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POST-SOCIALIST CONSTITUTIONS: THE DE JURE – DE FACTO GAP, ITS EFFECTS AND DETERMINANTS

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Post-Socialist Constitutions: *The De Jure – De Facto* Gap, Its Effects and Determinants

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Abstract

In this paper we aim to contribute to the debate on constitutional rules and their economic effects by extending the focus to the de jure – de facto constitutional gap. Firstly, we provide evidence that the size of this gap matters as non-compliance lowers the effectiveness of the constitutional commitment mechanism. Secondly, we identify several explanans of this gap, in particular relating to the democratization process, political conflict, age and comprehensiveness of the constitution. We base the conclusions on an empirical study for the unique setting of the post-socialist countries of Europe and Asia, which all enacted new constitutional frameworks after 1989, and argue that the constitutions in these countries acted primarily as blueprints.

Keywords:

Constitutional Economics, constitutional compliance, post-socialist transition, economic reforms, sham constitutions

JEL:

H11, K19, P21, P26

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1 Introduction

During the last ca. 15 years numerous empirical studies provided results confirming significant economic effects of constitutional rules introduced by different countries, relating to electoral systems, models of government, constitutional rights and freedoms, constitutional enforcement mechanisms etc. (see e.g. surveys by Voigt 2011a, 2011b). Proponents of this approach view the constitution primarily as a mechanism allowing to counteract time-inconsistency problems connected with drafting and implementing economic policy. Containing rules that impose constraints on activity of state authorities (e.g. separation of powers, bills of rights, an independent constitutional judiciary, constitutional budgetary limits), the constitution acts as a mechanism allowing to turn promises made by representatives of state power into credible commitments.

However, a more detailed view at these studies reveals that their authors usually argue that it is *de facto* constitutional rules (rules factually operating within states) that matter for various aspects of the functioning of the economy, not *de jure* rules (formal rules specified directly in the constitution texts). Some of these studies indicate that *de jure* constitutional rules are insignificant in this respect (e.g. Blume et al. 2009 with reference to direct democracy mechanisms; Voigt et al. 2015 – concerning constitutional court independence), while others argue that they may actually bring about negative economic consequences (e.g. Bjoernskov 2015 – referring to property rights protection). If it is *de facto*, not *de jure*, constitutional rules that matter, a significant question arises about the circumstances, in which *de facto* constitutions deviate from their formal wording. Most of the recent studies in the field (e.g. mentioned earlier in this paragraph) provide evidence of the existence of a *de jure* – *de facto* gap for various constitutional rules and increasing literature emerges regarding the factors explaining both types of rules, including studies interested in finding whether text matters for *de facto* operation of constitutional rules. The gap itself however – its potential effects and determinants – has not been subject to detailed analysis.

In this paper we aim to contribute to the debate on constitutional rules and their economic effects by extending the focus to the *de jure* – *de facto* constitutional gap. Firstly, we provide evidence that the size of this gap matters. The intuition behind this effect is that non-compliance lowers the effectiveness of the constitutional commitment mechanism. Secondly, since the gap matters, we ask the question about its determinants.

Bearing in mind the risks of potential oversimplification and omissions involved in studies of the complex relationship between constitutional frameworks and economic

performance in large-sample cross country studies, the empirics of this paper focus on an area, which provides particularly fruitful ground for Constitutional Economics studies – the post-socialist countries of Europe and Asia¹. Transformation of the political and economic systems that took place in these countries starting from 1989 required breaking away with the socialist/communist system of institutions and the establishment of new constitutional frameworks. Indeed, starting in 1990 all of these countries, with the exception of Latvia, adopted new constitutions². This unprecedented time of broad-scale constitutional and, more generally, institutional change has sometimes been called a “gigantic natural experiment” (Elster 1991, p. 449).

Importantly from the point of view of the main interest in this paper, post-socialist countries did not adopt a common constitutional model³. They differ in basic characteristics of their constitutions such as length (from less than 5000 words for Latvia to more than 19000 words for Poland, Serbia and Ukraine) and whether the constitution is composed of a single legal document or more documents (e.g. two – for the Czech Republic, three – for Lithuania). However, more importantly, the specific constitutional solutions encompassed by these acts vary significantly, even those pertaining to such fundamental components of modern constitutions as the structure of government, bill of rights or enforcement mechanisms⁴.

At the same time the practical operation of constitutional provisions has been found to differ significantly amongst the post-socialist countries. Law and Versteeg (2013) propose several measures of constitutional compliance in the area of bills and rights and distinguish between four types of constitutions: (1) strong constitutions, i.e. ones with high *de jure*, as well as *de facto* protection (constitutions which promise much and deliver much in practice); (2)

¹ These are: countries of Central and Eastern Europe (Albania, Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia); former Yugoslavian republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia); and former Soviet republics (Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan). Acknowledging the differences in the political and economic systems functioning in these countries before 1989, we further refer to all of them as ‘post-socialist countries’ or ‘transition countries’.

² The adoption of post-socialist constitutions took place in the period 1990-2011, with greatest intensity between 1990 and 1996 (except Hungary and Latvia all post-socialist countries introduced at least a provisional constitution in this period). Hungary operated on the basis of its numerously amended 1949 constitution throughout most of transition, adopting a new constitution as late as in 2011. Latvia returned in 1991 to its 1922 constitution (with several significant amendments).

³ Ludwikowski (1998) calls this constitution-making process ‘gardening’, as the solutions provided in post-socialist constitutions “*are like seedlings carefully chosen from different gardens and implanted, piece by piece, into living, constantly changing vegetation composed of rules, norms, and institutions*” (p. 64). For more on influence of foreign constitutional models on post-socialist constitution-drafting see also Ludwikowski (2000), Ordeshook (2002), Osiatynski (2003), or Dupre (2003).

⁴ For a more detailed discussion of these differences see e.g. Metelska-Szaniawska (2016) or various comparative constitutional legal analyses (e.g. Ludwikowski 1998).

sham constitutions, i.e. ones with high *de jure* protection and low *de facto* protection (constitutions which promise much and deliver little in practice); (3) weak constitutions, i.e. ones with low *de jure*, as well as *de facto* protection (constitutions which promise little and deliver little in practice); (4) modest constitutions, i.e. ones with low *de jure* protection and high *de facto* protection (constitutions which promise little but deliver much in practice). Among post-socialist countries 18 have strong constitutions (with Slovenia having the #3 'strongest' constitution of the world according to this classification), 6 are sham (Russia – #5 'worst sham' constitution in the world), 1 is weak (Kazakhstan – #3 weakest constitution in the world) and 1 is modest (Bosnia and Herzegovina – #5 'most modest' constitution in the world).

The literature on relations between *de jure* and *de facto* constitutional rules emphasizes that the starting point for such analyses should be the specification of a given country's type of constitution from the point of view of its function. In this context Melton et al. (2013) propose to distinguish between 4 types of constitutions: constitutions fulfilling the function of *operating manuals*, *constitutions-blueprints*, *constitutions-billboards*, and constitutions as *window-dressing*. Literature on post-socialist constitutionalism (e.g. Sadurski 2002) emphasizes that although the specific constitutional solutions adopted by various countries of the region differ, the main common feature of these constitutions was the attempt, reflected in their content, to break away from the socialist or communist past, by giving priority to provisions declaring the democratic nature and sovereignty of these states. Such circumstances correspond with the view of the constitution's role as a blueprint. In such case the discrepancy between *de jure* and *de facto* constitutional rules is initially determined by the informal institutional framework functioning in post-socialist countries/societies at the moment of drafting and enacting the *de jure* rules (cf. Pejovich 1997, Winiecki 2004). Together with the passing of time from the moment of adopting a new post-socialist constitution one could expect this gap to diminish, *ceteris paribus*, together with 'adjustment' of the constitutional practice in these societies to the formal arrangements agreed upon and included in the blueprint constitutions. At the same time, however, in their important study conducted for a sample of more than 100 countries of the world Elkins et al. (2009) argue that gaps between the constitution text and constitutional practice increase together with the aging of constitutions. This setting makes the post-socialist countries a particularly interesting area to focus the study of the *de jure* – *de facto* constitutional gap on, seeking to disentangle these two effects and search for the particular determinants of the size of this gap.

The paper is structured as follows. In Section 2 we operationalize the *de jure* – *de facto* constitutional gap, as well as measure the size of this gap and present its evolution for the post-socialist countries of Europe and Asia. Section 3 verifies whether the gap had any effect on economic transition in these countries. In Section 4 we turn to study the factors explaining the size and evolution of the gap. The paper finishes with conclusions.

2 The size and evolution of the *de jure* – *de facto* constitutional gap in post-socialist countries

We start the empirical analysis in this paper by conceptualizing and measuring the gap between *de jure* constitutional rules present in different post-socialist countries and their *de facto* operation. In this first attempt we focus simply on a selection of civil and political rights laid down (or not) in constitutions of these countries and enforced (or not) in practice. Such approach is justified both by feasibility constraints, as well as by the findings of earlier studies according to which most ‘disrespect’ for the constitution is identified in the area of civil and political freedoms (e.g. Law and Versteeg 2013)⁵. In particular, we study a selection of 7 rights/freedoms (for simplicity called ‘rights’ from now on) for which *de jure* and *de facto* measures are available and it is possible to match a single *de jure* right with the available *de facto* measure⁶. They are: freedom of movement, freedom of association, freedom of expression, freedom of the press, freedom of religion, prohibition of torture, and the right to habeas corpus⁷. Data for presence of a given right in the constitution (in a given country, in a given year) are drawn from the Comparative Constitutions Project database (Elkins et al. 2014), while data for their *de facto* equivalents from the CIRI database (Cingranelli et al. 2014 – for 6 of the 7 rights) and Freedom House’s Freedom of the Press database (Freedom House 1990-

⁵ While an interesting body of literature exists regarding constitutional compliance in the area of social and economic rights (e.g. Ben-Bassat and Dahan 2008, 2016; Law and Versteeg 2013), we refrain from focusing on this category of rights in this paper. The reason for this deliberate decision is the specific situation which arose with regard to these rights during the constitution-drafting process in post-socialist countries. Rights of this category were widely present in the socialist constitutions of these countries (but not accompanied by effective enforcement mechanisms, what left them primarily as empty declarations) and transition to a market economy often required their *de jure* curtailment, not extension. While this was usually the subject of serious disagreement between constitution-drafters in post-socialist countries, it also signifies that the role of the constitution as a blueprint for the society is not as evident with respect to this category of rights and their enforcement is a more complex issue (e.g., as in Poland’s constitution, some social and economic rights may be enforced directly by courts, while others are simply declarations of the state’s tasks vis-à-vis the citizens and their groups).

⁶ Some *de facto* indicators had to be excluded from analysis on this ground (e.g. Cingranelli et al.’s (2014) extrajudicial killings and electoral self-determination).

⁷ Numerous typologies of rights and freedoms exist and under some of them prohibition of torture and the right to habeas corpus are also classified as personal integrity rights.

2015a – for freedom of the press). The *de facto* indicators have been re-scaled to take values between 0 and 1 with higher values corresponding to higher enforcement levels. Based on *this* data *de jure* – *de facto* gaps have been calculated for each right separately and as an aggregate (average) indicator for each country-year. The gap involves subtracting *de facto* indicators from *de jure* ones so that a positive gap signifies underperformance.

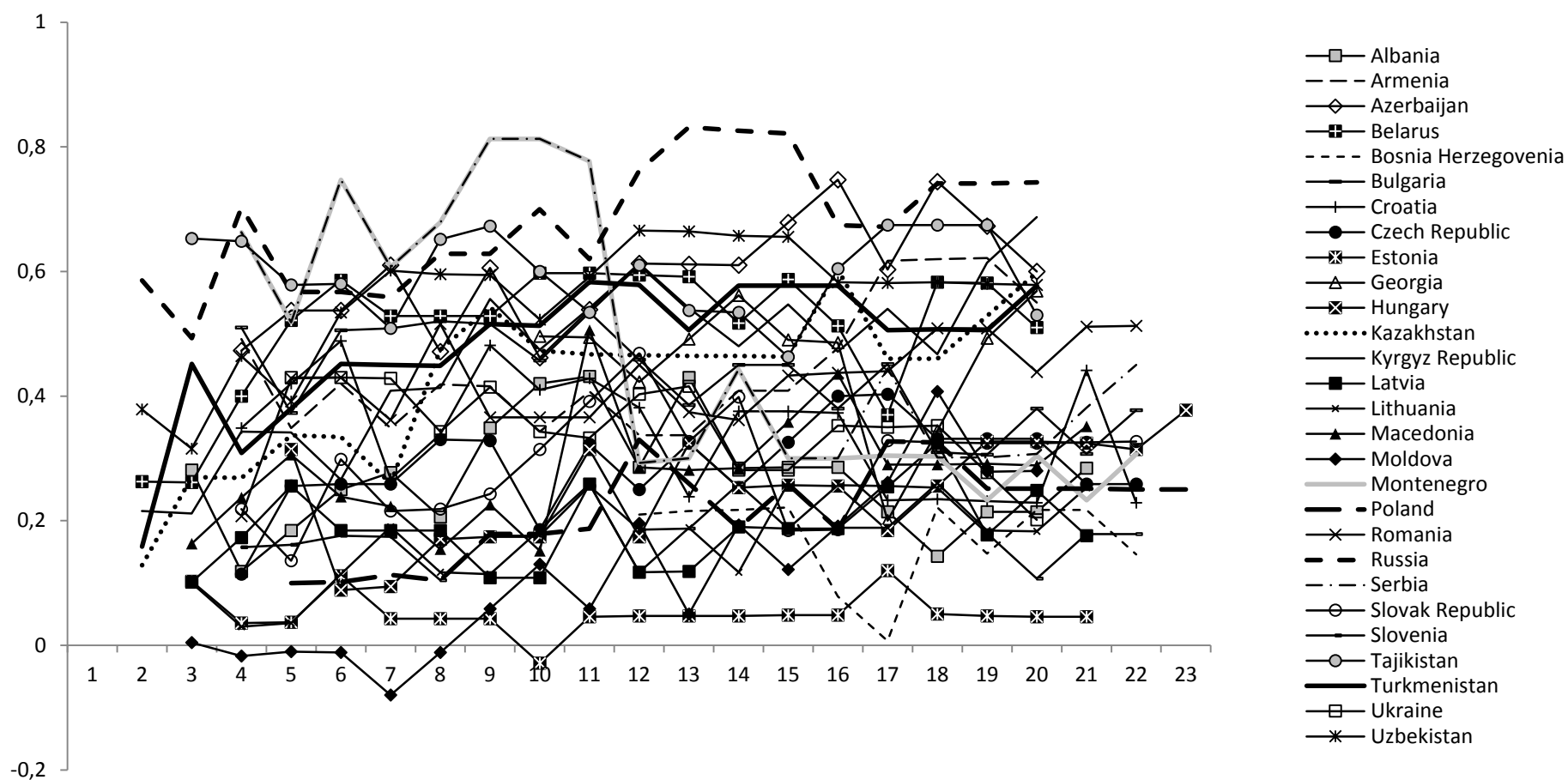
Figure 1 presents the first general view of the evolution of the gap. The size of this gap for subsequent years of transition is shown for each of the 28 post-socialist countries as a separate series. Transition time is defined as beginning in 1989 for Poland and Hungary, 1990 for other Central and Southeastern European countries (except Albania), 1991 for Albania and the Baltic states, and 1992 for the former Soviet republics⁸. The figure reveals very different trajectories. The gap takes highest values for Russia, Uzbekistan, Tajikistan (countries with sham constitutions, as classified by Law and Versteeg 2013) and Azerbaijan. Armenia, Kyrgyzstan, Belarus, and Turkmenistan follow, being examples of countries with a generally increasing trend (they experience a larger gap recently than they did at the outset of transition). Serbia demonstrates highest values of the gap for early years of transition, however experiences a considerable decrease (by half) later, what is likely to be explained by the turbulent history in the area during the 1990's. Countries with relatively lowest values of the gap (i.e. where *de facto* constitutions diverge least from *de jure* ones) are Estonia, Slovenia, Bosnia and Herzegovina (since 2005), as well as Moldova (however, with an increasing trend).

Three general observations can be formulated on the basis of Figure 1. Firstly, except for a handful of results for Estonia and Moldova in the very first years of transition, all countries demonstrate positive *de jure* – *de facto* gaps confirming that constitutional practice diverges (more or less, depending on whether the gap takes positive values close to 0 or close to 1) from the formal rules laid down in the constitutions of these states⁹. Secondly, even though all

⁸ In framing our analysis in the so-called 'transition time' rather than calendar time, in order to account for the fact that transition started at different times in different countries, we follow much of the empirical literature on economic transition in post-socialist Europe and Asia (e.g. Falcetti et al. 2002, Falcetti et al. 2005).

⁹ For Estonia the gap generally takes low values, signifying relatively high constitutional compliance in this country, and for a single year (2000) the gap is negative as a result of perfect compliance with 6 out of the 7 studied rights and overperformance in the area of press freedom (which is not stipulated *de jure* in Estonia's constitution). Overperformance in the area of press freedom (at a lower level though), as well as with regard to freedom of religion (both not included *de jure* in the constitution), also explains the negative gap for Moldova identified for the period 1995-1999.

Figure 1. *De jure – de facto* constitutional gap in post-socialist countries, 1989-2011 (transition time on the horizontal axis)



Note: *De jure – de facto* gap calculated as the difference between *de jure* and *de facto* rights protection (positive values signify underperformance, i.e. that countries' 'respect' for rights in practice is lower than the protection of these rights envisaged "on paper").

Source: Author's graph and calculations based on data from Elkins et al. (2014), Freedom House (1990-2015a), and Cingranelli et al. (2014).

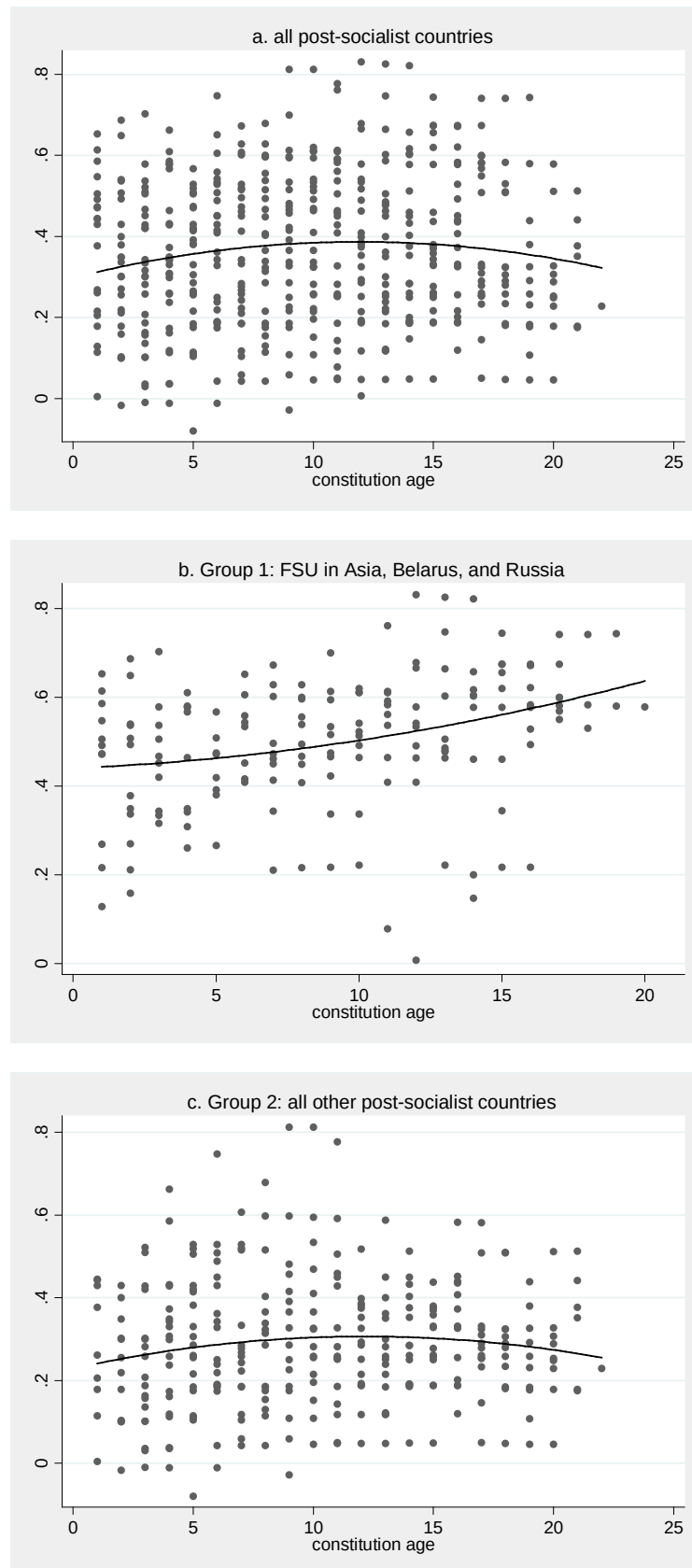
countries demonstrate considerable variation in the gap over the studied period, for many of them the size of the gap in the most recent years does not diverge significantly from its size for early years of transition. Thirdly, in the late years of transition two groups of countries seem to form: one group with the gap oscillating at ca. 0.6 (0.5-0.7) and the second group at ca. 0.3 (0.2-0.4). Members of the first group are former Soviet republics in Asia, Belarus and Russia; while members of the second group are the remaining post-socialist countries (Central and Eastern Europe, former Yugoslavia, and former Soviet republics located in Europe, including Moldova and Ukraine)¹⁰. While this is not surprising, it suggests that an important role in explaining the size of the *de jure* – *de facto* constitutional gap in these countries may be played by the democratization process.

Figure 2 relates the *de jure* – *de facto* constitutional gap to the age of post-socialist constitutions – part (a) for all post-socialist countries, while (b)-(c) for the two groups identified based on Figure 1. At the first glance part (a) does not seem to suggest that the age of post-socialist constitutions constitutes a crucial factor determining the *de jure* – *de facto* gap for these countries, however, there seems to be some evidence of a potential weak hump-shaped relationship, indicating two forces influencing the evolution of this gap for the particular case of post-socialist countries – the general tendency of constitutional practice to diverge from the formal rules as constitutions get older (as argued by Elkins et al. 2009, and earlier Strauss 1996) and the particular developments in this part of the world connected with the fulfilment of the blueprint role by post-socialist constitutions. The first tendency seems most relevant for former Soviet republics in Asia, Belarus and Russia (group 1 presented in part (b) of Figure 2), while for the remaining countries (group 2 in Figure 2(c)) the results follow the general (weak) hump-shaped pattern. These conjectures remain to be verified by the estimations presented further in the paper.

Before we embark on studying the particular factors explaining the size and evolution of the *de jure* – *de facto* constitutional gap in time, we first verify whether the gap had any relevance for the economic transition in these countries.

¹⁰ Two countries do not quite fit this broad picture – Romania with the gap oscillating at ca. 0.5 and Estonia – at below 0.1. In further studies presented in this paper we classify them together with the second group.

Figure 2. *De jure – de facto* constitutional gap and the age of post-socialist constitutions, 1989-2011



Source: Author's graph and calculations based on data from Elkins et al. (2014), Freedom House (1990-2015a), and Cingranelli et al. (2014).

3 Does the *de jure* – *de facto* constitutional gap matter?

Several aspects of the constitutional framework have proven significant for successful economic transition in post-socialist countries from 1989 onwards, including such crucial areas of change as privatization, liberalization, enterprise restructuring, competition policy and so forth. The link is based on the role of the constitution in building credible commitment of political actors vis-à-vis economic actors and the entire society. In particular, this approach, rooted in the Constitutional Economics and Political Economics literature (e.g. Persson and Tabellini 2003), emphasizes the role of constitutional constraints on discretionary power of political decision makers, as well as building the latter's capacity to push through difficult reforms, for an effective constitutional commitment-enhancing mechanism. The most recent results of Metelska-Szaniawska (2016) indicate that three aspects of the post-socialist constitutional framework were particularly relevant for the effective functioning of the commitment mechanism and, therefore, conducive to reforming the economies throughout the transition period: *de facto* constitutional court independence, *de facto* protection of constitutional rights and freedoms, as well as, in the case of some groups of countries, the factual structure of power (its concentration or deconcentration). *De jure* variables failed to prove significant in this context in any systematic way. In this section we ask the question whether the existence of the *de jure* – *de facto* constitutional gap in post-socialist countries mattered in this respect. The main expectation is that larger gaps indicating less stringent constitutional compliance undermine the effectiveness of the constitutional commitment-enhancing mechanism and result in less successful performance in economic reforms.

To test for potential significance of the *de jure* – *de facto* constitutional gap in the discussed context we employ the empirical approach developed in Metelska-Szaniawska (2009) and extended in Metelska-Szaniawska (2016), relating the constitutional framework of the post-socialist countries to their performance in the field of post-socialist economic reforms. In the employed empirical model performance in reforming the economy [variable name: *econ_reform*; measured by the aggregate transition indicator constituting an average of a set of indicators of six structural reforms (EBRD 1994-2013), taking values between 1 and 4.33 depending on the advancement in reform] is explained by a set of constitutional variables and a set of control variables. The first group includes the *de facto* measure of the concentration of power within the state [variable name: *concentration*; calculated based on the political constraints index originating from Henisz (2000, 2002, 2013); taking the value of 0 for least concentrated and 1 for most concentrated power], the *de facto* measure of constitutional rights

and freedoms [variable name: *rights*; based on the Freedom House (1990-2013b) political rights and civil liberties indices; calculated so as to take values between 0 and 1, with 1 for the broadest scope of the functioning bill of rights¹¹], as well as two measures of constitutional court independence – *de jure* and *de facto* [variable names: *CCI_dejure* and *CCI_defacto*; based on *de jure* and *de facto* judicial independence indicators proposed by Voigt et al. (2015)]. As for the control variables, the existing literature regarding the initiation and implementation of economic reforms during post-socialist transition has indicated the following determinants: the ‘initial conditions’ for reform (e.g. de Melo et al. 2001; Falcetti et al. 2002; Falcetti et al. 2005); the amount of foreign financial aid received during the transition period (Fish 1998); the outcome of the initial post-socialist elections, i.e. elite turnover (EBRD 1999; Fish 1998); the duration of the economic reforms process (Hellman 1997); the power of interest groups in a state (EBRD 1999; IMF 2000); as well as some social and cultural factors (e.g. EBRD 1999; Fish 1998)¹². In this paper we supplement this model framework with an additional explanatory variable – the size of the *de jure* – *de facto* constitutional gap. We list all variables included in the analyses in Appendix 1, together with their definitions and data sources.

Table 1 reports the relevant results for the study period 1989-2011 (constrained by the availability of rights data). Columns I-IV relate to specifications which do not include the *CCI* variables, as well as the control variable *trust* (for which data are not available for all post-socialist countries) and therefore allow for studying the largest sample (20-25 countries); Columns V-VII include the *CCI* variables but not *trust* (medium sample – 18-23 countries); while Columns VIII-X include both *CCI* and *trust* and therefore concern the smallest sample (16-20 countries). For each sample we present the results of panel data regression analyses (fixed¹³ and random effects models), system estimations accounting for potential feedback

¹¹ The inclusion of this variable together with the variable representing the *de jure* – *de facto* constitutional gap (calculated based on formal and factual protection of selected rights and freedoms) should not raise concerns as the coverage of the rights indicator is much broader. The results of estimations not including this variable yield unaltered conclusions.

¹² This list of variables is limited to the ones whose significant influence on economic reforms in transition is confirmed within the existing studies. Some other potential factors, which have raised controversy, are, for example, the average percentage of parliamentary seats held by the communist party or its direct successor during transition, as well as religious factors. Measures of the influence of various forms of state capture by interest groups (including corruption) on the functioning of enterprises, as well as foreign aid and different geographical/cultural variables proved insignificant in all specifications of the model analyzed in this paper, while not being available for the entire sample, therefore we withdrew them from further analysis. We, however, include a control variable relating to the functioning of societies in transition, i.e. a measure of trust between individuals and in their relation with political institutions of the state.

¹³ Fixed effects results are only presented for the largest sample as both *CCI* and the *trust* variable are time invariant and would be omitted in FE estimations for the remaining cases.

effects between economic reforms and economic growth (three stage least squares)¹⁴, as well as estimations using the synthetic control method (SCM) – as a robustness check. SCM focuses on comparing the evolution of a studied outcome variable (in our case: performance in economic reforms) for a unit (in our case: post-socialist country), where a particular intervention or event (in our case: adoption of a new post-socialist constitution) took place, with its evolution for a ‘synthetic counterfactual’ (i.e. ‘synthetic’ unit of interest, where the studied intervention or event did not occur) constructed based on a data-driven procedure of selecting comparison units that approximate the characteristics of the unit exposed to the intervention. In this way it allows to address the potential endogeneity problem that could arise if performance in the area of post-socialist economic reforms and constitutional variables included in the study (i.e. also the *de jure* – *de facto* gap) were influenced by confounding factors. To apply this method we proceed in two steps: Firstly, we verify whether the adoption of the constitution had any effect on economic reforms in each of the post-socialist countries (and if so, then was the resulting reform gap positive or negative, and what was its magnitude). We draw here on the estimates of the synthetic counterfactuals and reform dividends obtained for each of the post-socialist countries in an earlier study (Metelska-Szaniawska 2016)¹⁵. Then, in a second step, we study whether, and to what extent, the identified reform gaps for these countries can be explained by the *de jure* – *de facto* constitutional gaps (given other potential explanations – path dependence and factors studied previously in the regression frameworks). Specifically, this consists in running additional regressions for country-year panel data with the annual reform dividends for each country (varying year by year) as a dependent variable and the *de jure* – *de facto* constitutional gap, as well as control variables, as explanans. Columns IV, VII, and X of Table 1 present the results of this second step of estimations.

¹⁴ The relevant growth equation follows from a detailed study of the determinants of economic growth in transition, and the influence of economic reforms thereon, by Falcetti et al. (2005), and includes variables relating to: transition time, initial conditions (in interaction with transition time), lagged economic reform performance, the share of the general government fiscal balance in GDP, and economic recovery (a variable intended to control for the effect that, *ceteris paribus*, the harder the fall in output, the greater the potential for a period of rapid growth once the recovery begins). Based on the findings of recent literature (e.g. Feld and Voigt 2003; Voigt et al. 2015) we also include *CCI_defacto* in the growth equation. For the sake of clarity the detailed results pertaining to the growth equation are not presented in Table 1, however they are available from the author upon request.

¹⁵ Our choice of pre-treatment characteristics is based upon the specification used in the regression framework, i.e. includes variables related to the initial conditions for reform, the result of the first post-socialist elections, as well as lagged reform variables to account for the fact that past performance significantly influences actual performance in post-socialist economic reforms. This model also operates in transition time not calendar time.

Table 1 Estimation results for dependent variable: *econ_reform_{it}* (or *reform_gap_{it}* for SCM), 1989-2011

Independent variables	Coefficients									
	without CCI and trust				with CCI, without trust			with CCI and trust		
	I FE	II RE	III 3SLS	IV SCM	V RE	VI 3SLS	VII SCM	VIII RE	IX 3SLS	X SCM
<i>const_gap_{it}</i>	-0.28*** (-2.89)	-0.24*** (-2.51)	-0.16* (1.68)	-3.06* (-1.81)	-0.21*** (-2.44)	-0.13* (-1.63)	-4.47*** (-2.15)	-0.16*** (-1.96)	-0.13*** (-1.97)	-3.87* (-1.83)
<i>concentration_{it}</i>	-0.16*** (-2.17)	-0.16*** (-2.24)	-0.01 (-0.12)	0.24 (0.11)	-0.16*** (-2.46)	2.6×10^{-4} (0.07)	-0.36 (-0.17)	-0.15*** (-2.43)	-0.11 (-1.63)	-1.78 (-0.76)
<i>rights_{it}</i>	0.04*** (2.33)	0.05*** (3.15)	0.14*** (7.97)	0.29 (0.98)	0.06*** (4.42)	0.08*** (6.34)	0.14 (0.47)	0.06*** (4.29)	0.08*** (6.57)	0.08 (0.26)
<i>CCI_dejure_i</i>	-	-	-	-	-0.26 (-1.25)	-0.09 (-0.84)	-1.13 (-0.57)	-0.10 (-0.48)	-0.13 (-1.46)	-1.03 (-0.49)
<i>CCI_defacto_i</i>	-	-	-	-	0.51*** (3.01)	0.33*** (4.06)	2.43 (1.30)	0.37*** (2.21)	0.25*** (3.63)	2.01 (1.05)
<i>trtime_{it}</i>	0.12*** (16.90)	0.12*** (16.55)	0.04 (1.09)	-	0.11*** (16.09)	0.02 (0.70)	-	0.12*** (16.76)	0.05*** (2.88)	-
<i>trtime²_{it}</i>	-3.2×10^{-3} *** (-11.67)	-3.2×10^{-3} *** (-11.43)	-2.5×10^{-3} * (-1.73)	-	-3×10^{-3} *** (-10.65)	-5.7×10^{-4} (-0.66)	-	-2.9×10^{-3} *** (-10.59)	-3.9×10^{-4} (-0.59)	-
<i>(IC × trtime)_{it}</i>	2.2×10^{-3} (0.77)	6.1×10^{-4} (0.23)	4.5×10^{-3} (1.61)	-	9.2×10^{-4} (0.37)	5.1×10^{-3} *** (2.35)	-	1.5×10^{-3} (0.58)	8.8×10^{-3} *** (4.43)	-
<i>(IC × trtime²)_{it}</i>	2.4×10^{-5} (0.21)	7.8×10^{-4} (0.74)	-5.9×10^{-5} (-0.39)	-	2.9×10^{-5} (0.29)	-1.2×10^{-4} (-1.11)	-	5.5×10^{-5} (-0.52)	-3.7×10^{-4} *** (-3.57)	-
<i>elections_i</i>	-	0.19*** (5.49)	0.09*** (5.95)	-	0.16*** (6.77)	0.11*** (8.74)	-	0.20*** (8.40)	0.11*** (9.89)	-
<i>trust_i</i>	-	-	-	-	-	-	-	1.52*** (2.98)	0.99*** (5.67)	7.65 (1.33)
<i>growth_{it}</i>	-	-	0.05*** (4.51)	-	-	0.04*** (5.00)	-	-	0.02*** (4.38)	-
<i>reform_gap_{i,t-1}</i>	-	-	-	0.91*** (43.03)	-	-	0.90*** (38.96)	-	-	0.90*** (35.97)
<i>constant</i>	2.32*** (26.40)	1.66*** (11.57)	2.18*** (9.61)	0.86 (0.34)	1.60*** (8.11)	2.03*** (11.01)	1.53 (0.55)	0.96*** (3.70)	1.71*** (10.00)	0.61 (0.19)
<i>R²</i>	0.579	0.766	0.554	0.879	0.858	0.726	0.880	0.870	0.811	0.897
<i>F-stat. / χ^2-stat.</i>	169.59	1264.97	893.49	2543.04	1506.12	1536.87	2273.36	1778.32	1674.45	2177.06
# obs. / # countries	445 / 25	445 / 25	410 / 25	356 / 20	407 / 23	372 / 23	318 / 18	351 / 20	316 / 20	281 / 16

Note: Values of the *t*-statistic in brackets. * Significant at a 10% level, *** Significant at a 5% level.

Source: Author's calculations.

The result that stands out from all columns of Table 1 confirms our expectation: the *de jure* – *de facto* constitutional gap (*const_gap*) is significantly negatively related to the performance in economic reforms. This can be concluded on the basis of the negative statistically significant coefficients obtained for the *const_gap* variable in all columns relating to regression analyses (FE, RE), including simultaneous equation systems (3SLS). The results obtained for explaining the gaps in economic reforms (reform dividends) based on SCM also yield a significant negative coefficient on the *de jure* – *de facto* constitutional gap variable confirming the potential causal relationship, i.e. significant influence of constitutional compliance on successful performance in economic reforms. We do not discuss the results for the remaining (constitutional and control) variables in detail, as they are not the main focus in this paper, however the general conclusion holds that they behave as expected¹⁶. Interestingly, for the SCM estimations the constitutional compliance measure trumps the significance of all other individual constitutional variables included in the study. This suggests a novel finding for the literature on economic effects of constitutions highlighting the relevance of the latter as commitment-enhancing devices, namely that it is neither the sole content of the post-socialist constitutions nor the *de facto* constitutional rules present in these countries that matter for performance in economic reforms, but the degree to which the formal constitutional rules are actually complied with.

4 What determines the *de jure* – *de facto* constitutional gap in post-socialist countries?

Having found in the previous section that the *de jure* – *de facto* constitutional gap constitutes a significant determinant of successful economic transition in post-socialist countries, we now take a further step and pose the question: what explains the existence and evolution of this gap? In this endeavor we draw on the literature seeking to identify the determinants of *de jure* and *de facto* constitutional rights protection (e.g. Poe et al. 1999; Ben-Bassat and Dahan 2008, 2016; Keith et al. 2009; Hill 2010; Elkins et al. 2013; Law and Versteeg 2013; Melton 2013) and include the following potential determinants of the *de jure* – *de facto* constitutional gap in the baseline econometric tests: democratization level, presence of a political conflict, ratification of the International Covenant on Civil and Political Rights, the

¹⁶The lack of statistical significance of coefficients for some of the initial conditions variables in most of the employed specifications does not raise concern as it confirms a rather weak relevance of these factors for successful transition given that the presented study covers nearly 25 years from the outset of transition.

number of NGOs (as a proxy for development of the civil society)¹⁷, the *de facto* independence of the judiciary¹⁸, size of the economy (GDP *per capita*), population, and ethnic fractionalization¹⁹. On the one hand, more democratic regimes are expected to be more effective at upholding rights declared in the constitution and to demonstrate higher constitutional compliance than authoritarian ones. A similar positive effect is also hypothesized for countries which have ratified the aforementioned covenant, have a well-developed civil society, favorable economic conditions, and a relatively more independent judiciary as a crucial element of the rights enforcement mechanism. On the other hand, countries plagued by political conflict (including intra- and interstate wars), with large and/or heterogeneous populations are expected to be more prone to constitutional violations. Based on the considerations presented earlier in Section 2 we also include constitution age (the number of years that have passed since a given post-socialist constitution was adopted).

In an alternative specification, we follow Law and Versteeg (2013) and incorporate characteristics of constitutions relating to their comprehensiveness and ideology as potential determinants of the *de jure* – *de facto* constitutional gap in post-socialist countries. Constitutions which contain great numbers of rights provisions, as well as those which are more statist in ideological terms, are expected to perform relatively worse *de facto* than those containing primarily ‘generic rights’ and more liberal on the ideological spectrum²⁰.

Information about the construction of the discussed variables, as well as sources of data are provided in Appendix 1. Expecting path dependence, we also include a lagged gap variable. Finally, given the role of the socialist/communist institutional legacies in post-socialist countries, in order to examine the potential significance of the extent of incongruence of the *de*

¹⁷ Including the *democracy* variable in the regressions alongside the measure of civil society development should not raise concerns as competing views exist both in the theoretical and in the empirical literature with regard to their potential relation (positive or negative). While according to the neo-Tocquevillian view development of the civil society can be seen as a prerequisite for the progress in democratization (e.g. Pérez-Díaz 1993; Putnam 1994; with regard to post-socialist transition – e.g. Pietrzyk 2003), critical accounts have also been offered (e.g. Berman 1997; Rueschemeyer 1998; Bermeo, Nord 2000; Brysk 2000). For further discussion see e.g. Diamond (1999). The association between these two variables in our data also remains rather weak (correlation coefficient of 0.16).

¹⁸ Some of these studies are limited in such way that they focus on the presence of judicial review in the constitution. We argue that it is not the mere presence of such mechanism but also its ‘quality’, as expressed by the degree of judicial independence, that matters. Our empirical results support this claim as, in fact, a simple variable reflecting the presence of judicial review in the constitution proved insignificant in all tested specifications and has been removed from the final model presented here.

¹⁹ As our study concentrates on a particular group of countries – the post-socialist states of Europe and Asia – we do not include variables referring to countries’ legal origins or general country-group dummies. One exception are dummy variables for the two groups of countries discussed in Section 2, which – however – proved insignificant in all tested specifications (just like various interactions involving them).

²⁰ Since, according to Law and Versteeg (2011), the democratization level, constitution age and GDP *per capita* are likely determinants of these two constitutional characteristics, we exclude the latter three variables from this alternative specification.

jure rules laid down in the new constitutions with the prevailing informal institutional framework in place in these states during early years of transition we include an ‘initial gap’ variable capturing the aggregate (average) *de jure* – *de facto* gap for the year when the new post-socialist constitution for a given country was adopted²¹. The data for the dependent variable and the complete set of explanans are summarized in Table 2.

Table 2 Descriptive statistics

Variable name	Observations	Mean	Standard deviation	Minimum	Maximum
<i>const_gap</i>	488	0.360	0.186	-0.080	0.831
<i>democracy</i>	594	0.555	0.386	0	1
<i>conflict</i>	594	0.104	0.306	0	1
<i>covenant</i>	595	0.918	0.275	0	1
<i>ngos</i>	595	3.360	0.976	0	5.489
<i>JI_de facto</i>	591	0.469	0.274	0.017	0.958
<i>GDPpc</i>	568	8.853	0.731	6.970	10.197
<i>population</i>	568	15.782	1.051	14.109	18.819
<i>ethnic</i>	595	0.387	0.162	0.118	0.675
<i>constitution_age</i>	539	9.583	5.925	1	23
<i>initial_gap</i>	514	0.295	0.179	-0.210	0.663
<i>const_comprehensiveness</i>	382	0.387	0.167	-0.264	0.729
<i>const_ideology</i>	382	0.049	0.221	-0.389	0.522

Source: Author’s calculations.

While the main question in this section concerns identifying the set of determinants of the *de jure* – *de facto* constitutional gap, in the studied case of post-socialist countries we particularly expect to find a significant relationship between the democratization process and the evolution of this gap. Additionally, we question the significance of the age of constitutions in this context (since its effect increasing the gap is expected to be offset by a counter-effect

²¹ If there was a provisional constitution adopted by a post-socialist country early in the transition process, followed by the ultimate constitution adopted a few years later (e.g. Albania in 1991 and 1998, or Poland in 1992 and 1997) and the latter was adopted within the period of 10 years since the outset of transition, the initial gap variable takes values relating to the gap for both of these constitutions in turn. If post-socialist countries adopted constitutions later in the transition period, these are not encompassed by the initial gap variable (this concerns e.g. Kyrgyzstan’s 2006 and 2007 constitutions, Turkmenistan’s 2006 constitution, and Hungary’s 2011 constitution).

connected with the constitutions' role as blueprints in this region), while the initial size of the gap is expected to matter.

Columns I and II of Table 3 present the relevant results for the fixed- and random-effects models for the baseline specification, while Column III – for the alternative specification²². As the lack of appropriate instruments precludes the possibility of an IV-analysis which would allow to tackle the potential endogeneity problem in our data, we treat the fixed-effects panel framework (allowing to control for country-specific fixed effects) as a more reliable one for drawing conclusions based on our results²³. The time coverage of this analysis is 1989-2011 and it includes 25-27 post-socialist countries, depending on the specification. Several interesting conclusions emerge. Firstly, the *de jure* – *de facto* constitutional gap demonstrates strong path-dependence and, furthermore, 'initial gap' remains its important determinant throughout the studied period. Four of the remaining determinants confirm their significance in all columns of Table 3, in which they are included, namely: the democracy level, presence of a political conflict, age of the constitution, as well as comprehensiveness of the constitution. The effect of the first of these variables on the size of the *de jure* – *de facto* constitutional gap is negative, confirming that progress in democratization taking place in post-socialist countries after 1989 went together, *ceteris paribus*, with mitigating the *de jure* – *de facto* constitutional gap in these countries (while backlashes in democratization could in part explain the constitutional gap increases in some countries during the transition period). As expected, presence of a political conflict (relevant in particular with regard to the Balkan countries in early transition, as well as for some of the former Soviet republics throughout the studied period) is connected with an increase in the constitutional gap. The result for the variable pertaining to the age of constitution is a weak (because of the very small size of the coefficient) confirmation of the argument made by Elkins et al. (2009) and earlier Strauss (1996). Even though Figure 2 suggests a hump-shaped relationship, as well as a more clearly negative relationship for the group of countries composed by former Soviet republics located in Asia, Russia and Belarus, these conjectures fail to pass the more sophisticated econometric verification in this section²⁴. The result for the measure of comprehensiveness of the

²² The fixed effects model does not allow to study the effect of time-invariant variables, therefore it is only presented for the baseline specification.

²³ This is also suggested by the results of the Hausman tests for all included specifications for which fixed-effects results are reported.

²⁴ The results of supplementary estimations conducted for a number of extended model specifications including age of the constitution squared, as well as various country-group interactions, yielded, at best, mixed conclusions, failing to unambiguously confirm the potential country-group-specific effect of the age of constitutions in the studied context.

constitution confirms the expectation, according to which countries promising more rights in their constitutions (not only ‘generic’ ones) encounter greater gaps resulting from constitutional violations.

Table 3 Estimation results explaining the *de jure – de facto* constitutional gap, 1989-2011 (dependent variable: *const_gap_{it}*)

Independent variables	Coefficients		
	I Baseline specification FE	II Baseline specification RE	III Alternative specification RE
<i>democracy_{it}</i>	-0.095*** (-2.66)	-0.046*** (-2.11)	-
<i>conflict_{it}</i>	0.042*** (2.27)	0.032*** (1.98)	0.053*** (2.88)
<i>covenant_{it}</i>	0.058*** (2.27)	0.019 (0.96)	0.036* (1.84)
<i>ngos_i</i>	-	-0.003 (-0.60)	-0.011* (-1.85)
<i>JI_de facto_{it}</i>	0.031 (0.32)	-0.086*** (-2.36)	-0.140*** (-5.56)
<i>GDPpc_{it}</i>	-0.015 (-0.69)	0.001 (0.10)	-
<i>population_{it}</i>	-0.050 (-0.41)	0.015*** (2.76)	0.020*** (3.34)
<i>ethnic_i</i>	-	-0.057*** (-1.97)	-0.027 (-0.81)
<i>constitution_age_{it}</i>	0.004*** (2.97)	0.002*** (2.03)	-
<i>initial_gap_i</i>	0.246*** (2.87)	0.122*** (3.50)	0.106*** (2.35)
<i>const_gap_{i,t-1}</i>	0.382*** (8.53)	0.596*** (15.00)	0.605*** (13.59)
<i>const_comprehensiveness_{it}</i>	-	-	0.071*** (2.16)
<i>const_ideology_{it}</i>	-	-	-0.034 (-1.54)
<i>constant</i>	1.016 (0.53)	-0.068 (-0.75)	-0.148 (-1.54)
<i>R</i> ²	0.571	0.821	0.830
<i>F</i> -stat. / χ^2 -stat.	26.20	1977.44	1488.92
# obs. / # countries	442 / 27	442 / 27	316 / 27

Note: Values of the *t*-statistic in brackets. * Significant at a 10% level, *** Significant at a 5% level.
Source: Author’s calculations.

For the remaining potential determinants of the *de jure* – *de facto* constitutional gap the results are mixed or suggest no statistically significant relationship. With regard to the gap-mitigating effect of judicial independence and the gap-increasing effect of population size we fail to obtain a confirmation in the fixed effects estimation framework (Column I). Size of the economy is significant in neither of the two columns of Table 3, where it is included, indicating that it is rather political, not economic processes that are relevant from the point of view of respect for constitutional rights. Given that the measure of *de jure* – *de facto* constitutional gap focuses on political rights and civil liberties, such result is not surprising. The findings with regard to the number of NGOs, serving as a proxy for the development of civil society, are in line with our expectations only for the alternative specification²⁵.

We also fail to obtain a confirmation of the expected relevance of the remaining variables pertaining to the ratification of the International Covenant on Civil and Political Rights, ethnic fractionalization, and constitutional ideology. With regard to the Covenant, its insignificance or even contribution to the gap (as indicated in Columns I and III) could be explained by the fact that most of the studied countries will have ratified this legal document prior to initiating their transition process (in fact, the only countries which ratified the Covenant significantly later were former Soviet republics in Central Asia featuring relatively large *de jure* – *de facto* constitutional gaps). The results, according to which ethnic fractionalization is not a significant factor contributing to the *de jure* – *de facto* constitutional gap, indicate a general conclusion that constitutional violation in post-socialist countries is not based on ethnic grounds²⁶. With such finding in mind, the rather unexpected result suggesting a potentially negative link between ethnic fractionalization and the size of the *de jure* – *de facto* constitutional gap (Column II of Table 3) could presumably be explained by the pressure that the presence of an increased number of ethnic groups actually exerts on constraining government, and the resulting relatively more effective enforcement of the constitution. However, the reliability of the latter conclusion is limited given that it is only based on the results obtained for one of the tested models. Finally, the result presented in Table 3 indicating no significant role of constitutional ideology for the *de jure* – *de facto* constitutional gap in post-socialist countries, may be explained by the specificity of this group of countries, characterized by a common socialist (i.e. highly statist) legacy and at the same time adopting their post-socialist

²⁵ This partially unsatisfying result may be attributed to the imperfectness of this proxy (a crude time-invariant indicator accounting only for the number of NGOs registered with the UN Department of Economic and Social Affairs).

²⁶ In alternative specifications of the model we included Alesina et al.'s (2003) measures of linguistic and religious fractionalization, however this did not yield any additional meaningful conclusions.

constitutions (as mentioned at the outset of this paper) with a view to break away from this past. These two offsetting effects result in a fairly moderate degree of the ideological bias for constitutions in this group of countries (with a mean score of 0.049 for the *const_ideology* variable on a [-1;1] scale in Table 2 and only five constitutions characterized by values lower than -0.3 or higher than 0.3 at any time period within the entire country-year sample under analysis).

Before we formulate conclusions on the basis of the discussed results, we supplement the latter by conducting a similar study of the underlying determinants with respect to Law and Versteeg's (2013) data on a related concept of constitutional underperformance, in particular in the area of 'civil and political freedoms', as well as 'personal integrity rights'²⁷. Constitutional underperformance reflects the extent to which countries promising, *de jure*, a relatively generous catalogue of rights in their constitutions succeed at upholding these rights in practice. The first category of rights mentioned above encompasses: freedom of assembly and/or association, freedom of movement, freedom of religion, right to vote, as well as freedom of the press and/or expression; while the second includes: prohibition of arbitrary arrest and/or detention, prohibition of torture, right to habeas corpus, fair trial rights, and prohibition of death penalty. According to Law and Versteeg's (2013) definition, each country's underperformance score indicates the proportion of the total number of rights envisaged in its constitution that were actually respected by this country in a given year, i.e. 0 indicates that it seriously violated all of the rights included its constitution, while 1 indicates perfect respect of all the rights included in the constitution²⁸. In our sample the underperformance scores for 'civil and political freedoms' range over the entire [0;1] interval with a mean of 0.689 and standard deviation 0.211, while 'personal integrity rights' yield scores between 0 and 1 with a mean of 0.702 and standard deviation 0.217.

Table 4 presents the estimation results as regards determinants of constitutional underperformance in the joint area of 'civil and political freedoms' and 'personal integrity rights' (Columns I-III), as well as for each of these two categories of rights separately ('personal integrity rights' in Columns IV-VI, 'civil and political freedoms' in Columns VI-VIII). Due to data availability limitations this analysis spans over the period 1989-2010. For each dependent

²⁷ The third type of rights studied by Law and Versteeg (2013) are socio-economic and group rights, which we do not analyze – see footnote 6.

²⁸ An interesting phenomenon studied by Law and Versteeg (2013) is constitutional overperformance (overperformance scores measure the extent to which countries respect rights that are *not* found in their constitutions), however in the area of civil and political freedoms in post-socialist countries it fails to materialize.

variable we study both the baseline and the alternative specification. Since higher underperformance scores, as defined by Law and Versteeg (2013), signify in fact more compliance, i.e. a lower degree of constitutional underperformance and smaller constitutional gaps, the coefficients in Table 4 have opposite signs compared to the results presented in Table 3.

Columns I-III of Table 4 generally confirm the results obtained earlier for the *de jure – de facto* constitutional gap, presented in Table 3. Presence of a political conflict, age of the constitution, its comprehensiveness and size of the ‘initial gap’ are factors relevant to violations of both categories of rights taken together, contributing to constitutional underperformance in these areas. With regard to democracy level (significant in the fixed effects, not the random effects framework) we also suggest a confirmative conclusion based on the more reliable fixed-effects estimations. Interestingly, while the fixed effects framework does not allow to incorporate time-invariant measures, the results of the random-effects model suggest that countries with more developed civil society experienced less constitutional underperformance (based on both the baseline and the alternative specification). Just like the *de jure – de facto* constitutional gap, constitutional underperformance also exhibits relatively strong path dependence. Other factors, such as the degree of judicial independence, size of the economy, and population size, fail to confirm their significance in the more reliable fixed effects framework.

The results presented in Columns IV-VIII of Table 4 allow to take a deeper and more detailed look at factors relevant from the point of view of each group of included rights, demonstrating meaningful differences in this respect. In both cases constitutional underperformance features inertia and in both cases age of the constitution matters²⁹. The result is not as convincing with regard to the ‘initial gap’ variable, which is not significant in the alternative specification for the civil and political freedoms. Particular differences can, however, be observed with regard to the role of democracy (and civil society development), which is relevant only for civil and political freedoms³⁰, as well as political conflict and

²⁹ In the case of personal integrity rights this conclusion is based on the more reliable fixed effects model.

³⁰ Again, for democracy – based on the more reliable fixed effects framework; for civil society – based on the random effects model (as the relevant proxy used in this study is time-invariant).

Table 4 Estimation results explaining constitutional underperformance, 1989-2010

Independent variables	Coefficients								
	dep.var.: <i>const_underperform_cpf&pir_{it}</i>			dep.var.: <i>const_underperform_pir_{it}</i>			dep.var.: <i>const_underperform_cpf_{it}</i>		
	I Baseline FE	II Baseline RE	III Alternative RE	IV Baseline FE	V Baseline RE	VI Alternative RE	VI Baseline FE	VII Baseline RE	VIII Alternative RE
<i>democracy_{it}</i>	0.112 (2.39)	0.009 (0.33)	-	0.066 (1.16)	-0.045 (-1.33)	-	0.164*** (2.40)	0.063 (1.60)	-
<i>conflict_{it}</i>	-0.055*** (-2.64)	-0.057*** (-3.15)	-0.068*** (-3.47)	-0.108*** (-4.25)	-0.121*** (-5.19)	-0.148*** (-5.75)	-0.008 (-0.27)	0.001 (0.02)	0.004 (0.15)
<i>covenant_{it}</i>	0.032 (1.22)	0.002 (0.10)	-0.013 (-0.65)	0.083*** (2.52)	0.009 (0.37)	-0.016 (-0.62)	-0.015 (-0.40)	-0.005 (-0.17)	-0.012 (-0.44)
<i>ngos_i</i>	-	0.018*** (2.85)	0.013*** (2.16)	-	-0.001 (-0.20)	-0.007 (-0.92)	-	0.037*** (4.10)	0.034*** (3.78)
<i>JI_de facto_{it}</i>	-0.147 (-1.35)	0.171*** (3.59)	0.246*** (7.83)	-0.075 (-0.56)	0.152*** (2.62)	0.161*** (5.17)	-0.213 (-1.35)	0.206*** (3.08)	0.340*** (7.58)
<i>GDPpc_{it}</i>	0.022 (0.85)	0.018* (1.71)	-	0.051 (1.61)	0.015 (1.19)	-	-0.006 (-0.16)	0.021 (1.47)	-
<i>population_{it}</i>	-0.117 (-0.88)	-0.025*** (-4.16)	-0.021*** (-3.47)	0.043 (0.27)	-0.013* (-1.86)	-0.013* (-1.73)	-0.277 (-1.44)	-0.038*** (-4.40)	-0.030*** (-3.56)
<i>ethnic_i</i>	-	-0.003 (-0.08)	-0.043 (-1.22)	-	-0.054 (-1.32)	-0.108*** (-2.42)	-	0.048 (1.01)	0.015 (0.32)
<i>constitution_age_{it}</i>	-0.005*** (-3.06)	-0.003*** (-3.06)	-	-0.003* (-1.74)	-0.001 (-0.40)	-	-0.007*** (-2.90)	-0.006*** (-4.06)	-
<i>initial_gap_i</i>	-0.361*** (-3.18)	-0.135*** (-3.79)	-0.012*** (-2.73)	-0.366*** (-2.66)	-0.202*** (-4.46)	-0.214*** (-3.87)	-0.386*** (-2.39)	-0.083* (-1.71)	-0.041 (-0.71)
<i>const_underperform_cpf&pir_{i,t-1}</i>	0.340*** (7.37)	0.538*** (12.72)	0.469*** (10.02)	-	-	-	-	-	-
<i>const_underperform_pir_{i,t-1} / cpf_{i,t-1}</i>	-	-	-	0.295*** (6.48)	0.510*** (12.30)	0.435*** (9.62)	0.329*** (6.76)	0.526*** (11.92)	0.471*** (9.53)
<i>const_comprehensiveness_{it}</i>	-	-	-0.098*** (-2.83)	-	-	-0.128*** (-2.96)	-	-	-0.074 (-1.57)
<i>const_ideology_{it}</i>	-	-	-0.002 (-0.07)	-	-	0.007 (0.25)	-	-	-0.010 (-0.33)
<i>constant</i>	2.226 (1.07)	0.479*** (4.55)	0.479*** (5.77)	-0.585 (-0.23)	0.458*** (3.56)	0.717*** (5.29)	5.055* (1.68)	0.538*** (3.72)	0.602*** (4.19)
<i>R²</i>	0.619	0.852	0.852	0.590	0.774	0.789	0.322	0.807	0.805
<i>F-stat. / χ^2-stat.</i>	15.91	2288.23	1749.61	12.46	1359.59	1162.95	15.88	1662.59	1290.72
<i># obs. / # countries</i>	409 / 25	409 / 25	323 / 26	409 / 25	409 / 25	323 / 26	409 / 25	409 / 25	323 / 26

Note: Values of the *t*-statistic in brackets. * Significant at a 10% level, *** Significant at a 5% level.

Source: Author's calculations.

comprehensiveness of the constitution – factors at play only with regard to personal integrity rights³¹.

The discussed results bring a valuable refinement to the earlier conclusions and this in a twofold manner. Firstly, they show that the circumstances of a political conflict during post-socialist transition contributed to exposing personal integrity rights to violation³², while constitutional non-compliance in the area of civil rights and political freedoms was rather linked to underdevelopment of democracy (and potentially also civil societies) in these countries. Secondly, while the discussed findings indicate the relevance of the constitution-aging effect for underperformance in both categories of rights, for personal integrity rights the role of the constitution-as-blueprint effect (confirmed by the significance of the size of the *de jure* – *de facto* constitutional gap at the time of the constitution's adoption for its further evolution) is more convincing. Similarly comprehensiveness of the constitution seems relevant for personal integrity rights, not civil and political freedoms. All in all, the results obtained in search for determinants of the related concept of constitutional underperformance can be treated as a confirmation and, in some cases, an extension of the general conclusions formulated earlier with regard to the circumstances favoring/mitigating the *de jure* – *de facto* constitutional gap in post-socialist countries.

The conclusions formulated above constitute a first step towards the complete empirical account of the constitutional non-compliance problem resulting in emergence of such phenomena as the *jure* – *de facto* constitutional gap and constitutional underperformance. The potential relevance of other factors, such as e.g. judicial independence or population size, which demonstrated their significance in some, but not all, estimations presented in this study, remains to be confirmed (or rejected) in future studies. These future approaches could, in particular, benefit from devoting more attention to the potential endogeneity problem and the search for appropriate instruments which would allow to mitigate or eliminate it, as well as provide more convincing evidence on the causal link between the factors identified in this study and compliance or deviation of constitutional practice from *de jure* wording of constitutions in post-socialist countries and elsewhere.

³¹ With regard to judicial independence and population size the same comments apply as mentioned alongside the discussion of the results in Columns I-III of Table 4. For an explanations of the result for the *covenant* variable in Column V see earlier considerations in this section pertaining to Table 3.

³² As the latter often go in hand with ethnic tensions, the result in Column V showing more constitutional underperformance (i.e., to be precise, lower underperformance scores) in the area of personal integrity rights in the case of a higher degree of ethnic fractionalization is not surprising and can be regarded as a supplementary confirmation of the discussed conclusion.

Conclusions

In this paper we aimed to contribute to the debate on constitutional rules and their economic effects by extending the focus to the *de jure* – *de facto* constitutional gap. In an empirical study for the unique setting of the post-socialist countries of Europe and Asia, we provided evidence that the size of this gap matters for successful economic transition as non-compliance lowers the effectiveness of the constitutional commitment mechanism. Further we identified several explanans of this gap relating, in particular, to the democratization process in these countries (and, presumably, development of their civil societies), presence of political conflicts, as well as their constitutions' age and degree of comprehensiveness. Different sets of factors proved relevant for constitutional underperformance in the case of various categories of constitutional rights and freedoms.

Since the *de jure* – *de facto* constitutional gap matters for successful performance in post-socialist economic reforms, the determinants of this gap, which we here indicated, can also be regarded as indirectly affecting the reforms process. Therefore our contribution is not limited to the recently developing strand of research interested in the relationships between the *de jure* and the *de facto* dimensions of constitutional frameworks within which countries and their economies function but, by identifying these indirect channels of influence, with this paper we also contributed to the vast literature on the role of political and institutional factors in post-socialist economic transition.

The results obtained in this paper confirmed the presence of two counteracting effects in relation to the evolution of the *de jure* – *de facto* constitutional gap in post-socialist countries: the effect of the aging of constitutions (increase of the gap as time passes from the adoption of a given constitution), as well as the constitution-as-blueprint effect manifested by the significance of the size of this gap at the time of the constitution's adoption ('initial gap') for its further evolution. Interestingly, our results also indicate that the effectiveness of this blueprint mechanism (particularly relevant for personal integrity rights) depends on the degree of comprehensiveness of the *de jure* bill of rights envisaged in a constitution, as promising too much in this respect may lead to an even larger constitutional gap. This suggests that the key to successful avoidance of the negative consequences of large *de jure* – *de facto* constitutional gaps lies in making sure that countries drafting constitutions which are intended to serve as blueprints 'don't bite off more than they can chew'.

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Appendix 1 DESCRIPTION OF VARIABLES AND DATA SOURCES

Variable name	Description	Data source
<i>CCI_defacto</i>	<i>De facto</i> constitutional court independence indicator	Voigt et al. (2015)
<i>CCI_deiure</i>	Formal constitutional court independence indicator	Voigt et al. (2015)
<i>concentration</i>	Concentration of state power index reflecting the extent to which a single political actor is capable of decisively influencing state policy	Author's calculations based on Henisz (2013)
<i>conflict</i>	A binary variable indicating the presence of an armed conflict	Gledistch et al. (2002) as updated by Pettersson and Wallensteen (2015)
<i>const_comprehensiveness</i>	A measure of comprehensiveness of a constitution capturing whether it contains a greater or lesser number of rights provisions from the perspective of global constitutionalism (only "generic rights" or also "esoteric" ones). Higher scores correspond to more comprehensive constitutions (i.e. containing more rights)	Law and Versteeg (2011)
<i>const_gap</i>	An aggregate indicator of the gap between <i>de jure</i> and <i>de facto</i> constitutional rules calculated as the average difference between <i>de jure</i> and <i>de facto</i> rights indicators for a selection of 7 constitutional rights/freedoms for each post-socialist country and year (see further explanation in the main text)	Author's calculations based on Cingranelli et al. (2014), Freedom House (1990-2015a) and Elkins et al. (2014)
<i>const_ideology</i>	A measure denoting a constitution's position on the ideological spectrum between libertarian and statist constitutions devised based on the analysis of rights provisions in global constitutionalism. A higher score denotes a more statist constitution	Law and Versteeg (2011)
<i>constitution_age</i>	Number of years since the adoption of the given post-socialist constitution (includes provisional constitutions)	Own calculations based on Elkins et al. (2014)
<i>const_underperform_cpf</i>	A measure of constitutional underperformance for civil and political freedoms, i.e. the proportion of five such rights (for a list see Section 4) in a country's constitution that was actually respected (0 indicates that the country seriously violated all of them, while 1 indicates perfect respect for all them)	Law and Versteeg (2013)
<i>const_underperform_cpf&pir</i>	An average measure of constitutional underperformance for civil and political freedoms and for personal integrity rights – five rights per category (for a list see Section 4)	Author's calculations based on Law and Versteeg (2013)
<i>const_underperform_pir</i>	A measure of constitutional underperformance for personal integrity rights, i.e. the proportion of five such rights (for a list see Section 4) in a country's constitution that was actually respected (0 indicates that the country seriously violated all of them, while 1 indicates perfect respect for all them)	Law and Versteeg (2013)
<i>covenant</i>	Ratification of the International Covenant on Civil and Political Rights	UN (2016)
<i>democracy</i>	A composite indicator of institutionalized democracy	Marshall et al. (2014)

<i>econ_reform</i>	Aggregate transition indicator (index of economic reforms) constituting an average of a set of six indicators of structural economic reforms	Author's calculations based on EBRD (1994-2013)
<i>elections</i>	An indicator reflecting the result of the initial post-socialist elections in a country (including some aspects of their organization)	Fish (1998)
<i>ethnic</i>	The probability that two randomly selected persons from a given country will belong to the same ethnic group	Alesina et al. (2003)
<i>GDPpc</i>	Log of GDP per capita	Feenstra et al. (2015)
<i>growth</i>	Annual GDP growth rate (in %)	World Bank (2013)
<i>IC</i>	Initial conditions index calculated from the first principal component of a factor analysis over 11 indicators	Author's calculations based on Falcetti et al. (2002)
<i>initial_gap</i>	The aggregate (average) <i>de jure</i> – <i>de facto</i> gap for the year when the new post-socialist constitution was adopted (see also footnote 14)	Author's calculations based on Cingranelli et al. (2014), Freedom House (1990-2015a) and Elkins et al. (2014)
<i>JI_defacto</i>	<i>De facto</i> judicial independence indicator	Linzer and Staton (2015)
<i>ngos</i>	Log of the number of non-governmental organizations	UN (2015)
<i>population</i>	Log of population	Feenstra et al. (2015)
<i>reform_gap</i>	A measure of the gap between the actual value of the aggregate transition indicator and its synthetic counterfactual estimated using the synthetic control method for each post-socialist country and year	Author's calculations (see more Metelska-Szaniawska 2016)
<i>rights</i>	Constitutional rights indicator reflecting the operative political rights and civil liberties	Author's calculations based on Freedom House (1990-2013b)
<i>trtime</i>	Transition time beginning in 1989 for Poland and Hungary, 1990 – for other Central and Southeastern European countries (except Albania), 1991 – for Albania and the Baltic republics, and 1992 – for remaining former Soviet republics	-
<i>trust</i>	A measure of trust between individuals and in their relation with political institutions of the state (proxy for civil society)	Author's calculations based on World Values Survey (1994-1999)



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