to (externally imposed) legal constitutionalism has emerged and tends to significantly undermine some of its key tenets (not least regarding the prominent role of courts and rigid, higher law constitutions). This trend is clearly worrisome from a legalistic point of view, but what is particularly cause for distress from a democratic point of view are the repercussions for civic constitutionalism. Admittedly, the narrative of the book, with legal and civic constitutionalism as its main protagonists, has been rendered more complex by the emergence and unfolding of these counter-constitutional projects, in particular the Fidesz constitutional 'revolution' in Hungary and the constitutional moves of the Romanian Social-Democratic government.

In the concluding chapter, I restate the problematic strain in the new democracies between legal and civic constitutionalism. The counter-constitutional projects in Hungary and Romania are clearly rendering a democratization of these constitutional democracies a distant project. It is, however, also possible to indicate some social resonance to the questions raised in this book, not least in the case of Romania. Actions and claims made by civil society actors provide in this not only some direly needed hope for the retrieval of the 'lost treasure' of civic constitutionalism, but also interesting and unexplored areas for the socio-legal analysis of constitutionalism, its current predicament and resulting democratic implications.

Notes

1 R. Unger (1996), *What should legal analysis become?*, London: Verso, p. 72, cited in: Bellamy (2007: 1).
2 I am currently developing comparative research along these lines in a project called Constitutional Politics in Post-Westphalian Europe (CoPolis) (see, for a preliminary statement, Blokker 2013).
3 As Albert Hirschman put it with regard to perversity: 'the attempt to push society in a certain direction will result in its moving alright, but in the opposite direction' (1991: 11).
4 Neil Walker has extensively elaborated on this in terms of what he calls 'a holistic method of constitutionalism' (2009: 15).
5 This is of course not to say that this entails a *necessary* relation. In some ways, the primacy of EU law and the role of the European Court of Justice replicate such a logic on a supranational level (even if in a very different context) (cf. Walker 2009: 3–4).

2 A critique of legal constitutionalism

The constitutional systems of the new democracies discussed in this book have been predominantly guided – or at least strongly informed – by a specific vision of constitutions. This vision could be referred to as legal or 'new' constitutionalism, and appears to be predominant both in theory and practice (and not only in the region discussed). This understanding of the role of constitutions in institutionalizing democratic regimes strongly emphasises what one could call a *negative* view of constitutions. A negative view prioritizes the imposition of limits on political powers (against the arbitrary use of power), the guarantee of adherence to standards of the rule of law and the guarantee of fundamental rights. It can be related to an instrumental rationality or function of constitutions, which can be understood in Weberian terms as permitting the purposive rationalization of politics and the political community (Přibáň 2007: 3). In this instrumental dimension, constitutions are portrayed as documents that ground legality as well as depoliticized sets of rights. And constitutions make a strong distinction between the public and the private, as well as between politics and the rule of law (see Blokker 2010b). A key concern is the protection of specific democratic *outcomes* that avoid, for instance, the tyranny of the majority (see Dworkin 1996; cf. Waldron 2006). The strong distinction between politics and law is allegedly best guarded by specialized institutions, such as constitutional courts, and through their safeguarding of fundamental rights and constitutional principles. The legal or new constitutionalism that has become dominant in recent decades emphasizes this instrumental dimension of constitutions strongly. This type of constitutionalism entails an important shift away from democratic politics and towards judicial supremacy. According to Michael Mandel '[r]epresentative institutions have been demoted from the sovereign entities with legally unlimited power of the nineteenth and much of the twentieth century to institutions hemmed in by legally enforceable constitutional limitations,

most characteristically found in "rigid" Charters and Bills of Rights' (1997: 251). Also Ran Hirschl critically assesses the global trend towards legal constitutionalism:

> Over the past two decades the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*. Around the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. Most of these polities have a recently adopted constitution or constitutional revision that contains a bill of rights and establishes some form of active judicial review. National high courts and supranational tribunals meanwhile have become increasingly important, even crucial, policy-making bodies. To paraphrase Alexis de Tocqueville's observation regarding the United States, there is now hardly any moral, political, or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one. This global trend toward the expansion of the judicial domain is arguably one of the most significant developments in late twentieth and early twenty-first century government.
>
> (2004: 71)

The argument in the book is that the implications for democratization of what I will variably refer to as new or legal constitutionalism should be scrutinized more carefully than has been done so far.[1] In other words, while many proponents of legal constitutionalism argue for its indispensable nature in grounding democracy and democratic institutions (including fundamental rights),[2] not least in the context of post-authoritarian societies, the argument here is that there are important implications of the legalistic view of constitutionalism, which might not only 'precommit' democratic politics, but also more generally promote a sceptical view towards citizen engagement. In this, they might result in detrimental effects for the viability of constitutional democracy as well as the diffusion of the idea of constitutional democracy throughout wider political and civil society.

In this chapter, I will briefly discuss the main critiques of legal constitutionalism, to subsequently opt for a form of democratic constitutionalism as the most conducive for the emergence of robust constitutional democracies. The legalistic, liberal view of constitutionalism can theoretically be criticized from various theoretical angles. In my view, the most important and relevant ones for the discussion here are political constitutionalism (in particular Bellamy 2007; Waldron 1999, 2006), popular constitutionalism (Kramer 2004; Post and Siegel 2007; Tushnet 1999),[3] societal constitutionalism (Teubner 2012; Thornhill 2011; see also Skapska 2011) and democratic constitutionalism (Albert 2008; Colon-Rios 2012; Colon-Rios and Hutchinson 2011; Tully 1995, 2008a). Political constitutionalism has strong reservations with regard to the undermining of popular sovereignty in legal constitutionalism due to the latter's emphasis on constitutional courts as providing the 'final word' on the interpretation of constitutions and rights. In this, political constitutionalism promotes a republican view of non-domination, and emphasizes a rehabilitation of representative democracy and parliamentary sovereignty in the face of judicial supremacy. Popular constitutionalism, a largely American and rather variegated discussion, emphasizes the role of the American people and civil society in constitutional interpretation, against an exclusively judicial interpretation of the constitution. Societal constitutionalism criticizes the mainstream views of constitutionalism as suffering from forms of state-centrism and 'methodological nationalism'. The claim is that modern constitutionalism ignores societal forms of constitution-making (it builds here on the idea of legal pluralism), and increasingly also those beyond the nation-state arena. Finally, democratic constitutionalism relates the modern constitutionalist view to imperialism and a specific Enlightenment tradition of understanding constitutions. It criticizes mainstream approaches to constitutionalism for overlooking traditional forms of constitutionalism, for imposing exclusionary forms of modern constitutionalism (see Tully 1995, 2008), and for failing to promote civic, pluralistic participation 'all the way down' (Albert 2008; Colon-Rios 2012). The thrust that is present in all these critiques is that legal constitutionalism tends to ignore or underestimate the social and political dimensions to constitutions, and therefore to reiterate the distinction between law and politics, as well as law and society.

The objective in this chapter is, in a first step, to discuss the theoretical argument for, and the emergence in constitutional realities of, legal constitutionalism. In a second step, the four theoretical approaches to constitutionalism that are critical to an overly legalistic view of constitutionalism will be reviewed. Finally, in a third step, I will – inspired by the various forms of critique on legal constitutionalism – identify a number of constitutional areas where democratic participation could become more meaningful and made more upfront for a democratically understood constitutionalism. My aim is to contribute to the delineation of a more balanced understanding of democratic constitutionalism (cf. Tully 2008a). I point in this to a different understanding of constitutionalism, that of civic constitutionalism. This understanding has

a bearing on the actual institutionalization of constitutionalism of the new democracies, but equally on some of the current constitutional problems these democracies are facing. But civic constitutionalism in the new democracies evidently needs reinforcement.

Legal constitutionalism: a multi-faceted critique

The abstract idea of a written constitution as the foundational basis of modern democratic societies is a relatively undisputed element in much of social, political, and legal theory (cf. Bellamy 2007: viii). In the two centuries of 'reign' of modern constitutionalism, a general, minimal consensus has emerged on the nature and functions of the constitution.[4] As Michel Rosenfeld argues, '[t]here appears to be no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights' (1993: 497). Modern constitutionalism corresponds largely with the Westphalian idea of a state system of separate and homogeneous nation-states. In this, it comprises a tendency to 'presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions' (Tully 1995: 9). In a slightly different formulation, the 'understanding of a constitution and its assigned role as the guardian of the political process is commonly associated with modern constitutionalism and builds on institutionalised and mythical links with statehood that had been forged over centuries' (Wiener 2008: 23).

In this, modern constitutions tend to share a number of generic features (the following list is not meant to be exhaustive). First, a modern constitution is regarded a 'structure of law' that is in important ways separate from its subjects. Whereas the modern constitution is ultimately dependent on the people for its legitimation, once constituted, it becomes a relatively autonomous set of meta-norms and rules that constitutes social and political interaction. James Tully (2008a) calls this relative autonomy or externality the 'formality' of modern constitutions. Second, one of the essential ideas behind the constitution is to channel and express popular sovereignty. In this, popular sovereignty has been widely understood in a monist way, that is as the expression of a singular, mythical people. At any rate, the idea is that the 'raw' constituent power of the people is relevant only in constitutional foundation, in that the act of the constitution transfers popular sovereignty from the *pouvoir constituant* to the *pouvoir constituée*. Third, the singular understanding of the people presupposes a shared civic or ethnocultural identity, which is symbolically reflected in the constitution,

either implicitly or explicitly so (cf. Weiler 2003). Fourth, modern constitutions are understood as coherent and non-contradictory, contractual structures, in which 'constitutional essentials are unambiguously settled and made binding into the future' (Chambers 1998: 149). Fifth, while most of the dimensions noted above invoke a pre-political, restrictive and foundational perception of constitutions, constitutions also provide for a positive or enabling democratic dimension. This includes positive civil and political rights, which enable citizens and political actors to act set their own rules, even if within the limits set by the very same constitution.

At the risk of simplifying our understanding of modern constitutionalism, it is possible to condense the five generic features described above and focus on two imperatives or meta-political principles of modern constitutionalism. The two imperatives are the *limitation of sovereignty* (constitutionalism) and *popular sovereignty* (democracy) (Cohen and Arato 1992; Loughlin and Walker 2007: 1; Tully 2008a: 91–2). The first principle, that of constitutionalism or the rule of law, understands a constitutional order as legitimate when

> the exercise of political power in the whole and in every part of any constitutionally legitimate system of political, social and economic cooperation [is] exercised in accordance with and through the general system of principles, rules and procedures, including procedures for amending any principle, rule or procedure.
>
> (Tully 2008a: 92)

The emphasis is on order and the provision of an orderly process of politics. The second principle, that of democracy, which

> requires that, although the people or peoples who constitute a political association are subject to the constitutional system, they, or their entrusted representatives, must also impose the general system on themselves in order to be sovereign and free, and thus for the association to be democratically legitimate.
>
> (Ibid.: 93)

The second principle is about (collective) autonomy or self-rule, in which people give themselves their own laws, rather than being subject to some form of 'heteronomy'. Today, the balance between the two tilts towards constitutional order. As Joel Colon-Rios and Alan Hutchinson observe: 'today, the prevailing view is decidedly more constitutionalist than democratist' (2011: 3).

The rest of the chapter will engage with the emergence of new constitutionalism as a particular form of modern constitutionalism, and the forms of critique such a legalistic view of constitutionalism has attracted by various scholars.[5] The main divide can be said to be between an emphasis on the imperative of limiting sovereignty and an emphasis on popular sovereignty. Many forms of critique on legal constitutionalism regard the 'colonization' of the democratic dimension by the constitutional one, or the depoliticization of democratic politics.

Legal constitutionalism

The legal-constitutionalist view in principle endorses liberal constitutionalism, that is 'as a normative framework that sets limits on and goals for the exercise of state power' (Bellamy and Castiglione 2000: 172). In this view, the constitution is largely seen as providing the preconditions for democracy. Democracy can only function as such if democratic politics abides to the constitutional limitations set to it. The constitution, and increasingly the idea of an included set of entrenched fundamental rights, provides, then, an independent and superior law that secures the working and outcomes of democracy. One of the key assumptions of legal constitutionalism is that it is in principle possible to reach a reasonable consensus on what such preconditions of democracy ought to be, and how to translate them into a language of rights and fundamental law (Bellamy 2007: 3). Before democratic politics is possible, essential framework conditions need to be entrenched. In this, it is in principle possible to arrive at a pre-political set of 'essential preconditions for democracy', the 'right' abstract principles (Dworkin 1995) or 'best answers' (Bellamy 2007) that all can rationally agree to, and which identify what democracy ultimately is about.[6] Indeed, Ronald Dworkin's concern is with 'what democracy, accurately understood, really is' (1996: 15). For Dworkin, constitutionalism means a 'system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise' (1995: 2). In this, the 'constitutional conception presupposes democratic conditions. These are the conditions that must be met before majoritarian decision-making can claim any automatic moral advantage over other procedures of collective action' (1996: 23). Since, in a well-designed constitutional democratic system, a consensus on the right norms can be presupposed, there is no need to change such norms in the future, only to ensure their correct implementation. In other words, it is possible to depoliticize principled, constitutional questions and take these out of the democratic political process altogether, because a rational consensus has been reached or can be presumed on those questions once a constitution is in place.

A second key assumption is that it should be ultimately legal actors that identify and interpret key constitutional principles, as the judicial branch is more reliable than political majorities in doing so (Bellamy 2007: 3). In other words, democratic politics is 'regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics only looks to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies'.[7] According to Dworkin,

> In some circumstances . . . individual citizens may be able to exercise their moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.
>
> (1996: 30)

The emerging view of the constitution is a static, permanent framework, which is only to a very limited extent open to political and civic influence, in the form of amendment, revision or otherwise. The legal-constitutionalist view in essence understands the constitution as a 'meta-norm', which is not implicated in, as it transcends, substantive views on the common good, and in this provides a 'neutral framework that rests on a separation of the right from the good' (Bellamy and Castiglione 2000: 174–5).

It is a conception and template influenced by this view of constitutionalism that has emerged in the last decades as the predominant way of institutionalizing constitutional democracy. By the early twenty-first century, new constitutionalism (Arjomand 2003; Stone Sweet 2008, 2009) has allegedly become predominant, even if not uncontested. The emphasis is on written constitutions with an entrenched 'catalogue of rights', and a 'system of constitutional justice to defend those rights' (Stone Sweet 2008: 219). The novelty is that the constitutional court as an independent institution is not only the ultimate guardian and interpreter of the constitution, but equally so of fundamental rights.

In terms of the generic features of modern constitutionalism mentioned above, new constitutionalism prioritizes the higher law status of the constitution and of the bill of rights, as well as normative coherence and legal certainty, and takes an amplified understanding of the rule of law. The latter is part of post-authoritarian and post-totalitarian transitions to new democracies, such as those in Central and Eastern Europe. It

includes a constitutional politics that comprises both the 'judicialization of politics' – which encompasses the reconstruction of the normative basis of the state – and the political activism of judicial actors as the guardians of the process of democratization (Arjomand 2003). The emphasis in democratic transitions has thus been on legal formalism and coherence, and constitutionally entrenched democratic preconditions, while democratic participation has been largely confined to 'normal politics'. In a more general sense, the shift is towards legal constitutionalism, while, '[w]ith very few exceptions, legislative sovereignty has formally disappeared. The new constitutionalism killed it, paradoxically perhaps, in the name of democracy' (Stone Sweet 2008: 218).

If new constitutionalism amplifies some of modern constitutionalism's main dimensions, it at the same time seems difficult to deny that a number of the key features of modern constitutionalism have become increasingly untenable (in a normative, democratic sense), and unrealistic or anachronistic (in terms of correspondence with political, social, cultural, and economic realities) (cf. Krisch 2010).[8] Here, I will focus in particular on a democratic critique, that is, the idea that new constitutionalism one-sidedly promotes constitutional order, while ignoring dimensions of civic enablement and societal participation. The latter dimension builds on the idea of *isegoria*, or the idea that all members of a political community should have an equal chance to have their voice heard in legislative and foundational matters. Below, I will discuss different critiques of legal constitutionalism from this distinct viewpoint,[9] that is, legal constitutionalism's problematic relation to the ideas of democratic participation and (societal) self-government or self-determination.

Political constitutionalism

The most visible contender of a legalistic theory of constitutionalism, which as we have seen endorses *inter alia* judicial supremacy and the strong entrenchment of rights, is the theory of political constitutionalism (see, most prominently, Bellamy 2007; Waldron 1999). The political-constitutionalist conception takes a wholly different view of the role and substance of the constitution, and its relation to democratic politics. Its dispute with legal constitutionalism starts from the observation that the

> need for [an] alternative and more political approach arises from the *contested* nature of rights. Despite widespread support for both constitutional rights and rights-based judicial review, theorists, politicians, lawyers and ordinary citizens frequently disagree over which rights merit or require such entrenchment, the legal form they should take, the best way of implementing them, their relationship to each other, and the manner in which courts should understand and uphold them.
>
> (Bellamy 2007: 16; emphasis added)

Rather than understanding the constitution as a 'right basic norm', political constitutionalists understand the constitution as providing a basic framework for resolving disagreements over the right and the good. This also means that foundational norms should always be subject to reconsideration and reformulation. In other words, the constitution is not seen as in need of an entrenched set of fundamental principles, but rather as the framework for the articulation of and deliberation over conceptions of self-government and the common good. As Bellamy aptly expresses it: 'we could see constitutions not as constraints imposed upon democracy but as the *limits that a mature democracy places upon itself*' (2007: 91; emphasis added).

The relation between democracy and constitutionalism in political constitutionalism is not based on the need for 'pre-commitments' or extra-political guarantees, nor on the idea of superior judgemental capacity (of judicial experts). Rather, the emphasis is on the idea of political equality and a thrust towards the inclusion of a wide range of people's judgements (see Goldoni 2012). Political constitutionalism starts from the idea that reasonable disagreement is part and parcel of democracy. The critique of legal constitutionalism is that a 'failure to acknowledge the disagreements that surround constitutional values, and the resulting need for political mechanisms to resolve them, can itself be a source of domination and arbitrary rule that impacts negatively on rights and the rule of law' (Bellamy 2007: 145; cf. Waldron 1999).

The attempt is, then, not to transcend the plurality of political views with regard to different understandings of constitutional values and rights, but to include the widest range of substantive views possible. Political constitutionalism points to a continuously evolving process of politics, including constitutional politics, in terms of political debate grounded in the principles of mutual recognition and *audi alteram partem*. The political view of the constitution opens a door for the influence of politics on the law, in that it emphasizes the negotiation of differences and a continuous quest for mutually agreeable conditions. Political constitutionalism does not attempt to sever democratic politics from questions of justice and right, but, in full acknowledgement of the impossibility of settling constitutional questions and rights issues

once and for all, it makes the relation between politics, and rights and legality visible by means of a continuous political engagement with acceptable interpretations.

It can, however, be argued that political constitutionalism ultimately attempts to defend a *status quo ante*, that is the system of parliamentary supremacy. As indeed Bellamy argues in his *Political Constitutionalism*, 'the democratic arrangements found in the world's established working democracies are sufficient to satisfy the requirements of republican non-domination' (2007: 260). Indeed, Bellamy holds that

> the workings of actually existing democracies promote the constitutional goods of rights and the rule of law. Party competition and majority rule on the basis of one person one vote uphold political equality and institutionalise mechanisms of political balance and accountability that provide incentives for politicians to attend to the judgments and interests of those they govern and to recruit a wide range of minorities into any ruling coalition.
>
> (2007: viii)

Also in Waldron's work, his theoretical views start from an assumption that '[i]n general, . . . the democratic institutions are in reasonably good order' (2006: 1361), and therefore, that legal constitutionalism is mostly a threat to what otherwise would be reasonably well-functioning constitutional democracies. But there is also a sense that times are changing and that representative, liberal democracies might be facing important challenges. Bellamy acknowledges as much when he argues that '[i]t will be objected that I have praised a version of actually existing democracy that is currently passing out of existence' (2007: 260). Ultimately, however, the main argument in political constitutionalism remains that only parliamentary legislative politics can provide an inclusive and legitimate form of politics. In this, it is indirect, representative democracy that is seen as the only legitimate basis of constitutional democracy. As the same Bellamy argues '[d]eliberation, consensus, direct citizen participation through social movements, consultative juries and other mechanisms besides the ballot box – these all have their place, but a secondary one' (ibid.: 210).

Popular constitutionalism

Different theoretical conceptions of democracy have, in contrast, emphasized the importance of wider societal engagement in constitutionalism,

in this going beyond a conception of constitutionalism as confined to the judicial and political societies. An example of a more societal understanding of constitutionalism is popular constitutionalism. Popular constitutionalism[10] consists of a view of constitutionalism and constitutional interpretation that is primarily formulated against a conservative view which endorses an 'originalist' view of the American constitution. Some of originalism's understandings have a distinctively legalistic flavour, in that the constitution is understood as a closed legal order that should be only open to judicial interpretation, which in itself should stay as closely as possible to an original meaning. Originalism[11] thus argues in favour of a very distinct understanding of the American constitution, that is one that remains as close as possible to the text and the 'original' understandings (for instance, that of the constitution-framers at the end of the eighteenth century and that regarding later, crucial moments of change such as the 14th Amendment; see Post and Siegel 2009: 29). In this, it strongly emphasizes a rigid separation of law from politics. In the originalist view, the 'primary purpose of the Constitution [is] to bind judicial decision making to meanings created in discrete and limited moments of constitutional lawmaking, like the 1789 founding or the 1868 ratification of the Fourteenth Amendment' (Post and Siegel 2009: 29).

Popular constitutionalism, in contrast, sees the constitution as in need of change so as to respond to changing societal views and constitutional culture. Rather than advancing a view of the constitution as ultimately grounded in a singular, true and knowable original meaning, popular constitutionalism emphasizes 'interpretive disagreement as a normal condition for the development of constitutional law' and thus the possibility of constitutional change over time as understandings of the role and substance of constitutions change (Post and Siegel 2007: 374). This also implies the questioning of the role of (constitutional and higher) courts as ultimate guardians of the constitution, and points to the role of legislators, as well as the people (in the form of citizens and civil society movements) in the interpretation of constitutional values and rights (Tushnet 1999: 11).

As argued by Mark Tushnet, if one rejects judicial supremacy in interpreting the constitution, one

> does not thereby defend an anarchic system in which the law is whatever anyone thinks it ought to be. The Declaration's principles define our fundamental law. Vigorous disagreement over what those principles mean for any specific problem of public policy does not mean that we as a society have no fundamental law in common.

> I argue throughout this book that disagreements over the thin Constitution's meaning are best conducted *by the people*, in the ordinary venues for political discussion. Discussions *among* the people are not discussions by the people *alone*, however. Politics does not occur without politicians, and political leaders play an important role in the account of populist constitutional law I develop here. Most generally, the politicians we ought to admire most are those who help us conduct our discussions with reference to the Declaration's principles, and not simply as political contests over what different groups of people happen to want.
>
> (1999: 14)

The legalistic view of constitutionalism in which the final arbiter is the judicial court is rejected, because 'the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire the Americans to recognize it as *their* Constitution' (Post and Siegel 2007: 374). In the view of Robert Post and Reva Siegel, courts play a 'special role' in the process of a 'complex pattern of exchange' between citizens and governments over the meaning of the constitution (ibid.). However, when the courts' opinions diverge too far from the 'deeply held convictions of the American people', the latter will display resistance and make objections against court interpretations. Such popular resistance has often been interpreted as a threat to the constitution as such, but is better understood as a lively engagement of citizens with the constitution and therefore enhancing in a way its democratic legitimacy (ibid.: 375). It could even be argued that 'citizen engagement in constitutional conflict may contribute to social cohesion in a normatively heterogeneous polity' (ibid.: 377).

Societal constitutionalism

Another relevant and highly interesting debate concerns the context of a sociological approach to constitutionalism. A particularly rich and astute theory regards that of societal constitutionalism, grounded in Luhmannian theoretical concerns. The object of critique is here not just that of legal or liberal constitutionalism, but rather the 'obstinate state-and-politics centricity' of various, more established legalistic and political understandings of constitutionalism (Teubner 2012: 3). The theory is relevant to the discussion because legal constitutionalism can be understood as an amplified form of modern, state-centric constitutionalism, which renders the critique of societal constitutionalism particularly pertinent.

Much of the thrust of societal constitutionalism is towards (in particular transnational) private forms of self-steering and governance, but many of its critical insights are directly relevant for the discussion of democracy and constitutionalism here. Indeed, societal constitutionalists claim that the *problématiques* that the nation-state faces today (a variety of forms of constitutionalization beyond the state, a loss of democratic control over relevant norms) have to do with a 'basic deficiency of modern constitutionalism' (Teubner 2012: 5). Modern constitutionalism has wrongly portrayed the modern constitutional state as omni-present and as covering the whole of constitutional politics within the context of a polity: 'we should relieve politics of its delusions of omnipotence. The political constitution of the state cannot bundle the collective energies of the whole society, founding the nation's unity' (ibid.: 63). According to societal constitutionalists, the political constitution is a misrepresentation of the constitutional state of affairs, in that modern constitutionalism has always been in tension with tendencies of societal differentiation and the emergence of self-governing regimes (as, for instance, in the economy, science and the medical sphere). The current prominence of alternative constitutional regimes to the constitutional state has to do with globalizing tendencies, but these in themselves merely intensify the differentiation, fragmentation and autonomization of the social. An important emphasis, if not the *raison d'être*, of societal constitutionalism is the establishment of distinct constitutional regimes by societal actors, somewhat ambiguously called 'civil constitutions', in the absence or in direct defiance of political constitution-making.

Some of the key insights of societal constitutionalism are particularly relevant for the discussion on the democracy–constitutionalism nexus here. It provides the insights that state constitutionalism never fully integrated and controlled society, that constitutionalism can be related to non-state forms of constitutional norm production and interaction on its basis, as well as that political or legal constitutionalism potentially diminishes societal autonomy. At the same time, it seems to me that many societal constitutionalists ultimately underestimate or avoid important dimensions of the question of democratic politics by largely avoiding the questions of constituent power and collective autonomy. Teubner indeed suggests that 'we should maybe avoid the term "self-determination" when discussing other social sub-orders or we should use a purely "functional" definition of the term constitution. Or maybe we should abandon self-determination as "emphatic republicanism" and see it as only one of several possibilities for constitutional foundation' (2012: 61). Jiri Přibáň (2012), in discussing Teubner's *Constitutional*

Fragments, hints at an intrinsic 'fear of the political' in societal constitutionalism. The question of collective autonomy becomes particularly problematic when, after having suggested its potential irrelevance, Teubner actually relegates forms of autonomy to the societal sphere, while relating formal politics to potential authoritarian tendencies. It seems, then, that democratic politics, or at least forms of collective autonomy or self-government, emerge in the global civil society, whereas political constitutionalism appears as threat to civil autonomy and self-government (cf. Anderson 2012: 371). In this, Teubner makes a strong distinction between the state, the political and power, on the one hand, and society and self-governance, on the other. As observed by Jiří Přibáň:

> The paradox of the political self-denial and external expansion of the concept of constitution is a hall-mark of societal constitutionalism which both completely depoliticizes the concept of constitution and gives it the most prominent political role by relocating it to a higher level of theoretical abstraction and identifying it with both functional differentiation and societal alternatives to institutionalized politics.
>
> (2012: 457)

The problematic status of politics and the political comes further through in Teubner's take on the distinction between '*le politique*' and '*la politique*'. He narrows the distinction down – in contrast for instance to Claude Lefort's definition of this distinction – to formal politics and politics in society (Teubner 2012: 114; cf. Lindahl 2011). What is ignored here is what Lefort indicated with 'the political' or '*le politique*', that is, the foundational and ontological definition of the political in the genesis of historical societies, or the meta-political definition of what forms of social interaction are understood as political in terms of providing collectively binding decisions. In the case of the modern, democratic nation-states this entails a distinction (which Teubner in a way reproduces) between formal politics (grounded in a constitution) and social interaction (enabled by rights).

What remains obscure in such an approach regards the meta-political dimensions of autonomy, that is who are the actors that can legitimately set the rules that are binding on a wider political community and what are the foundational norms for identifying such actors (cf. Lindahl 2011: 236). Such questions are strongly related to issues of constituent power. Chris Thornhill has suggested that classical constituent power is now increasingly replaced by (transnational) rights regimes:

> the contemporary constitution establishes a deeply internalistic political system, in which the original external reference of the political system, expressed in the idea of constituent power, is superseded. Rights, recursively entered and re-entered into the political system, construct a matrix for the ongoing reproduction of society's political structure, against a societal background of extreme acentricity and external contingency.
>
> (Thornhill forthcoming: 12)

Much of the (implicit) thrust seems to be that the modern idea of collective autonomy, in which the ruled have some say over the making of the rules to which they obey, is hopelessly outdated, but it is not clear what democracy still means in a global order of civil constitutions, in which collective self-determination is understood in largely functional ways.

Democratic constitutionalism

In a final theoretical interpretation of constitutionalism I want to discuss, a critical, radical-democratic or agonistic dimension is at the forefront. The argument in 'democratic constitutionalism' is that contemporary or modern constitutionalism is deficient in terms of its democratic nature. In Joel Colon-Rios' view, democratic constitutionalism 'rests on the idea that ordinary citizens should be allowed, to the extent to which it is practically possible, to propose, deliberate, and decide on important constitutional transformations through the most participatory methods possible' (2011a: 3).

The thrust of democratic constitutionalism is against a one-sided understanding of constitutional democracy in which constitutional order and stability take the overhand over the possibility for the ruled to interfere into the setting of the rules. Main problems in contemporary constitutionalism involve exactly its depoliticizing/juridifying tendencies. In particular James Tully's historical exploration of modern constitutionalism becomes important here.[12] Contemporary state as well as global legal forms can, according to Tully, be understood on grounds of their common basis in the logics and biases of 'modern constitutionalism' (and despite the latter's fragmentary and pluralistic nature). Rather than an erosion of the significance of modern constitutionalism in a novel and fragmented post-state order, Tully observes its continuation in a form of 'informal imperialism'. The latter refers to the diffusion and imposition of modern constitutional forms – including state-based 'constitutional democracy' and 'systems of law

beyond the state' – over the globe (2008a: 199). Tully's view is relevant here in that he takes the critique on legal constitutionalism to its roots, that is to the key features of modern constitutionalism as such (there is some affinity with Gunther Teubner's views here). In other words, whereas the critique of political constitutionalism, and to some extent that of popular constitutionalism, tends to remain confined to a 'test of reality'[13] of the existing constitutional order, largely reproducing its ontology, democratic constitutionalism's critique addresses the foundations of the existing constitutional paradigm.

In Tully's view, some of the key features of modern constitutionalism, and relevant for us here, include: the formality of modern constitutional forms, in that constitutional orders are 'disembedded' or separated from wider society; a constituent political power that is at the basis of constitutions; the intermediary role of a constitutive sovereign, in the modern world most commonly the state; and a meta-narrative of constitutional democracy which portrays itself as representative and universal (ibid.: 197–209). Democratic constitutionalism understands modern constitutional orders as having significant problems with democratic legitimacy, in that the constitutional meta-dimension overshadows the democratic meta-dimension. This is particularly evident on the post-national level, where global juridification reproduces some of the features of modern constitutionalism, but at the same time leaves out the democratic dimension of 'democratic deliberation of the humans who are subject to [global constitutional regimes]' (ibid.: 2008a: 101), while confining the constituent dimension to a restricted group.

A democratic constitutional approach attempts then to critically analyse the unbalanced constitutional forms and orders as well as to indicate ways of rebalancing them. What is significant is that Tully points to practices *beyond* existing institutions and sees as relevant a 'multiplicity of sites' where citizens can engage in democratic practice (ibid.: 98). Democratic constitutionalism consists of a critical, normative suggestion of how to radically rebalance the legal and democratic dimensions in the contemporary situation in favour of the democratic-participatory dimension. In this, the approach builds on a rehabilitation of non-modern, alternative experiences of 'customary constitutionalism'[14] and grass-roots struggles 'in the most effective forums' against inequalities and heteronomy that are continued through informal imperialism (ibid.: 103).

In its emphasis on a multiplicity of relevant sites of democratic practice, democratic constitutionalism has a more outspoken agonistic ring, and in this goes beyond the idea of parliamentary supremacy in political constitutionalism. What is significant is that democratic

constitutionalism invokes both practices of 'democratic governance' or day-to-day democratic politics and the level of 'fundamental law' or the foundations of existing constitutional orders (in the terms of Colon-Rios 2009). In this view, the shift towards a re-evaluation of democratic politics in political constitutionalism goes quite some way, but it falls short of obtaining its own, self-set ultimate aim. As observed above, it can be argued that political constitutionalism supports the *status quo ante* of liberal representative democracy. A radical democratic view of constitutional democracy, in contrast, claims that democracy would need to entail a more direct and substantive participation of citizens in the democratic process, including constitutional or meta-politics that aims at transforming existing institutions (cf. Colon-Rios 2009).

Democratic constitutionalism shares with political constitutionalism an emphasis on the open-endedness of the democratic process, on a difference in public points of view that 'goes all the way down', and includes an ultimately open-ended view of rights. For democratic constitutionalism this means that the nature of the constitution itself is understood in a radically different way from modern constitutionalism's foundationalism. That is, whereas modern constitutionalism understands 'constitution making as an 'act of completion', the constitution as a final settlement or social contract in which basic political definitions, principles, and processes are agreed, as is a commitment to abide by them', democratic constitutionalism entails a 'conversation, conducted by all concerned, open to new entrants and new issues, seeking a workable formula that will be sustainable rather than assuredly stable' (Hart 2003: 2–3; cf. Chambers 1998). While the foundational nature of modern constitutionalism is not dissolved completely, the idea of a 'final act of closure' is replaced by one of flexibility and a 'permanently open process' (Hart 2003: 3). This derives from an unwillingness to tie down democracy to choices made by previous generations, the recognition of the continuously changing nature of society and identity, as well as the realization of the ultimate impossibility of grounding foundational principles once and for all.

Democratic constitutionalism departs significantly from political or republican constitutionalism in that it judges representative constitutional politics as insufficient. Instead, democratic constitutionalism endorses a more open democratic settlement which aims at the 'extension of democratic process to include, free, open, and responsive discussion of the constitutional settlement'. The latter provides the framework under which 'diverse and disagreeing groups can live, while continuing to engage in a freely accessible debate about that settlement itself' (Hart 2003: 5, 3). If, then, both political and democratic constitutionalism

understand the constitution not as fully entrenched and pre-political, but as an outcome of the continuous political process itself, it is only in the latter that democratic politics is understood in its radical sense as the 'rule of people extended to all matters . . . , including the creation and re-creation of the fundamental laws' (Colon-Rios 2011b: 17). In democratic constitutionalism, the democratic dimension of constitutional legitimation clearly has the upper hand, even if the constitutional ordering type of legitimacy is not abandoned.

Civic constitutionalism or democratizing constitutionalism

The approach to constitutionalism taken in this book accepts much of the overlapping critique of legal constitutionalism as emerges in the various critical strands identified above. Civic constitutionalism takes inspiration from Tully's suggestions regarding an 'open-ended or non-restricted approach' to democratization. Tully suggests four dimensions that are of importance in such an approach. First, the 'democratic negotiation of norms of integration takes place not only in the official fora of the traditional public sphere, but also *wherever* individuals, groups, nations or civilizations in the EU come up against a norm of integration they find unjust and a site of disputation emerges'. In a related way, 'it is not only the official representatives of constituencies who have a right to enter into the multiplicity of public spheres, but, in principle, every member represented by an official spokesperson who is affected by the norm in question'. Second, the fundamental norms and 'procedures of negotiation' are themselves open to different interpretations, and cannot, therefore, be 'placed beyond question by some dubious argument or another about their meta-democratic status'. Third, the general norms cannot 'be imposed before-hand by an appeal to allegedly universal, necessary, or self-evident processes of modernization, democratization, juridicalization or Europeanization'. And, fourth, democratic politics is based on 'multilogues' that consist of 'on-going, open-ended and non-final constituents of a democratic way of life' (2007: 74–5).

In the analysis presented in this book, I will only focus on a few small but significant steps towards such an inclusive, participatory, post-foundationalist and open-ended approach. I will suggest a number of areas where the democratization of democracy can already be observed (even if sometimes tendencies in reverse are visible), and which could be the basis of future processes of deepening democracy. These constitutional areas include the area of constitutional change, building on the idea of constitutions as changing, open-ended structures (as in a Jeffersonian view, cf. Closa 2012); the area of democratic renewal, grounded in the idea of the importance of a multiplicity of forms of civic access and voice; and the area of constitutions as participatory vehicles, based on the idea of possibilities for self-government (the principle of self-determination).

One common thrust is the argument that legal constitutionalism tends to narrow down the space for democratic politics. Such a view becomes particularly important in the context of societal transformation. It could be argued that the constitutionalization of emerging democracies involves a paradoxical and simultaneous experience in which legalization both helps to build constitutional democracy and undermines some of its dimensions. This is not least because of a tension between a universalistic model and local capacities, in which the former takes the guise of a 'top-down transitional justice model', in which

> modernizing authoritarian rule, with external military, financial, legal, and governmental support and advisors, and subordinate local participation in institution building and processes of reconciliation, are said to be necessary stages in the development of the standard Western model of constitutionally limited representative government, elections, an official public sphere, a military tied to the West, and capitalist market open to free trade, constitutionally shielded from democratic control, and subordinated to the global economy, international trade law and institutions of global finance. (Tully 2012: 3)

The combined argument, undoubtedly relevant for the experiences in Central and Eastern Europe, is that the adoption of a 'new constitutionalist' model and its reinforcement by external forces has informed the marginalization of other (local) models of constitutionalism and related democratic rules and practices.

At the same time, in this book the critique of some approaches to modern constitutionalism (i.e. societal constitutionalism and Tully's democratic constitutionalism) will not be taken all the way, that is in terms of their call for 'paradigmatic' change.[15] In other words, here it will be accepted that the adoption of modern constitutionalism – at least in an incomplete way – has contributed to the democratization of the post-communist societies and could possibly be open (or have been opened) to more democratic forms of constitutionalism, based on a multiplicity of democratic channels and forms of civic participation (cf. Arato 2000, 2009). In other words, the democratization of democracy is deemed a possibility. The assumption is that constitution-making

and constitutional politics are importantly about competition and conflict between social forces (including external ones) endorsing different understandings of constitutionalism, including legal or new constitutionalism, communitarian constitutionalism, and political and democratic understandings of constitutionalism.

The suggestion is – without being exhaustive – that there are at least three ways in which the institutionalization of constitutional orders has (or could have) resulted less in the construction of forms of closed constitutionalism, grounded in an emphasis on judicial review and entrenchment, and more in the construction of forms of open, democratic constitutionalism, in which there are more extensive possibilities for civic engagement.[16] Here, I suggest three significant areas, which indicate possible dimensions of more democratic forms of constitutionalism: constitutional politics, direct forms of democracy and decentralized forms of democracy.

Constitutional politics

From the point of view of democratic constitutionalism, the legal view of constitutionalism provides only limited scope for democratic self-rule. As argued by Colon-Rios and Hutchinson, '[u]nder liberal constitutionalism, democracy is exhausted by a constitution that establishes representative government, protects liberal rights and enables all citizens to "participate" in government by the episodic election of legislative representatives or through the judgements of their judicial officials' (2011: 52). As we have seen, from the point of view of various forms of critique on legal constitutionalism, such a view might be detrimental to democracy. As again Colon-Rios and Hutchinson put it:

> from a democratic standpoint, the challenge for the citizenry is not so much about defining the values of constitutions, but constitutions whose change is outside the scope of popular decision making, supposed to take place exclusively through judicial interpretation or through an amendment formula designed to make change difficult and unlikely. Too often, constitutions place checks and limits on democratic participation in the name of some other set of vaunted truths or elite-favouring values.
>
> (Ibid.: 44)

From a political-constitutionalist view, a balance between democracy and constitutionalism could be restored by shifting constitutional politics towards the legislative. In more radical accounts, in particular that of

democratic constitutionalism, the citizens as such are seen as the ultimate subjects of constituent power. Such a view seems more relevant in an age in which traditional, legislative-centred representative democracy seems in great troubles invoking societal legitimacy (cf. Rosanvallon 2011). In other words, the in-built distrust towards citizen participation in legal (and to a lesser extent in political) might not provide the right answers to the decline of representative democracy, related to its elitist, technocratic, and altogether distant nature. Democratic constitutionalism takes a view of 'strong democracy', which holds that it is 'formal constitutions and their institutional paraphernalia that do more to inhibit and dull democracy's emancipatory potential than to nurture and fulfill it' (Colon-Rios and Hutchinson 2011: 44).

In this, a democratic-constitutionalist view points to possibilities of democratic self-government, not only on the level of 'politics', but also on that of the 'political'. In constitutional terms, democratic constitutionalists see possibilities for constitutional politics in which ordinary citizens play a significant role. The idea is that a 'vital dimension in the assessment of any legal norm as just is the fact that it originated in an exercise of self-legislation by the governed, not simply imposed on their behalf' (Colon-Rios and Hutchinson 2011: 48). The idea is thus that 'input-oriented legitimacy' is of crucial importance if constitutional democracy is to be revived. Such input should also relate to matters of constitutional fundamentals, meaning the 'amenability of constitutional arrangements and fundamental laws to periodic reconsideration and revision seems an indispensable part of any democratic compact' (ibid.: 49).

As Colon-Rios has argued, one can distinguish between two dimensions of democracy, one related to daily governance and the adoption of ordinary laws (democratic governance) and the other to fundamental laws (2009: 3). The first dimension of democratic governance is of great significance with regard to possibilities for civic participation and forms of civic engagement (e.g. by means of legislative initiative, various forms of electoral influence, recall procedures, and deliberative practices). However, from a radical-democratic point of view, this dimension can only play a limited role in fully realizing an ideal of popular self-rule. In other words, it is only when citizens are able to participate in the formulation of fundamental rules and laws that they are able to engage in democratic self-government. While many liberal, legal constitutions are not at all conducive to civic participation in the second, fundamental dimension, there are different mechanisms that can facilitate such involvement, and that can be found in some new constitutions as adopted in Latin America and Africa, predominantly.

Relevant mechanisms include the ideas of civic constitutional assemblies, popular constitutional initiatives and civic constitution-drafting (cf. Colon-Rios 2009: 24–6). It remains to be seen, and I will discuss this in Chapter 5, to what extent such views have also had some influence in the post-communist societies.

Various dimensions of constitutional politics or possibilities for civic influence on revision and amendment are important for a discussion of democratic constitutionalism. There is the question of whether a constitution is relatively rigid or not, that is whether it includes parts that are safeguarded from amendment, and whether the procedure to change the constitution puts up large hurdles for amendment, for instance by requiring supermajorities for constitutional changes, affirmative popular referenda, or the adoption of constitutional changes by two successive parliamentary sessions. There is also the salient question of the right to initiative, that is which actors are able to engage in the initiation of a process of constitutional change (this role can be bestowed on the executive (the president), the legislative, as well as on the wider citizenry).

Direct forms of democracy

As argued above, a major concern with liberal, legal forms of constitutionalism is its limited take on forms of civic participation and political engagement. This becomes visible in a liberal-constitutional emphasis on representative democracy, the entrenchment of fundamental rights and the endorsement of the interpretation of the constitution by a specialized body. In a political-constitutional view, the emphasis shifts towards representative politics through legislatives, also concerning fundamental norms and laws. Both constitutional perceptions have in this relatively little to offer in terms of a revival of or stimulus for civic-democratic participation and engagement as a mode of reinvigorating democratic institutions.

There is, however, increasing attention for how more participatory, deliberative and direct forms of democracy might play important roles in redirecting modern democratic regimes towards more legitimated and reciprocal forms of modern rule. This is not least visible in the context of the EU, where rights-based understandings of citizenship are understood as insufficient, and in need of complementation by republican understandings of participation.[17] One institution that has also enjoyed renewed attention from constitutionalist scholars is that of the referendum (see in particular Tierney 2012). Stephen Tierney argues it is best to see direct democracy not in contrast to representative

democracy, but rather as a supplement or sometimes as a 'supplant' of representative democracy (Tierney 2012: 1; cf. Frey 2004). Obviously, for the promoters of direct democracy and referenda, the role of referenda goes further: 'referendums encapsulate the democratic ideal of government by the people' (Tierney 2012: 2). From this more radical, civic-republican perspective, representative democracy is unable to respond to demands for self-rule, and remains a form of democracy that is one step away from democratic autonomy. Be that as it may, it can in general be argued – despite critical views that understand referenda *tout court* as plebiscitarian and therefore dangerous devices – that

> [t]he referendum is fully entwined with the changing dynamics of contemporary representative government as some of the established certainties both of constitutional supremacy and of citizen trust and efficacy erode in the face of normative, political, and economic pressures which today affect the established contours of statal constitutionalism.
>
> (Ibid.: 6)

Thus, in our larger picture of the changing contours and substance of modern constitutionalism; it can be argued that forms of direct democracy, including that of referenda, play an important role in the reconfiguration of modern democracies. As Tierney goes on:

> The referendum in this sense becomes in fact a fascinating case study with which to address a changing normative architecture in which older territorial, institutional, and identificatory certainties which underpinned the unitary and hierarchical order of the constitutional state become ever more insecure and in which citizens increasingly look to new and often direct forms of political engagement to compensate for the perceived democratic failings of traditional constitutional models.
>
> (Ibid.: 6)

Relating back to the discussion of constitutional politics above, instruments of direct democracy have relevance regarding both ordinary and constitutional politics. One can, in this, make a three-fold distinction: first, direct democratic instruments that have to do with constitutional amendment (for instance, in the form of confirmatory referenda or citizens' initiative for constitutional change); second, direct democratic instruments that have to do with the wholesale adoption of new constitutions (cf. Tierney 2012: 11)[18]; and third, direct democratic

instruments that have to do with civic participation in ordinary democratic governance (also this last form, even if not directly engaging with constitutional matters, has an important constitutional dimension in terms of its entrenchment as constitutional principle).

While the most common direct democratic, constitutional instrument is probably the popular referendum (in the cases of constitutional amendment or wholesale renewal) (cf. Frey 2004: 3–4), it could be argued that in its standard execution (that is, an often political elite-initiated form of change or renewal which is subsequently to be approved or confirmed through a referendum) a popular referendum is only rather marginally about civic participation. As Colon-Rios (2011b) has argued, popular referenda are not infrequently lacking in widespread public deliberation and contain questions on pre-designed alternatives. In this regard, other, more innovative and novel instruments should be considered as part of a direct-democratic repertoire. Such instruments include constituent assemblies which combine civic participation with deliberative methods[19] and could include mechanisms by means of which such assemblies can be triggered by citizens themselves (while more traditionally such assemblies are invoked by legislatures).[20]

Decentralization of democracy

A further dimension of democratic innovation is that of the (radical) decentralization of, and enhancement of (local) participatory mechanisms in, national democratic systems. Decentralization offers some potential for the reinvigoration of democracy and citizen participation, in the sense of providing opportunities for citizens to engage in the creation of common rules for living together, for instance in the form of direct participation through referenda or legislative initiative. Even though one should be aware of the pitfalls involved, decentralized forms of democracy might offer an effective and viable antidote to a closed and elitist democratic-constitutional order. The constitutional dimension is relevant here, even if not widely discussed in this sense, in that the enshrinement of the right to self-government and the constitutionalization of dimensions of local democratic self-government can importantly help to entrench possibilities for local civic engagement. As, for instance, argued by Martin Loughlin, '[the role of law] is an aspect of central-local government relations which is neglected in many contemporary studies and yet is of vital importance in identifying the character of that relationship' (1996: 1).

One set of examples of a radical-democratic constitutionalism specifically promoting popular participation and decentralization relates

to Latin America in a recent, 'fourth wave' of constitutional reform (Colon-Rios 2011c). Among the aims in this novel constitutional model are the promotion of civil society participation in government and the political inclusion of disempowered parts of society, stemming from a critical approach towards representative democracy. What is significant here is that the monistic and centralistic approach of liberal and legal constitutionalism (cf. Tierney 2004: 9) is rejected in favour of a constitutional order that promotes diversified political access to various groups and communities. One reason why such a model might be relevant in the Central and Eastern European context is that a similar tradition of civil society thinking and activity exists, and that a similar question in post-authoritarian constitution-making relates to how to meaningfully institutionalize forms of civil society while keeping bottom-up politics open to renewal and innovative practices (Olvera 2013). It should at the same time be acknowledged, as forcefully argued by James Tully (2008a), that decentralization of constitutional democratic systems carries with it the risk of a weakening of political decision-making powers. In the neo-liberal ideology that became dominant in the 1980s, local democracy was not endorsed on the basis of the principle of self-government, but rather to diminish the influence of the centralized state and enhancing the role of society, notably in the form of economic agents. This is a dimension that is clearly significant also for the new democracies in Central and Eastern European dimensions (see Ost 2011).

While this dimension cannot be denied, and should be carefully taken into account, it can equally be argued that local democracy, if institutionalized in a robust way, might contribute to democratic autonomy and enhance relevant influence of society on democratic politics. In an understanding different from the neo-liberal view, a civic-republican view has emerged – in particular from the 1990s onwards and not unrelated to the notion of civil society that emerged in the 1980s in Central Europe – that purports 'that political decentralization and local autonomy were important elements of democracy itself' (Loughlin *et al.* 2011: 5). Strengthening local government and democracy could then for a number of reasons be seen as potentially enhancing the quality of a democratic state. Such democratization of democracy might result from the proximity of local politics to the citizens, the higher accessibility of local politics to participation, in particular if in the form of direct and deliberative forms of democracy (Schiller 2011), and the shorter reaction time of local government to policy issues (Bailey and Elliott 2009: 436). As Rosanvallon has argued, the relevant notion of 'proximity' has increasingly gained foothold since the 1990s (he mostly

discusses the French context), and does 'not so much designate a precise object as suggest a preoccupation'. As he continues,

> [proximity] indicated that the usual language and concepts of politics no longer seemed adequate to express the expectations of citizens . . . it expressed in a general way the sense that distant, aloof government would no longer do – distance and aloofness being proximity's opposites. Proximity was not only an expression of value but also the core of a justificatory ideology. Leaders appropriated the term in the hope of regaining lost legitimacy, while citizens seized on it to express their disillusionment and their hopes for change.
>
> (2011: 4282–90)

In political-theoretical terms, the local democratic narrative that emphasizes the democratic surplus value of local democracy can be understood as a kind of amalgam of republican political thought (emphasizing civic virtue, public autonomy and civic engagement), communitarianism (politics close to the citizens), as well as ideas of deliberative democracy (politics as based on inclusion, deliberation and consensus-building). It seems undeniable that at least in superficial terms this narrative has become increasingly important in addressing problems of policy-making in European democracies. One clear sign of this is the emphasis on regionalization in European integration and the adoption of the European Charter of Local Self-Government (1985).

The increased attention for forms of decentralization, public participation and forms of participatory and direct democracy has emerged, interestingly, exactly in a period in which constitutional democracy is increasingly subject to great tensions and transformations. First, in Europe there is the evident shift in political and constitutional weight towards the European level. In other words, the overlap and concentration of jurisdiction, territory, and people is increasingly less evident as important decisions and politics regarding a variety of political communities are taken outside of those communities. Second, in a related way, there is the increasing complexity and arcane streak that matters of governance and democratic politics display, not least through forms of technocratization and juridification. Third, there is the increasing civic disattachment – in both East and West – vis-à-vis representative democratic politics. National political elites and institutions are profoundly lacking in civic trust and legitimacy.

In normative terms, it can be argued that local self-government might – at least in some circumstances – provide a partial antidote to these

democratic deficits and disengagement. This is so in a number of ways. First, the strengthening of local democracy potentially makes constitutional democracies more pluralistic, in that political power becomes divided and diffused on the vertical level, which helps to avoid, on the one hand, the political hegemony of central governmental institutions (a salient objective in former totalitarian societies) and, on the other, might help recover some of the lost grasp of democratic sovereignty on politics. Second, local self-government makes it easier for citizens to participate in democratic politics and governance in a meaningful way than it would be when politics is completely centralized. Third, and as is probably most famously argued by J.S. Mill, local possibilities for democratic participation might help to foster sentiments of public autonomy among the citizenry:

> It is necessary, then, that, in addition to the national representation, there should be municipal and provisional representations; and the two questions which remain to be resolved are, how the local representative bodies should be constituted, and what should be the extent of their functions. In considering these questions, two points require an equal degree of our attention: how the local business itself can be best done, and how its transaction can be made most instrumental to *the nourishment of public spirit and the development of intelligence.*
>
> (2004: 512; emphasis added)

Fourth, local self-government might in some instances also be a more effective type of government, in that it is more likely to have a capacity of responsiveness, in terms of responding to local problems according to local views.

Local government and democracy are, however, no obvious panacea to democratic and governance problems. Stephen Bailey and Mark Elliott have recently argued that local government is only likely to deliver the goods when a 'virtuous circle' is created, that is a situation in which 'the obvious importance and responsiveness of local government incentivizes the participation of individuals in local politics and elections' (2009: 436). In other words, '[a]ttempts to strengthen local democracy must, on this view, go hand-in-hand with attempts to strengthen local government'. In reality, however, many central governments have failed to induce such a virtuous circle 'within which strong local democracy and powerful institutions of local government enjoy a symbiotic, mutually constructive relationship'. Rather, governments have tended to contribute to a 'vicious circle' in which 'extensive

central control, the consequent limitations to local power and autonomy and the disengagement of individuals and communities are factors that are mutually reinforcing' (ibid.: 437).

In this, local democracy has obvious constitutional dimensions. This brings us to the process of the constitutionalization of subnational democracy. In the case of the post-communist societies, an important question to ask is whether the transformation process has significantly contributed to the consolidation of vital constitutional democracies, which involve robust dimensions of pluralized and decentralized politics and the promotion of active citizenship, or whether constitutional democracy has largely remained a fiction (cf. Skapska 2011: 9). Any attempt at answering this question will need to take into account the foundations of these new democracies, and will have to enquire into whether the new democratic regimes are conducive or not to civic democracy. Indeed, with regard to subnational self-government, the assessment of a 'virtuous circle' of local government and democracy as identified by Bailey and Elliott above needs a holistic view of the place of local government and democracy in the wider democratic-constitutional order. This means that the problems related to stimulating a virtuous form of local democracy 'can be fully faced up to only if important questions about the legal and constitutional role of local government are squarely addressed' (ibid.: 437). In other words, the foundations of decentralization and devolution are significant and need to be explicit and clear-cut if a virtuous type of local government and democracy is to be expected to emerge.

In the context of democratic constitutionalism, various instruments of local self-government are relevant. In general, what is important is that the 'state is granting local self-government with meaningful jurisdictions and not only administrative tasks under central control' (Schiller 2011: 9). In the more distinctive sense of local democracy as a context for civic engagement and participation, many forms of democratic channels and instruments can be pointed to, not least because this is an area that throughout Europe is subject to experimentation and reform. In this book, a number of instruments beyond representative politics will be emphasized, even if it is acknowledged that a robust form of representative politics on the local level is significant in its own right. But civic participation is more at the core of reforms related to direct democracy, in particular in the form of (different types of) referenda, legislative initiatives and recall procedures (see Schiller 2011: 15–17). But these instruments could evidently be just the forefront of possibly more experimental mechanisms, such as local deliberative fora or participatory budgeting.

Concluding remarks

Much of the theoretical critique on legal constitutionalism appears convincing and warrants further – including comparative-empirical – analysis. The thrust in political constitutionalism against strong judicial review and in favour of a hold of representative politics on constitutional values is shared here, as it emphasizes a view of democracy as an open-ended process, rather than as a closed political form grounded in pre-political essentials or pre-commitments (which in themselves are identified by enlightened theorists). The understanding that constitutional politics should be open to a plurality of points of view is in agreement with such a democratic imaginary. The arrest of political constitutionalism before democratic politics beyond parliamentary, representative forms is, however, not shared here. Rather, the observation that current representative democracies experience forms of fatigue and crisis is accepted, and the assumption that new (or forgotten, old) forms of democratic participation should be explored forms the basis of the understanding of constitutional democracy in this book. In constitutional theory, some resonance regarding these concerns can be found in a number of approaches that contest a view of constitutionalism that presupposes a strong distinction between the constitution and society. In popular constitutionalism, this is visible in an understanding of constitutions as needing to reflecting societal views and change, and the acceptance of the role of political and societal actors in constitutional politics. In a very different manner, societal constitutionalism strongly criticizes the formal-political emphasis in constitutional theory, and attempts to detach the idea of constitutionalism from formal, and in particular state, politics altogether. Societal constitutionalism in general might be affected by a 'fear of the political', and in this suggests an a-political form of societal self-governance, avoiding, however, crucial questions of collective autonomy and political access for the many. It is, then, above all in democratic constitutionalism that the challenge of democratizing constitutionalism is taken up most explicitly. Here, the idea that constitutional politics should be explicitly opened up to citizens' proposals, deliberations and decisions is endorsed. I have argued above that in democratic constitutionalism, we see an important, alternative conceptualization of the constitution emerging, that is not so much as a negative frame for democratic politics, but rather as a vehicle for inclusive, democratic political interaction and as a continuous deliberative process on the fundamental values of a political community.

My argument – and subsequent comparative empirical analysis (see Chapters 3 to 6) – is sympathetic to much of what is claimed in the

critical approaches to legal constitutionalism. On the basis of these critiques, I have outlined a variety of democratic constitutionalism, which I have called *civic constitutionalism*. The thrust of this approach is that it is possible the democratize the democratic-constitutional state, and that a number of dimensions are of immediate importance, including the dimensions of constitutional politics and change, the dimensions of alternative, direct forms of democracy, and the dimension of decentralized democracy. Much of the inspiration for the civic-constitutional approach is provided by an 'activist' view of constitutions in which citizens potentially play an active role (cf. Frankenberg 1997), the ideas of weak constitutionalism (cf. Albert 2008; Colon-Rios 2012) and democratic constitutionalism (Tully 2008a). These critical approaches suggest that viable constitutional democracy needs the active inclusion and participation of civil society. In this view, constitutions are understood as vehicles of democracy and as co-constituting civil society and the public sphere.

In the rest of the book, I will explore the constitutionalization of democracy in five new democracies (the Czech Republic, Hungary, Poland, Romania and Slovakia) from this perspective. In Chapter 3, I will analyse the emergence of legal constitutionalism and analyse to what extent some of the negative, disabling dimensions of a legalistic constitutionalism are evident in the new democracies. In Chapter 4, I will explore an alternative, historical narrative of constitutionalism that can be identified in some of the dissident ideas that emerged in the later decades of communism. In Chapter 5, I will comparatively analyse to what extent we can equally identify positive, enabling dimensions in the constitutions of the new democracies, exploring constitutional dimensions that provide possible counterweights to legal constitutionalism. In Chapter 6, I will place the constitutionalization process of the new democracies in the context of European integration, and indicate significant problems and tensions that have emerged in the integration process regarding the balance between democracy and constitutionalism in the region.

Notes

1 A significant exception can be found in the work of Wojciech Sadurski; see, e.g., Sadurski (2008). See also Puchalska (2011); Skapska (2011).
2 A classical statement is Dworkin (1995).
3 For discussions, see Colon-Rios (2011a); Goldoni (2010).
4 At the same time, it can be argued that the nature, form and distinct functions of the constitution in – and increasingly also beyond – modern democratic realities is an ever more frequent object of dispute. This is not least because of the profound changes that affect constitutional democracies and constitutionalism as a result of processes of globalization and sub-state empowerment, as well as internal transformations of the modern polity and democratic politics, and related diversification of democratic imaginaries.
5 A concise version of this discussion can be found in Blokker (forthcoming, 2013).
6 One of the best-known formulations of such an idea is that of an 'overlapping consensus' (Rawls 1993; cf. Bellamy 2007: 101–2).
7 Judith Shklar, cited in Goldoni (2012: 929).
8 Relevant trends include the emergence of alternative (transnational, international, non-state) authorities that claim constitutional capacity and some hold on sovereignty, beyond or parallel to the traditional sovereign nation-state. The European Union is the most significant and evolved example of this (other such phenomena include the World Trade Organization and human rights charters). But constitutionalization beyond the state equally includes private, economic actors that engage in the production of 'self-validating contracts' and 'closed circuits' that differ from state legal orders not only in terms of geographical site but also in terms of the novel, self-referential quality of the norms themselves (cf. Teubner 1997). A concomitant, but not altogether overlapping, trend is that of a devolution and differentiation of democratic sovereignty towards sub-state levels. This trend is related to processes of post-state constitutionalization, but is much more importantly inspired by political resistance to imposed, Western forms of majoritarian constitutionalism and by political projects for cultural recognition, regional autonomy and self-government.
9 Here, I will not be able to extensively address the highly salient question of post-national constitutionalism and its relation to new constitutionalism.
10 I refer here to a wider debate which also includes the 'democratic constitutionalism' of Post and Siegel (see Post and Siegel 2007, 2009) as well as Tushnet's 'populist constitutionalism' (Tushnet 1999), but here I will use 'popular constitutionalism' so as to be able to distinguish between the American, populist approach and James Tully's (and others') project of democratic constitutionalism. Further, I realize that I am side-stepping some differences between various contributors to the progressivist debate (e.g. between Post and Siegel and Kramer), but I hope that the main thrust I present here is indeed one that is shared by the various contributors. Many contributors discussed here are now contributing to the debate on the 'Constitution 2020'. For a subtle and historically grounded discussion of popular constitutionalism, see Colon-Rios (2011a).
11 For a discussion of various strands within originalism, see Colon-Rios (2011a).
12 Other relevant and related approaches are 'weak constitutionalism' (Albert 2008; Colon-Rios 2011b) and 'participatory constitutionalism' (Hart 2003). Anderson mentions Tully's approach in a discussion of 'paradigmatic readings of globalization', as opposed to 'sub-paradigmatic approaches' (these are de Sousa Santos' terms) (Anderson 2012: 381). Using the language of Cornelius Castoriadis, one could refer to Tully's work, and democratic constitutionalism more in general, as having an 'instituting' thrust, as opposed to an 'instituted' one.

13 Reality tests can be related to a reformist type of critique. The latter attempts to close an observed gap between the order of symbolic propositions and the order of the state of affairs (for instance, when a president is said to have acted unconstitutionally). As such, though, the reality test does not threaten instituted reality, but ultimately corrects it (Boltanski 2009).
14 As argued by Tully, a customary approach to constitutionalism is radically different from the modern one, in that it entails a 'different idea of constituent power', in that 'the constituent powers of humans (and non-humans) are always already immanent in the specific forms of transposable *habitus* they take in the countless normative relationships of interaction (non-formal customary laws) that humans and non-humans both bear and transform *en passant*' (2008b: 469 emphasis in the original). In other words, constituent power is not something prior to or outside of (democratic) interaction, but intermingled with the latter.
15 Although an underlying view of understanding constitutions (as in particular endorsed by Tully) as flexible structures that ought to be re-created *en passant* and in a participatory way forms clearly an inspiration for civic constitutionalism.
16 Up to a certain, even if rather limited, extent, distinct dimensions of a more democratic constitutionalism have been institutionalized in the five new democracies under discussion; see Chapter 5.
17 Even if the institution of a European Citizens' Initiative 2012 can be understood as the institutionalization of a republican view of civic participation, instruments of this type are in general not robust, neither on the supranational, nor on national and subnational levels. A related discussion is the critical reading of in particular 'new governance' approaches (Smismans 2007).
18 Tierney refers to these two types as 'constitution-changing' and 'constitution-framing' instruments, referring to referenda (2012: 11).
19 An experiment along these lines was recently undertaken in, for instance, Iceland. A recent, less citizen-driven experiment was that of the European constitutional convention; see, e.g., Frey (2004).
20 Other instruments that should perhaps be discussed more extensively here are less related to influencing representative democratic institutions, but rather to influencing judicial review (such as in the Hungarian institution of *actio popularis*) or the protection of rights (for instance, by means of the institution of ombudsman). I will briefly allude to the former in the concluding chapter, but not extensively discuss these in the rest of the book (but see, e.g., Kurczewski and Sullivan 2002).

3 The prominence of legal constitutionalism in the new democracies

The centrality of legalism, constitution-making and human rights in the radical changes in 1989 in Central and Eastern Europe has been widely noticed and analysed. One can notice, however, a certain tendency in prioritizing the external and modernizing (or catching-up) dimensions in democratization and constitutionalization (e.g. Magen and Morlino 2009; Morlino and Sadurski 2010). These include, for instance, the adherence to an apparent European standard (as displayed by the constitutional traditions in Western Europe, in particular those of Germany and France) as well as the adaptation process to the European integration project (in terms of EU accession, conditionality and the *acquis*). Comparative attention for local constitutional and democratic traditions and experiences tends to be less upfront. In this, there is a risk of downplaying some of the complexities related to local factors and tensions in the process of democratization, and exaggerating the positive effects of the adoption of 'tested' institutions and structures. Legality, the rule of law, and constitutionalism as available in longstanding democratic societies are often seen as the extreme opposite of the reality of the communist regimes, and hence are logically taken as the core of the post-communist transformation process. But potential risks and dilemmas in the building of democracy are not always sufficiently appreciated.

In this chapter, I will discuss the emergence of legal constitutionalism from a historical and political-sociological perspective, emphasizing local dimensions to this process. I will start with a brief discussion of some of the intricacies of the constitutional dimensions of the communist regimes, and provide a concise account of the understandings of legalism and rights that were involved in the dissident struggle against the communist regimes, and the (modest) constitutional reforms initiated by some of the latter.[1] The significance of this lies not least in the way these phenomena interacted with the emergence in the region of legal constitutionalism in the post-1989 period. In the second part of