely, duties owed by the monarch to his subjects (although possessed only by the *szlachta*), had materialized in Poland by the seventeenth century.⁴⁶

B. Constitutional Development Distorted

By the seventeenth century Poland's "democracy of the gentry"⁴⁷ was characterized by a Parliament divided into three estates: the House of Deputies, which represented the *szlachta*; the Senate, which represented the provincial officials of the state and church; and, finally, the monarchy.⁴⁸ The three "estates" theoretically shared power equally over the lawmaking pro-

they had a special responsibility to maintain and defend democracy and the balance of power that existed in the Polish state. *Id.*

During the 18th century the model of the Sarmatian landholder, always ready to leave his glorious estate to defend the fundamental concept of the "democracy of the gentry," replaced the stereotype of the Sarmatian knight. *Id.* at 128-29.

⁴⁴ The Cambridge History of Poland, *supra* note 31, at xiv.

⁴⁵ "Under the doctrine of Sarmatianism, the idea of a special relationship between the Polish national character and Catholicism was for the first time elevated as the leitmotif of Polish political thought." Ludwikowski, *supra* note 2, at 128.

⁴⁶ In Western Europe, the French absolute monarchy reached its apex during the reign of Louis XIV. In England, where the Parliament had struggled for legislative control for some time, the Tudor dynasty effectively retained supreme state control in the King during the 17th century, particularly during the reigns of Henry VIII and Elizabeth I. Not until the very end of the 17th century did the English Parliament achieve legislative supremacy, when it wrested the right to control taxation. Ludwikowski, *supra* note 2, at 123 n.30; see also E. Wade & G. Phillips, *supra* note 19, at 181-84 (discussing the growth of the English Parliament into the dominant legislative branch).

⁴⁷ R. Ludwikowski, *The Main Principles of the May 3, 1791 Polish Constitution in a Comparative Perspective* 4 (Apr. 10, 1989) (unpublished paper presented to the Conference on Constitutionalism and Human Rights in Poland, France, and America) (available in Miller Center for Public Affairs, University of Virginia).

⁴⁸ The Cambridge History of Poland, *supra* note 31, at 54-55; Ludwikowski, *supra* note 2, at 125. To solidify this system known as the democracy of the gentry, the Polish *szlachta* founded the "movement for the execution-of-the-law," which assumed that the *szlachta*'s

cess. In order for legislation to pass, each estate had to vote in favor of the legislation—affording each estate the right to veto legislative measures. Toward the end of the seventeenth century, however, the House of Deputies subsumed much of the King's power.⁴⁹ In addition, during the eighteenth century municipal sheriffs, who previously had been directly subordinate to the King, began to free themselves from royal control.⁵⁰

Royal power continued to crumble. The crown became almost solely a symbolic position after the Sejm gained the ability to appoint the King's ministers and to control the army.⁵¹ The fundamental flaw of the resulting "szlachta's democracy" was that it lacked effective procedures to ensure cor-

"share of power was guaranteed by the fact that the supreme power in the state was vested not in the king alone but in the 'King in Parliament'." Ludwikowski, *supra* note 2, at 125.

⁴⁹ The szlachta, who comprised the membership of the House of Deputies, engineered this power shift through their control of Poland's financial resources and political power. The Cambridge History of Poland, *supra* note 31, at 56. Although "[t]he king was theoretically 'above the other estates' " by the view of the gentry, "it was assumed that he [ruled by] 'consilium' (the practice of consulting the [szlachta] and experts)." Ludwikowski, *supra* note 2, at 125.

⁵⁰ The Cambridge History of Poland, *supra* note 31, at 62.

⁵¹ See A. Zamoyski, *supra* note 7, at 178-79 (discussing the structural disabilities preventing Poland from making the political reforms necessary to repair its economy); Ludwikowski, *supra* note 2, at 129 (discussing the decay of the Polish state and society). Except for a small levy on the land they owned, the exemption of the szlachta from all taxes, a privilege granted in 1496, placed serious limitations on the power of the King. See *id.* at 122.

The longstanding strength of the view, at least among the gentry, that the King was little more than a figurehead was eloquently expressed by Stanislaw Orzechowski, a flamboyant 18th century Polish priest: "Your king . . . is nothing but the mouth of your kingdom. He is bound by your voluntary and legitimate election and in this way he cannot do . . . anything but that which comes from your deepest conviction." Ludwikowski, *supra* note 2, 126 (quoting S. Orzechowski, Speech to the Polish Nobility Against Law and Statutes of the Polish Crown as set in Order by Jakub Przulski, in *Wybor Pism* (Selection of Works) 98 (1972) (a collection of speeches made by famous Polish political figures)).

Orzechowski, a popular critic of those who wanted to strengthen the power of the crown, emphasized the difference between the Polish King and the kings of other European countries when he stated: "In the pagan states, the king is the sole purpose of everything; in Poland—a Christian Kingdom, . . . (commonwealth is everything and the king serves the commonwealth)." Ludwikowski, *supra* note 2, at 126 (quoting S. Orzechowski, *supra*, at 562-64). To Orzechowski, the maintenance of the democracy of the gentry required the right to criticize the king. *Id.*

The szlachta harnessed the institutions that composed the Polish constitutional democracy to advance their own interests, eventuating the disintegration of the state apparatus in the 18th century. First, the ability to use the state to promote their own interests allowed the szlachta to take advantage of the system at the expense of the lower levels of society. For example, in 1496 the szlachta restricted many of the rights of the clergy, the burghers, and the peasantry, and used the broad governmental powers they possessed to acquire land from those with less political influence. N. Davies, *supra* note 30, at 212. Second, in order to keep the crown weak, the standing army was allowed to disintegrate, and in order to keep taxation down, the

rect and effective parliamentary conduct, and instead relied on the honesty and sense of fair play of its participants to make the government run.⁵² As early as the seventeenth century, the *szlachta* class became acutely divided, with factions developing based on estate size and ability to hold provincial, crown, or court offices.⁵³ Because no authority to silence or expel disruptive members existed, the Sejm became a chaotic stage for fights between regional interests, and, as a result, accomplished little. The “*liberum veto*,” through which a single member could veto the Sejm’s ability to act, guaranteed national political paralysis.⁵⁴

In this way, the important, but unrefined, constitutional reforms developed in Poland during the thirteenth through sixteenth centuries hampered the efficiency and effectiveness of the Polish government during the seventeenth and eighteenth centuries. Three hundred years of power-grabbing by the *szlachta* (beginning in the mid-to-late fourteenth century) created a sys-

national treasury was allowed to erode. The Cambridge History of Poland, *supra* note 31, at xvi.

The noble classes of the Western European countries were not as successful as the Polish *szlachta* in assuming control of the state. The *szlachta* maintained their high position and greater power by consistently attacking the position of the other estates in Poland. By 1496 the burgher class was prohibited from owning real estate. Moreover, in order to protect the purity of the *szlachta* class, a Sejm resolution in 1505 declared that members of the *szlachta* who decided to become municipal officers or engage in craft trades would lose their “*indygenat*,” the right of belonging to the *szlachta* class. Ludwikowski, *supra* note 2, at 122-23. Some Polish scholars have maintained that the weakness of the Polish burghers played a substantial part in Poland’s future fall. *Id.* at 123 n.27.

In order to increase the flow of grain from Poland to Western Europe, the Polish landlords also increased their control over the peasantry. Through the purchase of municipal estates, the *szlachta* gained control over the peasants attached to parcels of land. By the end of the 15th century, serfdom was officially recognized by law. The resolutions of the Sejm between 1501 and 1543 prohibited peasants from leaving a village without the landlord’s permission, and allowed only one son from each peasant family to settle down in a town to study or work as a craftsman. *Id.* at 123.

By the middle of the 18th century, the wealthy members of the Polish *szlachta* were considered to be the richest private individuals in Europe next to the English aristocracy. History of Poland, *supra* note 11, at 291.

⁵² A. Zamoyski, *supra* note 7, at 100.

⁵³ Ludwikowski, *supra* note 2, at 127 n.41. The most elevated faction of the Polish *szlachta* were known as the “*possessionati*,” who throughout the 17th and 18th centuries continued to use their superior social position and huge estates to increase their influence over the Polish state, at the expense of the inferior factions of the *szlachta*. *Id.*

⁵⁴ A. Zamoyski, *supra* note 7, at 100-01. The *liberum veto*, based on notions of unanimity and equality among members of the *szlachta*, allowed a single adverse voice in the Sejm to cause the breakup of, and the loss of any legislation completed in, that session. Ludwikowski, *supra* note 2, at 127. Forty-eight of the 55 biennial legislative sessions held after 1652 were adjourned as a result of a single deputy’s exercise of the *liberum veto*. The Cambridge History of Poland, *supra* note 31, at xvi.

tem of parliamentary supremacy—with checks on governmental power exercised only *within* that body, as opposed to among governmental branches. Poland had made a valiant early attempt at constitutional government, but the end product was unfortunately a flawed and one-sided political system (albeit a basis for later, more effective, constitutional reforms).

The resulting chaos made Poland susceptible to foreign intrusion.⁵⁵ In 1772 Poland had almost one-third of its territory partitioned away by Prussia, Russia, and Austria.⁵⁶ This foreign aggression spurred a desperately needed rethinking of traditional constitutional values. Eventually the country's politically enlightened element would initiate reforms—with the long range objective of formulating a national constitution.⁵⁷

II. THE BLOSSOMING OF CONSTITUTIONALISM IN POLAND

A reform coalition known as the Four Year Diet was convened in 1788 to develop appropriate constitutional reforms.⁵⁸ In August of 1790 King Stanislaw August Poniatowski declared that “the ‘only method of assuring to Poland the integrity of its possessions, and of preserving it from the ruin which foreign politics were preparing for it was to establish a Constitution,

⁵⁵ Ludwikowski, *supra* note 2, at 129.

⁵⁶ *Id.* at 130; see also History of Poland, *supra* note 11, at 290-91 (discussing the role of foreign powers in breaking up the Sejms). Poland's internal crisis unfortunately coincided with successful reforms by Peter the Great in Russia and internal reforms in Prussia and Austria as well. In each case, these reforms vastly increased the power of their respective central governments, making them increasingly potent military threats. Ludwikowski, *supra* note 2, at 130.

⁵⁷ J. Kasperek-Obst, *supra* note 30, at 30-31. The reformists, understanding the importance of a national education system to achieve the unified national consciousness necessary for reform to be successful, created the National Educational Commission in 1773. The Commission wanted education to unify the Polish people in both a sense of common historical context and shared contemporary values. A. Howard, *supra* note 6, at 13-14. The resulting intellectual regeneration and reinforcement of the Polish national consciousness led to a fuller understanding of the need to improve “the organism of the Commonwealth.” The Cambridge History of Poland, *supra* note 31, at 128.

⁵⁸ Ludwikowski, *supra* note 2, at 139. The Sejm was reestablished as a confederation so that decisions could be made by a simple majority vote, and to make the proceedings immune to adjournment through the use of the liberum veto. *Id.*

The most active leaders in the reform faction, Hugo Kollataj, Stanislaw Malachowski, Ignacy Potocki, and King Stanislaw Augustus, carefully observed important world events that could provide insight into how to solve Poland's internal problems. A. Zamoyski, *supra* note 7, at 247-48. The reformists watched particularly the American colonists' creation of an independent democratic form of government. Ludwikowski, *supra* note 2, at 131. Conversely, America's Founding Fathers observed the Polish struggle to establish a national constitution, referring to Poland in *The Federalist Papers* as an example of the problems associated with a confederate form of government. *Id.*

which should secure its internal independence.’”⁵⁹ The awareness of rising external threats to Poland’s integrity and independence accelerated the effort to draft a new constitution as soon as possible.

Because of acute differences within the Four Year Diet, the process of formulating a new constitution proceeded slowly and the idea of creating a draft of the constitution outside of the Sejm gained viability.⁶⁰ King Stanislaw Augustus convened a smaller group to draft the new constitution secretly.⁶¹ Expediency mandated that the draft constitution be introduced to the Sejm at a time when the minimum number of members of the opposition would be present.⁶² Although majority support for the constitution existed by the end of the May 1791 session, legally required unanimity had not yet been achieved.⁶³ The King disregarded established legislative procedure, however, and enacted the constitution into law. In one swift move, Stanislaw Augustus provided what one constitutional scholar has described as the basis “‘for the organization of a modern state and modern society.’”⁶⁴ The Sejm “accepted” the final version of “*Reforma Konstytucji*” through political maneuvering. Although the opponents of reform protested the circumvention of standard legislative procedure, the Sejm quickly disposed of these objections, voting by majority to invalidate all protests against the new constitution.⁶⁵

King Stanislaw’s appreciation for the English political system, with its division of power and bicameral parliament, led the framers of the Polish constitution to study this system in detail. The framers especially admired

⁵⁹ A. Howard, *supra* note 6, at 14 (endnote omitted).

⁶⁰ J. Kasperek-Obst, *supra* note 30, at 30-31. In the late 1780s, there was growing concern over the impending peace treaty between Russia and Prussia, which would free Russia to concentrate on the attainment of Poland. *Id.* at 35.

⁶¹ A. Zamoyski, *supra* note 7, at 247-48.

⁶² The framers of the 1791 constitution introduced the draft document on May 3, when most of the opponents of reform were away for the Easter holiday. Although Sejm protocol mandated that resolutions be published before consideration for passage, drafts could be considered immediately. On May 4, 28 deputies submitted an official protest against the circumvention of standard legislative procedure; nevertheless, the Sejm, by majority vote, invalidated all protests against the new constitution. J. Kasperek-Obst, *supra* note 30, at 35; see also Ludwowski, *supra* note 2, at 141 (discussing the plan devised by the framers of Poland’s new constitution to assure the legislative approval of that document).

⁶³ J. Kasperek-Obst, *supra* note 30, at 35.

⁶⁴ A. Howard, *supra* note 6, at 15 (endnote omitted); see J. Kasperek-Obst, *supra* note 30, at 35 (stating that although the draft had not attained the required unanimity, the King, “ignoring the formal niceties . . . arose and swore an oath which rendered the Constitution law”). It should be noted that the constitution of May 3, 1791 was “the first constitution in Europe to base (though not quite consistently) political prerogatives on property, and not on birth.” J. Topolski, *An Outline History of Poland* 119 (1986).

⁶⁵ Ludwowski, *supra* note 2, at 140-41.

the English government's procedure of "cooperation and clashes," which characterized the relationship between the English King and the two parliamentary bodies. The writings of Henry Bolingbroke and his regard for England's "patriarchal monarchy" also influenced the Polish constitutionalists.⁶⁶

The constitutional reform coalition closely analyzed the 1789 draft of the French constitution of 1791 as well. That draft recognized the will of the people as the source of law, and promoted the doctrine of separation of powers. The Poles drew substantially from Montesquieu, who first posited a theory of checks and balances on various branches of government.⁶⁷ The reform movement also referred to Rousseau's social contract to emphasize that "the substantial transformation of the Polish social structure was not only necessary but quite feasible."⁶⁸

One of the chief purposes of the new constitution was to restructure and to unify the ineffective Polish government by limiting the powers of Parliament and by balancing its influence with other branches of state.⁶⁹ Accordingly the new constitution discarded the concept of the liberum veto, which had allowed provincial interests to supersede the general good.⁷⁰ At both the national Sejm and the local diet level the concept of decision by majority

⁶⁶ Id. at 133. Many reformers, such as Hugo Kollataj, were well-read in English political literature, and admired England's moderate constitutional monarchy that was able to successfully combine features of democratic, aristocratic, and monarchical government. Id. at 133-34. See generally B. Lesnodorski, *Dzielo Sejmu Czteroletniego (The Work of the Four Year Sejm)* 63 (1951) (discussing the theoretical influences on the framers of the Polish constitution of 1791) (translation of book name by author).

⁶⁷ J. Hawgood, *Modern Constitutions Since 1787*, at 79 (1939); J. Kasparek-Obst, *supra* note 30, at 85; Ludwikowski, *supra* note 2, at 135; L. Garlicki, *The Influence of American Constitutional Ideas on the Development of Constitutionalism in Poland and Eastern Europe* 2-3 (Apr. 10, 1989) (unpublished paper presented to the Conference on Constitutionalism and Human Rights in Poland, France, and America) (available in Miller Center for Public Affairs, University of Virginia). Montesquieu's *The Spirit of Laws* was first translated in its entirety into Polish in 1772. Ludwikowski, *supra* note 2, at 135.

⁶⁸ Ludwikowski, *supra* note 2, at 136. See generally W. Smolenski, *Przewrót Umysłowy w Polsce Wieku XVIII (Intellectual Upheaval in Eighteenth Century Poland)* (1979) (discussing the theoretical influences affecting the framers of the 1791 constitution) (translation of book name by author). The opponents to reform also cited Rousseau—to argue against a strengthened monarchy and in favor of the traditional liberties of the Polish szlachta. Ludwikowski, *supra* note 2, at 136.

Despite different geopolitical circumstances, the intellectual foundation of the 1791 constitution was similar to that of the American Constitution, reflecting the ideas of many of the same Western European philosophers and creating a "common legacy" between the two documents despite the different political structures that resulted. Id. at 137.

⁶⁹ See Ludwikowski, *supra* note 2, at 149-51.

⁷⁰ A. Howard, *supra* note 6, at 15.

vote replaced mandatory unanimity, which had so hampered the legislative efforts of the government.⁷¹

The framers wanted to re-create a unified state by establishing a cohesive political entity. In this vein article 7 of the constitution emphasized the importance of the crown being “elective in regard to families,” thus readopting a hereditary monarchy and ending royal elections.⁷² The power of the King was enhanced, with the crown having both the power of legislative initiative and the right to call the Sejm into session.⁷³ Although the new constitution gave the King substantially greater power than he had possessed in recent centuries, it contained numerous provisions designed to keep absolute autocratic power in check.⁷⁴ For instance, the King regained effective control over the military,⁷⁵ but the Sejm retained the power to declare war.⁷⁶

The 1791 constitution reflected the dominant constitutional themes that had surfaced during Poland’s period of democratic growth in the fifteenth and sixteenth centuries. It provided for decentralized state power, with government authority dispersed at state and local levels.⁷⁷ The constitution stressed the centrality of separation of powers to the foundation of the government.⁷⁸ Article 5 emphasized that:

Three distinct powers shall compose the government of the Polish nation, according to the present constitution.

1st. Legislative power in the [assembled estates].

2d. Executive power in the king and the Council of Inspection.

3d. Judicial power in [courts] existing, or to be established.⁷⁹

In addition, the allocations of power among the branches incorporated an elaborate system of checks and balances.

⁷¹ Upadek Konstytucji 3 Maja 1791 (Constitution of May 3, 1791), art. 6 (Pol.) [hereinafter 1791 Const.], reprinted in *New Constitution of the Government of Poland* (London trans. 1791); see L. Kanski, *supra* note 15, at 5.

⁷² 1791 Const., *supra* note 71, art. 7 (emphasis omitted). The constitution provided that upon the extinction of the royal family, a new house was to be elected by “the nation.” *Id.*

⁷³ *Id.* art. 6.

⁷⁴ J. Kasperek-Obst, *supra* note 30, at 42. The framers of the 1791 document adhered to the notion that the constitution was an appropriate mechanism for preventing state power from being transformed into a tool of tyranny. *Id.*

⁷⁵ 1791 Const., *supra* note 71, art. 7. Article 7 emphasized that “[i]n time of war [the King] shall have the supreme command of the national forces.” *Id.*

⁷⁶ *Id.* art. 6. Article 7 expressly denied the King the right to declare war. *Id.* art. 7.

⁷⁷ See *id.* art. 2. Plenipotentiaries were elected by the burghers to work with Sejm commissions in matters involving municipal issues and commerce. Ludwowski, *supra* note 2, at 144-45.

⁷⁸ 1791 Const., *supra* note 71, art. 5.

⁷⁹ *Id.* (emphasis omitted).

The King shared the executive power of government with the Council of Inspection, which was composed of, among others, a Primate, and the Ministers of Justice, Police, War, Foreign Affairs, and Finances.⁸⁰ The Marshall of the Sejm and the heir-apparent to the throne also sat on the Council of Inspection, although neither could vote.⁸¹ Although “[t]he King’s opinion . . . decisively prevail[ed]” in this Council, his decrees were not valid without the signature of the relevant minister.⁸² The ministers making up the Council were ultimately responsible to the Sejm,⁸³ but were appointed by the King.⁸⁴

The new constitution reaffirmed the old parliamentary structure. The Sejm was the official legislative branch, a bicameral body consisting of a Senate and a Chamber of Deputies.⁸⁵ For the first time, legislators had limits placed on their terms of office. Another provision mandated that the Sejm be convened at least every two years.⁸⁶

The Chamber of Deputies, declared by the constitution “a temple of legislature” where “the national sovereignty is vested,” consisted of over 204 “popularly elected” deputies that represented the szlachta and plenipotentiaries of various municipalities.⁸⁷ This lower chamber could initiate legislation, and then send bills on for Senate approval.⁸⁸ This elevation of the status of the “lower chamber” of Parliament became an important characteristic of Polish constitutionalism.

The 1791 constitution assigned the Chamber of Deputies important state functions, such as the ability to levy taxes, responsibility over government loans, and the powers to declare war and to ratify treaties.⁸⁹ It also mandated that the Chamber of Deputies, along with the Senate, confirm minis-

⁸⁰ Id. art. 7.

⁸¹ Id.

⁸² Id. The executive retained the power to execute the laws, “even by the means of public force, should it be necessary.” Id.

⁸³ Id.; see also Ludwikowski, *supra* note 2, at 150 (discussing the framework of decentralized state power founded by the 1791 constitution).

⁸⁴ 1791 Const., *supra* note 71, art. 7; see also J. Kasperek-Obst, *supra* note 30, at 45-49 (setting out the executive powers provided for in the 1791 constitution, including the King’s powers of appointment).

⁸⁵ 1791 Const., *supra* note 71, art. 6.

⁸⁶ Id.

⁸⁷ Ludwikowski, *supra* note 2, at 150 (quoting 1791 Const., *supra* note 71, art. 6). “Popular election” is a somewhat misleading term, however, because suffrage was based on the ownership of land. As such, the Chamber of Deputies was essentially a body elected by the szlachta rather than the nation as a whole. J. Kasperek-Obst, *supra* note 30, at 43.

⁸⁸ 1791 Const., *supra* note 71, art. 6. The power to initiate legislation was not, however, vested solely in the Chamber of Deputies. See, e.g., id. art. 7 (granting the King the power of legislative initiative).

⁸⁹ Id. art. 6.

ters appointed by the King, and conferred on them the power to dismiss a minister by a two-thirds vote of both bodies.⁹⁰ The Parliament could not remove the King.⁹¹

The King presided over the Senate, in which membership depended on royal appointment. The Senate had less responsibility over the day to day governance of Poland than the Chamber of Deputies.⁹² The constitution conceived of Senators, with their stable views and political experience, as elder statesmen. Their charge was to articulate their convictions whenever a matter of state importance arose.⁹³ The Senate thereby served as a balancing force in reviewing important or controversial legislation.⁹⁴ The Senate, and not the King, had the right to veto legislative decisions of the Chamber of Deputies.⁹⁵ The Chamber of Deputies could override this veto in a subsequent session, though.⁹⁶

In keeping with its emphasis on a separation of powers, the 1791 constitution reflected the importance of an autonomous judiciary. Article 8 emphasized that “[a]s judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected.”⁹⁷ Independent judicial courts were created, with judges selected by a special committee comprised of deputies of the Sejm.⁹⁸

Thus, the 1791 constitution, while granting the executive greater powers than it had previously enjoyed, retained Poland’s historical separation of

⁹⁰ Id. art. 7; see Ludwikowski, *supra* note 2, at 150. The King’s nominations of ministers were subject to presentment to both chambers, which could refuse the nominations by a vote of “no confidence.” Id.

⁹¹ See Ludwikowski, *supra* note 2, at 150. The 1791 constitution declared in article 7 that “the King’s person is sacred and inviolable; as no act can proceed immediately from him, he cannot be in any manner responsible to the nation.” 1791 Const., *supra* note 71, art. 7.

⁹² See 1791 Const., *supra* note 71, art. 6; J. Jedruch, *Constitutions, Elections and Legislatures of Poland, 1493-1977*, at 218 (1982); J. Kasparek-Obst, *supra* note 30, at 43-44. In the Senate, the King had one vote, and a second in the case of a draw. 1791 Const., *supra* note 71, art. 6.

⁹³ J. Kasparek-Obst, *supra* note 30, at 44.

⁹⁴ Id. All bills introduced in the Chamber of Deputies were sent to the Senate for further debate. Ludwikowski, *supra* note 2, at 150.

⁹⁵ 1791 Const., *supra* note 71, art. 6.

⁹⁶ Id.

⁹⁷ Id. art. 8.

⁹⁸ Id.; Ludwikowski, *supra* note 2, at 151. The new constitution radically transformed the judicial system. For instance, nobles no longer had their own special courts. Rather, the courts “were replaced by the landowners’ courts (*ziemianskie sady*), and appellate, provincial courts, staffed by judges elected for four years by the local diets (*sejmiki*).” Id. Jurisdictional changes were also made for townspeople and peasants. Id. The most important reform, however, was the establishment of a court composed of members of the Sejm, elected by the Sejm, to hear cases “‘against the nation’” and “‘against the supreme Government of the Commonwealth.’” Id. (citations omitted).

powers framework. It vested the Chamber of Deputies and the Senate, the two houses of the national Sejm, with important powers designed to check the great power of the King, and each other. Finally, the constitution provided for the creation of an independent judiciary to interpret legislative mandates.

With regard to the second dominant theme in Polish constitutionalism, the 1791 constitution expanded on the concept of the contractual state, a theme first manifested in the *Acta Henriciana* and the *Pacta Conventa*. Article 5 declared that “all power in civil society [should be] derived from the will of the people.”⁹⁹

While the *szlachta* primarily possessed influence over government power at this time, the new constitution liberalized the routes to ennoblement, and thus to political representation, for Polish burghers and plenipotentiaries.¹⁰⁰ The new constitution eventually required the Sejm to ennoble at least thirty of these potential members of the *szlachta* at each session.¹⁰¹ As a consequence of these provisions, the term “citizen” began to include not just the *szlachta*, but also other landed classes and citizens of wealth.¹⁰²

The term “people,” as applied in the 1791 constitution, only included the single social class of the Polish *szlachta*. Even though the constitution made entry into this class easier, the Polish state remained a far cry from genuine popular sovereignty. The “Law on Government,” however, did declare that the Polish nation was composed of peasants and townspeople as well as the nobility.¹⁰³ While the peasantry gained no political participation rights from the new constitution, it did entitle them to “the protection of national

⁹⁹ 1791 Const., *supra* note 71, art. 5. Article 4 reiterated the socially reformist nature of the 1791 constitution: “We publish and proclaim a perfect and entire liberty to all people.” *Id.* art. 4.

¹⁰⁰ Ludwikowski, *supra* note 2, at 144-45.

¹⁰¹ *Id.* at 145.

¹⁰² L. Kanski, *supra* note 15, at 5-6. Article 11 emphasized that “all inhabitants [of the nation] are natural defenders of their country and its liberties.” 1791 Const., *supra* note 71, art. 11.

¹⁰³ 1791 Const., *supra* note 71, arts. 3, 4; Ludwikowski, *supra* note 2, at 153. While the 1791 constitution essentially retained the political monopoly of power held by the *szlachta* (which included declaring the *szlachta*’s predominance over “private and public life”), it also introduced several new groups into the political arena. For example, it created routes to ennoblement for the burghers and permitted townspeople to purchase real estate. *Id.* at 144-45. Further, the *szlachta* differed greatly from other European aristocracies. In France and Germany, for instance, the nobility constituted only one percent of the population; the Polish *szlachta*, on the other hand, constituted ten percent of the population. *Id.* at 145.

law.”¹⁰⁴ Among other things, this meant that contracts between the peasantry and the nobility now had legal standing.¹⁰⁵

To an extent never before seen in Poland, the new constitution expanded on the third dominant theme of Polish constitutionalism by guarantying a number of important individual liberties. Most of the individual privileges, liberties, and property rights gained by the szlachta from Poland’s foreign monarchs were retained.¹⁰⁶ Some of the more fundamental privileges, namely the doctrine of *neminem captivabimus* (the Polish *habeus corpus* act), were extended beyond the szlachta to all property owners and to Jews.¹⁰⁷ Article 1 enacted a clear right to religious freedom: “[W]e assure, to all persuasions and religions, freedom and liberty, according to the laws of the country”¹⁰⁸ But while it did not impose any single religion on the people, the new constitution did reflect the primacy of Catholicism in Polish society. The constitution began with the words: “In the name of God, one in the Holy Trinity!”¹⁰⁹ This unswerving deference to Catholicism in the 1791

¹⁰⁴ 1791 Const., *supra* note 71, art. 4.

¹⁰⁵ *Id.*; Ludwikowski, *supra* note 2, at 146. The social position of the Polish serf at the end of the 17th century was little different from that of the American slave, and the 1791 constitution did little to change this. Servitudes remained in effect, making the Polish peasant personally dependent on the szlachta and subject to the szlachta’s authority. *Id.*

¹⁰⁶ L. Kanski, *supra* note 15, at 5-6; see also Ludwikowski, *supra* note 2, at 144 (discussing the retention by the 1791 document of laws concerning personal liberty developed by the szlachta in Poland in earlier times).

¹⁰⁷ L. Kanski, *supra* note 15, at 5-6. The pervasive role of these basic tenets of liberalism were expressed by a prominent radical political writer of the day, Stanislaw Staszic: “‘Equality, freedom and property are the simplest and the most indispensable among human rights.’” *Id.* at 6 (quoting Staszic, *Przestrogi dla Polski (Admonitions to Poland)*, in *1 Pisma Filozoficzne i Społeczne (Philosophical and Social Writings)* 173, 186 (1954) (translation of article title and book name by author)).

¹⁰⁸ 1791 Const., *supra* note 71, art. 1. While Poland’s primary religion was Catholicism, Poland was proud of its religious tolerance; the persecution of “other creeds” was never as widespread in Poland as in other European countries. See A. Zamoyski, *supra* note 7, at 90-91.

¹⁰⁹ 1791 Const., *supra* note 71, preamble. Article 1 stated: “The Holy Roman-Catholic Faith, with all its privileges and immunities, shall be the dominant national religion. The changing of it for any other persuasion is forbidden under the penalties of apostacy” *Id.* art. 1.

Though clearly favored, Catholicism did not qualify as a “national religion”; Poles did not have to become Roman Catholics, and could practice other religions openly. Ludwikowski, *supra* note 2, at 142; cf. T. Cooley, *supra* note 5, at 213-14 (arguing that the United States Constitution’s prohibition against the governmental establishment of a national religion did not mean “that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it”).

constitution strengthened the link between the Roman Catholic Church and constitutionalism in Poland.¹¹⁰

The danger of constitutional stagnation was offset by article 6, which mandated that a constitutional Sejm be convened every twenty-five years to review possible reforms and changes.¹¹¹ Moreover, because the framers understood the importance of creating a document capable of adapting to changing conditions, the framers made deliberate use of flexible and ambiguous language.¹¹²

Thus, the 1791 constitution captured and formalized those dominant constitutional themes that both addressed Poland's pressing need to rebuild a credible nation-state for external purposes, and preserved many of the szlachta's political and economic gains that had evolved during the last five centuries. Out of concern for national survival, the constitution provided institutional mechanisms to prevent the reemergence of the political chaos that had plagued seventeenth and eighteenth century Poland. Edmund Burke, the English statesman, heralded the new Polish constitution as one of the most magnificent achievements in the modern world, emphasizing that this document " 'contained [the] seeds of continuous improvement, being built on the same principles which make our British constitution so excellent.' " ¹¹³

While the szlachta had focused on the formation of the constitution, the affairs of Europe had changed at an alarming rate. With the fall of the Bastille, feuding monarchies in Europe became united in their concern about the revolutionary, anti-monarchist tide sweeping across the continent.¹¹⁴ With the constitution barely one year old, Russia, incensed at Poland's adoption of a constitution and reacting to the eruption of hostilities between France and Prussia, sent 97,000 troops across the Polish border.¹¹⁵ Poland could field only 37,000 troops in its defense; the Russians soundly defeated

¹¹⁰ See R. Ludwikowski, *supra* note 47, at 26. Since its inception, Poland has been within the Catholic cultural sphere, with historical tradition maintaining that the beginning of the Polish nation occurred when Poland officially accepted Christianity in 966. See O. Halecki, *A History of Poland* 3 (1943).

¹¹¹ 1791 Const., *supra* note 71, art. 6.

¹¹² Ludwikowski, *supra* note 2, at 155. The Polish constitution created only a general outline of the structure and function of the primary state institutions, leaving the intricate details to statutory interpretation by the Sejm. *Id.*

¹¹³ The Cambridge History of Poland, *supra* note 31, at 135 (quoting Edmund Burke). At the same time, however, Burke commented that " '[t]he new Constitution only serves to supply that restless people with new means, at least new modes, of cherishing their turbulent disposition.' " J. Hawgood, *supra* note 67, at 79 (quoting Edmund Burke).

¹¹⁴ A. Zamoyski, *supra* note 7, at 249.

¹¹⁵ *Id.* at 250-51.

them.¹¹⁶ Then on January 23, 1793, Prussia and Russia agreed to a further partitioning of Poland.¹¹⁷

Although in effect for only a short time, the 1791 constitution became a symbol of Poland's national identity—an identity based on values of constitutionalism and enlightened government. The momentum of this historic document allowed its principles to survive for over 125 years of foreign domination.¹¹⁸ A well-known Polish constitutional scholar, Bronislaw Dembinski, stated: “The miracle of the Constitution did not save the state but did save the nation.”¹¹⁹ Inherent in the national psyche of Poland is a spirit of political romanticism, which has been described as “the permanent readiness of the people to sacrifice important human values in defense of religion, national identity, culture, tradition and liberty even in situations where the ultimate struggle seems unable to offer any rational chance of victory.”¹²⁰

The 1791 constitution's role in maintaining the Polish national identity is also tied to the relationship between the constitution and Catholicism. The declaration in the constitution of the supremacy of Catholicism strengthened the conviction that a special relationship between Catholicism and constitutionalism did indeed exist.¹²¹ This connection carried over into the nineteenth century and played a key role in developing a strong national consciousness that equated being Polish with being Catholic.¹²²

No discussion of Poland's constitutional development through the eighteenth century would be complete without mention of the Polaniec Manifesto of May 7, 1794. Drafted by Thadeus Kosciuszko, it was intended to remain in effect through the duration of the Polish uprising against her foreign occupiers.¹²³ The Polaniec Manifesto aimed to motivate the peasantry to fight for the freedom of Poland, and granted peasants broad individual rights—most of which had been omitted from the May 3, 1791 constitution—to accomplish this aim. These rights included protection by the national government, freedom to change place of residence, and freedom from arbitrary eviction.¹²⁴ While not a constitution in the formal sense, the

¹¹⁶ Id. at 250.

¹¹⁷ Id. at 251. The partition itself was compensation demanded of Russia by the Prussians in return for their efforts at containing revolutionary France. Id.

¹¹⁸ J. Hawgood, *supra* note 67, at 79.

¹¹⁹ Ludwikowski, *supra* note 2, at 155 (quoting B. Dembinski, *Polska na Przelomie* (Poland on the Turn) 4 (1913) (translation of book name by author)).

¹²⁰ Id. at 156.

¹²¹ Id. at 155.

¹²² Id. at 155-56. Poland's partitioners did not share its values of constitutionalism and Catholicism. The external repression of both values reinforced the bond between them.

¹²³ J. Kasperek-Obst, *supra* note 30, at 64.

¹²⁴ Id. at 60. In his *Polaniec Manifesto*, Kosciuszko also promised the peasantry freedom from servitude, “irremovability” from their land, and a “proportional reduction” (by half) in

manifesto propounded constitutional themes; it attempted to restructure fundamental aspects of Polish society by empowering the peasant class with rights heretofore deemed unthinkable. For the first time, constitutional principles would apply regardless of social class, giving broader definition to the notion that state power emanates from the will of the people.¹²⁵

Kosciuszko's promises did manage to rouse many courageous fighters, but the insurrection failed in November 1794.¹²⁶ On October 10, 1795, following Austrian occupation, Poland ceased to exist as an independent state, and its occupiers barred the use of the name Poland within its borders. The Final Treaty of Partition, signed by Russia, Prussia, and Austria in January of 1797, formalized the diplomatic niceties of the partition.¹²⁷ As with the 1791 Polish constitution, however, the principles of the Polaniec Manifesto transcended its short life.

III. THE YEARS OF PARTITION

Following France's defeat of Prussia in 1807, Napoleon set up a puppet Polish state in that part of Prussia previously belonging to Poland.¹²⁸ Napoleon, as was his practice with all his new territories, drew up a constitution for his new Polish state, which he called the Grand Duchy of Warsaw.¹²⁹ His "constitutional regime" closely paralleled his imperial government in France.¹³⁰

Imposition of the Napoleonic Code introduced Poland to the doctrine of completely equal application of liberties and freedoms. This introduction would have significant repercussions later in Poland's constitutional history.¹³¹ The Code's emphasis on egalitarianism had a leveling effect on the Polish social class system.¹³² Laws and statutes now applied equally to

their serf labor dues if the insurrection proved successful. N. Davies, *supra* note 30, at 539. The Manifesto was expanded in July of 1794 to open the position of municipal supervisor, which had responsibility for public safety, to a person " 'of any estate . . . , provided only that he be virtuous, judicious, not under suspicion of avarice or of harmful associations nor under a base obligation to any, be able to read write and reckon, and enjoy a good reputation in his region.' " J. Kasparek-Obst, *supra* note 30, at 60 (endnote omitted) (quoting Act of July 1794).

¹²⁵ J. Kasparek-Obst, *supra* note 30, at 61, 64.

¹²⁶ A. Zamoyski, *supra* note 7, at 253-57.

¹²⁷ N. Davies, *supra* note 30, at 541-42.

¹²⁸ J. Jedruch, *supra* note 92, at 247-48.

¹²⁹ J. Kasparek-Obst, *supra* note 30, at 70.

¹³⁰ J. Hawgood, *supra* note 67, at 79.

¹³¹ The constitution imposed by Napoleon included the adoption of the Napoleonic Code. *Id.* at 80.

¹³² The Cambridge History of Poland, *supra* note 31, at 239.

every member of society, and a uniform and effective court system came into existence.¹³³

Napoleon's constitution also provided freedom for the serf class. Article 4, in addition to establishing that "all citizens are equal before the law," abolished Poland's ancient system of estates, "put[ting] an end to serfdom as a legal institution."¹³⁴ The enforcement of this provision, as well as efforts made toward instituting provisions commanding religious tolerance, contributed greatly to Poland's constitutional heritage.¹³⁵ Napoleon's defeat in Moscow in 1812 placed Poland back in Russian hands, but the egalitarian principles inherent in the Napoleonic system would remain an important part of Polish constitutional thought.¹³⁶

For more than a century, Poland was in the hands of its partitioners.¹³⁷ Periodically the Poles rose in resistance; in so doing, they asserted and further refined their constitutional values.¹³⁸ In 1861, for example, Poles organized the City Committee, which fought one of the earliest campaigns of urban guerilla warfare.¹³⁹ The City Committee, and its successor, the National Central Committee (KCN), directed an organized and well-funded rebellion.¹⁴⁰ The Manifesto of the KCN, issued in order to mobilize the

¹³³ The Cambridge History of Poland, *supra* note 31, at 239.

¹³⁴ 2 N. Davies, *supra* note 30, at 299 (citation omitted).

¹³⁵ J. Hawgood, *supra* note 67, at 80. The Napoleonic constitution provided the legal right to the peasantry to move freely within the borders of the Polish state. The Cambridge History of Poland, *supra* note 31, at 246.

¹³⁶ A. Zamoyski, *supra* note 7, at 263-66.

¹³⁷ The Polish Kingdom was bound to Russia through an imposed constitution, framed at the Vienna Congress of 1815. J. Kasparek-Obst, *supra* note 30, at 71; see J. Jedruch, *supra* note 92, at 260-65. While Poland's foreign occupiers would frame constitutions enunciating the "connection" between Russia and Poland, these were simply enforced documents that played no contributory role in Poland's constitutional history. J. Kasparek-Obst, *supra* note 30, at 71, 79. The Russian occupiers never understood the enormous value the Pole placed on civil liberties guaranteed by a functional constitution. A. Zamoyski, *supra* note 7, at 309. The liberal regulatory scheme set up by the Russian-imposed constitutions during the period of partition was not followed in practice, with the Russian regime following a very repressive model of state power. A. Zamoyski, *supra* note 7, at 266-67; L. Kanski, *supra* note 15, at 9.

¹³⁸ The November Uprising (1830-1831) against foreign subjugation had as an early priority the adoption of a constitution that would be enacted in the case of victory. The last authentic Polish constitution, that of 1791, was retained as a skeleton model for the framing of this draft document. The draft document emphasized a tripartite division of power, hailing back to Poland's traditional separation of powers doctrine. The draft document also contained the traditional individual rights institutionalized in the 1791 document. The collapse of the 1830-1831 uprising brought the return of Russian rule. Although the draft document never became law, it remained an important part of the perpetuation of the tradition of constitutionalism in Poland. See J. Kasparek-Obst, *supra* note 30, at 72-80.

¹³⁹ 2 N. Davies, *supra* note 30, at 351, 353.

¹⁴⁰ *Id.* at 353-54.

lower classes to support the KCN's cause, called for laws allowing peasants to own land.¹⁴¹ At one point, the underground government even "issued a decree providing [for] the death sentence for landowners who continued to exact payment in lieu of labor dues."¹⁴² This decree and the KCN's Manifesto built on the principles inherent in the Polaniec Manifesto and the Napoleonic Code. Although the national movement exacted some concessions from the Tsar, by April 1864 Russia had extinguished most of the insurrection and integrated the Congress Kingdom of Poland into its empire.¹⁴³

Certainly the szlachta never would have made such offers to the peasantry absent the partition and subsequent occupations. And certainly no legitimately constituted national Sejm adopted them. The public pronouncement of these ideas to all Poles in the context of national struggle, however, elevated them to the level of constitutional expectations. These expectations of inclusion—of the contractual state for *all* the people—became the legacy of the years of partition.

IV. RESTORATION OF CONSTITUTIONALISM

A. *The Polish Constitution of 1921*

Poland reemerged an independent nation after World War I. In November 1918 Josef Pilsudski, a political and military leader whose popularity made him capable of unifying the politically fragmented nation, was declared head of the resurrected Polish state until a new government could be formed.¹⁴⁴ Elections for the Sejm were held on January 26, 1919, and two weeks later the first session of the new Sejm was convened.¹⁴⁵ On February 20, 1919 the Sejm adopted the "Little Constitution," effectively transferring power to the Sejm.¹⁴⁶ This interim document was the foundation of government for the next two years while a final constitution was being

¹⁴¹ Moreover, in order to make the uprising a genuine rebellion of the people, in 1863 the KCN announced a complete emancipation and enfranchisement of every person in the Polish state, including the peasantry. *The Cambridge History of Poland*, supra note 31, at 378.

¹⁴² 2 N. Davies, supra note 30, at 360. The ascension of Tsar Alexander II of Russia increased Poland's constitutional lament. Although Alexander remained "firmly opposed to all separatist national movements," he also made a number of concessions, including allowing a right of assembly. *Id.* at 348. These concessions triggered the formation of numerous thinly-cloaked "societies"—which were in reality "active political organs." *Id.* at 348-49.

¹⁴³ 2 N. Davies, supra note 30, at 360, 364-65; see also A. Zamoyski, supra note 7, at 268-85 (briefly outlining the history surrounding the insurrection).

¹⁴⁴ H. Roos, *A History of Modern Poland* 39-40, 43 (1966); see also *The Cambridge History of Poland*, supra note 31, at 568 (discussing Poland's post-World War I transition to a democratic state).

¹⁴⁵ J. Kasparek-Obst, supra note 30, at 83.

¹⁴⁶ *Id.*

drafted.¹⁴⁷ Unfortunately the Sejm, which had endowed itself with most state power under this document, had little experience in the practice of government, and could not achieve the consensus necessary to address the nation's pressing socioeconomic problems.¹⁴⁸

While the multitude of political parties in existence at this time differed on the structure of the new constitution, all agreed that it should reflect Poland's traditional democratic and parliamentary themes.¹⁴⁹ On February 14, 1919 a commission of thirty deputies of the Sejm convened to create a draft which was finally made into law on March 17, 1921.¹⁵⁰ The commission had modeled the new Polish document after the French constitution of 1875, which represented to them the ideal format for a benevolent and effective system of government—"weakness in normal circumstances with strength in the face of national crisis."¹⁵¹

Poland's traditional constitutional strains resurfaced in the 1921 constitution. Like the 1791 constitution, this constitution endorsed the parliamentary approach to government, and adopted a tripartite separation of powers scheme.¹⁵² From an allocation of powers standpoint, Poland had reconstituted itself as a democratic republic with a bicameral legislature having more power than that of the executive branch.¹⁵³ Apparently not learning from its past, Poland once again developed an inefficient and ineffective system of government whereby every element of the executive and judiciary depended to a certain extent upon the will of the lower chamber of the legislative

¹⁴⁷ J. Topolski, *supra* note 64, at 212-13.

¹⁴⁸ See A. Zamoyski, *supra* note 7, at 340. Restructuring Poland proved a difficult task. The area constituting the new Poland consisted of a conglomeration of regions that had, for over a century, belonged to either Germany, Russia, or Austria-Hungary. These regions possessed different social, cultural, economic, political, and legal standards. For example, the different regions used as many as six different currencies until 1920, when the Polish mark became the official currency. Unifying the legal system proved even more difficult. The existence of three primary legal systems, combined with recalcitrant provincial jurisdictions, frustrated the achievement of a unified Polish system. Moreover, the Poles found that many of the problems that they had blamed on their occupiers actually originated from within their own society. For what seemed like the first time, Poles had to police themselves, form their own standing army, and throw away their age-old suspicion of government control. The economic devastation of the First World War further impeded the process of unification. A. Polonsky, *Politics in Independent Poland 1921-1939*, at 2-3, 7-9 (1972).

¹⁴⁹ See J. Kasparek-Obst, *supra* note 30, at 84; H. Roos, *supra* note 144, at 100.

¹⁵⁰ J. Topolski, *supra* note 64, at 213.

¹⁵¹ J. Hawgood, *supra* note 67, at 335-36; see H. Roos, *supra* note 144, at 101.

¹⁵² Const. of 1921, arts. 2, 3 (Pol.) [hereinafter 1921 Const.], *reprinted in* *The Polish Handbook* 13 (trans. F. Czarnomski ed. 1925).

¹⁵³ *Id.* arts. 1, 2.

branch; the resulting inefficiency led some to label Poland “an almost decapitated state.”¹⁵⁴

The National Assembly, the Polish legislature, consisted of two chambers—the Sejm and the Senate.¹⁵⁵ Article 3 emphasized that the Sejm, or lower chamber, possessed the leading role in the formulation of government policy by stating: “No law shall be passed without the authorisation of the Diet.”¹⁵⁶ The Sejm, now directly elected by universal suffrage, was charged with responsibility over the national budget, making constitutional amendments, raising the army, and levying and collecting taxes.¹⁵⁷ The Sejm shared the privilege of legislative initiative with the President.¹⁵⁸ A simple majority vote of the Sejm could force a single minister, the entire executive cabinet, or even the President, to resign.¹⁵⁹ The Sejm could dissolve itself by a two-thirds vote of its own members; alternatively, the President, acting in conjunction with a three-fifths vote of the Senate, could dissolve the Sejm.¹⁶⁰ Such a vote would also dissolve the Senate, however, making it unlikely that the Senate would accede to such joint action with the President.¹⁶¹

The Senate did not play a very influential role in Polish government.¹⁶² Also subject to direct election,¹⁶³ the Senate reviewed legislation passed by the Sejm, and could reject proposed measures upon majority vote.¹⁶⁴ By a majority of eleven-twentieths, however, the Sejm could override a bill rejected by the Senate, and article 35 committed the President to sign such a bill into law.¹⁶⁵

The 1921 constitution, for the first time in Poland’s history, rejected royal rule.¹⁶⁶ The preamble proclaimed that Poland would continue “the great traditions of the glorious Constitution of May the Third [1791],”¹⁶⁷ and consistent with that document rejected autocratic executive power.¹⁶⁸ While

¹⁵⁴ J. Hawgood, *supra* note 67, at 336 (citation omitted).

¹⁵⁵ 1921 Const., *supra* note 152, art. 1; A. Polonsky, *supra* note 148, at 46.

¹⁵⁶ 1921 Const., *supra* note 152, art. 3.

¹⁵⁷ *Id.* arts. 4-6, 11, 12, 125.

¹⁵⁸ *Id.* arts. 33, 56, 58; A. Polonsky, *supra* note 148, at 45.

¹⁵⁹ 1921 Const., *supra* note 152, art. 58; J. Kasperek-Obst, *supra* note 30, at 94; A. Polonsky, *supra* note 148, at 45.

¹⁶⁰ 1921 Const., *supra* note 152, art. 26; A. Polonsky, *supra* note 148, at 45.

¹⁶¹ J. Kasperek-Obst, *supra* note 30, at 94.

¹⁶² *See id.* at 87.

¹⁶³ 1921 Const., *supra* note 152, art. 36.

¹⁶⁴ *Id.* arts. 11, 35; *see* A. Polonsky, *supra* note 148, at 46.

¹⁶⁵ 1921 Const., *supra* note 152, art. 35.

¹⁶⁶ J. Kasperek-Obst, *supra* note 30, at 85.

¹⁶⁷ 1921 Const., *supra* note 152, preamble.

¹⁶⁸ J. Hawgood, *supra* note 67, at 335; H. Roos, *supra* note 144, at 101.

supreme power theoretically resided in the Presidency, in reality presidential authority was limited to representational duties.¹⁶⁹ For instance, the President, chosen by a vote of the National Assembly,¹⁷⁰ could only dissolve the Sejm if he had the required three-fifths majority of the Senate.¹⁷¹ The President also possessed no veto power over legislation.¹⁷² According to article 46, the President, upon a declaration of war, could not assume the role of Commander-in-Chief himself, but instead had to appoint a military commander following the recommendation of the Council of Ministers.¹⁷³ And while the President appointed ministers and executive officers,¹⁷⁴ these officials were accountable to the Sejm.¹⁷⁵ As with the 1791 constitution, the 1921 constitution institutionalized the concept of a constitutionally restrained executive, placing greater limitations on the Polish President's powers than any of the limitations encumbering his post-World War I European counterparts.¹⁷⁶

The 1921 constitution incorporated limitations on the President's power primarily because of the National Democratic Party's fear that a strong presidency would allow a single dynamic leader, specifically Pilsudski, to dominate the processes of government.¹⁷⁷ Consequently, in the presidential elections of 1922, Pilsudski declined to run because he refused to be placed in a "gilded cage."¹⁷⁸

The 1921 constitution created a "Supreme Tribunal for Civil and Criminal cases,"¹⁷⁹ but left the exact organization of the judiciary system to the Sejm.¹⁸⁰ Consistent with the 1791 constitution, the 1921 constitution provided for an independent judiciary.¹⁸¹ The courts' responsibilities included

¹⁶⁹ H. Roos, *supra* note 144, at 101.

¹⁷⁰ *Id.*

¹⁷¹ J. Hawgood, *supra* note 67, at 336.

¹⁷² A. Polonsky, *supra* note 148, at 46.

¹⁷³ 1921 Const., *supra* note 152, art. 46.

¹⁷⁴ *Id.* art. 45; H. Roos, *supra* note 144, at 101.

¹⁷⁵ See 1921 Const., *supra* note 152, arts. 43, 58. The executive power of government was possessed by the Office of the President and, according to article 43, by "Ministers responsible to the Diet." *Id.* art. 43.

¹⁷⁶ J. Hawgood, *supra* note 67, at 336.

¹⁷⁷ See A. Polonsky, *supra* note 148, at 46; H. Roos, *supra* note 144, at 101.

¹⁷⁸ H. Roos, *supra* note 144, at 103. Pilsudski eventually removed himself entirely from the resulting government, recognizing the danger of a government dominated by the Sejm and hoping that his dissociation would increase his political stature in the long run. *Id.* at 104.

¹⁷⁹ 1921 Const., *supra* note 152, art. 84.

¹⁸⁰ *Id.* art. 75. The President was responsible for appointing members of the judiciary at the recommendation of his Minister of Justice. *Id.* arts. 45, 76; J. Kasperek-Obst, *supra* note 30, at 89.

¹⁸¹ J. Kasperek-Obst, *supra* note 30, at 85-86 (referring to 1921 Const., *supra* note 152, arts. 2, 77).

the review of regulations and decrees passed unilaterally by the executive branch, but not of bills passed by the Sejm: “The Courts of Justice shall not have the right to challenge the validity of Statutes legally promulgated.”¹⁸² This uneven application of the process of judicial review served to further enhance the power of the National Assembly.¹⁸³

The local government system was based on the then-existing French system, with a governor administering each of Poland’s seventeen provinces.¹⁸⁴ Article 66 proclaimed that “[t]he administrative organisation of the State shall be based upon the principle of decentralisation . . .”;¹⁸⁵ Poland would base “its organization on the principle of broad territorial local self-government.”¹⁸⁶ Accordingly provinces were divided into districts, each one administered by a territorial subprefect.¹⁸⁷ The decentralized structure proposed by the constitution reflected the continuing influence of the concept of strong local government systems—a concept first introduced by the *szlachta* early in Poland’s constitutional evolution.¹⁸⁸

Moreover, the new constitution contained modern provisions that set forth certain affirmative rights that obliged the government to protect the socioeconomic life of its citizenry.

Article 102 stipulated that every citizen had the right to the state’s protection over his work—to social security. Article 103 prohibited in precise words employment of children under 15 years of age, as well as night shifts for women and youth workers. Separate statutes

¹⁸² 1921 Const., *supra* note 152, art. 81; see also L. Garlicki, *supra* note 67, at 13-14 (discussing the absence of any form of judicial review in the 1921 Polish constitution).

¹⁸³ The French concept of the “supremacy of the statute” was thereby incorporated in the 1921 constitution. L. Garlicki, *supra* note 67, at 8.

¹⁸⁴ 1921 Const., *supra* note 152, art. 65. While the autonomy of local government systems was in many ways dependent on the will of the Sejm, the 1921 constitution, like the 1791 constitution, created a constitutional foundation upon which local government could function. But see A. Polonsky, *supra* note 148, at 48 (emphasizing that the constitutional provision framing a system of local government was not reflective of reality, with the autonomy of local government systems in many important ways dependent on the Sejm).

¹⁸⁵ 1921 Const., *supra* note 152, art. 66.

¹⁸⁶ A. Polonsky, *supra* note 148, at 48 (referring to 1921 Const., *supra* note 152, art. 66). But see *supra* note 184 (A. Polonsky’s observations on the reality of local dependence on the Sejm).

¹⁸⁷ A. Polonsky, *supra* note 148, at 48.

¹⁸⁸ The more prominent aspects of this decentralization include: the *sejmiki*, or local land diets, see *supra* note 34 and accompanying text; the special courts of the nobles that the 1791 constitution did away with, see *supra* note 98; and the ability of the *szlachta* to make decisions in these local bodies (by preventing any trumping national legislation through the use of the *liberum veto*), see *supra* notes 53-54 and accompanying text.

were to determine the principles of state protection over maternity and orphans.¹⁸⁹

Consistent with the evolution from the 1791 constitution through the Polonic Manifesto, Napoleon's constitution, and the KCN Manifesto,¹⁹⁰ the 1921 constitution emphasized several fundamental concepts of civil liberty. All citizens were equal before the law—family and class had no bearing on the application of justice.¹⁹¹ The 1921 constitution provided a host of individual liberties, including equal access to public office, the right to choose one's occupation, freedom of speech, freedom of the press, and freedom of assembly.¹⁹² While it did not specifically resurrect the doctrine of *neminem captivabimus*, the document did ensure continued recognition of each citizen's freedom against arbitrary restraints on individual liberty.¹⁹³ The constitution guaranteed the right to privacy in one's domicile from arbitrary search and seizure.¹⁹⁴ Article 83 mandated the use of juries in certain judicial proceedings,¹⁹⁵ and article 98 prohibited "[p]enalties involving corporal punishment."¹⁹⁶ Moreover, the constitution recognized private property rights as "one of the principal foundations of social organization and the legal order."¹⁹⁷

The 1921 constitution, while emphasizing the importance of religious freedom, also highlighted the primacy of Catholicism in Polish sociopolitical culture. Article 114 stressed that Catholicism "shall have a preponderating

¹⁸⁹ L. Kanski, *supra* note 15, at 12; see 1921 Const., *supra* note 152, arts. 102, 103.

¹⁹⁰ See *supra* notes 113-43 and accompanying text.

¹⁹¹ 1921 Const., *supra* note 152, art. 96. Article 95 guaranteed the protection of life, liberty, and property to all people notwithstanding origins, race, nationality, language, or religion. *Id.* art. 95.

¹⁹² See *id.* arts. 96, 102, 104, 105, 108.

¹⁹³ J. Kasperek-Obst, *supra* note 30, at 92.

¹⁹⁴ 1921 Const., *supra* note 152, art. 100.

¹⁹⁵ *Id.* art. 83.

¹⁹⁶ *Id.* art. 98.

¹⁹⁷ *Id.* art. 99.

Consistent with Poland's constitutional heritage, the contractual state concept reemerged in the 1921 document. The preamble stated: "We, the Polish Nation, . . . Enact And Confirm This Constitution . . ." 1921 Const., *supra* note 152, preamble. Indeed, article 2 emphasized its popular roots: "The Sovereign Power in the Polish Republic shall be vested in the Nation." *Id.* art. 2. State authority once again derived its legitimacy from the consent of the governed and from the rule of law.

On the other hand, the 1921 constitution stressed several obligations of citizens in their relations to others, in particular, to family, community, and society. Article 89 demanded loyalty and allegiance from the citizen to the state. *Id.* art. 89. Article 91 mandated military service from citizens. *Id.* art. 91. Article 94 called for parents to raise their children as good citizens, and to provide them with a minimum elementary education. *Id.* art. 94.

authority in the State.”¹⁹⁸ Catholicism thus continued its historical association with constitutionalism in Poland.

In sum, the 1921 constitution resurrected many themes of historical Polish constitutionalism, themes suppressed during the era of partition. A parliamentary system, provisions for strong local government, the notion that government power derived from the people and that the government in turn owed the people basic rights, and an elaborate framework of individual liberties were all incorporated into the 1921 constitution. On the other hand, this constitution also provided a political structure that sowed the seeds of ineffective government, reminiscent of pre-1791 Poland.

Due to regional and political differences harking back to the period of partition, local government entities pursuing their own interests contributed to the acute fragmentation of the Polish political state.¹⁹⁹ By 1925 Poland had ninety-two recognized political parties.²⁰⁰ Several of these political parties represented the national minorities inhabiting Poland at that time,²⁰¹ and thirty-two parties actually had seats in the Sejm.²⁰² This political diversity made it impossible to achieve a concrete majority, and turned the government into a pawn of constantly changing parliamentary coalitions.²⁰³ The Polish penchant for sympathizing with the opposition, developed during the extended foreign occupation, further obstructed efforts toward political cohesiveness.²⁰⁴

B. Creating an Effective Government: The Influence of Josef Pilsudski

Because of the political division discussed above, and because the National Democrats structured the 1921 constitution in such a way as “to curb the power of Pilsudski,” Pilsudski and his numerous supporters never viewed it as a legitimate document.²⁰⁵ Pilsudski felt that the 1921 constitution’s creation of a strong parliament caused the subsequent political chaos and gov-

¹⁹⁸ *Id.* art. 114.

¹⁹⁹ A. Polonsky, *supra* note 148, at 52-53. For example, in the province of Galicia, residents referred to themselves as both Austrians and Poles. *Id.* at 52.

²⁰⁰ *Id.* at 52.

²⁰¹ National minorities comprised one-third of Poland’s population at this time. *Id.*

²⁰² *Id.*

²⁰³ H. Roos, *supra* note 144, at 101. This fragmentation was exacerbated by the individualistic Polish intelligentsia, whose dominance in party politics served to further atomize Polish politics. This atomization was aggravated by the underlying fact that the lower chamber of the National Assembly dominated the governance of the country; it was this body that needed to function, and this body that was most acutely affected by party factionalism. A. Polonsky, *supra* note 148, at 53.

²⁰⁴ A. Polonsky, *supra* note 148, at 53.

²⁰⁵ *Id.* at 99-100.

ernment corruption.²⁰⁶ The failure of the incumbent government's policies to deal with the economic crisis of 1925, and the collapse of the new Polish currency, the "zloty", made some cry for Pilsudski to exercise ironhanded leadership.²⁰⁷

The Wojciechowski government rejected Pilsudski's call for tighter executive control over the tumultuous Sejm. Pilsudski responded by leading a coup d'état on May 11, 1926 that restructured the government, placing much more power in the executive branch.²⁰⁸ The Sejm offered Pilsudski the Presidency, but he deferred, preferring the formation of a "government of experts" led by eminent scientist Ignacy Moscicki.²⁰⁹ The new government saw as its principal tasks the rejuvenation of the economy and the strengthening of the executive branch so that government could act more effectively.²¹⁰

Formal constitutional changes after the coup d'état were proposed in the form of amendments to the constitution known as the "August novels."²¹¹ To protect the national budget from continuing quagmire in the Sejm, the amendments allowed the government to spend at the same rate as the previous year if the legislature did not agree on a budget before adjourning.²¹² In the name of inhibiting corruption, the August novels buttressed article 22 of

²⁰⁶ H. Roos, *supra* note 144, at 110. See A. Polonsky, *supra* note 148, at 100, for a discussion of government corruption in Poland during this period.

²⁰⁷ A. Polonsky, *supra* note 148, at 147-48; see *The Cambridge History of Poland*, *supra* note 31, at 586; H. Roos, *supra* note 144, at 109-10. Ignacy Daszynski, a socialist leader, wrote in 1926: "If there are in Poland strong forces which could dream of a dictatorship of 'honest men,' if there are strong hearts and strong fists ready to destroy the 'order' of today, one should not look for them in the ranks of reaction The moral leader of these people who long for honesty in the state, who understand that the misdeeds of the Sejm and Government can destroy Poland, is Jozef Pilsudski." A. Polonsky, *supra* note 148, at 147 (quoting I. Daszynski, *Sejm Rzad Krol Dyktator* (Parliament, Government, King, Dictator) (1926) (translation of book name by author).

The political crisis in Poland in 1925 was exacerbated by the government's inability to deal with rampant inflation, which started in Poland during the early 1920s as a result of war-time destruction and efforts to unify the nation into one economic unit. A. Polonsky, *supra* note 148, at 100. The high rate of unemployment and the skyrocketing costs of basic necessities spawned revolutionary movements, reflecting the nation's growing desire for change. Between 1921 and 1922 prices rose almost 1300%. Differences in how to deal with the economic crisis split the cabinet. *Id.* at 105, 124.

The national conflicts occurring in the eastern part of the nation added further fuel to Poland's economic and political crises. Lithuanian and Ukrainian nationals opposed the Polish state's institution of various reforms. J. Topolski, *supra* note 64, at 219.

²⁰⁸ H. Roos, *supra* note 144, at 111-12; A. Zamoyski, *supra* note 7, at 341-42.

²⁰⁹ *The Cambridge History of Poland*, *supra* note 31, at 588.

²¹⁰ *Id.* at 602.

²¹¹ J. Kasparek-Obst, *supra* note 30, at 99.

²¹² H. Roos, *supra* note 144, at 115.

the constitution by providing for the automatic dismissal of legislators found by the Supreme Court to have used their office to earn income or benefits outside of their regular salary.²¹³

To allow the executive to govern unimpeded by the legislature, the amendments also empowered the President to dissolve Parliament without the consent of either of the National Assembly's chambers, and gave him the right to issue decrees bearing the force of law during times the legislature was not in session.²¹⁴ Once Parliament reconvened, however, it could confirm or reject these decrees.²¹⁵ In this way, Poland retained parliamentarism after the coup d'état; but Pilsudski warned the legislators in August 1926 of "a final showdown, and of a brutal type, if they want to return to their former habits."²¹⁶

For a time the August novels appeared to stabilize the system of government in Poland.²¹⁷ In addition in 1927 the economic health of Poland improved dramatically.²¹⁸ Even at this time of stability and prosperity, however, budget issues created antagonisms between the President and the National Assembly.²¹⁹ After the Sejm elections of 1928 the Sejm became even more ineffectual and factionalized.²²⁰ It adjourned sessions on the spur of the moment and left incomplete budgetary discussions and other legislative matters because of the multitude of diverse interests.²²¹ The global economic problems visited upon Poland in the winter of 1929-1930 exacerbated the preexisting political problems; the general economic decline "contributed greatly to the general radicalization of politics."²²²

²¹³ J. Kasparek-Obst, *supra* note 30, at 99.

²¹⁴ H. Roos, *supra* note 144, at 115.

²¹⁵ *Id.* The orders and decrees issued by the President had to refer specifically to the applicable articles of the constitution, required the endorsement of the ministers of government, and had to be published in the Legislative Journal of the Polish Republic. J. Kasparek-Obst, *supra* note 30, at 100.

²¹⁶ A. Polonsky, *supra* note 148, at 189.

²¹⁷ H. Roos, *supra* note 144, at 115. The cabinet of the new government saw as its principal task the rejuvenation of the Polish economy. A. Polonsky, *supra* note 148, at 190. In addition to the emphasis placed on stabilizing the zloty, the balancing of the national budget by trimming government expenditures, and the revival of the economy through public investment, the new government proposed a number of progressive reforms. *Id.*

²¹⁸ The Cambridge History of Poland, *supra* note 31, at 588.

²¹⁹ H. Roos, *supra* note 144, at 118.

²²⁰ J. Hawgood, *supra* note 67, at 337.

²²¹ *Id.* at 337-38.

²²² A. Polonsky, *supra* note 148, at 283. Poland was hit hard by the Depression. The Polish national income between 1929 and 1933 fell 25%. *Id.* at 280. Unemployment in December 1929 was up to 185,000; by 1931 it had soared to 372,000. The Depression had a dramatic effect on Poland's intelligentsia; "the number of unemployed 'intellectual workers' (a census term) rose from 70,000 in 1929 to 160,000 in 1932-33." *Id.* at 281. This in turn further radicalized the political atmosphere. *Id.* at 283.

As early as 1928 Pilsudski identified the complete reformulation of Poland's constitution as one of his primary objectives. After having watched the evolution of ineffectual government that followed the enactment of the 1921 constitution, Pilsudski concluded that "in a powerless nation grown feral in bondage, liberty produces an abuse of liberty."²²³ He wanted to place much greater power in the Office of the President relative to the other branches of government. Even the August novels of 1926 did not satisfy Pilsudski, because they did not give the Office of the President ample authority to act effectively and decisively.²²⁴ To Pilsudski, who had taken over the post of Prime Minister,²²⁵ the ideal form of government was a state "governed by a man of the highest moral authority . . . who should stand above all the parties and above all the state authorities, and be able to intervene when it was necessary for the public good."²²⁶

The elections of 1930, partly manipulated by Pilsudski's supporters, created a parliamentary majority that favored the creation of a strong executive.²²⁷ This gave Pilsudski the parliamentary control needed to alter the structure of government in accordance with the terms of the constitution, if not its intent.²²⁸ Pilsudski's followers presented a draft of the new constitution to the Sejm in 1931; the final version of the new constitution was promulgated into law on March 23, 1935.²²⁹

²²³ J. Kasperek-Obst, *supra* note 30, at 114 (quoting J. Pilsudski, *Pisma Wybrane* (Selected Works) 412 (1943) (translation of book name by author)).

²²⁴ *Id.* at 100.

²²⁵ H. Roos, *supra* note 144, at 121.

²²⁶ H. Izdebski, *Constitutional Development in France and Poland Since 1791: A Comparison* 18 (Apr. 10, 1989) (unpublished paper presented to the Conference on Constitutionalism and Human Rights in Poland, France, and America) (available in Miller Center for Public Affairs, University of Virginia). See generally W. Kulesza, *Koncepcje Ideowo-Polityczne Obozu Rządzącego w Polsce w Latach 1926-1935* (Political Ideas of the Ruling Camp in Poland in 1926-1935) (1985) (discussing Josef Pilsudski's role within the Polish state from 1926-1935) (translation of book name by author).

²²⁷ See H. Roos, *supra* note 144, at 121.

²²⁸ J. Hawgood, *supra* note 67, at 338. The constitution provided for its own amendment via passage of a bill by a special majority. Like the 1791 constitution, the 1921 constitution was open to general revision every 25 years. *Id.* at 336.

²²⁹ A. Polonsky, *supra* note 148, at 386-87. The new government formed a Constitutional Committee, which in 1934 submitted 63 "constitutional theses" to the Sejm. Although these constitutional theses simply consisted of proposals for changing the 1921 constitution, considered together they amounted to a new constitution. These provisions, however, were not adopted in good faith. Pilsudski's followers, apparently without his knowledge, enacted the new constitution during an opposition boycott of the constitutional debate, a clear violation of the notice provisions of the governing 1921 constitution. Because Pilsudski did not approve of constitutional change accomplished through trickery, he insisted that the Senate give the document legitimacy through its detailed analysis and discussion. Over a year

C. *The Polish Constitution of 1935*

The 1935 constitution differed from the 1921 constitution primarily in its deemphasis of the role of the Sejm and its elevation of the President above all other state authorities.²³⁰ The President assumed the role of “Chief of State,” as opposed to simply being the executive head of government. This change reflected Pilsudski’s desire “that the President shall be made a factor superior to the other powers.”²³¹

After 1935 the President had a number of powers not granted to his predecessors. For example, the 1935 constitution gave the executive the right to appoint and dismiss the members of the government and judiciary, as well as the power to convene and to adjourn the two chambers of the National Assembly.²³² For official acts the President had the power to issue decrees with the force of law if the minister who supervised that area of government consented to the decree.²³³ The President had a seven year term of office, with the opportunity for unlimited reelection.²³⁴ Article 12d made the President the supreme head of the armed forces, and denied to military commanders the power to act independently without the consent of the President.²³⁵ In addition, the President’s decrees no longer needed the

after the Sejm first approved the draft reform constitution, the Senate agreed to promulgate it into law in 1935. *Id.*

²³⁰ J. Kasperek-Obst, *supra* note 30, at 104.

²³¹ J. Hawgood, *supra* note 67, at 339; see Const. of 1935, arts. 2, 3 (Pol.) [hereinafter 1935 Const.], *reprinted in* Constitution of the Republic of Poland (Pol. Comm’n for Int’l Law Cooperation trans. 1935).

²³² 1935 Const., *supra* note 231, arts. 12, 13, 65; see also J. Kasperek-Obst, *supra* note 30, at 107-08 (listing and comparing presidential powers under the 1935 Polish constitution with the United States Constitution).

²³³ 1935 Const., *supra* note 231, arts. 14, 55. For official acts within the “President’s prerogatives,” countersignature was unnecessary. *Id.* art. 14. Such provisions flowed, according to one supporter, from Pilsudski’s beliefs that “[t]he law . . . [has] as its goal the satisfaction of the most pressing needs, the necessity of which [had] become evident in the years since the adoption of the Constitution of . . . 1921.” A. Polonsky, *supra* note 148, at 181 (citation omitted).

²³⁴ 1935 Const., *supra* note 231, art. 20; J. Hawgood, *supra* note 67, at 339. The Polish people would choose their President indirectly through an electoral assembly consisting of high government officials and senior members of the Sejm and Senate. 1935 Const., *supra* note 231, arts. 16, 17.

²³⁵ 1935 Const., *supra* note 231, art. 12d.

approval of the Prime Minister,²³⁶ nor could the judicial branch rule on the constitutionality of these decrees.²³⁷

The 1935 constitution culminated the backlash against the numerous post-World War I political parties that had severely hampered the functioning of government. In contrast to the system of checks and balances found in the 1921 constitution, the 1935 constitution delegated most state power to the President "in the event of [governmental] conflicts . . . to remove friction and to restore the proper balance within the state."²³⁸

Clearly the 1935 constitution enhanced the President's role in the Polish political structure. Aside from the President, however, other government offices remained accountable to the legislative branch. For example, government ministers, "politically responsible to the President,"²³⁹ were also constitutionally accountable to the Sejm.²⁴⁰ Article 29 stated that the Sejm could demand the removal of a government minister through a vote of "no confidence," provided that the Senate approved of the removal.²⁴¹ The Sejm continued to share the right of legislative initiative with the executive.²⁴² But the Sejm could exercise no powers beyond its legislative role; article 31 stated that "the functions of governing the State do not belong to the Sejm."²⁴³ So, in certain respects, the 1935 constitution did retain a semblance of the separation of powers.

In the area of civil liberties and individual rights, the 1935 constitution retained certain aspects of the 1921 constitution. Important protections, such as freedom of religion, freedom of conscience, and the inviolability of

²³⁶ H. Roos, *supra* note 144, at 140. Preference for the executive also showed in the constitution's clear preference for amendments offered by the Office of the President. Proposed constitutional amendments originating in the Office of the President required "only ordinary majorities in the Sejm and Senate" for passage. At the same time, the President could postpone parliamentary consideration of amendments proposed by the Sejm. J. Hawgood, *supra* note 67, at 340.

²³⁷ Cf. L. Garlicki, *supra* note 67, at 14-15 (discussing the 1921 constitution's bar on judicial review of statutes). The framers of "Pilsudski's Constitution" considered the judiciary "politically unreliable" and thus a threat to the supremacy of the executive branch. *Id.* at 15.

²³⁸ Car, *Introduction to Constitution of the Republic of Poland*, *supra* note 231, at 9.

²³⁹ A. Polonsky, *supra* note 148, at 388.

²⁴⁰ 1935 Const., *supra* note 231, art. 30.

²⁴¹ *Id.* art. 29; A. Polonsky, *supra* note 148, at 388. The President appointed one-third of the members of the Senate, 1935 Const., *supra* note 231, art. 47, giving rise to a Senate chamber highly deferential to the President. This deference was important because of the enhanced power of the Senate under the 1935 constitution. H. Roos, *supra* note 144, at 140. According to article 53, upon review of a bill passed by the Sejm, the Senate could accept or reject the bill, or alternatively amend it. 1935 Const., *supra* note 231, art. 53. The Sejm retained the power to override any Senate decision by a three-fifths majority. *Id.*

²⁴² 1935 Const., *supra* note 231, art. 50.

²⁴³ *Id.* art. 31; J. Hawgood, *supra* note 67, at 339.

one's domicile, carried over into the 1935 document.²⁴⁴ These provisions notwithstanding, the 1935 constitution took a much different tack toward the issue of individual rights. The 1935 constitution had as a pillar the idea of "social solidarity," the notion that the individual and the nation were linked in common values.²⁴⁵ The starting point, contrary to classic liberalism, was not that the state's interest conflicted with the individual's, but that the interests of the individual and the state coincided; "the state's task was to connect the individuals' efforts into an harmonious cooperation for the benefit of the common good."²⁴⁶ To this end article 1 provided that the Polish state was a common value for all citizens, and articles 4 to 10 defined the basic relations between the individual and the state.²⁴⁷ Under this scheme, "[t]he state was to be an organizer of public life."²⁴⁸ Although the creativity of the individual was declared a "mainspring of collective life,"²⁴⁹ article 7 provided for balancing the political rights of citizens against "their merits and efforts for the benefit of the common good."²⁵⁰

Thus, in order to wrest Poland out of its self-perpetuating state of political and economic crisis, Pilsudski's 1935 constitution deemphasized some of the constitutional limits on autocratic government. First, while a degree of separation of powers continued to exist, the executive branch was elevated above all other state authorities. Second, the new order assumed the convergence of individual and state interests to promote the "common wealth," rather than juxtaposing individual interests to those of the state. And finally, although retained, the 1935 constitution limited the exercise of individual rights to the extent that they hindered the state's efforts toward alleviating the political and economic problems existing in Poland.

The "guided democracy," as one author called the new constitutional system,²⁵¹ did not live up to the expectations of its framers. This disappointment resulted primarily from Pilsudski's death three weeks after the constitution's ratification, as the framers had designed the constitution with him in mind.²⁵² Because the executive was constitutionally alienated from the legislative branch, the Presidency needed a charismatic figure who could smooth relations with such an institutionally antagonistic branch. Pilsudski was such a figure; his death left a vacuum in the new Polish administra-

²⁴⁴ See J. Kasperek-Obst, *supra* note 30, at 110-12 (listing and comparing civil liberties guarantees of 1935 Polish constitution with those contained in the United States Constitution).

²⁴⁵ L. Kanski, *supra* note 15, at 14.

²⁴⁶ *Id.*

²⁴⁷ 1935 Const., *supra* note 231, arts. 1, 4-10.

²⁴⁸ L. Kanski, *supra* note 15, at 14-15.

²⁴⁹ 1935 Const., *supra* note 231, art. 10.

²⁵⁰ L. Kanski, *supra* note 15, at 15.

²⁵¹ A. Polonsky, *supra* note 148, at 512.

²⁵² H. Roos, *supra* note 144, at 141.

tion,²⁵³ and his supporters became polarized into groups that “favoured a return to a constitutional system and [groups that] favoured open authoritarianism.”²⁵⁴

The political bickering that took place after Pilsudski’s death did not last long. In September 1939 German and Soviet tanks rolled across Polish borders. Poland succumbed once again to foreign control, and its constitutional reforms were eliminated in the process. The vitality of the 1935 constitution continued to influence the vanquished Polish state, however, through special provisions enacted to legitimize presidential continuity without a territorial base.²⁵⁵ A new Polish government, the “Government in Exile,” operated from abroad during World War II, a feat not possible under the 1921 constitutional framework.²⁵⁶

A review of Polish constitutional history up to World War II reveals a cyclical pattern oscillating between a populist but ineffective government closely guarding individual freedoms, and a strong central government working to secure a unified Polish state. Throughout, three basic themes run through the successive periods of Polish constitutional history.

First, Polish constitutional history reflects an appreciation of a tripartite, but not necessarily equal, separation of powers, enforced by a system of checks and balances, with power dispersed through a strong local government system. Even under Pilsudski, the Polish political system did not abandon its affinity for a system whereby the different branches remain accountable to each other.

Second, while the 1935 constitution muted the notion of the contractual state, it did recognize that state power emanated from its population, labeling state power the “common weal[th] of all [Polish] citizens.”²⁵⁷ Since early in Polish history, the preferred forms of government have derived their authority and legitimacy from the consent of the governed. Even under occupation Poles asserted their right to inclusion in the contractual state.²⁵⁸

Third, certain core individual liberties have traditionally been considered constitutionally protected from unreasonable interference by the state. Although the 1935 constitution slightly muted individual protections, it did recognize liberties such as freedom of speech, press, and religion. Such rec-

²⁵³ See A. Polonsky, *supra* note 148, at 512; H. Roos, *supra* note 144, at 141.

²⁵⁴ A. Polonsky, *supra* note 148, at 512.

²⁵⁵ A. Zamoyski, *supra* note 7, at 359.

²⁵⁶ See A. Polonsky, *supra* note 148, at 513; H. Roos, *supra* note 144, at 141. The innovative value of some aspects of this document was further evidenced by Charles de Gaulle’s adoption of many elements of the 1935 constitution into the constitution he convinced France to accept in 1958. *Id.*

²⁵⁷ 1935 Const., *supra* note 231, art. 1.

²⁵⁸ See *supra* Part III.

ognition undergirds the concept of the liberal state—an entity with limited powers in relation to its citizens.²⁵⁹

Despite the importance placed on religious freedom throughout the evolution of Polish constitutionalism, historically the Catholic church has remained “the institution that has safeguarded the historical and cultural, ethical, and educational values of the Polish nation.”²⁶⁰ After 1939 constitutional values, kept alive through Catholicism and Polish national consciousness, would lie dormant in the hearts of Poles, suppressed from the public political arena, until the 1980s—the time for rebirth and renewal.

V. FROM CONSTITUTIONALISM TO TOTALITARIANISM

A. 1944 to 1948: *Constitutional Institutionalization of the Communist “People’s Democracy” in Poland*

After World War II external forces again denied the Polish nation self-government. The Yalta and Potsdam agreements recognized the Soviet-sponsored “Provisional Government of National Unity” in Poland in June 1945, acting under the 1921 constitution.²⁶¹ A target date of January 1947 was chosen, as the Yalta agreement stated, for “free and unfettered elections . . . on the basis of universal suffrage and secret ballot” to establish a new Parliament under a permanent constitutional system.²⁶²

²⁵⁹ Cf. Frankowski, *The Procuracy and the Regular Courts as the Palladium of Individual Rights and Liberties — The Case of Poland*, 61 Tul. L. Rev. 1307, 1307-08 (1987) (discussing the concepts of “political rights” and the “liberal state” within the context of examining individual rights in post-World War II Poland).

²⁶⁰ Hruby, *The Church in Poland and Its Influence*, 36 J. Int’l Affairs 317, 318 (1982).

²⁶¹ See 2 N. Davies, *supra* note 30, at 556; J. Kasperek-Obst, *supra* note 30, at 117. The Soviet-sponsored provisional government did not implement the 1935 constitution because it was associated with the Polish “Government-in-Exile,” which the provisional government wanted to alienate from post-World War II Poland. See 2 N. Davies, *supra* note 30, at 556-58; J. Kasperek-Obst, *supra* note 30, at 117.

The presence of the Red Army and the signing of the Polish-Soviet Treaty of Friendship, Mutual Aid, and Cooperation in April 1945 signaled that Stalin’s Soviet Union would play a major role in post-World War II Poland. 2 N. Davies, *supra* note 30, at 558-59.

The importance of the presence of the Soviet army in Poland was openly admitted by Boleslaw Bierut, then First Secretary of the Polish Communist Party, in a speech made at the second postwar Party congress. He stated at that time: “. . . the working masses, the working class, and its political organizations had a class ally in the Soviet army, . . . an ally *who by his very presence rendered powerless the camp of reaction* and made it incapable of dealing by force of arms with the revolutionary government.”

R. Staar, *Poland 1944-1962: The Sovietization of a Captive People* 13 (1975) (quoting B. Bierut & J. Cyrankiewicz, *Podstany Ideologiczne PZPR (Ideological Foundation of the PZPR)* 32 (1952) (translation of book name by author)).

²⁶² R. Staar, *supra* note 261, at 45 (citation omitted); see also 2 N. Davies, *supra* note 30, at 559, 568-69 (discussing the establishment of a “permanent constitutional system”).

The new government quickly provided the framework for Communist rule, rapidly assuming a totalitarian character modeled on the Stalinist regime in the Soviet Union. It became obvious that the promises of free elections made by Stalin at Yalta and Potsdam were worthless. Stalin initiated a campaign of intimidation; Soviet security forces branded opponents to the Soviet presence as "bandits," and killed or intimidated all who could conceivably mount organized resistance.²⁶³ Through coercive manipulation the Polish Worker's Party (PPR), the Polish communist party favored by Stalin, easily won the majority of seats in the reestablished Sejm in 1947.²⁶⁴ This gave the Communists the legal means to run the Polish government.²⁶⁵

On February 19, 1947 the newly convened Communist-controlled Sejm ratified the "Little Constitution," based, at least loosely, on the principles of the 1921 constitution.²⁶⁶ This document was only intended to define the various facets of government temporarily, until a more permanent and comprehensive constitution could be completed.²⁶⁷ The Little Constitution made the Sejm the supreme organ of the Polish Republic, endowed with the power to formulate state policy.²⁶⁸ As its primary innovation the Little Constitution created the Council of State, a collective body elected by the Sejm that replaced the office of President, assumed most of the duties of that office, and functioned as the premier lawmaking body of the government during the substantial periods between sessions of the Sejm.²⁶⁹ The Council

²⁶³ See 2 N. Davies, *supra* note 30, at 560.

²⁶⁴ The Polish Communists won this victory even though their membership was one-tenth the size of the leading opposition party. A. Zamoyski, *supra* note 7, at 370.

²⁶⁵ 2 N. Davies, *supra* note 30, at 570. Stalin, who in 1944 acknowledged that applying communism to Poland was like "fitting a saddle to a cow," A. Zamoyski, *supra* note 7, at 396, prohibited many of the established Polish political parties from taking part in the 1947 elections, under the pretext that they were associated with fascist elements. R. Staar, *supra* note 261, at 46; see also A. Zamoyski, *supra* note 7, at 369-71 (discussing the measures used by the Soviets, both political and violent, to solidify control over Poland). In the 1947 elections, millions of voters associated with parties in opposition to the PPR were "disqualified" from voting, and many others were harassed and arrested on their way to the polls. 2 N. Davies, *supra* note 30, at 570; A. Zamoyski, *supra* note 7, at 370. Not satisfied with forceful intimidation, the Communists also falsified results, guaranteeing that political change negative to the Soviet agenda would not occur. R. Staar, *supra* note 261, at 3.

²⁶⁶ H. Roos, *supra* note 144, at 229; L. Garlicki, *supra* note 67, at 4.

²⁶⁷ R. Staar, *supra* note 261, at 29. In 1947 the Sejm issued a declaration respecting the basic rights and freedoms of citizens: equality under the law notwithstanding nationality, race, religion, sex, or origin; protection of life and health; freedom of religion; and freedom of publication, speech, and association. On the other hand, the declaration proscribed the exercise of these rights and freedoms when directed against the political systems of the state. The declaration stated that legislative acts would settle the range of and limits on an individual's rights. A. Peaslee, *Constitutions of Nations* 822 (1950).

²⁶⁸ A. Burda, *Parliament of the Polish People's Republic* 21 (1978).

²⁶⁹ R. Staar, *supra* note 261, at 29.

of State, consisting primarily of members of the PPR, soon accumulated even more special powers of government, thereby eliminating any hope that the Polish government would run on the basis of popular consent.²⁷⁰

In 1948 the policy of “organic unification” essentially eliminated all the opposition parties, either subordinating them to, or forcing them to merge with, the PPR, thus creating the Polish United Workers Party (PZPR).²⁷¹ This merger, rejecting Poland’s traditionally pluralist political system, provided the last step in the subjugation of Polish political culture to Stalin’s designs.²⁷² After subsuming the opposition, Poland’s occupiers slowly began the process of “socialist construction”—leading Poland down a path toward full-scale totalitarianism.²⁷³

B. 1948 to 1976: “Constitutionalism” in Communist Poland

Poland’s new leaders imposed Stalinism on Poland in different ways. They militarized the country under the rationale that American imperialism had acquisitive designs on the socialist bloc.²⁷⁴ They imposed a centralized “planned economy” through a policy mandating the nationalization of industry and the expropriation of all large landholdings.²⁷⁵ They adopted a “Six Year Plan” to transform the nation’s agrarian economy to one geared to heavy industry.²⁷⁶ Agriculture was forcibly collectivized,²⁷⁷ and Polish culture was manipulated to incorporate the “benefits” of Stalinism and glorify the infallibility of the “Great Leader.”²⁷⁸ In addition, the state consistently subjected to attack the Roman Catholic Church, which historically had opposed the central tenets of Marxism.²⁷⁹ It engaged in extensive efforts to factionalize the Church and dilute the religious commitment of the Polish people.²⁸⁰

²⁷⁰ 2 N. Davies, *supra* note 30, at 570-71.

²⁷¹ H. Roos, *supra* note 144, at 229-32; A. Zamoyski, *supra* note 7, at 371. The Poles had vented their frustration with the Stalinist regime through wholehearted support of the largest independent anti-communist legal political party in Poland at that time, the Polish Peasant Party (PSL). R. Staar, *supra* note 261, at 49-50.

²⁷² A. Zamoyski, *supra* note 7, at 370-71.

²⁷³ Z. Brzezinski, *The Soviet Bloc* 68-69 (1971).

²⁷⁴ 2 N. Davies, *supra* note 30, at 578.

²⁷⁵ R. Staar, *supra* note 261, at 5, 15; see also Z. Brzezinski, *supra* note 273, at 12-14 (discussing the radical land reform and nationalization of industry policies in post-World War II Poland).

²⁷⁶ See 2 N. Davies, *supra* note 30, at 579.

²⁷⁷ See *id.*

²⁷⁸ *Id.* at 578, 581.

²⁷⁹ R. Staar, *supra* note 261, at 5.

²⁸⁰ Cf. *id.* (discussing how the Communists found it difficult to break the stronghold of the Church on the Polish people). The Party had emphasized in one of its decrees, “[i]n a real people’s state, there is no room for any “competition” of organs.” Z. Brzezinski, *supra* note

On July 22, 1952 the Republic of Poland was renamed "The Polish People's Republic,"²⁸¹ and a new Soviet-style constitution was imposed. The Communists declared that the document gave legal validity to the political and societal changes occurring in the country.²⁸² The 1952 constitution, the "Basic Law," was patterned on the Soviet constitution of 1936. The Basic Law retained much of the original language of the 1936 Soviet constitution and reflected major inputs by Soviet constitutional theorists.²⁸³ Effectively an imposition from abroad, the new constitution subverted the constitutional rule Poles had come to expect. In a final symbolic act the new government ordered the removal of the royal crown, the former symbol of the Polish sovereign state, from the head of the Polish eagle on the national flag.²⁸⁴

The 1952 constitution, an amended version of which governs Poland today, institutionalized the Stalinist system of socialist democracy in Poland²⁸⁵ and declared Poland a "people's democracy." In the Soviet lexicon the people's democracy represented the first stage in a society's march toward a full socialist republic, with the Communist Party, the representative of the broad coalition of the working class, possessing near limitless power.²⁸⁶ Although the 1952 constitution declared that the "working people,"²⁸⁷—"the leading class"²⁸⁸—possessed the power in a people's demo-

273, at 75 (quoting 1 *Zagadnienia Prawne Konstytucji Polskiej Rzeczypospolitej Ludowej* (Legal Problems of the Constitution of the Polish People's Republic) 166 (1954) (translation of book name by author)).

In 1949 when the Vatican mandated the excommunication of Catholics who supported communism, the government seized church property and systematically arrested priests. See Hruby, *supra* note 260, at 320-21. The government's approach, however, failed to destroy the Church as an institution. In fact, the government's repression of the Church inadvertently strengthened relations between the Church and society, making it "easier for the population to identify with the oppressed church and to confer on it the halo of martyrdom." *Id.* at 319.

²⁸¹ 2 N. Davies, *supra* note 30, at 580.

²⁸² Burda, *Introduction to Constitution of the Polish People's Republic* at 11 (Polonia Publishing House trans. 1964).

²⁸³ R. Staar, *supra* note 261, at 31.

²⁸⁴ Interview with Anje Viliñishki, Deputy, Polish Sejm (Dec. 2, 1989) (tape available at Voice of America headquarters in Washington, D.C.).

²⁸⁵ 2 N. Davies, *supra* note 30, at 580; see also Burda, *supra* note 282, at 11 (discussing how the 1952 Polish constitution gave "legal validity" to the political changes imposed in Poland).

²⁸⁶ Z. Brzezinski, *supra* note 273, at 23. The "people's democracy" is a transitional phase between the "bourgeois" democratic states of the West and the pure socialist state as seen in the USSR. *Id.*

²⁸⁷ Const. of 1952, art. 1 (Pol.) [hereinafter 1952 Const.], *reprinted in* Constitution of the Polish People's Republic (Warsaw trans. 1953). In the Polish model of communism, there existed

the (purely fictional) assumption that the Party, acting in alliance with the peasant class . . . , represents the interests of the whole nation The state machinery, including the Parliament, functions under general Party guidance to implement those

cratic state, in reality the concept of the people's democracy served as a device to bring Poland into the Soviet orbit under a veil of democracy. The people's democracy in Poland centralized political control and allowed those at the top of the political pyramid to impose their will under the pretext of popular rule.

In contrast to the decentralized system of state power that characterized centuries of Polish self-government, the principle of "democratic centralism" provided the thematic foundation for the governmental structure of the people's democracy.²⁸⁹ The term democratic centralism originates from Leninist theory: it denotes a system based on centralized authority, in which the Communist Party holds all the power.²⁹⁰ The socialist principle of a planned economy and the concept of a people's democracy, although intimating broad participation and influence by the people on the administration of government, actually require the centralization of power in the Party leadership for the purposes of political coordination, social control, and economic management.²⁹¹ Through this construct the elite of the Polish Communist Party, accountable to no one within Poland's borders, exercised the real power of the state. Totalitarianism was concealed behind the veil of a

interests. . . . Since the Party is expected to be, by definition, truly representative of the dominant social forces, no conflict of significant magnitude between the citizen and the State may arise. . . . Thus, the primary role of constitutional rules is not to protect the individual from the state . . . , but to strengthen and develop the existing political and social economic order.

Frankowski, A Comment on Professor Garlicki's Article "Constitutional Developments in Poland": The Lyrics Sound Familiar, but Are They Really Playing Our Song?, 32 St. Louis U.L.J. 737, 743 (1988) (footnote omitted).

²⁸⁸ 1952 Const., *supra* note 287, preamble.

²⁸⁹ R. Staar, *supra* note 261, at 15.

²⁹⁰ Frankowski, *supra* note 287, at 737-38; see also 2 N. Davies, *supra* note 30, at 580-81 (explaining briefly the canons of "Leninist democratic centralism"); R. Staar, *supra* note 261, at 15-17 (discussing the exclusive practice of democratic centralism by the central organs of the Polish Communist Party). Within the Party itself, power was wielded by its central organs, notably the Political Bureau and the Secretariat. Important policy decrees were formulated by the Political Bureau, and only then formally filtered by the Secretariat of the Party, which oversees the work of the official state organs, to the legislature for official action. *Id.* at 38.

²⁹¹ R. Staar, *supra* note 261, at 15-16.

Since the Party is the perfect embodiment of working-class interests, it is simply inconceivable that its leaders would do anything detrimental to such interests. On the practical level, since the Communist Party exercises a virtual monopoly of power, it is difficult to imagine that the Party would create a mechanism allowing for its leaders to be held accountable to outside independent bodies.

Frankowski, *supra* note 287, at 738.

As Polish constitutional authority Andrzej Burda explained, "in a socialist state, the Marxist-Leninist party is the decisive factor which outlines the direction of the country's social, economic and political development." A. Burda, *supra* note 268, at 57.

people's democracy,²⁹² and the constitutional basis of government that Poland had nurtured through the centuries was replaced by a document devoid of any real meaning.

Interestingly enough, the Communists, perhaps in a manner calculated to enhance their legitimacy, drew on, and then extended, some of the themes of centralization first advanced by Pilsudski and his supporters. Pilsudski advanced the concept of social solidarity, deeming it appropriate to limit individual rights because the interests of the people and the state coincided;²⁹³ the Communists advanced the people's democracy, preventing exercise of individual rights against the state's interests.²⁹⁴ Pilsudski perceived the need for a "man of the highest moral authority" to intervene when necessary and to act effectively and decisively to control economic or political instability;²⁹⁵ the Communists institutionalized their intervention for the purposes of political coordination, social control, and economic management.²⁹⁶ Pilsudski seized power through a coup and his followers manipulated the 1930 elections;²⁹⁷ the Communists employed coercion and electoral fraud to seize power.²⁹⁸ In each instance, the Communists built upon the ideas and actions of an indigenous Pole and his followers, and extended the limits of those actions to accomplish the goal of subjugating Poland to Soviet rule.

Recognizing the Communists' attempts at legitimacy, however, does not imply that Pilsudski's ultimate goal also included dictatorship. Pilsudski submitted the 1935 constitution to the Senate for a year of debate,²⁹⁹ and would have had to stand for reelection every seven years.³⁰⁰ The Communists, on the other hand, immediately gave the Council of State power to act definitively when the Sejm was not in session,³⁰¹ and then institutionalized the Communist Party's leading role as the working people's representa-

²⁹² See C. Friedrich & Z. Brzezinski, *Totalitarian Dictatorship and Autocracy* 15 (2d ed. 1965).

²⁹³ See *supra* notes 245-50 and accompanying text.

²⁹⁴ See *supra* notes 286-91 and accompanying text.

²⁹⁵ See *supra* notes 223-26 and accompanying text (quoting H. Izdebski, *supra* note 226, at 18).

²⁹⁶ See *supra* note 291 and accompanying text.

²⁹⁷ See *supra* notes 208, 227, and accompanying text.

²⁹⁸ See *supra* notes 263-65 and accompanying text.

²⁹⁹ See *supra* note 229.

³⁰⁰ See *supra* note 234 and accompanying text. The question of whether Pilsudski's followers would have permitted a free and fair election after obtaining their strong executive in the 1935 constitution obviously must remain a historical footnote.

³⁰¹ See *supra* note 269 and accompanying text.

tive.³⁰² The 1935 constitution attempted to unify and save a fragmented nation, whereas the Communists' 1952 constitution sought to devour it.

The Party left the text of the 1952 constitution deliberately ambiguous and general.³⁰³ As a result, the Party, not the constitution, became the real source of law in Poland.³⁰⁴ The Soviet-controlled Polish state thus broke from Poland's constitutional tradition, using the 1952 constitution as merely one of the many structural tools employed "to put into effect the great ideals of Socialism."³⁰⁵ In keeping with its ideological goal, the 1952 constitution eliminated the tripartite division of power, establishing instead a hierarchy of government authority.³⁰⁶ Because the Party claimed to represent the interests of the working people, the state apparatus operated under "general Party guidance" in the execution of those interests.³⁰⁷ The traditional bicameralism of the Polish Parliament was discarded on the premise that such a system diluted the representation of the people, and therefore "[wa]s incompatible with the principles of true democracy."³⁰⁸ The Party selected in advance all candidates for "election" to the Sejm, eliminating the possi-

³⁰² See *supra* notes 286-88, *infra* notes 303-09, and accompanying texts.

³⁰³ Frankowski, *supra* note 259, at 1312-13; see also Garlicki, *Constitutional and Administrative Courts as Custodians of the State Constitutions — The Experience of East European Countries*, 61 *Tul. L. Rev.* 1285, 1286 (1987) (discussing the subordinate role of socialist state constitutions to legislative power). The 1952 constitution was characterized by its ambiguity and generality, with a normative approach to the creation of a state apparatus and the relationship of individual liberties to the state. The Stalinist constitution would remain a malleable document, with no direct application to the life of the state or the populace. The state constitution was "subordinate to parliamentary statutes that conclusively determine[d] the ambit of imprecise constitutional clauses." Frankowski, *supra* note 287, at 743. Thus the constitution, once a document of high esteem in Poland, played a subordinate role in the Polish communist state.

³⁰⁴ See Frankowski, *supra* note 259, at 1309; Garlicki, *supra* note 303, at 1286.

³⁰⁵ 1952 Const., *supra* note 287, preamble. The new constitution, in keeping with its normative intent, reflected the allegedly socialist character of the state. Incorporated in the document, in order to unify "the alliance between workers and peasants," was the Marxist-Leninist principle "[f]rom each according to his ability, to each according to his work." *Id.* preamble, art. 14.

The state, in the fulfillment of its obligations to achieve "a planned economy," was organized to expedite the socialization of the national economy, with special emphasis on the collectivization of agriculture. *Id.* arts. 7-14.

³⁰⁶ A. Burda, *supra* note 268, at 28.

³⁰⁷ Frankowski, *supra* note 287, at 743. In 1988 "[v]irtually 100% of the top and middle level officials in areas such as national defense, law enforcement (including the judiciary), and foreign service [were] Party members." *Id.* at 747.

³⁰⁸ S. Rozmaryn, *The Sejm and People's Councils in Poland* 13 (1958). Elections with universal, direct, and equal suffrage for this unicameral body of "representatives" of the "working people" were to occur every four years by secret ballot. 1952 Const., *supra* note 287, arts. 2, 16, 23; see also R. Staar, *supra* note 261, at 32-33 (outlining the provisions for electing delegates to the Sejm). Sessions were to be held semi-annually, with no other state organ

bility that “the working people of town and countryside” would possess any influence over their representatives.³⁰⁹ These controls, put in place to effect the Party’s guidance, harnessed the Sejm, the traditional cornerstone of popular government, as just another tool in the extension of totalitarian rule.

Likewise, in contradiction to established constitutional values, the 1952 constitution subordinated the infrastructure of the state to the whims of the Party elite. The Party leadership had to approve all government appointees and all those desiring to become candidates for elective state positions; all state ministries were accountable to the appropriate division in the Party.³¹⁰ In this system the state played the role of the “junior partner,” if not simply the “administrative branch,” of the Party.³¹¹

To carry out its policy objectives, the Party used the Council of State as its primary political arm. As with the deputies of the Sejm, the members of the Council of State were subject to prior approval by the Party leadership.³¹² The Council of State—the primary executive organ of government—possessed: the power of legislative initiative; the authority to mandate elections; the authority to convene the Sejm; the right to issue decrees, without limitation as to subject matter; the ability to interpret laws; the authority to oversee local people’s councils; and, most importantly, the power to legislate during the long time periods between sessions of the Sejm.³¹³

The people’s councils, bodies answerable to the Council of State, constituted the local governing bodies of Poland at the commune and town level. They provided such local services as law enforcement and budget management.³¹⁴ Through the people’s councils, the Party maintained control of the working people at the local level. Instead of decentralizing power as in the past, these local entities served merely as extensions of central control.

A Supreme Court appointed by the Council of State at five year intervals administered the judicial system.³¹⁵ All Polish judges received legal indoctrination and ideological training to minimize the judiciary’s “political[]

having the right to veto measures passed by the Sejm. 1952 Const., *supra* note 287, arts. 17, 20.

While the 1952 constitution explicitly declared the Sejm the primary organ of state authority, it outlined the Sejm’s rights and duties in only a general fashion so that the Party elite could dictate the actual political and social role of the Sejm. The Party determined these rights and duties by gauging the “degree of political maturity displayed by society.” A. Burda, *supra* note 268, at 131.

³⁰⁹ 2 N. Davies, *supra* note 30, at 581.

³¹⁰ *Id.* at 580-81.

³¹¹ *Id.* at 608.

³¹² *Id.* at 580.

³¹³ 1952 Const., *supra* note 287, arts. 24-27; R. Staar, *supra* note 261, at 33.

³¹⁴ 1952 Const., *supra* note 287, arts. 27, 34-45.

³¹⁵ *Id.* arts. 46-51; R. Staar, *supra* note 261, at 35.

unreliab[ility].”³¹⁶ Stalin believed in harnessing the legal system to enhance the intensity of the class struggle, and consequently swiftly turned the criminal justice system into an instrument of political power.³¹⁷ The Party used the criminal justice system as a tool to achieve short-term political goals and to accomplish the following two long-term goals: to reform Polish society to orthodox Marxism-Leninism, and to protect the Communist power structure.³¹⁸ Individuals labeled “enem[ies] of the working people” were treated as criminals,³¹⁹ and the administration of justice became little more than the execution of political power.³²⁰

The Communists rejected as fundamentally flawed the notion of an independent, politically neutral judiciary.³²¹ Judges in a socialist system constituted part of the state’s coercive apparatus,³²² therefore no procedures were necessary to determine the constitutionality of statutes. Judicial review was rejected because it “would constitute a limitation of the sovereign rights of Parliament.”³²³ The 1791 constitution, on the other hand, had crystalized Poland’s appreciation of the need for an independent judiciary to ensure

³¹⁶ Frankowski, *supra* note 259, at 1325.

³¹⁷ *Id.*

³¹⁸ Frankowski, *The Polish Criminal Justice System After World War Two — Selected Problems*, 44 U. Pitt. L. Rev. 139 (1982).

³¹⁹ *Id.* at 141.

³²⁰ *Id.* at 145.

³²¹ Frankowski, *supra* note 259, at 1323-24.

³²² *Id.* at 1324. The courts were subject to direct and indirect pressures from the Communist Party. Communist lay judges, associated with the central administrative elements of the judiciary, gave “assistance” to legally trained judges in matters of political importance. See R. Staar, *supra* note 261, at 35.

³²³ S. Rozmaryn, *supra* note 308, at 15-16. The Soviet-modeled constitutions of the East bloc were based on the theory of unity of state power, which granted parliament the highest position in the country and asserted that no other governmental branch or agency could curtail this supremacy. Courts could not review parliamentary statutes, because this would, in effect, render the judiciary superior to the parliament. See Garlicki, *supra* note 303, at 1286.

The following statement illustrates the official approach to the concept of judicial review:

Control of the constitutionality of statutes by extra-parliamentary organs, judicial or quasi-judicial, is a reactionary, not a progressive institution. That is the very reason why it is entirely out of place in a socialist State or in a People’s State which places full confidence in the people’s sense of justice and the directions of its will.

Rozmaryn, *The Control of the Constitutional Character of the Laws No. 12*, at 2 (Dec. 1948) (english summary). The American method of judicial review was heavily criticized, with the United States Supreme Court labeled “the instrument of reactionism.” L. Garlicki, *supra* note 67, at 16.

Supposedly, under the communist system, the power of judicial review was held not by the courts, but by the Council of State. Garlicki, *Constitutional Developments in Poland*, 32 St. Louis U.L.J. 713, 718-19 (1988). In fact, in 1976 a constitutional amendment formally entrusted Poland’s Council of State with the right to “‘watch over the constitutionality of laws.’” *Id.* at 718 (footnote omitted).

proper exercise of the powers allocated to the executive and the legislature.³²⁴ In Communist-controlled Poland this appreciation was ignored; the judicial branch, like other organs of state power, existed primarily to promote the political interests of the Party.

Not only did Communist-controlled Poland alter the political and judicial legacy of its people, it also largely ignored the traditional cultural and religious underpinnings of Polish constitutionalism. The 1952 constitution, in a significant break with previous constitutions, makes no reference to Catholicism or God, and mandates only that the church be a body entirely separate from the state.³²⁵ Reflecting the Polish Communists' notion that their authority alone should engross total human experience, article 70 states that "[t]he abuse of the freedom of conscience and religion for purposes prejudicial to the interests of the Polish People's Republic is punishable."³²⁶

Finally, in the area of individual liberties, the bill of rights of the 1952 constitution purportedly espoused the traditional individual freedoms characteristic of western liberal democracies. The rights of work,³²⁷ study,³²⁸ and association³²⁹ were protected, as were the freedoms of speech and assembly.³³⁰ The constitution provided no mechanism, however, for the individual to enforce these rights and freedoms.³³¹ The government claimed that no need for an enforcement mechanism existed because the essential interests of those governing and those governed were identical.³³² To clarify the limited context in which citizens could exercise these freedoms, article 72 stated that "[t]he setting up of, and participation in, associations the aims or activities of which are directed against the political or social system or against the legal order of the Polish People's Republic are forbidden."³³³

³²⁴ Recall the discussion *supra* notes 69-98 and accompanying text detailing how the *szlachta* released some of their power to the executive to create a credible nation-state for external purposes. See also *supra* text accompanying note 113 (noting the *szlachta*'s desire to preserve their political and economic gains to the greatest extent possible).

³²⁵ 1952 Const., *supra* note 287, art. 70; R. Staar, *supra* note 261, at 247.

³²⁶ 1952 Const., *supra* note 287, art. 70.

³²⁷ *Id.* art. 58.

³²⁸ *Id.* art. 61.

³²⁹ *Id.* arts. 71, 72.

³³⁰ *Id.* art. 71.

³³¹ R. Staar, *supra* note 261, at 39. Article 72 of the constitution proclaimed the freedom of association. 1952 Const., *supra* note 287, art. 72. However, the 1932 Presidential Executive Order on Associations gave state officials wide latitude to decide issues regarding the creation, governance, and dissolution of all civic associations. This rendered the constitutional clause meaningless. The decisions of state agents on all vital matters affecting an association were not reviewable. Frankowski, *supra* note 287, at 747.

³³² Frankowski, *supra* note 259, at 1309.

³³³ 1952 Const., *supra* note 287, art. 72. It would seem that this admonition should be kept in mind when construing the remaining constitutional provisions.

In January 1976 the Sejm agreed to amend the 1952 constitution. The amendments assured the leading role of the Party in all government affairs and "in building socialism," and thus formally recognized the Party's political monopoly over the government apparatus.³³⁴ On one level these amendments simply "constitutionaliz[ed] . . . the status quo," and made Poland's 1952 constitution consistent with those of other Eastern European countries. But on another level they ensured that the ruling Communists could attack as unconstitutional any future effort to sever the Party or the Soviet Union from the governance of Poland.³³⁵

In sum, Poland's communist phase saw the abandonment of the three fundamental themes of Polish constitutionalism. First, a rigid centralized system of government dominated by the Party replaced the traditionally decentralized Polish state characterized by checks and balances, and by the distribution of much of its power to local governing bodies. Second, the concept of a government system operated by the will of the Party replaced the notion that the government existed by the will of the people. Third, any principles of individual liberty espoused by the 1952 constitution were limited by the primary importance of the state and the goals of the Party elite.

C. 1976 to 1989: Communist Constitutionalism in Crisis

By 1976 Poland had evolved into a society conditioned to reject government propaganda and more attuned to western ideas. Although the inclusion in other East bloc constitutions of amendments similar to the ones instituted in Poland in 1976 had caused no repercussions, in Poland, vigorous protests came from two distinct groups: the lay intelligentsia and the Church.³³⁶ The intelligentsia vehemently opposed the inclusion of the 1976 amendments, reasoning that such legitimation of Party power signified a

³³⁴ Const. of 1952, art. 3 (Pol.) [hereinafter Amended 1952 Const.], reprinted in *Constitutions of the Countries of the World: Historic Constitutions* (A. Blaustein & G. Flanz eds. 1978) (superseded constitutional materials catalogued in alphabetical order by nation, then in chronological order). Article 3 provided that "[t]he Polish United Workers' Party shall be the guiding political force of society in building socialism." *Id.*

³³⁵ Pomorski, *Controversies over the "Leading Role" of the Polish United Workers' Party: The 1976 Constitutional Amendment*, 8 *Mod. Legal Sys. Cyclopedica* 141, 145-47 (1985). The totalitarian system imposed by the Soviets in Poland never infiltrated Polish society and gained the popular appeal that it achieved in other East European countries. Collectivization, the process of land reform that was "supposedly the main indicator of society's progress towards socialism," was completely abandoned in Poland in 1956. 2 N. Davies, *supra* note 30, at 581-82. As a result of losing most of its national minorities during World War II, Poland was a very homogeneous, and thus unified, society, making it much less susceptible to Sovietization. R. Staar, *supra* note 261, at 1.

³³⁶ Pomorski, *supra* note 335, at 147-48.

major step toward “mental enslavement.”³³⁷ The Church, which by this time had become a quasi-political, anti-Marxist force in Poland,³³⁸ attacked the amendments in two Sunday masses aired over Radio Free Europe.³³⁹ These protests did not fall on deaf ears—ninety-five percent of the Polish population is Catholic.

Discontent increased as a result of an economic crisis in the summer of 1980, which caused food prices to skyrocket.³⁴⁰ On August 14, 1980 Lech Walesa, a dismissed electrical fitter, led a strike in the Lenin Shipyard in Gdansk in protest of the dismissal of a co-worker.³⁴¹ The government, perhaps recognizing the potential magnitude of the strike, signed an agreement with the workers that promised the creation of free trade unions and made certain other concessions.³⁴² The new “Solidarity” trade union, the first of its kind in any communist state, began an intense set of talks with the government to discuss mutual grievances.³⁴³

This breakthrough gave Poles a sense of openness and freedom not felt in Poland since before World War II. The people began to demand change, to reject the repressive features of communism, and to demand a democratic form of government.³⁴⁴ The First National Congress of Solidarity declared in October 1981: “The State must serve Man, not overpower him; the state machinery must serve society and should not be identified with one political party. The State must become the common property of the whole

³³⁷ *Id.* at 149.

³³⁸ 2 N. Davies, *supra* note 30, at 613-14. Despite “thirty-five years of socialist transformation and state-sponsored atheism,” in 1982 Poland’s Catholic Church insisted that it retained a strong spiritual hold on the Polish population. Hruby, *supra* note 260, at 317.

³³⁹ Pomorski, *supra* note 335, at 152. The popular Cardinal Wyszynski publicly criticized the proposed amendments added to the constitution in 1976. Hruby, *supra* note 260, at 322. The election in 1978 of Pope John Paul II, the first Polish Pope, intensified the political role of the Church. Hruby characterized his election as an event in Poland with momentous “psychological and political impact.” *Id.* at 324. It galvanized the Polish people against their communist oppressors; some have suggested that without this event, the creation of Solidarity and the subsequent reforms would not have occurred. *Id.* (citing L. Wechsler, *Solidarity: Poland in the Season of Its Passion* 22 (1982)).

³⁴⁰ A. Zamoyski, *supra* note 7, at 389-90.

³⁴¹ *Id.* at 390.

³⁴² *Id.*

³⁴³ *Id.* at 392.

³⁴⁴ Frankowski, *supra* note 287, at 738-40. On October 8, 1980 the 1952 constitution was amended, with the Sejm allegedly receiving greater autonomy from Party influence. The amendments mandated that the Supreme Chamber of Control, the economic planning arm of the state responsible for the administration of cooperative organizations, which had been subordinate to the Council of Ministers, operate directly under the auspices of the Sejm to make it more accountable to the people. Annotation, *Constitutional Chronology 1979-1984*, in *Constitutions of the Countries of the World: Historic Constitutions*, *supra* note 334, at 2 (1985).

nation.”³⁴⁵ The Congress of Solidarity, the first democratically elected national assembly since World War II, also promulgated a decree aimed at “all the nations of the Soviet Union” to inform them that Poles were fighting “[f]or [y]our [f]reedom and [o]urs.”³⁴⁶

The government finally stiffened against the pervasive demands for change, however, and on December 13, 1981 the Council of State, relying on the provisions of the 1952 constitution, declared a “state of war” against those elements perceived to be eroding the foundation of Party power.³⁴⁷ The government imposed martial law, outlawing Solidarity and its sister union, Rural Solidarity.³⁴⁸

On March 26, 1982, to placate the populace, two articles were inserted into the 1952 constitution.³⁴⁹ Article 33a provided for the formation of a Constitutional Tribunal to review the constitutionality of parliamentary statutes and executive decrees.³⁵⁰ The introduction of judicial review would bring laws, executive decrees, and government regulations into line with the constitution. In order to ensure that the judicial review function resided solely in the hands of the Tribunal, article 30 was amended to remove from the Council of State the duty “to watch over the constitutionality of the laws.”³⁵¹

³⁴⁵ Frankowski, *supra* note 259, at 1310-11 (quoting Kim *jestesmy i dokad dzamy* (What Is Our Platform), *Tygodnik Solidarnosc* (Solidarity Weekly), Oct. 16, 1981, at 1 (translation of article title and journal name by author)). Solidarity had almost universal support, and the Party began to feel its foundations disintegrate. The nontotalitarian communist state that existed in Poland between August 1980 and December 1981 was an unprecedented phenomenon in that the Party renounced its authority over important societal institutions, such as the crucial industrial proletariat. The Party’s main role was to monopolize the management of the government apparatus without serious political challenge. Pomorski, *supra* note 335, at 152.

³⁴⁶ A. Zamoycki, *supra* note 7, at 392. Since its inception, Solidarity and the Church have maintained a mutually supportive relationship, with the workers pressing the state to obtain many of the Church’s longstanding demands, such as greater access to the media. Moreover, Solidarity has directly identified itself with the Catholic Church, incorporating religious symbols into many of its activities. Likewise, the Church has mediated negotiations between the government and Solidarity and has continued its traditional role as a primary guardian of Polish nationalism. Hruby, *supra* note 260, at 325-26. During the imposition of martial law in Poland in 1981-1982, the Catholic Church was the sole internal critic of the government. *Id.* at 326.

³⁴⁷ T. Ash, *The Polish Revolution: Solidarity* 262 (1985) (quoting General Jaruzelski, *in* Information Centre for Polish Affairs Bulletin No. 20, at 8ff (trans. 1981)).

³⁴⁸ Frankowski, *supra* note 287, at 746.

³⁴⁹ Martial law was eventually lifted on July 22, 1983. Graham, *Warsaw Abolishes Martial Law*, *Wash. Post*, July 22, 1983, at A1.

³⁵⁰ Amended 1952 Const., *supra* note 334, art. 33a.

³⁵¹ Annotation, *supra* note 344, at 5. Parliament was responsible for appointing the Tribunal for a period of four years, with the President of the Polish Supreme Court acting as

The Constitutional Tribunal had several important restrictions placed on the scope of its review. In matters of state security, only a few carefully chosen state organs could petition the Constitutional Tribunal.³⁵² Moreover, the Constitutional Tribunal was limited to reviewing laws and statutes that came into existence after the Tribunal's creation in 1982.³⁵³ This placed many politically sensitive executive decrees, amendments, and statutes beyond the Tribunal's reach.³⁵⁴ Furthermore, while the Tribunal's rulings on executive decrees and government regulations were final, the Tribunal's decisions on legislative acts obligated the Sejm only to investigate the matter.³⁵⁵ This important difference served to preserve the principle of legislative supremacy in the system of government.³⁵⁶

Despite these limitations, the Tribunal, since its inception, has issued seventeen decisions and, in so doing, has formulated general constitutional

the Tribunal's President. Parliament was also responsible for passing statutes that regulated the Tribunal's structure, jurisdiction, and procedure. Garlicki, *supra* note 323, at 722, 725.

Although the Tribunal's procedure is judicial, in that it examines cases in open court in an adversarial proceeding, not all parliamentary acts and executive decrees were reviewable by the Constitutional Tribunal. The Tribunal was prohibited from reviewing provisions of the constitution for internal consistency and from reviewing constitutional amendments and international agreements. *Id.* at 725-28.

³⁵² Frankowski, *supra* note 287, at 749. In matters concerning "state security," initiative for review lay only with the Council of State, the Presidium of the Parliament, the Committee for National Defense, and the Council of Ministers. Garlicki, *supra* note 323, at 727.

³⁵³ Garlicki, *supra* note 323, at 726.

³⁵⁴ *Id.* A questionable executive order beyond Tribunal review was the 1981 Council of State Martial Law Decree outlawing Solidarity and its sister body, Rural Solidarity—a mandate clearly at odds with article 85 of the 1952 constitution that establishes the right of all people to create and join trade unions. Frankowski, *supra* note 287, at 746.

³⁵⁵ Garlicki, *supra* note 323, at 728. The Tribunal's finding that a statute was unconstitutional was to be examined by the Parliament, which could reject the Tribunal's recommendation by a two-thirds vote. *Id.* This scheme has obvious political overtones, in that the Party-controlled Parliament could prevent the Tribunal from overstepping politically acceptable limits when deciding truly fundamental and politically sensitive issues. Frankowski, *supra* note 287, at 749. The limitation of the Tribunal's scope of review concerning acts of Parliament demonstrated that body's desire to maintain supremacy over the Tribunal. It also demonstrated "that the Tribunal's principal sphere of interest [would] be the review of regulations issued by administrative agencies and by the Council of Ministers." Garlicki, *supra* note 323, at 729.

Strict procedural rules also controlled access to the Tribunal, with the citizen having no ability to petition directly for review of his claim. Frankowski, *supra* note 287, at 749; see also L. Kanski, *supra* note 15, at 27 (under present system an individual has only indirect access to the Tribunal).

³⁵⁶ Frankowski, *supra* note 287, at 749; see also Garlicki, *supra* note 323, at 729 (discussing the limited subject matter jurisdiction of the Polish Constitutional Tribunal).

guidelines, such as the concept of equal protection.³⁵⁷ The Constitutional Tribunal's presence has also contributed to Poland's democratic evolution by encouraging the observance of basic principles of good government by organs of the executive branch.³⁵⁸ The Tribunal's actions have encouraged the notion that governmental authority must derive its legitimacy from adherence to the rule of law.

The second important amendment of March 1982 was the creation of the Tribunal of State. A quasi-judicial "impeachment court," the Tribunal of State was separate from the judiciary, elected by the Sejm, and presided over by the President of the Supreme Court.³⁵⁹ It adjudicates criminal responsibility for constitutional or statutory infringements by state officials committed under the color of office.³⁶⁰

³⁵⁷ Garlicki, *supra* note 323, at 729, 732. The constitution's equal protection clause read as follows: "Citizens of the Polish People's Republic shall have equal rights irrespective of sex, birth, education, trade or profession, nationality, race, religion, social status and origin." 1952 Const., *supra* note 287, art. 69. Using these general guidelines, the Constitutional Tribunal interpreted the equal protection clause as banning discrimination against individuals or groups based on the characteristics enumerated in that article. These guidelines further provided that this interpretation may be compromised when necessary to achieve "social justice," such as the granting of relief to the lower classes of society. Garlicki, *supra* note 323, at 732.

As to the Tribunal's other cases, only two cases involved the constitutionality of a parliamentary statute. "In each case, the Tribunal upheld the constitutionality of the statute." *Id.* at 729.

"In fourteen of [those] cases, the Tribunal reviewed whether administrative regulations conformed with the Constitution and parliamentary statutes. In eight of [those], the Tribunal found the regulation unconstitutional. In six cases, the Council of Ministers repealed [the] regulation in question even before the Tribunal rendered its decision." *Id.*

³⁵⁸ L. Kanski, *supra* note 15, at 28.

³⁵⁹ Garlicki, *supra* note 323, at 721-22 & 721 n.44; see also Annotation, *supra* note 344, at 4-5 (discussing article 33b and the various facets of Poland's Tribunal of State).

³⁶⁰ Amended 1952 Const., *supra* note 334, art. 33b. The Tribunal of State was a judicial creation of the "Solidarity period" (the period between the inception of the Solidarity movement and the declaration of martial law), when the Polish ruling elite was subjected to intense scrutiny in order to determine the cause of the economic crisis of 1980. Frankowski, *supra* note 287, at 739.

Proceedings of the Tribunal of State [involved] four stages. The first stage [was] a preliminary motion to bring a person before the Tribunal. Preliminary motions [could] be submitted by parliamentary commissions, fifty member groups of Parliament, the Council of State, and the Constitutional Tribunal. The second stage [was] an examination of the preliminary motion by the parliamentary Commission on Constitutional Responsibility. The Commission perform[ed] investigatory proceedings, broadly applying the basic rules of criminal procedure. On the basis of its investigation, the Commission submit[ted] to Parliament either a motion for discontinuance of proceedings or a motion to bring the action before the Tribunal of State. The third stage involve[d] a resolution of Parliament concerning the impending indictment. The fourth and final stage [was] the actual proceedings before the Tribunal of State based on the basic rules of criminal procedure, including the right to appeal.

The need for such a tribunal became apparent during the Solidarity period, when widespread rumors of personal greed and abuses of power by state officials demanded the response of judicial action.³⁶¹ For the first time since the Communist Party assumed power, high Party officials were held accountable for abuses and offenses committed during their tenure.³⁶² Thus, the notion of the contractual state began to reemerge in Poland, with the ruling Party slowly becoming attentive to the duties accompanying state positions of authority. Like the Constitutional Tribunal, however, the Tribunal of State's jurisdiction was somewhat restricted. For instance, the Tribunal of State could not review acts committed by Deputies of the Sejm,³⁶³ which further reduced the accountability of that body.

The electoral system also underwent constitutional reform. On July 20, 1983, two days before martial law was lifted, the Sejm passed important amendments allowing two new parties to participate in the formerly single-party electoral system. According to article 3 the United Peasant Party and the Democratic Party could now officially participate in Polish political life, although the provision that "the Polish United Workers Party [PZPR] shall be the guiding political force of society in building socialism" was not removed.³⁶⁴ The amendments, implicitly accepting the benefits of a limited multi-party system, stressed that the new relationship of the PZPR and the two other parties be based on "cooperation" to further the "strengthening of the socialist State and the all-around development of the country."³⁶⁵

Garlicki, *supra* note 323, at 723.

³⁶¹ Frankowski, *supra* note 287, at 739. In 1983 the ex-Prime Minister and his three deputies, all of whom were in office prior to 1980, were indicted. Parliament found the ex-Prime Minister and one of the deputies to have breached the law, and, accordingly, sent them before the Tribunal of State. However, the general amnesty law of 1984, which coincidentally resulted in the release of the leaders of Solidarity, discontinued the trial of the former Prime Minister and his associate. Garlicki, *supra* note 323, at 724.

³⁶² Frankowski, *supra* note 287, at 738. Because the wording of the constitution is frequently so broad, nearly all political decisions can be considered breaches of law: infringements on the constitution or parliamentary statutes. Garlicki, *supra* note 323, at 722.

In principle, the Tribunal of State [could] only impose sanctions of a moral and political character. If the accused [was] found guilty, the Tribunal [could] deprive a [convicted official] of his right to vote, his decorations, and his right to occupy executive posts in state agencies, political parties, and social organizations. Convictions by the Tribunal of State, however, [did] not typically result in the loss of the guilty person's office. The holder of every office in Poland (except judges) is subject to political accountability, that is, he is subject to parliamentary recall at any moment.

Id. at 723.

³⁶³ Garlicki, *supra* note 323, at 722.

³⁶⁴ Annotation, *supra* note 344, at 6. Moreover, the importance placed on the enhancement of political pluralism is seen in the 1952 constitution, which describes allowable political parties with the words "regardless of their world-view." *Id.* at 6-7.

³⁶⁵ *Id.* at 6.

The new amendments, which emphasized the value of the alliance of political parties with “societal organizations,” also tacitly expanded the political realm to include associations of Catholic laymen and other Christian organizations.³⁶⁶ This marked a change in communist philosophy, which had previously mandated atheism. Indeed *Nowe Drogi*, the official ideological journal of the Polish Communist Party, recognized this dogmatic shift when it stated that “religion has a sufficient number of points in common with socialism [to conclude that] a religious world outlook [is] favorable to socialism.”³⁶⁷ Political pluralism, a trademark of Polish constitutionalism, thus began to replace the communist single-party system.

Even more changes were on the way. On July 15, 1987 the Sejm approved legislation creating the Office of the Commissioner for Citizens Rights, an independent ombudsman-type position designed to protect “citizens” against abuses of government power and violations of their constitutional rights.³⁶⁸ Upon complaints by citizens or organizations against specific state entities, the Commissioner could apply to the Sejm for the introduction of remedial measures.³⁶⁹ In addition the Commissioner had the right to ask the Constitutional Tribunal to review departures from normal constitutional practice by state organs.³⁷⁰ The Commissioner could also initiate criminal, civil, or administrative proceedings on behalf of individual citizens or organizations, or even, in extraordinary circumstances, appeal to the Supreme Court to remedy highly abusive situations.³⁷¹

In 1988 alone, the Commissioner received more than 50,000 complaints, involving the Commission in a multitude of controversial social and political matters.³⁷² The establishment of the Office of the Commissioner for Citizens Rights signified the beginning of the abandonment of the Polish Communist Party’s effort to use the government apparatus to enforce socialist dogma on

³⁶⁶ Id. at 6-7.

³⁶⁷ Z. Brzezinski, *The Grand Failure* 123-24 (1989) (quoting Reykowski, *Czy socjalizm jest psychologicznym nieporozumieniem? (Is Socialism Psychologically Misunderstood?)*, 6 *Nowe Drogi* (New Ways) 50, 52 (1987) (translation of article title and journal name by author)).

³⁶⁸ L. Kanski, *supra* note 15, at 28. Under the Act, the Commissioner shall consider in cases pertaining to protection of citizens’ rights and freedoms, whether as a result of any action or [omission by] agencies, organizations or institutions bound to observe and implement such rights and freedoms, infringement of law or principles of community life and social justice has taken place. Id. (quoting 21 *Dziennik Ustaw* (Journal of Laws) 123 (1988) (translation of journal name by author)).

³⁶⁹ Id.

³⁷⁰ Id.

³⁷¹ Id. at 29.

³⁷² Id. at 28-29. Eight percent of the complaints involved constitutional claims, while 28% involved claims concerning the administration of justice. Twenty-two percent of the claims involved welfare and employment issues, and 17% of the claims involved housing and

the Polish people.³⁷³ It also signaled a return to the old, but not forgotten, concepts that government exists by the will of the people, and that individual rights exist independent of state power.

In sum, Poland's constitutional heritage, cast aside by communist rulers in 1952, experienced a gradual reawakening during the 1980s. By the mid-1980s the demise of communist constitutionalism was at hand. The 1952 constitution—never intended to be a serious statement of the social contract between the state and the people, but rather a tool for subjugation—had to yield to the reassertion of fundamental Polish constitutional principles: judicial review through the Constitutional Tribunal; accountability and the rule of law through the Tribunal of State; multi-party democracy through amending article 3; resurrection of the Catholic Church's special role; and protection of individual liberties through the Office of the Commissioner for Citizens Rights. Thirty years of communist rule could not stamp out centuries of Polish constitutional heritage.

VI. 1989 TO 1991: DEMOCRATIC REBIRTH AND CONSTITUTIONAL REFORM

In early April 1989 the Sejm officially lifted the ban placed on the Solidarity movement seven years earlier and gave the organization full legal status.³⁷⁴ That act signaled the end of the totalitarian phase of Polish political life. Constitutional reform would follow.

Poland held its first free national elections since World War II in June of 1989. Solidarity candidates won sweeping victories in both the newly created Senate (ninety-nine out of one hundred seats) and in the races for the minority of seats up for election in the Sejm.³⁷⁵ The United Peasant Party and the Democratic Party, once loyal and obedient allies of the Polish Com-

municipal services. Only eight percent of the claims involved tax matters and other economic issues. *Id.* at 29.

In 90% of the cases, the Commissioner determined that no violation occurred. Nevertheless, in 1988 alone the Commissioner brought 14 extraordinary appeals to the Supreme Court, lodged 2 motions with the Constitutional Tribunal, and brought over 20 joint recommendations to various central organs of government. *Id.* at 30.

³⁷³ Telephone interview with Leszek Garlicki, Professor of Constitutional Law, University of Warsaw (Jan. 9, 1990) [hereinafter Garlicki Interview].

³⁷⁴ Wash. Post, Apr. 6, 1989, at A1, col. 4.

³⁷⁵ Singer, *Solidarity — The Road to Power*, *The Nation*, Oct. 9, 1989, at 376, 376. This election was the result of the "historic compromise" between the Communist Party and Solidarity, in which it was agreed that the newly created Senate would be subject to completely free elections. *Id.* The new Senate became the first freely elected legislative body in the Soviet bloc since World War II. *L.A. Times*, Apr. 7, 1989, at A2, col. 1. It was also agreed that the Sejm would have 35% of its seats subject to completely free election, thus reserving almost two-thirds of that body's seats for members of the Communist Party, guaranteeing Party

munist Party, could not overlook this landslide.³⁷⁶ The control formerly possessed by the Communist Party over these two political entities began to disintegrate, upsetting the scheme the Party had used to control the Sejm.³⁷⁷

After the elections, the Sejm, a rubber stamp under the Communist regime, began to exercise real political power in Poland. Elections no longer consisted of "massive demonstrations of ritualized affirmation" of Party doctrine,³⁷⁸ but instead entailed genuine pluralistic contests determinative of political succession. The First Secretary of the Polish United Workers Party (PZPR), Mieczyslaw Rakowski, admitted in an interview that the "PZPR has . . . arrived at the end of its historic mission," and concluded that the people now had "confidence in Solidarity, no matter what agonizing and unpopular measures they are taking."³⁷⁹ The Communist Party's leading role in Polish political life had disintegrated.

On December 7, 1989 the Solidarity-controlled Sejm established a Constitutional Commission to create a new democratic constitution.³⁸⁰ The Commission is composed of forty-six deputies of the Sejm from a variety of parties, including Solidarity, the Communist Party, the Polish Peasant Party, and the Christian Union.³⁸¹ Commission leaders hope to complete

retention of majority representation in the supreme body of state control. Singer, *supra*, at 376.

³⁷⁶ Singer, *supra* note 375, at 376. The 1952 constitution mandated that a bill rejected by the Senate could not become law without approval by a two-thirds majority of the Sejm. Thus, the new political arithmetic in the Sejm provided the Solidarity Party with an effective veto power. *Id.* at 376-77.

³⁷⁷ *Id.* at 376.

³⁷⁸ Sakwa & Crouch, *Sejm Elections in Communist Poland: An Overview and a Reappraisal*, 8 *Brit. J. Pol. Sci.* 403, 403 (1978) (quoting Gilison, *Soviet Elections as a Measure of Dissent: The Missing One Percent*, 62 *Am. Pol. Sci. Rev.* 814, 815 (1968)).

³⁷⁹ U.S. Info. Agency, *Foreign Broadcast Information Service: Daily Report, East Europe*, Rakowski on PZPR, Poland's Future, Dec. 28, 1989, at 57 (report on interview by Miklos Ritecz with Mieczyslaw Rakowski, Polish United Workers Party Central Committee First Secretary).

On August 19, 1989 the new political arithmetic created by the shift in allegiance of the United Peasant and Democratic Parties from the Communist Party to Solidarity required Communist President Jaruzelski to nominate Tadeusz Mazowiecki to become the first noncommunist Prime Minister in Poland since before World War II. Mazowiecki's overwhelming election to the post signified the end of over 40 years of Communist rule in Poland. Mazowiecki, a Catholic and a leading journalist, who previously served as a close adviser to Solidarity leader Walesa, declared in his election speech that "Poland can no longer afford ideological experiments," and promised to "introduce the rule of law" in his country. Horne, *Mazowiecki Is Elected in Poland; First Non-Communist in 45 Years*, *Wash. Post*, Aug. 25, 1989, at A1, col. 4, A17, col. 1.

³⁸⁰ U.S. Info. Agency, *Foreign Broadcast Information Service: Daily Report, East Europe*, Report on Constitutional Commission, Dec. 8, 1989, at 20.

³⁸¹ *Id.*

their task by May 3, 1991, the two hundredth anniversary of Poland's 1791 constitution.³⁸² Until then, the Sejm has promised to retain the basic political structure imposed by the 1952 constitution.³⁸³ Despite this promise, significant changes have already occurred in important areas of sociopolitical life. These changes, important in their own right, provide some insight into the future direction of Polish constitutionalism.

A. Distribution of Political Power

On April 6, 1989 the Sejm approved legislation mandating the reestablishment of bicamerality in the Polish Parliament, and leading to Solidarity's near unanimous June 1989 landslide in the one hundred member Senate. In addition, the legislation provided for the restoration of the Office of the President.³⁸⁴ These measures, the April Amendments, resulted from a "historic compromise" between Solidarity and the Party,³⁸⁵ and reintroduced separation of powers into the Polish state. While not explicitly setting forth a separation of powers, the April Amendments established "an equilibrium" of state power between the Sejm, the Senate, and the Office of the President.³⁸⁶ The enactment of these amendments, grudgingly agreed to by the Polish Communists, marked the end of their system of autocratic, centralized authority in Poland.³⁸⁷

The restoration of the post of President allowed a single individual to hold powers formerly held collectively. Article 38 stated that the President would assume most of the powers formerly held by the Council of State.³⁸⁸ Both houses of the legislature elect the President, who has both enumerated and implied powers.³⁸⁹ The President's enumerated powers include control over the armed services and over the National Defense Committee (the

³⁸² U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Sejm Prepares to Amend Constitution, Dec. 1, 1989, at 90.

³⁸³ *Id.*

³⁸⁴ A. Howard, *supra* note 6, at 16; see also U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Draft Constitutional Changes Outlined, Apr. 7, 1989, at 37 (formulating the respective powers of the Senate and President).

³⁸⁵ Singer, *supra* note 375, at 376.

³⁸⁶ Garlicki Interview, *supra* note 373. Though the Polish constitution does not explicitly provide for the separation of powers like the American Constitution, the lack of an explicit provision is not uncommon, particularly among West European constitutions, and does not undermine the implicit existence of such a concept. The important dynamic at work here is the fundamental shift of state power from complete concentration in the Sejm to an allocation of state power among the Sejm, the Senate, and the Office of the President. *Id.*

³⁸⁷ Letter from Leszek Garlicki to Mark Brzezinski (Nov. 22, 1989) [hereinafter Garlicki Letter].

³⁸⁸ Garlicki Interview, *supra* note 373.

³⁸⁹ *Id.*

secret police).³⁹⁰ In addition, article 32 gives the President important implied powers, derived from the general provisions identifying the President as the "highest body" of government responsible for "guarding the sovereignty" of the state.³⁹¹

Consistent with a separation of powers framework, the President did not succeed to all of the powers formerly held by the Communist Council of State. The President does not have the power to issue decrees of statutory validity between sessions of the Sejm, nor can he provide generally binding interpretations of the laws.³⁹² Thus the new system precludes the executive from exercising quasi-legislative or quasi-judicial functions.

The newly created Senate, subject to free elections, possesses the power to reject, to amend, or to supplement legislation originating in the Sejm.³⁹³ The Sejm can later override any Senate action by a two-thirds vote.³⁹⁴ The Senate may also initiate its own measures.³⁹⁵ Absent one party's overwhelming control of the Sejm, the concept of bicameralism will take on real meaning.³⁹⁶

Another important change occurred in the summer of 1989. The Soviet-style centralized system of local government was replaced with a system that gave local governing units a great deal of autonomy.³⁹⁷ On July 29, 1989 the

³⁹⁰ Radio Free Europe, Soviet/East European Report, Oct. 1, 1989, at 2.

³⁹¹ Garlicki Interview, *supra* note 373. The power possessed by the newly restored position of President has not been exercised in any significant way. For the first time since the inception of the 1952 constitution, however, a single individual representing the state, and not the Party, holds these implied and enumerated powers.

³⁹² Draft Constitutional Changes Outlined, *supra* note 384, at 37. Moreover, all decrees of major importance issued by the President would have to be countersigned by the Prime Minister. *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* Any party controlling two-thirds of the Sejm would effectively reduce the system to a unicameral regime. The Senate's role in that instance would consist of identifying such problems in the Sejm's bill that it would lose its two-thirds majority upon the attempted override. The June 1989 elections deprived the Communist Party of such a two-thirds majority. See *supra* notes 375-77 and accompanying text.

³⁹⁵ Draft Constitutional Changes Outlined, *supra* note 384, at 37.

³⁹⁶ In the area of the judiciary, the placement of the Prosecutor's Office under the Ministry of Justice has been proposed, thus excluding it from the supervision of the Office of the President. U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Sejm Debates Changes, Jan. 2, 1990, at 46. Moreover, high on the Solidarity government's agenda in the area of constitutional reform is the creation of a judicial branch independent of state influence. Echikson, Poland's Democratic Party; No Longer 'Democratic' in Name Only, *Chr. Sci. Monitor*, July 31, 1989, at 5, col. 1.

³⁹⁷ Foundation in Support for Local Democracy, Press Release, at 1 (Dec. 1989) [hereinafter Press Release] (copy on file with the Virginia Law Review Association; Foundation located in Warsaw, Poland). The process of depoliticization in the workplace began in October 1989 when the Solidarity government removed the Communist Party

Senate passed a resolution abolishing the current system of people's councils.³⁹⁸ The new scheme of autonomous "local councils" will be immune to arbitrary decisions of national organs.³⁹⁹ As part of the transition from the old system to the new, about 3,000 "citizens groups," under the auspices of the newly formed Commission for Local Self Government, took control of local public affairs in early 1990. They proceeded to set the date of, and develop procedures for, the election of 110,000 local "councilors."⁴⁰⁰ Because democracy in Poland has traditionally been associated with decentralization of state power,⁴⁰¹ the restructuring of local government accomplishes an important step in the building of a new Polish democratic state.

B. Socioeconomic Reforms

Related to the decentralization of Polish political power are the current efforts to eliminate centralized control over the nation's economy. As a first

"overlords [who] controlled promotions, doled out privileges, . . . choreographed propaganda, . . . and otherwise ensured that the party's will was done" at the grass roots level. Battiata, *A Polish Coal Mine Ousts Its Party Bosses; Communist Overseers Forced to Return to Work Underground*, Wash. Post, Oct. 16, 1989, at A1, col. 1.

³⁹⁸ Press Release, *supra* note 397, at 2. The resolution also called for legislative formulation of a new democratic system of electoral laws, and the creation of a solid system of financing local budgets immune to influence from state organs. *Id.* The resolution mandated "the abolishment of the constitutional principle of an all-embracing state power, [and] the recognition of the communal legal entity and of the ownership rights." *Id.* The resolution requires that state interference in local affairs be kept to a minimum, and abolishes state administrative regulations concerning communal tasks. Furthermore, the resolution demanded the creation of intercommunal associations, both local and national, to represent local interests at the national level. To support the autonomy of the local government system, the resolution also called for the establishment of the right to judicial appeal of decisions by state officials bearing on local authority. *Id.*

Solidarity parliamentary leader Bronislaw Geremek stated: "It is precisely the local council elections that can become a huge instrument in crushing [party favoritism] at all levels, shattering local cliques and bringing social groups into public life." *Solidarity Seeks to Oust Communists*, Wash. Post, Jan. 18, 1990, at A31, col. 4, 5.

³⁹⁹ Press Release, *supra* note 397, at 2.

⁴⁰⁰ *Id.* at 1. These command elections took place on May 27, 1990, nearly two years earlier than originally scheduled. *The Poles Vote for Local Offices: 52,000 Races Are Contested*, N.Y. Times, May 28, 1990, § 1, at 7, col. 1.

The organizers of the new local government system face the dilemma of how to train and to educate over half a million people—who for years were urged by the totalitarian centralized state not to participate in local governance—to operate the new municipalities under democratic conditions. Interview by Voice of America with Janusz Trzcinski, Deputy, Polish Seym (Dec. 2, 1989) [hereinafter *Trzcinski Interview*] (tape available at Voice of America headquarters in Washington, D.C.).

⁴⁰¹ The 1921 constitution based its theory of democracy on local self-government. See *supra* notes 184-88 and accompanying text. Even earlier, the szlachta made most of their decisions, except how to limit the King's power, at the local level. See *supra* note 188.

step toward introducing capitalism, the Sejm voted on December 29, 1989 to drop the clauses in the constitution describing Poland's economy as based on "socialised means of production."⁴⁰²

The Solidarity government has instituted a plan to restructure the economy with a crash reform program that places market forces rather than central planning at the heart of the economy.⁴⁰³ To this end the Sejm has approved eleven new financial and economic statutes introducing free market principles into the economy.⁴⁰⁴ As an initial step, the government has begun to transfer ownership of many state-owned companies to private hands.⁴⁰⁵ In November 1989 the government developed a six month plan to end state price controls and to tighten monetary policy.⁴⁰⁶ The type of long-term economic initiatives undertaken will depend on the success of these initial steps to dismantle the previous heavily subsidized economic structure, as well as on the disagreements that will arise between the various political parties in Poland as the economic crisis becomes more severe. In any event, the evolving process of ensuring free economic activity and protection of private ownership signals the abandonment of the centralized "command-type" socioeconomic planning that characterized the communist economic system.⁴⁰⁷

C. *The Contractual State*

On December 29, 1989 the Sejm passed a bill of amendments to the 1952 constitution that would reintroduce a semblance of the contractual state concept.⁴⁰⁸ Two days later, the section of article 1 that previously had described Poland as a "socialist state" was replaced with the following text: "The Republic of Poland is a democratic legal State materializing the principles of social justice."⁴⁰⁹ In describing this bill of amendments, a press release from the Polish embassy in Washington, D.C. stated that "obser-

⁴⁰² U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Polish Sejm "Drastically" Amends Constitution, Jan. 3, 1990, at 28.

⁴⁰³ Greenhouse, Warsaw's Economic Plan: Prosperity as Goal, with Freedom to Fail, N.Y. Times, Dec. 31, 1989, § 1, at 14, col. 1.

⁴⁰⁴ Polish Sejm "Drastically" Amends Constitution, *supra* note 402, at 28.

⁴⁰⁵ Greenhouse, *supra* note 403, at 14, cols. 1, 2.

⁴⁰⁶ Laurence, Taking the Road to Reform in the Shadow of Lenin, Daily Telegraph, Dec. 8, 1989, at 21, col. 1. Poland's long-term economic plans also call for the eventual creation of a stock exchange. *Id.*

⁴⁰⁷ Embassy of the Polish People's Republic in Washington, D.C., Press Release, at 2 (Jan. 1990) [hereinafter Press Release II] (copy on file with the Virginia Law Review Association).

⁴⁰⁸ *Id.* at 1.

⁴⁰⁹ Annotation, Poland: Additions to the Constitutional Chronology as of January, 1990, *in* 14 Constitutions of the Countries of the World (current constitutional materials catalogued in alphabetical order by nation), *supra* note 334, at v (1990).

vance and respect for the law of the Republic of Poland, should be a fundamental obligation for all state [officials].”⁴¹⁰ Thus, the new Polish leadership returned to the theory that government must comply with its duties and obligations to its people to maintain its legitimacy.

D. Symbolic Changes

Some of the changes made in Poland by the new government, although highly important, were instituted primarily for symbolic purposes.⁴¹¹ In December of 1989 the Sejm and the Senate jointly approved a number of such amendments to the 1952 constitution. The Sejm voted to amend article 3 of the 1952 constitution, the provision which guaranteed the Communist Party’s leading role in the governance of Poland.⁴¹² This officially marked the end of the Polish Communist Party’s tenure as the “leading force of [Polish] society.”⁴¹³ The amendments bill also restored the original name of the Polish state, the Republic of Poland.⁴¹⁴ Attacking the heart of Marxist-Leninist phraseology, the term “the working people” referred to in article 2, for whom the 1952 constitution was allegedly framed, was deleted.⁴¹⁵ Article 2 now states that “Supreme authority in the Republic of Poland is vested in the People.”⁴¹⁶ As one Polish politician put it: “We say the nation [not the working people] is only the sovereign.”⁴¹⁷

Poland, of course, is not the only East bloc country to experience great changes. The fact that many other Warsaw Pact countries have gone in the same constitutional direction as Poland—dropping the “leading role” of the party from the constitution, instituting free elections, allowing for multiple political parties, protecting freedom of assembly, etc.—provides evidence of the irreversibility of the constitutional changes now underway in Poland.⁴¹⁸

⁴¹⁰ Press Release II, *supra* note 407, at 1.

⁴¹¹ U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, *Sejm Approves Amendments*, Jan. 2, 1990, at 47.

⁴¹² Annotation, *supra* note 409, at v.

⁴¹³ *The Constitutions of the Communist World* 285 (W. Simons ed. 1980) (quoting article 3 as it was inserted into the 1952 constitution in 1976).

⁴¹⁴ Press Release II, *supra* note 407, at 1.

⁴¹⁵ Annotation, *supra* note 409, at v.

⁴¹⁶ *Id.*

⁴¹⁷ Echikson, *supra* note 396, at 5, cols. 1, 4 (quoting Jerzy Jozwiak, Democratic Party Chairman). As one constitutional scholar put it, “I can conclude that the [Polish Communist P]arty is at least theoretically disintegrated.” J. Resenbrink, Comments during Panel Discussion at Conference on Constitutionalism and Human Rights in Poland, France, and America 42 (Apr. 11, 1989) (copy on file with the Virginia Law Review Association).

⁴¹⁸ Interview with Bozena Crouch, Polish Expert, European Law Division, Library of Congress, Washington D.C. (Jan. 8, 1990). In fact, the Solidarity leadership announced on January 17, 1990 the beginning of a new offensive to purge the remnants of Communist power in Poland, emphasizing that democratic change had to move faster after the “explosions of

While most of the political change occurring all over the post-communist world amounts to revolution, in Poland the changes are more aptly characterized as an evolution—an evolution of constitutional values that has spanned centuries of Polish history.

While the 1989 amendments significantly democratized the 1952 constitution, the Solidarity government has resolved to go even further and draft a new constitution in order to fulfill the nation's aspirations for a truly democratic government.⁴¹⁹ As one Solidarity leader has stated: "Full cohesion can be reached in the new constitution and not on the road of ad hoc changes."⁴²⁰ The January 1990 decision of the Polish Communist Party to dissolve and to reform on more democratic lines reduces the possibility that the new constitution will have to accommodate communist principles.⁴²¹ This development supports the prospect that the forthcoming 1991 constitution will truly reflect Polish constitutional standards.

VII. CONCLUSION: A LOOK TO THE FUTURE

A review of Polish constitutional history indicates that Poland's return to constitutional rule reflects a long-lasting national attachment to enduring constitutional principles. First, the return to constitutional rule likely will involve renewed efforts to reestablish a meaningful separation of powers, with executive power constrained, and with the legislative and judicial

freedom" in neighboring European countries. *Solidarity Seeks to Oust Communists*, supra note 398, at A31, col. 4.

⁴¹⁹ UPI, Dec. 9, 1989. The three Solidarity leaders, Prime Minister Tadeusz Mazowiecki, Lech Walesa, and Bronislaw Geremek, declared in December 1989: "Poland is in need. Through a common effort we must heave her up from crisis . . . by giving Poland a democratic constitution." *Id.*

⁴²⁰ *Sejm Debates Changes*, supra note 396, at 46 (statement of A. Suchocka).

⁴²¹ *Greenhouse, Calling Party Too Weak to Go On, Polish Communists Act to Disband*, N.Y. Times, Jan. 28, 1990, § 1, at 1, col. 3. The Polish Communist Party decided to disband and reform into a social democratic party much like the socialist parties in France, Italy and Spain in the hope that it would have a better chance of winning power in an increasingly democratic Poland. *Id.* col. 4. Political analysts have concluded that the Polish "Communist move to dissolve symbolized not only the collapse of the party's popularity but also a desperate effort to repackage and sell it as a palatable political alternative to Solidarity." *Id.* *Mieczyslaw Rakowski*, the head of the Communist Party (PZPR), stated in his January 27 address to the Party that "he regretted that Poland had embraced 'Lenin's idea of the dictatorship of the proletariat' which, he said, 'became the dictatorship of one party and degenerated into oligarchic or personal tyranny.'" *Id.* at 14, col. 5.

Lech Walesa, in a statement on the date of dissolution, said, "[e]nding the Communist Party is the last step in closing an era of authoritarian rule." *Greenhouse, Successor Party Picks New Leaders*, N.Y. Times, Jan. 30, 1990, § 1, at A14, col. 1, 2.

branches guaranteed independence.⁴²² No longer an extension of the centralized state, local government will play an important role in the transition from totalitarianism to democracy. Poles do recognize from their historical experience of being overrun by numerous foreign invaders that effective government requires an effective executive, and in this regard they will not overlook Western European models. The critical issue here concerns whether Poland will accord the executive ample authority to run a modern state, but not centralize so much power that all other governmental organs are rendered subservient.⁴²³

Second, the forthcoming constitution will make use of the traditional concepts of liberal democracy and the contractual state. These notions hold that state authority derives its legitimacy from the consent of the governed and that "those in power . . . recognize that the country is governed not by them but by laws."⁴²⁴ Indeed, the fate of the 1991 constitution itself will be decided by the people—it will be put to a referendum before it is promulgated into law.⁴²⁵

Third, Poland's next constitution will reflect the nation's traditional appreciation of individual rights, which will in all likelihood be guaranteed in the form of a bill of rights.⁴²⁶ Individual rights and freedoms will exist independent of, rather than subordinate to, state power.⁴²⁷ Indeed, the new constitution will define and restrict the state's power.

In the fall of 1989 Janusz Onyszkiewicz, Spokesman for the Solidarity government, speculated as to some of the provisions that the new constitution will include. He suggested that some of the specific elements of the 1958 French constitution, a document that incorporated several provisions from the 1935 Polish constitution, may resurface in the 1991 constitution.⁴²⁸

⁴²² Shipler, *After the Wall: A Rule of Law in the Soviet Bloc*, Wash. Post, Dec. 10, 1989, at C1, col. 2, C4, col. 4.

⁴²³ The economic crisis the new government will inherit will make it tempting to centralize power so that the new executive may act effectively and decisively. The framers should ensure that the new constitution addresses Poland's long-term needs, not a short-term economic crisis. Deferred political chaos represents the greater danger.

⁴²⁴ Frankowski, *supra* note 259, at 1308 (describing the western model of liberal democracy).

⁴²⁵ *Solidarity Seeks to Oust Communists*, *supra* note 398, at A31, col. 5.

⁴²⁶ Interview with Hubert Izdebski, Professor of Constitutional Law, University of Warsaw (July 22, 1990).

⁴²⁷ *Id.*

⁴²⁸ Unpublished Responses to Audience Questions by Janusz Onyszkiewicz, Spokesman for the Solidarity Government in Poland, Following His Remarks at the University of Virginia (Sept. 20, 1989) [hereinafter *Onyszkiewicz Responses*]. As was noted *supra* Part II, the Polish 1791 constitution was influenced by the French constitutional debates that were frequently published in Poland. H. Izdebski, *supra* note 226, at 6-7. In addition, the 1791 constitution relied heavily on the works of the French thinkers Rousseau and Montesquieu. *Id.* The 1921

Richard Davies, the former U.S. Ambassador to Poland, emphasized that the presidential aspects of the 1958 French constitution might provide an appropriate model for a democratic government under the charismatic Lech Walesa.⁴²⁹ This prospect becomes increasingly more likely in light of the Polish economic crisis of 1990 and its potential for degenerating into a political crisis. An internal threat, perhaps made worse by a political crisis in the Soviet Union, could reinforce pressures for a strong presidential leadership.

In sum, as the totalitarianism imposed on Poland for the last forty-five years crumbles, the Polish constitutional tradition is being rejuvenated. On May 3, 1991, two hundred years after the inception of the first Polish constitution, Poland will have come full circle, once again adopting a national constitution that reflects indigenous political values. The Polish effort to draft a new constitution suited to Poland's current needs and representative of its national aspirations will draw from a genuinely rich constitutional heritage. While the road to reform remains filled with tremendous obstacles, the dynamic supporting constitutional change now dominates national political motivation. As one of the framers of the 1991 constitution, Janina Zakrzewska, has stated: "[T]he process of passing to democracy is still fragile and fraught with danger. Nevertheless, only this process gives [the Polish people] hope . . . of building a state that [they] can truly regard as their own."⁴³⁰

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constitution also incorporated French constitutional ideas. Indeed, that document was modeled to a certain extent on the Constitution of the Third Republic of 1875 (France). *Id.* at 15. In turn, the 1935 Polish constitution, which emphasized limitation on legislative power in favor of executive privilege and the special role of the President, influenced Charles de Gaulle's 1958 French constitution. H. Roos, *supra* note 144, at 140-41.

Janusz Onyszkiewicz has stated in regards to the new Polish constitution, that the distribution of power between the President, the Prime Minister, and the bicameral Parliament may again reflect French influence. Onyszkiewicz Responses, *supra*. As under the French system, the President would be the Polish head of state, the commander of the armed forces, and director of foreign policy; the Prime Minister would be the head of government, charged with the ultimate responsibility of administering the government; the Parliament would be the chief legislative power. *Id.*

⁴²⁹ Unpublished Responses to Audience Questions by Richard Davies, Former United States Ambassador to Poland, Following His Address at the Miller Center, University of Virginia (Jan. 25, 1990). Ambassador Davies emphasized that the future Polish constitution likely will contain provisions creating a strong Office of the President, with that position possessing "broad, extensive powers," similar to the provisions provided in the 1958 French constitution. *Id.*

⁴³⁰ U.S. Info. Agency, Foreign Broadcast Information Service: Daily Report, East Europe, Constitutional Law Expert on Democratic Changes, Oct. 10, 1989, at 85.