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"GOOD LAW" VERSUS "BAD LAW": CIVIL DISOBEDIENCE DURING THE DESEGREGATION PROCESS IN THE UNITED STATES OF AMERICA

ABSTRACT In 1954, after almost sixty years of tolerating the separate-but-equal doctrine shaped in *Plessy v. Ferguson*, the U.S. Supreme Court decided to reject the unequal policy of the government in educational system, and thus to initiate changes in the status of racial segregation. *Brown v. Board of Education of Topeka* decision ignited both positive and negative feelings and emotions of Americans, who began to show two types of civil disobedience. The first type of disobedience was addressed against the Court and its controversial precedent, and could be visible mainly in Southern states among white citizens and some state authorities. Despite the fact that the Court's decision was binding, Southern judges, politicians as well as ordinary people showed their disobedience towards the highest judicial institution in the country and its notion of desegregation. The second type of civil disobedience was addressed towards these institutions which neglected the necessity of social change and promotion of equality, and could be observed in actions undertaken by various individuals and organizations aiming at broadening the constitutional protection of black Americans. The purpose of the article is to analyze both types of civil disobedience which were initiated by the same source – a judicial precedent, and had an enormous impact on American society of the late 1950s and early 1960s, leading to final change in the perception of the equality principle as well as the status of civil rights. The article proposes a thesis that the scope and character of civil disobedience may depend on the ideology of certain social groups and therefore influence their attitude to the direction of changes in law.

Keywords: civil disobedience, rule of law, racial segregation, U.S. constitution, U.S. Supreme Court

INTRODUCTION

Civil disobedience can be analyzed as an element of relations between the society and government, or, from the more specific perspective, of social attitude towards certain provisions of law. The second perspective has become an interesting and challenging field of research for many theorists, including Henry David Thoreau,[1] John Rawls,[2] and Ronald Dworkin,[3] who discussed the effects of law on individuals, social groups, the society as a whole as well as the possible negative reactions of the society towards established legal norms.

Empirical analysis of the correlation between the society and the law may be undertaken with regard to any contemporary state. In the 20th-century United States of America various social movements resulting from disapproval of the law played a significant role in the changes within the society. There have been many examples of civil disobedience towards the law in the history of the United States, with various social groups protesting against discriminatory laws against women (Suffrage Movement), laws giving monopoly to big business (Progressive Era), legally-based censorship (times of WWI, WWII, Cold War), or, recently, the status of the right to privacy (abortion, LGBTI rights), as well as the anti-terrorism measures (*The U.S.A. Patriot Act*).

The main reason for social protests was the scope of social, economic or political relations derived from the character of legal provisions implemented by federal or state legislatures. There have been studies referring to social impact of the law created by the legislative branch of government, but it is important to observe a growing influence of the U.S. Supreme Court decisions on social relations. Due to the ability to interpret the law, including the Constitution,[4] the Court plays a significant role in the process of reshaping the meaning of certain legal provisions, and thus impacting the everyday life of the people. The political and social role of the Supreme Court has been analyzed in various works of constitutional scholars,[5] but most of the studies did not refer directly to the issue of civil disobedience.

The purpose of the article is to analyze a significant period of American history, when one decision of the Supreme Court had an enormous impact on activities undertaken by various social groups, leading to two types of civil disobedience: enforced by opponents and proponents of that decision. These periods of complex civil disobedience occurred in the 1950s and 1960s as a direct result of the Supreme Court's precedent in *Brown*

1 See: H.D. Thoreau, 'On the Duty of Civil Disobedience [Resistance to Civil Government]' [1849] in idem, *Reform Papers*, ed. W. Glick, Princeton 1973, pp. 63-90.

2 See: J. Rawls, *Theory of Justice*, Cambridge, Mass. 1971.

3 See: R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass. 1978.

4 *Marbury v. Madison*, 5 U.S. 137 (1803).

5 Compare American books and articles by Alexander M. Bickel, Robert Dahl, Arthur S. Miller, Christopher Wolfe, Charles Fried, Lawrence Baum, Laurence Tribe, Mark Tushnet, Erwin Chemerinsky and many more. See also writings (in Polish) of Wacław Szyszkowski, Leszek Garlicki, Ryszard M. Małajny, Grzegorz Górski, Dorota Lis-Staranowicz, and Paweł Laidler.

v. Board of Education, which found segregation on school facilities unconstitutional.[6] The chapter argues that civil disobedience initiated by the Supreme Court's decision was mainly a result of the enormous impact of federal judiciary on the life and values shared by American people. But that argument is only a basis for more important analysis of the general character of civil disobedience towards the law. As will be shown in this article, civil disobedience may lead to diversification of the law into "good law" and "bad law", depending on the attitude of the people affected by certain judicial decisions. From that point of view, it may be observed that civil disobedience can be an enduring element of social life, as there will always exist a social group defining certain laws as "bad" and "unacceptable". Despite the fact, that the problem of civil disobedience raises a lot of important questions concerning its scope and possible outcomes, the author does not aim at conducting thorough analysis of the issue, but focuses on the impact of desegregation process in the U.S. on the evolution of the concept of civil disobedience.

The article refers mainly to the analysis of legal documents and court decisions, as well as literature on the topic of civil disobedience, mostly by U.S. scholars, but it is important to acknowledge, that the issue of civil disobedience as an element of (American) democracy was often analyzed by Polish researchers.[7]

SEGREGATION AND *BROWN*

Despite the fact that since 1868 black members of American community received U.S. citizenship, and became subject to equal protection of law (Fourteenth Amendment), and that in 1870 they gained suffrage rights (Fifteenth Amendment), Southern states made numerous efforts to prevent the enforcement of the new laws. These efforts led to establishment of legal norms (called Jim Crow laws), which established segregation in public facilities, such as transportation, schools, and public offices, but also prevented black citizens from participating in elections by prohibiting illiterates to vote, which in reality concerned mainly former slaves and their families.[8]

These processes were supported by the Supreme Court in 1896, when the Justices affirmed, on the one hand, equality among races, but, on the other, found segregationist state-laws constitutional. The doctrine established in *Plessy v. Ferguson*,[9] called sepa-

6 347 U.S. 483 (1954).

7 See: W. Lang, J. Wróblewski, *Sprawiedliwość społeczna i nieposłuszeństwo obywatelskie w doktrynie politycznej USA*, Warszawa 1984 (*Współczesne Doktryny Polityczno-Prawne USA*); M. Kaczmarczyk, *Nieposłuszeństwo obywatelskie a pojęcie prawa*, Warszawa 2010; idem, 'Nieposłuszeństwo obywatelskie a demokracja', *Studia Socjologiczne*, No. 1 (2013), pp. 21-40; M. du Vall, 'Electronic civil disobedience (ECD) jako jedna ze współczesnych form obywatelskiego nieposłuszeństwa', *Państwo i Społeczeństwo*, No. 2 (2010), pp. 123-133; A. Szutta, *Obywatelskie nieposłuszeństwo. Próba określenia pojęcia*, Warszawa 2011; M. Pieniążek, 'Obywatelskie nieposłuszeństwo jako gwarancja praw podmiotowych', *Studia Prawnicze*, Vol. 8, No. 1 (2012), pp. 9-26.

8 See: J.M. Packard, *American Nightmare. The History of Jim Crow*, New York 2003.

9 163 U.S. 537 (1896). More about the outcome of the Court's decision see: D. Cates, *Plessy v. Ferguson. Segregation and the Separate-But-Equal Policy*, ed. M. York, New York 2012.

rate-but-equal, meant government's consent for state-based segregation, and led to continuing social divisions in the early decades of the 20th-century. From the perspective of the public school system, black children could not attend schools for white children due to regulations enforcing segregation in public facilities, and such situation occurred in the whole public sphere. Various social groups and organizations took efforts to mobilize desegregationist movement and to address the issue of social inequality at state and federal institutions, among which the main role was to be played by the courts. In the late 1940s and early 1950s the National Association for the Advancement of Colored People (N.A.A.C.P.), with the help of American Civil Liberties Union (A.C.L.U.) developed numerous of cases, which were adjudicated by the Supreme Court, but did not bring any change to the status of black Americans, as the Justices neglected the possibility of overruling the separate-but-equal doctrine.[10]

Finally, in 1954, the Court adjudicated in the five segregation cases unified under the name *Brown v. Board of Education.*[11] A black girl Linda Brown was forced to attend a segregated school a few miles from her house in Topeka, Kansas, while there was a school for white children located just a few blocks from where she lived. Her parents challenged the Kansas law, arguing that it established segregation which led to inequalities among children of different racial descent. Mr. and Mrs. Brown filed a suit against the Board of Education of Topeka, which approved of the program and had operated it since 1879. The lower courts upheld the law, using as a justification the Supreme Court's separate-but-equal doctrine, but the Court decided to revise the old precedent as unjust and unconstitutional. The author of the unanimous opinion, Chief Justice Earl Warren, stressed that it was a proper moment for analyzing the problem from the perspective of the importance of education for the whole society: *[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship* [...] *[I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*.[12]

The Court argued that segregation process impaired the motivation of black children to learn, therefore separate educational facilities were undoubtedly unequal: *We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by rea-*

[10] See: C. Tomlins (ed.), *The United States Supreme Court. The Pursuit of Justice*, Boston 2005.

[11] 347 U.S. 483 (1954). The other cases were: *Belton v. Gebhard*, *Bolling v. Sharpe*, *Briggs v. Elliott* and *Davis v. County School Board*.

[12] 347 U.S. 483 (1954).

son of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[13]

Despite its unanimity, the decision of the Warren Court initiated violent social reactions in regions where segregation was deeply rooted in tradition and everyday life. Officially, state governments were obliged to adjust their norms and regulations to the Court's precedent, and the state courts were bound to follow the ruling of the highest judicial authority in the country. The officially binding character of the *Brown* decision produced immediate and strong opposition in the American South. The social and political groups opposing the ruling pursued the first type of civil disobedience against the Court and its desegregation efforts. That, in turn, led to the second type of civil disobedience triggered by the members of the civil rights movement and directed against the activities undertaken by segregationists.

THE REACTION OF THE SOUTH

The 1954 Supreme Court precedent produced an immediate reaction of the white segregationists from Southern states. These opinions were supported by official statements of states' authorities. For example, governor Ross Barnett of Mississippi announced that *no school will be integrated* [...] *while I am* [...] *governor*.[14] The newly elected Alabama governor, George Wallace, made a strong statement opposing *Brown* decision by declaring *segregation now, tomorrow and forever*.[15] And the governor of Arkansas, Orville Faubus, during the campaign of 1956, pronounced, that *court edict* could not change *centuries old customs*, and that he could not *be a party to any attempt to force acceptance of change to which the people [we]re so overwhelmingly opposed*.[16]

The language of segregationists depicted their political and ideological enemies as challenging the "American way" of life and referred to the supporters of desegregation as "socialists" and "Marxists". It is important to acknowledge that the language used by most of white Southerners was just the first step to the organized social and political disobedience against the legal holding of the *Brown* precedent. By criticizing, on the one hand, the Supreme Court's activism in changing social relations in America and, on the other, by neglecting its usurpation of power, white segregationists, led by state authorities, called for disorder which was mainly expressed in growing social violence.

The first organized opposition to Court's desegregation order took place in Arkansas, where the School Board in Hoxie School District initiated integration efforts of black children with the white majority. As the process continued, local groups, organ-

[13] Ibid.

[14] Ross Barnett, as quoted in: W. Doyle, *An American Insurrection. James Meredith and the Battle of Oxford, Mississippi, 1962*, New York 2001, p. 39.

[15] B.M. Wilson, *Race and Place in Birmingham. The Civil Rights and Neighborhood Movements*, Lanham 2000, p. 93.

[16] Orville Faubus, as quoted in: T. Freyer, *Little Rock Crisis. A Constitutional Interpretation*, Westport 1984, p. 78 (*Contributions in Legal Studies*, 30).

ized as Citizens Committee Representing Segregation in the Hoxie Schools, began to hamper the decision of the School Board. It led to various forms of provocative behavior, such as late night anonymous phone calls, mysterious knocks on doors, and even threats addressed towards school officials, as well as members of the black community. The most effective way of showing civil disobedience was the boycott of the school undertaken by many white students, which led to reduced attendance in Hoxie schools in the following months.[17]

A more dramatic situation occurred in the other part of the state, in Little Rock, where Governor Faubus had ordered the state's National Guard to prevent nine black students from enrolling into the Central High School. The students were registered in 1957 by local branch of N.A.A.C.P., but their entering the school was endangered by the threats from segregationists, who were additionally supported by state authorities. As a result, the Arkansas National Guard blocked the school entrance, which, on the one hand, made Faubus a local hero, but, on the other, forced the federal government to pay closer attention to the events at Little Rock. To ensure that the Court's decision would come into effect, President Dwight Eisenhower took the National Guard from state's jurisdiction and ordered it to provide for enforcement of the Supreme Court ruling. On that day, the President addressed the American people and explained that his duty to uphold the holding of the highest judicial instance was "inescapable".[18] The subsequent successful entry of black children to high school did not obviously end negative attitudes of white children towards them, which made the desegregation process in Arkansas long and complicated.[19]

A similar clash of state and federal powers occurred three years later at the University of Mississippi. The turmoil arose during the process of enrollment of a black student, James Meredith. When Meredith applied for the University and was officially admitted, thousands of white citizens of the state organized protests against desegregation in public education facilities. As the black student approached the campus, which was guarded by 200 security patrolmen, more than 2,500 protesters, many of whom were armed, gathered in order to prevent him from entering. There were also about 1,000 students who openly disagreed with the policy of the University resulting from the *Brown* decision.[20]

Civil disobedience towards the Supreme Court's decision and towards actions undertaken by the Department of Justice did not mean general insubordination towards the law. The rioters supported the initiatives of state government, especially governor Ross Barnett who was openly an advocate of segregationist policy. Eventually, in the wake of a social and political crisis, President John F. Kennedy sent more than 500 law enforcement officers to secure the peaceful entry of Meredith to the University cam-

[17] K. Anderson, *Little Rock. Race and Resistance at Central High School*, Princeton 2013, pp. 68-73 (*Politics and Society in Twentieth-Century America*).

[18] C.J. Pach, E. Richardson, *The Presidency of Dwight D. Eisenhower*, Lawrence 1991, p. 53 (*American Presidency Series*).

[19] See: T. Freyer, *Little Rock Crisis...*; K. Anderson, *Little Rock...*

[20] F. Lambert, *The Battle of Ole Miss. Civil Rights vs. States' Rights*, New York 2010, p. 107 (*Critical Historical Encounters*).

pus. This led to street fights, forcing Department of Justice to send 165 more National Guardsmen, which finally set order at the University surroundings. As a result, over 300 people were wounded, and 200 arrested. In the next months, over 20,000 troops were guarding the campus, thus outnumbering the students five to one.[21]

Paul M. Gaston has written of the incidents of extreme violence in Southern states as members of the civil rights movement were beaten, tortured, and even murdered.[22] The use of hate speech against African-Americans was a common feature of Southern societies and a normal element of everyday life. The other important element of the campaign against civil rights movements was the handful of suits against the local NAACP branches, mostly by state attorneys general, as it limited the possibility of active resistance against the segregationist policies of state governments.[23]

What is significant is that the whole movement against the implementation of the *Brown* decision had a strong theoretical background. Many local governments promoted the so-called doctrine of interposition, under which a state could interject its sovereign power between its citizens and the national government. In the late 1950s, segregationists tried to force the implementation of the interposition doctrine, seeking to undermine the authority of the Supreme Court and the binding character of its precedents.[24] Such an approach led also to the revival of the theory of nullification (the right to nullify any federal law by the state), as in Arkansas, Alabama, and Mississippi one could observe growing conviction of segregationists that states should use their sovereignty to oppose the *Brown* decision. Sometimes theories supporting white extremists came not from politicians, but from judges. The most famous judicial pro-segregationist approach, called the Parker Doctrine, came from the argumentation of the South Carolina judge John Parker, who did not find in *Brown* any constitutional ban on segregation, but the necessity to protect the rights of all blacks that are taught in public schools in the state.[25] According to that approach, it was not necessary to integrate blacks into white schools in the South, which led to further disobedience.

THE COUNTER-REACTION

When Southern segregationists were showing their disapproval towards the 1954 precedent of the Supreme Court, civil rights activists who were directly or indirectly responsible for the success of *Brown* decided to show their disobedience towards both theoretical and practical aspects of segregation. Officially, the activities undertaken by

21 Ibid., p. 128.

22 P.M. Gaston, 'Sutpen's Door: The South since the Brown Decision' in E.M. Lander, Jr., R.J. Calhoun (eds.), *Two Decades of Change. The South Since the Supreme Court Desegregation Decision*, Columbia 1975, pp. 106-108.

23 T. Freyer, *Little Rock Crisis...*, pp. 128-131.

24 Ibid., pp. 80-82.

25 R. Kluger, *Simple Justice. The History of Brown v. Board of Education and Black America's Struggle for Equality*, New York 1976, p. 752.

desegregationist movement were aiming at supporting further integration, and, as the leaders of the movement argued, the methods were to be non-violent.[26]

An analysis of the most significant actions of individuals or social groups supporting desegregation proves that, in some respect, they successfully avoided confrontation, but, in other situations, violence was inescapable. Such organizations as the Southern Christian Leadership Conference (S.C.L.C.), the Congress of Racial Equality, the Revolutionary Action Movement, and Black Muslims, as well as individuals connected with the A.C.L.U. or the N.A.A.C.P., initiated short– or long-term processes which led to changes in law, political actions and social attitude towards the problem of equality. The best example of such actions can be found in Rosa Parks' Montgomery bus boycott. On December 1, 1955, in Alabama, Parks, a 43-year-old seamstress and active N.A.A.C.P. member, refused to give up her seat in the section for white passengers. Her action quickly became a part of a campaign to protest against segregationist movement and racial tendencies in the whole South. It proved effective, as numerous black members of the community decided to support Parks by boycotting Montgomery transportation system for more than a year.[27]

There were at least three visible results of the type of civil disobedience initiated by Rosa Parks. Firstly, the bus boycott spread throughout most of Southern states serving as an example of a successful non-violent action.[28] Secondly, it raised judicial concern over the issue of bus segregation, and not later than in 1956 did the Supreme Court decide about unconstitutionality of state law requiring public buses with segregated seats.[29] Thirdly, despite the fact that Park's boycott was not the first effort to unite the black community over the issue of common opposition towards segregation, she made history due to the future leadership in the movement of her pastor, Martin Luther King, Jr.

King was not only an activist, and the leader of the S.C.L.C., but also the doctrinal father of the second type of civil disobedience which emerged after the Southern states hesitated to implement the *Brown* holding. According to King's own words, civil disobedience did not become the main part of his strategy of non-violent direct action. He was convinced that the Montgomery bus boycott was justified, and so were similar protests in Alabama, as an element of general disapproval of segregation.[30] King accepted civil disobedience as a logical and righteous response to the statues and ordinances by which the South institutionalized its system of racial discrimination. He shaped that concept which evolved in the 1960s in his three writings: 'Love, Law, and Civil Disobedience' (1961), 'Address to the American Jewish Committee' (1965), and 'The Trumpet of Conscience' (1968).[31] Despite his theoretical background, the leader

[26] Such statements can be found in the writings of Martin Luther King, Jr.

[27] P.D. Buchanan, *Race Relations in the United States. A Chronology, 1896-2005*, Jefferson 2005, pp. 83-84.

[28] R. Kluger, *Simple Justice...*, p. 750.

[29] *Browder v. Gayle* 352 U.S. 903 (1956).

[30] M.L. King, Jr., 'Three Statements on Civil Disobedience (1961-1968)' in D.R. Weber (ed.), *Civil Disobedience in America. A Documentary History*, Ithaca 1978, p. 211.

[31] Ibid., pp. 212-225.

of the S.C.L.C. was aware that only well-organized actions can stimulate real changes. That is why he called Rosa Parks and James Meredith real heroes of the South, as *they had moved the entire nation back to the true spirit of democracy as advocated by the founding fathers*.[32]

The Montgomery bus boycott did not cause significant counteractions of the segregationists or law enforcement agencies, but when in 1961 civil rights activists, known as the Freedom Riders, began boycotting segregated interstate buses, the response from the white community as well as the police was immediate and violent. The Freedom Riders were often attacked and beaten by local segregationists, and then arrested by the police and charged with committing various state crimes.[33] Apart from the Freedom Rides, Martin Luther King organized other actions, such as street demonstrations. For example, in 1963 in Birmingham, he openly opposed the choice of pro-segregationist mayor Albert Boutwell, declaring: *If we can crack Birmingham* [...] *we can crack the South*.[34] Such statements and direct actions of the civil rights movement against segregationists led to King being criticized by many white Americans, who accused him of racism against white people. King knew that, as he openly admitted: *we are not attacking whites, we are attacking a system in which white men happen to take part, but we are attacking it as much for their sake as for our own*.[35]

Similarly, he was willing to unite the society over desegregation issues, as in his famous "I Have a Dream" speech during the 1963 March on Washington, when he called for new legislation on civil rights, but also appealed to Americans to overcome the remaining boundaries of racism and segregation. King's political legacy may be encapsulated in his 'Letter from Birmingham Jail', where he showed advantages of non-violent direct action: *"Why direct action? Why sit-ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks to so dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent-resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth*.[36]

However, violence was an element of social reality in the 1960s, when the fight over the proper scope of civil rights was at stake. There were hundreds of riots in America between 1965 and 1968, and after the death of Martin Luther King, Jr., there were street fights and violence in over a hundred cities across the United States. As a result,

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32 S.J. Bass, *Blessed are the Peacemakers: Martin Luther King Jr., Eight White Religious Leaders, and the 'Letter from Birmingham Jail'*, Baton Rouge 2001, pp. 19-20.

33 See: R. Arsenault, *Freedom Riders. 1961 and the Struggle for Racial Justice*, New York 2006.

34 Martin L. King, Jr., as quoted in: S.J. Bass, *Blessed are the Peacemakers...*, p. 95.

35 Martin L. King, Jr., as quoted in: W.S. Coffin, Jr., M.I. Leibman, *Civil Disobedience. Aid or Hindrance to Justice?*, Washington, D.C. 1972, p. 32 (*Rational Debate Seminar*).

36 M.L. King, Jr., 'Letter from a Birmingham Jail' in J. Fahey, R. Armstrong (eds.), *A Peace Reader. Essential Readings on War, Justice, Non-violence and World Order*, New York 1992, p. 116.

nearly 70,000 troops were called to restore peace, 46 people were killed, 3,500 injured, and more than 20,000 arrested with damages exceeding $45 million.[37]

Not all of the movements opposing segregation decided to follow King's directions. For example, various church leaders in the South, who appealed in the late 1950s for obedience to the new laws. In 1957, a group of ministers of Richmond, Virginia, purchased advertising space in local newspapers to attack massive resistance: *To defy the Supreme Court and to encourage others to do so, in our judgment, is not only poor strategy, it is poor citizenship*.[38] Similar actions were undertaken by white ministers in Tennessee, Mississippi, Texas, and Florida, calling for *first class citizenship* and for obedience. Clergymen in Alabama appealed for *law and order and common sense, peaceful compliance to desegregation orders*. They announced 7-point declaration to opponents of segregation, arguing that *violence had no sanctions in American political tradition*, *disagreement over laws should never lead to anarchy and subversion*, and *courts had the power to change laws which should not be ignored by individuals*.[39] Therefore, it was not only civil disobedience through more or less violent actions that defined the whole civil rights movement in the 1950s and 1960s, but also statements of different organizations underlining the necessity to adapt to the desegregation processes.

IS OBEDIENCE NECESSARY?

Henry David Thoreau poses an important question in his essay on civil disobedience: *unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?*[40] John Rawls in *Theory of Justice* declares that civil disobedience is justified to bring change in the law which addresses the sense of justice in the majority.[41] Therefore, in order to achieve demanded reforms of the law, citizens are justified in disobeying the law. Ronald Dworkin argues that existence of bad laws does not give direct legitimacy to disobey them, but at the same time he disagrees with the notion that Constitution is always what the Supreme Court says it is.[42] All these approaches may serve as a background for the discussion concerning the sources of civil disobedience of 1950s and 1960s in the United States with regard to the issue of desegregation.

There is no doubt that segregationists and civil rights supporters both based their disobedience on ideological attitude towards the law. They agreed to obey "good laws", which were ideologically acceptable, whereas they rejected obedience to "bad laws", which established undesirable social norms. From that perspective, obedience and dis-

37 R. Kluger, *Simple Justice...*, p. 762.

38 S.J. Bass, *Blessed are the Peacemakers...*, p. 11.

39 Ibid., p. 12.

40 See: H.D. Thoreau, 'On the Duty...', pp. 63-90.

41 See: J. Rawls, *Theory of Justice.*

42 See: R. Dworkin, *Taking Rights Seriously*.

obedience were both present as an expression of conflicting interests and ideologies of particular social and political groups. Or, in the words of Tony Freyer, obedience to law became the basis for both compliance and resistance.[43] It is important, however, to acknowledge that "segregationists and desegregationists" obeyed laws which were conflicting, as their values and ideology were in conflict too. That makes the discussion of civil disobedience after the *Brown* decision a complex issue. Obviously, white Southerners and black activists used similar means and arguments to pursue their own vision of social relations, and civil disobedience became their main tool to achieve justice.

Historically, efforts to disobey rulings of the Supreme Court were something natural, especially when the Justices decided to determine crucial elements of state policy or social relations. Even American presidents showed their reluctance to enforce judicial precedents, with Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt serving as the best examples.[44] There is no secret that Dwight Eisenhower was not fully satisfied with the ideological direction of the Court's precedents under Chief Justiceship of his appointee Earl Warren, and it was mainly due to Warren's liberal attitude presented in the *Brown* and *Cooper* precedents.[45]

Occasionally one can observe social protests against implementation of concrete decisions of the highest judicial instance in the country. Such a situation occurred after controversial rulings on the issue of abortion,[46] death penalty,[47] or school prayer.[48] It was also visible in the nation's reaction after the Court's ruling in the flag burning case, *Texas v. Johnson*,[49] as well as in the recent precedent *Obergefell v. Hodges* which affirmed constitutionality of the same-sex marriages in the United States.[50] Nevertheless, the society has never been so divided by any holding of the Court as in the case of *Brown*.

The above-mentioned examples prove the social importance of Supreme Court precedents, as the institution is often responsible for constitutional adjudication. The process of interpreting the supreme law of the land gives the Justices the right to reshape social relations, and to create binding principles, such as the separate-but-equal doctrine in 1896, and the inequality of school segregation in 1954. When the interpreted issues refer to a vital aspect of everyday life of the people, it is obvious that various social groups will try to show their attitude towards the new meaning of particular issue. Civil

43 See: T. Freyer, *Little Rock Crisis...*

44 See: P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki*, Kraków 2011 (*Prace Amerykanistyczne UJ*). See also R.J. McKeever, *The U.S. Supreme Court. A Political and Legal Analysis*, Manchester 1997.

45 B.W. Curry, R.L. Pacelle, Jr., B.W. Marshall, '"An Informal and Limited Alliance": The President and the Supreme Court', *Presidential Studies Quarterly*, Vol. 38, No. 2 (2008), p. 227, at <http://dx.doi.org/10.1111/j.1741-5705.2008.02637.x>.

46 *Roe v. Wade* 410 U.S. 113 (1973).

47 *Gregg v. Georgia* 428 U.S. 153 (1976).

48 *Wallace v. Jaffree* 472 U.S. 38 (1985).

49 491 U.S. 397 (1989).

50 576 U.S. 14-556 (2015). In a dissenting opinion written by conservative Justice Antonin Scalia, he called the Court's decision as *a threat to American democracy*.

disobedience is one of the possible reactions of these groups, as sometimes it is difficult for them to adapt to new social reality.

The problem becomes more complex when one realizes that the institution responsible for the constitutional interpretation of the law is not the most democratic of all, as the Justices are chosen by the president, with advice and consent of the Senate, and are able to serve for life tenure.[51] When the Congress, the main lawmaking body in the federal government, creates controversial acts, the public has indirect means to verify the membership of both houses. When the Court makes a decision which changes the meaning of important law, population has only two options: either to adhere to the precedent, or to refer to the Congress in order to change it. The problem is, however, that constitutional precedents of the Supreme Court cannot be changed by ordinary legislation,[52] which diminishes even indirect actions of the society. Therefore, the only way to show social disapproval of the Court's holding is to resort to civil disobedience.

If we follow Thoreau's argument that unjust laws always exist, we would need to confirm the continuous existence of civil disobedience as a mean to show social disapproval towards certain laws. By labeling them "bad laws", we would need to confirm that in every society there are people who are rejecting the direction of changes of the law. Therefore, such actions as those undertaken in the 1950s and 1960s by segregationist and civil rights supporters would be justified, as both sides of the conflict referred to such legal norms which they found supreme.

For white extremists, it was the state law and the policy of state government that should have been obeyed, whereas desegregationists showed their adherence to the decision of the federal court. The solution of the conflict lay in the law itself: it was not a confrontation between "good law" and "bad law", neither was it a confrontation between majority and minority, but a dispute between state rights and the powers of the federal government. From that point of view there could be only one winner – the power which was supreme. But segregationists and desegregationists found also the common source of reference during their protests against "bad laws" – the Constitution. According to both sides of the conflict, their arguments were constitutional, and it was the supreme law of the land they were defending. Peggy Cooper Davis even posed the question *Whose Constitution?* in her analysis of the legal effects of the *Brown* ruling.[53] The fact is that the way of interpretation of constitutional issues always raises conflicting arguments, as it concerns different values and ideologies shared by the society. Such

[51] See: Article Two, Section Two of the U.S. Constitution: *[The president] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court* [...], and Article Three, Section One: *The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office*.

[52] Constitutional precedents of the Supreme Court can only be directly changed by constitutional amendments. There were only four such situations in U.S. history, in 1795, 1865, 1916, and 1971. See: J.R. Vile, *A Companion to the United States Constitution and its Amendments*, Westport 2006.

[53] P.C. Davis, 'Performing Interpretation: A Legacy of Civil Rights Lawyering in *Brown v. Board of Education*' in A. Sarat (ed.), *Race, Law, and Culture. Reflections on Brown v. Board of Education*, New York 1997, p. 34.

conflict is inevitable, as both parties believe they are defending "proper" values. Therefore, "good law" and "bad law" shall always exist. It is a norm of democracy.

Reverend William Sloane Coffin, Jr. justified civil disobedience towards the law, whenever it was done in the name of higher justice, thus protecting the rights embedded in human nature.[54] It reflects arguments posed by Rawls, but also opinions of Martin Luther King, Jr., who believed in law and order, but argued that they should bring justice for all citizens, therefore people have to be active in their fight for justice. Such an approach may lead to a conclusion that, whenever our concept of justice is endangered, we can disobey the existing law and order. Even if we agree that social conflict over the meaning of justice is inevitable, it does not mean that any forms of civil disobedience should be accepted. In any case it would lead to a continuous disobedience of the existing norms by part of the society, and the social reality in contemporary America would be reflected in conflicts over the scope of the right to privacy, right to free speech or federal-state relations.

Of course the tensions stemming from the Supreme Court's 1954 ruling were unique in the history of the United States. Never before and never again has civil disobedience been the essence of social relations in the country, and the source of such a situation lay in the character of the decision itself. According to J. Harvie Wilkinson, *Brown may be the most important political, social, and legal event in American twentieth-century history. Its greatness lay in the enormity of the injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew*.[55]

CONCLUSION

As Hanna F. Pitkin observes, there have been various forms of civil disobedience in history: *Some forms of non-obedience are violent, others not; some are personal and others organized; some are isolated actions and others a systematic program of action; some are directed against a particular law or decree and others against an entire system of government. To a person confronted with a real decision about resistance or obedience, it makes an enormous difference what kind of action is contemplated*.[56]

The complexity of the changes in social relations initiated by the Court in *Brown* caused conflicting reactions from different parts of the society. The termination of the separate-but-equal doctrine changed the social status of two significant groups: white citizens from the South and black citizens from the country at large. Both groups decided to use civil disobedience as a proper tool to protect their values. Segregationists felt endangered by the drastic impact of the new laws on their traditional way of living, whereas civil rights supporters saw danger in the approach of Southern states towards

[54] See W.S. Coffin, Jr., M.I. Liebman, *Civil Disobedience...*, pp. 1-10.

[55] J.H. Wilkinson, *From Brown to Bakke. The Supreme Court and School Integration, 1954-1978*, New York 1981, p. 6.

[56] See: D. Mathiowetz (ed.), *Hanna Fenichel Pitkin. Politics, Justice, Action*, New York 2016 (*Routledge Innovators in Political Theory*, 7).

racial integration. The landmark effect of the 1954 precedent was obvious; as noted by Richard Kluger, *[e]very colored American knew that Brown did not mean he would be invited to lunch with the Rotary the following week. It meant something more basic and more important. It meant that black rights had suddenly been redefined: black bodies have suddenly been reborn under a new law.*[57]

Mark Tushnet argues that *as defenders of the law, [Justices] could hardly acknowledge openly that there was a real risk that people would fail to comply with their decision*.[58] However, social tensions after the Court's ruling were probably unavoidable, as the reaction of the Southern states reflected historical differences between the North and the South. The references to doctrines of nullification and interposition, and also the usage of confederate flags by segregationists during the protests over admission of black students to schools and universities,[59] revealed the deeply rooted social divisions.

In order to show its role as the final interpreter of the Constitution, but also to unify the society, the Court confirmed the binding character of the *Brown* decision in *Cooper v. Aaron*.[60] In that context, the rights of the states to segregate the society were named "bad law", whereas desegregation orders were the "good law". William C. Capel called it a rather "good direction of law", as he observed that the final effect of the great departure from the "bad law" marked by *Brown* was the implementation of the Civil Rights Act of 1964.[61]

Brown changed America and became a spark inciting social tensions and leading to an organized, ideologically-based opposition to the changing social relations in the country. Both types of civil disobedience strengthened the position of various federal institutions, such as the Supreme Court, Congress, the Constitution (especially the meaning of the Fourteenth Amendment), as well as the position of the United States abroad.[62] The political and social changes of 1950s and 1960s led to implementation of the Civil Rights Act and the Voting Rights Act,[63] which ended the fight over the proper meaning of equal protection of law.

This has never happened before that the judicial decision produced so many tensions within the broader American society. Furthermore, as another Supreme Court decision proved, silent opposition of African-Americans in a segregated library led the Court to broaden the desegregation policy.[64] As time showed, civil disobedience, as defined and

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57 R. Kluger, *Simple Justice...*, p. 749.

58 M. Tushnet, '*Brown v. Board of Education* (1954)' in A. Gordon-Reed (ed.), *Race on Trial. Law and Justice in American History*, New York 2002, p. 173 (*Viewpoints on American Culture*).

59 F. Lambert, *The Battle of Ole Miss...*, p. 113.

60 358 U.S. 1 (1958). The Court referred to creation of the power of judicial review established by the *Marbury* precedent: *This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.*

61 W.C. Capel, 'Comments' in E.M. Lander, Jr., R.J. Calhoun (eds.), *Two Decades of Change...*, p. 93.

62 See: M. Dudziak, *Cold War Civil Rights. Race and the Image of American Democracy*, Princeton 2000 (*Politics and Society in Twentieth-Century America*).

63 78 Stat. 241 (1964) and 42 U.S.C. 1973 (1965).

64 See: *Brown v. Louisiana* 297 U.S. 278 (1966): *The rights of peaceable and orderly protest which petitioners*

initiated by Martin L. King, became an efficient tool of social groups in their fight to achieve protection of "proper" social norms: by neglecting "bad laws" they aimed to achieve "good laws", and the most decisive factor of their approach was their ideology. One could observe such an approach in the opposition of American society towards the Vietnam War, but also when liberal social groups fought for the expansion of certain constitutional guarantees (i.e. the right to abortion, the protection of the rights of LGBTI movement, affirmative action). The legacy of civil rights movement of the 1950s and 1960s became an indispensable element of contemporary American society.

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were exercising under the First and Fourteenth Amendments are not confined to verbal expression, but embrace other types of expression, including appropriate silent and reproachful presence, such as petitioners used [...]

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