

Role of the judiciary in shaping federations: cases of the Supreme Court in the United States of America and the Court of Justice in the European Union

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Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Stefanovic, A. (2017). Role of the judiciary in shaping federations: cases of the Supreme Court in the United States of America and the Court of Justice in the European Union. *Journal of Liberty and International Affairs*, 3(Supp. 1), 74-90. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-52895-5>

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Peer review method: Double-Blind

Date of acceptance: March 30, 2017

Date of publication: July 26, 2017

Original scientific article

UDC 341.645.2.076(4):347.991.076(73):303.01



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Abstracting

ROLE OF THE JUDICIARY IN SHAPING FEDERATIONS: CASES OF THE SUPREME COURT IN THE UNITED STATES OF AMERICA AND THE COURT OF JUSTICE IN THE EUROPEAN UNION

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Abstract

The author of this article uses the comparative method in describing how judicial bodies through their case law shaped and modeled the federal structures of government in the cases of the United States and the European Union. Through initially laying out the theoretical explanations of the significance of constitutional (judicial) review in federal structures, and elaborating on the powers and position of the Supreme Court in the United States and the Court of Justice in the European Union, he seeks to show how these bodies influenced, in similar ways, some of the key features of these two federal organizations.

Key words: EU; USA; Federalism; Supreme Court; Court of Justice; constitutional review; implied power

FEDERALISM AND THE ROLE OF THE JUDICIARY

Federalism is a form of division of political power that supplements the traditional horizontal separation of government functions - between the legislative, executive and judicial branches - with a vertical dimension: lower levels of government should not derive their power and legitimacy from higher levels but be founded independently on the people's will. Federalism represents a system of power sharing between various units of government so that two or more levels of government have formal authority over the same area and people. These different levels of government- a central government and smaller regional governments, usually called states or provinces- are given substantial responsibilities and powers. Therefore, federalism is in its nature an element of constitutionalism, as it introduces a vertical control mechanism. Unlike division of power between the legislative and executive which is functional, federalism is a territorial method of dividing power (Marković 2011, 365).

Also, unlike unitary states, where sovereignty manifests itself through mechanisms of political control performed by the central government towards the subnational units of local government, in federal states one can speak of legal sovereignty, which rests in the constitutional judiciary that enjoys the power of constitutional (or judicial) review of legal and executive acts of both the federal government and the federal units. Following this line of thought, it is clear that the federal constitutional courts (or, supreme courts) have the competence of delimiting powers between various levels of government, as well as to be the final arbiter of whether the behavior of federal units is within the legally confined space of activity. As opposed to unitary states where there can be no conflict of power, since the central government has full sovereignty, in federal states conflict of powers is resolved for the benefit of the level of government which acts within its competences (Marković 2011, 362-363). In this regard, unlike unitary states, which can exist without a codified constitution, federal states desperately need one (Jovanović 1936, 286). In a way, the institution of constitutional judiciary has merged in time with the concept of the federal structure of government (Marković 2011, 363).

The significance of the judiciary in federations possesses yet another dimension. As federations rest on the division of powers and responsibilities between various levels of government, federal constitutions have the task of securing this vertical layer of government. This is why federal constitutions usually contain particularly difficult mechanisms for constitutional reform. Having this in mind, it can be argued that one of the hallmarks of federal constitutions is exactly constitutional supremacy, i.e. that all government authority is rooted and derives from the constitutional document, and that this principle of constitutionality needs to be respected. The importance of judiciary is seen through the necessity of having an independent and impartial judiciary which would interpret the Constitution. Therefore, there is a powerful role to be played by supreme and constitutional courts in all federations. Building on this, informal constitutional changes through judicial review can stand on the same footing as formal constitutional amendments. The courts, having found themselves in such a position, do not stop at only interpreting the constitutions; rather, they seek, through their judgments, to adapt the constitutional text to the changing circumstances, and to resolve pressing intergovernmental conflicts (Burgess 2006, 159).

Judicial Review

Remarks exist that judicial review emerged in the English common law, and the *Dr. Bohnam's Case*, where Edward Coke, the Chief Justice of the Court of Common Pleas, ruled that the Acts of Parliament are controlled by common law. Likewise, another great British legal mind, William Blackstone, used the adjective 'unconstitutional' to refer to "egregious transgressions of the public trust (...) that they justified a revolutionary response" (Holms 2012, 17). Nevertheless, judicial review is nowadays regarded as an American product, as it is, in its fullest sense, associated with the emergence of the first written constitutions, which is not the case with the English non-codified Constitution (Hejvud 2004, 568). Because of this, Charles Evans Hughes, a Supreme Court Justice, wrote in 1966 that the Supreme Court is "distinctly American in conception and function, and owes little to prior judicial institutions." (Bureau of International Information Programs, 22).

Judicial review, or constitutional review, presents a part of the broader category of constitutional justice or constitutional adjudication, which covers all the functions a constitutional, or supreme, court performs in ensuring the pursuance to the Constitution (Frosini 2008, 184). Usually, a distinction can be made between two modes of judicial review: a decentralized (diffused) and a centralized (concentrated) model.

The decentralized model came to being in the United States, and the Supreme Court, alongside the federal and state judicial structures, is the prototype of this kind of judicial review. Here, review of constitutionality of statutes and other acts (be they federal or state) is performed not just by the Supreme Court, but by the entire judiciary, including the lower courts, which hence makes the system decentralized. Likewise, review is connected to a concrete dispute between parties, i.e. there is an actual controversy between real adversaries. Thus, judicial review in this system is performed *in concreto* (Frosini 2008, 186-187).

The centralized model is also called the concentrated, European or Kelsenian model, in honor of Hals Kelsen, the theoretical originator of this model. In this system, review cannot be performed by ordinary courts, but by a specialized body placed outside of the judiciary, which rules on the constitutionality of laws *ab abstracto*, without an actual controversy being taken before this body (Frosini 2008, 187). This quasi-judicial body, often called a constitutional court, is seen as a negative legislature, as its task is to annul legislation deemed unconstitutional (Hague and Horrup 2014, 339). Most of European states have opted for the latter model, including Eastern European states which went on the path of instituting democratic governance after the collapse of communism. At the same time, with the creation of the European Communities and, later on, the European Union, with its own judicial system headed by the Court of Justice, there are opinions that the two modes of judicial review have begun to converge, and that, in the context of Union law, the system of judicial review in Europe has begun increasingly to adopt the features of the American counterpart. Namely, through the empowerment of lower national courts to *disapply* national statutes and other acts which are not in compliance with Union norms, the review system was decentralized, enabling citizens to initiate the control of constitutionality of legislation and other acts even before courts of ordinary jurisdiction, and not necessary the constitutional court (Chen and Maduro 2013, 127). Moreover, this system is decentralized as there is no relationship of hierarchy between the ECJ and national courts—rather between them a relation of cooperation is evident. Even though national courts are obligated to implement Union law in accordance with the interpretation given by the ECJ, nevertheless the ECJ itself cannot overturn or reverse judgment made by national courts (Stanivuković 2009, 21).

THE UNITED STATES OF AMERICA: A LONG STANDING LIBERAL DEMOCRATIC FEDERATION

The current political system of the United States was created by the United States Constitution adopted during the Constitutional Convention in 1787 (known back then as the Federal Convention). The previous confederal government created by the Articles of Confederation and Perpetual Union (hereinafter: the Articles) proved to be ineffective and incapable of resolving the pressing needs of the founding generation. Therefore, one of the greatest challenges was how to create a government that would transform this confederal democratic structure into a system of national governance while preserving the democratic foundation (Kincaid 2010, 121). Even though the mandate of this Convention was to amend the Articles, the delegates adopted a whole new document which wiped out the loose confederal system of government, and instituted a potentially strong national government with significant powers. The new document sought not only to establish new government, but also to create a new nation: unlike the Articles that started off with the words “We, the undersigned States (...)”, the preamble to the Constitution laid basis for the American nation to be born with the words: “We, the people of the United States (...)”. Three of the framers - Alexander Hamilton, James Madison and John Jay - in promoting the new Constitution argued that the confederacy had historically proven to be an impotent form of government and that it was “the cause of incurable disorder and imbecility” (Hamilton, Jay and Madison 2012, 41). The adequate remedy for this situation would be an “energetic government” by which he (Hamilton) meant the “augmentation of federal authority” at the expense of the current state of government. In order to fully condemn existing confederal principles as irretrievably deficient both Hamilton and Madison, in the Federalists papers, conducted an extensive survey of earlier confederative experiences and showed why they acquired the reputation of being weak, anarchic and highly unstable (Burgess 2006, 59).

This new system was formed on the principles of republicanism (as opposition to monarchy), federalism (as a form of division of powers between the national government and state governments) and separation of powers. Even though the term “separation of powers” is not expressly mentioned in the Constitution, in the language of the first three Articles it is clear that this kind of system is laid down. James Madison, the principle writer of the Constitution, in Federalist No. 51 states that, although authority has the same origin - in the American people - in order to disable mob rule and oppression of the majority, a system in which authority is divided between different agencies with possibilities of mutual checks and balances was necessary (Bianco and Canon 2013, 540). Federalism also came to being as a consequence of the framers’ fear of tyranny of the majority. Federalism’s feature as an additional form of division of power was seen through the possibility of balancing different, territorially organized interests. Thus, the introduction of federal structure of government had the aim of perfecting the American democracy and to direct the decision making process towards achieving the common good (Kovačević 2013, 69-71). As the American Constitution was, in James Madison’s words, a Charter of power granted by liberty (Ayn Rand Institute), it was necessary to limit and control this power through vertical and horizontal lines of checks and balances. Today, the American Constitution is the oldest living constitution in the world. At the same time it has not changed much in more than two hundred years. The framers of the Constitution envisaged a specific mechanism of modifying the Constitution- the amendment technique. But, given the

complexity of adopting such amendments only 27 in total have been passed so far, 17 since 1791 and the entry into force of the Bill of Rights, which contains the first ten Amendments. However, as Jefferson noted, the Constitution belongs to the living, not to the dead, and should be rightly referred to as a living document, as it is constantly being tested and altered.

The Constitution changes not only through formal amendments, but also through informal processes. While formal amendments change the letter of the Constitution, informal processes change the unwritten body of tradition, practice and procedure related to the Constitution (Edwards, Wattenberg and Lineberry 2014, 57). The fact that the provisions of the Constitution were quite general and, indeed, vague, offered an opportunity for them to be interpreted in accordance with the *spirit of time*, and to adapt to changing political and social customs and values (Bianco and Canon 2013, 46-47). The longevity of the Constitution was, in particular, secured through the case law of the Supreme Court of the United States, and its judgments often proved to be more important for the development of the American constitutional law and the American constitutional system, than the statutes adopted by Congress, or by the federal states.

The Supreme Court of the United States

The framers anticipated an anti-majoritarian role for the Courts, but they did not expect it to be politically powerful. Hamilton wrote in Federalist 78 that the Supreme Court would be the least dangerous branch of government. He went on to describe how the judicial branch, unlike the other two branches, cannot have such a strong influence on the whole of the society. He argues this because it “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (Hamilton, Jay and Madison 2012, 402). On the other hand, he insisted that the judiciary is also an important check in the government system- judicial independence serves for the protection against the “occasional ill humors in the society” (Magleby, Light and Nemacheck 2014, 62).

The Constitution is vague about the structure of the federal court system, specifying only that there should only be a Supreme Court, and the discretion is left to the Congress to establish lower federal courts of general jurisdiction. Apart from explicitly mentioning the Supreme Court, the Constitution also stipulates its original jurisdiction - cases relating to ambassadors, public ministers and consuls, and controversies where a state is a party. However, even here the Supreme Court is not required to hear all cases. On the other hand, Article III authorizes Congress to determine Supreme Court’s appellate jurisdiction. A party wishing to have its case reviewed by the Supreme Court is required to file a petition for a *writ of certiorari* with the Court. The Supreme Court grants writs only when there are special and important reasons for doing so, and if four or more Justices on the Court are in favor of granting a petition, a writ is issued and the case is accepted. The Court’s docket is thus controlled and the justices can devote themselves to cases that deserve attention (Schubert 2012, 149).

One of the most prominent features of the Supreme Court (and, in fact, the entire judicial system in the country) is the power of the Court not only to interpret laws, but also to declare them invalid if in conflict with the higher law - the Constitution. The power to invalidate laws, known as judicial review, is not spelled out explicitly in the Constitution, but is a right asserted by the Supreme Court since the early XIX century. However, the

Constitution lacked an explicit provision stipulating the Supreme Court's power of judicial review. The framers were divided on the issue: on the one hand, Hamilton stressed the courts should have the "duty (...) to declare all acts contrary to the manifest tenor of the Constitution void", and that "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former" (Hamilton, Jay and Madison 2012, 405); on the other hand, many other framers opposed this idea, including Thomas Jefferson, claiming that the power of judicial review might institute a despotic oligarchy (Hague and Horrup 2014, 338). It was the landmark case *Marbury v Madison*, 5 US 137 (1803) when the Supreme Court asserted for itself the power of judicial review. In its unanimous decision the Court stated that the Judiciary Act, adopted by Congress in 1791, was unconstitutional as it was in collision with the Constitution. More precisely, section 13 of this statute gave jurisdiction to the Supreme Court which was not prescribed by Article III of the Constitution. Chief Justice John Marshall, writing for the majority opinion, stated eloquently in this decision that "it is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply". In other words, the argument was that the Constitution is the fundamental and paramount law of the nation and that any act of the legislature, repugnant to the Constitution, is void (Janda, Berry and Goldman 2008, 425). Referring back to Charles Evans Hughes, it is precisely because of this that "the Constitution is what the judges say it is". Over time, opinions have arisen that the Supreme Court has established itself as the most important federal institution in the United States, and that, through its competence of constitutional interpretation, it has become a 'covert legislator'" (Avramović and Stanimirović 2006, 267), or even a "permanent constitutional convention" (Vasović 2008, 203). In essence, the Supreme Court could not be called merely a guardian of the Constitution, but in some respects even its master (Jovičić 2006, 114). As Tocqueville wrote in *Democracy in America*: "I am not aware that any nation of the globe has hitherto organized a judicial power on the principle now adopted by the Americans" (Tocqueville, 116) in that "a more imposing judicial power was never constituted by any people" (Tocqueville, 171).

THE EUROPEAN UNION: AN INCOMPLETE QUASI FEDERAL ORGANISATION

Unlike the United States, the EU is not a full-fledged political union. At the same time it is more than a simple international organization created between sovereign nations as a regime of international law. It is endowed with the three standard branches typical of government- a legislative body, an executive, and a judiciary. Especially since the Single European Act, decision making is not based on unanimity rule, but on various forms of majority voting (even though unanimity voting is still present in some important policy fields, such as foreign relations). The decisions of the Court of Justice (ECJ) are directly applicable to individual citizens and legal persons (Padoa-Schioppa 1995, 156). Contemporary European states differ from those that founded the US, in diversity of language, in historical experience, and in political culture. They have been independent for a long time, and some have been around for thousands of years, which lead them to having deeply rooted structures of society, culture and governance. However, they do face essential needs which individual government cannot satisfy separately, but need to be confronted by a common government (Pinder 2010, 251).

The idea of European integration, i.e. the unification of European states in some form of statehood, can be traced to the Enlightenment Period and such authors as Émeric Crucé, Immanuel Kant, Sent Simon, etc. (Košutić, Rakić and Milisavljević 2012, 13). These ideas reached their peak in the XX century, and the aftermath of the Second World War created the conditions for such ideas to be brought to life and to gain existence in Europe's political arena. As the Declaration of Independence is the foundation of the United States, the origin of the European Union can be found in the Schumann Declaration of 1950. This document, named after the French Minister of Foreign Affairs Robert Schuman, but authored by Jean Monnet, a French civil servant, called for the creation of a supranational authority over coal and steel production in Germany and France, with the possibility of other countries joining. But, it did not end there. It also explained that through such a plan, *de facto* solidarity and economic development should be achieved as first steps in the process of creating a European federation. According to the Schuman Plan, Europe would not be built in a day, nor constructed according to a federal blueprint. The European edifice would be constructed slowly, assembled brick by brick: "the pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe. This proposal will lead to the realization of the first concrete foundation of a European federation indispensable for the preservation of peace." (The Schuman Declaration 1950).

Since the fifties, European integration has made astonishing progress, as the European Communities in time became the European Union, with a higher degree of unification both in the economic sphere (the creation of the Monetary union, and coordination in many economic policies) and the political sphere (cooperation in foreign policy and transferring many interior policies to the European level). The EU has traveled quite far towards a federal democracy, with the division of powers between the Union and the Member States. Member States were unable to create a complete federation as the American colonies did in 1789 with the adoption of the US Constitution. Instead, the European federative structure proceeded through a process of continuous accumulation of elements of federal institutions and powers (Pinder 2010, 267).

As it was, and is, intrinsically dynamic in nature, the EU was not created by a single constitutional act, rather it is a process in which the attribution of government functions to a supranational level has been gradual and marked by constant efforts to strike a balance between the preservation of national prerogatives and the need to efficient community level action (Padoa-Schioppa 1995, 156).

The allocation of competences in the EU is the result of deliberate choices by the Member States. Each step of the development of the EU, since its creation in the 1950s, the relinquishment of elements of national sovereignty has been assessed on the basis of common values and on grounds of efficiency in the exercise of government (Padoa-Schioppa 1995, 157). Following the Maastricht Treaty the EU has even been characterized as a “pre-federal entity” (Pelkmans 1995, 166). Even though the institutional configuration in the Union is far from a super state, nevertheless this construction is of a *sui generis* nature. It merges states, which remain sovereign, but agree to pool their sovereignty in certain areas- sometimes in a more federal way, such as in many federal states, but in other cases through traditional intergovernmental cooperation (Piris 1994). Thus, it is possible to describe the EU as a classic example of federalism without a federation, which means that the origins, formation and subsequent evolution and in its institutional framework expanding policy output it had always been the repository of federal ideas, influences and strategies without actually transforming itself into a form of federation. In this sense, the EU remains an intellectual puzzle because and a conceptual enigma. Its metamorphosis into a federal organization has been slow, piecemeal and incremental (Burgess 2006, 226). All in all, today it is easier to view the EU more as a union of constitutional law, than a union of international law. In other words, the Union resembles a federation more than an international organization, even that with extensive supranational elements (Prélot 2002, 235).

The Court of Justice of the European Union

The first Founding Treaty - the Treaty establishing the European Coal and Steel Community - provided not only for the executive High Authority, but also for a Court of Justice, a Common Assembly, and a Council of Ministers. Article 31 of the Treaty, which is still present in the Founding Treaties (present day Article 19 of the Treaty on the European Union), stipulated that the ECJ shall ensure that in the interpretation and application of this Treaty the law is observed, thus providing basis for the future paramount case law which would shape the Union. As time goes by, EU’s primary or constitutional law ceases to be what is prescribed by the Founding Treaties, and is more and more comprised of the ECJ’s case law, and this is exactly what has moved the EU’s legal system from a traditional international agreement closer to a kind of a national federal structure (Mišćević 2012, 278). For this reason, the ECJ is considered more than an influential international court - rather it represents the most prominent example of a judicial contribution to the emergence of a transnational political order (Hague and Horrup 2014, 341). The ECJ is, in this sense, distinct compared to all other kinds of international judicial bodies: unlike international courts, the ECJ can adjudicate cases not only where states appear as parties, but also legal and natural persons; likewise, in order for the ECJ to adjudicate a case and render a judgment there is no requirement for state compliance; thirdly, ECJ’s judgment have a great impact on national courts, which have to act in

accordance with the ECJ's decisions and implement them in the cases before them (Mišćević 2012, 279). Due to these differences, the ECJ is often seen as the element which contributes to the supranational nature of the Union the most (Račić 1995, 109).

According to the present day Treaties, the ECJ enjoys jurisdiction in three main areas: firstly, it hears cases brought against a member state due to failure to comply with EU law, known as infringement proceedings; secondly, the ECJ has the power of judicial review over acts adopted by EU institutions, due to lack of competence, or infringement of a Treaty obligation; lastly, the ECJ can issue preliminary rulings according to the preliminary reference procedure, which is initiated by national courts in order to obtain an interpretation of some aspect or norm of EU law (Hix and Høyland 2011, 82). Exactly the preliminary reference procedure was the most significant canal for development of EU law and the constitutionalization of the Union system (Hix and Høyland 2001, 83). This was the basic judicial mechanism for the full application of the direct effect principle. *Prima facie*, the role of the ECJ here is limited as the dispute is not resolved with the judgment rendered by it. The reference given by the ECJ is only a phase within the dispute, and happens as the national court suspends the procedure in order to refer a question or questions, pertaining to the case at hand, to the ECJ, due to its significance to the Union law.

Therefore, the ECJ cannot apply the relevant norm to the concrete case. However, preliminary reference decisions the ECJ issues cannot be appealed nor discarded by the national court. Thus, the preliminary reference procedure secures the ECJ's role as the leading and only interpreter of EU law. Furthermore, it establishes an open canal of communication between the ECJ and national courts, in which the ECJ gains for itself supremacy towards the national courts. Such mechanisms enable the ECJ to create uniformity in interpreting and applying EU law in all of its Member States (Novićić 2013, 26-27). In such a way, "individuals became the guardians of the legal integrity of Community law within Europe similar to the way individuals in the United States have been the principal actors in ensuring the vindication of the Bill of Rights and other federal law" (Vajler 2002, 41). Even though the ECJ was the instance that created the principles of Union law, such as supremacy and implied powers, which moved the EU closer to the regulation that exists within federal states, nevertheless the role of national courts in this process cannot be pushed aside. Namely, if there was no willingness on the part of national courts to accept the principles "suggested" by the ECJ, they would produce no effect in national legal system of Member States. In essence, this "collaboration" between the ECJ and national courts had a crucial effect on the constitutionalization of the Founding Treaties and the Union law in general (Kovačević 2013, 197-198).

SUPREMACY OF THE FEDERAL LEGAL ORDER

The supremacy of the written constitution is given among the key features of a federal state. A federation is thus defined as a state in which a superior constitutional order towers over a multitude of lower constitutional orders (Prélot 2002, 235). The federation is an autonomous legal entity, different from the compound states. They are also subordinated to the federal government, which remains sovereign (Jovanović 1936, 284-287). The supremacy of the federal constitution is thus an essential feature of the federal organization, exactly due to the existence of constitutional distribution of powers between two or more levels of government. Therefore, constitutions of most federations acknowledge this

supremacy - if not explicitly, at least implicitly. The supremacy principle is precisely the source from which the importance of judicial review in federations stems from (Watts 1996, 91). However, in both of these cases- the EU and the US, the highest judicial bodies and their judgment not only benefited from the supreme position of the federal order, but were instrumental in establishing and confirming this principle.

The American federalism is based upon several principles, outlined in the Constitution. Among them is the “supremacy clause” which stipulates superiority of the federal Constitution and legislation over state laws. The “supremacy clause” is to be found in Article VI, Section 2, and reads as following: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” (Constitution of the United States of America, Article VI, Section 2). Despite the fact that the supremacy of the federal legal system was expressly stated in the Constitution, the question of legal and political supremacy arose in the United States in a landmark case - *McCulloch v Maryland*, 17 US 316 (1819). In this case the Supreme Court declared state taxation of the national bank in Maryland unconstitutional. The Court argued that even though the national government is limited in its powers, it is supreme in those areas where right have been transferred to it.

Therefore, Maryland cannot tax the national bank, even though the power of taxation is divided between national and state governments. If it would be allowed, it would enable the states to tax all other federal instruments, which was clearly not the intent of the framers of the Constitution: “The power to tax involves the power to destroy... If the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution (...) shall be supreme law of the land, is empty and unmeaning declamation” (Ducat 2009, 106-111). Moreover, the Court turned to the essence of the federal government, and the nature of the association created by the 13 colonies in 1787: “the Government of the Union (...) is, emphatically and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” (*McCulloch v Maryland*, 17 US 316). With this judgment the Supreme Court “set down the classic statement of the doctrine of national authority. The argument he advanced was not new; its main outlines had been endlessly debated since the first Congress. But Marshall deserves the credit for stamping it with the die of his memorable rhetoric and converting it from a political theory into the master doctrine of American constitutional law” (McCloskey and Levinson 1994).

Unlike the US Constitution, the Founding Treaties of the EU did not contain a “supremacy clause”, nor is there such a provision in the Founding Treaties nowadays. The only time the supremacy clause was proposed to be codified in the Treaties was with the Treaty on the establishment of the Constitution for Europe. Still, there were some articles in the Treaty that were of indirect importance for creating a basis of supremacy of EU law, e.g. the general principle of loyalty and sincere cooperation between Member States, which was formulated in Article 4 of the Treaty of Rome (Knežević-Predić and Radivojević 2009, 153) – present day Article 5 of the Treaty on the European Union. Similarly to the establishment of the principle of direct effect, which was nowhere mentioned in the Treaties, but emerged from the *Van Gend en Loos*, 26-62, [1963], E.C.R., judgment, supremacy of EU law was also inaugurated by the Court in a case from 1964- *Costa v E.N.E.L*, Case 6-64, [1964], E.C.R. The ECJ asserted that “by creating a Community of

unlimited duration, having its own institutions, its own personality, and its own legal capacity (...) the Member States have limited their sovereign rights, albeit within limited field and have thus created a body of law which binds both their nationals and themselves". Therefore, the Court concluded that it is impossible "for the states (...) to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity". The principle of supremacy was clarified by the ECJ in subsequent case law. In *Internationale Handelsgesellschaft*, Case 11-70, [1970], E.C.R. the Court emphasized that "the law stemming from the Treaty (...) cannot (...) be overridden by rules of national law, however framed" so that "the validity of a Community measure (...) cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure". This meant that the legal status of the conflicting national measure was not relevant in determining whether EU law should take precedence, so that not even constitutional law of a member state could be invoked to challenge the supremacy of this supranational legal order (Craig and de Búrca 2011, 260). Developing the concept further on, the ECJ in the *Simmenthal*, Case 106-77, [1978], E.C.R. judgment further explained that EU law render inapplicable any conflicting national norm, but also prevented the adoption of new national measures which would be conflicting with EU law. In other words, the EU applied no matter if the conflicting national norm was passed prior to the EU measure, or after it (Craig and de Búrca 2011, 260).

IMPLIED POWERS

Another important judicial tool in shaping the federal models in the US and the EU was the doctrine of implied powers. The reason for the initiation of this doctrine was internal conflict of powers between the central (or supranational) government and the constitutive units. Even though certain differences do exist in the case laws of the respective judicial bodies, in terms of different reasons and agendas the Courts possessed, nevertheless the outcome in both cases was the establishment of a binding version of federalism (Hodun 2015, 10-11).

In the US Congress' powers were limited to the powers enumerated in Article I, Section 8 of the US Constitution. However, the last clause of this Section left a vague possibility for extending these powers: Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof". This clause, known as the "necessary and proper clause" was the constitutional embodiment of the doctrine of implied powers and its textual justification (Hodun 2015, 61). Judicial opinions on this clause changed over time, and influenced the different types of American federalism - from dual to cooperative and new federalism. However, the judgment in *McCulloch v. Maryland*, 17 US 316 (1819), remains key in understanding the notion of implied powers in American constitutionalism. *McCulloch* was a milestone in discussions about federal powers in the US, but also a milestone in the American case law system (Hodun 2015, 61-62). The Supreme Court argued that powers of the federal government cannot be limited to those enumerated in Article I Section 8, but have to be viewed in the context of the goals of the federal government set out in the preamble and the "elastic clause". Even though the Constitution

does say anywhere that there is a power of Congress to establish national banks, this power can be deduced from Congress' powers to levy taxes, to borrow money and wage war. Therefore, the Supreme Court declared the act of Congress establishing a national bank constitutional (Ducat 2009, 107-108). The Court declared the following: "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional".

Or, as Hamilton envisaged in his opinion on the constitutionality of the Bank: "That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society" (Hamilton's Opinion as to the Constitutionality of the Bank 1791).

In the EU's case, the doctrine of implied powers originally emerged with regard to external powers of the EU. It was the situations in which the Union enjoyed certain internal competences, while the correspondent external powers in the same fields being absent, that the ECJ started filling up the blank spots through the newly invented concept of implied powers. This doctrine was inaugurated in the famous *ERTA*, 22/70 [1971] E.C.R. judgment, where the ECJ ruled that once a common policy on the part of the EU comes into force, it makes possible for the EU to acquire external powers on the issue. An internal power given to the EU entails that the EU can assume external competences corresponding to the former (Hodun 2015, 145-150). Due to the importance of the *ERTA* judgment, implied powers of the Union were usually connected to its external activities. However, over the course of the previous decades, the ECJ was also active in applying the doctrine to many other Union policies, including migration and criminal law (Hodun 2015, 212-226). Despite the potential neglect of internal implied powers, this doctrine was indispensable for the future development of the EU. Joseph Weiler argues that the doctrine of implied powers in the case of the Community during the seventies took a radically new form. He calls this process "mutation" which is connected not only with the concept of implied powers, but also with the changes in the strict construction of the principles of enumerated powers in the Union system (Vajler 2002, 61, 66).

HUMAN RIGHTS AND FREEDOMS

Human rights and freedoms are historically and theoretically connected to the process of constitution making, since one of their primary objectives is to protect rights and freedoms through controlling and limiting state power. Being an instrument of diffusing and controlling power is the crux of human rights and freedoms, on one hand, and federalism, on the other. In the US the historical trend was for democratic reforms to erode federalism by enhancing national powers. In other words, the expansion on individuals' rights often shrank states' rights (Kincaid 2010, 219). Even though the Supreme Court was sometimes on the losing side of history (*Plessy v. Ferguson* could serve as a prime example), nevertheless the Court was and still is instrumental in defending, securing and expanding the corps of constitutional rights and freedoms. The European Communities, on the other hand, lacked provisions pertaining to human rights protection, and it was not until the ECJ and its judgments from the late 1960s and early 1970s that the first rules on

fundamental rights were created on the supranational level. The extensive body of quasi-constitutional law that was provided to the EU by the ECJ through its jurisprudence was significantly done through adding and developing mechanisms of protection of fundamental rights throughout Union law. In such a way the ECJ declared that the respect for fundamental rights was included among the general fundamental principles of the Union legal order (Borchardt, 2010, 24-26).

The original text of the Constitution of the United States did not contain a Bill of Rights. It was thought by the proponents of the federal government, at the time of the adoption of the Constitution, that since most of the thirteen states had already adopted their own Bill of Rights, that there was no need for such a federal document. Some of them even thought that the adoption of a federal Bill of Rights would be unnecessary on the grounds that the powers of the national government were already limited. Alexander Hamilton went so far as to argue that a Bill of Rights would even be dangerous (Ginsberg 2013, 57-59).

However, the lack of Bill of Rights was a focal point of criticism of the Constitution during the ratification process, and, therefore, immediately after the start of the first Congress' session, ten amendments were adopted to the Constitution which guaranteed certain rights and liberties to citizens. These first ten amendments were called Bill of Rights. Their limitation is seen in the fact that they applied only with regard to the activities of the federal government, and not the states.


The basis for the extension of application of the Bill of Rights towards the states was laid with the adoption of the XIV Amendment. Through this amendment the Supreme Court made most of the provisions of the Bill of Rights applicable to states through a process known as the incorporation doctrine. Namely, the XIV Amendment is addressed directly to the states, and it was contended that the due process clause of this Amendment limits states in the same way the provisions of the Bill of Rights limits the national government. However, it was not until 1925 that the Court accepted to take such a path. Consequently, in *Gitlow v. New York* case, 268 US 652 (1925), it was asserted for the first time that the rights and freedoms of the Bill of Rights (in this case, the I Amendment) applied to the states as well, i.e. that states are also prohibited from infringing upon the right to free speech and freedom of the press. Since the 1920s the incorporation process was accelerated, with the result of most of the rights and freedoms being extended as limitations to state activities. The last such incorporation occurred in 2010, when the Supreme Court set forth that the right to bear arms of the II Amendment applied to states, in the *McDonald v. Chicago*, 561 US 742 (2010), case (Magleby, Light and Nemacheck 2014, 50). The Supreme Court was also active in contending, through the XIV Amendment, other rights, not explicitly stated in the Constitution, both against the states and the federal government. It has introduced categories of persons ineligible for the death penalty, such as mentally handicapped persons and minors; and it has also protected other categories of people from state abridging their rights, such is the case with the LGBT population (Stefanović 2015, 73-83).

The European Communities were created as economic associations, as they had the goals of establishing a customs union and a common market. Therefore, the Founding Treaties did not contain explicit provisions regarding human rights and freedoms, apart from those inextricably connected with economic and entrepreneur activity, such as the right to establishment. However, with the inauguration of the principles of direct effect and supremacy of EU law, it became possible for a norm of EU law, not in any way relating to

human rights, to take precedence over a national constitutional norm protecting a certain right or freedom (Stefanović 2014, 25). Therefore, it became necessary to introduce this branch of legal protection within the Union. Since 1969 and the *Stauder*, Case 29-69, [1969], E.C.R., judgment, the ECJ became very active in securing human rights protection.

As the EU, all the way to the Maastricht Treaty, lacked an explicit provision referring to the sources of rights and freedoms in the Union law and their protection, the ECJ in *Internationale Handelsgesellschaft* in 1970 and *Nold*, Case 4-73, [1974], E.C.R., outlined that the Union provides protection in accordance with the common constitutional traditions of Member States, and international agreements on the matter, that member states have acceded to. Over the decades, the ECJ was adamant in developing its human rights law. As it was not a human rights court, it often followed the decisions of the European Court of Human Rights, even though deviations in case law did exist. Recently the ECJ again produced decisions on human rights that affected the relationship between the EU and Member States: In 2013 it decided in *Melloni* that Member States were to be precluded from deploying different standards of human rights protection, in those areas already standardized on the EU level. Likewise, the ECJ sought to defend its human rights system in the Union through declaring in Opinion 2/13 that the Draft Agreement on the Accession of the EU to the European Convention on Human Rights is not in compliance with the Union legal system (Stefanović 2016a, 29-31). The ECJ elevated human rights to the level of basic constitutional principles, which can even have precedence compared to what is outlined in the Founding Treaties, and even basic principles of international law (Stefanović 2016b, 114-115).

CONCLUSION

As the role of constitutional judiciary and its function of judicial, or constitutional, review, is inextricably linked to the nature of federalism and the structure of the federal state, it is of no surprise to what extent constitutional and supreme courts are able to shape the appearance and features of the federal state. The comparison between the Supreme Court in the US and the Court of Justice of the EU and their case law concerning relevant issues, only proves that parallels could be drawn even between courts of different procedures, competences and enforcement mechanisms, and that exist and operate in different settings- one in an established federal state, and the other in a supranational, *sui generis* organization. Nevertheless, the logic in which they adjudicated cases pertaining to some important characteristics of federal government was the same, or extensively similar, as well as the effect their case law had on shaping of the institutional setting they were placed in. Therefore, the present day appearance of these two entities would not be the same if it were not for these two judicial bodies, nor is it conceivable that they would truthfully develop in the way they historically did, if it were not for their case law. 

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