On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe

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Elected politicians — legislators and, in some systems, members of the executive — can choose to exercise authority themselves or to delegate that authority to any number of agencies. Such delegation of power can occur at the constitutional stage, but is most common at the post-constitutional stage. Two categories of delegation can be distinguished: domestic delegation to agencies within the legislators' jurisdiction, and international delegation to supranational or international bodies. While some research has been done on domestic delegation, especially in the context of delegation to administrative agencies in the U.S., as well as on delegation to supranational bodies, especially with regard to the E.U., these activities have not been analyzed within a unified framework. This paper attempts to inquire into these issues and provide a general picture of the decision-making process regarding whether to delegate authority and to which body to transfer the authority.

The past decade has been a period of rapid change in Central and Eastern Europe. Almost all of these countries have either passed entirely new constitutions or substantially modified the old ones. This is a unique situation in which constitutional delegation of powers can be performed almost simultaneously with post-constitutional delegation. The constitutional process in Israel is very different. It has been underway for fifty years. However, it can also be characterized by simultaneous constitutional and post-constitutional choices. In this paper, we examine such delegation choices in nine countries. We describe the main differences among these countries with regard to delegation of power, try to trace their origins and analyze their effects on delegation of powers. One question raised is what are the ramifications of a quasi-simultaneous constitutional and

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post-constitutional choice? Have constitutional rules been chosen in anticipation of the necessary compatibility with the rules of international organizations that one wants to join? Has membership in international organizations led to a boost in credibility of those governments concerned?

INTRODUCTION

During the late 1980s and early 1990s, the countries of Eastern and Central Europe underwent a peaceful transition to democracy, after half a century of communist rule. All of these countries adopted new (or significantly amended) written constitutions. Despite significant differences in the specific details of the governmental structures, the vast majority of these countries based their new systems of government on the Continental model. Two of the main features of this model are parliamentary democracy and a special constitutional court. In Israel, in contrast, the constitutional process has been underway for fifty years already, with no complete document in on the horizon. However, Israeli courts do perform judicial review of legislation, and the Supreme Court of Israel has become a powerful player in the collective decisionmaking process.

In this paper, we try to determine the possible sources of some of the institutional differences amongst these governmental regimes. This is a very broad undertaking, and obviously we cannot address every possible structural feature and historical event that might be a viable explanatory factor for these institutional differences or every possible effect of these differences on the collective decisionmaking process. We focus on the system and structure of the separation of powers and especially on the delegation of power to domestic bodies, such as an independent judiciary and central banks, and to international bodies.

This paper is part of a more general project in which we are trying to develop a positive model of delegation of power. This model will attempt to explain why politicians delegate power and what guides them in their choice between international delegation and domestic delegation of power. It also attempts to analyze constitutional versus post-constitutional delegation.[1] In this sense, our project belongs to constitutional economics in which the choices of (constitutional) constraints are endogenized.

If one seeks to explain the delegation of powers by politicians and to

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1 Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 Kyklos (forthcoming 2002).

distinguish between domestic and international delegation, one is interested in formulating nomological hypotheses, i.e., hypotheses that purport to be universally and permanently applicable. 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 in fact be of importance.

First, as indicated above, the countries of Eastern and Central Europe have undergone similar processes, under similar geo-political circumstances, in the same period. This can allow us to examine the differences among these countries in laboratory-type conditions. Israel in this respect can serve as a control case, though it shares an important (from our vantage point) common feature with the Eastern and Central European countries: the simultaneous operation of constitutional and post-constitutional processes.

Second, the rapid changes in the countries under scrutiny, not only with regard to constitutional and legal norms, but also with regard to economic and political performance, invite an examination of the interrelationship between the institutional structures and the de facto performance. Such a comprehensive inquiry is beyond the scope of this paper, but it sets a possible agenda for further research that might be relevant to the general theoretical questions we ask: Why do politicians delegate power and to whom? Any connection that does exist between certain features of constitutional design (such as an independent judiciary) and the long-term performance, for example, in terms of economic success, will only enhance the analysis of why politicians are interested in delegating their powers.

Third, delegation of powers usually can be understood as a "post-constitutional constitutional choice": basic choices are made on the basis of an existing constitution, which includes provisions for the creation of independent agencies. However, in the case of the Central and Eastern European countries, as well as Israel (for different reasons), these apparently sequential choices might in fact have been simultaneous: decisions to delegate power and more basic decisions concerning who is to have general competence to delegate are made at the same stage. A plausible conjecture is that this simultaneity will have different outcomes from those resulting from a sequential process, because the post-constitutional choices will constitute part of a more general package deal. This will make the analysis of decisions to delegate power more complicated, because it will be more difficult to detect the relevant restrictions under which the actors operate.

Possible relevant constraints include the following: historical constitutions and the constitutional legacies of the different countries — for example, the communist constitutions in the Eastern and Central European countries, which could serve as the starting point from which to embark on substantial

change, and the British Mandatory constitutional structure, which served as the baseline for Israeli constitutional law; the agreements reached at roundtable talks; and international agreements.

Historical constitutions are often a symbol of national pride or unity. The Polish constitution of 1791 is surely the most obvious example of this. In this respect, historical constitutions might serve as a focal point and source for constraining force. The communist constitutions were often not taken very seriously by the communist regimes, but they still had the potential to constrain the transition process from totalitarian regime to democracy. The roundtable talks were an institutional innovation to overcome the difficulties communist regimes had in entering into negotiations with interest groups that were not part of "democratic centralism." Similar trends can be observed in the work of the Israeli Interim State Council, which drafted the Declaration of the Establishment of the State of Israel and began the constitutional process in the new state.

If there is broad consensus among the members of a constitutional convention regarding the need to apply for membership in specific international organizations ("IOs"), the statutes regulating these IOs also could serve as a constraint on the framing of the constitution. This would be rather unusual, because in our conception of IOs, we usually assume the existence of a number of nation-states with their respective constitutions as a given, which form the basis for negotiating the establishment of an IO. In the former case, the IO is the existing given entity 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 powers, veto powers, voting rules, etc.) will, of course, also influence the content of the constitution.

Central and Eastern Europe might also be unique because of the pace of the development of independent agencies in those countries. Independent agencies evolved very slowly in Western constitutional systems. In principle, the experience gained with various institutional arrangements in the West could be considered when deciding how to delegate powers in the newly passed constitutions.

A common observation is that everything is up for grabs shortly after a radical regime changes.[2] The notion that there are special moments at

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2 David Hume, Essays — Moral, Political, and Literary 474 (Eugene F. Miller ed., 1987) (1777), for example, wrote:

> ... and were one to choose a period of time, when the people's consent was the least regarded in public transactions, it would be precisely on the establishment of a new government. In a settled constitution, their inclinations are often consulted;

which a group makes decisions not according to the standard self-interest rationale but according to special interests valid only at that very moment still prevails in constitutional thought. Ackerman,[3] for example, speaks of "constitutional moments."[4] In this paper, we beg to differ. Our analysis of constitutional and post-constitutional choices regarding delegation of power draws on a broad understanding of rational choice. We thus claim that this general framework can accommodate those "constitutional moments," or in other words, "constitutional moments" can be analyzed using a broad approach to rational choice. At times of radical constitutional change, 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 identify and address some of those constraints.

We survey eight Eastern and Central European countries in this paper, as well as Israel. Four of the Eastern and Central European are classified by the Freedom House Project as consolidated democracies and consolidated market economies: the Czech Republic, Estonia, Hungary, and Poland; and four are classified as transitional polities and transitional economies: Bulgaria, Romania, Russia, and Slovakia.[5] Nine countries are too many for a serious case study, but we wanted to provide varied information, also from countries that have been practically neglected and that can offer interesting insights into our analysis. On the other hand, nine countries are too few for a regression analysis, so our conclusions should be understood as tentative.

The paper is organized as follows. In the first section, after defining, the key concepts, we present some theoretical conjectures concerning the delegation of powers. Section II addresses the constraints that the drafters of the new constitutions had to contend with. Section III provides an overview of the newly created institutional arrangements dealing with delegation of powers: both domestic and international delegation. Finally, Section IV offers some explanations for what is described in Sections II and III,

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but during the fury of revolutions, conquests, and public convulsions, military force or political craft usually decides the controversy.

3 1 Bruce Ackerman, We the People: Foundations (1991).

4 John Rawls, A Theory of Justice (1971), bases his constitutional philosophy on this special, actual or hypothetical, moment behind the veil of ignorance. However, he assumes that even at this moment, individuals are rational and self-maximizers.

5 Adrian Karatnycky, Nations in Transit — 1998, at 4 (1998). The third category in this survey of twenty-eight ex-communist countries is countries that are consolidated autocracies and statist economies, including: Tajikistan, Belarus, Bosnia, Uzbekistan, and Turkmenistan.

concluding with some unanswered questions and a possible agenda for future research.

I. Some Theoretical Conjectures

A. Distinguishing between Domestic and International Delegation

Our general question is whether it is possible to explain the variance in the structure of agencies and their degree of independence across the scrutinized countries, by analyzing the constitutional (and post-constitutional) competences and restrictions of organs with the authority to delegate power. Hence, we will explain how an independent agency is created and the transfer of competence to that agency, with our hypothesis being that the modes of delegation chosen and the extent of powers transferred can be explained by both constitutional structures as well as political considerations. With regard to both Central and Eastern Europe and Israel, however, this approach might be somewhat shortsighted, since constitutional and post-constitutional delegation decisions often occur (quasi-) simultaneously. Therefore, we will try to take one step *backwards* with our analysis: the first step of our analysis will not assume the currently valid *de jure* constitutions to be exogenously given, but, rather, they will be analyzed as though they themselves are the product of a deliberate choice.

Before detailing some of the conjectures concerning these two levels of choices —constitutional and post-constitutional — we will define what we mean when referring to "delegation of powers." *Post-constitutional delegation of powers* occurs when a body not constitutionally assigned to exercise certain powers does so. Thus, legislative delegation 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."[6] Similarly, *constitutional delegation of powers* occurs when the drafters of the constitution assign powers to certain bodies. If it is the legislature that drafts the constitution, constitutional delegation and post-constitutional delegation are very similar in scope and the only difference between them is with regard to the normative status of the delegation. Under black-letter doctrine, we usually think of delegation of rule-making power by the legislature as

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6 Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349, 359 (1993).

being to the executive or an administrative agency. However, the delegatee (in both types of delegation) can be also the judiciary, a parliamentary committee, a local authority, a public corporation, a special administrative body, or an international organization.

In this paper, special emphasis will be placed on 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 which is subject to the domestic constitution. International delegation is when 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 the international organization to which legislative power is delegated, but it will not be the only actor with a "say" in the modification and interpretation of the organization's statutes. To qualify as "international delegation," it is sufficient that the rule-making powers are exercised by a body not completely under the control of domestic constitutional organs. The involvement of an international body is, therefore, not necessary. This means that international delegation could also refer to a situation in which rule-making powers are conferred to a constitutional organ of another nation-state. To be analyzable within a unified framework, domestic delegation and international delegation must be substitutes for one another. This means that international organizations that deal primarily with border-crossing externalities will not be discussed here. Rather, we will focus on solutions that could, at least in principle, also be achieved by domestic delegation.

The most straightforward method of delegation of power is when the legislature instructs by statute other bodies to set forth rules in a specific area, rather than create such rules itself. Defined in such a way, delegation of power occurs at a different level from that of separation of powers as envisioned by Montesquieu. The latter is usually interpreted as being confined to the separation of the legislature, executive, and judiciary, with each assigned a different governmental function.[7] But since we are interested both in the choice of constitutional rules and in (post-constitutional) decisions to delegate, separation of powers can be regarded as a form of delegation of power. Moreover, we propose broadening the usual delineation

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7 Additionally, separation of powers à la Montesquieu can also be distinguished from the checks and balances system. Whereas in the case of the former model, each governmental branch is responsible for different functions, in the latter system, each branch performs functions of the other branches as well, thus having a certain veto power over the decisions of the other branches. See Maurice Vile, Constitutionalism and Separation of Powers (1967).

of delegation of powers and separation of powers. First, granting (either under the constitution or by statute) decision-making powers to non-political actors, such as judges, can be regarded as a mode of delegation. Second, actors who do not belong to any of the three traditional branches of government who are granted decision-making powers can be seen as constituting separate fourth, fifth, etc., branches. When a country's citizens have the power to influence the collective decision-making agenda or to make decisions directly, it seems warranted to add "the people" as such a branch.[8]

In explaining the choice of constitutional rules as well as of delegation of powers, we assume that the relevant actors maximize their expected utility. We thus follow the public-choice approach here and do away with competing approaches that assume that politicians seek to maximize some kind of social welfare. Rational legislators will only be prepared to transfer authority if the costs entailed in the delegation are outweighed by the benefits. Put simply, among the three alternatives of: (1) deciding themselves; (2) delegating competence to a domestic agency; or (3) delegating competence to an international or supranational organization, rational legislators will always choose the alternative that ensures the highest expected net gain.

Note, however, that our concept of cost and benefit is not restricted to monetary or power elements. Thus one of the tasks we undertake is to identify the costs and benefits related to these three alternatives. In Voigt and Salzberger,[9] we identify a number of benefits from delegation, including: delegation enables politicians to secure influence beyond the end of the election cycle; delegation can be used as a tool to credibly commit; it can serve to reduce uncertainty; it can reduce the delegator's workload; it can be used to expand the public sector; and it can serve as a tool to remain in power or maintain legitimacy. These possible benefits have to be weighed against the possible costs: such as delegatee drift; monitoring costs; reversal costs; coordination costs; and even legitimacy drift.

In Voigt and Salzberger, we conjecture that the type and extent of the observed delegation of powers can be explained by the constitutional structure underlying the delegation decision.[10] As already pointed out, Central and Eastern European countries as well as Israel are "special" in the sense that constitutional and post-constitutional choices might have occurred almost

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8 This may seem awkward, since the three branches of government are often interpreted as representing the people.

9 Voigt & Salzberger, *supra* note 1.

10 *Id.*

simultaneously. That is why we propose to deal first with possible explanations for constitutional choice.

B. The First Step: Explaining Constitutional Choices

The Economics approach analyzes choices under scarcity. Actors are assumed to seek to maximize their individual utility, subject to certain constraints. The choice of a constitution can also be analyzed in this framework. Passing a new constitution is usually not an individual choice, but a collective one. The specifics of collective or public choice will therefore have to be taken explicitly into account. In analyzing collective choice, it is still assumed that the individual actors seek to maximize their individual utility, but an important constraint in so doing might be the other relevant actors who do likewise, but whose interests might be partially conflicting. Thus, the first step in analyzing constitutional choice is to identify the relevant actors, their interests, or preferences, and the constraints to which they are subject in making their choices: Who will propose and draft the new constitution and who will be responsible for ratifying it, and what are their interests or preferences? If the group of people who are going to propose the new constitution has come together in what is called a constitutional convention, then one must ask who has the power to set the agenda for the group and what are the procedural rules for its deliberations? Of special interest in this context, of course, are the voting rules. If the members of the constitutional convention know from the outset of their deliberations who will have the power to accept or to reject their proposals, this will serve as a powerful constraint with regard to the contents of their proposals.

Thus far, we have identified two elements that determine the contents of constitutional rules, namely: (1) the particular interests of the relevant players; and (2) the procedural rules used to aggregate their preferences. A third, crucial factor is the relative bargaining power of the various individuals involved or, rather, the groups present at the constitutional convention. The bargaining power of a group is determined by its ability and willingness to impose costs on others and, thereby, to reduce the net social output. One vital factor determinative for a group's bargaining power is the group's fallback position, i.e., the level of utility it will achieve if no agreement is reached.[11]

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11 For more on the relevance of bargaining power in explaining constitutional choice and change, see Stefan Voigt, Explaining Constitutional Change — A Positive Economics Approach at ch. 6 (1999).

Jon Elster's constitutional economics research agenda places strong emphasis on the analysis of the procedures used. Elster discusses the ramifications of time limits for constitutional conventions; how constitutional conventions that concurrently serve as legislatures allocate their time between the two functions; the effects of regularly informing the public as to the progress of the constitutional negotiations;[12] and how certain supermajorities and election rules can determine the outcome of conventions.[13]

McGuire and Ohsfeldt[14] have tried to explain the voting behavior of the Philadelphia Convention delegates as well as those of the delegates to the ratifying conventions of the thirteen states by examining the individual delegate interests. Similar analyses would, of course, be most interesting with regard to Central and Eastern Europe, but this is not the appropriate forum to do so. Instead, we can put forth only some crude indicators of the possible relevance of the three factors just presented. Whereas McGuire and Ohsfeldt examined the individual interests of those present at the Philadelphia Convention (whether debtors or creditors of the government, slave owners, Western landowners, potential exporters, or otherwise), we will confine ourselves to the organizational or party interest. We posit that constitutional conventions made up of members of a parliament still stemming from a socialist regime will have different preferences from conventions comprised of newly-elected parliamentarians. Similarly, we conjecture that the interests of members of ruling parties will differ from those of members of newly emerging parties.

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12 On the question of whether there is a systematic relationship between the public sessions of a constitutional convention and the rules agreed upon, see Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986). Macey advances the hypothesis that public deliberations make the obvious use of log-log-rolling and horse-trading less likely. In this setting, the representatives would at least try to formulate their arguments in terms of the common good.

13 Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. Pa. J. Const. L. 345 (2000). For more on this aspect of constitutional choice, see Voigt, *supra* note 11, ch. 4.

14 *See* Robert A. McGuire & Robert L. Ohsfeldt, *An Economic Model of Voting Behavior over Specific Issues at the Constitutional Convention of 1787*, 46 J. Econ. Hist. 79 (1986); Robert A. McGuire & Robert L. Ohsfeldt, *Self-Interest, Agency Theory, and Political Voting Behavior: The Ratification of the United States Constitution*, 79 Am. Econ. Rev. 219 (1989); Robert A. McGuire & Robert L. Ohsfeldt, *Public Choice Analysis and the Ratification of the Constitution*, *in* The Federalist Papers and the New Institutionalism 175 (Bernard Grofman & Donald Wittman eds., 1989).

In addition, the viscosity of the veil of ignorance,[15] or degree of uncertainty,[16] can be a factor in the outcomes of the convention. In some of the countries under scrutiny in this paper, the veil has been very thin; for example, the members of the constitutional conventions had clear expectations as to who could be in power after the next elections. This means, for example, that we can expect members of a strong party with a highly popular leader to favor a presidential rather than a parliamentary system. Parties that expect to enjoy high popularity will favor a first-past-the-post system, whereas parties that expect to win just three or four percent of the vote will strongly oppose a high threshold, for example.

If interests do not coincide perfectly at the 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[17] on which they can agree with relative ease. These might be procedural rules (how they want to organize their proceedings) or substantive ones. Since constitutions often reflect the aspirations of a society, we conjecture that constitutional conventions will look to their countries' previous constitutions, especially when they were expressions of autonomy, sovereignty, etc. The communist constitutions, and the Mandatory constitution (Order-in-Council) in the Israeli case, might acquire certain relevancy, since the conventions have to start their deliberations on the basis of some set rule. In this sense, these constitutions have the advantage of being the status quo. Another important constraint faced by the constitution-makers is the agreements reached at roundtable talks. These agreements reflect the first agreements between representatives of the old regime and the new groups of the emerging civil society. As already alluded to above, if a majority of the constitution-makers want their country to become a member of an international organization, they might seek to pass a constitution that conforms to the statutes of the relevant organization.

If this conjecture proves to be correct, this would be a clear instance of path-dependence: although the constitutional conventions may intend to move away from the communist legacy, that legacy might still loom large in that it serves as the basis for the first post-communist constitution. The same applies to the relationship between the Mandatory constitutional order in Palestine and the constitutional principles adopted by the independent

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15 Rawls, *supra* note 4.

16 James M. Buchanan & Gordon Tullock, The Calculus of Consent — Logical Foundations of Constitutional Democracy (1962).

17 Thomas Schelling, The Strategy of Conflict (1960).

Israeli constitutional convention. The "constitutional culture" or the history of liberal constitutions might also play a role, especially if it contains focal points that can make consensus easier.

The structural organization of the constitutional convention also will have great influence on the document the convention proposes. Jon Elster[18] argues that the contents of the constitution mirror the structure of the constitutional convention. In particular, he argues that constitutional conventions that simultaneously serve as legislatures will give heavy weight to the legislature in comparison to the executive and judiciary. They also will assign an important role to the legislature in the constitutional amending process at the expense of extra-parliamentary ratification possibilities, such as referenda. Finally, the structure of parliament will mirror the structure of the constitutional convention, i.e., unicameral conventions will create unicameral systems and bicameral conventions will create bicameral parliaments.

C. The Second Step: Explaining the Choice to Delegate

The general logic of choosing not to choose has been detailed above. At this stage, we will confine ourselves to presenting various conjectures and hypotheses related to such a decision. The first such hypothesis is that the costs of abolishing an independent agency or canceling its decisions are higher if the existence and independence of this agency are regulated at 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 the high level of benefits expected from it.

It has often been pointed out that being too strong can be a disadvantage.[19] 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 would not misuse its strength. States that have not had the opportunity to build a reputation as a solely impartial arbiter will be especially susceptible to this. In such cases — and it is our conjecture that the Central and Eastern European states belong to this group — the post-constitutional creation of domestic independent agencies will often not

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18 Jon Elster, *The Role of Institutional Interest in East European Constitution-Making*, 5 E. Eur. Const. Rev. 63 (1996).

19 Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. Institutional & Theoretical Econ. 286 (1993).

carry enough credibility with the citizenry because such agencies can be abolished with relative ease. Therefore, it might be a rational move for these countries to delegate relatively more power at the constitutional stage and/or to delegate relatively more competence to international agencies. Under both options, the government will not easily influence the resultant independent bodies. But this is only one part of the story: for many of these countries, this is the first time they have enjoyed independence. The popularity of the government in those countries might be (negatively) affected if authority that society had hoped to acquire for a long time is freely delegated internationally. Domestic constitutional delegation might be, therefore, preferable.

Taking the possible effects of international delegation into account, we hypothesize that the greater the prestige of an international organization among the domestic electorate, the more likely delegation to that organization. This hypothesis is based on the assumption that membership in an international organization that enjoys prestige domestically will translate into votes in national elections, i.e., increased chances of reelection chances. Making the hypothesis a little more elaborate, one could further argue that the prestige of membership is not absolute, but relative; that is, one wants to get in before the neighbors do. If this is the case, we should be able to observe a veritable race for membership.[20]

The extent to which a specific government chooses international delegation might also be a function of its ideological stance. If we assume that right-wing governments are more favorably inclined towards the free market than left-wing governments are and, furthermore, that international organizations are, by and large, similarly inclined in favor of markets, then we should expect right-wing governments to more actively delegate powers to international bodies. A right-wing government, in order to ensure that the path to a market economy will be pursued even after its own demise, might even be eager to delegate internationally. Closely connected to this hypothesis is the conjecture that at the beginning of the transition in power in Eastern and Central Europe, the old (communist) governments that expect to be outvoted in the near future might try to secure influence beyond election day by creating agencies and staffing them with ideological cronies.

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20 Suppose a government ratifies a set of internationally agreed-upon rules, but then does not abide by them and is subsequently sanctioned by the relevant international organization (e.g., 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; that is, when does a government get away with it, at least domestically.

Hence, these governments are more likely to delegate domestically than internationally.

However, if right-wing governments are less keen than their left-wing counterparts to protect human rights, especially social rights, then we can expect left-wing governments to be more inclined to delegate internationally to certain organizations (rights organizations). One can even argue that since right-wing governments are more credible than left-wing regimes with regard to market reform, it is in fact the left-wing governments that have to delegate more internationally to gain credibility with both domestic and foreign investors.

Moreover, we can expect countries that early on in their new form expressed interest in membership in international organization — especially the EU — to anticipate in their constitutions some of the rules to which they would have to conform if they were to become members. For example, the statutes of a central bank might already conform to the requirements of the European Monetary Union, or national antitrust rules might be aligned with EU competition policies.

II. Constraints on Constitutional Choice

As indicated, the primary task of our project is to explain constitutional and post-constitutional delegation decisions within the broad framework of rational choice. The variance in these decisions among the nine countries scrutinized, against the background of the similar histories of transition from communist rule for eight of them, warrants a more careful look at the differences in the constraints that politicians faced in each of the countries. This Section will identify some of these constraints, whose connection to the various institutional choices will be examined further on.

Many scholars will point to historical experience as a significant factor in current choices. If we apply this general insight to our study, we will arrive at the hypothesis that a liberal constitutional legacy is likely to constrain current constitutional choices. Although one of our major arguments is that delegation of powers is likely to be carried out as the result of politicians' self-interests, this does not entail the conclusion that such delegation does not improve the well-being of the public at large and the protection of its rights and interests. An independent judiciary, for example, can strengthen the position of the individual vis-à-vis the government; an independent central bank can reduce inflation, to everyone's benefit in the long run.[21]

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21 In this respect, we differ with William Landes and Richard Posner's theory of the

Out of the nine countries we examine, six have a liberal constitutional legacy of sorts: Poland, Romania, Czechoslovakia (the Czech Republic and Slovakia), Bulgaria, and Estonia. The same cannot be said of Russia and Hungary, whose past constitutions cannot be regarded as liberal democratic. As far as Israel is concerned, since it is a new entity, it is difficult to talk about its constitutional legacy. It is, however, interesting to examine the Israeli constitutional and post-constitutional choices against, on the one hand, the background of the British Mandatory legal heritage, which Israel inherited with its establishment as a state in 1948, and, on the other hand, against Jewish legal traditions regarding the relationship between the state and society, the lack of ultimate religious authorities, and the dialectic tradition.

The most impressive constitutional legacy is that of Poland, which stems back to the constitution of 1791, the first written constitution in Europe.[22] This constitution was fairly modern and liberal, for example, referring to the doctrine of separation of powers as the most fundamental principle of good government. The Polish post-World War I constitution of 1921 reenacted major parts of the 1791 constitution.

Romania adopted its first constitution in 1866, after the Crimean War, modeling it after the 1831 Belgian constitution, a fairly liberal one. Bulgaria adopted its first constitution in 1879. While praised for being one of the most democratic constitutions in Europe, due to the numerous Balkan conflicts, it was soon abrogated. Estonia adopted a democratic constitution in 1918, following its recognition as a sovereign state, but it was replaced in 1934 by an authoritarian constitution. Czechoslovakia enacted a progressive constitution in 1920, modeled on France's 1875 Third Republic constitution.

It is doubtful whether on the basis of the above, the hypothesis regarding the effect of constitutional legacies on current constitutional and post-constitutional choices can be verified, at least with regard to the de-jure state (as opposed to the de-facto situation). The constitutions of the two countries lacking a real liberal legacy cannot be differentiated from the constitutions of the other six countries with respect to liberal character and

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independence of the judiciary. William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875 (1975), and are nearer to Salzberger's theory, *supra* note 6.

22 Only three constitutions that were enacted in the eighteenth-early nineteenth centuries are still in force today: the U.S. Constitution (1787-1791); the Norwegian constitution (1814), and the Belgian constitution (1831). *See* Eivind Smith, *Introduction, in* Constitutional Justice Under Old Constitutions (Eivind Smith ed., 1995).

extent of delegation of powers.[23] With regard to the de-facto situation, while the case of Russia might support the hypothesis that a state's lack of a liberal constitutional tradition is a factor in its current non-liberal status, Hungary shows just the opposite: despite the absence of such a legacy, Hungary has managed to place itself at the forefront of the emerging new democracies in Europe.

Many expected that among the new democracies of Eastern and Central Europe, Poland, Hungary, and Czechoslovakia would be the first to adopt new constitutions. But it was in fact Bulgaria and then Romania that, in 1991, enacted the first new constitutions (although amendments to existing constitutions were enacted prior to then in Hungary and Poland). In 1992, it was the Czechs, Slovaks, and Estonians who adopted new constitutions, followed by Russia in 1993. Poland waited until 1997 to enact a constitution, and Hungary continued with only amendments to its existing constitution, culminating in 1997 with the replacement of about 95% of its 1949 constitution. Be that as it may, the chronological order of formal constitutional construction does not indicate degree of liberal progressiveness; on the contrary, the earlier constitutions appear less liberal than the later ones. We believe that the constraints (or lack thereof) of the roundtable talks and the process of constitutional construction are important explanatory factors in the sequence of constitutional enactment and the end constitutional results.

In Bulgaria, the first country to adopt a new constitution, no formal roundtable talks were conducted. The old — communist — National Assembly voted to end the Communist Party's monopoly on political power already in 1989, conforming to the demands of the newly formed Union of Democratic Forces. But in the early elections in 1990, the Communist Party (renamed the Bulgarian Socialist Party) won a majority of seats. This is a unique phenomenon among all the transitions in Eastern and Central Europe. Exploiting this window of opportunity for the old guard, the Bulgarian Parliament rushed to adopt a new constitution. It came into force without a referendum being held, because of its drafters' fears that the people would not approve it. All these were factors in Bulgaria becoming the first country with a new constitution in the region, in July 1991. Moreover, they serve to explain the relatively strong separation of powers (and strong presidency)

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23 Russia can be distinguished as having one of the more impressive government structures in terms of de-jure separation of powers and delegation of powers. *But see* Peter C. Ordeshook, *Constitutions for New Democracies: Reflections of Turmoil or Agents of Stability?*, 90 Pub. Choice 55 (1997).

under the constitution, which can be attributed to the Communists' political calculations that they would not be able to maintain their domination of parliament for long.

The case of Romania, which experienced a similar pace of constitutional-making as well as degree of separation, or delegation, of powers, is almost the opposite to the Bulgarian case. In Romania, the lack of roundtable talks was the result of the seizing of power by the reformists. A few days before Ceausescu's execution, at the end of 1989, a newly formed body called the Council of the National Salvation Front ("NSF"), comprised of communists, dissidents, and intellectuals, seized power. The NSF then won a huge majority in the elections to both houses of parliament and president in May 1990. Its clear domination of the political branches of government enabled the NSF to enter into a rapid process of constitution-making. Unlike what was witnessed in Bulgaria, however, the NSF used its power to convene a special constituent assembly to draft the constitution and held a referendum in November 1991, in which the constitution was approved.

Nonetheless, the final product in Romania bears a number of similarities to that in Bulgaria. The Romanian constitution prescribes a unique form of bicameralism, with no real difference between the two chambers' structure of representation and a strong presidency to be elected by the people. The weakest branch is the judiciary, especially the constitutional court, shaped similar to the French model. But unlike in France, the Romanian constitution enables the reversal of the constitutional court's decision by a two-thirds majority in parliament. It can be argued that quite the opposite to the ruling Communists in Bulgaria, the NSF's overwhelming majority in all political institutions and its expectation that this domination would not last for long led it to delegate powers generously. The only branch whose powers are relatively limited is the constitutional court, because it was not perceived as a potential stronghold for those politicians who took part in the drafting of the constitution.

It is interesting to compare the Bulgarian and Romanian experiences to the Czech-Slovak one with regard to the effects of constraints on constitutional order and delegation. In all four countries, the constitution was enacted by a newly elected parliament, but there are interesting differences in the pace of the constitution-making process. While in Czechoslovakia (prior to its separation into two republics), the elections were preceded by a conciliatory interim government and president (the result of what was coined the "Velvet Revolution"), there was no such stage in Bulgaria and Romania. While in Czechoslovakia, the elections resulted in the rise of new powers and a clearer picture as to the separation of future political powers, in Bulgaria and Romania, the process was so swift that the results were "tentative,"

with a significant presence of ex-communists. These differences might explain the tendency towards more separation of powers, or rather more constitutional delegation of powers, in Bulgaria and Romania: the more uncertain politicians are as to their chances to remain in power, the more powers they tend to delegate.

The Polish case is interesting from the perspective of constraints on constitutional choice. Constitutional choice was intertwined with post-constitutional choice in Poland more than in any of the other countries we examine in this paper. Unlike the four countries just described, the election of a new parliament did not precede constitutional change. This change began a few years before the first free elections and then continued after the first elections and subsequent ones. In fact, constitutional reform in Poland preceded the fall of Communism, beginning in 1982 with a change in attitude with regard to the binding nature of the constitution, the introduction of judicial review, and the establishment of a constitutional court. This was indeed a unique phenomenon in the Eastern Bloc.

It is our claim that the rather strong form of separation of powers (bicameralism and a strong presidency) and delegation of powers in Poland can be explained against this background. The initial establishment of a constitutional court with the power of judicial review in 1982 can be regarded as the communist regime's attempt to delegate powers in order to remain in power or maintain legitimacy.[24] The insistence on a strong presidency, with the power to veto legislation, can be similarly understood. Each fearing loss of power, both sides — the Communists and opposition — opted for a division of power among several branches of government. When in the 1989 elections, Solidarity won 99 out of 100 seats in the new senate and a major share of the seats available in the lower house, according to the roundtable agreement, it was too late to change the basic structure. Thus, although some fine tuning followed in the 1992 interim constitution (dubbed the "small constitution"), decreasing the powers of the president and increasing the powers of the executive, by, for example, introducing a constructive vote of no confidence, the basic structure of government in Poland has not been changed, not even by the 1997 constitution.

Hungary and Israel are the only countries among the nine we cover in this study in which a new constitution has yet to be enacted. However, both countries have experienced a "constitutional revolution," which Hungary completed earlier and much more quickly than its neighbors. The Hungarian constitution-makers exploited a "window of opportunity": a short period

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24 *See* Voigt & Salzberger, *supra* note 1.

during which the Communists were demoralized and the opposition was not yet seriously divided. In Poland, some members of Solidarity pushed for a similar strategy, but failed in their attempts.

The case of Hungary adds an interesting perspective to our focus on constraints in the constitutional mechanism. As the transition (towards the democratization of the structure of government, not with regard to economic reform) in Hungary began a little later than in some of its neighboring countries, notably Poland, a major constraint on constitutional construction was the knowledge of the Polish experience. The opposition in Hungary refused to accept a deal similar to that agreed upon in Poland, because it witnessed the materializing powers of Solidarity. Thus, the structure of government agreed upon in Hungary is based less on dividing the political powers between various organs and more on a delegation of powers to non-political bodies, such as the constitutional court and international organizations. This can be explained by the opposition's realization that the Hungarian population would be facing hard times during the period of economic reform and that such delegation of power could help the government to remain in power.

The last three countries in our study — Russia, Estonia, and Israel — have significantly different features from the other six. In addition to the transition to democracy, Russia was contending with a problem of self-definition and the secession of various republics, which, in turn, filtered down into a struggle over 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 implement a new constitutional order. Thus, more than in any of the other countries we discuss, the new Russian constitution reflects the actual balance of the powers (Yeltsin and Parliament) at the time of the enactment of the constitution. Yeltsin pushed for the American model of presidential republic; Parliament wanted a Continental-style parliamentary democracy.

After receiving a vote of confidence from the Russian people in a referendum he called in April 1993, Yeltsin decided to convene a constituent convention to come up with an alternative draft to the one proposed by parliament. The convention did draft such an alternative, but it was rejected by parliament, which decided on a procedure for adoption of a constitution totally dependent on parliament itself. In September 1993, Yeltsin dissolved parliament, which, in response, voted to depose Yeltsin. Yeltsin, in turn, ordered the military to attack parliament and suspended the activities of the opposition parties, the constitutional court, and opposition newspapers. In November 1993, the same day of the elections for a new legislature, he put

his draft constitution to referendum, which was approved by a majority vote of 58.4%.

The new Russian constitution provides for a strong president who is to be elected by the people and has significant executive powers, including chairing government meetings and the power to nominate the head of the central bank and constitutional judges (subject to the approval of parliament); moreover, the president also has veto power over legislation. The procedure for impeachment of the president, specified in the constitution, is complicated and unlikely to be applied.

In the Russian case, therefore, the reasons behind the main features of the separation of powers are somewhat different from those underlying our theory of delegation of powers, which does not take into account the use of physical force.[25] However, the constitution also creates, or reaffirms, such bodies as the constitutional court and central bank, to which powers were delegated due to uncertainty, shifts in responsibility, collective decision-making problems, and other delegational benefits, all of which do fall in the scope of our theory.

The Estonian constitution provides for relatively extensive delegation of powers, especially domestic delegation — for example, to the constitutional court and central bank. This structure can be attributed to the constitution-making process itself. Estonia seceded from the USSR in 1990. A constituent assembly was formed, comprised of thirty members from the old parliament and thirty members from an interim, independent quasi-parliament (Congress of Estonia). The final draft of the constitution, preferring a parliamentary democracy to a presidential system, was approved by overwhelming majority in a referendum in 1992, making Estonia the first former Soviet republic to adopt a constitution. The composition of the constituent assembly, which did not reflect actual powers, but, rather, an artificial equal division of seats, was responsible for this generous delegation to the non-political institutions of government.

The Israeli case is very different from the other countries discussed here. The British constitutional legacy inspired the arrangements provided for under the UN's 1947 Partition Resolution and the way in which the Resolution was followed. The Resolution, which called for the termination of British rule in Palestine and the establishment of two states — an Arab state and a Jewish state — also outlined in great detail a constitution-making scenario. The Resolution called for the two future states to hold elections

25 Voigt & Salzberger, *supra* note 1.

for a constituent assembly that would draft and adopt a written constitution, including entrenched guarantees of civil rights.

The State of Israel was established in May 1948. Its Declaration of Independence was adopted unanimously by all members of the Provisional Council, representing all parties from the extreme right to the Communist Party. It includes various structural components, as well as a list of human rights to be upheld. Elections to the constituent assembly took place in January 1949, but already at that time, it was clear that the elected body would act as a legislature and not a constitutional convention. Among the reasons for this change in plans was the inclination of David Ben Gurion, Israel's first Prime Minister, to follow the English model of government. He opposed the idea of a written constitution, fearing the judicial review that would likely result from the adoption of a constitution. Indeed, the first legislative act of the assembly was the Transition Law, which gave the legislative body of the State of Israel its name, the Knesset, and stated that the constituent assembly is the first Knesset.

The debates in the first Knesset on enacting a constitution resulted in the 1950 Harari Resolution, which declared that Israel should have a written constitution, but decided against its immediate enactment. Instead, the Knesset Constitution, Law, and Justice Committee was ordered to prepare chapters of the constitution, which would be enacted separately as basic laws and would eventually be incorporated into a unified written constitution. Neither a time limit nor a specification of the distinction between a basic law and an ordinary law (statute) was provided for, leading to a blurring of the distinction between constitutional and post-constitutional decisionmaking.

Nine basic laws were enacted between 1958 and 1988. They deal with various aspects of the structure of government, but none include a bill of rights. This lack of an enacted bill of rights led the courts, especially the Supreme Court, to develop a judicial-made bill of rights. Moreover, the current President of the Supreme Court Aharon Barak even hinted that he does not rule out invalidation of legislation by the courts when it contradicts basic democratic principles, despite the lack of positive authorization (i.e., a constitution) to exercise such review. Finally, in 1992, two basic laws that are part of a future bill of rights were enacted. Both have clauses of entrenchment and provide grounds for judicial review of legislation, despite the fact that this power is not specified explicitly. Shortly after the enactment of these laws, the Supreme Court began to perform such review.

Let us try to generalize and conclude. Normative analysis of constitution-making provides us with strong arguments in favor of a constitutional convention or constituent assembly that is separate from the ordinary legislature, since one of the objectives of a constitution is to place

restrictions on the power of parliament.[26] When legislators draft and/or enact a constitution, they will spend a disproportionately high percentage of time on deciding short-term issues and will thus neglect constitutional issues of long-run relevance. Moreover, as members of parliament who obviously want to be reelected, representatives of the constitutional assembly will be less eager to sacrifice the interests of their constituents in favor of the good of the whole nation. Finally, these representatives might enter into an outright power game and support only those proposals that serve the interests of their parties or even their personal interests.[27] However, despite these strong arguments and the more general normative framework, which considers constitutions a social contract that should reflect long-term consensus,[28] historically, most constitutional conventions have been constituted from an existing parliament, and Israel and the countries of Central and Eastern Europe surely are no exception to this rule.

This phenomenon comes as no surprise. Not only would an "all-purpose" assembly seem to be timesaving in periods of radical change,[29] but the nature of the actors involved in the collective decisionmaking process and their utility functions make it very difficult to achieve this normative goal. In this sense, the history of constitution-making in Central and Eastern Europe, as in other places, does not conform with the notion of a "constitutional moment."[30] Had politicians and other decisionmakers behaved in accordance with "the constitutional moment" thesis, we would have expected to find more constituent assemblies separated from the legislatures.

We thus believe that changes in the utility function of politicians, as predicted by Ackerman's constitutional moment theory, do not occur. What we do witness are periods of increasing uncertainty and lack of information, which affect the choices of the political players. The differences in the constitutions enacted in the early 1990s under similar circumstances after the fall of Communism reflect, amongst other things, such uncertainty and lack of information. In this sense, the constitutional choices in the countries under scrutiny reflect also the informational output from each one. Indeed, the fact that the opposition in Hungary did not accept proposals for limited

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26 *See* Vincent Ostrom, The Political Theory of a Compound Republic, A Reconstruction of the Logical Foundations of the American Democracy as Presented in the Federalist (1971); James M. Buchanan, The Limits of Liberty — Between Anarchy and Leviathan (1975).

27 Dennis C. Mueller, Constitutional Democracy at ch. 21 (1996).

28 Buchanan & Tullock, *supra* note 16; Rawls, *supra* note 4.

29 Mueller, *supra* note 27.

30 Ackerman, *supra* note 3.

democratization of parliament was due to the information on the election results in Poland. This information created expectation of a similar outcome in Hungary, which led to the adoption of a system with a weaker form of separation of powers. The same reasoning underlies the relatively stronger form of separation-delegation of powers in Romania and Bulgaria, the consequence of election results that were not perceived as manifesting the true balance of powers between the Communists and reformers. The change in the Israeli system of government in 1992 to the direct election of the Prime Minister (in separate elections from those for parliament) and a return to the Continental model of government in 1999 can be explained along these lines as well.

III. Some Institutional Stock-Taking

In this section, we summarize the various constitutional and post-constitutional rules that have been adopted in the nine countries with regard to delegation of powers. A complete overview is, of course, impossible in the present forum. With regard to domestic delegation, we place particular focus on the judiciary and central bank and refer to other independent agencies. With regard to international delegation, we concentrate on possible membership in the European Union, but also analyze membership in other organizations such as the WTO. Finally, we consider the possible interrelationship between domestic delegation and international delegation.

A. Domestic Delegation

Over the last few years, an entire cottage industry of analysis of the possible relationship between the independence of central banks and inflation rates has evolved. Measuring such independence has been the focus of a significant portion of this literature. Further on, we offer an analogous analysis of the independence of constitutional courts, focusing on measuring the courts' independence. It is noteworthy that in the case of constitutional courts it is less clear what the dependent variable to be analyzed is (the equivalent of inflation rates). Investment and growth rates are possible candidates, but there are other suitable candidates. We will leave this question for future analysis and focus on the initial step of measuring courts' independence.

It would seem to make sense to present first the established literature on central banks and then proceed to our innovation on constitutional courts. However, we have decided on reverse order, for the following reasons. In most cases, the independence of (constitutional) courts is provided for at the

constitutional level, whereas the same cannot always be said of central banks. Moreover, the independence of central banks can be regarded as a function of the independence of the courts. Thus, from both structural and substantive points of view, the discussion of the independence of constitutional courts ought to precede the discussion of the independence of central banks.

1. Constitutional Courts

An essential component of every constitutional set-up is an enforcement mechanism. Adjunct to the two major functions of a constitution — namely, providing for the structure of government and the division of powers amongst its organs and protecting individuals from illegal use of government powers — the tasks of constitutional enforcement include monitoring the relations among the state organs and protecting human rights. In most countries, the task of constitutional enforcement is assigned to the judiciary. However, two models can be distinguished globally. The first is systems that assign this task to the judiciary in general. The U.S. federal judiciary is the most notable example of this model, for every court has the competence to perform judicial review. The second model assigns this task to a special constitutional court separate and autonomous from the general court system and hierarchy. Most European countries follow the latter model.

All the emerging democracies of Central and Eastern Europe in our study, with the exception of Estonia, opted for the second model and established special constitutional courts. Estonia adopted a system 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 highest court of the land.[31] Israel can also be classified under the American model. Indirect attack on the validity of legislation can be launched in every court, although direct attack is conducted only in the High Court of Justice.

Despite the fact that the other countries (Bulgaria, Romania, Czechoslovakia, Poland, Hungary, and Russia) adopted the Continental model, there are interesting differences in the structure of their constitutional courts, the jurisdiction of these courts, and the degree of independence of their judges. In what follows, we try to assess the various formal arrangements in all nine countries with regard to the independence of the constitutional enforcement mechanism and its efficacy. We divide this assessment into a number of components, giving each a score ranging from 1 (least independent) to 10 (most independent).

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31 The state ombudsman is the initiator of direct judicial review proceedings.

a. Constitutional versus post-constitutional arrangement. The independence and efficacy of constitutional enforcement mechanisms, or of constitutional courts, and their ability to counterbalance the other branches of government, are contingent 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, a greater degree of independence can be expected than when these arrangements are set under ordinary law, which is subject to amendment by parliament whenever it is dissatisfied with the court's performance. The U.S. Constitution, for example, provides for many structural components regarding the judiciary, the Supreme Court, and its justices. However, the Constitution does not specify the number of Supreme Court justices. This lacuna was well exploited in the nineteenth century, as well as in 1937, when threats to "pack the Court" through legislation changing the number of justices were successful to pressure the Court to change its position on the New Deal legislation. This exemplifies well the significance of including the arrangements regarding constitutional courts in the constitution.

Hence, we give the highest score to countries in which these arrangements are part of the constitution and whose constitutions cannot be amended like regular legislation (i.e., amendments require a referendum or super-majority). Countries in which the arrangements are set down in regular statutes will be given lower scores.

In Bulgaria, which receives a score of 8, most of the provisions on the constitutional court are specified in the constitution. Amendment to the constitution requires a 75% majority vote of the National Assembly. A similar arrangement exists in Slovakia, also given a score of 8, and in the Czech Republic, scoring 9, where amendments require a majority of three-fifths of parliament. In Poland, scoring 8, the relevant provisions are included in the 1997 constitution, which can be changed by only a two-thirds majority. In Romania, which we score 9, the fundamental provisions also are included in the constitution, which can be amended only by a two-thirds majority in parliament and a referendum.

In contrast, in Estonia, scoring 6, only parts of the arrangement — judicial appointment and independence — are provided for in the constitution. Other components, including constitutional jurisdiction and review procedure, have been laid out in a special legislation: the 1993 Law on Constitutional Law Review Procedure. The constitution can be changed by a majority of parliament members in two separate votes. In Hungary, to which we give a score of 5, only some 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 the system for their election, but not

the length of their term of office. However, the constitution does provide that any legislation regarding the constitutional court requires a two-thirds majority of parliament, thereby elevating its normative status. In Russia, given a score of 4, some of the arrangements regarding the constitutional court and its judges are set in the constitution, along with provisions on other courts. However, some significant details were left to the legislature, such as term of office of constitutional judges. The constitution can be amended only by a two-thirds majority of all members of parliament and a three-quarters majority of all members of the Federation Council (with the exception of certain chapters that require a referendum to approve their amendment).

As noted, Israel, to which we give a score of 5, still has no written constitution. However, the composition of the Supreme Court, its jurisdiction, and other elements relevant to the independence of the Court are provided for under Basic Law: The Judicature, which is to become part of the constitution.

b. The authority and procedure for appointing constitutional judges. The procedure for appointing 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 constitutional court. The constitutional court is supposed to protect the citizens from illegitimate use of power by the authorities, as well as to settle disputes between different branches of the government. Thus the court should be as independent as possible from the other branches. The most independent procedure for judicial appointment is election by professionals (other judges or jurists). The least independent method is appointment by a single powerful politician (the Prime Minister or Minister of Justice, for example). Between these two, we can find combined arrangements, for example, appointment by politicians from different branches of government or representing different parties.

In Poland, scoring 4 in this category, the constitutional court judges are chosen by a simple majority of parliament. In Slovakia, with the same score, they are appointed by the President from a doubled-digit list of candidates prepared by the legislature. In Russia, with a score of 5, the constitutional court judges are appointed by the Federation Council following the President's recommendation. In the Czech Republic, scoring 7, the judges are appointed by the president from a list proposed by parliament; the President's decision then requires the Senate's approval. In Hungary, with a score of 8, judges are nominated by a National Assembly committee comprising one representative from each party in the National Assembly. They then need to be elected by a two-thirds majority of the

National Assembly. Thus, although it is the legislature that appoints the judges, there is still need for broad consensus for the appointments.

Romania, to which we give a score of 6, follows the French system, under which different government institutions appoint a certain number of judges: three judges are appointed by the Chamber of Deputies; three by the Senate; and three by the President. Bulgaria, scoring 7, follows the same model: one-third of the judges are elected by their fellow judges in the two supreme courts, which increases the professional considerations and thus independence from politicians; one-third is appointed by parliament; and one-third by the President. In Estonia, scoring 8, the seventeen National Court judges are appointed by parliament upon the recommendation of the President of the Court, who is nominated by the President of the state and appointed by parliament. Thus, the majority of judges are appointed on a professional basis (with significant input from the President of the Court) with some political scrutiny. Judicial review is performed by five judges, who form the Court's judicial review chamber. In Israel, to which we give a score of 9, all judges (including Supreme Court judges) are nominated by a special committee comprising three Supreme Court judges, two members of the Bar, two cabinet ministers, and two Knesset members (one from the opposition). Thus, although there is some political input in the decisionmaking, the majority of this committee are professionals — judges and lawyers.

c. Judicial tenure. Judges enjoy the greatest degree of independence if they are appointed for life (or up to a mandatory retirement age) and cannot be removed from office, except by a complex legal procedure. They are least independent if they are appointed for a set period, with subsequent terms optional, and removal from office a fairly easy process. If judges can run for a second term, their independence in the first term is severely hampered, for they will seek popularity among their nominators. Judges who are appointed for a set period and cannot be re-appointed fall in-between these two alternatives in terms of the independence they enjoy. They are more independent than the latter, but less independent than life-tenured judges, since upon completing their term on the constitutional court, they may seek another position that is contingent upon those who appointed them as judges. The following scoring in descending order of the countries examined takes into account also the length of the terms, which ranges between seven years and life-appointment.

In Estonia, scoring 10, judges are appointed for life. In Israel, scoring 9, the appointment is up to a mandatory retirement age of 70. In Russia, scoring 8, constitutional court judges are appointed for a single term of twelve years (previously it had been a life appointment and some judges on the Russian

constitutional court are still subject to the old rule). In the Czech Republic, scoring 7, judges are appointed for a single term of ten years; in Bulgaria, Poland, and Romania, all with a score of 6, for a term of nine years; and in Slovakia, scoring 5, for a term of seven years. In Hungary, with a score of 3, the constitutional court judges are appointed for a term of nine years with the option for reelection.

d. The accessibility of the court. Another component of judicial independence is the accessibility of the court and its authority 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 her rights have been violated. In Israel, scoring 10 in the aspect, indirect judicial review can be performed by any court. The Israeli Supreme Court, which conducts direct review, is widely accessible to the public, and traditional barriers to standing and justiciability have been relaxed over the past two decades. Estonia, scoring 9, is the only European country in our sample to adopt the American — general courts — model. Under this model, constitutional proceedings can be initiated by anyone and in any court. In this sense, constitutional review in Estonia has the potential to become the most effective among the studied countries. In Hungary (a score of 8), Poland (a score of 8), the Slovak Republic (a score of 7), and Czech Republic (a score of 6), individual citizens can petition the constitutional court on matters of human rights. The accessibility is more limited in the Slovak and Czech Republics, where the constitution fails to specify this matter. Russia scores 5, with partial access to the court for individual; in Bulgaria and Romania, both scoring 3, only state organs can initiate proceedings in the constitutional court.

e. Court competence. The last indicator of the independence of a constitutional court is its scope of competence. This is a somewhat tricky variable. At a first glance, it might seem that wide 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 on collective decision-making. But, in fact, from a certain point, more competence actually can impair a court's independence, public perception of the court as a neutral and honest broker, and, therefore, its ability to act as a counterbalance to the other branches.[32] In other words, a court's reputation and, therefore, independence and efficacy can suffer if it is pulled into political power struggles. This might

32 The logic that formal or factual strength can make one weaker applies not only to constitutional assemblies and the legislature, but also to the court. For a more general argument along these lines, see Schelling, *supra* note 17.

have been 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 we examine, constitutional review of legislation is the core function of the constitutional court. This power probably includes also review of other legislative acts (of lower normative status — either of other organs of the central government or of state or local authorities), although this extended power of review is mentioned explicitly in the constitution only in the Czech and Slovak Republics, Estonia, Romania, and Russia. Only in Romania can judicial review be conducted before the promulgation of legislation, but the court's decision can be reversed by a reaffirmation of the law by a two-thirds majority of parliament. Despite the fact that the same majority is required to amend the constitution, one can conclude that judicial review in Romania is weaker than the case in any of the other countries presented. In Russia, judicial review exists also with regard to the constitutions of the republics (as opposed to the federal constitution) and their agreements with the Federation.

A second common task of the constitutional courts is the adjudication of conflicts between authorities in the different 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 authority to decide on the constitutionality of political parties is granted to the constitutional courts in Romania, Bulgaria, the Czech Republic, Poland, and Slovakia. The interpretation of the constitution is mentioned amongst the competences of the constitutional courts in Bulgaria, Russia, and Slovakia.

More problematic are, on the one hand, the authority to review the compatibility of international treaties with the constitution and, on the other hand, the authority to review legislation in light of international law. The variance in the arrangements in these two matters is especially relevant to our study. It reflects elements of both international delegation — the normative position of international law within the municipal legal system — and domestic delegation — the extent of powers delegated to a constitutional court to review the conformity of domestic law to 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 of international courts. Thus, under the Czech constitution, international law supercedes domestic law, which is wide international delegation, and it delegates enforcement power to the constitutional court, which is wide domestic delegation. Similar provisions can be found in the Slovak, Polish, and Bulgarian constitutions, but without the very significant, though rather

vague, authority given to the court to take "measures necessary to effect a decision by an international court which is binding for the Czech Republic if it cannot be effected otherwise" (Article 87(I) of the Czech constitution). This provision is significant because it means that not only does the Czech constitution place international law above domestic law, it also regards the interpretation of international law by international courts as part of international law, thereby creating 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 spectrum, we find the Russian and Estonian arrangements, which empower the constitutional court to review the compatibility of international agreements with the constitution, signaling the subordination of international law to domestic law. Both the Romanian and Hungarian constitutions are silent on the constitutional court's jurisdiction to rule on matters related to international law.

The trickier powers assigned to constitutional courts are: (1) the competence to rule on the constitutionality of parliamentary proceedings, granted to the constitutional courts in Hungary and Romania; (2) the authority to supervise elections, granted to the constitutional courts in Bulgaria, the Czech Republic, and Romania (vis-a-vis presidential elections); (3) the authority to monitor disciplinary and impeachment procedures against the President, provided for in Romania and Russia; and (4) the power to supervise referenda, provided for in Slovakia and Romania. The Czech constitution and the Israeli Basic Law: The Judicature grant powers to the constitutional court (or Supreme Court in Israel) in all matters not within the jurisdiction of another court. Moreover, the Czech constitutional court also is empowered to delegate some of its powers to the administrative court. In Israel, the statutory definitions of the Supreme Court's powers are very general and leave plenty of room for the Court to interpret the scope of its own powers. In the last twenty years, the Court has adopted a very broad view of these powers to include, amongst other things, competence to review legislation, to review internal decisions of parliament, and to accept petitions originating from the Occupied Territories.

Aggregating the "positive" and "negative" competences of the courts results in the following ranking of scores: the Czech Republic — 10; the Slovak Republic — 9; Poland — 9; Bulgaria — 8; Estonia — 8; Israel — 8; Russia —7; Hungary — 6; and Romania — 4. This, of course, is a de-jure ranking of the competence of the various constitutional courts. The de-facto situation might be different, although, for example, the political involvement

of the Russian Constitutional Court corresponds to this analysis of its formal powers.

f. Summary. The following table summarizes our findings of de-jure independence.

Table 1: De Jure Independence of Constitutional Courts

	Constitutional Arrangement	Appointment of Judges	Tenure	Access	Competence	Total
Bulgaria	8	7	6	3	8	32
Czech R.	9	7	7	6	10	39
Estonia	6	8	10	9	8	41
Hungary	5	8	3	8	6	30
Poland	8	4	6	8	9	35
Romania	9	6	6	3	4	28
Russia	4	5	8	5	7	29
Slovakia	8	4	5	7	9	33
Israel	5	9	9	10	8	41

What sort of conclusions can be drawn from this table, when we consider it against the background of the different constraints placed on constitution-making and the actual processes of constitution-making in the nine countries? First, we see that those countries that were the first to enact a constitution — Bulgaria and Romania — ended up with the least independent constitutional courts. As we concluded in the previous sections, this is an interesting finding, that these countries are characterized by a relatively strong form of separation of powers. However, this applies mainly with regard to the division of powers between the political branches, and not delegation

of power to the non-political branches. A more general lesson might be that it is necessary to distinguish between delegation of power between politicians and delegation of power to non-politicians. Different rationales might underlie these two forms of delegation, and different reasons might motivate them. This conclusion deals yet another blow to the "constitutional moment" theory.

Second, it seems that historical constitutional legacy is an important determinative factor in the extent of independence the judiciary enjoys. The two countries with no such legacy, Romania and Russia, are ranked sixth and seventh, respectively, in terms of the de-jure independence of their constitutional courts. Finally, it is interesting to note that the countries in which we found the highest level of judicial independence, or the most extensive delegation of power, are Estonia and Israel. Estonia's constitution was enacted by an ad-hoc constituent assembly. Israel's constitution has yet to be amalgamated, though over the years, through its development, certain conventions have formed, which will be difficult to overrule. Such is the independence and extent of the powers of the Israeli Supreme Court.

2. Comparing the Independence of Central Banks

This paper considers the decisions of governments to delegate power and especially their choices whether to do so at the constitutional stage or at the post-constitutional stage and whether to delegate domestically or internationally. These crude distinctions can be made more precise by identifying various levels of domestic delegation and examining whether they also contain hidden international delegation.

As we have just seen, independent judiciaries, in particular, constitutional courts, are in most cases regulated at the constitutional level and can thus be considered to fall within the scope of constitutional choice. In many industrialized countries, central banks do not figure quite as prominently at the constitutional level. 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 entrenched at the constitutional level, such as the judiciary. One of the first steps in understanding 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.

In five of the countries, the Czech Republic,[33] Hungary,[34] Estonia,[35] Poland,[36] and Russia,[37] the central bank, its functions, and institutional structure are specified in the constitution. The Romanian constitution does

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33 The Czech Republic constitution devotes a separate chapter (of one article) exclusively to the Czech National Bank. Article 98 pronounces the Czech National Bank the state's central bank and specifies currency stability as the Bank's primary (though not sole) goal. Article 98(2) provides that the Bank's status, jurisdiction, and other details are to be set down in law. Additionally, the Bank is mentioned in Article 62, which deals with the functions of the President of the Republic, providing the President with the authority to appoint members of the Czech National Bank Council.

34 Article 32(d) of the Hungarian constitution lays down the constitutional basis for the National Bank of Hungary. Under this article, the National Bank of Hungary is responsible for issuing legal tender, maintaining the stability of the national currency, and regulating money circulation. In addition, Article 32(d) specifies appointment and term procedures. The Bank is organized as a joint-stock stock company, a very unusual form of organization today for a national bank. However, when the Bank was founded in 1924, this organizational structure was common practice, Rolf Kobabe, Zentralbanken in Osteuropa — Europäische Integration und rechtliche Konvergenz 136 (1999). Since the state is the sole stockholder, the Bank's independence would seem to rest on shaky ground.

35 Article 111 of the Estonian constitution lays out the constitutional foundation of the Bank of Estonia. It grants the Bank a monopoly in issuing currency and stipulates that the Bank's primary objective is securing "the stability of a good national currency." Nomination and appointment procedures of the members of the Council of the Bank of Estonia are set forth in Articles 65(7), (9) and Articles 78(11), (12) of the constitution; Article 104 specifies that statutes regarding the Bank (amongst other laws noted) can be adopted or amended only by a majority of the members of parliament (as opposed to a majority of those present at the vote). After a fifty-year interval, the Bank of Estonia recommenced operations in January 1990, even prior to Estonia gaining independence. After independence, a working group was formed at the Bank to prepare monetary reform, and soon after Great Britain returned the gold that had been confiscated from the Bank of Estonia during World War II, the Bank began to set-up reserves. Moreover, membership in the Bank for International Settlements gave it access to the reserves deposited there. In May 1992, the Deutschemark was selected as the anchor currency. The Estonian Kroon was set to the Mark at a rate of 8 to 1 and has remained unchanged ever since. Eesti Pank, Eesti Pank 1919-1999 (1999), *available at* http://www.ee/epbe/en/history. html.

36 The operation of the National Bank of Poland is based on Article 227 of the Polish constitution, which sets out the Bank's tasks and goals, as well as its organizational structure.

37 The Central Bank of the Russian Federation is mentioned in Article 75 of its constitution, stating the Bank's main function to be to ensure the stability of the Ruble. Furthermore, the Article explicitly provides that the Bank is to exercise its powers independently of other bodies of state power.

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 setup, and thus, as far as delegation of power is concerned, the form of delegation in these two countries cannot be considered constitutional.[38] Since Israel does not have a written constitution, its central bank obviously cannot be regulated at that level; moreover, none of the basic laws deals explicitly with the central bank.

Historical legacy has played a role also in the formulation of central bank laws. The Hungarian central bank, for example, is organized as a joint-stock company. This can be explained by the fact that at the time of the founding of the bank in 1924, such an organizational set-up was common practice.[39] Similarly, central bank statutes in recently sovereign states often have as models their historical predecessors, with Estonia one case in point. But historical legacy also can play a role in exactly the reverse manner. Slovakia, for example, had never had a central bank, and thus it was designed from scratch. A possible ad-hoc hypothesis is that in such cases, more modern statutes should be expected — at least on the books. Historical legacy played a role also in the modification of the independence of the Bank of Israel. The statute regulating the bank was enacted in 1954. Prior to that, currency had been issued by the Anglo-Palestine Bank (later Bank Leumi). The other functions usually performed by a central bank (monetary policy, banking supervision and monitoring, etc.) were the responsibility of the Ministry of Finance. Three-digit inflation rates in the 1980s led to the Bank of Israel gaining greater independence from the government. However, the basic structure of the Bank, the way in which its governor is appointed, and the procedure for his or her dismissal have remained unchanged since 1954.

Summarizing his extensive study on central banks in Central and Eastern Europe, Kobabe[40] stresses that the safeguarding of the independence of central banks at the constitutional level can be important in case of conflict with other constitutional organs. He notes that in the event of a conflict, the Polish, Hungarian, and Estonian central banks do not have the right to take the conflicts to the constitutional court. In Bulgaria and Romania, no constitutional provisions concerning the central banks exist at all.

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38 Article 84(8) of the Bulgarian constitution stipulates that the National Assembly shall elect and dismiss the Governor of the Bulgarian National Bank. There is no other mention of the Bank in the constitution. Article 56 of the Slovak Republic constitution declares only the establishment of a bank by the Republic and that the details will be set out in legislation.

39 Kobabe, *supra* note 34.

40 *Id.* ch. F.

Government participation in the nomination of members of the organs responsible for deciding monetary policy also should be evaluated critically. Governments do participate in this procedure in Hungary, Romania, and Slovakia. The independence of a central bank is also shaped by its relationship to other state organs and the possibility of those organs influencing monetary policy. If the Czech Central Bank were to interpret its powers too broadly, this could lead to a reduction of its functional independence.[41] The independence of the Hungarian National Bank has ambivalent status due to its organization as a joint-stock company with the state as the only shareholder. In Poland, the annual report of the central bank must be approved by the government. The bank's budget is (co-)determined by the bank and the government in the Czech Republic and Slovakia. In Estonia, the parliament even has the function of settling disputes between the organs of the National Bank, raising the possibility that exchange rate policy decisions are made by parliament itself. With regard to the relevance of the goal of price stability, Kobabe notes that this is the clearly dominant goal only in Slovakia.

If one just takes a look at the sequence in which new constitutions and central bank legislation have been passed, three possibilities emerge: (1) the constitution and central bank law are passed (almost) simultaneously; (2) the constitution is passed first, followed by the central bank law; (3) the central bank law is enacted, followed by the constitution. In countries falling into the first category, it can be expected that the central bank law was part of a larger deal between the various actors involved in the constitution-making process. The second possibility is the one most in line with our concept of constitutional and post-constitutional choice: based on the (new) constitution, legislators make post-constitutional choices — for example, enacting a central bank statute. The third possibility is perhaps the most interesting one: the foundations for a new central bank are laid on the basis of an old (or perhaps interim) constitution. From Table 2 below, we can see that the first category applies to the Czech Republic, Estonia, Romania, and Slovakia; Bulgaria and Russia fall into the second category; while Hungary and Poland witnessed the third possible scenario. Israel, as mentioned above, does not yet have a constitution, but when one is enacted, Israel will fall into the third group.

Commitments by a national government to stick to a policy of monetary stability and thus secure low levels of inflation are not credible. It has been shown[42] that a problem of time inconsistency prevails in this context, i.e., that

41 *Id.* at 234.

42 Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. Pol. Econ. 473 (1977); Robert J. Barro

governments have incentive to announce a certain policy at one point in time and then deviate from that policy later on, because such deviation promises higher net political gains. Since rational subjects anticipate this pattern of behavior, the inflation level will be higher than it would have been had the government been able to credibly commit itself.

It was presumed for a long time that independent central banks, whose governors are assigned the task of securing monetary stability, would be conducive to lowering inflation rates. In the early 1990s, various indicators were developed to make that intuition empirically testable.[43] Indeed, it emerged that the extent of independence enjoyed by a central bank is a good indicator of what inflation rate can be expected, at least in industrialized countries.

Very few works have attempted to apply the indexes designed to measure the independence of central banks to the countries in Central and Eastern Europe. Loungani & Sheets'[44] article is but one example. In this article, the authors propose two indexes. The first is based on Debelle & Fischer's[45] suggestion that central bank independence is comprised of "goal independence" and "instrument independence" to which Loungani & Sheets[46] attribute equal weight. Goal independence is determined by whether the central bank legislation stipulates price stability as the central macroeconomic objective of the central bank. Instrument independence is ascertained by three elements of equal weight: (1) Does the central bank control the "instruments" of monetary policy? (2) Is there any binding legal limit imposed on the direct financing of the government by the central bank? (3) Is the government allowed to receive any direct financing from the central bank? (4) Is the central bank subject to government directives in the execution of monetary policy? The second index proposed by Loungani & Sheets is[47] the "similarity to the Bundesbank" index ("SIB"), which takes the Bundesbank as the benchmark

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& David Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. Monetary Econ. 101 (1983).

43 Vitttorio Grilli et al., *Political and Monetary Institutions and Public Financial Policies in the Industrial Countries*, 13 Econ. Pol'y 341 (1991); Alex Cukierman, Central Bank Strategy, Credibility and Independence —Theory and Evidence (1992); Alex Cukierman et al., *Measuring The Independence of Central Banks and Its Effect on Policy Outcomes*, 6 World Bank Econ. Rev., Sept. 1991, at 353.

44 Prakash Loungani & Nathan Sheets, *Central Bank Independence, Inflation, and Growth in Transition Economies*, 29 J. Money, Credit & Banking 381 (1997).

45 Guy Debelle & Stanley Fischer, *How Independent Should the Central Bank Be, in* Goals, Guidelines and Constraints Facing Monetary Policymakers 195 (Jeffrey C. Fuhrer ed., 1994).

46 Loungani & Sheets, *supra* note 44.

47 *Id.*

case. The SIB-index is made up of nine components that include not only "goal" and "instrument" independence, but also "political independence."[48]

Table 2 below presents the indices for the nine countries in our study. The indexes can have any value between 0 and 1; the higher the value, the higher the extent of independence.

Table 2: Central Banks' Independence

	DF-index	SIB-index	Arrangement in Constitution	Date of Legal Base	Date of post-Communist Constitution	Inflation 1998	Inflation 1999
Bulgaria	0,875	1,000	0.7	June 97	1991	22,3	0,3
Czech Rep.	0,875	1,000	0.9	Dec. 92	1992/1993	10,6	2,1
Estonia	1,000	0,667	0.8	June 92	1992	8,2	3,3
Hungary	0,312	0,722	0.7	Oct. 91	1997	14,3	10,0
Poland	0,500	0,611	0.8	1/89 / 7/92	1997	11,8	7,3
Romania	0,500	0,556	0.4	March 91	1991	59,1	45,8

48 Political independence is ascertained on the basis of the following questions: (1) Can the governor of the central bank be dismissed by the executive branch or by the legislature, if there is a 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 sit on the central bank board, with voting power? (5) Does a government official or representative sit on the central bank board, with veto power?

Russia	0,375	0,500	1.0	April 95	1993	27,7	85,9
Slovakia*	0,875	0,944	0.5	Nov. 92	1992	6,7	10,7
Israel*	0,625	0,722	0.5	Aug. 54	—	8,7	1,3

* Not included in Loungani & Sheets; we present our own calculations here.

Loungani & Sheets[49] found that the SIB-index is a good predictor for the 1993 inflation rate of the countries under consideration, with the R2 equaling .45.[50] Their study, however, can be criticized on various grounds, the two most obvious being the small number of countries analyzed (twelve) and the fact that the inflation rate is based on one year, which was relatively early on in the transition period.[51]

Based on data from twenty-six former socialist economies, Cukierman et al.[52] find that in the early stages of liberalization, central bank independence has no bearing on the rate of inflation. But as soon as sufficiently high and sustained levels of liberalization are attained and variables such as price

49 Loungani & Sheets, *supra* note 44.

50 We have recalculated their regression, taking Slovakia into account: for 1993, it turns out that the correlation coefficient increases to .496. But if one calculates the regression for the 1998 and 1999 inflation rates, the results are not convincing. For 1998, the correlation coefficient drops to 0.01 (and thus the inflation rate is almost perfectly uncorrelated with SIB). For 1999, the correlation coefficient has at least the correct (negative) sign, but its value is not impressive either at 0.087. If one uses the Debelle-Fisher index alternatively, results remain virtually unchanged.

51 Olga Radzyner & Sandra Riesinger, *Central Bank Independence in Transition: Legislation and Reality in Central and Eastern Europe*, 1 Focus Transition 57 (1997), express doubt as to whether the degree of central bank independence is the major factor explaining inflation performance in the Central and Eastern European countries. They stress (id. at 60) that in an environment of economic transformation and stabilization programs, inflation rates will be determined by a number of factors that are not directly influenced by the central bank, such as price liberalization and tax reform.

52 Alex Cukierman et al., Central Bank Reform, Liberalization and Inflation in Transition Economies — An International Perspective (Tilburg Univ., Ctr. for Econ. Research, Working Paper No. 2000-106, Oct. 2000).

decontrols and price wars are controlled, 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 both have a positive impact on the chosen level of independence. The problem with the first variable is that it might also reflect geographic proximity to the West or — and probably of greater significance — cultural similarity.

Regardless, we can use the Loungani & Sheets' two indicators to rank the de-jure independence of central banks. But we propose two additional components: whether the bank is regulated under regular legislation or by the constitution and the substance of this arrangement vis-à-vis the procedure for appointment of its directors and the reversibility of their decisions (analysis that is based on Kobabe[53]). The countries in which the fundamental matters regarding the central bank are laid down in the constitution were given a score of 1, from which deductions were made if the substance of the arrangements allow easy reversal of the directors' decisions. The countries in which only partial regulation of the central bank is provided for in the constitution had a starting-point score of 0.7, from which deductions also were made according to substance. The two countries (Romania and Israel) in which central bank regulation is by regular statute only began with a starting score of 0.5. The scores are presented in Table 2 above. The average of the two indexes and our additional one results in the following ranking in de-jure independence, from most independent to least independent: the Czech Republic; Bulgaria; Estonia; Poland; Russia; Israel; Hungary; Romania; and Slovakia.

One crucial problem should be pointed out, namely, the possible divergence between *de-jure* central bank independence and *de-facto* independence. In measuring *de-jure* independence, one must look at the legal foundations of the central bank, whereas with *de-facto* independence, one has to trace elements of actual independence that the central bankers enjoy in reality. Cukierman[54] has proposed the "turnover rate" of central bank governors as an indicator of de-facto independence: the higher the turnover rate, the lower the de-facto independence. However, using this indicator will make the de-facto independence of the newly created central banks even more difficult to ascertain.

Radzyner & Riesinger[55] have uncovered evidence concerning the five

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53 Kobabe, *supra* note 34.

54 Alex Cukierman, Central Bank Strategies, Credibility and Independence (1992).

55 Radzyner & Riesinger, *supra* note 51.

states they analyze (the Czech Republic, Hungary, Poland, Slovenia, and the Slovak Republic) that goes beyond anecdotal evidence.[56] They calculated the turnover rate of central bank governors, inquired into the practice of financial independence (especially bank lending to the government), and examined how the mechanisms coordinating between monetary and fiscal policies function in practice. They concluded that although "the legal status of the central bank top officials is well protected by law, the central banks of some countries are not free from actual political interference."[57] Cukierman et al.,[58] for their part, seem to assume throughout that the realized levels of central bank independence would be substantially lower than the levels in the books.

Thus far, we have analyzed the independence of central banks as a form of domestic delegation. However, the arrangements regarding central banks have also a dimension of international delegation. A currency board, a unique institutional arrangement that was introduced in Estonia in 1992 and in Bulgaria in 1997, exemplifies this well.[59] A currency board can be

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56 In his introductory essay on the politics of central banking, Dwight Semler, Focus: *The Politics of Central Banking*, 3 E. Eur. Const. Rev. 48 (1994) notes:

> The legal autonomy of the new central banks will probably be less important than their ability to satisfactorily coordinate monetary policy with wider fiscal policy goals in the face of intense political pressure. The evidence to date, on this front, is far from promising. For instance, the first head of the National Bank of Poland, Grzegorz Wojtowicz was driven from office accused of issuing more than five trillion zloties in unsecured credit guarantees. His replacement, Hanna Gronkiewicz-Waltz, faced a heated confirmation process and now confronts overt parliamentary pressure caused by the bank's tight money policy. The president of the Hungarian bank, Gyorgy Suranyi, was sacked by Prime Minister Antall for being too independent-minded ... .

57 Radzyner & Riesinger, *supra* note 51, at 84.

58 Cukierman et al., *supra* note 52.

59 To complete the picture, Lithuania and Bosnia introduced currency boards in 1994 and 1997 respectively. Bulgaria established its currency board on July 1, 1997, with the Deutschmark as the anchor currency and the rate set at 1000 Lev to 1 Deutschmark. The choice of the anchor currency was made by a committee of experts appointed by the government. In preparing for the currency board, it was necessary to modify the law dealing with the Bulgarian National Bank. The anchor currency, as well as the exchange rate, was fixed by a statute. By the end of 1998, inflation had fallen to 1%, down from over 2000% in the first quarter of 1997. After being in operation for eighteen months, the National Bank reserves had almost quadrupled (from US$800 to US$3 billion). The basic interest rate fell from over 200% to 5.3% in October 1998 (Anne-Marie Gulde, *The Role of the Currency Board in Bulgaria's Stabilization*, 36 Fin. & Dev. (1999)). The choice of the current monetary regime was made six years after the new constitution had been adopted.

interpreted as an extreme form of an exchange rate peg: the domestic currency is fixed to an "anchor currency." Holders of the domestic currency are allowed to convert their assets against the pegged currency at a fixed rate at any time. Monetary supply is no longer determined by the central bank, but, rather, is dependent on the quantity of reserve assets (usually the peg currency and other foreign currencies, as well as gold). Monetary supply, therefore, directly hinges on the balance of payments. The establishment of a currency board is almost tantamount to abdicating domestic monetary policy. Hence, in this way, monetary policy decisions are delegated internationally and taken over by an organization beyond the immediate reach of domestic actors, namely, the (foreign) central banks that serve as the anchor for the domestic currency.[60]

In addition, since the majority of the countries we are examining seek eventual membership in the EU, one could expect them to enact legislation in accordance with EU standards for central bank independence and other structural and substantial elements. This touches upon the issue of the interrelationship between domestic delegation and international delegation, which is addressed in Subsection 4 below.

3. Other Domestic Delegatee Bodies

Most studies comparing independent agencies across different countries have focused exclusively on central bank independence, for the simple reason that the central banks were the only agency for which comparative data were available. In this paper, we attempt to expand this limited view by offering a simple indicator for the independence of constitutional courts. The next step would be to develop indicators for other agencies, such as antitrust offices. In light of the discussion on central bank independence, it seems almost self-evident that the more independent an antitrust office, the better

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It can therefore be considered a post-constitutional choice and not part of a package deal including both basic constitutional arrangements and a statute regulating the National Bank.

60 In a recent IMF working paper (Atish R. Ghosh et al., Currency Boards: The Ultimate Fix? (IMF Working Paper No. WP/98/8, Jan. 1, 1998)), it is shown that inflation rates under currency board arrangements are about four percentage points lower than under other pegged exchange regimes. The authors note that this better performance cannot only be attributed to what they call the *discipline* effect, namely, the restrictions in monetary growth, but, in fact, mostly to what they term the *confidence* effect, i.e., the expectation that a currency board will perform better than other regimes. They also note that the differences in performance cannot be explained by the fact that countries with a lower proclivity towards inflation are more likely to adopt a currency board. Indeed, the results remain significant even after controlling for regime-choice endogeneity.

its competition policy. Such a conjecture would, however, be very difficult to test empirically. Whereas in the case of central banks, the inflation rate can be operationalized fairly easily, no unequivocal measure is readily available with regard to the outcomes or consequences of competition policies.

Empirically, we observe that antitrust offices are much less independent than many central banks. In the U.S., for example the (independent) Federal Trade Commission has to cooperate with the Department of Justice Antitrust Division. The EU has no antitrust office of its own. In Germany, which prides itself on having an independent *Kartellamt* (antitrust office), the Finance Minister can override its decisions in the event of an overwhelming macroeconomic interest. It would nonetheless be interesting to find an index that evaluates quality and independence of antitrust offices. The only such indicator that has come to our attention can be found on the Internet by global-competition.com, which has dubbed itself "the site for international competition policy and regulation." Under the heading "Rating the Regulators," the performances of twenty-four competition authorities in terms of speed, expertise, and independence are compared. Unfortunately, none is from Central or Eastern Europe.

Competition authorities have a special role to play, at least potentially, in the transition from a centrally planned economy to a decentralized coordinated economy. Again the legacies of the past come into play and traditional monopolists will likely continue to dominate in quite a few markets, with significant entry barriers for newcomers. It seems quite likely that representatives of the former monopolists will lobby for special favors like subsidies and exemption from antitrust rules.[61] Normatively speaking, an independent antitrust office would, therefore, be especially important at the transition stage. On the positive level of analysis, the composition of the constituent assembly and the legislature can have a major influence on the substance of the institutional arrangement of the antitrust authorities.

Five of the nine constitutions analyzed in this paper make explicit mention of the term "competition" in its economic sense: the Bulgarian constitution (Article 19(2): "The state shall establish and guarantee equal legal conditions for economic activity to all citizens and corporate entities by preventing any abuse of a monopoly status and unfair competition and by protecting the consumer"); the Hungarian constitution (Article 9(2): "The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy"); the Romanian constitution (Article 134(2): "The State must secure: a) a free trade, protection of loyal competition,

61 They might also try to block the introduction of policy competition entirely.

provision of a favorable framework in order to stimulate and value every factor of production"); the Russian constitution (Article 34(2): "No economic activity aimed at monopolization or unfair competition shall be allowed"); and the Slovakian constitution (Article 55(2) "The Slovak Republic protects and promotes economic competition. Details will be set out in a law").

It seems safe to say that competition legislation in Central and Eastern Europe has been heavily influenced by the antitrust rules of the European Union.[62] The agreements that some of the states of Central and Eastern Europe have concluded with the EU contain a clause stipulating that EU competition policy should become the norm in the domestic legislation. This is quite different from the institutions of monetary policy, where EU influence is difficult to discern.

The following are some of the institutional features of antitrust authorities in the countries examined in this paper. In the Czech Republic, the Chairman of the Office for the Protection of Economic Competition is appointed by the President of the Republic and also can be dismissed by him or her, upon the recommendation of the government. In Estonia, the Office of Competition Control is a government body, integrated into the Ministry of Finance. The independence of its members increased with the law reforms of 1997, which specify that the members are appointed for five years and only a subsequent government to the appointing one can reverse this term of office.

In Poland, the President of the Office for the Protection of Competition and Consumers is appointed (and can be dismissed) by the Prime Minister. The former is subordinate to the Council of Ministers. Poland created the specialized Antimonopoly Court in Warsaw, with further appeal possible to the Supreme Court. The Antimonopoly Court often makes use of legal solutions reached by EU courts. In the opinion of the Antimonopoly Court members, the possibility to do so cannot only assist in dealing with situations that are not described in detail in the Polish antitrust legislation, but also can help arrive at fundamental definitions on which competition law is based, such as "dominant position."[63]

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62 With regard to the Czech Republic, see William Knowles et al., Czech Republic, Recent Developments in Czech Competition Law, at http://www.global-competition.com/spl_rpts/ear/czech.htm; with regard to Estonia, see Jüri Sepp & Ralph Michael Wrobel, *Besonderheiten der Wettbewerbspolitik in einem Transformationsland am Beispiel Estlands*, 50 Wirtschaft und Wettbewerb 26 (2000) (Ger.); with regard to Poland, see Marta Sendrowicz et al., Poland, An Overview of Polish Competition Law, at http://www.global-competition.com/spl_rpts/ear/poland.htm.

63 Sendrowicz, *supra* note 62.

Russia has chosen a different institutional solution, establishing in 1998 the Antimonopoly Ministry. In the Slovak Republic, new legislation is being prepared to strengthen the position of the Antimonopoly Office "and make it one of the more independent state organs."[64] One interesting aspect of the Slovak solution is that the Antimonopoly Office has a Legislation Division that is responsible for drafting competition or competition-related legislation and commenting on the drafts of any other laws that could affect competition.[65] In Israel, in 1988, new legislation replaced the previous arrangements for antitrust protection. An antitrust authority was established, governed by a government-appointed official whose influence has only grown ever since. Furthermore, a special court was empowered to deliberate antitrust matters.

The quality of the various competition policies has been evaluated by the European Bank for Reconstruction and Development in its annual transition report. On a scale ranging from 1 to 4+, with 1 indicating the worst possible mark and 4+ at the standard of established Western market economies, the competition policies of our nine case countries were ranked as follows: Bulgaria — 2; Czech Republic — 3; Estonia — 3-; Hungary — 3; Poland — 3; Romania — 2; Russian Federation — 2+; Slovak Republic — 3.[66] (Israel was not included in this report.)

As noted in the Introduction, we apply a broad concept of delegation of powers. It would therefore make sense to analyze not only independent agencies to which governments have possibly delegated competence, such as antitrust offices or environmental agencies, but also directly democratic elements (because the population at large becomes an actor in its own right) and even include the independent media. The more structurally independent the media, the more likely it will play an important role in controlling the government. This could fall within the scope of "delegation" because the constitution-makers grant others the power to voice criticism. Such an analysis is, however, beyond the scope of this paper.

4. Interdependency between Domestic Delegatee Bodies

It is interesting to examine the relationship between the degrees of independence of various delegated bodies within the same jurisdiction. Particularly interesting is the possible interrelation between judicial

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64 Alena Cernejová, Slovak Republic, Slovakia's New Competition Act, *at* http://www.global-competition.com/ spl_rpts/ear/slovakia.htm.

65 *Id.*

66 European Bank for Reconstruction & Development, Transition Report 1999, at 24 (1999) [hereinafter EBRD].

independence and central bank independence. Three conflicting hypotheses can be raised in this context.

First, given that judicial independence and central bank independence are usually regulated at different normative levels — the constitutional versus the post-constitutional — an almost self-evident hypothesis is that an independent judiciary is a precondition for an independent central bank. Formulated somewhat differently, one could argue that central bank independence is a function of judicial independence. In addition, turning to our theoretical analysis of delegation of powers and the costs of delegation, one can hypothesize that the existence of one independent delegatee will decrease the costs entailed in delegating powers to another independent delegatee. According to this assumption, if an independent constitutional court is provided for under the constitution, the cost to the government of delegating power to an independent bank at the post-constitutional level will be lower, and thus, relatively greater independence is likely to materialize.

A second, competing hypothesis refers to the benefits side of the theoretical analysis of delegation of powers, in particular, the shift in responsibility. Under the rationale of this aspect of the analysis, different delegated bodies can be viewed as substitutes for one another. Since responsibility can be shifted to various bodies, if an independent delegatee, such as a constitutional court, already exists, the potential benefits to be derived from an additional independent body will be lower. This would point to a negative correlation between the degree of independence of a constitutional court and that of a central bank. However, since these two institutions deal with very different subject-matters, this substitution effect could be marginal.

A third hypothesis would be that the degree of central bank independence cannot be explained by the extent of judicial independence, nor vice versa. In other words, there is no correlation between the two, or that if such correlation does exist, it may result from factors other than the delegation framework (for example, cultural elements). Under this hypothesis, there might be yet another factor explaining both central bank independence and judicial independence. Applied to the context of this paper, this hypothesis might be formulated to state that the extents of de-jure independence of both the judiciary and central bank are a function of the composition of the constitutional assembly, the preferences of the actors represented therein, as well as the rules for aggregating individual preferences into collective decisions.

The fact that we have studied only nine countries prevents us from putting the interrelationship between central bank independence and constitutional court independence to rigorous test. However, a glance at the results presented in Tables 1 and 2 shows a pattern of positive correlation between

the two, which manifests itself in the fact that the difference in the rankings of the two does not exceed two slots. Three countries with a higher ranking for independent constitutional courts also are ranked high with regard to independence of the central bank (the aggregation of the three indexes): the Czech Republic, Estonia, and Poland. Countries ranked as having less independent constitutional courts also have less independent central banks: Hungary, Romania, and Russia. The only exceptions are Slovakia, ranked ninth for central bank independence but fifth for constitutional court independence, and Israel, ranked first in terms of judicial independence, but only sixth with regard to its central bank (the latter, however, due to the absence of a rigid constitution, which is not a specific feature of its central bank). Bulgaria is ranked third on the central bank independence list and sixth on the constitutional court independence table. The indicator for the quality of competition policy, mentioned in the previous section, shows the same pattern: a tendency to correlate positively with the other two measures of independence, with only Slovakia the odd one out.

B. International Delegation

1. The Constitutional Basis for Delegating Powers to International Organizations: De-Jure Delegation

Before examining the extent to which the governments of Israel and the Central and Eastern European countries actually have delegated powers internationally (de-facto delegation), we will first inquire into the constitutional basis to transferring sovereign rights or competence to a body external to the nation-state, as well as into the status of international law and international agreements in the domestic legal system. These two parameters can serve as indicators as to the extent of de-jure international delegation. The first feature can tell us which domestic political institutions are empowered to delegate externally. Naturally, different delegating organs — the legislature, executive, etc. — will have different incentives to delegate externally, but more importantly, the identity of the delegator and the process of delegation can be indicative of the ease with which power can be internationally delegated. In countries where the government (the executive) has the authority to make international treaties binding on the legal system, the flexibility of delegation is greater than in countries where legislation or constitutional amendment is required for such delegation or where such delegation is subject to the veto power of another branch of government, such as the constitutional court.

The second parameter — the normative status of international law in the domestic legal system — is a good indicator of the extent to which

the given country delegates internationally and the importance it places on such delegation. Countries whose domestic legislation is subordinate to international law and courts can strike down domestic legislation as contradicting international law can be regarded as potentially greater international delegators than countries that do not consider international law superior to the domestic legislation.

Israel, Bulgaria, Estonia, and Slovakia seem to have the more flexible international delegation arrangements amongst the nine studied countries. In Israel, which follows the British model, the government (rather than the legislature) signs international agreements and treaties. In Bulgaria, the authority to delegate internationally is divided between the government and parliament. Certain agreements require parliamentary ratification, including agreements concerning Bulgaria's participation in international organizations or international adjudication, agreements obligating the treasury, and agreements on human rights. The government has the power to enter into other agreements, without any need for further approval.

Similarly, in Estonia, the parliament is empowered to ratify or reject important treaties, including any treaty under which the Republic of Estonia joins an international organization or league.[67] Other treaties can be entered into by mere government decision. In Slovakia, the President is empowered to conclude and ratify international treaties, but he is allowed to delegate this authority to the government.[68] The National Council's consent is required only for economic and political treaties and treaties that require legislation for implementation.[69]

In Hungary, the authority to conclude international treaties is assigned to both the President and the government.[70] However, under Article 19 of the Hungarian constitution, if the treaty is of outstanding importance to Hungary's foreign affairs, ratification by parliament is required. International treaties affecting matters of national defense must be confirmed by national law and publicly proclaimed.[71] Thus in Hungary, international delegation is a fairly cumbersome process.

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67 Article 121 of the Estonian constitution.

68 Article 102 of the Slovak constitution.

69 Article 86 of the Slovak constitution. Under Article 7 of the constitution, the Slovak Republic is allowed to enter into a state alliance with other states. The right to secede from such alliances, however, cannot be restricted. The decision to enter into a state alliance with other states or to secede therefrom can be made by a constitutional statute followed by a referendum.

70 Articles 30A and 35 of the constitution.

71 Article 40C of the constitution.

It is even 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 sixty days.[72] In the Czech Republic, all branches of government take part in international delegation of powers. The Czech constitution grants the President agenda-setting powers with regard to joining international organizations and signing international treaties, but the President is authorized to transfer the task of negotiation to the government or, subject to its approval, to individual members of the government, as expressly provided for in the constitution.[73] Decisions of the President regarding international delegation must be signed by the Prime Minister, who is thereby endowed with veto power. Relative to the situation in the above countries, a greater proportion of international accords require parliamentary ratification, including agreements on human rights and fundamental freedoms, political agreements, economic agreements of a general nature, as well as agreements that require domestic legislation for implementation.[74]

Article 90 of the Polish constitution authorizes the transfer of certain sovereign rights to an international organization. The constitution mentions two possible procedures for ratifying international agreements: (1) a statute shall be passed by the House of Representatives (Sejm) by a two-thirds majority in the presence of at least half of the statutory number of deputies and by a two-thirds majority in the Senate in the presence of at least half of the statutory number of senators; or (2) ratification by referendum. With regard to international treaties, the Polish President is authorized to ratify as well as renounce international agreements and must notify the Sejm and the Senate accordingly. Before ratifying an international agreement, the President may refer it to the Constitutional Tribunal to deliberate on its conformity with the constitution.[75] That is to say, the constitutional court has the power to delay ratification as well as a certain extent of veto power.

In Russia, international delegation falls in the exclusive jurisdiction of the Federation,[76] with the President authorized to conduct negotiations and sign international treaties.[77] The constitutional court has the power to

72 Article 91 of the Romanian constitution.

73 Article 63 of the constitution.

74 Article 49 of the constitution.

75 Article 131 of the Polish constitution.

76 Article 71 of the constitution.

77 Article 86 of the constitution.

examine whether the treaty is compatible with the constitution.[78] Although the constitution makes no mention of ratification by parliament, Article 106 provides that if parliament ratifies an agreement, the Federation Council is required to consider it.

With regard to the status of international law within the domestic legal system, the Czech Republic, Bulgaria, and Poland are the countries in which precedence to international law is more significant. The Czech constitutional court is empowered to invalidate laws that contradict international agreements and to give effect to decisions of international courts. Thus, under the provisions of the Czech constitution, domestic law is subordinate to international law. In addition, the court is empowered to take "measures necessary to effect a decision by an international court which is binding for the Czech Republic if it cannot be effected otherwise."[79] The significance of this feature is that not only does the Czech constitution place international law above domestic law, it also adopts an arrangement similar to the European Union's direct effect doctrine. Moreover, it recognizes interpretation of international law by international courts as constituting 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 are the most far-reaching in terms of international delegation.

Article 85 of the Bulgarian constitution provides that those "treaties ratified by the National Assembly may be amended or denounced only by their built in procedure or in accordance with the universally acknowledged norms of international law." This far-reaching clause likely means that international delegation by parliamentary ratification is irreversible, except as provided for under the terms of the treaty itself or by international law. Article 85 also indicates that international delegation enjoys a higher normative status to regular legislation, explicitly requiring the amendment of the constitution if it conflicts with the international agreement. Moreover, the constitutional court is granted the power to strike down new legislation that contradicts international law or agreements ratified by Bulgaria.[80] Thus, we see here a very extensive apparatus for international delegation.

In Poland, a ratified international agreement constitutes part of the domestic legal order and is applied directly, unless its application requires

78 Article 125 of the constitution.

79 Article 87(I) of the Czech constitution.

80 According to Article 149 of the constitution.

legislation. Furthermore, although the list of sources of law in Poland in Article 87 of the constitution places international agreements after domestic legislation, a separate provision specifies that international law has precedence over statutes if the agreement cannot be reconciled with the provisions of the relevant statutes.[81]

Under Article 123 of the Estonian constitution, all international treaties are subordinate to the constitution, and in the event of a conflict with the constitution, they are not to be concluded. However, this very same article also states that treaties are normatively superior to legislation and, in the event of a clash, treaty provisions will be applied. The constitution empowers the National Court to review the compatibility of international agreements with the constitution, but grants no explicit authority to decide whether legislation is in conformity with international law.

In the Slovak Republic, under Article 11 of the constitution, international agreements on human rights take precedence over domestic statutes, provided that the former guarantee a greater extent of liberties. It is not clear what is the relative normative status of other types of international agreements. The constitutional court has the jurisdiction to review the compatibility of laws with international treaties.[82]

Likewise, Article 7 of the Hungarian constitution states that, "The legal system of the Republic of Hungary accepts the generally recognized principles of international law and shall harmonize the country's domestic law with obligations assumed under international law." This can be interpreted to mean that domestic law, perhaps even the constitution, is subject to international law. However, the constitution does not specify how this harmonization is to be conducted, beyond providing that the legislative procedures for harmonization require a two-thirds majority. The constitution is also silent on the matter of enforcement authority, making no mention of whether the constitutional court has the jurisdiction to strike down legislation conflicting with international law.

Russia, Romania, and Israel are on the opposite end of the spectrum in terms of the status of international law in the domestic legal hierarchy. Many provisions in the Russian constitution refer to international law, including provisions on human rights, extradition, nationality, etc. Article 15 of the constitution provides that "the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system" and "if an international

81 Article 91 of the Polish constitution.

82 Article 125 of the Slovak constitution.

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 provided for, and no explicit jurisdiction is given to the constitutional court on the matter, in contrast to its authority to review the conformity of international treaties with the constitution.

In Romania, treaties ratified by parliament become part of national law.[83] This means that they are subject to the constitution and at the same normative level as regular domestic legislation —that is, later legislation might take precedence over the international treaty. Under Article 20 of the Romanian constitution, in a case of inconsistency between an international treaty on fundamental human rights to which Romania is a signatory and national law, international law prevails over national law. However, this article can be interpreted to mean that if the treaty does not concern fundamental rights and conflicts with domestic law, the latter takes precedence. Enforcement mechanisms, such as review by the constitutional court, are not provided for under the constitution.

Finally, in Israel, customary international law is automatically part of the domestic legal system. However, only treaties that are incorporated into the domestic legal system by Knesset legislation have internal binding force.

The left side of Table 4 below presents the ranking of the structural foundations of international delegation, which can also be regarded as the ranking of the possibility of de-jure international delegation. This ranking is the result of the scores in the two features examined above: the constitutional capacity and flexibility of delegation and the constitutional binding force or normative status of such delegation within the domestic legal system. The Czech Republic, Bulgaria, and Poland are ranked at the top, and Romania and Russia at the bottom.

2. The Actual Delegation of International Powers: De-Facto External Delegation

When describing the order in which the countries of Central and Eastern Europe became members of international organizations and thereby delegated powers internationally, it is important to recall that this is not a unilateral decision: a country must be accepted as member by the organization it seeks to join. The basis on which a country is admitted is often the similarity of its legal framework to those of the more "Western" countries. In this respect, we should expect the Central and Eastern European countries first to ratify a post-communist constitution and only subsequently

83 Article 11 of the Romanian constitution.

apply for membership in international organizations. If we look at the Council of Europe — where safeguarding of human rights plays a crucial role — there are two cases of countries admitted as member states before adopting a new constitution: Hungary (admitted in November 1990) and Poland (admitted in November 1991). In 1992, Bulgaria ratified the European Convention on Human Rights, 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 except Russia and Israel have signed the EU "Europe Agreements," which provide for a transition period towards customs-free trade while also granting trade advantages over the general GATT standards. Russia and the EU have concluded a partnership and cooperation agreement, which does not envisage full membership in the near future. Israel, which is geographically not part of Europe and thus not a potential EU member, has signed one of the most extensive agreements with the EU, providing, inter alia, for free trade and participation in EU R&D and educational programs.

Three of the countries have been admitted as members to NATO. All, except for Russia, which is currently negotiating membership, are members of the WTO. Some of the countries had been members of GATT even prior to their transitions (Poland became a member in 1967, Romania in 1971, and Hungary in 1973). Taking membership in various international organizations into account to rank the countries in terms of degree of integration, the order from most to least integrated is: (1) Poland; (2) Hungary; (3) Czech Republic; (4) Romania; (5) Bulgaria; (6) Slovakia; (7) Israel; (8) Estonia; and (9) Russia. It should be noted, though, that our scoring is Europe-biased, as it includes a time-score for membership in the Council of Europe and the EU. Israel's ranking, therefore, does not reflect its degree of worldwide integration.

Table 3: Extent of Integration

	EU Time-Score	Council of Europe Time-Score	NATO yes/no	GATT Time-Score	Total	Integration Bank	Referendum
Bulgaria	3	3	4	7	17	5	53
Czech Rep.	3	5	1	5	14	3	36
Estonia	7	4	4	8	23	7	21
Hungary	1	1	1	4	7	2	47
Poland	1	2	1	2	6	1	57
Romania	3	6	4	3	16	4	65
Russian Fed.	8	7	4	9	28	9	
Slovakia	3	8	4	5	20	6	54
Israel	9	9	4	1	23	7	

The EU Time-Score indicates the chronological order in which official applications for EU membership were filed (the earliest scoring 1, the next scoring 2, and so forth); the Council of Europe Time-Score indicates the chronological order in which the countries became members of the Council; the NATO yes/no column indicates whether a country is a member of NATO or not (the coding is 1 for members, and 4 for non-members); and the GATT Time-Score indicates the chronological order of GATT (WTO) accession. The Sum is the aggregation of the four individual scores, from which the Integration Rank is derived. The Referendum column indicates the net difference of positive minus negative answers to the question, "If a referendum

were held tomorrow on the question of [our country's] membership in the EU, would you vote for or against membership?" and is taken from Central and Eastern Euro-barometer 8, which was conducted in November 1997.

3. Summary

Table 4 below summarizes our findings with regard to international delegation in the nine countries we cover. The left side of the Table presents the ranking of the structural foundations of delegation, which can be considered the ranking of the de-jure possibilities of international delegation as well. The right side of the Table presents the ranking of actual and prospective delegation, or the extent of de-facto international delegation.

Table 4: Constitutional Flexibility for International Delegation

	Flexibility of Delegation	**Status of Delegation**	**De-Jure Delegation Rank**	**Actual Delegation***
Bulgaria	6	8	9	5
Czech Rep.	4	9	7	7
Estonia	6	7	7	3
Hungary	6	7	7	8
Poland	5	8	7	9
Romania	5	5	1	6
Russia	5	6	2	1
Slovakia	7	7	9	4
Israel	8	5	7	3

* for purposes of coherence, we have reversed the ranking: 9 is the highest delegator, 1 the lowest

From the Table, it arises that there is no full correlation between the extent of de-jure delegation and the extent of de-facto delegation. While Hungary, Poland, and the Czech Republic have high levels of both de-jure and de-facto international delegation, other countries have high de-jure status of international delegation, but low de-facto delegation (Israel, Bulgaria, and Estonia), or vice versa (Romania). Russia scored low in both indexes.

A possible, very tentative explanation for these results is that countries in which international delegation is binding domestically with a high normative status in the domestic legal system and with existing enforcement mechanisms will be more hesitant to join international organizations or bind themselves under international treaties. Be that as it may, one important insight derived from this analysis is that the number of international organizations or treaties to which a country belongs is not necessarily indicative of its degree of integration in the international community or its level of international delegation.

C. On the Possible Interdependence between Domestic and International Delegation

Similar to the positive correlation we found with regard to the levels of delegation in different domestic institutions, it seems that such a correlation exists also between the general level of de-jure domestic delegation and the extent of de-jure international delegation. In other words, countries in which the level of de-jure domestic delegation — to constitutional courts, central banks, etc. — is high also tend to have a high level of (de-jure) international delegation, and vice versa. The Czech Republic, Estonia, and Slovakia belong to the high-level delegation group, to which can be added also Israel, except with regard to its central bank. Romania and Russia fall into the low-level delegation group. Hungary and Poland are in the medium-level delegation group, while Bulgaria is the odd one out: it has the highest level of de-jure international delegation as well as the highest level of delegation to its central bank, but not to its constitutional court or competition watchdogs.

One possible explanation for this tentative finding (tentative, because, as specified above, the limited number of countries in this study prevents us from examining these interrelations extensively) can be attributed to our general model of delegation of powers.[84] It is our claim that delegation of powers will be exercised when the political benefits from such delegation

84 Voigt & Salzberger, *supra* note 1.

outweigh the political costs. If delegation to one independent body already exists, then the cost involved in delegating to other bodies decreases, making such delegation more likely. Several of the benefits we mention in our theoretical framework — such as shift of responsibility, a tool for maintaining power or legitimacy, a tool for expanding the public sector, etc. — are not limited to one subject area. Indeed, they are the products of general features, such as the size of the polity, the electoral system, legislative process, and so on. This perhaps is further indication that domestic delegation and international delegation are not substitutes for one another, but complementary processes.

CONCLUSION

In the Introduction, we explained our choice of the Eastern and Central European countries by pointing, among other things, to a study in which four of these countries are listed as consolidated democracies (the Czech Republic, Estonia, Hungary, and Poland) and four others as countries in transition, both politically and economically (Bulgaria, Romania, Russia, and Slovakia). This division is partially reflected in our subject of analysis: constitutional delegation and post-constitutional delegation of powers. The Czech Republic and Estonia appear to have the highest level of both international delegation and domestic delegation, and Slovakia and Israel fall into the same group. Russia and Romania have the lowest levels of both domestic delegation and international delegation. Our tentative findings place Hungary and Poland in the middle group, while Bulgaria seems to be characterized by a high level of de-jure international delegation, but mixed domestic delegation: a high level of delegation to its central bank, but a low level to its constitutional court. An ad hoc hypothesis with regard to Bulgaria's central bank score could be offered, attributing this phenomenon to the currency board.

These findings are interesting and tend to support our conjecture that more delegation of power indicates a thicker approach to liberal democracy, which extends beyond mere majority rule. This conjecture leads directly to the question of correlation and causality. Piazolo[85] observed that 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 only has

85 Daniel Piazolo, *Growth Effects of Institutional Change and European Integration*, 23 Econ. Sys. 305 (1999).

to promise full membership and a boost in credibility will be 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 do not fully support the conjecture that the more geographically Western a country, the more integrated (with the West) we can expect it to be. Geography might play a crucial role in institutional development — as well as political and economic development — but our findings show that it is certainly not the sole factor. The Transition Report of the European Bank for Reconstruction & Development recognizes regional patterns in development, but insists that there is a range of historical and political factors, such as length of time under central planning, that also have a role.[86] We concur with this.

More than ten years into transition, many questions still appear to be unanswerable. In this article, we have focused on the newly passed de-jure constitutions rather than on what they develop into in reality, i.e., the de-facto constitutions. Indeed, it is probably still too early to ascertain divergences between the two. Yet it is nonetheless possible to formulate hypotheses on the various degrees of divergence: where constitutions are inherently contradictory, constitutional reality should diverge from the letter of the constitution.[87] If we were to accept the view that constitutions need to be backed by spontaneously arising institutions,[88] we could try to predict divergence by looking at civil society ratings (Nations in Transit regularly reports civil society rankings): the higher the ranking, the more costly for the government to renege on the constitution, and, therefore, the less likely it will do so.

This paper has sought to analyze the choice of rules, i.e., constitutional rules have been *explananda*. We have largely abstained from analyzing them as *explanans*. In other words, we have not inquired into the welfare effects, the distributional consequences, etc., of alternative constitutional arrangements. One paper is not enough to cover this issue. We also have refrained from normative analysis. Surely, more than one paper deserves to be written with a normative focus in mind.

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86 EBRD, *supra* note 66, at 27.

87 *See* Peter Ordeshook, *Are "Western" Constitutions Relevant to Anything Other than the Countries They Serve?*, in Constitutions, Markets and Law 149 (Stefan Voigt & Hans-Jürgen Wagener eds., 2001).

88 Voigt, *supra* note 11, ch. 5.