

Discussion of the paper by H. Schambeck

ARCHER

Given the paper's concentration upon constitutional law, I would like to introduce some sociological considerations as to how this law itself is elaborated. Frequently groups pursuing their values operate as social movements outside the democratic and legal frameworks (e.g. early trade unions, peace and green movements, feminism etc.). If successful, they insert themselves into the political process in a manner which is subsequently institutionalised and legally ratified. This is a mechanism through which both law and democracy are progressively elaborated: it explains changes in them which cannot be explained by them.

SCHAMBECK

With regard to the question of which election law favours the representation of the people one has to make a distinction: the system that exists in England obtains a stronger integration effect and a lower representation effect; with the proportional system the contrary is the case. Plurality of parties in parliament can be the consequence. Different groups are decisive for legislation in parliament. The passing of a law – even a constitutional law – which refers to a government bill needs a wide-ranging popular will. In Austria interest groups such as the Chamber of Commerce and Industry, the trade unions and the various Länder can express their opinion before a law is submitted to Parliament.

However, we have to make sure that day-to-day political arbitrariness does not interfere in the constitution. This is the limit between democratization and jacobinization, this is the advantage of a democratic constitutional state, because it enables democratization but prevents jacobinization. The three functions of the state have to be democratized in the same way, so that the civil servant and the judge implement laws made by parliament. Democracy is a process of education for politicians as well for the people. Oretga y Gasset once said: "Politics is the highest purpose in life. Life is political whether you want it to be or not. You're part of this struggle as a subject or as an object". We must make an effort to try and become more of a subject than an object.

BETANCUR

Mr. Chairman, I, like Margaret, was fascinated by what Mr. Schambeck has said, because to see how he mixed in a very eloquent fashion, and very effectively as well, constitutional law with the state and the virtual possibilities of democracy – it was a beautiful presentation, a very persuasive one as well, and you could see, as he presented what he was saying, the university professor who was there. We can see the twenty years he has been in parliament as well, you can see that experience, and his involvement in political life as a politician, and this sort of symbiosis which was marvellous for Archer, she was very expressive.

In a beautiful portrait of Diego Velazquez, the Meninas, to be seen in the Prado Museum, you see the royal family, and you see the young princesses, you see a dwarf, you see the dogs, you see the jester, and the painter is there painting the royal family, and at the back you see a little window, it's a mysterious little window. Now, what does that little window represent? Well, I think that's the window that Professor Schambeck refers to, the window that is open to the future, and that's what democracy has also to foresee so that we can find solutions to situations that may occur in the future; and when Professor Schambeck spoke to us we had, as I said, this mix of constitutional law and the virtual possibilities of democracy, and I was thinking of what Jacques Maritain said, that democracy more than a form of government is a form of life, and that's not just a phrase of Jacques Maritain, but something which comes out clearly when you look at this dual nature of democracy: democracy as an end, as a form of life, and democracy as a means, as a process, as a means of governing.

I just have one doubt: at what moment can we avoid those Latin American officials who hope that they will be permanently present in Brazil, in Panama, in Peru, in many other countries or Argentina as well, that's true, if it becomes a kind of vocation to eternity to go on for ever? That can be very Kafkaesque can't it, when you think about a square in Prague where you see this temptation ... the people are tempted by eternity in the castle of Kafka. So, what can we do, Professor, how can we make sure that that little window for the future is open, how can we keep that open if an electoral system, if a state has petrified, let's say, this administration, and where the officials are prisoners in this cage, what can you do, how can you make sure that door remains open?

SCHAMBECK

Given the political and the constitutional experiences of the last decades, the task of our days is to think in terms of political formation, which isn't only the collection of data – we have to transmit knowledge. We

can now meet at international level, as we are doing here, and assess various developments, and the Roman Catholic Church does this as well by sending missions, or the UNESCO does similar things, so we can have a world-wide dialogue in which we can make an attempt at making people understand a number of notions, like for example constitutions.

I was in Moscow at the Duma, and I had a discussion with constitutional judges in Moscow, and I saw that they are very interested in this. It was great that the Federal Republic of Germany colleagues Professor Kirchhof and Professor Isensee brought to Russia a number of tomes of German constitutional law translated into Russian. We can therefore also from our midst provide a contribution to democratic education.

VYMĚTALÍK

The paper presented by President Schambeck was very interesting for me. In our country, unfortunately, one of the principal problems of democracy lies in the relativisation of ethical values together with a prevailing negative viewpoint concerning the formation of civic society. Natural law is obviously not recognised either. That's why education towards democracy based on true human values is so much needed. Unfortunately, there are only a very few people in our country who could exercise it. Besides, there is a lack of interest by people, who should listen. This is a very painful problem of our democracy.

FLORIA

Regarding political education, I would say that it is a very important issue, and this is something even Aristotle mentioned. But what is wrong, and I think this often comes up in the Catholic Magisterium, is that there's a confusion between *general* education and *political* education. People recognize the relative freedom of politics but don't look at this distinction when dealing with education. I think this is an error, and this is something that often occurs. Now, this assertion that democracy is a form of life, and I, like Jacques Maritain, think it's true, but first and foremost I think democracy is a form of government. I don't think that we should be distracted by politics because democracy is certainly a form of government. If it's a form of life without a form of government what else could it be? Democracy is a type of constitutional democracy, and that means pure democratic values along with a certain touch of political liberalism. Democracy can create values; democracy can be an instrument creating values, but at the same time democracy is a process and is in itself a value. I think it presupposes plurality, it presupposes a certain competence and it presupposes certain limitations, it's a kind of political ethics which we need to uphold.

DONATI

In synthesis: I enjoyed your paper very much. It's a vision of what a constitutional democracy ought to be, but I must say that there is something missing. I am not referring only to your paper, but to the whole debate this morning. What is missing is, to my mind, a deeper analysis of the crisis of Western democracy. It seems that democracy is just a question of machinery which should be made more efficient, while democracy, particularly in Western countries, is absent from many many aspects. I mean there is a deep crisis in terms of deficiencies, shortcomings, contradictions and so on and so forth. So, I think that we should draw a sharper line between democracy in Third World countries and Western advanced post-industrial countries, because democracy isn't the same in all these different situations. I mean, constitutional democracy is certainly the dream and the guarantee for Third World countries. But we have to realize that Western constitutional states are in crisis in many respects. First of all, ordinary legislation no longer implements constitutional law because very often it introduces disorders into constitutions, and this is not simply a failure in relation to one measure or another: it is a systematic introduction of disorder into legislation by legislation itself. And the second order of consideration concerns the increasing disequilibrium in the classical powers: the legislative, administrative and judicial powers. As was mentioned in the previous contribution, particularly in the U.S., but also in Italy, and we could speak of many other Western countries, the judicial power, particularly at the middle and lower levels, is undermining democracy, in the sense that it is invading the constitutional order at many levels.

So, the questions are: do you think that these phenomena are real? If yes, what should be done particularly in advanced (post-industrial), democratic systems, differently from what can be done and should be done in Third World Countries? Thank you.

SCHAMBECK

I wish to thank all those who have taken part in the discussion. What I was speaking about was not a crisis of democracy, but the setting up of a constitutional state and its institutions. It does not advance in all, but certainly in many countries. Despite the difficulties that have emerged all over the world we can state in the last few years that many political changes which have taken place in Central and Eastern Europe after communism have been without bloodshed. In the past there have been changes in political systems which have not entailed constitutional continuity but grave political conflicts. Moreover, we have all agreed on the fact that the political

responsibility of the non-constitutional or non-parliamentary forces in legislation, administration and jurisdiction as well as of parties and interest groups is very strong.

But this needs political formation, which involves great awareness and knowledge, to which the Catholic Church can contribute much. We should also recognize the importance of the role of the judges. But judges should not make political decisions in the place of parliaments and governments. The judges' task is to measure a person's or a politician's behaviour according to the law. A state run by judges develops when parliament and government are too weak or when political forces do not take their tasks seriously enough.

There is also the problem of resistance but resistance as such cannot be included in the constitution. Positive resistance is legalized disobedience. Resistance always involves a matter of conscience for the individual person and the constitutional lawyer has come to a point at which the limits of his competence are reached.