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On the Delegation of Powers: With Special Emphasis on Central and Eastern Europe[1]

ELI M. SALZBERGER
Faculty of Law, Haifa University, Israel

STEFAN VOIGT* Stefan.Voigt@ruhr-uni-bochum.de
Economics Faculty, Ruhr-University-Bochum, Germany

Abstract. Elected politicians can choose to decide themselves or to delegate competence. Delegation can occur in the constitutional stage, but is most common in the post-constitutional stage. Furthermore, domestic delegation can be distinguished from international delegation. The authors propose to analyze both delegation decisions within a unified framework and apply it to eight countries of Central and Eastern Europe that have experienced substantial constitutional change recently. The main differences among these countries with regard to delegation are portrayed, their origins are traced and their effects analyzed.

JEL classification: H1, H7, K0, P5.

1. Introduction

During the late 1980s and early 1990s, after half a century of communist rule, the countries of Central and Eastern Europe went through a peaceful transition to democracy. All of these countries adopted a new (or significantly amended an existing) written constitution. The vast majority of them based their new system of government on the continental model, two of whose main features are parliamentary democracy and a special constitutional court. However, there are significant differences in the specific details of their governmental structures. In this paper, we try to determine the possible sources for the institutional differences in these regimes, which emerged in the same period of time and against a similar historical background. This is a very broad task, and obviously we will be able to address neither every possible feature that might be a viable explanatory factor for these institutional differences, nor every possible effect of such differences. The same limitation applies to the range of institutional components that will be scrutinised here. We will focus our analysis on the structure of the separation of powers and especially on the delegation of powers to domestic organisations, such as independent judiciaries and central banks, and to international bodies, such as international organisations.

* Contact Address: Stefan Voigt, Universitätsstr. 150, 44780 Bochum, Germany. Tel: +49-234-322 5341; Fax: +49-234-321 4273.

Interest in explaining the delegation of powers by politicians and in distinguishing between domestic and international delegation means interest in nomological hypotheses, i.e., hypotheses that purport to be applicable everywhere and always. Thus, a paper with a particular focus on a group of countries with particular characteristics might seem awkward. Yet, there are a few reasons why such a specific focus can be important.

First, it has often been observed that, shortly after radical regime changes, everything is up for grabs. To analyse constitutional and post-constitutional choices, we draw on rational choice, broadly interpreted. We thus claim that this general framework should do. In times of radical constitutional changes, however, the identification of the constraints that the relevant actors are subject to might not be as clear-cut as in "normal" times. In this paper we will try to address some of these constraints.

Second, the rapid changes in the scrutinised countries, not only in regard to constitutional and legal norms, but also in regard to economic and political performance, invite an examination of the interrelations between the institutional structures and de facto performance. Such a comprehensive examination is beyond the scope of this paper, but it sets an agenda for further research that might be relevant to the general theoretical questions we ask: why politicians delegate powers and to whom. If links are found between certain features of constitutional design (such as an independent judiciary) and end results (for example, the degree of economic success), such links can add to the analysis of why politicians are interested in delegating their powers.

Third, delegation of powers can usually be viewed as "post-constitutional constitutional choice" - choice made on the basis of an existing constitution. In the case of the countries of Central and Eastern Europe, this sequential choice might have turned into a simultaneous one, in which decisions to delegate are made at the same time as more basic decisions concerning who is to have the general competence to delegate power. It can be conjectured that this simultaneity will lead to different outcomes than sequential choices, because the post-constitutional choices will become part of more general package deals. This means that the analysis of decisions to delegate power will become more difficult, because it will be more complicated to detect the relevant restrictions under which the actors operate.

Candidates for relevant constraints include historical constitutions, which are often a symbol of national pride or unity. They might serve as a focal point and as a source of constraining force. The preceding communist constitutions could be another constraint. They were often not taken very seriously under communism, but still, they had the potential to constrain the transition process. The round table talks were institutional innovations to overcome the difficulties communist regimes had in entering into negotiations with interest groups that were not part of "democratic centralism".

If there is a broad consensus among the participants in a constitutional convention about the need to apply for membership in specific international organisations (IOs), the statutes regulating these IOs could also constrain the framing of the constitution. This would be an unusual trait, because in our thinking about IOs we usually assume a number of nation states with their respective constitutions as given, and that these form the basis for negotiating the founding of an IO. Here, the IO is already given and the constitution-makers can choose to comply with its rules in anticipation of subsequent

membership. The procedural rules that a constitutional convention agrees upon (agenda-setting power, veto powers, voting rules, etc.) will, of course, also influence the content of the constitution.

Central and Eastern Europe might also be "special" because of the pace of development of independent agencies. Independent agencies evolved very slowly in Western constitutional systems. In principle, the experiences that have been gained with various institutional arrangements in the West could be taken into account when deciding how to delegate powers in the newly-passed constitutions.

We cover eight countries in this study: four countries that the Freedom House Project found to be consolidated democracies and consolidated market economies (the Czech Republic, Estonia, Hungary, and Poland) and four countries assessed to be in transitional polities and transitional economies (Bulgaria, Romania, Russia, and Slovakia) (Karatnycky, Motyl, and Shor 1998:4).[2]

The paper is organised as follows: In the next section, some theoretical conjectures concerning the delegation of powers will be presented after the key concepts have been defined. Section three deals with the constraints that the drafters of the new constitutions were subject to. Section four offers an overview of the newly created institutional arrangements in regard to delegation, both domestic and international. The paper concludes with an outlook that makes some open questions explicit.

2. Some Theoretical Conjectures

2.1. Delineating Domestic and International Delegation

Our general question is whether it is possible to explain the variance in the structure of agencies and their independence across our sample by analysing the constitutional (and post-constitutional) competences and restrictions given to those organs that have the power to delegate power. The creation of an independent agency and the transfer of competence to that agency is thus to be explained, and it is our hypothesis that the modes of delegation chosen and the extent of powers transferred can be explained by constitutional structures, as well as by political considerations. In regard to Central and Eastern Europe, this approach might be too short-sighted, though, since the choice of constitution and the choice of post-constitutional delegation often occurred (quasi-) simultaneously. Therefore, we will try to carry our analysis one step backward. In that first step of our analysis, the currently valid de jure constitutions will not be assumed to be exogenously given any more, but will themselves be analysed as subject to deliberate choice.

Before spelling out some conjectures concerning these two levels of choices, we offer a definition of what we mean when we speak of "delegation of powers". Post-constitutional delegation of powers occurs "whenever rule-making powers that are not constitutionally assigned to a body other than the legislature are in fact being exercised by such a body" (Salzberger 1993:359). Similarly, constitutional delegation of powers occurs when the body that is drafting the constitution assigns powers to other bodies. If it is the legislature

that drafts the constitution, constitutional delegation and post-constitutional delegation are very similar in scope, and the difference between them relates only to the normative status of the delegation. The delegatee (in both stages) can be the executive, the judiciary, a committee of the legislature, a local authority, a public corporation, a special administrative body, or various international organisations.

Special emphasis will be given to the distinction between domestic and international delegation. Domestic delegation occurs when the rule-making powers are exercised by a body created by the domestic legislature and is under the governance of the constitution. International delegation is a situation in which the rule-making powers are exercised by a body that is not entirely under the control of domestic constitutional organs. A government might participate in the creation of an international organisation to which legislative power is delegated, but it will not be the only actor having a "say" in the modification and interpretation of its statutes. To qualify as "international delegation", it is sufficient that the rule-making powers are not exercised by a body completely under the control of domestic constitutional organs. The involvement of an international body is, therefore, not necessary. This means that we would also speak of international delegation if rule-making powers are conferred to a constitutional organ of another state. To be analysable within a unified framework, domestic and international delegations have to be substitutes for each other. That means that international organisations that deal primarily with border-crossing externalities will not be taken into account here. The focus is, rather, on solutions that could, at least in principle, also be achieved domestically.

The most straightforward method of delegation of powers is when the legislature, by a statute, directs other bodies to create rules in a specific area, instead of creating them itself. Defined in such a way, delegation of power occurs on a different level from the separation of powers as envisioned by Montesquieu. The latter is usually interpreted as being confined to the separation of legislature, executive, and judiciary, each being assigned a different governmental function.[3] But since here we are interested in both the choice of constitutional rules and the choice of (post-constitutional) decisions to delegate, separation of powers can be perceived as a form of delegation of powers.

We assume that the relevant actors maximise their expected utility. Among the three alternatives of (1) deciding themselves, (2) delegating competence to a domestic agency, or (3) delegating competence to an international organisation, rational legislators will always choose the alternative that promises the highest expected net gains. Note, however, that our concept of benefits and costs is not restricted to monetary or power components. It is thus one of our tasks to identify costs and benefits connected with the relevant alternatives. In Voigt and Salzberger (2002), we identify a number of benefits accruing from delegation. They include the following: legislators can secure influence beyond the end of the election cycle; delegation can be used as a tool to credibly commit, as a tool to reduce uncertainty, but also to reduce one's workload; it can be used to expand the public sector and to remain in power or maintain legitimacy. These possible benefits have to be weighed against possible costs, such as delegatee-drift, monitoring costs, reversal costs, coordination costs, and even legitimacy drift.

In Voigt and Salzberger (2002), we conjecture that the type and extent of the observed delegation of powers can be explained by the constitutional structure underlying the delegation decision. As already pointed out, Central and Eastern Europe is "special" in the sense that here constitutional and post-constitutional choices have often occurred almost simultaneously. That is why we first deal with possible explanations for constitutional choice.

2.2. The First Step: Explaining Constitutional Choice

The economic approach analyses choices under conditions of scarcity. Actors are assumed to maximise their individual utility, subject to certain constraints. The choice of a constitution can also be analysed within this framework. Passing a new constitution is usually not an individual but a collective choice. The specifics of collective or public choice will therefore have to be taken explicitly into account. In analysing collective choices, it is still assumed that the actors try to maximise their individual utility, but an important constraint in so doing might be other relevant actors who do likewise, but whose interests might be partially conflicting. To explain constitutional choices, it will thus be important to identify the interests or preferences of the relevant actors and to identify the constraints that they are subject to in their choice.

The first step thus consists in identifying the relevant actors. If the group of people who are to propose a new constitution is called the constitutional convention, then one must ask: Who has the power to set the agenda within that group and what are the procedural rules that they use in their deliberations? Of special interest, of course, are the voting rules used. If the members of the constitutional convention know from the beginning of their deliberations who will have the power to accept or to reject their proposals, this would constitute a powerful constraint on the content of their proposals.

Thus far, we have identified two components that will determine the content of the constitutional rules, namely (a) the interests of the relevant players involved and (b) the procedural rules used to aggregate their preferences. A third factor playing a crucial role is the relative bargaining power of the various individuals or rather groups present at the constitutional convention. The bargaining power of a group is determined by its ability and willingness to inflict costs on others and thereby reduce the net social product. One crucial factor determining the bargaining power of a group is its fallback position, i.e., the level of utility it can secure if no agreement is reached (more on the relevance of bargaining power for explaining constitutional choice and change in Voigt 1999:chapter six).

In addition, the viscosity of the veil of ignorance (Rawls 1971) or the degree of uncertainty (Buchanan and Tullock 1962) can serve as an explanatory factor in the outcomes of the convention. In some of the scrutinised countries, the veil has been very thin, i.e., members of the constitutional convention had clear expectations about who could be in power after the next elections, etc. This means, for example, that we can expect members of a strong party who have a highly popular leader to opt in favour of a presidential rather than a parliamentary system. Parties that expect to be very popular will

be in favour of first-past-the-post; parties that expect to get just three or four percent of the vote will strongly oppose a high threshold, etc.

If interests do not coincide perfectly in a constitutional convention, or if the degree of uncertainty is low, consensus will be scarce. Since time is also scarce, members of the constitutional convention will look for any focal points (Schelling 1960) on which they can agree with relative ease. These might be procedural or substantial rules. Since constitutions often reflect the aspirations of a society, we conjecture that constitutional conventions will examine their countries' former constitutions, especially those that were expressions of autonomy, sovereignty, etc. The communist constitutions might also acquire a certain relevance, since the conventions have to start their deliberations on the basis of some set of rules. In this sense, the communist constitutions have the advantage of being the status quo. Turning more clearly to constraints faced by the constitution-makers, the agreements of round table talks could be interpreted as such, because they reflect the first agreements between representatives of the old regime and the new groups of an emerging civil society. As was already alluded to above, if a majority of the constitution-makers want their country to become a member of an international organisation, they might care to pass a constitution in conformity with the statutes of the relevant international organisations.

If this conjecture proved to be correct, it would be a clear instance of path dependence: Although the constitutional conventions may intend to get away from the communist legacy, that legacy might still loom large in that it forms the basis for the first post-communist constitution. "Constitutional culture" or a history of liberal constitutions might also play a role if there are focal points that make consensus easier.

2.3. The Second Step: Explaining the Choice to Delegate

The general logic of choosing not to choose was spelled out above. We will confine ourselves here to the presentation of several conjectures and hypotheses related to this decision. The first one is that the costs of abolishing an independent agency or reneging on its decisions are higher if the existence and independence of this agency are regulated on the constitutional level and not by ordinary legislation. Thus, delegation of competence on the constitutional level may be an indicator of the "seriousness" of the delegation or of the high level of benefits expected from it.

It has often been pointed out that it can be a disadvantage to be too strong (Weingast 1993). A state that is strong enough to protect private property rights and to enforce private contracts is also strong enough to expropriate private wealth. Rational subjects know this and will therefore invest less than they would if they could be sure that the state will not misuse its strength. States that have not had the chance to build up a reputation as being solely an impartial arbiter will be especially affected. In such cases - and we conjecture that the states of Central and Eastern Europe belong to this group - the creation of domestic independent agencies will often not be a credible commitment because such agencies can be abolished with relative ease. It might therefore be rational for these countries to delegate relatively more powers in the constitutional stage and/or to delegate relatively more competence to international agencies. In both options, the resulting independent body

cannot be easily influenced by the respective governments. But this is only one part of the story: Many of these countries are independent for the first time ever. The popularity of the government in those countries might be (negatively) affected if competence that the society had long hoped to achieve is freely delegated internationally. Domestic constitutional delegation might therefore be preferred.

Taking the possible effects of international delegation into account, we hypothesise that the higher the prestige an international organisation enjoys among the electorate, the more likely it is that delegation to that organisation will occur. This hypothesis is based on the assumption that membership in an international organisation that enjoys prestige domestically will translate into votes, i.e., increased re-election probability. Making this hypothesis a little more elaborate, one could argue that the prestige of membership is not absolute, but relative, i.e., one wants to be in before the neighbours get in. In this case, we should observe a veritable race for membership.[4]

Furthermore, the amount of international delegation chosen by a specific government could also be a function of its ideological position. If we assume that right-wing governments are more in favour of markets than left-wing governments and, further, that international organisations are by and large in favour of markets, then we should expect right-wing governments to be more active in delegating to international bodies. To ensure that the road toward a market economy will be pursued even after its own demise, a right-wing government might be more keen to delegate internationally. Closely connected to this is the conjecture that, at the beginning of the transition, old (communist) governments that expect to be outvoted soon might try to secure their influence beyond election date by quickly creating agencies and staffing them with ideological friends. Such governments are therefore more likely to delegate domestically rather than internationally.

On the other hand, if right-wing governments are less keen on human rights, especially social rights, then we can expect left-wing governments to be more keen than right-wing governments to delegate internationally to certain organisations. One can even argue that since right-wing governments are per se more credible in regard to market reforms, it is left-wing governments who will have to delegate more internationally to gain credibility.

We further expect the constitutions of those countries that early on expressed interest in membership in international organisations - especially in the EU - to anticipate in their constitutions some of the rules that they would have to conform to later on. The statutes of a central bank could, for example, already be in conformity with the requirements of European Monetary Union. Antitrust rules could be in conformity with EU competition policies, etc.

3. Constraints on Constitutional Choice

As indicated in the introduction, the main task of our project is to explain constitutional and post-constitutional delegation decisions within the broad framework of rational choice. The variance between such decisions among the eight countries scrutinised here, on which we will elaborate in the next section, against their similar historical backgrounds of transition from communist rule calls for a more careful look at the differences in the constraints that politicians faced in each of the countries. Some of these different

constraints will be highlighted in this section. The connections between these constraints and the various institutional choices will be shown later.

Many expected that Poland, Hungary, and Czechoslovakia would be the first to adopt a new constitution. But it was Bulgaria, followed by Romania, that, in 1991, enacted the first new constitutions (Hungary and Poland, however, introduced amendments to existing constitutions earlier). In 1992, it was the turn of the Czechs, Slovaks, and Estonians. Russia followed suit in 1993. Poland waited until 1997, and Hungary continued with amendments to its existing constitution, which culminated in 1997 with the replacement of about 95 percent of its 1949 constitution, without the enactment of a new one. Be that as it may, the sequence of formal constitutional constructions does not reveal their degree of liberal progressiveness; on the contrary, the earlier constitutions can be viewed as less liberal than the latter ones. We believe that the constraints (or lack of constraints) of the round table talks and the process of constitutional construction can be important explanatory factors for the sequence of constitutional enactment and for the end constitutional results.

In Bulgaria, the old communist National Assembly voted to end the Communist party's monopoly on political power as early as 1989, following demands from the newly-formed Union of Democratic Forces. But in the early elections that followed in 1990, the Communist (re-named Bulgarian Socialist) Party won the majority of seats. This was a unique phenomenon among all the transitions in Eastern and Central Europe. The old guard rushed to adopt a new constitution. It came into force without a referendum because the drafters feared that this constitution would not be approved by the people. All these components can explain why Bulgaria was the first country in the region to have a new constitution, enacted in July 1991. Moreover, they can explain the relatively strong form of the separation of powers (and presidency) prescribed by the constitution, which can be attributed to the communists' political calculations that they would not be able to dominate the parliament for long.

The Romanian case, which had similar results in terms of the pace of constitution-making and the degree of separation or delegation of powers, is almost the opposite of the Bulgarian case. Here, the lack of round table talks was the result of the reformers' seizure of power. A few days before Ceaucescu's execution in the last days of 1989, a newly-formed body called the Council of the National Salvation Front, comprised of some communists, dissidents, and intellectuals, seized power. The National Salvation Front won the May 1990 elections for both houses of parliament as well as for the presidency, all with a huge majority. The clear majority of the NSF in all political branches of government enabled it to go through a rapid process of constitution-making. Unlike the Bulgarian case, however, this power of the NSF allowed it to convene a special constituent assembly to draft the constitution and even to put the constitution to referendum, which was approved in November 1991.

The end results, however, have similarities with Bulgaria's. The constitution prescribes a unique feature of bicameralism, with no real difference between the two chambers' structure of representation, and a strong president, to be elected by the people. The weakest branch is the judiciary, especially the constitutional court. The system has similarities with the French model. But unlike in France, the constitution permits the reversal of the

constitutional court's decision by a two-thirds majority in parliament. It can be hypothesised that the overwhelming majority of the NSF in all political institutions, in contrast to the case in Bulgaria, led it to delegate powers generously, driven by the expectation that this majority in all branches would not hold for long. The only branch whose powers were relatively limited was the constitutional court, which was not perceived as a future stronghold of the politicians who took part in drafting the constitution.

It is interesting to compare the Bulgarian-Romanian experience to the Czech-Slovak one in terms of the effects of constraints on constitutional order and delegation. In all four countries, the constitution was enacted by a newly-elected parliament. However, the pace of the process varied. While in Czechoslovakia (before the country was divided) the elections were preceded by a conciliatory interim government and presidency (the result of what was termed "the Velvet Revolution"), Bulgaria and Romania lacked such a stage. While in Czechoslovakia the elections resulted in rule by new powers and a clearer picture of the division of political powers to come, in Bulgaria and Romania the process was so swift that the results were "tentative", with a significant presence of ex-communists (who in Bulgaria actually received the majority of votes). These differences might explain the tendency to a greater separation of powers, or rather more delegation of powers, in Bulgaria and Romania. Politicians will tend to delegate more powers when they feel less certainty about their chances of remaining in power.

In Poland, more than in any other country in this study, constitutional choice was intertwined with post-constitutional choice. Unlike the four countries examined above, elections to a new parliament did not precede the constitutional change. This change began a few years *before* the first free elections and continued after the first elections and then after subsequent ones. In fact, constitutional reforms in Poland preceded the fall of communism. They begun in 1982 with a change of attitude toward the binding nature of the constitution, the introduction of judicial review, and the establishment of a constitutional court. This was indeed a phenomenon unique in the Eastern bloc.

We believe that the rather strong form of separation of powers (bicameralism and a strong presidency) and indeed of delegation of powers in Poland can be explained against this background. The initial establishment in 1982 of a constitutional court with the power of judicial review can be seen as the communist regime's attempt to delegate powers in order to remain in power or maintain legitimacy (see Voigt and Salzberger, 2002). The insistence on a strong presidency, with the powers to veto legislation, can be viewed similarly. Fearing to lose powers, both sides - the communists and the opposition - opted to divide powers among several branches of government. After the 1989 elections, in which Solidarity won 99 out of 100 seats in the new Senate and a major share of the seats available according to the round table agreement in the lower house, it was too late to change this basic structure. Thus, although some fine tuning followed in the 1992 interim constitution (also dubbed the "small constitution"), decreasing the powers of the president and increasing the powers of the executive, for example through the introduction of a constructive vote of no confidence, this basic structure of government in Poland has not been changed. The same is true for the 1997 constitution.

Because the transition (in terms of the democratisation of the structure of government, not in terms of economic reforms) began later in Hungary than in neighbouring countries,

notably Poland, a major constraint on constitutional construction was information on what took place in Poland. The opposition in Hungary did not agree to accept a deal similar to the one agreed upon in Poland, because it saw the materialising powers of Solidarity. Thus, the structure of government agreed upon in Hungary was based less on separating the political powers among various organs and more on a delegation of powers to non-political bodies, such as the constitutional court and international organisations. This can be explained in terms of the opposition's realisation that the Hungarian population would face a hard period during economic reforms and that such delegation might help the government remain in power.

Hungary is the only country among the eight we cover in this study in which a new constitution has not yet been enacted. But in fact, Hungary went through a "constitutional revolution", and this was completed earlier and in much less time than in its neighbouring countries. The Hungarian constitution-makers exploited a "window of opportunity", a short period in which the Communists remained demoralised and the opposition was not yet seriously divided. In Poland, some members of Solidarity pushed for a similar strategy, but failed.

The last two countries in our study have features significantly different from the other six. In addition to the transition to democracy, Russia also faced a problem of self-definition and the secession of various republics, which also affected an important struggle about the division of powers between the central government and the republics. In addition, Russia is the only country in our study in which physical force was employed to enforce a new constitutional order. Thus, more than in all the countries we previously discussed, the new Russian constitution reflects the actual balance of the existing powers (between Yeltsin and parliament) at the time of the enactment of the constitution. Yeltsin pushed for an American model of a presidential republic; parliament wanted a continental-style parliamentary democracy. After receiving a vote of confidence in a referendum he called in April 1993, Yeltsin decided to convene a constituent convention to come up with a draft alternative to the one parliament offered. Such a draft was proposed, but parliament rejected it, choosing a constitution-adopting procedure that was totally dependent on parliament itself. In September 1993, Yeltsin dissolved the parliament and, in response, parliament voted to depose Yeltsin. Subsequently, Yeltsin ordered military forces to attack parliament, suspending the opposition parties, the constitutional court, and opposition newspapers. He put his draft to referendum on the same day of the elections to a new legislature in November 1993, and the new constitution was approved by a majority of 58.4 percent.

The new constitution provides for a strong president, who is to be elected by the people and who is given significant executive powers, including the chairing of government meetings and the power to nominate the head of the central bank and constitutional judges (subject to the approval of the Duma). The President can also veto legislation. The procedure for impeachment of the president, as specified by the constitution, is complicated and unlikely to materialise. In the Russian case, therefore, the reasons for the main features of separation of powers differ somewhat from our theory of delegation of powers, which does not take into account the use of physical powers (Voigt and Salzberger 2002). However, the constitution also creates or reaffirms bodies such as a constitutional court

and central bank, to which powers are delegated for the reasons of uncertainty, responsibility shift, collective decision-making problems, and other delegational benefits that do fall within the realm of our theory.

The Estonian constitution has one of the more extensive delegation of powers, especially domestic delegation (for example to its constitutional court and central bank). This structure can be attributed to the process of constitution-making. Estonia separated from the USSR in 1990. A constituent assembly was formed, comprised of 30 members from the old parliament and 30 members from an interim independent quasi-parliament (Congress of Estonia). In a referendum in 1992, an overwhelming majority approved their final draft, preferring a parliamentary democracy over a presidential one, making Estonia the first former Soviet republic to adopt a constitution. The composition of the constituent assembly, which did not reflect actual powers but was an artificial equal division of seats, brought about this extensive delegation to the non-political institutions of government.

Let us try to generalise and conclude. Normative analysis of constitutional-making provides us with strong arguments in favour of separating a constitutional convention or constituent assembly from the ordinary legislature, since one of the aims of a constitution is to place power restrictions on parliament itself (Ostrom 1987; Buchanan 1975). When legislators draft and/or enact a constitution, (1) they will allocate a disproportionately high percentage of time to deciding short-term issues, thus neglecting constitutional issues that are more relevant in the long run; (2) as members of parliament who want to be re-elected, representatives of the constitutional assembly will be less ready to sacrifice the interests of their constituents in favour of the good of the whole nation; and (3) representatives might play an outright power game and support only those proposals that are in the interests of their parties or even only in their personal interests (Mueller 1996:ch. 21). Despite these strong arguments and the more general normative framework, which views constitutions as a social contract that ought to reflect long-term consensus (Buchanan & Tullock 1962; Rawls 1971), it has been noted that, historically, most constitutional conventions have been constituted from an existing parliament. The countries of Central and Eastern Europe surely are no exception to this rule.

This observation is not surprising. It is not only that an all-purpose assembly might appear to save some time in such periods of radical changes (Mueller, ibid.). Of course the interests of the actors involved in the collective decision-making will make it very difficult to achieve this normative goal. In this sense, the histories of constitution-making in Central and Eastern Europe, as in other places, do not conform with the notion of a constitutional moment (Ackerman 1991). Had politicians and other decision-makers behaved according to the "constitutional moment" thesis, we would expect to find more constituent assembles that were separated from the legislatures.

We thus believe that the changes in the utility function of politicians predicted by Ackerman's constitutional moment theory do not occur. Periods of increasing uncertainties and lack of information do, however, occur. They affect the choices of the political players. The differences in the constitutions, which were enacted in the early 1990s under similar circumstances after the fall of communism, reflect these uncertainties, among other things. They also reflect informational input from neighbouring

countries. Thus, the reason that the opposition in Hungary did not accept proposals for limited democratisation of parliament was its lack of information on the election results in Poland. This information created the expectation of a similar outcome, which resulted in the adoption of a system with a weaker form of the separation of powers. The same reasoning can explain Romania's and Bulgaria's relatively deeper form (though not in comparison with Russia) of separation and delegation of powers as the consequence of election results that were not perceived as revealing the real balance of powers between the communists and the reformers.

4. Some Institutional Stock-Taking

In this section, we aim to summarise the various constitutional and post-constitutional rules that our eight countries passed in regard to the delegation of powers. Of course, a complete overview is impossible. Regarding domestic delegation, we focus especially on the judiciaries and on central banks. Possible interdependencies will also be sketched in brief. In regard to international delegation, we focus on possible membership in the European Union, but membership in other organisations, such as the WTO, is also analysed. The last step in this section consists in analysing possible relationships between domestic and international delegation.

4.1. Domestic Delegation

Over the last couple of years, an entire cottage industry has evolved to analyse possible relationships between the independence of central banks and inflation rates. Measuring such independence occupies a significant share of this literature, which we survey in section 4.1.2. In section 4.1.1, we offer an analogous analysis of the independence of constitutional courts, focusing on measuring the courts' independence.

It might seem to make sense to present the established literature (on central banks) first and then proceed to our additions (on constitutional courts). We have decided to present our analysis in the reverse order, because in most cases the independence of (constitutional) courts is provided for on the constitutional level, whereas this is not always the case for central banks. Moreover, the independence of central banks can be regarded as a function of the independence of courts. Thus, from a structural and substantive point of view, the discussion of the independence of constitutional courts ought to precede the discussion of the independence of central banks.

4.1.1. The Constitutional Courts

An essential part of every constitutional set-up is an enforcement mechanism. In most countries, this enforcement task is assigned to courts. However, one can distinguish between two models used around the world: (1) Countries in which this task is assigned to the general courts system. The federal judiciary in the US may be seen as the most significant example of this model, in which every court can perform judicial review. (2)

Countries in which this task is assigned to a special constitutional court separated from the general courts system and hierarchy. Most European countries subscribe to this model.

All the emerging democracies in our study, save Estonia, opted for the second model and established special constitutional courts. Estonia adopted a system that is closer to the American one. Indirect judicial review in Estonia can be performed by every court and direct judicial review or findings of unconstitutionality by lower courts are deliberated by the National Court, which is the general Supreme Court of the land.[5] Although all the other seven countries adopted the continental model, there are interesting differences in the structure of their constitutional courts, these courts' jurisdiction, and the degree of independence of their judges. In what follows, we try to assess the various formal arrangements in the eight countries under scrutiny vis-à-vis the independence of the constitutional enforcement mechanism and its efficacy. We divide this assessment into several components, each of which we give a score ranging from 1 (least independent) to 10 (most independent).

(a) Constitutional vs. Post-Constitutional Arrangement

The independence and efficacy of constitutional enforcement mechanisms or of constitutional courts and their ability to serve as a counterweight to the other branches of government are dependent upon the stability and immunity of the definition of the court's powers, its procedures, and the arrangements regarding its operators - the judges. If these arrangements are specified in the constitution itself, we expect a greater degree of independence than in cases where these arrangements are fixed by ordinary law, which is subject to amendment by parliament whenever the latter is dissatisfied with the performance of the court.

Thus, countries in which these arrangements are part of the constitution and whose constitutions cannot be amended as any other law (i.e., where amendment requires a referendum or a super-majority) will be given the highest score, whereas countries in which the arrangements are a matter of regular statute will be given a lower one.

In Bulgaria (8), the provisions on the constitutional court are in the constitution. Its amendment is possible only by 3/4 vote of the National Assembly. A similar arrangement exists in Slovakia (8) and in the Czech Republic (9), where amendments require a 3/5 majority of parliament. In Poland (8), the provisions are part of the 1997 constitution, which can be changed by a 2/3 majority. In Romania (9), the fundamental provisions are part of the constitution, which is very difficult to amend - 2/3 majority in parliament *and* referendum. A more detailed arrangement is provided in a statute.

In Estonia (6), only parts of the arrangement (judicial appointment and independence) are provided for in the constitution. Other parts, including constitutional jurisdiction and procedure of review, are addressed in a special legislation - the *law on constitutional law review procedure 1993*. The constitution can be changed by a majority of parliament members in two separate votes. In Hungary (5), only part of the basic provisions safeguarding the independence of the constitutional court are included in the constitution - the number of judges in the constitutional court and their method of election, not including their term of office. However, the constitution specifies that a statute on the constitutional court requires a 2/3 majority of parliament, elevating the court's normative status. In Russia (4), some of the arrangements regarding the constitutional court and its

judges are fixed in the constitution, together with provisions concerning other courts. However, some significant details were left to legislation, such as the term of constitutional judges. The constitution can be amended by a 2/3 majority of all members of the Duma and a 3/4 majority of all members of the Federation Council (except certain chapters, which require a referendum for amendment).

(b) The Power to Elect the Judges

The procedure of appointment of constitutional court judges and the identity of those who have the power to appoint them may have a notable effect on the independence of the court. The constitutional court is supposed to protect the citizens from the illegitimate use of powers by the authorities, as well as to settle disputes between the branches of government. Thus, it ought to be as independent as possible from the other branches. The most independent procedure for judicial election is election by professionals (other judges or jurists). The least independent method is selection by one powerful politician (prime minister or a minister of justice). In between, we may find combined arrangements, e.g., appointments made by politicians but from different branches of government or representing different parties.

In Poland (4), the judges of the constitutional court are elected by a simple majority of Parliament. In Slovakia (4), they are appointed by the President from a doubled-number list of candidates proposed by the legislature. In Russia (5), the judges are appointed by the Federation Council after recommendation by the President. In the Czech republic (7), the judges are appointed by the President from a list proposed by Parliament, and the President's decision requires the approval of the Senate. In Hungary (8), judges are nominated by a committee of the National Assembly comprising one member of each of the groups of representatives of the parties with seats in the National Assembly. They are elected by a two-thirds majority of the National Assembly. Thus, although the judges are appointed by the legislature, their appointment requires a broad consensus in the legislature. Romania (6) follows the French system, according to which different judges are elected by different institutions: 3 by the Chamber of Deputies, 3 by the Senate, 3 by the President (6). The same method is employed in Bulgaria (7), but there, a third of the judges are elected by their fellow judges in the two Supreme Courts. This increases professional considerations and thus independence from politicians. The other two-thirds of the judges are appointed by Parliament (1/3) and the President (1/3). In Estonia (8), the 17 judges of the National Court are appointed by Parliament upon the recommendation of the President of the Court, who himself is appointed by Parliament upon the nomination of the President. Thus, the majority of judges are appointed on a professional basis (with a significant input from the president of the court) with some political scrutiny. Judicial review is performed by 5 members, the judicial review chamber within the court.

(c) Judicial Tenure

Judges are most independent if they are appointed for life (or up to a mandatory retirement age) and cannot be removed from office, save by legal procedure. Judges are least independent if they are appointed for a set period, with optional subsequent terms, and where removal from office is a fairly easy process. If judges can run for a second term, their independence in the first term is severely hampered and they will want to be popular among their nominators. Judges who are appointed for a set period and cannot be

reappointed are in between. The following coding also takes into account the length of term, which ranges between 7 years and life.

In Estonia (10), judges are appointed for life. In Russia (8), constitutional court judges are appointed for one term of 12 years (previously, it was a life appointment, and some judges on the Russian constitutional court are still governed by the old rule). In the Czech Republic (7), there is one term of ten years; in Bulgaria, Poland, and Romania (6), one term of nine years; and in Slovakia (5), one term of seven years. In Hungary (3), the judges of the constitutional court are appointed for a term of nine years with an option for re-election.

(d) The Accessibility of the Court

Another component of judicial independence is the accessibility of the court and its ability to initiate proceedings. A court that is accessible only to a certain number of members of parliament or other officials will be less effective than a court that is accessible to every citizen who claims that his or her rights have been violated. As we noted before, Estonia (9) is the only country in our sample to adopt the American - general courts - model, and according to this model, constitutional proceedings can be initiated by anyone and in any court. In this sense, the constitutional review in Estonia has the potential to be the most effective among the studied countries. In Hungary (8), Poland (8), and the Slovak (7) and Czech Republics (6), individual citizens can apply to the constitutional court in human rights matters. This accessibility is more limited in the Slovak and Czech Republics, where it is not specified by the constitution itself. Access by individuals is partly possible in Russia (5) and is not possible in Bulgaria (3) or Romania (3), where only state organs can initiate proceedings in the Court.

(e) The Competence of the Court

The last independence indicator for constitutional courts is the breadth of competence assigned to them. This is, however, a somewhat tricky variable. At first glance, it might seem that extended competence enhances the independence of courts or that there should be a direct correlation between the extent of powers assigned to a court and its impact. But in fact, from a certain point on, more competence can actually reduce the independence of the court, its perception by the public as a neutral and honest broker, and thus its ability to counterbalance the other branches. In other words, a court that is drawn to participate in political power struggles can lose its reputation and thus its independence and effectiveness. This may be the case with the Russian constitutional court, which took sides in the clash of powers between the president and parliament in the early 1990s.

In all the countries in our study, constitutional review of legislation is the core function of the constitutional court. This power probably also includes review of other legislative acts, although only some of the countries (the Czech and Slovak Republics, Estonia, Romania, and Russia) explicitly mention this extended power of review. Romania is the only country in which the review of legislation can be conducted only before the promulgation of the law and in which the decision of the court can be reversed if the law is affirmed again by a 2/3 majority of parliament. Although this is the same majority required to amend the constitution, one can conclude that the judicial review power in Romania is the weakest among the countries we studied. In Russia, judicial review powers also

exist in regard to the republics' constitutions (as against the federal constitution) and their agreements with the federation.

A second common power of the constitutional courts is to adjudicate conflicts of authority between the various branches of central government and between federal and local authorities. Such powers are provided for in Bulgaria, Hungary, the Czech Republic, Estonia (by post-constitutional legislation), Slovakia, and Russia. The interpretation of the constitution is listed among the competencies of the courts in Bulgaria, Russia, and Slovakia.

A set of more problematic powers are, on the one hand, the power to review the compatibility of international treaties with the constitution and, on the other hand, the power to review the compatibility of legislation with international law. The variety of the arrangements in this area is especially relevant to our study. It reflects, on the one hand, a component of international delegation - the normative position of international law within the municipal legal system - and, on the other hand, domestic delegation - the extent of powers delegated to a constitutional court to review the compatibility of domestic law with international law.

The Czech Republic seems to have the broadest dual delegation in this respect: The constitutional court is empowered to invalidate laws that contradict international agreements and to give effect to decisions made by international courts. Thus, the Czech constitution makes international law superior to domestic law - a far-reaching international delegation - and it delegates enforcement power to the constitutional court - a far-reaching domestic delegation. Similar provisions can be found in the Slovak, Polish, and Bulgarian constitutions, without the very significant but rather vague power to take "measures necessary to effect a decision by an international court that is binding for the Czech Republic if it cannot be effected otherwise" (Art. 87(I) of the Czech constitution). This is a significant component, because it means that the Czech constitution not only places international law above domestic law, but also regards the interpretation of international law by international courts as part of international law; this creates a symmetry between its constitutional court (whose interpretations of the constitution are binding) and international courts (whose interpretations of international law are binding and made effective through the constitutional court).

On the other side of the map, we find the Russian and Estonian arrangements, which empower the constitutional court to review the compatibility of international agreement with the constitution, signalling the subordination of international law to domestic law. The Romanian constitution does not address the jurisdiction of the court to rule on matters connected with international law, and the Hungarian constitution is also silent about this.

The more tricky powers assigned to constitutional courts are: (1) the competence to rule on the constitutionality of parliamentary proceeding, which is granted to the constitutional courts in Hungary and Romania; (2) the power to supervise elections, which is specified as constitutional court power in Bulgaria, the Czech Republic, and Romania (in regard to presidential election); (3) the power to monitor disciplinary and impeachment procedures against the president, which is provided for in Romania and Russia; and (4) the power to supervise a referendum, in Slovakia and Romania. The Czech constitutional grants powers to the constitutional court in all other matter that are not within the jurisdiction of another

Table 1. De jure independence of constitutional courts.

	Constitutional arrangement	Judges election	Tenure	Access	Competence	Sum	Rank
Bulgaria	8	7	6	3	8	32	5
Czech Rep.	9	7	7	6	10	39	2
Estonia	6	8	10	9	8	41	1
Hungary	5	8	3	8	6	30	6
Poland	8	4	6	8	9	35	3
Romania	9	6	6	3	4	28	8
Russia	4	5	8	5	7	29	7
Slovakia	8	4	5	7	9	33	4

court, but the constitutional court there is also empowered to delegate some of its powers to the administrative court.

Aggregating the various aspects leads to the ranking displayed in table 1. This is, of course, a de jure ranking of constitutional courts' competence. The de facto situation might be different.

(f) Summary

Table 1 above summarises our findings of de jure independence. What sort of conclusions can be drawn from this table, when we view it vis-à-vis the various constraints on constitution-making and the actual processes of constitution-making in the eight countries included in this study? First, it seems that those countries that were the first to enact a constitution - Bulgaria and Romania - came out with the least independent judiciaries. This is an interesting finding, since we concluded in the previous sections that these countries can be characterised as having a relatively strong form of separation of powers. However, this form applies mainly to the division of powers between the political branches, rather than delegation to non-political ones. A more general lesson might be that one has to distinguish between delegation of powers to politicians and delegation of powers to non-politicians. There might be different reasons for these two forms of delegation.

Second, in the case of the independence of the judiciary, historical legacies can be viewed as an important explanatory factor. The two countries with no such legacy - namely Hungary and Russia - are ranked sixth and seventh in the de jure independence of their constitutional courts. Finally, it is interesting to note that the country in which we found the highest degree of judicial independence, or the most extensive delegation, is Estonia. Its constitution was enacted by an ad hoc constituent assembly.

4.1.2. Comparing the Independence of Central Banks

As we have just seen, independent judiciaries, and in particular constitutional courts, are in most cases regulated on the constitutional level and can thus be considered within the realm of constitutional choice. In many industrialised countries, central banks do not figure quite as prominently. They often operate on the basis of powers granted by regular legislation. Distinguishing precisely between these levels could prove important, because

the de facto independence of post-constitutional independent agencies (such as a central bank) could very well depend on the (de facto) independence of the independent agencies anchored on the constitutional level, such as the judiciary. One of the first steps in describing the role of the newly-created central banks of Central and Eastern Europe, therefore, is to inquire whether they have constitutional or post-constitutional status.

The functions and the institutional structure of the central bank are specified in the constitution in the Czech Republic, Hungary, Estonia, Poland, and Russia. The Romanian constitution does not mention the central bank. In Bulgaria and the Slovak Republic, the central bank is mentioned in the constitution, but there are no provisions regarding its functions or institutional set-up, and thus we cannot view delegation of power to the central bank as being on the constitutional level in those countries.

It was long presumed that countries with independent central banks, whose governors were assigned the task of securing monetary stability, would be conducive to low inflation rates. In the early 1990s, various indicators were developed to make that intuition empirically tractable (Grilli, Masciandaro, and Tabellini 1991; Cukierman 1992; Cukierman, Webb, and Neyapti 1991). It turns out that the degree of independence of a central bank is indeed a good indicator of the inflation rate one can expect in a given currency, at least for the industrialised countries.

Based on data from 26 formerly socialist economies, Cukierman et al. (2000) find that, for the early stages of liberalisation, central bank independence is unrelated to inflation. But as soon as sufficiently high and sustained levels of liberalisation are reached and variables like price de-controls and wars are controlled for, central bank independence turns out to be negatively and significantly correlated with inflation. The authors ask what factors could possibly explain the variance in legal central bank independence and find that (a) being on the fast track toward EU (and EMU) membership and (b) passing a central bank law late in transition have a positive impact on the chosen level of independence. The problem with the first variable is that it could also reflect (i) geographical proximity to the West or - probably more important - (ii) cultural similarity.

Our own ranking of the de jure independence of central banks draws on a paper by Loungani and Sheets (1997). Their analysis is based on Debelle and Fisher (1994), who suggest that central bank independence is composed of "goal independence" and "instrument independence", to which Loungani and Sheets (1997) attribute equal weights. The second index Loungani and Sheets (1997) propose is the "similarity to the Bundesbank-Index (SIB)" which takes the Bundesbank as the benchmark. The SIB index is made up of nine components that include not only "goal" and "instrument" independence but also "political independence".[6] For our own analysis, we add the components discussed above: whether the regulation of the bank is by regular legislation or by the constitution, and the substance of this arrangement vis-à-vis the procedure for the appointment of its directors and the reversibility of their decisions (analysis based on Kobabe 1999). The countries in which the constitution treats fundamental issues regarding the central bank were given a score of 1, from which we deduced whether the substance of the arrangements allow easy reversal of the directors' decisions. The countries in which only the constitution partly regulates the central bank started with a score of 0.7, from which deductions were made accordingly. The one country (Romania) in which central

Table 2. Central banks' independence.

	DF index	SIB index	Constitutional arrangement	Average	Rank
Bulgaria	0.875	1.000	0.7	0,858	2
Czech Rep.	0.875	1.000	0.9	0,925	1
Estonia	1.000	0.667	0.8	0,822	3
Hungary	0.312	0.722	0.7	0,578	7
Poland	0.500	0.611	0.8	0,637	5
Romania	0.500	0.556	0.4	0,485	8
Russia	0.375	0.500	1.0	0,625	6
Slovakia[#]	0.875	0.944	0.5	0,773	4

[#] Slovakia is not included in Loungani and Sheets; we present our own calculations here.

bank regulation is only by statute started with a score of 0.5. The scores are presented in Table 2. The average of the two indices and our additional one results in the ranking of de jure independence found in the rightmost column of table 2.

Table 2 specifies the indices for the eight countries of our study. The indices can take any value between 0 and 1, with higher values representing higher degrees of independence.

So far, we have analysed the independence of central banks as domestic delegation. However, the arrangements regarding central banks also have an international delegation dimension. A unique institutional arrangement introduced in Estonia (1992) and Bulgaria (1997) is a good example. This is the currency boards. A currency board can be interpreted as an extreme form of an exchange rate peg: the domestic currency is fixed to an "anchor currency". Holders of the domestic currency have the right to exchange their assets against the pegged currency at a fixed rate at any time. Monetary supply is no longer determined by a central bank, but depends on the quantity of reserve assets (usually the peg currency and other foreign currencies, as well as gold). Monetary supply thus directly hinges upon the balance of payments. The establishment of a currency board is almost equivalent to the abdication of a domestic monetary policy. Thus, monetary policy decisions are delegated internationally and made by an organisation beyond the immediate reach of domestic actors, namely those (foreign) central banks that serve as the anchor of the domestic currency.

In addition, one could expect that most of the countries under scrutiny here that want to join the EU would anticipate EU standards for bank independence and other structural and substantial components and that these countries would pass central bank laws in accordance with those standards. Since this issue touches upon the interdependence between domestic and international delegation, it will be dealt with explicitly in section 4.3.

4.1.3. Interdependencies Between Domestic Delegatee Bodies

It is interesting to examine the relationship between the degrees of independence of various delegatee bodies in the same constituency. The possible interrelations between

judicial independence and central bank independence are of particular interest. Our study of only eight countries does not enable a rigorous test of the interrelations between central banks' independence and constitutional courts' independence. However, looking at the results in Tables 1 and 2 reveals a pattern of positive correlation between the two, which manifests itself in the fact that the differences in the ranking of the two do not exceed two slots. Countries that are ranked as having the more independent constitutional courts are also ranked as having the more independent central banks (the aggregation of the three indices) - the Czech Republic, Estonia, and Poland. Countries that are ranked as having less independent constitutional courts also have less independent central banks - Hungary, Romania, and Russia. Bulgaria is ranked number 2 in the central banks independence list and number 5 in the constitutional courts table.

4.2. International Delegation

4.2.1. The Constitutional Basis for Delegating Powers to International Organisations, or: the Level of De Jure Delegation

Before examining the extent to which governments of Central and Eastern European countries have delegated actual power internationally (de facto delegation), we propose examining the constitutional basis for transferring sovereign rights or competence to a body external to the nation-state as well as examining the status of international law and international agreements within the municipal legal systems. These two indicators can serve as an index of the de jure extent of the potential for international delegation. The former can tell us which domestic political institutions are assigned the power to delegate externally. Naturally, different delegating organs will have different incentives to delegate externally, but more importantly, the identity of the delegator and the process of delegation can indicate how easy it is to delegate internationally. In countries where the government is empowered to bind the legal system by international treaties, the flexibility of delegation is greater than in countries where legislation or constitutional amendment is required to perform such delegation or where such delegation is subject to veto by another branch of government, such as the constitutional court.

The second aspect - the normative status of international law within the municipal legal system - is a good indicator for the importance attributed to international delegation. In other words, countries that place international law above their own legislation and that enable their courts to strike down legislation as contradicting international law can be regarded as potentially more extensive international delegators than countries that do not regard international law as superior to their domestic legislation.

Bulgaria, Estonia, and Slovakia seem to have the more flexible international delegation arrangements. In Bulgaria, the competence to delegate internationally is divided between the government and parliament. Some agreements require parliamentary ratification. The government has the power to enter into other agreements without the need for further approval. Likewise, in Estonia, the parliament is empowered to ratify or renounce important treaties. But other treaties can be made by government decision. In Slovakia, the president is empowered to conclude and ratify international

treaties, but he is allowed to delegate this power to the government. Consent by the National Council is needed only for economic and political treaties and treaties whose execution requires legislation.

In Hungary, the power to conclude international treaties is allocated to the president as well as to the government. But if the treaty is of outstanding importance to Hungary's foreign relations, the constitution stipulates that parliament must ratify it. International treaties that affect matters of national defence must be confirmed by national law and publicly proclaimed.

It is more difficult to delegate powers internationally in the Czech Republic, Poland, Russia, and Romania. In Romania, international treaties are negotiated by the government, concluded by the President, and must be ratified by Parliament within 60 days. In the Czech Republic, all branches of government take part in the international delegation of powers. The Czech constitution allots agenda-setting powers in regard to joining international organisations and signing international treaties to the President, but he may transfer the task of negotiation to the government or, with its approval, to its individual members; this is expressly specified in the constitutional law. The President's decisions require the Prime Minister's signature. He is thus endowed with veto power. Parliament must ratify a greater proportion of international accords than in the countries mentioned above. Such accords include those on human rights and fundamental freedoms, political agreements, economic agreements of a general nature, and agreements whose implementation requires the passage of a law.

Art. 90 of the Polish constitution enables the transfer of certain sovereign rights to an international organisation. The constitution mentions two possible procedures for the ratification of international agreements: (1) A statute shall be passed by the House of Representatives (Sejm) and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies in each house respectively. (2) A referendum must be held. The Polish President has the competence to ratify or reject international agreements and must notify the House of Representatives (Sejm) and the Senate thereof. Before ratifying an international agreement, he may refer it to the Constitutional Tribunal with a request to adjudicate upon its constitutionality. In other words, the Court has the power to delay ratification and some veto power.

In Russia, international delegation is the exclusive jurisdiction of the Federation, and the president is allocated the power to conduct negotiations and sign international treaties. The constitutional court has the power to examine the constitutionality of the treaty. Although the constitution does not mention that the Duma must ratify such a treaty, Article 106 stipulates that if ratification of such an agreement had been conducted by the Duma, the Federation Council must consider it.

The Czech Republic, Bulgaria, and Poland are at the top of the table in regard to the status of international law within the municipal legal system. The Czech Constitutional Court is empowered to invalidate laws that contradict international agreements and to give effect to decisions of international courts. Thus, the Czech constitution places international law higher than domestic law. In addition, the Court is also empowered to take "measures necessary to effect a decision by an international court that is binding for the Czech Republic if it cannot be effected otherwise" (Art. 87(I) of the Czech constitution). This is a

significant component, because it means that the Czech constitution not only places international law above domestic law, but also adopts an arrangement similar to the European Union's direct effect doctrine. It also regards the interpretation of international law by international courts as part of international law. These provisions create symmetry between the Czech constitutional court (whose interpretations of the constitution are binding) and international courts (whose interpretations of international law are binding and made effective through the constitutional court). These arrangements can be considered the most far-reaching in regard to international delegation.

Article 85 of the Bulgarian constitution specifies that those "treaties ratified by the National Assembly may be amended or rejected only by their built-in procedure or in accordance with the universally acknowledged norms of international law". This clause is far-reaching in terms of our issues. It could mean that the international delegation by ratification of parliament is irreversible, except by the terms of the treaty itself or international law. It also indicates that the normative status of international delegation supersedes regular legislation and requires amendment to the constitution if the international agreement is in conflict with the constitution (as explicitly specified by the second part of the same article). Moreover, the constitutional court is granted the powers to strike down new legislation that contradicts international law or agreements that have been ratified by Bulgaria. Thus, the infrastructure for international delegation is indeed very extensive.

In Poland, a ratified international agreement constitutes part of the domestic legal order and is to be applied directly, unless its application depends on the enactment of a statute. Moreover, although they are listed among the sources of the law in Poland (Art. 87 of the constitution), international agreements are placed after legislation; Article 91 specifies that international law has precedence over statutes if the two cannot be reconciled.

The Estonian constitution (Art. 123) subordinates all treaties to the constitution, and if they contradict it they are not to be concluded. However, the same article holds that the treaties are superior to legislation and that, in case of conflict, their provisions are to be applied. The constitution also empowers the National Court to review the constitutionality of international agreement, but there is no explicit authority to review whether legislation is in conformity with international law.

In the Slovak Republic (according to Art. 11 of the constitution), international agreements on human rights take precedence over statutes, provided that they guarantee a greater extent of liberties. The relative normative status of other international agreements is not clear. The constitutional court has the jurisdiction to review the compatibility of laws with international treaties. Likewise, the Hungarian constitution states that "the legal system of the Republic of Hungary accepts the generally recognised principles of international law and shall harmonise the country's domestic law with obligations assumed under international law." (Art. 7) This can mean the subordination of international legislation and maybe also of the constitution itself to international law.

Russia and Romania are ranked at the bottom of the list in regard to the status of international law within the municipal legal system. Article 15 of the Russian constitution provides that "the commonly recognised principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal

system" and "if an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply." However, no enforcement mechanism is specified, and no explicit jurisdiction is given to the constitutional court on the matter, in contrast to its jurisdiction to review the constitutionality of international treaties.

In Romania, treaties ratified by parliament become part of national law. This means that they are subject to the constitution and are also in the same normative level of legislation, i.e., later legislation might take precedent over the international treaty. According to Article 20 of the Romanian constitution, in case of inconsistencies between international fundamental human rights treaties that Romania has signed, on the one hand, and national law, on the other, international law prevails over national law. However, a possible interpretation of this article is that if the treaty does not concern fundamental human rights and is in conflict with municipal law, the latter takes precedent. The constitution does not specify enforcement mechanisms, such as review by the constitutional court.

The left side of table 4 presents the ranking of the structural foundations of delegation, which can also be viewed as the ranking of the de jure possibilities of international delegation. This ranking is comprised of scores on the two components scrutinised above: (1) constitutional capacity and flexibility of delegation, and (2) the constitutional binding force or normative status (within the national legal systems) of such delegation.

4.2.2. The Actual Delegation of International Powers, or: De Facto External Delegation

When describing the sequence in which the countries of Central and Eastern Europe have become members of international organisations, thereby delegating power, it must be taken into account that this is not a unilateral decision. To become members, these countries not only have to want to become members; the existing international organisations also have to let them in. The basis on which they are admitted is often the similarity of their legal framework to those of "more Western" countries. In that sense, one should expect these countries first to ratify a post-communist constitution and only subsequently to apply to the international organisations. If we look at membership in the Council of Europe - in which safeguarding human rights plays a crucial role - there are two cases in which countries were let in before they had passed a new constitution: Hungary (admitted in November 1990) and Poland (admitted in November 1991). Bulgaria ratified the European Convention on Human Rights in 1992, accepting the optional protocol on civil and political rights. In October 1993, Romania became a member of the Council of Europe.

All of the countries under scrutiny here except Russia have signed so-called "Europe Agreements" with the EU, providing for a transition period toward customs-free trade while also granting trade advantages exceeding the general GATT standards. Cooperating states set up trade and diplomatic cooperation and prepare for full membership. Russia and the EU have concluded a partnership and cooperation agreement, which does not envisage full membership in the near future. Three of the analysed countries have become NATO members. All of them are members of the WTO except Russia, which is negotiating membership. Some of the countries were members of GATT even before the transition

Table 3. Extent of integration.

	EU time score	Council of EU time score	NATO yes/no	GATT time score	Sum	Integ.Rank
Bulgaria	3	3	4	6	16	5
Czech Rep	3	5	1	4	13	3
Estonia	7	4	4	7	22	7
Hungary	1	1	1	3	6	2
Poland	1	2	1	1	5	1
Romania	3	6	4	2	15	4
Russian Fed.	8	7	4	8	27	8
Slovakia	3	8	4	4	19	6

EU time score indicates the chronological order in which official applications for EU membership were filed (the fastest scoring 1, the second 2, and so forth); Council of E time score indicates the chronological order in which the countries became members of the Council of Europe; NATO y/n indicates whether the country is a NATO member or not (the coding is 1 for members, and 4 for non-members); GATT time score indicates the chronological order of GATT (WTO) accession. The Sum is the addition of the four individual scores, from which the "integration rank" is derived.

Table 4. Constitutional flexibility for international delegation.

	Flexibility of delegation	Status of delegation	De jure delegation rank	Actual delgation*
Bulgaria	6	8	8	4
Czech	4	9	6	6
Estonia	6	7	6	2
Hungary	6	7	6	7
Poland	5	8	6	8
Romania	5	5	1	5
Russia	5	6	2	1
Slovakia	7	7	8	3

For coherence, we reversed the ranking: 8 is the highest delegator, 1 the lowest.

started (Poland became a member in 1967, Romania in 1971, and Hungary in 1973). If one takes membership in various international organisations into account and ranks the countries of the region according to their degree of integration, the ranking from most to least integrated is: (1) Poland, (2) Hungary, (3) the Czech Republic, (4) Romania, (5) Bulgaria, (6) Slovakia, (7) Estonia, and (8) Russia.[7] Table 3 summarises the extent of integration and rank the countries accordingly.

4.2.3. Summary

We summarise our findings about international delegation in the eight countries covered in our study in table 4 above. The left side of the table presents the ranking of the

structural foundations of delegation, which can also be viewed as the ranking of the de jure possibilities of international delegation. The right side of the table provides a ranking of the actual delegation, or the de facto extent of international delegation.

It is clear that there is no full correlation between de jure possibilities of delegation and de facto delegation. While Hungary, Poland, and the Czech Republic figure as having high levels of both de jure and de facto international delegation, other countries are ranked as having a high de jure status of international delegation, but a low de facto delegation (Bulgaria and Estonia) or as having a low level of de jure delegation and a high level of de facto delegation (Romania); Russia has a low ranking in both indices. A possible and very tentative explanation for these results is that countries in which international delegation is domestically binding and where this delegation also has a high normative status as well as mechanisms of enforcement within the domestic legal system will be more hesitant to join international organisations or bind themselves with international treaties. Be that as it may, one insight of this analysis is that the number of international organisations or treaties to which a country belongs does not provide a complete picture of its level of integration in the international community or of its level of international delegation.

4.3. On Possible Interdependencies Between Domestic and International Delegation

Similar to the positive correlation between the levels of delegation to different domestic institutions presented in the previous section, it seems that such correlation also exists between the general levels of de jure domestic delegation and of de jure international delegation. In other words, countries in which the level of domestic delegation - to constitutional courts, central banks, or other institutions - is high, also have a high level of international de jure delegation, and vice versa. The Czech Republic, Estonia, and Slovakia feature in the high-level delegation group. Romania and Russia belong to the low-level delegation group. Hungary and Poland are in the middle level of delegation group. Bulgaria is the odd one out: it has the highest level of de jure international delegation and also the highest level of delegation to its central bank, but not to its constitutional court or to its competition guardians.

The possible explanation for this tentative finding (tentative because, as mentioned above, the low number of countries in this study does not enable us to examine these interrelations rigorously) can be attributed to our general model of delegation of powers (Voigt and Salzberger 2002). We argue there that delegation of powers would be exercised when the political benefits of such delegation outweigh the political costs. If delegation to one independent body already exists, then the cost involved in delegation to other bodies decreases. Thus, it is more likely that such delegation will occur. Several of the benefits we mention in our theoretical framework (such as responsibility shift and delegation as a tool to remain in power or maintain legitimacy, a tool to expand the public sector, and a tool to solve collective decision-making problems) are not limited to one subject area. They are the result of general features, such as the size of the polity, its electoral system, its legislative process, and more. This can be an additional explanation of the fact that domestic and international delegation are not substitutes, but complementary processes.

5. Conclusions and Outlook

In the introduction, we justified our choice of countries by pointing to a study in which four of them are listed as consolidated democracies and four others as countries in transition both politically and economically. This division is partially reflected in our study. The Czech Republic and Estonia seem to have the highest level of both international and domestic delegation. Slovakia can be added to this group. Russia and Romania have the lowest levels of both domestic and international delegation. Our tentative findings put Hungary and Poland in a middle group, while Bulgaria seems to have a high level of de jure international delegation as well as a high level of delegation to central bank, but a low level of delegation to a constitutional court. An ad hoc hypothesis on Bulgaria's central bank score could be that this is due to the currency board.

Piazolo (1999) observed that those countries that have been promised full EU membership have developed considerably better than the other transition countries. It is doubtful, however, whether this observation could be made policy-relevant, in the sense that the EU would merely have to promise full membership to effect a boost in credibility as the inevitable result. In other words, it is not clear whether the promise of EU membership was the cause or the result of "better" development. Our findings also do not fully support the conjecture that the further west the countries are located, the more integrated (with the West) we can expect them to be. Geography might play a crucial role for institutional development, and for political and economic development as well, but the findings indicate it is certainly not the sole factor. The Transition Report of the EBRD recognises regional patterns in development but insists that there are a range of historical and political factors, such as the length of time under central planning, that also play a role (EBRD 1999, 27f.). We concur.

More than ten years into transition, many questions still appear unanswerable; we have focused here on the newly-passed de jure constitutions, rather than on what they develop to be in reality, i.e., the de facto constitutions. It is probably still too early to ascertain divergences between the two. Yet, it should be possible to come up with hypotheses on the various degrees of divergence: Where constitutions are inherently contradictory, constitutional reality should diverge from the letter of the constitution (see Ordeshook's contribution to this special issue). If one accepts the view that constitutions need to be backed by spontaneously arisen institutions (Voigt 1999:chapter five), one could try to predict divergence by looking at civil society ratings. The higher the ranking, the more costly it will be for the government to renege on the constitution and therefore the less likely this is to occur (Nations in Transit regularly reports civil society rankings).

This paper has sought to analyse the choice of rules, i.e., constitutional rules have been *explananda*. We have largely abstained from analysing them as *explanans*. In other words, we have not asked about the welfare effects, the distributional consequences, etc. of alternative constitutional arrangements. More than one paper needs to be written on this issue. We have also abstained from normative analysis. Surely, more than one paper deserves to be written with a normative focus.

Notes

1. The paper was written while the authors enjoyed the hospitality of the German Institute for Advanced Study in Berlin (*Wissenschaftskolleg zu Berlin*). They would like to thank Alexander Blankenagel, Laszlo Bruszt, and Gerald Rowe for discussions on some of the topics dealt with in the paper.
2. The third category in this survey of 28 ex-communist countries that are consolidated autocracies and statist economies. These include Tajikstan, Belarus, Bosnia, Uzbekistan, and Turkmenistan.
3. Additionally, separation of powers à la Montesquieu can also be distinguished from checks and balances: whereas in the former, each of the government branches is responsible for different functions, in the latter, each branch also performs functions of the other branches, thus having some sort of veto power over the decisions of the other branches.
4. Suppose a government ratifies a set of internationally agreed rules but then does not abide by them and is subsequently sanctioned by the international organization (e.g., via suspension of its membership). It would then be interesting to inquire under what conditions the prestige of the government suffers due to suspension and under what conditions the prestige of the international organization suffers, i.e., under what conditions the government gets away with it, at least domestically.
5. The state ombudsman is the initiator of direct judicial review proceedings.
6. Political independence is ascertained by the following questions: (1) Can the executive branch or the parliament dismiss the governor of the central bank if there is conflict regarding monetary policy? (2) Does the central bank governor's term of office exceed the election cycle? (3) Does the term of office of central bank board members exceed the election cycle? (4) Does a government official or representative have a voting seat on the central bank board? (5) Does a government official or representative sit on the central bank board with a veto?
7. The ranking is somewhat biased against countries that were established only after 1989 (Estonia and Slovakia). This can be one reason for their poor ranking.

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