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Constitutional Framework and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism and Semipresidentialism

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CONSTITUTIONAL FRAMEWORKS AND FRAGILE DEMOCRACIES: CHOOSING BETWEEN PARLIAMENTARIANISM, PRESIDENTIALISM AND SEMI- PRESIDENTIALISM

Mark Freeman[†]

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INTRODUCTION

Since the early 1970s, the world has witnessed a series of transitions to democracy: in Southern Europe in the 1970s, in South America in the 1980s, and in Eastern Europe in the 1990s.¹ In each of these transitions, governments have had to

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¹ See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991). Huntington refers to this series of transitions as the "third wave" of democracy. He argues that the first wave of democratization began in the 1820s and continued until 1926, during which period approximately 29 democracies came into existence. A "reverse wave" reduced the number of democracies in the world to 12 by 1942. The second wave was said to last from 1945

grapple with a complex set of moral, legal and political issues. These include how to deal with past violations of human rights, how to foster long term economic and social development, and how to restructure political institutions to safeguard democracy for the future. This article focuses only on the last of these issues. In particular, this article attempts to assess which of the three most common forms of democratic political governance — parliamentarianism, presidentialism or semi-presidentialism — best facilitates successful democratic transition.²

This article is divided into three main sections. The first section will set out the thesis being tested, together with the assumptions and limitations that underlie it. The second section will review the prototypical characteristics of presidentialism, parliamentarianism, and semi-presidentialism, including the relationship in each case between the executive and legislative branches, and between each branch and the citizenry. The third section of the article will analyze the experiences of the first country in Southern Europe, in South America and in Eastern Europe to have completed a democratic transition under the dominant constitutional model of its region. Accordingly, the section will focus on Spain's experience with parliamentary government, Argentina's experience with presidential government, and Poland's experience with semi-presidential government.³ In each case, there will be (i) a review of the history of the transition in that particular country, (ii) an analysis of the dynamics of the executive-legislative relationship during the critical years of the transition, and (iii) an examination of various hypothetical counter-factual scenarios, with a view to considering how things might have turned out under a different system of government. Following these three sections, a tenta-

to 1962 during which time 36 countries democratized. This was followed by a second reverse wave lasting from 1960 to 1975, during which the number of democracies was reduced to 30. As for the third wave, according to his calculations, approximately 30 countries made transitions to democracy between 1974 and 1992. *See generally id.*

² *See* THE FAILURE OF PRESIDENTIAL DEMOCRACY (Juan Linz & Arturo Valenzuela eds., 1994) [hereinafter THE FAILURE]; *see also* JUAN J. LINZ & ALFRED STEPHAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION (1996) [hereinafter DEMOCRATIC TRANSITION].

³ *See* DEMOCRATIC TRANSITION, *supra* note 2, at 87, 191-92, 255. *See also id.* at 167-71 as to why Brazil, which started its transition before Argentina, did not complete it until many years later.

tive conclusion will be provided regarding the relative strengths and weaknesses of each model for countries in democratic transition.⁴

I. THESIS, ASSUMPTIONS, AND LIMITATIONS

A. *Thesis*

Spain, Argentina and Poland have all completed democratic transitions.⁵ In each country, the transition involved a shift from authoritarianism to democracy and was accompanied by a determination to entrench democracy and democratic institutions.⁶ Spain, however, is arguably the only one of these countries where democracy has been consolidated.⁷ Does Spain's

⁴ It should be noted that there are a number of other models of democratic government which do not fit neatly into any of the presidential, parliamentary or semi-presidential types. Examples of these are the German model (often referred to as "chancellor's democracy"), the Swiss model (sometimes referred to as "consensus democracy"), and more unusual models such as those of Fiji (parliamentary government combined with a native chieftain) and Samoa (parliamentary government combined with family heads). However, because these models have not been adopted by any of the new democracies, they properly fall outside of the scope of this article. For a brief discussion of some of these forms, see generally Juan J. Linz, *Presidential or Parliamentary Democracy – Does it make a Difference*, in *THE FAILURE*, *supra* note 2, at 42-44 [hereinafter *Presidential or Parliamentary Democracy*].

⁵ A "democratic transition" can be considered complete when the following conditions are in place: (a) a broad agreement about political procedures which is sufficient to produce an elected government; (b) a government which has come to power as a direct result of a free and popular vote; (c) an elected government which *de facto* has the authority to generate new policies; and (d) executive, legislative and judicial branches of government which have *de jure* independence from other state institutions. See *DEMOCRATIC TRANSITIONS*, *supra* note 2, at 3.

⁶ See generally JOSÉ MARÍA MARAVALL, *THE TRANSITION TO DEMOCRACY IN SPAIN* (1982) (regarding Spain); CARLOS NINO, *RADICAL EVIL ON TRIAL* (1996), at 53-104 (regarding Argentina); and MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1998) (regarding Poland).

⁷ A democratic regime can be considered "consolidated" when: (a) no significant actors in society are either spending significant resources attempting to create a non-democratic regime, or turning to violence or foreign intervention to secede from the state; (b) a strong majority of public opinion believes that democracy is the most appropriate form of political governance, with only a small and isolated minority believing otherwise; and (c) governmental and non-governmental forces are required and acculturated to resolving conflict within the rules of the country's democratic process. See *DEMOCRATIC TRANSITION*, *supra* note 2, at 6. Linz and Stepan also identify at least five other attributes of a consolidated democracy: (a) a conducive environment for the development of a free and dynamic civil society; (b) a relatively autonomous and valued political society; (c) a deep respect for the rule of law; (d) a usable state bureaucracy; and (e) an institutionalized eco-

choice of parliamentarianism help to explain the fact that it has a consolidated democracy while Argentina and Poland do not?⁸ This article asserts that (i) the choice of parliamentarianism provides a *partial* explanation for the fact that democracy has been consolidated in Spain, and (ii) the choices of presidentialism in Argentina and semi-presidentialism in Poland provide a *partial* explanation of the fact that democracy has not been consolidated in those countries.

This thesis rests on several inter-related assertions. *First*, the overriding priority for any country in a democratic transition ought to be the generation of strong public support for democracy and its institutions as a guarantor against a return to tyranny and its accompanying evils. Unfortunately, the public optimism and the zeal for democracy one usually finds in the earliest stages of a transition have a tendency to fade quickly if conflict within a government prevents that government from effecting the reforms which are needed to meet public expectations.⁹ Conflict within government can also create an opportunity for anti-democratic forces from the past to re-assert themselves.¹⁰ Consequently, it is important that the political system chosen by a new democracy be *conducive to a cooperative form of political governance*. It is, however, a reality of political life that even governments able to function in a cooperative manner can fall out of favor in the eyes of the public.¹¹ The danger of such circumstances in the context of a democratic transition is that the public may consciously or unconsciously translate its distaste for a particular government into distaste for democracy (i.e., it may conclude that democracy is no better

nomie society (i.e., a market economy modified by responsible government regulation and intervention). *See id.* at 7-13.

⁸ *See id.* at 108-15, 200-04, 269-92. Although the analysis of Linz and Stepan dates back to 1996, the chief problems of democratic consolidation that they identify regarding Argentina and Poland regrettably persist. *See, e.g.,* J. PATRICIA MCSHERRY, *INCOMPLETE TRANSITION: MILITARY POWER AND DEMOCRACY IN ARGENTINA* (1997); HARALD WYDRA, *CONTINUITIES IN POLAND'S PERMANENT TRANSITION* (2000).

⁹ *See* HUNTINGTON, *supra* note 1, at 258-70.

¹⁰ *See id.* at 231-253; *see also* Philippe C. Schmitter, *Dangers and Dilemmas of Democracy*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 72-92 (Larry Diamond & Marc F. Plattner eds., 1996) [hereinafter *THE GLOBAL RESURGENCE*].

¹¹ *See, e.g.,* Larry Diamond, *Economic Development and Democracy Reconsidered*, in *RE-EXAMINING DEMOCRACY* 93 (Gary Marks & Larry Diamond eds., 1992).

than the "old system," rather than concluding that there simply needs to be a new government within a democratic framework).¹² It is, therefore, not only essential in the context of a democratic transition that a political system promote cooperation in governance, but it is also essential that the system possess the *capacity to effect fluid changes in government or leadership* when public support undergoes a significant decline.

Second, as among parliamentary, presidential and semi-presidential forms of government, this article asserts that parliamentary government furnishes institutional rules and arrangements that are more conducive to cooperative and flexible governance, and thus is better suited to successful democratic transition. Parliamentarianism tends to be more conducive to cooperative governance because of its *fusion of the executive and legislative branches into one body* (i.e., parliament) and because of the corresponding *absence of a significant, separate political prize* outside of parliament (i.e., a powerful presidency).¹³ As a result of these attributes of the parliamentary system, coalition building flows naturally because it is the only way to attain significant power within the system in the absence of a legislative majority. Parliamentarianism also tends to be more conducive to flexible governance because of the relative efficiency of the *parliamentary vote of no confidence* as a tool for replacing leaders or governments that have fallen dramatically out of favor with the public.¹⁴

In contrast, presidentialism and semi-presidentialism provide institutional rules and arrangements that are less conducive to cooperative and flexible governance, primarily due to the fact that they both provide for a *president with robust de jure and de facto powers that is directly elected for a fixed term*.¹⁵ First, by establishing a separation of powers in which the president and the legislature are to act as checks on each other, the already conflictual politics endemic to fledgling democracies run a high risk of transforming into destabilizing and debilitating battles which can undermine public confidence in government

¹² See HUNTINGTON, *supra* note 1, at 253-58.

¹³ See, e.g., AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 67-85 (1984).

¹⁴ See, e.g., Linz, *Presidential or Parliamentary Democracy*, *supra* note 4, at 9-10.

¹⁵ See *id.* at 6-10.

and public support for democracy.¹⁶ Second, this risk is further exacerbated by the fact that the president in these systems has an independent mandate to govern for a fixed term (typically four years or more), and, as a result, has no institutional incentive to cede or share power. This is true even when he or she becomes extremely unpopular or proves incapable of providing effective government.¹⁷ Although impeachment offers an escape valve in times of crisis, it is a measure that is far more extreme and more difficult to use than a simple vote of no confidence.¹⁸

These are of course very bold and very general claims being advanced, and not altogether original.¹⁹ I believe, however, that these claims involve critical questions that, if valid, hold immense implications for policy makers and law reform advocates in the context of democratic transitions.

B. *Assumptions and Limitations*

It is important to acknowledge that there are at least four other fundamental institutional choices which are deeply interconnected with the choice of political model and which have a

¹⁶ Of course, those who favor a separation of powers argue that the separation is necessary in order to avoid the "tyranny of majority" danger that they associate with the absence of a formal separation of powers in a parliamentary system. However, the "tyranny of majority" danger exists equally under all three systems because just as the danger of tyranny exists in a parliamentary system in the event that one party takes the majority of seats, it also exists in a presidential or semi-presidential system in the event that one party takes both the presidency and the legislature.

¹⁷ See *Presidential or Parliamentary Democracy*, *supra* note 4, at 8-9. On this point, supporters of presidential and semi-presidential systems argue that the fixed term is an important way to provide executive stability, something they allege to be lacking in parliamentary systems. This argument is, however, somewhat of a red herring because executive stability can readily be achieved under a parliamentary system (assuming it is considered important and desirable) by simply instituting a more majoritarian-style electoral model, thereby circumventing the oft-cited example of multi-party parliamentary dysfunction, *viz.*, Italy. See, e.g., GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 53-83 (1994).

¹⁸ See Juan J. Linz, *The Perils of Presidentialism*, in *THE GLOBAL RESURGENCE*, *supra* note 10, at 137-138 [hereinafter *Presidentialism*]. Although votes of no confidence are not easily achieved in a parliament led by a party with a majority of seats, such majorities are relatively rare in the context of democratic transitions which, because they are almost always marked by deep social divisions, usually produce multi-party legislatures.

¹⁹ Indeed, many of these ideas were being debated over one hundred years ago by people like Woodrow Wilson and Walter Bagehot. See, e.g., WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (1885).

direct effect on democratic outcomes. First, architects of new democratic constitutions must select an electoral system.²⁰ The two most common electoral models are: the plurality (i.e., majoritarian) model and the proportional representation model.²¹ Second, a structure for the legislature, whether unicameral, bicameral or hybrid, must be chosen.²² Third, a division of powers system, whether federal or unitary, must be selected. Fourth, a mechanism for judicial review must be selected, whether centralized (following the Austrian model), decentralized (following the U.S. model) or hybrid.²³

Although each of these additional institutional design choices will have an impact on the choice of political system, the impact each will have is indirect and secondary only. In other words, the cooperation and flexibility deficiencies that I have associated with presidential and semi-presidential systems flow *primarily* and *directly* from the system features mentioned earlier, *viz.*, the fact that these systems provide for a powerful, directly elected president who governs for a fixed term. Other institutional choices — such as the choice of a majoritarian electoral system, a bicameral legislature, a unitary political structure, or a decentralized system of judicial review — can only *mitigate* the negative effects associated with presidential and semi-presidential government.²⁴ This is an important point because it underlines the value of examining the choice of political system in isolation, to understand the distinctive role that it plays in democratic consolidation.

²⁰ See LIJPHART, *supra* note 13, at 150-168.

²¹ Other institutional choices related to electoral design include, *inter alia*, the choice between (i) staggered and synchronized elections, (ii) single and double ballot systems, and (iii) shorter and longer electoral terms. See generally SARTORI, *supra* note 17.

²² See LIJPHART, *supra* note 13, at 90-105.

²³ See generally ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989).

²⁴ Of course, the same point applies to other institutional choices as well. For example, electoral systems based on proportional representation tend to produce more political parties than systems based on majority vote. See SARTORI, *supra* note 17, at 53. This can have a *direct* effect on minority representation and legislative efficiency. The choice of a parliamentary form of government, a unicameral legislature, a unitary political structure or a centralized system of judicial review can only *mitigate* the effects that are directly produced by the proportional representation system.

At this juncture it is important to also say a word about the *capacity* of transitional democratic governments to freely choose their new constitutional arrangements. Surprisingly, there is relatively little that has been written about the process of constitution-making in new democracies.²⁵ However, the significance of this issue should be obvious. New democracies often operate under a special set of constraints that complicate constitutional reform.²⁶ For example, it is common in democratic transitions for the outgoing undemocratic regime to extract constitutional concessions as the price of relinquishing sovereign powers.²⁷ It is also common for newly democratic governments to find themselves saddled with existing constitutional frameworks that impede reform.²⁸ Consequently, even if the assertions in this article are valid, it is important to acknowledge that constitution-making environments in new democracies often place significant limitations on the capacity of constitutional architects to enact the reforms that they consider most appropriate.

Finally, it is important to briefly comment on the choice of Spain, Poland and Argentina as case studies. First, as stated in the introduction, each of these countries was the first in its region to have completed a democratic transition under the dominant constitutional model of that region.²⁹ Second, the experiences of these three countries provide a very representative indication of what in fact occurred in similarly situated

²⁵ This point has also been noted by Jon Elster. See, e.g., Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUB. ADMIN. 169, 174-186 (1993).

²⁶ See DEMOCRATIC TRANSITIONS, *supra* note 2, at 81-83.

²⁷ One of the most notorious illustrations of this point comes from the democratic transition in Chile, where the price of re-establishing democracy included the retention of a constitution created by the unelected Pinochet regime. The constitution contained several *de jure* limitations on the new democratic government. See generally Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L. J. 1425 (1992).

²⁸ Examples of this include the former United Soviet Socialist Republic and Czechoslovakia, where at different moments in each transition, the non-democratic constitutions took on lives of their own and virtually paralyzed decision-making processes. See generally Rett Ludwikowski, "Mixed" Constitutions - Product of an East-Central European Constitutional Melting Pot, 16 BOSTON U. INT'L L. J. 1 (1998).

²⁹ See *supra* note 2 and accompanying text.

countries in their respective regions. Third, the transitions that occurred in each of these countries share a number of important similarities: (i) each involved a non-violent transition from authoritarianism to democracy; (ii) in each case the transitional government had to deal with a weakened but nevertheless powerful military institution; (iii) in each case public support for democracy was very high at the beginning of the transition; (iv) the results of the initial legislative elections in each country failed to produce strong majorities; and (v) each country is a dominant player in its geopolitical context.³⁰ Although there are, of course, many social, economic and political differences between these countries, the similarities identified above make them appropriate case studies for the purposes of this comparative inquiry.

II. DEFINITIONS

This section will provide an outline of the principal definitional features of the “pure” forms of presidential, parliamentary and semi-presidential government, including a breakdown of the relationship in each case between the executive and legislative branches, and between each branch and the citizenry.³¹ These elements are the minimal criteria that must be present in a system for it to be properly and fairly characterized as parliamentary, presidential or semi-presidential. Thus, although the South American version of presidentialism is not *identical* to the United States version, each of them shares the minimal definitional features of presidentialism as defined below.³² Similarly, although the parliamentary model used in Southern Europe is not identical to that in the United Kingdom, and al-

³⁰ See, e.g., *id.* at 87-115, 190-204, 255-292.

³¹ In developing these definitions, I have endeavored to include only those characteristics that all political scientists seem to accept as being the constitutive elements of each model. See generally, LIPPHART, *supra* note 13; Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarianism in Comparative Perspective*, in *THE FAILURE*, *supra* note 2, at 119-136; see also generally DESIGNS FOR DEMOCRATIC STABILITY (Abdo Baaklini & Helen Desfosses eds., 1997) [hereinafter DESIGNS]; Ezra N. Suleiman, *Presidentialism and Political Stability in France*, in *THE FAILURE*, *supra* note 2, at 137-162.

³² See generally Carlos Nino, *The Debate on Constitutional Reform in Latin America*, 16 *FORDHAM INT'L L. J.* 635 (1992-1993) [hereinafter *Debate Over Constitutional Reforms*]; Fred W. Riggs, *The Survival of Presidentialism in America: Para-constitutional Practices*, 9 *INT'L POL. SCI. REV.* 247, 248-250 (1988).

though the semi-presidential model used in much of eastern Europe is not identical to that in France, in each case there is conformity with the minimal or "pure" elements of the political model as defined below.³³

A. *The "Pure" Parliamentary Model*

"Pure" parliamentary government, unlike presidential government, does not permit a strict separation of powers between the legislative and executive branches.³⁴ Instead, the legislative and executive branches together comprise the parliament, and the executive branch is formed from within parliament (and is accordingly dependent upon its confidence).³⁵ In practice, this means that the executive branch must be supported by a majority in the parliament. In this sense, a parliamentary regime can be characterized as a system of mutual dependence.³⁶ Government ministers are usually members of parliament and are, in any case, politically responsible to the legislature. Although some parliamentary systems have a symbolic or ceremonial head of government (such as a president or a monarch), it is the prime minister that is the true head of government, and who, together with the cabinet, exercises the principal executive powers.³⁷ With respect to the duration of electoral mandates, a government can fall if it receives a vote of no confidence from the parliament. If it chooses, however, the government also has the capacity to dissolve parliament and call for new elections.³⁸ The prototype for this "pure" model of parliamentarianism is the United Kingdom.³⁹

B. *The "Pure" Presidential Model*

In a "pure" presidential system, a president is popularly elected for a fixed term either by the citizenry or via an electoral

³³ See generally Oleg Protysk, *Do Institutions Matter? Semi-presidentialism in Comparative Perspective*, in PERSPECTIVES ON POLITICAL AND ECONOMIC TRANSITIONS AFTER COMMUNISM 17 (John S. Micgiel ed., 1997); and PARLIAMENT AND DEMOCRATIC CONSOLIDATION IN SOUTHERN EUROPE (U. Liebert & M. Catta eds., 1990).

³⁴ See LIJPHART, *supra* note 13, at 6.

³⁵ *Id.*

³⁶ See Stepan & Skach, *supra* note 31, at 120.

³⁷ See LIJPHART, *supra* note 13, at 6, 72.

³⁸ See *id.* at 68.

³⁹ *Id.* at 5.

college, and accordingly is not politically dependent on parliamentary votes of confidence.⁴⁰ The president usually wields considerable constitutional powers, generally including complete control of the composition of the cabinet and administration (subject to confirmation by the legislature). In addition to being the holder of executive powers, the president is also the symbolic head of state and cannot be removed from office between elections except by extraordinary impeachment procedures.⁴¹ However, in contrast to the semi-presidential system, under the presidential system, the president does not usually have the power to dissolve the legislature and call new elections. Also, in contrast to the parliamentary system, Cabinet Members do not sit in the legislature. Finally, with regard to the legislative branch, its members are directly elected for a fixed term by the citizenry.⁴² The prototype for this “pure” model of presidentialism is the United States.⁴³

C. *The “Pure” Semi-presidential Model*

Semi-presidentialism, which has also been described both as a “dual executive” system and a “semi-parliamentary” system, is, in many ways, a hybrid form of presidentialism and parliamentarianism.⁴⁴ Generally, semi-presidential systems have (i) a president as the head of state who is directly elected by the citizenry, rather than nominated by the parliament, and (ii) an indirectly elected prime minister, who usually must be supported by the parliament. As in parliamentarianism, the prime minister exercises significant powers. In this model, however, the president also has significant powers.⁴⁵ For example, with

⁴⁰ *Id.* at 68.

⁴¹ *See id.*

⁴² *See* Stepan & Skach, *supra* note 31, at 120.

⁴³ *See generally* James L. Sundquist, *The U.S. Presidential System as a Model for the World*, in *DESIGNS*, *supra* note 31, at 120.

⁴⁴ *See generally* Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 *EUR. J. POL. RESEARCH* 165 (1980). Following the reasoning of Duverger, some political scientists describe the semi-presidential system not as a synthesis of parliamentary and presidential systems, but as a system that alternates between parliamentary and presidential phases. This characterization flows from the fact that the president is, to some extent, only the supreme authority in circumstances where his or her party also has a majority in parliament. He or she must cede considerable power to the prime minister when his or her party is in the minority in parliament. *See id.*

⁴⁵ *See id.* at 166; *see also* Suleiman, *supra* note 31, at 144.

the consent of the prime minister, the president typically has the power to dissolve parliament.⁴⁶ In addition, as in the case of presidentialism, the president usually has the power to either veto certain acts of parliament or ask for reconsideration of bills.⁴⁷ Moreover, while law-making is primarily a parliamentary prerogative, some legislative functions can be shifted to the president who may legislate in those areas by decree.⁴⁸ With respect to cabinet composition, semi-presidentialism is similar to presidentialism inasmuch as members of cabinet do not typically come from parliament (with the exception of the prime minister). The prototype for this "pure" model of semi-presidentialism is the French Fifth Republic.⁴⁹

III. CASE STUDIES

Having outlined the thesis, assumptions and limitations of this article, and having provided a set of operational definitions, there will now be an examination of the three case studies: Spain, Argentina and Poland. For each case study, there will be (i) a brief review of the history of the transition, (ii) an assessment regarding whether the country's choice of political model advanced the goal of *cooperative governance*, and whether the goal could have been better achieved under one of the other political models, and (iii) an assessment regarding whether the country's choice of political model advanced the goal of *flexible governance*, and whether the goal could have been better achieved under one of the other political models.

A. *The Parliamentary Experience: Spain*

Spain was the first country in the "third wave" of democratic transitions to adopt a parliamentary model of governance.⁵⁰ Before its transition to democracy in the mid 1970s,

⁴⁶ See Stepan & Skach, *supra* note 31, at 149.

⁴⁷ See Robert Elgie, *France*, in SEMI-PRESIDENTIALISM IN EUROPE 75-76 (Robert Elgie ed., 1999).

⁴⁸ See *id.*

⁴⁹ See DEMOCRATIC TRANSITION, *supra* note 2, at 279.

⁵⁰ Portugal and Greece completed democratic transitions at around the same time as Spain. Portugal adopted the semi-presidential model, but the powers of the president have been constitutionally reduced and since 1988 Portugal has increasingly functioned as a parliamentary system. Greece adopted the parliamentary model. See *id.* at 141.

Spain had spent almost forty years under the dictatorship of General Francisco Franco.⁵¹ With the death of Franco in November 1975, the process of transition commenced in earnest, a process that is considered by many to be the paradigmatic example of a non-violent "pacted transition."⁵²

Although the Franco regime was clearly authoritarian, it was well short of being totalitarian.⁵³ Moreover, unlike the military regimes in Greece and in Latin America, Franco established a working institutional and constitutional structure in his final years. This included an official single party (the "Falange"), a prime ministerial office, an advisory institution (the "Council of the Realm"), a monarchy (in the person of King Juan Carlos), and a legislature (the "Cortes" - which did little more than ratify executive decrees).⁵⁴ As a result, from the start of the transition in Spain, consideration was given to institutional reforms based on an existing structure.⁵⁵ Not surprisingly, therefore, the first major legislative act of the transition was the passage of the Law for Political Reform⁵⁶, which effectively configured the existing institutions into a parliamentary monarchy.⁵⁷

The passage of the law also opened the door for the first free elections in forty years, which were held in June 1977.⁵⁸ The results of that first election reflected the divided society that Spain was: the moderate Union of the Democratic Center party (UDC) (led by Adolfo Suarez) obtained 34.9% of the vote;

⁵¹ See generally SHEELAGH M. ELLWOOD, *FRANCO* (Keith Robbins ed., Longman Publishing 1994).

⁵² See JOSEPH M. COLMER, *GAME THEORY AND THE TRANSITION TO DEMOCRACY: THE SPANISH MODEL* (1995). A "pacted transition" refers to a transition to democracy in which a pact is made between "regime moderates" and "opposition moderates" who are both able to use and contain their respective "hardliners." This is also referred to as a "four-player game theory model." For an analysis of how this model was applied in the case of Spain, see *id.*

⁵³ See *DEMOCRATIC TRANSITION*, *supra* note 2, at 38-54, where the authors analyze the differences between totalitarian and authoritarian regimes.

⁵⁴ *Id.* at 91.

⁵⁵ *Id.* at 89-91.

⁵⁶ *Id.* at 94-95. It was enacted by the still-unelected Cortes in November 1976. *Id.* at 95.

⁵⁷ This was subsequently formalized in Article 1(3) of the Spanish Constitution, which provides: "The political form of the Spanish State is the parliamentary Monarchy" CONSTITUTION OF SPAIN, art. 1(3), translation available at www.uni-wuerzburg.de/law/sp00000_.html.

⁵⁸ See *Presidentialism*, *supra* note 18, at 131.

the Socialists (led by Felipe Gonzalez) 29.4%; the Communists 9.3%; and the rightist Popular Alliance party 8.4%.⁵⁹ Since no party had more than a plurality of seats, this led to a search for coalitions. This type of coalition building is a constitutive characteristic of parliamentary systems.⁶⁰ Simply put, under a parliamentary system with no clear party majority, there is an institutional incentive for power-sharing and coalition-forming between parties, as it is only in a coalition that any of the parties can enjoy a substantive stake in the system as a whole. In the case of Spain, a coalition was formed between two political nemeses — the UDC and the Popular Alliance. This coalition combined to take majority control of the parliament.⁶¹ Suarez was chosen to serve as prime minister.⁶² Over the subsequent three years, the coalition provided the united and effective governance that is so crucial in the earliest years of a democratic transition. It is also noteworthy that although Suarez had very strong public support as prime minister, he never tried to stake out independent or antagonistic positions against the legislature.⁶³ This can be explained by the fact that in a parliamentary system, the prime minister cannot help but remain keenly aware that he or she needs the ongoing support of his or her parliamentary coalition in order to continue to serve as its leader.

Would the same positive results in terms of cooperative governance have obtained if Spain had instead adopted a presidential or semi-presidential system rather than a parliamentary system? The answer is probably no. First, in both presidential and semi-presidential systems, coalition building is inherently more difficult because of the existence of a presidency possessed of robust *de jure* and *de facto* powers.⁶⁴ When a political party takes the presidency in such systems, there is institutionally less incentive for it to form a coalition in the legislature because, unlike in a parliamentary system (where sharing power is the only way for a party to obtain any significant stake in the system), the holding of the presidency already af-

⁵⁹ See *id.* at 131.

⁶⁰ See *id.* at 131-133.

⁶¹ See *id.* at 132.

⁶² See *id.* at 131.

⁶³ See DEMOCRATIC TRANSITION, *supra* note 2, at 93-98.

⁶⁴ See MARVALL, *supra* note 6, at 6-10.

fords a substantive stake in the system, and one which is guaranteed for a fixed term.⁶⁵ Thus, had Suarez been elected President in a presidential or semi-presidential system, it is less likely (although not impossible) that his UDC party colleagues would have formed a coalition with the Popular Alliance.

Second, both presidential and semi-presidential elections tend to operate according to the rule of "winner-take-all," in which winners and losers of the election are sharply defined for the entire period of the presidential mandate. The problem is that this zero-sum game tends to create polarization and conflict between the executive and legislative branches whenever a political party wins one contest (e.g., the presidential election) but loses the other (e.g., the legislative elections). In a presidential or semi-presidential Spain, such conflict would likely have arisen because the UDC would have held the presidency (i.e., Suarez), but not the legislature.⁶⁶ Of course, this type of conflict can largely be avoided by the president's party forming a coalition in the legislature. As just noted, however, such coalitions are less likely to form in a presidential or semi-presidential system.⁶⁷

We now turn to the second assertion about the comparative advantage of parliamentarianism in the context of a democratic transition: its capacity to effect fluid changes in government or leadership when public support dips too low or in times of crisis. First, returning to events in Spain, by 1981 Suarez had become somewhat discredited as prime minister. Ultimately, he was compelled by the coalition to resign.⁶⁸ The parliamentary coalition itself, however, remained intact and a successor prime min-

⁶⁵ See generally LIJPHART, *supra* note 13.

⁶⁶ See *Presidentialism*, *supra* note 18, at 131-133.

⁶⁷ It should be noted, however, that this dynamic is more attenuated under semi-presidentialism in the event of "co-habitation" (i.e., when the president does not control a majority in parliament, but the prime minister does). In such circumstances, the parliament enjoys almost as much *de facto* power as the presidency. Because the president remains the chief executive of government and retains substantial powers, however, even "co-habitation" produces fewer incentives for power sharing than a pure parliamentary system.

⁶⁸ See *Presidential or Parliamentary Democracy*, *supra* note 14, at 30. By the middle of 1980, public support for Suarez had fallen to 26%. In fairness, the drop was also due to an internal crisis within the UDC party, an economic recession, and renewed Basque terrorism. See *id.*

ister was chosen by the coalition in a series of simple steps. The fluidity of this change of leadership turned out to be critical because it coincided with the final throes of the old authoritarian regime that shortly thereafter made an unsuccessful attempt at a coup.⁶⁹ A second illustration of parliamentary flexibility came in the following year. As it turned out, the new prime minister, Calvo Sotelo, proved unable to hold the coalition together and public support for the coalition suffered a sharp decline.⁷⁰ As a result, Sotelo decided to dissolve the Cortes and call for new elections. This permitted Felipe Gonzalez and his Socialist Party to assume power with an overwhelming majority that ended up governing Spain for the next twelve years.⁷¹ Thus, both in the Suarez and the Sotelo examples, the flexibility of the parliamentary system permitted very smooth, crisis-free transitions in power, thereby ensuring that support for democracy in Spain did not diminish.

Would these smooth transitions have occurred if Spain had instead adopted a presidential or semi-presidential system? Once again, the answer is probably no. First, had Suarez been an independently elected president, there would have been little institutional leverage to force his resignation (since impeachment would have been impossible given the electoral results). There would, therefore, have been greater incentive for him to linger ineffectually in office until the end of his fixed term. This might also have undermined the government's ability to survive the coup attempt, and would likely have caused a serious decline in public support for democracy.⁷² Second, in the Sotelo example above, the power to call new elections with such ease and speed was critical in preventing the coalition's internal crisis from transforming into a crisis of regime. Under a semi-presidential or presidential scenario, however, the legislative branch would have had no power to call new elections.⁷³ This would have caused a real risk of the emergence of a situa-

⁶⁹ See DEMOCRATIC TRANSITION, *supra* note 2, at 89.

⁷⁰ Economist Intelligence Unit, EIU Country Profile, Spain at 5 (1999/2000).

⁷¹ Juan J. Linz, *The Virtues of Parliamentarianism*, in THE GLOBAL RESURGENCE, *supra* note 10, at 156 [hereinafter *Parliamentarianism*].

⁷² This is precisely what happened under very similar circumstances during Garcia's presidency in Peru. See DEMOCRATIC TRANSITION, *supra* note 2, at 156.

⁷³ See *Presidential or Parliamentary Democracy*, *supra* note 4, at 8-10; and Elgie, *supra* note 47, at 75-6.

tion of government paralysis in which the legislative and executive branches would simply have become “stuck” with each other until the end of the presidential mandate.⁷⁴

Thus, with the benefit of hindsight, Spain’s adoption of a parliamentary constitutional framework seems to have been the right choice. Today Spain is a deeply consolidated democracy in which (i) a clear majority of public opinion believes that democracy is the most appropriate form of political governance, and (ii) there is a strong tradition of resolving conflict within the rules of the country’s democratic process.⁷⁵ Is this success the direct result of Spain’s choice of a parliamentary system? Clearly not. However, the choice of a parliamentary system — and in particular its capacity to promote cooperative and flexible governance — does appear to provide at least a *partial* explanation for this success.

B. *The Presidential Experience: Argentina*

Argentina was the first country in the cycle of successful democratic transitions that swept South America in the 1980s to adopt a presidential model of governance.⁷⁶ Before its transition to democracy, Argentina had spent seven years under the dictatorship of a vicious military regime.⁷⁷ In terms of the chief characteristics of the system in place in Argentina at the time, at least three things should be noted. First, unlike its counter-

⁷⁴ Semi-presidentialism mitigates this dynamic to some extent by virtue of the fact that the president has the power to dissolve parliament. Such power is, however, exercised rarely because of the damaging effect it would have on the president’s public support and because of the dangerous precedent it would set for democratic practices in government. In contrast, in a parliamentary system, there is generally no danger to democracy when new elections are called because it is perfectly acceptable under the system rules, and the decision is made collectively by the parliament rather than by one person. See *Presidential or Parliamentary Democracy*, *supra* note 4, at 48-49.

⁷⁵ For further analysis of the democratic consolidation in Spain, see DEMOCRATIC TRANSITION, *supra* note 2, at 108-15.

⁷⁶ In truth, the presidential system was not so much “adopted” in Argentina as it was “restored” via the prior democratic constitution. See *id.* at 202. While this decision to restore rather than replace the previous democratic system may have allowed the country to avoid a potentially divisive national debate, it also precluded an examination of whether the previous system had itself contributed to the democratic breakdown.

⁷⁷ See generally NÚNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Universitaria de Buenos Aires ed., 1986).

part in Brazil, the Argentine military government never created parties or held elections during its years in power.⁷⁸ Second, unlike the regimes in Uruguay and Chile, the Argentine regime never developed a so-called "guided democracy" constitution.⁷⁹ And third, at the time of the transition, the economy was in ruins due in large part to the disastrous war with the British in Malvinas.⁸⁰ As a result, when the Argentine military finally surrendered in disgrace to the British in 1982, not only was the collapse of the regime as a whole very swift, but the Argentine military also found itself unable to impose significant constraining conditions (initially at least) on the successor government as a price of transition.⁸¹ Nevertheless, the relationship between the armed forces and the new civilian government remained a crucial issue.

The first democratic elections following the demise of the regime took place in 1983. The Radical Party candidate, Raúl Alfonsín, was elected as Argentina's new president.⁸² Under the constitution in place at that time, this meant he would preside for a fixed term of six years.⁸³ However, Alfonsín's party failed to capture a majority in both houses of the legislature. This failure was repeated in each election that took place during his tenure as President.⁸⁴ This prompted the President to generally try to work around, rather than with, the legislature. As for the legislature (and particularly the Peronist-controlled Senate), it generally engaged in an "opposition for opposition's

⁷⁸ See DEMOCRATIC TRANSITION, *supra* note 2, at 190.

⁷⁹ *Id.* at 190-91.

⁸⁰ See Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L. J. 2619, 2622 (1991).

⁸¹ See *id.*

⁸² See *id.*

⁸³ See article 77 of the previous Argentine Constitution (original Spanish version), available at www.georgetown.edu/LatAmerPolitical/Constitutions/Argentina/arg1860.html. As a result of constitutional amendments adopted in 1994, the presidential term has been reduced to four years. Section 90 of the current Argentine Constitution reads: "The President and Vice-President shall hold their offices for the term of four years; and they may be re-elected or may succeed each other for only one consecutive term . . ."; ARGENTINE CONST., art. 77 (English translation), available at <http://www.uni-wuerzburg.de/law/ar00000.html>.

⁸⁴ From 1983 to 1987 the Radicals had a slight majority in the Chamber of Deputies, but not in the Senate; and from 1987-1989, the Radicals controlled neither of the houses. See Mark P. Jones, *Evaluating Argentina's Presidential Democracy: 1983-1995*, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA, 265-66 (Scott Mainwaring & Matthew Shugart eds., 1997).

sake" style of politics during Alfonsín's term in office.⁸⁵ Thus, the election results — combined with the presidential system — produced a classic dynamic of confrontation between the executive and legislative branches of government.⁸⁶

Three examples of this dynamic from the Argentine experience stand out each of which had a deeply negative effect on public confidence in government. First, by 1985, Argentina was in desperate need of an economic stabilization plan to curb spiralling levels of inflation.⁸⁷ The Alfonsín administration's plan (known as the "Austral Plan") was conceived in secrecy by a group of technocrats that had been given control of the Economics Ministry. It was then imposed on the country by emergency decree.⁸⁸ The total lack of consultation with the legislature predictably drew the ire of both the opposition Peronists, who held a majority in the Senate at the time, and the "Confederación General de Trabajo", the predominant trade union body that has historically been linked to the Peronists.⁸⁹ As a result, in part because of Alfonsín's non-consultative approach, the Austral Plan was abandoned leaving the country in a new and even more precarious economic bind.⁹⁰ Second, in Argentina, there was a vigorous effort made by the government to prosecute members of the armed forces suspected of having committed war crimes and crimes against humanity.⁹¹ When difficulties in carrying out these prosecutions began to emerge, the Peronists

⁸⁵ See generally James McGuire, *Political Parties and Democracy in Argentina*, in *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA*, 223-39 (Scott Mainwaring & Timothy R. Scully eds., 1995).

⁸⁶ See generally Carlos Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES*, 167-69 (Arend Lijphart & Carlos Waisman, eds., 1996).

⁸⁷ See Guillermo O'Donnell, *Delegative Democracy*, in *THE GLOBAL RESURGENCE*, *supra* note 10, at 102.

⁸⁸ See generally Marcelo Cavarozzi & Oscar Landi, *Political Parties under Alfonsín and Menem: The Effects of State Shrinking and the Devaluation of Democratic Politics*, in *THE NEW ARGENTINE DEMOCRACY* 180-81 (Edward C. Epstein ed., 1992).

⁸⁹ See *id.* at 182-84; see also Edward C. Epstein, *Labor-State Conflict in the New Argentine Democracy: Parties, Union Factions, and Power Maximizing*, in *THE NEW ARGENTINE DEMOCRACY*, *supra* note 88, at 134-35.

⁹⁰ See *Political Parties*, in *THE NEW ARGENTINE DEMOCRACY*, *supra* note 88, at 183; see also *DEMOCRATIC TRANSITION*, *supra* note 2, at 193.

⁹¹ See generally NINO, *supra* note 6, at 41-104.

used this as a political opportunity to damage the presidency.⁹² This ultimately caused the government to reverse course on its prosecution strategy, to the detriment of the military regime's many victims. Third, the President's term was marred by no less than thirteen general strikes.⁹³ This is largely explained by the fact that the overwhelming majority of trade unions (most of which were aligned with the Peronists) were encouraged by the Peronist opposition to make things difficult for the President.⁹⁴ This labor turmoil considerably undermined the pace and success of the transition.

What might have happened if Argentina had instead adopted a parliamentary or semi-presidential system of government rather than a presidential system at the beginning of its transition? First, under a parliamentary system, there would have been no independently elected president, and therefore, all of the parties in parliament would have had a strong incentive to seek out coalition arrangements. In addition, once a coalition is established in a parliamentary system, it is generally in the self-interest of coalition members to seek consensus in policy-making in as much as continuity in power is dependent on continuity of coalitions. In point of fact, like Alfonsín in Argentina, Suárez in Spain initially considered making the Spanish stabilization plan an executive decision. Unlike Alfonsín, however, he quickly realized that it would be more legitimate and more effective to arrive at a consensual agreement with the other members of the parliamentary coalition.⁹⁵ That is ultimately what he did, and in contrast to the Austral Plan, the Spanish plan never needed to be abandoned.⁹⁶

With respect to what might have happened in Argentina under a semi-presidential system, the picture is less clear. First, the electoral results would have probably created a situa-

⁹² For instance, the Peronists abstained from sending congressmen to the National Commission on Disappeared Persons, knowing that their lack of participation would affect the legitimacy of the Commission and therefore the President. They also took every opportunity to criticize the President's approach as overly lenient to the military, even though it was probably clear to most Argentines that the government was doing its utmost to take an aggressive approach in the circumstances. *See generally* NINO, *supra* note 80, at 2636.

⁹³ *See* DEMOCRATIC TRANSITION, *supra* note 2, at 193.

⁹⁴ *See id.* at 191-93.

⁹⁵ *See id.* at 90.

⁹⁶ *See id.*

tion of "co-habitation," thereby building a kind of mutual dependency between the president and the parliament. However, the potential for executive-legislative gridlock or conflict would still have been present for the simple reason that, in semi-presidential and presidential systems alike, the president has an independent and powerful mandate from the citizens which he or she can invoke when the legislature fails to cooperate. Second, because the Radicals would have held the presidency under a semi-presidential model, there would also have been less incentive for them to seek to form a coalition in the legislature. On the other hand, in a semi-presidential system, the Radicals would also have appreciated the fact that unless they tried to form a coalition, they would not likely see one of their own endorsed by the legislature as the new prime minister (who in a "co-habitation" situation enjoys powers very near to that of a president). Thus, while there would have been more incentive for cooperative politics in Argentina under semi-presidentialism than there was under presidentialism, there would nevertheless have been more incentives for such cooperation under parliamentarianism than under semi-presidentialism.

The second deficiency I have associated with presidentialism in the context of a democratic transition is its weak capacity for promoting crisis-free changes in government or leadership.⁹⁷ This weakness is well documented by an example from the Argentine transition. In October 1987, Alfonsín's party lost control of both houses of the legislature, but he remained President.⁹⁸ In effect, this meant that the country would have to endure the rigidity of a commitment to a failed administration that no longer enjoyed its support. As a result, executive-legislative cooperation virtually disappeared in Argentina, and the country experienced various national traumas for the next two years of the Alfonsín administration. These included four attempted military coups, and hyperinflation due to policy-making paralysis.⁹⁹ By June 1988, the government's approval rat-

⁹⁷ See *Presidential or Parliamentary Democracy*, *supra* note 4, at 9.

⁹⁸ Although the Radicals lost control of both houses, they did not lose enough seats to create the necessary votes for an impeachment. See *Democratic Transition*, *supra* note 2, at 193-194.

⁹⁹ See *DEMOCRATIC TRANSITION*, *supra* note 2, at 194. See also *Debate Over Constitutional Reform in Latin America*, *supra* note 32, at 643 (where the author

ing stood at 12%.¹⁰⁰ Alfonsín was finally compelled to resign six months early in order to prevent a major political/constitutional crisis.¹⁰¹

Could these traumas have been avoided or mitigated if Argentina had instead adopted a parliamentary or semi-presidential system? First, under a parliamentary system, a prime minister whose party had lost control of both houses of parliament as a result of mid-term elections, as occurred in Argentina, would have simply been forced out by a vote of no confidence. Indeed, the absence of a fixed and independent electoral mandate for the executive branch in a parliamentary system simply precludes any scenario such as the one described.¹⁰² As to the probable course of events under a semi-presidential model, it seems likely that the problems would have been comparable to those actually experienced in Argentina. To wit, there would have been the same lack of incentives or institutional escape valves to persuade or force an unwilling President Alfonsín to leave office before the conclusion of his fixed electoral term. In short, as in Argentina, it would likely have taken an extreme social and political crisis to force a resolution of the issue under a semi-presidential model.

In spite of these and other destabilizing incidents during the transitional years, Argentine democracy today is in a relatively robust state.¹⁰³ It would, however, be an overstatement to characterize Argentine democracy as fully consolidated.¹⁰⁴ The main deficiency in Argentine democracy remains the absence of a strong tradition of the rule of law and respect for ordinary democratic procedures. Indeed, Alfonsín's successor,

discusses how executive-legislative conflict can create dangerous power vacuums that get filled by "corporate groups" such as the military and the private sector).

¹⁰⁰ See *id.* at 194.

¹⁰¹ See Arturo Valenzuela, *Party Politics and the Crisis of Presidentialism in Chile*, in *THE FAILURE*, *supra* note 2, at 141.

¹⁰² See *Parliamentarism*, *supra* note 71, at 156.

¹⁰³ See, e.g., Freedom House, *Freedom in the World (1999/2000)*, *Argentina Country Report*, at <http://www.freedomhouse.org/survey/2000/reports/country/arg.html>; see also NINO, *supra* note 86, at 173, (regarding the 1994 constitutional reforms referred to earlier in the article, which appear to have mitigated a few of the worst features of Argentine presidentialism).

¹⁰⁴ In fact, it is still difficult to characterize as "consolidated" any of the presidential democracies that underwent democratic transitions in South America in the 1980s, including Uruguay, Brazil and even Chile. See generally *DEMOCRATIC TRANSITION*, *supra* note 2.

Carlos Menem, showed a marked disdain for democratic values and institutions that went largely unchecked for ten years.¹⁰⁵ For example, during his first four years in power, when his party enjoyed a majority in both houses of the legislature, he took advantage of this situation and a clause in the constitution permitting the issuance of “necessary and urgent” decrees, ultimately issuing 244 decrees. Only 4% of these decrees were passed through the full ratification process in the legislature.¹⁰⁶ Similarly, when faced with the prospect of political resistance by the Supreme Court, he increased the number of judges from five to nine to enable himself to appoint political allies to the Court and get the judgment he desired.¹⁰⁷ Whether the new president of Argentina can overcome these and other pitfalls of presidential government and consolidate democracy, remains to be seen.¹⁰⁸

C. *The Semi-presidential Experience: Poland*

Poland was the first country in the cycle of democratic transitions in Eastern Europe to adopt a semi-presidential model of governance.¹⁰⁹ Before its transition to democracy, Poland had spent almost forty-five years under Soviet occupation and domi-

¹⁰⁵ See generally DEMOCRATIC TRANSITION, *supra* note 2, at 200-204.

¹⁰⁶ See *id.* at 201. Several examples of such decrees are reviewed in Delia Ferreira Rubio & Matteo Goretti, *When the President Governs Alone: The “Decretazo” in Argentina, 1989-1993*, in EXECUTIVE DECREE AUTHORITY, 33-61 (John M. Carey & Matthew Shugart eds., 1998).

¹⁰⁷ See DEMOCRATIC TRANSITION, *supra* note 2, at 201. Menem’s behavior in office exhibits all of the signs of Latin American “delegated democracy.” The “signs” of delegated democracy are: (i) presidents who see and place themselves as “above” parties; (ii) presidents who view the legislature and the judiciary as a nuisance and an impediment to effective government; (iii) presidents who see themselves as the “alpha” of politics, and their staff as the “omega”; and (iv) presidents that insulate themselves from any potential oppositional forces and seek to become the sole person responsible for their policies. See generally O’DONNELL, *supra* note 87.

¹⁰⁸ See CNN Online edition, November 1, 1999, available at <http://eu-rope.cnn.com/WORLD/world.report/index11.01.html>. The new president, President Fernando de la Rúa of the center-left Alliance Party, was elected to a term of four years on October 24, 1999.

¹⁰⁹ See Freedom House, *Freedom in the world*, at <http://www.freedomhouse.org>. Albania, Moldova, Romania, Estonia, Georgia, Ukraine, Latvia, and Lithuania have all opted for semi-presidential systems as well. Bulgaria, the Czech Republic, Slovakia, and Hungary opted for parliamentary systems. See *id.*

nation.¹¹⁰ Resistance to the Russian presence was always strong, particularly on the part of the Catholic church (which had always retained a sphere of relative autonomy from the regime), and on the part of the labor movement (notably the self-governing unions which were formed under the guidance of Solidarity which, at its peak, represented ten million workers).¹¹¹ It wasn't until early 1989, however, after almost a decade of martial law and intense labor strife, that the regime led by General Jaruzelski agreed to conduct the so-called "Round Table Talks" regarding the future of democracy in Poland.¹¹²

In general, the Polish transition — and particularly the Round Table Talks process — reflected the classic pattern of a pacted transition. What was unusual about the transition process in Poland, however, was how much the incumbent regime overestimated its strength and popularity, and how little the opposition appreciated its own.¹¹³ As for the content of the pact that ultimately emerged from the Talks, the most important point for present purposes is that it provided for a semi-presidential form of government.¹¹⁴ However, at least three other points should also be noted in this context. First, like other post-Communist countries, Poland faced what was known as the "simultaneity problem" (i.e., the problem of having to simultaneously establish both a constitutional democracy *and* a market economy).¹¹⁵ Second, after forty-five years of single-party state rule, "party politics" had developed a very negative connotation in Poland, a factor that considerably slowed the develop-

¹¹⁰ See generally JACEK JEDRUCH, CONSTITUTIONS, ELECTIONS AND LEGISLATURES OF POLAND:1493-1993, 307-41 (1998).

¹¹¹ See DEMOCRATIC TRANSITION, *supra* note 2, at 256-57, and 261-62.

¹¹² See generally Elster, *supra* note 25, at 202-06.

¹¹³ See DEMOCRATIC TRANSITION, *supra* note 2, at 266. This misunderstanding on both sides was best highlighted by the results of the first semi-free elections in June 1989, in which Solidarity achieved an unexpected and overwhelming success over the Communists. See *id.*

¹¹⁴ The powers assigned to the president under the pact were very broad, but vaguely defined. Presidential powers included a limited power to dismiss the prime minister, and seemingly unfettered power over matters such as foreign policy, defense and national security. See Jon Elster, *Afterword*, in POSTCOMMUNIST PRESIDENCIES, at 229-30; see also Krzysztof Jasiewica, *Poland: Walesa's Legacy to the Presidency*, in POSTCOMMUNIST PRESIDENCIES, at 133-48.

¹¹⁵ Elster, *supra* note 25, at 170-73.

ment of a political society.¹¹⁶ Third, Poland in transition lacked a tradition of the rule of law, due largely to communism's substitution of policy for law. All of these factors impacted the speed and the process of the democratic transition in Poland.¹¹⁷

Turning to the initial election in Poland, the first fully competitive presidential election took place in December 1990, and was won by Lech Walesa. He had campaigned on an explicitly anti-party platform, but was clearly identified as being part of the Solidarity camp. Then in October 1991, Poland held its first fully competitive elections for both houses of the legislature. The results were alarming in two respects: (i) only 43% of the electorate participated in the elections; and (ii) twenty-nine parties ended up being represented in the lower house, with no party receiving even 14% of the vote.¹¹⁸ Although coalition building was clearly not going to be easy, the semi-presidential system in Poland made matters worse. First, coalition building proved extremely difficult because Solidarity-identified parties felt they had won the presidency, and therefore saw less need to form a coalition in the legislature. Second, and more significantly, coalition building was impeded by the "dual executive" nature of semi-presidential systems, which requires that a prime minister obtain the support of both the president *and* the legislature. In a legislature as divided as that in Poland, this was virtually impossible to achieve.¹¹⁹ As a result, it took two crisis-like months just to form a coalition, and the new govern-

¹¹⁶ See DEMOCRATIC TRANSITION, *supra* note 2, at 269-272. In this regard, it is interesting to note that almost none of the major political movements in Eastern Europe called themselves "parties", including "Solidarity" in Poland. Indeed, so intent were the Poles on avoiding routine party politics, that oppositional behavior evolved into a general principle known as the "politics of anti-politics." See *generally* DAVID OST, SOLIDARITY AND THE POLITICS OF ANTI-POLITICS: OPPOSITION AND REFORM IN POLAND SINCE 1968 (1990).

¹¹⁷ See *generally* Elster, *supra* note 25, at 202-14.

¹¹⁸ See DEMOCRATIC TRANSITION, *supra* note 2, at 275-276. This problem of excess representation was fixed (in part) by an electoral law reform enacted in 1993 which provided that a party could not be represented in the lower house unless it received more than 5% of the national vote. See *id.* at 287.

¹¹⁹ The Polish version of semi-presidentialism was particularly unwieldy during the transitional period. See, e.g., POLAND SMALL CONST., art. 57, 58, 59, 60 and 62. These articles in effect formalized the structure that had been in existence since the transition began in 1989 vis-a-vis the nomination and appointment of prime ministers. See translated version of the Small Constitution from the original Polish by the University of Wuerzburg, available at http://www.uni-wuerzburg.de/law/pl02000_.html.

ment went through three prime ministers in the first seven months.

To make matters worse, even after the formation of the coalition in Poland, the president and the legislature quickly fell into a classic pattern of executive-legislative conflict. The conflict was particularly acute in Poland because of the combination of (i) a semi-presidential governance structure, and (ii) election results in which neither the president nor the prime minister controlled a party majority.¹²⁰ In Poland, this awkward mix played out in particularly dangerous ways during the course of the constitution-making process that followed the elections. Although an interim constitution was ultimately agreed to,¹²¹ the intense conflicts which surfaced during the process between the president, the prime minister and the legislature exacted high price on the new democracy in the form of further public disillusionment in both politicians and the political process.¹²² This disillusionment only became worse with time as relations between the two executives (i.e., between the prime minister and the president) and between each of them and the legislature transformed into a seemingly endless stream of mutual recriminations.

Would these same negative results have obtained if Poland had adopted a parliamentary or presidential system, rather than a semi-presidential system? First, under a parliamentary model, there would have been no independently elected president, and therefore, no need for presidential approval of a prime minister. This would obviously have made it much easier for a coalition to form, since (i) the parties in parliament would have all had an equal interest in forming a coalition, and (ii) once formed, there would have been no need for a separate and independent approval from a president. Moreover, following coali-

¹²⁰ See generally LUDWIKOWSKI, *supra* note 28. It should be noted that this situation i.e., where neither the president nor the prime minister control a party majority, has to date been avoided in the French Fifth Republic. See DEMOCRATIC TRANSITION, *supra* note 2, at 279. We can speculate that such a situation would present problems far more grave for good governance than the relatively workable circumstance of "co-habitation" in which the president does not control a majority but the prime minister does. Indeed, this exact scenario has already led to *armed* struggle in other parts of Eastern Europe including, *inter alia*, Russia and Georgia. See *id.* at 278.

¹²¹ See generally OST, *supra* note 116.

¹²² See DEMOCRATIC TRANSITION, *supra* note 2, at 283-87.

tion formation, the government in a parliamentary system does not have the option of de-legitimizing the legislature since the legislature and executive are fused in a parliamentary system.¹²³ This is not to suggest that if Poland had adopted a parliamentary system that it would have avoided *all* of the crises that occurred in the early years of the transition. The cooperation advantages of a parliamentary system, however, would certainly have helped mitigate the severity of the crises and their attendant harm to public enthusiasm for democracy.

In contrast, had Poland been operating under a presidential model, there would have been difficulties in forming a coalition because of the sentiment among Solidarity-identified parties that they held the presidency.¹²⁴ On the other hand, coalition building under a presidential system would have avoided the additional impediment of collective decision-making over a second executive (i.e., the prime minister). Similarly, although one could reasonably predict that presidentialism would have produced the same executive-legislative conflict in Poland (given that the president did not enjoy a legislative majority), the conflicts would probably have been less drawn out because of the fact that presidentialism provides for only *one* executive position, not two.¹²⁵

We now turn to the second deficiency that has been associated with semi-presidentialism in the context of a democratic transition, *viz.*, its weak capacity to effect rapid and smooth changes in government or leadership when public support dips too low or in times of crisis. In Poland, President Walensa's approval rating had dropped to 20% by 1993, the lowest approval rating for a president in all of Eastern Europe at that time.¹²⁶ However, Walensa continued to believe that he had a "special relationship" with the Polish citizenry, and frequently alternated between ridiculing the parliament and threatening to dissolve it in the name of "the people."¹²⁷ Some commentators

¹²³ See LIJPHART *supra* note 13, at 68.

¹²⁴ See generally Ania van der Meer Krok-Paszkowska, *Poland, in SEMI-PRESIDENTIALISM IN EUROPE*, *supra* note 47, at 175-87.

¹²⁵ See LIJPHART, *supra* note 13 at 76.

¹²⁶ See DEMOCRATIC TRANSITION, *supra* note 2, at 286. Even the level of trust in his government was higher, at 25%. See *id.*

¹²⁷ See DEMOCRATIC TRANSITION, *supra* note 2, at 287 (quoting speech by Walensa). A similar dynamic existed under President Collor in Brazil who,

were in fact worried about his presidential aspirations leading to an "executive coup against the politicians," especially after he failed to achieve the increases in presidential powers which he had been seeking since his inauguration as president.¹²⁸ The semi-presidential system, however, precluded his removal in the absence of impeachment-level consensus, something that would have been impossible at any point during Walensa's term in office. As a result, Walesa stayed on as President until the end of his term in 1995, only narrowly averting a major political/constitutional crisis.¹²⁹

Could this situation have been avoided or mitigated if Poland had instead adopted a parliamentary or presidential system? First, under a presidential system, the forced removal of Walensa would have been impossible for the same reason that it was under semi-presidentialism, *viz.*, because of the lack of impeachment-level consensus in the legislature. In addition, because of the independent mandate to govern for a fixed term that is provided to a president in a presidential system (as in a semi-presidential system), the institutional incentive for a president to voluntarily cede power even when he or she becomes extremely unpopular is very weak.¹³⁰ In contrast, had Walensa instead been a prime minister in a parliamentary Poland, he could have been removed by a simple vote of no confidence — something which would not have happened during the early years when he was popular both inside and outside the legislature, but which clearly needed to and *would* have happened by 1993 when Walensa's popularity was extremely low.¹³¹ And yet, it must be conceded that Polish politics was so disorganized and divided during the early years of the transition that it is doubtful that any system, including parliamentarianism, could have averted the significant loss of public support for politicians and democracy that occurred. Under a parliamentary govern-

backed by a party that controlled less than 5% of the legislature in 1990, attempted to characterize the legislature as "out of touch" with the citizenry in the classic anti-politics and anti-party approach that presidentialism and semi-presidentialism have tended to produce in Latin America and Eastern Europe. *See id.* at 170.

¹²⁸ JADWIGA STANISZKIS, CONTINUITY AND CHANGE IN POST-COMMUNIST EUROPE 27 (Netherlands Institute of International Relations, 1992).

¹²⁹ *See* Van der Meer Krok-Paszkowska, *supra* note 124, 182-87.

¹³⁰ *See Presidential or Parliamentary Democracy, supra* note 4, at 9.

¹³¹ *See* DEMOCRATIC TRANSITION, *supra* note 2, at 287.

ment in Poland, however, there would have at least been *some* flexibility in attempting to meet public expectations through changes in leadership.

As to the state of Polish democracy today, things have very much improved. Indeed, in spite of the many crises and conflicts that plagued the first five years, Polish democracy did not break down, and Poland even stands a good chance of becoming a member of the European Union at some point in the next few years.¹³² This significant improvement is no doubt due, in part, to the fact that Poland adopted a new constitution in April 1997, which established a system more similar to parliamentarianism. This system has thus far produced a much higher quality of domestic politics than the prior system.¹³³ Whether Poland can now consolidate democracy within the new system remains to be seen. By choosing a more parliamentary system — with its seemingly superior capacity for promoting cooperative and flexible governance — Poland is at least no longer playing against the odds.¹³⁴

IV. CONCLUSION

The chief purpose of this article was to attempt to assess which of the three most common models of political governance — parliamentarianism, presidentialism or semi-presidentialism — best facilitates successful democratic transition. The working hypothesis of the article was that, as between these three models, *parliamentarianism* is best at facilitating suc-

¹³² See Freedom House, *Freedom in the World (1999/2000)*, Poland Country Report, at <http://www.freedomhouse.org/survey/2000/reports/country/poland.html>.

¹³³ See generally Hanna Suchocka, *Checks and Balances Under the New Constitution of Poland*, ST. LOUIS-WARSAW TRANSATLANTIC L. J. 45 (1998). The new constitution stripped the President of various prerogatives. However, the new constitution, similar to the classic parliamentary models, reserves the roles of “supreme representative” and “guarantor of the continuity of the state authority” for the president. Still, in contrast to traditional parliamentarianism, the new constitution continues to provide for the direct election of the president. See *id.* The 1997 Polish constitution, as translated from the original Polish by the University of Wuerzburg, is available online. POLAND CONST., available at http://www.uni-wuerzburg.de/law/p100000_.html.

¹³⁴ In this context it is worth noting that as of today, Hungary and the Czech Republic (both of which adopted *parliamentary* systems at the start of their respective transitions) are arguably closer to achieving democratic consolidation than any other post-communist country. See generally DEMOCRATIC TRANSITION, *supra* note 2.

cessful democratic transitions because of its greater capacity to promote both *cooperative* and *flexible governance*. This hypothesis was then examined using three test cases: Spain, Argentina and Poland.

Having now examined these three test cases, the evidence seems to suggest that on balance, parliamentarianism may indeed possess a greater capacity to promote cooperative and flexible governance than either presidentialism or semi-presidentialism. To that extent, it would appear to be the preferable political model for democratic transition contexts. This is, however, a tentative conclusion only — further research is clearly needed.

My hope is that as further research is done on the comparative advantages and disadvantages of parliamentarianism, presidentialism and semi-presidentialism, it will eventually become possible to provide *reliable, empirically-based advice* to transitional governments regarding the core attributes and dynamics associated with each of these different constitutional models. Given the ever-increasing number of transitions to democracy in the world today, the ability to provide such advice has never been more important.