# THE INFLUENCE OF THE CASE-LAW ON THE HUMAN RIGHTS DEVELOPMENT

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Abstract: The contribution deals with the influence of the Case-Law on the human rights development in United States of America. The concept of The Living Constitution containing human rights and freedoms is reached through the extensive way of interpretation - judicial legislation and the meaning given to legal terms by judiciary. I will focus on some few important decisions of courts (mostly the U.S. Supreme Court) as the sources of law in the field of human rights, their background, their importance and the consequences on the next development.
This element of Anglo-American legal culture has slowly acquired its place more and more in European legal culture and in European law can be found in the decisions of The European Court of Human Rights as well as The European Court of Justice.

Keywords: Supreme Court, decision, rights, constitutional, equality, European law

## 1 The principle of judicial review

The current status of human rights and freedoms in the U.S. has undergone a long development which has been influenced by various factors. The case-law (mostly the U.S. Supreme Court decisions) has played very important, if not the most important, role in this process.

The importance of judicial law-making results from the differences of the Anglo-American legal system in which one of the basic principles is the principle of judicial review. Under this concept, "*we understand the right of judicial authorities to declare an act of legislature unconstitutional and as such as null and void*."[1] The concept of constitutionality in this case should be understood in its wider sense, not only as understanding of the U.S. Constitution as the basic law of the land but also as a range of principles (including the principle of respect for human rights and freedoms and the principle of judicial review), laws, customs and judicial decisions that complete content of the basic law of the land which do not necessarily have to be expressed in writing[2].

The paradox is that no article of the Constitution or another legislative act endows the courts with the power - control of constitutionality. It is based on the traditions of the Anglo-American legal system and the U.S. Supreme Court explicitly declared it. The U.S. Supreme Court, in its decision *Marbury* v. *Madison* (1803)[3] gave judicial bodies authority to exercise and control acts of the legislature that "*shifted the creation of law to courts, or rather judges*."[4] If the judges conclude that there is a conflict between the Constitution and the law that should be applicable in their decision-making activities the judges are required to prefer Constitution as guardians of constitutionality: "*The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent*". The result of this approach is that "*the law repugnant to the Constitution is null and void.*" In the opinion Chief Justice John Marshall[5] also stated that *„It is emphatically the province and duty of the Judicial Department to say what the law is.*" The principle of judicial review and recognition of the Constitution as the supreme law of the land (repugnant provisions are considered as null and void), and where the courts serve as a means to enforce the constitutionally guaranteed rights and as a corrector of the rights which are repugnant to the Constitution was (and still is) very important for further development and creation of law in the U.S.

### 1.1 Situation before 1803

The principle of judicial review has its roots and was visible even before *Marbury* v. *Madison*. "*The power of judicial review had already been asserted in the states and had been implicit in a few decision of the federal courts before 1803. But it had not yet been explicitly asserted by the U.S. Supreme Court and its theoretical basis in the axioms of republican ideology had not yet been satisfactorily demonstrated by a court*."[6]

An example of such decision (in human rights field) is the *Quock Walker Case* (1783)[7] in which the Supreme Court of Massachusetts ruled that slavery is repugnant to the Constitution of Massachusetts. The court ruled that the rights and customs penalizing slavery are repugnant to the Constitution of Massachusetts declaring that "*all men are born free and equal, and have . . . the right of enjoying and defending their lives and liberties*".[8] Even though, slavery was hence not prohibited by the Constitution, because of the principle of judicial review, the decision was binding. In the words of Supreme Court of Massachusetts judge, William Cushing: „*slavery is…as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence*."[9]

In theory, this principle was discussed and justified when drafting the Constitution. In Federalist No. 78, devoted to the judiciary, Hamilton stated: „*The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents*."[10]

Human rights and freedoms in the U.S. are double enacted: on the state and the federal level. On one hand, sovereignty in the field of human rights belongs to states; on the other hand, the state law must not be repugnant to federal law. However, it is the task of courts to interpret these rights and liberties: "*Meaning that courts give to different phrases and concepts contained in the Constitution, had relevant meaning throughout the United States history*."[11] The interpretation given by the courts is not unchangeable. It reflects social changes, which represent

[1] COOKE, E. J. *Ústava Spojených štátov amerických*. Bratislava: Nadácia Občan a demokracia, 1999, p.28.
[2] COOKE, E. J. *Ústava Spojených štátov amerických*. Bratislava: Nadácia Občan a demokracia, 1999, p.34.
[3] MARBURY v. MADISON, 5 U.S. 137 (1803). Available online: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=5&page=137 >.
[4] KRÁĽ, J. *Ľudské práva v Slovenskej republike*. [S.l.] : [s.n.], 2004, p. 22.
[5] John Marshall (1755 -1835), Chief Justice of U.S. Supreme Court in 1801-1835.
[6] WIECEK, W. M.*Liberty under Law*. Baltimore: John Hopkins University Press, 1990, p. 34.
[7] As Quock Walker Case is called series of 3 judicial cases, 2 civil cases: *Quock Walker* v. *Jennison, Jennison* v. *Caldwell* and one criminal case *Commonwealth* v. *Jennison*, in which the jury stated that Quock Walker is a free man.
[8] Constitution of Massachusetts, 1780. Available online: <http://www.mass.gov/courts/sjc/constitution-slavery-b.html>.
[9] Available online: <http://www.mass.gov/courts/sjc/constitution-slavery-a.html>.
[10] *The Federalist Papers*, The Federalist. No. 78, author Alexander Hamilton. Available online: <http://avalon.law.yale.edu/18th_century/fed78.asp>.
[11] COOKE, E. J. *Ústava Spojených štátov amerických*. Bratislava: Nadácia Občan a demokracia, 1999, p.33.

(sometimes contradictory from today's point of view) attitudes and opinions of that-time society. This can be seen in decisions of the U.S. Supreme Court that sometimes, in its later decision, it overturns its previous decision. One of the judges of the Supreme Court (Charles Evans Hughes in 1907) expressed this by words: *"We are under a Constitution, but the Constitution is what the judges say it is and the judiciary is the safeguard of our property and our liberty under the Constitution*".[12] Below, I will focus on some important U.S. Supreme Court decisions that influenced the development of human rights and freedoms.

## 2 The restrictive interpretation of freedom and equality in the 19th century

The Declaration of Independence as well as the U.S. Constitution had proclaimed that all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. The Bill of Rights was very progressive and comprehensive catalog of rights and liberties at that time. But the question is: Who is the subject of these rights? The U.S. Constitution uses the concept of citizen. However, who exactly is included under the word citizen? Based on the above-explained principle of judicial review, it is the task for courts to interpret this concept. The U.S. Supreme Court in its decision *Dred Scott* v. *Sandford* (1857)[13] found that "*Negros*" do not include under the concept of citizen as meant by the Constitution and as such they can not be entitled to rights and privileges guaranteed by the Constitution. "*The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?... We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.*"

The decision induced turbulent reactions in already escalating situation between the Northern and Southern states. Therefore, after the Civil War the XIV. Amendment, claiming that *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside* was ratified. This amendment also guaranteed the Equal Protection of Law and the protection of civil rights and liberties have been removed to the state law (under the supervision of federal law).

### 2.1 The "*separate but equal*" doctrine

As the result of the XIV. Amendment and subsequent circumstances the constitutional doctrine of "*separate but equal*" started to be applied. Already in 1850 the Supreme Court of Massachusetts ruled that racial segregation in public schools was in accordance with the U.S. Constitution. It was so decided in the case of *Roberts* v. *City of Boston*.[14] Benjamin Roberts sued the City of Boston because his 5-year old daughter could not attend a local school near her home since she was black. The Supreme Court of Massachusetts refused his argument when it ruled that if blacks do have the right of access to education equivalent to that provided to whites, the constitutional guarantee of equality was respected.[15]

The Justice of the Supreme Court of Massachusetts, Lemuel Shaw, maintained: „*Racial prejudice is not created by law, and probably cannot be changed by law.*" The Supreme Court of Massachusetts herewith established the precedent that the state supreme courts in the South quickly adopted.

To protect and safeguard the rights and freedoms guaranteed in the XIII. and the XIV. Amendment Congress adopted the Civil Rights Act (1875), declaring *That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.*[16] The U.S. Supreme Court in a series of decisions together marked as *The Civil Rights Cases*[17] declared the above quoted provision unconstitutional. Justice Bradley rejected the XIV. Amendment as a basis for this legislation because it prohibited only s*tate action of a particular character*. [18]Civil rights secured by the Fourteenth Amendment could not be deprived by private actions and The Congress lacks power to reach such acts under the Amendment. Also, Bradley's reasoning on the Thirteenth Amendment was that private discrimination does not constitute either involuntary servitude or a badge of slavery.

In 1890 Louisiana passed *Separate Car Act*, stating that all railway companies (other than street-railroad companies) carrying passengers in that state were required to have separate but equal accommodations for white and colored persons, *by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.*[19] In 1892 H. Plessy was arrested, because he traveled in the part for whites, and refused to move into a part for the colored. The case was heard before the U.S. Supreme Court, which in his infamous *Plessy* v. *Ferguson* decision[20] declared that laws requiring separation of races are not repugnant to the Constitution, thereby legitimizing the doctrine of "*separate but equal*": *The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.* The only dissenting[21] judge was J.M.Harlan: "*Our constitution is color-blind, and neither knows nor tolerates classes among citizens.*"

This decision of *Plessy* v. *Ferguson* was overturned just after 58 years. Wiecek also marked it as the "*leading segregation case of the Court's history*."[22] However, as Currie stated: "*In any event, Plessy was a reliable symbol of the times*."[23] In the field of

[12] Charles Evan Hughes, 1862-1948. "Charles Evans Hughes." BrainyQuote.com. Xplore Inc., 2011. Available online: <http://www.brainyquote.com/quotes/authors/c/charles_evans_hughes.html>.
[13] DRED SCOTT v. SANDFORD, 60 U.S. 393 (1856). Available online: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=60&invol=393>.
[14] This case was also cited in later *Plessy* decision.
[15] Available online: <http://www.masshist.org/longroad/02education/roberts.htm>.

[16] *The Civil Rights Act* (1.3.1875). Available online: <http://chnm.gmu.edu/courses/122/recon/civilrightsact.html>.
[17] CIVIL RIGHTS CASES, 109 U.S. 3 (1883). As Civil rights cases is called a series of five cases, in which Afroamericans sued theatres, hotels and transit companies that had refused them admittance or excluded them from "*white only*" facilities.
[18] WIECEK, W. M.*Liberty under Law*. Baltimore: John Hopkins University Press, 1990, p. 100.
[19] Laws enacted in period 1875 – 1965 mandating *de iure* racial segregation later became known as „*jim crow laws*".
[20] PLESSY v. FERGUSON, 163 U.S. 537 (1896). Avaliable online: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=163&invol=537>.
[21] U.S. Supreme Court (consisting of 9 judges) required majority of votes for its decison, but the dissenting judges are allowed to write their dissenting opinion.
[22] WIECEK, W. M. *Liberty under Law*. Baltimore: John Hopkins University Press, 1990, p. 104.
[23] CURRIE, D. P. *The Constitution in the Supreme Court.* The Second Century 1886-1986. London: The University of Chicago Press Ltd., 1990, p.40

public education the doctrine was confirmed by decision *Cumming* v. *Richmond County Board of Education* (1899)[24], in private schools by decision *Berea College* v. *Kentucky* (1908). The consequence of these decisions was that the equal protection clause was a dead letter, or, what amounted to the same thing, sunk into a hundred years′ sleep.[25]

## 3 Case–law in the 20th Century

The changes in the society leading to overturn the above mentioned decisions of the U.S. Supreme Court were slow and gradual. The definitive abolition of the "*separate but equal*" doctrine was Brown v. *Board of Education of Topeka* (1954)[26], one of the most significant decisions in American history. Signs of gradual change, however, occurred earlier: in 1938 the decision of the *State of Missouri ex rel. Gaines* v. *Canada*[27], in which the U.S. Supreme Court granted full equality in the dual education system: *The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.* Even in the decision *McLaurin* v. *Oklahoma State Regents Cases* (1950)[28] the court concluded that Appellant*, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.*

### 3.1 *Brown* v. *Board of Education*

The facts of this case were similar to that in 1850 (*Roberts* v. *City of Boston*). Linda Brown had to attend school far from her home because she was black. When the father tried for his daughter to be allowed to attend closer school (for whites) he was denied. With the support of the National Association for the Advancement of Colored People (NAACP), chaired by Thurgood Marshall (who later became a judge of the U.S. Supreme Court) his case and 4 other similar cases were brought before the U.S. Supreme Court (together marked as *Brown* v. *Board of Education)*. The U.S. Supreme Court has unanimously stated: *We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.*

What was the importance of this decision? "*Only a generation after it was handed down, Brown seems like an elemental force in American constitutional law, something so essential that the Constitution was unfinished before 1954. After Brown, American constitutional law could never be the same. Brown opened doors that could never be shut, not just for black Americans but for all who saw themselves the victims of inequality and discrimination."*[29] This decision was followed by many others[30] which together with the Civil Rights Acts (1957, 1960, 1964) eliminated discrimination based on race or sex. Subsequent decisions during the seventies and eighties of the 20th century came further applying the „*affirmative action*" policy.

### 3.2 As many judges, as many opinions: the death sentencing

In some cases, however, the U.S. Supreme Court does not provide a unanimous opinion on the matter, especially when such sensitive issue as death sentencing is at stake. As mentioned above, the sovereignty in the field of human rights belongs to states. This explains the fact that some states have abolished the death penalty, while others have not. In the case of *Furman* v. *Georgia* (1972)[31] Furman was claiming that the death penalty, sentenced by Georgia, is repugnant to the VIII. Amendment prohibiting cruel and unusual punishments. The U.S. Supreme Court (by a vote of 5 to 4) ruled in favor of Furman, nevertheless, the judges did not concur in their opinion and each one of the nine judges wrote his own opinion. Judge Powell, in his dissenting opinion: *The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales. In my view, none of these opinions provide a constitutionally adequate foundation for the Court's decision. ... Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution*. Judge Stewart in his concurring opinion: *I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed*. Thus, the U.S. Supreme Court effectively voided 40 death penalty statutes.[32] States had to rewrite their legislation and enact new statutes respecting views presented in Furman's case. Florida, Georgia, and Texas chose the way of limiting discretion by providing sentencing guidelines for the judge and the jury when deciding whether to impose death. The guidelines allowed for the introduction of aggravating and mitigating factors when determining sentencing. The U.S. Supreme Court accepted this approach in a series of cases known as *Gregg decision*[33] and held that the death penalty itself is constitutional under the Eighth Amendment: "*We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it*. "In its later decisions the U.S. Supreme Court set certain conditions under which the courts are authorized to impose the death penalty (only for murder, only after consideration of all mitigating factors, only if all possibilities of appeal were exploited, etc.)[34]

## 4 The influence of Case-Law on the European Law

The typical feature of Anglo-American legal culture - judicial law- making - has slowly acquired its place also in the European legal culture. The European Court of Justice (as ex-Court of Justice of the European Communities) has consistently held that „*fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the European Convention on Human Rights") is of particular significance in that regard* ".[35] Although the decisions of the European Court of Justice are not sources of positive law, through the way of formulating general principles and traditions

[24] CUMMING v. BOARD OF ED. OF RICHMOND COUNTY, 175 U.S. 528 (1899). The paradox is, that the author of this opinion was judge Harlan - the sole dissenting judge in *Plessy* decision.
[25] WIECEK, W. M. *Liberty under Law*. Baltimore and London: John Hopkins University Press, 1990, p. 105.
[26] BROWN v. BOARD OF EDUCATION OF TOPEKA, 347 U.S. 483 (1954). Available online: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=347&invol=483>.
[27] STATE OF MISSOURI EX REL. GAINES v. CANADA, 305 U.S. 337 (1938). Available online: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=305&invol=337>.
[28] McLAURIN v. OKLAHOMA STATE REGENTS, 339 U.S. 637 (1950). Available online http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=339&invol=637.
[29] WIECEK, W. M. *Liberty under Law*. Baltimore and London: John Hopkins University Press, 1990, p. 158.
[30] *Regents of the University of California* v. *Bakke* (1978), *Griggs v. Duke Power Co.* (1971), *Runyon v. McCrary* (1976), *Bob Jones University v. United States* (1983), *Johnson v. Transportation Agency of Santa Clara, CA* (1987) and this policy continues.
[31] FURMAN v. GEORGIA, 408 U.S. 238 (1972). Available online: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/408/238.html>.
[32] Available online: <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const.>.
[33] As Gregg decision are called 3 cases: *Gregg* v. *Georgia* (428 U.S. 153), *Jurek* v. *Texas* (428 U.S. 262), and *Proffitt* v. *Florida* (428 U.S. 242).
[34] COOKE, E. J. *Ústava Spojených štátov amerických*. Bratislava: Nadácia Občan a demokracia, 1999, p.111.
[35] 227/88 Hoechst AG v. Komisia. OUTLÁ, V.- HAMERNÍK, P.- BAMBAS, J. *Judikatura Evropského soudního dvora*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2005, p. 277-278.

common to Member States (that include respecting fundamental rights and freedoms) have de facto become sources of law.[36]

An important step in formal recognition of human rights and freedoms in the EU was the adoption of the Charter of Fundamental Rights of The European Union (2000). After the Treaty of Lisbon came into force (1.12.2009), the Charter has become legally binding (as a part of primary law the Charter has the same legal value as the Treaty on founding EU). The Preamble of the Charter explicitly affirmed the rightscase–law that had arisen from case-law: *This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.*

European Union under the Treaty of Lisbon also acceded to the The European Convention for the Protection of Human Rights and Fundamental Freedoms and committed itself to fully respect it. Because of this, the question about the relationship between the case-law of European Court of Human Rights and European law arose: Is the judicature of European Court of Human Rights binding for the European Law? "*If case-law of the European Court of Human Rights falls within the sphere of Community law and is as such "tucked" into the law of the European Court of Justice, it becomes part of Community law. Its effects in the legal systems of the Member States then enter new dimensions, the case law acquires the properties of Community law, such as supremacy and direct effect. The above described differences in the reception of the European Court of Human Rights case law in the legal systems of Member States negate. Everything becomes Community Law. Then it may happen that some case-law of the European Court of Human Rights, that does not undergo a reception by the European Court of Justice will continue to be accepted only to the extent that national law allows them. In contrast, „communitarized" case-law of the European Court of Human Rights will be (through the decisions of the European Court of Justice) directly effective and preferably applicable before the Member State law*."[37] Such an approach would mean that *„the European Court of Justice may, but do not have to create such an "union case-law", otherwise sequence, if the European Court of Justice identifies with the decision of the European Court of Human Rights, then the law of the European Court of Human Rights perspectively becomes directly effective and takes precendency over Member State law*."[38] Such an approach can give a very strong position to the European Court of Justice and the case law - direct effect and supremacy over the laws of the Member State legislature. The further practice of European Court of Justice will figure out how to deal with these issues.

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[36] Based on article 220 of Treaty Establishing European Community, Court of Justice of the European Communities not only interpretes the law, but also formulates legal rules that implicit in European laws.
[37] Kühn, Z. - Bobek, M.- Polcák, R. *Judikatura a právní argumentace: Teoretické a praktické aspekty práce s judikatúrou*. Auditorium: Praha 2006, p. 78 etc. (herein reffered concept of „community law" is need to be meant as „ " after Lisbon treaty entered into force).
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