

BOOK REVIEWS

Grażyna Skąpska, *From “Civil Society” to “Europe”. A Sociological Study on Constitutionalism after Communism.*

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Last fifteen years witnessed the rise of a new transdisciplinary field in the social sciences: societal constitutionalism. Perpetuated by diverse theoretical sources, notably by the macrosociological writings of an American sociologist, late David Sciulli (Sciulli 1986; Sciulli 1988; Sciulli 1992), this research area attracts scholars from a number of disciplines, including law, political science and sociology. Following Sciulli, they define their object of interest as the social conditions, processes and institutions that contribute to the successful establishment of a social order. In this vein, “constitutionalism” is given a brand new meaning. Not only does this term denote a body of black-letter law enshrined in written constitutions, a set of legal doctrines, a corpus of adjudicative decisions, and a “legal culture,” but above all a web of social values, attitudes, meanings and actions of professionals and lay persons, which contributes to the distribution of power, effectiveness of social control and possibilities of attaining social integration.

Although not limited to law, this way of thinking corresponds with the long-standing agenda of sociology of law, aiming to challenge the trivialities of the juridical self-understanding by explicating the social embeddedness or indeed the social nature of law. Societal constitutionalism thus suggests that a social order requires that legal and non-legal conditions operate in concert. For that reason it finds a particular recognition in the debates on private, non-state or international constitutions (See contributions in Joerges, Sand, and Teubner 2004 and subsequent literature). In this way, societal constitutionalism takes the socio-legal agenda to the extremes, because it aims to refute juridical thinking in a field, where it is expressed most strongly: constitutional law. It questions the belief that social life can successfully be regulated by an arbitrary design, if only the regulation makes proper use of the highly complex and extremely abstract language of constitutional law.

The book under review, *From "Civil Society" to "Europe". A Sociological Study on Constitutionalism after Communism*, written by a recognized Polish sociologist, Grażyna Skąpska, and published in 2011 by Brill in a series "International Studies in Sociology and Social Anthropology" edited by Sciulli, rests on a very similar set of assumptions. Even if Skąpska refers to the original formulations in societal constitutionalism only rarely, favouring theoretical eclecticism, her work could serve as an exemplary application of the concept. As she puts it in the extensive Introduction, "In light of my deepest convictions, the entrenchment of constitutions in extra-legal, social norms and expectations—but especially in discursive practices—and its recurrent contribution to the activation of such norms, expectations and shared meanings is of primary importance for democratic consolidation" (Skąpska 2011, 15). Moreover, similarly to societal constitutionalism literature, *From "Civil Society"...* clearly has not only descriptive or analytical aims, but also critical ones.

The specific object of Skąpska's inquiry is re-enactment of the democratic, western-style constitutionalism in Eastern and Central Europe (abbreviated ECE, comprising Poland, Slovakia, Hungary and Czech Republic), post 1989 political changes. The author is interested in how well the opportunities for constitutional reforms created by past events and existing meanings, are utilised in the building of a new order and how good does the institutional framework of newly established constitutions fit with the expectations of the populace. Thus, apart from being akin to the societal constitutionalism thinking, *From "Civil Society"...* corresponds to the interests expressed in the vast literatures on systemic transition, civil society and the rule of law. It is also a continuation of author's many earlier publications.

The volume opens with said Introduction, explaining objectives of the book, and a Prologue, focusing on the round table talks of late 1980s as the important factor explaining the nature and dynamics of constitutional changes in the region. The main body of the volume is divided into five chapters. The first one, entitled "A Constitution as a theory of society within society" presents main theoretical assumptions that drive the argument. The second, "Stalinist constitutionalism" describes doctrines and practices of ECE's pre-1989 constitutionalism. The third chapter is devoted to the "discursive resources of postcommunist constitutionalism," most importantly popular beliefs and attitudes towards emerging constitutional order but also concepts disseminated by dissidents under former system as well as new and persistent legal doctrines of courts and the academia. The fourth and fifth chapter deal with the most acute legacies of the past: the perceived need and apparent impossibility to reconcile with human rights violations, and the chaotic property relations resulting from the communist nationalizations and subsequent reprivatization. The book concludes with "Thirteen theses on postcommunist constitutionalism," which summarize the author's findings and observations scattered throughout the book.

In line with her previous works, Skąpska's evaluation of the constitutional developments in the ECE is predominantly critical. In her eyes, the systemic transformation in the region did not lead to the establishment of satisfying social constitutions, with negative perceptions of power, lack of public virtues and insufficient civic engagement plaguing the political lives of the four studied societies. Skąpska associates this

outcome with the standing discrepancies between meanings, symbols and axiological expectations of the general public and the on-going institutionalised constitutional practices, such as political actions and ideologies as well as legal doctrines. Thus, in her opinion, the expected feedback loop between extralegal factors and actual practices did not yet emerge.

According to the author, this is due to the apparent inability of at least some of ECE countries to introduce a successful “Leitdifference,” i.e. to symbolically detach themselves from past meanings and orient their discursive practices by a new semantics. According to Skąpska, accomplishment of such a task is the key element of the establishment of a new constitutional order, regardless of advances in procedural and organisational spheres. Only then can the constitution achieve the status of a “theory of society in society” (Skąpska 2011: 72ff), i.e. reflect the actual practices and perpetuate them. In the event of a failure in this respect, old ways are likely to reproduce, leading to such dysfunctionalities as corruption, distrust and authoritarianism. This, according to Skąpska, is the case of the ECE. Conversely, she associates the chances of a successful constitution-building in ECE with the activity of the civil society, in the spirit of its past glorious moments, as well as the institutionalisation of semantics of “living within the truth,” as postulated by dissident intellectuals of the region (Skąpska 2011: 131).

This general diagnosis is further differentiated with respect to specific issues. The author is particularly critical towards Hungarian and Polish relatively lenient approach to decommunization and lustration and appears to be more favourable of Czech Republic’s resolutions in this area. Also the consensual round-table method of transition, excluding the possibility of a “transitional justice period” due to the early establishment of the rule of law protections, is perceived by her as a factor impairing the effectiveness and perception of the newly established constitutional order (Skąpska 2011: 165–170). This evaluation is reinforced by the author’s adherence to the belief, that round table talks broke off with the hitherto solidarity between dissident intellectuals and the masses.

Mutatis mutandis, similar observations pertain to property relations and privatisation, described in a rather bleak tone. According to Skąpska, both reprivatization of the property taken by communist governments and privatization of national assets, did, with a few exceptions, take place in a murky atmosphere of tacit networks, political corruption, nepotism and unjust exploitation of resources captured by the members of the former nomenklatura even before communism had collapsed (Skąpska 2011: 217). All this does not facilitate the establishment of a property system perceived as just but rather contributes to the symbolic distancing of the societies at large from new constitutional practices. Moreover, in the conditions of rule of law, this point of departure may lead to the reproduction of economic injustices, clientelism and political capitalism.

Although this brief reconstruction of the main points raised in the book does not do justice to the complexity of its theoretical argument, it should leave no doubt as to reviewed volume’s ambitious objectives and broad subject scope. Not only does it delve into social aspects of constitutionalism, and aims to present the developments

diachronically as to reflect their historical dynamics, but also attempts to deliver a comparative material relating to all four ECE countries.

The argument is most convincing when the author raises theoretical points—distanced and abstract, rather than empirical and illustrative. Of particular interest is the analysis of the differences between consensual transition in the ECE and the revolutionary method of social change in Western Europe, as epitomized by the French revolution. Theoretically inclined sociologists will surely benefit from the confrontation of many theoretical approaches to constitutionalism, performed by the author in the course of her deliberations. By the same token, constitutional lawyers will have the opportunity to confront their established ways of thinking with a broader, sociologically-informed perspective. On the other hand, a non-ECE reader will find in the book detailed descriptions of the processes taking place in the region.

Still, ambitious as it is, the book suffers from a number of deficits that make the argument less convincing than it could possibly be. First and foremost, although systematic and structured, it lacks an analytical edge. Little stress is put on explaining basic terms, playing a pivotal role in the argument. This pertains to such central notions as “postcommunism,” “totalitarianism” and (to a lesser extent) eponymous “constitutionalism.”

It must be pointed out that the notion “totalitarianism” (and its derivatives, such as “totalitarian constitutionalism”) as understood by Skąpska, deviates from the usual sense of the term, as established in the social sciences, including the cornerstone Friedrich-Brzeziński definition. In *From “Civil Society”*... this label is assigned to the realities as different as those of ECE countries in the 1950s and Poland and Hungary in the 1980s. Little linguistic differentiation is made as to particular periods in the history of the communist regimes, with distinct thaw periods and significant contrasts between individual countries. All this, even if gets a mention in the book, is described under the same label. As a consequence, the current state of societal constitutionalism in ECE is traced to a generalized vision of the past of these societies as “totalitarian,” and that despite author’s many efforts to demonstrate the historical nature of the transformations in the region.

Also the lack of a precise definition of what is meant by “postcommunism” does not facilitate the appreciation of author’s arguments. Used vaguely and without much regard for fine details and diverging realities of the ECE countries, the notion resembles Whorf’s “empty barrels.” It carries a significant load of meaning—which may or may not do justice to the realities of four societies at the span of two decades—but in the end remains unanalysed. Thus, despite declarations, continuous and changing nature of developments in the ECE finds no *semantic* reflection in the book. In particular, the possibilities and conditions of describing the four societies as *postcommunist* more than twenty years after the transition was initiated (or half the time they remained under the communist rule) are not discussed at all.

Second, many statements in the book clearly lack a convincing empirical basis or are even provided without any empirical reference at all. Also, more fine-grained and better documented arguments are to be expected in case of author’s homeland, Poland. This is visible in all of the empirically-oriented chapters. Many descriptions of

new property relations are rooted in author's previous research, but the conclusions and theoretical arguments go significantly beyond generalizations possible on such grounds. Similar point holds to the issue of human rights violations. Skąpska's certain claims in this respect are clearly not based on the empirical material she has at her disposal. Of course, it would be unfair to judge a predominantly theoretical book by the fact that it does not refer to empirical research, which is otherwise scarce or even (in certain areas) not available at all. Still, circumstantial evidence exists that could be utilised, and the absence of sufficient empirical grounds should urge the author to limit the scope of her claims, both descriptive and critical.

Two final remarks pertain to two secondary aspects of the book, albeit important for the general impression a reader can get. Firstly, it cannot escape notice that the quality of the editorial work by Brill publishing house leaves much to be desired. Although still readable, the book suffers from numerous technical errors—such as typos, missing punctuation marks and inconsistent quotation styles—that should not draw the eye of a reader in a volume priced at almost 100€.

Secondly, even if this matter is indeed rarely discussed in academic book reviews, a few words should be devoted to the reviewed volume's unusual cover. It features an edited photograph of the justices of the Polish Constitutional Tribunal, whose faces are blurred beyond recognition in a manner known from television crime reports. Image so modified carries a very powerful symbolic message, one that goes beyond an even highly critical stance towards the current state of constitutionalism in ECE. Even if Skąpska's argument is to a large degree critical to intellectual roots and outcomes of the constitution-building processes in the ECE, she certainly does not go as far as the cover photo suggests.

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