

1 Chapter 3 1
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3 Democratic Ethics, Constitutional 2
4 Dimensions and ‘Constitutionalisms’ 3
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12 **Introduction** 12
13 13

14 Constitutions should not be regarded as foundational documents circumscribing 14
15 closed legal orders. In Richard Bellamy’s words, ‘the constitution cannot be viewed 15
16 as an objective fount of moral and political wisdom’ (2007: 166). Constitutions are 16
17 ‘instituted’ and, as such, tend to reflect prevalent political cultures of constitution- 17
18 making actors. This means that, in reality, constitutional documents seem to show 18
19 a plurality of politico-ethical values (cf. Rosenfeld, 2006), even if they do not 19
20 always invoke these explicitly. Once instituted, constitutions cannot be regarded as 20
21 sources of meta-political norms that merely need implementation. Constitutional 21
22 norms and values, and law in general, are open to continuous (re)interpretation 22
23 and contestation, and so can have validity only if they reflect cultural repertoires 23
24 present in society (cf. Příbáň, 2002). 24

25 This chapter develops a number of analytical tools and ideal-typical models 25
26 to investigate the relationship between constitutions and their politico-cultural 26
27 environment. One can distinguish a number of ways in which constitutions can 27
28 be open to politico-ethical repertoires: they can reflect them, as well as being the 28
29 object of, influence on or reinforcement of them. One way of approaching the 29
30 legal politico-cultural entanglement analytically is to distinguish between the 30
31 range of constitutional dimensions. The predominant, negative understanding 31
32 of constitutionalism prioritizes an instrumental or political dimension – that 32
33 is, the constitution understood as a ‘political map’, as a way of both limiting 33
34 power and delimiting spheres of autonomy – as well as a formal-participatory 34
35 dimension in which participation is limited to the retrieval of existing rights. 35
36 However, the constitution can also be said to reflect another, cultural and symbolic 36
37 dimension, which more specifically includes a normative dimension in terms of 37
38 the expression of ultimate, politico-ethical values, an identity-shaping dimension, 38
39 a positive, aspirational dimension of substantive ends, and a politico-participatory 39
40 dimension. 40

41 Another way of approaching the relationship between the constitution and 41
42 its environment is to distinguish between different politico-ethical visions of 42
43 the constitution. It can be argued that different perceptions of the constitution or 43
44 ‘constitutionalisms’ are informed by different democratic ethics. There are at least 44

1 four relevant ethics: the ethics of rights, identity, participation and distributive 1
 2 justice (Blokker, 2008; 2009). Liberal, communitarian, republican and substantive 2
 3 constitutionalism respectively prioritize these ethics, but this does not mean that 3
 4 they ignore other ethics. Rather, while prioritizing one ethic over another, they 4
 5 tend to hierarchize and interpret these ethics differently. 5

6 A distinction between different understandings of the role and status of 6
 7 the constitution in a plurality of ‘constitutionalisms’ not only serves heuristic 7
 8 purposes, enabling the comparative study of constitutions, but can also function as 8
 9 a way of indicating the perceptions of constitutions among societal and political 9
 10 actors (thus relating to the ‘constitutional reality’ as well as to the constitutional 10
 11 text). From this view, the various ‘constitutionalisms’ can be seen as distinct 11
 12 interpretations of a political community and as a means of understanding ways of 12
 13 integrating such communities (cf. Rosenfeld, 1998b; 2006). ‘Constitutionalisms’ 13
 14 can be related to distinct political cultures, which are themselves organized around 14
 15 the aforementioned democratic ethics, that is, ‘key concepts’ or ‘symbols’ that 15
 16 orient such cultures, and tend to prioritize distinct constitutional dimensions over 16
 17 others.¹ 17

18 This chapter begins by exploring the two meta-languages or dimensions of 18
 19 constitutions – the instrumental and symbolic languages – and related specific 19
 20 constitutional dimensions. It then discusses how such meta-languages in general, 20
 21 and distinct constitutional dimensions in particular, are reflected, hierarchized 21
 22 and interpreted in distinct perceptions of the constitution. Existing constitutional 22
 23 documents in the Central and Eastern European context, especially the Hungarian, 23
 24 Polish and Romanian cases, are used to illustrate certain points.² 24

25 25
 26 26

27 **Constitutional Dimensions** 27

28 28
 29 Constitutions can be understood as ‘meta-texts’ that, from a primary, analytical 29
 30 point of view, articulate two meta-languages. First, a constitution expresses an 30
 31 instrumental language or rationality: it formulates the functional differentiation 31
 32 of society and the limitation of political power; and it defines in this the relations 32
 33 between state and citizens, as well as among state institutions, government and 33
 34 opposition (Přibáň, 2007: 20; Scholl, 2006: 36). This instrumental rationality 34
 35 can be understood in Weberian terms as permitting the purposive rationalization 35
 36 of politics and the political community (Přibáň, 2007: 3). It also informs the 36
 37 predominant understandings of liberal constitutionalism (see below), in which 37
 38 constitutions are portrayed as documents that ground legality and a depoliticized 38
 39 39

40 40
 41 1 This chapter substantively expands and elaborates the discussion elsewhere of 41
 42 constitutional dimensions and a plurality of ‘constitutionalisms’ in the context of multiple 42
 43 political cultures in new EU member states (see Blokker, 2009, Chapter 5). 43

44 2 There will be occasional reference to a wider comparative constitutional context, 44
 44 beyond the Central and Eastern European context. 44

1 set of rights, making a strong distinction between public and private, as well as 1
2 between politics and the rule of law. One important reading of the instrumental 2
3 view of constitutions takes the form of 'legal constitutionalism', which regards 3
4 constitutions as closed legal universes that arrange the contours of politics and of 4
5 a neutral state, but should not themselves be open to change by democratic politics 5
6 (Bellamy, 2007). 6

7 Second, a constitution articulates a symbolic language that invokes the 7
8 substantive groundings of the political community in terms of the normative 8
9 principles on which it is based, its collective identity and traditions, and the 9
10 aspirational and participatory ideals of that community. The symbolic dimension, 10
11 in contrast to the negative political dimensions, is not concerned with the universal 11
12 values of constitutionalism and their interpretation within a closed system of law, 12
13 but with the embedding of such universal values in a local, historical and cultural 13
14 context (in a similar sense to Hegel's 'national spirit', or Montesquieu's 'spirit 14
15 of the laws'). In other words, from one perspective, constitutions express the 15
16 'fundamental ethos' of distinct societies. They attempt to codify a 'characteristic 16
17 way of life, the national character of a people, their ethos or fundamental nature as 17
18 a people, a product of their particular history and social conditions' (Pitkin, 1987: 18
19 167). 19

20 The symbolic rationality of constitutions can be related to the Weberian 20
21 notion of value-rationality and substantive law, which 'reflects extra-judicial 21
22 elements and accommodates moral, economic or traditional and religious criteria 22
23 in the domain of positive law' (Příbáň, 2007: 20). The symbolic dimension of a 23
24 constitution invokes ultimate values, extra-societal markers such as natural rights, 24
25 societal traditions and identity, which need to be protected and promoted by the 25
26 constitution. It can be argued that there is a collective dimension to the symbolic 26
27 language of a constitution, in that constitutional symbolism 'expresses the moral 27
28 authority of a political collectivity over individuals' (Příbáň, 2007: 21). The 28
29 constitution articulates through its symbolic dimension a (constructed) collective 29
30 unity and a form of collective self-understanding. This particularist constitutional 30
31 dimension is often portrayed in an extra-temporal or essentialist way but, in reality, 31
32 will always be open to contestation and change, as new interpretations of collective 32
33 identities emerge, or older ones are re-proposed. In this way, constitutions can be 33
34 understood as symbols of unity (Scholl, 2006: 38). The symbolic dimension is also 34
35 about giving political meaning to and embedding abstract legal terms into a socio- 35
36 cultural language. Through the language, traditions and history of a particular 36
37 society, a constitution gives meaning to that society's legality, that is, the political 37
38 forms and specific views of its system of justice. Symbolism is equally important 38
39 for the expression of the normative principles and aspirational values, or 'idées 39
40 directrices', of a political community. In this sense, the symbolic dimension can 40
41 be seen as an attempt to integrate modern pluralistic societies. 41

42 It is clear that modern constitutions will display both instrumental and symbolic 42
43 dimensions to various extents. This must be the case, because instrumental 43
44 rationality will always need to be paralleled by some kind of socio-cultural 44

1 embedding and registry of ultimate values; and a purely symbolic constitution	1
2 would lack the regulatory, ordering language needed to functionally integrate a	2
3 political community.	3
4	4
5	5
6 Instrumental Rationality	6
7	7
8 The instrumental rationality of constitutions can be said to express a predominantly	8
9 negative view of constitutions, in which constitutions limit government, stipulate	9
10 rights (which provide for negative freedoms) and endorse stability and order (cf.	10
11 Barber, 2006). The following subsections show how instrumental rationality	11
12 relates to the two main constitutional dimensions: the political dimension and the	12
13 formal-participatory dimension.	13
14	14
15 <i>Political Dimension</i>	15
16	16
17 The political dimension of constitutions is at the heart of what is currently	17
18 understood by 'constitutionalism'. András Sajó argued:	18
19	19
20 Constitutions – since the basic laws of the Greek city states (polis) until today	20
21 – concern the relationship of the state's fundamental organs and its institutions.	21
22 If during the process of creating this basic arrangement the principles of	22
23 constitutionalism are kept in mind, these relations establish a system of limits	23
24 that allow the freedom of the citizenry to prevail. Constitutions are about power;	24
25 a constitution impregnated with the ideas of constitutionalism is about limited	25
26 power (1999: 2).	26
27	27
28 The political dimension – political in the sense of providing the rules of the political	28
29 game – expresses instrumental rationality fully in that the constitution contributes	29
30 to the rationalization of the political order, by confining political decision-making	30
31 to a distinct sphere of professional politics and by invoking a specific type of	31
32 political participation, thereby making politics orderly and predictable, as well as	32
33 a matter of calculability. This can be better understood as the regulating side of the	33
34 constitution. In other words, the political dimension, in what could also be called	34
35 its 'functional meaning', outlines the institutional order or sphere of politics on	35
36 which democracy is to be based, 'framing the regular powers of a society and of its	36
37 political system' (Castiglione, 1996: 420). The political dimension can be related	37
38 to a 'pragmatic' or 'constitutional' image of democracy, in which the constitution	38
39 plays the role of a regulating principle.	39
40 This regulating idea is often related – although not necessarily so – to the	40
41 function of the constitution as a limiting, negative one. Regulation is then perceived	41
42 predominantly in a negative way, in that it sets out – by means of a 'set of principles,	42
43 manners, and institutional arrangements' – to limit government or majority rule	43
44 in order to prevent the state from subjugating individuals (Sajó, 1999: xiv; cf.	44

1 Barber, 2006). Thus, separating powers and stipulating the inviolability of a set 1
 2 of rights to be enjoyed by individuals in the constitution become the fundamental 2
 3 constitutional principles preventing political power from being abused and turned 3
 4 against society, particularly minorities. 4

5 Apart from the regulating aspect, that of institutionalizing politics, the state 5
 6 and citizenship, there is a more foundational side to the political dimension 6
 7 of constitutions. In this latter sense, as a constitutive or foundational act, the 7
 8 constitution actually creates or establishes a political community. Although the 8
 9 constitutive dimension is then a *conditio sine qua non* for the instrumental rationality 9
 10 of the constitution, its nature is better understood as symbolic (see below). In its 10
 11 guise as a foundational act, there is a mythical aspect of the constitution involving 11
 12 concealment or suspension of the political (cf. Lefort, 1988: 11), in that the political 12
 13 violence that is the basis of any political order is made subordinate, functional or 13
 14 even invisible to the creation of a formal and legitimate constitutional order. 14

15
 16 *Formal-participatory Dimension* 16
 17 17

18 The political dimension invokes a mostly negative, regulating and foundational 18
 19 perception of constitutions. But constitutions are not reducible to a foundational act 19
 20 or descriptions of the political and legal system, nor to elaborations of separations 20
 21 of power or limitations on social interaction. Constitutions clearly also provide for 21
 22 an enabling, democratic dimension through civil rights (freedom of expression, 22
 23 consciousness, association) and political rights (active and passive voting rights) 23
 24 that enables citizens and political actors to act politically, even if it is within 24
 25 the limits set by the very same constitution. One of the essential functions of a 25
 26 constitution is channelling the political will of citizens – in other words, expressing 26
 27 popular sovereignty. 27

28 It can be argued that there are two approaches to enablement and popular 28
 29 participation. The first, so-called 'constitutional politics', is based on a traditional 29
 30 constitutional model in which participation is confined to the activation of 30
 31 constitutional rights, rather than change to or amendment of them.. The second 31
 32 approach, labelled 'new constitutionalism' by the late Vivien Hart (2003), does not 32
 33 confine participation to the enactment of existing rights, but explicitly endorses 33
 34 participation in constitutional politics (see discussion of the politico-participatory 34
 35 dimension below). 35

36 Thus, while the participatory or 'enabling' dimension of constitutions can, in 36
 37 principle, be said to touch upon an idea of popular sovereignty, when taken in a 37
 38 purely formal-legal sense (the first mentioned above) it can still be understood 38
 39 within a largely instrumental rather than substantive language. Participation in 39
 40 a formal-legal sense is related to the constitution's role in 'codifying the rules 40
 41 of the democratic game' (Bellamy and Castiglione, 1997: 595), its provision 41
 42 of a framework for the actualization of subjective rights by individual citizens, 42
 43 and conflict resolution on the basis of constitutional norms. It is, however, less 43
 44 concerned with ideas of public participation, inclusion and civic voice and virtue 44

1	as intrinsic aspects of constitutional democracy, and with what one could call	1
2	'democratic imagination' and (radical) democratic change.	2
3		3
4		4
5	Symbolic Rationality	5
6		6
7	A good part of legal and political scientific studies of constitutional orders focuses	7
8	on instrumental rationality, the dimensions of political order and, to a lesser	8
9	extent, participation. Relatively little attention is given to the politico-cultural or	9
10	symbolic dimension of constitutions, in particular the way in which constitutions	10
11	are related to politico-ethical discourses and (latent) perceptions that constitute	11
12	views on politics and the political community held in a particular society (political	12
13	image). The symbolic rationality of constitutions – hingeing on value-rationality	13
14	– can analytically be understood as including a number of dimensions that are	14
15	indispensable to the constitution of a modern political community, that is, the	15
16	normative, identitarian, aspirational, and participatory dimensions. The symbolic	16
17	dimension indicates that the legal system can be never completely closed off from	17
18	the societal and cultural spheres and is always permeated by the latter.	18
19		19
20	<i>Normative Dimension</i>	20
21		21
22	Constitutions are generally considered to be a 'basic law' (cf. the German	22
23	<i>Grundgesetz</i>). As such the fundamental 'meta-text' or norm constitutes the legal	23
24	order, which derives its ultimate references and values from the constitution. Sajó	24
25	described the constitution '[a]s the starting point and the closing argument of a	25
26	legal system' (1999: 39). From this it can be argued that any formal constitutional	26
27	document needs to refer to things outside its own legal domain, in other words, a	27
28	kind of embedding in extra-legal, fundamental values. The axiological dimension	28
29	of a constitution entails an attempt to ground a particular political community in a	29
30	set of ultimate values in order to provide the necessary substantive meaning, which	30
31	a purely formal constitution would not be able to provide. Without some kind of	31
32	extra-legal, substantive dimension, a constitution would remain 'both overformal	32
33	and relativistic' (Castiglione, 1996: 419).	33
34	Dario Castiglione argued that the normative, 'absolute' dimension can be	34
35	grounded in a set of fundamental, ethico-normative principles, in the existentialist	35
36	origin of the constitution (emphasizing its original nature), or in a reflection of	36
37	organic, societal fundamental principles (1996: 420). But the normative dimension	37
38	of a constitution does not necessarily entail the expression of a unity based on a	38
39	singular, relatively coherent set of values. As the example of the Polish Constitution	39
40	of 1997 shows, a constitution can be based on 'axiological pluralism' in which	40
41	no singular ontological view on values and their identification exists (Winczorek,	41
42	1999). The Polish Constitution, particularly in its preamble, displays a dualistic	42
43	vision that invokes both natural, religion-based values and universalist, civic ones	43
44	(cf. Zubrzycki, 2006; see also Blokker, 2009; Brier, 2006; Halas, 2005).	44

1 The dimension beyond and additional to a purely formal one articulates 1
 2 ultimate values by means of reference to symbols. In this, as argued by Joseph 2
 3 Weiler, the constitution's symbolic function can be *implicit*, that is, a constitution's 3
 4 ethos might result indirectly from the political dimension and the stipulation, and 4
 5 hierarchization, of specific rights. Alternatively, this dimension can be *explicit*, 5
 6 as is often the case when the distinct values and traditions of a specific political 6
 7 community are included in the constitution's preamble (2003: 55–6). In the latter 7
 8 sense, the emphasis is not so much on a normative, legitimacy dimension, but 8
 9 rather on the identification of a collective identity. 9

10
 11 *Identitarian Dimension* 11
 12 12

13 The symbolic side, then, not only entails the formulation of a set of ultimate 13
 14 values, but, in a related way, refers to an identitarian dimension, which is the 14
 15 expression of the collective identity of a particular political community. Hans 15
 16 Vorländer contended that the constitution fundamentally expresses an idea of 16
 17 unity or identity, in that it pretends to constitute a political community (Vorländer, 17
 18 2006; cf. Rosenfeld, 1993). As argued above, modern pluralistic and secularized 18
 19 societies cannot integrate purely on the basis of reference to extra-social markers 19
 20 such as religion or tradition, but need to look to imminent, intra-social values. 20
 21 In this, the constitution provides a typically modern answer to the integration of 21
 22 heterogeneous or pluralistic societies (Vorländer, 2006: 230; cf. Lefort, 1988). As 22
 23 Ulrich Preuss explained: 'The power of the modern state [...] requires a secular 23
 24 justification. And while, in the perspective of political theology, the people and 24
 25 its sovereign power have replaced an almighty God, it is the constitution which 25
 26 supplants the Holy Scripture' (1995: 99). 26

27 Whereas the normative dimension refers to generalizable or universally 27
 28 formulated fundamental principles, the identitarian dimension delimits the 28
 29 constitution as the fundamental declaration of a particular polity. The normative 29
 30 and identitarian dimensions are equally relevant for any constitutional order in 30
 31 that they both entail a way of giving fundamental meaning to the legal system 31
 32 within a specific historico-cultural context. Whereas the codification of ultimate 32
 33 values is an expression of the prevailing values and beliefs that are relevant for 33
 34 a particular political culture (or, often more accurately, a plurality of political 34
 35 cultures existing in a specific polity), and in this forms a legitimating mode, the 35
 36 identitarian dimension attempts to portray the collective as a singular entity or as 36
 37 'people-as-one', in an endeavour to integrate a diversity of individuals and groups 37
 38 on the basis of a common identity. 38

39 Tensions can then emerge between a universally formulated set of values (which 39
 40 might promote diversity over identity or commonality) and the explicit formulation 40
 41 of a (majority) identity (which might favour homogeneity and assimilation). But 41
 42 the normative dimension can also be said to rely on the identitarian dimension, 42
 43 in as far as the legitimating of norms needs reference to a specific socio-political 43
 44 context. This can take the form, for instance, of a circumscribed sovereign nation or 44

1 a particular constitutional self (Rosenfeld, 1993: 499). In other words, there needs 1
2 to be some identity between a set of fundamental values and a particular political 2
3 community, in which certain commonalities are emphasized while particular 3
4 differences are minimized (Rosenfeld, 1993: 500). In this regard, it is important 4
5 to underline the necessity of the identitarian dimension as providing some kind of 5
6 more durable basis for the constitution of a political community, which might also 6
7 appeal to future generations (Rosenfeld, 1993: 511). 7

8 The codification of a collective identity is then an attempt to make visible 8
9 or to express symbolically the singularity of a collective or political community. 9
10 A clear example of an outspoken identitarian dimension can be found in the 10
11 Romanian Constitution of 1991, which, even if it only explicitly invokes the 11
12 notion of 'nation' twice (see Regia Autonomă, 1998; Lungu, 2001; Preda, 2002), 12
13 contains numerous references to a national community. The national community 13
14 is regarded as the inheritor of the state and its sovereignty forms the foundation of 14
15 the post-communist, democratic state (as expressed in article 1). 15

16 Expressing identity in ethno-cultural terms is obviously not the only option 16
17 for a collective identity. The well-known analytical distinction is between 17
18 ethnic and civic understandings (cf. Příbáň, 2007; see also Preuss, 1993), even 18
19 if, in reality, some reference to an ethno-cultural understanding of a political 19
20 community is unavoidable (Rosenfeld, 1993). The latter becomes, for instance, 20
21 clear from the Hungarian Constitution (which, according to Scheppele, reflects a 21
22 'strongly liberal universalist, human-rights-centered version of constitutionalism' 22
23 (Scheppele, 2004)), in which there is an almost total absence of what could be 23
24 called an 'ethic of identity'. In this sense, the spirit of the constitution is mostly 24
25 prospective and based on a notion of the civic or nation state (cf. Příbáň, 2007; 25
26 Majtényi, 2005). The ethno-cultural, identitarian dimension, however, comes 26
27 through when the constitution invokes a (singular) reference to the cultural nation 27
28 made up exclusively of ethnic Hungarians, in the article related to the status of 28
29 Hungarians living outside of the Hungarian state (article 6(3)). In comparison, 29
30 while the Romanian Constitution of 1991 predominantly articulates the identity 30
31 of the majority, while the Polish Constitution has a more dualistic approach that 31
32 invokes both the idea of an ethno-national community as well as a civic one. 32

33 33
34 *Aspirational Dimension* 34
35 35

36 The identitarian dimension can take the form of a specific reading and interpretation 36
37 of the past intended to create an image of unity and to endorse social cohesion and 37
38 consensus in the present. A further, diachronic dimension to constitutions, also 38
39 clearly visible in many of the constitutions of the new democracies in Central 39
40 and Eastern Europe, is the future-oriented invocation of an ideal future society. 40
41 This can be referred to as an aspirational or teleological dimension, in that the 41
42 constitution is understood as a normative, programmatic statement of aims to be 42
43 achieved by the political community, informing a process of societal change and 43
44 the promotion of welfare generally. 44

1 The aspirational, positive dimension is often viewed with ambivalence (see, 1
 2 in particular, Sajó, 1999; Preuss, 1995), as it may include a policy-oriented, 2
 3 teleological quality that consists of the stipulation of a 'more or less detailed 3
 4 catalogue of state goals' (Preuss, 1995: 99), especially in terms of social policy- 4
 5 making (taking the form of, for instance, social rights and policy goals). Ulrich 5
 6 Preuss has indeed argued against the aspirational dimensions of many of the 6
 7 post-communist societies, which invoke images of democratic rule as well as 7
 8 substantive values, such as solidarity and welfare (Preuss, 1995). In this latter, 8
 9 policy-related sense, the critique is often, first, that there is a risk of constitutions 9
 10 stipulating teleological goals that may jeopardize the limiting, negative political 10
 11 dimension (Preuss, 1995: 101; cf. Barber, 2003); and, second, that the invocation 11
 12 of social rights undermines the overall credibility of the rights dimension of a 12
 13 constitution, because social rights cannot be guaranteed and are not defensible in 13
 14 judicial courts (Sajó, 1999). But, at the same time, it needs to be acknowledged 14
 15 that the teleology of constitutions signals an attempt to contribute to the enhanced 15
 16 social solidarity of a political community and, by doing so, to add to a cohesive, 16
 17 integrative dimension. 17

18
 19 *Politico-participatory Dimension* 19
 20 20

21 The participatory dimension is generally formulated in terms of enabling rights 21
 22 (civil and political rights, but also social and cultural rights). As indicated above, 22
 23 a basic distinction can be made between rights-based understandings of formal 23
 24 participation and more substantive understandings of effective participation, 24
 25 in which participation is valued as an aim in itself (cf. Rosenfeld, 2006). The 25
 26 politico-participatory dimension is about creating spaces or moments of equal 26
 27 participation, taking an active view of the democratic process and understanding 27
 28 participation as active self-rule, an end in itself. In this sense it is akin to the 28
 29 value-rationality of the symbolic dimension. The politico-participatory dimension 29
 30 can then be seen in contrast to the traditional view of constitutionalism, in which 30
 31 the constitution is understood as an 'act of completion', consisting of a 'final 31
 32 settlement or social contract in which basic political definitions, principles, and 32
 33 processes are agreed, as is a commitment to abide by them' (Hart, 2003: 2). Indeed, 33
 34 '[t]raditional constitution making as a conclusion of conflict and codification of 34
 35 a settlement that intends permanence and stability can seem to threaten rather 35
 36 than reassure' (Hart, 2003: 3). Instead, the politico-participatory dimension is 36
 37 about the constitution as a process, a form of 'conversational constitutionalism', 37
 38 in which the idea of a constitution as a 'final act of closure' is rejected in favour 38
 39 of endorsing a 'freely accessible debate' as a 'permanently open process' and as 39
 40 a 'conversation, conducted by all concerned, open to new entrants and issues, 40
 41 seeking a workable formula that will be sustainable rather than assuredly stable' 41
 42 (Hart, 2003: 3). Participation is seen not as a way of claiming one's legitimate 42
 43 rights in the face of a stable, enforceable final text, but as involving a 'moral claim 43
 44 44

1 to participation' (2003: 4) that adds a foundational democratic dimension to the	1
2 constitution as such.	2
3 To sum up, the politico-participatory dimension gives a self-reflexive, self-	3
4 doubting substance to the constitution, in a way that changes the traditional idea	4
5 of the constitution as a final text and foundational act. This dimension is evidently	5
6 not available in all constitutions, especially not the most well-known traditional	6
7 constitutions (including – as noted by Hart (2003) – the American Constitution). It	7
8 can, however, be argued that such a participatory, dynamic dimension is evermore	8
9 important in new constitutions, corresponding to a pluralistic, political and anti-	9
10 foundational understanding of the constitution (cf. Bellamy, 2007; cf. Arato,	10
11 2000).	11
12	12
13	13
14 Constitutional Dimensions and 'Constitutionalisms'	14
15	15
16 The dimensions of constitutions so far discussed are variously present and interpreted	16
17 in different perceptions of constitutions or 'constitutionalisms'. In this, various	17
18 tensions can be pointed out: between the negative and positive interpretations	18
19 of the constitution's role; between the instrumental and symbolic rationalities;	19
20 between legal and political views of constitutions (see Bellamy, 2007); and between	20
21 rule-of-law and identitarian 'constitutionalisms'. The next part of this chapter	21
22 describes four different 'constitutionalisms' – liberal, communitarian, republican	22
23 and substantive – and the way in which these 'constitutionalisms' invoke and fill	23
24 in the various dimensions. The four types should be understood as ideal-types,	24
25 useful as heuristic devices for comparatively studying predominant languages of	25
26 constitutionalism in existing constitutions as well as in 'constitutional reality'. The	26
27 four types clearly relate to distinct democratic discourses, themselves prioritizing	27
28 distinct democratic ethics (for example, rights in liberalism, participation in	28
29 republicanism), but obviously cannot be taken as an exhaustive list of possible	29
30 interpretations of the role of constitutions in modern democracies.	30
31	31
32 <i>Liberal Constitutionalism</i>	32
33	33
34 A liberal conception of constitutionalism primarily views the constitution in	34
35 terms of the aforementioned political and formal-participatory dimensions. It is	35
36 primarily a negative constitutionalism, in that it regards the constitution essentially	36
37 in a regulatory and limiting sense, that is, as the institutionalization and limitation	37
38 of political power, as well as a framework of citizens' rights and liberties (cf.	38
39 Castiglione, 1996; Ionescu, 1988; Ungureanu, 2007: 7). The idea is to ensure	39
40 the limitation of state power and prevent its being concentrated in the hands of	40
41 a 'few men', rather than ground it in the law. The relation between constitution	41
42 and democracy is, in this sense, complementary rather than contradictory, in that	42
43 the constitution secures the preconditions for democracy. Expressing a liberal	43
44 view of constitutions, Stephen Holmes suggested that 'limited government and	44

1 self-government are likely to become mutually supportive rather than mutually
 2 subversive' (1995: 136; cf. Bellamy, 2007). Constitutionalism is thus equated with
 3 liberalism (Ionescu, 1988).

4 In Central and Eastern European constitutions, the liberal, legal-constitutionalist
 5 view has evidently played a prominent role since the 1980s. Perhaps the most
 6 conspicuous example is the Hungarian Constitution, which, even if formally still
 7 grounded in the old, communist constitution, is widely held to express a liberal,
 8 legal-constitutionalist outlook. The negative, limiting dimension is importantly
 9 underpinned by a well-entrenched mechanism of judicial review by the
 10 Constitutional Court. The latter has an exceptionally wide mandate (Körösenyi,
 11 1999: 164), and, particularly in the 1990s, has interpreted its role in terms of the
 12 active safeguarding of constitutional principles and the Hungarian *Rechtsstaat*.
 13 Another peculiar example of a liberal, negative constitutional outlook is the
 14 explicit, but rather tardy, attempt to strengthen the liberal, limiting dimension by
 15 means of the amendment of the Romanian 1991 Constitution in 2003 – in the form
 16 of an explicit reference to both the separation of powers and the supremacy of
 17 constitutional law in articles 1 (4) and (5) (cf. Carp and Stanomir, 2008: 4–5).

18 A further primary emphasis in any liberal conception – next to the political-
 19 institutional aspect – is on the incorporation of a catalogue of inviolable individual
 20 rights and liberties in order to protect the individual citizen from unlimited and
 21 arbitrary interference of the state in individuals' lives. This is often, even if not
 22 always, concomitant with the idea of fundamental human rights, basic civic and
 23 political rights, and the clear delineation of a private sphere. In terms of a hierarchy
 24 of rights, this means that civil rights are normally deemed primary in liberal
 25 constitutionalism, while political rights and limited, constitutionally constrained
 26 government are derivative in the sense that, primarily, they serve to guarantee civil
 27 rights (Rosenfeld, 2006: 32). Seen this way, politics has an 'essentially negative
 28 role' in guaranteeing a private sphere (Rosenfeld, 2006: 33; cf. Barber, 2006). This
 29 also means that adherents of liberal constitutionalism watch social (and cultural)
 30 rights with suspicion, because they deem them an unwarranted legitimation for
 31 inappropriate state interference in private lives. It can therefore be argued that the
 32 aspirational dimension, in terms of programmatic constitutional aims, is commonly
 33 distrusted by those with classical liberal views.

34 From the point of view of the normative dimension of a liberal constitution,
 35 the 'overriding values' are individual liberty and equality, which can be best
 36 guaranteed through formal rights (Rosenfeld, 2006: 28). In a legalist reading, the
 37 idea is that these values are to be protected by 'exceptional legal entrenchment'
 38 and the liberal constitution is to be regarded as a 'higher law' (Holmes, 1995: 134).
 39 In this regard, it can be argued that an important drive in liberal constitutionalism
 40 is to diminish the sphere of politics and protect a set of fundamental, natural
 41 values from the encroachment of politics (cf. Bellamy, 2007).³ As mentioned, this
 42

43 ³ This is evident, for instance, in the Hungarian and Romanian Constitutions (articles
 44 8(2) and 148(2) respectively).

1 protection is further strengthened through the mechanism of judicial review, which 1
 2 has indeed been prevalent in the constitutional changes in Central and Eastern 2
 3 Europe, particularly in the Hungarian case (most explicitly so during the Sólyom 3
 4 presidency). 4

5 The liberal view of constitutionalism would not normally endorse any kind of 5
 6 explicit symbolic dimension in terms of the articulation of a collective identity. 6
 7 This is related to the pluralist idea of state neutrality, in which cultural and 7
 8 religious matters are left to the individual, while the state takes the role of an 8
 9 impartial arbiter. State neutrality regarding religion is, for instance, expressed in 9
 10 article 60 (3) of the Hungarian Constitution. Also the Polish Constitution (despite 10
 11 other, identitarian tendencies) invokes such a notion in article 25: the state 'shall 11
 12 be impartial in matters of personal conviction, whether religious or philosophical, 12
 13 or in relation to outlooks on life, and shall ensure their freedom of expression 13
 14 with public life'.⁴ In a strict reading of state-church separation, the state's role 14
 15 in a liberal conception of constitutionalism is then ultimately a procedural, and 15
 16 therefore mostly non-substantive, one, in that its role is to protect and enforce 16
 17 individual rights. Any symbolic, identitarian dimension is deemed to be in tension 17
 18 with the liberal constitutional spirit (Ungureanu, 2007: 7, 9–10). 18

19 The formal-participatory dimension is expressed in individual participatory 19
 20 rights (voting rights) and through the division of powers that creates the possibility 20
 21 of control of political power by various institutions, and therefore the possibility 21
 22 of control of the executive by the legislature (Bellamy and Castiglione, 1997: 22
 23 598). Thus, liberal constitutionalism contains a limiting and negative dimension, 23
 24 even if the positive, participatory dimension is mostly about citizens' capacity to 24
 25 restrain state influence on the private sphere and to redeem their own interests 25
 26 (see Michelman, 1989: 451). In other words, the participatory dimension in liberal 26
 27 constitutionalism is more about the activation and reproduction of the constitutional 27
 28 order, and much less about substantive civic participation and its change. 28

29 30 *Communitarian Constitutionalism* 30

31
32 In a communitarian view of constitutions, there is evident attention to the 32
 33 symbolic dimension in general and the identitarian dimension in particular. This 33
 34 does not mean that the instrumental rationality of constitutions and a language 34
 35 of rights are necessarily secondary (contrary to Forst, who speaks of a 'relative 35
 36 neglect of constitutional safeguards', 2001: 358), but rather that such rationality 36
 37 is interpreted with regard to a particular collective entity or community. As Philip 37
 38 Selznick argued, '[c]ontextual thinking is not the enemy of ideas and principles; it 38
 39 is what makes them effective' (2002: 75). In most types of communitarianism, the 39

40
41
42 4 Sadurski notes that in the Polish case the notion of 'impartiality' is a compromise 41
 43 between secular and religious forces, appearing to indicate a less strict separation between 42
 44 state and church (2003: 14). Indeed, article 25(3) invokes 'the principle of cooperation for 43
 the individual and the common good'. 44

1 political dimension of constitutions is appreciated in that it fully acknowledges the 1
2 limitation of state power versus civil society, as well as rights and their limitative 2
3 import, even if the emphasis is on the specific, contextual interpretation of rights 3
4 and their expression of a distinct community. Communitarian constitutionalism 4
5 can then be understood as largely complementary to liberalism, even if it criticizes 5
6 liberal constitutionalism as having too much of an impoverished view of both the 6
7 individual and society. Communitarian constitutionalism is further complementary 7
8 in that it reminds liberalism of the importance of the common good and an 8
9 appreciation of the collective good shared by individuals (Selznick, 2006: 27). 9
10 In symbolic-identitarian terms, this means that the constitution is regarded as 10
11 reflecting (or being in need of reflecting) the pre-political entity of the community 11
12 and its innermost values and identity. In this regard, even if communitarian 12
13 views see the constitution as embodying a language of both universal rights and 13
14 particularist values, they will always see the former as embedded in the latter, 14
15 rather than the latter overriding the former, as in a 'priority of rights' understanding 15
16 of the polity (cf. Ungureanu, 2007: 4). Indeed, democracy is understood to be the 16
17 'rule of communal values' (Forst, 2001: 353). Communitarian constitutionalism is 17
18 then explicit about the constitution's integrative function and its symbolic nature, 18
19 that is, a constitution concerns the foundational expression of a community *qua* 19
20 sharing a common identity and its perceptions of the common good. In Weiler's 20
21 terms, a communitarian constitution will be explicit about its symbolic function 21
22 (2003: 55–56; cf. Ungureanu, 2007: 5) and will understand symbolism as an 22
23 essential part of the role of a constitution in democratic societies. 23
24 It is therefore not surprising that in the communitarian understanding of the 24
25 constitution, a foundational part is played by the definition of citizenship, that is, 25
26 who is part of the polity and on what grounds (cf. Walzer, 1983). Membership 26
27 defines who enjoys the full set of rights stipulated in the constitution and who can 27
28 participate fully in the political community. While a more universal understanding 28
29 of citizenship is equally grounded in the nation-state concept, in the communitarian 29
30 understanding of citizenship this often entails a more stringent, ethnic understanding 30
31 of membership of the nation. In universalistic, civic understandings being physically 31
32 part of a society would be the criterion (Preuss, 1995: 114–15; Rosenfeld, 1998a). 32
33 An interesting but ambivalent example of how a communitarian view can play a 33
34 role in definitions of citizenship is the Romanian case. In the 1991 Constitution, as 34
35 argued by Barbu (1999: 143), a dual conception of citizenship seemed to emerge: 35
36 a pre-political one based on ethnic identity and serving as the basis for popular 36
37 sovereignty; and a civic-political one, in which all those residing on the territory 37
38 enjoyed distinct rights and had distinct obligations. But by the time of the 2003 38
39 amendment, defenders of the latter dimension seemed to have gained in strength 39
40 (externally supported by the requirements for EU accession), which has since led 40
41 to an attenuation of the communitarian dimension. 41
42 As observed above, a communitarian outlook does not imply that individual 42
43 rights are of minor importance or that a bill of rights is of no significance. With 43
44 regard to national minorities, however, communitarian-based constitutions (at 44

1 least in polities that understand themselves as homogeneous) will give priority to 1
 2 the majority (cf. Rosenfeld, 1998b: 217–18). Such a constitutional endorsement of 2
 3 a community understood in homogeneous cultural terms – despite a prevalence of 3
 4 a liberal-legal language – can be found in a number of constitutions in Central and 4
 5 Eastern Europe.⁵ In some cases, including those of Hungary, Poland and Romania, 5
 6 this dimension also comprises a reference to diaspora communities, as part of a 6
 7 larger, communitarian understanding of citizenship. 7

8 With regard to its normative dimension, in the communitarian perception 8
 9 of the constitution the ‘community is paramount and *communal solidarity* the 9
 10 overriding value’ (Rosenfeld, 2006: 29). It is not so much the constitution itself 10
 11 that has foundational importance, but rather the pre-political values and history of 11
 12 the community, of which the constitution needs to be a faithful reflection. In a strict 12
 13 interpretation of the communitarian view, the constitution does not so much answer 13
 14 the question ‘Who are we?’ (cf. Sadurski, 2001), since the historical community 14
 15 already exists on a pre-political level, but makes the answer to this question visible 15
 16 in a codified, textual form. Regarding an ethic of identity and the communitarian 16
 17 quest for self-exploration and definition of the common good, communitarian 17
 18 constitutionalism ‘grants a foundational importance to the communal identity and 18
 19 the historical values of the community’ (Ungureanu, 2007: 3). 19

20 As should have become clear by now, in terms of participation, communitarian 20
 21 constitutionalism favours a politico-participatory dimension over a formal- 21
 22 participatory one (cf. Selznick, 2002). This is most evident in its perceptions of 22
 23 participation: first, as an expression of public autonomy and the responsibility of, or 23
 24 opportunity for, the individual to participate in the deliberation over and definition 24
 25 of the common good; and, second, with an emphasis on law as ‘responsive law’, 25
 26 that is, ‘the idea that law should be responsive to changing circumstances and 26
 27 the needs of the community’ (Selznick, 2006: 29). There is in this a focus on 27
 28 inclusion and deliberation over shared problems that calls for the participation 28
 29 of both majority and minorities (cf. Breslin, 2004: 151–52). But then again, the 29
 30 predilection for ‘democratic consensualism’ might involve rather strong pressures 30
 31 for conformity. This perception of law, and constitutionalism in particular, refutes 31
 32 the alleged neutrality and universality of the liberal arrangement, reflecting instead 32
 33 the idea that ‘law is more just when it springs from the character and condition 33
 34 of the people, and when it is administered with due regard for the integrity of 34
 35 institutions and the vitality of civil society’ (Selznick, 2006: 29). 35

36 Although the attention for identity and the ethical community is clearly 36
 37 predominant in communitarian constitutionalism, there is a recognition of the 37
 38 socio-material needs that may be critical for citizens to be able to participate in the 38
 39 political community and therefore to preserve the community as such (cf. Forst, 39
 40 2001: 359; Selznick, 1998). This commitment to substantive values can take the 40

41 _____ 41
 42 5 From a wider comparative angle, it should be noted that a similar communitarian 42
 43 outlook can be found, for instance, in the (unwritten) Israeli constitution, as well as in some 43
 44 forms in the German basic law (see Breslin, 2004, chapter 6). 44

1 form of references to social solidarity in constitutions. Breslin, for instance, detected 1
 2 such a communitarian dimension in, for instance, the 'mixed constitutionalism' of 2
 3 the German basic law. His argument was that such a communitarian dimension not 3
 4 only involves a certain cultural-historical understanding of an ethical community, 4
 5 but also social understandings of property and the promotion of the welfare and 5
 6 collective existence of citizens (Breslin, 2004: 197–201). He alluded equally to the 6
 7 mixed nature of Central and Eastern European constitutions, seeing in the latter a 7
 8 sensitivity to a socio-material dimension. However, it might be more accurate to 8
 9 relate this to a distinct socialist, rather than communitarian, heritage (see below).⁶ 9

10
 11 *Republican Constitutionalism* 11

12
 13 Republican constitutionalism prioritizes political participation and self- 13
 14 government. In this regard, the political, limiting dimension is variously 14
 15 interpreted in different strands of republican constitutionalism. In what could be 15
 16 called 'substantive' understandings of republican constitutionalism (cf. Bellamy, 16
 17 2007), a certain affinity between the republican aims of public autonomy and self- 17
 18 government and a liberal predilection for rights and the rule of law is presupposed, 18
 19 in the sense that the latter function as preconditions for the former (Bellamy, 19
 20 2007: 155; cf. Tomkins, 2005: 42–46). In this legalist-republican understanding 20
 21 of the constitution, the emphasis is on preventing the emergence of arbitrary rule 21
 22 and adequate safeguards for democracy. Such a legal reading of republicanism 22
 23 translates into a constitutional design that promotes the equal participation of all in 23
 24 public life and political rule, but that also contains an emphasis on the prevention 24
 25 of unlimited and arbitrary state interference by means of the division of powers, 25
 26 checks and balances. In this, it becomes clear that republican and liberal visions 26
 27 of constitutionalism (at least in some readings of the first) cannot always be neatly 27
 28 separated and are sometimes complementary (cf. Bellamy and Castiglione, 1997: 28
 29 596). 29

30 In other, more radical-democratic understandings of republican constitutionalism, 30
 31 the constitution is not so much considered the unalterable expression of pre- 31
 32 political, fundamental rights that are to function as ultimate safeguards, as it is 32
 33 the temporary outcome of a continuous constitutional 'conversation'. A distinct 33
 34 republican view of the role of the constitution is one that is conducive to reflection 34
 35 and deliberation about the nature of rights and the organization of the polity at 35
 36 large. In this, the role of 'constitutional politics' is explicitly allowed for. The 36
 37 constitution facilitates the ongoing quest for the identification of the set of rights 37
 38 and common good that best coincides with the political community. One way of 38
 39 formulating this is to perceive the constitution not as codifying the preconditions of 39
 40 democracy, but rather as a 'procedure for resolving disagreements about the nature 40
 41 41

42 ⁶ An example is the social dimension to property in the Hungarian Constitution: 42
 43 'Hungary has a market economy in which public and private property are to receive equal 43
 44 consideration and protection under the law' (art. 9). 44

1 and implications of democratic values in a way that assiduously and impartially 1
2 weighs the views and interests in dispute in a manner that accords them equal 2
3 concern and respect' (Bellamy, 2007: 4). 3
4 It can then be argued that republican constitutionalism, even if it overlaps and 4
5 adds to liberal constitutionalism in a number of ways, diverges from the latter in 5
6 that it, firstly, entertains a different substantive understanding of the status and role 6
7 of rights in the constitution and, secondly, values the role of constitutional politics, 7
8 which is, thirdly, related to a strong emphasis on active citizenship, participation 8
9 and deliberation as an intrinsic good to democracy. With regard to the first point, 9
10 the republican vision of rights is not, as in the liberal perception, based on the idea 10
11 of the constitution as a 'higher law' that enshrines already existing, pre-political 11
12 rights (as in natural law). Instead, it rather understands rights as the outcome of 12
13 a society-wide deliberation over and decision on the common good (Michelman, 13
14 1989: 445–46). In republicanism, rights are determined by the citizens of the 14
15 democratic community and form political resolutions to the problem of living 15
16 together. As Cass Sunstein explained, 'understandings that point to prepolitical or 16
17 natural rights are entirely foreign to republicanism, [and] the existence of realms 17
18 of private autonomy must be justified in public terms' (1987: 1551). 18
19 However, from a more critical and historical view, the republican project of 19
20 an ongoing democratic quest of self-exploration can be said potentially to entail 20
21 some pre-political presuppositions as to the nature of the political community, 21
22 that is, in terms of a national community with a related identity. In terms of 22
23 the identitarian dimension, it can be argued that the republican project of self- 23
24 government cannot function without a fairly homogeneous and homogenized 24
25 identity that is also reflected in its constitution. Less explicitly so than in 25
26 communitarian constitutionalism, in republican constitutionalism the singularity 26
27 of the members of the polity seems presupposed. The famous expression of this 27
28 homogeneity in the American Constitution is 'we, the people', a formulation that 28
29 has been repeated in different ways in other foundational documents. According 29
30 to Roderick MacDonald: 30
31
32 [S]ince the revolutionary period in Europe legal republicans have typically 32
33 understood the State as the political reflection of a single 'people'. Initially, 33
34 the reflected image was claimed to be that of a political community committed 34
35 to a particular form of citizenship and secular authority through a founding 35
36 constitutional document (2005: 4). 36
37
38 This can be reformulated as the idea that in classical republicanism there is a 38
39 tendency to favour a level of homogeneity of the polity in cultural terms – akin to 39
40 small communities – as the only environment in which civic virtues can flourish, 40
41 which makes it somewhat similar to communitarian views (Rosenfeld, 1998b: 41
42 218–19). But the identitarian dimension does not only or necessarily take an 42
43 exclusionary guise in republican constitutionalism. It should also be acknowledged 43
44 that the republican view of constitutionalism entails an idea of 'constitutional 44

1 patriotism', that is, the idea that – in contradistinction to pre-political views of 1
2 nationalism – the constitution is the object as well as the outcome of a shared 2
3 commitment to participation in public life, grounded in a kind of political and 3
4 cultural 'republican patriotism' or public ethics (Viroli, 1999: 86, 90). 4
5 The normative dimension in republican constitutionalism is less extensive or 5
6 present than in liberal legalism, in that the republican 'overriding value' consists 6
7 of an absolute endorsement of deliberative self-government (Rosenfeld, 2006: 7
8 28–29). This means that in the republican view (at least in some of its readings), 8
9 while the constitution needs to safeguard this overriding value, it can itself be 9
10 the object of periodical modification in order to adapt the constitution to shifts 10
11 or changes in the political will of the polity. Republicanism favours, in this, what 11
12 Ackerman called 'constitutional politics' or what Michelman labelled 'republican' 12
13 or 'jurisgenerative' politics. 13
14 It should be obvious by now that the participatory dimension of the republican 14
15 constitution is paramount and involves a politico-substantive dimension, 15
16 rather than a formal one. Regarding the role of active citizenship in republican 16
17 constitutionalism and clearly related to the emphasis on the autonomous rule- 17
18 setting by the citizens themselves in a republican polity, there is a strong emphasis 18
19 on the participatory component of citizenship (Buttle, 2001). In other words, the 19
20 enabling features of constitutions allow citizens to have influence on democratic 20
21 rule-making and the adjustment or revision of the constitutional framework. 21
22 Constitutions that are inspired by perceptions of democracy that value the public 22
23 autonomy of citizens allow for civic participation in democratic rule-making 23
24 (through participatory rights such as civil and political rights); value citizen input 24
25 in legislation by means of direct democracy (as in referenda); emphasize in some 25
26 cases the need for decentralization of the state administration in order to facilitate 26
27 local and regional forms of democratic government (cf. Rosenfeld, 2006: 32, n. 27
28 37); and provide for, at least in some readings of republicanism, relatively easy 28
29 amendment or modification of constitutions initiated by publicly emerging calls for 29
30 change (that is, facilitating the influence of democratic politics on the constitution). 30
31 The latter constitutional dimension might be taken as the most radical (cf. Tierney, 31
32 2009) and at the same time the most problematic in many constitutions. 32
33 In the three cases discussed most prominently here, civic constitutional politics 33
34 is limited by stringent constitutional rules. While in the Hungarian and Polish 34
35 cases, direct civic participation in constitutional politics is excluded, the Romanian 35
36 Constitution in the first instance facilitates civic initiative towards constitutional 36
37 revision. At the same time, however, the amendment procedure as such has 37
38 been made complex and substantially reduces possibilities for effective public 38
39 participation. Indeed, according to Arato, the Romanian Constitution's 'revision 39
40 rule is the most difficult in the region' (2000: 163; cf. Banciu, 2001: 404–5). But 40
41 the republican dimension does play some role in Central and Eastern European 41
42 constitutions. For instance, in terms of (local) self-government, references can 42
43 be found in various places in the Polish Constitution of 1997. In the preamble the 43
44 principle of subsidiarity is invoked, while in article 4(2) a reference is made to the 44

1 'direct exercise' of 'supreme power'. The Polish Constitution further refers to the 1
 2 decentralization of public power (article 15(1)) and local self-government (16(1,2)). 2
 3 In the Hungarian case, the 1997 amendment led to a certain constitutionalization 3
 4 of forms of direct democracy (Deszo and Bragyova, 2007: 70). 4

5 With regard to the aspirational dimension of constitutions, republican 5
 6 constitutionalism does not necessarily endorse programmatic statements or policy 6
 7 aims as part of the constitution. But in a derivative sense, it can be argued that on 7
 8 the basis of the republican ideal of independence (Richardson 2006), a republican 8
 9 constitution might involve an aspirational dimension in an attempt to guarantee 9
 10 citizens' capacity to act publicly. Sunstein argued that, '[f]or people to be able to 10
 11 act as citizens, and to be able to count themselves as such, they must have the kind 11
 12 of independence that such minimal protections [against starvation, homelessness 12
 13 and other extreme deprivation] ensure' (2001: 223). The constitutional call for state 13
 14 interference in order to attenuate a socio-economic distribution that is considered 14
 15 'too unequal' might then be justified in the context of the larger attachment to the 15
 16 ideal of self-government. 16

17 *Substantive or Positive Constitutionalism* 17

18 *Substantive or Positive Constitutionalism* 18
 19 19
 20 A fourth model of constitutionalism, a substantive, 'aspirational' or 'teleological' 20
 21 approach (Preuss, 1995), is related to what could be identified as an ethic of 21
 22 distributive justice and to a positive, interventionist view of the constitution. 22
 23 This perception of constitutionalism could also be labelled 'positive' or 23
 24 'welfarist constitutionalism' (Barber, 2003; 2006). In contradistinction to liberal 24
 25 constitutionalism, the political dimension is not deemed the primary dimension 25
 26 in positive constitutionalism, but is rather understood as instrumental to the 26
 27 predominant, positive purpose of the constitution, that is, the furtherance of the 27
 28 public interest. The limiting function of constitutions, in terms of the protection 28
 29 of citizens against arbitrary government as well as against third parties on the 29
 30 basis of fundamental rights, is deemed important; but it is secondary to the 'first 30
 31 and stronger concern' of the positive function of government in the name of the 31
 32 general welfare (Barber, 2006: 654, 657). In other words, limiting government 32
 33 is understood not only in a purely negative sense, that is, as preventing arbitrary 33
 34 interference into individual life paths, but also in positive terms, as a way of 34
 35 'keeping government focused on its proper objects' (Barber, 2006: 657). 35

36 In a related way, rights in substantive constitutionalism are not understood 36
 37 solely in negative terms, but rather in a positive way, as contributing to a social 37
 38 function and, in more general terms, as providing or securing particular positive 38
 39 ends (such as the enjoyment of particular goods). A narrower socio-economic 39
 40 reading of positive constitutionalism shows it to contain a predilection for social 40
 41 rights. Such a predilection can take two forms: a derivative one and a fundamental 41
 42 one (cf. Barber, 2003: 6–7). In a derivative reading, social rights are deemed 42
 43 important in order to achieve some other goal (participation in the market or civic 43
 44 participation in politics, perhaps). In this way, social rights are complementary 44

1 to more traditional civic and political rights (as in the Marshallian reading), but 1
2 have an importance of their own too, in that they ensure the effective enjoyment of 2
3 traditional rights. Social rights thus constitute entitlements on the state that allow 3
4 citizens to benefit fully from the guarantees and 'enablers' provided through 4
5 civic and political rights. Rosenfeld expressed this relationship as follows: 5
6
7 [I]f political rights are understood not only as rights of participation, but as rights 7
8 of *effective* participation, then their realization may depend on the vindication 8
9 of some social and economic rights. Indeed, only an educated electorate that 9
10 is adequately housed and fed can fully and effectively exercise its right to 10
11 participate in its polity's process of self-determination (2006: 12). 11
12
13 When, however, social rights are endorsed in a more fundamental sense, they 13
14 are taken as furthering substantive ends that go beyond the mere guarantee of 14
15 minimal social protection, the safeguarding of democratic citizenship, or antidotes 15
16 for market failure. In other words, positive constitutionalism entails a 'pro- 16
17 government aspect that emphasizes public purposes over private incentives and 17
18 suggests broader constitutional responsibilities than aggregating private interests' 18
19 (Barber, 2006: 666). The market, in this reading, is taken as a means for achieving 19
20 general welfare (Barber, 2003: 9). 20
21 It can then be argued that constitutions emphasizing the positive goal of 21
22 distributive justice will tend to have a 'programmed' nature; they might contain 22
23 a rather elaborate catalogue of objectives for the state to follow as well as the 23
24 guarantee of a set of social rights. In its ideal-typical form, substantive, welfarist 24
25 constitutionalism promotes a democratic project of social aims, social justice 25
26 and explicit social rights in the name of public welfare and social democracy 26
27 as a distinct political form. Substantive ends outlined in a constitution need 27
28 not, however, concern only social protection; they can, more in general, include 28
29 ends like 'national security, freedom of conscience, domestic tranquility, and the 29
30 people's economic wellbeing' (Barber, 2003: 1). 30
31 In normative terms, positive constitutions place ideas of social solidarity and 31
32 equality on the highest level, and strongly emphasize the integrative function 32
33 of constitutions. In other words, substantive constitutionalism is less about the 33
34 democratic, participatory dimension that relates to popular sovereignty, and 34
35 more about prioritizing an integrative function that 'contains the reasons why 35
36 the citizens fulfil duties of solidarity towards each other' (Preuss, 1995: 100). 36
37 Substantive constitutions endorse a view of social justice that flows from the idea 37
38 that constitutions 'embody the goals, aspirations, values and basic beliefs which 38
39 that society's members commonly hold and which bind them together' (Preuss, 39
40 1995: 99). The legal codification of the idea of solidarity reflects this idea and 40
41 attempts to strengthen such solidarity and social cohesion. The state is entrusted 41
42 with an extensive role of intervention in society in the name of redistribution, 42
43 social justice and participation. From a more fundamental, welfarist point of view, 43
44 44

1 public interest and general welfare are taken as the highest goals in themselves 1
2 (Barber, 2006). 2

3 In terms of an identitarian dimension, the prioritization of the public interest 3
4 and social solidarity is difficult to imagine without some idea of commonality of 4
5 the members of the political community, that is, some notion of shared identity on 5
6 which a form of social trust can be based. In this regard, it has often been argued 6
7 that, in order to uphold a sufficient level of solidarity among the members of a 7
8 polity, they need to identify each other as equals to some extent. A substantive, 8
9 socialist view of constitutionalism tends to presuppose rather than generate an idea 9
10 of commonality, and in this it can be said to show affinities with communitarian 10
11 notions of the pre-political community. The symbolic dimension in substantive 11
12 constitutionalism tends to be mostly of an implicit kind, in that it is the substantive 12
13 dimension of social solidarity that is evident (in particular through social rights 13
14 arrangements) rather than the invocation of a distinct political community and its 14
15 defining characteristics. 15

16 It is of course well known that Central and Eastern European constitutions 16
17 reflect an aspirational, positive dimension quite expansively. For instance, the 17
18 Hungarian Constitution states in its preamble that the transition to a constitutional 18
19 state is also about the ‘conversion to a socially alert market economy’, while it 19
20 acknowledges the socio-democratic nature of Hungarian democracy. According 20
21 to Gábor Juhász, while during communism social rights took the form of a kind 21
22 of favour from the state, ‘amendments to the Constitution in 1989 established 22
23 a much stronger right to social security’ (2007: 396). Also in the Polish case, a 23
24 reference to ‘social justice’ in the prominent article 2 of the Constitution invokes a 24
25 ‘constitutional anchor’ for possible redistributive policies. The article reads: ‘The 25
26 Republic of Poland shall be a democratic state ruled by law and implementing the 26
27 principles of social justice.’ The Polish Constitution further invokes an ethic of 27
28 redistributive justice in article 20, which contains the notion of a ‘social market 28
29 economy’. The Romanian Constitution refers to a social market economy in article 29
30 1(3): ‘Romania is a democratic and social State.’ Indeed, this definition of the 30
31 Romanian state as a social state, as observed by Cristian Ionescu, is ‘much more 31
32 an aspiration than a reality’ (2007: 280). Also Ioan Stanomir argues that the social 32
33 state creates a ‘horizon of expectations’ (Carp and Stanomir, 2008: 196). Be that 33
34 as it may, in the normative terms of the discussion of substantive constitutionalism 34
35 found in Chapter 5 of this volume, the formal aim is to implement policies that 35
36 enhance social equality and solidarity. 36

37 In participatory terms, it can be argued that there is relatively little appreciation 37
38 for politico-substantive forms of participation in positive constitutionalism. There 38
39 is both an emphasis on government and administration and a constitutionalized 39
40 endorsement of public interest, but citizens tend to be perceived as ‘clients’ of 40
41 the welfare state (Murphy, 1990; Rosenfeld, 2006: 34, n. 41). In this, the focus is 41
42 more on citizens’ formal enjoyment of positive rights than on their civic input in 42
43 defining such rights. 43
44 44

1 Concluding Remarks	1
2	2
3 This chapter has avoided looking at constitutional democracy from a legalist or	3
4 monist perspective. More specifically, its argument has been that constitutions	4
5 cannot be read solely in a negative, limiting way, as much of the legal, politico-	5
6 theoretical and politico-scientific literature does. Rather, two meta-languages of	6
7 constitutions can be identified – an instrumental language and a symbolic one – that	7
8 can be further deconstructed into a range of constitutional dimensions. This shows	8
9 that the negative, limiting dimension, which is predominantly political, constitutes	9
10 one, admittedly crucial, dimension among a variety of dimensions of constitutions.	10
11 The variety of symbolic dimensions are often ignored in contemporary 'legal-	11
12 constitutional' views. But by invoking this complex variety of constitutional	12
13 dimensions, it also becomes clear that constitutional texts are bound to contain	13
14 various tensions, which are often not easy to efface or avoid, and which will either	14
15 remain latent or become the explicit object of controversies.	15
16 Such an argument becomes even more evident when one takes into account	16
17 the plurality of 'constitutionalisms' that can be identified on a theoretical level,	17
18 but that, equally, have found a certain sedimentation in the constitutional outlooks	18
19 of relevant actors as well as in the constitutional texts themselves. In this chapter,	19
20 this sedimentation was exemplified by references to the Hungarian, Polish and	20
21 Romanian Constitutions as well as to a number of others. The examples show that	21
22 various constitutionalist readings can be related to singular constitutional texts,	22
23 even if, admittedly, much more comparative, socio-legal research needs to be done	23
24 to further specify differences and commonalities, and the particular weight of these.	24
25 But it seems fair to argue that a singular, legalist view of constitutionalism, present	25
26 particularly in popular views of 'judiciary democracy', is hard to uphold. In a	26
27 similar way, the idea that a constitution can be regarded as an 'act of completion'	27
28 distinct from the political community as such, the meaning of which is relatively	28
29 uncontestable and untouchable, is problematic.	29
30 What further emerges from the discussion of multiple 'constitutionalisms',	30
31 along with their different emphases on and hierarchization of constitutional	31
32 dimensions, is that constitutionalism itself is 'essentially contestable' and cannot,	32
33 in this, be seen as a neutral discourse impenetrable by politico-ethical viewpoints	33
34 or discourses. In effect, all identifiable ideal-typical sketches of constitutionalism	34
35 contain clear-cut politico-ethical views of constitutional democracy.	35
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