

PARADOXES OF CONSTITUTIONAL POLITICS IN THE POST-SOVIET SPACE

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Constitutional politics in autocratic and hybrid regimes has become an increasingly popular topic in political-science research. The amendment of constitutions in countries with democratic deficits is a commonly identified—although rarely empirically addressed—phenomenon. While it is tempting to disregard the influence of constitutions in autocratic and hybrid regimes and treat them as shams, recent research suggests that the power of constitutional politics in a nondemocratic setting cannot be dismissed so quickly. In line with this research, I argue that constitutions and constitutional politics serve a variety of purposes in countries with democratic deficits—both in substance and in effect. Understanding the different roles of constitutional politics might contribute to our knowledge on why hybrid and autocratic regimes endure and gain legitimacy. Thus, in this Article I aim to assess the extent to which explanations for the frequency and occurrence of constitutional amendments—developed for the democratic context—also apply for constitutional politics in non-democratic regimes, in particular in the post-Soviet area. Based on this, I will discuss the dominant role of constitutional politics in this regional setting, specifically as a power tool for a patrimonial president in Ukraine and as a trigger for democratization in Georgia.

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I. INTRODUCTION

Assuming that ruling alone and having absolute authority is only a theoretical possibility, political power is always, even in its most absolute sense, dependent on a cohesive group and “devices”¹ to control this group. In a surprisingly high number of cases, the devices of choice are constitutions.² And while it is tempting to disregard the influence of constitutions in autocratic and hybrid regimes and treat them as shams, recent research suggests that constitutions in these contexts cannot be dismissed so quickly.³ In fact, findings show they contain a range of information on the social expectations towards the elite, on the continuity or disruption of the historic regime,⁴ and on the specifics of everyday governance. Law and Versteeg⁵ convincingly argued that constitutions in authoritarian and hybrid contexts serve a variety of purposes both in substance and in effect. And “[c]onstitutional amendments are the essence of constitutional politics. They can influence the political system more than most other decisions within a political realm.”⁶ Up to now, however, the nature of constitutional politics in autocratic and hybrid regimes has hardly been addressed in the comparative politics literature.⁷ Thus, the research questions answered in this Article are the following: what explains the occurrence of constitutional amendments, in particular under nondemocratic constraints? What is the content of constitutional amendments in nondemocratic societies? And, what effect can constitutional amendments have on the democratic development or the autocratic stabilization of the respective country?

To answer these questions, this Article is divided into two main parts. First, I will provide a brief review of the established research on

1. Tom Ginsburg, *Constitutions . . . in Dictatorships?*, FIFTEENEIGHTYFOUR (May 7, 2014), <http://www.cambridgeblog.org/2014/05/constitutionsin-dictatorships/>.

2. Tom Ginsburg, *Written Constitutions Around the World*, 15 INSIGHTS ON LAW & SOCIETY (2015).

3. Tom Ginsburg & Alberto Simpser, *Introduction*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 14–15 (Tom Ginsburg & Alberto Simpser eds., 2014).

4. See generally ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

5. See generally David S. Law & Mila Versteeg, *Constitutional Variation Among Strains Of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg et al. eds., 2014).

6. Anna Fruhstorfer & Michael Hein, *From Post-Socialist Transition to the Reform of Political Systems?*, in CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE 569 (Anna Fruhstorfer & Michael Hein eds., 2016).

7. Mikael Wigell, *Mapping ‘Hybrid Regimes’: Regime Types and Concepts in Comparative Politics*, 15 DEMOCRATIZATION 230 (2008).

constitutional politics in a democratic context, with an emphasis on the explanations given for the varying frequency of constitutional amendments. Thus, I define constitutional politics here narrowly as formal constitutional amendments. Second, I will identify patterns in the form and contents of formal constitutional amendments in the post-Soviet region. Based on this, I propose two different perspectives on this research puzzle, with a comparative analysis of the nature of constitutional politics and the detailed description of similar cases with a very different role of constitutional politics. I draw on a unique data set of the constitutional development in post-Soviet countries, namely Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan, since the implementation of the first post-Soviet constitution. I will first reassess the hypotheses in the quantitative strand of constitutional-politics research for the post-Soviet context. Based on this comparative perspective, I will show—among other aspects—that executive-legislative relations (in particular presidential power) are the most frequently amended topics. Finally, I focus on two case studies, those of Ukraine and Georgia, with an emphasis on the interrelated impact of constitutional politics and presidential power.

II. CONSTITUTIONAL POLITICS IN AUTOCRATIC AND HYBRID REGIMES

Constitutions structure the choices actors have and create a path for the distribution of power among the important actors in politics. In this Article, I argue that “[t]he constitution embodies the political substance of a polity; if the constitution consists of a written text, its political essence is encapsulated in its textuality.”⁸ The political essence could be seen as the authority the constitution unfolds. Thus, power and authority are two very different concepts. Institutionalized power, however, is sometimes seen as authority, which in modern societies is often tantamount to law—particularly constitutional law.⁹ With this perspective on modern constitutions and their authoritative status, one is inclined to relate them to democratic systems. Rethinking this within a nondemocratic-regime context allows for a different perspective and creates room for the consideration that constitutionalism might still be at play, even under adverse conditions.

Thus, it is necessary to change the normative perspective on constitutionalism. This means moving away from the dichotomous perspective of, *e.g.*, McIlwain,¹⁰ and instead adopting the perspective of Isiksel, who described authoritarian constitutionalism “as a system in which the constitution, rather than constraining the exercise of public power, is coopt-

8. JON ELSTER, ET AL., *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* 64 (1998).

9. HANNAH ARENDT, *ON REVOLUTION* 38 (1963).

10. *See generally* CHARLES H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1947), <http://www.constitution.org/cmt/mcilw/mcilw.htm>.

ed to sanction oppressive uses of it.”¹¹ How important constitutions are in regimes with problems in their democratic development, such as in Georgia, Turkey, and Ukraine, comes as a surprise to scholars analyzing constitutional politics in these countries.¹²

Isiksel describes a phenomenon for Turkey, which could explain the earlier-mentioned importance of constitutional politics: “[t]he system functions on a shared assumption that the constitution *matters*; that it cannot simply be tossed aside once a party is in power.”¹³ Moreover, these ambiguous regimes establish a unique form of commitment to constitutions, which results in fierce political conflicts over amendments to the constitution.¹⁴ These amendments are not necessarily intended to drive the country towards democracy. In a similar vein, the idea that “constitution-making is a continuation of politics by other means”¹⁵ insinuates that constitutions are used as instruments of power. This also applies to democracies. For hybrid or autocratic regimes, however, it is even more apparent. Individual case studies provide some preliminary evidence that constitutions and constitutional politics are also of importance in countries where the normative concept of constitutionalism¹⁶ does not matter as much or even at all.¹⁷

Nevertheless, comparative political science has not devoted much attention to constitutional politics in nondemocratic contexts.¹⁸ Beyond the perspective of constitutional engineering, research has not established a coherent research agenda on constitutions and constitutional politics in nondemocratic regimes. Literature provides a range of approaches to this topic. Based on the shared assumption that constitutions matter, we can assume a variety of roles of constitutional politics. In theorizing how constitutions function under nondemocratic conditions, Ginsburg and Simpser¹⁹ covered some ideas on the functional logic of constitutions and constitutional politics in nondemocratic contexts. Among these roles could be elite coordination,²⁰ the entrenchment of

11. Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CONST. L. 702, 702 (2013).

12. *Id.* at 721.

13. *Id.* at 705.

14. *Id.* at 704–05.

15. THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS: REDESIGNING THE STATE 17 (Keith G. Banting & Richard Simeon eds., 1985).

16. MCILWAIN, *supra* note 10, at ch. 1 (“[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. . .”).

17. See generally Mark Tushnet, *Authoritarian Constitutionalism* 4–5 (Harv. Pub. L., Working Paper No. 13-47).

18. *Id.* at 7 (with the exception of Ginsburg & Simpser, *supra* note 3 and a variety of individual case studies).

19. See generally CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014).

20. See generally Henry E. Hale, *The Informal Politics of Formal Constitutions: Rethinking the Effects of “Presidentialism” and “Parliamentarism” in the Cases of Kyrgyzstan, Moldova, and Ukraine in Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014).

policies,²¹ information provision,²² or the shaping of social norms.²³ Additionally, one could argue that law—thus also constitutional law—is simply the most feasible and proper way to organize modern societies and governance, even in not entirely democratic settings.

For the post-Soviet context, Hale has provided convincing evidence “that formal constitutions can have an important impact even in societies in which rules are not reliably followed and in which institutions are routinely corrupted—as in highly patronalistic societies.”²⁴ More importantly,

[p]residentialist constitutions have their effect not so much because they are ‘followed’ as because (all other things being equal) they signal that whichever patronalistic network captures presidential office is likely to be the most powerful one in the country and make the occupant of the presidency a singular focal point for elite coordination.²⁵

With the understanding that authority, and thus institutionalized power, is in part based on social constructions and that law is defining for authority and power, I assume that constitutions, including constitutional amendments, contribute to this role construction. Furthermore, constitutional amendments and the frequency of their occurrence might depend on certain properties of the constitution itself, but certainly also on political circumstances beyond the text. Hence, the properties of the constitution itself have important implications for the country’s ensuing constitutional life.

First, the rigidity of the amendment procedure can already provide an explanation for the varying frequency of constitutional amendments, as some authors argue.²⁶ Recent research provides an ambiguous picture of the explicatory value of this independent variable.²⁷ In addition, it remains unclear if and how amendment provisions influence constitutional politics beyond democratic contexts.²⁸ One indication that the rigidity of the amendment process also has effects in nondemocratic societies is provided by Russia, although the effects are questionable.²⁹ The thresh-

21. NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS & THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* 11 (2001).

22. See generally Adam Przeworski, *Ruling Against Rules*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Alberto Simpser eds., 2014).

23. Stephen Holmes & Cass R. Sunstein, *The Politics Of Constitutional Revision In Eastern Europe*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 279 (Sanford Levinson ed., 1995).

24. Hale, *supra* note 20, at 239.

25. *Id.*

26. See generally Donald S. Lutz, *Toward A Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

27. Law & Versteeg, *supra* note 5, at 171.

28. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *INT’L J. CONST. L.* 686, 712 (2015).

29. See generally, Felix Petersen & Ilya Levin, *The Russian Federation*, in *CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE* 519 (Anna Fruhstorfer & Michael Hein eds., 2016).

old for amending the Russian Constitution is the highest in the countries of Central and Eastern Europe and lies on the median of the post-Soviet area. At the same time, Russia has an “amended articles rates below the median”³⁰ of all Central and Eastern European countries. But, the effect is not a “conservation” of the political system. Rather, we can observe the daunting Russian praxis of amending the constitution through ordinary law.³¹ Petersen and Levin described this as “de facto amendments taking place outside or beneath the constitution.”³² Surprisingly, this is not a common pattern, as we can see from the amendment frequency and intensity in other Eastern Europeans countries.³³ Apart from the complexities of an authoritarian context, one can assume that the rigidity of the constitutional amendment process should decrease the amendment frequency.³⁴ Thus, I assume the following:

H1: The higher the rigidity of the constitutional amendment process, the lower the probability of a constitutional amendment.

Continuing the perspective on the democracy-autocracy aspect, the democracy level of individual countries is, to a large extent, determined by executive-legislative relations.³⁵ Although presidential power does not provide a simple causal explanation for the success or failure of democracy, research has shown “that the constitutional variation among semi-presidential regimes has . . . powerful effects on democratic survival.”³⁶ In particular, the specific constitutional configuration of a president-parliamentary system, “whose distinguishing feature is that they grant the power to dismiss governments to both the assembly and the president, very significantly and powerfully reduce the durability of democracy.”³⁷ This has multiple implications for constitutional politics in the post-Soviet space as we can observe president-parliamentary and premier-presidential systems in most of them.³⁸ Additionally, premier-presidential institutions help to “preempt the escalation of political conflicts.”³⁹

What does this amount to in relation to constitutional politics? One can expect that powerful presidents in nondemocratic societies do not need constitutional amendments to enforce their power. Previous research, however, has shown that there is no linear relation between the

30. Fruhstorfer & Hein, *supra* note 6, at 562.

31. See Peterson & Levin, *supra* note 29.

32. *Id.* at 533.

33. Andrew Roberts, *The Politics of Constitutional Amendment in Postcommunist Europe*, 20 CONST. POL. ECON. 99 (2009).

34. Other properties of the constitutional text as such (length, inclusiveness) are also part of the scholarly literature, but as they do not establish a statistically significant meaning for democratic contexts, they are pursued here.

35. Robert Elgie & Petra Schleiter, *Variation in the Durability of Semi-Presidential Democracies*, in SEMI-PRESIDENTIALISM AND DEMOCRACY 55 (Robert Elgie et al. eds., 2011).

36. *Id.*

37. *Id.* at 57.

38. Yu-Shan Wu, *Clustering of Semi-Presidentialism: A First Cut*, in SEMI-PRESIDENTIALISM AND DEMOCRACY 23 (Robert Elgie et al. eds., 2011).

39. Elgie & Schleiter, *supra* note 35, at 58.

amendment rate/frequency and the democracy level, *e.g.*, in Central and Eastern Europe.⁴⁰

Additionally, the assumed roles of constitutions and constitutional politics in nondemocratic societies point towards a re-evaluation of this assessment: *e.g.*, entrenching policies⁴¹ requires an amendment to the constitution.⁴² Also, in non-democratic societies, *e.g.*, in the first years of Lukashenko's rule in Belarus, presidents enforce and entrench their political ideas and in doing so strengthen their leadership.⁴³ Thus, I expect that the level of presidential power has a direct effect on the occurrence of an amendment, especially conditioned by the factor of time.

Furthermore, autocratic or hybrid regimes in the post-Soviet region are regimes oriented towards and dominated by a political leader.⁴⁴ These leaders have the centripetal force and might use constitutional politics to foster elite cohesion, not only as an operating manual, but also to enhance their external and internal legitimacy. This becomes particularly visible—but not exclusively—shortly after a leadership change. Myriad empirical examples come to mind, and, from a theoretical perspective, we can expect nondemocratic leaders to use constitutions—among other instruments—to stabilize their rule.⁴⁵ Especially with the specific context of the post-1989 constitution-making in post-Soviet countries, I expect that constitutions with a less powerful president are amended more frequently.

H2: The less constitutional power a president has, the higher the probability of a constitutional amendment.

In addition to the properties of the constitutional text itself, not only do the characteristics of the political regime influence constitutional amendments, but they are they also influenced by the political circumstances.⁴⁶ Authors are inconsistent, however, in their assessment of the specific direction of this influence.⁴⁷ Whereas Roberts argued that “[l]ess democratic regimes produce more amendments,”⁴⁸ because autocratic leaders have far fewer obstacles to successfully implementing constitutional amendments, one is inclined to assume that autocratic leaders have no need to amend the constitution. Empirically, the difference between the average amendment rate in democratic and nondemocratic countries is negligible.⁴⁹ Thus, the assumptions are theoretically expectable in both directions:

40. Fruhstorfer & Hein, *supra* note 6, at 558.

41. Fabian Burkhardt, *Belarus*, in *CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE* (Anna Fruhstorfer & Michael Hein eds., 2016).

42. *Id.*

43. *Id.*

44. Andrew Roberts, *The Politics of Constitutional Amendment in Postcommunist Europe*, 1 *CONST. POL. ECON.* 102 (2008).

45. See Isiksel, *supra* note 11, at 721–22.

46. Ginsburg & Melton, *supra* note 28, at 687.

47. See *infra* notes 48–49.

48. Roberts, *supra* note 44, at 102.

49. See Ginsburg & Melton, *supra* note 28, at 705 n.44.

H3a: The lower the democracy level, the higher the probability of a constitutional amendment.

H3b: The lower the democracy level, the lower the probability of a constitutional amendment.

III. RESEARCH DESIGN

After laying out the theoretical expectations, this Part will illustrate how the theoretical claims are empirically tested. First, I will discuss the case selection, and then move on to describe the operationalization of the independent variables.

A. Case Selection: The Post-Soviet Area

In order to empirically test the theoretical expectations described, I analyze constitutional politics in Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan as the successor states of the Soviet Union (excluding Estonia, Latvia, and Lithuania). This focus will allow me to directly compare the occurrence of constitutional amendments in relatively similar regional contexts. These countries have the important advantage that they have a similar historical legacy and—at least to a certain extent—a similar level of patrimonial structures.⁵⁰ I assume these structures have some effect on constitutional politics in these nondemocratic societies and will show the different roles constitutional politics might take on. An important feature of these twelve systems is that they have an assumed similar perception of their respective constitutions, as we can see from the similar level of amendment activity and procedural similarities in the implementation, origin, and length.⁵¹ The variation in the autocratic elements of these countries—both over time within the countries themselves and also between the individual countries—is an important advantage of this comparative perspective.

B. Operationalization

This research approach has two stages: First, I examine the impact of the previously described conditions for the conservation or the flexibility of a constitutional system. For the purpose of this analysis, formal constitutional amendments are the dependent variable. These amendments are defined as events that may or may not occur in any given year. In order to test my theoretical expectation, I analyze an original data set consisting of all constitutional amendments as from the implementation of the first post-Soviet constitution up to, and including, 2015. The sample comprises all constitutional amendments successfully implemented.

50. See, e.g., Henry E. Hale, *25 Years After The USSR: What's Gone Wrong?*, 27 J. DEMOCRACY, no. 3, 2016, at 24–35.

51. Data on file with author.

This includes constitutional amendments that were at a later point in time declared unconstitutional by a constitutional court (as, for example, in Moldova, where the 2000 constitutional amendment was declared unconstitutional in 2016). The occurrence of one or more constitutional amendment(s) in a given year is coded with 1; the absence of a constitutional amendment is coded with 0. In this phase of the analysis I estimate the importance of the following explanatory variables:

Rigidity: The rigidity of the constitutional amendment process is a common explanation provided for the probability of a constitutional amendment to occur.⁵² The level of rigidity is a composite index by Lutz, increasing the level of rigidity with every additional requirement.⁵³ For the cases selected here, the “index of difficulty”⁵⁴ ranges from 0.8 in Moldova and Ukraine (easy to amend) to 4.3 in Kazakhstan (moderately difficult to amend).⁵⁵

Presidential power: As described earlier, the specifics of nondemocratic societies lead me to the assumption that powerful presidents in nondemocratic societies do not need constitutional amendments to enforce their power.⁵⁶ Nevertheless, previous research has shown that there is no relation between the amendment rate/frequency and the democracy level, *e.g.*, in Central and Eastern Europe.⁵⁷ Thus, I control for the constitutional power of presidents according to the Presidential Power Score by Dyle and Elgie.⁵⁸

Democracy level: I also include a measure of the democracy level to control for the development over time and the increasing level of autocratic elements, as well as to control for the differences between the individual states. I measure the level of democracy by means of the level of freedom in the respective country per year according to the Freedom House Index.⁵⁹

Leadership change: Among the variety of possible explanations for the initiation of a constitutional amendment, a change of leadership might have the greatest impact on constitutional politics in nondemocratic societies. In particular, in autocratic or hybrid regimes with a highly personalized leadership structure (often also based, *e.g.*, on charisma), the death, removal, or resignation of their leader (in this regional context, the president) might result in formal constitutional amendments.

52. See, *e.g.*, Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 J. THEORETICAL POL. 339–61 (2005).

53. Donald S. Lutz, *Toward a Theory of Constitutional Amendment* 88 AM. POL. SCI. REV. 355, 368 (1994).

54. *Id.* at 369.

55. Data on file with author.

56. *Supra* Part II.

57. Fruhstorfer & Hein, *supra* note 6, at 558.

58. See generally David Doyle & Robert Elgie., *Maximizing the Reliability of Cross-National Measures of Presidential Power*, 46 BRIT. J. POL. SCI. 731 (2014).

59. *Freedom in the World*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2016> (last visited Dec. 3, 2016).

IV. DATA ANALYSIS: EXPLAINING THE OCCURRENCE OF CONSTITUTIONAL AMENDMENTS

The amendment activity varies considerably in post-Soviet nations and ranges from 0.1 amendment laws per year in Georgia to over 0.3 in Uzbekistan and even 0.63 in Russia.⁶⁰ Among the fifty-nine amendments observed in this study, over 70% dealt—to a varying degree—with executive-legislative relations.⁶¹ A conditional fixed-effects logistic regression was performed to ascertain the effects of rigidity of the amendment process, the level of democracy, the level of presidential power, the years since the implementation of the constitution, and a leadership change on the likelihood that a constitutional amendment occurs.

TABLE 1

DV: Constitutional Amendment	Odds Ratio
Explanatory variables	
Rigidity (H1)	.64 (.38)
Presidential power (H2)	.01 (.04)
Democracy (H3)	.90 (.26)
Age of the constitution	1.09 (.04)**
Leadership change	.57 (.33)
GDP	.99 (.00)*
Log likelihood	-96.83
Number of observations	229

Standard errors are in parenthesis. *Statistically significant at 10%, one tailed; **Statistically significant at 5%, one-tailed

I present the empirical findings of the regression analysis in Table 1 and report the findings with regard to all independent variables and with a more-than-two-year time lag of the dependent variable. This is based on the assumption that the time between an event and the actual implementation of a constitutional amendment is about two years. Based on this comparative analysis, we see that that only the age of the constitutions and the economic development are statistically significant, however the effect is minimal to nonexistent. A test with different time-lags has similar results.

Overall, this test of different factors does not offer an entirely convincing explanation of the occurrence of constitutional amendments in the post-Soviet space. Apart from the age of the constitution, none of the other independent variables provides answers for the different amendment activities, thus, I can neither confirm nor dismiss any of the earlier described hypothesis. While this is beyond the scope of this Article, I still

60. Data on file with author.

61. Data on file with author.

think that the timing of the leadership change could provide an indication of an instrumentalization of constitutionalism, which I will emphasize in the following case description.⁶² Due to these inconclusive results, it is reasonable to pursue the detailed analysis of individual amendment processes. These may provide more answers than this macro-quantitative approach can.

V. CASE STUDIES: CONSTITUTIONAL POLITICS IN UKRAINE AND GEORGIA

In the second stage of the analysis, I illustrate the role of constitutional politics in countries with problems in their democratic development, using the examples of Ukraine and Georgia. Based on a close look at the development of the democracy level in the countries under consideration here, we see that legislative-executive relations in particular form a central element of constitutional politics.⁶³ With respect to the post-Soviet area, this perspective should be emphasized because of the specific societal structure of patrimonialism: a strong president and a patrimonial society can be complementary and strengthen each other.⁶⁴ Thus, the following sections will trace the causes of the constitutional amendments in the area of executive-legislative relations and will illustrate the diverse consequences these amendments had on Ukraine and Georgia.

A. *Constitutional Politics in Ukraine*

Ukraine evolved from a president-parliamentary to a premier-presidential, back to a president-parliamentary, and again back to a premier-presidential system in a span of less than twenty years.⁶⁵ It provides an interesting example of a constitutional ping-pong game.⁶⁶ The first democratic constitution was implemented in 1996 and established a president-parliamentary system.⁶⁷ The so-called Orange Revolution in 2004 led to a constitutional amendment decreasing the constitutional power of the president, which resulted in a change to a premier-presidential system.⁶⁸ Subsequently, in 2010, after the election of Victor

62. See *infra* Part V.A.

63. See Roberts, *supra* note 44, at 109.

64. See *infra* text accompanying note 166.

65. In president-parliamentary systems, the prime minister is responsible to both president and parliament; in premier-presidential systems, by contrast, the prime minister is responsible only to parliament. See generally Robert Elgie, *Three Waves of Semi-Presidential Studies*, 23 *DEMOCRATIZATION* 49–70 (2016); Matthew Shugart & John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1992).

66. Fruhstorfer & Hein, *supra* note 6, at 568.

67. President-parliamentary and premier-presidential systems are two subtypes of semi-presidential systems, diverging in their level of presidential influence on the nomination and dismissal of the prime minister/cabinet. See Steven D. Roper, *Are All Semipresidential Regimes the Same? A Comparison of Premier-Presidential Regimes*, 34 *COMP. POL.* 253, 255 (2002).

68. Paul D'Anieri, *What Has Changed in Ukrainian Politics? Assessing the Implications of the Orange Revolution*, 52 *PROBS. POST-COMMUNISM* 82, 86 (2005).

Janukovič as president, the 2005 constitutional amendment was revoked and declared unconstitutional by the constitutional court.⁶⁹ This meant, however, a change back to the constitution of 1996.⁷⁰ After the 2014 Euromaidan uprising, a constitutional amendment, or even a new constitution, is being discussed again.⁷¹ In the following, I will present the reasons for this ping-pong activity and describe the nature of the changes and their impact on the perpetuation of autocratic elements in the political system.

From a more general perspective, constitutions are reflections of societal struggles and political issues within the country's political discourse.⁷² In Ukraine, this discourse is shaped by two highly contrasting dimensions. On the one hand, an increasing dissatisfaction with the political actors, the parties, and a deep distrust in political institutions culminated in two revolutionary events.⁷³ What is described as authoritarian constitutionalism to Turkey applies for the ambiguous regime of Ukraine as well. "The system functions on a shared assumption that the constitution *matters*; that it cannot simply be tossed aside once a party is in power."⁷⁴ The continuous discussion and the back-and-forth of the constitutional amendments are caused by a variety of reasons. First, the ongoing amendment need constitutes a natural process due to structural dysfunctions in the political system.⁷⁵ Second, the expectation that institutional structures will ultimately shape behavior prevails and particularly shaped the constitutional amendment processes after the two uprisings.⁷⁶ Third, constitutions can indeed be used as an instrument of control.⁷⁷ I will elaborate on each of these functions in more detail below.

In 1996, constitution-making was already not a particularly cordial event; "[t]he various constitutional drafts reflected the volatile political situation."⁷⁸ The presidential institution with immense constitutional powers was tailor-made for President Leonid Kučma, reflecting his political ambitions.⁷⁹ This is similar to Moldova and probably as post-Soviet legacy: the strong presidential institution was accompanied by a strong parliament.⁸⁰ As Gallina has correctly argued, "[i]n reality, the constitu-

69. Alexei Trochev, *A Constitution of Convenience in Ukraine*, JURIST (Jan. 26, 2011), <http://www.jurist.org/forum/2011/01/jurist-guest-columnist-alexei-trochev.php>.

70. *Id.*

71. *See, e.g.*, CONST. COMMISSION, <http://constitution.gov.ua/en/> (last visited Jan. 29, 2017).

72. *See generally* MCILWAIN, *supra* note 10.

73. *See* D'Anieri, *supra* note 68, at 86; Mikhail Minakov, *A Decisive Turn? Risks for Ukrainian Democracy After Euromaidan*, CARNEGIE ENDOWMENT (Feb. 3, 2016), <http://carnegieendowment.org/2016/02/03/decisive-turn-risksfor-ukrainian-democracy-after-euromaidan-pub-62641>.

74. Isiksel, *supra* note 11, at 705.

75. *Id.* at 720.

76. *Id.* at 702.

77. Ran Hirschl, *The Strategic Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 157–81 (2013).

78. Nicole Gallina, *Ukraine*, in CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE 497 (Anna Fruhstorfer & Michael Hein eds., 2016).

79. *See generally* ANDERS ASLUND, HOW UKRAINE BECAME A MARKET ECONOMY AND DEMOCRACY 57–95 (2009).

80. CONSTITUTION OF THE REPUBLIC OF MOLDOVA Jul. 29, 1994, Tit. III, Ch. VII, art. 106.

tion had granted the president independence from parliament and control of the government through the prime minister.”⁸¹ The president was responsible for the nomination of the prime minister⁸² and, more importantly, could dismiss the prime minister after presidential elections⁸³ and a confirmed vote of no confidence by parliament.⁸⁴ The president could also dissolve parliament in case no orderly session was possible.⁸⁵ In addition, the president had, and has the power to issue, an absolute legislative veto, which can only be overruled by a two-thirds majority in parliament.⁸⁶ Within this institutional context, then-President Leonid Kučma could design a presidency based on patrimonial networks with him as the patron. In the course of the following years, two constitutional amendments dealing with executive-legislative relations were initiated.⁸⁷ In 2000, an even further increase of presidential power was discussed, whereas the 2003 draft aimed for a premier-presidential system.⁸⁸ Both were unsuccessful—lacking a two-thirds majority in parliament—yet, the 2000 amendment attempt received the necessary majority through a referendum.⁸⁹

Subsequent to the so-called Orange Revolution, the Constitutional Amendment Act in 2004 established a new logic of presidential constitutional power. Among the far-reaching amendments was a change in the nomination and appointment procedure of the prime minister and the cabinet (which was essentially a change from a president-parliamentary to a premier-presidential system), the dismissal of the prime minister handed over to the parliament, and an actual increase in presidential prerogatives to dissolve parliament.⁹⁰ What was not changed, however, was the influential position of the president in legislation; both the legislative veto, which can only be overridden by a two-thirds majority,⁹¹ and the legislative initiative⁹² remained part of the presidential constitutional power.⁹³ “The immediate outcome of the new institutional setting was an ongoing power struggle between the president and the parliamentary majority.”⁹⁴ What was meant as an advancement towards democracy resulted in a severe political standoff, from 2004 to 2010, between the main political actors, showing that a reduction in presidential constitutional

81. Gallina, *supra* note 78, at 500.

82. CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 85, ¶ 12; *id.* art. 106, ¶ 9.

83. *Id.* art. 114.

84. *Id.* art. 115.

85. CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 90.

86. *Id.* art. 94.

87. For a detailed description of this process, see Gallina, *supra* note 78.

88. *Id.*

89. *See id.*

90. *See id.*

91. CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 94.

92. *Id.* art. 93 (“The right of legislative initiative in the Verkhovna Rada of Ukraine belongs to the President of Ukraine, the People’s Deputies of Ukraine, the Cabinet of Ministers of Ukraine and the National Bank of Ukraine.”).

93. *Id.*

94. Gallina, *supra* note 78, at 505.

power does not necessarily lead to an advantage for democracy.⁹⁵ This argument is also strengthened by a comparative perspective that “both strong presidents and strong prime ministers exert a positive effect on the implementation of economic reforms in post-communist countries and the highest level of reform is achieved when both have significant formal powers.”⁹⁶

Nonetheless, as Hale has described, “[p]ower needs to be divided in such a way that conflicting preferences of different branches are resolved in a peaceful and orderly manner.”⁹⁷ These elements are difficult to find in the relationship between the president, prime minister, and parliamentary majority in Ukraine—for all periods under observation here.⁹⁸ The strong legislative veto of the president, the presidential prerogatives in the dismissal of constitutional court judges, and the weak element of countersignature were combined with the structural weaknesses of the party system (grossly affected by the legacy of a patrimonial presidency) and the advantage-seeking behavior of the central political actors.⁹⁹

Viktor Juščenko later characterized the time of his presidency in stark dissociation from Yulia Tymošenko—the prime minister during his presidency—claiming that “[t]he most serious [sic] mistake was to give the power to her twice.”¹⁰⁰ Juščenko’s quote shows how the self-perception of his role as president is different from what is stipulated in Article 114, Article 106 Paragraph 9, Article 90, and Article 83 of the Constitution of Ukraine concerning the nomination of the prime minister, and Article 115 concerning the dismissal of the prime minister.¹⁰¹ As of January 1, 2006, the president confirmed that the recommended prime minister would be elected by parliament.¹⁰² This rather ceremonial role contradicts Juščenko’s assessment that it was his prerogative to give the power to the prime minister.¹⁰³ This is the textbook definition of patrimonial presidential behavior and shows how deeply social constructions of political leadership are embedded in the political culture of this country.

Additionally, the constitutional power still vested in the president (apart from the debated nomination and appointment procedure of the

95. Paul D’Anieri, *What Has Changed in Ukrainian Politics? Assessing the Implications of the Orange Revolution*, 52 PROBS. POST-COMMUNISM 82, 87 (2005).

96. José Antonio Cheibub & Svitlana Chernykh, *Are Semi-Presidential Constitutions Bad for Democratic Performance?*, 20 CONST. POL. ECON. 202, 226 (2009).

97. Henry E. Hale, *Democracy or Autocracy on the March? The Colored Revolutions as Normal Dynamics of Patronal Presidentialism*, 39 COMMUNIST AND POST-COMMUNIST STUD. 305, 314 (2006).

98. Lucan Way, *Civil Society and Democratization*, 25 J. DEMOCRACY, no. 3, 2014, at 35–43.

99. *Id.*

100. *Yushchenko Tells About His ‘Worst Mistake’*, KYIV POST (May 31, 2010, 3:27 PM), <http://www.kyivpost.com/content/politics/yushchenko-tells-about-his-worst-mistake-68117.html>.

101. See CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 83, 90, 106, 114, 115.

102. *Id.* art. 106, ¶ 9.

103. See *Yushchenko Tells About His ‘Worst Mistake,’ supra* note 100.

prime minister and the cabinet) intensified this development.¹⁰⁴ For example, the legislative veto, which can only be overruled by a two-thirds majority, allows the president to retain a *de facto* powerful position.¹⁰⁵ With a fragmentation level of 0.83 (own calculation) in the *Verkhovna Rada* (Parliament of the Ukraine) after the 2006 parliamentary elections, Juščenko was able to block legislative projects.¹⁰⁶ As Åslund has demonstrated, Juščenko vetoed nearly all legislative projects by the government starting in April 2007; 2008 is especially characterized by a “stalemate,” largely induced by the president.¹⁰⁷ The election of Viktor Janukovič in 2010 meant a reverse in constitutional politics. Following the problematic selection of a new prime minister—and trying to avoid opposition leader Yulia Tymošenko—there was, effectively, a constitutional *coup d'état*, which was approved by the constitutional court.¹⁰⁸ Additionally, the court re-established the 1996 constitution with a semi-presidential system in the manner of a president-parliamentary system by declaring the 2004 amendment unconstitutional.¹⁰⁹

In 2012, President Janukovič formed a constitutional assembly tasked with working on a constitutional amendment.¹¹⁰ With these amendment ideas, Ukraine was “embarking on a purely presidential and authoritarian system.”¹¹¹ However, as one would expect of a ping-pong game, the Euromaidan protests resulted in the end of Janukovič’s presidency and constitutional politics took yet another turn.¹¹² The parliament reinstated the 2004 amendments to the constitution in February 2010, even before Janukovič left the country and, with this, returned to a premier-presidential system.¹¹³ The law “was supported by 140 MPs of the Regions Party, 89 MPs of the Batkivschyna Party, 40 MPs of the UDAR Party, 32 of the Communist Party, and 50 independent lawmakers.”¹¹⁴

104. See Gwendolyn Sasse, *Constitution Making in Ukraine: Refocusing the Debate*, CARNEGIE EUR. (Apr. 12, 2016), <http://carnegieeurope.eu/2016/04/12/constitution-making-in-ukraine-refocusing-debate/iwzg>.

105. See CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 106, ¶ 30.

106. See Petro Burkovsky & Olexity Haran, *From Presidentialism to Parliamentarism: Strengthening or Weakening Democracy in Ukraine?*, PONARS Policy Memo No. 412 from Kyiv Mohyla Acad., at 4 (Dec. 2006).

107. ANDERS ÅSLUND, *UKRAINE: HOW UKRAINE BECAME A MARKET ECONOMY AND DEMOCRACY* 222–23 (2009).

108. *Ukraine Court Boosts Powers of President Yanukovich*, BBC (Oct. 1, 2010), <http://www.bbc.com/news/world-europe-11451447>.

109. *Id.*

110. *Yanukovich Forms Constitutional Assembly Chaired by Kravchuk*, KYIV POST (May 18, 2012), <http://ru.kyivpost.com/article/content/ukraine-politics/yanukovich-forms-constitutional-assembly-chaired-b-1-127827.html>.

111. Gallina, *supra* note 78, at 508.

112. Scott Neuman, *Ukrainian President Voted Out; Opposition Leader Freed*, NPR: THE TWO-WAY (Feb. 22, 2014, 8:57 AM), <http://www.npr.org/sections/thetwo-way/2014/02/22/281083380/ukrainian-protesters-uneasy-president-reportedly-leaves-kiev>.

113. *Ukrainian Parliament Reinstates 2004 Constitution*, INTERFAX-UKR. (Feb. 21, 2014, 5:06 PM), <http://en.interfax.com.ua/news/general/191727.html>.

114. *Id.*

Since then, a new constitution has been discussed.¹¹⁵ The constitutional draft submitted to the Venice Commission, although criticized, points again in the direction of a limitation of constitutional presidential power. This also further perpetuates, however, the unclear agent-principal relation of the 2004 amendments.¹¹⁶

In line with a central argument on the relation between semi-presidentialism and democratic consolidation,¹¹⁷ in 2004 Ukraine established a premier-presidential system in times of great hope for democracy.¹¹⁸ This constitutional amendment reduced the constitutional power of the president.¹¹⁹ Yet, this democratic hope was disappointed by an authoritarian regime reproduction due to a struggle among the Ukrainian political elite.¹²⁰ With a patrimonial concept of political leadership deeply entrenched in the behavior of the political elite, both constitutional constellations proved immensely challenging for the relationship between president, parliament, and prime minister.¹²¹ It is a trademark of Ukrainian constitutional politics that “the president has sought to shape each reform process in ways that best promoted his self-interests.”¹²² It is also, however, a trademark of the post-Orange Revolution context that this self-interest was neither limited to constitutional politics nor to the president.¹²³

B. Case Study: Constitutional Politics in Georgia

From the outset, Georgia was a difficult place for a democracy to prosper as a result of a post-Soviet legacy, severe economic deficits, and a highly patrimonial society.¹²⁴ The patrimonial culture is also an explanation for the social expectations concerning a powerful leader in this context. With these preconditions in mind, the path leading to a problematic democratic consolidation (at least until 2012), combined with a powerful presidency, was persistent. In the following, I will describe the political developments under the presidencies of Eduard Shevardnadze and Micheil Saakashvili, with an emphasis on constitutional politics. Eduard

115. See RFE/RL's Ukrainian Service, *Ukraine's Prime Minister Calls For Referendum On New Constitution*, RADIO FREE EUR.: RADIO LIBERTY (Jan. 24, 2016), <http://www.rferl.org/content/ukraine-yatsenyuk-new-constitution/27508024.html>.

116. See *Ukrainian Parliament Reinstates 2004 Constitution*, *supra* note 113.

117. See Elgie & Schleiter, *supra* note 35, at 42–61.

118. *Id.*

119. See Kimitaka Matsuzato, *Disintegrated Semi-Presidentialism and Parliamentary Oligarchy in Post-Orange Ukraine*, in SEMI-PRESIDENTIALISM AND DEMOCRACY 192, 193 (Robert Elgie et al. eds., 2011).

120. *Id.* at 205.

121. See *id.*

122. Esther Seha, *The Reduction of Presidential Powers in Semi-Presidential Regimes: Armenia, Croatia, Russia and Ukraine Compared* (Ctr. for the Study of Democracy, Leuphana U. Luneburg, Working Paper, 2014), <http://ecpr.eu/Filestore/PaperProposal/b7071b81-cfc6-45ec-a7c8-08c0a277afcc.pdf>, at 13.

123. See *id.* at 4.

124. Charles H. Fairbanks Jr., *Georgia's Rose Revolution*, 15 J. DEMOCRACY, no. 2, 2004, at 110, 111, 115.

Shevardnadze and Micheil Saakashvili are the two presidents who served under the constitution analyzed here.¹²⁵ For a better understanding, I will start with a short introduction to the period in between independence and constitution-making (1991–1995).

The first incumbent of the presidential position in a sovereign Georgia after the end of the Soviet Union was Zviad Gamsakhurdia.¹²⁶ He was a former human-rights activist, played a key role in Georgia's independence movement, and was democratically elected (as far as that was possible in the turmoil of early 1991).¹²⁷ Despite this history, he was accused by media outlets, and in transformation research, of establishing dictatorial behavior right from the outset¹²⁸ and instrumentalizing the parliament to pursue his nationalistic ideas.¹²⁹ Personal affiliation with the president became a prerequisite for membership in parliament.¹³⁰ This triggered severe opposition and, finally, a *coup d'état* with a *de facto* ending of Gamsakhurdia's presidency.¹³¹ He was overthrown by the national guard and paramilitary groups and forced into a guerrilla conflict.¹³² Eduard Shevardnadze followed him as head of state in 1992 as the chairman of the State Council.¹³³

This is one of the first critical junctures that forced the development of Georgia into a specific direction, both in terms of a broader development and of constitution-making. The violent dethronement of an elected president is rarely a good sign for democratic development. Still, “[i]n an increasing returns process, it is not only a question of what happens but also of when it happens.”¹³⁴ It follows that these increasing returns are an important part of a path-dependent development. Without arguing that Georgia was a blank slate—as obviously ethnic tension and a post-Soviet legacy prevailed—a number of outcomes were theoretically possible here in the form of multiple equilibria. With the contingency of the events, however, the equilibria were narrowed down to fewer and fewer, until only one power complexity became dominant and established a path that is difficult to leave.¹³⁵ Ending the presidency of the first, more or less, democratically elected president within the first year of his term by a *coup d'état* was one of the initial events responsible for narrow-

125. *Id.* at 110.

126. *Id.* at 111.

127. Martin McCauley, *Obituary: Zviad Gamsakhurdia*, INDEPENDENT (Feb. 24, 1994), <http://www.independent.co.uk/news/people/obituary-zviad-gamsakhurdia-1396384.html>.

128. Darrell Slider et al., *Political Tendencies in Russia's Regions: Evidence from the 1993 Parliamentary Elections*, 53 SLAVIC REV. 711, 712 (1994).

129. *Id.*

130. *Id.*

131. *Id.*

132. McCauley, *supra* note 127.

133. *Id.*

134. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000).

135. *Id.* at 265.

ing the possibilities for democratic development.¹³⁶ Moreover, Shevardnadze took over the chairman position with questionable legitimization. Although he was directly elected, he was the only candidate for the office of chairman of the State Council.¹³⁷ Additionally, the elections took place in a “semi-warlike environment.”¹³⁸ The context of these elections was violent, inscrutable, and even dangerous.¹³⁹ Based on this legitimization, Shevardnadze ruled *de facto* until the establishment of the new constitution in 1995.¹⁴⁰ As the dominant leader, he narrowed the path for the constitutional power developed later on in the constitution.

Prior to 1995, the constitution-making process illustrates the intertwined relation between presidential power and democratic success. First, and foremost, it was a confrontational process between parliament and president. What Roeder called the “bureaucratic coalitions and oligarchs”¹⁴¹ brought Shevardnadze in, but, at the same time, forced upon president and parliament a leadership dilemma remaining the dominant area of conflict, even after 1995.¹⁴² The constitutional commission working on the constitutional drafts arguably discussed a clear break from the *de facto* presidentialized leadership, even favoring a parliamentary or moderate semi-presidential system.¹⁴³ This corresponds with arguments made by Geddes¹⁴⁴ and Easter,¹⁴⁵ who show that the establishment of a strong presidential institution is mostly the result of a classic power struggle. Georgia’s constitution-making process before 1995 provides evidence for this endogenous development.¹⁴⁶ Using the same argument as Cheibub,¹⁴⁷ Fortin-Rittberger shows that the formation of executive-legislative power relations is very much a product of the context in which this relation is developed.¹⁴⁸ The weak state capacity in Georgia actually supported the expansion of presidential constitutional power, which is also in line with an overall comparative perspective on the post-communist space.¹⁴⁹

136. IRAKLY ARESHIDZE, *DEMOCRACY AND AUTOCRACY IN EURASIA: GEORGIA IN TRANSITION* 29 (2007).

137. *Id.* at 34.

138. *Id.*

139. As one description exemplifies, “ordinary citizens who had nothing to do with the rebellion against Gamsakhurdia, and who were not politically active, were defending polling stations with automatic rifles from possible disturbances and attacks by Gamsakhurdia’s supporters.” *Id.*

140. *Id.*

141. Philip G. Roeder, *Varieties of Post-Soviet Authoritarian Regimes*, 10 *POST-SOVIET AFF.* 61, 81 (1994).

142. ARESHIDZE, *supra* note 136, at 37.

143. ANNA KAPANADZE, *THE CONSTITUTION-MAKING POLITICS IN GEORGIA* 16 (2010).

144. Barbara Geddes, *A Comparative Perspective on the Leninist Legacy in Eastern Europe*, 28 *COMP. POL. STUD.* 239, 268 (1995).

145. Gerald M. Easter, *Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS*, 49 *WORLD POL.* 184, 209 (1997).

146. Jessica Fortin-Rittberger, *Does Weak State Capacity Lead to Vertically Concentrated Executives?* (2014), <http://ssrn.com/abstract=2452830>, at 6.

147. *See generally* JOSÉ ANTONIO CHEIBUB, *PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY* (2007).

148. Fortin-Rittberger, *supra* note 146, at 3.

149. *Id.* at 14.

The refusal of Shevardnadze to accept a constitutional draft with a medium or even low-level power institution is an indicator of the problems in democratic development after 1991, rather than simply a cause of it. The causes of the problematic development were diverse. Like most post-Soviet countries, Georgia faced economic problems, fragile statehood, and, as discussed earlier, a highly patrimonial society.¹⁵⁰ Additionally, issues of territory and national identity arose, as “[n]ationalism fueled the early democratic movements, and then immensely complicated their successful institutionalization.”¹⁵¹

Under this pretext, Georgia’s constitution was adopted in 1995 and established a powerful presidential institution.¹⁵² The outcome of this patrimonial setting and the constitution tailor-made for Shevardnadze, who was also head of the constitutional commission, was an almighty presidential institution.¹⁵³ The president had the power to initiate a referendum on important matters and he was the head and commander of the armed forces.¹⁵⁴ He also had the right to issue a legislative veto, which could only be overruled by a three-fifths majority,¹⁵⁵ as well as an important role in the nomination and appointment of the cabinet.¹⁵⁶ This is a specification in Georgia from 1995–2004, indicating that a prime minister, as such, was not established by the constitution; rather, all competences concern all ministers, with one minister being responsible for the chancellery.¹⁵⁷ This paints a picture of a presidency with immense constitutional power.

Thus, in terms of constitutional power, the strong legislative veto and the role of the president as head of government were arguably the most influential. According to Article 77 of the Constitution of the Republic of Georgia, the president nominates a new government as soon as the presidency starts.¹⁵⁸ This competence, however, is technically limited, as the parliament has to confirm the nomination and can, upon the request of a one-third majority, provoke a vote of no confidence and, with a majority, the dismissal of government.¹⁵⁹ Additionally, up until 2004, the dissolution of the parliament was not included in the constitutional provisions.¹⁶⁰

At this time, the constitution-making process was already influenced by the social expectations from political leadership.¹⁶¹ The strong patrimonial construction of the society is one central argument in ex-

150. *Id.* at 6.

151. Fairbanks Jr., *supra* note 124, at 111.

152. RICHARD BIDLACK, *RUSSIA & EURASIA* 251 (46th ed. 2015).

153. KAPANADZE, *supra* note 143, at 16.

154. THE CONSTITUTION OF GEORGIA Aug. 24, 1995, art. 73, 74.

155. And a 2/3 majority to overrule a veto on constitutional amendments. *Id.* art. 68.

156. *Id.* art. 77, 80.

157. KAPANADZE, *supra* note 143, at 16–17.

158. THE CONSTITUTION OF GEORGIA Aug. 24, 1995, art. 77.

159. *Id.* art. 81.

160. KAPANADZE, *supra* note 143, at 25.

161. *Id.* at 3.

plaining the acceptance of the Shevardnadze leadership.¹⁶² This may also be explained by the lack of public interest. The public, understandably, was mainly concerned with the real-life conflict in Abkhazia, not with the rather abstract constitution-making.¹⁶³ Nonetheless, if we consider Max Weber's definition of patrimonialism, the importance of personal relations and the unclear relation between the public and the private sphere are also part of the explanation.¹⁶⁴

The high level of constitutional power has led to a presidential dominance not atypical for the post-Soviet area. At the same time, Shevardnadze continued on the previously described path of increasing returns. This is a classic observation for countries with strong executives.¹⁶⁵ When a strong government accumulates political power, the exclusion of other actors deepens social or partisan cleavages.¹⁶⁶ This then leads to less resistance to any authoritarian government behavior and, evidently, to an increasing returns process. The danger is that the attractive option of unchallenged authoritarian behavior institutionalizes, increasing "the difficulty of reversing the course down which actors have started."¹⁶⁷ This equilibrium becomes "resistant to change."¹⁶⁸ Political analysts credit Shevardnadze with some success in the process of democratic reforms.¹⁶⁹ His later years, however, especially with alleged election frauds and his only half-hearted fight against corruption, led to the so-called Rose Revolution and his forced resignation.¹⁷⁰ He was succeeded by his former protégé, Micheil Saakashvili, in 2004.¹⁷¹

The only real change achieved in Georgian politics, however, was an even stronger presidential domination under Saakashvili. The constitutional amendment of 2004 destroyed the hopes raised during uprisings labeled as a colorful revolution.¹⁷² The 2004 amendment strengthened the already powerful position of the president.¹⁷³ Although establishing the new position of a prime minister in the constitution, the presidential competences in the nomination and appointment of this prime minister and the dissolution of parliament were extensive. He also had the power to dissolve parliament in the event that it failed to confirm the government chosen by the president.¹⁷⁴ The same applies for the vote of no confidence, leaving the president to decide on the fate of the parliament—

162. Fairbanks Jr., *supra* note 124, at 115.

163. *Id.* at 111.

164. STEPHAN HENSELL, *DIE WILLKÜR DES STAATES: HERRSCHAFT UND VERWALTUNG IN OSTEUROPA* 49–54 (2009).

165. Pierson, *supra* note 134, at 265.

166. Patrick H. O'Neil, *Hungary: Political Transition and Executive Conflict: The Balance or Fragmentation of Power?*, in *POSTCOMMUNIST PRESIDENTS* 216 (Raymond Taras ed., 1997).

167. Pierson, *supra* note 134, at 257.

168. *Id.* at 263.

169. ARESHIDZE, *supra* note 136, at 33.

170. Fairbanks Jr., *supra* note 124, at 110.

171. *Id.*

172. *Id.* at 118.

173. THE CONSTITUTION OF GEORGIA Aug. 24, 1995 (amended 2004).

174. *Id.* art. 80.

either dissolving it, calling for early elections, or appointing a new prime minister.¹⁷⁵

What was critically judged was the new, increased presidential competence concerning the budget. The prime minister was in charge of the preparation of the budget and the parliament had to confirm it; failing this confirmation three times could result in the dissolution of parliament by the president.¹⁷⁶ With the prime minister arguably featuring as the “creature”¹⁷⁷ of the president, this decree power can become highly problematic.¹⁷⁸ This budget decree, however, would have only been in force for a month.¹⁷⁹ Therefore, the limited capacity in the long-term political decision-making can also lead to a less dramatic interpretation of this competence.¹⁸⁰

Within this context, the presidential power under Saakashvili can be considered at its peak. Choosing the flag of his party—the United National Movement¹⁸¹—as the new country flag,¹⁸² as well as naming Ataturk as one of his inspirational political leaders, Saakashvili clearly showed that his first intention was state building and not democratization.¹⁸³ Additionally, running for office in parliamentary elections, “Saakashvili handpicked the MPs to be placed on UNM’s [United National Movement] list thus commanding ultimate party loyalty.”¹⁸⁴ This complete loyalty is combined with a diffuse or even nonexistent separation of party and government.¹⁸⁵ Nevertheless, the one-party dominance was ended by the parliamentary elections in 2012.¹⁸⁶ The diverse group of political parties winning the parliamentary elections in October 2012 under the umbrella of the Georgian Dream Movement¹⁸⁷ constituted the first period of cohabitation in Georgia.¹⁸⁸ During this period, contrary to the idea of an almighty presidential institution, the *de facto* power of Saakashvili was, at least minimally, under pressure.¹⁸⁹ After the parliamentary election in 2012, Saakashvili faced cohabitation.¹⁹⁰ During the twelve months leading up to the presidential elections, the relations between president, prime minister, and parliament were highly confrontational.¹⁹¹

175. *Id.* art. 73.

176. *Id.* art. 80.

177. ARESHIDZE, *supra* note 136, at 201.

178. *See id.* at 202.

179. *See id.* at 200.

180. THE CONSTITUTION OF GEORGIA Aug. 24, 1995, art. 73, art. 93.

181. *Ertiani Natsionaluri Modzraoba (ENM)*.

182. Lincoln A. Mitchell, *Democracy in Georgia Since the Rose Revolution*, 50 ORBIS 669, 673 (2006).

183. *Id.* at 674.

184. Melanie G. Mierzejewski-Voznyak, *Party Politics After the Colour Revolutions: Party Institutionalisation and Democratisation in Ukraine and Georgia*, 30 EAST EUR. POL. 86, 94 (2014).

185. Mitchell, *supra* note 182.

186. Mierzejewski-Voznyak, *supra* note 184.

187. *K’art’uli ots’neba—demokratiuli Sak’art’velo*.

188. Mierzejewski-Voznyak, *supra* note 184, at 100.

189. *Id.*

190. *Id.*

191. *Id.* at 96–97.

The different perspective of, for example, deputies, journalists, and others on the presidential institution can best be characterized by the surprise of some political analysts at the democratically elected parliamentary majority actually daring to override a presidential legislative veto.¹⁹²

But why did this happen? For Georgia, as a hybrid regime,¹⁹³ legitimacy as the explanatory pillar of autocratic stability applies.¹⁹⁴ The binding and exemplary nature of legitimacy¹⁹⁵ depends on it being duly accepted.¹⁹⁶ In 2010, the Georgian Parliament decided on a far-reaching constitutional amendment to reduce presidential constitutional power.¹⁹⁷ This amendment was initiated by Saakashvili in preparation of the end of his second term as president.¹⁹⁸ It was widely reported that Saakashvili wanted to run for prime minister following his two terms as president. Although these reductions did not come into force until after the 2013 presidential election, the social expectations of the presidential institution shifted.¹⁹⁹ This probably came as a surprise to Saakashvili.

The decrease in presidential constitutional power initiated by Saakashvili in 2010 was equal to admitting that the presidency does not necessarily have to be almighty. In addition, his failed foreign policy towards Russia added to a sense of undermined legitimacy.²⁰⁰ With one pillar of autocratic stability breaking down, Saakashvili suddenly seemed vulnerable. This sudden and unexpected vulnerability constitutes an incident that resulted in the fall of political actors that had been invulnerable in many countries up to that point.²⁰¹ This curtailing holds one central explanation as to why the Dream Movement of Bidzina Ivanishvili broke the one-party dominance of Saakashvili's United National Movement.²⁰² This also corresponds with research on elections in undemocratic contexts similar to Georgia.²⁰³ It shows that presidential influence over political offices is the most problematic factor in the establishment of a united

192. *Georgian Parliament Overrides Presidential Veto on Amnesty Law*, ELECTIONS WATCH (Jan. 14, 2013), <https://electionswatch.org/2013/01/14/georgian-parliament-overrides-presidential-veto-on-amnesty-law/>.

193. Larry Jay Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCRACY, no. 2, 2002, at 30.

194. Johannes Gerschewski, *The Three Pillars of Stability: Legitimation, Repression, and Co-optation in Autocratic Regimes*, 20 DEMOCRATIZATION 13, 18 (2013).

195. See generally MAX WEBER, *SOZIOLOGISCHE GRUNDBEGRIFFE: MIT EINER EINFÜHRUNG VON JOHANNES WINCKELMANN* (1984).

196. Donald H.J. Hermann, *Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence*, 33 DEPAUL L. REV. 1, 10 (1983).

197. Daisy Sindelar, *Georgian Parliament Approves Controversial Constitutional Amendment*, RADIO FREE EUR. RADIO LIBERTY (Oct. 15, 2010), http://www.rferl.org/content/Georgian_Parliament_Approves_Controversial_Constitutional_Amendment/2191769.html.

198. *Id.*

199. HENRY E. HALE, *PATRONAL POLITICS: EURASIAN REGIME DYNAMICS IN COMPARATIVE PERSPECTIVE* 207 (2014).

200. Vasif Huseynov, *The Foreign Policy of Post-Soviet Georgia: Strategic Idealism and the Russian Challenge*, 5 CAUCASUS INT'L 117, 125 (2015).

201. Mierzejewski-Voznyak, *supra* note 184, at 97–98.

202. *Id.* at 99.

203. *Id.* at 102.

opposition before national elections.²⁰⁴ Most parties facing the choice of office-seeking or democratization are reluctant to oppose the president.²⁰⁵ After all, he will be the one to decide on the government formation and the parties' role within it. The reduction of presidential constitutional power in this area of decision-making is important for the strength of the opposition. It seems, however, that in Georgia, merely the expectation of a reduction of presidential influence sufficed. Hence, the power of the social expectation towards the role constructed by the constitution should not be underestimated for institutional change.

Georgia provides a nearly ideal case for the dialectic perspective that the constitution is greatly shaped by the behavior of individual actors.²⁰⁶ This, in turn, establishes an institutional path that is hard to leave. Even more importantly, the case provides evidence that the trigger for change in Georgia was not provided by a revolution, but by a constitutional amendment that had unexpected effects. The so-called Georgian Rose Revolution was, in fact, the reproduction of the deficits in the political system.²⁰⁷ Still, the constitutional amendment of 2010 to reduce presidential constitutional power, although not in force at that time, changed the perspective on the power of the president.²⁰⁸ This is not a causal argument, but further research on the effect of amendment processes on social expectations of institutions seems promising.

VI. CONCLUSION

After the end of the Soviet Union, citizens and political elites alike "pinned their hopes"²⁰⁹ for a democratic future in Eastern Europe on the establishment of a Western-style constitutional democracy.²¹⁰ Twenty-five years later, however, we see that some countries, in particular in the post-Soviet region, are facing corrupt leadership, severe economic deficits, and the stabilization of initially hybrid regimes with autocratic elements or even a full-fledged autocracy.²¹¹ The deep disappointment in the inability to develop stable democratic constitutional systems is a serious problem, both for the individual countries and for our perspective on the perks of constitutional engineering.²¹²

Based on a comparative perspective, I tested some of the established explicatory variables for the post-Soviet area. The level of free-

204. Jennifer Gandhi, *The Role of Presidential Power in Authoritarian Elections*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 213 (Tom Ginsburg & Alberto Simpser eds., 2014).

205. *Id.*

206. Mierzejewski-Voznyak, *supra* note 184.

207. *Id.*

208. Vasili Rukhadze, *Georgian Parliament Once Again Alters Constitution*, EURASIA DAILY MONITOR (Oct. 10, 2013), http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=41477&no_cache=1#.V-C0ISgrLIU.

209. Fruhstorfer & Hein, *supra* note 6, at 548.

210. *Id.*

211. *Id.*

212. Michel Rosenfeld et al., *Central and Eastern European Constitutionalism a Quarter Century After the Fall of the Berlin Wall: Introduction to the Symposium*, 13 INT'L J. CONST. L. 119, 120 (2015).

dom proves to have the most reliability in explaining the occurrence of constitutional amendments, the higher the level of democratic development the more likely a constitutional amendment. Also, the level of presidential power has a comparable effect.

The case studies show that in none of those cases did constitutional politics resemble anything similar to window dressing or ruling against rules. Much more can be done to substantiate this claim beyond the circumstantial evidence I provide through these case studies. While this is beyond the scope of this Article, the process tracing and nonlinear influence of leadership change, democratic change, and constitutional politics would be particularly interesting for other countries in this region and beyond.

Ukraine experienced something referred to as a constitutional ping-pong game,²¹³ with a back-and-forth of constitutional amendments. The constitutional amendments that accompanied the political change from Leonid Kuchma to Viktor Juščenko in 2004 (inauguration 2005), from Viktor Juščenko to Viktor Janukovič in 2010, and from Viktor Janukovič to Petro Porochenko in 2014, were encouraged by the presidents, who staked a claim to the constitution. In the course of these events, however, Ukraine has increasingly developed clear characteristics of authoritarian constitutionalism,²¹⁴ despite what we might think of its democratic development. It is an example of the textbook definition of patrimonial presidential behavior, where constitutional amendments have become an instrument of control and of power politics.

On the other hand, constitutional politics worked as a trigger for democratic development in Georgia. Interestingly enough, not the 2004 Rose Revolution, but years later, a 2010 constitutional amendment, brought instability to the autocratic leadership. This amendment—although not in force at that time—changed the expectations regarding the ruling elite and weakened their cohesion. Suddenly, President Saakashvili seemed vulnerable. There is strong evidence to suggest that institutions represent expectations with respect to the actors' behavior.²¹⁵ Complementary social expectations make institutions stable. But what happens when the institution changes? The Georgian case provides evidence that institutional change also results in a change in social expectations. This relation, however, was observed for one case in a very specific transformation context. Further empirical research is required to determine whether this inverse relation also exists in other cases.

213. Fruhstorfer & Hein, *supra* note 6, at 568.

214. Mark Tushnet, *Authoritarian Constitutionalism*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 45–46 (Tom Ginsburg & Alberto Simpser eds., 2014).

215. Wolfgang Streeck & Kathleen Thelen, *Introduction* to *BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES* 9 (Wolfgang Streeck & Kathleen Thelen eds., 2005).