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"COMMENTARY TO PETER PACZOLAY'S' PAPER ON "JUDICIAL REVIEW AS A SUBSTITUTE FOR NOT YET CONSTITUTED INSTANCES OF POPULAR SOVEREIGNTY""

by
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Peter Paczolay is the president of the Constitutional Court of Hungary, and in his paper he describes and judges the role of the Court in such a differentiated and *reflective* way, that this alone speaks in favor of this contested institution.

His main thesis expresses his reflection on the role of the court for the development of human rights, and he comes to the conclusion – or so I understand it – that judicial review is ambivalent but in some cases it may be a welcomed instrument to direct the popular will towards basic human rights ideas.

On the one hand, judicial review functions as a "substitute" for popular sovereignty. Whereas Kelsen still argued for a judicial review that only controls the processes of judicial decisions and its compatibility with constitutional law but without determining or changing the content of law, judicial review has a different function nowadays. As Dahl puts it, judicial review either acts against the popular will, limits it or even functions as a 'quasi guardianship': if the protection of fundamental rights is not possible through the democratic processes, then the alternative is to ensure their protection by official not subject to the democratic process. A consequence of this is: It is not the people that make law but the courts.

But on the other hand, judicial review can be an instrument that promotes the judicial definition and development of human rights. Paszolay mentions the 1954 decision *Brown vs. Board of Education* in the States where racial segregation was declared to be unconstitutional, and he stresses the Hungarian example of the abolition of capital punishment through a court decision. And Paszolay, even though hesitating because of the anti-democratic flip side of judicial review he has so sophisticated described, he seems to be in favor of the idea that the constitutional court should be a substitute for popular sovereignty – at least in some case.

That leads me to the first of my three comments:

1. If my reconstruction is correct, then a question comes up that addresses the function of judicial review from a normative point of view: What are the social and political conditions that determines the function of the court? To be more precise: When seems it to be adequate that the court just *controls* the law making processes and its compatibility with the constitution, when should it be *limiting* the legislators decisions, and when seems it be necessary to *even act as a positive legislator*, dictating the people what they should have been decided? My impression is that Peter says that it depends on the historical and political context whether this last step of substituting the popular will is really necessary. So, for example, if in a country the Holocaust denial is not sanctioned by the "civil society" or the parliament, then a court decision would be a correction of a somehow "defect" democratic culture. One could argued that if a democracy is highly developed than an interference of the court is not necessary but it is part of the political culture of a country. But this only works if there is resistance from within the people against public decimation of minorities. It that is not the case, the court come in.

So, the question is whether the substitute theses is based on *distrust* in democracy and the democratic competences of the people. And if so, what social conditions must be given to estimate a democracy as being stable enough and no longer depended on this heavy interference through the court.

2. Do people really learn what human rights mean and how to interpret them if confronted with courts decision (in Hungaria) that - to cite Peter - " shocked an unprepared parliament". I don't deny that judicial review is an important instrument to formally control the legislator's law making processes. But can institutions trigger off a 'top down' learning process that makes them believe in human rights and act according to them. I have doubts about that. Rather democracy seems to be a meaningless argy-bargy without real decision competences.

The court as a controlling instance, in contrast, leaves room for democratic self-determination. For example in the German case on the kosher butchering filed my Muslim butchers the court decided that a strict ban is not compatible with freedom of religion but that requirements, bans and rules have to be decided by the parliaments of the different *Länder*. Here the case is returned to the parliaments, setting limits of their self-determination but not doing the work for them.

3. Finally, I am interested in Peter's notion of popular sovereignty. The German political scientist Ingeborg Maus argues – referring on Kant - that popular sovereignty has *an intrinsic value*. Political autonomy, the right not to be subjected to arbitrary rules but to be your own master of rules is a claim that can't be denied to anybody without good reasons. Having defined popular sovereignty in that way it is difficult to legitimize a substitution of popular will by court decisions. This would be an unreasonable disempowerment of the citizen. Defining popular sovereignty as a means to deal with social problems and find the best solution possible, and when it may turn out that these solutions do not work properly, then it seems efficient to hand over to the court. Then Popular sovereignty is legitimized in relation to its capacity to solve problems. And I suggest that Peter's notion comes to close to the letter but I would like to know more about it.