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The Significant Role of the Supreme Court in the United States and Canada. A Comparative Study

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Both the Supreme Court of Canada and the Supreme Court of the United States play a vital role in shaping social and political relations in the two countries. Since these two institutions originate from the same English political system, on one hand we can observe many similarities between the two Courts, like i.e. the number of judges, the position in the federal judicial system, and the role of the court of last resort. On the other hand however, there are also a few significant differences that occurred on account of various legal foundations and different constitutional histories. The purpose of this article is to compare both Courts and to present their significance in respective legal systems.

Supreme Court is an institution which belongs to the judicial branch, one of the three branches of government, and – according to the principle of separation of powers – it operates apart from the executive and the legislative branches. General powers of the judiciary are to adjudicate legal disputes, that is to resolve disputes between individuals, between individuals and the state, and between governmental institutions (*The Federalist Papers*, No. 80). Judicial branch consists of a wide range of courts differing from each other in jurisdiction, number of judges, competences, or position in the judicial hierarchy. In that sense, the Supreme Court of the United States and the Supreme Court of Canada both constitute the highest level of judiciary, with the power to make final decisions in particular cases. Despite a similar contemporary position, there were a few important differences in the history of creation of both Supreme Courts.

First of all, the American Supreme Court was created by the Constitution of 1787 and thus became the only court existing from the beginnings of the state. The third Article of the U.S. Constitution states that "the judicial power of the United States shall be vested in one

Supreme Court" (U.S. Constitution 1787, Art. III). Lower courts were created by several acts of Congress, the main of which was the Judiciary Act of 1789. In Canada, on the contrary, the British North America Act, known today as the Constitution Act of 1867, did not create any Canadian judicial institution. The document invited the new federal Parliament to create its own court of appeal – the Parliament of Canada could "provide for the constitution, maintenance, and organization of a general court of appeal for Canada" (Constitution Act 1867, Ch. VII). Eight years later, in 1875, the system was enriched with the Supreme Court which was not created by the Constitution or an amendment to it – it was erected by an Act of Parliament (*Supreme Court Act* 1875). The position of the Supreme Court of Canada in judicial hierarchy was not as strong as that of its American counterpart because the Canadian Court was not the official court of last resort up to 1949. Before that year cases which happened in Canada, or cases which concerned Canadian citizens were to be finally resolved by the Judicial Committee of the Privy Council, an English tribunal located in London (McKenna 1993: 91-92).

Comparing contemporary powers of both courts one should comment on their most important competence. Let me start with the Courts' jurisdiction, i.e. the ability to hear cases (Feinman 2000: 25). Both tribunals have appellate jurisdiction, which means that they are the last judicial resort for all litigants – individuals as well as the government. Despite historical differences, nowadays both Courts have the power to hear appeals from lower courts, including federal courts and state/provincial courts. Judicial hierarchy is constructed similarly in the United States and Canada, with the Supreme Courts at the top of it, followed by two lower instances of federal judiciary, and two or three instances of courts located in American states and Canadian provinces. The hierarchy is presented below:

<table>
<tr><th colspan="2">SUPREME COURT OF THE U.S</th><th colspan="2">SUPREME COURT OF CANADA</th></tr>
<tr><td>STATE SUPREME COURTS OF APPEAL</td><td rowspan="2">U.S. CIRCUIT COURTS OF APPEAL</td><td>PROVINCIAL COURTS OF APPEAL</td><td rowspan="2">FEDERAL COURT OF APPEAL</td></tr>
<tr><td>STATE INTERMEDIATE COURTS OF APPEAL</td><td>PROVINCIAL SUPERIOR COURTS</td></tr>
<tr><td>STATE TRIAL COURTS</td><td>U.S. DISTRICT COURTS</td><td>PROVINCIAL COURTS</td><td>FEDERAL TRIAL COURT</td></tr>
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Being the court of last resort makes both Courts the final instance in all cases brought in front of them – their decisions are ultimate and their precedents are binding. A precedent, i.e. a rule which guides judges in making subsequent decisions in similar cases (Knight, Epstein 1996: 1019), is the most important feature of the common law system existing in the United States and Canada. It does not mean that every case can become a "precedent case". There are numerous cases coming every year to both Supreme Courts, however not all of them are reviewed. Probably the power to reject most cases existing in both Courts, makes them have similar caseloads for oral argument and written judgement, though the Supreme Court of Canada gets far fewer petitions for review (Ducat, Ostberg and Wetstein 2003: 709). Most appeals are heard by the Courts only if a special permission is given first. Such permission is called *writ of certiorari* in the United States and *leave* in Canada. It is given by the Supreme Court only if a case involves a question of public importance or if it raises an important issue of law (Fisher 2001: 149). Both Courts grant permission for appeal only to a small percentage of cases submitted to it for consideration (5-10 per cent of all cases every year), what allows them to have control over their dockets. However, we have to mention an additional feature of the Canadian Supreme Court – apart from cases which are granted *leave*, the Court does hear mandated criminal appeals called "*as of right appeals*" that defendants

can bring under Canadian law without receiving *leave* (Ducat, Ostberg and Wetstein 2003: 709).

Comparing appellate jurisdiction of both courts we have to mention the type of law that is brought before them. Because of dual legal system operating in Canada the Supreme Court's jurisdiction embraces the civil law of the province of Quebec and the common law of other provinces and territories. Nevertheless, the Supreme Court of Quebec (the highest resort in the province) makes decisions in civil cases on the basis of the Civil Code's provisions and very often those cases do not reach the Supreme Court of Canada thus making the Quebec Court of Appeal unofficial last resort. As a matter of fact, in more than 99 per cent of the cases this court is the court of last resort. On the contrary, the Supreme Court in the United States hears only common law cases and there is no American state having such a distinctive character as the Province of Quebec in Canada, despite the fact that some scholars are comparing Quebec with Louisiana (Fitzgerald 1998: 291-313).

There are, however, some visible differences in Courts' jurisdiction. Beside appellate jurisdiction, the Supreme Court of the United States has the so-called original jurisdiction. It is the power to hear cases as the court of first and last resort; the power which is mentioned in the third article of the Constitution. It enlists such cases as those affecting Ambassadors, other public ministers and consuls, and the ones in which particular states are a party (U.S. Constitution 1787, Art. III). Original jurisdiction cannot be changed by the Congress, which has the power to decide upon the extent of appellate jurisdiction. Efforts to change the original jurisdiction undertaken by the Congress at the beginning of its operation proved unconstitutional due to the landmark decision of the U.S. Supreme Court (*Marbury v. Madison* 1803). Also the Supreme Court of Canada has a power called reference jurisdiction which does not exist with its American counterpart. The Canadian Court can be asked by the representatives of federal and provincial governments to hear references, i.e. to consider important questions of law such as the constitutionality or interpretation of federal or provincial legislation, or the division of powers between the federal and provincial levels of the government (McKenna 1993: 92-95). In practice, any point of law may be referred to the Canadian Supreme Court. The Court is not often called upon to hear references, but its opinions on the questions referred to it by the government can be of great importance. Canada is the only country with a common law system which has this kind of jurisdiction. Such a legal advisory function in the United States belongs to the Attorney General (Baker 1992), an executive officer who heads the Department of Justice in Presidential administration.

What makes both Courts' role in political and legal system significant, is the judicial review – the power to decide upon constitutionality of acts created by other branches of the government. This power needs further explanation, because it has different forms in the two countries. The power of judicial review should also be analysed more closely, as it gives both tribunals vast competence and puts them in a higher position in relation to other branches of government: the executive and the legislative. Judicial review is most often linked to the American system where it has existed almost since the very beginning. Although the Constitution did not provide for such a power of the judiciary, in 1803, while examining the case *Marbury v. Madison*, the U.S. Supreme Court gave itself a power to decide upon constitutional validity of acts of Congress and President. Stating that "it is emphatically the duty of the judicial department to say what the law is", the Justices helped to establish the Court as the final authority on the meaning of the Constitution (*Marbury* 1803). It enabled the increase of power of the judiciary, which resulted in the interpretation of such important issues as federal/state powers, competences of the President, or individual rights' issues. Since the beginning of the 19th century the American judiciary gained a power which has been very often considered "political" and has led to evolution of the checks and balances system created by the U.S. Constitution (Burnham 1995: 9-13, 315).

Quite a different situation occurred in Canada where the Supreme Court did not have the power of judicial review as widely understood as in the United States. Canada inherited its governmental structure from Great Britain which has lived for a long time under the system of parliamentary sovereignty. In Britain no court decisions could block the Parliament's power to set final policy in any area. Under the Constitutional Act of 1867, this model was adopted to Canada. The only difference was that the Canadian courts could declare a provincial or federal law unconstitutional only when a statute violated the division of responsibilities set forth in the Act of 1867. However, for cases that raised questions of 'federalism', Canadian courts could be overruled by the federal parliament and the legislatures of ten provinces (Doig 2004: 4). There were of course cases raising federal issues in which the Court became the official and ultimate interpreter, but formally no provision of the constitution, no act of parliament and no precedent constituted such power. The Canadian judiciary had to wait for the adoption of the Constitution of 1982 which created the power of judicial review concerning the matters set out in the Charter of Rights and Freedoms. In that document the Supreme Court of Canada was granted the power to declare any governmental action that the Court would find to be inconsistent with the Charter as null and void.

Until 1982 Canada had no counterpart to American Bill of Rights – it had no statement of individual rights enshrined in its written constitution, and it had no judiciary that could declare legislative actions null and void, as violations of those rights. Canadians relied on their elected officials to protect their liberties – following the doctrine of legislative sovereignty, the federal Parliament and provincial legislatures could overturn any court decision (Doig 2004: 2). The situation changed in 1982. The new constitutional amendments elevated judicial power to a status far higher than anything previously seen in Canada. The courts received the power to nullify legislation not only on division-of-power grounds, which they had already possessed, but also on the basis of a long list of expansively worded rights in the Charter of Rights and Freedoms (Flanagan 2002: 125-146). The 1982 document is similar to the American Bill of Rights. For example, it ensures freedoms of religion, speech, assembly, due process of a criminal with a right to counsel, protection against unreasonable searches and seizures, right to speedy trial by fair and impartial tribunal, right to life, liberty and security, prohibition of discrimination based on sex, race and religion (Ducat, Ostberg and Wetstein 2002: 237). Both the Charter and Bill of Rights became fundamental documents in Canada and the United States, giving the Supreme Courts the opportunity to interpret them the way justices felt they should. Therefore, both Courts may be called guardians of the Constitution – their rulings protect rights and liberties guaranteed by the highest source of law. Creation of precedents allows the Justices in the United States and Canada to influence the legal system, because their rulings become the core of this system. It also allows them to become more active players in the political system, because of the opportunity to decide about the main rights of the individuals (Morton, Knopff 2000: 13). While comparing judicial review in both countries, Peter Russell believes that "the importance of judicial review in Canada at the present time equals, if it does not exceed, its importance in the United States" (Russell 1992: 37). In my opinion, there are no proofs that the Canadian Court's judicial review is more powerful than its American counterparts' competence. In Canada it concerns only the Charter and in the United States it consists in the interpretation of the whole Constitution. Furthermore, we should not forget to mention the "notwithstanding clause" existing under the Canadian system: a power under which the provinces or the federal government can use the clause to suspend, for the period of up to five years, any of the rights included in some sections of the Charter (McKenna 1993: 95). It concerns such rights as freedom of: conscience, religion, opinion, assembly, education, and prohibition of unreasonable search, arbitrary arrest and imprisonment, as well as equal protection of laws, and also can serve as a limitation of judicial review.

Considering the position of both courts in political and legal systems, a short look at the appointment process should be taken, because it gives opportunity to estimate who has real influence on what is happening in those tribunals of justice. Both Courts consist of nine persons called Justices – a Chief Justice, and eight associate Justices in the United States and eight puisne Justices in Canada. The American Constitution gives the power of appointment to the President, whose choice has to be approved by the Senate (Constitution 1787, Art. II). In practice, the chief executive has the biggest influence on who is going to occupy the post of a Supreme Court Justice, and who shall create future precedents and legal solutions. In Canada Justices are appointed by the Governor in Council from among candidates chosen by the Prime Minister (*Supreme Court Act* 1985). In practice, the role of the Governor is only formal and nominations proposed by the Prime Minister are approved immediately. In this aspect, we can observe a small difference, because in Canada the Prime Minister has a complete control of the appointment process, contrary to legislative wrangling that takes place in the United States (McCormick 1994). However, since both courts consist of the same number of Justices, have similar powers, and play a significant role in the governmental system, the influence of the American President and the Canadian Prime Minister seems to be comparable. Some differences may occur when we read provisions of *The Supreme Court Act* from 1875, limiting discretion during the appointment process. According to the law, three Justices have to come from Quebec, and according to tradition, next three come from Ontario, two from Western provinces and one from Atlantic provinces (Hausegger and Haynie 2003: 638). This does not, however, limit Prime Minister's ability to choose the candidates on the basis of their political views. In both countries we can observe politicization of the appointment process which proves the willingness of the executive to have influence on Courts' decisions (Frank 1977). If we take into account the power of judicial review and the position of the court of last resort, we can see that it shows a wide range of competence possessed by the Supreme Court of the United States and the Supreme Court of Canada. The executive, aware of these broad powers of the judiciary, tried many times in history to appoint Justices whose views were more liberal or more conservative, depending on who governed the country (Abraham 1980: 77). Some may ask about the independence of Justices which should be a guarantee of their objectivity and non-partisanship.

In the United States the independence of judges is assured by means of two things: firstly, they are appointed for life tenure and can only be removed from office through the impeachment process; secondly, their compensation cannot be diminished during one's service as a judge, which means that the Congress is limited in its power to decide upon the height of compensation for federal judges (Constitution 1787, Art. III). The independence of the judiciary in Canada is guaranteed both explicitly and implicitly by different parts of the Constitution of Canada, as well as some special Acts of Parliament (*Judges Act* 1985). This independence is understood as security of tenure, security of financial remuneration and institutional administrative independence. These similar guarantees in both countries are meant to keep Justices far away from partisan and political activities and to force them to interpret the law according to legal rules and principles. Although it apparently seems to be a simple and well-of-thought solution, we should ask how in reality both Supreme Courts operate and what kind of cases they review?

The recent thirty or forty years of judicial history have shown similar tendencies occurring on the two Courts' benches. Most important cases decided by the Supreme Court of the United States concerned rights and freedoms of individuals, such as: abortion (*Roe v. Wade* 1973), right to die (*Washington v. Glucksberg* 1997), rights of married couples (*Griswold v. Connecticut* 1965), rights of the accused (*Miranda v. Arizona* 1966), freedom of religion (*Wallace v. Jaffree* 1985), or affirmative action (*University of California v. Bakke* 1978). Furthermore, the American Supreme Court recently decided who was going to be the

President of the United States (*Bush v. Gore* 2000), which placed the Justices in the center of political process (Starr 2002: 264-280). On the other hand, the Supreme Court of Canada resolved cases concerning mainly the rights and freedoms of individuals stated in the 1982 Charter, such as: abortion (*Morgentaler et.al. v. Her Majesty the Queen* 1988), sexual minorities (*M v. H.* 1999*, Reference re. Same Sex Marriage* 2004), Aboriginal rights (*R. v. Marshall* 1999), language rights (*Ford v. Quebec Attorney General* 1988), rights of the accused (*R. v. Park* 1995), as well as issues concerning political situation in Quebec (*Reference re. Secession of Quebec* 1998). Thanks to the powers gained by the Canadian Court, its Justices became the main actors in the process of redefining the issues of individual rights (Kelly 2002: 97-124). All the above-mentioned decisions have been binding for all citizens, all courts and every governmental institution – proving the real power of precedents created by the highest tribunals in both countries.

According to Kenneth M. Holland, "the United States Supreme Court is probably the most activist high court tribunal on earth, with Canada's fast becoming a runner-up" (Holland 1991: 2). The significant role of the two Courts is conspicuous in everyday life: the power of judicial review; being ultimate judicial instance, the court of last resort deciding which cases should be reviewed; the creation of precedents, rules binding for other governmental branches; or special role of Justices in common law countries. The function of powerful tribunals deciding about the rights to privacy, about the meaning of the law, or about the limitations of freedoms and rights of individuals – it places them in a unique and significant position in American and Canadian legal systems. If we add the so-called judicial activism, i.e. a tendency in the Court to issue decisions in important cases becoming the main political and legal force in the country, we have a picture of powerful Justices, who can shape the future of Canada and the United States. Hopefully they will be able to shape it according to law, not politics.

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