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## **Constitutional reform in Europe and recourse to the people**

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Constitutionalism in Europe is in turmoil. This is not only because of the European integration project and its constitutional claims, but also due to important changes in the form and role of constitutions in European societies (as well as globally). One could, with Francesco Palermo, speak of an age of ‘constitutional acceleration’, that is the ‘intensification of recourse to [the instrument of] revision in order to update the constitution’ (Palermo 2007: 15). Ginsburg and Dixon, more in general, relate the prominence of constitutional change and constitution-making in recent times to the ‘third wave of democracy’ that commenced in the 1970s, and which included Southern Europe and later Central and Eastern Europe, but in a way, in particular from the 1990s onwards, also touched the constitutional design of ‘established’ democratic states (Ginsburg and Dixon 2011: 3). Constitutional dynamics are thus not restricted to new democracies in the making, but also involve established democratic regimes. What interests me here in particular is how the ‘trend over this period has been one of increasing public participation in the constitutional design process’ (Blount 2011: 38).

In this chapter, I will look at one recent tendency in constitutional politics, that is, an (possibly increased) emphasis on a recourse to popular participation in the reforming of constitutional orders. There are now quite some examples in contemporary Europe where constitutional revision and amendment is orchestrated in such a way as to include the voice of the people. A transversal set of arguments in these projects of constitutional revision is that they provide an explicit response to civic discontent, structural democratic deficiencies, and that reforms can only be successful if citizens and/or civil society are able to participate. In recent years, examples of such projects include Iceland, Ireland, the Netherlands, Romania, and not least, the Convention on the Future of Europe. And also in the UK currently proposals are being made to set up a Constitutional Convention that is to include citizens, while two decades of constitutional reform included allusions to democratizing the constitutional order.

The tendency towards recourse to the people is curious in a number of ways. First of all, arguably the main tendency in European constitutional orders since 1945 has been a turn away from the people, towards a form of ‘juristocracy’ in what has been called ‘new constitutionalism’ (Hirschl 2004; Stone Sweet 2008). Second, in a related way, while the most significant constitutional changes in Europe, related to 1989, were in important respects about the re-establishment of self-government, in most if not all cases of Central and Eastern European constitutionalism, the emphasis has been on legalistic, rigid and entrenched constitutions in which there is an only relatively weak attention to civic democratic engagement (see Blokker 2013). Third, the emergence of constitutionalism beyond the state – arguably most developed in the European context – appears to involve an unbalanced emphasis on legalistic understandings of constitutionalism, which

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emphasizes aspects of the rule of law and a regulative dimension, but generally complicates relations with democracy and self-government. In this regard, many scholars appear to ‘theorize away’ the problem of democratic legitimation in post-national regimes (cf. Dobner 2007: 141-2; Besson 2006; see, for examples, Teubner 2012; Kumm 2006).

While democratic involvement in constitutional politics appears then as an uphill struggle, it seems at the same time difficult to deny that some form of counter-tendency to ‘apopular constitutionalism’ or ‘counter-constitutionalism’ is increasingly visible (the term is Richard Albert’s, Albert 2008). This counter-trend is related to democratic innovation and legitimacy as well as the contestation of purely technocratic and legalistic governance, and seems prominent in a number of constitutional reform projects in Europe. In the paper I want to, first, discuss different degrees of sensibility in constitutional theory to forms of inclusion and civic participation in constitutional politics, concisely engaging with the dimensions of constitutional subjectivity and forms of collective autonomy. I will search for these dimensions in what I will call legal, political, popular, and democratic understandings of constitutionalism. In a second step, I will turn to a number of recent examples of citizen involvement in constitution-making in the cases of Iceland, Ireland, and Romania. Finally, I will conclude that the recourse to the people is often more apparent than real, and that only in few instances civic participation in constitutional politics lives up to the requirements set by normative democratic theory.

### ***Constitutionalism and the people: a theoretical inquiry***

#### *Legal constitutionalism*

On the legal-constitutionalist view, the constitution is a legal document that can be largely understood 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 so the idea of an included set of entrenched fundamental rights - provide 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).

A good example of legal constitutionalism is Ronald Dworkin’s substantive view of constitutional democracy. In the words of Frank Michelman, for Dworkin democracy does not mean that ‘the people of a country ought to decide for themselves all of the politically decidable matters about which they have good moral and material reason to care’ (Michelman 1999: 6), but rather means ‘government subject to conditions – we might call these “democratic conditions” – of equal status for all citizens’ (Dworkin 1996: 17). 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), ‘right rights’ (Michelman 1999), or ‘best answers’ (Bellamy 2007), that all can rationally agree to, and which identify what democracy ultimately is about.<sup>2</sup> Indeed, Ronald Dworkin’s concern is with ‘what democracy, accurately understood, really is’ (Dworkin 1996: 15). For Dworkin, constitutionalism means a ‘system that establishes individual legal rights that the

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<sup>2</sup> One of the most well-known formulations of such an idea is that of an ‘overlapping consensus’ (Rawls 1993; cf. Bellamy 2007: 101-2).

dominant legislature does not have the power to override or compromise' (Dworkin 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' (Dworkin 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.

The relevant constitutional subject in Dworkin's substantive view, that is, those that are able to make their interpretation of the constitution and its principles count, is ultimately restricted to Supreme Court judges. While general debate about constitutional principles includes 'professional lawyers but also the public at large in newspapers and popular journals' (Dworkin 2006: 156), the 'Supreme Court has the last word' (Dworkin 2006: 156). According to Dworkin, it should ultimately be higher judges that identify and interpret key constitutional principles, as they are more reliable than political majorities in doing so (Bellamy 2007: 3). One could interpret this as that 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'.<sup>3</sup> According to Dworkin, '[i]n 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' (Dworkin 1996: 30). Thus Dworkin finds beneficial that the 'public participates in discussion', but lays the final 'adjudicative responsibility with the judges, whose decision is final, barring a constitutional amendment, until it is changed by a later judicial decision' (Dworkin 1995: 10). Citizens' expression of their views on constitutional principles is essential in this view, but since citizens (or politicians) are not able to transcend a political, particularistic understanding, judges need to guide the way to a 'clean', purely moral understanding of these principles. As Michelman puts it, 'you have to admit the practical possibility that an independent judiciary will tend to get closer to the truth than would be the great body of the people or their elected tribunes in legislatures' (Michelman 1999: 19, 23).

In the substantive view, self-government does not mean that citizens should themselves be engaging in making their own rules, including the fundamental rules, but self-government rather means that persons are able to identify with laws made through a majoritarian process, while judicial review secures the rational preconditions for this process (Michelman 1999: 31). In other words, self-government is supposedly not about the actual authorship of the laws, including the laws of lawmaking (Michelman 1999: 24-5), but rather about the realization and recognition by any individual citizen that formal politics maintains 'by its actions' 'due respect for [one's] own moral and intellectual singularity, and for the interest [one] accordingly take[s] in both the contents of collective outcomes and [one's] capacities to influence them' (Michelman 1999: 30-31). As Dworkin argues 'we must ask ... what rights must be reserved to an individual citizen if submitting to the will of the majority of his fellow citizens in other circumstances is to be consistent with his dignity' (Dworkin 2006: 146). Self-government is not the realization

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<sup>3</sup> Judith Shklar, cited in: Goldoni 2012: 929.

that a citizen can directly participate in majority rule. It is rather, as Michelman understands it, a 'feeling of satisfaction or even pride that you take in lawmaking that is done by an organization that treats you and your independence and your interests with the kind of respect that is due to a member' (Michelman 1999: 32; cf. Waldron 2006: 1375). Thus, on Dworkin's 'partnership view', 'constitutional rights protecting an individual's freedom to make ethical choices for himself are not compromises of democracy but rather attempts to guarantee it' (Dworkin 2006: 146).

The emerging view of the constitution is a relatively 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 & Castiglione 2000: 174-175).

### *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, Waldron 1999 and Bellamy 2007). 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, politics, 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' (Bellamy 2007: 91; emphasis added). The relation between democracy and constitutionalism in political constitutionalism is based not on the need for 'pre-commitments' or extra-political guarantees and the idea of superior judgmental 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 judgments (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 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. In this, however, political constitutionalism risks being less inclusive and participatory as it claims to be on the basis of its full recognition of pluralism. As Marco Goldoni has rightly pointed out, the view of constitutional subjectivity or agency in political constitutionalism is reduced to the parliament (Goldoni 2014). Political constitutionalists hold that it is the legislature that is ultimately best able to represent (always anew) the irreducibly diversity of viewpoints in society. Indeed, 'so long as a system of equal votes, majority rule and party competition – however interpreted – offers a plausible system for giving citizens an equal say in the ways collective arrangements are organised – including those of the democratic process – then a self-constituting democratic constitution that avoids dominating through arbitrary rule will have been secured' (Bellamy 2007: 220-21). Existing, representative arrangements are thus preferred also as means of constitution-making, while extra-institutional actors and politics are looked at with a certain skepticism: constitutions are structuring, enabling devices in that 'it is a matter of what a constitution affirmatively makes possible out of what would otherwise be the loose and lurching and dangerous politics of the streets' (Waldron 2009: 23).

Political constitutionalism's main critique is on the insistence on norm entrenchment and judicial review in legal constitutionalism. The argument is – rightly from a democratic viewpoint – that constitutional arrangements should not be imposed on a democratic society, but should rather be the result of reflections of '*the people whose society is to be governed by these arrangements*' (Waldron 2009: 11: emphasis in original). Constitutions institutionalize 'legislatures, large institutions, manned (peopled) in a certain way and invested with public authority so that they can act credibly in the name of us all' (Waldron 2009: 20). The way self-government is perceived is, however, not entirely unrelated to Dworkin's view in that it is not so much the actual possibility of civic engagement in actual (constitutional) politics that is stressed, but rather the realization that representative institutions offer the best arrangements for the preservation of individual dignity (in the case of Dworkin) or respect for different viewpoints (Waldron).

The political-constitutional approach takes a more flexible view of the constitution than the legal-constitutional one, but at the same time understands the primary constitutional subject largely as the parliament, as the most adequate forum for debate and decision on foundational rules and principles.

### *Popular constitutionalism*

A set of constitutional theories that endorses more extensive popular engagement with constitutional politics than provided either by legal or by political constitutionalism is that of popular constitutionalism. A very influential theory in this branch is Bruce Ackerman's idea of dualistic democracy. In Ackerman's reading of American constitutional history, politics can be understood in a dual sense, that is, as consisting of normal politics (normality) and constitutional politics (exceptional circumstances). In periods of normal politics, it is political officials that engage in politics, constrained by the 'constitutional

forms imposed during rare periods of constitutional creativity’, while ordinary citizens do not or hardly engage in political matters. It is in periods of exceptional constitutional politics that ‘mobilizational forms of mass engagement... dominate the constitutional stage’ (Ackerman 1991: 171).

In popular constitutionalism, the constitutional role of citizens is not reduced to the receiving end, as in legal constitutionalism, nor to a purely indirect role through parliamentary prerogatives, as in political constitutionalism. Rather, actual citizens’ initiatives are relevant for changing the existing constitutional architecture, even if only rarely so, that is, ‘under well-defined historical situations’ (Ackerman 1991: 171). In Ackerman’s view, the citizens’ role is not always available but occurs in specific ‘constitutional moments’ in which a ‘heightened constitutional consciousness’ informs a high level of civic mobilization in favour of constitutional change (Ackerman 1988: 163). Such moments often involve some sort of crisis: ‘[t]he events catalyzing a dramatic rise of political consciousness have been as various as the country’s history – war, economic catastrophe, or urgent appeals to the national conscience’ (Ackerman 1995: 66). The role of citizens comes through in such moments in which normal politics gives way to higher lawmaking, but such moments can only be successful if a civic ‘movement earns the constitutional authority to claim that, in contrast to countless ideological factions competing in normal politics, its reform agenda should be placed at the center of public scrutiny’ (Ackerman 1991: 266).

In Ackerman’s dualistic approach the role of the citizen is, however, largely confined to one of support and mobilization. Ackerman’s discussion of the constitutional convention is one of an illegal vehicle in which ‘informal and unauthorized propositions’ emerge, but which is ultimately grounded in a popularly elected convention which is made up of revolutionary elites (Ackerman 1991: 174). The public has a supportive rather than a pro-active function in this constitutional theory. In his ‘neo-Federalism’, Ackerman suggests the working of a ‘life cycle of a successful movement in constitutional politics’ that begins with ‘sufficiently deep and broad support amongst the private citizenry’, but then moves onto the proposal stage (which brings in the established political parties or the president), mobilized popular deliberation (in the appropriate political institutions), and legal codification (with an upfront role for the Supreme Court) (Ackerman 1991: 266-67). Ackerman’s idea of a two-track system includes a higher lawmaking track that ‘imposes specially rigorous tests upon the political movements that hope to earn the heightened sense of democratic legitimacy awarded to spokespersons for the People’ (Ackerman 1995: 65). In other words, much of the civic input is reduced to – in an early phase - support for an initiative, while in later stages the constitutional project, driven by ‘revolutionary elites’, becomes entirely dependent on ‘institutional trial’ or ‘testing’ (Ackerman 1991: 267; 1995: 65). As Ackerman claims

Only after the innovators carried their initiative repeatedly in deliberative assemblies and popular elections has our Constitution finally awarded them the solemn authority to revise the foundations of the polity in the name of We the People (Ackerman 1995: 64).

And elsewhere Ackerman states, ‘it is no easy thing for a transformative political movement to maintain control over the presidency, Congress and the Court for a decade or two to elaborate and consolidate a fundamental change of our constitutional principles’ (Ackerman 2014: 5). In this, no separate democratic procedures or channels for citizen participation are suggested (as in, for instance, in a civic initiative for amendment or the

deliberative forum of a civic constitutional assembly).<sup>4</sup> Civic involvement seems for a good part subjected to the endorsement of a cause by revolutionary elites as well as the goodwill of formal political and institutional representatives to take up such a cause. Indeed, ‘parties have played a strategic role in almost all important exercises in constitutional politics’ (Ackerman 1991: 282), while constitutional politics also ‘very heavily relies on the good judgment of courts’ (284). As Sanford Levinson puts it, ‘Ackerman’s principal interest is in decisionmaking by political leaders (and, necessarily, elites) who make decisions in the name of the People rather than in such decisionmaking by the People themselves’ (Levinson 2014: 4). Indeed, the ‘“popular sovereigns” may be like a Greek chorus or Shakespearean groundlings, but the focus is on the actions of the kings and their courts’ (Levinson 2014: 9).

What emerges from this brief discussion of popular constitutionalism is a view in which the People matters, but at the same time performs a largely supportive role for elites who identify the People’s voice in ‘revolutionary’ projects of constitutional revision. While Ackerman importantly distinguishes between government and the people, the constitutional theory mostly describes the importance of popular support for constitutional revision projects, without which such projects would appear as privatistic assaults on the constitution (Colon-Rios 2009: 17).

#### *Democratic constitutionalism*

In a final theoretical interpretation of constitutionalism I wish 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. On 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’ (Colon-Rios 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. Whereas the critique of political constitutionalism, and to some extent that of popular constitutionalism, tends to remain confined to a ‘test of reality’ of the existing constitutional order, largely reproducing its ontology, democratic constitutionalism’s critique addresses the foundations of the existing constitutional paradigm.

Democratic constitutionalism understands modern constitutional orders as having significant problems with democratic legitimacy, in that a constitutional meta-dimension overshadows a democratic meta-dimension. A democratic constitutional approach attempts to critically analyze unbalanced constitutional forms and orders as well as to indicate ways of re-balancing them. What is significant is that democratic constitutionalism points to practices beyond existing institutions and sees as relevant a ‘multiplicity of sites’ where citizens can engage in democratic practice (Tully 2008: 98).

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<sup>4</sup> Ackerman does admit to the contemporary importance of rethinking American constitutional revision practice in the light of instruments of direct democracy, not least the referendum (see Ackerman 1991: 356-7, fn 12). Recently, Sanford Levinson has however pointed to Ackerman’s ‘faith in a fundamentally anti-democratic constitution’, while paying little attention to state constitutions that often allow for referenda and popular initiatives (Levinson 2014: 6-8).

Democratic constitutionalists question the legal-constitutionalist understanding of constitutional law as 'impermeable to the passions of mass politics', that is, it can only be 'changed and interpreted by those occupying positions of power' (Colon-Rios 2013: 200-208). They argue that such a restricted view of the relation between the citizenry and constituent power 'can only be compatible with an extremely limited conception of democracy' (Colon-Rios 2013: 208-15). The suggestion is that 'ordinary citizens' lack of opportunities to re-create 'their' fundamental laws, to engage in acts of democratic re-constitution, puts into question the democratic legitimacy of the constitutional regimes under which they live' (Colon-Rios 2013: 223-30). A strong call in democratic constitutionalism is in favour of the inclusion of citizens among the constitutional subjects so that they can 'propose, deliberate and decide upon important constitutional transformations through extraordinary mechanisms that work independently of a constitution's ordinary amendment procedure' (Colon-Rios 2013: 223-37).

A radical democratic view of constitutional democracy claims that democracy would need to entail a more direct and substantive participation of citizens in the democratic process, including constitutional politics. Democratic or civic constitutionalism shares with political constitutionalism an emphasis on the open-endedness of the democratic process, and the ultimately open-ended nature of rights. But for civic constitutionalism this means 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', civic 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.

Civic constitutionalism departs significantly from political or republican constitutionalism in that it judges representative constitutional politics as insufficient. Indeed, according to the latter, the 'democratic arrangements found in the world's established working democracies are sufficient to satisfy the requirements of republican non-domination' (Bellamy 2007: 260). Instead, civic 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).

In democratic or civic constitutionalism democratic politics is understood in its radical sense as the 'rule of people extended to all matters ... including the creation and recreation of the fundamental laws' (Colon-Rios 2009: 23). Here, the democratic dimension of constitutional democratic legitimation clearly has the overhand, even if the constitutional ordering type of legitimacy is not abandoned. To this effect, civic constitutionalism is potentially open to a wide range of pluralistic influences.



### *National cases of conventions*

Let us now turn to a number of cases of involvement of citizens in projects of constitutional change and constitution-making in Europe. Three cases – those of Iceland, Ireland, and Romania – indicate important shifts away from a rigid, legalistic view of constitutionalism, with its insistence on expert or elite-based constitutional politics, and in some cases also from political constitutionalism, with its emphasis on the pre-eminent parliamentary role in constitutional politics. The cases relate to forms of constitutional reform in which both legality and legitimacy are continuous, with an emphasis on established rules of revision (even if these are in practice sometimes abandoned), in contrast to more radical, rupturing forms of change in cases of for instance transitions from authoritarian to democratic systems (see Arato 2012). All three cases include some forms of more incisive civic engagement, as imagined in popular or, more directly, in democratic constitutionalism. In this, the cases might serve as important empirical ‘testing’ of the theories explored above.

#### *Iceland*

The Icelandic case is unique in that it is the only instance of a ‘consolidated’ modern democracy in which a full-blown constitution-making process was (co-)initiated and executed by (formally) ordinary citizens. In this regard, Icelandic constitutional politics comes closest – even if not in all respects as we will see below – to the democratic constitutional idea. The mobilization of the citizens in the wake of the severe economic crisis that resulted from a financial collapse at the end of 2008 could be understood in Ackermanian terms as having led to ‘universal alarm’. The economic crisis led to a ‘heightened constitutional consciousness’ of the citizenry, which through widespread protest made a variety of claims, including radical constitutional change. In Iceland, the constitutional subjects or rather protagonists were clearly the people in some form: a multitude gathered in frequent protest actions, in particular in Reykjavik's main square in front of the Icelandic parliament, Althingi; civic associations that promoted radical constitutional change, such as the Democratic Movement and the Citizens’ Movement, which emerged in the midst of the crisis; individual political entrepreneurs such as Hordur Torfason, a musician who sang protest songs outside of parliament on a daily basis from 2008 onwards (cf. Bater 2011). Baldvin Bergsson has observed that a veritable ‘social movement’ emerged from the protests against the implications of the financial crisis in 2008-9, even if the actual initiatives to constitutional change were coming from distinctive individuals and civic associations such as the Constitutional Society (Bergsson 2014). The call for change was not merely one of ‘constitutional engineering’ or ‘maintenance’ but included invocations of radical change in the form of an entirely novel constitution.<sup>5</sup> For instance, the Citizens’ Movement argued in 2009 as follows:

We must make radical democratic reform to ensure that the events of the last months [the economic and political crises, pb] will not repeat themselves... We must build from the bottom up. To ensure this is possible we need to instigate a constitutional [assembly]. A constitutional [assembly], if done correctly, would initiate a discourse on what kind of

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<sup>5</sup> This needs to be seen not only in the light of calls for a moral regeneration of Icelandic society in the context of the financial crisis, but also in the context of the 1944 Constitution that had never been significantly changed and is very similar to the 1874 Icelandic Constitution. The latter was a copy of the Danish Constitution and reflected Iceland's suzerain status with regard to the Danish Crown. In other words, the 1944 Constitution can only with great difficulty be regarded as an expression of Icelandic collective autonomy.

society we want, what values we wish to uphold and how we want to distribute power to those that seek to represent us in government. Post collapse, the build up and investigation needs to be put on a certain path – we believe a *constitutional [assembly]* is that path (Citizens' Movement 2009; emphasis added).

But citizens and social movements were not only the initiators of critique and change. Citizens played a constitutive part throughout the attempt at constitution-making that was set up in the wake of the protests. It should be noted here that according to some observers, calls for constitutional change had emerged at various times in recent decades, therefore some fertile political ground for radical constitutional change might be said to have been available when the financial crisis erupted at the end of 2008. When the government collapsed as a result of the crisis, the new prime minister became Jóhanna Sigurðardóttir, who had been endorsing constitutional change on various occasions since at least 1994. Both societal and political calls for constitutional change came together in the idea of setting up a Constitutional Council, to be made up of 25 elected citizens and with a drafting mandate, and with the explicit exclusion of political actors.<sup>6</sup>

The citizen-based Constitutional Council was effectively elected in November 2010, even if these elections were not unproblematic. The elections for the Council were nullified by the Supreme Court in January 2011, because of supposed procedural inconsistencies, but the Council was subsequently appointed by Althingi (the Parliament). The Council worked on a new draft Constitution for four months in 2011, and delivered a draft by July of that year. The drafting process in itself was unusually open to civic input and commenting, not least by means of the usage of new media (a website, Facebook, Twitter), and the Council indeed appears to have been taking into account individual comments by citizens in the deliberations. From the delivery of the draft onwards, however, the process of constitution-making changed rather radically, in that it was now Althingi that was supposed to deliberate the draft and decide on its future. Althingi has been very slow in actually engaging with the citizens' draft (between 2011 and 2013 very little deliberation took place), for which one reason might be a certain alienation between the political forces and the 'bottom-up' citizen-driven project of constitutional change. The citizens were consulted one more time in a referendum with six questions on the constitutional draft in October 2012, and with a relative positive result for the project, but the citizens' draft was ultimately left largely undiscussed until the elections of April 2013 saw the electoral victory of largely hostile political parties, the conservative Independent and Progressive Parties. Even if the civic-constitutional project has not resulted in tangible, comprehensive changes, currently (summer 2015), the governing political parties are suggesting a new referendum on constitutional changes on some of the most significant issues (Bergsson 2015), indicating that some constitutional reform is hard to avoid in the wake of the project of constitutional renewal.

One international expert report on the Icelandic constitutional text identified 'significant input from the public' and judged its civic dimension as being 'at the cutting-edge of ensuring public participation in ongoing governance' (Elkins *et al.* 2012: 11). The constitutional drafting was evaluated as 'tremendously innovative and participatory', and the final result 'as one of the most inclusive in history and well-above the mean of contemporary constitutions'. All this indicates a significant democratic-constitutional dimension in the Icelandic experiment. At the same time, if we consider Ackerman's

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<sup>6</sup> Citizen deliberation was also part of a Constitutional Gathering, a deliberation day with some 1,000 randomly selected citizens, held in November 2010.

observations, it might be true that, since the civic draft has ultimately not survived the test of the political institutions, the verification of the voice of the People means that it has not spoken on this occasion.

### *Ireland*

The Icelandic case indicates important affinities with the theory of democratic constitutionalism, and might have to some extent influenced the constitutional revision process that emerged in Ireland in roughly the same period. The Irish Constitutional Convention that operated from December 2012 until February 2014 was about a partial revision of the Irish Constitution and was not purely citizen-driven, but the process did contain significant innovations regarding citizen participation in constitutional revision.

The set-up of a Constitutional Convention in Ireland in December 2012 probably found its origins in the Oireachtas (National Parliament) Joint Committee of the Constitution in late 2009/early 2010. The parliamentary Committee proposed the establishment of a Citizens' Assembly along the lines of the British Columbia Citizens' Assembly as well as the Dutch *Burgerforum* of 2006 (Farrell 2013). The Assembly was understood as enabling electoral reform on a 'non-partisan basis', while the establishment of such an 'Assembly would facilitate *greater popular engagement with the democratic institutions* as well as enhancing the *legitimacy* of any proposed reform' (Oireachtas 2010: 15; emphasis added). This idea of an assembly or Constitutional Convention was equally endorsed by oppositional political parties and explicitly justified through references to citizen involvement. The centrist party Fine Gael, one of the political promoters of constitutional change in the wake of the economic meltdown, argued in its manifesto 'New Politics' that 'Ireland's broken political system is at the heart of its economic collapse' and that '[i]n any Republic the people are supposed to be supreme' but 'Ireland today is a Republic in name only' (Fine Gael 2011: 3). The manifesto argued to the involvement of citizens in radical change and that a 'Citizens Forum' was to 'accept submissions from all groups and members of the public on possible changes to the institutional articles of the constitution, and encourage as wide ranging a public debate as possible on these changes' (2011: 4). Similar observations were made in a statement of the Labour Party:

It is time for a fundamental review of our constitution. It is essential that the people be involved in the process. Labour proposes a constitutional convention, a coming together of all strands of Irish society to redraw our Constitution. The constitutional convention would include experts and specialists, but would *also include individual citizens, randomly chosen* to serve in much the same way that we choose juries (Labour 2011; emphasis added).

The Constitutional Convention that was set up did involve citizens in new and innovative ways. Of particular interest is how citizens were selected and how the constitutional revision process was set up (cf. Farrell *et al.* 2014). The 66 citizens that were selected to participate in the Convention were selected randomly, with the help of a survey company, which selected citizens on the basis of age, gender, region, education and socio-economic status (Farrell *et al.* 2014: 3). Other members of the Convention were 33 elected politicians, selected by various political parties. Also experts – mostly political scientists – were involved in the roles of mediators and as advisors. The Convention process consisted of deliberative meetings roughly every month since January 2013, which would last for a weekend, with the members of the Convention voting on final recommendations. The mode of operation of the meetings was deliberative, and based on

debates around circular tables with politicians and citizens members. In some ways following the spirit of the Philadelphia Convention, the Irish Convention went beyond its explicit mandate and adopted 38 recommendations of reform, including proposals for the reform of the lower house (Dáil) and the introduction of citizen initiatives.

Initially, the Irish Convention has been met by social and political indifference and critique, including regarding its merely consultative nature. But there are indications that the process has been more positively understood over time. Upon its completion in early 2014, the Convention generally received much more positive reviews (Suteu 2015: 267). In terms of the Convention's citizen involvement and deliberative nature, it corresponds to some of the thrust of democratic constitutionalism and an emphasis on the need for complementary, direct-democratic instruments in modern democracies in crisis. While the purely consultative nature deradicalised the Irish experiment from a democratic-constitutional point of view, the process did result in some real impact. In 2014, four referenda were promised on its basis. On 22 May 2015, a first referendum was held on two issues, same-sex marriage and the reduction of the age of eligibility to run for president. The first issue, same-sex marriage was approved by a large majority of the voters (62 %), whereas the second was rejected (by 73 %).

In contrast to the Icelandic experience, the Irish experience seems to have been a largely top-down, elite-driven experiment, remaining an exercise that is granted from above rather than initiated from below. But while it is ultimately the political institutions that execute the 'test' of the popular voice as the government maintained final say over reforms (cf. Suteu 2015: 268), in the Irish context this seems to have meant that it is a voice that cannot be (fully) ignored.

### *Romania*

The Romanian case of citizen involvement involves a not insignificant attempt at wider public involvement in constitutional debate and politics, but also an unclear and very limited impact of such involvement on actual constitutional reform. A recent attempt at constitutional reform, starting in 2013, was not the direct result of a wider societal call for change, but rather the reaction to continuous political infighting between institutions. In this, the Romanian case of constitutional politics can be taken as closer to a political-constitutional approach, but with an important twist. The recent Romanian attempts at reform follow less a pluralistic, parliamentary approach and more a majoritarian, governmentally driven process.

In the wake of a major constitutional conflict between president Băsescu and the incumbent government of Victor Ponta in the summer of 2012, the Social Liberal Union (USL) of Victor Ponta won a large majority in the December 2012 elections. The supermajority made the prospective of significant constitutional revision possible, as the Romanian amendment rule stipulates that amendments need to be approved by two-third majorities in both the Houses of Parliament (art. 151(1)). One of the main objectives of the project of constitutional reform – which was effectively started in February 2013 – stemmed from the insight that the intrinsic power struggle in the Romanian democratic system, in particular related to the cohabitation between President and PM, and in distinct ways facilitated by the Constitution's vagueness over presidential prerogatives (Tănăşescu 2008), is unlikely to subside. In its 2013-16 program, the Ponta Government has stated that:

The aim of constitutional revision consists in *(re)gaining the trust of citizens* in state institutions through guaranteeing a predictable and stable conduct of institutionalized power. The stake of this step consists in strengthening Romanian democracy. The fundamental law would need to clarify the responsibilities and relations between the main public authorities and, very importantly, to achieve the integrative function. [The] Constitution and its values should become the binding element uniting the Romanian citizens with the state. The electoral legislation cannot be absent from the process of rethinking the institutional architecture. The harmonization of the legislative acts in the field and their integration in the Electoral Code, expression of a consensual approach at the level of political class and the consultation with the civil society is one of the major objectives of the Government.<sup>7</sup>

Ponta argued that the main objective was to build 'constitutional peace'. His articulation of the formal objective was that '[i]t is the obligation of enlightened minds and sensible people to build a long-lasting peace, that is to find those mechanisms that make sure that in a period hopefully as long as possible we will no longer have conflicts among the state powers, political, constitutional conflicts likely to disrupt the smooth running of the society'.<sup>8</sup>

Constitutional reform was thus primarily driven by internal political concerns and initiated by part of the political establishment. The substance of much of the reform entailed fairly modest modifications of the constitutional order, but the *process* of revision appeared to point to a promising and innovative – civic-constitutional - way of enhancing a democratic-constitutional culture in Romania. Rather ample space was given to public debate and pro-democracy movements, based on an earlier experience with a so-called *Forum Constitutional* in 2002. The two Forums consisted of relatively wide public debate on constitutional reform, organized with the Chamber of Deputies. Public debates were held in various cities throughout Romania, the Fora gave the possibility to submit proposals for constitutional revision on the Forum's website, and to discuss publicly constitutional issues on an online forum. The final outcome consisted of a report, edited by the president of the Forum, and presented to the parliamentary commission.

One of the main forces behind the *Forum Constitutional* was a pro-democracy movement – *Asociația Pro Democrația* (APD). The APD has in the past consistently contributed an idea of 'grass roots' constitutional politics, by on various occasions making claims towards a more participatory understanding of constitutional democracy and attempting to raise civic awareness of constitutional matters (Andreescu 2011: 33). In the wake of an earlier presidential and constitutional crisis in 2007, the APD had started a public discussion on constitutional reform by the means of various public debates in different Romanian cities. The APD self-professed aim was to increase awareness of citizens around the issue of constitutional reform, not least with regard to the choice citizens need to make in the constitutionally arranged for referendum in case of amendment:

Since the future reform will influence the consolidation of Romanian democracy for a prolonged period of time, it is necessary that the possible implications of the modifications are understood by the largest possible number of citizens. In contrast to the revision of 2003, which was made under pressure of an external imperative, the debate on a future change of the Constitution needs to take into account both the relations between institutions as well as relations between the state and society, and relations between various groups in society. At the same time, given the fact that

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<sup>7</sup> Adapted from [http://www.gov.ro/programme-for-government-2013-2016\\_12a105576.html](http://www.gov.ro/programme-for-government-2013-2016_12a105576.html). Emphasis added.

<sup>8</sup> See <http://www.agerpres.ro/english/index.php/english-news/item/194055-PM-Ponta-Building-longterm-constitutional-peace-is-our-obligation.html>.

every change of the Constitution is to be adopted by referendum, it is necessary to hold a public debate on the Constitutional revision to inform citizens on the issues they will vote on. What is more, the future modification of the Constitution offers a chance to hold an open debate which will help to enrich the political culture of the Romanian citizens, an essential aspect of the consolidation of democracy (APD 2008: 6).

APD had been one of the driving forces in the organization of both a 2002 and a 2013 *Forum Constitutional*, as an 'institutionalised structure of dialogue with civil society regarding the revision of the constitution'.<sup>9</sup> In 2002, as in 2013, the intention was to provide a public deliberative forum in parallel to the official Romanian Commission for the Revision of the Constitution.

But while the Constitutional Forum as a civic, inclusive precursor to the parliamentary revision process appeared procedurally speaking promising, in retrospective it seems to have been largely inconsequential. Even if the president of the Constitutional Forum, Cristian Pîrvulescu, argued in the wake of the Forum that it would not have been advisable for the bicameral Commission for the Revision of the Constitution to disregard the recommendations of the Forum,<sup>10</sup> the Commission has been criticized for doing exactly that. Nine NGOs accused the Commission for the Revision of the Constitution of a lack of transparency and as being unclear about whether civic propositions were taken into account or not. The organizations asked the Commission to offer clear arguments for the rejection of specific proposals and to engage in debate for a reasonable amount of time.<sup>11</sup> Also the parliamentary revision process itself was criticized. Bogdan Dima, involved in a civic initiative called The Commission for a New Constitution, expressed strong doubts about what he calls the 'anti-revision' of the Constitution, which he thought consists in an 'exclusively political game, generated by personal political relations of some of the key leaders of the last years'.<sup>12</sup> Finally, a constitutional expert, Ioan Stanomir, regarded the current revision process as 'lacking in vision and characterized by amateurism'.<sup>13</sup>

After the initial period of public debate, which included the Constitutional Forum as well as two meetings with the Council of Europe's Venice Commission, the Ponta government internally produced a constitutional revision draft in late 2013, which was submitted to the Constitutional Court<sup>14</sup> and the Venice Commission in February 2014. The Constitutional Court raised several issues of constitutionality in its review of the amendment proposal, finding problems of unconstitutionality with the proposed changes to 26 articles of the 2003 Constitution.<sup>15</sup> And according to the Venice Commission, it was regrettable that 'following some initial positive steps indicating an option for an open and transparent approach, the revision process was lead in a less inclusive manner and did not entirely benefit of the timeframe available and the potential input of the various circles having shown interest, in the Romanian society, for the revision of the Constitution'

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<sup>9</sup> Forum Constituțional (2002) *Forumul Constituțional. Raport final*, p. 11, available at: [http://www.forumconstitucional.ro/raport\\_final.pdf](http://www.forumconstitucional.ro/raport_final.pdf).

<sup>10</sup> See <http://www.rri.ro/art.shtml?lang=1&sec=5&art=389435>.

<sup>11</sup> See <http://m.romanalibea.ro/stire-304031.html>.

<sup>12</sup> See <http://bogdandima.ro/?p=1123>.

<sup>13</sup> See <http://www.ziare.com/politica/constitutie/stanomir-amatorismul-defineste-revizuirea-constitutiei-1239834>.

<sup>14</sup> As indicated by article 146a of the Constitution, the Constitutional Court is to review the constitutionality of the amendments proposed.

<sup>15</sup> See <http://www.mediafax.ro/politic/analiza-comisia-de-revizuire-a-constitutiei-isi-reia-activitatea-la-un-an-dupa-respingerea-legii-la-curtea-constitutionala-13947715>.

(Venice Commission 2014: 32). Since the constitutional review of the Constitutional Court in February 2014, the process of constitutional reform has slowed down considerably (also because of retreat of the National Liberal Party from the government coalition), being further complicated by the election of a new president, Klaus Iohannis, belonging to the political opposition, in November 2014. Be that as it may, Iohannis has on various moments argued in favour of a necessity of modernizing the Constitution. In March 2015, a new parliamentary constitutional reform commission was installed,<sup>16</sup> whereas the attempt of the government is to finalize the process by the end of 2015.

The Romanian experience with constitutional politics seems one that could be defined as a problematic variant of political constitutionalism, that is, populist-majoritarian constitution-making. Key characteristics are a process that is government-driven, non-consensual and has populist overtones (cf. Arato and Tombus 2013). A process of constitutional revision that was initiated in a promising and inclusive way (as appreciated by the Venice Commission), subsequently turned into a non-transparent, elite-driven exercise in an attempt to impose a partial, non-consensual view by means of a supermajority onto society. This majoritarian avenue seems now however blocked (April 2014), in that the supermajority has turned into a reduced majority.

### **Concluding remarks**

All three cases discussed include significant citizen input and innovative forms of constitutional politics. But none of the cases ultimately embraces the radical inclusiveness of democratic constitutionalism fully. The Icelandic case comes closest, but the design of the process ultimately appears disattached from the main political institutions, and therefore runs into forms of filibustering and outright rejection. The Romanian case includes a promising attempt at widespread and open public debate, but without significant impact on actual constitutional revision, and with a complete abandonment of publicity and inclusiveness later on in the process. The more moderate experience of Ireland seems the most successful in that structural citizen inclusion has been realized in an innovative way, while the process can boast relatively significant results. The ad hoc Irish experience lacks however a robust, institutionalized form of civic influence on constitution-making.

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<sup>16</sup> See <http://www.mediafax.ro/politic/parlamentul-a-modificat-comisia-de-revizuire-a-constitutiei-hasotti-l-a-inlocuit-pe-crin-antonescu-13919315>.

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