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THE SIGNIFICANCE OF JUDICIAL REVIEW OF SUB-NATIONAL CONSTITUTIONS AND LAWS IN FEDERAL STATES**

This article discusses various issues that emerge as a consequence of constitutional pluralism existing in federal states. Particular attention is dedicated to the relationship between constitutions of federal units and federal constitutions and laws. As a consequence of two coexisting legal systems in a federation, there are as many as six categories of general acts – a constitution, laws and bylaws of the federation, on the one hand, and constitutions, laws and bylaws of federal units, on the other. It is necessary that so many categories of legal acts are in harmony with each other, and this can be ensured only by means of judicial (constitutional) review. Two of the globally most recognized and most representative models of conformity control among different categories of legislative acts – German and American – have been presented. Finally, an attempt has been made to emphasize the importance of such control and the challenges that it may face in the future.

Key words: *Judicial review. – Federal constitution. – Sub-national constitution. – Constitutionality and legality. – Federal law.*

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1. FEDERAL SUPREMACY PRINCIPLE AS THE BASIS OF FEDERAL LAW

The federal supremacy principle¹ consists of two elements, i.e. it implies that a federation is a separate political and governmental organization and a “super-state” – a carrier of absolute sovereignty, both international and constitutional. The first element reflects the fact that by no means may the character of a federation as a special form of governmental and political entity be brought into question. The second element of supremacy on the one hand suggests that a federal union holds full international or external sovereignty, which is reflected in its right to decide on war and peace (*ius belli*), the right to enter into international treaties (*ius tractatum*), as well as the right of its external representation (*ius legationis*). On the other hand, an internal or constitutional sovereignty of a federation is best reflected in a German saying that “the federal law breaks the state law” (*Bundesrecht bricht landesrecht*)², meaning that the federal laws in all cases prevail over or amend the nonconforming state laws. It is common that the federal law takes precedence over the state law which is subordinate to it and is thus held in check in every situation where it does not conform to the federal law. Every federal law is based on the supremacy principle of federal constitution, and in order to consistently follow and administer the principle in practice, appropriate methods and procedures are required to keep such acts and operations contravening the federal constitution at bay. Under such terms, every federal system needs an adequate review of constitutionality.³ Internal or constitutional sovereignty of a federation is based on the supremacy of the federal law, the protection of which represents the most important task of the constitutional judiciary in federal states. Therefore, even though the federal law and the state law are basically independent, it should be emphasized that the latter must conform to the former, as otherwise the survival of a federal union would be impossible.⁴

The federal constitution defines two separate constitutional forms of law – federal on the one hand, and the law of federal units on the other – which implies the existence of multiple individual systems of gen-

¹ Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford 1989, 317.

² Article 31 of the Basic Law for the Federal Republic of Germany of 1949.

³ An exception to this rule would be the Belgian federation, since it is a predominant opinion that it does not apply there, as there is no hierarchy between the acts adopted by the federal parliament (laws) and those enacted by the community and regional parliaments (decrees and ordinances), which means that Belgium thus borderlines the confederation, since the federal law may be overridden through regional and community regulations.

⁴ Karl. J. Fridrih, *Konstitucionalna demokratija*, Podgorica 2005, 180–181.

eral legislative acts. Such systems relate to one another in a certain sense that is also determined by the federal constitution. The hierarchy of general legislative acts within federations is therefore more complex, since a much greater number of categories of normative acts occur compared to the unitary states.⁵ Therefore, when it comes to federation, “a question arises as to the conformity of not only federal laws and other acts to the federal constitution, but of laws and other acts adopted by federal units to the federal law, which prevails over the law of an individual state with its legally binding character.”⁶ Significant issues may emerge particularly in the sphere of mixed legislative jurisdiction, where we can “imagine a situation in which either of the legislators could get ahead of themselves in the legislative process, and for instance a federal legislator could get engaged in a detailed legislation process instead of dealing with principles only, while a state legislator, through the legislative activity, could be in full breach of any principles adopted by the federal legislator.”⁷

2. HOW DO SUB-NATIONAL CONSTITUTIONS RELATE TO FEDERAL CONSTITUTIONS?

As a consequence of two coexisting legal systems in a federation, there are as many as six categories of general acts – a constitution, laws and bylaws of the federation, on the one hand, and constitutions, laws and bylaws of federal units, on the other.⁸ If we put the bylaws at both governmental levels aside for a moment, and direct our attention towards the most important normative acts (constitutions and laws), we can conclude

⁵ The opinion of Lukić is that it is possible to differentiate between two elements combined in the hierarchy of legal acts or norms. One of the two elements may be termed as “positive” based on the fact that a superior legal norm defines the structure of an inferior legal norm. In that way, the creation of such a norm and the development of law is secured. The other element may be considered “negative” in that it “determines the manner of establishing as a fact that a norm has been created in accordance with a superior norm, as well as the steps to be taken in order for a seemingly legal norm to be removed from the legal order.” (Radomir D. Lukić, “O hijerarhiji pravnih normi”, advisory report *Division of Normative Function between Authorities of Various Political and Territorial Units*, Belgrade 1966, 12)

⁶ Kosta Čavoški, *Ustavnost I federalizam*, Belgrade 1982, 71.

⁷ Miodrag Jovičić, *Savremeni federealizam – uporednopravna studija*, Belgrade 1973, 251.

⁸ However, there are federal states (India, Belgium) where federal units do not have an independent constitutional capacity, which in itself is an anomaly of a federal system and a significant restriction to the autonomy principle of federal units. Nonetheless, such federations have a far more simplified hierarchy of general legislative acts. Some authors, one of them being Jovan Djordjević, consider that federal units “need to have their respective constitutions. An existence of a constitution is not a proof of a federal relation, although without one such a status has not been secured nor does it exist to this day.” (Jovan Djordjević, *Politički sistem*, Belgrade 1985, 291)

with certainty that the federal law must conform to the federal constitution and that the state law must conform to both the federal constitution and laws and the state constitution. However, the relationship of the federal constitution and the federal law with the constitution of a federal unit may pose a problem. Most federations have adopted a rule requiring that the state constitution must conform both to the federal constitution and federal legislation. At the same time, the subordination of state constitutions to the federal constitution is unconditional, while the subordination to the federal law is conditional on the fact that the law conforms to the federal constitution. Otherwise, the constitutional court will abolish or abrogate a federal law, while a state constitution will stay in force. As stated by Jovičić “a solution that provides for subordination of state constitution to the federal constitution and laws shows unquestionable practical values, as it secures the establishment of a unique constitutional and legal system within a federation and it averts the danger of discrepancies between the constitutional and legal systems of the federation and federal units. However, from the perspective of the application of the federal principle, this solution points to its obvious weaknesses, as it significantly undermines the independence of federal units.”⁹ In simple words, this rule is a result of a preference for the principle of constitutionality and legality over the federal principle.

A judicial review of state constitutions is a highly significant matter for the functioning of any federal state. The rule by which sub-national constitutions need to conform to the federal constitution is one of the basic elements of the federal supremacy principle¹⁰ and it is based on three assumptions. Firstly, a federal constitution is an act made at the highest level of the governmental hierarchy and it has supreme legal force in a federation, for which reason state constitutions must conform to it. Secondly, the federal constitution precedes state constitutions in time and in logical sequence. Therefore, a sub-national constitution with respect to the federal constitution is not simply a *lex inferior*, but as a rule it is a *lex posterior* as well. For that reason it is important that the federal constitution takes legal precedence over state constitutions, as a state constitution would otherwise have the power to amend it. And thirdly, the federal constitution is a general legislative act binding even for the federal units whose representatives to the federal parliament voted against the constitution, i.e. whose parliament or citizens, being against it, did not proceed to its ratification. Sub-national constitutions may be subjected to court control of their constitutionality, and in the event that their nonconformity to the federal constitution is determined by a review, such unconstitutional provisions shall be abolished or abrogated. We may find an interesting

⁹ M. Jovičić (1973), 257.

¹⁰ Francis Delpérée, *La droit constitutionnel de la Belgique*, Bruxelles – Paris 2000, 87–88.

solution in the Republic of South Africa, where such reviews of conformity of a sub-national constitution to the federal constitution are part of a regular enactment procedure, and constitutions may not go into effect until the Constitutional Court has confirmed their conformity to the federal law. An exception to the rule by which a constitutional court or a supreme court decides on the constitutionality of state constitutions would be Switzerland, where cantonal constitutions are not subjected to judicial review. However, it is far from the fact that cantonal constitutions are excluded from any review, as cantons submit their constitutions to the federal parliament for ratification, and the constitutions are therefore treated as federal regulations and are integrated into the federal law. Consequently, the Swiss Federal Court would not take on the task of controlling the constitutionality of cantonal constitutions, and such a move has faced criticism from some distinguished constitutionalists.¹¹

3. HOW DO SUB-NATIONAL CONSTITUTIONS RELATE TO FEDERAL LAWS?

The relationship between state constitutions and federal laws poses more problems compared to how they relate to the federal constitution. However, “in all federations, with slight differences here or there, it is posited that a state constitution is inferior not only to the federal constitution but to the federal laws as well.”¹² Between two legal systems, as pointed out by Jovičić, “no discrepancies are desirable, but if they should emerge, then it is in the best interest of maintaining order and legal security to determine ‘seniority’, which would favor the federation and, in this case, its general act.”¹³ Such a solution, however, as previously noted, has little to do with the application of the federal principle. Nonetheless, its absolute application is found only in federal states where federal acts are not subjected to the control of constitutionality, as is the case in Switzerland. In other federations it is only assumed, arguably so, that federal laws conform to the federal constitution, but if the constitutional court determines that this is not the case, a federal law shall be abolished or abrogated. In that respect, the nonconformity between federal laws and a state constitution may have two outcomes: if it is found that a federal law is unconstitutional, i.e. it does not conform to the federal constitution,

¹¹ More details in: Miodrag Jovičić, *O ustavu – teorijsko-komparativna studija*, Belgrade 1977, 243–245; Marcel Bridel, *Précis de droit constitutionnel et public suisse*, tome II, Lausanne 1965, 147.

¹² Ljiljana Slavnić, *Federalizam i ustavnosudska funkcija – slučaj Jugoslavije – pravna studija sa uporedno-pravnim elementima*, Belgrade 2000, 31–32. Such a solution has been adopted in the United States of America, Federal Republic of Germany, Austria, Russian Federation etc.

¹³ M. Jovičić (1973), 251.

such law is abolished or abrogated, while the state constitution remains in effect; if it is determined, however, that a federal law does conform to the federal constitution, then the controversial provisions of the state constitution are abolished, abrogated or they simply are not applied. Although the cited rule “allows for the establishment of a unique system of constitutionality and legality within a federation and it clears the danger of nonconformity between the two legal systems”¹⁴, it significantly affects the state autonomy principle which is supposed to materialize through the enactment of their own constitutions and represents “an obvious degradation of the importance that the constitution of a federal unit has.”¹⁵

In spite of the criticism that the rule of legal supremacy of federal laws over sub-national constitution significantly reduces the extent to which the federal principle is applied, it is almost impossible to avoid it in federations where the federal constitution grants major freedoms to states when it comes to creating their own constitutional orders. Most federal constitutions contain minimum requirements that federal units have to meet when enacting their constitutions, and with increasing freedom of the states in terms of self-organization comes greater importance of the federal regulation priority principle. In other words, if the framers of sub-national constitutions organize states almost independently from the federal constitution, it is necessary to secure an efficient application at the federal level of the rule by which state constitutions have to conform to federal laws.¹⁶ It is the only way to ensure proper functioning of the federal legal system.

4. JUDICIAL (CONSTITUTIONAL) REVIEW OF LAWS IN FEDERATIONS

When we consider the judicial review of laws in federations, the situation is somewhat different. As previously said, there are two types of laws in legal systems of federations – federal laws and state laws, and thus the basic function of constitutional judiciary – the function of judicial (constitutional) review of laws – in federations has two aspects.

The first aspect of the judicial (constitutional) review of laws is putting the state laws to a test of constitutionality and legality. Such laws need to be in accordance with both the federal constitution and federal laws, and with a state constitution.¹⁷ Scholars are virtually unanimous in

¹⁴ Lj. Slavnić, 32.

¹⁵ M. Jovičić (1977), 246.

¹⁶ Lj. Slavnić, 32–33; M. Jovičić (1977), 246–248.

¹⁷ The relationship between the federal laws and state laws is somewhat more complex in federations where the federal constitution differentiates between absolute and

their opinion that the conformity review of laws of federal units to the federal constitution is an institute that every federation needs, and some authors believe that a federal order may not survive without such review. Thus Čavoški states that this aspect of review is a “*condicio sine qua non* of the federal order, without which it could not exist at all (...)”¹⁸ It is considered that unless a federal court has such authority to review the conformity of state regulations to the federal constitution and federal laws, and to abolish or abrogate any nonconforming regulations, the federal supremacy principle would be jeopardized and in practice this would lead to a gradual collapse of the federal order.

Another form of judicial review in federations – judicial (constitutional) review of federal laws – is considered less important with respect to the first aspect and hence it is not a necessary requirement for a federation to function successfully. However, this form of judicial review of laws is more than useful and is in fact desirable, since it is a reliable legal mechanism that may prevent the federal legislator from crossing the jurisdiction limits as defined in the constitution. The classical theory of federalism therefore supports the perspective that a federation needs an arbitrator in the form of judiciary, whose task is to protect the federal constitution both from federal and state enactments.¹⁹ The judicial review of federal laws seeks its theoretical grounds in the idea of a “restrictive constitution”, as the constitution sets the limits within which the federal parliament may act.

Even though the second aspect of court control of constitutionality in a federation – which is based on the abolishment or abrogation of unconstitutional federal laws – is undoubtedly less important, it would be entirely incorrect to claim that it does not have any relevance when it comes to the proper functioning of the constitutional system. “A federal order may survive without it, but then there are no reliable legal guarantees that the separation of powers between the federal government and member states, once established, would remain within the limits defined by the constitution.”²⁰ The reason for that is the possibility that the federal legislator may have in enacting laws that could breach the jurisdiction of federal units without fear that such laws would be abolished or abrogated. In other words, as the judicial review of state laws is aimed at protecting the federal supremacy principle, the judicial review of federal laws is needed primarily to protect the principle of state autonomy. It should be kept in mind however that federal units as such have their representatives in the house of the federal parliament, which is basically co-

mixed jurisdiction, as is the case in the Federal Republic of Germany (Article 72 of the Basic Law) and the Russian Federation (Article 76 of the Constitution).

¹⁸ K. Čavoški, 72.

¹⁹ For more details, see: J. Djordjević, 294.

²⁰ K. Čavoški, 72.

equal with the general house of representatives in terms of the legislature, and any potential enactments of unconstitutional laws that would expand the federal jurisdiction would come as the result of a vote by a majority of member states. Such laws “in fact have a character of amendments to the constitution, despite having been enacted in a regular legislative procedure”²¹. However, considering that laws are adopted by a simple majority of votes, such actions would be unjust towards the minority that is against extending federal jurisdiction, as such a minority would be able to prevent the adoption of a constitutional amendment that would introduce such changes, since the enactment of an amendment, as a rule, requires a supermajority.

However, even though the judicial review of all laws is undoubtedly desirable in federations, some of them have exempted specific legislative acts from the judicial review through the federal constitution or judicial practice, by the court’s narrow interpretations of the constitution. For the sake of illustration, we will refer to the cases of two European federations – Switzerland and Austria. Switzerland is the first case where federal laws have been placed out of the reach of judicial review by provisions of the constitution.²² Such provisions were present in the Constitution of 1874, and they were reiterated at the 1939 referendum, when a proposed amendment was repealed that would have otherwise allowed the judicial review of federal laws by the Federal Court. The provisions banning the Supreme Federal Court from reviewing the constitutionality of federal laws were included in the new constitution of the Swiss Confederation of 1999.²³ According to the opinion of Jovan Stefanovic, “a truncated form of judicial review” that is present in Switzerland is a consequence of both historical circumstances and the governmental system, as the constitutional order of the country was not constructed on the grounds of separation of powers, but rather on the principle of unity of power.²⁴ The traditional historical reasons are to be sought in how this country, which converted from confederation to federation in 1848, was initially created. However, even after its conversion, central authorities were quite limited in their powers, and the review of their acts was unnecessary. But, the court control of the constitutionality of federal laws was not introduced even after 1874 when the evolution that led towards the allocation of significant constitutional powers to the Federal Court, in spite of certain attempts to do so. Another form of restricted constitutional review may be seen in Austrian federation, and it comes as the consequence of a complex hierarchy of legal regulations found there.

²¹ *Ibid.*

²² K. J. Fridrih, 187.

²³ See Article 189, Paragraph 4 and Article 191 of the Swiss Constitution of 1999.

²⁴ Jovan Stefanović, *Ustavno pravo Jugoslavije i komparativno pravo*, Vol. I, Zagreb 1965, 89–91.

“The Constitutional Court of Austria has taken a stance that the federal constitutional laws are to be exempt from the constitutionality review in material terms, while their conformity to the constitution may be a matter of formal review.”²⁵ The Constitutional Court’s attitude is an appropriate one, in consideration of the nature of the Court’s function as constitutional guardian, which is to not allow the legal review of acts with a super-legal, i.e. constitutional status.²⁶

Finally, the question of conformity between the laws of federal units and their constitutions from the perspective of the federal seat and federal order is not relevant, as every federal unit should take care of this aspect on its own. In fact, in the event of nonconformity, the federal law would remain unharmed. Federal units may employ different ways to defend constitutionality within their own jurisdictions, and the most effective solution to achieve that is the establishment of separate constitutional courts for every state, as is the case of the Federal Republic of Germany, the Russian Federation, and Bosnia and Herzegovina.

5. AMERICAN AND GERMAN MODELS OF JUDICIAL (CONSTITUTIONAL) REVIEW AS ROLE MODELS FOR COMPARATIVE LAW

Edward McWhinney has termed the systems where the task of controlling constitutionality is assigned to regular courts as *judicial review* systems, while those that have a separate constitutional court are termed *constitutional review* systems.²⁷ First is an American-style *judicial review* posited upon a Supreme Court of general jurisdiction determining concrete case/controversies against a detailed fact record, where essentially a decision on the rights and duties of the parties in an active and direct mutual conflict is made based on facts. On the other hand, a Continental European-style *constitutional review* is applied by a specialized constitutional court in the case of abstract controversies between different units of government (e.g. executive and legislature) or various levels of government (e.g. central and regional administration) about their respective rights and duties under the constitution.²⁸ As a part of this

²⁵ Lj. Slavnić, 35. On the other hand, in the Russian Federation, constitutional laws are subjected to control by the Constitutional Court of the Russian Federation.

²⁶ However, a number of federations and most specifically the Federal Republic of Germany accept the concept that allows a constitutional court or a supreme court to review the constitutionality of amendments to the constitution.

²⁷ This classification is discussed by Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge 2007, 29–30.

²⁸ Edward McWhinney, *Supreme Courts and Judicial Law-making: Constitutional Tribunals and Constitutional Review*, Dordrecht – Boston – Lancaster, 1986, XIV.

chapter, we will discuss solutions offered by two federations as the most important representatives of the first and the second system, respectively – USA and Germany. In today’s world of constitutional judiciary there are two leading standards in the form of the U.S. Supreme Court and German Federal Constitutional Court. Their practice is a treasury of ideas in terms of constitutional judiciary for the majority of countries.

The most prominent representative of the first system is the United States of America. Renowned American constitutionalist Edward S. Corwin distinguished among three forms or branches of court control of constitutionality in the USA that originated as a result of the federal system of government. The first is the *national judicial review* that implies the right of all courts to review conformity of congressional acts to the U.S. Constitution. Another form of court control of constitutionality is the *federal judicial review* that refers to the right and duty of all courts to give priority to the U.S. Constitution over controversial state constitutions and laws. Finally, the third branch is the *states’ judicial review* which refers to the state courts’ power to decide the conformity of state legislative acts to their respective constitutions.²⁹ The only branch of judicial review that is not expressly mentioned in the Constitution, but has derived from Supreme Court practice is the national judicial review. It was established by a decision delivered in the case of *Marbury v. Madison* (1803), where the main conclusions were based on two essential arguments: the first stating that the supremacy of the Constitution as a fundamental act over ordinary acts exists, and the second by which all courts have the power and duty to interpret laws and to not apply such laws contradicting the Constitution.³⁰ The other two branches of court control of constitutionality have their strongholds in constitutional norms – the federal review has its own in the *Supremacy Clause*, while states’ review has it in state constitutions.³¹

Thus all acts of Congress, constitutions of states and all laws, as well as bylaws, are subject to a review of constitutionality. Apart from the specified legislative acts, international treaties undergo the court control of constitutionality as well, although court practice in that area is not extensive. In fact, “even though no international treaty has ever been held to be unconstitutional, in the case of *Missouri v. Holland* (1920) it was clearly

²⁹ Edward S. Corwin, “Judicial Review”, *Encyclopedia of Social Sciences* (vol. 8), London, 1932, 457.

³⁰ See: Edward S. Corwin, “*Marbury v. Madison* and the Doctrine of Judicial Review”, 12 *Michigan Law Review* (1914), 538; Stanley L. Paulson, “Constitutional Review in the United States and Austria: Notes on the Beginning”, *Ratio Juris*, Vol. 16, No. 2, June 2003, 227.

³¹ On the constitutional basis for court control of constitutionality in the USA, see: Louis L. Jaffe, “The Right to Judicial Review II”, *Texas Law Review*, Vol. 71/5, 1958, 795.

expressed that the constitutional validity of treaties and legislation resting on treaties may appropriately be the subject of judicial inquiry.”³²

Generally, the constitutional judiciary of the Federal Republic of Germany has three distinctive features. Firstly, there is a centralized system of constitutional judiciary where the Federal Constitutional Court is vested with the power to review the constitutionality of legislative acts, although regular courts are allowed to control constitutionality in certain cases, which obviously is a tinge of decentralization in the system. Secondly, apart from the Federal Constitutional Court, Germany has constitutional courts in federal units, and those courts have the power to review the constitutionality of state acts. Evidently, this form of “federalization” of the constitutional judiciary is not to be considered as introductory of a specific decentralized system of court control of constitutionality. The existence of multiple constitutional courts (one federal and several state courts) is to be considered as a logical consequence of a complex federal system. Thirdly, German Constitutional Court (comprising 16 judges) consists of two senates with eight judges each.³³ The First Senate decides on constitutional controversies between the federation and federal units, as well as conflicts among states themselves (“senate of constitutional disputes”), while the Second Senate decides on constitutional complaints (“senate of human rights”). The majority of activities of the Court are conducted by the Senates, and many authors name it the “twin court” due to the existence of two Senates.³⁴ As the main protector of the federal constitution, the Federal Constitutional Court of Germany holds extensive jurisdiction, and its functions may be classified into several groups.³⁵ These are: control of regulation constitutionality, deciding on controversies regarding separation of powers (horizontal and vertical), impeachment procedures, election scrutiny, protection of human rights, prohibition of political parties and issuing legal opinions on constitutional matters.³⁶

³² Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge, 1989, 138. Decision: 252 U.S. 416 (1920).

³³ Judges are appointed by both houses of parliament by a two-thirds majority. Appointments by the *Bundestag* are indirect, while those by the *Bundesrat* are direct. The court chairman and his deputy are appointed interchangeably by both houses of parliament.

³⁴ In that regard, see: Luka Mezeti (Lucca Mezzetti), “Savezni ustavni sud Nemačke – struktura i funkcije”, *Pravni život*, 11/1997. (vol. III), 902.

³⁵ “Jurisdiction of the Constitutional Court is generally defined by the Basic Law itself.” (David P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago 1994, 27)

³⁶ Compare: Ralf Rogowski, Thomas Gawron, *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, New York-Oxford, 2002, 62.

The Federal Constitutional Court controls the constitutionality of legislative acts “in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law”³⁷, and in the event of disagreements on whether a law meets the requirements on application of the *Bundesrat* or of the government or legislature of a land.³⁸ All legislative acts may be subjected to constitutional review in the Federal Republic of Germany, including laws enacted before the constitution was adopted, as well as amendments to the constitution, acts of the executive government and international treaties (or more specifically, the laws ratifying such treaties).³⁹ From the aspect of the federal order, a very important power held by the Constitutional Court is that of controlling the constitutionality of state constitutions.

6. CONCLUSION

Apart from its aim to protect the principle of constitutionality and legality (the same task it has in unitary states as well), the constitutional judiciary in federations has the delicate function of maintaining equilibrium in federal relations by preventing any transformations leading to a unitary or confederate system. Over the first nine decades of the past century the prospect of unitarization of federal states was considered a far more serious threat to federal systems worldwide, compared to the other prospect of its disintegration which emerged only in the last two decades and turned out to be a real threat.

Grosso modo, the constitutional judiciary in federations faces two basic challenges: “firstly, it needs to secure the respect of separate functions between the federation and federal units as determined by the constitution, and secondly, it has to secure the conformity among various categories of general acts adopted by the federation and federal units.”⁴⁰ In that regard, for the constitutional judiciary to be able to successfully complete its tasks, two important prerequisites must be satisfied: its independent operation needs to be protected, and the federal principle should be sufficiently reflected in its organization.

³⁷ Article 93, Paragraph 1, Item 2 of the German Basic Law.

³⁸ Article 93, Paragraph 1, Item 2a of the German Basic Law. The federal law on concurrent legislation may be enacted “if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.” (Article 72, Paragraph 2 of the German Basic Law).

³⁹ Ralf Rogowski, Thomas Gawron, *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, New York-Oxford, 2002, 63.

⁴⁰ M. Jovičić (1973), 252.

In the 20th century, and particularly after the Second World War, an obvious trend of passing more powers onto the federal center at the expense of federal units came into sight, and it was based on the need to achieve better government efficiency. This trend has been described by constitutionalists as the “weakening of the content of federal principle” or “strengthening of federal functions”. However, at the end of the past century, and after the collapse of socialist constitutionality in particular, some federations followed an entirely different pattern of weakening federal power and strengthened the powers of federal units, while the constitutional judiciary held a noteworthy role in the process by supporting this trend with its decisions. However, the global economic and financial crisis, comparable to that of 1930s, has brought in a new wave of government interventionism which inevitably leads to centralism, and we will soon witness the response of the constitutional judiciary to the challenges it will undoubtedly have to face.