Rights and duties in the Polish Charter of 1921

di Giuseppe Franco Ferrari

Abstract: The paper examines the historical evolution that led to the approval of the Polish Constitution of 1921, within the framework of the currents of European constitutionalism. The discipline of duties, rights and freedoms contained in the constitutional text is considered valuable and advanced, although its implementation has been difficult.

Keywords: March Constitution, European constitutionalism, rights, freedoms, problems of effectiveness.

1. The historical difficulties

The Polish nation in the aftermath of WW1 was in search of identity, or to state it better it was trying to pour its cultural identity into an institutional structure, after a history of about one hundred and fifty years of division or partitions. The condition of the nation during such a long span of time had been similar to that of the Italian between the Congress of Vienna and the independence: according to the famous definition by Metternich, a mere geographic expression. The State of Poland had completely disappeared as far as in 1792, after the third partition. The confirmation of the dismemberment had been attenuated by some economic privileges amenable to an idea of nation, which however were soon revoked. Only the Austrian-Hungarian Empire after 1860 and in a more significant way towards the end of the century granted some measure of autonomy to Galicia and resorted to Polish politicians for top government posts. The Russian Empire had open some space for a Polish representation in the Duma and in the Council. Prussia had historically preferred denationalization and colonization policies.

The war period had been extremely difficult, due to the incorporation of Polish peoples and territories in the perimeters of both the alliances at war. Such a non-enviable situation had compelled the Polish government class to avoid and delay too harsh choices and to get by while waiting for the end of the war and possibly a global solution of the political problems of central Europe as a whole at the table of peace. Such a policy had been very hard to carry out, above all during the Russian occupation of eastern Galicia

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and Lviv (September 1914 -June 1915). Later on when, after the collapse of the Russian Army, the Warsaw region fell under the control of the Germans and the most important members of the National Council migrated to Russia or elsewhere. At the beginning the German rule was soft enough, aiming at achieving friendly relations with the Poles. Soon, however, the climate changed: the creation of a Polish State as a part of the double Monarchy was announced in January 1916 and it took a whole year to create a provisional Council of State; already in the spring of 1917, after the proclamation of the independence of Poland by the Russian revolutionary Government, Pilsudski refused to deploy his regiments with the Austrian Army, and Polish legions were being organized in Italy and in France. In October a Regency Council was created by the Germans, whose central character was prince Lubomirski, while earl Adam Tarnowski pay homage to the German Kaiser with blatantly servile words still in January 2018. Only on October 8, 2018, did the Regency publish a declaration urging the full independence of the Polish State to be composed by all the Polish territories. The Regency had been declared decayed on the 7th of November, when in Lublin a provisional Government presided by Daszynski was set up, which soon recognized a Cabinet born in Warsaw under the authority of Pilsudski and the presidency of a socialist, Andrzej Moraczewski, which however was not joined by the representatives of the Poznan region.

The heritage of the war and its impact on the territorial structure of the still unborn Polish State were really heavy, above all from the viewpoint of the heterogeneity of the component parts of the new political entity, their different attitudes and cultures. Furthermore, the turbulence was doomed to last: the war never reached a real conclusion, because the main conflict had come to an end, but several lesser local outbreaks were keeping on, from the Baltic sea to the Balkans[1]. Europe was still on fire. The collapse of the central Empires had released or rekindled ethnic tensions that had been soothed or limited and stifled in the previous century or more. The pacific coexistence of several ethnic groups saw going to give way to intolerance and hostility at a time when new boundaries had to be traced between brand new sovereign States.

The elections of the constituent Diet took place on January 26, 1919, and the assembly was summoned for February 10. At that time, in eastern Galicia the Ruthenians founded the Republic of western Ukraine and started

[1] Such is the authoritative opinion of many historians of different nationality: see e.g. S.Dunn, T.G. Fraser (Eds.), Europe and Ethnicity: The First Word War and Contemporary Ethnic Conflict, London, 1996; M. Mac Millan, Peace Makers. The Paris Conference of 1919 and Its Attempt to End War, London, 2001; A. Sharp, The Versailles Settlement: Peacemaking after the First World War, 1919- 1923, London, 2008; R. Gerwarth, The Vanquished. Why the First World War Failed to End. 1917-1923, London, 2016, chs. 12 e 13; L. Smith, Sovereignty at the Paris Peace Conference of 1919, Oxford, 2018; M. Mondini, Fiume 1919. Una guerra civile italiana, Rome, 2019.

a military offensive against Lviv, which was strenuously defended by improvised Polish militias; then the Polish army, provided with Italian materials, rejected the Ukrainian forces beyond the river Zbrucz. Towards the North, Polish troops fought along all the year 1919 in order to get control of Bialystock (February 19), Vilnius (April 19), Luck (May 16), Borysow (September 11), deep inside territories previously controlled by the Ukrainians. In the Teschen region, provisionally divide at the end of the war, a conflict blew between Czech-Slovakians and Poles in January and was stopped by another temporary agreement signed in Paris that referred to a plebiscite for the resolution of the controversy. In the Posen (Poznan) area an insurrection of the Polish population against the German majority was stopped by the intervention of French troops under the command of Marshal Foch, who imposed an armistice (February 14), not always respected by the parties. A representative of the Posen area was admitted to the Paderewski Cabinet as Minister for the "former Prussian provinces".

Hotbeds of hostility remained alive during the more than two years of the constituent process, concluded by the final approval of the Charter in third reading, on March 17, 2021. The Versailles Treaty, in fact, did not define any eastern border for Poland, leaving its definition (art. 87) to further determinations to the winning Powers and their allies, although plebiscites were ruled out as long as the military occupation of one the parties was ongoing. Therefore, Pilsudski first tried an offensive late in April 2020 against Ukraine and the Bolshevik troops and then had to withdraw after the Russian reaction: later on, in August, he came close to an alliance with Germany and in September he succeeded in recovering many of the territories lost shortly before and subscribed an armistice at Riga on October 12, that the constituent Diet ratified on the 20. The final peace of Riga was approved by the same Diet on March 18, 2021, the day after the last vote on the Constitution.

Similar considerations are applicable to the relationship between Poland and Germany. All along the work of the constituent Diet, plebiscites and related turbulences, in areas such as High Silesia, Masuria, eastern Prussia and Gdansk, were the background music of the drafting of the constitutional text. In high Silesia, where the plebiscites were to take place under the supervision of a commission formed by the winners, Italian troops had to be interposed between Polish and German combatants in a kind of guerrilla.

According to the 1921 census, of the little more of 27 million Poles, 8.5 millions, viz 31.2% of the total, belonged to other nationalities: about 3 million Ruthenians, 2.5 million Jews, 1.5 Belarusians, 1.5 Germans and small numbers of Lithuanians and Latvians. Many of these minorities could have created serious problems to the Polish State in case of border problems or other international tensions. No representatives of the ethnic minorities gained a seat in the constituent Assembly, which may have been one of the

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causes of the environmental conditions that characterized its work. In the first Diet elected on November 5, 2021, to the contrary, 88 minority members gained a seat: 34 Jews, 24 Ruthenians, 5 Germans, 3 Belarussians, 1 Russian. A significant part of people inhabiting the territory of the new State was therefore excluded from representation.

The permanent warfare concerning many parts of the national territory, ethnic problems, religious tensions reached a height during the two years of the constituent Diet. Nevertheless, the final text of the 1921 Constitution apparently did not reflect the conditions of the military and political environment of the time of its elaboration. The parts dedicated to the rights and duties of citizens are so well drafted and crystal clear to authorize the interpreter, if not versed in history, to believe that the Polish March Charter might have been adopted in peaceful and serene circumstances. In this perspective the constitutional document seems to be a real miracle of history.

2. The duties of citizens

The first eight articles of Section V are dedicated to the "general duties" of Polish citizens. The number and variety of them, enshrined in the first part of Section V of the Charter (arts. 87-94), are likely to be a consequence of the heterogeneity of the social structure of the new State. When, such as in the peculiar political context of the aftermath of the war, a body politic comes to be composed of a full range of ethnic groups, many of which assigned to it on uncertain foundations and suspect of unreliable allegiance, obviously the constituent assembly tailoring a text fitting its physical structure must put a good measure of emphasis on the bonds linking the members of the community to the recent-born State. The concentration of provisions aiming at encouraging the membership feelings and strengthening the belonging of the different categories of citizens must have had as a rationale the uncomplete trust of non-Polish nationals towards political institutions devoid of long-standing traditions. After all, the several partitions that stud Polish history could suggest the idea that at least two powerful neighbors might be tempted to put an end to the new experience. The founding fathers in such a case only have two instruments to consolidate the relationship between territory and political community: a solemn enunciation of duties concerning the belonging of all subjects to the motherland and a precise and cogent definition of citizenship. To both approaches did the constituents resort.

Art. 87, even before defining the criteria for the acquisition of the Polish citizenship, which are summarily formulated in art. 88, the March Constitution deals with the prohibition of double or multiple citizenship. A clear symptom of the intent to help the demographic roots of the State to grow and stabilize and to reinforce the sense of identification of populations

of different cultural and religious background with the hew born country. Similar provisions have been adopted by several States emerged by the disintegration of the Soviet Union in the early '90s, in order both to consolidate the frail political structure and to prevent Russian minorities from assuming too active a role in the delicate phase of organization of the new sovereigns[2]. When the loyalty of the members of the community has to be secured for the sake of its identity, multiple adhesions must be avoided. A possible result of such a principle may be the adoption of the "ius sanguinis" formula: in fact, art. 88, before delegating to special statutes the task of regulating acquisition and loss of citizenship, states a preference for the criterion of birth from Polish parents, presumably both of them. The legitimacy of a State bringing together peoples of different ethnicities relies on its capacity or creating a kind of republican consensus founded on citizenship. Such a doctrine has obviously been carved out much later[3], but after WWI that very idea was circulating in a possibly unconscious version in central and eastern Europe, wherever the peace of Versailles and the agreements forming its progeny gave birth to States whose borders came to include thousands, and sometimes millions, of persons belonging to nationalities different from the main one. Constitutions such as those of Czechoslovakia (1920), Yugoslavia (1921) and Romania (1923) include similar provisions or adopt other measures conducive to the same end, such as the proclamation of unity and indivisibility as well as the granting of special autonomy under strict central control in provinces with prevailing presence of ethnic minorities. Nevertheless, Europe in the inter-war period experienced the existence and migration of millions of stateless persons, a phenomenon that Hannah Arendt was among the first authors to describe and investigate[4]. As usually, constitutional provisions, entrenched and punctual as they may be, can hardly paralyze the course of history, when overwhelming forces are doomed to prevail.

The catalogue of duties confirms this interpretation: their objects are respectively fidelity to the Republic (art.89), respect and obedience to Constitution, statutes and ordinances of central and local government (art. 90), subjection to military service (art. 91), submission to public burdens and services (art. 92), respect for legitimate authorities and facilitation of the performance of their duties and conscientious performance of public duties to which a citizen may be appointed by the nation (art.93).

The Assembly seems to have apparently striven to build up a safety belt around the republican fortress, woven of the loyalty of the citizens, of consciousness of the hard task and of the fatiguing efforts to carry out in

[2] See e.g. the Constitutions of Latvia, arts. 4 and 5.3, Moldova, art. 18.1, Lithuania, art.12.
[3] See e.g. F. Lovett, P. Pettit, Neorepublicanism: a normative and institutional research project, 12 Pol. Science 11 ff. (2009); Q. Skinner, Liberty before Liberalism, Cambridge, 1998.
[4] See The Origins of Totalitarianism, New York, N.Y., 1951.

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order to keep the country together. A concentration of noble propositions, a bulk of peremptory provisions aimed to create a rampart against outside enemies and foreign invasions as well as inner cleavages. A sociological research about the social composition of the constituent Sejim and the legal culture that its members shared is unfortunately not available in languages other than Polish[5]: however, if one has to infer from the party composition of the assembly, it is possible to suppose that such an approach must have been the output of a mix of aristocratic self-consciousness, rising middle-class expectations and lower-class discipline, welded together by nationalistic inspiration. In such an ideological context the emphasis on duties, as well as on the supposed continuity of the national State, interrupted for one hundred and twenty years, and the centrality of citizenship were the bricks and mortar of the newly founded national entity. This part of Section V reveals a strong concentration towards unitary legitimacy that, in hindsight, resembles Mazzini's ideas and foreruns Habermas and the Republican thought.

Art. 95 somehow seals up this approach by prescribing parents the duty to upbring children as righteous citizens of the mother country: a provision which is halfway between the request of educational consolidation of citizenship and the enunciation of a kernel of an ante litteram social right.

3. The rights of citizens

The prevalent part of Section V is dedicated to rights. However, references to the Polish territory as dimension for their protection, following the line of consolidation of the national union, is quite frequent. Art. 95 is an example, with reference to the equality principle. In the same perspective, the prohibition on the acceptance of foreign titles or orders without permission of the President (art. 96.2) is another sign of an effort of scrupulous preservation of an unlimited devotion to the mother country.

Civil, political and social rights, or at least some of the last ones, are set out in the Section all together, without a division up into classes or categories, although some more general expectations appear first. Their distribution seems to follow more a logic by groups than a general order, since some structural connections between consecutive articles do exist, but a uniform criterion is not evident.

[5] A few lines are dedicated to this topic by M. and K. Granat, The Constitution of Poland, Oxford, 2019 and C. Filippini, Polonia, Bologna, 2010, 24 ff. Useful information, although in a peculiar perspective, can be found in F. Tommasini, La risurrezione della Polonia, Milan, 1925, the author being the Italian ambassador in Warsaw in those very years. Some other contemporary texts are J. Blociszewski, La Constitution polonaise du 17 mars 1921, Revue de science politique, 192*, 28-58 and A. Giannini, Le Costituzioni degli Stati dell'Europa orientale, Rome, 1925, vol. II, 449-483.

3.1. The catalogue opens up with a Lockian declaration of "full protection of life, liberty and property" (art. 95) for all, without social, national, linguistic, racial or religious distinctions. Foreigners are guaranteed rights equal to those of Polish citizens on conditions of reciprocity, and equal duties, unless statutes expressly impose them on citizens only. The principle of equality immediately follows (art. 96), with the corollaries of the equal access to public offices and the exclusion of all privileges of birth, estate, coats of arms, family of other titles, whose place is taken by the social mobility channels typical of a mature welfare State: learning, office or profession. It must have been an uneasy step, in despite of the constituent circumstances, for a country where the aristocracy had traditionally played a significant political role.

Consequently, personal liberty is enshrined in art.97: its regulation bears all signs of a precocious modernity. A law reserve governs the cases and conditions of arrest and personal search and a judicial order is prescribed. The terms of police arrest and its conversion into a judicial measure resemble the rules of art. 13 of the Italian Constitution of 1948, in an extraordinary modernity effort. Such propositions are followed (art. 98) by the freedom of access to courts, which includes the prohibition of exceptional courts, the principle of non-retroactivity of criminal statutes, the prohibition of punishments involving physical suffering and the guarantee for judicial reparation of injury or damage.

Only at this point does the Charter describe the guarantees of property. Art. 99 recognizes property, whether belonging to individual citizens or collectively to associations, institutions or public authorities, as "one of the most important bases of social organization and legal order" and affords the owners a full protection: the only possible exception is the abolition or limitation for reasons of public utility against compensation according to statutory provisions. Land ownership and commerce may be restricted by statutes in the interest of an agrarian organization based on agricultural units capable of regular production. This provision obviously aims at the solution of an historical problem that Russian and Prussian legislation had neglected or set aside.

The other civil liberties are sparse in the text of the Section. Art. 100 incorporates the inviolability of the home, correctly distinguishing between individual searches and seizures ordered by judicial authorities according to the law and general restrictions of administrative nature. Art. 101 includes the rights to move within the State or migrate, to select a place of residence, under law reserve. Arts. 104 and 105 include the right to freely express one's ideas and the freedom of the press, including an absolute ban on censorship and print licensing, both under law reserve. Art. 106 protects the secrecy of correspondence, once again allowing infringements in cases provided by statutes. Freedoms of meeting and association are vested in art. 108.

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The prerogatives and privileges forming citizenship come back again in art. 109 in the form of a right to preserve one's nationality and develop mother-tongue and national characteristics. This kind of provision is typical of constitutions adopted in periods of ethnic turmoil, following the end of a war, such as WWI, or the dissolution of former multinational entities, such as of the Soviet Union in the early '90s. In fact, similar norms can be found in charters of the generation of the March Constitution, such as those already mentioned, and of the post-Soviet cycle[6]. However, the peculiar ethnic structure of the Polish State, despite the absence of representatives of minority communities in the constituent Sejim, persuaded the assembly to provide ethnic minorities with the full and free development of their national characteristics, including the faculty of creating autonomous unions, qualified as public law organizations, assisted and financially supported by the State (art. 109.1 and 2). Art. 110 adds on a right of members of national, linguistic or religious minorities to found, supervise and administer religious or social institutions ad schools at their expenses and to use freely therein their language and to observe their religious rules. Such guarantees are conceived keeping into consideration the heterogeneous structure of the Polish populace and trying once again to preserve its political unity through benefits concerning the preservation of their identity within a pluralistic framework.

A few words must be spent about the large resort by the founding fathers to law reserves. This is the typical method applied when a constitution or declaration of rights is elaborated and published in a period that follows the collapse of a dictatorship or of an authoritarian political regime or when a State emerges as a new entity form the disappearance or the melting of others. In such cases, of course, it is impossible or not politically advisable to refer to former legislation, belonging to different and less democratic historical conditions. Therefore, brand new statutes have to be adopted in the more liberal framework, although there is no guarantee that a freshly-elected majority will be able to keep all the promises of the constitution, both in political and technical terms. The first example of such an approach has been the repeated deference to statutes in the French Declaration of 1789, when no reference to earlier laws was practicable and the work to be done in the next future was overwhelming. To the contrary, the American founding fathers, when drafting their Bill of rights, after

[6] Constitutions such as those of Bulgaria (art. 54), Macedonia (art. 7.1 and 48), Slovenia (art. 61), Serbia (art. 49) have introduced a right to ethnic identity, that can be exercised also in a negative form, by refusing to declare one's national affiliation, such as in Belarus (art. 50.1), Russia (art. 26.1), Albania (art. 3), Moldova (art. 10), Ukraine (art. 11), Latvia (arts. 37 and 45), Estonia (art. 49). Rights to the protection of the language (such as in the present Constitution of Poland (art. 27), of Bulgaria (arts. 3 and 36), Belarus (arts. 17 and 50), Russia (art. 26.2), Estonia (arts. 51.1 and 52.1) and many others, or the right to the alphabet (Macedonia, art. 7; Croatia, art. 12.1; Montenegro, art.); Serbia, art. 8: Moldova, art. 13; Bosnia, art. 6.1) or even to the preservation of cultural and religious inheritance (Macedonia, art. 48) are also common.

having promulgated the federal Constitution, could rely on a bulk of local constitutions and laws protecting freedoms: therefore, they adopted a more negative approach, forbidding Congress from making statutes, in the presumption that any legislative interventions only could encroach existing liberties. The Polish post-war context resembles more the first than the second scenario.

3.2. A great deal of provisions (arts. 111-116) are devoted to religious freedom, arguably depending on the plurality of confessions traditionally existing in the national territory. Both freedom of conscience and right of freely professing one's religion in public or privately and of performing religious commands or of carrying out rites, within the limits of public order and public morality, are included in the constitutional shelter. However, religious freedom cannot be used in ways that infringe the law, nor to evade the performance of public duties. The negative exercise of religion is also protected, since "no none may be compelled to take part in religious activities or rites unless he is subject to parental or guardian's authority". Such a provision is surprisingly modern, although it may look normal in the historical conditions of Poland.

Many other norms, such as articles 113 to 116 and 120, concern religious communities and their the relationship between churches and the State, after the model of arts. 135-142 of the Weimar Constitution. The solution preferred in this area, after a fatiguing debate, consisted in an agreement, mentioned but apparently not incorporated, to be reached with the Catholic Church, as representative of "the preponderant majority of the nation", and to be ratified by the Sejim, while the other religious minorities could reach an understanding to be included in a piece of legislation. Such a treatment of the religious phenomenon resembles the distinction introduced by the Italian Constituent Assembly in 1947. There topic, however, is covered by another speaker.

3.3. The only political right enshrined in Section V is the right to present individual or collective petitions to all State and self-government representative bodies and public authorities (art. 107). The right to vote is finely regulated in Section II, dedicated to the legislative power. Universal suffrage, without distinction of sex, is introduced right away, on condition of the age of twenty-one, the full possession of civil rights and the residency on the day preceding the proclamation of the elections (art. 12). Such approach sounds quite advanced, if one looks at the average European regulation in that historical period. Emphasis is also put on the personal exercise of the vote and on the exclusion of members of the army in active service, another uncommon clause in that period, above all in the light of the military tradition of the country. To the contrary, while the passive electoral right is open to all citizens over twenty-five, an express provision (art. 13) prevents from forbidding the military in active service to be elected. This must have been a concession to the historical importance of the army. Other

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detailed provisions concern the temporary or permanent exclusion from the rights to vote or to be elected for persons convicted of offense (art. 14) and for public officials performing their functions in the electoral district (art.15). Special leaves of absence for public employees elected to the Sejim are also provided (art. 16), as well as the prohibition of all appointments of deputies to paid public offices, with the exception of Minister, under-secretaries and university professors (art. 17). Deputies cannot be responsible editors of a periodical publication (art. 23) nor buy or acquire under any title real property of the State, be party in contracts for public supplies or works or concessions, public benefits or decorations from the government.

Absolute freedom of mandate is solemnly introduced, being the deputies representatives of the whole nation and not bound by instructions given by the voters (art. 20).

The electoral system is left to an ordinary statute (art.20), together with the rules governing the electoral procedure. Such a statute was quickly approved by the same constituent Sejim later on in July 1922[7].

As a whole, the constitutional regulation of political rights not only catches up with some of the best Charters of its generation, but even overtakes many of them in terms of genuine yearning towards a modern liberal democracy. As a matter of fact, law in the books is no guarantee of concrete respect and full application of constitutional provisions. For instance, the admissibility of the military to the Sejim and to ministerial offices might have contributed to the coup d'etat organized by Marshal Pilsudski in May 1926 with the declared intention of restoring citizens' welfare and putting an end to the arrogance of the parties. It is also possible, however, that the tradition role of the armed forces would have prevail anyway, aside from the content of the constitutional rules. All in all, the staying power of a democracy only partially depends on the quality of its constitution.

3.4. Some provisions attributable to the category of social rights appear in a random way in Section V. First of all, the right to choose one's occupation and profession (art. 101), that could be classified as a civil liberty if the connection with the regulation of labor were less evident. In art. 102 labor is indeed declared "the main basis of the wealth of the Republic", under special State protection. Furthermore, such protection includes the creation of a system of social insurance in case of unemployment, illness, accident, debility: a kind of rudimentary safety net, which hints at or foreruns the creation of a kind of welfare state. Traces of possible influence of German doctrines and of the Weimar Constitution may be recognized here.

Other provisions concerning labor refer to the prohibition of wage-earning for children under fifteen and of the night employment of women and young workers (art. 103.4 and 5). The protection of childhood and motherhood (art. 103.1 and 3) also belongs to this area of interest, as well as

[7] Statute of July 18, 1922.

the gratuity of all public schools (art. 119.1), the compulsory nature of elementary education (art. 118) and the availability of State-financed scholarships for exceptionally able but not well-to-do pupils in secondary and academic schools (art. 119.2).

3.5. The final seal to Section V is the introduction of the state of emergency (art. 124), defined as a temporary suspension of some civil rights, such as personal liberty, domicile, press, correspondence, meeting and association, for the whole of the State territory or for localities. The prescribed procedure imposes that it has to be directed by the Council of Ministers, with the consent of the President, and ratified by the Sejim, to be summoned on purpose. The factual circumstances that might justify the resort to it are wider than those foreshadowed by art. 48 of the Weimar Constitution: an ongoing war or a threatened one, internal disturbances or widespread conspiracies "which bear the character of high treason and threaten the constitution of the state or the safety of the citizens".

The constitutional regulation of the state of emergency is accurate and surrounded by all due precautions, both of substantial and procedural nature. Nevertheless history has been able to circumvent the normative provisions. In may 1926, during the march on Warsaw, the equivalent of the Italian march on Rome of October 1922, the procedure was not triggered; Prime Minister Witos and President Wojchiekoswski left their posts and Marshal Pisudski could take the power virtually without resistance, with the full support of the army.

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