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LACK OF ARGUMENTS OR A COMMON SENSE: REASONS OF THE U.S. SUPREME COURT'S PREFERENCES TO INTERNATIONAL COMMUNITY IN THE PROCESS OF CONSTITUTIONAL INTERPRETATION

The U.S. Supreme Court is responsible for interpretation of the highest law in the United States, the federal Constitution. Throughout more than 200 years of its history, the Court has decided numerous cases shaping, reshaping and modifying many different clauses and provisions of the document. Among various methods of constitutional interpretation, most often the Justices have referred to the original intent of the Framers (historical interpretation), plain meaning of the document (textual interpretation), character of the analyzed institutions (structural interpretation), theoretical aspects of the issue (doctrinal interpretation) or they have imposed a balancing test of arguments which led to a so-called reasonable interpretation. In this process the Court has rarely referred to arguments stemming from the international community, and has hardly ever used them as a justification of particular decisions. Such a reluctant attitude towards arguments offered by the international community may prove the lack of legal necessity of the use of such arguments. However, there are a few examples of the Court's adjudication in which a reference to the international community became a significant part of the majority opinion, which may lead to the assumption that the Justices tend to use such arguments in the case of a highly political issue (*Brown v. Board of Education*) or in order to justify a major change in legal issues (death penalty cases). The main purpose of this paper is to analyze the most crucial opinions of the U.S. Supreme Court in which the Justices decided to settle the disputes in relation with arguments posed by the international community. The author aims at finding a visible pattern of influence of the international community on the decision-making process of the Supreme Court. The answer to this question may reveal the real attitude of American law towards international law.

Introduction

International law consists of norms created by states and other subjects of international relations. Despite its development in the formal relations among states during the Congress of Vienna, international law has become a significant issue since the 1950s, as most of the democratic states have been willing to shape their internal and external relations in accordance with some higher rules and principles. It has led to closer cooperation in the area of economy, but also social relations, political issues and safety/security.

The development of numerous international organizations since the late 19th century, and especially after World War II, has led to enhancement of the formal procedures of interactions among various states and to creation of international institutions which are responsible for solving conflicts in the name of the international community. The process of globalization has left no choice for the politicians and societies of particular states but to further their efforts in order to achieve common goals on the international level.[1] At the same time, the increasing role of the international community has been observed in the process of pointing out the weaknesses and disadvantages of particular legal actions and institutions occurring in various states of the world. The international community has become not only an active observer (thanks to the activity of the media and development of the so-called information era), but, above all, a protector of the proper imposition of such values as democracy, rule of law, or human and civil rights. Since 1945 many different institutions and organizations based on international law have been created in order to successfully implement these norms in situations of open violation of the norms by individual states. But not everything can be formalized, and in most of the cases the states are not directly bound by what the international community desires. Additionally there are states which in many cases do not adapt their individual norms and regulations to those settled by the majority of the international community and therefore they become an addressee of its complaints. Very often such complaints do not have a legal basis in international law and are therefore not binding for the state, but may produce a feeling that the level of democracy in that state is below common norms settled by the international community. The United States definitely seems to be among these states which on one hand are subject to a more active international reaction, and where, on the other, international law does not play as important role as it does in Europe.[2]

In the United States the U.S. Supreme Court is responsible for interpretation of the highest domestic law of the country, i.e. the federal Constitution of 1787. Throughout more than 200 years of its history, the Court has decided numerous cases shaping, reshaping and modifying many different clauses and provisions of the document. Among various methods of constitutional interpretation, most often the Justices have referred to the original intent of the Framers (historical interpretation), plain meaning of the document (textual interpretation), character of the analyzed institutions (structural interpretation), theoretical aspects of the issue (doctrinal interpretation) or they have imposed a balancing test of arguments which leads to a so-called reasonable interpretation. From a different perspective there have been two basic approaches helping to understand the judicial decision-making process of the Supreme Court: a legal approach, i.e. an effort to find a legally suitable answer to the case, and a policy-based approach, stemming from the personal policy preferences of a judge.[3] In this process the Court rarely refers to

[1] For more on the topic of international law see: Malcolm N. Shaw. 2008. *International Law*, Sixth Edition. New York: Cambridge University Press.

[2] This reluctance towards international law may be observed in the structure of the U.S. sources of law, where, in specific situations, even an Act of Congress may overrule a former international treaty.

[3] Jeffrey A. Segal, Harold J. Spaeth, Sara C. Benesh. 2005. *The Supreme Court in the American Legal System*. New York: Cambridge University Press, 19.

arguments stemming from the international community, and hardly ever uses them as a justification of particular decisions. Such a reluctant attitude towards arguments offered by international law or the international community may prove the lack of legal necessity of the use of such arguments. However, there are a few examples of the Court's adjudication in which a reference to the international community became a significant part of the majority opinion, which may lead to a further assumption that the Justices tend to use such arguments in the case of a highly political issue (i.e. *Brown v. Board of Education*) or in order to justify a major change in legal issues (death penalty cases). Therefore, the main purpose of this analysis is to present the most crucial opinions of the U.S. Supreme Court in which the Justices decided to settle the disputes in relation to arguments posed by the international community. It may lead to determining a visible pattern of influence of international law and the international community on the decision-making process of the Supreme Court, especially in the last few decades of its operation. The answer to this question may additionally reveal the real attitude of American lawyers towards the usage of international law in justification of certain legal actions.

Methodological issues

All research concerning the existence and operation of an institution should refer to its genesis, structure, powers, and relations towards other institutions acting at the same level, but also to the theoretical basis and practical effects of its operation. Therefore an analysis of the U.S. Supreme Court as an institution should regard its character, structure, constitutional and real powers, its relations with other branches of the American government, as well as an analysis of the results of its adjudication, i.e. the case-law. For scholars conducting research on American governmental institutions it is highly interesting and challenging to find out the proper theoretical foundations of their existence, but also the real effects of their operation. A thorough analysis of the U.S. constitution from both theoretical and practical perspectives leads to a (more than obvious) assumption that there have been many institutions which, after gaining basic powers thanks to the federal constitution of 1787, expanded their competences in the process of the state's development. The U.S. Supreme Court especially belongs to such a group, evolving since 1789 from a weak and secondary institution to a strong and influential actor in the contemporary American checks and balances system.[4] Such reflection would not be possible without imposition of proper methodology, consisting of a comparison of the U.S. governmental structure in 1787 and today, and of the analysis of the powers of particular institutions playing the most important role in that structure. But when it comes down to research aiming at finding concrete references in the Supreme Court's adjudication, one should focus on particular decisions undertaken

[4] For analysis of the evolution of the Supreme Court in the U.S. legal and political system see: Paweł Laidler. 2009. *Trzecia władza czy pierwsza władza? Rozważania na temat konstytucyjnej pozycji Sądu Najwyższego Stanów Zjednoczonych*. In Włodzimierz Bernacki, Adam Walaszek (eds.). *AmerykoMania*. Kraków: Jagiellonian University Press, 133–175.

by the Justices of the Court in the process of adjudication. In order to achieve the best results, it would be appropriate to search for all of the decisions in which there was even a minimum reference to the analyzed reality. Taking into consideration more than two hundred years of case-law, in which there were about 100 decisions in the first decade (1791–1800), increasing to more than 5,000 decisions in the last decade of the 20th century,[5] it seems almost an impossible task to achieve. However, scholars are able to find some visible patterns in the Court's decision-making process by looking at the most important opinions written by the Justices in the history of the institution. Such a result may be achieved either by an individual analysis of the case-law concerning the most crucial legal issues, or a general analysis of the directions in which American law and the American legal system have developed.

During my research I applied both methods, analyzing on one hand more than five hundred cases which concerned various aspects of American law, grouped into two major categories: the powers of the government (federal/state relations, separation of powers, checks and balances, powers of particular institutions) and the powers of the people (civil rights and liberties); on the other, I focused on specific periods of U.S. legal history during which references to the international community were more evident than in others. Crucial in this respect proved to be the initial period of the Court's adjudication (1790–1803), the period around the Civil War (1750s and 1760s), and the 20th-century decision-making process with a closer look into the years 1945–2009, when the influence of international law and the awareness of the international community became more visible. In the remaining periods of U.S. historiography the Supreme Court focused on internal relations following the isolationist vision set out by the American government. The result of the analysis was the discovery of more than fifty cases in which there was a reference to the international community, and a deeper examination of the Justices' opinions in these cases led to a focus on several decisions where the reference to the international community proved crucial to the final direction of the Court's adjudication. This examination allowed the determination of some patterns concerning both the operation of the U.S. Supreme Court in American political and legal reality, and the attitude of American society towards international law and the international community. The concluding remarks of the research are mentioned in the 'results of the analysis'.

The U.S. Supreme Court in the U.S. legal system

Article Three, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." From this provision the highest judicial instance derives its dominating position among all U.S. courts – federal and state. Other parts of Article Three refer to the powers of the Supreme Court, its original and appellate jurisdiction, and the status of federal judges. The Supreme

[5] Kermit L. Hall. 2001. *The Oxford Guide to the U.S. Supreme Court Decisions*. New York: Oxford University Press, viii.

Court may adjudicate as the court of first and last resort in some cases and controversies (original jurisdiction exercised in the legal conflicts affecting ambassadors, public ministers and consuls, and those in which a state shall be a party), but it mainly reviews the decisions of lower courts, serving as the ultimate arbiter in disputes (appellate jurisdiction).[6] The finality of the Court's decisions allows it to create precedents (decisions binding in all similar future cases determined by the lower courts) which shape the scope of many legal issues, principles, rules, definitions and relations that refer to an important social, economic, or political reality. However, the most crucial power of the Supreme Court is judicial review, the ability to check the constitutionality of actions undertaken by the other branches of the American government, both on the federal and state level. No law inconsistent with the federal Constitution may exist, and the highest judicial authority serves as a guardian of the supreme law of the land. The power of judicial review was established in the Supreme Court decision *Marbury v. Madison*.[7] In practice it has led to the creation of numerous precedents referring to such issues as the powers of the government (federal-state relations, the scope of separation of powers and the checks and balances system) and the powers of the people (the scope of the Bill of Rights guarantees, the role of the state in criminal and civil trials, the principles of democracy, the rule of law and equality). Considering the last 200 years of judicial review, there is hardly any area which has remained untouched by the influential hand of the federal judiciary: even individual rights to privacy have been recently confronted by the Justices. It proves the high position of the Court in the American separation of powers structure, where the system of checks and balances has evolved in the direction of stronger control of the American judiciary over other branches of government.

It is not easy to bring a case to the Supreme Court for review, and only 5% of cases that reach the highest federal judicial institution every year are granted special writ of certiorari, a document allowing the controversy to be heard by the Justices. The members of the Court exclusively decide which cases are significant and deserve deliberation. However, practice shows some regularity that guides the Justices in their choice – if the controversy involves a question of public importance or if it raises an important issue of law, it always draws the Court's attention. Each year the Court decides about 150 cases of great importance and interest which influence different areas of U.S. constitutional law. Some cases reverse earlier decisions, some give a new meaning to particular issues, and some affirm old rules and holdings. Each decision of the Court is delivered in opinions written by the whole panel of nine Justices, but most often one Justice writes a majority opinion which constitutes the ruling.[8] It is necessary to observe that it is also a discretional role of the Justices to decide whether

[6] For more on the position of the U.S. Supreme Court in the U.S. political and legal system see: Christopher Tomlins (ed.). 2005. *The United States Supreme Court: the Pursuit of Justice*. New York: Houghton Mifflin Company.

[7] 5 U.S. 137 (1803).

[8] Paweł Laidler. 2006. *Basic Cases in U.S. Constitutional Law*. Volume One: *Separation of Powers*. Kraków: Jagiellonian University Press, 26–27.

an opinion should be written in accordance with the principles of international law, or whether it should only adopt U.S. rules and regulations that may not be consistent with the direction in which the international community is heading.

References to the international community

For the first time in its history, the Supreme Court made a short reference to the relations between U.S. and international law in the *Chisholm v. Georgia* case. The main issue presented in the dispute was whether one state could be sued in the federal court by a citizen of another state. By deciding that the controversies between individual states and inhabitants of different states were under the jurisdiction of federal courts, the Justices made a brief comment regarding the possible future direction in which the U.S. legal system should head: "The United States, by taking a place among the nations of the earth, bec[a]me amenable to the laws of nations."[9] However, it is rather impossible to state that this reference was something more than just a single thought concerning the acknowledgement of American law in the international reality. The Justices did not have any visible purpose to shape some kind of relation between the U.S.'s and international legal systems, as the new state focused on interior issues aiming at the proper development of particular institutions. One should rather try to find in the case a pattern for the next decades, determining the necessity to look into the foreign legal systems in order to find a solution to an issue that was not confronted by the newly-born state. Such a situation occurred at the beginning of the 19th century, and it was British law which became the basis for legal reference for the U.S. Supreme Court.

In *Marbury v. Madison*, the Justices, led by the famous Chief Justice John Marshall, were obliged to answer many various legal questions concerning the proper operation of the state: the relations between the executive and judiciary, the powers of the Supreme Court, the powers of the President, the meaning of different legal institutions, and jurisdictional problems. Despite the fact that the main purpose of the case was to create the power of judicial review, thus changing the scope of the checks and balances system in the U.S. political and legal reality, it is worth observing that in many parts of his majority opinion, John Marshall referred to English and British law when trying to explain some aspects of the controversial decision. In this way he confirmed, for instance, the existence of the rule of law in the United States: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit

[9] 2 U.S. 419 (1793) at 474.

or action at law whenever that right is invaded.'"[10] In another part Marshall looked into Medieval English law (!) to find a definition of an important legal institution: "Blackstone, in the third volume of his Commentaries, page 110, defines a [writ of] mandamus to be 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.'"[11] Therefore, some aspects of English and British law were used by the Supreme Court as a justification and a legal reasoning in deciding one of the most important cases in the history of the United States.

Thirteen years later, in *Martin v. Hunter's Lessee*, the Justices had to determine the scope of the Supreme Court's appellate jurisdiction and carry out the interpretation of the supremacy clause of the Constitution's Article Six. The dispute concerned an interior conflict within the U.S. federal and state judiciary, but it also touched upon the broad issues of appellate and original jurisdiction of the American courts. The Marshall Court, in the majority opinion held by Justice Joseph Story, commented on the types of cases that could affect U.S. foreign relations and observed that "the same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations, and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry."[12] The character of the reference is different from the one presented in the *Marbury* decision. In *Martin v. Hunter's Lessee*, the Justices feel obliged to look into American legal reality from various positions, and they acknowledge the possibility of future references to international law, called at these times 'the law of nations'. This approach is definitely closer to the one offered in *Chisholm v. Georgia*, establishing a theoretical and doctrinal foundation for possible future disputes involving the international community.

The next case in which the U.S. Supreme Court mentioned international issues while confronting national problems, concerned the very crucial aspect of the constitutional status of slavery. In 1857 the Court adjudicated in a highly controversial dispute, *Dred Scott v. Sandford*, determining the legal situation of a former slave living in a free territory. Justices considered Dred Scott as a slave because of his lack of citizenship, negating the possibility of slaves becoming U.S. citizens in future. Basing their opinion on an interpretation of Articles Three and Four, the Justices acknowledged that never in American history had a slave become a citizen, and so the tradition must be upheld. While making its argument, the Court noticed that "no one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the

[10] 5 U.S. 137 (1803) at 163.

[11] Ibidem at 168.

[12] 14 U.S. 304 (1816) at 335.

civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it."[13] Thus the Justices admitted that even if there was any opposition to their decision stemming from the international community, it is the U.S. legal system they need to confer to. What is interesting is that there was no direct necessity to use the international community as an argument in the case, but the Court decided to confront the problem from a wider perspective in order to present a negative image of international law in the eyes of the highest judicial tribunal in the United States. Such negative perception of foreign principles in confrontation with American reality proved the high reluctance of the Justices towards the usage of the international community as an argument in deciding a dispute regarding American social relations. The reason is obvious: it would be difficult to sustain the final verdict in the case when basing it on the attitude of the international community towards slavery.

The *Dred Scott* case was the last significant decision of the Supreme Court in the 19th century which referred in some way to the international community. Surprisingly or not, the next period of the Court's adjudication directly or indirectly referring to international law happened almost 100 years after the controversial slavery dispute. After 1945 many international organizations were created in order to have a larger influence in jurisdictions of particular states, and the awareness of the international community grew, aiming at achieving a proper level of democracy, rule of law and status of rights and liberties in the civilized world. It was obvious that the interconnecting of U.S. law and international law would happen more often, thus producing opportunities for the Court to refer to the international community. However, some of the references have proven similar in type and form to the ones used 100 years earlier. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court decided to cite the principles of the international community in a negative way, comparing them with important aspects of the U.S. legal system. The famous Steel-Seizure case concerned the legality of the presidential actions aimed at seizing and operating a vast number of American steel mills in order to influence the situation in mills during the Korean War. The Justices held in 1952 that the seizure was beyond presidential powers, either those derived from the Constitution, or those delegated by Congress, thus basing the decision on U.S. law exclusively. But in a separate concurring opinion (counting also as a majority opinion), Justice Robert H. Jackson observed that "Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and, in 13 years, suspension of rights was invoked on more than 250 occasions."[14] International reality was set here as

[13] 60 U.S. 393 (1857) at 426.

[14] 343 U.S. 579 (1952) at 651.

a negative example of accumulation of powers by the chief executive, which was feared also in the United States by Truman's seizure. Thanks to a negative argument, Justice Jackson could argue against the actions of the U.S. President, thus confirming their unconstitutionality. It is worth mentioning that in his further opinion Justice Jackson used the example of France as a positive idea for American solutions, but above all his negation of the Weimar constitution sounded more convincing than any other legal argument in the case.

Just two years later, the Supreme Court confronted one of the most important issues in its history, segregation. Since 1896 the doctrine 'separate but equal' had existed, dividing society into 'better' and 'worse,' depending on color and race. In 1954, in the famous case *Brown v. Board of Education*,[15] the Supreme Court had an opportunity to end the controversial policy of the state against African-American minorities. Speaking for unanimous Court, Chief Justice Earl Warren stated that any kind of separation in society led to inequality, which was forbidden by the U.S. Constitution. He proved that the segregation process impaired the motivation of African-American children to learn and that the separate educational facilities were inherently unequal. From the perspective of the civil rights movement's organizations and the majority of American people, the decision was just and fair and was based on reasonable arguments of the equality and rule of law derived from the Constitution. However, it is worth mentioning that there were also reasons other than U.S. legal rules and principles which counted in the final verdict of the Court. According to the U.S. government's brief addressed to the Justices of the Court, "the existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination ... raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[16] There is no doubt that one of the real reasons for the necessity to change the segregation laws in the United States was the Cold War period, during which there was not only an open conflict between the U.S. and USSR, but also a strong public relations movement in both states (various diplomatic and propaganda actions) aimed at achieving a better international position. The American government felt that its position in Europe may be weaker because of racial inequalities that occurred in a state which called itself a model democracy.[17] Therefore, the Court was not only bound by particular provisions of the Constitution but also by tremendous pressure from the U.S. government. The *Brown* case may be seen as an example of a hidden reference to the international community as one of the major factors in achieving a proper legal decision.

Since 1954, references to the international community have been observed more often in the Supreme Court's adjudication process, most regarding cases concerning the liberty and freedom of the people. However, in most of these disputes, the Justices only indirectly touched upon the possible influence of the international community

[15] 347 U.S. 483 (1954).

[16] Amicus brief for the United States in *Brown v. Board of Education* (1954).

[17] For more on this topic see: Mary L. Dudziak. 2000. *Cold War Civil Rights. Race and the Image of American Democracy*. New Jersey: Princeton University Press.

on the direction of the American legal system. The most visible and effective impact of international law on the U.S. Supreme Court's decision-making process may be observed in the last ten years, which proves that the 21st century could be a period of closer ties between the international and American legal doctrine. In 2002, in *Atkins v. Virginia*, the Court had to decide whether the execution of mentally disabled people was unconstitutional and should be prohibited. The majority of the Justices led by John Paul Stevens admitted that the Eighth Amendment to the Constitution forbade cruel and unusual punishments, and the death penalty for the mentally disabled was therefore unconstitutional. What is significant is that the Court did not only refer to American legal reality but also to the opinion of the international community, which was against such executions: "Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[18] Similarly, three years later, in *Roper v. Simmons*, when the Justices confronted the issue of the imposition of the death penalty on minors, the majority opinion delivered by Justice Anthony Kennedy consisted of several references to the international community: "The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."[19] Additionally, sixteen famous Nobel laureates signed a brief urging the Court to "consider the opinion of the international community, which has rejected the death penalty for child offenders worldwide."[20] The Supreme Court did not hesitate to find the execution of minors unconstitutional, changing the American practice of sentencing people below 18 to death, and allowing the international community to have a significant impact on its decision-making process.

It was not only the death penalty which raised the strong opposition of the international community against laws existing in the United States. There were also cases concerning the right to privacy, where the Court decided to refer to different attitudes of the world community towards U.S. principles and regulations. Such a situation was observed in 2003, in *Lawrence and Garner v. Texas*, when the Justices had to determine the constitutional status of homosexuals. The question in the dispute regarded the possibility of people of the same sex to engage in intimate conduct, which had been declared unconstitutional in 1986.[21] But in 2003 the Supreme Court decided to change the law and overruled former precedents, creating a new rule allowing for intimate relations between homosexuals: "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have

[18] 536 U.S. 304 (2002), footnote 21.

[19] 543 U.S. 551 (2005).

[20] Amicus curiae to the Supreme Court of the United States, 2004.

[21] *Bowers v. Hardwick* 478 U.S. 186 (1986).

been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v. *United Kingdom*... Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[22] For the first time in its history, the U.S. Supreme Court not only cited the decision of an international court, but also decided to adapt its rules into the American legal system, thus changing not only the law but also social relations in the United States. The influence of the international community in 2005 was direct and unavoidable. What about the influence of the world on the Court's cases which concerned issues stemming from the "War on Terror"?

There are three landmark cases concerning the above-mentioned issues where the Court decided to refer to international law due to technical and formal aspects of the cases: *Rasul v. Bush*, *Hamdan v. Rumsfeld* and *Boumediene v. Bush*. In the first dispute the Justices confronted the issue of the legal status of four British and Australian citizens who were captured by the American military in Pakistan or Afghanistan during the War on Terror. The question in the case was whether American courts had jurisdiction over legal appeals filed on behalf of foreign citizens who were held by the U.S. military base in Guantanamo. Confirming the jurisdiction of the U.S. judiciary over the Guantanamo Base, the Justices resigned to adopt the rule established in the 1950 case *Johnson v. Eisentrager*,[23] where the Court denied the jurisdiction of American courts over German war criminals held in a German prison on lands administered by the United States. The reference to international law helped the Justices to legitimize the U.S judicial control over the military base located on Cuban territory, as it could be exercised in all "dominions under the sovereign control."[24] A more important reference to international law may be observed in *Hamdan v. Rumsfeld*, where the Supreme Court had to answer the question of the possible influence of the Geneva Convention on the U.S. legal system. Hamdan, held in the Guantanamo Base, wanted to be heard by U.S. courts on the writ of habeas corpus, but his formal status as a prisoner of war needed to be determined under the Geneva Convention. Despite the negative ruling of the lower court, the Supreme Court affirmed the jurisdiction of the Convention over Hamdan, which indirectly meant the possibility of enforcement of the international conventions during the trials held in American courts of justice. The case is probably one of the most important examples of the relations between the domestic U.S. legal system and international law, where the Court decided to allow international agreements and principles to play more than a formal role in the decision-making process on the highest judicial level in the United States.[25] A similar effect was reached in the third and last dispute regarding the War on Terror, *Boumediene v. Bush*. In general, the question in the case concerned the entitle-

[22] 539 U.S. 558 (2003).
[23] 339 U.S. 763 (1950).
[24] 542 U.S. 466 (2004).
[25] 548 U.S. 557 (2006).

ment of the Guantanamo Base detainees to the protection of both the U.S. Constitution and the Geneva Convention. In a decision confirming such entitlement, Justice Anthony Kennedy went back to the history of the Middle Ages in Europe and American history, proving on one hand the status of the writ of habeas corpus in the United States, but on the other the proper application of the writ in such countries as Great Britain, Canada, India, and other British-controlled territories.[26] The principles used in other jurisdictions are used here to justify the final verdict of the Court and the binding status of the Geneva Convention is confirmed. Once again, international law makes its impact in a highly controversial issue of the U.S. legal system.

Conclusions

Despite the fact that the basis for the above-presented analysis of the U.S. Supreme Court's case-law referring to international law and the international community was chronology, it is worth looking at these decisions from a wider perspective. What kinds of issues were decided by the Court? In what form was the reference to the international community mentioned? Did it play a vital role in the final opinion of the Justices? And finally, was the reference used as a justification of particular decisions or maybe just a tool in the process of adjudication? The examination of these decisions allows us to divide them into many distinct categories, taking into consideration various aspects such as:

- timeline: historical decisions (1790–1803) and modern decisions (1945–2009);
- topic: civil rights and liberties (majority), and other issues (minority);
- attitude: positive and negative reference to the international community;
- rhetoric: official reference and non-official reference.

The analyzed cases fit into each category, allowing the researcher to find some patterns and rules guiding the Supreme Court's references to the international community in its decision-making process. Therefore, the analysis leads to at least four important conclusions, which shall be expressed below.

1. The decisions of the U.S. Supreme Court referring to the international community do not concern the powers of the government but the rights and liberties of the people.
2. There is a visible growth of the influence of international law on the decision-making process of the U.S. Supreme Court.
3. The reference to international law and the international community is more likely to happen in the issues which are controversial and concern only American jurisdiction.
4. The international community was used by the Justices as a positive or negative argument, which leads to the conclusion that it may be used as a tool in the Court's decision-making process.

There is no doubt that the impact of the international community on the decision-making process of the U.S. Supreme Court does not concern the relations among the

[26] 128 S.Ct. 2229 (2008).

branches of government. These issues are treated as an interior and sovereign aspect of the functioning of a state, and the scope of separation of powers, as well as the proper application of the checks and balances system, seems untouchable by external influence. International law does not cover the institutional issues of particular states unless the states are members of international organizations. The international community is not vitally interested in the inner-governmental relations of particular states unless these relations affect social issues such as rights and freedom of the people. Therefore, one can hardly find any decision of the U.S. Supreme Court concerning the powers of the government on which the international community had a direct impact. There was of course *Chisholm v. Georgia*, or *Martin v. Hunter's Lessee*, but both disputes may be seen as an example of the Court's willingness to adapt to the rules of international law on a theoretical basis, not a practical one. Even in *Marbury v. Madison*, where the Justices cited provisions from English and British law, thus shaping American legal institutions, the reference to international norms and regulations was rather pragmatic and necessary in a newly created state, than based on the real willingness of the international community to influence any change in the law of the new country. Furthermore, it was only British laws that were used by John Marshall to define U.S. legal institutions, which in majority had been established a few centuries earlier in England.

A different situation occurs in respect of the civil liberties cases. Especially in recent years, the number of cases in which the Justices referred to the international community and international law has increased, and may be observed in disputes regarding the right to privacy and the rights of the accused in criminal cases. The first fundamental cases touching upon the right to privacy were decided in accordance with U.S. legal system and without any reference to international principles and regulations. *Griswold v. Connecticut*[27] or *Roe v. Wade*[28] have their place among the most fundamental and controversial decisions of the Supreme Court in that respect, but so does *Bowers v. Hardwick*. The difference is that whereas the use of contraceptives and abortion had been legalized by the right to privacy derived by the Justices from a constitutional interpretation of Articles Three, Four and Nine, the *Bowers* decision was overruled by a precedent based partly on the influence of the international community. In *Lawrence and Garner v. Texas*, apart from applying the constitutional right to privacy, the Justices recognized the significance of the norms and regulations established outside the United States. A similar situation occurred in the death penalty cases, *Atkins v. Virginia* and *Roper v. Simmons*, but it took a lot of time and case-law for the Court to realize the necessity of a change influenced by the attitude of the international community towards the death penalty. The most controversial cases in that respect, *Furman v. Georgia*[29] and *Gregg v. Georgia*,[30] were decided fully based on American principles and laws, without any reference to the international community, despite the fact that many European democratic countries had not executed their citizens since 1945.

[27] 381 U.S. 479 (1965).
[28] 410 U.S. 113 (1973).
[29] 408 U.S. 238 (1972).
[30] 428 U.S. 153 (1976).

The first cases which referred to the international community were decided by the Supreme Court in its early years. But the verdicts in *Chisholm*, *Marbury* and *Martin* were not a result of an analysis of the willingness of the international community to influence any change. Moreover, there was no such willingness. The majority of the citizens of the world were not aware of what was happening in America, apart from a growing feeling of the existence of the American Dream awaiting any immigrant who decided to leave his/her country. Even after 1945, when the world realized the necessity of closer international relations, there were hardly any decisions of the U.S. Supreme Court which took into consideration the important voice of the international community. The *Brown* decision may serve here as an exception, but it was exceptional, being officially based on an interpretation of the U.S. Constitution, and, in reality, a result of the weakening PR position of the United States in the wake of the Cold War. Then, in the late 1990s and early 21st century things changed. The number of cases referring to the international community suddenly increased. Why? There are probably two main reasons for such a situation: the growing awareness of the international community and the changing attitude of the U.S. Supreme Court Justices towards international law.

Democracy – this is the word that alerts the international community. Whenever a state is theoretically or practically violating the rights and freedoms of its citizens, whenever human rights are in danger, then particular organizations or individuals speak up and try to affect the increase of the level of democracy in that state. The awareness of the international community in the 21st century is very high compared to the past, and when one state imposes laws which are considered hostile to the freedom of its citizens, very often the international community decides to act. Of course nothing can be done without the consent of institutions responsible for implementing and establishing new rules and laws in a particular state. Therefore, in the United States, it is the job of Congress and the Supreme Court to make a move. While Congress creates most of the law, the Court interprets it, thus establishing its final constitutional status. Before 2002 the Justices rarely used international law or principles of the international community as binding under the U.S. jurisdiction. On the contrary – these laws and principles had an impact only when they were consistent with the policy of the U.S. government. But since 2002 there have been at least ten crucial decisions in which the international community played a bigger role than as an undefined group mentioned in the opinion only for historical reasons. The cause of this is not only globalization, but also the evolvement of the Court itself.

First of all, there is an open discussion among the current and former Justices of the Supreme Court regarding the proper level of influence of the international law and community on the U.S. legal system. In the press, or on the radio, TV or internet, it is easy to find many statements made by Justices who have their own opinion on this topic. From these sources one can derive a general conclusion: liberal Justices are more often proponents and conservative Justices opponents of a larger impact of the international community on American legal reality. Among the acting conservative Justices, one of the fiercest adversaries of the influence of international law on American law is Justice Antonin Scalia. According to his famous dissenting opinion written in *Roper v. Simmons*, the Supreme Court "should cease putting forth foreigners' views as part of

the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."[31] Furthermore, Scalia's reluctance towards international law was visible in his dispute with liberal Justice Stephen Breyer which took place in 2005. Scalia stated then that "the United States does not have the same moral and legal framework as the rest of the world, and never had,"[32] thus placing America among the unique nations which should not look to the international community as a guide in shaping its policies and legal norms. Quite an opposite attitude was presented by Justice Breyer, who commented on his approach to one of the freedom of religion cases: "So, of course I had to face the fact that in France they subsidize a religious school and it isn't the end of the earth. And the same thing is true in Britain, other countries. So, should I be aware of that? Yes. Should I have – feel that conscientiously I might have to deal with that in my opinion? Yes. Is it something where I'm citing only things that favor me? Of course not. I mean, what I see in doing this is what I call opening your eyes, opening your eyes to things that are going on elsewhere, use it for what it's worth."[33]

The above-mentioned conversation reveals only part of the problem, which may be confirmed by the decision-making process of the U.S. Supreme Court. When one looks into the distribution of votes among the Justices in the cases where the reference to the international community was direct and clear, the majority of the liberals are for and the majority of the conservatives are against the implementation of foreign rules.[34]

Case name	Decision	Majority	Dissent
Atkins v. Virginia (2002)	The execution of mentally disabled people is unconstitutional and inconsistent with the voice of the international community	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens	Rehnquist, Scalia, Thomas
Lawrence and Garner v. Texas (2003)	Adult homosexuals have a constitutional right to privacy which is consistent with the direction of international law	Breyer, Ginsburg, Kennedy, Souter, Stevens	Rehnquist, Scalia, Thomas

[31] 539 U.S. 558 (2003), dissenting opinion by Justice Scalia.

[32] James B. Staab. 2006. *The Political Thought of the Justice Antonin Scalia: a Hamiltonian on the Supreme Court*. Lanham: Rowman & Littlefield Publishers, 214.

[33] U.S. Association of Constitutional Law Discussion, *Constitutional Relevance of Foreign Court Decisions*. American University, Washington D.C., January 13, 2005, link: http://www.freerepublic.com/focus/news/1352357/posts (15.06.2009).

[34] The chart is based on an analysis of only the 21st century's decisions referring to international law/community, and on an assumption that the group of conservatives consists of Justices Alito, Roberts, Scalia and Thomas (before 2005 also Rehnquist and O'Connor), Justice Kennedy is an intermediate voice in the Court, whereas the liberals are Justices Breyer, Ginsburg, Souter and Stevens.

Case name	Decision	Majority	Dissent
Rasul v. Bush (2004)	The right of habeas corpus may be used by the detainees at Guantanamo Base	Breyer, Ginsburg, O'Connor, Souter, Stevens	Rehnquist, Scalia, Thomas
Roper v. Simmons (2005)	The imposition of the death penalty to an 18-year-old is unconstitutional and is inconsistent with the voice of the international community	Breyer, Ginsburg, Kennedy, Souter, Stevens	O'Connor, Rehnquist, Scalia, Thomas
Hamdan v. Rumsfeld (2006)	The Geneva Convention has jurisdiction over an 'enemy combatant' held by the U.S.	Breyer, Ginsburg, Kennedy, Souter, Stevens	Alito, Scalia, Thomas
Boumediene v. Bush (2008)	Foreign terrorists held at Guantanamo Base have constitutional rights before U.S. courts	Kennedy, Breyer, Ginsburg, Souter, Stevens	Roberts, Alito, Scalia, Thomas
Medellin v. Texas (2008)	ICJ's rulings are not always binding, state courts are not bound directly by international law	Roberts, Alito, Kennedy, Scalia, Thomas	Breyer, Ginsburg, Souter

According to the chart, there is a visible pattern between the ideology of a Justice and his/her approach towards international law and the international community. This may lead to the assumption that despite the legal necessity and perhaps sometimes even common sense of adopting foreign rules, the doctrine standing behind each Justice may influence his/her decision the most. Therefore, one should not talk about lack of arguments or common sense as the main reason for the usage of the rules and principles of the international community, but about the ideology and political views of particular Justices responsible for setting the direction in which the U.S. legal system will go.

The future?

Taking the results of the analysis into consideration, one may ask about the future level of cooperation between the U.S. Supreme Court and the international community. As there has never been any formal form of cooperation, today one can hear more often about the necessity of implementing international rules and principles in American legal decisions. Such voices come from lawyers whose political opinions are more

liberal, who tend to search for a closer relationship between international and state courts. On the other hand, there is also a strong, historically-based opposition towards the usage of legal norms and opinions of different states in the process of the Supreme Court's decision-making. In general, the discussion does not produce real answers to the questions – these must be derived from particular decisions of American judicial tribunals. Apart from the more active usage of the voices of the international community by the Justices in the 21st century, one must also observe decisions which show formal problems with implementation of foreign rules in U.S. legal reality. The Court's opinion in *Medellin v. Texas* can serve as one of the last examples in this respect.

The dispute concerned a Mexican national, Jose Medellin, who was sentenced to death for participating in the rape and murder of two American girls. After his conviction his lawyers filed a motion arguing that their client could not get in touch with the Mexican consulate and therefore the United States had violated his rights under the Vienna Convention. What is significant is that the motion was based on a decision made by the International Court of Justice stating that the United States had violated the Vienna Convention rights of many Mexican nationals (including Medellin), which should lead to re-hearings in their trials.[35] As a result, the case *Medellin v. Texas* was brought to the U.S. Supreme Court, which was obliged to determine not only the legal status of Jose Medellin, but also the position of an international agreement in the U.S. legal system. In a majority opinion, the Justices pointed out that the Vienna Convention was not a self-executing treaty and was not directly binding: "This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law."[36] Furthermore, the Court noticed that the rulings of the International Court of Justice were not directly binding in U.S. state and federal courts. The Justices presented the history of the American attitude towards the International Court of Justice: "The United States originally consented to the general jurisdiction of the ICJ when it filed a declaration recognizing compulsory jurisdiction under Art. 36(2) in 1946. The United States withdrew from general ICJ jurisdiction in 1985. See U.S. Dept. of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction (Oct. 7, 1985), reprinted in 24 I. L. M. 1742 (1985). By ratifying the Optional Protocol to the Vienna Convention, the United States consented to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention. On March 7, 2005, subsequent to the ICJ's judgment in *Avena*, the United States gave notice of withdrawal from the Optional Protocol to the Vienna Convention. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations."[37]

The *Medellin* decision does not mean that U.S. courts are not bound by international law at all, but it raises many doubts about the binding effect of international agreements on American law. In the future the Supreme Court may decide to follow the

[35] *Avena and Rother Mexican Nationals (Mexico v. United States of America)*, March 31, 2004.

[36] 128 S.Ct. 1346 (2008).

[37] Ibidem.

precedent from 2008 which confirmed the general negative attitude of the U.S. judiciary towards international law and the international community. Additionally, changes in the Supreme Court may influence the general attitude of the tribunal towards international law – the more conservatives, the more reluctance towards applying any international rulings or principles; and on the contrary, the more liberals, the more active implementation of foreign judgments and opinions. Or, perhaps, international rules and principles will be used by American judges as a tool in order to justify their general views and arguments. The truth may lie in the words of former Justice Ruth Bader Ginsburg, who recently said: "We live in an age in which the fundamental principles to which we subscribe – liberty, equality, and justice for all – are encountering extraordinary challenges. But it is also an age in which we can join hands with others who hold to those principles and face similar challenges."[38]

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[38] Ruth B. Ginsburg. 2005. *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*. Speech at the American Society of International Law, April 1.