CHAPTER THREE

IN SEARCH OF A NEW SEMANTICS: DISCURSIVE RESOURCES OF POSTCOMMUNIST CONSTITUTIONALISM

The symbolic year of 1989 compromised Stalinist constitutionalism and also placed in doubt the unspoken social contract. It initiated processes of democratization and liberalization as well as new identity formation for the former communist societies. The next step in the transformation would be the unification of these societies with the European Union. Thus, after 1989, all elements of legitimacy for the communist constitution and all the components of its semantics lost validity. This encompassed the Marxist-Leninist theory of historical development, of the state, and of law; it also encompassed socialist rights to subsistence granted by the state as the foundation of a negative constitutional consensus, and, finally, due to EU accession, the appeals to nationalism typical of the final stage of the communist system's functioning. Currently, the big question concerns the very conceptualization of difference and the semantic steering for the further self-observation, self-description, and identity formation of postcommunist societies. Thus at stake is the semantics of the new postcommunist constitution on the one hand, and the formation of the constitutional community united by a shared understanding of constitutional principles on the other.

Pondering these issues, one cannot avoid reflecting that postcommunist societies in East Central Europe find themselves in a difficult, even precarious position when compared to the formation of liberal-democratic constitutionalism two centuries ago in Europe and the United States, or even sixty years ago in West Germany after the Second World War. At that time powerful constitutional semantics provided doctrines of natural law (either in the form of a metaphysical, empirical, or philosophical edifice) as a deep justification for the constitutions as well as a deep explanation of the fundamental difference between dictatorial and liberal-democratic constitutionalism. In the case of the first American and European constitutions, this meant the difference between the liberal society composed of free and equal citizens, and a feudal or even enlightened absolutist society. In the case of German
constitutionalism after World War II, this signified a dramatic difference between a political system based on the idea that every person possesses human dignity as an inalienable quality, and the system that led to the Shoah. Currently – also for sociological reasons – references to natural law neither provide constitutions with generally binding meanings, nor legitimization. Who now possesses the authority to explain and justify constitutional content?

In late modernity, in an age of globalization, close international cooperation, and the simultaneous differentiation of political and social systems, the burning issue is a comprehensive semantics which would help the new democracies overcome the ambiguities of the profound change, to cope with the complexities of the modern world, and to preserve something which distinguishes these “new democracies” from their political environment as well as, above all, from their anti-democratic past.

In the remainder of this chapter I will debate the most important resources, the most crucial elements of social capital which influenced the postcommunist transformation and have the potential to provide constitutionalism in ECE with semantic steering. In other words, I will argue that there were important reservoirs of novel ideas which developed within the societies of “new Europe” and were decisive in the shaping of their distinctive character. According to this argument, the peaceful revolutions in East Central Europe and the subsequent transformations do not merely comprise a link in a long chain of modern revolutions; they had their distinct resources, and they all entered the process of change with their unique capital, their true assets in the form of novel ideas about constitutionalism, politics, civic society, and the rule of law.

However, the question appears as to whether those novel ideas and true assets are strong enough to compete with social and political liabilities such as legacies of the immediate, communist past as well as far earlier legacies of deep social divisions and exclusions, characteristic of this part of Europe. These assets and liabilities contribute to the recent constitutional history of ECE, to the history of struggles for civic freedoms and liberties, but also to the history of struggles for justice that represent the most direct context for the new constitutions in this region. I will open my argument with a short discussion of the recent constitutional history, then turn to some fresh ideas regarding society, politics, and law whose authors were former dissidents of East Central European civil society proper. Finally, I will discuss the liabilities with