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It's All About the Court(s): General Remarks on the American Idea of Judicial Impact on the Scope of Civil Rights

A legal system is one of the most fundamental issues concerning the functioning of a state, because on the one hand it determines social, political and economic relations, and on the other its provisions and rules bind the government and citizens, ensuring that no one stands "above the law". The variety of regulated issues causes the weight and value of legal norms to relate to fundamental aspects of the political and social system of the state or to individual issues of everyday life. Regardless of the nature of regulations, one may derive from them the character and essential features of the legal system. While analyzing different kinds of norms of American law one should draw a conclusion that the main ideas of the Founding Fathers, who not only created the U.S. Constitution of 1787 but also influenced the first crucial years of the development of the American political and legal system, are still present. These ideas concern a system that is based on a few important principles: the significance of the common law system, the rule of precedent, the separation of powers of the government, the rule of law, the federal-state hierarchic relations, unique procedures in the courts of justice, and, last but not least, the protection of fundamental rights of the people. However, due to the expansion of the powers of the judiciary authorities, it is worth observing that some of the original ideas have been reshaped or even modified. Additionally, one should admit that American law is very close to the people: some civil law cases show surprisingly high activity of individuals bringing suits to the courts, and the multiplicity of cases concerning various aspects of civil rights, both the rights that are literally in the Constitution, and those derived from its essence. All of the mentioned issues need a brief commentary to prove their significance and indispensability in the U.S. legal system, which would lead to concluding remarks concerning the real attitude of American constitutional law towards civil rights issues in the 21st century.

At the beginning, one should look back into the rules of English common law that had the greatest impact on the creation of the American legal system. The common law, which developed in Great Britain after the Norman Conquest, was mainly based on the decisions of judges in the royal courts. The system consisted of rules based on precedents – whenever an English judge made a decision that was to be legally forced, this decision became a precedent: a rule that guided judges in making subsequent decisions in similar future cases.[1] Theoretically, common law could not be found in any code or legislation; it existed only in past decisions of the courts. However, some of the British lawyers decided to codify English common law, thus creating volumes of legal norms useful for the next generations of scholars and historians.[2] The most influential in executing that task was William Blackstone, whose *Commentaries on the Laws of England* became the most valuable document of English law read by the colonists in the 1770s.[3] The lecture of the *Commentaries* allowed the colonists to choose some of the English legal institutions and principles that matched their ideas of a perfect legal system, and to reject such rules and regulations which seemed difficult to adapt in the American reality. It was significant that the colonists accepted, without any hesitation, the fundamental rights of the individuals exposed by Blackstone, i.e. right to freedom, right to safety and right to property. They also appreciated the concept of the supremacy of law, the tradition of precedent, the role of the judges in the legal system, and some guarantees of the accused in the criminal trial.[4] At the same time the English idea of political system was rejected with all its features (such as monarchy, powers of the Parliament, the unitary system), as an objection to historical oppressions experienced by the colonists.

As a result, some of English common law features became part of a newly-born American common law system. This system may often be called (in its English or American version) *judge-made-law*, because of the powerful role of the judiciary in preserving the legal ideas and principles. The judges create the law and shape new regulations following an old latin phrase *stare decisis et non quieta movere*, which means: "to stand by precedents and not to disturb settled points".[5] Common-law courts do not rely on codes, but on previous courts' decisions or – if there is no similar decision – they create a new rule in a case, which is then called "the case of first impression". According to Oliver Wendell Holmes, a famous U.S. Supreme

[1] J. Knight, L. Epstein, 'The norm of stare decisis', *American Journal of Political Science*, Vol. 40, No. 4 (1996), pp. 1019-1020, http://dx.doi.org/10.2307/2111740.

[2] Among the most prominent codificators were Henry Bracton and Edward Coke. See: E. Bodenheimer, J.B. Oakley, J.C. Love, *An Introduction to the Anglo-American Legal System. Readings and Cases*, St. Paul 2001.

[3] See: W. Blackstone, *Commentaries on the Laws of England 1765-1769*, New Jersey 2004.

[4] A.E. Farnsworth, *An Introduction to the Legal System of the United States*, New York 1996, p. 12.

[5] W. Burnham, *Introduction to the Law and Legal System of the United States*, St. Paul 2006, p. 65.

Court Justice, the "law is only what the judges say it is".[6] Therefore, common law is often called *case law*, because legal cases play the main part in understanding the principles and provisions of a particular system. Whatever the theoretical sense of American common law may be, it is important to notice that without practical decisions the legal system wouldn't be so creative and effective as it should be from the perspective of the ever-changing social, political and economic reality. The main decisions concerning the character of American law were made during the Constitutional Convention that took place in 1787 in Philadelphia and led to the creation of legal foundations of contemporary United States, as well as the basis for future meaning of civil rights.

The main reason of the Convention, which gathered more than fifty representatives of the thirteen states, was to revise the Articles of Confederation – the first effort to establish a new country. The document turned out to be imperfect, creating a confederation in which the division of powers proved erroneous.[7] The delegates, among whom there were many distinguished statesmen (more than 60% of whom were lawyers!!!),[8] decided to prepare a new document that would organize the states into a federal republic. Despite many differences concerning the division of power, the role of federal government or the relations among states, the Convention turned out to be a big success: the delegates created a constitution which, after its ratification in 1788, became the fundamental document of the new country. The United States Constitution, as the supreme law of the land, regulated the most important issues concerning the American legal system, implemented in seven brief articles and six main principles resulting from its substance: democracy,[9] rule of law,[10] federalism,[11] supremacy of the

[6] Oliver Wendell Holmes in United States v. Schenck, 249 U.S. 47 (1919).

[7] The problems concerned i.e. such issues as: weak federal government, differences between rich and poor states, economic crisis, and lack of national judicial institutions. For more on the topic see: M. Jensen, *The Articles of Confederation. An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781*, Madison 1963; P. Laidler, *Konstytucja Stanów Zjednoczonych Ameryki. Przewodnik*, Kraków 2007, p. 11.

[8] It is impossible to list all of the famous names of the Convention, but there was an active group of leaders, such as George Washington, Edmund Randolph, James Madison, Thomas Jefferson, John Adams, Banjamin Franklin, George Mason, to name a few.

[9] The Constitution and all the powers granted to the government are derived from the people and belong to the people. According to the Preamble of the Constitution, people of the United States have sovereignty. It was affirmed by John Marshall in the decision McCulloch v. Maryland, 17 U.S. 316 (1819). American community has the right to vote and therefore to choose the representatives that would govern in their name and in their favour. The Constitution grants voting power to the people in Congressional elections (article I) and Presidential elections (article II).

[10] "The government of the United States is [...] a government of laws, not of men" – a famous statement by John Marshall from his opinion in Marbury v. Madison, 5 U.S. 137 (1803). The main role of the judiciary is to settle disputes regardless of who the party is (a governmental officer or a private person). The role of the judiciary is prescribed in Article III of the Constitution.

Constitution,[12] separation of powers,[13] checks and balances.[14] Especially the federalism issue made the American legal system significant, because it caused its complexity - there is one federal legal system of the United States and more than fifty separate legal systems of the states and incorporated territories linked by the supremacy of the Constitution. It is obvious that the federal system would have an enormous impact on the future division of powers, also it delineated the perspective of the scope of civil rights protection.

All of the mentioned principles have influenced the shape and character of the legal system of the United States. Unfortunately, during the Convention there was a disagreement between the delegates concerning the constitutional reference to the rights and freedoms of individuals. Lack of unity and lack of time led the Founding Fathers to give up on adding provisions regarding civil rights protection. Indeed, it was one of the reasons why not all of them decided to finally sign the new document.[15] The failure to attach regulations on the rights and freedoms of individuals was quickly repaired by the First Congress, which passed a group of ten amendments to the Constitution known as the Bill of Rights in 1791. From that moment the United States were equipped with a written document (supreme law of the land), which, among many important norms referring to the powers of the government, devoted significant space to a catalogue of guarantees given by the state to the people. Freedom of speech, freedom of the press, freedom of religion, the right to bear arms, and several procedural rights were given to U.S. Citizens,[16] thus limiting the powers of the government.

[11] The document is the highest law of the country and all other acts have to be consistent with its rules and provisions This principle is written down in Article VI of the Constitution. The Constitution is at the top of the hierarchy of the sources of law. Any federal, state or local law must be created in accordance with the Constitution, and can be declared null and void if it violates constitutional provision or principle.

[12] There is one federal government of enumerated powers and fifty state governments possessing all the other powers The Constitution defines all the powers of federal government and leaves the rest of the competences to the states, according to Article IV and X Amendment to the Constitution. Vertical federalism regulates relations between the federal government and the states, whereas horizontal federalism regulates relations between state governments. On the issue of federalism see: L. Fisher, *American Constitutional Law*, North Carolina 2001; J. Nowak, R. Rotunda, *Constitutional Law*, St. Paul 2001; T. Wieciech, *Ustroje federalne Stanów Zjednoczonych, Kanady i Australii*, Kraków 2009.

[13] No branch of government can obtain more powers than the others - S.D. Smith, *The Constitution and the Pride of Reason*, New York 1998, p. 33. The power of the government is divided among three competing branches of government: the executive, the legislative and the judiciary.

[14] Each branch checks the actions of the others and balances their powers. Sometimes the system is called "separate institutions sharing powers". See: R.E. Neustadt, *Presidential Power. The Politics of Leadership*, New York 1960, p. 33.

[15] Three delegates having serious impact on the shape of the constitutional provisions rejected the possibility to sign the document without Bill of Rights: For more on the topic see: M. Farrand, *The Records of the Federal Convention of 1787*, New Haven 1911.

[16] It is important to acknowledge that "citizens" in 1787 meant white male landowners.

The Founding Fathers believed that the Constitution would become the basis for future development of legal norms and regulations, and that the constitutional principles were the best available at that time. They imagined that the tripartite constitutional system was the one that could make the government better at fulfilling its responsibilities. However, they did not realize that a few years after the creation of the Constitution, the separation of powers doctrine would be modified by the U.S. Supreme Court. In one of the most important decisions in its history, *Marbury v. Madison*,[17] the Justices created the power of judicial review. It allowed the federal judiciary to declare null and void these actions of other branches of government which exceeded or contradicted their powers as expressed in the Constitution.[18] Such expansion of judicial powers had a crucial meaning for the character of American legal system. From that moment on, there had been a tribunal which could interpret any constitutional norm or principle, changing the sense of particular clauses or even obtaining some legal values literally absent in the document! Judicial review became the most significant aspect of the U.S. legal system, not only confirming the *judge-made-law* feature of common law, but expanding it to *judge-made-decisions-on-every-aspect-of-American-social-and-economic-and--political-reality.*

As a result one could observe the enormous influence of the Supreme Court on such issues as federal-state relations, powers of the Congress under the commerce clause, competences of the executive and legislative branches of government, and, above all, the scope of civil rights. The idea of the American legal system became an idea of nine[19] Justices who adjudicated in a specific period of time confirming or rejecting the basic concepts of the Founding Fathers. For example, the delegates to the Philadelphia Convention repeatedly emphasized that in creating a government capable of promoting the public good, the Constitution must at the same time protect the rights and respect the principles of justice.[20] Following that thought, the Supreme Court in the 20th century made numerous decisions protecting individual rights and freedoms of American society. The Founders wanted the freedom of speech to exist – the Supreme Court found that there are several different forms of speech, some of which should be protected, some not.[21] The Founders put the freedom of religion clause in the First Amendment – the Justices decided to what extent the clause should be in force.[22] The Founding Fathers *did not* directly relate to right to privacy while creating the Ninth Amendment – the Court derived this

[17] 5 U.S. 187 (1803).

[18] P. Laidler, 'Real Check v. Real Balance. Judicial review in the U.S. governmental system' in A. Mania et al. (eds.), *United States and Europe. Conflict v. Collaboration*, Cracow 2005.

[19] Since 1869. Before that date the number of Justices varied from 5 to 10.

[20] J. Korn, *The Power of Separation. American Constitutionalism and the Myth of the Legislative Veto*, New Jersey 1997, p. 20.

[21] For more on freedom of speech cases see: J. Nowak, R. Rotunda, *Constitutional...*, pp. 1025-1306.

[22] For more on freedom of religion cases see: ibid., pp. 1307-1428.

right from the Constitution and adjudicated it in cases concerning abortion, use of contraceptives or LGBT rights.[23] Even the general character of the Bill of Rights was defined by the Justices, who at first acknowledged that guarantees from the document bind only the federal government, and – almost a hundred years later – that state governments are also subject to limitations stemming from the Bill of Rights.[24]

No matter what the social attitude towards the judiciary is: it is the U.S. Supreme Court thanks to which Americans so strongly value freedom. It is obvious that the original idea of freedom as a symbol of American legal system came from the Founding Fathers, however, it had been clearly emphasized by the federal judiciary in the following 200 years. Of course, the Congress as the main national lawmaker continuously carried on creating particular laws regarding civil rights, thanks to its legislative initiative, legislation tools and political power. But whenever a regulation was considered unreasonable, individuals could bring action against the government appealing to judicial sympathy, sensitivity or sensibility. The challenged law was not always declared null and void, but it gave an opportunity to redefine the concept of civil rights and set direction for future judgments. Such situation occurred for example with major legislation concerning civil rights issues implemented in 1866, 1875, 1964, and 1965.[25] The Congress determined the rules guiding the treatment of minorities in specific circumstances, but the final word on their practical meaning and accordance with constitutional norms belonged to the Supreme Court.[26]

One should ask, what would have happened if the *Marbury* decision had not come into force. There were clear dangers in enforcing the idea of strong judicial control over the executive branch of government, consisting of political enemies of the Court. John Marshall's notion to confront American legal reality with the substance and essence of the Constitution, thus pointing out the legal mistakes of political bodies such as the Congress or the President, sounded irrational at the beginning of the 19th century and was difficult to sustain by the then-governing bodies. For example, that negative attitude towards judicial review could be observed during Andrew Jackson's tenure as a President, when he refused to adopt a constitutional interpretation of the legal status of Native Americans shaped in one of the Supreme Court's decisions.[27] Almost one hundred years later, the Court

[23] Respectively: Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); and Lawrence and Garner v. Texas, 539 U.S. 558 (2003).

[24] Barron v. Baltimore, 32 U.S. 243 (1833); Gitlow v. New York, 268 U.S. 652 (1925), and several cases falling under the process of selective incorporation of Bill of Rights.

[25] Respectively: Civil Rights Act of 1866, 14 Stat. 27-30; Civil Rights Act of 1875, 18 Stat. 335-337; Civil Rights Act of 1964, 78 Stat. 241; and Voting Rights Act of 1965, Publ. L. 89-110.

[26] Examples of cases checking the constitutionality of the mentioned acts are, respectively: Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968); Civil Rights Cases, 109 U.S. 3 (1883); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[27] Worcester v. Georgia, 31 U.S. 515 (1831) – legal status of American Indians.

itself imposed some self-limiting doctrines which influenced its future operation, called in general: judicial restraint. The idea of judicial restraint could be derived from official legal opinions written by particular Justices who perceived the necessity to control judicial activity of many of their colleagues[28]. However, the abovementioned efforts to limit judicial review do not change the general idea formed since 1803, that the courts, and especially the U.S. Supreme Court, have enormous impact on the directions of legal interpretation. If the Marbury decision has not come into force, the country would have quickly confronted a constitutional crisis stemming from inaccurate and diverse interpretations of the document by various bodies which in character would be more political than legal.

Today there are still many scholarly opinions leading to a conclusion that the Supreme Court is politicized and therefore does not guarantee clear legal opinions based on bipartisanship and objectivity (of which the Author is a strong follower),[29] but there is no doubt that politicization of constitutional tribunals can be observed everywhere in the world. For instance, in Polish Constitutional Tribunal one can notice that any kind of decision leading to the interpretation of particular clauses of the Polish constitution produces different reactions of politicians – the ones in favor of the verdict underline the impartiality of the Tribunal, but the opponents of the verdict criticize its politicization.[30] Similarly, from time to time political opponents of concrete decisions of the U.S. Supreme Court raise the alarm about the improper functioning of the constitutional interpretation, whereas others applaud its courage and objectivity. And it is highly visible in case-law confronting the scope of constitutional civil rights. In reality, the Marbury decision came into force to complete the work of the Founding Fathers, who omitted a very important instrument of constitutional control, indispensable nowadays for democratic countries. Therefore, the courts are the final interpreters of the law and it is the judges' role to shape the meaning of important social, political and economic issues of the American everyday life. According to the famous statement of President Woodrow Wilson, who called the Supreme Court "the constitutional convention in continuous session",[31] the difference is that during the original convention the delegates did not thoroughly discuss issues concerning civil rights, whereas the contemporary Court is mainly involved in the interpretation of the meaning of constitu-

[28] As stated by Justice Louis Brandeis in Ashwander v. T.V.A.: "[...] the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, it will not anticipate a question of constitutional law in advance of the necessity of deciding it, it will not formulate a rule of constitutional law broader than the precise facts to which it is applied [...]", 297 U.S. 288 (1936).

[29] See: P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki*, Kraków 2011.

[30] It could be observed for instance in the Tribunal's decision concerning the unconstitutionality of the lustration laws in Poland: K2/07, May 11, 2007.

[31] A.T. Mason, G. Garvey, *American Constitutional History. Essays by Edward S. Corwin*, New York 1964, p. 127.

tional rights and liberties. Therefore it seems important to define when civil rights cases became the main area of concern for the U.S. judiciary.

There is no doubt that the change in the interpretation of the Bill of Rights began in the early 20th century, when the Court initiated the "incorporation doctrine" of the due process of law clause of the Fourteenth Amendment. Until that moment the guarantees written in the first ten amendments were addressed to the federal government and states were not bound by their provisions, but the implementation of the Fourteenth Amendment, followed by the active process of its interpretation undertaken by the Justices after WWI caused a significant change in the scope of states' rights. During a forty-year period, the Court proposed a so-called selective incorporation of Bill of Rights' guarantees, not only deciding about the scope of protection, but also defining which guarantees should enjoy broader constitutional protection. The boundary was also set by the Justices alone, who incorporated only those guarantees which were of fundamental character, and were "of the very essence of a scheme of ordered liberty", as was stated by Benjamin Cardozo in his *Palko v. Connecticut* opinion.[32] The direct effect of such an approach was the increase of the caseload concerning civil rights, as citizens of various states began to sue local governments for not respecting their constitutional rights. Such a change in the Court's docket was foreshadowed by the Justices in 1938 in the famous Footnote Four to *United States v. Carolene Products Co.*, when Harlan Fiske Stone predicted possible future limitations to the powers of government, provided they encroached on the rights of the people.[33] Robert MacKeever argues, that Stone initiated a new era in the Court's adjudication, when the judiciary became an advocate of the rights of minorities, who predominantly lost in the political sphere.[34] As a result, states are subject to various limitations emerging from most of the guarantees inscribed in the first ten amendments: freedom of speech, freedom of the press, freedom of association, freedom of assembly, free exercise of religion, guarantee against establishment of religion, right to bear arms, and several procedural rights, such as warrant requirements, protection against unreasonable searches and seizure, protection against double jeopardy, privilege against self-incrimination, right to public and speedy trial, right to an attorney, right to trial by jury, right to confront witnesses, as well as protection against cruel and unusual punishments.[35]

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[32] 302 U.S. 319 (1937).

[33] 304 U.S. 144 (1938), footnote four.

[34] R.J. MacKeever, *The U.S. Supreme Court. A Political and Legal Analysis*, Manchester 1997, p. 7.

[35] Respectively in cases: Gitlow v. New York, 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940); McDonald v. Chicago, 561 U.S. 3025 (2010); Aguilar v. Texas, 378 U.S. 108 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Benton v. Maryland, 395 U.S. 784 (1969); Malloy v. Hogan, 378 U.S. 1 (1964); In re Oliver, 333 U.S. 257 (1948); Gideon v. Wainwright, 372 U.S. 335 (1963);

Justice William Brennan wisely observed that the original purpose of the Fourteenth Amendment was to broaden the powers of Congress, not the judiciary.[36] In reality, it was the Supreme Court which benefited most from the selective incorporation doctrine, gaining the final word in determining the scope of civil rights. Such a situation led to social and political discussion about the proper role of the judiciary in the American system of government. Famous researchers of this issue pointed out the growing political role of the federal judiciary, arguing for its role as a guard of constitutional values. Robert Dahl defined the Court as an institution deeply rooted in the dominating political coalition, the main role of which was to represent the United States and its interests. According to Dahl, the Court became the main legitimization of all constitutional and political changes in the country.[37] Several years later, Alexander Bickel offered a different approach, calling the highest judicial institution in the United States a "countermajoritarian" institution, playing the role of the final "anchor" in the minorities' fight for their rights and freedoms. Therefore, as Bickel suggested, the Justices were more often advocates of civil rights' groups than federal or state governments.[38] Both approaches were confronted by Richard Funston, who drew his own conclusion bringing together the opinions of Dahl and Bickel, that the role of the judiciary depends on the political configuration in the White House and Congress.[39] A careful analysis of the history of American constitutional law leads to a concept modifying Funston's arguments, that the role of the Supreme Court depends not on the configuration of the government, but on governmental policy towards crucial values of the society, such as freedom and safety. There is no doubt that, since 1950s, courts began to acknowledge broader rights of the people, and the only serious limitation to such policy, despite ideological differences, was the idea of protection of national security. One could observe this during the Cold War period, one can observe it today, when the United States are fighting against terrorism.

The analysis of American idea of civil rights protection should also be concerned with the characteristics of legal trials in U.S. courts. There are of course civil and criminal trials, the latter, however, seem to be more crucial for the topic in question, as a centerpiece of the criminal justice system.[40] The basic three significant features of the criminal procedure are: the adversarial system, the existence

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Duncan v. Louisiana, 391 U.S. 145 (1968); Pointer v. Texas, 380 U.S. 400 (1965), and Robinson v. California, 370 U.S. 660 (1962).

[36] J.C. Agresto, *The Supreme Court and Constitutional Democracy*, Ithaca 1984, p. 131.

[37] See: R. Dahl, 'Decision-making in a democracy. The supreme court as a national policy-maker', *Journal of Public Law*, Vol. 6 (1957).

[38] See: A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis 1962.

[39] R. Funston, *A Vital National Seminar. The Supreme Court in American Political Life*, Palo Alto 1978.

[40] Criminal trials are centerpiece of criminal justice system because they are held before juries drawn from the community, are the most visible aspect of the justice system and often

of the jury, and a broad catalogue of rights of the accused. The adversary process means a litigation in which there are two sides that have different objectives but can employ the same means to achieve those objectives, and there is a judge whose main role is to observe the actions of the adversaries without participating in the investigative process.[41] Jury trials, originating from 13th century England, are trials in which a group of laymen, representatives of a cross-section of the community, having the duty and the opportunity to deliberate, free from outside attempts at intimidation, has to decide on the question of a defendant's guilt.[42] It is one of the most fundamental civil rights, and a very popular guarantee for the accused in criminal procedure, because *any* accused may waive the right to jury trial.[43] Among other guarantees of the accused (which have been reinterpreted by the Supreme Court), are: the right to counsel, right to a fair and speedy trial, right against self-incrimination, double jeopardy and exclusionary rule.

The existence of many limitations to the actions of prosecutorial agencies leads to a feeling that the American system of justice is constructed in a way which assures that the "presumption of innocence" rule shall never be violated. It also fits in the larger vision of a state the role of which is to protects the rights and freedoms of individuals. The criminal justice system proves that American society – and especially American political and legal establishment – believes that it is better to have a system where no innocent person shall suffer, whereas some guilty people may enjoy their freedom. Of course, the ideal situation would create conditions in which all guilty people are in jail and all innocent people are free, but there is no such system in the world. Meanwhile, Americans believe that their approach is fair enough,[44] despite allowing the existence of death penalty. It is the highest punishment in the federal criminal justice system and legal systems of thirty five states, due to the Supreme Court's interpretation[45] of the Eighth Amendment's cruel and unsual punishment clause. Nowadays, as a very controversial issue, the capital punishment seems to be a showcase of the system, even though it has proved erroneous many times in history.[46] Paradoxically, the idea of death penalty sentence was taken from the British common law, which later on abandoned its execution. It is also significant that a state aiming at broad protection of civil rights still con-

attract widespread media coverage, and often have an important impact on the administration of justice. See: J.M. Scheb, J.M. Scheb II, *Criminal Law and Procedure*, New York 2005, p. 470.

[41] J.M. Feinman, *Law 101. Everything You Need to Know about the American Legal System*, New York 2000, p. 324.

[42] Williams v. Florida, 399 U.S. 78 (1970).

[43] Duncan v. Louisiana, 391 U.S. 145 (1968).

[44] There are no statistical data, however, showing that the number of innocent people suffering from the wrong verdicts is higher in other legal systems of the world.

[45] Gregg v. Georgia, 428 U.S. 153 (1976).

[46] Especially in the 30s and 40s of the 20th century when courts imposed death penalty to African-Americans basing on weak evidence, whereas white Americans received "only" life imprisonment sentence for the same crimes.

firms the constitutionality of such controversial guarantees as death penalty or the right to bear arms. However, the proponents of the two institutions would justify their existence by ... the willingness to protect one of the basic rights of the people: the right to safety. William Blackstone, one of the Founding Fathers, and the conservative majority on the 21st century Supreme Court would confirm such an approach!

While observing the activity of people in the United States, who often solve their problems in courts, one may ask about the reason and source of such behavior. Definitely it shows the attitude of citizens towards their judicial system: Americans believe that the court system is created to settle disputes between private parties or the individuals and the state. Law may express many competing values of the society, which often come into conflict.[47] In that dimension it is worth mentioning that most of the civil cases that take place every year in U.S. courts of first resort are so-called tort law cases. Torts are wrongful acts committed by a person or entity resulting in injury or loss to the victim.[48] There are three kinds of torts: negligence, intentional torts, and strict liability torts. Especially the last group seems very controversial, because it concerns cases against entities which may be held liable for an injury regardless of their intent or negligence.[49] In effect, American courts award enormous compensatory damages, which very often hamper an entity's development. However, all of it derives from the very essence of the American legal system, which can be found in the motto placed above the entrance to the Supreme Court: *Equal Justice under Law*. The law sets the rules and the society has to follow them. At the same time the court-activity of U.S. citizens leads to the indispensability of the legal profession. There are judges, prosecutors, attorneys (for litigation), there are legal officers in the highest political posts in both state and federal governments, and there are also legal advisers with private practice or working for business entities, without whom the system could not work properly.[50] It seems that the legal profession is naturally rooted in American reality. Since most of the participants of the Constitutional Convention were lawyers, it seems obvious that the American idea of a perfect legal system was created by the lawyers and it serves the lawyers, especially judges who are able to decide about social and political relations in the country.

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[47] Conflicts may concern such values as: freedom versus equality, privacy versus state control, national security versus freedoms.

[48] J.M. Scheb, J.M. Scheb II, *An Introduction...*, p. 159.

[49] Nowadays strict liability tort is imposed on those who engage in abnormally dangerous activities and can be imposed on designers and manufacturers of products.

[50] A.A. Levasseur, J.S. Baker (eds.), *An Introduction to the Law of the United States*, Lanham 1992, pp. 423-424.

Alexis de Tocqueville in his famous *Democracy in America* presented the actual meaning of law and legal relations in the United States. "Whenever the political laws of the United States are to be discussed, it is with a doctrine of sovereignty of the people that we must begin." And, "there is hardly a political question in the United States which does not sooner or later turn into a judicial one".[51] These two important statements show the position of law within the society and the position of society in the American legal reality. On the one hand, politics and law have always been very close to each other, thus creating another distinctive feature of U.S. legal system. On the other, the people of the United States created a Constitution which has been leading them for more than 200 years. Constitutional theory and practice produced a unique court system that has become the most distinctive feature of American legal thought. And although courts are fundamental elements of legal structure in most of the countries in the world, it is the U.S. judiciary that has the sole power to interfere in everyday life of the sovereign nation. Including the sphere of civil rights. The political aspect of the court's adjudication can be observed not only in cases regarding federal-state relations or powers of the government. It is visible in the ideological attitude of certain Justices towards the proper interpretation of constitutional clauses devoted to rights and freedoms of individuals. Liberal Justices, most of whom were appointed by Democratic administrations, tend to support broader protection of civil rights. During the times when liberal ideology was represented by the majority of Court members, American constitutional jurisprudence was enriched in such concepts as right to abortion, affirmative action, pure separation of state and religion, and homosexual right to privacy.[52] Conservatives, in contrast, do not neglect the idea that people should enjoy safeguards from encroachments of the government, but offer a narrower scope of protection of their constitutional rights. Still, there are areas where conservatives believe people should be given broader constitutional protection, such as the right to bear arms.[53] The ideological difference occurs also with respect to the approach to criminal procedure guarantees. Liberals support a so-called due process model aiming at awarding the accused considerable constitutional protection, whereas conservatives promote a crime-control model based on wider control of the accused by broadening the powers of law enforcement agencies. Historically, there were periods when one of the concurring models prevailed, but today one can observe the clash of liberal and conservative approaches, as an accused can enjoy broad guarantees provided they are not terrorist

[51] A. de Tocqueville, *Democracy in America*, trans. by B. Janicka, M. Król, Warsaw 2005, pp. 217-220.

[52] Resulting from cases: Roe v. Wade, 410 U.S. 113 (1973); Grutter v. Bollinger, 539 U.S. 306 (2003); Lemon v. Kurtzman, 403 U.S. 602 (1971); and Lawrence and Garner v. Texas, 539 U.S. 558 (2003).

[53] District of Columbia v. Heller, 554 U.S. 570 (2008); and McDonald v. Chicago, 561 U.S. 3025 (2010).

suspects.[54] Therefore it is impossible to understand American attitude towards the scope of civil rights without referring it to ideological trend in federal judiciary.

There is no perfect legal system in the world. One may point out the differences between the American common law and European civil law systems. This comparison may draw some positive and some negative aspects of both. Is it better to have law based on precedents or codified norms? Which of the systems produces a better idea of how to protect civil rights? Is an adversarial system able to produce just results in cases when the attitude of the attorneys is not always based on ethics and competence? Are thousands of lawyers working in American cities a guarantee of the old maxim *And Justice for All*? I think the problem concerns the people, not the system. In every country which is governed under the rule of law principle, the basic idea is the same: to protect the rights of the state and individuals, according to law. In every such country there are people who tend to be "above the law". Practice often proves that there are also people who can make mistakes while interpreting the law. That is why binding and persuasive precedents exist in common law countries and the structure of justice allows for recovering from interpretational mistakes. But not for long. If the system is efficient enough, the courts will correct the mistakes of ordinary people. Yet, what will happen if the mistakes are made by judges (wrong verdict)[55] or politicians (passing inappropriate laws)?[56] A perfect situation would occur if the system could correct its own wrongdoings, but that is hardly ever possible. And there will never be an ideal system of protecting civil rights, because people share different opinions and beliefs, as they expect different activities from the government. No matter who (the legislative, executive or judicial branch) has the final word in creating, executing and interpreting the law.

The future of civil rights in the United States is in the hands of the Justices. In the 2011-2012 term the Court interpreted the contemporary meaning of the rights of immigrants, and the scope of federal power over health service.[57] In its 2012-2013 term the Supreme Court is going to determine the scope of affirmative action, right to privacy, same-sex marriages, and will even confront human rights issues.[58] It is hard to imagine in contemporary democracies a more direct effect on

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[54] Since 9/11 Congress has broadened the powers of law enforcement agencies (i.e. *The U.S.A. Patriot Act*), and the Court did not declare unconstitutional any serious post-9/11 legislation aiming at investigation of terrorist suspects. Meanwhile, liberal Justices affirmed the ideas of due process model in Brown v. Plata, 562 U.S. 09-1233 (2011).

[55] For example Korematsu v. United States (323 U.S. 214, 1944) or death penalty cases against African-Americans in the 30s and 40s of the 20th century.

[56] For example *Alien and Sedition Acts* of 1798.

[57] Respectively: Arizona v. United States, 567 U.S. (2012); and National Federation of Independent Business v. Sibelius, 567 U.S. (2012).

[58] Respectively: Fisher v. University of Texas, Clapper v. Amnesty International USA, Department of Health and Human Services v. Massachusetts Kiobel v. Royal Dutch Petroleum Co., Inc.

social relations of a single governmental institution, which does not have direct democratic legitimization. Regardless of the priority of the legislative departments to create civil rights regulations, it is the judicial department which, having ability to review the constitutionality of such regulations, has the primacy in determining the proper scope of civil rights in America. It does not make the system perfect, but undoubtedly unique.

Abstract

Different legal systems provide different concepts of civil rights protection. In most countries the law is created by the legislative and is enforced by the executive, making the two powers dominating actors in the process of shaping the scope of the rights of the people. From time to time, such regulations are found unconstitutional by special Courts (Tribunals), which adapt them to constitutional reality. However, in common law countries, and especially in the United States of America, the concept of power of the legislative over civil rights is undermined by active judicial review undertaken by federal courts with the Supreme Court at the top. The lawmaking ability of the judges, their position within the branches of government, as well as the power of judicial review, leads to the dominating position of court-shaped principles and regulations over various social and political issues. Civil rights cases belong today to the most valuable legacy of the Supreme Court, in which precedents have enormous impact on the scope of protection of constitutional rights and freedoms.

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