

## REVIEWS AND ANNOTATIONS

**Schambeck, Herbert. *Beiträge zum Verfassungs und Europarecht, Herausgegeben von Andreas Janko, Boguslaw Banaszak, Damiano Nocilla, Walter Schmitt Glaeser, Michal Tomášek. Wien: Verlag Österreich, 2014, 461 p.***

I. The book under review represent collected studies, essays, articles, papers and lectures of world - known austrian constitutionalist, political scientist and philosopher Herbert Schambeck.

Prof. Herbert Schambeck was born 1934 in Baden bei Wien. In 1959 Herbert Schambeck went to University of Viena as assistant of prof. Dr. Adolf Merkl. After that prof. Herbert Schambeck moved to University of Innsbrucks as the professor of Political science, Constitutional law and Administrative Law. In 1967 went prof. Herbert Schambeck as visiting professor to University of Notre Dame, Indiana, USA. After that prof. Schambeck moved to University of Linz as professor of Public Law, Political Science and Legal philosophy (1967–2002). From 1969 to 1977 prof. H. Schambeck was member of Federal Council (Bundesrat), from 1975 to 1997 President of the Federal Council (Bundesrat). Dr. h.c. Santiago de Chile, Washington D.C., Prague, Wroclaw, Kiev, Sofia. Member of the Academy - Padua, Madrid, Düsseldorf, Mailand, Vatikan and Rome.

The editors of the book have been very succesful in constructing the systematic division of the book. The result of editors activity is very consistent both substantively and stylistically. Collected studies, essays, articles etc. are written in a clear language.

Undoubtedly the book fills many gaps which existed on the book market as far as the literature from the fields of Constitutional law, Comparative law, Philosophy of law and European law is concerned.

II. The reviewed book consists of preface (written by editors and devoted to the scientific personality of prof. Herbert Schambeck), four parts and twenty six chapters.

Given such a numerous worthful chapters on the one hand and space limitations provided for this review on the other, this review contains (with some exceptions) general remarks without broad reference to single part of the book.

Part I introduces the Concepts of the Constitution, Politics, Democracy, Constitutional Law, Religion and History, Rule of Law, Social State and the development of the Austrian Constitutional law.

III. For scientists from the field of Comparative Constitutional Law is extremely interesting and valuable part two.

The second part of the book under review realize deep scientific analyzes of the topical questions of the Constitutionalism and Constitutional Law namely as far as Austrian and German constitutions are concerned. Excellent scientific comparative analysis represent chapter nine “Zur Bedeutung der parlamentarischen Zweikammersystems - eine vergleichende Analyse des Bikameralismus” (pp. 147–164) and chapter ten “Der Bundespräsident und die Bundesregierung im Verfassungsvergleich Deutschland und Österreich” (pp. 146–177).

IV. 1. The third part deals with many important questions of the european unification and European law - i. e. basic principles of the european Constitutionalism, constitutional law of EU member states, the idea and problems of the European Constitution, the significance and basic aspects of the Treaty of Lisbon, European Union and direct democracy, European Union and the development of basic rights, the origin, contents, system and typology of the rights, freedoms and principles set out in the Charter of fundamental rights of the European Union, the road to social Europe and many other important questions of the unifying Europe.

IV. 2. In the center of our interest (conformably to the scientific qualification of the reviewer) will be chapter 11 and chapter 14. The title of chapter 11 is: “Verfassungsgerichtsbarkeit und Gesetzgebung in Österreich”. I highly appreciate the definitions of constitutional judicial review and constitutional law given by professor Herbert Schambeck in chapter 11: “Verfassungsgerichtsbarkeit ist das Messen der durch Gesetz rechtsrelevant gewordenen Politik an dem Masstab des Verfassungsrechtes. Das Verfassungsrecht ist die normative Grundordnung des Staates, sie ist, wie Adolf Merkl

bemerkte, “kodifizierte Politik”. Das Verfassungsrecht ist ein Ausdruck der Selbstzähmung in der Politik eines demokratischen Staates; die Verfassungsgerichtsbarkeit steht in ihrem Dienste. Sie setzt sich für die Einheit der Staatsordnung ein. Da der Staat im Rechtssinn von der Kontinuität der Verfassungsrechtsordnung abhängt, erfüllt in dieser Sicht die Verfassungsgerichtsbarkeit eine für den Bestand des Staates und seiner Demokratie entscheidende Aufgabe” (pp. 179–180).

IV. 3. Definitions and characteristics of the role of the Constitution, Constitutional law and constitutional judicial review represents excellent stimulus for reviewer s comparative considerations. Any constitutional judiciary, whatever its concrete form, depends on the type and character of the country’s legal and constitutional culture.<sup>1</sup> It forms an integral part of a democratic constitutional system and is one of the most important guarantees of the basic constitutional rights and freedoms.

I consider Kelsen’s concept of the constitutional court as an organ lifting the Constitution to the level of *ius strictissimum atque eminenter cogens* as still valid. It is symptomatic that in the CSFR the constitutional act on the constitutional court was adopted in close connection with the Charter of Fundamental Rights and Freedoms in the year 1991 as the first fully democratic constitutional acts after the velvet revolution.

IV. 4. In democratic legal cultures we can discern, generally speaking, three types of constitutional judiciary. They are: First, a general, diffuse constitutional judiciary. In its developed form we find the oldest model in the United States with its roots going back to the Privy Council of feudal England. This type of constitutional judiciary, identical in the US with the concept of “judicial review”, is implemented by all general courts and, in particular, by the US Supreme Court at which cases arrive by the most varied procedural routes, if they concern problems of federal constitutionality. Typical for this type is a single jurisdiction, that is, the subsequent incidental control of constitutionality.

The second type, which was developed only after the First World War, is a concentrated and specialized constitutional judiciary, established in the form of a special constitutional court endowed, as a rule, with multiple competences: Concrete, abstract, subsequent, preventive, incidental competence to deal with constitutional complaints, conflicts of competence, etc. The most typical representatives of this type include the Federal Republic of Germany, Austria and Italy.

The third type is the so-called hybrid type of constitutional judiciary in which the exercise of constitutional adjudication is entrusted to a special department or tribunal of the general supreme court. Switzerland is an exemple for this type, but it is known with certain modifications also in other countries. It is also widespread in countries which have absorbed continental European legal culture either entirely or partly.

For Czechoslovakia as a typical continental European country, it was natural to adopt the system of a concentrated and specialized constitutional judiciary. The 1920 Constitution of the pre-Munich Czechoslovak Republik introduced a constitutional judiciary, which was very close to the model of the contemporary Austrian Constitutional Court. The constitutional judiciary introduced by the Constitutional Act on Czechoslovak Federation of 1968, but never implemented in practice, primarily followed the model of the Federal Republic of Germany.

The Constitution of the Czech Republic (1992) introduced Constitutional Court which is very closed both to the model of the contemporary Austrian Constitutional Court and German Federal Constitutional Court.

IV. 5. Statistical data recording the performance of constitutional judiciaries qualitatively and quantitatively have convincingly proved that the activities of constitutional judiciaries, whether in the American form, i.e. the general constitutional judiciary, or in the continental European form, i.e. the concentrated and specialized constitutional judiciary, concern to an ever increasing extent the protection of fundamental human rights and freedoms of the individual. In the concentrated and specialized constitutional judiciaries it is primarily the institution of constitutional complaint initi-

<sup>1</sup> BLAHOŽ, J. *Soudní kontrola ústavnosti; srovnávací pohled*. Praha: Codex ASPI 2001, p. 492; BLAHOŽ, J., BALÁŠ, V., KLÍMA, K. *Srovnávací ústavní právo*. Wolters Kluwer: Praha, 2011, p. 524. CARIAS, A. B. *Constitutional Courts as Positive Legislators*. Cambridge 2013, p. 933 ff.

ated by individuals or legal persons that has acquired decisive significance in terms of the number of cases involved. The quality of the institutional solution for constitutional complaints together with the standard of legal culture and legal tradition of the country, are the decisive factors for the high quality of this most important procedural guarantee of human rights.

If we compare the procedure for constitutional complaint in the Czech Republic with those in Switzerland, Austria and Germany, we shall find some significant differences. Under the solution adopted in the Czech Republic, a constitutional complaint can only be directed against individual legal decisions, measures or interventions of administrative authorities which are claimed to have violated the complainant's rights guaranteed by the Constitution.

In Germany, Switzerland, and Austria, on the other hand, the constitutional complaint is possible both against individual legal acts and against generally binding normative legal acts. In respect of the constitutional complaint against a generally obligatory normative legal act there is a marked difference between the Austrian and German solutions on one side and the Swiss solution on the other. While German law makes it possible to contest a generally obligatory normative legal act by a constitutional complaint, if the complainant proves that he is personally and directly affected in his rights by this normative act,<sup>2</sup> Swiss law also permits a constitutional complaint in case a vital legal interest of the appellant is affected, which means that the individual may file a constitutional complaint not only because his rights have been violated by the application of the normative act against himself, but also because the normative act could violate his rights in the future.

In Austria, the possibility of an individual constitutional complaint against statutes was introduced by a constitutional amendment in 1975.<sup>3</sup> In addition, even where a constitutional complaint is directed against administrative decisions, the case law of the Austrian Constitutional Court permits the filing of such a complaint not only by an individual who is directly addressed by the decision but also by any person whose legal sphere was affected by the act or decision.<sup>4</sup>

The subsidiarity of the constitutional complaint is generally identical in all aforementioned countries including the Czech Republic.

IV. 6. Chapter 14 of the book under review concentrates on the philosophical and constitutional questions on human rights and basic rights. The title of the chapter 14 is "Die Grundrechte im demokratischen Verfassungsstaat". I highly appreciate the scientific concept of basic rights given by professor H. Schambeck: "Die Grundrechte sind Ausdruck des Strebens des Menschen nach Rechtsicherheit, Freiheit und Gerechtigkeit ... Grundrechte sind Schutzrechte, welche dem Einzelnen, sei es als physische oder juristische Person, gegenüber dem Staat oder in dem Staat zustehen ... Die Idee der Würde des Menschen begleitet die abendländische Rechtsphilosophie seit ihren Anfängen" (pp. 277, 279).

V. Part four of the book under review is composed of two biographical studies devoted to excellent scientists Hans Kelsen and Adolf Julius Merkl. The studies are quite informative and fact - oriented. Both of the studies are very valuable from the scientific point a view.

VI. The book under review is an excellent in - depth study of the democracy, Constitutionalism, Philosophy of law, Constitutional law, Political science, constitutional judicial review, basic human right, structure and organization of the European Union and European law. I find the book to be a great contribution, unique in Europe and worldwide, as nothing this extensive has been contributed in the fields mentioned above. Both in respect of analysis and evaluation, the book breaks a new ground and is a welcome addition to our existing knowledge namely on Constitutional law comparative constitutional Law and Political science.

Many chapters of the book under review also provide inspiration for the future development of european constitutions and European Union.

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<sup>2</sup> Cf. BVerfGE 3,2; 3,36; 4,11; 6,277; 10,380; 12,316; 13,246; 16,147.

<sup>3</sup> Art. 140 of the Austrian Constitution as amended by BGBl 1975/302.

<sup>4</sup> Art. 144 of the Austrian Constitution. VfSlg 3304/1958, 8746/1980.

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