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”When human beings abandon the possibility of creating and maintaining a system of enforceable rules that apply to the conduct of government, they put themselves at the disposal of those who govern. This has been the fate of most people through the course of human history.” (Vincent Ostrom)

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“Constitutional Engineering and the Postcommunist Transitions to Democracy”¹

The most important difference between humans and the most intelligent other mammals is that the latter can pose and solve problems of collective organization. It is more difficult in simple, traditional societies where social order is embedded in sacrum, and therefore mostly unalterable. At the beginning of human civilization, since Babylon times, people started to look instrumentally at their institutions learning by trial and error and institutionalizing their discoveries. Yet, according to Harold Berman (1986), the institutional innovation that provided the foundation of the modern concept of state and law was the Gregorian revolution of the eleventh century. The separation of the spiritual from the secular was carried on legal grounds and gave impetus to other legal regulations of different spheres of social life. Berman saw in Canon law the precedent for modern constitutions. However, the conviction that human beings could program rationally their institutions dates from the eighteenth century, for it was the Age of Enlightenment that remembered the Aristotle’s precept that the “constitutional rule is a government of free men and equals” (1943: 62).²

¹The first part of the paper is a revised and expanded version of a paper presented at the Conference on “The Party System in Ukraine Before and After Maidan”, organized by Razumkov Center and Konrad Adenauer Foundation, Kiev, September 16th. 2015. The second part offers a modified version of the model first published in an article (Kamiński, Kamiński, 2007).

² Buchanan and Tullock made a similar point: “it seems futile to talk seriously of a ‘theory’ of constitutions in a society other than that which is composed of free individuals – at least free in the sense that deliberate political exploitation is absent” (1965: 13).

Constitutional engineering differs from institutional design in one respect: it concerns meta-norms.³To put it short, constitutional engineering concerns principles regulating the enactment of all other rules. That is why constitutional norms must be difficult to alter: they are supposed to guarantee the stability of social order.

The first attempt to design a “good state” was the work of the Fathers of American Constitution. Their effort was backed by an attempt to develop political theory of a good state. Since then a lot of constitutions have been written and adopted, and a lot of research was carried to assess their outcomes, though their conclusions are vague. Our knowledge and, therefore, ability to formulate with certainty adequate practical prescriptions is limited. As Adam Przeworski noted, “we have intuitions about the impact of presidentialism versus parliamentarism, we know the effects of alternative electoral systems, and we tend to believe that an independent judiciary is an important arbitrating force in the face of conflicts, but our current empirical knowledge leaves a broad margin for disagreements about institutional design” (1991: 35). But even this may be an overstatement: it is characteristic of most cross-national comparative studies that, though many correlations are statistically significant, they are mostly weak. The reason is that a multitude of other circumstantial factors intervene in the working of institutions. This means that there is no one single best way to organize a political system. Under different conditions, different institutional solutions may prove effective.

Human order is man-made. Democracies, but also totalitarian regimes, can be consciously designed.⁴ It is assumed that under democratic regimes societies and their political representatives are willing and able to shape and reform institutions in ways that improve their security, developmental potential and living conditions. Yet, this assumption is often ill-founded: democratic institutions vary in quality, and tendency toward the rise of oligarchies is ubiquitous.

The remainder of this paper is organized as follows. The first section discusses several determinants of constitutional engineering to identify factors that may influence its results. In the second section we consider from this perspective the constitutional processes and their practical effects in postcommunist countries.

³ It seems that the first to use the notion “constitutional engineering” was Giovanni Sartori (1994).

⁴ For an analysis of Lenin’s design for a totalitarian state, see A. Kamiński (1992).

1. Constitutional engineering

The constitution and practical arrangements that are consistent with it are supposed to be a product of a social pact: taken together they provide underpinnings for the political and economic order. As such, they determine the future developmental potential of a nation.⁵ The term “constitutional engineering,” relates to “institutional design” applied to the architecture of the state. It infers that, under the same conditions, the same institutional arrangements should produce largely similar outcomes (Sartori, 1994). By the same token, by designing political institutions societies achieve a significant degree of control over their respective future opportunities.

The caveat is, however, that a constitutional design is not the only predictor of socio-economic development. Even apparently small differences in environmental conditions may produce hugely divergent results. This should not suggest, however, that constitutional engineering must lead to failure. Instead, it should be treated as a warning that while designing institutions one must be careful to take into account as many relevant circumstantial factors as reasonably possible.

Constitutional design is about constraints put upon the exercise of political power. Within these constraints constitutions enable and require action. Giovanni Sartori noted that: “[...] constitutions are ‘forms’ that structure and discipline the state’s decision-making processes. Constitutions establish *how* norms are to be created; they do not, and should not, decide *what* is to be established by the norms. That is to say, constitutions are, first and above all, *procedures* intent upon ensuring a controlled exercise of power” (1994: 202). They are not bills of rights – they provide the frame of government. They should consist of basic principles describing political and economic order, duties and competences of various elements in the organization of the state. But they should not be overly detailed - they “should not provide what ordinary legislation is required to provide”. Thus, “[...] the more we establish all-regulating and all-promising constitutions, the more we prompt their infringement and a country’s debacle” (Sartori, 1994: 199). Unfortunately, contemporary constitution-makers tend all too often to disregard this advice.

On the surface constitutional engineering may appear similar to technical engineering. Although both deal with basic questions of organization and process, similarities end there. As Thomas Hobbes remarked, the most important difference is that human beings are not only artificers who design institutions but also

⁵ We use this term as developed in a historically—corroborated explanation of a critical role of institutions in determining development paths in Mancur Olson (1982), Douglas C. North (1981, 1990, 2014), Charles Kindleberger (1996), David Landes (2000), Daron Acemoglu and James Robinson (2012), and many others.

the matter thereof ([1651] 1962, 9). Institutions are never neutral from the point of view of individual and group interests – they determine not only the ability of individuals and groups to satisfy their aspirations, but also shape the content of these interests and aspirations. Constitutional design is never entirely the work of dispassionate minds - it is a political process combining eventually sober intellectual insights, calculations of particular interests, emotions, and accidental events. When purely particularistic concerns prevail, results can be detrimental to the interest of society. Thus, the most important factor in determining the qualities of the constitutional design are general principles on which it is based: when constitution's foundations are sound, the rest is less important and can be corrected, when the foundations are foul a correction is becomes difficult.

The constitutional design is the responsibility of political elite – of political actors directly responsible for the constitution's content and implementation. The first important decision concerns whom to include in the process of constitution making. Actors designated to participate in the process may be open-minded and motivated by public interest or they may use their influence to consolidate positions of power and privilege of narrow interest groups (Przeworski, 1991: 32-33). If the latter is the case, the greater is elite's initial preponderance over the society, the more skewed to serving its particularistic interests will the constitutional design be.⁶

The question which political institutions, or constitutional arrangements, encourage good governance, democracy and individual freedom (and more recently economic development) has been discussed in political science for centuries. Two broad areas of consensus emerged: first, development over at least the last two centuries unequivocally demonstrates that democracy and the private sector have been responsible for historically unprecedented reduction in poverty. In consequence, the constitution should provide strong institutional framework for protection of private property, for security of economic and political freedom, and enforcement of contractual obligations.⁷

The second area of consent emerging from a vast body of literature is that—in addition to major actors--the most important constitutional choices concern the type of government, the electoral system, and the vertical organization of the state. At the most general level the former contains three options:

⁶As Przeworski notes, "Constitutions adopted to fortify transitory political advantage, constitutions that are nothing but pacts of domination among the most recent victors, are only as durable as the conditions that generated the last political victory." (36).

⁷One should add to the above list the separation of powers to legislate, execute, and adjudicate with the former being "the supreme power of the commonwealth" as discussed in the works of such classic writers as Charles de Montesquieu (2009), John Locke (2004), as well as Alexander Hamilton, John Jay, and James Madison ([1787] (n. d.)).

parliamentary government; presidential government; and semi-presidential government (Duverger, 1980; Sartori, 1994), and the federal versus unitary states (Ostrom, 1991; Elazar, 1987). In practice, each of these options may have numerous variants. As for the electoral system, the menu is large. For the sake of simplicity let us limit our discussion to three possibilities: single-member-districts or a majoritarian system; proportional representation; and mixed-systems (Lijphart, 1994: 10; Norris, 1997). Within a majoritarian system, there are two variants: the first-past-the-post or a plurality system, and the absolute majority systems (with a second tour when no candidate obtains fifty percent plus one vote majority). The alternative vote system, used in Australia also falls under this category. Proportional representation involves multiple-member-districts where parliamentary seats are distributed according to the proportion of votes each contesting party received. Among the two extremes one can find a huge amount of specific variants. The distinction concerning federalist and unitary systems concerns the vertical distribution of power and responsibility in the state. There are several variants between the centralized, unitary systems of government and confederations, where the jurisdiction of the central government is very limited.

Electoral systems

The choice of an electoral system has a huge impact on the facets of an emerging national party system, i.e., the number and distribution of political parties. The hypothesis shedding light on the links between electoral systems and the number of political parties has come to be known as “Duverger's Law” (Duverger, 1951). His explained differences in the number of parties emerging under different electoral systems on the grounds of his conceptualization of free elections as competitive markets where both candidates and voters dynamically alter their behavior as they try to get as close as possible to their preferred outcome. This results in two distinct relationships between the citizenry and their political representation. According to “Duverger's law,” plurality vote leads ultimately to the emergence of a two-party system, where each party competes for electoral support to win control over government. Two-party system produces usually a single-party government, whereas proportional representation system tends to produce multiparty political systems and coalition governments. The stabilizing mechanism in the majoritarian systems is the *drift towards the median voter*, i.e., assuming the left-right axis, the focus is on the elector who is less or equally radical than one half of electorate, while the other half is more or equally radical than (s)he is (Kamiński M., 2015). In the PR systems the emphasis is on the fit between the distribution of certain features in society and their reproduction in the parliament.

Another difference between the plurality system and the PR is that in the former parties are more responsive to preferences and whims of electors, and the leadership takes a more considerate posture towards rank and file members of parliament. Under the PR system, a candidate must find him/herself on the party list, and then the rank on the list becomes a factor that greatly influences the probability of the person being elected. This means that under the two political regimes political parties are managed and function in different ways.

In case of the plurality systems, voters elect government, while under the PR system- they elect parliament. In the first case coalitions are built outside the parliament – party programs are supposed to include and reconcile a variety of social interests, while the parliament is an arena for program implementation. In the second case, parliament becomes an arena for coalition-formation in support or against a given policy (Milnor, 1969: 188).

The choice of the electoral system was the topic of the most intense debate that took place at the beginning of 1990s. It opened with an article by Arend Lijphart (1991a, 1991b) in which he argued in favor of PR as the best option for post-communist states. His adversaries raised several issues concerning PR' shortcomings: difficulties in forming government, problems with accountability, disintegrative impact of proportional representation on society, and so on (Laydeyret, 1991; Quade, 1991). Responding to his critics in a later publication, Lijphart (1994: 144) conceded giving the following synopsis of the nature of the choice: “[...] does one value minority representation and the principle of proportionality more highly than the two party principle and government accountability, or the other way around?” Pipa Norris (1997: 301), in her comment on the debate, concludes that the choice between the plurality and PR system is that between accountability and effectiveness of government on the one hand and representation of minorities and social justice on the other. The reason the debate still lingers on is that it concerns basic differences in value system.

There are, however, many more differences that are shown in the cross-national studies on electoral and party systems. Some of the results are statistically significant, but in the majority of cases correlations are rather unimpressive.⁸ The reason is, as mentioned, that the impact of an electoral system depends on many circumstantial factors: the state of the civil society; other constitutional choices, like the form of

⁸For instance, Kunicova and Rose-Ackerman found that proportional representation (PR) systems are more susceptible to corrupt political rent-seeking than plurality systems. They argued that this result depends on the different loci of rents in PR and plurality systems, and on the monitoring difficulties faced by both voters and opposition parties under PR. (2005:573). Similar findings had been earlier reported by Persson, Tabellini and Trebbi (2001).

government; centralization of government and self-government; the quality of institutions that enforce horizontal accountability of the executive. Let us very briefly consider the impact these factors may have on the functioning of the systems of representation.

Presidential and parliamentary government

Another debate concerning the form of government was provoked by Juan Linz' and his co-authors' (1992; Linz and Stepan, 1996) criticism of the presidential form of government as unstable and crisis prone. The president elected in a universal suffrage would consider legitimate his/her primacy over the parliament. This is particularly threatening when s/he represents a different party than the ones that have the majority in parliament. Second, constitutions usually limit the number of presidential terms, and ambitious individuals do not suffer such constraints gladly.⁹ Furthermore, presidents make all the coalition deals before elections and these are part of his/her program, while parliamentarians are able to reach tacit agreements while performing their functions. Thus, the presidential systems are by their nature rigid, while parliamentary governments allow for more flexibility.

Arguments raised by Juan Linz and Alfred Stepan are of uneven importance. Commenting on their empirical evidence, derived mostly from Latin American experience, Scott Mainwaring (1992: 114) noted that the alleged instability of the presidential government is most in evidence when it is accompanied by the proportional representation electoral mode (Shuggart and Carey, 1992). They are also the most prone to political corruption (Persson, Tabellini and Trebbi, 2001; Kunicova and Rose-Ackerman, 2005). Without pondering the problem in depth, one may agree with Linz that it is more difficult to construct a stable democratic system with a presidential government than with a parliamentary one.

Some authors discern also a separate category of semi-presidential governments introduced by Maurice Duverger (1980).¹⁰ Here the system oscillates in the direction of presidentialism, when the president comes from the party that dominates in the parliament, and in the direction of parliamentary government, when he is faced with the parliament dominated by the opposing party.

Federalist and unitary states

Horizontally, the division of powers within the state relates to the distinction between legislature, executive, and judiciary. The choice concerning the division of powers within the state hierarchy relates to the continuum between centralization versus decentralization of competences and responsibilities

⁹ Both sources of instability were already identified by Karl Marx in his *18th Brumaire of Luis Bonaparte*.

¹⁰ Maurice Duverger found here strong support in Giovanni Sartori (1994: 121-140).

within the machinery of the state. The term continuum can cause certain disagreements for there is an important qualitative difference between regimes that are built bottom up, through covenants between several territorial units, and those built top down through the sovereign decisions of a central power. Yet, constitutional arrangements may have many properties of a federal system while resulting from a conscious devolution of competences of the central government to lower level territorial units. This is, among others, the case of Poland.

As mentioned, federalism represents the idea of constructing the state bottom-up. It also solves the problem posed by Montesquieu concerning the size of the republic: "if a republic be small, it is destroyed by a foreign force, if it be large; it is ruined by internal imperfections" (Montesquieu, 1966: 126). Federal government is a result of a covenant between several states to become members of a larger political entity to which they delegate powers over issues that are of common interest, namely external security and management of those public goods that should be the responsibility of central government. This principle of subsidiarity was succinctly stated by Vincent Ostrom (1987: 111) as underlying the American federal structure: "Those matters which could be separately provided would be subject to principles of self-government operative within each of the states. Those matters of common concern which could not be attained by the separate provisions of each state were subject to the concurrent operation of principles of self-government in a limited national government."

A federal system consists of overlapping jurisdictions coordinated by a variety of different cooperative and joint arrangements (Ostrom, 1987: 130). Autonomy of various units within the system allows them to attain "economies of scale". There is only one caveat: it works "[...] only as long as one unit of government, or set of governments, cannot dominate all other units of government." (Ostrom, 1987: 137). Thus, the system of checks and balances operates not only within the horizontal dimension of the state, but also vertically, in relations among its various units. This description of the working of the federal system is close to ideas developed by Charles Lindblom (1964), who looked at the working of the American political system through the prism of the mechanism of mutual adjustments. Thus, he tacitly assumed that, like in the case of the economic market, the system we directed by an "invisible hand" of cooperation and competition.

Contrary to some presumptions, federalism requires, in a normative sense, a strong, albeit effectively limited, central government.¹¹ One remark is pertinent here. Despite constitutional provisions, a federal system faces a constant tension between the central government and its constituent part, each trying to enlarge its jurisdiction. The two tendencies must be kept in check. Preponderance of anyone of them will lead either to a *de facto* unitary government or to the ungovernability of the whole. That such threats are real is obvious. According to some authors, such a tendency has been at work in the American federal system (Levin, 2013). Thus, some scholars use a distinction between the federal structure and the federal process to show that in reality coexistence of a strong all-empowering center under formal federal provisions happens often (see, Elazar, 1987: 67-69). Over the recent years one could observe, for instance, the movement of the Russian regime from an ill-designed federal structure with a weak center to a unitary state with a strong one.

2. Circumstantial factors

The erection of a constitutional regime is only partly a matter of constitution. Stalin's "constitution" of 1935 (Unger, 1981), for instance, was a mere piece of literary fiction. Constitutional provisions must find reflection in social reality and this requires enforcement mechanism. Moreover, around the written text customary interpretations develop that are as real as the content of the constitution itself. Duverger (1980) noted that the powers adjudicated to the president in the Finnish constitution are broader than those of the president in France. In reality, Finland has a parliamentary government, while the position of the president in France is highly prominent under any circumstances. Let us consider briefly factors that may influence the real constitutional order in a country.

The circumstantial factors may involve the geopolitical location - neighboring states may favor or oppose the change of regime. Another factor that can interfere with constitutional development is the so-called "resource curse": when a country is rich in natural resources, while institutions of the civil society are weak, a well-organized ruling class can use its strategic advantage to hamper the emergence of liberal democratic institutions (Gylfason, 2001; Robinson, *et al.*, 2006). Finally, the "cultural compatibility" may be a factor in accounting for constitutional development: some traditional patterns and value systems can be functional or dysfunctional from the point of view of erecting liberal-democratic institutions.

¹¹ As Daniel Elazar has noted, "a federation is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers" (1987: 7).

The elite and the civil society

Of the circumstantial factors the most important is the historically grounded relationship between the privileged classes and the society. The political elite are individuals (sometimes families or strata) that occupy positions of authority in society, and are supposed to perform in this society the leadership functions.¹² The quality of political leadership is a crucial factor in the construction of the constitutional regime. But one must also consider the state of the civil society, its ability to act when the elite does not fulfill its function. The two may depend on each other: a quality of leadership probably is on the long run dependent on the level of civil society's development. Yet, the two may be treated separately: the political leadership can at times be better or worse than the society. During the process of transition, when state's institutions are weak, it is the relationship between the strength of the civil society and the quality of political leadership that is the major factor in solving the issue of accountability of the state.

The role of the elite in framing the political and economic system is well taken by Henryk Szlajfer (2012: 91-99).¹³ He distinguishes between the holistic and particularistic nationalisms.

“[...] depending on the nationalism variant, it focuses either on the maximization of particular gains (*particularistic nationalism*) or on the achievement – in complex interactions between the state and societal actors – of certain collective goods, defined as national interest, including the demand for economic growth and strengthening of the national economy (*holistic nationalism*)” (2012: 91).

Szlajfer sees the “pure type” of holistic nationalism in the Weberian approach to state and economy. On the other hand, the particularistic nationalism reduces the national interest to the level of sectoral interests (93-4). This distinction corresponds with ours between the two alternative types of value systems of political elites (see Table 1).

The scope of the civil society depends heavily on many elements interacting with each other: political systems may enhance the ability of social groups to self-govern or they may turn out to be detrimental to it; civil society may encourage inter-group cooperation leading to development of universal value systems, or hinder cooperation inducing groups and individuals to focus on particular interests. Stability of totalitarian systems depends on their effectiveness in depriving subjected societies of the ability to self-govern, and forcing them to focus on individual and family survival. Up to a point, the more

¹² This line of reasoning is similar to that of Gaetano Mosca (1939), and therefore exposed to a similar line of criticism. Yet, at this level of abstraction, it serves well our purpose..

¹³ See also Jan Kofman (1997) for a similar interpretation.

atomized, terrorized and passive the communist subjects had been, the greater was the regime's stability (A. Kamiński, 1992). A well-functioning democracy, to the contrary, tends to promote universal values, as a factor stimulating cooperation and initiative among people. It also relies on the effective mechanisms assuring the vertical and horizontal accountability of government. By combining the two axes, the type of value systems and the level of accountability, we obtain four situations characterizing relationship between the political elite, the political parties and the society (Table 1) and their possible impact on political development.

Table 1: Combinations of value system of a society's elite and levels of horizontal and vertical accountability

		Value System of Political Elite - Leadership	
		Particular/narrow interest	Universal/public interest
Accountability	Low	I (stagnation)	II (stability and growth)
	High	III (unstable equilibrium)	IV (prosperity)

Each quadrant represents a different outcome in terms of a likely political landscape. Quadrant "I," the combination of low accountability and narrowly focused values of the elite, is an unstable outcome with a high incidence of corruption and economic stagnation. Quadrant "II" depicts overall political conditions conducive to modernization and economic development: centralized government with a top-down system of rule but with a commitment to fulfilling public interest. Unstable equilibrium with either political parties becoming captured by narrow interest groups or formal institutions preventing this outcome by imposing disciplines on the conduct of public business presents quadrant "III." Quadrant "IV" illustrates conditions for the emergence of constitutional liberalism: commitment to universal values, vibrant civil society and a set of strong institutions guarantees stability and encourages a virtuous cycle of political and economic development. We assume that the value system of the broadly understood elite is of particular importance in constitutional development, for ultimately it is the elite that shape the political culture of the society. It also directly affects, through constitutional design, the institutional architecture of the state.

Of particular interest in debating the post-communist transitions to democracy is the case "I" – a weak civil society facing, in the absence of effective tools of accountability, a ruthless political elite guided by particularistic aspirations. In such a case, any constitution may provide only appearances of democracy

with make-believe electoral systems. Under such circumstances, it is impossible to avoid the domination of parasitic political elite with negative consequences for stability and economic growth. This description is also to some extent valid for other post-communist countries. To conclude, a constitution as a written document provides just a form. This way the form is filled depends on the quality of leadership and the state of the civil society.

The time factor: political parties, the state, and public administration

In a transition of a totalitarian system to democracy time is a very important. First, in order not to miss “the window of opportunity”, the process of constitution making should start immediately and should not last too long.¹⁴ First of all, the virtue of the speed is that it permits to reduce the impact of particular interests on the content of the constitution. Thus, Claus von Beyme notes that “the more protracted the constitution-making process is, as in Russia or Poland, the greater the contradictions in the constitutional system” (2001: 14). Second, enactment of the constitution symbolizes the break with the former regime: delays deprive it of the symbolic value.

Another manifestation of the *time factor* was described by Eva Etzioni-Halevi (1989) in her study of political corruption. She found that a political system is particularly prone to corruption when political parties establish themselves in the system of power before public administration had achieved maturity by defining its missions and introduced basic procedures. According to her, the level of political corruption does not depend on characteristics and political culture of the rank and file public, but on the elite political culture and on the power structure dominated by the elites.

Under transition from communism to liberal democracy the relationship between the domain of politics and that of public administration is of particular importance because it determines the effects of the process of privatization of state assets. Privatization potentially offers huge opportunities for self-enrichment. When the process proceeds in the absence of effective legal, administrative, and political controls it must have a detrimental impact on the future quality of governance.

The choice of approach to economic liberalization together with the mode of privatization critically influenced the makeup of the political power structure and the shape of subsequent choices leading to the emergence of different political economic regimes. Gradualism together with mass privatization by population-wide distribution of vouchers, as well as manager buyouts created huge opportunities for

¹⁴ Some authors noted, for example, that Poles, who spent eight years on enacting the new Constitution of 1987, had missed the “window of opportunity” (Dahrendorf, 1990; Ackerman, 1992; Zakrzewska, 1993).

rent seeking and corrupted political outcome. It also negatively affected the quality of economic governance and contributed to the rise of corruption with negative consequences for economic development and political evolution.¹⁵

Thus, from the point of view of constitutional engineering it is important to have conditions favorable to preservation of the administrative autonomy, thus limiting opportunities for penetration of the administrative realm by particularistic, partisan interests. One can doubt if this could be possible in the absence of a mature system of law and independent judiciary.

The bumpy road of transitions away from communism

We shall look now into the postcommunist constitutional developments. First of all, we shall try to assess the success or failure of the liberal democratic transition; second, we shall narrow down our concerns to two strategic choices: the type of government and the electoral system. We treat the effect of transition, success or failure together with basic constitutional choices, as dependent variables. On the other hand, the relative strength of the civil society is, in our analysis, the independent variable. We also assume that the postcommunist political elites are guided in their constitutional choices by egoistic motives. They restrain themselves only when faced with social resistance.

For the sake of simplicity, we view the communist regime as consisting of two elements: the Society (S) and the Communist Establishment (CE). The CE includes incumbents of top political and administrative positions, the army, and security services as well as upper ranks of “nomenklatura” together with managers of large state owned enterprises – this is the “plus” side in the hierarchy of authority. “Society” represents the “rest”, the “minus” side of the authority. Society can extend from the state of nearly total atomization to a quasi-organized civil society. The more uniform and atomized the S, and the more disciplined the CE, the more stable the totalitarian state is.¹⁶ Under opportune conditions, when the CE is divided by internal disputes, the S is sometimes able to generate a quasi-organized opposition (O), while in other circumstances there may at best emerge a small group of dissidents. The

¹⁵For an extensive discussion, see Antoni Z. Kaminski and Bartłomiej Kaminski. 2001. “Governance in Transition: The Challenge of Subverting Corruption,” Chapter 5 in *Economic Survey of Europe, No. 2*, 2001, United Nations, New York and Geneva, and “Trajectories of Transition from Communism: Bumps, Exits and Deviations,” paper presented at a conference 1989: Twenty Years After organized by the University of California, Irvine, November 5-8, 2009, available at <http://www.democracy.uci.edu/files/docs/conferences/kaminski-kaminski.pdf> accessed on September 12, 2015.

¹⁶With one stipulation: as Aristotle noted, total uniformity implies complete annihilation of the state (1943: 81). The Soviet Union came close to this state of affairs during the Great Purge of 1936-8; the Communist China approached this limit during Cultural Revolution, 1966-1976.

relationship among elements in the triad S-CE-O determines direction and speed of transition from communism.

We propose that O is likely to emerge and prevail over CE in societies with strong roots in West European civilization and a solid sense of national identity – relatively strong S. Such societies would be inclined to easily accept measures severing links with the communist past even though these might inflict austerity. They would be ready to accept a quick pace of dismantling the legacies of communism. Second, their attitudes notwithstanding, power relationship between O and CE would decide whether a radical, liberal-democratic transformation of the state and economy would be undertaken or another form of an authoritarian regime would be adapted. Following Scott Mainwaring (1992: 323), we consider three types of situations: 1/ transition through Transaction; 2/ transition through Regime Defeat; 3/ transition through Extrication. In the first case, O and CE would be in equilibrium in terms of relative strength. Then, the outcome of an open struggle would be highly uncertain, which would eventually make both sides willing to seek a compromise. In the second, the O would decisively prevail over the CE and dictate its conditions. In the third situation, the CE would be able to maintain control over political the process of political change. The three possible relationships between CE and O produced three different trajectories of transition that emerged on after the collapse of communism. These differences found reflection in constitutional outcomes.

Before we discuss these trajectories, we have to consider the exogenous, *control* factor: the possible reactions on developments in any member-country of USSR and other states of the communist bloc that oppose democratic changes.¹⁷ A threat to the survival of the communist regime in any of the satellite states was perceived by Moscow as a threat to its control over the Soviet bloc; it would be also considered by rulers of other communist states as a factor threatening their own position.

Events in Poland and Hungary in 1956 were closely connected by a feed-back mechanism: or *contagion*. By intervening in Hungary, Moscow informed Warsaw about the limits of its tolerance: or *control*. Intervention in Czechoslovakia, in August 1968, gave rise to a quasi-formalized Brezhnev's Doctrine that authorized Warsaw Pact forces, read the Red Army and its allies, to intervene to defend stability of the communist regime. This exogenous *control* factor had to be taken into account by the O,

¹⁷ We use Laurence Whitehead's (1996: 5-24) distinction of three factors that influence transitions: contagion, control, and consent. Contagion proceeds through the impact that events in one country exercise on events in others in geographic and cultural proximity. As to the control, powerful countries tend to export their institutional arrangements abroad within limits of their possibilities. Consent involves "actions and intentions of relevant domestic groupings, and the interactions between internal and international processes" – or linkage politics (15). In each respect the postcommunist world presents a different picture than that of the second and third wave of democratization.

as the representative of S, and by the CE in case of direct negotiations. The threat of the Warsaw Pact intervention was an important source of uncertainty particularly for nations, that otherwise would not have accepted the system anyway. We should add to these also countries that unwillingly found themselves an integral part of USSR in the aftermath of the World War II: Estonia, Latvia, and Lithuania. Any dissent there would be crushed by the KGB as an internal matter. Hence, we have three different situations before the start of the transition.

1. A relatively well-institutionalized O, internally divided CE, under conditions of uncertainty as to the Moscow's willingness to intervene to support local communist regimes. This uncertainty, on the one hand, prompted the local communist leaders to seek partners for negotiations in O. Such attempts started in Poland, first informally and later formally, in mid-1980s. This eventually led to a "pacted" transition (O'Donnell and Schmitter, 1986: 37-39).¹⁸ Under the new political regime the communist party transformed into a social-democracy and reminded part of the democratic process.
2. Demise of Soviet Union itself led to liberation of states occupied by USSR since the second world war, namely Estonia, Latvia and Lithuania. At least in the first two countries national political elite quickly emerged and removed the ruling group imposed by Moscow. This required a strong national consciousness and a fairly well integrated society with formal, politically neutral organizations which under particular circumstances could become political weapons.¹⁹ Similarly, the "velvet revolution" in Prague led to the removal of the whole ruling class in Czech Republic.
3. Under the absence of an integrated society, not to mention an opposition, the CE could reshape itself into a "party of reform," of either a nationalist or a social-democratic brand, and dominate the process of transition. Each choice had different consequences. If the social-democratic option was chosen, the initial result was an authoritarian system that could, however, further lead to a democratic outcome (ex. Croatia). The choice of the nationalist option invariably led to an authoritarian (Russia, Belarus) or autocratic (Uzbekistan, Turkmenistan) outcome.

¹⁸ Thus we only partly agree with Bunce (2003) and McFaul (2004), as they both treat all successful postcommunist transitions to democracy as non-collaborative – in this case there is an evident element of collaboration between, a part of the opposition and the "reformist" elements in the Polish United Workers Party..

¹⁹ Ecological protests in the Baltic states played such a role. For instance, the plan to expand the chemicals industry was "one factor leading to the formation of Sąjūdis in June 1988" (Lieven 1993, p. 220), which subsequently became a full-scale secessionist movement in Lithuania.

The first situation represents the “cooperative model” of regime change. In Poland, this was a result of a long series of rebellions. In some countries, like Hungary or Czechoslovakia it was an effect of contagion accompanied by the devolution of the Soviet power in East-Central Europe. To others freedom was brought on the plate.

The three different modes of transitions have produced different patterns of constitutional choices:

1. **CE stronger than O:** CE opts for a strong executive (presidential government), while funneling social discontent (O) into a weak legislative. Control of administrative resources (ability to influence electoral results) induces CE to adopt a majoritarian or a mixed electoral system.
2. **O stronger than CE:** As CE still dominates state administration; O strives to strengthen the legislature to gain control over the executive (parliamentary government). Once opposition becomes institutionalized, it acquires interests that do not necessarily coincide with those of the civil society. This motivates O to reduce accountability to S by adopting the PR electoral system.
3. **Balanced CE-O relationship:** Depending on circumstances, within narrow limits, the balance can be tipped either in favor of the semi-presidential or parliamentary government. Both sides will opt for the PR for the same reason as in the former case.

Both “2” and “3” cases of democratic transition have produced a similar trajectory; we shall call it simply the *pro democratic* or *PD (PD1 and PD2) trajectory*. Though, neither the differences in relative strength of CE and O nor the taxonomy of the mode of transitioning do exhaust the whole wealth of real life situations, at least they cover a range of cases large enough to make it useful for our theoretical discussion.²⁰ We shall call the authoritarian transition the *anti-democratic* or *AD trajectory*.²¹

There is one important qualification: the outcomes may be altered by external factors. An external factor is not a catalyst of change: in the model outlined here, it operates through affecting the outcomes by tipping the balance of power in favor of a PD or AD trajectory. Another channel available to an external actor promoting democracy is through enhancing the strength of the S: various externally

²⁰ While wars impacted transitions in former Yugoslav republics, republics of Transcaucasia republics and Moldova, this does not affect our taxonomy: communist establishment versus society. The former initially prevailed in them all.

²¹ The dismantling of communism in Yugoslavia stands apart. Its mode of collapse was different for several reasons: no exogenous factor was involved; central planning had been dismantled almost four decades earlier replaced with soft planning of quasi-independent firms managed by workers’ councils; and, at least in Croatia and Slovenia, the CE became an integral part of S mobilized against Milosevic’s plans to impose Serbian control over Yugoslavia. Macedonia was the effect of contagion, and Bosnia and Herzegovina reflected Croat-Serb tensions. Civil war and its aftermath have shaped political evolution: from nationalist AD trajectory (except Slovenia) to a PD trajectory.

funded programs aiming at developing civil society and strengthening independent social organizations are good examples.

The decisive element in sustaining the first and second trajectory and affecting the eventual change of trajectory in countries of the third group was the support of the West and multilateral financial institutions: given the primary role played by the EU, this is often referred to as an “EU factor.” As for the first and second trajectory, European Association Agreements with Central Europe and later Stabilization and Association Agreements with Balkan countries by offering the prospect of accession to the EU have affected transition on at least two counts: First, while they were of little relevance to initial economic liberalization, they provided guidance and incentives to establishing institutions supporting competitive markets harmonized with the *acquis communautaire*; Second, they compelled these countries to open their markets to competition from the EU and remove various restrictions on foreign direct investment. The increased level of openness had not contributed to fast modernization of industrial and services sectors but also had a positive impact on the quality of economic governance and the incidence of corruption (B. Kaminski 2000). Last but not least, because of a strong support for EU membership amongst populations in Central and Southern Europe, xenophobic impulses have been suppressed. As a result, a whole group of countries that had started the change of regime choosing the AD trajectory, eventually switched after a few years to the PD path. The best examples are those of Slovakia and Croatia, not to mention Bulgaria, which starting from the third group switched to the PD trajectory. On the other hand, the “Russian factor” works in the opposite direction, i.e., it pushes a country from the liberal to authoritarian trajectory or reinforces the latter, as the case of Belarus or Kyrgyzstan illustrates.

These initial constitutional choices have long-term consequences for the quality of governance. In order to assess their impact on the subsequent political regime development, we have used two dimensions addressed in the World Bank’s survey of the quality of governance in more than 200 countries across the world—“voice and accountability” and the “rule of law”—to create an Aggregate Index of Political Regime (see note in Table 1). We have arbitrarily set the benchmark to fully qualify as a democratic state at 55 percent, i.e., ‘better’ political regimes than in 55 percent of governments worldwide. Thirteen new EU member-states from Central and Southern Europe meet this condition while Georgia and Serbia with the scores equal or above 50 percent are pretty close to meeting it.²²Other

²²An open question remains whether Georgia under new government elected in 2013 will not backslide.

Balkan countries had scores below 50 percent: yet, they may be regarded as being on a democratic trajectory in large part thanks to the external factor, i.e., special ties with the EU.²³

Juxtaposing SAP scores against the type of government and electoral system does not produce easily discernible patterns except for two regularities: all authoritarian regimes have a presidential system of government; and all democracies opted for PR (proportional representation) electoral system.

Table 2: Political regimes and outcomes of various trajectories in 2012

Democracy	WB SAP	Type of gov	Electo- ral S.	In- between	WB SAP	Type of gov	Electo- ral S.	Authoritarian	WB SAP	Type of gov	Electo- ral S.
Estonia	84.1	PA	PR	Georgia	51.7	PRES	MX-PA	Ukraine	32.9	PA/PRES	PR
Slovenia	79.1	PA	PR	Serbia	50.0	PA/PRES	PR	Armenia	30.3	PRES	MX-PA
Czech R.	78.2	PA	PR	Macedonia	48.8	PA/PRES	PR	Kazakhstan	23.2	PRES	PR
Poland	76.5	PA/PRES	PR	Bosnia	46.5	Hybrid		Russia	21.8	PRES	PR
Lithuania	73.7	PA	PR	Moldova	45.5	PRES	PR	Azerbaijan	18.3	PRES	MA
Latvia	71.6	PA	PR	Albania	36.5	PA	MX	Kyrgyzstan	20.4	PRES	PR
Slovakia	70.4	PA	PR					Tajikistan	10.4	PRES	MX
Hungary	69.2	PA	PR					Belarus	8.5	PRES	MA
Croatia	57.5	PA/PRES	PR					Uzbekistan	4.7	PRES	MA
Romania	56.9	PA/PRES	PR					Turkmenistan	2.8	PRES	MA
Bulgaria	55.0	PRES	PR								
Average	70.2				45.1				17.3		
Variation	0.14				0.14				0.60		

Notes: (1) PA—parliamentary; PA/PRES—parliamentary/presidential; PR—proportional; MX—mixed electoral system; MX-PA—Mixed parallel electoral system; WB SAP—the values of SAP (Single Aggregate Index of Political Regime) it is an average of “Voice and Accountability and “Rule of Law” dimensions of governance. SAP is normalized in terms of percentile ranks with larger value indicating more democratic regimes. The value of 35, for instance, means that a country is more democratic than around 35 percent of 213 countries covered by the World Bank’s survey (see Section 5. B). (2) In 2004 Ukraine moved from the presidential government and a mixed electoral system to parliamentary/presidential government and PR. A few years ago, Russia moved from the mixed electoral system to PR.

Yet, it would be naïve to assume that those postcommunist countries that chose PR opted for justice and representation of minorities’ interests, while those that adopted a majoritarian system wanted to have their governments more effective and accountable. Similarly, it would be farfetched to assume that the choice of a parliamentary or presidential type of government had anything to do with adoption or rejection of Juan Linz’ criticism of presidential regimes. Academic debates and concern for public good had probably little impact on constitutional choices made in postcommunist states. Concrete decisions have been reached under the impact of specific constellations of interests, combined with actors’ concern about expected pay-offs (See O’Donnell and Schmitter, 1986: 4-7; Bunce, 2003: 170-

²³They all enjoy preferential status under Stabilization and Association Agreement, whose end-game is accession to the EU. Macedonia, Montenegro and Serbia already have an official status of EU-candidates, that is, they have begun accession negotiations.

174). For the sake of simplicity, we shall continue our analysis with the earlier-identified actors, that is, communist establishment – CE; society – S; and opposition – O.

Political crises are always accompanied by disintegration of the political establishment. This happens particularly when the state's legitimacy is in doubt. Russians, who saw in communism the realization of national aspirations and the guarantee of Russia's superpower status, could have reacted differently than societies that felt oppressed by it. Among other nations, attitudes toward communism varied from an outright rejection to indifference. A ruling class in disarray is a prerequisite to transition. It is also a necessary, but not a sufficient, condition for the ability of a society to come to the fore. In order for a society to influence developments, it must possess a certain level of integrity. Then, rebellion becomes possible and may lead to a mass organization, like in the case of the "Solidarity" movement in Poland. An organization must have leaders. At that point, we have an organized opposition; its strength depends on the level of social trust it enjoys. The society in turn consists of a plurality of groups with their own leaders with their own aspirations. Communist leadership may have influenced the shape of the opposition by subtly favoring ones and excluding others. Once negotiations between the communist leadership and the opposition started, the intimate link between the O and the S becomes vulnerable. Leaders of the opposition may make compromises unacceptable to the society at large, or at least some important segments of it. Such compromises may be dictated by better access to information, fear or simply, by particular interests. Simultaneously, the society becomes a source of uncertainty for those former oppositionists who have won public offices and want to keep them.

Thus, irrespective of a trajectory, the new power elite will design the constitutional system in ways that assure its continuation in office. Jeremy Pope (2000: 131-132) had a point when he wrote that: "Among these emerging democracies, [...] even these officials genuinely seeking solutions have not always applied the basic principles of democracy. Applying these principles would, by definition, call for a robust policy debate, responsiveness to the demands of citizens, and receptiveness to the inputs of civil society as solutions are hammered out. Instead, the state has been reluctant to include civil society as a partner. At times, some governments have seen it as a rival, both in terms of power and influence, and in terms of the outside aid it diverts from channels which have traditionally been the exclusive preserve of government. Such governments, in ignoring civil society, have failed to implement mechanisms which would institutionalize accountability and build public trust."

Under AD trajectory, when the CE remains in charge of transition, the old, refurbished power elite diffuses social tensions by controlling results of "competitive" parliamentary elections, while keeping the role of the legislative reduced, and securing the dominance of the president's office. The

control of power resources, namely administrative resources, makes it convenient to adopt a plurality or a mixed system. This is what initially happened in Russia, Ukraine, Belarus and all Central Asian states. According to Andrew Wilson's: "Administrative technology is unlikely simply to take over [...] an element of pretense is still paramount. The balance may change, but virtual politics will survive. Significantly, in both Ukraine and Russia the powers-that-be prefer mixed electoral systems. The proportional representation element (national party lists) is a necessary vehicle for virtual parties. On the other hand, the constituency system has been retained, as it is in the constituencies that the cruder types of administrative resources can be more directly applied." (2005: 87)

With a fairly strong civil society, the plurality system compels politicians to take S into account, and increases the risk of losing office. Thus, the new political establishment is inclined to adopt a PR system. Moreover, as the power of the former anti-communist opposition resided in the parliament, it would rather opt for a parliamentary form of government.²⁴

Several additional variables intervene, however. The country's size, political culture strongly intertwined with geopolitical location and endowment in natural resources influence the relations within our triangle and therefore the actual transformation. Political culture criterion distinguishes between lands inhabited by nations linked mostly to Western Christianity from those inhabited mostly by the Orthodox or Muslim populations. This variable is closely linked to geopolitical location²⁵ differentiating between countries whose location presents obstacles to the emergence of a stable democratic regime and those with external environment stimulating liberal democratic change.

The "Russian factor", political, economic, and military pressures in particular, hampers the efforts of societies to realize the liberal democratic project. From the start of the postcommunist transformations, Moscow perceived the PD trajectory as a double threat: first, the destabilization impact successful transitions in neighboring countries can have on her own political system; second, as "land grab" by the West. The case of Ukraine serves as an example. Dmitri Trenin (2008: 139), a highly competent Russian security analyst, noted that: "While Georgia, even in the worst case situation, is likely to remain important, but peripheral, Ukraine as a political battlefield between the West and Russia would seriously destabilize Russian-European relations." The crisis began with President Viktor Yanukovich's decision to accept Russia's 'bribe' for not signing Association Agreement with the EU in 2013: a few months later, he was ousted by the mass revolt. Russia's response has been takeover of Crimea and launch of terrorist operations in Eastern Ukraine. The strategic interest of the EU is in the

²⁴This interpretation is in line with the one presented by Gerald Easter (1997: 187-9).

²⁵ There is one caveat; political culture operates from inside, whereas geopolitical location from outside.

consolidation of democratic institutions in Ukraine, political stability, and economic success of the country. Russia is indifferent to such concerns. It sees a success of the Ukrainian experiment as a loss to itself. The defeat of the Ukrainian dream is the only way to make it a part of the Russian sphere of “privileged interests.”.

Another factor relevant to transition outcomes relates to the “resource curse”—to borrow an apt phrase coined by Richard Auty (1993). Countries well-endowed in natural resources tend not only to have poor economic growth performance (Sachs and Warner 1995) but also tend to be autocratic. In the presence of centralized revenues from the resource sector, the government’s survival does not depend on tax revenues from decentralized business activity but on control over the stream of revenues from natural resources. By the same token, the government is much less preoccupied with the widening of tax base through development of the institutional infrastructure protecting and enforcing private property. Since the loss of power threatens a loss of access to a centralized stream of benefits, this is lethal for democratic process as the cases of Russia, Kazakhstan and Azerbaijan illustrate.²⁶

Although rich countries, except for oil exporters, are democratic, the links between democracy and the level of economic development are not straightforward.²⁷ As Przeworski and Limongi (1997) argued, democracy can emerge at any level of economic development but can survive in poorer countries only insofar as it succeeds in generating development. In a similar vein, Haggard and Kaufman (1995) note that “[...] the relationship between level of development and regime type seems indeterminate among middle-income countries, which have been characterized by both authoritarian and democratic rule. A certain threshold of national income may constitute an important condition for democratic rule. But the level of economic development cannot tell us anything about the dynamics of democratic transitions or why they occur when they do” (1995: 29).

5. Concluding observation

The question addressed in the paper can be phrased in the following way: under what circumstances, if ever, are the actors occupying strategic positions in the political realm inclined to rise above short-term, egoistic concerns and concentrate on designing a constitutional regime that would serve a collective interest? The short-hand answer is that they are only, when the situation leaves them

²⁶ Russia is clearly a special case: it is huge, ethnically diverse, relatively highly industrialized, albeit with an economy heavily oriented toward natural resource intensive products. For an excellent analysis of Russia’s political economy in the 1990s, see Shleifer and Treisman (2000).

²⁷ The review of relevant literature would go beyond the format of this paper. Instead, we recommend a concise discussion of scholarly literature on links between economic conditions and democratization in Bandelj and Radu (2006).

with no other options. Particularly that political science does not offer a clear-cut vision of what a “good state” is in institutional terms. It is easier to say what a “bad state” is. The factor that restricts the options available to the political class is the strength of the civil society. Yet, we know, and can empirically demonstrate it, that some institutions serve certain purposes better than others. Here, we have adopted rather crude criteria connected with the success or failure of a liberal democratic transition.

We have distinguished three trajectories of postcommunist transitions: one leading to autocratic or authoritarian regimes; and other two leading to a liberal democracy. In the first case, even when appearances of democratic institutions have been maintained, they serve as a façade. We also found that all such cases are characterized by a presidential form of government and a majoritarian or mixed electoral system. While, in all instances of success we have a parliamentary government and the proportional representation electoral system. This does not mean that the parliamentary government is necessarily better than a presidential one or that a PR system is better than a majoritarian system. We suggest that behind the constitutional choices are different elements that the political actors had to take into account.

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