

North to Ukraine: Warsaw, Kyiv, and the Divergence of Property Rights

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ABSTRACT

Douglass North (1994) famously remarked that “it is the polity that defines and enforces property rights.” Although this conception captures only the creation of formal property rights, it provides a good measure for understanding the development of rights to ownership, disposal, and management in many societies. The purpose of this paper is to trace the development of property rights in Poland and Ukraine and explore their divergence over the past three centuries using North’s framework of the formation of property rights. In each country, the distribution of political power and the political institutions that arose had a profound impact on property rights and their development. Examining this process, this paper concludes that North’s coherent approach to the formation of property rights can explain the process of historical development in Poland and Ukraine. Indeed, while it was the Polish *polity* that defined the evolution of property rights from 1386 to 1795 and then again from 1989 onward, due to diffusion of power, it was Ukrainian *politicians* that controlled the destiny of property rights for most of Ukraine’s history. This situation has not changed despite the Maidan revolution in Ukraine, and recent moves by the ruling party in Poland show how tenuous property rights are in the face of concerted political opposition.

JEL Codes: P14, P26, K11, N13, N14

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1. Introduction

Property rights, comprehensively defined by Hartwell (2016: 172) as the right of an owner of property to “do what they like with it, including give it away, sell it, or bequeath it to others upon one’s own demise,” have been acknowledged as a key component of an economic system at least back to the writings of Adam Smith.¹ Although such rights have largely been neglected in standard neo-classical frameworks (North 1978), the emergence of “new institutional economics,” and in particular the work of the late Douglass North, has rightly highlighted the importance of property rights in determining economic outcomes. Indeed, a revolution in empirical work has confirmed the importance of these rights to all manner of economic outcomes (see Torstensson 1994), with perhaps the most important one being the contribution of property rights to economic growth. By specifically mitigating transaction costs and reducing uncertainty, property rights help to foster the conditions in which commerce can thrive (Clague *et al.* 1996, 1999).

But if such property rights are necessary, how does one ensure that they exist? How do they come into being? The answer to this question also has been debated for centuries, with Smith ([1763] 1896:401) himself remarking that “the state of property must always vary with the form of government.” While there has been some consensus in the economics literature that political institutions have a huge role in the determination of the level of formal property rights, the extent of this interplay is still a matter of contention, as is the response of governments to external and internal incentives.² Various schools of thought have attributed property rights formation to historical accidents or the cultural values of a society, with rulers seeking to choose a level of property rights that reflects a country’s culture. Other, more economically-minded approaches have attributed the level of property rights in a country to the profit maximization of rulers or, taken from a broader view, the relative costs and benefits of instituting property rights for all strata of society.

It is this last approach, of property rights determination as the result of a cost-benefit calculation, that underpins the writings of Douglass North, who famously remarked that “it is the polity that defines and enforces property rights” (North 1994:361). Developing a theory of broad-based property rights as the result of societal compromise as mediated through the political system, North’s work (especially North 1971, 1978, and 1979) provided a measure for understanding the development of rights to ownership, disposal, and management in many societies. Indeed, if we are to understand property rights levels (and subsequent changes in those levels) as a result of relative preferences and abilities, such an approach could also help to understand the variation in property rights across countries and across time.

The purpose of this paper is to thus apply this economic framework of property rights determination in order to understand the development of property rights in two specific post-communist countries, Poland and Ukraine. Despite sharing a border and having been politically and economically intertwined over the past 650 years, and with incredibly similar initial conditions (Table 1), the two countries have seen a remarkable divergence in economic outcomes since the fall of communism in 1989 (in Poland)

¹ Of course, the philosophical and political roots of private property go back much further, as is evidenced in John Locke’s ([1690] 1991:329) statement that “Government has no other end but the preservation of property.”

² In this essay, I understand “formal” property rights to mean those rights that are codified in law and subject to the enforcement of the state. Conversely, “informal” rights are those that are derived from custom, habit, or local traditions and may have no legal standing but nonetheless remain as a constraint on property usage or disposal.

and end-1991 (in Ukraine). Poland is today touted as a transition success story, the only country in Europe to have grown during the global financial crisis, and a nation safely ensconced in supra-national institutions such as the EU and the OECD. While recent elections and policy moves by the Law and Justice government (PiS) have not been received favorably, it is hard to deny the distance that Poland has traversed since martial law and the end of communism. On the other hand, Ukraine has (and continues to be) an economic basket-case, with latest figures suggesting that the country's GDP contracted 9.9% in 2015 after a fall of 6.6% in 2014 (according to official figures). Politically, Ukraine has gone through two revolutions (the "Orange Revolution" of 2005, which failed to reform the country institutionally, and the Maidan Revolution in 2014), and currently faces a low-level Russian invasion in its east and the loss of Crimea in the south. The economic differences could not be starker.

Table 1 – Initial Conditions in Poland and Ukraine

	Poland	Ukraine
Transition year	1990	1992
1989 GDP per capita (PPP, constant 1989 US\$)	\$5,150	\$5,680
Urbanization (% of population) in 1990	62%	67%
Average GDP growth, %, 1985-89	2.8%	2.4%
Exports, % of GDP 1990	26.2%	27.6%
Private Sector as % of GDP, 1989	30%	10%
Share of Industry in total employment, transition year	28.6%	30.2%
Infant mortality rate, 1989, per 1000 live births	15.6	16.8

Source: Hartwell (forthcoming), based on data from the EBRD Structural Indicators, World Bank WDI Database, and de Melo *et al* (2001).

Elsewhere, I have argued that the current economic divergence between these two countries can be traced fundamentally to their divergence in property rights and other institutions, not just in the transition period but tracing back hundreds of years through their respective histories (Hartwell, in press). In this paper, I take a more nuanced approach specifically in regards to property rights and detail how the distribution of political power and the political institutions that arose in each country had a profound impact on property rights and their development, with remarkable continuity across centuries. Examining this process of property rights formation in Central and Eastern Europe on the basis of North's accumulated lifetime of research, this paper concludes that North's approach to property rights accurately explains the process of historical development in Poland and Ukraine. Indeed, while it was the Polish *polity* that defined the evolution of property rights from 1386 to 1795 and then again from 1989 onward, it was Ukrainian *politicians* that controlled the destiny of property rights for most of Ukraine's history. And whereas political institutions diffused the ability to alter property rights in Poland, the political elites of Ukraine have continually conspired to resist the extension of broad-based property rights as a way to protect their own interests.

2. Understanding the Genesis of Property Rights

As distilled by Mijiyawa (2013) and Hartwell (2016), there appear to be four prevailing schools of thought concerning the creation of property rights and other fundamental economic institutions. The

first approach, the so-called “historical approach,” treats property rights as the by-product of “historical accidents” or events that occurred in the distant past (as shown in Acemoglu *et al.* [2001] and Yoo and Steckel [2010]). This approach is useful when concentrating on a short time-frame or attempting to examine recent institutional changes, if previous institutional formation is assumed as an exogenous event (this approach also lends itself to instrumental variable estimation); however, when considering longer histories of property rights development, attributing current rights to long-ago “accidents” is an atheoretical approach at best, a diversion from real determinants of property rights at worst. Additionally, the historical approach suffers from a common neo-classical fallacy, in that it excludes the role of other institutions in shaping the institutional environment which property rights spring from. In this sense, the historical approach may place property rights formation as the by-product of a particular personality or a specific event, but sheds no light on the complexity of an institutional system and how this system supported or hindered the creation of property rights.

The second approach to the formation of property rights, the cultural approach, somewhat rectifies this omission by attributing the formation of property rights to political actors in an economic system rather than exogenous forces. In particular, the cultural approach posits that institutional variations across countries reflect the differences in the beliefs of political leaders about which institutions are good for society, with politicians choosing a level of property rights based on their own ideology (Grief 1994). As an all-encompassing theory of property rights formation, this approach also has many shortcomings, particularly related to the reality of gradual shifts in property rights legislation: what happens when the underlying culture of a country changes, through immigration, education, or other reasons? Do leaders follow the change and amend property rights or do they resist it? And what if there are changes in attitudes towards other supporting institutions, such as rule of law? With an inability to capture small shifts in the *Zeitgeist* towards property rights, the cultural approach appears to be more a theory of revolutionary change, suited to breaks in regimes rather than an evolutionary theory of institutional drift. Indeed, the cultural approach would easily be supported by eras such as the demolition of capitalism in Russia after 1917, where a revolutionary vanguard decided that property rights were a tool of exploitation and outlawed them at a formal level. The erosion of communism in the 1980s at the informal level in countries such as Poland and Hungary would be more problematic for the cultural approach to explain.

Similar in substance to the cultural approach but recognizing the shortcomings of cultural determinism, the third approach distinguishes itself in attempting to relate political power in a more fluid manner to property rights protection. As typified in the work of Sonin (2003) and Acemoglu *et al.* (2005), the political approach asserts that property rights are chosen by the individuals who control political power to maximize their personal payoffs, rather than what is good for society. This conception allows for understanding more subtle changes in property rights, as changes in leadership can lead to changes in property rights institutions as calculations shift and new personalities enter the political arena. While there may be some empirical backing for this view (Charron *et al.* 2012), this approach too leaves out the influence of supporting or other institutions within a society, focusing solely on political institutions as the determinant of the level of property rights rather than the legal and other institutions necessary for rights (Hodgson 2015). In fact, there is a measure of endogeneity that remains unaddressed in this approach, as political systems are drawn from the same cultural currents economic ones such as property rights, and thus a culture that allowed for a highly centralized political system would also be one that is likely predisposed against property rights (as we shall see, this applies in Russia and in the history of Ukraine). Blaming profit-maximizing politicians for the lack of property rights misses the institutional attributes which would allow these same politicians the ability to function as such.

Along these lines, the political approach appears to offer an end-corner solution, presupposing a closed political system that has few iterative interactions. As noted in North and Weingast (1989) if the political system is sufficiently open, the political system itself may be a restraint on property rights infringements, given that the party in power will not always be at the reins; its own property rights would be at risk were it to lose an election or be deposed, meaning it is constrained by time rather than place. Thus, total maximization of personal payoffs would only be possible in a closed political system or a system where the costs of collective action in deposing the ruler were sufficiently high (Acemoglu 2003), leaving little sense of how this approach would operate in a relatively open system where change is more frequent.

The final theory regarding property rights determination is, in many ways, a synthesis of these previous approaches, but applies an economic lens to institutional creation, building on the political approach by recognizing the transaction costs of institutional change. In particular, the economic approach posits that property rights are created when the benefits of their creation exceed their costs, a theory advanced by Demsetz (1967) but taken up in North (1971) and subsequently forming the basis of North's approach to property rights in general. Under this conception, the adoption of property rights is not necessarily limited to the thoughts of the sovereign or the calculations of the powers-that-be but results from a contested struggle between political and cultural institutions, long time-horizons, and short-term relative price movements. Property rights at the informal level emerged from "voluntary organizations devising institutional arrangements to solve problems of impersonal exchange over time, first in a specific community but gradually evolving to support such exchange over both time and space," a process where the polity "played little or no role" (North 1993:19). At the formal level, property rights protections represented both a scaling-up of these informal rights and a cost-benefit calculation between the cost of reducing uncertainty and the benefits reaped by this reduction across all strata of society.

The classic derivation of the economic viewpoint comes from North's (1979) paper on the state, where he creates a model of the state as a discriminating monopolist that provides services to lessen transaction costs in an economy, while at the same time attempting to maximize revenue. The service that is provided is that of a third-party enforcement mechanism, which requires "an elaborate structure of law and its enforcement" (North 1984:259). This structure can differ widely in its actual implementation but that has the same effect in guaranteeing property rights and somewhat restricting the leadership; Mantzavinos *et al.* (2004) note that the Moroccan *suq* has the ability to coordinate the knowledge of market participants, although at a higher level of transaction costs than other institutions in the West. Regardless of its form, this body of legislation is designed to provide a means to remove uncertainty in transactions, allowing for commerce and, as North (1979:252) notes, resulting in "the provision of a set of public (or semipublic) goods and services designed to lower the cost of specifying, negotiating, and enforcing contracts which underlie economic exchange." From society's viewpoint, the reduction of uncertainty results in increased commerce and higher utility, while from the ruler's viewpoint, the expansion of commerce creates a longer-term source of rents to extract via taxation.

However, while this appears to be a straightforward calculation in favor of ever-expanding property rights, the sovereign has other objectives to maximize, as too many property rights undercut his own power and can allow for the challenge of rivals. Thus, under this economic approach, there exists a constant and "persistent tension between the ownership structure which maximized the rents to the ruler (and his group) and an efficient system that reduced transaction costs and encouraged economic growth" (North 1979:253). Such tension is not limited to the immediate present, but persists over time in an iterated game theoretic framework, as every period brings the temptation for the sovereign to

defect and maximize his own rents at the expense of society. North asserts that this tension is precisely the reason why such rights are rare at the formal level throughout history, as the ability to choose when to bestow property rights means that there is also an ability to deny those said rights if the calculation is not in favor of the rulers. For the most of human history, fear of loss of power is greater than promise of increased rents.

The challenge thus for economic growth becomes the need for credible commitment to bind sovereigns to reducing transaction costs and preserving property rights in the future as well as today while removing the incentive to restrict rights (North 1993). In practice, that has meant limiting the power of the government from the side of the people, enmeshing impersonal rules regarding property in a framework that was (for the most part) unassailable by political whim (North 1978). Unfortunately, getting the sovereign to this point is also not an easy task, as, much like Acemoglu's (2003) assertion regarding collective action, North (1984:260) notes that "a change in constraints [only] comes from a change in the relative bargaining power of rulers versus constituents (or rulers versus rulers), and, broadly speaking, changes arise because of major, persistent changes in relative prices." But unlike the cultural approach, which implicitly posits revolutionary change as the driver of property rights changes, this economic approach acknowledges that small shifts in relative bargaining power can occur over time, shifts that can come about from accrual of economic power, gridlock or change in political institutions, or exogenous forces (e.g. invasion and occupation). The cumulative effect of these shifts can be enough to alter the calculation of rulers through relative price changes, and thus filter through to the political system.

In fact, these constraints and shifts in power may then result in a new set of "rules of the game," leading to the creation of a constitution which lays out self-enforcing mechanisms that incentivize all parties to adhere to the system (North and Weingast [1989] use the example of the Glorious Revolution of 1688). In this manner, changes in relative prices are captured in the political system, while still protecting the appropriate distribution of benefits that will keep the institutional innovation intact (North and Thomas 1970). And through the fashioning of appropriate political institutions in the constitutional process, a country may avoid a situation where "conflicting groups (propertied or property-less), given access to political restructuring of property rights... redistribute wealth and income at the expense of others and at the expense of the viability of the system" (North 1978:967).

Of course, this procedure puts enormous pressure on "getting the fundamentals" of the constitution right, and is no guarantee against future erosion or backsliding, especially if relative prices once again change; North (1978:971) notes that "forms of market competition can only survive under the highly restrictive assumption that the costs of using the political system to alter the market structure are prohibitive." In fact, it has been pointed out by Vahabi (2011:247) that "an efficient predatory state is theoretically conceivable, but the problem is that *it does not necessarily predate when the predation is efficient.*" Put another way, while a "political Coase theorem" as advocated by Cheung (1970) or North (1990a) may assume rationality in political decision-making, there is scarce evidence that political markets are efficient or even rational. In fact, as Vahabi (2011) rightly notes, the costs of using coercive power for a government are entirely separate from transaction costs in a voluntary exchange, and thus they may alter the calculus of a sovereign in deciding to protect or discard property rights in a different manner than garden variety transaction costs of the market. However, this point does not invalidate the basic tenets of North's (1981 and 1990a) theory, in that he assumes that calculation of costs to institutional change by political actors may drive the persistence of inefficient institutions; these costs would presumably include both the costs of coercion and that of transaction. Political markets need not

be efficient in order to explain the genesis of property rights, and indeed North (1990b) notes that it is “gridlock” (i.e. political stasis) that may produce change.

Another key issue underpinning the assumed impartiality of the political system (due to transaction costs) is directly related to the administration of the rules of the game, encompassed in the bureaucracy and especially its capability to ensure that property rights are protected. While private adjudication services could operate at a large scale and on a voluntary basis (see the *Law Merchant* detailed in Milgrom *et al.* 1990), supplanting these locally-based rules with universal formal law meant that new formal institutions needed to be built to perform the same contracting function. Put another way, ensuring that a body of laws representing the rules of the game actually decreased transaction costs required supporting institutions such as an independent judiciary to enforce the rules. This additional layer of complexity has also stymied the development of property rights. In fact, the saga of developing countries in the 20th century and into the 21st has been related to this precise point, as legislation that may have been well-intentioned (or even supported by foreign donors such as the World Bank or USAID) was lost in translation on the way to administration. Bureaucracy may follow its own internal incentives or even be utilized politically as a way to circumvent legislation, and a dependent judiciary may continue to rule in favor of the sovereign even when the law and the facts are against him. Even when malevolent ends are not present, the lack of capacity may mean that access to property rights is only attainable for an elite, keeping exchange at a *de facto* level personal (North *et al.* 2012). Such a scenario will vitiate property rights even in the presence of a well-fashioned constitution and favorable relative prices.

Finally, this conception of property rights formation and evolution, even where credible commitment can be fashioned, is still no guarantee that a high level of property rights protection will exist. In particular, where cultural constraints are against property rights in the first instance, this may let the sovereign off the hook, with informal rights remaining small-scale and larger-scale rights avoided. As North (1993:23) mentioned, “it takes much longer to evolve norms of behavior than it does to create formal rules and for those economies without a heritage of such norms the reconstruction process is necessarily going to be long and the outcome very uncertain.” Expanding on this point, North (2000:50) correctly pointed out that “rulers can seldom afford efficient property rights, since such rights can offend many of their constituents and hence jeopardize the security of others’ rights.” In this scenario, his (1994) assertion that the polity defines and enforces property rights can be taken as literal truth, with the polity restricting the growth of broad-based property rights and offering the sovereign an easy calculation about the extension of said rights. Following on this reality, any constitution that may emerge as defining the rules of the game will also create caveats to effective exercise of property rights, loopholes that are then filled by secondary legislation to tighten the noose on such rights even further (also involving the bureaucracy, as just noted). In this situation, where even the polity is not knowledgeable about the benefits conferred by property rights, there is no incentive for the sovereign to educate them.

In short, even the economic approach as typified in the writings of Douglass North shows the difficulties in establishing property rights (and, by extension, seeing sustained economic growth). Indeed, given all of the contingencies and obstacles, it is a wonder that rights exist at all, and yet, they *do* exist in many countries in a form that engenders economic growth.³ North and Weingast (1989:804) detail the changes in England after the Glorious Revolution and how supporting political institutions were able to exert control over “the exercise of arbitrary and confiscatory power by the Crown;” in their retelling of

³ As I have mentioned in other contexts, statistically speaking, nothing in the universe should ever occur, yet it does.

the Revolution, they point to the creation of “an explicit set of multiple veto points along with the primacy of the common law courts over economic affairs” (North and Weingast 1989:829), allowing for a diffusion of power in the matter of property rights. North (1978) also makes this point in the context of the early American Republic, with particular reference to Madisonian democracy and the diffusion of economic policy via checks and balances. This dispersal of political power in turn helped to fuel economic growth in the immediate aftermath of the Revolution in England and in the early 19th century in the United States.

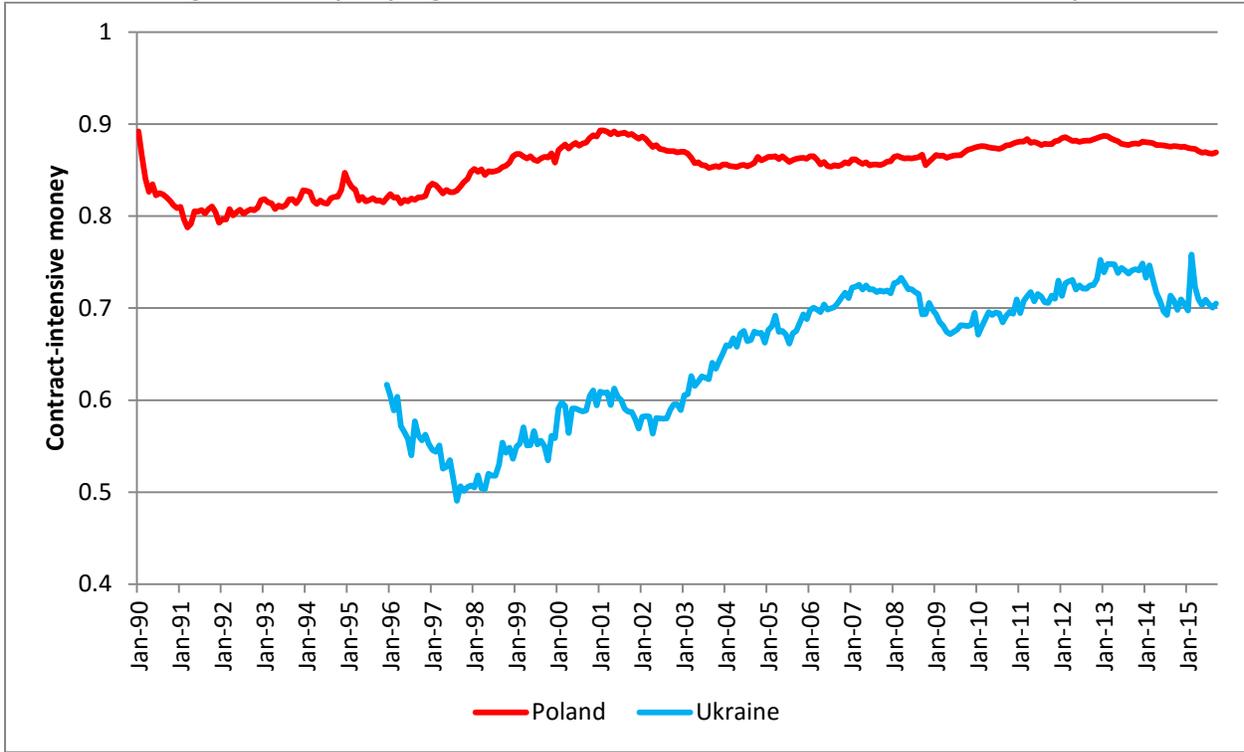
Thus, a key lesson learned from North’s writings, as well as subsequent research, is that diffusion of political power, dispersed rather than necessarily constrained at a central source, made it much easier for the threat of expropriation to subside and overall contracting costs to decline. To return to Vahabi’s (2011) point above, diffuse power also substantially increased the costs to coercive action, meaning a shift in the calculus for the sovereign against expending resources to maintain the status quo (Vira 1997). As noted above and in North and Weingast (1989), the prospect of competition within the political marketplace may also help to act as a diffuser of power while simultaneously forcing political institutions to adapt in order to survive (North 1993). While a constitution may provide the ground rules for the diffusion of power, technological change, exogenous forces, and results of previous policies can all combine to actually change the bargaining power of parties to the political system. This in turn may help a country transition from a “limited access order” to an “open access” one, substantially removing the power to fundamentally transform property rights from government and vesting it back within the society (North *et al.* 2012). The story of England in the 17th century and the American republic in the 19th century follows this pattern, as does more recent success stories such as Singapore, Estonia, or Taiwan, where political institutions also evolved to cede power to the economic sphere.

3. Poland and Ukraine: Diverging Rights to Property

This overview of the economic approach to property rights brings us to a fascinating test case for North’s theories of institutional change, namely the tale of Poland and Ukraine. Sharing a border, a similar language (mutually intelligible if spoken slowly), a long history of overlapping experiences and institutions, and even substantially the same political institutional make-up post-1989, the two countries have emphatically *not* shared the same experience of property rights. Indeed, from the end of transition through 2014, there has been a marked divergence in their levels of and approach to property rights, as shown in Figures 1 and 2. These figures utilize two separate quantitative indicators for property rights common in the literature, one objective and one subjective.⁴ Figure 1 expresses property rights as “contract-intensive money,” the proportion of money held outside the formal banking sector, as detailed in Clague *et al.* (1999) and utilized in a transition context in Hartwell (2013). As can be seen, Poland’s level of property rights has been consistently higher than Ukraine’s, as well as consistently level since EU accession. Figure 2 uses another commonly-utilized measure for property rights, the International Country Risk Guide (ICRG) measure of “investor protection,” to show the same tale. The ICRG index encapsulates risk of expropriation and is calculated on a scale from zero to 12, with higher numbers representing greater property rights. Under this additional metric, Poland also has continually scored well above Ukraine, if not as consistently high as the property rights expressed under contract-intensive money.

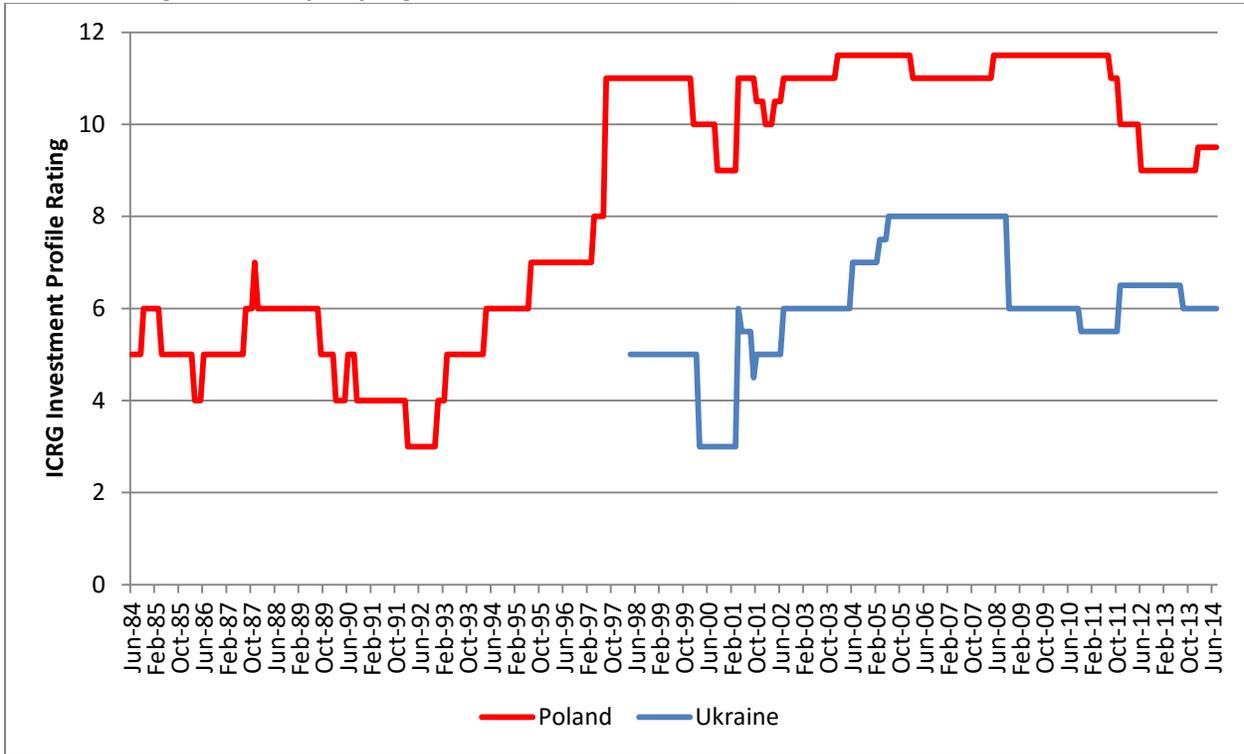
⁴ This paper is not the venue to tackle the question of the quantitative measurement of property rights and the shortcomings of each approach. For this reason, two separate measures are shown.

Figure 1 – Property Rights in Poland and Ukraine, Contract-intensive money



Source: Author's calculations from IMF and central bank data

Figure 2 – Property Rights in Poland and Ukraine, ICRG Investor Protection Index



Source: International Country Risk Guide

Given such similarities in the shared history of the two countries, this divergence may be seen as somewhat puzzling, given that it occurred quite dramatically in such a short period of time (and after a long spell under the same political and economic system). However, using North's framework as described above may help us to understand this divergence; in particular, an examination of the political "institutional matrix" (North 1994) that each country faced over the past twenty-seven years can offer clues as to the development of this crucial economic institution. But in order to properly understand the story of property rights in these two countries, we must widen our examination of the development of political institutions beyond merely the transition era or even the communist past, and encompass instead hundreds of years of political and economic institutional changes. With a deeper appreciation of the development of political institutions and their attitude towards property rights, only then does the divergence of since 1989 make sense.

Space does not permit a retelling of the long saga of property rights in each country (see Hartwell, in press, for an in-depth examination of this history), but a few salient points stand out immediately in regards to each country. Starting with Poland, we can see that the diffusion of power, and especially regarding property rights, was a cornerstone of the Polish political system during the height of the Polish-Lithuanian Commonwealth. In particular, the presence of the nobility (the *szlachta*) established a precedent of protection of property from expropriation, as King Jagiełło, needing the military services of the nobility, was forced to pledge in 1422 "not to confiscate property of a member of the *szlachta* without prior judicial determination, thus establishing a right to private property" (Brzezinski 1991:53). While the nobility was determined to preserve their own rights, the competition between the *szlachta* in the Parliament (the *Sejm*) and the King meant that self-organized contracting institutions began to arise, with "Poland-Lithuania's long tradition of decentralized, local control" (Murphy 2012: 388) ensuring healthy competition of such property rights arrangements. Utilizing sanctions such as community responsibility system, which imposed damages on individuals if they violated property rights in an inter-community (-town or -village) transaction, the local institutions allowed for property rights protection to become tangible (Greif 2006). And the development of the judiciary as an "independent, inter-provincial legal system" (Brzezinski 1991:56) created legitimacy that enforcement would be impartial and mostly free of political interference. As Guzkowski (2014) shows, these local-level enforcement mechanisms and their implementing institutions (such as village courts) became an effective means for securing transactions, and these small-scale contracting and protection institutions in Poland were, unlike England around the same time, driven from below rather than from above by the gentry. The sum total of these innovations meant that as early as 1348, "a peasant... had full rights of ownership of movable property, and in some cases he could buy, sell, and bequeath land" (Kamiński 1975:267).

The balance of power in Poland began to tip in the 17th century, however, as a continuous series of wars against Russia, Sweden, and others, threatened property rights at both the local and central level. In a grand bargain, the King was increasingly reliant on the *szlachta* to finance military adventures, which meant the *szlachta* were given a relatively free hand "to gradually expropriate rights from the peasants" (Greif 2007:24). Mainly this was conducted via the re-enservment of peasants, but the expansion of private towns over this time frame also allowed the *szlachta* to control the urban landscape, as well as the rural. The cooperation extracted from the King by the *szlachta* continued to alter the calculus of the benefit of broad-based property rights for the nobility, delaying them even further. The concomitant decline in Poland over this period, weakened by conflict, made it ripe for external takeover, culminating in the three Partitions of 1772, 1793, and 1795.

The Partitions made a difference in reinforcing the decentralized nature of property rights, mainly by setting up such rights as a form of protest to the occupying powers that be. Informal property rights,

built around a shared national identity for a country that no longer existed, helped to resist occupation and provide some continuity with the past. Of course, the Partition of the country amongst the Russian, Prussian, and Austro-Hungarian Empires also meant that formal property rights were exogenously created, determined in Vienna, St. Petersburg, and Berlin. Each Partition had its own, different approach to the political granting of such rights:

- The Austro-Hungarian portion of the Partition, in Galicia, remained more liberal towards property rights protection than elsewhere in partitioned Poland, backing Polish tradition with a rule of law secured by Austrian force of arms (Kuninski 1997).
- The Prussian administration, on the other hand, observed formal property rights for Poles in the early years of the Partition, but the continuous increase in the number of Poles soon led to the creation of a Settlement Commission to purchase Polish land for German settlers; ironically, this approach ended up restricting the turnover of land transactions in the German-occupied lands, as Polish landowners created a boycott of sales to the Commission, in order to keep the lands in Polish hands (Eddie 2004). This resistance in turn then led to more draconian measures, including restricting any rights of sale to blood relatives, creating a series of permits to keep new building restricted via bureaucratic means, and in 1908 authorization for outright expropriation of 70,000 hectares of land (Kaczmarczyk 1945).
- Finally, in the Russian partition, property rights were highly restricted, although, as Murphy (2011) noted, Russia's move towards centralization meant placating and assimilating the nobility, and in order to do this their property rights needed to be upheld (Murphy also notes that in a battle between noble property rights and town autonomy, property rights won the day, with the practice of town ownership effectively ended by 1867). At the other end of the class ladder, and in another political ploy to win back the peasantry after the 1863 Uprising, peasants were also given full property rights to their land via an emancipation decree in 1864, hoping to pacify the large peasant population of the Lands of the Vistula (Wandycz 1974).

The legacy of the Partitions, as well as global acceptance of socialist tenets in the late 19th century, weighed heavily on property rights in the newly independent Poland after the First World War, as the government began a comprehensive land reform process as early as 1919 (implemented beginning in July 1920), in an effort to minimize social conflict regarding the concentration of large-sized land holdings (Pronin 1949).⁵ The land reform limited property ownership, capping the maximum holding size of any one piece of land at 300 hectares in the eastern provinces, while industrial areas had maxima set between 60 and 180 hectares (Zawojka 2004). Additional reforms were introduced in 1925 and 1927 which somewhat relaxed these restrictions, increasing the maximum size of allowable holdings; however, these changes were accompanied by a requirement for “the distribution of a minimum of 500,000 acres annually over a period of ten years” (Pronin 1949:136), threats to owners of compulsory expropriation if they did not sell, and compensation regulations that limited sales prices to 50 percent of its market value (Zawojka 2004).

The destruction of the Second World War led directly to the Soviet installment of a Communist government, which quickly rendered the concept of property rights traitorous for the Polish mind. The application of such Marxist ideology to Poland meant the Soviets extending the very same “agrarian

⁵ A hint as to the importance that the new Republic would place on property rights can perhaps be found in the fact that 98 Articles of the Constitution occurred before property rights were mentioned.

reform” that they had carried out between 1939 and 1941 in the eastern portions of the country (now parts of Soviet Belarus and Ukraine) to the rest of Poland, resulting in deportations, executions, arrests, and, mildest of all, confiscation (Pronin 1949). As with the earlier, pre-War regulations, maximum landholdings were set and land was redistributed from large landowners to smaller ones, with some large (formerly German) estates remaining intact to be used by state agricultural enterprises (Zawojka 2004). Throughout the entire economy, private ownership was denigrated in favor of state-owned and collective enterprises, “subject to centralized, complex, and highly politicized control” (Wellisz and Iwanek 1993:345). Property in the Polish People’s Republic became a matter of property for the “state,” where only the government had the right of exclusion, although a fruitful literature sprang up trying to explain the property rights that were held on the factory floor by managers under socialism (Furubotn and Pejovich 1972).

Given the direct opposition of communist ideology and the machines of government to property rights, it wasn’t until the mid-1980s, after decades of stagnation, that popular and elite attitudes towards broad-based private ownership had begun to turn favorable (Tarkowski 1990). The fall of the communist government in free and fair elections in 1989 also presaged a massive formal shift in favor of property rights, but the challenge for Poland’s transition would be to secure the benefits of property rights but avoid the difficulties seen during the years of the Commonwealth and in the Second Republic, where unconstrained executives at various levels had the ability to threaten these rights.

It appeared that Poland solved this conundrum at an early stage by removing the government as much as possible from commerce. The basis for property rights in post-communist Poland began as part and parcel of the economic transition even before the political transition began, with the passage of the Economic Activity Act in December 1988 putting private sector firms on “firmer legal footing,” guaranteeing equal legal treatment of all forms of ownership, setting the basis for privatizing state assets, and, most importantly, enshrining the concept that “everything not explicitly prohibited is permitted” (Slay 2014:78). These early moves in institutional reform were accompanied by building supporting institutions, most notably a judicial system that was fiercely independent of the government, as codified in the 1997 Constitution, which removed the *Sejm’s* ability to override the decisions of the Constitutional Tribunal (Schwartz 1998).

The experience of Poland gives ample evidence for North’s framework of property rights, as expansion of formal property rights came in response to a perceived gain on the part of the ruling elite, whether they were Polish or foreign, *vis a vis* the rest of society. In fact, constitutionalism was for the most part a small factor in property rights, as the Constitutions that Poland enacted over its history reflected the underlying balance of power rather than providing the ability to constrain executives on their own. As Grief (2007:42) noted in a different context, the “constitutional institutions benefitting the elite can be socially harmful exactly because they are ‘good’ at fostering intra-elite cooperation;” in the Polish case, only the Constitution of 1791 protected the rights garnered by the *szlachta* in Article II and pledged to “preserve sacred and intact the rights to personal security, to personal liberty, and to property, landed and movable.” Coming as it did on the heels of one Partition and facing two more, the 1791 Constitution more expressed hope than reality. The Constitution of 1921 in Article 99 claimed that private property was “one of the most important bases of social organization and legal order,” but Piłsudski’s military coup and the 1935 Constitution placed “social solidarity” as a priority over individual rights. With the Soviet takeover and the rewriting of the Polish Constitution in 1952, even the vestiges of Article 99 from earlier Constitutions were removed, including any mention of a right to property (Cholewinski 1998), with “social justice” instead inserted as the guiding principle of the People’s Republic. It wasn’t until the

new Constitution in 1997 that the already-existing acceptance of property rights was codified, a fact that solidified the development of supporting institutions.

In contrast to Poland, Ukraine never cultivated a diffusion of political power; the history of Ukraine from the 12th century on is one of continued centralization of power in the hands of the executive, whether Ukrainian or foreign, leading to lack of political competition and a manifest removal of veto points in the determination of property rights. The rule of Yaroslav the Wise in the Kievan Rus' era is associated with the first codification of law in eastern Slavdom (the *Rus'ka Pravda*), seen in retrospect as the high point of both political competition and property rights in Ukrainian lands (Blum 1964). But with the Mongol invasion and the gradual absorption of modern-day Ukraine into the Polish-Lithuanian Commonwealth from the 14th century onward, the political competition that existed under the Rus' disappeared suddenly. In particular, the adhesion of Ukrainian lands to the Commonwealth meant that Poland extended its own estate system of rigid socio-economic stratification amongst classes (nobility, burghers, and peasants); but where Poland may have used this system to create a balance of power, with a myriad of interests struggling to retain political power (thus ensuring that property rights were always at the top of the agenda), no such reality was extended to the lands of Ukraine. Indeed, the Ukrainian lands of Volhynia were mostly treated as occupied territory rather than incorporated as new administrative divisions of Poland. Thus, indigenous nobility was on its way to assimilation into the Polish-Lithuanian structures but remained treated as second-class citizens (Magocsi 2010), meaning the lack of an effective veto point for property in Ukraine.

With a series of rebellions in the early 1600s underscoring the growing power of the frontier-land dwelling Cossacks and their popularity amongst the peasantry, the major Cossack rebellion of 1648 upended the Polish control of the estate system and threatened the largest Ukrainian land-owners who *de facto* ruled over the Ukrainian lands (Kamiński 1977). In the short-term, the Cossack rebellion was seen as a victory for property rights across the whole spectrum of society, as they immediately restored the rights of land transfer to the peasantry and removed the labor obligations that had been imposed (Subtelny 2009). But in reality, the establishment of the Cossack Hetmanate merely swapped out one set of elites for another, changing the ownership of the state monopoly but effecting little change in the political structure. In fact, the Cossack leadership was able to arbitrarily grant estates to Cossack noblemen as a reward for faithful service, as well as to codify various rights of inheritance of property (Myronenko 2013).

Moreover, the Cossack rebellion succeeded through assistance from the Russian Empire, a deal which was to have long-term consequences for property rights in the country: absorption by the Russian Empire after the Treaty of Pereyaslav and the *de facto* split of Ukrainian lands after 1667 led to a steady loss of property rights across every class in the new Ukraine. Indeed, the new Russian administration wholeheartedly supported the Cossack nobility's moves to circumscribe the property rights of the peasantry (Subtelny 2009), including the reforms of 1786, where the Cossack hierarchy defined perpetual grants to land and blocked off large swathes of Ukrainian estates from ever being disposed of. Throughout the 19th century, the Tsar also used property rights as a way to buy-off incipient political opposition, as the abolition of serfdom in 1861 was used to buy the loyalty of the peasantry *vis a vis* the Polish nobility who still tended to dominate economically, granting more power to the peasants to counterbalance the enemies of the Tsar (Volin 1943). However, as North (1979) would have predicted, the extension of property rights was tightly reined in so that competition did not arise, as Tsarist authorities emphasized the idea of "communal property rights," where land was allotted to communities rather than households (Nafziger 2015).

A further impediment to property rights enforcement in Russian Ukraine in the 19th century was to be a consistent issue in Ukrainian history, namely the weakness of the judiciary as a supporting institution. There was little tradition in Russia of the concept of a *Rechtsstaat*, with an independent judiciary constituted to protect citizens against infringements on their property or liberties, and it was not until the Judicial Statutes of 1864 that “independent public courts, an oral adversary procedure, and the jury system” were allowed as a way to limit “the tyranny of the police” (Wortman 2011:2). However, even this momentous change in legislation was of limited usefulness in the area of property rights, as special “peasant” (*volost*) courts were exempted from the new regulations, meaning that the vast claims of former serfs were held in these courts under different (and less transparent) procedures (Plank 1996). For non-Russian nationalities such as Ukrainians, access to the new independent courts was even more difficult, meaning that property claims were adjudicated in a “business as usual” manner in Kyiv.

The turn of the 20th century saw the institution of a right to individual property ownership in 1906, a consequence of the revolution of 1905 in Russia. Introduced as part of the Stolypin reforms to revitalize the agrarian sector in Russia (of which Ukraine was an integral part), the codification of property rights rolled out slowly, being first introduced by a *ukaz* from the Tsar in November 1906, confirmed in a statute four years later, and further elaborated in an additional statute in May 1911. The reforms introduced a land titling process that greatly undermined the communal property approach, shifting the Russian Empire over a period of nine years to a title-based system. In Ukraine, this meant a large change in the Left Bank of the Dnieper River, as by 1914 communal property was prevalent only in Kherson and Kharkiv (Guthier 1979).

Unfortunately, the arrival of property rights in Russia only lasted for a mere eleven years, as the Bolshevik revolution of 1917 destroyed all forms of private property and reverted Ukraine (and the rest of the Soviet Union) to communal property. With the Holodomor and the following Great Terror and purges of the population, private property in the Ukrainian SSR was driven far into the underground, with any small-scale private enterprise in the 1930s punishable by death or deportation. And despite the re-acceptance of some private ownership during the Second World War and in the months immediately following (Hessler 1998), the tightening of Stalinist policies, in tandem with the expansion of communism throughout Central and Eastern Europe, meant that large-scale, formal and individual property rights had indeed been eradicated in Ukraine. The Soviets were able to complete collectivization by 1951, with nearly all of the region’s 1.5 million peasants concentrated on 7,000 collective farms (Subtelny 2009). It was only at the upper echelons of the Party that anything resembling property rights based on personal interest existed, where the rights of the *nomenklatura* allowed them to maximize their rents at the expense of the property and liberties rest of the country (Winiecki 1990).

The fact that Ukraine was actually a part of the administrative apparatus of the Soviet Union, and with a twenty-five year head start on Poland in implementing communism, also meant that Ukraine had much less experience with informal property rights and contracting. However, the gradual thawing of economic control in the 1980s weakened Moscow’s control of the economy and brought a measure of political decentralization. Informal institutions rushed to fill the void left by the retreat of the Communist Party throughout the Soviet Union; in particular, with knowledge that the system was to change but no sense of its timing, firms and especially collective farms were able to use informal contracts to create deals in anticipation of a restitution of full property rights (Mathijs and Swinnen 1998). But the longer it took towards a dramatic reform by the elites, the more the informal contracting arrangements became entrenched in Ukraine and elsewhere throughout the Union.

The dissolution of the Soviet Union and Ukraine's independence in late 1991 should have provided the political impetus for economic reform, but unfortunately, the history of modern Ukraine has been one of a consistent link with history in regards to political centralization. Much as Poland showed that centralization of power did not necessarily mean the executive (as power became centralized in the nobility), the same occurred with Ukraine in the post-communist era; power remained centralized in the parliament (the *Verkhovna Rada*), which remained a bastion of Communists opposed to reform until 1994, as new President Leonid Kravchuk declined to dissolve the Rada and hold new elections. This reality led to a delay of institution-building just at the moment it was needed most, with the Communist-dominated Rada creating new legislation clarifying types of land ownership and laying out a framework for privatizing land (both from 1992) which did not depart dramatically from the Soviet or Russian model (in particular by focusing on Tsarist-era "communal rights").

This hesitancy against a quick move to broad-based property rights continued in the creation of Ukraine's new Constitution, with "the drafters intend[ing] to give the Constitution some rigidity... by additions restricting forms of property and human rights" (Ludwikowski 1996:90). Early drafts of the Constitution from 1992 noted that "the exercise of the right of ownership must not contradict the interests of society as a whole or of individual natural persons and legal entities," while additional drafts in 1993 not only retained these provisions but also envisioned additional administrative mechanisms consistent with limited property rights; as Ludwikowski (1993:183) noted, the retention of special economic courts, "confirms that the drafters still anticipate that the state will administer a vast area of public property." Article 41 of the final Constitution in 1996 eliminated the most egregious references to socialism, but, although the Article begins with the assertion that "everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities," the rest of the Article and elsewhere in the Constitution contains caveats, exclusions, and, most importantly, the threat of revocation.

The constriction of the right to private property in Ukraine has been encapsulated most thoroughly in the treatment of rural and agricultural land, where there may have been a theoretical right to property but legislative obstacles and constraints made the exercise of this right nearly impossible. The most egregious restriction placed on property was a (at first) six-year moratorium on land sales enacted in 1992 (Krasnozhon 2011). The land sale moratorium was structured to prohibit a farmer trading or selling any land that was deemed "arable" under the Code, with the sale and purchase or transfer of privately-owned land explicitly prohibited if used for commercial agricultural production or individual farming activity. Not only did this restriction remove the incentive for landowners to improve the land, much less the ability to transfer it, it also made Ukrainian farmers incredibly disadvantaged *vis a vis* larger (and sometimes politically-connected) agricultural concerns. Instead of a land market, Ukrainian farmers saw "land grabs" carried out under fraudulent means but with the full complicity of Ukrainian politicians (Visser and Spoor 2011). Thus, farmers were simultaneously denied their full complement of property rights while corruption could render these rights useless at any time. This land sale moratorium, touted as temporary, was still in place at the time of this writing.

The shift in political centralization in Ukraine shifted from 1994 to 2005, as President Leonid Kuchma was able to aggrandize power in his own hands during his two presidential terms. While Ukraine underwent a long-delayed macroeconomic stabilization, the shift of power did not create a balance, and instead property rights continued to suffer (as shown in Figure 1 and 2). Only the brief interruption of the "Orange Revolution" from 2005 to 2009 slowed the tide of centralization in the executive, but moves by new President Yushchenko actually handicapped the forces of Westernization, as he acquiesced to transferring the executive power obtained by Kuchma back to the Rada as part of a

Constitutional bargain. The election of President Viktor Yanukovich in 2010 reversed this bargain and instead resulted in a wholesale transfer of property rights from society and even the state to the executive. Yanukovich utilized the powers of his office to directly expropriate businesses and threaten property rights, “usurp[ing] all power, accumulate[ing] gargantuan resources via corruption schemes, destroy[ing] the court system, encroach[ing] thoroughly on civil liberties and violat[ing] human rights” (Riabchuk and Lushnycky 2015:48)

More egregiously, Yanukovich bypassed the state mechanism to favor political insiders, nicknamed “the Family” and consisting of political insiders from the Donbas. As North (1979:256) predicted, where powerful interests can compete politically, “the ruler will avoid offending powerful constituents. If the wealth or income of groups with close access to alternative rulers is adversely affected by property rights, the ruler will be threatened. Accordingly, he will agree to a property rights structure favorable to those groups, regardless of its effects upon efficiency.” This was precisely the case in Yanukovich’s Ukraine, where “the conditions necessary for this rapid concentration of wealth by those who exercised political power meant that there could be no reliable legal mechanisms to protect individual rights, including property rights” (Satter 2014:7). The extent of official corruption under Yanukovich created great resentment in Ukrainian society, also as North predicted: “if, however, growth is destabilizing, so is no growth” (North 1979:257). In particular, the withdrawal from the EU Association Agreement in November 2013 provided the impetus for demonstrations on Maidan, which eventually led to Yanukovich fleeing to a welcoming Russia in February 2014.

Unfortunately for Ukraine, the situation regarding property rights has not changed despite the Maidan revolution. Whereas there may be more competition from civil society, real diffusion of power remains difficult to envision as a reality, and property rights remain a low priority for the new government. This can be seen in the extension of the “temporary” land sale moratorium through 2017, meaning that a true market remains out of reach in agricultural land. Similarly, many of the same elites who were active prior to the revolution are once again in power, and Ukrainian oligarchs have been successful in continuing to exert pressure on the government to resist broad-based property rights. In sum, Ukraine’s move towards property rights remains on hold as the political system continues to be shaken up from inside.

4. Conclusions

This paper has examined the development of property rights in Poland and Ukraine since the Middle Ages, applying the framework developed by Douglass North over his long career to understand their determination and allocation. As can be seen from the analysis above, the extension of broad-based property rights in Poland came about from a gradual process of political decentralization, tempered by long periods of occupation (the Partitions and the communist era) which forced property rights into informal and small-scale channels. But while political elites during these eras removed formal property rights and attempted to maximize their own rents, societal currents continued to push for protection of property. When offered the opportunity, via the collapse of communism in the late 1980s, informal and cultural approaches to property rights once again ascended and helped to restrain the executive from unilaterally abrogating those rights.

Unfortunately, the long history of property rights in Ukraine proves North’s (1990b) maxim that there is a bias in favor of the status quo regarding institutions. Unlike Poland, Ukraine saw a continuous centralization of political power from the mid-17th century onward, with its inclusion in the Russian

Empire meaning only token advances towards property rights. Indeed, Ukraine has seen a determined resistance to property rights throughout its history from political elites, with a recurring theme of denial of land ownership or transfer to the masses and a tightly controlled regime of property rights accessible only to those elites. This has been supplemented by a demonstrable lack of supporting institutions, including the judiciary, an issue which continues to plague Ukraine even today. Simply put, with little political competition and a lack of the organizations that would support property rights, there was never an alteration of the calculus of political rulers to provide property rights on a broad scale. Indeed, the risk of competition always far outweighed the benefits to be garnered from mitigating uncertainty.

A key tent of North's framework, as noted throughout this paper, is that it allows for the gradual shift of property rights protections. Recent events in Poland, including a move by the ruling party to politicize the Constitutional Court, shows that even established property rights may be tenuous in the face of concerted political opposition. Whether or not such a move succeeds will be contingent on the ability of the rest of society to neutralize such a move and on the strength of countervailing institutions. Unlike Ukraine, which is still struggling to understand this reality, Poland is better-placed to succeed.

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