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TABLE OF CONTENTS

EDITORIAL

ESSAYS

CENTRO STUDI SUL FEDERALISMO
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The ever-recurring salience of asymmetric federalism

by

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As I write these lines, discussions about asymmetric regionalism are at the top of the political agenda in Italy. Towards the end of the 17th parliamentary term, in 2017, the regional governments of Lombardy, Veneto and Emilia-Romagna initiated the procedure for obtaining greater autonomy – literally, 'particular forms and conditions of autonomy' – in a number of policy areas. Preliminary agreements were signed shortly before the Italian general election of 2018. The subsequent parliamentary term was dominated by a heated debate on the implementation of asymmetric regionalism. The discussion clearly reflected the significant disagreements about the appropriate balance between the central and regional governments in the Italian model of regional state. Such disagreements were further inflamed by the handling of the Covid-19 pandemic crisis. Moreover, the initiative launched by Lombardy, Veneto and Emilia-Romagna allowed highlighting – once more – that the transition of the Italian regional system was still an unfinished business. To date, the constitutional amendment hastily passed in 2001 has not been fully implemented. This has a significant impact on the (partly missing) standards for the uniform protection of fundamental rights, the distribution of financial resources among the several institutional layers, and the institutional and procedural links between the state, the regions, and the local governments. Crucially, the wording of Art. 116(3) of the Constitution, that is, the clause that is supposed to govern the grant of 'particular forms and conditions of autonomy', is relatively unsatisfactory and obscure. That is why scholars and politicians have pointed out the need for a general state law to regulate the substantive and procedural framework of asymmetric regionalism in greater detail.

In the current parliamentary term, the implementation of asymmetric regionalism features high in the agenda of the Lega Salvini Premier, one of the political parties that support the Meloni government. In recent years, the platform of the Lega has been marked by major turnarounds, among which the most prominent was the renouncement of hard Euroscepticism and the ensuing support of the Draghi government. On 23 March 2023, the Meloni government established a nonpartisan committee in charge of setting the basic standards for civil and social rights throughout the national territory. On the same day, the Minister for Regional Affairs and Autonomy, Roberto Calderoli, tabled a general bill on asymmetric regionalism.[I] The bill provides for a roadmap to negotiate and conclude the agreements with the regions concerned. It also defines a procedure for setting the standards

for the protection of fundamental rights. In political terms, one of the goals of the Calderoli bill is to reassure the opponents of asymmetric regionalism, who have often hinted at the risk of a 'secession of the rich' (Viesti 2019): the procedure that may prelude to the conclusion of the agreements (*intese*) is quite detailed and tries to define more precisely the respective roles of the actors involved. A possible flaw of the bill is that it (aptly) focuses on the standards for the protection of fundamental rights but seems to elude the underlying financial issues (Staiano 2023: xii). The defective implementation of a new model of financial autonomy for the regional and local governments in the aftermath of the 2001 reform is one of the unsolved problems of the Italian model of regional state and looms large in the more recent plans to grant greater autonomy to the three regions in northern Italy.

This debate is not only of Italian interest. Scholars like Francesco Palermo (2019) have repeatedly warned that nowadays asymmetry is a distinctive feature of *all* federal and regional models. Discussions in Italy are dominated by issues that often echo a wider international conversation: they include the appropriate balance between experimentalism, competition and interterritorial solidarity, the increasing political polarisation of western democracies, and the need to reconsider some of the basic concepts of federalism (and regionalism) in the wake of the major crises of the last decade. The papers published in this issue offer fresh viewpoints on many of these topics.

As usual, we encourage our readers to submit articles, review essays and notes, or to submit proposals for fully-fledged special issues.

The contents of this issue

The essays that compose this issue cover a number of topics. Two of them focus on intergovernmental financial relations and fiscal federalism. Salvatore Barbaro takes into account the ability of the Higher Education Pact in Germany to meet its goals. He builds on this case study to answer this research question: can earmarked resources in the form of financial grants better achieve policy goals? His analysis results in a mixed picture, pointing out some critical flaws of federal grants-in-aid. Francisco Javier Romero Caro considers the integrative and disintegrative potential of the Canadian equalization program. In his piece, Romero Caro builds on the assumption that resort can be made to fiscal instruments to accommodate diversity and reduce the risk of secession. Consequently, his analysis is mainly

focused on Quebec. Against the background of such a diverse federation as Canada, equalization programs emerge as an accommodation and nation-building tool. Still, some side effects can be detected: they may have to do with the increasing polarisation of the Canadian political system or with a feeling of alienation that has occasionally surfaced in the western Province of Alberta.

Three articles offer comparative analyses of specific issues.

Ana Tereza Fernandes considers the debate about second chambers in federal jurisdictions and their ability to provide territorial representation. Her case study focuses on the activities of the senates of Argentina, Brazil, and Mexico: she concludes that these second chambers are no exception to what Renaud Dehousse (1990) called Madison's paradox. Even in Latin America, the partisan capture of the second chambers has led to the emergence of alternative, executive-based arenas for intergovernmental negotiations.

Iris Reus and Julia Nelles focus on how the governments of the sixteen German *Länder* reacted to the Covid-19 pandemic and whether or not the pressure for uniformity left any room for differentiated regulations. The findings of their study highlight substantial variance among the German *Länder*. Consequently, the piece by Reus and Nelles contributes to debunking the widespread idea of strong harmonisation as a key component of Germany's response to the Covid-19 crisis: quite to the contrary, the *Länder* 'made use of their scope and set their own course in fighting the pandemic'.

In her piece, Cecilia Rosado-Villaverde focuses on the role of subnational entities of federal and quasi-federal orders in protecting fundamental rights and freedoms. The departure point of her research is the entrenchment of several right-related clauses in the *estatutos de autonomía* of the Spanish Autonomous Communities in the first decade of the 21st century. Similar attempts were made in Italy during the drafting of the second-generation regional *statuti*. Rosado-Villaverde develops a comparison between Italy, Spain, and the Federal Republic of Germany against the background of the economic and pandemic crises. During these crises, subnational governments have often come to the forefront, with the policy line of the regional government of Madrid providing a convincing example for this. The essay defines the Spanish autonomic state as an evolving system, located halfway between the German and the Italian model; on the whole, 'territorial entities have a more significant position than had been foreseen at the end of the first decade of the 21st century in terms of rights and freedoms'.

Finally, Roberto Talenti looks into the global system of climate governance from a specific vantage point, that is, the role of environmental NGOs (ENGOs) . In Talenti's opinion, a significant correlation exists between the emergence of a hybrid multilateral climate regime and the stronger role that ENGOs have been able to play in the governance of climate change.

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[1] Text of the bill available at https://www.senato.it/leg/19/BGT/Schede/Ddliter/testi/56845_testi.htm.

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PERSPECTIVES ON FEDERALISM

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Earmarking grants in a federal polity

by

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Abstract

The ongoing transition from layered-cake federalism to marble-cake federalism led to an increasing role of intergovernmental grants in many countries. The field of higher-education is an example. Central governments in federalist countries claim that earmarked resources can better achieve policy goals. This discussion paper evaluates the goal attainments in a billion-worth program for higher education in Germany, the higher-education pact (2007—2020). Two key objectives were concerned with the program: Firstly, to enhance teaching quality, measured by the student-faculty ratio—secondly, the promotion of enrolments in the STEM faculties.

This discussion paper is the first comprehensive assessment of the grant program. We find some notable flaws of centrally-provided grants and shed light on some unwanted effects from central-government intervention. Further, we study two economic issues on intergovernmental grants and find mixed evidence for flypaper behaviour and fungibility activities. Our results indicate little backing for funding higher education by grants-in-aid.

Key-words

higher-education funding, federalism, flypaper, fungibility

1. Introduction

The transition from dual federalism to a cooperative one, which Grodzins (1966) labelled the transition from a layer-cake to marble-cake federalism (for the US case, see, for instance, Weiser (2001)) is a well-documented phenomenon. Most federalist systems blot out their well-defined task-sharing arrangements. Since a task is ideally assigned to a specific tier, centre (federal) and state (sub-central) governments increasingly shared policy implementation responsibilities in practice.

Aside from the US, Germany is a good example of such a transition. More than 15 constitutional amendments have taken place throughout the last twenty years, and the direction of the measures is not always clear. The higher-education policy is a worth-mentioning example for the inconsistency embedded in the German federal system, as vividly outlined by Burkhart et al. (2008) and Kropp and Behnke (2016).[II]

This transition is accompanied by an increasing role of conditional intergovernmental grants. Simultaneously, unconditional grants are headed south in practice. In general, central-governmental grants to states and local entities have slowly grown over the penultimate decade within OECD countries (OECD, 2016, p. 23). In 2010, earmarked and non-earmarked grants were nearly in balance. Ten years later, earmarked grants grew by 5.4 per cent at the expense of non-earmarked ones. Moreover, mandatory grants significantly replace discretionary ones. Focusing on mandatory grants, those being matching grew by roughly ten per cent (OECD, 2016, p. 25). The OECD findings confirm previously reported observations (Baker et al., 1999; Huber et al., 2002; Huber and Runkel, 2006) and are in line with recent ones (López-Santana and Rocco, 2021).

This triumphal march of mandatory and matching grants (henceforth: *conditional grants*) is puzzling since it contradicts the traditional theoretical view on fiscal federalism. However, considerations of political expediency may explain the growing importance of conditional grants: For the centre, providing such grants instead of unconditional ones (or awarding a higher share of total tax revenue) may be more advantageous for several reasons:

1. The centre will forgo tax revenues only temporarily.
2. It is much less expensive for the centre to reach a particular aim by providing allocative grants (what we will demonstrate by a simple model in Ch. 3)
3. The centre can claim political success,
4. Conditional grants enable policy competition, which federal governments use to influence and control states' policy (Benz, 2007).
5. central-government incumbents may use grants-in-aid to enhance their re-election probability by granting financial aid to states in which they have or can gain the most supporters Cox and McCubbins (1986); Johansson (2003); Grossman (1994). In this line, Borck and Owings (2003) argue that the grant distribution to sub-central entities is at least partly determined by lobbying activities of regional governments. In a recent study, Baskaran and da Fonseca (2021) provide evidence for *hometown favouritism*[III] in Germany.

Another reason is what can be called a *collusion of line ministries*. When economists emphasize the welfare-improving impact of unconditional grants, they focus on an overall welfare measure (see Section 3). The primary beneficiary of such unconditional grants within a government is the treasury since s/he receives fungible funds and no co-financing obligation. Any line minister is then forced to negotiate with the treasury on how much funds will be directed to their particular sphere of responsibility. Earmarked grants avoid such discussions. Here, the grants must be used for a specific purpose, and line ministers can turn the tables since now the treasury is under pressure to put up financial resources for the co-financing. Therefore, joint line-minister conferences are interested in proposing conditional grants rather than claiming unconditional financial leeway. The interest of states' line ministers meets the central-government considerations listed above.

The politically relevant question is: are central governments successful in attaining their goals by granting financial resources to the tiers which hold legislative competence? Or are the concerns outlined by economic theory justified that the intertwined responsibilities lead to low target achievements? Is task-sharing a brake shoe or a means for efficient higher education policy-making? To assess these questions, we will contrast the goals and success of a billion-worth program for higher-education funding.

In 2007, the states and the central government agreed on the higher-education pact to enhance capacities in tertiary education. It had a term from 2007 to 2020. All states

received conditional grants in exchange for the enrolment of an increasing number of students. Half of the states were also eligible for unconditional grants. Two key objectives of the program are worth emphasizing. Firstly, to provide financial leeway for an expected higher-education expansion. Secondly, to promote enrolments in the natural sciences (STEM). We present the surrounding institutional background and further details of the program in Section 2. We aim to analyse the extent to which the program's goals were achieved. For a broader understanding of the economic theory of intergovernmental grants, we present a simple analysis of their impact upon state expenditures in Section 3. In this context, two strings in fiscal-federalism literature will be discussed and surveyed: the flypaper effect (a particular response of states to unconditional grants) and fungibility issues (the use of conditional grants distinct from the grantor's wishes).

We will empirically assess these two economic issues: Do we observe the flypaper behaviour of those states who received unconditional grants? Secondly, did the states find a way to make part of the conditional grants fungible? Overall, we will compare the centre's goals with the states' responses to intergovernmental grants.

Our results for both the target achievements and the economic issues, we will present in Section 4. A concluding Section **5** summarizes the results.

2. Institutional background

2.1. Fiscal federalism and federal reforms in Germany

Sixteen states build the federal state. Three of them are city-states (Hamburg, Berlin, and Bremen). Five states joined after reunification and are called the eastern states. We refer to the remaining states as the western territorial states.

Germany's constitution, the Basic Law, holds that as long as a legislative competency has not been assigned to the federal government, the legislative power lies with the states (Article 30). Thus, Germany's federal system was seen as a characteristic example of layer-cake federalism with clear task-sharing between the states and the central government.

Concerning the revenue side of Germany's federal system, the primary feature is the constitutionally mandated sharing of tax revenues. Despite VAT revenues, all significant tax revenues are divided between the federal and state governments. VAT revenues shall be distributed according to financial requirements of the central legislative and the states that

might change over time (Basic Law, Art. 106, 3). Both tiers shall have an equal claim to funds from current revenue to cover their necessary expenditures. This so-called *hinge of fiscal federalism* shall ensure task-sharing since as financial needs change, each tier can finance the expenditures to which it is competent under the Basic Law. The role of the VAT distribution for the functioning of fiscal federalism cannot be overestimated. It ensures the legal capacity of both tiers and is the mechanism that makes most intergovernmental grants obsolete. In recent years, the federal government has avoided negotiations about evolving financial requirements and the resulting adjustments of VAT revenue distribution as constitutionally mandated.

Around twenty years ago, Germany's federal system was repeatedly subject to dissatisfaction and complaints. The federal polity was seen as a leading source of the inability to impose reforms, for instance, due to the latently-existing threat of oppositional veto in the second chamber, the Bundesrat, and due to legislative entanglements, which lead to gridlocks and the 'trap of federalism' Scharpf (1988). Furthermore, policy-making was described by a peculiar zig-zagging Kropp and Behnke (2016). This dissatisfaction leads to a twice-started attempt to revise the federal order (2003 and 2005). The second attempt led to a federal reform, adopted in 2006. It aimed to disentangle the intertwined levels of governments and return to a more layer-cake type of federalism, and towards (or back to) a *separation model* (Hillgruber, 2005). For an overview on policy fields where the states gained legislative power Dose and Reus (2016).

In a joint conference of the chancellor and states' prime ministers (meeting on December 14, 2005), the federal and the states' governments agreed that federalism-reform proposals should include inter alia

1. a clearer distinction of the legislative power of the federal and the states in order to strength legislative effectiveness, and
2. a significant reduction of joint-financing arrangements and an overall revision of federal-grants designs.

Overall, the target of the then-established reform commission II[IV] was to reduce intertwined decision-making, thereby strengthening both the federal government's legislative power and the space for Länders' self-employed policy-making.

However, the last-mentioned oath was broken with the expending possibilities for co-financing arrangements. The possibilities of allocating matching grants instead of adjusting

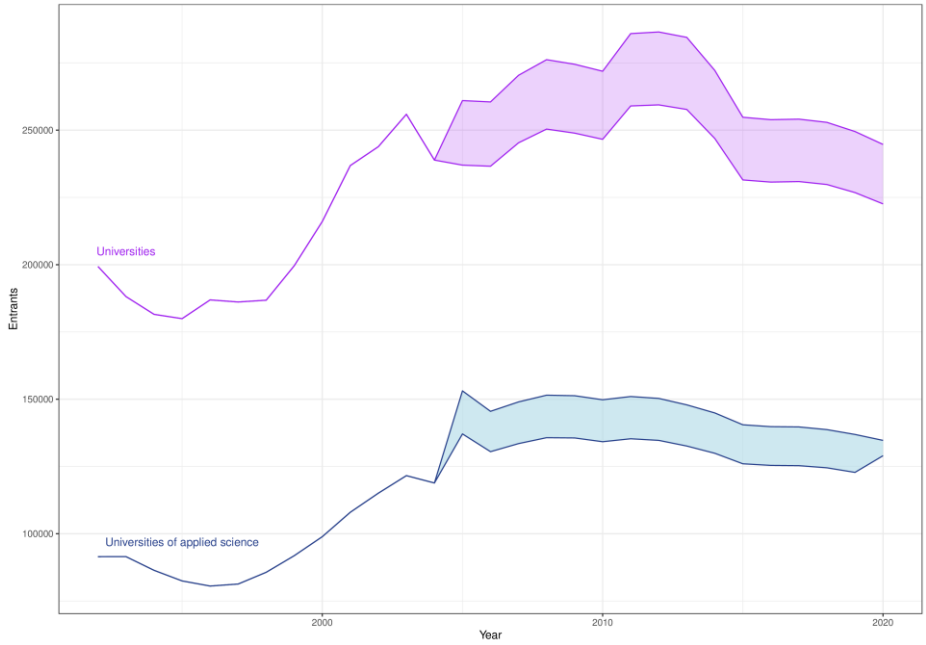
VAT revenues have increased in recent years, particularly in the field of (higher) education. As Kropp and Behnke (2016) pointed out, more entanglements than before the reform was adopted can be observed, and several reforms have reversed disentanglement.

In a more recent paper, (Benz and Sonnicksen, 2018, p. 139) argued similarly by emphasizing that reform outcomes 'appear as one step forward towards a separation of power and decentralization and two steps backwards towards power-sharing and centralization.' Burkhart et al. (2008) vividly showed how attempts to higher-education reform had ultimately run at cross-purposes with the just-mentioned goals of the federal reform commission. Burkhart et al. deal with the *excellence initiative*, a federal-funded and thus co-financed program (agreed on summer 2005) aimed at bolstering universities' quality in specific areas (see also Mergele and Winkelmayer, 2021, for a thorough evaluation). Burkhart et al. concluded that the simultaneity of federal reform and the excellence initiative 'exposes an irony at the heart of German federalism: in the precise moments that major projects of "disentangling" Germany's federalism take place, joint undertakings of federal and the state authorities continue to occur, reinforcing pre-existing patterns of politics' Burkhart et al. (2008).

2.2 The higher-education pact

A few weeks after the consent of the 2006 federal reform, the states and the federal government started their negotiation on the billion-worth higher-education pact, thus contradicting the overall goals of federal reforms. Initially, the states claimed a higher share of VAT revenues to enable their universities to cope with an expected rising number of new entrants. Figure 1 depicts the forecast for both types of universities.[V] High birth rates triggered this expected increase and the existence of two cohorts of high-school students graduating at the same time.[VI] Even an increasing rate of students qualifying for higher education leads to a prospected increase in enrolment.

Figure 1: Entrants forecast by the conference of education ministers, 2004.



Data source: Conference of education ministers

The central government rejected this proposal for more VAT revenues even though it approved the higher financial requirement resulting from the predicted number of first-year students (entrants). Instead, the centre offered an intergovernmental-grant program with conditional grants for additionally enrolled entrants. This strategy of the federal government was in line with the broader attempt to encroach upon Länders' exclusive legislative power in (higher-)education policy Kropp and Behnke (2016).

The centre faced sixteen states with very different starting positions and needs. The western territorial states and the city-states expected a considerable increase in new entrants. The eastern states, on the contrary, were shaken by the emigration of young people to the West (Kemper, 2004) and expected a correspondingly decreasing enrolment rate. In this respect, the western territorial states and the city-states had a great interest in finding an agreement.

A crucial constitutional feature is the unanimity requirement for programs in higher education. According to Art 91b, 1 of Basic Law, the unanimity requirement holds for all federal agreements primarily affecting institutions of higher education except for the construction of research facilities, including large scientific installations Gunlicks (2007).

Operators and scholars have feared suspicious package deals fostered by the veto power embedded in a unanimity demanding setup. These fears have been confirmed. The eastern states successfully negotiated an earmarking-free amount from the total funds to be granted even without additional first-year students. They were eligible to conditional grants in exchange for raising the number of entrants nevertheless.[VII]

The three city-states were only prepared to agree on unconditional grants for the eastern states if they too were to receive unconditional financial aid. The remaining negotiators, the western territorial states and the central government, i.e., those jurisdictions primarily dependent on reaching an agreement, consented. As a result, the western territorial states had to waive 22.5 per cent of the agreed amount per additional entrant (of EUR 11,000) to finance the fixed amounts for the eastern and city-states.[VIII] Therefore, three state groups are worth assessing separately and worth comparing to each other: The western-territorial states and the city-states were those under unprecedented pressure to expand their universities. However, only the city-states were eligible for earmarking-free grants. Finally, the eastern states had the lowest pressure but got unconditional grants.

The program was dubbed the higher-education pact and had four years (2007 - 2010, completing funding by 2013). The term was extended twice to 2020 (financed until 2023) with some amendments. A program's primary feature was a uniform grant for every on-top entrant. The number of entrants in 2005 served as the basis for the *on-top* requirement. One of the amendments the contracting parties made in the program's extension was an increase of the federal grant from EUR 11,000 to EUR 13.000. In addition, the fixed amount for the eastern states was moderately reduced in the second phase (2011 - 2015).

With the second roll-over in 2014, the central government tightened the states' obligations to match their grants. Some states should provide their universities with *additional* financial resources. Some other states were exempted from this obligation. The centre's main problem was that it could not check the "additional"-conditions since only the states knew how they would have financed their universities otherwise. Furthermore, the initial-number line, indicating the number of entrants in 2005, was manipulated for some states so that they could benefit from federal grants-in-aid even if they had not raised the number of entrants compared to 2005.

The key objectives of the German higher-education pact have been:

1. To provide financial envelopes to cope with the expected rising number of entrants without deteriorating the teaching quality. The achievement of this goal can be measured by the advising relationship (student-faculty ratio), and
2. the promotion of enrolments in the STEM (science, technology, engineering, and mathematics) faculties.[IX]

Between the start of the higher-education pact in 2007 and a decade later, more than one million prospective students were able to enrol in higher education, still measured in terms of on-top entrants. In this period, a total of roughly 18 billion Euros flowed to the states' universities.

A new treaty (called the future treaty, *Zukunftsvertrag*) with fundamentally different rules replaced the higher-education pact in 2020 and is now permanent (open-ended).

3. A simple model of intergovernmental grants to higher education

This chapter briefly describes the economic effects of intergovernmental grants to higher education. This chapter be skipped by readers familiar with the economic theory of intergovernmental grants. We will expand existing models (e.g., Dahlby, 2011) to the relevant case where both types of grants, conditional and unconditional ones, are simultaneously issued. This is done in light of the related program design outlined in the previous chapter.

Let us consider a central government as the grantor and as the recipient a state. The latter consists of one representative individual. Its preferences determine the state's social welfare and are represented by a Cobb-Douglas utility function, $u(\cdot)$, with the constant-return-to-scale property. The state's government can provide two private goods, x and q. q denotes the number of university places. x indicates a publicly provided composite good. For simplicity, we set x as a numéraire good. With α, we denote the partial elasticity of the marginal utility from x, and with $\beta=1-\alpha$, the partial elasticity of the marginal utility from q.

As the representative individual knows that she or he gains from universities, science, and better-educated people, he or she has preferences over the provision of university places even if she or he does not attend higher education.[X] Thus, both x and q are

"consumed" by all individuals. We neglect any form of redistribution to eliminate the effects of social welfare optimization. Both *x* and *q* are financed by an exogenously given tax revenue T which is raised without any allocative distortion (like a lump-sum tax). This feature allows neglecting *price-effects* from grants (Dahlby, 2011). The public budget constraint for any government providing the goods *x* and *q* depends on their prices.

The centre can provide two kinds of grants. Firstly, it supports the states with unconditional grants, *g*. Secondly, the state receives conditional grants. By the latter, promoting *q* should be achieved by offering a (fixed) amount for each additional study place, i. e., for each study place above the number of places that already existed when the program was launched q_0 . Designing a program in such a way is a common feature in practice as it corresponds to the centre's goal to minimize windfall gains. The grants-in-aid are denoted by τ, where τ' is constant (the same grant amount for each additional study place).

The response of a state to intergovernmental grants can be assessed in terms of the Lagrangian:

$$L = x^{\alpha} q^{\beta} + \lambda[T + g + \tau'(q - q_0) - p_x x - p_q q] \qquad (1)$$

Inserting the first-order condition

$$\alpha\, q^{(1-\alpha)} / x^{(1-\alpha)} = \frac{\beta\, x^{\alpha}}{q^{\alpha}\,(p_q - \tau')} \qquad (2)$$

into the budget constraint yields after some straightforward rearrangements the optimal supply of higher-education places:

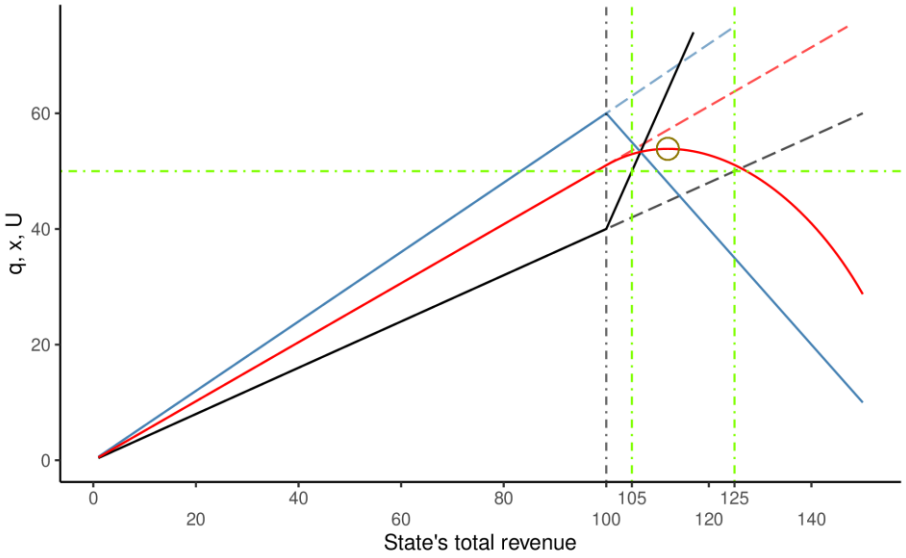
$$q* = \frac{\beta\, T}{p_q}\,(1 + g/T - \beta\, \tau' / p_q) - \qquad (3)$$

Eq. (3) is a general expression for describing the optimal level of the targeted good, *q*. It can readily be seen that providing either unconditional grants or conditional grants only are special cases. For instance, let the grants be entirely unconditional, then $q_u = \beta T(1 - +g)/p_q$. Deviations from the latter expressions are coined flypaper effects (see below). However, it is worth noting that unconditional grants have a higher impact on q* when conditional grants are granted for the same time. This leverage effect results from the fact that conditional grants reduce the effective price of the targeted good.

3.1 States' trade-off: increasing revenues vs. welfare deterioration

Intergovernmental grants from the central government raise the financial endowment of the state's government. This gain in resources is concerned with a *stimulation effect*: State's government is put in a position to provide more units of both goods without raising its own taxes. The overall stimulation effect, however, can be separated into an *income effect* and a *substitution effect*, respectively (Slutsky identity). The substitution effect occurs when a state alters its pre-grant allocation of resources according to the change in the price ratio. This substitution effect is concerned with a welfare loss. To provide an intuition, consider a conditional and matching grant in favour of good *q*. In order to provide more *q*-units, the state has to redirect financial resources from *x*-provision. Therefore, a diminishing provision of *x* pays the increasing supply of *q* (partially welfare-enhancing). The reduced provision of *x* yields a welfare-level reduction. In Figure 2 we depict the trade-off faced by the grants-receiving states. For the sake of simplicity, we neglect the leverage effect in our illustration (either conditional or conditional grants are considered).

Figure 2: Representation of the model.



The black line represents the Engel function for study places (*q*) and the blue line the Engel function for the composite good, *x*. We set a state's pre-grant revenue to *T*=100. Up to this point, the slopes of the Engel functions depend on preferences and price levels. The

dotted blue and black lines to the right of point *T* indicate the Engel function if grants are provided unconditionally.

When grants are given on a conditional basis, the slope of the Engel curves (for *T*>100) depends on the design of the grant programme rather than on preferences, i.e., the slope depends on how much more of a subsidized good a state has to provide to increase total revenue by landing a grant unit. Fungibility describes an empirically observed deviation from these Engel curves. In other words: the actual Engel curves do not exclusively depend on the programme design but on the ability of the receiving incumbents to shift earmarked grants to not-intended purposes.

Finally, the red lines indicate the utility level. The dashed red line indicates the utility level in the case of unconditional grants. The solid red line represents the utility level in the case of conditional grants. At its maximum level, indicated by the golden-coloured circle, we find the total revenue corresponding to the optimum level of *q*. The welfare loss is given by the vertical space between the two utility lines. Figure 2 also indicates why a grantor resorts to conditional grants despite its distorting effect: the centre needs significantly fewer financial resources to achieve a certain level of *q* compared to the resources required when unconditional grants are given. For instance, let us assume that the desired amount of *q* is 50. In the case of unconditional grants, the necessary financial resources correspond to the distance between the right vertical green-dotted line and *T* and the *saved* resources of the centre by providing conditional grants rather than unconditional ones correspond to the distance between the two green-dotted vertical lines.

3.2 Flypaper effect and fungible resources

Two other strings in literature are worth mentioning: The flypaper effect and grant fungibility. The flypaper effect results if an unconditional grant unit leads to higher local public spending than if the same amount is received from regional tax revenues. A plethora of studies has investigated the actual effect on the spending behaviour of state and local governments as a reaction to various types of grants. They give reason to believe that local governments respond differently to not-earmarked revenues. This result is dubbed a flypaper effect since a grantor's contribution *sticks where it hits* and is seen as 'anomaly' (Hines and Thaler, 1995). An equally considerable number of studies question the existence of the flypaper effect. Some papers find a statistical artefact (like Becker, 1996) or regard

the flypaper effect found in several empirical works as a consequence of inappropriate statistical models Megdal (1987). Thus, the empirical evidence is ambiguous, at least. Other research rejects the anomaly view. Roemer and Silvestre (2002) argue that most papers assessing the flypaper effect impose a single-consumer assumption. The non-equivalence between in-kind subsidies and income can be explained quite well by dropping it and using social-choice models instead.

The second string in literature assesses how recipients use conditional grants. This literature deals with *fungibility*. It describes the shifting of earmarked grants to other purposes. As an example, grants targeted to, say, investment in schools are used to enhance roads.

The first to show that this assumption is tenuous was McGuire (1978). Zampelli (1986) outlined four main strategies of a grants-receiving state to explain the fungibility of conditional grants: The state can reduce its regular funding of the targeted output, use a program or project which was going to be undertaken anyway, redefine budget categories, and finally re-allocate overhead costs.

In light of flypaper and fungibility effects, several efforts were made in research to design an optimal grant-program (e.g., Huber and Runkel, 2006; Breuillé and Gary-Bobo, 2007). This literature attempts to develop program designs that allow the central government to approach its goals best. The practical relevance must be questioned. Central governments in federalist systems have only limited power in designing financial programs. Often, even unanimity is required (e.g., for imposing some of the EU programs). We presented and discussed the unanimity requirement in Germany's constitution in Subsection **2.2**.

Such constraints are essential for assessing grant programs in practice and explaining why (aside from information asymmetries) it is often not feasible to provide optimal grants in a sense mentioned above. It is, therefore, all the more necessary to assess the actual effects of grants-in-aid. Similarly, Brooks and Phillips (2008) emphasized the role of the surrounding institutional setting in explaining states' responses to grants.

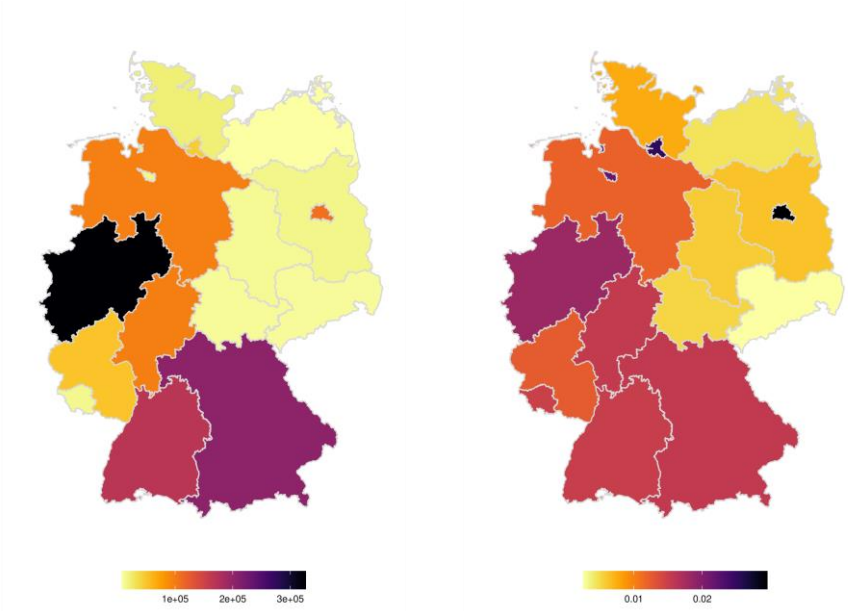
4. An empirical evaluation of the German higher-education pact

4.1 Data set

We took data from the federal statistical office and the joint conference of the ministers of finance and the ministers of science. The latter provides data on the financial transfers from the central government to states' governments; the first-mentioned source provides information on study places, the number of instructors, etc.

Further, we used prospect data by the conference of the ministers of science and education. Since demographic developments and other dependent variables might differ between the three state groups for reasons unrelated to the higher-education pact, we use their prospect data from the program's starting time to compare the prospected developments, which consider demographic trends, with the actual data.

Figure 3: Total additional entrants and total additional entrants per capita 2007 - 2017



4.2 Regional differences in university expansion

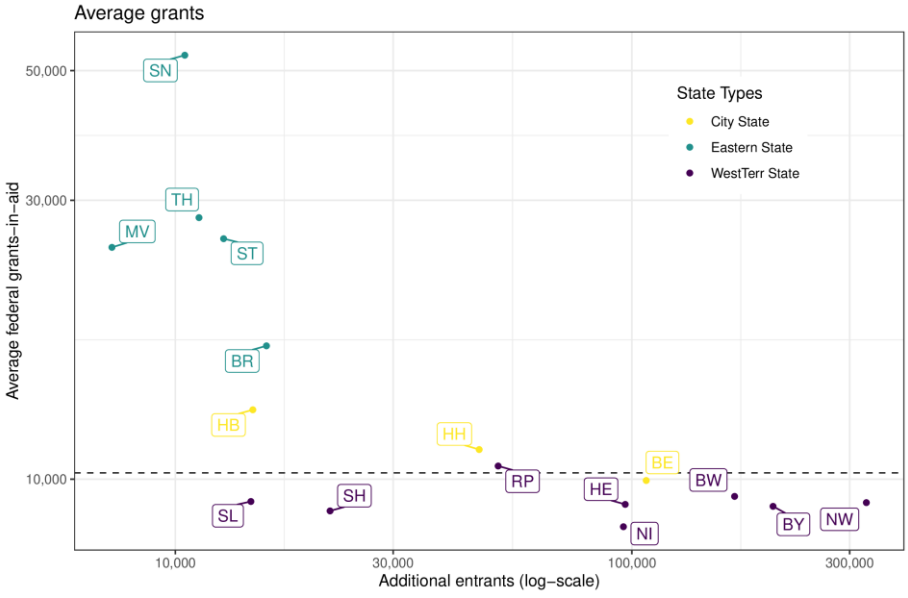
Between 2007 and 2017, a vast expansion in the higher-education system took place throughout the decade. Figure **3** shows that this expansion took place mainly in the western and city-states. The left-hand map depicts the additional entrants, and the right-

hand map sets the additional entrants relative to the states' number of inhabitants, hence additional entrants per capita.

4.3 The distribution of the grants-in-aid

Due to the unconditional grants received by half of the states, we find a remarkably skewed distribution of central-government funds. Figure 4 depicts the distribution and the average grant supplied across the states. The vertical dashed line indicates the average grant per additional entrant. As can be seen, almost all western-territorial states received a below-average grant per on-top entrant. The picture is different concerning the eastern states. They received a much higher average federal grant than all other states. The state Saxony (SN), for instance, got an average amount that was six times larger than that received by Bavaria (BY). This difference is remarkable, as Bavaria invested hugely in universities, whereas the expansion in Saxony took place almost solely in universities of applied sciences, as we will see later. Overall, the Figure indicates a negative correlation between expanding the universities and the grants received.

Figure 4: Average federal grants-in-aid versus additional entrants 2007 - 2017



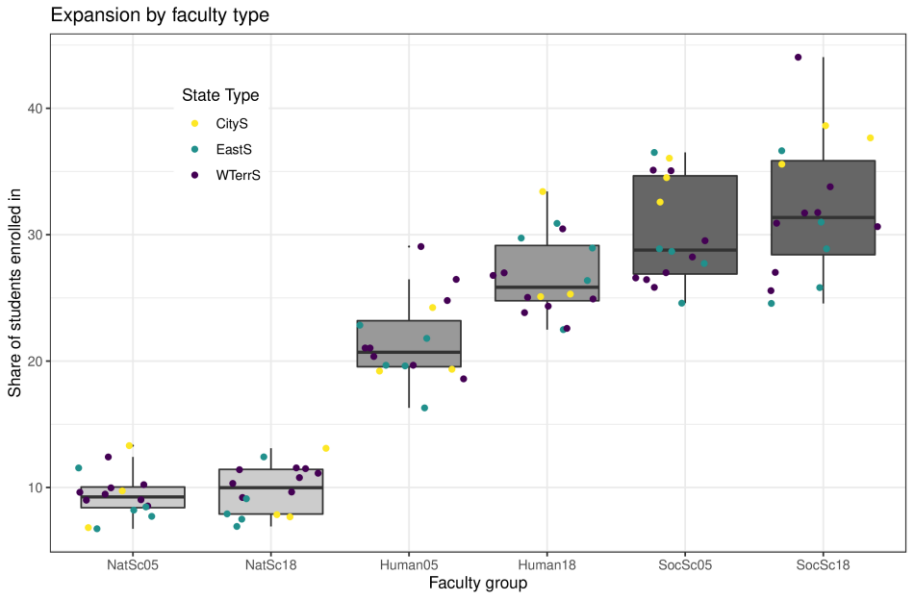
4.4 Higher education expansion by faculty groups.

Do the funds enhance enrolments in the STEM faculties? Since increasing the number of students enrolled in the STEM faculties has been a vital objective of the higher-education pact (see Subsection **2.2** and Fn. on page 26), we will focus on the development in the respective faculties. It should be noted that the treaty imposed no particular incentive in supporting it.

In order to evaluate which departments have enrolled additional entrants, we calculated the relative adjustment in three faculty groups: natural sciences (mathematics, physics, biology, and chemistry), humanities, and social sciences (law studies, economics, sociology, and political sciences).

We compared each faculty group on two dates, 2005 and 2018. Figure 5 depicts the result. The box plots indicate the overall distribution; the points show the respective values of the states.

Figure 5: Share of entrants being enrolled in three faculty groups



As can be seen, the states failed to make natural sciences / STEM more attractive. The share of students enrolled in natural sciences remained at a low level. In contrast, the most remarkable expansion occurred in the humanities, a development primarily pronounced in the eastern states. We found a significantly larger expansion in the eastern parts [XI] than in

the west. We depict this with the two middlebox plots and the upward movement of the green dots.

In this respect, not only was the goal to promote natural sciences missed but also a remarkable expansion in the (cheapest) faculty group of all, the humanities, was ignited. Additionally, those states with the highest federal funding (measured in relative terms) recorded a tremendous humanities expansion.

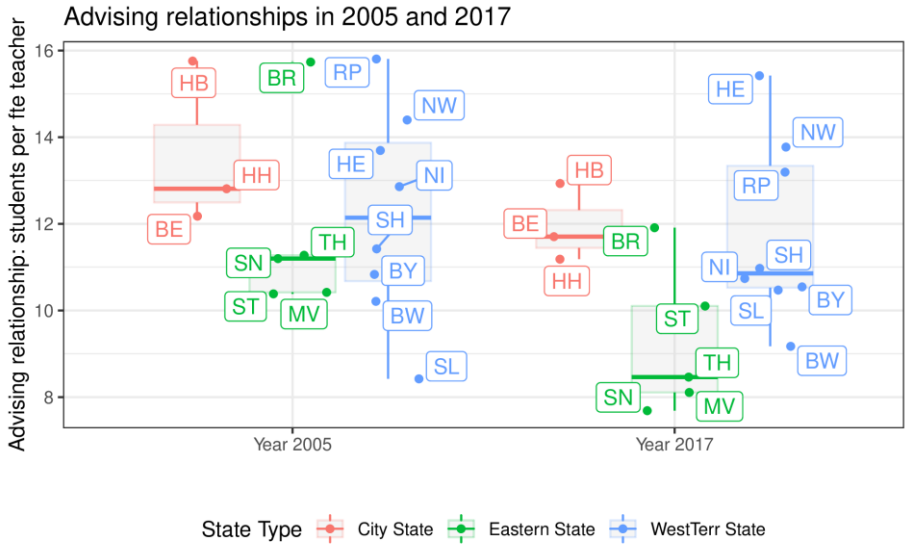
4.5 Student-staff ratio (advising relationship)

As noted in Subsection **2.2**, the second primary objective of the higher-education pact was to improve the student-faculty-ratio[XII] (advising relationship).

Since the pact funded the western territorial states below average and the eastern states above average, we may expect more funds to improve the advising relationships in the better-funded regions, i.e., in the eastern states.

We compare the advising relationships between 2005 and 2017. The results, sorted by state groups, are depicted in Figure 6. The left boxplot group indicates the advising relationships in 2005, the right group the 2017 values. In this period, almost all states enhanced their relationships. Two out of sixteen states (HE, SL) downgraded their values.

Figure 6: Advising relationships 2005 and 2017

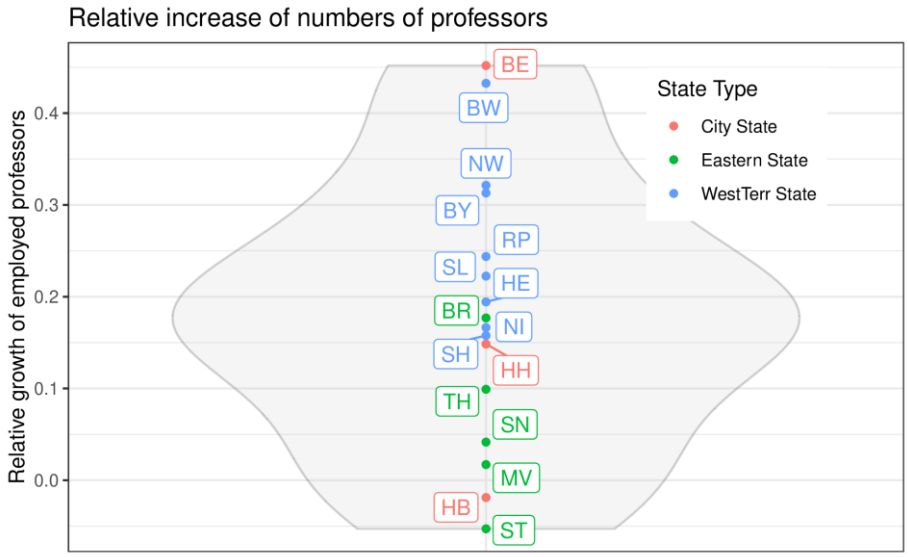


Overall, the median value for the advising relationship decreased (thus, became better). Though, the improvement was more pronounced in the eastern part.

Next, we will investigate whether the grants triggered the enhancements of the advising relationships. As a proxy for the states' financial effort, we will evaluate the increase in the number of instructors in a professorship position (henceforth: professors) during the same period. In particular, we wish to know whether improving the supervision ratio in the eastern parts coincides with a corresponding increase in the number of professors.

On average, the number of professors increased by 25 per cent. The violin plot[XIII] shows the respective values in Figure 7.

Figure 7: Number of professors between 2005 and 2017



Contrary to the expectations, the states with the most considerable improvements in the advising relationship were not the states which filled most teaching positions. The green-labelled values depict this result.

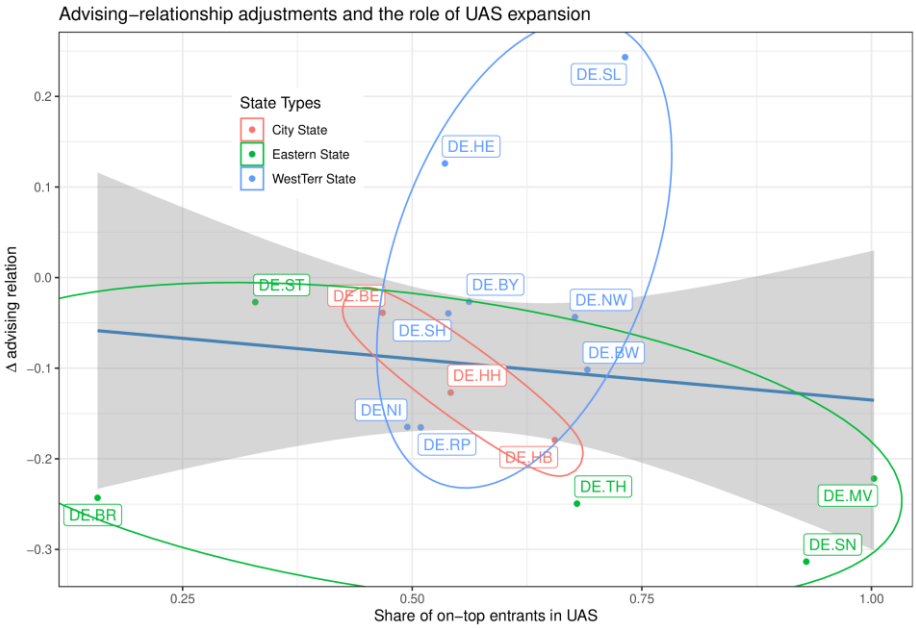
With the exemptions of the eastern state Saxony-Anhalt (ST),[XIV] all other territorial states increased their number of professors. As Figure 7 indicates, the overwhelming portion of this increase took place in the western part. Within the city-states, we find a mixed picture.

Summing up, an overall objective of the pact, the improvement of the student-faculty ratio, has been achieved. We find tremendous success in the better-funded eastern part by comparing the different state groups. However, we find the somehow puzzling result that

higher states' funding has not accompanied this improvement. Therefore, we will assess which factors affected the advising-relationship improvements in deeper detail.

In a simple regression analysis, we control for the enrolment share (the portion of a cohort entering a study), the federal funds per capita, and other variables. The regression results are presented in the Appendix (Table **1**). The variable "UAS share" has the highest explanatory value for improving advising relationships. It indicates the proportion of expansion at (the less expansive) universities of applied science. A similar effect on the advising relationship is due to an increase in humanities students (at a lower significance level). We thus conclude that a cost-saving expansion caused the enhanced advising relationship. We do not find an example where an improvement in the advising relationship coincides with an expansion in the natural sciences. We find only one example where an over-proportional expansion in traditional universities went hand in hand with an improved advising relationship (we will present this example further below). Figure 8 depicts the relationship between the student-staff ratio and the expansion in UAS. As can be seen, the overall effect is mainly driven by the eastern states.

Figure 8: Advising-relationship adjustments 2005 to 2017 and UAS expansion



The observed enhancement in the advising relationship is, thus, closely related to an expansion in the less costly UAS. Since conditional grants have to spend for what they are

earmarked for, several states used the grants for an unprecedented expansion of the less costly UAS field. The states comply with the grant-program requirements but find a way to fulfil these with minimum effort. Such behaviour was dubbed *price-shifting fungibility* (Barbaro, 2022). It describes the effect of granting-receiving states minimising conditional grants' distorting impact by lowering the prices or quality of the targeted good.

Although this might be a sad story from the grantor's point of view, it is concerned with positive economic welfare effects. Since conditional grants harm states' welfare due to an altering price ratio, states create financial leeway to promote goods and services other than the targeted interest by reducing the expenditure for the subsidised good. By doing so, they can partly compensate for the welfare loss caused by conditional grants.

Next, we argue that the observed expansion in the UAS has taken place precisely because of the grant program (and would not have occurred without the federal grants). We underline our argument by demonstrating that the actual development in the UAS sector differs remarkably from the educational ministers' prospect. Conversely, actual development and prospected one in the sector of the traditional universities mostly coincide.

Figure 9: Student prospect versus actual data 2005 - 2018

We found clear indications that this unequal development has occurred precisely because of the grant program (and would not have occurred without the federal grants). As shown in Section **2.2**, the states in 2005 developed a student prognosis (prospect) as the basis for the treaty. According to this student prospect, the number of UAS-students should remain constant between 2005 and 2015, only to fall slightly after that. In contrast to the university of applied sciences, the federal government and the states expected an overly large increase in the traditional university sector, particularly between 2010 and 2015. Figure 9 depicts the deviation from the prospect. The lines indicate the extent to which the actual data deviate from the forecasted ones. In 2017, the number of entrants in traditional universities exceeds the prospected number by 16%. The same number in universities of applied science was 56%.

Summing up, the observed enhancement in the advising relationship occurred mainly by a fungibility phenomenon rather than by switching resources from other areas to higher education (see also Barbaro, 2022).

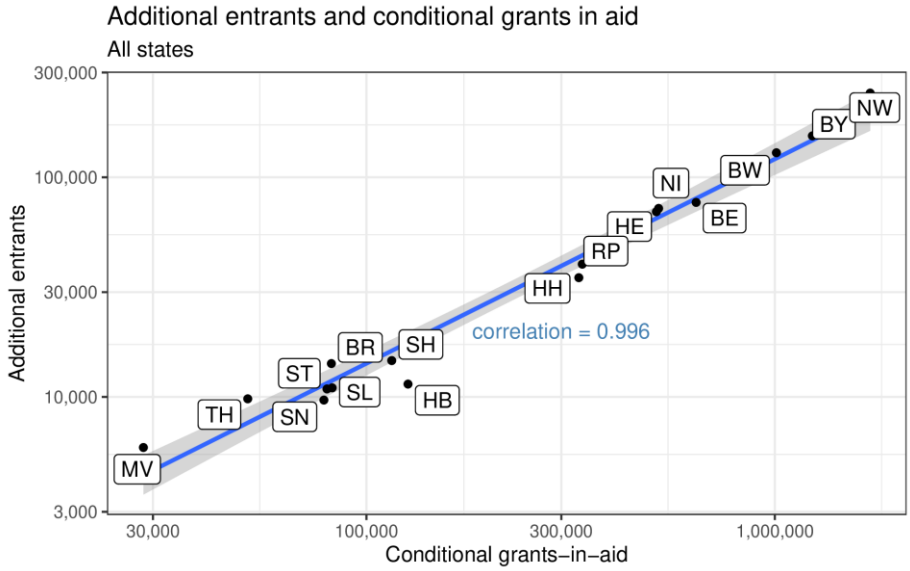
4.6 Comparing eastern and city states: the flypaper effect

We noted in Subsection **2.2** that all states received conditional grants, but the city-states and the eastern states also received unconditional grants. A genuine question is how city-states and eastern states used these unconditional grants. In particular, we wish to know whether they responded uniformly on unconditional grants or differently.

Standard economic theory predicts that the states' responses to unconditional grants are such that an additional grant unit leads to a proportional increase in the states' provision.

Hence, before focusing on the isolated effect from unconditional grants, we demonstrate a strong relationship between conditional grants and additional entrants. We depict this in Figure 10. We find a correlation coefficient between received conditional grants and additional entrants close to one. The grey area indicates the confidence interval.

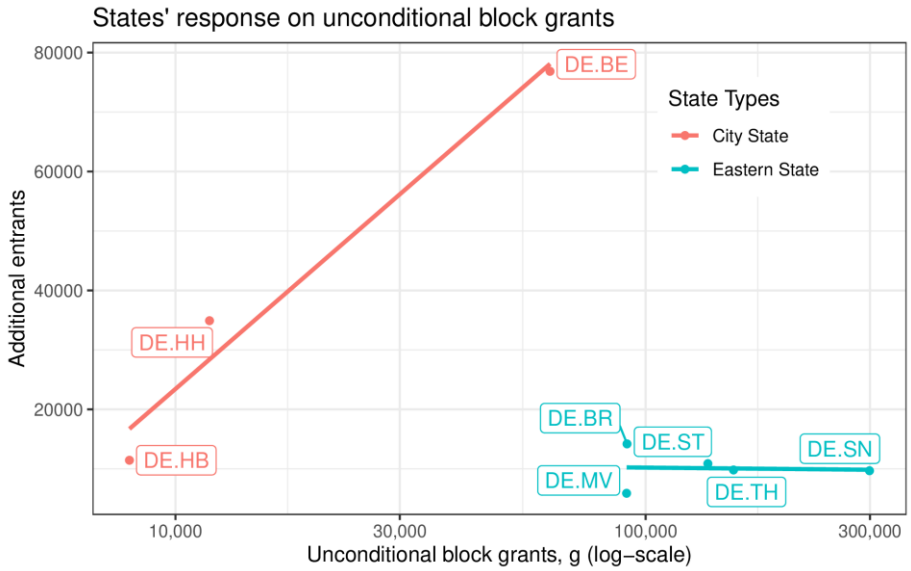
Figure 10: The effect of conditional grants on additional entrants



In a second step, we focus on how unconditional grants affect the number of entrants. We, therefore, separate those eight states which received unconditional grants.

The overall effect is ambiguous in sign. Considering both the city-states and the eastern states separately, we find remarkable differences between both groups. We calculate the regression lines representing the relationship between on-top entrants and the sum of unconditional grants received. We also control for the effect which arises from conditional grants. Figure 11 depicts the regression lines.

Figure 11: Responses to unconditional grants



We see for the city-states that a higher unconditional grant is accompanied by a higher expansion in the higher-educational section. In contrast, we cannot observe this in the eastern states. We find no positive correlation between unconditional grants and on-top entrants there. The partial regression coefficient is negative, although not significantly different from zero.

What can explain these differences? An answer is the framing surrounding the unconditional grants received. Our explanation builds on a valuable but fall-into-oblivion contribution by Brennan and Pincus (1990). They vividly emphasise that grants may have an implicit contingent aspect.

As outlined in Subsection **2.2**, the eastern states were granted grants without any specific expansion objectives. Moreover, the subsidies were justified by not reducing the number of university study places in the eastern part. Even though the unconditional grants for the city-states were justified similarly, the starting position was quite different. The city-states have been and are still particular hotspots of higher-education development. Two numbers may illustrate the differences. In 2007, from all the city-state students, 86 per cent came from the states where a significant increase in first-year students has prospected. The exact number in the eastern states was 28 per cent only. It was clear that the federal grants for the city-states were assigned to support their higher-education expansion. In this sense, the local parliaments in the city-states discussed the appropriate use of funds, and

the universities in the city-states claimed the grants for themselves. Thus, the city-states invested the vast majority of total funds in their higher-education institutions, whereas the eastern states used the grants for other purposes. Since both state groups received unconditional grants with the same de-jure disposability, the de-facto disposability was quite different. This evidence supports the hypothesis that de-facto disposability should be considered when explaining receipt's behaviour towards grants.

Recalling the starting point of the pact negotiation, the western territorial states and the city-states had the main interest in agreeing on grants due to the demographic conditions. Summing up, the city-states treated unconditional grants like conditional matching grants and responded closer to the western territorial states. Conversely, the eastern states gained financial envelopes by receiving unconditional grants. The eastern states, tortured by emigration, had little interest to agree on an intergovernmental-grant program. The latter was the reason for taking advantage of their veto power that led to unconditional grants. Therefore, the different responses in the eastern part on federal funds can be explained by different pressure to expand higher-education institutions. These differences in political pressure may explain why enrolment in the eastern states was primarily limited to the UAS sector.

5. Conclusion

All available evidence suggests that grants are becoming increasingly important. This international development brings into question issues such as: Which governmental tier should bear responsibility for higher-education funding? Should the task be unequivocally assigned to one tier, or is a joint financing superior?

Intergovernmental grants in federal systems, and conditional ones, in particular, tend to harm welfare. We showed theoretically and empirically the states' responses to federal funds. Without considering informational asymmetries, we identified some undesirable effects using a financially extensive program of intergovernmental grants, the German higher-education pact. We found such undesirable effects from the grantor's perspective in both unconditioned and conditioned grants-in-aid.

The reaction to unconditional grants can be better explained if the surrounding framing is taken into account rather than the legal form of the grant alone. We presented empirical evidence in this paper, likely to support this point of view. Concerning the widely-discussed flypaper effect, we made a point of paying attention to the distinction between de-jure and de-facto power of disposal.

We found significant enhancements in the student-faculty ratio, thus achieving a critical goal. This enhancement was mainly due to states' fungibility strategy rather than the intended re-allocation of resources from other purposes. However, states' fungibility strategy helps reduce welfare losses caused by conditional grants-in-aid.

We conclude that the degree of accuracy of conditional grants hinges on the recipients' abilities to varying the subsidised good(s) concerning both price level and quality.

In the light of our research, we cannot scientifically support the tendency to blot out the well-defined task-sharing in federal systems. It seems that research on federal systems, in particular the yardstick-competition approach, does not play a significant role in the public debate. This conclusion must be reached by considering the often-imposed demands for uniform regulations in federal systems as a basis. This paper sheds light on the downside of federal grants-in-aid and attempts to provide a worthwhile contribution to the ongoing discussion about the future of federal systems.

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[II] We will present some institutional background of Germany's federal system and higher-education funding in Section 2.

[III] Hometown favouritism describes that municipalities that are the residence of a minister exhibit increasing government employment.

[IV] The first federal-reform commission was set up in 2003 but was unsuccessful in 2004 due to disagreements, particularly over educational issues. (see Gunlicks, 2007; Moore et al., 2008).

[V] Germany has two types of universities. *Traditional* universities, on the one hand, where half of professors' working time (and a vast share of total resources) are assigned to research activities. On the other hand, there are the so-called universities of applied science (UAS), where professors should more or less focus on advising and teaching students instead of investing resources in research. The teaching load at UAS is often twice as high as that at traditional universities.

[VI] See the preamble of the higher-education treaty dated August 20, 2007.

[VII] See Art. 1, §3 of the treaty on the higher-education pact.

[VIII] The eastern states received fifteen per cent of the total federal fund, Berlin four per cent, and the remaining 3.5 per cent went to Hamburg and Bremen.

[IX] See p. 17 of the STEM action plan by the federal ministry of science. 'The main focus lies on the increase of enrollments in the STEM faculties.' (*own translation*).

[X] The support for public education funding mainly depends on the generational composition (intergovernmental conflict hypothesis), see, e.g., Brunner and Johnson (2016); Saastamoinen and Kortelainen (2020). However, by comparing different countries Busemeyer et al. (2020), no clear pattern emerges.

[XI] By using an ANOVA and at a 95 per cent level.
[XII] The student-staff ratio is calculated in the official statistics as the number of students per full-time equivalent teacher. Thus, a lower ratio indicates an improvement. Note that we use student-staff ratio, student-faculty ratio, advising relationship, or even supervisory relationship synonymously.
[XIII] The violin plot combines the box plot and density trace in one plot.
[XIV] The state Saxony-Anhalt (ST) even reduced the number of professors during the observation period, although this state had received above-average grants of EUR 25,000 for only roughly 12,800 additional entrants.

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- a joint setting with both kinds of grants-in-aid, unconditional block grants are leveraged by conditional ones.

Appendix A: Regression results

Table 1: Regression result for the advising relationship 2018

	Dependent variable:	
	Advising relationship 2018	Advising relationship 2018
Additional entrants	0.00001	
	(0.00001)	
UAS share	−7.412	−5.769
	(2.929)	(2.161)
Enrolment share	0.082	
	(0.131)	
Expansion in Humanities	−7.765	−6.278
	(3.648)	(2.684)
Rel. growth of professors employed	−6.522 (5.254)	
Fed. funds per capita	−0.009	
	(0.028)	
Constant	14.677	16.069
	(2.785)	(1.618)
Observations	16	16
R	0.597	0.452
Adjusted R	0.328	0.368
Residual Std. Error	1.740 (df = 9)	1.688 (df = 13)
F Statistic	2.218 (df = 6; 9)	5.362 (df = 2;13)
Note:	p<0.1; p<0.05; p<0.01	p<0.1; p<0.05; p<0.01

Since there are only few degrees of freedom and issues of multicollinearity might arise, we run a second regression with two dependent variables only, the UAS share and the expansion in humanities. We still find significant effects for both, as shown in the right column.

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Equalization and territorial integration in Canada: a nation building instrument?*

by

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Abstract

The accommodation of territorial diversity is one of the biggest challenges that modern societies must face nowadays, especially in a context where secessionist movements are on the rise. Multilevel government plays a key role in managing diversity and reducing the risk of secession. The fiscal dimension is a vital component of any system of shared government as the lack of financial resources to finance constitutionally assigned competences would render them inoperable, reducing autonomy to an empty vessel. However, the use of fiscal instruments to accommodate diversity and reduce the risk of secession has barely been explored. Against this background, this article explores, from a legal perspective, the internal architecture of the Canadian equalization program with the aim of investigating its integrative and disintegrative effects in relation to Quebec (and to a lesser extent also to other provinces). This is done on the hypothesis that equalization mechanisms: raise the cost of secession in sub-units that are net receivers of funds; have an integrating function as they promote economic development and cohesion and tend to enhance a sense of belonging and solidarity among constituent units by fostering national unity. The study focuses on arrangements at constitutional and legal level, including also secondary legislation with the final aim of evaluating if and to what extent the Canadian equalization program can be conceived as an instrument of nation building that contributes to reducing territorial tensions and accommodating diversity, in the end reversing disintegrative trends. This is done through the evaluation of the integrative and disintegrative effects of each of the elements of the internal architecture of equalization mechanisms.

Key-words

Equalization, Canada, accommodation, fiscal federalism, multilevel governance

1. Introduction

The accommodation of territorial diversity is one of the biggest challenges that modern societies must face nowadays, especially in a context where secessionist movements are on the rise. Multilevel government plays a key role in managing diversity and reducing the risk of secession (Lijphart 1977; Kymlicka 2001). The fiscal dimension is a vital component of any system of shared government as the lack of financial resources to finance constitutionally assigned competences would render them inoperable, reducing autonomy to an empty vessel. However, the use of fiscal instruments to accommodate diversity and reduce the risk of secession has barely been explored. These instruments are almost never mentioned in the literature on territorial accommodation as this has focused on other aspects such as the recognition of national identities (Gagnon and Iacovino 2007). Along the same line, fiscal federalism has been analyzed paying attention to matters such as the allocation of financial resources (Anderson 2010) or the functioning of the financial relations among different levels of government (Boadway and Shah 2009; Schnabel 2020) but without drawing much interest from the literature on nationalism and minority accommodation. This is in part due to fiscal federalism being a rather neglected topic of federalism, especially among public lawyers, due the complexity and polyhedral form of this phenomenon. Thus, the relation between fiscal federalism and secession has also not been covered sufficiently by the literature[II].

The case for decentralization to accommodate diversity is well established in the literature (Duchacek 1997; Keating 2001; Gagnon and Tully 2001; Burgess 2006). However, decentralization sometimes has a cost in terms of economic efficiency as divergences among subunits lead to different financial capacities -e.g. some regions are richer than others, have natural resources, etc.- and different costs when providing public services -due to geography, demographics or any other circumstances-. Equalization mechanisms are envisaged to bridge this gap and reduce disparities among subunits to achieve a certain degree of horizontal equity. Equalization can, thus, be described as a transfer of fiscal resources across jurisdictions with the aim of offsetting differences in revenue raising capacity or public service cost (Blöchliger et al. 2007, 5). Therefore, the main objective of equalization is to -theoretically- allow subunits to provide a comparable level of services at similar levels of

taxation. Consequently, as Boadway (2004, 212) puts it, equalization can be seen as a necessary counterpart to decentralization and unsurprisingly, equalization mechanisms can be found in most federal systems with the notable exceptions of the USA and Mexico (Watts 2008, 108-109).

Behind equalization lies an idea of inter-territorial solidarity, i.e., the need to achieve a certain degree of horizontal redistribution among territorial subunits in a multilevel state. This is, of course, connected with the value that each society gives to horizontal equity, not only in terms of equality among all citizens but also among the subunits that integrate the country. At a first glance, one could tend to think that homogeneous societies would value solidarity more than those that are divided (Choudhry 2008), but, on the other hand, solidarity and horizontal equity could be used as a tool to hold the country together and foster unity in the case of fragmented societies

Against this background, the article explores, from a legal perspective, the internal architecture of the Canadian equalization program with the aim of investigating its integrative and disintegrative effects in relation to Quebec (and to a lesser extent also to other provinces). This is done following the hypothesis that equalization mechanisms:

- raise the cost of secession in sub-units that are net receivers of funds
- have an integrating function as they promote economic development and cohesion
- tend to enhance a sense of belonging and solidarity among constituent units by fostering national unity.

The analysis will be of a preeminent legal nature, focusing on arrangements at constitutional and legal level, including secondary legislation but also soft law and political agreements. The final aim is to evaluate if and to what extent the Canadian equalization program can be conceived as an instrument of nation building that contributes to reducing territorial tensions and accommodating diversity, reversing disintegrative trends. This is done through the evaluation of the integrative and disintegrative potentials of each of the elements of the internal architecture of equalization mechanisms.

The choice of Canada as a case study is not trivial. First, among federal countries, Canada has one of the longest standing equalization programs dating back to 1957. This is relevant as the need for solidarity among territories is a value that needs to be constructed over time and sometimes is difficult to inoculate (Watts 2015, 21). Second, it has experience in dealing with the side effects of decentralization which could stimulate nationalist or even secessionist

movements. Finally, Canada has emerged as a successful example of territorial integration, resolving a secessionist crisis like the one that occurred at the end of the 20th century in the province of Quebec, where the unity of the federation was on the verge of collapsing.

The concepts of integration and disintegration used in this analysis are borrowed from the literature of European integration and applied to the internal dynamics that occur within multilevel systems between the central level and the territorial subunits, as well as among the latter themselves.

One of the most influential definitions of integration was coined by Wallace (1990, 9), who characterizes this phenomenon as "the creation and maintenance of intense and diversified patterns of interaction among previously autonomous units". This definition, although intended for sovereign states that join together in a supranational organization, is useful for studying the dynamics that affect the relationship between center and periphery in a multilevel state. Following this, an aspect of equalization -e.g., the territorial participation in the governance of the compact- that contributes to strengthen the ties between the national state and the territorial subunit by promoting dialogue and cooperation while respecting and protecting the political autonomy of the latter will be described as an integrative force.

Moreover, as seen above, the political dimension is a relevant factor when it comes to the study or the internal architecture of equalization mechanisms. For this reason, the role of political actors must be considered following Haas' (1968, 16) vision of integration as a process "whereby political actors in several, distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new political centre". Although this concept alludes to a new political center -that of the European institutions- in this case the political center in question is that represented by the central institutions and, therefore, the parent state itself. Thus, those elements of equalization that contribute to reinforce the loyalty of the territorial subunits towards the center are considered a step towards further integration.

In contrast to integration, disintegration has not attracted as much interest and the elaboration of a definition has not been pursued in depth. Only Scheller and Eppler (2014, 26) have attempted to fill the vacuum, conceptualizing this phenomenon by defining disintegration as those "erosion processes promoted by individual or collective actors […] which lower the legal, economic, territorial, socio-cultural and/or legitimating integration

level" undermining "the unity of the internal market, the Monetary Union and the European legal area". In the case at hand, this erosion process lowers territorial integration, undermining the unity of the state, fueling internal tensions and encouraging opportunistic and divisive behaviors that hinder cooperation between the different parts of a multilevel state. On this basis, those aspects of equalization that weaken the ties between a territorial subunit and the national level, hindering dialogue and cooperation will be considered as disintegrative. In the same vein, lack of participation by the territorial subunits that may result in isolation or opportunistic behavior that undermines the principle of horizontal solidarity will also be understood as promoting disintegration.

In sum, integration and disintegration are dynamic processes that can happen at the same time on various dimensions -institutional, territorial, economic or even socio-cultural- (Scheller and Eppler 2014, 26). The following section will focus on the territorial dimension of integration, although the other dimensions as far as they are instrumental for territorial (dis)integration will also be taken into account, analyzing the integrative and disintegrative potential of the different elements of equalization mechanisms. To this end, the aim is to identify those aspects that may increase the allegiance to the state by promoting dialogue and cooperation among the different components of a multilevel state, reducing tensions and appeasing conflicts as well as those that may hinder these values fostering disintegration and increasing the rejection of the current political settlement which could fuel secessionist movements.

2. Exploring the features of the Canadian equalization program

As the analysis will be framed following a legal perspective, it will focus on those components whose nature is connected to the notion of fiscal constitution in the broader sense, hence not only paying attention to those elements "formally incorporated in some legally binding and explicitly constitutional document", but also "customary, traditional, and widely accepted precepts" (Buchanan and Wagner 1977, 24) including sources of law without formal constitutional status and political facts that impact the interpretation and implementation of the rules and determine the way in which a system functions and evolves as in this aspect theory cannot be separated from practice. Thus, the components that made up the internal architecture of equalization mechanisms will be investigated with the aim of

identifying the integrative and disintegrative effects that these elements have in the territorial accommodation of national minorities in multilevel systems. A brief description of them is presented here below, before delving into the analysis of their (dis) integrative potential in relation to subunits facing secessionist challenges. These include:

The legal entrenchment of the program, i.e., the legal foundations of equalization programs that can be classified into three main models: constitutional entrenchment, legal enactment and an informal consensus on the goals of fiscal equalization via intergovernmental cooperation (Shah 2007a, 294).

The nature of the redistribution that refers to the determination of the overall funding of equalization with a particular emphasis on the origin of the funds (vertical and/or horizontal dimension). Additionally, it is also possible to draw a distinction between open-ended systems, i.e., there is no upper limit to the total pool of equalization, and close-end models wherein the total pool of money is exogenous as is generally linked to the revenue raised by a certain tax which depend on the economic cycle (Ahmad and Brosio 2018, 179-180). Lastly, one can find integrated programs in which all subunits receive transfers, or stand-alone programs that only envisage transfers to those subunits that qualify for equalization as they are below the standard.

The level and components of equalization. In this regard, it is possible to distinguish between the level of equalization and the components that the system would try to equalize. The level of equalization alludes to how much equalization would be pursued, taking into consideration the potential tradeoffs with respect to economic growth, financial stability or political incentives (Ahmad and Brosio 2018, 171-174). Additionally, equalization can be on gross or net terms. Gross equalization is directed towards bringing relatively poorer subunits to the national average or to another standard, leaving the fiscal capacity of the richer subunits unaffected. In contrast, a net equalization program aims to elevate the fiscal capacity of the relatively poorer subunits at the expense of the fiscal capacity of the richer. Whereas the components of equalization refer to the economic magnitude that the mechanism aims to equalize: revenue capacities or expenditure needs.

The degree of conditionality. Conditional or earmarked transfers are a common feature in multilevel states with the national government imposing a series of requirements upon the transferred funds which must be satisfied by the territorial subunits in order to receive them (Shah 2007b, 5-6). In most of the cases, these conditions are input-based with the national

level conditioning the transfers to a specific and exclusive type of expenditures (e.g., health, education, infrastructure, social services etc.). A second possibility is to establish output-based transfers, by conditioning the funds on the accomplishment of a certain result but without imposing any obligation on how to achieve that goal. Furthermore, conditionality can vary in scope resulting in either soft or hard conditionality. The strings attached to a transfer can be classified as soft when they only imply the mere adherence to broad and generally not disputed principles, such as accessibility to public services or the prohibition of interterritorial discrimination. On the contrary, hard conditionality is prescriptive, as the territorial subunits need to meet specific criteria like balanced budgets, a given degree of spending allocated to a program, or a minimum level of taxation.

The institutional administering of the program. Equalization compacts are complex financial schemes that require an institutional framework to manage its implementation and functioning. Although different institutional arrangements can be used, such as a central government agency or the delegation of this function to the national parliament, the dominant pattern in comparative perspective is to allocate this function either to an independent arm's length agency or to an intergovernmental forum.

The length of the program. Equalization mechanisms can include sunset clauses. These establish the maximum length of the program in place, which is set to expire after its completion if it is not renewed. Such renewal can either extend the program in its current form, or in a revised fashion. Another possibility is to let the program expire and then establish a new one, although this would be similar in nature if the main principles governing equalization are entrenched in a norm such as the constitution or a national law.

Dispute resolution. In this regard, a distinction must be made between mere political criticism and legal disputes. While political criticism of the equalization compact can be channeled through the institutional (frequently also intergovernmental or technical in nature) framework responsible for managing the program, legal disputes may end in court. Since the latter may require the interpretation of constitutional and legal provisions as the result of an inter-governmental conflict that generally involves one or several territorial subunits and the national level, the issue is normally adjudicated to the highest court in the land.

a) Legal entrenchment of the program

The idea of territorial solidarity is as old as the Confederation with the constitutional design of 1867 (sections 118 and 119) including a federal per capita subsidy with the objective of providing financial resources to the provinces in the early years of the newly formed Dominion. The first formal proposal calling for the implementation of equalization in Canada came from the Rowell-Sirois Commission in 1940, whose final report urged the creation of the National Adjustment Grants to ensure the financial sufficiency of the provinces, allowing them to fulfill their constitutional duties (Milne 1998, 181). This program was characterized by two main features: it would be administered by an independent agency and reviewed every five years, and equalization would not only be carried out according to the fiscal capacity of the provinces but would have also taken into account the needs of each province, creating an emergency fund for those whose financial situation would continue to be precarious after the implementation of the solidarity mechanism (Royal Commission on Dominion–Provincial Relations 1940, 83-85).

Finally, equalization was introduced as a federal program in 1957 under the Tax Rental Agreements, although in different fashion to the one proposed by the Rowell-Sirois Commission as none of their guidelines were adopted. Consequently, the Canadian equalization program was first enacted in a legal statute, the *Federal-Provincial Tax-Sharing Arrangements Act, 1956*, 4 & 5 Eliz. 2, ch. 29. This law was the result of cooperation between the federal government and the provinces as its full implementation required provincial legislation although this was not related to equalization[III]. Equalization was designed as a guarantee of the financial stability for the provinces in the post-war period with its aim being to provide unconditional payments to each province equal to the amounts needed to bring the per capita proceeds of rental payments (or of the allowed abatement) to the average per capita yield of the two provinces with the highest direct tax yield (Bird and Vaillancourt 2009, 212-213). In a certain way, the system was conceived as a sort of compensation for the centralization of most tax sources and social programs such as the unemployment insurance. Likewise, this new program was also aimed at integrating Quebec -although it was not its main purpose- breaking its fiscal isolation as the province declined to participate in any of the tax rental or tax collecting agreements concluded between the federal government and the provinces after World War II (Béland and Lecours 2014, 342).

The importance of the equalization program and the tensions that its design and effects caused led Nova Scotia in 1967 to advocate for the entrenching of a specific equalization formula in the Constitution (Smiley 1976, 115). Constitutional entrenchment was sought by the province to reduce fiscal tensions and avoid unilateral modifications of the calculations by the federal government that would be unfavorable to their interests as the compact was solely regulated in a federal law that could be modified without provincial consent. However, this claim will not materialize during the patriation process, with the formula being kept in ordinary legislation.

Equalization was constitutionalized in 1982 as part of what P.E. Trudeau called "the People's Package" in reference to the ambitious process of patriating the Constitution form the United Kingdom. Equalization was another piece of Trudeau's project of nation-building aimed at developing and strengthening a pan-Canadian identity. Including equalization into the Constitution highlighted the importance that was given to territorial solidarity during patriation as a process towards building a common social citizenship. Equalization embeds an idea of fraternity and solidarity that promotes integration and national unity, two of the values promoted by Trudeau during patriation. Finally, equalization was entrenched into section 36.2 of the 1982 Constitution in the following terms:

"Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

As can be seen, equalization was framed in a more vague and abstract manner than defended by Nova Scotia in 1967, with section 36.2 limited to the outlining the main goal of the program which is none other than to assure sufficient revenues to provincial governments so they can provide reasonably comparable levels of public services at reasonably comparable levels of taxation. In fact, what was given constitutional status in 1982 was not the equalization compact itself, but rather the principle of equalization or inter-territorial solidarity. Consequently, the federal government enjoys almost full freedom of choice to develop it, even in alternative ways to the program created in 1957, being theoretically possible to reduce equalization to its minimum expression. This is because section 36.2 only commits both Parliament and the federal government to the principle of making equalization payments, but it does not establish any formal obligation to make those transfers. Provincial governments tried to broaden the scope of equalization in the

Constitution during the Charlottetown constitutional round, strengthening the wording of section 36 to commit the federal government to making payments and not just to the principle of equalization (Béland et al. 2017, 25)[IV]. However, although the bid was initially successful as the federal government agreed, the agreement was never enacted as it was rejected in referendum in 1992.

Despite the narrow scope given to the constitutional provision on equalization, this has not prevented the general acceptance of inter-territorial solidarity by means of an equalization program by all political actors, although they frequently disagree on its nature and extent. The mere presence of the principle in the Constitution seems to have been enough to strengthen the legal foundations of the program and ensure its permanence over time despite occasional political criticism. The rigidity of the Canadian Constitution -one of the most in comparative perspective which makes it almost non-reformable (Albert 2015, 112-113)- has also contributed to the consolidation of equalization in Canada. The difficulty to amend the Constitution makes it virtually impossible to modify or eliminate the principle of making equalization payments as it would require the consent of both chambers of Parliament and of seven of the ten provinces, comprising at least 50% of the population. This effectively safeguards section 36.2 against any threat of unilateral repeal or substantial alteration by the national level as the approval of most of the provinces is required to proceed (Pelletier 1996, 326-327). Additionally, this guarantee was reinforced with the *Constitutional Amendments Act*[V] which grants a veto right to Ontario, Quebec, British Columbia and, by effect of its population, Alberta[VI] (Woehrling 1998, 339) as the federal government must obtain the consent of these provinces before introducing in Parliament a motion to authorize an amendment to the Constitution of Canada. Paradoxically, it has been a province, Alberta, who has called to repeal equalization from the Constitution, holding a non-binding referendum on the issue with the aim of pressing the federal government to change the calculation formula as it considers it unfair and a privilege towards Quebec as if it were a reward in exchange for remaining with the federation (Béland and Lecours 2014b, 347-348)[VII].

In spite of the importance of incorporating the principle of equalization into the Constitution, it did not have a significant impact in the functioning of the program in practice due to the vagueness and reduced scope of section 36.2 as equalization continued to be governed by an act of Parliament. The core of the legal regulation of the equalization

compact is contained in the *Federal-Provincial Fiscal Arrangements Act, 1985*, which regulates the technicalities and operational aspects of the program such as the timing (art. 3.94) or the method of calculation of the payments (art. 3.2). Thus, the principle of equalization anchored in section 36.2 of the Constitution does not constitute a substantial constrain for the federal legislator, who has full discretion to establish, modify, and terminate the terms of equalization transfers as long as it remains committed to the principle of equalization somehow. Therefore, equalization is entirely a federal program without any provincial participation in the passing or amendment of the *Federal-Provincial Fiscal Arrangements Act*, not even indirectly, given the Canadian Senate's inability to act as a territorial Second Chamber (Verney 1995, 94). A proposal that would have forced the federal government to consult with the provinces prior to any change of the method of calculation of the fiscal equalization payments was tabled in Parliament following Alberta's referendum bid, although it was voted down[VIII].

The integrative nature of equalization was recognized since its first enactment in 1957 as the program was quickly presented as a benefit of the union (Davenport 1982, 116). The constitutional entrenchment of equalization strengthened the legal foundations of the compact, increasing the integrative potential if compared with the previous situation where it was limited to sole legal enactment, an aspect of importance for Quebec given its status as a receiving province since it guarantees the continuity of the compact in time. However, the reduced scope of section 36.2 of the Constitution, which commits the federal level to the principle of equalization but falls short of imposing a legal duty on the national government to make those transfers, conditions the margin of appreciation of the courts when interpreting the compact. In fact, this can be considered as a political question and thus non justiciable, diminishing the integrative potential that results from the inclusion of equalization in the Constitution. Although this issue could be addressed by a redrafting of section 36 to commit the federal government to making equalization payments as was envisaged in the Charlottetown Accord, Canada's chronic difficulty in reforming the Constitution makes this very unlikely in the foreseeable future[IX].

As most models, Canada combines a general framework of equalization enshrined in the Constitution with a national law that sets the operational and technical aspects of the program. This formula combines the stability and predictability of a constitutionally entrenched provision with the flexibility of a legal statute to adapt to a changing reality.

Nevertheless, the vagueness of the constitutional provision does not impose any substantive limit to the legal regulation of the program and therefore its backbone can be unilaterally altered by the federal government without any territorial participation as it resides in a federal law, the *Federal-Provincial Fiscal Arrangements Act*. This deficit of territorial participation has also not been corrected through other mechanisms because the *Federal-Provincial Fiscal Arrangements Act* only requires a simple majority for its amendment and the Canadian Senate does not effectively channel provincial participation at the federal level. As a result, the equalization compact has been regularly modified to adapt to the financial needs of the federal government rather than those of the provinces -establishing caps or modifying the formula to avoid the financial burden that would result of Ontario becoming a recipient-, weakening the integrative potential of equalization (Courchene 2007).

b) Nature of the redistribution

Equalization has been a federal program since it was created in 1957 and, therefore, it is financed solely by the federal government from its own source revenue. Thus, equalization in Canada is of vertical nature being the federal government in charge of its design and administration via the Department of Finance with provincial participation limited to some sporadic discussions at the First Ministers' Conference. In spite of this, it is not uncommon for the political class and the media to present equalization as if it were a fraternal program in which the flow of money is horizontal, ie. from the richest provinces to the less favored ones (Béland, Lecours and Tombe 2022, 227).

Vertical equalization constitutes an integrative force towards those subunits such as Quebec that are net receivers of funds, a condition that the French speaking province has held since the program was first implemented in 1957. Thus, the Canadian equalization program raises Quebec's cost of secession as cutting the ties with Canada would mean a significant reduction of financial resources. In particular, this would have resulted in the province losing more than 13 billion dollars in equalization, about 11% of its budget in fiscal year 2019-20[X]. So it should not come as a surprise that economic factors have traditionally been the Achilles heel of the sovereigntist movement. The importance of equalization for Quebec has been recognized by the province's Premier François Legault who considers it part of the "original deal" of Confederation - although the term equalization was not coined until the 1940s- and thus it is considered as a right for Quebec, highlighting its contribution

to maintaining the province within the federation (Authier 2019)[XI]. Additionally, vertical equalization also promotes national unity as the federal government can present itself as the benevolent benefactor whose financial support contributes to reduce horizontal imbalances and achieve economic convergence with the rest of the country. Thus, the federal government can display equalization as a benefit of the union to foster a sense of belonging to the Canadian common project and to persuade Quebeckers into luring their allegiance to the existing constitutional framework increasing their loyalties towards the center. An argument that seems to have had some success, as Legault himself has alluded to equalization as one of the reasons to be a proud Canadian. The inclusion of equalization in the Constitution in 1982 reinforces this idea with equalization being a tool to promote the federal government's image and show its commitment to the province interests with the program acting as glue to hold the country together (Courchene 1984, 406)[XII].

The total pool of funds allocated to equalization has traditionally been determined on an ad-hoc basis by the central level, according to its financial situation and not to that of the provinces. Unlike in Australia, where GST revenue is earmarked for the program, in Canada the funding of equalization does not depend on any specific tax, and a pool of money is constituted with the federal government's own resources regardless of their origin. In 2009, the *Federal-Provincial Fiscal Arrangements Act* was amended so equalization would grow by the moving three-year average of the growth rate of the GDP as mandated by article 3.4 (5) with the total pool of 14,18 billion $ distributed in 2009 as basis. Although this was aimed at preserving the finances of the federal government, especially when gas and oil prices are high and the fiscal capacities of resource rich provinces soar, this decision also had the effect of reducing the uncertainty of subnational governments in respect of the size of the program. Therefore, provinces now have a legal guarantee that the total funds allocated to the program will not be drastically reduced, increasing the predictability and stability of the equalization compact[XIII]. The capping of the total amount of funds dedicated to equalization established in 2009 - as this will not exceed the previous year's amount increased by the moving average of GDP - means that the Canadian equalization system is close-ended. Further, it is conceived as a stand-alone program where only those provinces whose fiscal capacity falls short of the standard qualify for equalization payments as revenue sharing is materialized through others transfers such as the CHT for health and the CST for social services and post-secondary education (Boadway 2012, 307). Consequently, Canada's equalization

program works as a zero-sum game in which for one province to get higher entitlements, other(s) will receive less funds. This is more pronounced when a province that was not a recipient becomes one of them since the new distribution will result in a significant reduction of the amounts to be received by the rest of the entitled provinces. Also, as Ontario, the most populated province in the federation with nearly 40% the population, tends to be the province with the lower fiscal capacity above the equalization standard, becoming a recipient would significantly alter the distribution of funds as they are calculated on a per capita basis as happened in fiscal year 2009-10.

Although vertical equalization mechanisms are thought to be neutral in integrative terms for not receiving subunits as Béland and Lecours (2014, 340) suggest, this is not the case in Canada due to the fact that any change in the distribution of the funds results in winners and losers as the system works in practice as a zero-sum game. This has crystalized into a disintegrative force that fuels intergovernmental conflicts between receiving and not receiving provinces[XIV], with Quebec often being the scapegoat[XV]. Resource rich provinces such as Alberta or Saskatchewan, also denominated "have provinces", that are not eligible to receive funds from the program as their fiscal capacities are above the average frequently portrait equalization as if it were of horizontal nature (Lecours and Béland 2010, 586-587). These provinces tend to argue that the program is funded by the taxes that the federal government collects in rich provinces and that, as a result, they are subsidizing other parts of the country without getting anything in return. This claim has increased recently as most of the "have provinces" were running deficits while those that were receiving equalization, such as Quebec, had sizeable budgetary surpluses (Feehan 2020, 12). As a response, Saskatchewan has called for a 50/50 solution, a reform of the system in which half of the funds would be distributed per capita without any consideration of territorial equity. This solution would denaturalize the system, undermining the principle enshrined in article 36.2 of the Constitution (Baxter 2018). Alberta, for its part, has repeatedly demanded for the system to be reformed complaining of a lack of financing and deeming the federal refusal to change the nature of the system to be "a slap in face", subsequently claiming for equalization to be abolished from the Constitution (Toy 2018).

The positive effects of equalization for Canadian national unity with respect to Quebec have been used to support criticism of the program, depicting it as an example of the "*fédéralisme rentable*" advocated by Bourassa that results in a privilege for this province to

contain the rise of nationalism[XVI]. These critics are based on the fact that Quebec has been the largest recipient of funds since the program's inception, an aspect that is interpreted as a quid pro quo for maintaining national unity. While it is true that Quebec receives about two-thirds of the total amount of funds allocated to equalization, this is due to Quebec accounting for 23% of the federation's population. However, in per capita terms, provinces such as Manitoba or Prince Edward Island receive comparatively more funds, which also constitute a higher share of their own GDP than in the case of Quebec[XVII]. Likewise, "have provinces" do not subsidize Quebec's more generous social state because funds come from the federal budget with no wealth being drained away from provincial governments.

This misperception that politicians transmit about equalization, together with its nature as a zero-sum game, has resulted in high disintegrative regional tensions with Quebec at the epicenter since it receives the biggest share of the program in absolute terms. In the end, it is paradoxical that a system that has at its genesis the values of cohesion and territorial integration, also by avoiding Quebec's isolation, an internal exile as characterized by Laforest (2014), is used to promote a fallacious discourse towards that province that only helps to feed that very same feeling of rejection that gave so much profit to the sovereigntist movement in the 1980s and 1990s.

c) Level and component of equalization

The level of equalization pursued in a certain system is intrinsically linked to the goal of the program. In Canada, this was set in stone after the principle of equalization was included in article 36 of the 1982 Constitution, outlining the commitment of "Parliament and the government of Canada" to provide provinces with "sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

In this constitutional provision one can observe three basic features of the system. First, like most systems in comparative perspective, Canada's equalization program targets revenue equalization in order to ensure that all provinces can generate income at "reasonably comparable levels of taxation" to provide public services to their citizens. Put differently, equalization must prevent fiscal disparities between provinces from being of such a magnitude that they penalize citizens depending on their place of residence with inferior public services (Stevenson 2009, 27-29). Secondly, the program features partial equalization as it intends to reduce disparities in the provision of public services among the provinces but

not its complete elimination. This is because the aforementioned notion of reasonableness does not mean that public services levels must be identical throughout the federation, but rather comparable as to reduce horizontal imbalances. Finally, article 36 also hints that the program is based on gross equalization as it attributes to the federal government the task of making equalization payments to shorten the horizontal imbalance, thus increasing the revenues of the poorer provinces but leaving the richer unaffected.

Revenue equalization attempts to bridge the gap in the provinces' per capita revenue raising capacity. Succinctly, the fiscal capacities of the provinces are defined as the amount of per capita revenue that a province could raise if it imposed the national average tax rates plus 50% of the actual per capita revenues from natural resources[XVIII]. These theoretical fiscal capacities are compared with the national average and those below are entitled to equalization payments. This process, simple in theory at first sight, involves certain complications in practice as the actual payment will depend on other corrective measures such as the fiscal capacity cap or the need of adjustment payments to avoid that a province that receives equalization payments ends with a higher fiscal capacity that one that does not (Feehan 2020, 5). Thus, after equalization transfers are made the program achieves its constitutional goal of horizontal equity taking the fiscal capacity of the poorer provinces to the national average.

As briefly described, equalization in Canada only focuses on the revenue side, not including any degree of needs compensation. Although needs-based models entail a higher integrative potential than those strictly based on equalizing fiscal capacities -as they compensate for higher costs when providing public services to all territorial subunits, including those that have high fiscal capacities-, their complexity is also superior due to the hurdles to estimate cost of service provision and the political controversy that surround the process. The possibility of including needs compensation within the equalization compact has traditionally been rejected by the provincial governments considering it a federal interference in provincial matters[XIX]. In fact, Quebec under the government of Maurice Duplessis strongly opposed to any scheme that would involve needs compensation when equalization was first discussed in the 50s considering that it would encroach provincial competences (Pickersgill 1975, 309). Thus, considering the Canadian political landscape it is not adventurous to think that including needs compensation in the equalization compact would lead to an increase in intergovernmental tensions fostering disintegration in lieu of integration.

The chosen level of equalization -full or partial- takes into consideration the potential tradeoffs with respect to economic growth, financial stability or political incentives (Ahmad and Brosio 2018, 171-174). There are several factors that explain why the Canadian equalization program has opted for partial equalization instead of full equalization. The first one is the competitive nature of Canadian federalism. The provinces have experienced a significant gain of financial autonomy since the end of the Tax Rental Agreements era which has fostered economic competition among them. Furthermore, Canada is a diverse federation where important cleavages exist between the provinces in terms of size, population and economic structure. This has led to the development of strong local markets with little economic cooperation between provinces until a few years ago (Dymond and Moreau 2012, 74). In this regard, full equalization of provincial fiscal capacities would be a disincentive to economic growth and natural resource development hindering the economic competitiveness of the provinces[XX]. The significant weight that natural resources carry in the fiscal capacities of some provinces -mostly due to revenues generated from oil and gas royalties- is another factor that makes full equalization difficult as it would require a significant increase of the pool of funds dedicated to the program compromising the sustainability of the federal finances. The sustainability of the federal government's finances has marked the evolution of the program since the 70s as it has been reformed several times to prevent sudden increases in oil prices in international markets resulting increase in the fiscal capacity of resource rich provinces from destabilizing the system (Feehan 2005, 187-188). In 2004, Paul Martin's government decided to change the approach towards the allocation of the funds devoted to equalization. As stated above, this decision was intended to limit the federal contribution to equalization in the long-term anticipating a rise in energy prices that could threaten the financial situation of the federal government. The formula-driven system, where the total amount of funds was determined by the fiscal capacities of the provinces, was replaced by a fix-pool system. This path towards reducing the federal contribution to equalization was continued by Harper with the introduction of two new features: the fiscal capacity cap and the GDP growth ceiling. The fiscal capacity cap was designed to limit the payments to eligible provinces because of the exclusion of 50% of revenues from natural resources from the formula. This cap is aimed at avoiding that, after equalization, a recipient province would have a higher fiscal capacity than a non-recipient if the whole revenue from natural resources is taken into account. As, at the time, the total of

funds was formula-driven, it effectively reduced the federal contribution to equalization[XXI], preventing provinces with high revenue from natural resources such as Newfoundland of Saskatchewan from receiving payments[XXII]. In turn, the GDP growth ceiling limited the increase of the total amount of equalization payments in accordance with the three-year moving average rate of growth of the GDP. This measure was intended to reduce the payments to Ontario which had just become a recipient province for the first time as its large population meant that the federal government had to make an additional effort to prevent the rest of the receiving provinces from seeing their payments drastically reduced (Smart 2009, 2-3). These changes perfectly illustrate the existing tradeoff between the level of equalization and the sustainability of public finances, with the latter being prioritized by consolidating the partial nature of the Canadian equalization system.

Equalization transfers are paid to those provinces whose ability to raise revenue is below the national average. This ability is determined according to the Representative Tax System (RTS) which uses a set of representative tax bases -mainly personal income, business, consumption and property taxes- at national average tax rates (Bird and Slack 1990, 919-926). Although the number of provinces taken as benchmark to calculate the standard has varied over time, equalization in Canada has been performed in gross terms since the creation of the program[XXIII]. Therefore, equalization payments are aimed at increasing the fiscal capacity of poorer provinces to the national average as defined by the standard without affecting the fiscal capacity of the richer subunits (Dahlby 2014, 8-10). Despite the fact that the fiscal capacity of richer provinces is unaffected by equalization, this has not prevented the compact from becoming a disintegrative force towards these territorial subunits with Alberta being the loudest critic of the system. In fact, the integrative results of the Canadian equalization system resemble more those of a net system with richer subunits such as Alberta or Saskatchewan complaining that their wealth coming from their natural resources is drained away to subside poorer provinces, reducing the level of mutual trust within the federation. The explanation to this disintegrative force is political as in public discourse, especially by the wealthier provinces, the compact tends to be described as a horizontal model -which are net by definition- in contrast to its real nature as a pure vertical mechanism. Thus, as pointed out by Béland and Lecours (2011, 208-209) equalization has become increasingly politicized in Canada. Successive federal governments have used the program as an instrument to court certain provincial electorates, either offering special arrangements

along the line of those agreed with Newfoundland and Labrador and Nova Scotia, or implementing tweaks to the formula to avoid sudden losses in equalization revenue in the case that Ontario becomes a receiver (Feehan 2020, 9). For their part, some provincial governments, particularly those in resource-rich provinces that do not receive payments -although they did in the past as all ten provinces have received equalization payments at some point the history of the program-, have also targeted equalization to rally public support when demanding more transfers from the federal government. Such politicization has often been based on misleading assertions, such as presenting the compact as horizontal net equalization, that are far from the reality of the system, and has fueled intergovernmental conflict over the compact turning it into a disintegrative force in relation to richer subunits. The politization of equalization and the intergovernmental tensions that it causes also reduce the integrative potential that it is expected from the compact in the case of those provinces that are below the average and that, consequently, receive equalization payments. This is particularly clear in the case of Quebec whose entitlement to equalization is frequently criticized, being presented as unfair by the richer provinces (Béland and Lecours 2014, 347). Criticism of Quebec's status as a recipient province implies a weakening of the ties between the different units that integrate the Canadian federation reducing the level of mutual trust. Alberta's decision to hold a referendum to call for the elimination of equalization from the Constitution only deepens this lack of trust reducing the integrative potential of equalization also towards Quebec. In fact, behind this referendum, the impact of which at the federal level has been minimal, lies a desire on the part of Alberta to penalize Quebec for its refusal to allow new pipeline projects to pass through the province's territory[XXIV].

The politicization of the compact has proven to be a decisive determining factor in the future of equalization, discouraging any debate about the convenience of incorporating needs compensation or aiming at a higher level of equalization. While the lesser integrative potential of revenue equalization has been compensated with separated grants targeting needs-compensation such as the Canada Health Transfer (CHT) and the Canada Social Transfer (CST), full equalization seems a nonstarter as it would increase the political confrontation to levels that could destabilize the political system. Thus, the politicization of the compact, undermines the performance of the compact in relation to both richer -fostering disintegration- and poorer provinces -reducing the integrative potential- being the later especially clear in Quebec.

d) Conditionality

Unlike the other two major federal transfers (CHT and CST), equalization has been characterized since its first implementation by the absence of conditionality either input or output based (Bird 2018, 858-965). This means that funds coming from equalization do not have any strings attached regarding their expenditure and thus provinces enjoy full discretion in their use. In the same vein, there is no obligation for the recipient provinces to implement measures to accomplish a certain result such as providing better services to their residents. Accordingly, the funds can also be used to lower taxes or reduce debt (Béland et al 2017, 24). This lack of conditionality is not limited to the transfer itself but also covers the operability of the compact. As the calculation of the fiscal capacities of the provinces is not based on real revenue but rather on theoretical revenue at national standards, the equalization program does not penalize provinces that use their fiscal autonomy to pursue policies of low taxation or low level of public services. This is in contrast to other federal transfers such as the CHT which is subject to compliance with a series of principles, although they are rarely enforced because checking the compliance would entail a big political cost (Cameron 2008, 265-268)[XXV]. Consequently, equalization in Canada is designed as a general-purpose block grant that substitutes own revenue in line with the academic prescriptions for these programs (Boadway 2006; Martinez-Vazquez and Boex 2004; Shah 2007a).

The unconditional nature of equalization is an integrative force not only towards provinces that get equalization payments but also in relation to those that have expectations to qualify in the near future as they have the safeguard that in case that their fiscal capacity ends up below the national average, they will get payments without any loss of autonomy. Thus, unconditional equalization is integrative in relation to Quebec, strengthening the ties between the province and the federation while reducing the potential benefits of secession. There are two reasons that support this idea. First, unconditional equalization raises the cost of secession for those subunits that are net receivers of funds (Béland and Lecours 2014, 340). This is because in the event of secession Quebec would not only loose the more than 13 billion dollars that receives in equalization payments but also would not experience any gain in autonomy due to the absence of conditionality attached to those payments. Therefore, as far as it remains unconditional there is no tradeoff between equalization and autonomy in the case of Quebec or any other province that would like to cease to form part of the federation. Conversely, a conditional equalization program would increase the benefits of

secession, lowering its cost, as it will create a trade-off between the extra funding and a higher degree of self-government. Second, equalization can be used as a nation-building instrument to improve the image of the federal government, fostering allegiance to the federation. The federal government can display the program as one of the benefits of the union as this transfer improves the financial situation of the recipient government without imposing any obligations. Otherwise, imposing conditionality would reduce this benefit as equalization would turn into a tool to constrain provincial autonomy.

Notwithstanding the integrative potential of unconditional equalization, this characteristic can also lead to perverse economic incentives with some disintegrative potential. The absence of conditionality coupled with the formula used in the calculations -that results in equalization being a zero-sum game- can lead to "beggar-thy-neighbour" policies that could weaken the ties between the provinces hindering national unity. An example of this practice was the closure of the province-owned nuclear plant of Gentilly-2 in Quebec. This decision reduced the revenue that Quebec gets from natural resources lowering its fiscal capacity and increasing its equalization entitlements by 270 million as the province further diverged from the average. In addition, due to the zero-sum nature of the compact, the closure also had an impact in other recipient provinces that saw their payments reduced. This was the case of Ontario -a recipient province at the time- that had its equalization entitlement reduced of around 160 million dollars (PBO 2014, 8-9)[XXVI]. This example perfectly illustrates how the combination of the ceiling on the total payments and the lack of conditionality give room for "beggar-thy-neighbour" policies, discouraging recipient provinces from developing their natural resources -or increasing taxes- as this will reduce their equalization payments[XXVII]. For this reason, conditionality could be used as a soft budget constraint to discourage strategic behavior by territorial governments aimed at getting a higher share out of the program avoiding negative externalities on other constituent subunits and therefore reducing potential for disintegration and reinforcing mutual trust.

Despite these possible negative externalities that could be countered with some conditionality, the unconditional nature of the Canadian equalization program must be considered overall an integrative force in respect of Quebec as it raises the cost of secession and strengthens the bond between the province and federal government increasing the allegiance to Canada as a common project while respecting its autonomy to establish its own tax and service provision levels. The potential side effects mentioned above can be solved

through adjustments in the calculation formula as Tombe (2018, 906-917) proposes and hence do not require the inclusion of conditionality which would turn the compact into a strong disintegrative force.

e) Institutional administering of the program

Canada's federal system has followed its own path in the management of equalization. Despite intergovernmental forums and independent agencies being the dominant trend in comparative perspective, the Canadian program is solely administered by the center with provincial participation being marginal. This has consolidated a model that represents the paradigm of federal-provincial diplomacy where the provinces lobby the federal government to influence its decision-making in setting and managing the main federal transfers, including equalization.

The federal government has been in charge of administering the compact since its creation in 1957, being the Department of Finance the responsible administrative body. Consequently, the management of equalization is in the hands of the Executive with Parliament also playing its role as changes to the compact are enacted as part of the federal budget, as they represent federal spending programs (Boadway 2008, 132)[XXVIII]. Thus, the federal executive enjoys full discretion to establish, modify, and terminate the terms of equalization transfers as long as it remains committed to the constitutional principle of equalization. However, the federal government's management of the program is characterized by opacity and lack of transparency. Beyond the constitutional principle of equalization and some provisions of the Federal-Provincial Fiscal Arrangements Act, there are no further legal provisions about the management of the equalization program by the Department of Finance. Further, the technical information relating to core aspects such as the formula is not publicly disclosed and it is not easily accessible to the public due to the limitations imposed by the 1982 Access to Information Act (Béland et al 2017, 43). The lack of transparency combined with limited public knowledge about how the program works in practice pave the way for the politization of the program and its instrumentalization.

Another factor that contributes to the politization of equalization is the low degree of territorial participation in the administration of the compact. Provincial participation is not legally required and, although provinces are sometimes consulted, the federal government may unilaterally alter the compact or extend it in its present form without any intervention

from the former. This was the case in 2018 when the federal government decided to extend the current program until 2024 without changes, despite the numerous complaints of several provincial leaders calling for the overhaul of the distribution of the transfer payments. In this case, provincial participation was limited to some consultation during a Finance Ministers' meeting in December 2017 in which equalization was not even the main point of discussion as the meeting was dominated by discussions on cannabis taxation.

Although the administration of equalization is dominated by the central institutions, intergovernmental cooperation also plays a -small- role as the previous example illustrates. The Federal-Provincial-Territorial Meeting of Ministers of Finance is an intergovernmental body composed by the federal Minister of Finance and its provincial and territorial counterparts that generally meets twice a year to discuss economic and fiscal issues. Within this forum there is a specific committee -the Fiscal Arrangements Committee- that conducts consultations on fiscal transfer issues, including the equalization program. This forum serves as a venue where the provinces can express their views and concerns about equalization in order to demand changes to the compact from the federal government. However, these meetings are consultative and therefore any agreement that may be reached is a mere recommendation to the federal government.

Provinces have also recurred to horizontal cooperation to assert their positions and try to influence the federal government during the periodic renewal processes of the equalization compact. The Council of the Federation (COF), an intergovernmental body created in 2003 grouping the provinces and territories, has adopted a proactive role on this regard. After Paul Martin's decision to implement a "new funding formula framework" in 2004, the COF decided to commission a group of experts to form an independent advisory panel with a mandate to examine the vertical and horizontal fiscal balances among Canada's federal, provincial, and territorial governments and to make recommendations as to how any fiscal imbalances should be addressed[XXIX]. Although some of these proposals were later accepted by the federal government – which appointed its own panel, the Expert Panel on Equalization and Territorial Formula Financing, to expressly deal with equalization – horizontal cooperation has not been very effective when it comes to establishing a common position on equalization due to the diversity of viewpoints among the provinces.

The centralized management of the program with very limited provincial input results in a centrifugal force with disintegrative effects. The lack of effective mechanisms of territorial

participation in the management of the program – the Fiscal Arrangements Committee deals with all federal transfers not being equalization its primary objective – has fostered the development of a model of federal-provincial diplomacy where the provinces compete with one another to influence the federal government's decision-making in the design and daily management of equalization. This intergovernmental bargaining with the aim of lobbing the federal government to introduce changes in the compact that are advantageous to a given province increases the politicization of the compact and fosters disintegration. The side deals signed by the federal government with Newfoundland and Nova Scotia in 2004 were the result of this as the federal government tends to be keener on certain provincial interests depending on its reelection needs. This circumstance also explains why proposals that would be negative for Quebec's interests – such as changing how revenue from hydroelectricity is computed in the formula – are a nonstarter due to the significant weight that Quebec's seats have in a federal election. Thus, this circumstance plays in the province's favor when lobbing the federal government also in respect of equalization. Although this factor could be considered integrative towards the center, it also entails disintegration in respect of other provinces that come out as "losers" because they are unable to exert sufficient pressure on the center government to take their demands into account.

As an alternative to intergovernmental bargaining and with the aim of reducing the existing politization of the system, Béland and Lecours (2016, 12-13) have proposed the creation an independent body following the example of the Australian Commonwealth Grants Commission to advise the federal government and provinces on equalization. The Australian model, much in vogue among economic experts, has been replicated in other Westminster style systems of government, although with little success (Ahmad and Searle 2006, 397-398)[XXX]. However, the creation of an independent agency was rejected by most of the provinces when asked by the Advisory Panel on Fiscal Imbalance in 2006[XXXI]. Although establishing an independent agency in charge of the program would put an end to the federal government dominance in the management of equalization and potentially depoliticize equalization fostering integration, this would also eliminate the provincial capacity to influence the federal government through intergovernmental diplomacy. Thus, despite the flaws of the current system and the disintegrative effects that it may entail due to the dominance of federal unilateralism and limited intergovernmental cooperation -which is generally held behind closed doors and mostly informally-, provincial governments seem to

prefer to maintain their capacity to lobby the federal government to influence decision making over equalization policy with the aim to get a better share of the deal. Put differently, provinces are not willing to renounce the influence that partisan politics can have over equalization by relinquishing the administering of the program to an independent agency. This is particularly evident in the case of Quebec, as the creation of an independent agency may result in changes to the formula that could penalize the province' interests. Quebec has greatly benefited in the past from the federal government's need to gain votes in the province. This was the case of the 2007 reform, which resulted in a significant increase of funds for Quebec, and that for many was aimed at boosting support for the Conservative Party in 2007 in an upcoming federal election (Béland et al. 2017, 44). For this reason, the creation of an independent agency does not appear to be a better outcome in integrative terms than the status-quo as provinces would lose the possibility to influence the federal government through federal-provincial diplomacy, being this a salient element of Canadian federalism when it comes to financial relations.

f) Length of the program

Interterritorial solidarity programs are aimed at achieving the long-term goal of horizontal equity. However, the economic reality of the provinces changes over time and the system cannot be indifferent to those changes. The development of natural resources in the West, the decline in the manufacture sector in Ontario during the economic crisis or the revenues from offshore oil and gas in Newfoundland are factors that had an important impact in the fiscal capacities of the provinces and that, as a consequence, have conditioned the federal government's policy in respect of the program.

Equalization was conceived as a permanent program when it was first designed as it was part of a larger scheme of federal-provincial fiscal arrangements. This long-term vocation was reinforced in 1982 when the principle of equalization was included in the Constitution. However, although the essence of the program has remained, change has been a constant throughout the program's history with the technical aspects varying greatly over time. These changes have been necessary not just because of variations in provincial needs but also to implement ad-hoc political solutions to commitments of the federal government with certain provinces, or to meet the financial needs of the center and avoid a sharp increase in the resources devoted to the program. For instance, the initial version of the program did not

last for long, and less than five years after its enactment Prime Minister Diefenbaker proposed some amendments to include natural resources into the formula. This new formula was changed after just two years to fulfill Pearson's electoral promise of going back to the two-province standard (Davenport 1982, 118). Even major reforms such as the one conducted in 1967, when the program went from equalizing three sources of revenue (individual and corporate taxes and succession duties) to a much more complex formula based on the Representative Tax System that included several revenue sources, only lasted for about five years until further changes were needed to adapt to the rise in oil and gas prices.

Despite the long-term vocation of equalization, reinforced with its constitutional inclusion, the different programs in place have often featured sunset clauses establishing the time upon which they needed to be renewed. This has not been always the case as after Martin's major overhaul of equalization in 2004, the program did not feature any kind of sunset clause neither there was a legal requirement for a periodic evaluation of the performance of the program. A sunset clause was reintroduced in 2007 when Harper reformed the compact following most of the recommendations of the Expert Panel on Equalization. The clause was included in article 3 of the Federal-Provincial Fiscal Arrangements Act, with the duration of the program set for the "period beginning on April 1, 2007 and ending on March 31, 2014". In 2013, that article was amended to extend the program until 2019 and the same happened in 2018 with the current program in force until 2024. Sunset clauses have also been applied to limit in time the scope of several ad-hoc agreements compensating certain provinces for a loss of equalization entitlements. For example, the side deal concluded with Nova Scotia expired at the end of March 2020 as mandated by article 3.71 (2) b of the Federal-Provincial Fiscal Arrangements Act.

A sunset clause establishes the maximum length of the program under the current conditions. This means that the compact will expire after that date unless renewed. The renewal can be under the same conditions, as was the case in 2018, or implement changes to the compact as the Harper government did in 2006. The existence of a sunset clause can be considered as an integrative force as it offers some certainty to the provinces about the duration of the program, although it can be unilaterally changed by the federal government at any time. The sunset clause included in Federal-Provincial Fiscal Arrangements Act also allow provinces to anticipate the termination of the current program and lobby the federal

government for changes that would be advantageous to them. In Canada, the risk of intergovernmental conflicts during renewal processes that would result in disintegration is rather low as the federal government can unilaterally proceed without involving the provinces in the process. However, the example of 2018, when the federal government quietly renewed the compact for five more years, shows that it was aware of this risk and wanted to avoid clashes with the provincial executives that could undermine its popularity in the next federal election.

Another factor that deserves to be mentioned is the absence of ultra-activity clauses to assure that the expired program continues to be applied on a temporary basis until it is renewed. Such mechanism is not necessary in Canada as the federal government can amend the Federal-Provincial Fiscal Arrangements Act at any time to extend the program and there is no risk of opportunistic behavior by other actors to influence the decision-making process. In the unlikely event that the federal government does not, the compact will expire and equalization payments to the provinces will cease as there will not be a budget provision to finance them. This will create a political conflict and the provinces will likely go to court alleging a violation of section 36 of the 1982. In that case, it will be for the Supreme Court to decide about the scope of the commitment "to the principle of making equalization payments", circumstance that will certainly determine the outcome of the judgment.

Despite the need to renew the compact before it expires, the law does not call for a formal process of review of the program. This feature is common in countries with an independent agency in charge of administering the compact, which is not the case in Canada. Despite this, one of the recommendations of the Expert Panel on Equalization and Territorial Formula Financing called for the federal government to report annually to Parliament on key measures related to equalization[XXXII]. In particular, the federal government should inform Parliament of any "major changes made in the program" as well of "issues raised by the provinces and territories, and how those issues were addressed". In addition to this annual reporting, the experts also recommended the publication of a public discussion paper before every renewal that would serve as basis "for a Parliamentary review process in which provinces, academics, and interested parties would be able to express their views"[XXXIII]. The panel also asked for the publication of this paper in the event of changes being made to the compact before the period set by the sunset clause. Although these measures would have reinforced the integrative potential of the compact, establishing a

formal mechanism to review the effectiveness of the program while involving all stakeholders in the renewal process, they were not put in place by the federal government, which decided to establish the length of the program on an ad-hoc basis in the Federal-Provincial Fiscal Arrangements Act without imposing any duty of carrying a formal review process or informing Parliament.

g) Dispute resolution

The strong political dimension that equalization mechanisms embed often leads to the coexistence of conflicting visions of the program that may result in intergovernmental conflicts. This phenomenon can be clearly observed in Canada, where the provinces and the federal government frequently clash due to their diverging views of the essence and operation of the program. The political controversy that surrounds the program, which has increased in recent years, should, in principle, be solved politically through intergovernmental cooperation. However, the unilateral management of equalization by the federal government makes this difficult as there is no legal obligation to involve the provinces in the process. If, on the contrary, the dissatisfaction of a province with the compact goes further than political criticism, this may result in a legal dispute that must be resolved in court.

Given the constitutional entrenchment of equalization, it would be theoretically possible to bring a case before the Supreme Court alleging that some aspects of the program violate section 36. However, despite the controversy that the program causes in some provinces, the compact has never reached the Supreme Court. In 2007, the government of Saskatchewan asked for a reference to the provincial Court of Appeal -that later could be appealed to the Supreme Court- claiming that some parts of the formula violated the constitution as they were not "fair and equitable", but the appeal was eventually dropped after a government change in the province (Béland et al 2017, 45-6).

Despite the centralized management of the program, the provinces have opted to pursue the intergovernmental path through federal-provincial diplomacy to settle disputes over equalization instead of initiating legal challenges, reducing the risk of disintegration and avoiding the judicialization of equalization. The absence of litigation on equalization is explained by the unwillingness of the provinces to challenge the program in court. There are several reasons for this. First, it is not guaranteed that the court will accept the case as there is a high possibility that the compact would be deemed as a political question and then non-

justiciable (Hogg 2000, 156). This is due to the narrow scope of section 36, that only commits the federal level to the principle of equalization, which reduces the Court's margin of interpretation when analyzing the particular elements of the compact. Because of this, Kellock and Leroy (2009, 27-9) argue that most elements of the program cannot be challenged in court on grounds of constitutionality, since only the principle of equalization or inter-territorial solidarity enjoys constitutional status. Secondly, challenging equalization in court may be counterproductive for provincial interests as this would hinder any negotiation attempts with the federal government. Provincial governments recur to federal-provincial diplomacy to influence the federal decision making over equalization. If a legal challenge is launched, negotiations will probably be suspended until the court makes a decision. In fact, this was one of the main arguments put forward by the government of Saskatchewan to drop the case before the Court of Appeal as it argued that the challenge deteriorated the relations with the federal level not just on equalization but also over other issues, hindering provincial interests (CBC 2008). Additionally, political bargaining reduces the risk of an adverse outcome as it could be reversed through political negotiations while this would be more difficult in the event of an unfavorable court ruling that can hardly be changed. This is of particular importance as the Canadian Supreme Court tends to favor the federal government over the provinces (Brouillet 2007, 152), an aspect that further disincentivizes launching a legal challenge on equalization.

This perception of the Supreme Court as more favorable to federal interests than to provincial ones constitutes a disintegrative force and explains why launching a legal challenge over equalization has not been used in Canada as a tool to force the federal government to negotiate some aspects of the compact, as it happens on the contrary in Germany. As a result, provinces that would like to see some changes in the compact have had to find alternative ways to influence the federal government to implement them. An example of this is the decision taken by Alberta to call a referendum on equalization. Instead of directly confronting the federal government in court, the province decided to put a question to the people over the future of the program with the intention of persuading the federal government to revise the compact to introduce new elements that would favor the province. In the end, the referendum was conceived as a political statement to increase the province's bargaining power in the next renewal process and "force the federal government to

negotiate", as Alberta's Premier Jason Kenney reckoned, to gain some concessions from the federal government (CBC 2021).

The likely non-justiciability of the compact due to the ambiguity of the constitutional provision on equalization and the perceived tendency of the Supreme Court in favor of the center have discouraged provincial governments from litigating over equalization, forcing them to pursue dispute resolution through intergovernmental cooperation. This predominance of conflict resolution through intergovernmental negotiations over court litigation delivers a better outcome in integrative terms. Although conflicts are always divisive, intergovernmental cooperation entails the lowest risk of disintegration whereas the judicializing of equalization would increase territorial tensions weakening the existing patterns of interaction among governments.

3. Concluding remarks

In Canada's origins are intricately linked to the idea of territorial solidarity. The Fathers of the Confederation were immediately aware that any long-lasting union depended on guaranteeing sufficient financial resources to the provincial governments so that they could freely exercise their powers. Thus, the idea of nation building has gone hand in hand with the Canadian equalization program since its creation in 1957. The inclusion of the program into the Constitution highlighted the importance that was given to territorial solidarity during patriation as a process towards building a common social citizenship. It is not by chance that the program embeds an idea of fraternity and solidarity that promotes integration and national unity. The table below provides a graphic summary of the analysis carried on in the article.

Component			(Dis)Integrative potential*	Factors to consider
Legal entrenchment of the program	Principle enshrined in the Constitution with the program developed in a federal law		Integrative ↑↑	Narrow scope of the constitutional provision High constitutional rigidity prevents its reform
Nature of the redistribution	Vertical funded with federal taxes	Receiving province	Integrative ↑↑	
		Not receiving province	Disintegrative ↓↓	Fuels intergovernmental tensions with Quebec
	Close-ended system		Disintegrative ↓↓	Zero-sum game where any change results in winners and losers
	Stand-alone program with revenue sharing performed through others federal transfers		Disintegrative ↓	
Level and component of equalization	Partial equalization	Richer subunits	Disintegrative ↓	Treatment of natural resources
		Poorer subunits	Integrative ↑	
	Gross equalization	Receiving province	Integrative ↑	Lower in the case of Quebec because of politicization
		Not receiving province	Disintegrative ↓	Compact is presented as net in political discourse
	Revenue		Integrative ↑	Needs-compensation via CHT and CST
Conditionality	No		Integrative ↑↑↑	
Institutional administering of the program	Central agency with minor role for national parliament		Disintegrative ↓↓	Intergovernmental bargaining through federal-provincial diplomacy
Length of the program	Sunset clause (5 years) in federal law		Neutral	Unilateral renewal by the center
Dispute resolution	Supreme Court	Perceived as favorable to the center	Disintegrative ↓	Not used in practice
	Intergovernmental cooperation	High levels of mutual trust and cooperation	Integrative ↑	Consolidated model of federal-provincial diplomacy

*The number of arrows (from 1 to 3) refers to the intensity of the (dis)integrative potential of each component.

Constitutional entrenchment has led to the general acceptance of inter-territorial solidarity by all political actors, although they frequently disagree on its nature and extent. In fact, equalization can be considered as a benefit of the union with the program being aimed at ensuring that all provinces can generate income at "reasonably comparable levels of taxation" to prevent fiscal disparities between provinces from being of such a magnitude that they penalize citizens depending on their place of residence and that would result in inferior public services. Equalization has become a nation building instrument that not only raises the cost of secession of those subunits -such as Quebec- that are net receivers of funds, but that also promotes national unity and increases the allegiance to the center. In other words, equalization has been used by the federal government as an instrument to foster a sense of belonging to the Canadian common project and to persuade Quebeckers into luring their allegiance to the existing constitutional framework. The impact of equalization in the

evolution of the Canadian federation has been such that the nationalist Premier of Quebec, François Legault, has recognized the contribution of the program to maintaining the province within the federation. Further, equalization has always been a tricky issue for Quebec's nationalists as secession would imply losing a large amount of funds without gaining much autonomy because of the unconditional nature of equalization.

The Canadian experience also features some disintegrative trends, that not only hinder the integrative potential in relation to Quebec but that also threaten to create tensions in the resource-rich provinces like Alberta. Equalization has become increasingly politicized in recent years, by both the federal government and some non-recipient provinces. At the same time that the federal government used it to court certain provinces and defuse the appeal of the secessionist option in Quebec, some non-recipient provinces had difficulties to accept the use of equalization as an accommodation or nation building tool. In fact, Quebec has been sometimes used as the scapegoat, presenting the program as a sort of reward to Quebec for staying in the federation. In the end, the fact that it is construed as a close-ended system in which any change results in winners and losers has further poisoned the political discourse over equalization, fostering disintegration. Another factor that contributes to the politization of the compact is the lack of territorial participation in the decision-making processes over equalization. When participation is non-existent or ineffective, it may be difficult to channel contestation within the constitutional framework, with the risk of resulting in pathological behaviors that spread instability to the federal system as a whole. The referendum held in Alberta is one example of these pathological behaviors, illustrating that the risk disintegration is not limited to Quebec.

Despite these disintegrative trends, the Canadian equalization program has been able to channel contestation within the system, keeping conflicts over equalization 'under control' notwithstanding the matter as such is becoming a major source of intergovernmental conflict -both vertical and horizontal- due to enhanced politicization: both federal and provincial politicians have articulated claims and threats around the program with these increasing during periods of economic recession. The program has also proven to be a tool of territorial integration that has contributed to the accommodation of Quebec, by reinforcing the loyalty toward the center. Additionally, most of the disintegrative elements -such as the controversy about the share of natural resources that should be included in the formula, or the recent politicization of the program- could be countered with reforms. In particular, it would be

advisable to consider implementing effective mechanisms for channeling territorial participation in the governance of the compact or relinquishing this task to an independent agency to end with the federal government unilateralism that characterizes the governance of equalization in Canada and that seems to be one of the main causes of intergovernmental conflicts between receiving and not receiving provinces, with Quebec often at the center of the debate.

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II Sorens (2015) and Rode, Pitlik and Borrella Mas (2017) have addressed this subject from the point of view of political science and economic theory, respectively, leaving aside an important facet of this phenomenon as is the legal perspective.

III The provincial governments had to pass legislation authorizing the rental of the provincial taxes to the federal level to give effect to the Tax Rental Agreements. For example, the *Federal-Provincial Agreement Act, 1957*, ch. 142 in British Columbia or *The Tax Rental Agreement Act, 1957*, ch. 22 in Saskatchewan.

IV The new wording of the article would have been the following: *Parliament and the government of Canada are committed to making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.*

V *An Act respecting constitutional amendments* S.C. 1996, c. 1.

VI Formally, the federal government must seek the consent of two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Prairie provinces but as the population of Alberta exceeds that of Manitoba and Saskatchewan combined, the practical effect of this provision is a veto right for Alberta at the same level as that granted to British Columbia, Ontario and Quebec.

VII The referendum was held on October 18, 2021, with 60% of voters supporting the removal of equalization from the Constitution with a turnout of just 38%.

VIII BILL C-263 *An Act to amend the Federal-Provincial Fiscal Arrangements Act (equalization)*, 2nd Session, 43rd Parliament, 69 Elizabeth II, 2020-2021.

IX The Charlottetown Accord 1992 would have reworded section 36.2 in the following terms: "*Parliament and the Government of Canada are commited to making equalization payments so that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.*"

X For fiscal year 2019-20 equalization payments to Quebec were 13,124.4 while the total revenue amounted to 117,374 (figures in $ millions). Source: Ministère des Finances du Québec.

XI In the same vein, in a Twitter exchange with the then Quebec's Minister of International Relations, the Francophonie and External Trade, Jean-François Lisée, Legault alleged that equalization made secession less likely as it was not in the interest of Quebec.

XII This idea was behind the side deals that the Martin government signed with Newfoundland and Nova Scotia to compensate these provinces after they become "have provinces" due to the income from their offshore natural resources which were also aimed at making political by improving the federal government's image in those provinces.

XIII The use of the moving average as index instrument mitigates possible fluctuations resulting from extreme episodes such as the acute recession caused by the pandemic.

XIV As an example, the dialectical confrontation between the Premiers of Alberta and Quebec, Kenney and Leagult, respectively, about the history and practice of equalization. See Pilon-Larose 2019.

XV Quebec's strong opposition to the construction of new pipelines, vital to the economy of western provinces, has also helped to increase the fuss about the unfairness of the program as the province is thought to benefit too much from equalization.

XVI Bourassa used the expression *fédéralisme rentable* as an electoral slogan in the 1970 provincial election campaign, highlighting the benefits of Quebec's membership in the Canadian federation as opposed to the sovereigntist discourse of the *Parti québécois*.

[xvii] In fact, Quebec is typically the province that receives the least funds per capita, except in those years when Ontario was entitled to receive equalization payments.
[xviii] In this step of the calculations, according to article 3.2 (2) of the Federal-Provincial Fiscal Arrangements Act any province may elect either to include 50% of the revenue from natural resources or none, depending on what is most beneficial.
[xix] See Achieving A National Purpose: Putting Equalization Back on Track, Expert Panel on Equalization and Territorial Formula Financing, 2006, 39.
[xx] In fact, one of the most common criticisms from the "have provinces" towards the program is that it discourages receiving provinces from the developing their natural resources as doing so will result in a reduction of their entitlements.
[xxi] The fiscal capacity cap was maintained after the reform of 2009. As the system is no longer formula driven it does not affect the federal contribution to the program but only the distribution of those funds among the provinces.
[xxii] Newfoundland was partially compensated with a payment of two thirds of its previous entitlement to equalization the first year that the province was not eligible and another one of one third the following year as provided by article 28 of the *Nova Scotia and Newfoundland and Labrador Additional Fiscal Equalization Offset Payments Act* (S.C. 2005, c. 30, s. 85).
[xxiii] See Courchene (1984) for a brief history explanation of the different standards used during the history of equalization in Canada.
[xxiv] Quebec's repeated refusal to allow new pipelines to pass through its territory has aggravated tensions with Alberta, whose oil industry needs them to increase its export capacity amid the severe recession that has hit the province in recent years.
[xxv] The eligibility for the CHT is subject to compliance with the principles enshrined in article 7 of the *Canada Health Act R.S.C., 1985*, those being public administration, comprehensiveness, universality, portability and accessibility.
[xxvi] Ontario's 2014 budget reflected the province's unease with this result, claiming that the reduction in equalization payments to the province was due "to factors that have no relation to Ontario's economic performance" but that as a result Ontarians will "subsidize programs and services that themselves may not enjoy".
[xxvii] The lack of soft budget constrains to discourage strategic behavior has been studied by Tombe (2017) who suggest that provinces can implement policies that would increase their equalization payments. For instance, if the provinces with the lowest fiscal capacity, Prince Edward Island, were to increase its income or personal tax rate by one per cent, this would result in an increase of the payments to that province at the expense of the others due to its effect in the standard and the zero-sum nature of the compact. He has also developed a tool where one can simulate how equalization payments would change in the event that the provinces adopt certain policies: https://financesofthenation.ca/equalization/
[xxviii] The minor influence of Parliament is due to the de facto fusion between the legislative and the executive that characterizes the Westminster system of government, a feature that has led Monahan and Shaw (2013, 103) to affirm that there is no real separation of powers between the legislative and the executive functions in Canada.
[xxix] Reconciling the Irreconcilable. Addressing Canada's Fiscal Imbalance, Council of the Federation, 2006.
[xxx] See Watts (2003) and Boex and Martinez-Vazquez (2004).
[xxxi] Reconciling the Irreconcilable. Addressing Canada's Fiscal Imbalance, Council of the Federation, 2006, p. 39.
[xxxii] Achieving a National Purpose: Putting Equalization Back on Track - Expert Panel on Equalization and Territorial Formula Financing, p. 66.
[xxxiii] Ibid, p. 67.

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The territorial aspect of second chambers in Latin American federal countries

by

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Abstract

Second chambers are often designed to represent territorial interests, but they are prone to being taken over by political parties which undermines legislators' territorial focus. In traditional federal theory, a senate mediates the relationship between democracy and federalism because it enables subnational participation in national government. Recent literature challenges this assumption and provides evidence of inefficient territorial representation by the second chamber. The inability of a senate to represent territorial interests in national politics has been called Madison's paradox. The findings of this study of territorial representation in bicameral and federal Latin American countries support Madison's paradox and reveal that second chambers in federal Latin America have been ineffective in expressing the territorial dimension. Alternative formats of subnational participation in central government have emerged, such as executive-based bodies comprising the central and regional governments for political negotiations and the coordination and implementation of policies.

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Key-words

Federalism, democracy, second chambers, comparative politics, Madison's paradox

1. Introduction

There are various theoretical explanations for the existence of a second chamber[II] as part of the legislative power of a country. Although such legislative chambers also exist in unitary countries, in the field of federal studies, they are often related to the adoption of federalism in a country. Recent arguments, however, cast doubt on the efficiency of the senate for territorial representation and participation of subnational units in the political life of a federation. The territorial representation expected of the second chamber mostly relates to the formal composition of the house, based on the election of subnational, unit-based senators. Territorial participation of the upper chamber is reflected by the extent to which senators vocalize demands from their original state or province to influence the direction of national policy.

The essence of the arguments that question the ability of the senate for territorial representation and participation is its institutional design, prone to a high potential for party take-over. When the party system dictates the senators' preferences more than subnational demands, the senate resembles the lower house, duplicating the function of the political arenas. So, the take-over of the senate by parties dissociates it from the task of representing subnational units. The incongruence of expectations for the territorial character of the second chamber and the evidence of its inability for this task is called "the Madison paradox"[III] and affects most federal countries[IV].

Madison's paradox has mostly been discussed in theoretical terms, and generally refers to European and American federal experiences. The present study is a contribution to this discussion, empirically examining the paradox and applying it to Latin American cases, employing a combination of legal, political and pragmatic viewpoints.

The assessment of the territorial character of the second chamber in Latin American federal countries will start from (1) the constitutional role played by the senate in selected cases and (2) its institutional features, passing through (3) the overrepresentation index (Samuels & Snyder, 2001; Snyder & Samuels, 2004) for each country, and also includes a brief analysis of (4) the party system in each house. The first two elements of analysis reflect the territorial aspect of the second chamber, revealing the original purpose of the institution, traditionally associated with the US federal set-up. The latter two indicate the potential of

political take-over of the upper chamber by political parties, depending on the general orientation of the system, whether more nationalised or regionalised.

Latin American federal senates are the focus of this study as they developed specific institutional characters over time, regardless of the patterns established by the U.S. model[V]. Four countries in the region have formally adopted federalism: Argentina (1853), Brazil (1889), Mexico (1824), and Venezuela (1811). Venezuela dropped its second chamber in the constitutional reform of 1999 (Brewer-Carías, 2004). Therefore the comparative analysis of the senates will concentrate on the other three cases.

This paper proceeds as follows: I will introduce Madison's paradox and its key arguments; then I summarize the main elements of the institutional profiles and comparative observations on Madison's paradox in Latin American federal countries. Finally, I will discuss alternatives to territorial representation in federal countries and indicate complementary avenues of research.

2. Second chambers between democracy and federalism

Doria (2006) and Palermo (2018) raised a thought-provoking topic in the debate on federalism and its relationship with democracy: are second chambers truly a fundamental element of federal democracy, and, if yes, do they succeed in promoting territorial representation and participation of subnational units in national political life?

Second chambers have, traditionally, been regarded as a federal element ever since the advent of the US model, which had broad repercussions due to "The Federalist" papers (Hamilton et al., 2003). Although not essential to the federal character of a country (Watts, 2006), the second chamber would affect the operation of democracy, strengthening the principle of separation of powers (Benz & Sonnicksen, 2016). Second chambers also emphasise checks and balances and disperse authority to limit the tyranny of the majority (Watts, 2006), and, depending on how strong second chambers are, can act as veto players (Tsebelis, 2011).

In federal theorising, the second chamber would exert its legislative competences along with the tasks of territorial representation and participation of subnational units vis-à-vis the federal government. In this context, territorial representation means, "'(…) making present of something absent' while 'not making it literally present'. Representation, then, meant

'making present indirectly', via an intermediary (...)" (Burgess, 2006, p. 193). Since the advent of the Federalist Papers, the basic questions regarding representation at federal level are which territorial interests and should be represented, how to achieve equality of representation, and, finally, how 'representative' representation can be, i.e., representation as proportionality.

Territorial participation, in its turn, avoids isolation and allows influencing common policies that affect the constituent units. Theoretically, the participation of subnational units in national politics takes a representative form, with the upper house performing the tasks of law-making and control over the federal government. The second chamber "ideally represents the interests of the constituent units in the process of federal law-making" (Gamper, 2005, p. 1315). To guarantee the balance of power between the two chambers, it is fundamental for the second chamber to have veto power, in general, but especially for territory-related matters, which means those that could violate the constituent units' interests (Gamper, 2005; Tsebelis, 2011).

In democratic theory, the role of the federal chamber depends on the understanding of the relationship between federalism and democracy. For some scholars, the second chamber represents a constraint to majoritarian democracy[VI]. This derives from the argument of a total incompatibility between democracy and federalism (Gibson, 2004; Stepan, 1999a, 1999b). By proposing the continuum demos-constraining/enabling[VII] for classifying federal experiences, Stepan highlights the limits to the formation of the national will required by the democratic status. Inspired by the US model, other federations, such as some Latin American federal countries, would also see political consequences that are demos-constraining. One of those consequences would be a minority of people deciding on the fate of the majority when the competencies of the senate are symmetric to those of the lower chamber, which works on the premise "one person, one vote"[VIII].

On the other extreme, however, scholars consider federalism and democracy as necessary conditions that complement each other (Levy, 2007; Lijphart, 2012; Oates, 2011; Soares, 1998). In this perspective, the greatest merit of a federal model is the equilibrium of power between constituent units, guaranteed by the second chamber. Benz and Sonnicksen (2017) point out that features usually attributed to federalism, such as individual liberties, the rule of law, and the possibility of accommodating diversity more appropriately, could

promote democracy. The senate would be one of the *loci* of the political system where diversity is better embodied.

More recent literature (Benz & Sonnicksen, 2016, 2017, 2021; Sonnicksen, 2018) concedes that the second chamber can play a mediating role between federalism and democracy, here taken as two different dimensions of a political system. Together with other mediating elements, second chambers promote the coupling between federalism and democracy in what the authors consider "a tense relationship" (Sonnicksen, 2018). This tense coupling between federalism and democracy can occur in an intergovernmental dimension, which covers the national or regional character of the party system in a polity. It can also happen in an intra-governmental dimension, captured by the executive-legislative separation or fusion of powers, in which the senate can also be a determinant element. The senate is therefore the institution that better captures the territorial aspect in a federal political system, even influencing executive survival under certain circumstances[IX].

Second chambers are thus key in the discussion of the relationship between federalism and democracy. However, new interpretations of the origins of the American federal model question the role of second chambers as an arena for territorial representation, and especially, for subnational participation in federal political life. This has repercussions for other countries that have adopted similar structures.

"Madison´s paradox" (Dehousse, 1989; Doria, 2006; Palermo, 2018) arises from the theoretical inadequacy of the institutional model of the senate for the expected function. It departs from the common assumption that a territorial chamber is essential for a federal system to provide an arena for regional interests. The second chamber fails that duty by becoming a nationalised, party-dominated, institution like the lower chamber. From a historical perspective, this contradiction comes from the misinterpretation of the principles of equal representation of territorial units and indirect election since the advent of the American Constitution.

Madison, in the Federalist Papers, separates the representation of the people in a national state from the representation of the states in a federal state. The people would be represented in the lower chamber, which derives its power from the constituency and is proportionally representative. The federal representation must be different: "The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be

represented on the principle of equality in the Senate, as they are now in the existing Congress. So far, the government is federal, not national" (Hamilton et al., 2003, p. 241).

There are two models of upper houses, senatorial and ambassadorial, each based on a different concept of regional representation. The senatorial type aims for political representation of federated communities. All but one upper house in the world has adopted that model. The German *Bundesrat* is the only ambassadorial one, understood as the juridical representation of federated governments, besides the EU Council (whose federal character is still evolving).

The institutional failure in representing regional interests is mostly related to the senatorial model, because it allows linking the senator and the subnational unit by party dynamics. The ambassadorial model would escape that tendency because of the nature of that link: this type of senate consists of emissaries from state governments instead of elected representatives (Thelen & Karcher, 2014). This reduces the risk of political parties taking over those representatives.

The senatorial model comes from the US, where it was created to perform a different function, "(...) providing a bulwark against the risks of politics being dominated by parties" (Doria, 2006, p. 36). The justification for the existence of the second chamber as a territorial one only came later in reaction to criticism from anti-federalists. The original reason for proposing the American Senate, according to Doria, was a different one: "(…) the true rationale which led the Framers to build the Senate – not just a Senate, but that Senate – had originally to do not with federalism but with the theory of mixed government, and, more specifically, with the Madisonian idea of the necessity of a protection against the risk of factionalism" (Doria, 2006, p. 20).

Palermo (2018) builds upon Doria's assessment of the inefficiency of the upper chamber to serve as the voice of subnational units within the national decision-making process. His argument goes in the same direction: that the second chamber (in the senatorial model) is generally unsuitable for territorial representation and participation because the territorial aspect can be overruled by the political or democratic claim, duplicating the type of representation that usually goes on in the lower chamber.

The main reason for the inadequacy of senates to the territorial prerogative is that subnational units seek participation and not mere representation in the national political arena. The institutional senatorial form of second chambers is usually not suited to enable

effective participation: "(…) the Madison's paradox tells that territorial second chambers, aimed at representing territories and more general factors other than the democratic element, in the end, turned out to do precisely what they were supposedly aimed at not doing. They became political-democratic chambers like the lower houses of parliament (…)" (Palermo, 2018, p. 52).

The solution to the identity crisis of the senate is different for both authors. For Doria (2006), it lies in using the federal chamber as a disruptive tool via the party system: "(…) senatorial chambers instead [of ambassadorial ones] can – under certain conditions – perform a strong decentralizing and destructuralizing function, by offering the regional political personnel a national outlet for its ambitions" (Doria, 2006, p. 7). Although the ambassadorial model performs the function of territorial representation, it is the senatorial model that could weaken the centralising force exerted by the party system in a federal context.

In a different perspective, Palermo (2018) suggests the adoption of executive-based structures dedicated to dealing with the lack of a proper arena to vocalize their interests left by the unfulfilled expectations over the senate. These structures operationalise coordinated actions and enable negotiation among subnational units and between them and the federal government. Another trend to deal with the ineptitude of the senate for territorial representation would be moving from bicameralism towards bilateralism, creating alternative *fora* for a discussion of singular and regional-based claims. Therefore the "unresolved dilemma of subnational representation" (Palermo, 2018, p. 50) would depend more on intergovernmental relations (mostly informal and dynamic) rather than on the institutional architecture of second chambers. The issue is still unresolved. Regardless of "their set ups and powers" (Palermo, 2018, p. 51), second chambers cannot voice the demands of subnational units appropriately. These are more efficiently addressed by executive bodies, despite the institutional discourse that the senate is the locus for territorial representation.

According to Palermo, "a fundamental challenge of bicameralism is necessary" (2018, p. 51) because subnational representation and participation are key issues for the operationalisation of federal systems. We must confront the "widespread trust in second chambers" (Palermo, 2018, p. 64), because the arrangement is unable to articulate subnational interests in national politics. For meeting and negotiating among states and with the federal government, a political system must establish other arenas. "No reform has

succeeded to turn second chambers into something they are not designed to be" (Palermo, 2018, p. 64).

In sum, Madison's paradox is still on the reform agenda worldwide, questioning the aptitude of second chambers for territorial representation and participation in national political life. The next section contributes to this debate by exploring this issue for Latin American federal countries.

3. Assessing the territorial character of the second chambers in Latin American federal countries

Latin America covers twenty countries. By far the most are unitary states. Only four countries are formally federal: Argentina, Brazil, Mexico and Venezuela. Venezuela is an outlier here, as the 1999 Constitution abolished the senate, leaving no visible trace of formal territorial representation in the federal government. Since this is a study of second chambers, Venezuela was left out of the analysis.

Argentina, Brazil, and Mexico share another important feature: they are all presidential countries. Valenzuela (1991) claims that Latin American countries have been using the US as an unsuitable reference to establish political systems. Therefore Latin American presidentialism disregards important characteristics of its nations, people, culture and, more importantly, political elites. For the author, Belgium and Canada would be more suitable models than the US for granting democratic permanence to the countries of the region (Valenzuela, 1991).

On the other hand, Shugart and Carey (1992) suggest that institutional design affects how the political process in representative democracies operates and regimes with an elected president can offer some advantages. Presidentialism differs from parliamentarianism by having two agents of the electorate, the president and the assembly, while in parliamentary regimes the assembly is the only electorally accountable agent[X]. In regimes with elected presidents, their executive powers can be affected not only by constitutional constraints but by other institutional choices. In addition, the separation of elections between legislative and executive can affect the democratic operation of the whole system (Shugart & Carey, 1992) and impacts on federal institutions (Watts, 2012).

Regarding the second chamber in particular, the system of government, whether parliamentary or presidential, can have an important impact on the perception of its territorial character. In presidential systems, the senates have broader powers than parliamentary regimes, making upper houses strong players (Neiva, 2008). However, the parliamentary flexibility can, in turn, enable territorial expression in the senate, if the attributions of the upper house differ from the powers of the chamber of representatives (Linz, 1985). This effect is even stronger if it is associated with a regionalized party system (Watts, 2006).

For the presidential cases of Argentina, Brazil and Mexico, the analysis will cover the role and powers of each senate; the issue of legislative malapportionment and overrepresentation and its effects in the upper chamber; and finally, a debate about the interaction between the party systems and the second chamber. Table 1 gives an overview of the institutional aspects of federal senates in Latin America under the current constitutional order:

Table 1 - Overview - Senates of federal countries in Latin America

Countries	Year of the current Constitution	Number of senators for each constituent unit	Representativity
Argentina	1994	3	Provincias and Buenos Aires
Brazil	1988	3	States and Federal District
Mexico	1917	3*	States and Mexico City

*There are also 32 national senators-at-large, spread across the parties in proportion to their share of the national vote. As it does not involve territorial representation, they are only recognised here.
Source: Federal Constitutions of the countries systematised by the author.

3.1 Role and powers of the second chamber in Latin American federal countries

The role and powers of the second chamber are an important predictor of its effective territorial vocation. Russell (2001) stresses that some senates represent the territorial interests of subnational units while also fulfilling traditional roles of scrutiny and law revising functions. This expectation was to be met by three categories of specific roles: representation of the territories and their interests at the national level; a forum for the different territorial units to debate policies and agree on common positions, and establishing the link between the national parliament and territorial assemblies or governments (Russell, 2001). Naturally, each senate fulfils those roles to varying degrees.

Those roles materialised into effective representation and participation through special powers of territorial legislation (rights of law proposition and veto, for example), voting arrangements and the composition of special arenas to debate territorial affairs, as well as channels of territorial accountability. According to Russell: "Where the territorial assemblies or governments are represented this creates an indirect form of accountability between the upper house and the people, through elections at sub-national level" (Russell, 2001, p. 108).

Russell (2001) warns about the difficulties of finding evidence of the territorial role of second chambers. The present analysis reaches a similar conclusion. Table 2 summarizes the results from the analysis of the current constitutional setting of second chambers in Argentina, Brazil, and Mexico:

Table 2 - Constitutional role and powers of the second chamber in Argentina, Brazil and Mexico				
Countries	**Role of the second chamber**	**Composition of the second chamber**	**Powers of the second chamber**	**Second Chamber Power Score (Neiva, 2008)**
Argentina	Legislative	72 senators, directly elected: three for each province and three for the city of Buenos Aires. Party criteria: two seats for the largest party, one seat for the second largest party. Partial replacement: one-third of the seats are replaced every two years. The term lasts six years. There is no limit for re-election.	Judgement of authorities (President, Vice-President, chief of staff of the ministers, ministers and members of the Supreme Court)	25
			Authorizing (of state of siege in case of external attack)	
			Law initiative (explicit cases: *Ley Convenio* , over federal tax coparticipation; national development/settlement)	
			Joint nomination with the President of positions to some authorities (Supreme Court, other federal courts, ambassadors, among others)	
			Joint appointments with the military of superior officers of the Armed Forces	
Brazil	Legislative	84 senators, directly elected: three for each state and three for the Federal District. Majoritarian principle. Partial replacement: alternately, one-third and two-thirds of the seats are replaced every four years. The term lasts eight years. There is no limit for re-election.	Control* (summon authorities to provide information on a predetermined subject, request information, to set up parliamentary commissions of investigation)	31
			Judgement of authorities (President, Vice-President, military commanders, ministers and members of the Supreme Court, among others)	
			Approval of the President's nominations for some positions (judges, ministers of the Federal Courts of Auditors, territory governors, among others)	
			Authorizing (external fiscal operations at all levels of government)	
			Approval to dismiss the Republic's Attorney-General	
			Establishment of fiscal limits (to fix public debt limits at all levels of government and other matters)	
			Suspension of unconstitutional law enforcement	
			Auto-organisation	
			Election of the Republican Council	
			Tributary evaluation	
			Extraordinary summons of the Congress	
			Constitutional amendments initiative*	
Mexico	Legislative	128 senators, directly elected: three for each state and three for Mexico City. Relative majority principle: two seats for the largest party, one seat for the next largest minority in a proportional system. This last seat must be alternately headed by women and men each elective period. The term lasts six years. Re-election is possible only for two consecutive periods.	Appointment, ratification and removal of authorities (members of councils and commissions, and committees, among others)	24
			Approval of the President's nominations for some positions (ambassadors, consuls, executive financial positions, among others) and their resignations	
			Approval of the regulation to the coalition government and recognition of the jurisdiction of the International Criminal Court	
			Control* (to create parliamentarian commissions of investigation)	
			Law initiative	
			Law approval/revision	
			Foreign policy analysis and approval	
			Authorizing military placement (national forces to go abroad, foreign armies to pass through Mexican territory or to stop by its waters)	
			Analysis of the activities of the National Guard	
			Federative issues (provisional government and conflicts of responsibility)	
			Judgement of public servants	
*Responsibility shared with the lower chamber or other authorities.				

Source: Federal Constitutions of the countries systematised by the author, and Neiva, 2008.

The main constitutional role of the second chambers of Argentina, Brazil, and Mexico is legislative. They also share the power of nomination and judgment over specific authorities. Moreover, all these senates can authorise the Executive to take specific actions: to allow the movement of national and foreign military forces through the national territory, to declare the *estado de sitio* (state of siege) in Argentina, and to make some fiscal operations in Brazil (especially those that affect public debt).

When it comes to the legislative function, the Argentinian senate has a restricted right of law proposition, which is broader in Mexico. Mexican senators can initiate all sorts of laws: the Mexican senate has not only the power of law initiative but also approval and revision. Brazilian senators have no constitutionally specified law initiative: they are restricted to constitutional amendments, a competence shared with the lower chamber, but the senate can suspend the execution of laws in case of unconstitutionality.

The power of the Mexican senate to deal with federal issues and solve conflicts between the constitutive units in specific cases stands out from the comparative set. This is the only explicit constitutional device among the three cases that declares a territorial role exclusively for the second chamber[XI].

Regarding the composition of the second chambers under analysis, it is clear by the distribution of seats and rules of re-election that the chambers are intended to bring, in some measure, territorial representation to the national Legislative. However, this role seems detached from the powers attributed to them (Mexico deviating slightly here). The Mexican Constitution also deals with gender representativeness in the seat distribution of the chamber (since 2019), which remains a democratic issue worldwide[XII].

Finally, the last column of Table 2 also presents the Second Chamber Power Score built by Neiva (2008). Federalism is an important variable to explain bicameralism, but it is not enough to explain the strength of the senate. To verify that, Neiva discusses the determinants of the existence and the power of the senates, departing from the analysis of its constitutional powers. The system of government explains why senates are stronger in presidential systems than in parliamentary ones.

Neiva suggests an index of the political strength of senates of presidential bicameral countries deemed "minimally democratic" [XIII] (Neiva, 2008, p. 23) worldwide. He does so by analysing constitutional powers, divided into legislative, control, appointment, and other significant but only occasionally used powers, such as the approval of international treaties.

The index reveals that the most common power of a senate is to moot on a constitutional amendment (present in 92.9% of the cases), followed by the power of proposing a law (84.3%) and opining on them (58.8%). There are also less conventional functions, such as controlling the Executive, appointing authorities, and minor and occasional powers with symbolic relevance. The power index reaches the top value of 32, the Bolivian senate being the most powerful, and gets as low as 4, corresponding to the weaker case - the Caribbean island of Santa Lucia.

On this score, Brazil comes out as having the second most powerful senate of the minimally democratic countries considered by Neiva (2008), coming right after Bolivia, reaching an index of 31. Argentina follows with 25 points and Mexico with 24. Although the Second Chamber Power Score does not consider specifically the dimension of territorial representation, we can infer that while the Mexican senate is the only one that explicitly grants the territorial power of the second chamber, it is not as strong as those senates in which the representation of subnational units is reflected merely in their seat composition, such as the case in Argentina and Brazil.

In conclusion, this analysis of the constitutional role and powers of the second chambers of Argentina, Brazil, and Mexico highlights that only Mexico has the explicit constitutional power to deal with issues derived from the federal agreement. For the other two, the territorial character is implicit, resulting from the criteria of the election of their members. The relevance of this finding rests on the idea that the implementation of competences, and therefore the fulfilment of the expectations of the territorial character by the senate, would be better enabled if it derived from an explicit constitutional provision. In that sense, Madison's paradox is indeed present in the reality of those countries, where the territorial character of the senate is disconnected from the constitutional power to effectively represent the subnational units before the Union and allow them to take part in national political life.

On the other hand, Mexico, the only Latin American federal and bicameral country which constitutionally foresees the explicit power to solve federal issues, is comparatively weak among the countries of this sample. This casts doubts on how well the territorial interests are represented in the national arena, bringing Madison's paradox as a potential explanation for the lack of territoriality of the senate of Argentina, Brazil and Mexico.

3.2 Territorial overrepresentation in the second chamber in Latin American federal countries

Over- and underrepresentation are concepts of how the constitutional order establishes proportionality in the composition of the legislative power in a political system. Usually, in a bicameral system, the lower house is proportionally composed of the population of the district where the representatives are elected. To avoid large variance in the number of representatives, the constitution can establish a range for the number of representatives that each subnational unit can elect. These limits mean that one subnational unit can lose seats, while the other can gain them. This distorts the proportionality of the "one person, one vote" principle[XIV]. Over- and underrepresentation can therefore very often occur in a lower chamber. This inequality can be regionally measured, by comparing the percentage of the population and the respective seats that each subnational unit gets in the lower chamber (Backes, 1997).

In the upper chamber, the subnational units are usually equally represented: they have the same number of seats, regardless of the population of their district, because of what is represented in that chamber. If the lower chamber represents the individuals, the upper one aims to represent the subnational units. In this case, small states have the same weight as the most populated ones in national politics and in that sense overrepresent the population of the subnational unit.

The issue of overrepresentation of the second chamber has been widely discussed in the literature: Lijphart (1985) considers it a link between federalism and the model of consensual democracy; Samuels and Snyder (2001) demonstrate that federalism and country size have a significant impact on overrepresentation in the upper house, especially for developing Latin American and African democracies; Stepan (1999a) discusses it as a demos-constraining element of federalism; Gibson (2004) takes a procedural approach to it in policy-making, and Watts (2006) uses the overrepresentation aspect of federal bicameralism to critically examine his own concept of democracy and how it can benefit from federalism.

Rubiatti (2014) exposes very clearly the issue of overrepresentation in the second chambers in general, but specifically in Latin America. It is usually related to the democratic representation problem involved in the process of choosing political representatives[XV]. The main premise connecting representation and democracy is that in a democracy, an elected government would be necessarily representative[XVI]. The debate about this connection is

current and lively, but this study will focus on the idea that every democratic selection of representatives will necessarily follow a formal criterion.

The principle of equality is usually essential in democratic representation, and the assumption of "one person, one vote" is the most common guiding rule. In that sense, every bias on this assumption is taken by mainstream literature as a distortion. The term "malapportionment", usually used as a synonym for overrepresentation, expresses this idea of something inadequate in the ideal quest for equal representation. If we apply the principle of equality to the senate model, there is a change of focus on what or who is represented. There is an equality of representation among units, which usually get the same number of seats in the senate, but the population represented by each unit will vary, leading to an overrepresentation of less populated territories.

In Latin America, the main consequence of malapportionment or, more specifically, of the overrepresentation of less populated areas compared to the most populated ones would be unfair elections (Snyder & Samuels, 2004), to the advantage of the less developed territories, traditionally dominated by conservative, clientelist politicians. In contrast, urban areas would be underrepresented, undermining more progressive groups. Overall, the overrepresentation character of an electoral system would favour continuity and make a change in the status quo less likely (Rubiatti, 2014; Tsebelis, 2011).

Latin America has a well-known history of legislative malapportionment: Snyder and Samuels already showed that the region, and especially Argentina, Bolivia, Brazil, Chile, Colombia and Ecuador, has higher levels of malapportionment in both houses than the global average (Samuels & Snyder, 2001; Snyder & Samuels, 2004).

In Samuels and Snyder's proposed index of malapportionment, one of the variables is bicameralism. They start from the theoretical premise that senates tend to be more malapportioned than the lower chambers by striving for equal representation of minority groups in smaller territorial units. Lower chambers, on the other hand, are less likely to overrepresent territorial minorities. Samuels and Snyder cast doubt over this assumption of higher malapportionment in senates as compared to lower chambers. They point to great variance in malapportionment in both houses across bicameral systems. Both houses can present asymmetry of powers, which determines how malapportionment affects bicameral systems (Samuels & Snyder, 2001).

From a comparative perspective, in the lower chamber "The most-malapportioned countries in our sample are in less-developed regions with many recently-established democracies" (Samuels & Snyder, 2001, p. 659). This challenges the premise that malapportionment happens mostly in the upper house. Nonetheless, Samuels and Snyder's data confirm that the phenomenon tends to be stronger in the senate, but not necessarily. The Netherlands, Uruguay and Paraguay show virtually no malapportionment in their senates (Samuels & Snyder, 2001), because they are not designed for territorial representation.

Federalism and country size are the correlates of malapportionment that matter most for this phenomenon: the upper houses in federal and big countries are more malapportioned. The size of the countries affects malapportionment only in the upper houses (Samuels & Snyder, 2001).

In this literature, malapportionment is considered "a formal pathology of Latin American political systems", raising questions about the "performance and quality of democracy" (Snyder & Samuels, 2004, p. 134). According to Snyder and Samuels, malapportionment is, in both houses, a formalised, detailed and explicit problem that results in inequalities and unfair elections. Consequently, Latin America would not even be democratic in the first place. The authors called it an "'(…) electoral stealth technology' for engineering bias (…)" as it is "(…) less obvious and thus it is often not seen as a proximate cause of unfair elections" (Snyder & Samuels, 2004, p. 136), especially for the lower house. They go even further to suggest that "The compatibility between malapportionment and the other core elements of democratic politics makes malapportionment an especially pernicious problem because it can help sustain a powerful illusion of robust democracy that hides a reality in which some citizens are far more 'equal' than others in terms of the value of their votes" (Snyder & Samuels, 2004, p. 137).

The effects of malapportionment, and especially overrepresentation, on the quality of democracy mentioned by Snyder and Samuels (2004) are important in the lower chamber. When overrepresentation also affects the upper chamber, it influences the democratic status differently. The significant weight that small and rural-based subnational units gain by having the same number of seats as bigger and urbanised territories makes them powerful players in the national politics game. It can contribute to the maintenance, or even proliferation, of subnational authoritarian enclaves. Malapportionment can compel national and democratic

elites to tolerate such enclaves if they can secure national legislative majorities for law approval. The same effect can "hold the center hostage" (Snyder & Samuels, 2004, p. 154) as small and less populated constituent units can have veto power in the senate.

The overrepresentation index proposed by Snyder and Samuels ranges from 0.00 to 0.49, the highest being the most overrepresented house. Table 3 displays the index of malapportionment from Samuels and Snyder (Samuels & Snyder, 2001; Snyder & Samuels, 2004) for the second chambers of the case studies under analysis:

Table 3 - Malapportionment in the upper chambers (Snyder and Samuels, 2001, 2004)

Position	Country	Index
1	Argentina	0.49
2	Brazil	0.40
5	USA*	0.36
13	Mexico	0.23
	Average Latin America*	0.25

*Cases included for comparative reference
Source: Samuels & Snyder, 2001; Snyder & Samuels, 2004.

Argentina is the most unequal in terms of proportional representation in the second chamber. It means that in Argentina less populated provinces have the same weight in national politics as the more populated ones. Although they represent fewer voters, malapportionment makes the smaller provinces powerful players in national politics. Brazil follows as a significantly malapportioned senate, even more than the US, presented here as a reference and the main inspirational model for the adoption of federalism in Latin American countries. Mexico shows a significantly lower level of overrepresentation in the second chamber than Brazil and Argentina, and even lower than the average index for Latin America.

The differences in the results of overrepresentation, especially between the subset Argentina and Brazil, on one side, and Mexico, on the other, lie in how the seats of the second chamber are selected. For the first subset, there is a strict egalitarian representation from the subnational units – Argentina and Brazil allocate three seats for each province or state in the senate, regardless of population. One might expect that this would guarantee a strong territorial role for the Argentinian and the Brazilian senates. Due to their prominent

level of overrepresentation, the connection between the subnational unit and its senator's seat would be significantly strong. But, as stated earlier, the allocation of seats alone does not guarantee a strong territorial role from the second chamber, especially if they do not have this specific role and the necessary powers recognised by the constitutional order.

Mexico has a combination of systems: each state elects three senators, but 25% of the remaining seats are chosen on a national basis. It represents a "proportional correction" of the overrepresentation phenomenon, attenuating but not solving the inequality problem in the Mexican second chamber.

The overrepresentation of subnational units in the national legislative can produce a distortion of federal spending that would benefit overrepresented territories. In this case, the federalism is reallocative. If the overrepresentation does not affect the distribution of resources and it is done proportionally to the population, then it is a case of proportional federalism (Gibson et al., 2004).

The US and Mexico have more proportional distribution of seats among subnational units in the national legislative than Brazil and Argentina because in this latter set "a dual structure of territorial overrepresentation exists, with the lower chamber's regional allocation of seats compounding the overrepresentation inherent in the senate's role as an arena for territorial representation" (Gibson et al., 2004, p. 175). Brazil and Argentina overrepresent smaller, less populated units in the lower house more significantly than the US and Mexico, where the distribution of seats in the lower house is more proportional to the population of subnational units. In consequence, the distortion in the distribution of federal resources is higher in the first subset than in the second.

The conclusion is that, although the senate is the legislative house for territorial representation, the overrepresentation feature present in the lower chamber is what drives distortion in the distribution of federal resources. This limits the influence that the senate can have in the overall federal system, whether overrepresented or proportional. Overrepresentation in the lower chamber is, therefore, a stronger predictor of federal spending distortions, more than the senate overrepresentation in cases of reallocative federalism, such as Brazil and especially Argentina.

However, as demonstrated by Rubiatti (2014), distortion is the rule and not the exception when it comes to most structures of legislative power worldwide, with overrepresentation being a common feature among contemporary democratic regimes. Sometimes, instead of a

well-played political strategy, it can be a result of simple mathematical or functional impossibility: representation of voters can be impossible to break down in an exactly proportional number of seats.

Nonetheless, the significance of overrepresentation in the cases under analysis, especially Argentina and Brazil, could suggest a stronger connection between the senator and the demands of the subnational unit that elected her or him. In this sense, the strength of smaller states within national politics would be significant. However, overrepresentation in those countries happens especially in the lower chamber and not in the senate. Therefore the equal weight given to subnational units in the upper chamber as a federative tool is not a predictor of their ability to gain more federal resources for their territories.

Given the importance of explicit devices for the upper chambers under analysis to claim territorial matters in the national legislative, the fact that they are composed equally does not say much about their ability to steer federal resources to benefit their subnational units. So, what does? The answer may be the structure of incentives brought by the party system, the focus of the next section.

3.3. The impact of political parties on the territorial representation and participation of the second chamber

The party system is, together with the second chamber, a traditional mediating element of the relationship between federalism and democracy (Benz & Sonnicksen, 2016; Gibson, 2004; Sonnicksen, 2018). From a democratic point of view, Stepan (1999b) states in his approach to "demos-constraining/enabling" federalism, the operationalisation of federalism and democracy influences party regionalisation: while national parties help to keep the federation together, a regionalised party system can help to protect democracy by presenting an obstacle to the formation of populist majorities. Arretche (2001) goes in the same direction and points not only to the nationalisation of the party system (covering the entire country) but also to centralisation (i.e., the degree to which national leaders monopolise party decisions) as defining features of the degree of centralisation of the federation itself.

A different perspective claims that party discipline and factionalism are key elements to nationalising subnational conflicts and making representatives collaborate for the democratisation of authoritarian subnational enclaves in federal systems (Gibson, 2005; Mickey, 2015; van Mierlo, 2021). Willis et al (1999) were also concerned about the democratic

side, especially in Latin America. However, they reached a similar conclusion: when the party system is nationalised, central interests tend to prevail when confronted with subnational issues, constraining revenue reassignment and spending responsibilities.

For Gibson, democratisation affects party dynamics[XVII] in federal systems by empowering subnational actors, which "(…) structured the incentives (…) reshapes relations between center and periphery, altering policy-making patterns, and redistributing power (…)" (Gibson, 2004, p. 10). Party systems are, together with courts[XVIII], intergovernmental councils and other actors, important keepers of federal boundaries. Authority boundaries in federal systems are significant and vulnerable at the same time and need the safeguards of the party system to balance and reinforce them in a redundant way (Bednar, 2019).

The party system is an essential mediating element between federalism and democracy, but it could also become an element for democratic backsliding. The recent position of Grumbach (2022) about the role of parties in the relationship between federalism and democratic quality is quite interesting. While most of the literature is interested in national measures of democracy, he focuses on its subnational measure within the US federal system. To do that, he proposes a State Democratic Index. He assesses theories of democratic expansion and backsliding based on party competition, among other elements. His conclusion about the influence of subnational Republicans' governments on democratic backsliding is important because it shows how just one party could be responsible for a decline in the quality of democracy at subnational level.

In a comparative perspective, Watts (2006) includes political parties as an important piece in the puzzle of comparing federal second chambers: in general, the federations present some level of asymmetry in the party alignment between the federal and the subnational level. This asymmetry could be more pronounced and lean towards a more nationalised or regionalised party system, hanging mostly on party discipline. This is one of the aspects affecting the operation of political parties within a federation. Especially in parliamentary systems, where guarantying party discipline at each level of government can sustain the executive in office, party organisation is more autonomous in both subnational units and the central government.

Depending on how those incentives are organised, they affect the formation and operation of federal second chambers, especially in terms of territorial representation and participation. In Watts' words: "The pressure or absence of strong party discipline in

different federations has also had an impact upon the visible expression of regional and minority interests within the federal legislatures and particularly their second chambers." (Watts, 2006, p. 11).

The impact of political parties on the performance of the second chamber is a general phenomenon in federations, but the degree of this impact varies. However, according to Watts, in both parliamentary and presidential federal countries, "(…) there has been an increasing tendency for polarization along ideological rather than regional lines (…) (Watts, 2006, p. 12). The main consequence of this tendency would be the weakening territorial role of second chambers, with the reinforcement of the democratic premise, as later argued by Palermo (2018).

In his detailed analysis of the reality of the second chamber of Argentina, Brazil, and Mexico, Rubiatti (2014) starts from the assumption that the three senates already have a strong territorial aspect (based on the measure of overrepresentation). However, with political parties being the main structuring element of the political spectrum in contemporary political systems, they play a role in how the territorial forces are organised within the senate. This is true even for the physical distribution of senators' seats in the plenum: only in Brazil do the senators of the same state sit together. For Argentina and Mexico, the seating order is by party or coalition[XIX].

The party composition of the senate, and especially its difference from that in the lower house, would be a factor of effective incongruence in bicameral systems. When the two houses are composed differently in party terms, it is expected that they act more autonomously and the costs of legislation approval may increase since it commonly must be approved in both houses. This is what Lijphart (1977) calls "concurrent majorities", one of the four features of consociational democracy. It means that with different party configurations, both houses can veto each other's actions as additional protection of vital minority interests[XX]. Although including the analysis of the lower house composition would be interesting for a more complex understanding of the Congress as a whole, this study will concentrate on the composition of the second chambers of the countries under analysis.

The argument discussed in this paper goes as follows: in a federation, a more centralised party system leads to focusing on national elections, driving the federal system to a more centralised model. On the other hand, a more region-based party system may value more local and regional elections instead of the national one, creating a centrifugal force for the

federal system and strengthening subnational governments[XXI]. The effects of both movements on the composition and operation of the second chamber could be a concentration of the electoral focus on national disputes in a centralised party system, making the senate a less territorial legislative chamber, and consequently, more ideologically driven. Still, a region-based party system would privilege subnational elections, turning senators' attention to subnational demands in their mandates.

To discuss this argument in the context of the territorial character of the second chambers of federal and bicameral countries in Latin America, this paper will build upon the findings of Harbers (2010). She defines party nationalisation as the balanced territorial distribution level of votes for a party and its national support. In that sense, the opposite of party nationalisation is regionalisation (i.e., when a party enjoys a varied proportion of votes in different parts of a country). Party regionalisation is therefore different from party fragmentation (which refers to numerous parties in a polity). Those two concepts are related but refer to distinct dimensions of the party system.

Her main argument is that "(...) political decentralization and fiscal decentralization inhibit the development of nationalized party systems" (Harbers, 2010, p. 606). Centralisation of government activities is intricately linked to party nationalisation, especially for well-established democracies. For new democracies, decentralisation is a trend that relates to the party system, "Particularly in Latin America, with its long and well-documented history of centralism (…), decentralization constitutes a departure from previous patterns of governance" (Harbers, 2010, p. 607) and strengthens local elites and subnational identities. This affects the political and electoral strategies of parties, with consequences for political representation and competition.

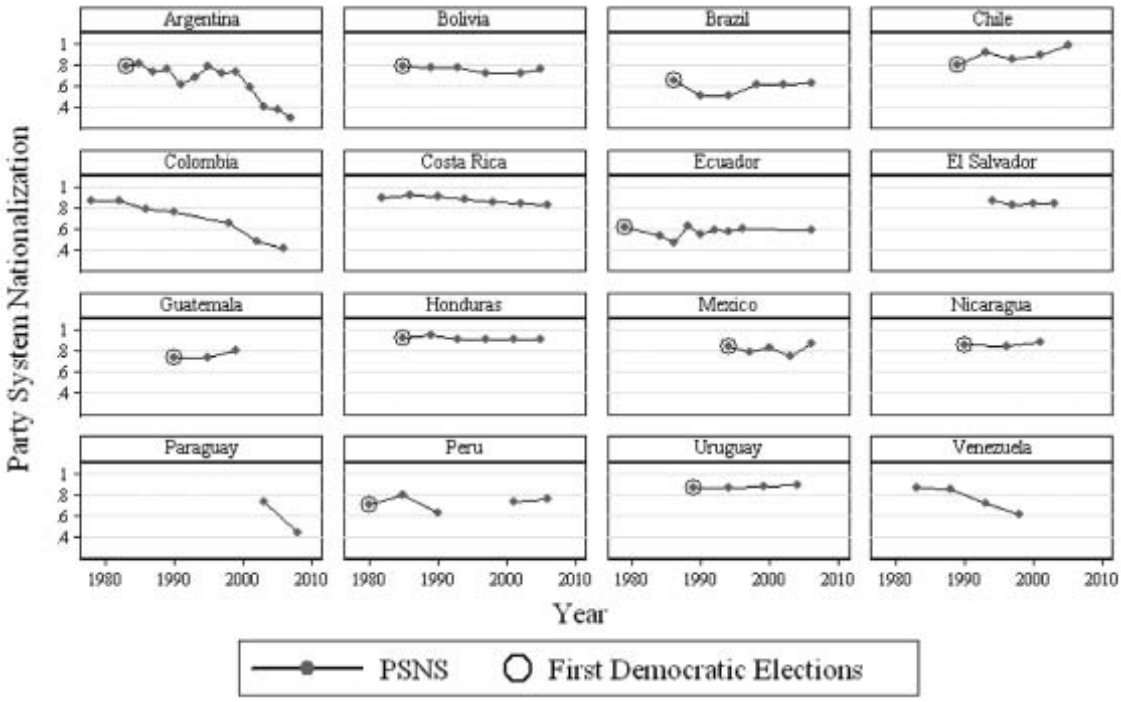
In Latin America, party systems are usually less programmatic (which means that the policy set supported by each party is not decisive for the voter), so decentralisation, especially the political type, creates incentives for parties to focus on regional elections instead of national ones. This is a swing movement: supporters will vote nationally when they are interested in national policies and regionally when focused on locally provided goods. This means that party nationalisation is intimately related to how responsibilities are divided and shared in the federal system.

Decentralisation disperses resources and responsibilities across levels of government. Both political and fiscal decentralisation can influence regional voting patterns. Political

decentralisation creates a sublayer of political competition, implying a new level of political organisation within the parties or the creation of subnational parties. Fiscal decentralisation provides access to resources and grants autonomy from the centre. Resources are especially important for new democracies, where the link between parties and voters is more fluid and less programmatic. In both senses, decentralisation in Latin America has strengthened local elites.

Harbers' analysis (2010) of the elections in Argentina, Brazil, and Mexico from the 1980s to the 2000s traces significant party nationalisation in those countries:

Figure 1 – Party system nationalisation from a comparative perspective (Harbers, 2010)



Source: Harbers, 2010, p. 617

Although there are changes over time, they are only significant in the Argentinian case, which moved from an intensively nationalised party system towards a more regionalised model. Brazil starts from a slightly less nationalised model than Argentina and with time showed a discreet movement towards regionalisation in the 1990s, reassuming the national pattern thereafter and retaining it. Finally, Mexico started the period of analysis as nationalised as Argentina, without further alterations until the 2000s, when it moved slightly

towards regionalisation and then back to nationalisation. Altogether, all party systems are significantly nationalised when compared to the general tendency of Latin America, even with the discreet movement towards regionalisation, which was only noticeable in Argentina.

In terms of the discussing the territorial character of the second chamber, the nationalisation of the parties in those three cases allows the assumption that political elites tend to focus more on national issues than on regional ones, weakening, again, any expectation of a significant territorial role from the second chamber. Combining this argument with the considerations about the role and powers of the senate, and the insignificance of overrepresentation in the upper house for policy effects in those cases, we can conclude that the senate cannot perform tasks of territorial representation adequately. Even though the federal theory sees the senates as arenas for territorial representation and participation in a federal system, they are not up to the task. But the regional interests of the subnational units must be voiced somewhere. The next section will try to map recent instances where those demands have been presented and negotiated for Argentina, Brazil and Mexico.

4. The prospects: territorial representation and participation in national politics

As established so far, Madison's paradox seems to be real in Latin America: in the federal countries of the region that have a second chamber as part of their federal arrangement, the house does not properly enable subnational participation in national political life beyond the territorial composition of the chamber. This is due to the lack of this explicit constitutional role and the powers to fulfil it, the effect of significant overrepresentation levels, and the nationalising effect of the party systems.

Nevertheless, some institutional devices have been emerging to balance expectations of an adequate arena for not just a formal representation of subnational units before the federal government but also their active participation. They consist of tools within parliaments, together with executive-based institutions.

4.1 Alternative forms of territorial representation: within legislative committees

Palermo (2018) mentions that even some unicameral systems adopt arrangements for territorial representation, reserving seats on the legislative chamber assigned to specific territories and minorities, irrespective of their populations. Those arrangements end up functioning as a bicameral system in practice and mostly suffer from the same problem, the take-over of its territorial vocation by a party-based one.

Another form of territorial representation in national legislative bodies are committees and commissions dedicated to one specific legislative matter. The Argentinian senate, for example, has permanent commissions for Administrative and Municipal Affairs, and Federal Tax Co-participation[XXII]. The Mexican senate has an ordinary commission on Federalism and Municipal Development[XXIII]. For Brazil, there is no evidence of the existence of specific groups for discussion of the federal arrangement in the senate. Such institutional arenas enhance the deliberation of bills to alter the federal pact, enabling subnational participation in the upper house.

4.2 Executive-based institutions for territorial representation and participation

Palermo (2018) also points towards the executive branch of government as a natural alternative to second chambers for an arena of territorial representation. According to him, "Irrespective of the very existence and the composition and powers of territorial second chambers, nearly everywhere, more or less institutionalized bodies have been established to link subnational entities and the centre at the governmental level" (Palermo, 2018, p. 55). Those institutions are usually composed of delegates from subnational units and the national government, emphasising participation and coordination beyond mere institutional representation.

Argentina is fairly centralised and repeatedly debates provincial autonomy. The constitutional reform of 1994 eased the situation by proposing a federal fiscal organism to oversee and control the implementation of the share of revenues, established by Art. 75, 2 of the Constitution. Nonetheless, most of the executive-based arrangements happen in informal meetings of top executives of federal and provincial officials (President and Governors); or only among provincial governors or in the federal councils, which are sectoral forums of policy ministers, often dominated by the national agenda (Carnota, 2015).

Of those arrangements, the meetings and forums for sectoral policy ministers stand out as an arena for provinces to voice their concerns and priorities, working as a top-down

deliberative body for policy-making. The federal councils aim for policy consensus for concurrent responsibilities, although they are not constitutionally embodied and are sponsored and funded by the federal agency, which gives indirect control of the agenda to the president (Carnota, 2015). Therefore, even in the field of intergovernmental relations, territorial participation in Argentina is still prone to domination by the central government.

In Brazil, the structure is slightly different. Considered a "political system with high power dispersion" (Da Cunha et al., 2020, p. 130), it coexists with fiscal centralism, very visible in some public policies like social security. The Union still has a central role in the federal pact, reinforced by the liberal reforms of the 1990s (Lopreato, 2020). Informality is also the rule when it comes to meetings of the president and governors, as well as of the governors and sectoral forums of policy ministers (not necessarily dominated by the federal government[XXIV]). In the Brazilian case, there are also formal participatory instances for each of the main public policies, which mostly include representatives of subnational units (states and municipalities, each one with one seat for all the subnational units of each level). However, the nomination for these instances depends on the President, and recently there have been cases in which the legal criterion for composition was disregarded[XXV], a sign that the institutionalisation of those spaces is still under dispute.

Finally, in Mexico, federalism is still considerably centralised. Regardless of the federative arrangement established by the 1857 Constitution, which respected the existence of two sovereign layers of government, the political and administrative practice in Mexico becomes more centralist by the day. The main goal of this process was to consolidate territorial integrity and national identity (Villanueva, 1996). The existence of executive instances to promote subnational representation and participation in the national political life started in the 1970s and 1980s, with the *Comités Promotores del Desarrollo de los Estados* (Committees for Promoting the Development of the States - Coprodes) sponsoring the coordination of the states in federal policies and the *Convenio Único de Coordinación* (Single Coordination Agreement - CIJC), a legal device to formalise intergovernmental relations. For fiscal affairs, a *Sistema Nacional de Coordinación Fiscal* (National System for Fiscal Coordination - SNCF), was created to promote equity in the fiscal distribution of federal resources.

Those instances enable the participation of state governments in the design of their specific developing plans, but they are subordinate to the discretion of the federal government (Villanueva, 1996). The national executive is another strong player before the other branches

of government, Legislative and Judiciary, given its relationship with the governing party. As the president can still control lower levels of government, the tendency of executive-based arenas for territorial representation and participation tends to be top-down and coordinating rather than participatory (Stein & Turkewitsch).

5. Final remarks

This paper examined the aptitude of the second chamber for the task of territorial representation and participation in light of Latin America's federal experiences. Recent literature on the topic casts doubts on the capability of the senates to represent the interests of subnational units and to promote their participation in national politics because of issues with the institutional design. This paper analysed this assumption for the three Latin American federal and bicameral countries: Argentina, Brazil, and Mexico. The paper discussed constitutional elements about the role and powers of those chambers, observations on subnational overrepresentation, and the potential influence of the party system over the senate.

The analysis indicates that the territorial character of the second chambers in the selected cases tends to be weak. From the constitutional perspective, the territorial role of the second chamber is not explicit, leaving space for partisan take-over of subnational representatives. Even though this aspect is more explicit in the Constitution of Mexico, the comparative weakness of the chamber makes its territorial role less relevant, contributing to the centralisation of the whole political system. More evidence on the legislative outcome of those chambers could help to better understand the broadness of the legislative territorial approach in the second chamber. This is a research path still to pursue.

The higher levels of overrepresentation of subnational units, especially in the Argentinian and Brazilian cases, are not reflected in a stronger territorial character of those second chambers. They do not affect federal dynamics towards a more regionally-driven situation, but could even serve as a centralising element because of the difficulty of coordinating the subnational representatives.

Finally, the nationalising patterns of the party system of the countries under analysis is significant and steers the focus of the political parties towards national issues, weakening the connection of the senators to subnational demands.

For the cases of Argentina, Brazil and Mexico, the three dimensions of the constitutional role and powers, the overrepresentation and the partisan aspect of second chambers, lead to the conclusion that Madison's paradox is indeed a real thing. Although the political and federal theory attributes the role of territorial representation and participation in the national political life to the senate, that body does not have the power, the necessary representative connection, or even the political conditions to really meet that expectation. This conclusion is likely to also apply for countries that follow the senatorial model, but large-N research must be conducted to check that.

As an alternative to the inability of the second chamber to represent subnational interests, the literature points to the flourishing of executive-based arenas where the constituent units can present and negotiate their demands in the analysed cases. Those arenas are mostly informal and dominated by the national political agenda. They can barely function as an organised call to face the frequently strong bargaining power of the central government. Another fragility of this alternative is the potential to favour unequal territorial participation, based on party alliances between the central government and strong and economic or politically powerful subnational units. These aspects diminish hopes for territorial representation and participation before the federal government by the subnational ones even in the executive arena.

This investigation focused on institutional features of federal systems and leaves room for deeper digging, starting from a more dynamic approach to understand better the relationship between subnational and central governments in different contexts. One interesting research agenda on the topic of the territorial role of the second chamber is related to informal executive federalism referred to in Section 4.2. How effective those structures are and how they operate in distinct types of democratic arrangements. These and other related questions will fuel future research endeavours.

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[II] For this paper, the expressions "second chamber," "upper chamber", "federal chamber", "revisional chamber" and "senate" will be used interchangeably.

[III] The term was first identified by Dehousse (1989) and further explored in Doria (2006) and Palermo (2018). Other political scientists have also discussed the problem of the inability of the senate to represent territorial interests in general: Franks (1999), Russell, (2000; 2001) and Sweden (2004).

[IV] Germany is usually an exception to Madison's paradox because of ambassadorial character of its *Bundesrat*. For an in-depth discussion, see Thelen and Karcher (2014). For a contrasting position on the matter, see Broschek (2010).

[V] Gibson (2004) highlights the inspiration Latin American countries took from the U.S. federal experience, starting from the Iberic colonial past of the region: "The origins of federalism in Latin America (just as in the United States) had little to do with multinationalism or linguistic cleavages drawn along territorial lines. The Iberian colonization experience had a culturally and religiously homogenizing effect on the dominant strata of the region, so that territorial divisions and ethnicity did not coincide in any significant way. (…) Thus, in Latin America, as in the United States, it was not cultural or ethnic diversity between regions but size, economic differentiation, strong traditions of local elite rule, and military stalemate that were the driving forces behind the adoption of federal forms of government." (Gibson, 2004, pp. 14–15).

[VI] For a discussion of non-majoritarian types of democracy, see Lijphart, 1985.

[VII] The continuum demos constraining-enabling for classifying federalism, proposed by Stepan (1999b), develops Riker's classic proposition further that compares different federal systems in the world to the American, including new variables and complexities. The main assumption of this taxonomy is that federalism, per se, is demos-constraining in that its institutions are obstacles for realising the majority principle at federal level.

[VIII] The symmetry between the role of both chambers leads to an especially strong effect in Latin America that will be further explored in the section on overrepresentation.

[IX] For example, in parliamentary systems with strong bicameralism (Benz & Sonnicksen, 2016).

[X] Unfortunately, Shugart and Carey (1992) do not differentiate between the effects of the regime on the lower or the upper house because they do not consider bicameralism as two agents on the legislative side, both serving representational ends.

[XI] Art. 46 and 76 of the Mexican Constitution.

[XII] For a broader discussion of what it means, see Neiva, 2008b.

[XIII] Neiva defines minimally democratic countries as those with a Freedom House index of a minimum grade of 5 for political rights for the year of 2000 (Neiva, 2008, p. 36).

[XIV] The "one-person-one-vote" premise refers to what Dahl (1978) describes as the equal weight of citizens preferences, a necessary condition for democracy.

[XV] On representation theories and implications, see Urbinati, 2006.

[XVI] For a discussion of this premise, see Manin et al., 2006

[XVII] To go beyond the institutional approach to political parties, see Bednar, 2009; Benz & Sonnicksen, 2016; Erk, 2006.

[XVIII] On the relationship between party system and court behaviour in federal environments, see Popelier, 2017.

[XIX] https://www.senado.gob.mx/64/pdfs/documentos_apoyo/64-65/Plano.pdf; https://www.senado.leg.br/senado/assentos.asp

[XX] Lijphart warns of the risk of minority tyranny derived from the minority veto power, but he states that this does not happen too often because of some collateral damage (Lijphart, 1977).

[XXI] This relates to the literature on second order elections (Norris, 1997; Reif & Schmitt, 1980). Unfortunately, to my knowledge, there are no studies applying this concept to the cases under study, which would be a valuable addition to the literature.

[XXII] https://www.senado.gob.ar/parlamentario/comisiones/?active=agenda

[XXIII] http://comisiones.senado.gob.mx/federalismo/

[XXIV] The case of the National Forum of State Ministers and Directors of Culture has been emblematic for going strongly and publicly against recent changes in the National Secretary for Culture in Brazil. A good example here: https://www.otempo.com.br/diversao/secretarios-de-cultura-cobram-governo-bolsonaro-sobre-conducao-da-lei-rouanet-1.2472741

[xxv] The recent composition of the National Education Council left out both institutions who represented State and Municipal Education authorities. For more: https://congressoemfoco.uol.com.br/educacao/secretarios-criticam-composicao-do-novo-conselho-nacional-de-educacao/

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Marching in line through the crisis or setting one's own course in fighting the Covid-19 pandemic? A comparison of six policies, 16 states and two shutdowns in the German federation[I]

by

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Abstract

When combating the pandemic, federations face the additional challenge that the responsibilities for political actions do not reside in one hand but are divided between several governments. Therefore, during the Covid-19 pandemic all federations showed efforts to coordinate their reactions. In Germany, the 'Länder' (states) decided on agreements concerning containment measures during regular conferences. These agreements led to uniform regulations in some periods and policies, but still left room for the states' own (and potentially different) strategies and decisions in others. Thus, from the perspective of federalism research, the question arises as to how much diversity can finally be found in the regulations at the subnational level. We examine this question using the periods of facility closures in six policies (restaurants, bars, dance clubs, cinemas, gyms, and gambling halls) covering all 16 states and both shutdowns during 2020-2021. The results show substantial variance between states (across policies) and between policies (across states).

Keywords

Federalism, Policy-Making, Covid-19 Pandemic, Shutdown, Lockdown

1. Introduction

How governments respond to the Covid-19 pandemic has generated a wealth of political science literature. The majority of this refers to certain countries or comparisons at the nation-state level (Toshkov et al. 2022). In the field of policy analysis, many studies either focus on a specific policy (e.g., Klatt & Böhret 2021 on Woman's Rights in Childbirth, Béstate et al. 2021 on Social Policy) or, in the case of broader case studies, remain superficial or present only anecdotal evidence. From the beginning, the literature has also addressed the question of how the specific conditions of federations – where, in contrast to unitary states, responsibilities are shared between political levels – affect policymaking when fighting pandemics (e.g., Büthe et al. 2020, Easton et al. 2020, Kettl 2020, Kuhn & Morlino 2021, Erkoreka & Hernando-Perez 2021, Murphy & Arban 2021). In Germany, the debate about the performance of the federal state, i.e., whether federalism leads to a more or less successful pandemic response than centralized states, was present not only in literature (e.g., Kropp 2020, Montag 2020) but also in the public and the media (Reus 2021).

Within the area of federalism research, several edited volumes, and special issues (e.g., Steytler 2021, Chattopadhyay et al. 2022, Publius Vol. 51/Issue 4 2021) have been published in the meantime, providing studies on different federations and their response to the crisis. However, this literature predominantly focuses on intergovernmental processes of coordination, exploring different federations and contexts (Schnabel & Hegele 2021, Vampa 2021, Broadhurst & Gray 2022, Jüptner & Klimovsky 2021, Kuhlmann & Franzke 2022, Navarro Velasco 2022). Often, the titles already state that "complex intergovernmental problems" (Pacquet & Schertzer 2020), "intra-state tensions" (Federman & Curley 2022), or even "intergovernmental conflict" (Lecours et al. 2021) are expected in the face of pandemic-driven challenges, in particular for federations with shared responsibilities between the different levels of government.

In contrast to the focus mentioned above, the comparative analysis of different policies, i.e., different measures related to different areas to contain the Covid-19 pandemic, at the subnational level is still a research gap. This is partly because data on this issue usually has to be collected by the researchers themselves, which is costly given the corresponding number of subnational entities. Unfortunately, the best-known dataset, the

"Oxford Covid-19 Government Response Tracker"[III] provides data at the subnational or local level for Brazil, Canada, the United Kingdom, and the USA only. The "CoronaNet Research Project"[IV] provides data at the subnational level for Germany also, but the policy categories used are relatively broad. The policies we examine are merged into a common category so that a comparison of individual policies is impossible. Consequently, the variance in the individual policies and differences are not visible. To fill this research gap, we conduct a separate analysis of facility closures in the six policies 'restaurants', 'bars and pubs', 'dance clubs', 'cinemas', 'gyms' and 'gambling halls', covering all 16 German states ('Länder') and the two shutdowns of spring 2020 and winter/spring 2020/21.

Given the extensive coordination efforts taking place in the German federation during the pandemic, our research interest is: *To what extent can subnational diversity of regulations be observed and which patterns do appear comparing states (across policies) and policies (across states)?* We create a new dataset for the time between March 2020 and September 2021, including 55,548 data points. In both periods (related to the two shutdowns), we find substantial variance in that several days, weeks, or even months lay between the times of facility reopening in the different policies and in the different states. Almost all states abided by the joint agreements for closure (i.e., results of coordination) in almost all policies. Differences were limited to the times in which the states decided independently. Except for Schleswig-Holstein – which opened earlier – and Bavaria – which opted for longer closure times –, no clear state-related patterns emerged across all six policies and the two periods. The differences between the states within the same policies and the different opening orders of the six policies show that the states each their own course in fighting the pandemic.

The article proceeds as follows: Chapter 2 outlines contextual information on policy making in the German federation during the pandemic and summarizes thematical findings of the literature. Chapter 3 then discusses the dataset and method. The results of the empirical analysis are presented in Chapter 4, followed by the conclusion in Chapter 5.

2. Policymaking in the German Federation During the Pandemic

In the Federal Republic of Germany, the dominance of legislation in 'regular times' is at the federal level, while the states are primarily responsible for implementing the laws (Rudzio 2019: 261f.). The responsibility for implementation comprises both the own state laws and the federal laws. Partly, the states participate in legislation at the federal level by the second chamber of parliament, the 'Bundesrat'.[V] Yet, administrative implementation of federal laws means less scope for differences at the subnational level compared to legal responsibilities leading to own – and potentially different – state laws.

Division of responsibilities during the pandemic

The central constitutional basis for the division of competences in times of pandemics is Article 74 (1) No. 19 Basic Law on "Measures against Publicly Dangerous or Communicable Diseases in Humans and Animals". According to this so-called 'concurrent legislative competence' the states are only allowed to legislate if and to the extent that the federal government has not exercised its legislative competence by passing a law. Although the Federal Infection Control Act contained comprehensive regulations in favor of the federal government, it also granted power to the states to issue decrees so that regulations remain possible at the state level (Mers 2019: 23f.). Additionally, concerning the pandemic, the responsibility for disaster control is relevant, which lies primarily with the states – except in the case of war-related hazards, for which the federal government is responsible (Art. 73 No. 1 GG) (Lemke 2020: 3). Thus, during the crisis, the states dominated first (Thiele 2012: 78f.). While the federal law regulated basic aspects of possible protective measures, the states determined independently whether, when, and to what degree these are introduced. The situation changed in times of the so-called 'Federal Emergency Brake' (see below) but generally there was a lot of scope for the states.

Overview of pandemic development and containment reactions

The first pandemic containment measures in Germany were imposed in February 2020, at that time still at the local level due to limited outbreaks (for the following see Färber 2021: 52-56). As can be seen in Figure 1, the number of people infected with the Covid-19 virus rose sharply from the beginning of March. After single states had already passed

policy measures to restrict social contact, more extensive measures were agreed upon on March 12. On March 22, the German chancellor and the heads of state governments agreed to a comprehensive lockdown of almost all areas of public life. All businesses (except basic services) had to close, as did schools, universities, restaurants, theatres, opera houses, sports venues, and the like. On March 25, 2020, the federal parliament declared an "epidemiological situation of national significance" and imposed a nationwide lockdown two days later. Since the measures provided for require the approval of the Bundesrat by constitutional law, the states were directly involved in the decision-making process. As of the end of May 2020, the number of new infections had declined sharply, and so the restrictions were gradually eased or lifted. In early October 2020, the numbers increased exponentially within a short time, leading to the second shutdown starting on November 2, 2020. The colored bars in Figure 1 – which represent the policies analyzed in this study – mark the two shutdowns (periods of closure) the states agreed on.

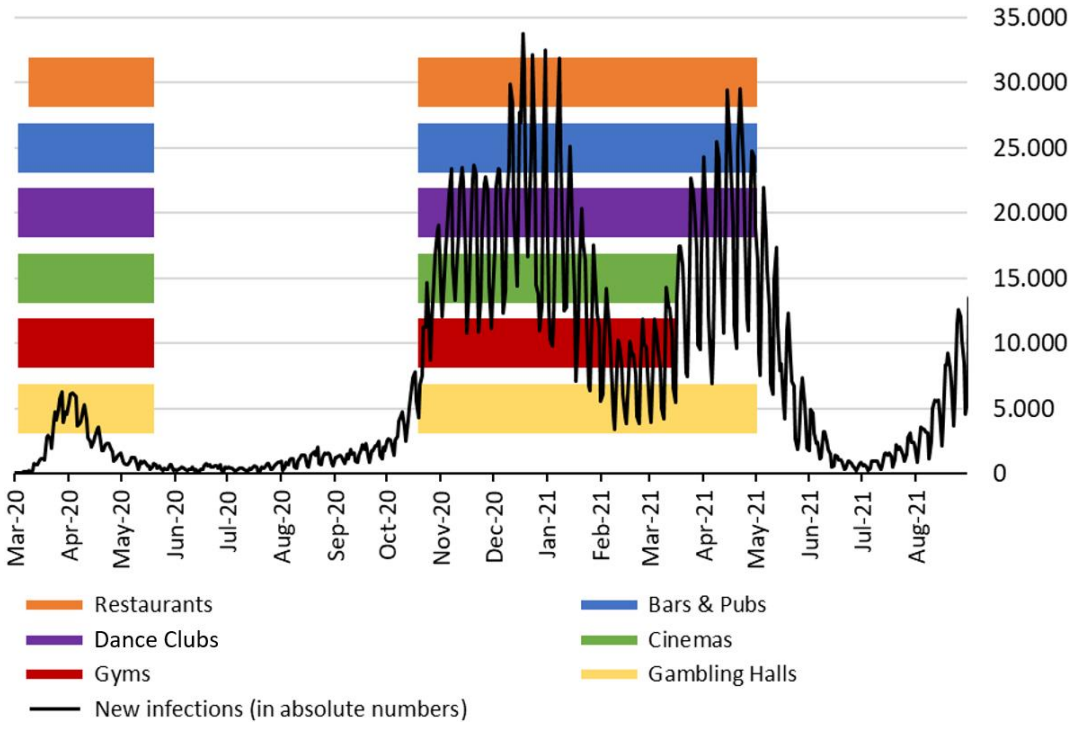

Figure 1: Rate of new infections (black curve) and closure periods by agreement of the 16 states for the six policies analyzed (colored bars)
Source: Own compilation

Coordination and joint agreements

The German federation can be classified as 'cooperative federalism' (Kropp 2010: 10) which generates a higher degree of entanglement due to the division of tasks between the federal and state level (see above, ibid.: 9). Already in the 1960s, coordination took place at and between all levels of government to such an extent that Hesse (1962) called Germany a "unitary federal state". During the pandemic, one of these (coordination) committees, the so-called "Ministerpräsidentenkonferenz" (MPK, translates into Conference of Prime Ministers) gained special relevance. At these conferences, the prime ministers as representatives of the 16 states meet at least four times a year, discussing and coordinating political reactions on current issues. In times of Covid-19, this conference format developed into more regular meetings, taking place at least once a month, with the chancellor joining upon invitation. The aim was to coordinate policy measures to contain the pandemic, which the states implemented later for their territories by passing their own decrees (Schnabel & Hegele 2021: 552). The conferences were mostly held online or via phone only, since larger face-to-face meetings were prohibited by decree nationwide due to the infection risk personal contacts posed. After these meetings, the joint agreements were presented as the output of the coordination process in press conferences and made publicly available. Agreements such as these reached at the MPK are not legally binding but usually have a high political binding effect. From March 2020 to September 2021, there were 28 conferences in total, leading to agreements on several policy aspects. The agreements relevant to our analysis are listed in Table 1 and visualized in Figure 1 (colored bars).

In the face of persistently high infection rates, the federal government passed the Infection Protection Act (so-called "Federal Emergency Brake"), which came into force on April 23, 2021. Accordingly, all facilities in the six policies in our analysis were required to close if the seven-day incidence exceeded 100 new infections per 100,000 persons for three consecutive days. Conversely, states were allowed to adopt their own regulations for the six policies if incidences were below 100. After being expanded by an opening clause for vaccinated, recovered, or tested persons as of July 7, 2021, the Infection Protection Act expired at the end of June 2021. From that point on, no restrictions – neither through joint agreements nor federal law – applied to the states.

		Restaurants	Bars and Pubs	Dance Clubs	Cinemas	Gyms	Gambling Halls
Period 1	03-17-2020 – 03-22-2020	–	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure
	03-23-2020 – 05-06-2020	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure
	05-07-2020 – 11-01-2020	–	–	–	–	–	–
Period 2	11-02-2020 – 03-04-2021	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure	Agreement for closure
	03-05-2021 – 04-22-2021	Agreement for closure	Agreement for closure	Agreement for closure	–	–	Agreement for closure
	04-23-2021 – 05-06-2021	Federal Infection Protection Act requires states to close all facilities in the respective policies if 7-day incidence exceeds 100 per 100,000 persons for 3 consecutive days (and vice versa, if the incidence is below 100, the states may decide for themselves)					
	05-07-2021 – 06-30-2021	Federal Infection Protection Act remains in force, yet with new opening clauses for the states: facilities in the respective policies can open even if the 7-day incidence exceeds 100 per 100,000 persons for 3 consecutive days as long as only vaccinated, recovered or tested persons enter the facility.					
	07-01-2021 – 09-30-2021	–	–	–	–	–	–

Table 1: Agreements on Covid-19 containment measures related to the six policies analyzed
Source: Own compilation
Note: The conferences relevant to this analysis were held on 03-16-2020, 03-22-2020, 04-15-2020, 04-30-2020, 05-06-2020, 10-28-2020, 11-25-2020, 12-02-2020, 12-13-2020, 01-05-2021, 01-19-2021, 02-10-2021, 03-03-2021, 03-22-2021 and 08-10-2021. Full text proof is available upon request.

Diversity in the German federation – findings from literature

Although being a federal state is part of the unalterable core of the German constitution (Article 20 (1) of the Basic Law, Article 79 (3) of the Basic Law), the associated notion of federal diversity has been overlaid for decades by the guiding idea of the 'equivalent living conditions.' As surveys have shown several times, the unitary orientation of the population is strong, with the vast majority favoring nationwide uniform policies (Petersen 2019: 122f., Scharpf 2008: 510). This orientation is reinforced by the media, which regularly report on policymaking in the states in a comparative way, mention 'outlier' and criticize a 'regulatory jungle' due to different regulations in the 16 states (Reus 2016: 9f.). The Federalism Reform of 2006 aimed at disentangling the legislative competences of the federal and the subnational level and transferred several new competences to the states. As shown by Reus and Vogel (2018) the reform led to a considerable degree of diversity in many of the new policies. However, it does not mark a turning point in terms of a change of the unitary orientation of the public.

During the pandemic, due to the broad policy responsibility of the states leading to potentially different regulations in the 16 states, the conflict over the unitary orientation of the citizens came to force even more. Managing the crisis caused by the Covid-19 pandemic therefore also turned into a "test of federalism" (Ensminger 2020). The image of federalism conveyed by the media in this test was – according to first commentaries – as negative as had been expected. Kropp (2020: 1) states that federalism "once again found itself in the crosshairs of already critical reporting", and Münch (2020: 209) notes that "hardly any journalist or presenter (...) got along without the words 'patchwork' and 'pressing ahead'." A comprehensive study by Reus (2021) of over 400 statements related to federalism and Covid-19 in articles from daily newspapers between March and September 2020 confirms these first evaluations and demonstrates the critical attitude of the media towards federalism. Particularly, the citizens' uniform orientation showed up in many letters to the editor. Concerning citizens' attitudes, Juhl et al. (2022) analyze which factors influence support of additional discretionary powers for the federal government, i.e., centralization, using daily panel data from the Mannheim Corona Study collected during the first wave of the pandemic. The analysis indicates that more heterogeneous regulations at the state level as well as the perception of a higher personal threat by Covid-19 lead to more support.

Based on these findings, we expect strong pressure on politicians towards uniformity at the state level. Thus, a process of harmonization should take place, not only during times of joint agreements (made by the MPK) but also around them, i.e., in times in which the states were not 'bound' by agreements. On the other hand, in dynamically changing situations with regionally differing developments – like the development of infection rates during the pandemic – federalism offers advantages, such as faster action or more tailored measures (Montag 2020, Congleton 2021). As voters might reward successful politicians and punish failures at the next election poll, the different conditions and developments could, nevertheless, promote diversity of regulations in the 16 states. Considering all arguments, we expect a moderate degree of diversity in the six policies analyzed.

3. Data and Method

Latin For the analysis, six policies were selected and for each of them, and the 16 states, recorded whether facilities were allowed to open or had to remain closed (shutdown). The investigation period spans from March 1, 2020, to September 30, 2021. Each day was separately coded for each state in each policy. This resulted in a total dataset of 55,584 data points (579 days x 6 policies x 16 states).

Investigation period

The beginning of the investigation period is March 2020 when more and more local outbreaks occurred, and the total number of infections rose sharply. The end of the investigation period is marked by the last day on which facilities in one of the states and one of the policies had to remain closed. Subsequently, the entire investigation was divided into two periods corresponding to the two shutdowns in spring 2020 and winter/spring 2020/2021. The end of the first period (covering the first shutdown) is determined by the start of the second shutdown on November 2, 2020. This results in a first investigation period spanning from March 1, 2020, to November 1, 2020, and a second period from November 2, 2020, to September 30, 2021. In the last step, we separately calculated how long facilities in the 16 states and six policies had to remain closed for both periods (duration, number of closure days) and at which times the closure or opening was decreed (beginning and end of the closure period).

Selection of policies

The policies selected are 'restaurants', 'bars and pubs', 'dance clubs', 'cinemas', 'gyms', and 'gambling halls'. This decision was made for several reasons: First, we are aiming at facilities in policies that are accessible to as many groups of adults as possible at any time and that are visited voluntarily. Thus, for example, medical areas such as physiotherapy, which are visited on the instructions of the doctor, are not eligible, because here the criterion of accessibility for all at any time is missing. This also excludes any kind of associations and similarly events that are only accessible to members. Second, concerning infections, this means that policies were selected for facilities where people from many different households gather and mingle so that there is a higher risk of spreading the virus.

Basic service facilities, such as grocery stores, were also excluded. The reason is that there is no voluntary consumption decision (as no one can survive without food for longer periods) and all democratic countries allowed them to stay open leading to only little variance between government regulations. The selection includes only private sector facilities and excludes state entities such as theatres, museums, or libraries. In doing so, not only the personal but also the economic dimension is represented, as government restrictions affect citizens not only as users or customers but as owners or operators, too. All facilities selected are enclosed spaces since the recognized epidemiological perspective is that the risk of infection is much lower outdoors (e.g., in adventure parks or zoos). Finally, facilities in these six policies are present in each state in a similar way and thus are suitable for a comparative design.

Coding scheme

Each day of the investigation period in the dataset was coded dichotomously as we are interested in state regulations in terms of "opening versus closing" (of facilities in a policy). The value '0' represents 'open', meaning facilities are allowed to open for customers. The value '1' stands for 'closed', i.e., the regulations in the respective state stipulate that the facilities in the corresponding policy area must be closed to the public on this day. The opening is always subject to compliance with the applicable hygiene regulations. Other conditions – gradations of opening, so to speak – are not included. Thus, a facility is considered open as soon as it is allowed to receive customers inside, even if the number of people (e.g., 60 percent of full capacity), the number of tables (spacing regulations), or even the opening hours (e.g., extended curfew) have been limited. As stated above, at the beginning of April 2021, the Federal Infection Protection Act came into force which set binding regulations for the states in case the rate of infection exceeded the mark of 100 new infections per 100,000 persons at the county level. Below this mark, the states were entitled to pass their own regulations leading to further incidence thresholds in certain states. As we code binarily (0 = open / 1 = closed) and do not include any additional tiered conditions, we do also not consider these thresholds.

Documents used for coding

State regulations are taken from each state's Covid-19 decrees, which total over 1,000 for all states in the entire investigation period. Since these are not available in a central location (in some cases not even in the single state), all relevant decrees had to be researched first. Then, the decrees were searched for references to the six policies. This included both the terms used in this analysis and several synonyms (e.g., discotheques instead of dance clubs). However, these search terms are not necessarily expedient for each regulation since many decrees (so-called amending decrees) only refer to planned modifications of regulations and do not mention the text of the respective regulation in full. For example, such an amending decree might state that a certain half-sentence is inserted in Paragraph 13 in Number 7, or even that some words are deleted – without reciting Paragraph 13 Number 7. In this case, it is necessary to look into earlier decrees to check which policies the paragraphs and numbers refer to and how the content of the previous decree is changed by the amending decrees. For a comprehensive coding documentation, not only the source reference (name and date of the decree) but also the specific text passage was noted for each policy regulation. An overview of all 55,584 codes as well as the textual evidence can be provided upon request.

4. Empirical Analysis

The following empirical analysis presents the patterns concerning government-ordered facility closures that emerged across the 16 states in the six policies examined. Starting with the policies, we are first looking for the overall degree of variance before continuing with state-related patterns within and across policies. The chapter is divided into three sections, with the first examining facility closures during the period of Shutdown 1 (2020) and the second examining those during the period of Shutdown 2 (2020/2021). For ease of comparison, the same aspects are examined in the same order for both shutdowns. The third section presents the comparison of periods, i.e., to what extent the shutdown in connection with the first wave led to different patterns than the shutdown in connection with the second wave.

4.1 Shutdown 1 (2020)

After Covid-19 had already developed into an epidemic in China in January 2020, the WHO officially declared the previous epidemic a global pandemic on March 11, 2020. In Germany, the federal and state governments agreed on a far-reaching shutdown. From March 17, 2020, all facilities in five of the policies examined were to close and finally, from March 23, 2020, on, also facilities in the sixth policy 'restaurants' had to be closed. This agreement was extended several times until May 7, 2020. Throughout the rest of the first investigation period, i.e., before March 17, 2020, and from May 7, 2020 (until the end of the first period on November 1, 2020), there were no joint agreements and the states decided independently on facility closures.

4.1.1 Policies Compared

This section looks at the states' regulations from the perspective of the policy as a whole, i.e., it addresses policy-specific patterns comparing the six policies.

Shutdown 1 | Policies: Duration of the closures

The duration of the closure, i.e., the number of days on which facilities in the 16 states had to be closed in each policy, is shown in Figure 2. The scale is different for presentation purposes which is why a visual comparison of the height of the columns would not be conclusive. Looking at the numbers above the columns (indicating the number of closure days), we first see large differences in terms of the range between the lowest and the highest value in the respective policy area. For bars and pubs, the largest spread amounts to 117 days' difference between the shortest closure time of 51 days and the longest closure time of 168 days. Cinemas follow by a large margin with a span of 56 days, followed by gambling halls with 43 days, gyms with 32 days, restaurants with 22 days, and dance clubs with 10 days. In line with the small span, the most even spread is found in dance clubs. An obvious outlier is found for bars and pubs with a closure time of 168 days, i.e., they were closed 78 days longer than in the following state with a value of 90 days. A moderate outlier is also the state with the longest closure time of 70 days compared to the next state with 60 days, given the overall rather small spread for restaurants. In the other policies – cinemas, gyms, and gambling halls – the states' values are relatively evenly distributed within the range.

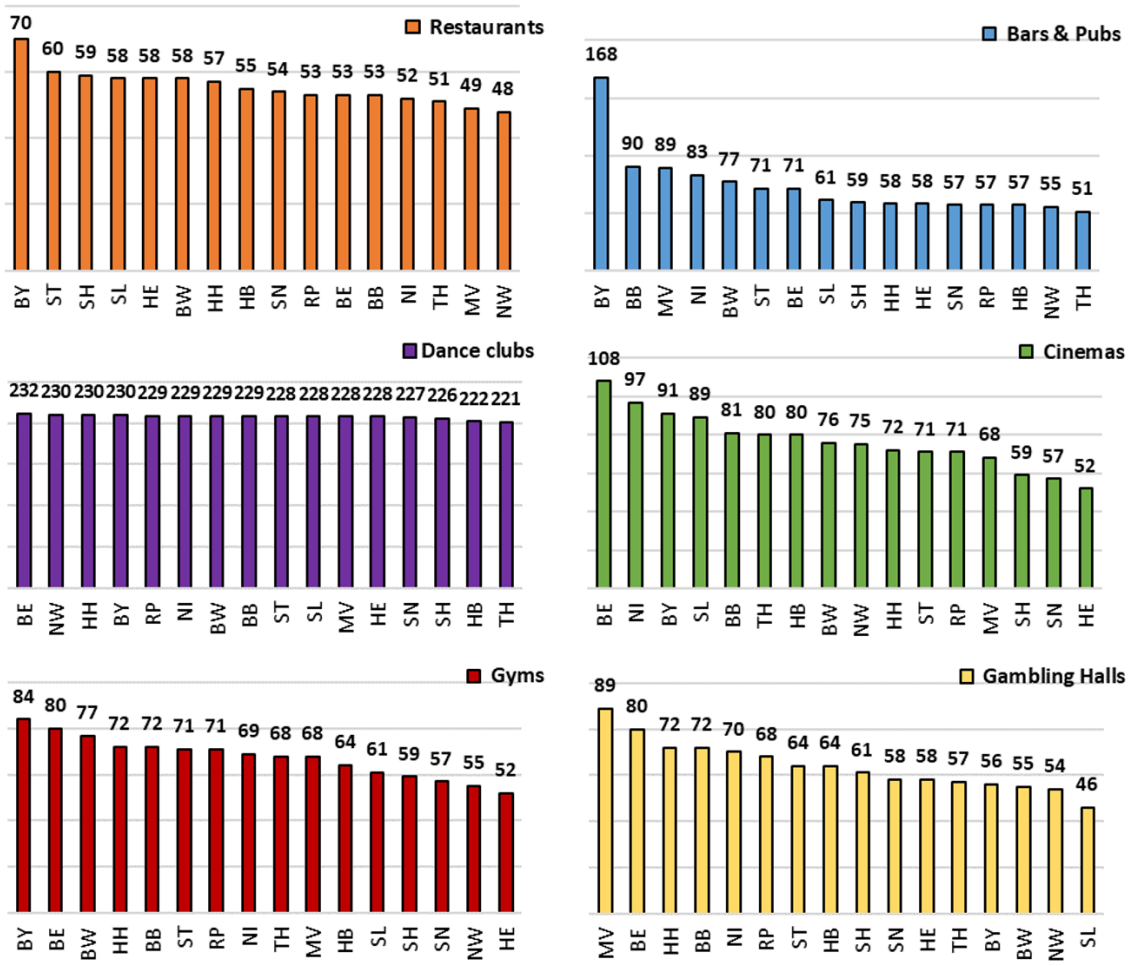

Figure 2: Shutdown 1 – Number of closure days per state differentiated by policies
Source: Own compilation

Shutdown 1 | Policies: Start and end times of the closures

In addition to the duration of the shutdown (number of days), it is of interest how the closures in the six policies are distributed on the time axis, i.e., if they started earlier or ended later. The initial phase – or in other words, the path into the shutdown – is represented by the left graphs in Figure 3, whereas the graphs on the right show the final phase of the shutdown before the openings. For presentation purposes, the time axes of the right graphs differ so that the variance between the states could still be seen.

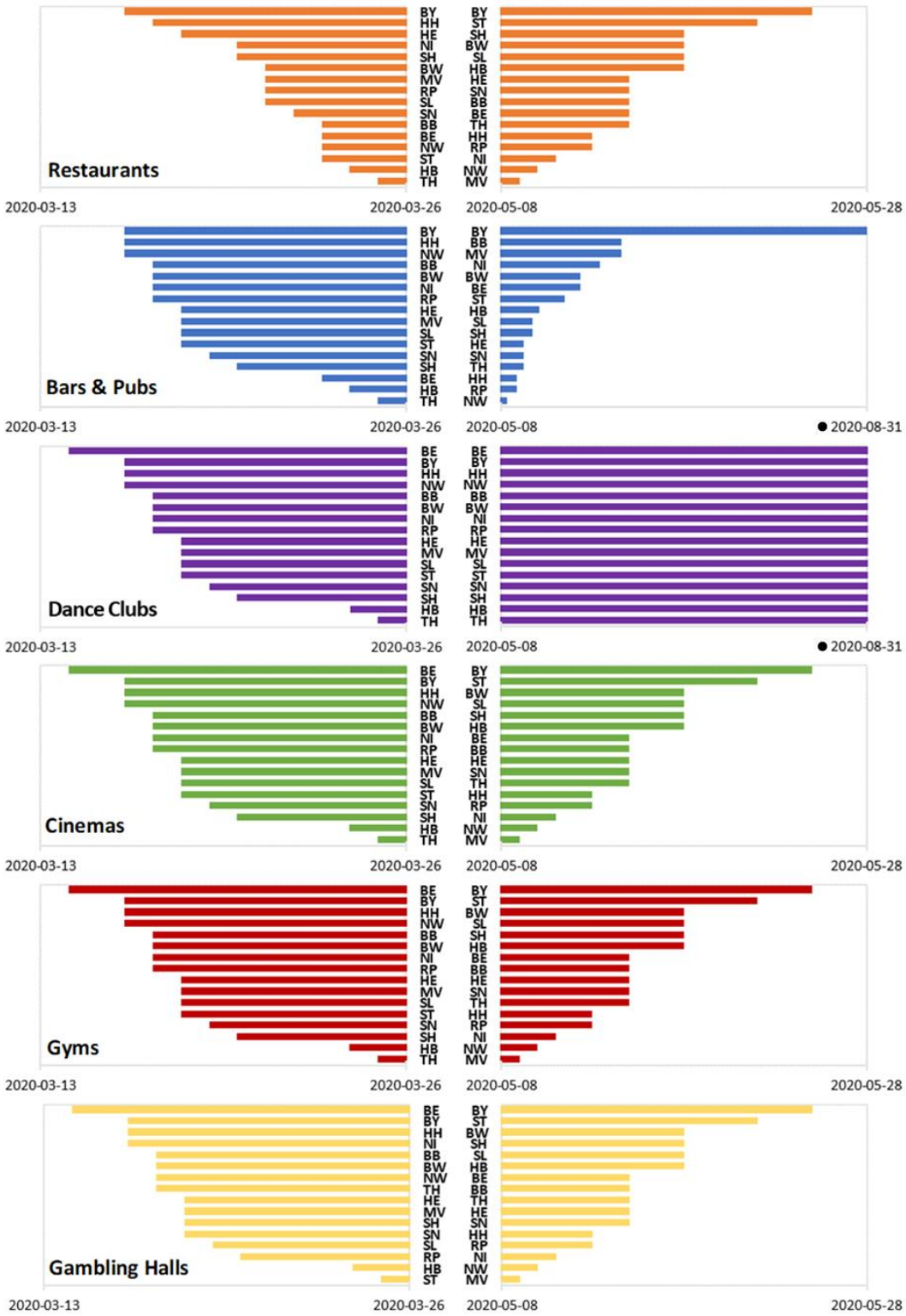

Figure 3: Shutdown 1 – Starting (left) and ending (right) points of the closures
Source: Own compilation
Note: The general time frame ends on May 28, 2020. Due to presentation purposes the end date of the X-axis is set differently for two policies with longer time frames, indicated by a black dot.

Dance clubs had not reopened by the end of the first investigation period (November 1, 2020) in all states. Furthermore, we register an extreme outlier for bars and pubs. The path to shutdown followed a similar pattern for four policies – dance clubs, cinemas, gyms, and gambling halls. A clear early mover is followed soon by closures in almost all the other states and finally, with a longer gap, by two stragglers. In the case of bars and pubs, there is no such early mover and three stragglers, which stand out from the other states due to later closures. In the case of restaurants, neither early movers nor stragglers can be identified, but the dates of closure in the states are distributed relatively evenly over the period. At the end of the shutdown, similar patterns also emerge in four policies (restaurants, cinemas, gyms, and gambling halls), with the majority of states opening at short intervals first, followed by another group of four states trailing behind, and two stragglers by a clear margin. In the case of bars and pubs, 15 states open at shorter, regular intervals one after the other, while the 16th state had a closure of 168 days – more than twice as long as the average for the other states (66 days).

4.1.2 States Compared

In this section, we change the perspective from policy-related to state-related patterns. We examine whether there are differences between the states in such a way that certain states regulate more restrictively across all policies than others.

Shutdown 1 | States: Duration of the closures

Figure 4 shows the closure time for each of the 16 states concerning the six policies considered. The first finding is that in all states the number of days is by far the highest for dance clubs since these were not reopened in any of the states after the end of the first shutdown till the end of the first investigation period. Moreover, no state-related pattern can be identified concerning the order of the other policies, i.e., the states closed or opened facilities in all policies except of dance clubs in a different order (facilities in no policy were closed the longest or shortest in all or most states). Larger differences between the closure times of the policies within a state are found in Bavaria with bars and pubs as an extreme outlier, Berlin, and North Rhine-Westphalia with cinemas as an outlier and Saarland with gambling halls as an outlier. A range of only two to six days between the closure times of

the various policies (except for dance clubs) is found in Hesse, Saxony, and Schleswig-Holstein, which also reopened these facilities after a rather short time compared to the other states.

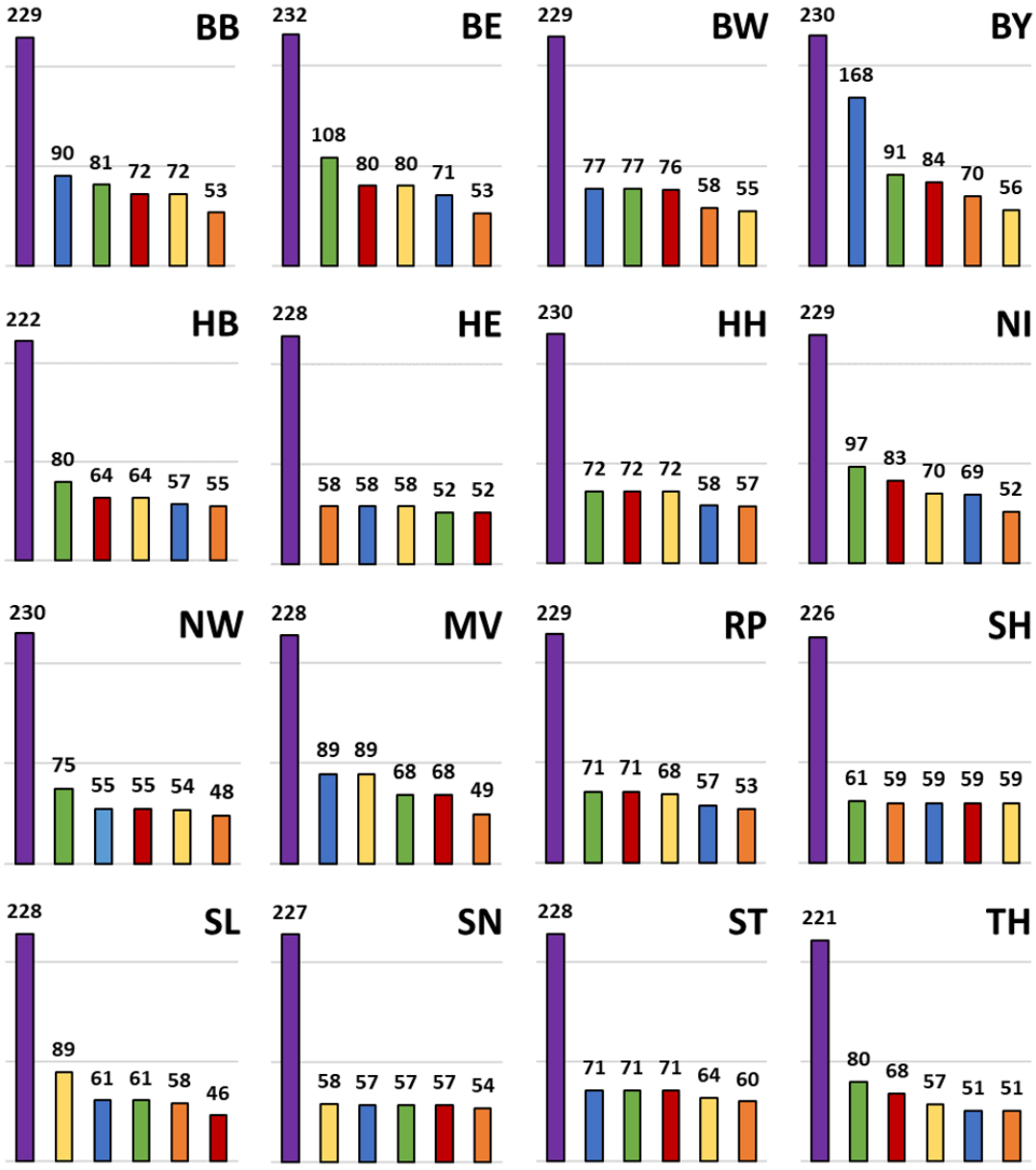

Figure 4: Shutdown 1 – Length of closure differentiated by policies and sorted by number of days for each state
Source: Own compilation
Note: The policies are restaurants (orange), bars and pubs (blue), dance clubs (purple), cinemas (green), gyms (red) and gambling halls (yellow).

Shutdown 1 | States: Start and end dates of the closures

Following up on the duration of the closure, Figure 5 shows a state comparison of the start and end times of the closures in the six policies. There are only minor differences between the paths into the shutdown and the paths out of shutdown. This applies both to an overall comparison of the states and a comparison of the six policies in the single state. Compared to other states, facilities in all policies were closed comparatively late in Bremen and all except gambling halls in Thuringia. In all 16 states, restaurants were closed later, reflecting the joint agreements (see Chapter 2). In Berlin and Baden-Württemberg, bars and pubs were also closed much later than the other policies. In the opening phase, dance clubs stand out, which were not reopened during the first investigation period in any of the states, as well as the outlier Bavaria, which also had a long closing time for bars and pubs. Restaurants are the policy with the earliest opening time in most states. Only gambling halls were allowed to reopen before restaurants in Baden-Württemberg, Bavaria, Saarland, and Thuringia. Beyond this, there are no policy-related differences in the states but individual priorities and concepts. Conversely, this means that they may well have made different decisions about the risk situation associated with the various policies or the economic pressure exerted by the sectors.

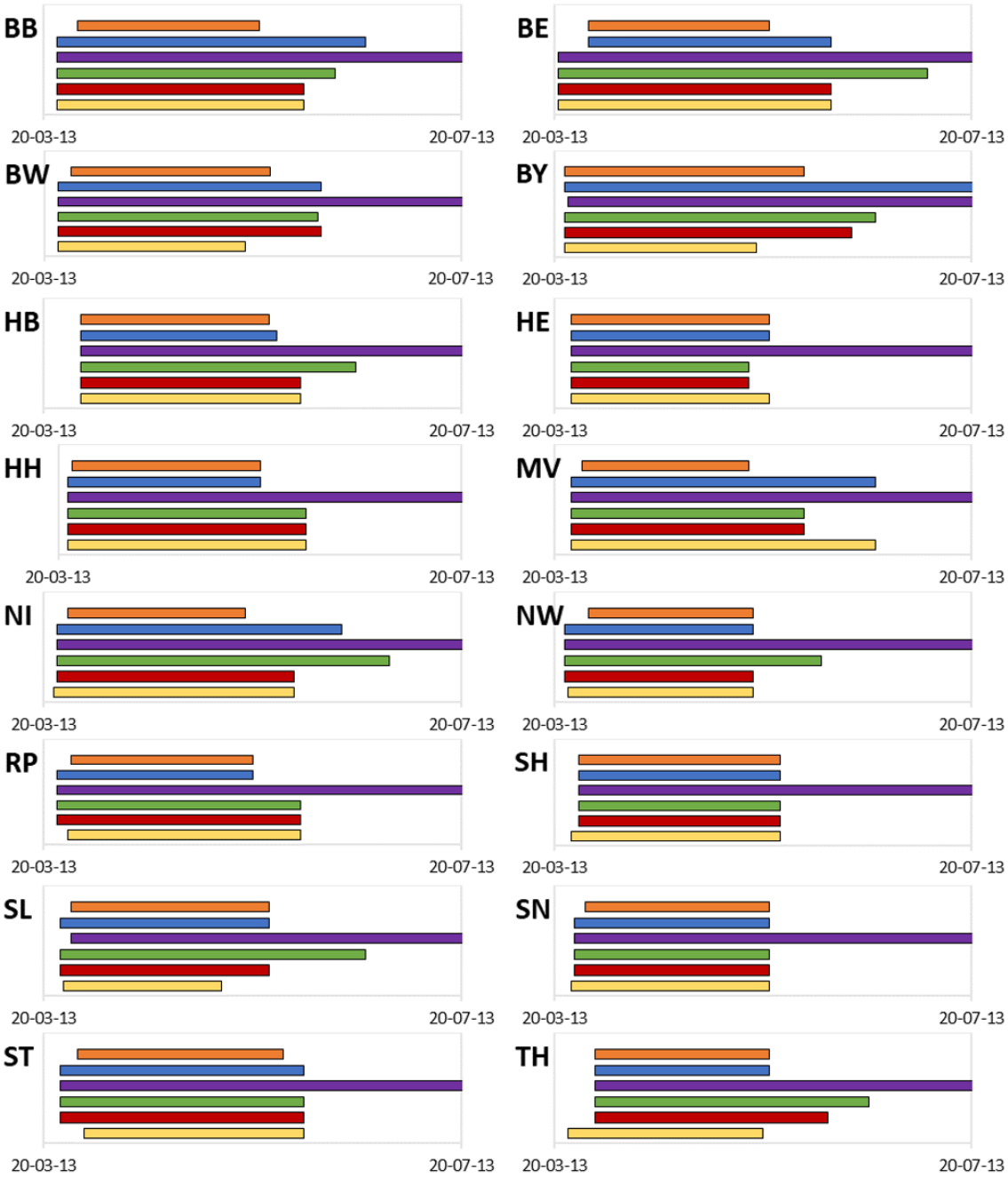

Figure 5: Shutdown 1 – Starting and ending points of the closures differentiated by policies per state

Source: Own compilation

Note: The policies are restaurants (orange), bars and pubs (blue), dance clubs (purple), cinemas (green), gyms (red) and gambling halls (yellow). The X-axis was cut in July 2020 for presentation purposes.

Shutdown 1 | States: Extent of closures over time

To capture differences between states over time, the single policies were transformed into an aggregated index of closures. On each day, each state is assigned the value 1 for closure and the value 0 for opening in each of the six policies. The index can thus vary between 0 (facilities in no policy closed) and 6 (facilities in all policies closed). In this way, the individual policy takes a back seat, and it becomes apparent which states have passed more or less restrictive regulations across all policies and swings or striking shifts at certain times can be recorded.

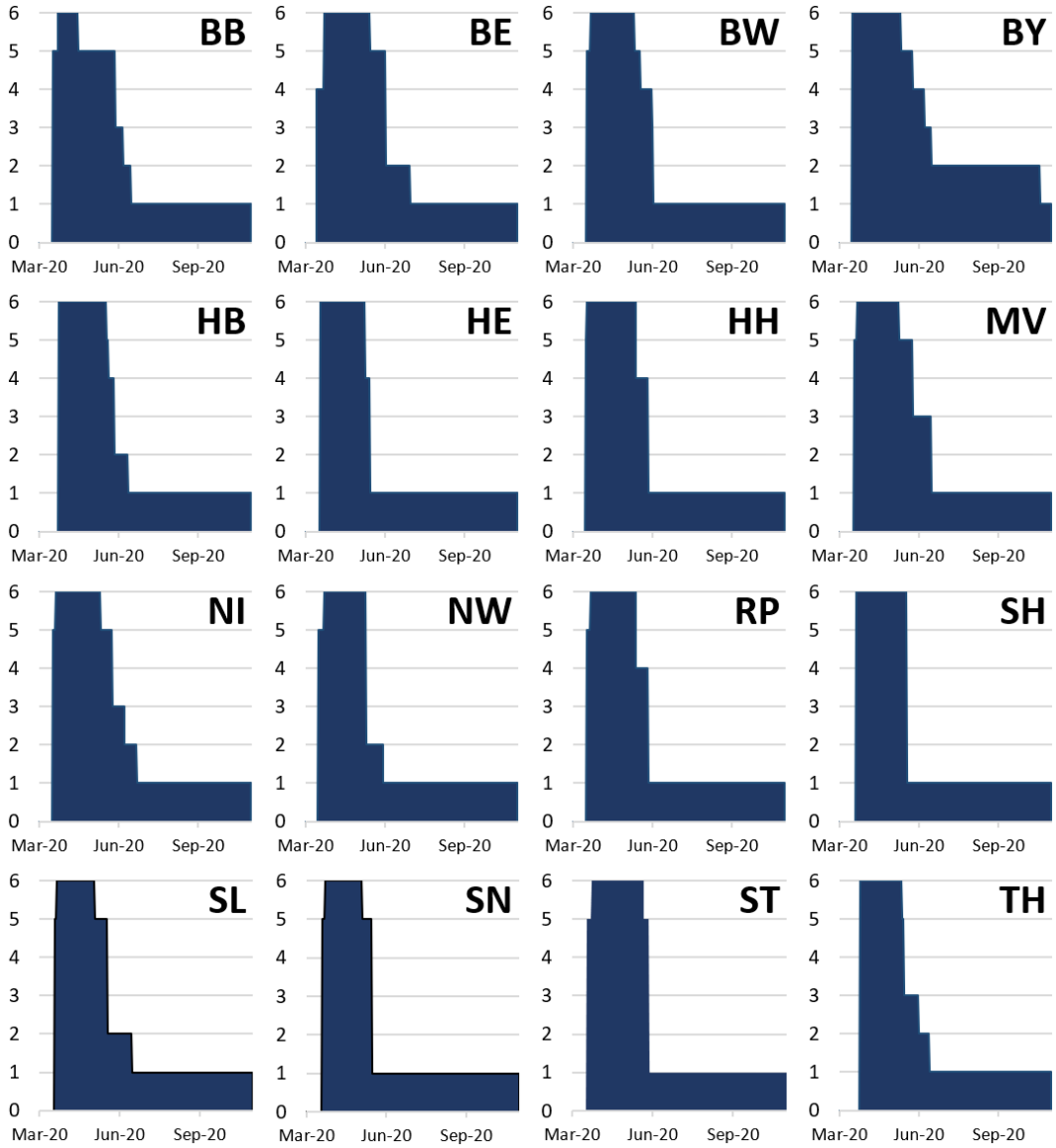

Figure 6: Shutdown 1 – Aggregated closure index per state over time
Source: Own compilation

Figure 6 shows that most states closed facilities in most policies – apart from dance clubs – for only a few weeks from mid-March to early June 2020. An almost simultaneous opening of all or almost all facilities in policies can be seen in Hesse, Hamburg, Rhineland-Palatinate, Schleswig-Holstein, Saxony, and Saxony-Anhalt. In contrast, there is staircase-shaped progress with intervals between openings in Brandenburg, Berlin, Bavaria, Mecklenburg-Western Pomerania, Lower Saxony, Saarland, and Thuringia. Brandenburg has the shortest period of closure of all policies (highest value 6), while Bavaria has kept facilities in another policy closed the longest (in addition to the dance clubs, equivalent to value 2).

4.2 Shutdown 2 (2020/2021)

The second shutdown in Germany began on November 2, 2020, as the reaction to the enormous increase in the number of infections in October in the course of the second wave. The shutdown, which was agreed upon by the 16 state governments and the federal government, was very far-reaching and included the simultaneous closure of all six policies considered in this analysis (cp. Chapter 2). The agreement to keep facilities in these policies closed was extended at several conferences until March 4, 2021. Between March 5 and April 22, 2021, the agreement included only four policies, while the opening of cinemas and gyms was left to the decision of the individual state.

As of April 23, 2021, the Federal Infection Protection Act (the so-called "Federal Emergency Brake") came into force, which, unlike the previous voluntary agreements, imposed mandatory guidelines on the states. Accordingly, by May 6, 2021, all facilities belonging to the respective policy had to be closed if the seven-day incidence exceeded the level of 100 new infections per 100,000 persons for three consecutive days. Conversely, this meant that the states were allowed to adopt their own regulations for incidences below 100 new infections. In this context, the actual incidence trend remained at such a high level until the end of April 2021 that on average, most states did not fall below the 100 mark. The only exception was Schleswig-Holstein and, from the beginning of May, Hamburg and then Lower Saxony. Although there was variance within the states as the federal law applied directly at the county level, only a smaller minority of counties permanently fell below 100. Beginning with May 7, 2021, an opening clause was added to the Federal Infection Protection Act, allowing the states to open facilities in the six policies even if

incidences exceeded 100 (according to the rule above), as long as only vaccinated, recovered, or tested persons entered the facility. At the end of June, the law lapsed, so that from the beginning of July to the end of September 2021 (i.e., for the rest of the investigation period), there were neither voluntary agreements to close facilities nor mandatory requirements by the federal government.

4.2.1 Policies Compared

Analogous to the analysis of the first investigation period, we start by looking at the states' regulations from the perspective of the policy as a whole, i.e., addressing policy-specific patterns comparing the six policies.

Shutdown 2 | Policies: Duration of the closures

The duration of the closures, i.e., the number of days that the facilities in the respective policies had to close, is shown in Figure 7 by the height of the columns. Due to presentation purposes the scale differs between the diagrams representing the different policies. Since the second shutdown was, in total, much longer than the first, longer closure periods are found in all policies. As in the first shutdown, the dance clubs have the longest closure times, but the gap between them and the other policies is now less extreme. The largest range within a policy can be seen in gyms, with 112 days between the highest value of 231 and the lowest value of 119 days. Bars and pubs follow with only one day with a range of 111 days (193 to 302 days), followed by dance clubs with 96 days (210 to 306 days), cinemas with 87 days (155 to 242 days) and gambling halls with 76 days (155 to 231 days). Restaurants have the smallest range with only 38 days between the lowest value of 193 days and the highest value of 231 days. In line with the smallest range, the most even spread of values is also found there. A similar pattern would be seen for bars and pubs without an extreme outlier with 71 days between them and the next state. Another clear outlier, but this time deviating downwards, is found for gambling halls with 39 days ahead of the next state (155/194 days).

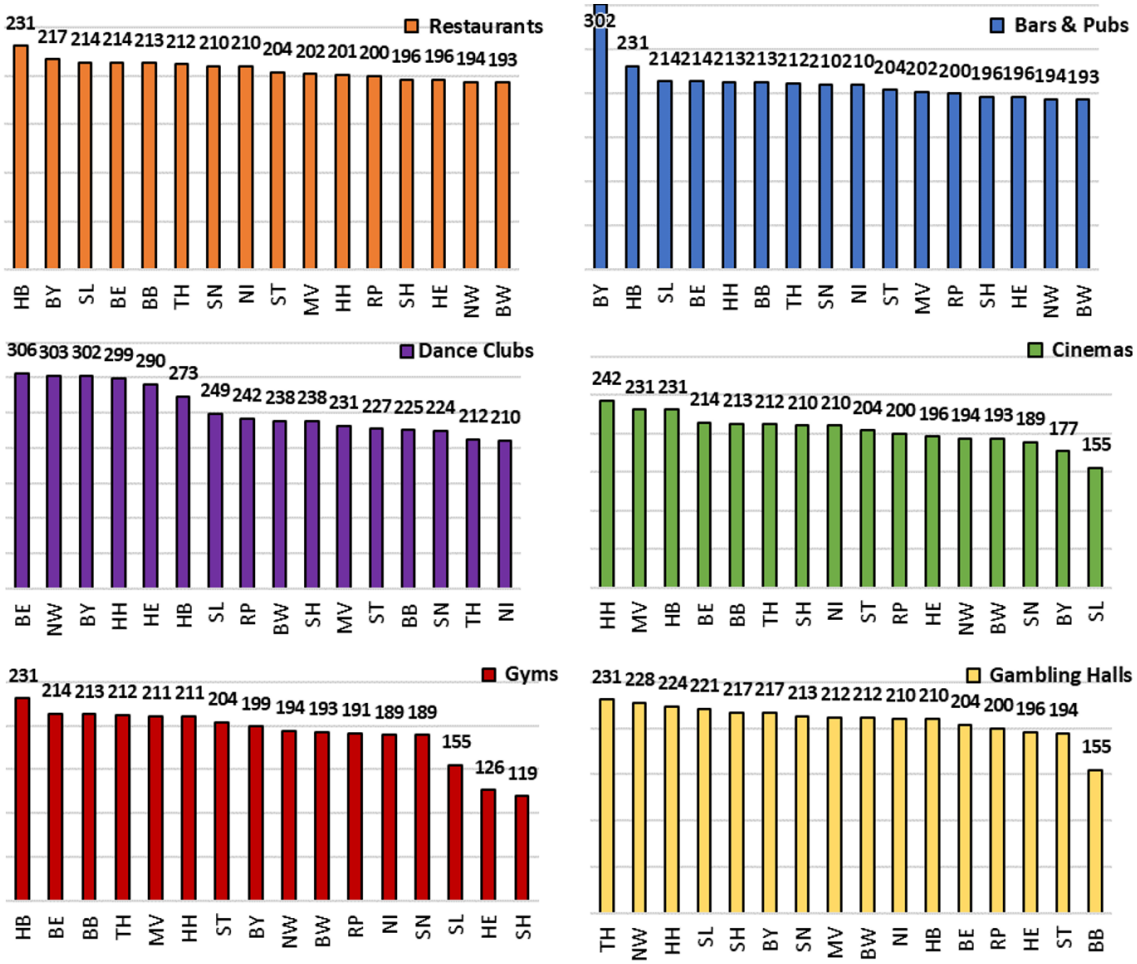

Figure 7: Shutdown 2 – Number of closure days per state differentiated by policies
Source: Own compilation

Shutdown 2 | Policies: Start and end times of the closures

Regarding the distribution on the time axis, only the period of the opening is relevant for Shutdown 2, as facilities in the six policies were closed at the same time in all 16 states on November 2, 2020 (Figure 8). For presentation purposes, the time axes are of different lengths so that a direct visual comparison of the six graphs would be misleading. The shortest period is found for restaurants, where all of the states allowed facilities to reopen within just over five weeks. By the end of June 2021, cinemas, gyms, and gambling halls had also reopened in all states. However, in these policies we can see a much longer time span between the first and the last opening state. For instance, the openings of gyms were spread over a period of around 25 weeks. For bars and pubs, the comparatively longer period until all states had opened is due to an extreme outlier (opening only at the end of

August 2021), as the second-to-last state allowed reopening 10 weeks earlier than the last. With regard to dance clubs, on the other hand, the majority of states was more cautious, so overall the openings started later and were spread over a longer period of 14 weeks.

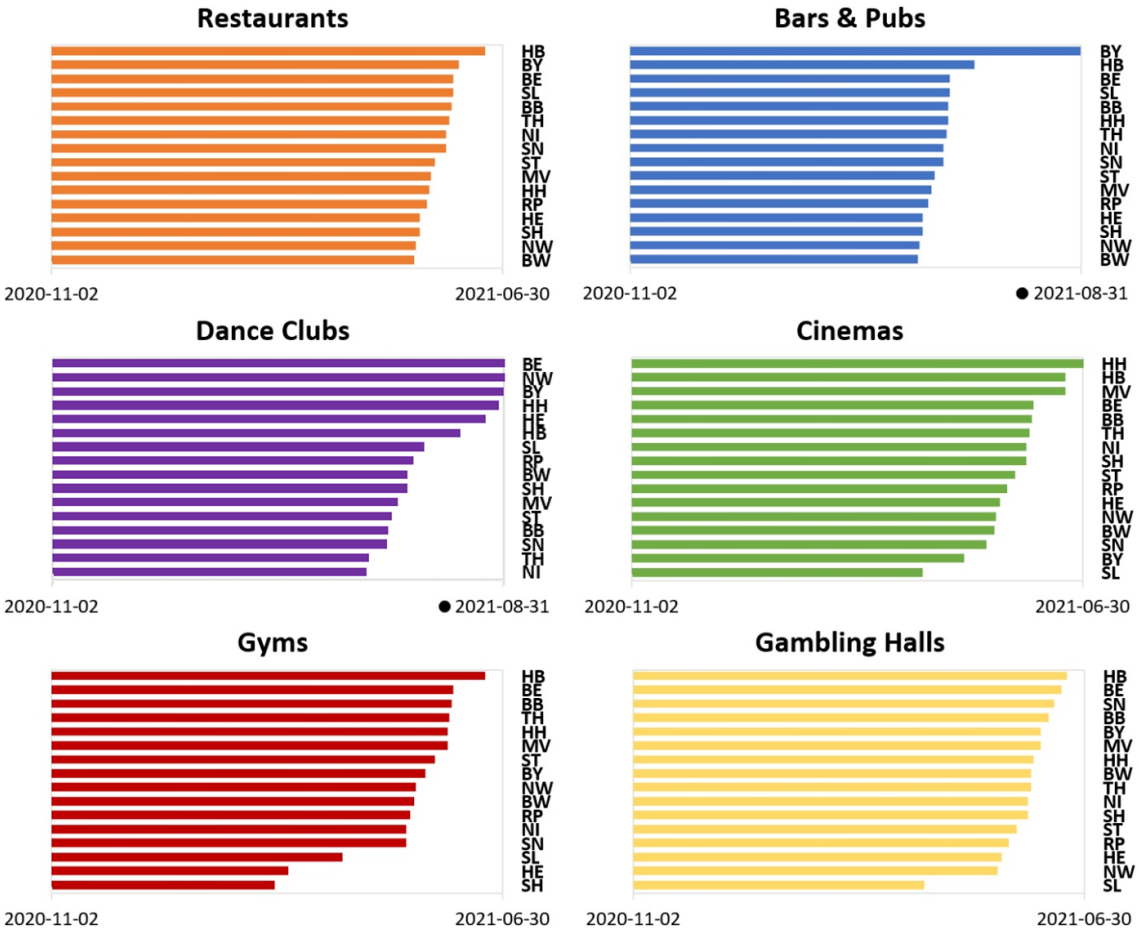

Figure 8: Shutdown 2 – Starting and ending times of the closures
Source: Own compilation
Note: The general time frame ends on June 30, 2021. Due to presentation purposes the end date of the X-axis is set differently for two policies with longer time frames, indicated by a black dot.

4.2.2 States Compared

Again, we change the perspective from policy-related to state-related patterns. We examine whether there are differences between the states in such a way that certain states regulate more restrictively across all policies than others.

Shutdown 2 | States: Duration of the closures

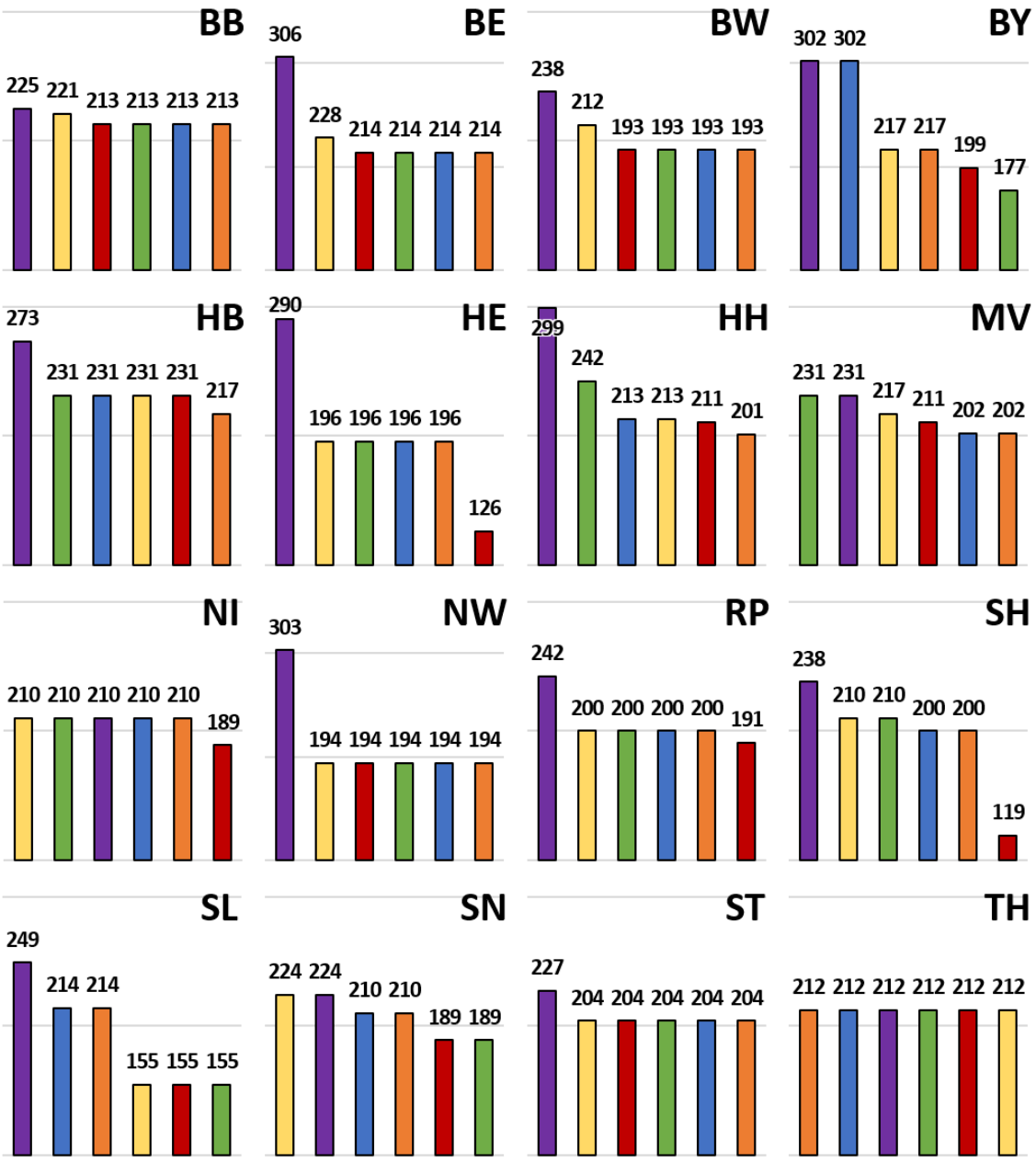

Figure 9: Shutdown 2 – Starting and ending points of the closures differentiated by policies per state

Source: Own compilation

Note: The policies are restaurants (orange), bars and pubs (blue), dance clubs (purple), cinemas (green), gyms (red) and gambling halls (yellow). The Y-axis starts at 100 in all states and varies according to the highest values in the different states.

Figure 9 shows the duration of the shutdown for each state, differentiated by the six policies. As in Shutdown 1, in all states the number of closure days was the highest for dance clubs but now by a smaller margin and sometimes with the same number as one or even several, other policies. No state-related pattern can be identified concerning the order of the other policies, i.e., the states closed or opened facilities in all policies in a different order (in no policy facilities were closed the longest or shortest in all or most states). Larger differences between the number of closure days of the policies within a state can be found in Bavaria, with just as many for bars and pubs as for dance clubs, in Mecklenburg-Western Pomerania, with just as many for cinemas as for dance clubs, and in Hamburg, Saarland, and Saxony. Gyms in Schleswig-Holstein and Hesse are lower outliers with a significantly lower number of days than the other policies in these states. What is striking in comparison to the first shutdown is that many states scheduled only a few days between the opening of the different policies. An exactly equal number of closure days in five policies can be found in North Rhine-Westphalia with 194 days, in Lower Saxony with 210 days, in Saxony-Anhalt with 204 days and in Thuringia with 212 days. In addition, four policies were opened simultaneously in Brandenburg after 213 days, in Berlin after 214 days, in Baden-Württemberg after 193 days, in Bremen after 231 days, in Hesse after 196 days and in Rhineland-Palatinate after 200 days.

Shutdown 2 | States: Start and end dates of the closures

To integrate different opening times of the facilities in the six policies into the analysis, Figure 10 features them on a time axis for all states. Unlike the first shutdown, there are no differences between the states at the beginning, as a joint agreement for closure in all six policies initiates the shutdown on November 2, 2020. As in the first shutdown, the late opening of the dance clubs stands out for most of the states compared to the other policies, although this time only a few states leave the dance clubs closed almost or until the very end. Once again, Bavaria proves to be an outlier by keeping pubs and bars as well as dance clubs closed for a significantly longer period. Unlike in the first shutdown, only Bremen and Hamburg opened restaurants earlier than the other policies. The other states chose other policies (e.g., gyms in Schleswig-Holstein or cinemas in Bavaria) at the beginning of the opening phase or opened several policies at the same time. Again, there

are only partly similar patterns concerning the different policies, but rather clearly different concepts in the opening policies of the states.

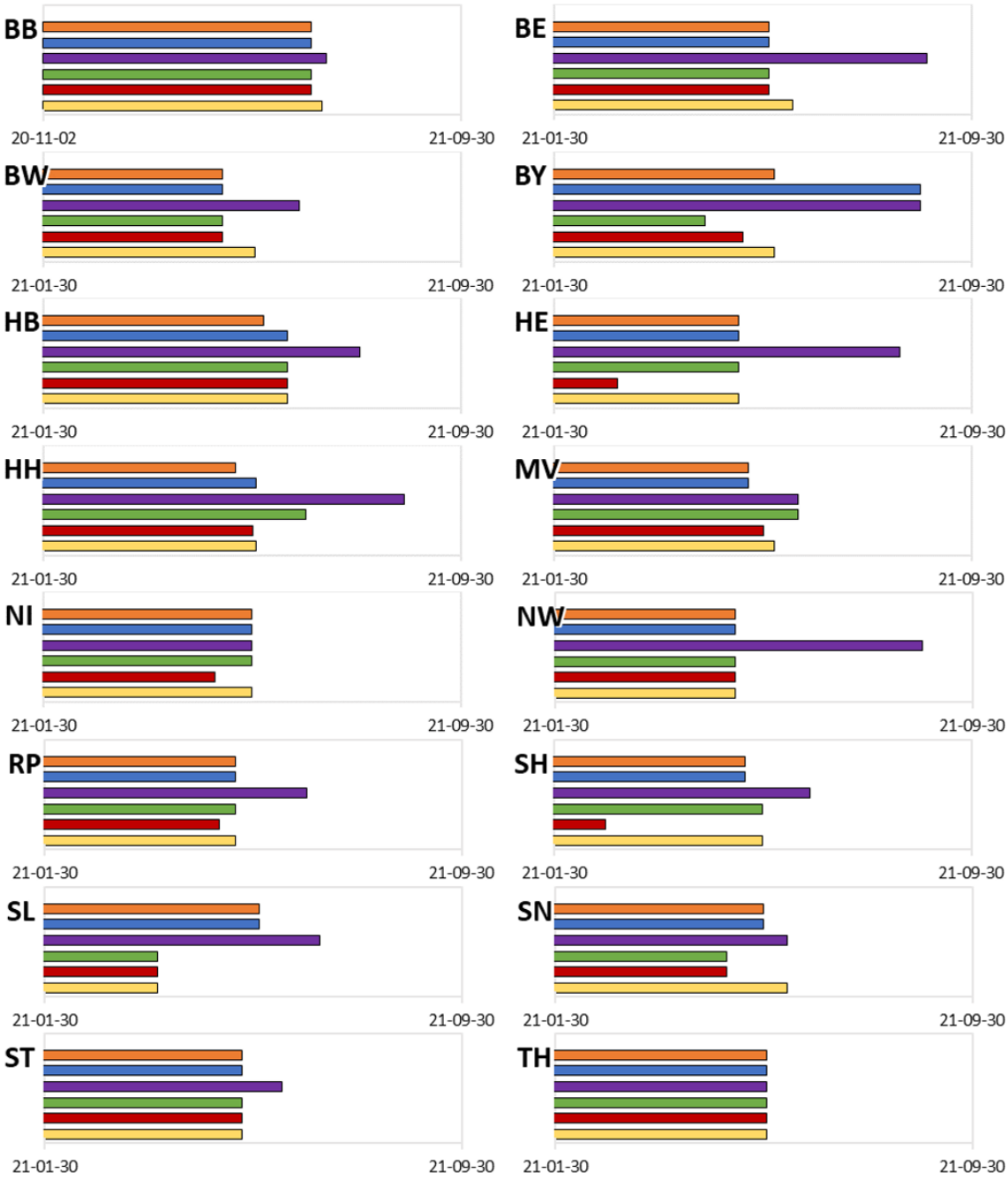

Figure 10: Shutdown 2 – Starting and ending points of the closures differentiated by policies per state

Source: Own compilation

Note: The policies are restaurants (orange), bars and pubs (blue), dance clubs (purple), cinemas (green), gyms (red) and gambling halls (yellow). The Y-axis starts at the end of January 2021 for presentation purposes.

Shutdown 2 | States: Extent of closures over time

To capture differences between states over time, the individual policies were transformed into an aggregated index, as was done for the first shutdown. The index can vary between 0 (facilities in no policies closed) and 6 (facilities in all policies closed) on every single day, so that it reflects which states have passed more or less restrictive regulations across policies over time.

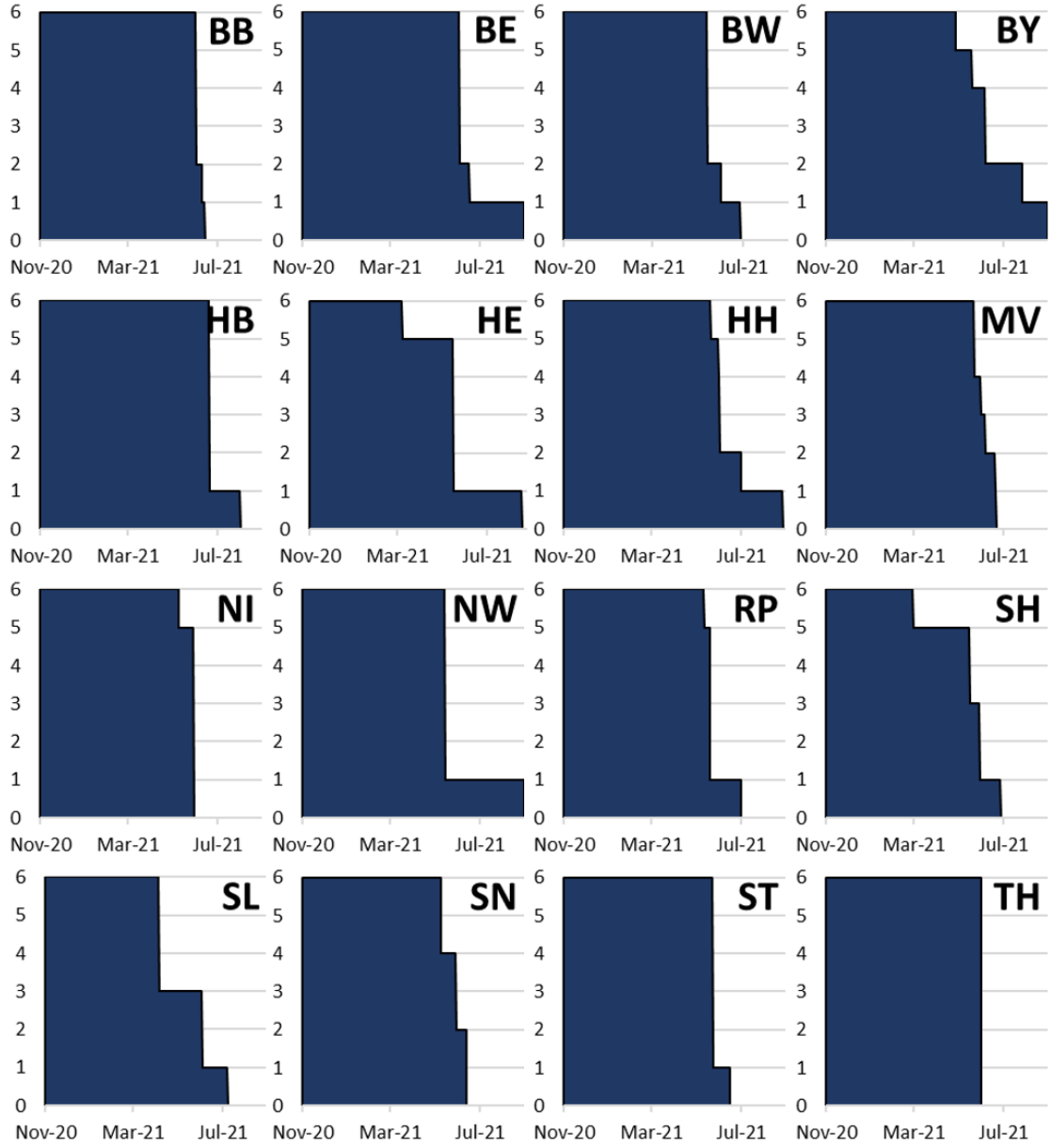

Figure 11: Shutdown 1 – Aggregated closure index per state over time
Source: Own compilation

Figure 11 first shows that in all 16 states the period of complete closure of all six policies accounts for a significantly larger share of the total period under investigation. It is striking that in the second shutdown only five states (Berlin, Bavaria, Hesse, Hamburg, and North Rhine-Westphalia) kept facilities in a policy closed until the end or shortly before the end of the investigation period. An almost simultaneous opening of all or almost all facilities in policies is evident in nine states. On the other hand, staircase-shaped progressions with clear intervals between the openings of facilities in the various policies were only found in Bavaria and Schleswig-Holstein. The shortest period in which facilities in all policies were closed (highest value 6) occurs in Schleswig-Holstein that took the first opening step as early as the beginning of March 2021.

4.3 Comparison of Shutdown 1 and 2

After analyzing the shutdowns separately in detail, we finish the analysis by comparing the results of the two periods regarding differences and similarities. In line with the previous chapters, the first section deals with the policies and the second with the states.

4.3.1 Policies Compared

To compare the distribution of all states' values in the six policies, we present aggregated information in form of boxplots in Figure 12. Shutdown 1 is displayed in the upper part of the diagram. As can be seen the interquartile range (between the first and third quartile) of dance clubs and restaurants is very small, i.e., the middle 50 percent of the values are very close to each other. For bars and pubs, this range is many times larger, meaning that there are huge differences between the number of days the middle 50 percent of the states have closed these facilities. An important location parameter is the median (middle horizontal line inside the box), which divides the distribution into two equal parts and, unlike the mean, is not susceptible to outliers. Using the median, it is apparent that by far the greater proportion of values is in the upper range for bars and pubs, i.e., there are longer closure times in these states. Regarding gyms, it is the other way round as the greater proportion of values is in the lower range. The circles outside the boxes for restaurants, bars and pubs, and dance clubs mark the outliers already mentioned.

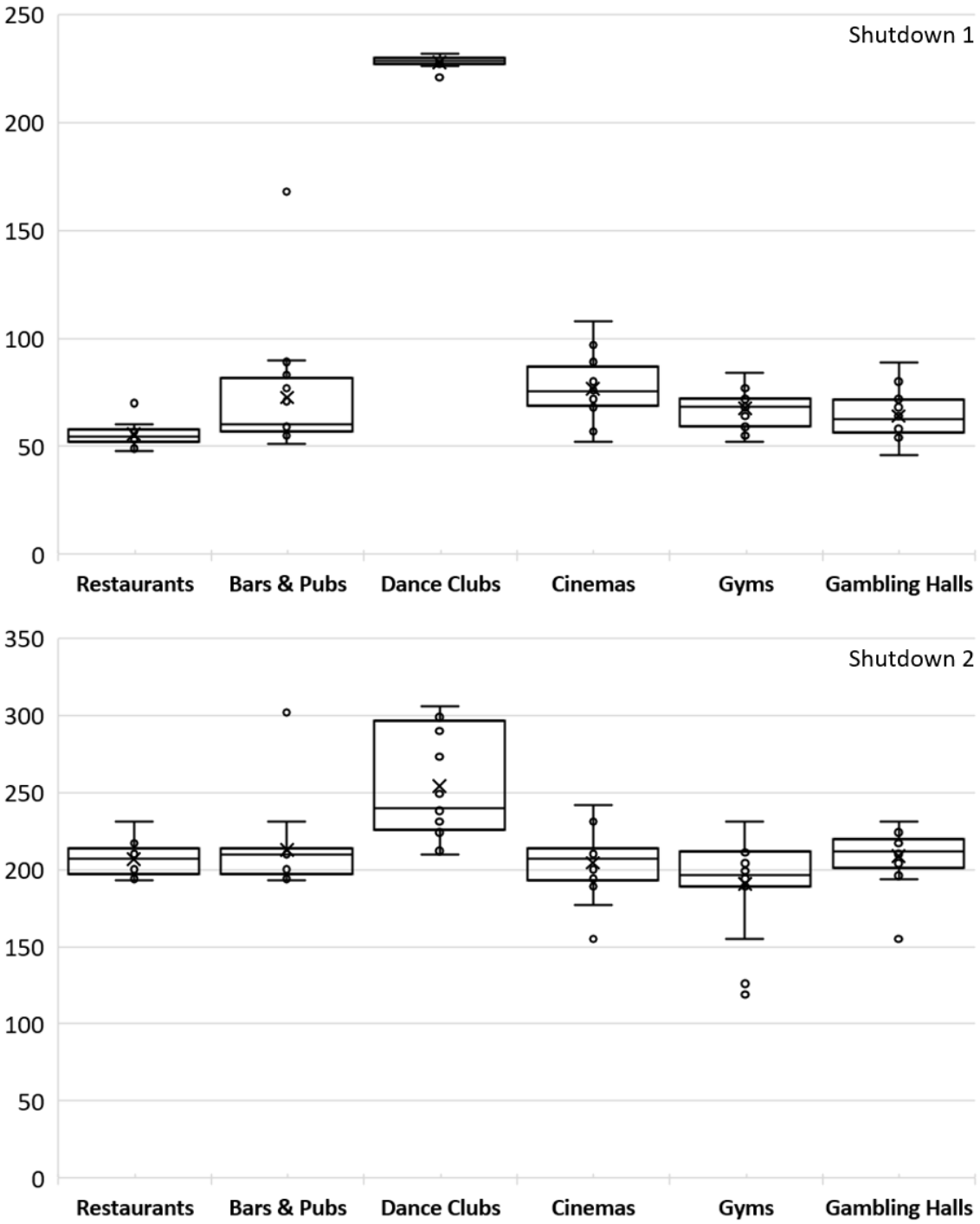

Figure 12: Distribution of the states' closure times in the six policies – Shutdown 1 (upper part) and 2 (lower part) compared
Source: Own compilation

Shutdown 2 is displayed in the lower part of Figure 12. For five of the six policies – restaurants, bars and pubs, cinemas, gyms, and gambling halls – the interquartile range is

rather small, i.e., the middle 50 percent of the values are concentrated in a similarly small range. In the case of dance clubs, the interquartile range is much larger, as there are huge differences between the number of days the middle 50 percent of the states have closed these facilities. The median indicates that by far the greater proportion of the states' values is in the upper range for dance clubs and in the lower range for bars and pubs. The latter contains one upper outlier, whereas cinemas and gambling halls contain one, as well as gyms two, lower outliers.

When comparing the boxplots for Shutdown 2 to those for Shutdown 1, the most striking difference is how the states handled the closing of dance clubs. In both shutdowns dance clubs were closed the longest but with distinctly different patterns. In the first shutdown, all states had nearly the same closure times leading to a very small interquartile range, while in the second one, a large variance of closure times occurred. Regarding bars and pubs, by far the greater proportion of values is above the median in the first shutdown, but below it in the second – each with an upper outlier (Bavaria in both cases) but with a much greater interquartile range in the first period.

4.3.2 States Compared

This chapter compares two aspects from the perspective of the states. The first section presents an aggregated overview of all states across all policies, i.e., the overall distribution matters and not the individual states. Following this, the single states and their concrete positions in comparison to the others are highlighted.

Shutdown 1 & 2 | Distribution of average values of states across policies

We now compare the distribution of states' average values, i.e., the average of the number of closure days across all six policies for Shutdown 1 and 2 (Figure 13). The end of the Y-axis is for each of the shutdown periods the number of days of the entire (part of the) investigation period so that a visual comparison of sizes and proportions becomes possible. The first investigation period reaches from March 1, 2020, to November 1, 2020, which sums up to 245 days, while the second period spans from November 2, 2020, to September 30, 2021, summing up to 332 days. In relation to the different lengths of the two periods, the interquartile range is similar. The median is 93 days for the first period and 210 days for the second period. Thus, averaged over all states and policies facilities were

closed 38 percent of the first period and 63 percent of the second. For Shutdown 1, the median divides the states' values nearly equally, whereas for Shutdown 2, the median indicates that by far the greater proportion of states' values is in the upper range. This means that more states had a longer average closure time across policies. None of the two distributions contains an outlier.

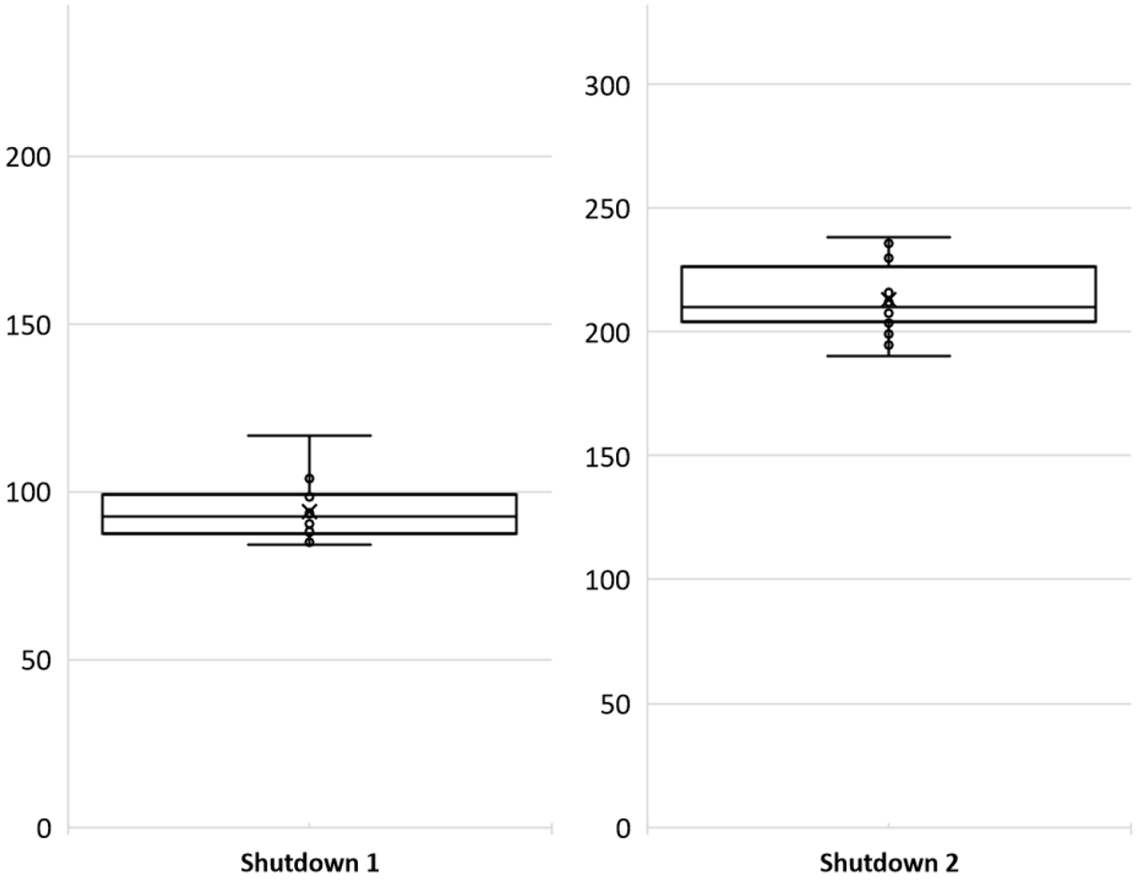

Figure 13: Distribution of the states' average closure times across policies – Shutdown 1 (left) and Shutdown 2 (right) compared
Source: Own compilation

Shutdown 1 & 2 | Individual states

Figure 14 shows the average number of closure days per state across all policies during the two investigation periods. For Shutdown 1, there is a range of 33 days between the states with the highest and the lowest value (Figure 14, upper part). Bavaria – in which facilities had to be closed on 117 days on average – is the clear leader, followed by Berlin

with the second-highest value of 104 days. The state with the lowest value is Hesse, though closely followed by Saxony with only one day more. The other states are distributed relatively evenly between 84 days and 100 days.

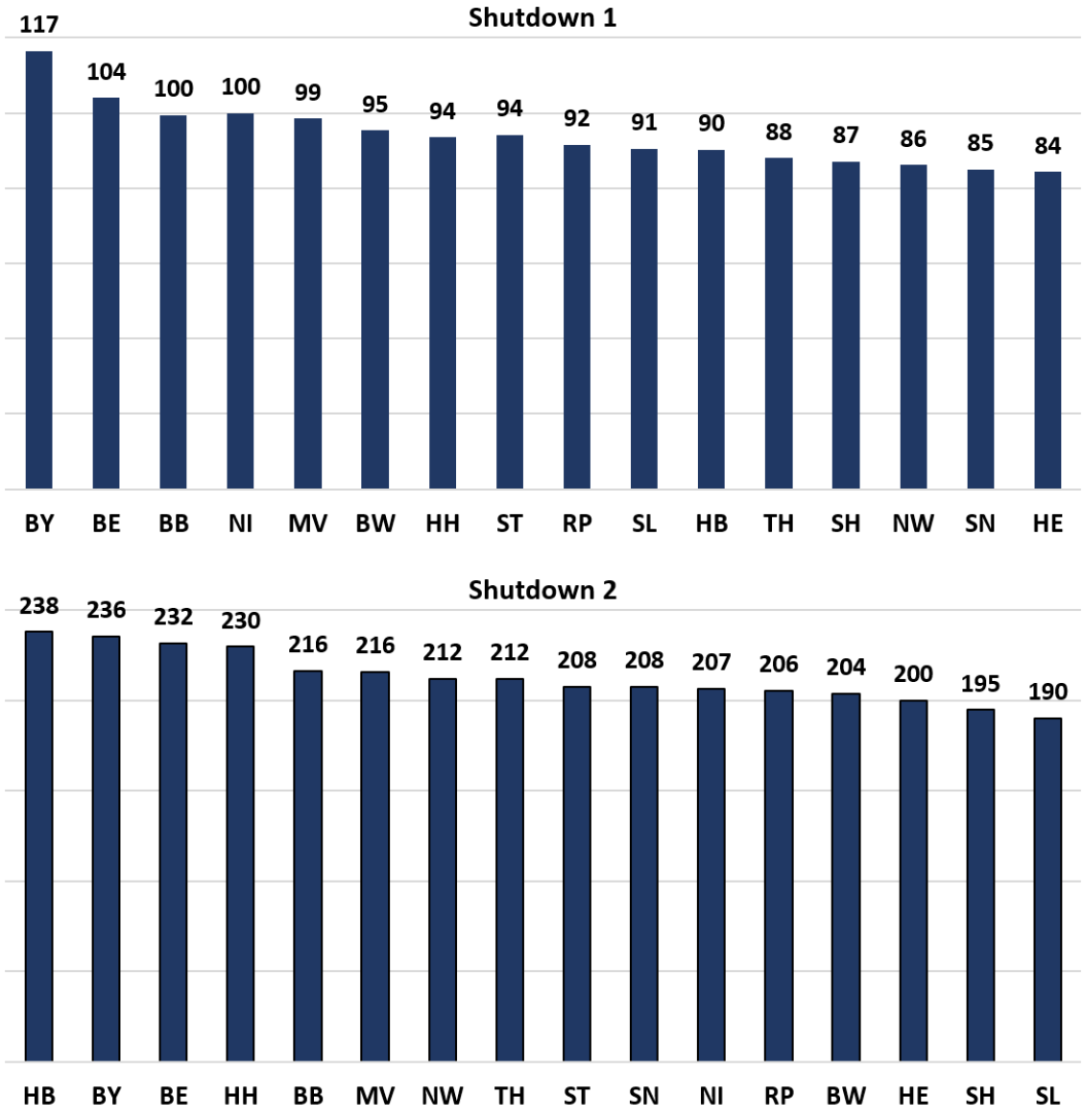

Figure 14: Number of closure days on average per state – Shutdown 1 (upper part) and 2 (lower part) compared
Source: Own compilation

During Shutdown 2 (Figure 14, lower part) the range between the highest and the lowest value was 48 days. Bremen became the new leader with 238 days, closely followed by the previous leader of Shutdown 1, Bavaria, with 236 days. Together with Berlin (232

days) and Hamburg (230 day) these four states formed a group of frontrunners in terms of longer closure times with a clear distance of 14 days to the next state (Brandenburg with 216 days). Saarland kept facilities in the six policies closed the shortest with 190 days on average, followed by Schleswig-Holstein with 195 days. The other states are relatively evenly distributed across the spectrum.

In relation to the overall longer duration of the closures, the span of 48 days in Shutdown 2 (190 to 238 days, 20 percent of the highest value) is a little less than the span of 33 days (84 to 117 days, 28 percent) in Shutdown 1. It is striking that Bavaria decided to repeatedly open facilities comparatively late (the last state in the first shutdown and second-to-last state in the second shutdown), whereas Hesse was one of the faster ones in both periods (the fastest state in the first shutdown and third-fastest state in the second shutdown). As we saw above, there are different regulations for the different policies within the states, which means that at least in some states the policy differences cancel each other out, so that these states' average values converge.

5. Conclusion

"Marching in line through the crisis or setting one's own course in fighting the Covid-19 pandemic?" To answer this question, we conducted a comparative analysis of the facility closures the 16 German states passed in six policies around the two shutdowns during 2020-2021. First, regarding our expectation of only moderate differences between the states' regulations, we underestimated the degree of diversity. Comparing the closure times and the opening order of facilities in the six policies, we found substantial variance in how the states reacted to the pandemic. They developed their own concepts and strategies, often with a different balance between health protection and possible negative consequences of infection control measures.

Looking at individual states, only two of them stand out as having acted similarly in both shutdowns. Comparatively, Schleswig-Holstein opened early on average across all policies, while Bavaria opened late. Other patterns concerning states could not be identified. Although not legally binding, the coordination efforts had a harmonizing influence insofar that during the agreed times almost all states closed the respective

facilities. At the end of the first shutdown, Saarland was the only state which allowed gambling halls to open few days before the joint agreement expired. At the end of the second shutdown, Saarland did the same about two weeks earlier than agreed. Moreover, Schleswig-Holstein allowed gyms to open few days earlier. Consequently, the agreements led to a uniform shutdown in almost all states and policies. However, apart from the commonly agreed shutdown periods, federal diversity unfolded in a clearly visible way, in that several days, weeks, or even months lay between the times of opening in the different states. This means that the – often-mentioned in literature – unitary oriented federalism culture in Germany did not promote further harmonization beyond the joint agreements. To the contrary, the states made use of their scope and set their own course in fighting the pandemic.

Looking at policies, across all states and both periods, the longest closure times are found for dance clubs. However, while dance clubs remained closed until the end of the investigation period in the first shutdown, these facilities finally reopened in the second shutdown. In the first shutdown, restaurants were kept open a few days longer by all states and also reopened earlier, while in the second shutdown they were closed at the same time as the facilities in other policies and did not reopen earlier. No overarching patterns emerge for any of the other policies. This shows that the hazard situation (aerosols, risk of spreading the virus) related to the policies was assessed quite differently by the states. For instance, Bavaria kept bars and dance clubs closed for a similar time in the second shutdown, while North Rhine-Westphalia was one of the first states to reopen bars but kept dance clubs closed much longer. Comparing the two shutdowns, the second one lasted significantly longer due to the persistently high incidence levels across all policies and all states. However, the decision for a second shutdown was made relatively late considering the infection development in absolute numbers. This reflects the incalculable danger situation facing the then-novel virus in the first shutdown, while in the second shutdown the tolerance limit was obviously higher.

Our analysis contributes to federalism research as well as to the so far rather sparse literature of comparative policy analysis addressing the Covid-19 pandemic and the subnational level. Regarding the German states this is surprising insofar as they have been responsible for a multitude of containment measurements. Although there are huge country-comparing datasets available, these do not offer data at the subnational level for

Germany or form such broad categories that a comparison of several individual policies is not possible. With 'restaurants', 'bars and pubs', 'dance clubs', 'cinemas', 'gyms' and 'gambling halls' our dataset comprises six policies that would otherwise have been combined into categories like 'economy' so that variance between the policies and states is no longer visible. To close this gap, we coded a comprehensive dataset including 55,584 datapoints covering every single day between March 2020 and September 2021. While many other studies are limited to one, and an often shorter investigation period, we can draw comparative conclusions of both the first shutdown in spring 2020 and the second shutdown in winter/spring 2020/21. In federalism research most publications focus on the processes and results of coordination. Our analysis not only allows the examining of differences and similarities regarding the states' regulations but also exploring the actual harmonizing effect of coordination by contrasting its results with the states' policy output.

Prospectively, this contribution lays the foundation for further causal analyses. A central factor of political science research to consider could be the partisan composition of the government as well as – given the increase in coalition governments consisting of two or even three parties – the influence of veto players within the government. In the context of the pandemic, problem pressure in the form of incidence trends or hospitalization rates comes into focus. A correlation analysis could show to what extent states reacted to specific and possibly different problem pressure by adapting different policies.

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[III] https://www.bsg.ox.ac.uk/research/covid-19-government-response-tracker
[IV] https://www.coronanet-project.org/
[V] A study by Stecker (2021: 249) revealed that after the Federalism Reform I (2006), the share of laws requiring the approval of the Bundesrat had decreased considerably but still amounts to one-third. In exchange for this decrease of their right of approval, the states were provided with new legislative competencies (Reutter 2006: 16). According to an examination by Reus and Vogel (2018: 641) the states passed various laws in several policy fields after the reform with a substantial degree of diversity.

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The Spanish model of protection of rights within the subnational level: a crossroad between the German and Italian cases

by

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Abstract

The territorial entities of the federal States carry out an essential work in terms of protection of rights and freedoms. The recognition of subnational declarations, their development through ordinary territorial laws and their system of guarantees are elements directly related to the very nature of the federal State. The Spanish case is characterized because the proclamation of catalogues of subnational rights did not arrive until the first decade of the 21st century. But this is not a special case, Italy also recognized declarations of rights in its regional statutes in the early 2000s although this assumption came from two important constitutional reforms. Germany is a clear example of a federal State that has recognized subjective rights for years in the constitutions of the Länder, and that is perceived as a model for the two countries named above. Many years have passed since the introduction of subnational rights at the beginning of this century, characterized by the great recession (2008-2013) and the crisis caused by covid-19. Both events have influenced the territorial organization of power and constitutional and subnational rights and freedoms.

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Key-words

Subnational rights, Regional Statutes, Constitution, federalism, limitation of rights, covid-19.

1. Introduction

The inclusion of rights and freedoms at the subnational level has occurred since the inception of the liberal State or even earlier[II]. Consequently, the constitutions of the States governed by the rule of law do not have a monopoly on the recognition of rights, but there is a whole plurality of legal rules which have also regulated of these rights (Fleiner 2000: 103-144; Reutter 2014: 216-243; Sánchez Ferriz and García Soriano 2002: 27-32; Bobbio 1991: 25-30). This historical, but also legal, political, and social trajectory demonstrates that the establishment of rights in areas other than that of the Constitution does not imply a rupture with the 'status quo' or a subtraction of the powers of the central State (Arnold 2005: 23-28; López Basaguren 2005: 119-156).

In 2003, the debate on the autonomous model and the territorial organization of power began in Spain, giving rise to the beginning to different processes of reform of the Statutes of autonomy, which constitutes «the basic institutional rules of each Autonomous Community» (article 147 Spanish Constitution)[III]. This reform movement, aiming to increase the competencies of the Spanish autonomous communities, reached cruising speed during the years 2006 and 2007 and ended in 2011[IV]. One must point out that this process did not remain isolated from the context of other countries, because since 2000 similar events took also place in other countries and different latitudes.

Thus, the approval of the new Constitution of the State of Veracruz in Mexico (2000), as an example of an American country, the important Italian constitutional reform on territorial organization of 2001 or some reforms that took place in Germany after 2006 are just some examples of a broad movement where subnational entities sought to redefine in its favour some elements of the initial federal pact. As a result, all these changes have led to an increase of competencies in subnational entities and the creation, in many cases, of bills of rights following the classic model of national constitutions[V] (Fondevila Marón 2012: 13-54; De Vergottini 2005: 25, Nakanishi 2018: 3-46).

The introduction or reform of the catalogues of rights in different federal countries brought with it a substantial number of debates within scholarship and provoked important constitutional judgments that dealt with this issue (Ceccherini 2002: 103-176; Tarr and William 2005: 12-21; Brun 2004: 315; Hofmann 2007: 14-19; Croisat 1994: 451-464; Canosa Usera 2007: 61-115). The somehow still open debate in Spain on whether we are in a country

of a federal political nature has led the scholarship to speak of an autonomous State (following the expression used by the Spanish Constitutional Court[VI]) or a politically decentralized State (i.e., a State territorially organized beyond a merely administrative decentralization), even though this country complies with most characteristics of a so-called federal country. For this reason, throughout the following pages the expressions Federal State and Politically Decentralized State will be used in a similar way (Aja Fernández 2007: 135-210; González Encinar 1985: 88).

The inclusion of subnational declarations of rights respond to a trajectory established in recent times of creating more and more catalogues of rights, both at the supranational and subnational levels, where it was unclear whether they were rhetorical norms without real effectiveness or they were in fact configured as declarations with protection systems effective enough to speak of rights with substantive content. This question is essential to understand the adequacy of this plurality of bills of rights (Sánchez González 2010: 304-315; Ruipérez Alamillo 2008: 175-230).

A reasonable time has passed since the beginning of this century and, therefore, it is necessary to think over again on what has happened to the subnational rights after the doctrinal and jurisprudential debate. Despite the fact that this debate has partially declined among the scholarship, some events that have taken place during the last years call up to revisit this issue, mainly focusing on what has happened to subnational rights at two essential moments in recent decades: the economic crisis that began in 2008 and the covid-19 pandemic. These two transcendental episodes in the Rule of Law around us have affected the territorial division of power within decentralized states and the application and implementation of subnational rights and fundamental constitutional rights. During the great economic crisis of 2008-2013, many politically decentralized European states proceeded to take drastic financial and budgetary measures that affected rights and freedoms, their effectiveness, their implementation, and the budget allocated to their application. In addition, the recentralization of economic policies was carried out, affecting the competences of the subnational territories of the States (Lewandowsky, Leonhardt and Blätte 2023: 237-250; Von Münchow 2020: 49-60; Alessi and Palermo 2022: 183-218; Castellà Andreu and Kölling 2022: 159-183).

These two circumstances affected the subnational rights that were downsized with respect to previous times. Regarding the crisis caused by the covid-19 pandemic, in this case,

the rights were clearly affected by the different states of emergency declared during the worst moments of this pandemic. In this sense, the limitation or suspension of rights was the key issue of the actions adopted by the public authorities during this crisis. That is why it is of great importance to see how the subnational entities reacted on to the measures taken by the central executive power that affected rights protected at the subnational level (Aragón Reyes 2022: 77-90; Tudela Aranda 2022: 209-214; Revenga Sánchez and López Ulla 2012: 215-237; Tajadura Tejada 2021: 137-175; Sáenz Royo 2021: 375-398; Matia Portilla 2022: 157-176).

The issue of the of the territorial organization of power in Spain, i.e. whether it is an unitarian or federal state, is a quite complex one that has to do with political, social and legal elements that may go beyond the objects and purposes of this paper. However, setting aside the discussion about the reluctance of Spanish public authorities to use of the term 'Federation' or 'Federal', it is commonly accepted that, despite its specificities, asymmetries and the lack of a true *Bundestreue* spirit of its institutions, Spain, with its unique and original '*Estado de las Autonomías*' model, shares the main elements of a Federal State (Agranoff 1996: 385-401; Aja 1999; García Roca 2000: 299; Novo Narvona *et allii* 2019)[VII].

On the other hand, Italy is a country with a number of similarities to the Spanish federal evolution, although not in all their dimensions. It is for this reason that the comparative study between both States has been carried out on numerous occasions. The study of these two systems, known some point as 'regional countries', has helped to advance in this matter (Duca & Duca 2006; Roux 2008).

However, it may seem stranger to compare Spain and even Italy with Germany, one of the quintessential European federal countries. Despite the initial reluctance, the comparison of the regional States with Germany is not so far away because Italy and Spain have been evolving in recent years through a federalising process. Italy began this definitive path with the constitutional reforms of 1999 and 2001. Spain initiated the process in the 80s, although the departing point was a totally centralized country, and later, with a breakthrough in 2005, although this did not mean that the Spanish institutions really addressed an issue as relevant to federal states as the existence of declarations of subnational rights and their full legal implications. For this very same reason, and also, since the Spanish federalism is also to be understood as an evolutive process (Agranoff 1996: 385-401), it seems of interest to use two federal countries with similarities and differences to the Spanish one, but to which the national scholarship and its institutions look forward to seek answers. In addition, the

context of these countries can help to better understand the debate around the actual effectiveness of subnational rights.

In summary, this paper analyses the incidence of subnational declarations of rights in federal states, at different points of their respective evolutions, and what is their relationship with the level of autonomy of subnational territories. To carry out this objective, the paper focuses on the moments of introduction and reform of these catalogues at the beginning of the XXI century in the selected cases and what it meant for these countries in their federalization process, as well as their subsequent development under the two moments of this period that have generated far-reaching consequences for the self-government of subnational entities. The first notable moment is the so-called great recession or economic crisis of 2008-2013 including the mortgage crisis of 2007 and the stock market crisis of January 2008. This great recession is being followed by a significant economic uncertainty following the coronavirus pandemic, which represents the second moment for subnational rights. Besides, I will try to find out whether or not this subnational reform process has represented a change with respect to the previous situation and if it has achieved a significant advance in the process of federalization in a country such a Spain (Martín-Aceña, Martínez Ruiz and Pons Brías 2013: 241-294; Holtfrerich 2014: 1-224).

2. The Bill of Rights of Subnational Statutes and 'Constitution'

2.1. The basic legal norms of subnational entities ad adequate rules to contain rights

The inclusion of a catalogue of rights in the basic institutional rules of Spanish and Italian subnational entities did not occur until the first decade of this century. In both cases, this task was not easy since this type of regulation was unprecedented and the peculiarities of these countries made it difficult the creation of subnational bills of rights. One of those specialties concerned whether the basic legal norms of the subnational entities were legally adequate for inserting these catalogues (Romboli 2010: 77-102; Delledonne and Martinico 2011: 881-912; Díez-Picazo 2006: 63-75; Caamaño Domínguez 2007: 33-46).

Other European federal countries did establish bills of rights in the basic rules or constitutions of their subnational entities prior to this date. This is the case in Germany where the Federation and the *Länder* have 'their own independent statehood'. In addition,

article 70 of the Federal Constitution provides that all legislative competences not conferred to the Federation by this Constitution shall be in the hands of the territorial authorities. The so-called statehood of the *Länder* translates into a sort of constitutional autonomy being able to approve their own constitutions without prior formal authorization from the Federation. The option of including a list of rights in subnational constitutions is part of that sort of constitutional order possessed by the *Länder*[VIII]. However, they must respect the principles of the democratic and social federal State governed by the rule of law, which in practice sets a fundamental limitation to the autonomy of the *Länder* vis-à-vis the *Grundgesetz* when approving or amending their respective *Verfassungen*[IX]. Likewise, the *Länder* must respect art. 19.2 of the Basic Law that establishes the guarantee of the essential content of rights and freedoms. This thesis was born in Germany and later exported to other states and even to the European Union. This content is basic in the German Rule of Law and will act as a limit to the subnational rights of the *Länder* (Habërle 2003: 55-113; Lothar 2009: 165-187; Hartwing 2005: 148; Lorenz 2015: 2-29; Steytler 2015: 1-19; Delledonne and Martinico 2012: 1-6; Castaldi 2012: 222-236).

On the other hand, the jurisprudence of the Federal Constitutional Court (*Bundersverfassungsgericht*) has maintained the conception of the Basic Law as an order of values that shapes social life and must be applied in all areas of law. The *Lüth* Judgment of 1958 (BVerfGE 7, 198) established the decisive concepts that configured the Basic Law as the essential norm that establishes the binding order of fundamental intangible values[X]. In this same Judgment, fundamental rights are conceived from their double nature: as subjective rights and as objective norms of principle (*objektive Grundsatznormen*). Thus, this formulation of the Basic Law directly influences the actions of *Länder*, which must verify that their constitutions (*Verfassungen*) respect this said conception (Hesse 1996: 93-98; Cruz 2009: 11-31).

In the case of Italy, the introduction of rights in the regional statutes was due to two constitutional reforms framed within the process of decentralization, federalization or 'devolution' that occurred in this country. The first reform was carried out on 22 November 1999 and the second was completed on 18 October 2001. These amendments affected Title V of Part II of the Constitution and configured the regions as 'entities with general competence and not only of attribution'. The new regional statutes that came into force after the constitutional reforms recognized declarations of rights for the first time. But the

regulation of these was not peaceful among the doctrine (Delledonne, Monti and Martinico 2021: 176-191; Brunori 2013: 149-167; Bin and Falcon 2012: 101-123).

The Italian Constitutional Court ruled on several actions of unconstitutionality against this issue in its Judgments n. 372, n. 378 and n. 379, during the year 2004. The solution established by the Italian Court in its case law affirmed that 'the articles analysed, even if they are materially included in an act-source, cannot be recognized as having any legal effect, placing themselves above all at the level of the expressive convictions of the various political sensitivities present in the regional territories at the time of adoption of the Statute'. This meant that regional rights did not even have the status of programmatic norms, they were only simple expressions of the different political options in the region at the time that each of the statutes was adopted. That means they were no regional rights at most, they were cultural declarations. This statement made it clear that constitutional jurisprudence did not consider regional statutes as a norm able to contain rights (Ruggeri 2020: 132-155; Bartole 2005: 11-13; Benvenuti 2004: 4145-4161; Falcon 2005: 31-34).

In the Spanish case, the Constitutional Court and much of the scholarship have established that the statutes of autonomy are capable of regulate rights and freedoms. These statutes of autonomy are in fact norms of a double nature, autonomic and central (regional and federal), that are responsible for reflecting the autonomy and self-government of territorial entities (García de Enterría and Fernández 2001: 284; Aguado Renedo 1997: 137-158; Santamaría Pastor 1998: 228; Jove Villares 2017: 46-54). These fundamental elements are included in the institutional approach and in the system of competencies itself but, equally, there must be other elements that establish the autonomous community as a political and autonomous entity. In this sense, the Judgment no. 31/2010, of June 28, of the Spanish Constitutional Court expressed in its fourth legal argument that 'the statutes of autonomy confer to the legal order a diversity that the Spanish Constitution allows, and that is verified at the legislative level, conferring to the autonomy of the autonomous communities the unavoidable political character that is proper to it (Constitutional Court Judgment 32/1981, of July 28, third legal argument, for all) '.

Likewise, the Constitutional Court has consolidated in its caselaw that there is, on the one hand, a mandatory statutory content included in article 147.2 of the Spanish Constitution and, on the other, an additional content which can include the recognition and protection of rights and freedoms[XI] (Ortega Álvarez 2011: 47-68; González Pascual 2011: 503-517). This

same argument was used by the Italian Constitutional Court, which differentiated the necessary content of the regional statutes and the eventual or additional content in its Judgments n. 372, n. 378 and n. 379, year 2004 (Ragone 2007: 63-69).

But Autonomous statutes are not the only subnational norms that recognize and regulate rights. Many autonomous communities that have not still reformed their Statute of Autonomy (*Estatuto de Autonomía*) include rights in their ordinary autonomic laws. These laws establish social rights such as Law 5/2014, of October 9, on Social and Legal Protection of Children and Adolescents of Castilla-La Mancha, but also regulate freedom rights as in Law 8/2017, of December 28, to guarantee the rights, equal treatment, and non-discrimination of LGTBI people and their families in Andalusia. Linguistic rights have also been recognized in laws of the autonomous communities such as the early Law 10/1982, of November 24, basic normalization of the use of the Basque language. The rights of political participation have also been regulated in this kind of laws such as Law 8/1986, of June 26, on Popular Legislative Initiative of the Basque Country, an instrument that is not mentioned in its Statute of Autonomy.

With this, it can be observed that it is not necessary to establish a catalogue of rights in the Statutes of Autonomy to develop and guarantee rights at the subnational level. In this sense, the autonomous communities that did reform their Statutes and introduced a bill of rights have been regulating in their laws these and other rights not expressly recognized in their basic instrument of government. This is the case of Catalonia, which approved Law 11/2014, of October 10, to guarantee the rights of lesbians, gays, bisexuals, transgenders, and intersex people and to eradicate homophobia, biphobia, and transphobia. It does not seem that the legislator of the autonomous communities has exhausted the possibilities granted within the framework of the statutory regulation of rights and freedoms.

2.2 Constitutional limits

In the Spanish case, the constitutional limits that the Statutes of Autonomy must respect are of two types. On the one hand, the Fundamental Norm establishes formal limits that respond to the principle of legal reservation established in the Constitution and to the system

of distribution of competencies between the central State and the autonomous communities. On the other hand, there are the material limits steaming from the principle of equality recognized in article 139.1 and the clause enabled in article 149.1.1ª of the Constitution (Tudela Aranda 2016: 143-165).

It is also necessary to clarify the concept of State in Spain that was defined by the Constitutional Court in its Judgment 32/1981, of July 28. This decision explained that 'the term State is the object in the constitutional text of a clearly amphibological use. Sometimes (for instance, arts. 1, 56, 137 and in the very heading of its Title VIII, to mention just a few examples) the term State designates the entire legal-political organization of the Spanish nation, including the organizations of the nationalities and regions that make it up and that of other territorial entities endowed with a lower degree of autonomy; in others, on the contrary (thus, in articles 3.1, 149, 150), State means only the set of general or central institutions and their peripheral organs, contrasting these institutions with those of the Autonomous Communities and other autonomous territorial entities' (fifth legal argument).

The legal reservation limitation establishes that the development of fundamental rights will be carried out by organic laws while the other rights included in Title I must be regulated by ordinary law. This reservation of law must be put in relation to Art. 149.1.1ª of the Spanish Constitution that determines that the basic conditions of the exercise of rights will be the competence of the central State, causing that the content that is outside these basic conditions will be regulated by central State law or by autonomics law. However, the ambiguity of the delimitation of these terms has caused the central State to go beyond the competence established in article 149.1.1ª. The constitutional Judgments 247/2007 explained that this precept has a great expansive force that can cause the interference of the central State in the competencies of the autonomous communities. To avoid this situation, this article must be interpreted as restrictively as possible both in its subject matter and in its scope (Sáenz Royo 2015: 181-205). About the rights not recognized constitutionally but included in the Statutes of Autonomy, the same constitutional decision stated that when there are rights recognized outside the constitutional catalogue, the constitutional limitation established in article 149.1. 1ª will not apply since these rights are outside its scope of action (Riu i Fortuny 2010: 91-109; Muñoz Machado 2013: 23-55).

In connection with the previous constitutional limit, one can also identify the one that refers to the system of distribution of competences that is one of the legal principles that

sustains the inclusion of rights in the Statutes of Autonomy. This limit does not only affect the different constitutional levels in terms of power distribution, but in terms of subnational rights, the essential thing is to apply the theory of the minimum standard established in the Basic Law, and developed by the German scholarship and jurisprudence. This theory is also included in the Italian Constitution (art. 117.2.m) and in the Spanish Constitution (art. 149.1. 1st), mentioned above (Palermo and Kössler 2017: 130-149; Reutter 2014: 216-243; Martinico and Pierdominici 2014: 116-140).

In fact, the autonomic laws in Spain have regulated statutory rights and rights not expressly recognized in the Statutes of Autonomy but provided for in these legal norms to adequately develop the matters for which they are competent that is, those that do not affect the essential level of these rights. In this sense, the Spanish constitutional scholarship has never questioned the autonomic legislative development of rights. However, the problem did arise with the inclusion of the bill of rights in the Statutes since they exposed a dilemma that affected the autonomous State. By recognizing complete charters of rights in the first Titles of the statutes, it would seem as if such a norm were endowed with a quasi-constitutional structure, when the Statutes of Autonomy are not configured as subnational constitutions, not even in the manner, for example, of German case (Escobar Arbeláez 2019: 39-51; García Couso 2012: 65-98).

In Italy, regional rights must be related to the competencies assumed by the territorial entities. However, the Federation has the competence to determine the essential level 'of benefits relating to civil and social rights' which is formed as a general clause in favour of the central State, art. 117.2.m of the Constitution. The essential objective of this clause was the most perfect possible division of the competence of each entity in matters of protection of rights. This provision grants the central State the basic competence in terms of the regulation and protection of rights that will have a general and equal scope for the entire territory, while leaving the regions the possibility of legislating in those fields where they have a competence title that is outside the essential level of protection of the civil and social rights which has to be granted by the central State (Martinico and Pierdominici 2014: 116-140; Alessi and Palermo 2022: 183-218; Monti 2019: 1-37; Ruggeri 2022: 483-560; Bifulco 2007: 29-54; Cabellos Espiérrez 2005: 289-324; Rossi 2005: 201-218; Nakanishi 2018: 48-67).

In Germany, although the inclusion of rights in the constitutions of the different *Länder* is more extensive than in Spain or Italy, many of the subnational rights are related to the

competencies of the territorial authorities. In fact, in 2006 it was initiated a very ambitious constitutional reform that modified forty provisions of the Basic Law that fully affected the structure of the federal model and the system of division of competencies between the Federation and the *Länder*. The new distribution reordered the attribution of competencies in many subjects, some of which had an impact on rights. This is the case of the law of the public service, which includes several individual rights such as the access, conditions of exercise, etc., that corresponded to the federation until this reform. The same was true for education at the primary and secondary levels. Following the constitutional amendment, the Basic Law provided for each *Land* to be exclusively responsible for this matter, leaving the Federation only competence in vocational training outside schools (Lothar 2009: 165-187; Martín Vida 2006: 161-194; Arroyo Gil 2012: 30-73).

However, this inclusion of rights in subnational constitutions (*Verfassungen)* must be related to the essential content of art. 19.2 of the Basic Law, which recognizes that «the essentials» of a fundamental right cannot be affected, in any case. Nevertheless, this article must be put in relation to art. 1 since this inviolable essential content affects the dignity of person, recognized human rights and the direct application of fundamental rights[XII]. Therefore, *Länder* must consider both precepts of the Basic Law when developing subnational rights and freedoms. One of the most important Constitutional Federal Court Judgments (*Bundersverfassungsgericht*) in this matter is the «Solange II» Judgement which establishes that a protection of fundamental rights must be guaranteed in a general way which must be respected in its essential content in an equivalent way to how it is protected by the Basic Law (BVerfGE 73, 339, 387)[XIII]. In this way, it can be observed that the relationship of subnational rights within the system of distribution is not only focused on the different constitutional levels, but that it is much more relevant to appreciate the essential level of rights, which must be respected by all public and private powers in order to comply with the Basic Law (Habërle 2003: 77-94; Lothar 2009: 165-187; Ehlers 2006: 27-50).

The last limit imposed by the Spanish Constitution is the so-called principle of equality throughout the national territory of article 139.1. The evolution of the jurisprudence of the Constitutional Court shows that this principle of equality must be understood not in a monolithic way but as a mandate of equality of Spaniards projected before each legal system of the different autonomous communities[XIV]. But this principle of equality must be linked to the principle of autonomy laid down in article 2 of the Constitution. The Judgment 37/2002,

of February 14, has established 'the principle of equality cannot be interpreted in a uniform manner that restricts the competencies of the autonomous communities, so that, in the case that concerns the Court [...] it must be admitted that these competencies can reasonably establish rates that differ from those regulated in the basic norms, as long as they do not contradict them'[XV] (Cabellos Espiérrez 2008: 120; Ortega Álvarez 2011: 47-68; Barceló i Serramalera 2011: 61-91).

The inclusion of bills of rights in the basic rules of territorial entities has not been similar in all federal States. Spain and Italy did it at the beginning of the twenty-first century and they had to solve several issues. One of them dealt with the adequacy of its Statutes as suitable rules for this mission. After the resolution of the problem through constitutional jurisprudence, the next step has been to reflect on the constitutional limits that subnational rights must respect. These limits provide a necessary content to understand the scope of this issue. In this way, the next point to be discussed will be which are the rights that are recognized in the basic subnational norms.

3. The nature of the rights recognized in subnational entities

3.1. Constitutional jurisprudence on the nature of statutory rights

The nature of statutory rights has been one of the most debated issues in Spanish constitutional jurisprudence, which dealt with this issue in its judgments no. 247/2007, on the Valencian Statute of Autonomy and no. 31/2010, on the Statute of Autonomy of Catalonia. The legal reasoning used in relation to the nature and inclusion of these rights were different in both decisions (Cámara Villar 2009: 259-298; Canosa Usera 2008: 569-583).

The first resolution maintained that these rights were merely programmatic norms whose purpose was focused on acting as a political guideline to mark the action of the autonomous governments and had no direct legal validity until the autonomic legislator intervened. Regarding the statutory rights provided for in the Constitution, the judgment no. 247/2007 exposed that: 'the capacity that the Constitution recognizes to the Statutes of Autonomy in order to establish the organization and operation of its legislative Chambers within the constitutional framework has effects in citizens, thereby determining the possible existence of true subjective rights (thus, with respect to active and passive suffrage)' (legal argument 15b). In the case of the right to vote and to be elected (suffrage) at the autonomic level,

expressly recognized in article 152.1 of the Spanish Constitution, they did have the nature of subjective rights (Guillem Carrau and Visiedo Mazón 2008: 13-36; Fernández Farreres 2008: 46-93; Expósito Gómez 2011: 481-502).

However, Judgment no. 31/2010 established that it was possible to include rights in the Statutes of Autonomy if they were linked to the competencies of the Autonomous Community, if they bind only the autonomic legislator and when it did not imply any prejudice to the fundamental rights recognized in the Spanish Constitution and international treaties or conventions. This argument was in line with the clause recognized in article 37.4 of the Catalan Statute, which stated that the rights and guiding principles of this rule did not imply a modification or novation of the system of distribution of competencies (Expósito Gómez 2011: 481-502). Secondly, this judgment maintained that under the category 'statutory rights' one could include very different realities since there were true subjective rights and there were also numerous mandates addressed to the legislator that could become subjective rights when and if the ordinary regional legislator intervened (Morcillo Moreno 2013: 45-52; Blanco Valdés 2010: 4-11).

Likewise, this decision clarified what happened with the fundamental rights in the autonomous sphere, those included in articles 15 to 29 of the Spanish Constitution and that enjoy a special level of protection, such as the individual appeal for the protection of fundamental rights (*recurso de amparo*) before the Constitutional Court. The Constitutional Court maintained in its judgment no. 31/2010 that both the basic content of fundamental rights and the exercise of these could not be regulated by the Statutes of Autonomy since the first content corresponded to a 'central' organic law passed by the National legislator and the second content belonged to ordinary laws. The Court went on to say in its legal argument no. 16 that the ordinary autonomic legislator, on the other hand, could be in charge of establishing the conditions of exercise of these rights and that there was no paradox 'in the fact that by simple autonomic law (ordinary law) it can do what does not fit in a Statute (basic autonomic norm). Namely, it is not that more can be done by a regional law, but rather that something different is done, as established in the set of norms ordered according to the criterion of competence' (legal argument 17). What this decision did allow is that the Statutes could repeat the same wording as the Constitution for fundamental rights. This technique was also ratified for Italy by the Constitutional Court in its Judgments no. 372, no. 378, and

no. 379, year 2004 (Morana 2009: 151-170; Carrillo 2011a: 365-388; De la Quadra-Salcedo Janini 2010: 287-291).

In Germany, the situation is different since the constitutions (*Verfassungen*) of the *Länder* recognize rights of a fundamental nature. Although this content is already included in the Basic Law, the rights of subnational entities help to complement the fundamental rights and the civil rights established by the Federation. The jurisprudence has established that the *Länder* incorporate concurrent fundamental rights with those of the federal Constitution but that these territorial entities have the capacity to make an autonomous regulation, separate and parallel to that of the Basic Law. In this way, the scope of validity and the content of an article written in a similar way in both norms are different, being able to speak of a fundamental right protected through two parallel legal channels and that can be interpreted differently. However, this possible different interpretation cannot go against the interpretation that has been made of that right in the federal Constitution (*Grundgesetz*). Different interpretations can be given but there must be a concordance between the fundamental right of the federal Constitution and that of the Constitution of a *Land* (Monti 2019: 1-37; Reutter 2014: 216-243; Palermo and Kössler 2017: 83-114; Arroyo Gil 2012: 67-69; Nettesheim and Quarthal 2011: 281-310; Doménech Pascual 2010: 187-214).

The Judgment of the Italian Constitutional Court n. 372, no. 378 and no. 379 of 2004 also resolved on the nature of regional statutory rights. The Constitutional Court maintained in the first place that the essential content of the rights must be regulated by the state/central legislator, without regional legislators being able to limit or affect the elements of this content[XVI]. However, once this essential level is guaranteed by the central State, the regions will be able to legislate on the rest of the content of the rights through the ordinary procedure (Biffulco 2003: 135-145). However, it limited the statutory regulation of rights. This said restriction has been much stricter than that of the Spanish case since the Italian Constitutional Court understood that they could not be recognized as having any legal effectiveness, eliminating the possibility that they were even programmatic norms (Delledonne, Martinico and Popelier 2014: V-X; Ruggeri 2020: 132-155; Delleddonne and Martinico 2011: 881-912; Benvenuti 2006: 21-57; Anzon 2005: 1-3; Cammelli 2005: 1-3).

3.2. The content of the catalogues of subnational rights

3.2.1 The rights of freedom, language, and political participation

The statutory declarations of rights in Spain recognize different types of rights that can be grouped following the classic categories, although the subnational catalogues are not homogeneous. In the first place, there are the rights of freedom that are very few and without an innovative wording with respect to the constitutional text since the majority belong to those constitutionally called as fundamental. On the other hand, these must be related to the autonomous competencies and cannot create new competencies or modify existing ones (Porras Ramírez 2008: 79-90).

One of the freedom rights that raised the most problems was the right to experience the death process with dignity and the right to receive adequate pain treatment and comprehensive palliative care. The dilemma has been about the possibility of expanding the content of the fundamental right to life, article 15 of the Spanish Constitution, leaving the door open for the Statutes of Autonomy to recognize euthanasia. The Constitutional Judgment 31/2010 said that these statutory rights were perfectly identified within the content of art. 15 SC and was even a necessary consequence to guarantee the right to life. After the reforms of the statutes, no autonomous community introduced the euthanasia, ending the fears exposed at the beginning of the controversy[XVII] (Cantero Martínez 2008: 267-280; Pérez Miras 2015: 96-104; Soriano Moreno 2020: 215-246; Mateos y de Cabo 2021: 167-189).

On the other hand, participation rights and linguistic rights were already recognized in the group of Statutes of Autonomy baptised by the scholarship as 'first generation' Statutes, which were approved at the beginning of the Spanish autonomous State decentralization process. Indeed, these subnational regulations established these rights because the Spanish Constitution so provides for it in its third article, for linguistic rights, and in its articles 9.2, 23, 148.1. 1º and 152, 1, among others, for those of participation. Regarding the latter, the 'first generation' Statutes recognized the right to vote, active and passive, the popular legislative initiative, and popular consultations. The Statutes reformed in full from the year 2006 added the right to good administration, the right to social and political participation, and the right to petition. In Italy, some rights appearing in the Constitution are stablished as cultural statements at the regional level because there are no fundamental regional rights or rights similar to those found in the Statutes of Autonomy (Ruggeri 2020: 132-155; Delleddonne and Martinico 2011: 881-912; Fernández Esquer 2022: 245-311; Martín Nuñes 2013: 113-132; Morcillo Moreno 2013: 81-83; Ruiz-Rico Ruiz 2014: 1-30; Morana 2009: 151-170).

The importance of participation rights lies not only in the fact that they act as a limitation to the autonomous public power, but also in the fact that they are probably authentic subnational fundamental rights, along with linguistic rights. This affirmation steams from their constitutional regulation but also from the fact that they have a universal character for a certain group within the subnational territory. It is not a Spanish situation, but one that occurs in different politically decentralized countries. This is the case of the right to vote in the subnational territorial entities of countries such as Germany or Italy. As a more specific example, the new Italian regional statutes have given great importance to citizen participation, and this is reflected in the fact that the Constitution includes them in their own Title that is sometimes located just before the Title dedicated to the regional institutional organization (Martinico and Pierdominici 2014: 116-140; Alessi and Palermo 2022: 183-218; Monti 2019: 1-37; Roura Gómez 2000: 435-448; Fondevila Marón 2012: 13-54; Vizoli 2014: 187-205; Fernández Esquer 2022: 65-238).

In terms of subnational fundamental rights, the German case is particularly enlightening. The constitutions of the *Länder*, both those approved before the entry into force of the Basic Law of 1949, and those that were promulgated afterwards, recognize authentic fundamental rights such as the rights of freedom, those of participation or the rights related to effective judicial protection. The subnational constitutions approved after 1949 add subjective rights of a new generation such as personal data protection, non-discrimination of dependent or disabled persons and access to files and administrative documents, among others. Likewise, these last subnational constitutions also expand some of the federal rights[XVIII] (Fernández Esquer 2022: 65-100; Hartwing 2005: 145-166).

The most controversial right to political participation in Spain has been the one related to the referendum. The Spanish Constitution determines that the holding of a referendum is the exclusive competence of the President of the Government, subject to a prior authorization from the Congress (the lower chamber) -article 92 of the Constitution-. It is not the same in the Italian case, where the regions have the capacity to foresee and hold consultative referendums, even before the constitutional reforms carried out in 1999 and 2001 (Martinico 2020: 75-95; Fernández Esquer 2022: 165-224; Alessi and Palermo 2022: 159-182). With respect to Spain, some reformed statutes recognized the right to promote the call for popular consultations. The Statute of Autonomy of Catalonia of 2006 introduced this right in its article 122, which was challenged before the Constitutional Court. The

Constitutional Judgment no. 31/2010 explained that the article was not unconstitutional as long as it referred to popular consultations other than the referendum (Aguado Renedo 2011: 541-554; Ridao Martín 2015: 359-385). This Autonomous Community approved a law to hold the specific self-determination referendum, Law 19/2017, of September 6. The Constitutional Court declared it unconstitutional in its judgment no. 114/2017, of October 17, since this legal rule invaded State competencies as well as other constitutional principles, the supremacy of the Constitution, national sovereignty, and the indissoluble unity of the Spanish nation (Castellà Andreu and Kölling 2022: 183-218; Fernández Cañueto 2018: 207-246; De Miguel Bárcena 2018: 133-166; Castellà Andreu 2016: 561-592; Castaldi 2019: 231-247).

Regarding linguistic rights, these were already provided for in the 'first generation' statutes, however their recognition and development in the reformed statutes from 2006 has been much greater. Thus, linguistic rights are directly related to education, where they have found their own sphere, since it has been decided to unite language and education. Co-official languages have also been promoted in other sectors such as the political, cultural, economic, or social. This situation has developed in the autonomous communities with Statutes that include catalogues of rights and in those communities where their Statute has not been reformed but where autonomic laws have been approved on the relationship of this constitutional right with other subnational rights (Tasa Fuster 2017: 51-59; Marín Conejo 2019: 103-166).

3.2.2. Equality, social rights, and principles

In Spain, the Statutes of Autonomy that have included equality, above all, have regulated the conditions that influence material equality, repeating the wording of the Spanish Constitution. In addition, many statutes have related equality to other statutory rights linked, in turn, to the competencies possessed by the autonomous communities, for example the right to health or education. Finally, equality is also included as a programmatic norm. In Germany, equality has a much broader scope in the *Länder* than in the Spanish Autonomous Communities (Morcillo Moreno 2013: 78-79; Rodríguez 2008: 227-265; Díaz Revorio 2008: 323-344).

Social rights constitute a group that are particularly important in subnational declarations since they have the most evident relationship with the autonomic competencies. Many of them are recognized as guiding principles of social and economic policy in the Spanish Constitution[XIX] and it seemed initially that thanks to the new Statutory recognition they were finally going to be included as subjective rights in a regulation that would consolidate their status. However, a clear deficit of direct applicability is observed since many of them are again configured as guiding principles or as programmatic norms, despite being formally called rights. However, there are some social rights that have their subjective configuration clearly marked, such as the right to health or education (Barrero Ortega 2013: 25-33).

In the Italian case, the largest group in the regional statutes are the principles, whose separation with rights is very complex. Most of these rules include principles that are already found in the Italian Constitution, such as equality or the protection of linguistic minorities. One can also find included at the regional level some principles that are not in the Italian Constitution although they derive from the content of its articles, such as the democratic principle. Finally, there are the principles that contain "current issues" and that base their content on international and European standards (Bin 2010: 251-255; Bifulco 2007: 29-54). In the same way, some regional policies of a social nature that do not appear in the Italian Constitution are included (there are not social regional rights). This is the case, for example, of the policies of sport or consumers (Delleddonne and Martinico 2011: 881-912; Caretti 2005: 27-30; Morcillo Moreno 2013: 85-99; Gambino 2009: 187-242).

Social rights are reflected in the constitutions of the *Länder* in a different way. The subnational constitutions (*Verfassungen*) approved before the entry into force of the Basic Law in 1949 established true rights of a social and economic nature, labour rights or rights of equality before the law. On the other hand, in the subnational constitutions approved after this date, social rights have simply become objectives of the subnational public power. This is an important difference with the Spanish situation, where statutory social rights are not just simple objectives but are rather critical for the autonomic politics on rights. Despite this, these rights are intrinsically related to the competencies of the *Länder* and to the existing available budgets, whether they have subjective content or are just considered as programmatic norms for the public power (Hofmann 2006: 13-28; Arroyo Gil 2012: 67-69). The nature of subnational rights is essential to understand what their legal effectiveness is. Likewise, knowing if the rights are of a political, social, or linguistic nature is also important

to have a complete map of the subnational rights. In this way, the next question to study will be whether there is an authentic protection system that influences its effectiveness.

4. Subnational guarantee systems

A system of guarantees is essential to achieve greater effectiveness of rights and freedoms. In the Spanish autonomous communities, there are some regimes for the protection of rights, although their implementation has not been easy and sometimes it has been practically impossible to provide Spanish subnational entities with their own system of guarantees[XX]. Not all the reformed Spanish Statutes included a system of guarantees. Within the different subnational guarantees are the normative guarantees of the reservation of law, the essential content, and the link to the autonomous public powers and to individuals, whose wording is similar to that contained in the Spanish Constitution. This type of guarantees can be introduced at the subnational level since, as the Constitutional Court said, they apply to any right or freedom, regardless of whether they have been configured in the constitutional text or in another legal norm (eighth legal argument, Constitutional Court Judgment 11/1981, of April 8) (Ortega Álvarez 2008: 91-97; Català i Bas 2005: 193-196; Montilla Martos 2008: 24; Morcillo Moreno 2013: 111-113).

Institutional guarantees are channelled through the institution of the Ombudsperson, which is established and regulated in the Statutes and in other subnational legal norms. This institution controls the fundamental rights application by the Administration. In addition, within the institutional guarantees it is necessary to mention the *Council of Statutory Guarantees* created in Catalonia. The article 76.4 of the Statute of Autonomy of Catalonia allowed this institution to draw up binding opinions on autonomic projects of law that developed or affected statutory rights. These opinions could only declare the suitability or not of the articles of the appealed law proposals with respect to the Statute of Autonomy and the Constitution (Ruiz-Rico Ruiz 2008: 365-373; Díez Jalón 2012: 1-18; Carrillo 2011a: 365-388; Aparicio Pérez 2009: 1-10; Jover Presa 2007: 77-93).

This article was declared unconstitutional in Constitutional Judgment 31/2010, using two arguments. In the first place, the opinion had to be presented in full parliamentary process and that meant limiting parliamentary authority and faculties, potentially violating the rights of political participation recognized in article 23 of the Constitution. Secondly, this function

of the *Council of Statutory Guarantees* 'was dangerously close to a jurisdictional control of the laws', which is the exclusive competence of the Constitutional Court according to article 161 of the Spanish Constitution (legal argument no. 32) (Morcillo Moreno 2013: 138-142; Soriano Moreno 2020: 176-185).

In Italy, Calabria tried to include new attributions to the *Consulta statutaria calabrese* (as a Council of Guarantees) that went beyond the issuance of merely advisory opinions and that could be understood as a certain capacity for constitutional control (Calabria regional law no. 2 of 2007). The Judgment n. 200 of 2008 of the Italian Constitutional Court established that articles 6, 7 and 8 of this regional law violated articles 102, 103 and 117. 2 letter l) of the Italian Constitution. Part of the scholarship maintains that the unconstitutionality of the Catalan and Calabrian *Councils of Guarantees* demonstrates that the nature of the subnational territories of Spain and Italy do not have a "federal" nature, but they are regional systems, or, at least, federalising processes in transformation (Silvestri 2009: 43-65; Romboli 2010: 77-102).

The Italian regional statutes only regulate institutional guarantees. The first institution worth highlighting, newly created, was called 'Guarantee College', 'Statutory Consultation', 'Statutory Guarantee Committee' or 'Statutory Council' and is competent to study those regional laws related to rights to see if they are adequate to what the regional Statute says before they are enacted. In the event of an incompatibility, the 'Guarantee College' will issue an opinion communicating the result to solve the problem. This opinion cannot in any case declare the illegitimacy of these regional laws. The second institution to highlight is the Civic Ombudsperson which is like the figure of the Spanish Ombudsperson (Rossi 2005: 201-218; Borgonovo 2022: 244-263; Tarli Barbieri 2015: 533-552).

As for the autonomous jurisdictional guarantees, it is doubtful to consider that they really exist. The Spanish politically decentralized State establishes the unity of the Judiciary, which supposes that it is outside the distribution of competencies. Nevertheless, the Statute of Catalonia proposed a subnational judicial protection of autonomous rights before the Superior Court of Justice of this Autonomous Community, based on the ambiguous regulation of art. 149.1. 1ª of Spanish Constitution on the exclusive state competence in matters of procedural legislation: 'without prejudice to the necessary specialties that in this order derive from the particularities of the substantive law of the Autonomous Communities'. In its Constitutional Judgment no. 31/2010, the Court resolved this issue and

decided that in order for the autonomic legislator, whether statutory or ordinary, to be able to incorporate unique procedural functions derived from its substantive law, it was necessary to establish the relationship between the 'necessary specialties' and a 'inescapable and unavoidable connection of the judicial defence, of the substantive legal claims configured by the autonomous norm by virtue of the particularities of the substantive law created by them'[XXI] (Soriano Moreno: 2020: 187-210; Morcillo Moreno 2013: 124-127; Cabellos Espiérrez 2010: 44; Gimeno Sendra 2010: 13-25; Carrillo 2011b: 331-354).

Regarding the constitutional protection of fundamental rights through the remedy of *amparo* (the individual appeal for the protection of fundamental rights before the Constitutional Court), in Spain there is only one Constitutional Court with jurisdiction throughout the territory and the *amparo* only protects fundamental constitutional rights[XXII]. This means that subnational rights do not have direct access to this type of protection. However, it could be possible for them to be used in the *amparo* application indirectly. The Statutes of autonomy have the capacity to repeat the fundamental constitutional rights and thus, it could be that the Constitutional Court extended its decisions covering not only the constitutional content but also the possible statutory content, which although it is very similar to that of the Supreme Norm, it can always differ or add a new context within the framework of the autonomic competencies. In other words, it would be a technique similar to that used by the Spanish Constitutional Court, namely after the Judgment of the European Court of Human Rights in *López Ostra c. Spain*, in which it linked the right to an adequate environment for the development of the person (article 45 CE) to the right to personal and family privacy recognized in article 18 SC (Gordillo 2020: 85-114[XXIII]).

Germany, unlike Spain, has a dual system of amparo remedy, the federal and the subnational. The Basic Law establishes that the *Länder* are in charge of deciding whether to implement the alternativity or subsidiarity rule when facing this double guarantee. However, if the *Land* decide not to include any of these clauses, both amparo remedies may be granted at the same time. Given the possibility of contradictions in the latter case, it is necessary to appeal to the mutual respect of both institutions. The art. 100.3 of the Basic Law establishes the cases in which the decisions of the Constitutional Courts of the *Länder* can be controlled by the Federal Constitutional Court (Reutter 2021: 38-60; Hartwing 2005: 145-166; Doménech Pascual 2010: 187-214; González Beilfuss 1996: 225-266; Hofmann 2007: 13-28).

The analysis of the system of subnational guarantees shows that judicial guarantees are usually in charge of the central powers, in the relevant cases analysed. However, normative, or institutional guarantees are more likely to exist at the subnational level than judicial guarantees. The German case stands out for its double system of guarantees of fundamental rights through the amparo remedies that gives great effectiveness to its regional rights. After studying all these issues, it is necessary to delve into what has happened to these rights during the two economic crises that have devastated Europe in the last decade.

5. Subnational rights after the first decade of the 21st century

5.1. The economic crisis and the principle of budgetary stability

The largest group of autonomous statutory rights is that which refers to social rights. These were quickly affected by the great economic crisis (2008-2013), which resulted in the Spanish constitutional reform of 2011. Article 135 of the Spanish Constitution and its development by Organic Law 2/2012, of April 27, of Budgetary and Fiscal Stability, had a direct impact on the Social State and, therefore, on social rights. Specifically, this constitutional reform affected the autonomous State in two ways. In the first place, because the reform brought with it the recentralization of the public administration action in terms of budgetary stability and financial sustainability to the detriment of autonomic competencies. The use of the basic and transversal State competences recognized in art. 149.1. 1ª, on rights, and in art. 149.1.13ª of the Constitution, on the basis and coordination of the general planning of economic activity, perfected this trend (Gordillo Pérez 2022: 44-48; Faggiani 2015: 709-743; Crespo Garrido 2022: 157-177).

This recentralization was consolidated with the doctrine of the Constitutional Court on the principle of equality around the system of distribution of competencies, which changed its jurisprudence as of 2014. In this sense, the Spanish Constitutional Court has carried out an expansive interpretation of the basic and transversal competencies of the central State against the competencies of the autonomous communities. In the same way, this jurisprudence has also made an expansive interpretation of State (central) action versus autonomous action in shared competences. This perception of the High Court has been reflected in Judgment 107/2014, of June 26, in Judgment 170/2014, of October 23, or in Judgment 93/2015, of May 14 (Soriano Moreno 2020: 108-112).

Secondly, because the political measures that were taken were austerity measures adopted by the central State that affected the autonomous communities. The Spanish 'spending rule' (similar to the German *Schuldenbremse*) provided for in Organic Law 2/2012 sought that the Public Administrations reduce the public debt they had, and, for that, the income obtained above the forecasts would go to the reduction of this debt. Many subnational territories reduced public debt not only through this technique but also by rationalizing the spending of social rights that usually include very high spending budget items and that in these years became a cost to be minimized (Fondevila Marón 2022: 237-254; Tudela Aranda 2015: 145-179; Viver Pi-Sunyer 2011: 146-181; Adnane 2013: 111-127).

But this situation not only affected Spain. Germany and Italy have also adapted their legal systems to respond to the demands of the European Union in economic and fiscal policy. Germany reformed the article 115.2 of its Basic Law to introduce the principle of fiscal stability and the debt brake rule (*Shuldenbremse*) that affected the Federation and the *Länder*. Likewise, they ended up reforming their constitutions to introduce limitations in terms of budget balance and stability. This situation affected subnational rights since the forecast of income and expenses is essential for the development of these (Oehling de los Reyes 2022: 319-337).

Italy also reformed articles 81, 97, 117 and 119 of its Constitution, through Constitutional Law 1/2012. This modification introduced as an exclusive competence of the central State 'the harmonization of public budgets' and eliminated shared or concurrent competences regarding this issue. In this same line, the Italian Constitutional Court had developed three criteria for the study of the constitutionality of those legal norms that regulate social rights and affect the financial demands of the State. In short, these criteria established that in order for these laws on social rights to be constitutional, they had to be gradual and had to establish concrete measures for these rights. The doctrine added one more criterion based on constitutional jurisprudence that referred to respect for budget limits. These did not allow the action of the legislator to exceed in the establishment of social benefits (Capodiferro Cubero 2022: 365-386). Even though the Court stripped statutory rights of legal effectiveness in 2004, regional competences in social matters have made, as in Spain, that subnational legislation deals with social rights, which were affected by the constitutional measures that were implemented during this economic crisis.

5.2. The covid-19 crisis and its impact on the rights of federal states

5.2.1. The state of alarm or emergency as a 'recentralizing' instrument of power

The other crucial moment in which statutory and autonomous rights were affected, and mainly constitutional rights, was the crisis generated by covid-19. The first Spanish state of alarm was declared on March 14, 2020. This was based on Organic Law 4/1981, on states of alarm, exception, and siege, which established that the competent authority in this exceptional state of alarm would be 'the Government or, by delegation of the latter, the President of the Autonomous Community when the declaration exclusively affects all or part of the territory of a community' (article seven). In addition, this state of alarm was based on Organic Law 3/1986, of April 14, on public health.

This was recognized by Royal Decree 463/2020, of March 14, in its fourth article. Therefore, in this legal norm the recentralization of the power of the State in the central Government was determined[XXIV]. Contrary to this model, the German Constitution does not provide specifically for a state of alarm, although there are mentions of the restriction of fundamental rights in its articles. Even so, both the Federation and the *Länder* took exceptional measures to increase the responsiveness and flexibility of the system. It is the same case as in Italy, which does not provide for this exceptional state in its constitutional text and the measures that restricted rights were taken within the ordinary constitutional framework, using legal norms and regulations (Ringe and Rennó 2023: 1-18; Zanotti and Meléndez 2022: 92-104; Kölling 2022: 147; Mastromarino 2020: 545-566).

The Spanish Royal Decree limited the freedom of movement of people throughout the territory. This restriction was provided for in the seventh article that was declared unconstitutional by the Judgment of the Constitutional Court no. 148/2021, of July 14, arguing that the freedom of movement was not restricted but was suspended and that was not constitutionally possible since the state of alarm only allows the limitation of rights. Thus, this first state of alarm brought with it two direct consequences that affected the Autonomous State. On the one hand, the recentralization of power that affected the system of distribution of competencies and, secondly, the restriction of the fundamental right of freedom of movement, recognized in article 19 of the Spanish Constitution. But equally, other rights were limited in Royal Decree 463/2020 as the religious freedom of art. 16 of the Constitution, the right to health of art. 43, the right to education of art. 27, the right to assembly of art.21 or the freedom of enterprise of art. 38, among others. Some of these rights

are included in subnational norms, which meant that their content could not be developed normally since the recentralization carried out by the national government did not allow the ordinary application of autonomic rights.

After the end of this first state of alarm, there was a stage of apparent normality, although this feeling quickly broke. The speed in the increase in cases of covid-19 after the end of the confinement and the state of alarm had two legal derivations. The first of these was that it caused great legal confusion, with the proliferation of norms that modified the restrictive measures to be observed from one week to the next and that affected rights and freedoms. The second derivation was that the virus did not have the same incidence in all the territories, causing the political and legal responses given by the autonomous communities to be different. The first problem that arose was that the central public authorities delegated the ability to limit rights to the autonomous communities. The concept of 'co-governance' began to gain strength. This term wanted to be used by the central government to deal with the pandemic situation and tried to create coordination between the central executive and the regional executives when taking measures. However, this 'co-governance' led to a delegation of functions by the central government to the autonomous communities that raised serious problems with respect to the true capacity of these subnational entities to make decisions of great legal significance and, specifically, with respect to the restriction of fundamental rights (García-Escudero Márquez 2022: 109-119).

Certain autonomous communities approved enabling regulations to adopt measures to combat covid-19. But these norms were decrees or agreements issued by a regional advisor or presidency that did not have the legal hierarchical level to affect rights, and even less to affect fundamental rights. Some subnational entities used the decree-laws for this restriction, trying to regulate this matter in a norm with the rank, force, and value of law. However, the Spanish Constitution expressly establishes the reservation of law in matters of rights. For this reason, it does not seem constitutional to allow the autonomous communities to limit rights, since this restriction forms part of the basic content of any right. Secondly, it is also not constitutional that norms other than laws the ones responsible to regulate the most intrinsic aspects of rights (Tudela Aranda 2022: 213-214; García-Escudero Márquez 2022: 109-119; Matia Portilla 2022: 157-176).

Some of these norms (regulations) were brought before the Spanish courts, which decided different results in each part of the territory. This is the case of Madrid, where the

courts decided to maintain a less restrictive regulation of rights, compared to Valencia, where the courts supported the most restrictive measures. For this phase of the pandemic, no contingency forecast or protocol was made by the central public power, which generated a serious lack of a regulatory framework with which to deal with the current context. This did not happen in other countries such as Germany where there was a reform of the Infection Protection Law after the first wave of covid-19, and which tried to introduce stable legal measures to combat the coronavirus and to consolidate the institutional balance (Kölling 2020: 467-486; Tudela Aranda 2022: 211-213; Aragón Reyes 2022: 77-90).

This entire situation has shown that the principles of collaboration and cooperation typical of a politically decentralized country are not sufficiently developed in Spain, unlike in Germany which is characterized by a cooperative federalism where there has been coordination at a horizontal level, between the Administrations of the *Länder*, and at a vertical level, between the federal government and the territorial entities, during the covid-19 crisis (Von Münchow 2020: 46-60; Kölling 2022: 146-147). In Italy, the coordination and collaboration between the central government and the regions also raised some problems that showed a lack of effective mechanisms to achieve the foreseen objectives (Brunelli 2021: 384-398; Bruneta Baldi 2020: 277-306). On the other hand, the limitation of rights by the autonomous communities was not provided for in the Spanish legal system, quite the contrary, the legal regulations, jurisprudence and constitutional doctrine have always established strict guarantee mechanisms for the limitation of rights. The jurisprudence has always used the extensive interpretation of the rights against the restrictive interpretation of their limits (Biglino Campos 2022: 15-39; Gordillo Pérez 2022: 32-39).

5.2.2. The delegation of power in territorial entities and its impact on rights and freedoms

At the end of October 2020, the second state of alarm was declared in Spain, which changed the management of the pandemic in relation to the previous phases. Royal Decree 926/2020, of October 25, appointed the presidents of the autonomous communities as the delegated competent authorities and, in this sense, they could issue the orders, resolutions and provisions to apply the provisions of the Royal Decree regarding the limitation of rights. This was the 'co-governance' criterion that materialized in this second state of alarm. Therefore, this Royal Decree was not committed to increase the coordination or cooperation

between the Government and the autonomous communities, but what the central Government did was refrain from exercising its competences and demand that the subnational entities be in charge of managing of this exceptional situation, an issue that violates Organic Law 4/1981. This first difficulty was linked to the second, that is, the Royal Decree of the state of alarm granted the autonomous communities a very wide margin to restrict fundamental rights (Tajadura Tejada 2021: 137-175; Sáenz Royo 2021: 375-398; Matia Portilla 2022: 157-176; De la Quadra-Salcedo Janini 2020: 1-28).

The question of whether the autonomous communities can limit or even suspend rights is raised again. The difference with respect to the previous phase is that Royal Decree 926/2020 expressly empowered subnational executives to take care of promoting severe restrictions on rights in their territory. According to Organic Law 4/1981, the competent authority in a state of alarm is the central executive power, which may delegate into the regional presidents. However, this delegation does not imply refraining completely from the situation and making the autonomous communities responsible for the entire management. If this is what the legal system establishes, then it is not possible for subnational entities to restrict rights. In addition, the vast majority of these rights are of a fundamental nature. This delegation is clearly excessive and contrary to the principles that govern the interpretation of rights and freedoms, such as the restrictive interpretation of the limits of rights, the expansive interpretation of rights, or the principle of proportionality (Tudela Aranda 2022: 209-214; Revenga Sánchez and López Ulla 2021: 215-237). This state of alarm was declared unconstitutional based on these arguments by the Constitutional Judgment no. 183/2021.

After the end of this second state of alarm (on May 8, 2021) a last and extensive stage of return to constitutional normality began. This phase was complex and there were also moments of legal insecurity. As for the Autonomous State and the rights and freedoms, the Superior Courts of Justice of the autonomous communities become competent to validate restrictions of rights that in this country are only legally provided for in exceptional states. For example, the Superior Court of Justice of the Valencian Community, in an Order of May 21, 2021, validated the touch instrument, because this measure complied with the judgments of suitability, necessity and proportionality and with the provisions of the Law Organic 3/1986, of April 14, on Public Health.

The modification of the law of the contentious-administrative jurisdiction that created the competence of the Superior Courts of Justice to validate restrictions of rights was

declared unconstitutional. The Constitutional Judgment no. 70/2022 repealed article 10.8 that established the aforementioned prior appeal before the Superior Courts of Justice that had been added by Law 3/2020, of September 18, on procedural and organizational measures to deal with covid-19 in the field of the Administration of Justice.

Another of the noteworthy actions of the autonomous communities at this time was to collect in one or several laws all the measures approved in the field of covid-19 previously included in regulations issued by the executive power, i.e., having a lower rank than the laws. This is the case of Law 2/2021, of June 24, on measures for the management of the covid-19 pandemic in the Basque Country. With this action, subnational regulatory support is no longer based on regulations or decree-laws, but on regional laws. Now the question is, are these laws adequate to limit rights? The restriction of these rights falls within the so-called basic content of the right in question, which is an exclusive competence of the central State according to art. 149.1. 1ª of the Spanish Constitution. On the other hand, in Germany, the *Länder* can limit rights as permitted by their own federal constitutional system, as long as it occurs in cooperation with the Federation. However, in Italy, the covid-19 crisis has manifested an institutional disorder that has highlighted the tensions between article 5 of the Constitution, which deals with the indivisibility of the Republic, and article 2 of the Constitution, which is responsible for the recognition of a decentralized public power. This condition has influenced rights and freedoms and has affected territorial cooperation. It can be seen in the few meetings of *The Conferenza Stato Regioni* in the first stage of the pandemic and in which the restriction of rights has been carried out by central norms, for the most part (Zanotti and Meléndez 2022: 92-104; Von Münchow 2020: 46-60; Mastromarino 2020: 545-566; Giner Alegría, Fernández Villazala and Gutíerrez Mayoral 2021: 115-136; Presno Linera 2020: 15-34).

The pandemic generated by the coronavirus highlighted the influential role of territorial entities in many areas, including the issue of rights and freedoms. Not only because the rights act as limitations to the public power, as long as they are subjective rights, but also because the subnational territories have legislated on second-generation rights that have acquired great relevance in the improvement of the social State. The right to health is a clear example of this and the covid-19 crisis and the different exceptional states used in politically decentralized countries have shown the role that these territorial entities must play not only in the development of second-generation rights, but also when dealing with its basic content.

6. Epilogue

The regulation of rights and freedoms in the territorial entities of the federal and politically decentralized States is an element that falls within their areas of competence in many of them. However, Italy and Spain did not introduce subnational rights until the beginning of the 21st century. Its inclusion was not an easy task since it caused important discussions between the scholarship and the constitutional judgments that did not equate the nature of the rights recognized in the Spanish and Italian statutes to the nature of the rights of other federal States of Law such as Germany. The system of guarantees that accompanies regional rights did not have an important development at the subnational level. At the beginning of the second decade the issue was resolved, in principle, with the Judgments of the Constitutional Courts and the problem around subnational rights was diminishing.

However, in the following decade, the Spanish subnational entities and the territories of other federal countries did not stop regulating rights in their ordinary legal norms. In the Spanish case, the debate on whether the Statutes of Autonomy could recognize rights was very intense, although the recognition of rights in subnational legislative norms did not raise so many expectations. So much so that today the Spanish autonomous communities continue to approve autonomous laws on rights. It is for this reason that the question does not remain closed. It is interesting to analyse which differences one may observe between the autonomous communities that proclaim rights in their Statutes and those that do not but use the ordinary legislative technique to establish and regulate those same rights. After more than a decade of the inclusion of statutory rights, it does not seem that there are major differences between the two groups. The most important contribution of the catalogues of statutory rights lies in a symbolic contribution to provide subnational entities with a more political nature with the aim of growing in political structure and becoming an entity closer to a real State. The same can be observed in the Italian case.

On the other hand, the status of rights and freedoms at the subnational level is a question that is still open since the two great crises that devastated Europe, the economic crisis that began in 2008 and the Covid-19 crisis of 2020 (and we will see what happens with the consequences of the Ukrainian War), clearly affected constitutional and subnational rights. The different measures that were taken in these recessions were not neutral with the

implementation of subnational rights nor with the development of model of the distribution of competences in existence before those events.

Moreover, the nature of autonomous rights makes two things clear, the first is that there are practically no fundamental rights other than those recognized in the Spanish Constitution, unlike in the German, except for the rights of political participation and the linguistic rights that are protected by the precepts of the 1978 Spanish Constitution. The second is that the autonomous communities, like the Italian regions and the German *Länder*, have devoted themselves to the proclamation and regulation of social rights and social policies, in the Italian case, that are directly related to the competencies of the territorial entities. These have chosen to appear as the sole responsible for these rights to become social service providers. In this way, rights of this nature serve the autonomous communities to consolidate the competence system included in the Statutes of Autonomy and in those laws drawn up by the central power that had transferred numerous matters to the autonomous communities by legal means. All this acquires great importance since the system of distribution of competences is the basis for the transfer and distribution of economic means by the central State to the subnational territorial entities in order for them to fulfil their competences.

The social State is a fundamental part of the current Rule of Law model and has a special relevance in federalism (Vázquez Alonso 2014: 505-534). This has been reflected in the two economic crises of the 21st century: the crisis of 2008 and the crisis of 2020. These recessions have brought to light some essential characteristics for the federal system and for the configuration of the rights and freedoms. The first is that when territorial entities recognize social rights, their legislative development has been constantly subjected to the general budget of the Central State and to the norms of harmonization, coordination, and cooperation in economic and financial matters.

Secondly, this crisis and especially the one caused by covid-19 have shown that territorial entities have great importance and relevance in terms of guarantying and affecting rights and freedoms, insofar as they constitute a public power that corresponds to the ordinary management of numerous issues that affect the legal status of citizenship. The coronavirus pandemic has affected many fundamental rights, but especially the right to health, which in Spain has a social nature and is related to many subnational competencies, making the

autonomous communities responsible for its implementation but also of the regulation that affect its basic content.

In short, we can characterize Spain as an evolving federal system between the Italian model and the German one that the territorial entities have a more significant position than had been foreseen at the end of the first decade of the 21st century in terms of rights and freedoms, whether these are recognized in the basic regulation of the territory or in the ordinary laws of development. But this greater incidence is not derived so much from the inclusion of a list of rights in the Statutes of Autonomy (or equivalent) more or less similar to those established in the Constitution, but rather as a consequence of the growing number of competencies and policies that they exercise and, as public authorities, their actions have a direct impact on the legal status of individuals.

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[II]This is the case of Switzerland that before being configured as a federal State, with the Constitution of 1848, the cantons regulated rights and freedoms for more than a century.

[III] The first of the Statutes that was to be reformed was the Statute of the Basque Country, a reform called 'Plan Ibarretxe', which was rejected on February 1, 2005, in the Congress of Deputies.

[IV] The first total reform that was carried out was that of the Valencian Statute, followed by the complete reform of the Catalan Statute. These reforms were followed by the Balearic Islands, Andalusia, Aragon, and Castilla y León in 2007 and Extremadura in 2011. In this period the Navarra Statute (2010) and the Murcia Statute (2011) were also reformed, but these were not total reforms but were only partial reforms.

[V] This territorial panorama that begins to evolve since the beginning of the twenty-first century has already been configured in other countries. See in Europe the case of Switzerland and Austria and, in the American continent, the consolidation of the Canadian system.

VI The expression '*Estado de las autonomías*' (State of autonomies) was used by the Spanish Constitutional Court in its Judgement 64/1982, 4 November 1982, ECLI:ES:TC:1982:64 (legal argument No. 8).

[VII] The model of territorial organization of power in Spain was already original from its first true attempt at political decentralization, in the Second Republic (1931-1936).

[VIII] In the case of Switzerland, all the constitutions of the Cantons have a bill of rights, many of them already had a catalogue of rights before the federal Constitution did. In 2005, several reforms were made to some of the cantonal constitutions and new rights were introduced, especially in the social order. Such is the case, for example, of the Canton of Fribourg where the cantonal Constitution includes a separate title on 'Social rights' (Herting Randall 2016: 151-177; Reich 2018: 280-285).

[IX] This is stipulated in article 28 of Basic Law of 1949. Besides, it is known that, in Germany, the term *Verfassung* (which translates as 'constitution') is used by the 'constitutions' of the subnational entities while the term *Grundgesetz* (usually translated as 'Fundamental' or 'Basic Law') is used to refer to the Federal constitution of Germany.

[X] Although there were already Decisions before Lüth. See BVerfGE 2, 1 – SRP-Verbot, BVerfGE 5, 85 – KPD-Verbot, y BVerfGE 6, 32 – Elfes.

[XI] See the Constitutional Court Judgments 225/1998 of 25 November, 247/2007 of 12 December and 31/2010 of 28 June.

[XII] This theory is also related to art. 3.1 of the Basic Law. According to the jurisprudence of *Bundersverfassungsgericht*, this last disposition prohibits «treating arbitrarily unequally what is essentially equal and arbitrarily equal to what is essentially unequal» (BVerfGE 49, 148, 165).

[xiii] This Judgment specifically speaks of the protection standard of fundamental rights that must be upheld by the Court of Justice of the European Union.
[xiv] Examples include constitutional Judgments 25/1981, 37/1981, 6/1982, 76/1983, 37/1987, 14/1998, 173/1998.
[xv] This issue was mentioned very ambiguously in Constitutional Judgment 247/2007 and was taken up more clearly in Judgment 31/2010.
[xvi] Issue resolved for the first time in the Judgment of the Italian Constitutional Court n. 282, year 2002, regarding the right to health.
[xvii] Today, euthanasia has been recognized by Organic Law 3/2021, of March 24, in force throughout the Spanish territory.
[xviii] In Sachsen-Anhalt the right to physical and psychological integrity is recognized in the Constitution of the Free State of Saxony (1992), article 16.
[xix] Chapter III of Title I of the Constitution.
[xx] Only Catalonia, Andalusia and Castilla y León expressly mention it in any way.
[xxi] The problem of subnational judicial protection based on art. 149.1. 1st EC has been studied by the Spanish Constitutional Court since the eighties of the 20th century. Thus, SSTC 83/1986, of June 26, 127/1999, of July 1, 47/2004, of March 25, 135/2006, of April 27, 31/2010, of April 28, can be cited. June, and the STC 21/2012, of February 16.
[xxii] Fundamental rights recognized in art. 14, in the First Section of Chapter II of Title I and in art. 30.2 EC.
[xxiii] *López Ostra v. Spain*, Application no. 16798/90, ECHR December 9, 1994, available at < https://hudoc.echr.coe.int/FRE?i=001-57905>.
[xxiv] Specifically in the Defense, Interior, Transport, Mobility and Urban Agenda and Health ministries.

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Addressing Complexity

The rise of the hybrid multilateral climate regime and its impact on the role played by ENGOs in the governance of climate change.

by

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Abstract

The spread of transnational and global phenomena is putting under strain the state-centric bias crystalized, *inter alia*, in inter-national law and in traditional forms of multilateralism. In this context, climate change can be considered as the transnational and global phenomenon par excellence, and for this reason it might be relevant to investigate over new forms of multilateralism enhancing the role played by NSAs and increasing the effectiveness of the global climate governance system. Accordingly, after duly addressing the literature on the issue at stake, this study has developed the concept of 'hybrid multilateral climate regime' (HMCR) and it has taken trace of its process of materialization with the aim of understanding to what extent does the HMCR emerging from the Paris Agreement has strengthen the role played by a particular category of NSAs (*i.e.*, ENGOs) in the global system of climate governance.

Key-words

Hybrid Multilateral Climate Regime, Environmental NGOs, NSAs, Climate Change, Global Climate Governance.

1. Introduction

1.1 The analytical problem

International Law is based, *inter alia*, on the postulate of full sovereignty of states,[II] which have long dealt with complex international issues by establishing multilateral regimes. While the beginning of multilateralism can be identified in the process which led to the Peace of Westphalia of 1648,[III] permanent systems of multilateral diplomacy emerged in Europe just after the end of the Napoleonic Wars,[IV] and then spread at the planetary level during the 20th Century.

Numerous multilateral regimes have emerged for the regulation of various aspects of international law and politics. However, there is a new realm of the international agenda, *i.e.,* the governance and protection of the global environment, which is gaining unprecedented importance, and which is unlikely to be effectively regulated through the establishment of a multilateral regime which still puts at the centre the self-interest of independent sovereign states. Indeed, 'no crisis in world history has so clearly demonstrated […] the increasing interdependence of governments and other stakeholders as the contemporary global environmental crisis',[V] and this is due to the fact that, as the US Diplomat George Kennan stated already in 1970, 'the entire ecology of the planet is not arranged into national compartments'.[VI]

When it comes to the environmental crisis, climate change can be considered as the transnational and global environmental phenomenon *par excellence*. As a matter of fact, while climate change is unequivocally caused by the anthropogenic emission of greenhouse gasses (GHGs) in the atmosphere, which is virtually generated as a subproduct of any economic activity performed by any subject in any region of the Globe, the consequences of climate change range from floods to droughts,[VII] and from rising sea levels[VIII] to ocean acidification[IX] (*i.e.,* phenomena which are transboundary in nature and which do not necessarily take place in the same region in which GHGs were emitted).

The singular nature of climate change, therefore, poses unprecedented governance challenges, as it requires the establishment of a regime that is qualitatively different from most of those which are already in place. This new regime requires, *inter alia*, a greater participation of non-state actors (NSAs), in order to bypass the traditionally state-based

dimension of both international law and traditional multilateralism. In fact, according to a functionalist perspective, the emergence of phenomena and threats which are transnational in nature requires the rise of equally transnational actors and structures in order to be duly addressed. Here is where the role of NSAs comes in.

The concept of 'hybrid multilateralism' has recently emerged in order to fill the voids that traditional multilateralism brings about when it comes to the governance of climate change. Nevertheless, this concept has not yet been tested against its potential to enhance the role of environmental NGOs (ENGOs) through the establishment of a hybrid multilateral climate regime. Therefore, this research will try to map the evolution of the concept of 'hybrid multilateralism' and the materialization of the 'hybrid multilateral climate regime', and it will consider the implications that the hybrid multilateral climate regime brings about when it comes to the enhancement of the role played by ENGOs in the governance of climate change.

1.2 The state of the art

The main focus of scholars studying NSAs' role in international environmental and climate law has changed over time. Accordingly, a chronological classification of the state of the art has been conducted, and four different phases have been identified: a) late '90s-early 2000s; b) run-up of the Paris Agreement; c) aftermath of the Paris Agreement; d) most recent years and emergence of hybrid multilateralism.

a) During the '90s, Cameron provides a focus on three (back then) recent 'developments in international environmental law',[X] one of which is the 'evolving role of non-state actors' in international environmental law.[XI] The author observes that the position of NSAs is problematic, as it is difficult to both develop a 'workable mechanism for non-state actor participation',[XII] and to provide NSAs with greater recognition within the international environmental law framework.

The problematic nature of NSAs is the main object of study of Alkoby, who thoroughly discusses 'the paradox of non-state actors' in the aftermath of the Kyoto Protocol.[XIII] Indeed, despite the great role played by NSAs in the negotiation processes leading to the creation of the Protocol of 1997, they still lack a clearly defined legal and political status.

These two works map the new role played by NSAs from the early '90s, and shift scholarly attention on the need to institutionalize NSA's participation in the international

environmental regime. However, these articles still do not focus on the international climate regime, and do not provide a legal analysis of the contribution that NSAs could play in enhancing climate governance.

b) The object of analysis changes with Dannenmaier, who observes that 'NSAs have helped to advance the international climate regime',[XIV] and that their role in climate compliance has slightly increased through the creation of the Kyoto Protocol. Furthermore, Dannenmaier wishes post-2012 negotiators to create a system which gives more room for NSAs' intervention in climate compliance mechanisms.

The work by Savaresi tries to understand to what extent NSAs influence states' behaviours on climate policies. According to the author, international environmental law is 'increasingly shaped with a crucial input from civil society',[XV] and this contributes to explaining the different role played by the EU and the US in the international climate regime.

The abovementioned works analyse the role of NSAs in the international climate regime, and they also deepen the study on NSA's influence on states' behaviour. However, having being published before 2015, they are still built on the study of the post-Kyoto climate framework, and they miss the new features introduced with the Paris Agreement.

c) Starting from the analysis of the Paris Agreement, Van Asselt observes that, given their very nature and capabilities, 'NSAs should be assigned a clear role in review processes'.[XVI] However, as the scholar observes, NSAs have been assigned no formal role by the Agreement itself, so that an explicit recognition of their function will hopefully take place in successive negotiations.

Afterwards, Colombo seeks methods for enforcing international climate law. According to the author, the role of NSAs bringing cases before domestic courts will gain new centrality in the enforcement of climate law, as it also emerges from both the Urgenda Case and the Leghari Case. As Colombo observes, 'it appears that similar decisions are more likely to morph out of the Paris Agreement in comparison with previous agreements'.[XVII]

All in all, the post-Paris literature focuses on the identification of methods through which NSAs could play a role in the enforcement of international climate law. In this context, while van Asselt pushes for the formal inclusion of NSAs in the international climate regime, Colombo focuses on NSAs' capacity to bring climate cases before domestic courts. Nevertheless, it should be observed that, although four years have passed since the

publication of Colombo's article, still no consistent practice on the enforcement of international climate law in domestic courts has emerged.

d) While Bäckstrand et al. assert that the traditional inter-state multilateral approach does no longer represent the reality of the international climate regime, and they describe the emergence of a system of hybrid multilateralism (conceived as a 'heuristic to capture [the] intensified interplay between state and non-state actors in the new landscape of international climate cooperation')[XVIII] from Copenhagen (2009) to Paris (2015), Kuyper et al. focus on how the Paris Agreement institutionalized such hybrid multilateral system through the introduction of nationally determined contributions, which will allow NSAs to enhance the 'justice, legitimacy, and effectiveness'[XIX] of the international climate regime.

Afterwards, Dryzek maintains that hybrid multilateralism opens new opportunities to NSAs, 'especially when it comes to that of intermediary in processes of orchestration',[XX] while Zelli et al. observe that different levels of institutionalization of hybrid multilateralism 'characterise selected sub-areas of global climate governance' in accordance with the specific problem-structure concerned.[XXI]

Finally, also Rajavuori acknowledges 'the gradual rise of hybrid multilateralism',[XXII] but he observes that the category of NSAs is too broad and diversified to provide a coherent analysis of the emerging climate regime complex.

The concept of 'hybrid multilateralism' is likely to be a valuable instrument for the conduct of further studies on the architecture of the post-Paris international climate regime. However, as Rajavuori asserted, a generalized study of NSAs' role in hybrid multilateralism is neither feasible nor desirable, given the existence of great differences between NSAs.

Consequently, the contributions deriving from this 'fourth period' go in the direction of focusing on the role played by particular categories of NSAs in the hybrid multilateral framework established under the Paris System. The current research, therefore, will try to understand whether the post-Paris hybrid multilateral climate regime is being capable of enhancing the role played by ENGOs (*i.e.*, a peculiar category of NSA) in climate change governance. Still, a definition of hybrid multilateral climate regime (HMCR) has never been provided before, so that this research will also try to address this literature gap.

1.3 Research question

The overarching question that this research will answer is: *To what extent does the hybrid multilateral climate regime emerging from the Paris Agreement System give environmental NGOs a stronger stand in the governance of climate change?*.

In order to provide a satisfactory answer to the research question, the following sub-research questions will be asked, and each one of them will be addressed in a separate paragraph:

I. What is a hybrid multilateral climate regime and which elements of the Paris Agreement can be reconducted to it?
II. What are environmental NGOs, and what is their role in the global governance of climate change?
III. To what extent did the presence of NGOs and ENGOs in the international climate regime increased over time, and was there any significant change after the establishment of the Paris Agreement?

The main research question is of major importance in order to properly address the analytical problem that has been identified (*i.e.*, the need to involve qualitatively new systems and actors in the governance of climate change). Furthermore, the research question is perfectly suitable to fill the gaps and expand the current state of the art concerning the role played by NSAs in the governance of climate change.

In addition to this, the three sub-research questions do not only aim at disassembling and clarifying the content of the main research question, but they also contribute to deepening its level of analysis.

1.4 Methodology

The current research will be conducted as a desk-study. As a matter of facts, all the data and information that will need to be processed in order to both answer to the main research question and to the sub-research questions can be found in international legal documents and in the existing literature.

Therefore, while the second paragraph (§2) will be developed through the adoption of both doctrinal and legal document analysis in order to clarify the meaning of hybrid multilateral climate regime, and to identify the elements of the Paris Agreement which can be reconducted to it, paragraph 3 (§3) will mainly rely on doctrinal analysis in order to clarify

the nature of NSAs, NGOs, and ENGOs, as well as the means at their disposal in the global governance of climate change.

Finally, legal document analysis will be central, again, in order to answer sub-research question III, in paragraph 4 (§4). In this occasion the reports produced by the SBSTA over the last two decades will be examined in order to understand if there has been any significant shift in the role played by NGOs and ENGOs over this timeframe (a special eye will be kept on the post-2015 changes).[XXIII]

1.5 Structure of the work

While the objective of this introductory paragraph (§1) was to highlight the problematic discrepancy between a state centric international climate regime and the transnational and global nature of the phenomena that it tries to address, to review the literature on the role of NSAs in international environmental and climate change law, and to introduce a research question aimed at addressing the literature gap, the second paragraph (§2) of this research will aim at clarifying the concept of hybrid multilateral climate regime, as well as at identifying the elements established by the Paris Agreement which can be reconducted to it. Accordingly, after shortly introducing the basics of international regime theory, the (limited) scholarly literature on hybrid multilateralism will be revised. Hence, a definition of hybrid multilateral climate regime will be drawn, and some considerations on what does HMCR entails will be provided. Finally, the paragraph will consider the Paris Agreement in order to understand which of its elements can be reconducted to the HMCR.

Secondly, provided that the category of non-state actors is too broad to conduct a coherent analysis of their role and behaviour in hybrid multilateral systems,[XXIV] and given that ENGOs represent a particularly interesting sub-category of NSAs when it comes to the role played in the HMCR,[XXV] paragraph 3 (§3) will provide an analysis of ENGOs' role in the climate governance system. Indeed, after defining the categories of NSA and NGO, and having described their functioning in the climate governance system, a definition of ENGO will be provided, as well as the analysis of ENGOs' role in the global governance of climate change. Finally, the potential for enhancing ENGOs' role through the strengthening of the HMCR will be considered.

Afterwards, to answer sub-research question III, paragraph 4 (§4) will pass through the SBSTA's 'reports on the session' that have been produced under the UNFCCC, and it will

track whether (and, eventually, to what extent) did the presence of NGOs and ENGOs within the SBSTA processes changed over time. Accordingly, this paragraph will firstly introduce the SBSTA, and it will explain why the monitoring of its reports can provide significant information. Subsequently, the data gathered through the analysis of SBSTA's reports will be revealed and commented, and the answer to sub-research question III will be provided.

In conclusion, after reporting a summary of the findings of each paragraph of this research, paragraph 5 (§5) will answer to the research question formulated in paragraph 1. Lastly, further grey spaces of the literature will be identified and signalled in order to prompt the conduct of new research directly or indirectly related to the issues which have been covered in this work.

2. What is a hybrid multilateral climate regime and which elements of the Paris Agreement can be reconducted to it?

2.1 International regimes' scholarship

Scholarly attention over international regimes started to emerge during the '70s and spread in particular during the '80s, *inter alia*, thanks to the precious contributions brought about by Robert Keohane's works.[XXVI] The study of international regimes has become so popular among IR scholars that, nowadays, regime theory is conceived as an established sub-field of international relations, which focuses in particular on the analysis of the origin, transformation, and effectiveness of international regimes.[XXVII]

Many definitions of international regime have been provided over time, but the one which is still considered the most authoritative and comprehensive was provided by Stephen Krasner who, in 1982, defined an international regime as a set of 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[XXVIII] Still, even this definition presents some shortcomings, because vague concepts as 'principles' and 'norms' remain poorly definite.[XXIX] Therefore, some scholars adopted a much narrower conception of international regime, and they conceived it as a system that only exists when institutionalized through the establishment of multilateral agreements.[XXX]

Apparently, international regimes can contrast the state of anarchy which, according to realist thinkers, would characterize inter-state relationships, and they can do so by creating stable platforms for inter-state cooperation which can facilitate international commitments, increase the cost of free-riding, and ease the establishment of new international agreements. As a matter of facts, international regimes favour the creation of iterated negotiation processes, consent the reduction of information costs, facilitate the establishment of monitoring systems, and are deemed effective in curtailing domestic opposition when it comes to the signature of new inter-state agreements.[XXXI]

It appears that issue-specific international regimes have emerged in all main global policy areas, including environmental protection, and more specifically climate change governance.[XXXII] Nevertheless, it should be noted that international regimes have been traditionally framed as exclusively composed by states and, even though some efforts to grant a bigger role to NSAs within this framework have been made, 'regime theory [still] regards States as principal actors in world politics'.[XXXIII]

2.2 The rise of hybrid multilateralism

Interestingly, while the scholarship on international regimes originated decades ago, in the Cold War context, and it was initially focused on international security concerns, the scholarship on hybrid multilateralism has much more recent origins, and it emerged from the scholarly field on climate governance. After passing through the relevant literature, only three definitions of hybrid multilateralism have been identified. These definitions present three main problems: they are not particularly intelligible and coherent with each other, they do not focus on the role played by the Paris Agreement, and they generally seem to confine hybrid multilateralism to the sole policy field of climate governance.

Firstly, as it has already been stated in the introductory paragraph of this research, the concept of hybrid multilateralism was developed by Bäckstrand et al., who defined it as 'a heuristic' to capture the 'intensified interplay between state and non-state actors in the new landscape of international climate cooperation'.[XXXIV] According to these scholars, hybrid multilateralism takes into account two new tendencies of global climate policy, *i.e.* the emergence of a hybrid climate policy architecture, and an intensified interaction 'between multilateral and transnational climate action'.[XXXV] In the same year, Dryzek has taken up the concept of hybrid multilateralism which, according to the author, is 'defined by emerging

linkage between the established multilateral negotiations and the plethora of self-organizing governance initiatives involving varieties of non-state actors cooperating with one another'.[XXXVI] Finally, Strachová has more recently defined hybrid multilateralism as a form of 'cooperation among different actors at different levels'.[XXXVII]

What emerges from these definitions is not merely the newfound accent put on the role played by NSAs, but also the heterogeneity they bring about as they define hybrid multilateralism as a 'heuristic', as a 'linkage', and as a form of 'cooperation'. Indeed, not only these terms strongly differ with each other, but they are also characterized by a strong level of vagueness.

Secondly, the relationship between hybrid multilateralism and the establishment of the Paris Agreement must be taken into account. In fact, it should be observed that many scholars focusing on the study of the climate regime have ascertained that hybrid forms of multilateralism just materialized with the establishment of the Paris Agreement. Indeed, already in 2016 (*i.e.*, one year before the definition of hybrid multilateralism was provided), Rockström et al. referred to the 'hybrid model' emerging from the Paris Agreement,[XXXVIII] while van Asselt et al. more specifically referred to 'the hybrid model of international climate policy embodied in the Paris Agreement'.[XXXIX] Still, it should be observed that in these first cases, the term 'hybrid' is referred to the mix of bottom-up and top-down provisions that the Agreement brings about, especially when it comes to the NDCs system, and it does not explicitly mention the enhancement of NSAs in this new framework. Afterwards, in 2017, Bäckstrand et al. plainly asserted that 'the Paris Agreement has led to a system that institutionalizes hybrid multilateralism',[XL] while Kuyper et al., one year later, argued that 'the Paris Agreement cements an architecture of hybrid multilateralism'.[XLI]

Evidently, the establishment of the Paris Agreement has strongly contributed to the materialization of hybrid multilateralism. Nonetheless, the definitions of hybrid multilateralism only focus on its functioning and constitutive elements, without referring to the Agreement whose establishment has been necessary in order to make the rise of hybrid multilateralism possible. Hence, the identification of a conceptual tool linking the rise of hybrid multilateralism to the establishment of the Agreement of 2015 could prove to be particularly useful in order to add coherence and continuity to this picture.

Thirdly, it might be noted that two out of three of the existing definitions of hybrid multilateralism directly reconduct this 'heuristic', 'linkage', or form of 'cooperation', to the field of climate governance. Indeed, while Strachová's definition adopts a more opened approach (as it describes hybrid multilateralism as a form of cooperation, without specifying the policy field in which this cooperation occurs), Bäckstrand et al.'s and Dryzek's definitions exclusively reconduct hybrid multilateralism to the climate policy field. This last approach seems to exclude the possibility for hybrid forms of multilateralism to materialise in further policy areas in which the role of transnational phenomena and NSAs is actually central, and in which hybrid multilateral systems maybe could (and should) be identified (*e.g.* policy fields of transnational migration, food security, and healthcare).[XLII]

Provided that the current research does not want to *a priori* exclude the possibility for hybrid forms of multilateralism to emerge in other policy fields in the future, it identifies the need to qualify those forms of hybrid multilateralism emerging in the climate policy field as peculiar (and not general) forms of hybrid multilateralism.

2.3 The Hybrid Multilateral Climate Regime

In order to preserve the broader vision brought about by the concept of hybrid multilateralism, but also to overcome its shortcomings and the inconsistency underpinning its definitions, the concept of hybrid multilateral climate regime is hereby introduced. This research defines the hybrid multilateral climate regime as a global regime, characterized by hybrid forms of multilateralism, which started to emerge in the field of climate governance after the establishment of the Paris Agreement. The existence of hybrid forms of multilateralism within the HMCR manifests itself through the enhanced role attributed to NSAs, which can also further evolve, *inter alia*, through the creation of new COP documents within the UNFCCC process.

The concept of HMCR can prove to be particularly useful as it incorporates the concept of hybrid multilateralism, while putting it in a more coherent and definite context. As a matter of facts, the HMCR clearly is a regime; however, it is not defined as an 'international regime', in order to avoid the state-centrism which characterises international regime theory.

Moreover, already in its name, HMCR is defined as a particular type of regime (hybrid multilateral c*limate* regime) in order not to exclude the possibility for the emergence of further Hybrid Multilateral Regimes not directly concerning the system of climate governance.

In addition, the emergence of the HMCR is explicitly reconducted to the establishment of the Paris Agreement. The aim of this passage is twofold: on the one hand, it takes on board the analysis of scholars identifying the emergence of hybrid forms of multilateralism in the Post-Paris institutional architecture; on the other hand, it also subtracts some levels of fuzziness to the definition of global regime, by circumscribing it to the system emerging after the creation of a peculiar international agreement. In this context, a critical voice might argue that linking the HMCR to the establishment of the Paris Agreement (*i.e.,* an inter-national treaty) actually means not to get rid of the state-centric approach which the creation of the HMCR aims to overcome. However, it should be noted that, in order to move form a traditionally international regime to a hybrid multilateral regime, a fist act of devolution of duties and tasks from states to NSAs should firstly take place. Therefore, in this framework, the establishment of the Paris Agreement might be seen as an act conducted by the (narrowly defined) inter-national community, in order to constitutionalise the emergence of the HMCR.[XLIII]

Finally, the HMCR is not defined as a static entity at the last stage of a process, but rather as a new start: the enhancement of the role played by NSAs (firstly triggered by the creation of the Paris Agreement) is just at its early stages, and its future evolution is anything but obvious or necessary.

2.4 The Paris Agreement and the HMCR

The Paris Agreement is an international climate treaty established within the UNFCCC framework at COP 21 in 2015. Given the limitations characterizing the Kyoto Protocol's top-down approach (*i.e.,* the strict division between Annex I and non-Annex Parties, and Annex I Parties' incapacity to extend and scale-up their obligations in a new commitment period)[XLIV] the Paris Agreement adopts a quite different stance towards climate governance. Indeed, instead of identifying binding individual obligations of result for 'developed' country Parties, the Agreement set global obligations of result,[XLV] and it also introduces individual obligations of conduct, binding for all country Parties,[XLVI] in a bottom-up fashion. Actually, it is in the establishment of a bottom-up system that some scholars identify the first traces of hybrid multilateralism emerging from Paris.[XLVII]

Therefore, the first relevant element which can enhance hybrid forms of multilateralism, and which can constitute the basis of the HMCR, needs to be identified at art.3 of the Paris

Agreement. Indeed, this article firstly introduces NDCs which Parties have to produce 'with the view to achieving the purpose […] set out in Article 2' (*i.e.,* keeping global temperature rise within 2°C and preferably within 1.5°C above the pre-industrial level). According to subsequent articles, 'each Party shell prepare, communicate, and maintain' NDCs,[XLVIII] new NDCs have to 'represent a progression beyond the Party's then current NDC',[XLIX] and 'each Party shall communicate a NDC every five years'.[L] NDCs surely are the keystone of the Paris Agreement's mitigation objective, and there is no doubt that in this context NSAs will play a crucial role 'as governors, implementers, experts and watchdogs'.[LI]

The presence of a bottom-up approach, which can also enhance NSAs' role and broaden the basis of the HMCR, should also be identified at Articles 7 and 14. Indeed, similarly to NDCs, National Adaptation Plans (NAPs) 'shall' be produced by each country Party, and together with the NDCs, they will be periodically assessed in the global stocktake process.[LII] Also in this case, it can be expected that a large variety of NSAs (ranging from ENGOs to HR-NGOs, banking institutions, consulting agencies, local communities, and further private companies) will have a large role to play in the process of planning, monitoring, and evaluation that both the creation of NAPs and the global stocktake will entail.[LIII] Indeed, as Article 7(5) clearly states, 'adaptation action should [take] into consideration vulnerable groups, communities and ecosystems, and […] traditional knowledge, knowledge of indigenous peoples and local knowledge systems'.[LIV]

However, there are also some elements of the Paris Agreement which cannot be directly reconducted to its bottom-up architecture, but that still play a role in the materialization of the HMCR. In this context, provisions explicitly referring to an enhanced role of NSAs can be identified at Article 6. Indeed, while Article 6(4) establishes a market mechanism in order to substitute the outdated Clean Development Mechanism, through a mechanism which shall, *inter alia*, 'incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities',[LV] at Article 6(8) country Parties recognize the importance of adopting 'non-market based approaches' for the implementation of their NDCs, with the aim to, *inter alia*, 'enhance public and private sector participation'.[LVI]

Further provisions which contribute to the expansion of the role played by NSAs are Article 11, on capacity-building, and Article 12, on climate education and awareness. Indeed, it is clearly asserted at Article 11(2) that 'capacity-building should be […] responsive to national needs, and foster country ownership of Parties, […] including at the national,

subnational, and local levels',[LVII] while Article 12 stresses the role of 'public participation' in the process of spreading climate change education.[LVIII]

In addition, the enhanced transparency framework established at Article 13 and the compliance mechanism identified at Article 15 also deserve to be mentioned. As a matter of fact, the enhanced transparency framework obliges each Party to regularly prepare 'inventory report of anthropogenic emissions',[LIX] and also requires Parties (though in a non-binding fashion) to provide information 'related to climate change impacts and adaptation'.[LX] In this context, the role of NSAs may be focused on (but not limited to) supporting country Parties in preparing official reports, or in conducting informal analysis and studies which may enhance the transparency of the system. Moreover, the compliance mechanism, to be carried out in a 'transparent, non-adversarial and non-punitive' way, 'shall be expert-based'.

It is in the political independence of the technical experts that, according to Van Asselt, the link between the compliance mechanism and the enhancement of NSAs' role can be identified.[LXI]

Importantly, also Article 16 deserves some attention, as it focuses on policy-making, and more specifically on the role that the Conference of the Parties has to play within the framework established under the Paris Agreement. In this context, Article 16(8) is particularly relevant, as it establishes that 'any Body or agency, [including] non-governmental [organizations], which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties serving as the meeting of the Parties to this Agreement as an observer, may be so admitted'.[LXII]

Lastly, it is important to observe that all the aforementioned provisions should be read in light of the Agreement's Preamble which recognizes, *inter alia*, 'the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge' and, even more importantly, 'the importance of the engagements of all levels of government and various actors'.[LXIII] In fact, while the firstly quoted paragraph clearly underlines the role of scientific knowledge (which can only be brought about by the scientific community, epistemic communities, and ENGOs, *i.e.* NSAs) in climate action, the second one explicitly mentions the importance of including actors beyond governments.

3. What are environmental NGOs, and what is their role in the global governance of climate change?

3.1 Non-State Actors and Non-Governmental Organizations

The category of NSAs is a particularly broad one, and this is the reason why a large variety of definitions of NSAs have been created over time. While Clapham uses an opened approach, as he defines NSAs as 'any entity that is not actually a state',[LXIV] Josselin and Wallace define NSAs as 'actors which are at least in principle autonomous form the structure and machinery of the state, [and which] are primarily transnational in organization and objectives'.[LXV] The term NSAs includes 'a spectrum from rebels, to terrorists, and Al-Qaeda, through to business, non-governmental organizations, and religious groups'.[LXVI] Indeed, while some scholars and policymakers identify NSAs as the 'bad guys', others associate them with civil society.[LXVII]

Apparently, NSAs have started to influence a number of fields of international law and politics, including environmental law, criminal law, transnational terrorism, global migration, and human rights protection, and such a great heterogeneity probably explains why no official definition of NSA has emerged from international law documents up until now.

Despite not constituting a compact and coherent group of actors, NSAs can play a formal role, at the international level, through different pathways, as they 'participate as observers in international organizations, […] and they participate in the national and international implementation of principles and rules adopted at the regional and global level'.[LXVIII] In addition, a more informal influence of NSAs on the global political agenda takes place, *inter alia*, through information sharing, financial pressures, and public awareness-rising.[LXIX]

The emergence and diffusion of NSAs at the global level allowed them to impact international law and to participate in international legal processes throughout history.[LXX] This 'explains why state-exclusivist approaches to international law and international relations are deficient and the study of nonstate actors and their interaction with multiple international legal dimensions and processes is called for'.[LXXI] Obviously, the rising relevance of NSAs also led a number of scholars to carryout research focusing, *inter alia*, on non-state power, non-state governance, private regulation, NSAs' interaction with international law, and NSAs' relationship with civil society.[LXXII]

NGOs can be considered as a sub-category of NSAs. Provided that the NGO-category is more homogeneous than the category of NSA, it is possible to identify some references to NGOs in international treaties and in international organizations' documents.

A first reference to non-governmental organizations can be identified at art.71 of the UN Charter, which allows the UN Economic and Social Council (ECOSOC) to make arrangements for consultations with NGOs. Furthermore, ECOSOC Resolution n.1296 firstly identified the criteria to provide NGOs with consultative status before the UN Economic and Social Council, and it was subsequently amended by further ECOSOC Resolutions. However, none of these Resolutions included any explicit definition of NGO.

Some NGOs also have consultative status in other intergovernmental or supranational organizations (as the Council of Europe and the European Union), and they receive significant public funds.[LXXIII] However, the absence of a common definition of NGO at the European level was strongly criticised by the European Court of Auditors, which also put into question the transparency of the European Commission's accounting system.[LXXIV]

A definition of NGO is provided by the OECD, which defines NGO as 'any non-profit entity organised on a local, national or international level to pursue shared objectives and ideals, without significant government-controlled participation or representation'.[LXXV] A further definition comes from the Encyclopaedia Britannica, which defines the NGO as a 'voluntary group of individuals or organizations, usually not affiliated with any government, that is formed to provide services or to advocate a public policy'.[LXXVI]

As well as NSAs, NGOs play a role in various fields of international law and politics, ranging from environmental protection, to human rights protection, healthcare assistance, conflict monitoring, economic development, and transnational migration.[LXXVII] Provided that NGOs both operate at the domestic and transnational level through lobbying, consulting, and monitoring activities, they exercise a considerable power that has sometimes been criticized in terms of legitimacy and accountability.[LXXVIII] As a matter of facts, despite usually relying on broad public support, NGOs remain private actors pursuing particular interests, their decisions are mainly expert-based, and their representative have not (necessarily) been elected by a democratic majority. For this reason, the rising relevance of NGOs at the global level gives birth to what Turner calls 'the new politics of expertise', *i.e.,* a form of politics characterized by the presence of several highly technical and complex issues, which therefore

enhance the position of experts, who 'might [in the worst-case scenario] place topics that should be subject to public discussion in the domain of expert knowledge'.[LXXIX]

Nevertheless, as Wapner demonstrates, NGOs are not less accountable than states.[LXXX] In fact, NGOs have to deal with issues of internal accountability (*e.g.* need for high number of participants, and for participants' donations), and external accountability (*i.e.,* NGOs operate in a global network in which they interact and share information with other NGOs, IGOs, and States), that make them 'not more accountable than states, but differently accountable'.[LXXXI]

3.2 Environmental NGOs

As Rajavuori observed, the category of non-state actors is too broad to provide a coherent analysis of their role and behaviour in hybrid multilateral systems.[LXXXII] Therefore, it is necessary to focus on a particular sub-category of NSAs in order to understand which is its specific role in the global governance of climate change. Although there are many different categories of NSAs deeply influencing the system of climate governance and which have been included in the HMCR, this study has decided to focus on ENGOs. Indeed, ENGOs constitute a particularly interesting subject, as they entail, *inter alia*, scientific expertise, massive public participation, and they specifically operate with the aim of protecting or restoring the natural environment.[LXXXIII] It seems reasonable then, to consider ENGOs as subjects endowed with a great potential for enhancing the global climate governance system, and whose institutionalization within the HMCR could bring about substantial benefits to the system itself.

No official definition of environmental NGO can be identified in international law documents. Nonetheless, the central role of non-governmental organization has been recognized in environmental (soft and hard) law documents as the Agenda 21 and the Aarhus Convention. In fact, the Agenda 21 states that 'relevant NGOs' (*i.e.,* ENGOs) 'should be given opportunities to make their contributions and establish appropriate relationships with the United Nations system',[LXXXIV] thus enhancing, *inter alia*, ENGOs' capacity to obtain consultative status before UN institutions. The Aarhus Convention goes even further, as it does not only provide any NGO 'qualified in the fields to which this Convention relates' (*i.e.,* ENGO) the right 'to participate as an observer' to the meeting of the Parties established by

the Convention,[LXXXV] but also grants any ENGO ('who considers that [its] request for information under article 4 has been ignored') with access to justice.[LXXXVI]

Furthermore, ENGOs can obtain observer status before international bodies that do not directly refer to NGOs in their constitutive treaty. For instance, ENGOs 'can get directly involved with UNEP by applying for Accreditation to the United Nations Environment Assembly (UNEA) of UNEP, which grants them observer status to UNEA'.[LXXXVII]

Despite the absence of an official definition, the ENGO can be defined as a particular category of NGO which is mainly concerned about addressing environmental issues. The first ENGOs emerged already in the mid-Nineteenth Century; however, progress in the fields of natural sciences led to a substantial expansion of public environmental concerns, which also led to a significant spread of ENGOs at the global level since 1970s.[LXXXVIII]

Nowadays, ENGOs can cover a large number of environmental problems ranging from species protection, to (general or specific) habitat protection, biodiversity conservation, contrasting waste pollution, ozone layer preservation, and fight against climate change. Therefore, it is also possible to distinguish between sector-specific ENGOs, which only focus on particular environmental issues (*e.g.* 'Sea Shepherd' on marine conservation; 'Traffic' on wildlife trade monitoring; 'Climate Action Network' on climate change mitigation and adaptation), and generalist ENGOs, which address a larger number of environmental topics (*e.g.* Greenpeace, World Wildlife Fund, and Client Earth).

Given the subject of this research, it is the case of focusing on ENGOs' role in tackling climate change. In this context, a distinction must be drawn between formal and informal ways through which ENGOs can contribute to the system of climate governance.

As well as other NGOs, the main pathway that ENGOs can undertake to formally participate to the system of climate governance concerns the possibility of obtaining observer status before intergovernmental or supranational organizations. Importantly, ENGOs can obtain observer status before the Conferences of the Parties under the UNFCCC. In this case, the application procedure is quite long (as it takes around 18 months), but it is based on a one-off process. Indeed, once obtained the observer status, the ENGO acquires the right to join any future UNFCCC COP, and it can therefore contribute to meetings and participate to the process of climate policy formulation.[LXXXIX]

Notwithstanding this, ENGOs remain secondary actors in the process of climate policy formulation, but they play a more prominent role in climate law implementation.[XC]

Climate law implementation is mainly conducted by ENGOs through informal pathways. Indeed, as also further NSAs and NGOs do, ENGOs can contribute to law and policy implementation by sharing information, rising public awareness, conducting scientific and legal analysis, and by engaging in monitoring and reporting activities.[XCI] Nevertheless, one of the peculiar instruments that ENGOs use in order to implement climate law is climate litigation.

It should be observed that ENGOs (and NGOs in general) have generally no standing before international tribunals and courts. Indeed, procedures before international arbitrators as the International Court of Justice (ICJ) and the International Tribunal on the Law of the Sea (ITLOS), can only be submitted by States recognizing these arbitrators' jurisdiction.[XCII]

The situation is slightly different in regional human rights courts. Indeed, while cases can be brought before the European Court of Human Rights by NGOs only in exceptional circumstances,[XCIII] recognized NGOs can lodge cases before the Inter American Commission of Human Rights,[XCIV] and before the African Commission on Human and Peoples' Rights.[XCV] The issue of linking HR law to climate change law is a complex one, and it will not be addressed in the current research. Given the aim of this work, however, it is relevant to underscore that no effective climate change litigation case has been brought before a regional HR Court by an environmental NGO up until now.

Finally, some encouraging results come from climate litigation cases lodged before domestic courts. The most prominent case in this regard is the 'Urgenda Case', started in 2015, in which the Urgenda Foundation (*i.e.,* an ENGO) brought the State of the Netherlands before the Dutch District Court (then the case passed to the Court of Appeal and to the Dutch Supreme Court) claiming that Dutch climate laws were unlawfully too loose.[XCVI] A similar case started in 2020, in the 'Neubauer et al. v. Germany'. In the German case, 'Friends of Earth Germany' (*i.e.,* an ENGO) was only one of the claimants who filed the case before the Federal Constitutional Court.[XCVII] Still, in both cases the courts have supported the ENGOs' claims, and they have ordered governments to adopt more stringent climate targets.

Furthermore, also private companies have been brought before domestic courts by ENGOs. This was the case in 'Milieudefensie et al v. Royal Dutch Shell', in which ENGOs lodged a case against the Dutch oil company, claiming a violation of Shell's duty of care. Also

in this case, the court argued in favour of the claimants and required Royal Dutch Shell to reduce its emission by 45% in 2030, having 2019 as a baseline.[XCVIII]

In light of the aforementioned successful cases, two caveats must be introduced.

Firstly, cases as 'Urgenda', despite praised by many, have also been criticized by some lawyers, who identified in the Court's ruling against the Dutch government a violation of the principle of separation of power.[XCIX] In order to solve this puzzle, it can be argued that, 'if a judicial decision defends environmental interests against majority decisions, this is legitimate only if constitutional value is attached to the environment'.[C]

Secondly, it is important to consider that different national legal systems can be more or less opened to accept NGOs' standing before domestic courts. Therefore, despite the great relevance of the aforementioned (domestic) cases, it should be kept in mind that ENGOs' capacity to bring climate cases before domestic courts strongly changes from one country to another. Hence, given the great potential for ENGOs to implement climate law through climate change litigation, to level the field of ENGOs' access to tribunal remedies would be crucial.

3.3 Next steps for the enhancement of ENGOs

As Berny and Rotes argued in 2018, ENGOs find themselves at a crossroad and, as any other form of civil society organization, they will have 'to take power or to compromise'.[CI] Undoubtedly, ENGOs' possibility to obtain observer status before international climate bodies (as the UNFCCC COPs) represents an important, though still limited, step towards the institutionalization of ENGOs' role in the process of climate law formation, and constitutes a central element for the building and enhancement of the HMCR. To account for the evolving role of ENGOs in UNFCCC processes would be particularly useful in order to understand how fast this development is taking place, and also in order to try to comprehend which future developments we can expect to occur in the coming years. For this reason, the next paragraph of this research will analyse the development of ENGOs participation to SBSTA sessions, which will be considered as a proxy of ENGOs' involvement in the international climate regime.

Furthermore, it would also be valuable to enhance NGOs' capacity to access tribunals. As a matter of facts, ENGOs proved to be particularly active watchdogs in terms of (national and private) climate targets' adequacy evaluation. Nevertheless, ENGOs' capacity to reach

domestic tribunals starkly changes depending on the domestic legal system. Still, climate change is a global phenomenon, and the harmonization of all country's domestic legal system could prove to be terribly complex, if not impossible. Therefore, to reform the functioning of existing international tribunals with a general subject-matter jurisdiction (as the ICJ) in order to provide ENGOs with the possibility of accessing them would be a terribly important step in the process of enhancement of the rising HMCR. Evidently, the conduct of future research on ENGOs' access to justice would be highly desirable.

4. To what extent did the presence of NGOs and ENGOs in the international climate regime increased over time, and was there any significant change after the establishment of the Paris Agreement?

4.1 The Subsidiary Body for Scientific and Technological Advice: limitations and strengths of this specific focus

As it has already been clarified, this research conceives the international climate regime as a particular regime that emerges in the policy area of climate governance when the (narrowly defined) international community (formed by once fully sovereign and independent states) devolves part of its power and responsibility to a broader climate governance system.[CII] It can be said, then, that the international climate regime emerged with the creation of the first international climate treaty (*i.e.*, the UNFCCC). Accordingly, in order to answer sub-research question III, it would be useful to pass through the SBSTA's 'reports on the session' that have been produced under the UNFCCC, and to track whether (and, eventually, to what extent) did the presence of NGOs and ENGOs within the SBSTA processes changed over time.

As a consequence, this research will consider the number of references to statements made by NGOs and ENGOs in SBSTA's 'reports on the session' as proxies of NGOs' and ENGOs' presence in the international climate regime. Such an approximation is not arbitrary but related to the prominent role played by the SBSTA under the three International Climate Treaties, as well as to the (even) political nature of this Body, and to the particularly high number of 'reports on the session' that it produced.

As a matter of facts, the SBSTA was established at Article 9 of the UNFCCC, in order to 'provide the Conference of the Parties […] with timely information and advice on scientific and technological matters relating to the Convention'.[CIII] Its duties include, but are not limited to, assessing 'the state of scientific knowledge relating to climate change', identifying 'innovative, efficient and state-of-the-art technologies […] on the ways and means of promoting development and/or transferring such technologies', and providing 'advice on scientific programmes, international cooperation in research and development related to climate change'.[CIV] Furthermore, the role of this permanent Body to the UNFCCC was reiterated by both the Kyoto Protocol and the Paris Agreement, stating that the functioning of the SBSTA applies '*mutatis mutandis*' to both the Protocol and the Agreement.[CV] In addition to this, in more than one occasion the SBSTA has been entrusted, by the COP, with the responsibility of organizing cycles of workshops focusing on specific and highly technical topics.[CVI]

Despite being a technical Body, the SBSTA is not politically independent (as 'it shall comprise government representatives'),[CVII] and for this reason the analysis of the reports that it produced over the last decades provides a valuable picture which combines both the scientific and political developments characterizing international climate politics. In addition, the SBSTA has been a particularly active Body, as it has published (up to date) almost fifty 'reports on the session' since 1997. By contrast, over the same time span, the Conference of the Parties has solely produced 24 (mainly political) reports, and the IPCC 29 (fully scientific) reports.

Still, also the limits of the approach adopted by this paragraph must be recognized. Firstly, the SBSTA remains a technical Body to the UNFCCC, not endowed with any concrete decision-making power, but only entrusted with the responsibility to provide information and advice to the Conference of the Parties.[CVIII] Therefore, to account for the number of references to NGOs' and ENGOs' statements within the SBSTA could be a limited way for approximating the evolving role of ENGOs within the broader international climate regime. Despite this, it is the very nature of the SBSTA to make it a suitable place for the interaction among states and specialized non-state actors as ENGOs, so that the analysis of SBSTA's reports represents an interesting occasion for observing the changing role of NGOs and ENGOs within the permanent body of the UNFCCC where such change is more rapid and evident.

Secondly, it can be observed that, if one relies on a broader definition of international climate regime (*i.e.*, by considering the international climate regime as something that goes beyond the institutions established under the three International Climate Treaties), the analysis provided by this paragraph, that solely focuses on NGO's and ENGOs' activities within the SBSTA, might appear even more limited. Nonetheless, to adopt a narrower conceptualization of international climate regime has been necessary in order to enable the operationalization of the current research.

Thirdly, also those who equate the international climate regime to the complex of climate institutions emerging since1992 (*i.e.*, since the establishment of the UNFCCC) could assert that there are international bodies or fora whose works are better representative than the SBSTA in terms of NGOs' and ENGOs' evolving role within the international climate regime, and which should therefore be taken as proxies instead of SBSTA's reports. However, as it has been stated, the analysis of SBSTA's works has been chosen because of a number of reasons, including SBSTA's prominent role within the international climate regime, the high number of reports it published, and its peculiar (*i.e.*, mainly scientific but also political) nature.

Furthermore, the decision to specifically account for the number of references to statements made by NGOs and ENGOs may be questioned as well. Nevertheless, it has been decided to solely account for references to NGOs' and ENGOs' statements, instead of focusing (more generally) on the number of references to NGOs and ENGOs in SBSTA's 'reports on the session', in order to really look at the space that NGOs and ENGOs have obtained over time within SBSTA's discussions, so to avoid superfluous references to NGOs (as those which aim at regulating their *modus operandi* within the SBSTA) that do not really provide an idea of their increasing presence within the SBSTA.[CIX] Moreover, the number *of references* to NGOs' (and ENGOs') statements has been accounted, instead of the number *of NGOs' statements*, because SBSTA's reports do not explicitly mention the number of statements made by NGOs and ENGOs in each session.

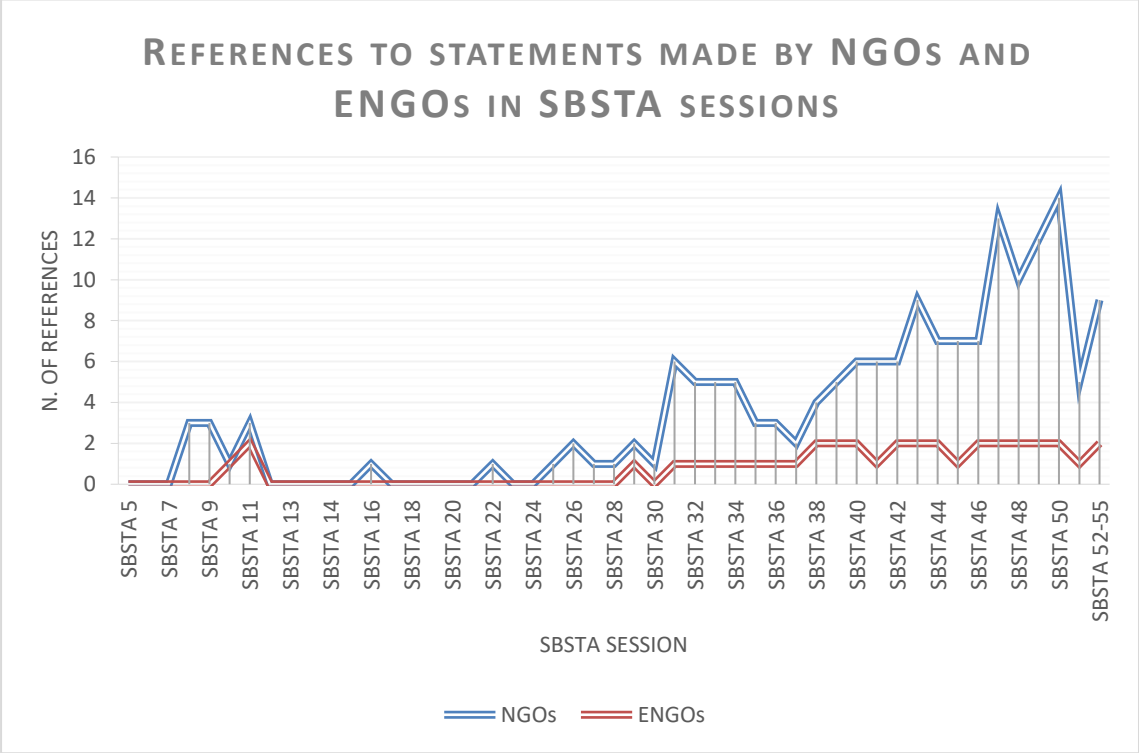
Finally, also the decision of relying on a quantitative method in order to trace the evolving role of NGOs and ENGOs within the international climate regime (*i.e.*, by counting the number of references to NGOs' and ENGOs' statements in SBSTA's reports) could be objected, and it might be argued that the adoption of a qualitative method of analysis could have produced more reliable information. However, the aim of this paragraph is to provide

a general trend of NGOs' and ENGOs' presence in the international climate regime since its establishment over twenty years ago, and for this reason it has been decided to analyse a larger number of reports, covering a longer period of time (24 years), at the cost of simplifying the level of analysis.

4.2 The result of the analysis

The data gathered from the analysis of all the 'reports on the session' published by the SBSTA up until now have been reported both in tables and graph. The first report that has been analysed is the one produced at SBSTA 5, as no report has been published by the SBSTA before that session.

Session	Year	NGOs	ENGOs
SBSTA 5	1997	0	0
SBSTA 6	1997	0	0
SBSTA 7	1997	0	0
SBSTA 8	1998	3	0
SBSTA 9	1998	3	0
SBSTA 10	1999	1	1
SBSTA 11	1999	3	2
SBSTA 12	2000	0	0
SBSTA 13	2000	0	0
SBSTA 13-2	2000	0	0
SBSTA 14	2001	0	0
SBSTA 15	2001	0	0
SBSTA 16	2002	1	0
SBSTA 17	2002	0	0
SBSTA 18	2003	0	0
SBSTA 19	2003	0	0
SBSTA 20	2004	0	0
SBSTA 21	2004	0	0
SBSTA 22	2005	1	0
SBSTA 23	2005	0	0
SBSTA 24	2006	0	0
SBSTA 25	2006	1	0
SBSTA 26	2007	2	0
SBSTA 27	2007	1	0
SBSTA 28	2008	1	0
SBSTA 29	2008	2	1
SBSTA 30	2009	1	0
SBSTA 31	2009	6	1
SBSTA 32	2010	5	1
SBSTA 33	2010	5	1
SBSTA 34	2011	5	1
SBSTA 35	2011	3	1
SBSTA 36	2012	3	1
SBSTA 37	2012	2	1
SBSTA 38	2013	4	2
SBSTA 39	2013	5	2
SBSTA 40	2014	6	2
SBSTA 41	2014	6	1
SBSTA 42	2015	6	2
SBSTA 43	2015	9	2
SBSTA 44	2016	7	2
SBSTA 45	2016	7	1
SBSTA 46	2017	7	2
SBSTA 47	2017	13	2
SBSTA 48	2018	10	2
SBSTA 49	2018	12	2
SBSTA 50	2019	14	2
SBSTA 51	2019	5	1
SBSTA 52-55	2021	9	2



Furthermore, the last SBSTA session, taking place in 2021, includes SBSTA 52, 53, 54, and 55. As a matter of facts, the COVID-19 pandemic impeded the SBSTA to hold its ordinary sessions in 2020, and forced the Body to catch up in 2021 through an extra-ordinary session.

The first result emerging from the tables concerns the evidently higher concentration of references to statements made by NGOs and ENGOs in the second half of the time span analysed. As a matter of facts, the tables clearly shows that, up until SBSTA 30, there had never been more than 3 references to NGOs' statements within the same SBSTA session, and references to ENGOs' statements were only present in 3 out of the first 27 SBSTA sessions. By contrast, from SBSTA 31 to SBSTA 55, the number of references to NGOs' statements in each session ranged between 2 and 14, with 5 being the mode. Furthermore, in any SBSTA session from 31 onwards there has always been at least a reference to statements made by ENGOs, with 2 being the mode.

Afterwards, by looking at the graph, the first important factor which emerges is the volatility of the number of references made to NGOs' statements over time. For this reason, it might be important to divide the graph in different periods.

In the first period, going from SBSTA 5 to SBSTA 30, the number of references to NGOs' statements has been consistently low. The main exception to the steady trend of the first period can be identified between SBSTA 8 and SBSTA 11, when NGOs and ENGOs showed greater interventionism in the phase of implementation of the Kyoto Protocol's most technical provisions, as those concerning the regulation of LULUCF.[CX]

A second period can be identified from SBSTA 31 to SBSTA 37. In this shorter phase, the trend is mainly descending. Indeed, after the peak constituted by SBSTA 31, caused by NGOs' unusually high number of interventions both in relation to the 'Nairobi work programme on impacts, vulnerability and adaptation' and in the 'closure of the session',[CXI] the number of references steadily declined until SBSTA 37.

Thirdly, from SBSTA 38 onwards the trend has been generally positive. In particular, SBSTA 43, taking place in December 2015 (*i.e.*, a few days before the establishment of the Paris Agreement) represents an important peak in terms of references to NGOs' statements (highest number ever reached until then). After that, the number of references reached its historical apex between SBSTA 47 and SBSTA 50, and it became more scattered again from SBSTA 51 onwards. Importantly, the incredibly high number of NGOs' interventions from SBSTA 47 onwards is largely (but not only) due to the effort to operationalize the Paris Agreement. In particular, NGOs' statements focused on the need to operationalize Article 6 of the Paris Agreement, to review the Warsaw International Mechanism for Loss and Damage, to put in place the financial measures identified in the Paris Agreement, and to solve issues related to agriculture.[CXII] Another factor which contributed to the relatively higher number of references to NGO's statements is related to SBSTA's new habit to distinguish among different types of NGOs. This element also explains the higher number of references to ENGOs, and it will be better addressed in the following paragraphs.

The number of references to ENGOs' statements is undoubtedly less volatile than the number of references to the statements of NGOs. Moreover, it is surely important to observe that the same three periods identified for NGOs' statements are also useful when it comes to analyse the trend of ENGOs' statements.

Indeed, while from SBSTA 5 to 30 there has been almost no reference at all to ENGOs' statements (with exceptions only constituted by SBSTA 10, 11 and 29), between SBSTA 31 and 37 there has always been one reference to ENGOs' statements. It is also relevant to

observe that, during this second period, some form of praxis seemed consolidating, which led ENGOs to customarily make statements in the phase of 'adoption of the agenda'.[CXIII]

Finally, the third period, from SBSTA 38 to 55, is marked by a very stable trend, with 12 reports out of 15 including two references to ENGOs' statements. In this last period a new praxis seems to emerge, as the intervention of ENGOs both in the phase of 'adoption of the agenda' and 'closure of the session' becomes a new constant of SBSTAs' sessions. In this period, the topics addressed by ENGOs' interventions are pretty much the same as those addressed by NGOs (*i.e.,* operationalization of Article 6 of the Paris Agreement, loss and damage, climate finance, and agriculture),[CXIV] hence they generally gravitate around the implementation of the Paris Agreement. Importantly, from SBSTA 43 onwards (*i.e.*, since the establishment of the Paris Agreement) 8 reports out of 10 included two references to ENGOs' statements.

Before drafting the conclusion of this paragraph, it should also be observed that, beyond the great opportunity that the Paris Agreement represented for scaling up NGOs' and ENGOs' presence in the SBSTA, a major driver increasing the number of references to NGOs' statements over time stands in SBSTA's greater differentiation among different categories of NGOs.

Indeed if, on the one hand, it has been possible to assist to the creation of a praxis that seems institutionalizing the role of NGOs and ENGOs in the phases of 'adoption of the agenda' and 'closure of the session' (*inter alia*, because of NGOs' intrinsic capacity to play a role in the implementation of the Paris Agreement),[CXV] on the other hand, SBSTA's greater attention to the diverse categories of NGOs should not be ignored.

As a matter of facts, while up to its 30th session the SBSTA only referred to 'non-governmental organizations' whatsoever, from SBSTA 31 onwards SBSTA's reports started to systematically distinguish among different types of NGOs (*e.g.* agricultural, youth, industrial, trade, environmental, etc.). This passage obviously increased the number of references to NGOs' statements in SBSTA's reports, but also the variety of NGOs included in SBSTAs' processes, as well as the absolute number of NGOs' statements in SBSTA's reports on the session.

Although the effects of a greater presence of industrial and trade NGOs in SBSTA's processes will surely require future assessment (especially when it comes to these particular categories of NGOs' capacity to hamper the achievement of climate-oriented and effective

results), the greater sensibility of the SBSTA towards different types of NGOs surely is an encouraging element when it comes to assess the process of establishment of the HMCR.

4.3 On ENGOs' intervention: a focus on the post-Paris situation

Zooming on the ENGOs' interventions from SBSTA 43 onwards, it emerges that the organizations which more frequently intervened in SBSTA's dialogues on behalf of environmental NGOs are the Climate Action Network (CAN) and Climate Justice Now (CJN), which intervened, respectively, 9 and 3 times between SBSTA 43 and SBSTA 55.[CXVI]

As it has been noted in the previous paragraph, most ENGOs' statements took place in the 'opening' and 'closure' phases of SBSTA sessions. Furthermore, the content of many ENGO's statements results being mainly vague and generic, not endowed with any practical suggestion, project, or critique.[CXVII] Therefore, what emerges is the strongly symbolic character of ENGOs' interventions, which mainly aim at pushing up other Parties' climate ambitions, but remain characterized by limited power of initiative and bargain (if any).

Still, ENGOs have also made some more technical and detailed interventions, especially in the most recent years.[CXVIII] It is, *inter alia*, by increasing the number of these technical interventions, which also contain analysis, new data, and strategies for the future, that ENGOs could *de facto* enhance their capacity to shape SBSTA's negotiating processes.

Lastly, a deeper analysis of ENGOs' statements from SBSTA 43 onwards also allows to observe that the vast majority of ENGOs' interventions explicitly mention the Paris Agreement or its targets.[CXIX] This element is particularly interesting, especially when considered together with the nature of the topics which have more frequently been addressed by ENGOs' in the last 13 SBSTA sessions, that include: the NDCs, the global stocktake, the global adaptation goal, Article 6 of the Paris Agreement, loss and damage, and food security (*i.e.*, central elements of the international climate law framework introduced with the establishment of the Paris Agreement).[CXX]

Hence, what emerges from this picture is that the greater involvement of ENGOs in SBSTA discussions after 2015 can (at least in part) be explained by the creation and entrance into force of the Paris Agreement.

4.4 Wrapping up the analysis' results

By considering the number of references to NGOs and ENGOs' statements in SBSTA's reports on the session as proxies of their presence in the international climate regime, it can be stated that the presence of NGOs and ENGOs in the international climate regime has strongly increased over time.

As matter of facts, notwithstanding the limitation of the approach that has been used, what emerges from the analysis of SBSTA's reports is a much stronger presence of references to NGOs' and ENGOs' statements in the second half of the timespan that has been considered. Indeed, references to NGOs' statements have reached their apex in the sessions following SBSTA 43 (i.e., just ahead of the date of establishment of the Paris Agreement), and references to ENGOs' statements have stabilized, with few exceptions, on 2 references per session from SBSTA 38 onwards.

When it comes to analysing the presence of NGOs and ENGOs after the establishment of the Paris Agreement, it is relevant to highlight that the report on the session of SBSTA 43 was characterised by the highest number of references to NGOs' statements up until then, as well as by 2 references to ENGOs. Moreover, in the SBSTA sessions taking place after the establishment of the Paris Agreement, the number of references to NGOs' statements has been considerably higher than in the preceding years.

This higher number of references to NGOs' and ENGOs' statements should mainly be reconducted to two factors. First, the adoption of the Paris Agreement brough about the necessity to address a number of issues (*i.e.*, operationalization of Article 6 of the Agreement, loss and damage, financial issues, and agriculture) which increased NGOs' and ENGOs' capacity to be involved in SBSTA's processes and which led, *inter alia*, to a habitual presence of ENGOs' statements both in the phases of 'adoption of the agenda' and 'closure of the session' of each SBSTA's report. Second, from SBSTA 31 onwards, SBSTA's reports started to distinguish among different types of NGOs, and this necessarily led to an increasing number of references to (different types of) NGOs' statements.

Evidently, it can be stated that both NGOs' and ENGOs' presence in the international climate regime has increased after the creation of the Paris Agreement.

Nevertheless, it is maybe too early to establish a strong causal relationship between the establishment of the Paris Agreement and the increasing presence of NGOs (and ENGOs), and this is mainly due to two reasons. Firstly, the number of SBSTA sessions taking place

after 2015 is still too limited to identify a precise trend of reports on the session's references to NGOs' and ENGOs' statements taking place after Paris. Furthermore, the increasing sensibility that the SBSTA showed by differentiating among different types of NGOs, despite being particularly relevant when it comes to the establishment of a hybrid multilateral climate regime, started to take place already in 2009, and it can hardly be reconducted to the entrance into force of the Paris Agreement.

5. Conclusions of the research

5.1 Connecting the dots

The first paragraph of this research started with the identification of the analytical problem represented by the discrepancy between the qualitatively new challenge posed by a global and transnational phenomenon as climate change, and the nature of an international climate regime that still gravitates around the paradigm of self-interested and fully sovereign independent states. Provided that we cannot keep relying on the '17th Century institutional technology to confront 21st Century challenges',[CXXI] the traditionally state-centric multilateral approach underpinning the international climate regime (and international law more generally) has been put under scrutiny, and the emerging literature on hybrid multilateralism (*i.e.*, a multilateral scheme which is opened to the participation of NSAs that are as transnational in nature as the new challenges which humanity is going to face) has been schemed through. In this context, gaps in the existing literature have been identified, related to the limitations concerning the definition of hybrid multilateralism, the necessity to provide a definition of hybrid multilateral climate regime, and the consequences of the establishment of a HMCR on a peculiar categories of NSAs (as environmental NGOs). Therefore, before identifying an appropriate methodology for the conduct of this research, paragraph 1 has introduced the following research question: *To what extent does the hybrid multilateral climate regime emerging from the Paris Agreement System give environmental NGOs a stronger stand in the governance of climate change?* Furthermore, paragraph 1 has identified three sub-research questions which gave birth to the following paragraphs of this study.

Paragraph 2 introduced the origins and peculiarities of the concept of international regime, it reported on the genesis of hybrid multilateralism, and it identified the main

weaknesses of this last concept's definitions (*i.e.*, scarce coherence, lack of references to the Paris Agreement, and *a priori* exclusion of the possibility for hybrid multilateral arrangements to emerge in policy fields which differ from the climate policy field). Therefore, in order to keep on board the flexibility and openness brought about by the concept of hybrid multilateralism, but also to go beyond its shortcomings, the concept of hybrid multilateral climate regime has been introduced and defined as 'a global regime, characterized by hybrid forms of multilateralism, which started to emerge in the field of climate governance after the establishment of the Paris Agreement'.[CXXII] Afterwards, the paragraph has analysed the Paris Agreement's text, and identified important elements of it that seem to enhance the HMCR. These elements mainly relate to the Agreement's bottom-up approach, which is implemented, *inter alia*, through the establishment of NDCs, NAPs, and both a transparency framework and a compliance mechanism which devolve new rights and duties to NSAs. Moreover, also the provisions on market mechanisms, cooperation, and capacity-building can be considered relevant in the process of establishment of the HMCR, as they directly mention and expand the role of NSAs. Finally, it has been observed that the Agreement also opens the door to the role of NSAs in the process of policy-making, by adopting a particularly inclusive approach towards NSAs (including NGOs) which want to be represented at any session of the COP under the Paris Agreement. Nevertheless, as it has been noted, the HMCR is a fluid and evolving entity. Hence, its current materialization, triggered by the establishment of the Paris Agreement, should not be seen as definitive, but better as a further ring added to an evolving chain.

Having understood the framework within which we are moving (*i.e.,* the HMCR), it has been necessary to focus on the actors whose roles and functions have been affected by the establishment of the HMCR (*i.e.*, the ENGOs). Accordingly, paragraph 3 investigated over the definition and role of NSAs and NGOs, and it therefore introduced the peculiarities and features of environmental NGOs which, in light of the absence of a formal definition, have been simply defined by this research as 'a particular category of NGO which is mainly concerned about addressing environmental issues'.[CXXIII] As it has been observed, nowadays there are different pathways that ENGOs can go through in order to play a role in the governance of climate change. On the one hand, there are formal procedures through which ENGOs can obtain observer status before intergovernmental or supranational organization, among which there is, notably, the UNFCCC, and which can give ENGOs a role (though

still very limited) in the process of global climate policy-making. On the other hand, less structured paths allow ENGOs to play a relevant role in the governance of climate change, through actions that include spreading of information and public sensibilization, but also monitoring and reporting activities, and conduct of research. Furthermore, ENGOs are also increasing their capacity to bring issues before relevant courts (mainly at the domestic level) lodging cases against governments and private actors.

Nonetheless, the paragraph has also underscored that there are still great margins of manoeuvre for ENGOs to express their full capacity in the process of climate governance. In particular, an enhancement of their position in the process of global climate policy-making would be definitely desirable, as well as a structural reform of the rules for access to authoritative international tribunals (and mainly the ICJ). As a matter of facts, this would grant legal standing to NSAs (including ENGOs) whose internationally recognized rights and interests have been violated.

Finally, paragraph 4 has reported the results of an analysis aimed at tracing the evolving role of NGOs and ENGOs in the international climate regime, looking for relationships between the establishment of the Paris Agreement and an enhancement of ENGOs' role. The paragraph considered the number of references to NGOs and ENGOs' statements in SBSTA's 'reports on the session' as a proxy of their presence in the international climate regime and, after highlighting both the limitations and strengths of this approach, both tables and a charter were built in order to represent how this trend evolved over the last 25 years. Furthermore, a focus on ENGO's statements from SBSTA 43 onwards has been provided. Apparently, the presence of NGOs and ENGOs in the international climate regime remained generally latent up to SBSTA 30 (2009), and it saw a significant increase from SBSTA 31 onwards. In particular, from SBSTA 38 (2013) to SBSTA 50 (2019) there has been a consistent rise in the number of references to NGOs' statements, the number of references to ENGOs' statements has been maximum (*i.e.*, 2) 11 times out of 13, and SBSTA 43 (immediately prior to the Paris Agreement) represented a first peak of references to NGOs' statements. The results of this analysis suggest an increasing role of NGOs and ENGOs in the international climate regime, with a particular boost after the establishment of the Paris Agreement. As paragraph 4 has reported, this might be due both to the intrinsic capacity of NGOs and ENGOs to play a role in the implementation of the Paris Agreement, and to SBSTA's greater attention to the different categories of NGOs.

5.2 Answering the research question

The information gathered through the paragraphs of this work allow to provide an answer the research question formulated at paragraph 1. Therefore, it can be stated that an evident correlation (yet not a strong causal link) has been identified between the emergence of the hybrid multilateral climate regime and the stronger stand that environmental NGOs have obtained in the governance of climate change. This is especially true when it comes to the general (but implicit) recognition of ENGOs' capacity to play a role in the implementation of the Paris Agreement, and ENGOs' stronger involvement (as observers) in climate policy fora (which could once turn into a more active role in policy-making). Much stronger progress will be needed in terms of enhancing ENGOs' formal role in the international climate regime, as well as in providing ENGOs with a legal instrument (*e.g.* the access to an international tribunal) for carrying out transnational climate litigation processes. Importantly, as it has been stated, the HMCR should be seen as an evolving entity, so that the current research, as well as the current answer to the research question, only aims at capturing a snapshot of what is hopefully the starting phase of a longer, progressive process of enhancement of ENGOs' role in the governance of climate change.

Undoubtedly, the answer provided to the research question can be accused of ignoring some blind spots and of bringing about important shortcomings, some of which have already been raised during the research process.

A first shortcoming relates to the difficulty of identifying a causal relationship between the establishment of the HMCR and the enhancement of ENGOs' role. As a matter of facts, although a greater role of ENGO's in the international climate regime has been traced from 2013 onwards (and in particular since 2015), it might be still premature to strictly tie such phenomenon to the establishment of the HMCR.

This element is also linked to the second limitation of the current research: the narrow timespan that can be analysed since the entrance into force of the Paris Agreement. Indeed, the Paris Agreement was only created in December 2015, and entered into force in November 2016. Hence, the period of time that can be considered after the alleged establishment of the HMCR is maybe too restricted for identifying a consistent post-Paris trend. This is even more true if we consider the situation of exceptionality that the international climate regime has lived as a consequence of the COVID-19 pandemic. Still, what remains out of question is that, over the 25 years that have been analysed, a coincidence

between the emergence of the HMCR and the increasing role of ENGOs (and NGOs) can be identified.

Thirdly, the definition of hybrid multilateral climate regime, provided during the research process and necessary in order to answer the research question, can be claimed of being tautological. Indeed, it gives for granted the emergence of a HMCR after the establishment of the Paris Agreement, and it does not bestow any margin of manoeuvre for the put into question of the HMCR's actual existence. Nevertheless, the object of this research was not that of proving the existence of the HMCR. Instead, it relied on previous authors' identification of hybrid forms of multilateralism in the system of climate governance, and it built a new concept (*i.e.*, the HMCR) in order to bypass some misconceptions related to the concept of hybrid multilateralism, while maintaining on board its strengths. Therefore, in light of the investigation conducted at paragraph 2, mainly relying on doctrinal analysis, it seemed necessary to link the concept of HMCR with the establishment of the Paris Agreement.

Lastly, an important weakness concerns the limitations of the methodology that has been used in order to assess the evolving role of ENGOs within the international climate regime. In fact, despite being meaningful for a number of reasons,[CXXIV] the approximation of ENGOs' changing role within the international climate regime to ENGOs' evolving presence in the SBSTA remains open to criticism.

5.3 A new point of departure

This research has provided a first exploration of the concept of HMCR, and it has looked for the identification of a causal relationship between its establishment and the role played by a particular category of NSAs (*i.e.*, ENGOs). Still, as the concept of HMCR is an evolving one, this research does not aim at finding any definitive truth, but it better aims at starting a process of exploration of an evolving field, which could be seen as a new point of departure for further research.

Among the issues that it will be necessary to further explore, there is the very nature of hybrid multilateral climate regimes. To address the effectivity of the HMCR's definition provided by this research, and to better investigate HMCR's relationship with the establishment of the Paris Agreement will certainly be a priority for any research which will build on the analysis of the HMCR and on its consequences on relevant actors.

Another element which could be considered in future research is the role played by ENGOs (and NGOs) themselves in the process of establishment of the HMCR. In fact, this study mainly relied on a top-down conceptualization of the HMCR (according to which states voluntarily devolved part of their sovereignty to establish the Paris Agreement, *i.e.*, the international treaty constituting the first sparkle for the emergence of the HMCR), so that the conduct of new studies adopting a bottom-up definition of HMCR could certainly bring about new important insights over the nature and features of the HMCR.

Furthermore, it will be important to monitor the future transformation (and hopefully evolution) that the HMCR will undergo. As a matter of facts, having being defined as a non-static entity with many margins for improvement, the current shape of the HMCR is destined to change over time, and to monitor such changes will be necessary in order to obtain a clear and updated picture of the HMCR's shape and scope of action.

Moreover, it would be useful to spend further energies to investigate over the causal relationship between the establishment of the HMCR and its long-term consequences on ENGOs. Indeed, as it has been stated, this research has identified a correlation between the emergence of the HMCR and the stronger role played by ENGOs in the governance of climate change. Nonetheless, the identification of a strong causal relationship will require the construction of further studies relying on the analysis of longer periods of time since the establishment of the HMCR.

Even more, to conduct research on the HMCR's impact on ENGOs that relies on a different methodological approach will also be vital. In fact, this research considers the number of references to ENGOs' statements in SBTSA reports as a proxy of their evolving role in the international climate regime. In light of the limitation of the abovementioned approach, to analyse the changing role of ENGOs even outside SBSTA processes will be of great importance and will provide further information about the role they play in other areas of the international climate regime.

In addition, it could be important to look for the links between the evolution of the HMCR and the possibility to provide ENGOs (and NGOs more generally) with access to international tribunals. As a matter of facts, climate litigation processes proved to be powerful tools in the hands of ENGOs, and the identification of a legal instrument harmonizing ENGOs' access to transnational litigation actions would strongly enhance ENGOs' position in the governance of climate change.

Taking a step back from the focus on ENGOs, new research could also focus on the analysis of the consequences that the emergence of the HMCR is having on further categories of NSAs. In this regard, it might be particularly interesting to analyse a possible flaw of the HMCR constituted by the eventual reinforcement of the position of NSAs (*e.g.* private companies operating in the sectors of energy, livestock, etc.) whose short-term economic interests contrast and risk hampering an effective protection of the global environment and climate.

Finally, as it has been stated, the HMCR is only one of many types of hybrid multilateral regimes which could emerge on the global arena. To investigate on the emergence of further hybrid multilateral regimes (and on their consequences) in other, typically transnational, policy areas (*e.g.* migration, food security, healthcare) could prove to be particularly effective in tackling the spread of qualitatively new phenomena and threats that the traditionally state-based and multilateral institutions are unsuccessfully trying to address.

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I would like to particularly thank Professor Jonathan Verschuuren for his precious teachings, suggestions, and advice, and without whom I could have not been able to reach the expertise in international environmental and climate change law which has been essential to write this work.
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[XXII] Mikko Rajavuori, 'The Role of Non-State Actors in Climate Law', in Mayer & Zahar (eds.), *Debating Climate Law* (2021) Cambridge University Press, 4.
[XXIII] The reasons for choosing this particular methodology, as well as the limitations that it brings about, will be duly addressed at paragraph 4(1).
[XXIV] Rajavuori (n 21).
[XXV] See paragraph 3.
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[XXXIII] Anu Bradford (n 25) 4.
[XXXIV] Karin Bäckstrand et al. (n 17) 562.
[XXXV] Ibid. 562.
[XXXVI] John S. Dryzek (n 19) 1.
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[XLIII] See Ernani Contipelli, 'Polycentric Approach To Global Constitutionalism And Climate Change' (2019) Revista Catalana de Dret Ambiental.
[XLIV] See David Freestone, 'The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime' in Kevin R. Gray, Richard Tarasofsky, Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
[XLV] See Paris Agreement (2015) Artt.2(1)(a) – 4(1) – 7(1).
[XLVI] Ibid. Artt. 3 – 4(2) – 7(9).
[XLVII] See Bäckstrand et al. (n 17) and Kuyper et al. (n 18).
[XLVIII] Paris Agreement (2015) Art.4(2).
[XLIX] Ibid. Art. 4(3).
[L] Ibid. Art.4(9).
[LI] Bäckstrand et al. (n 17) 568.
[LII] Paris Agreement (2015) Art.14.
[LIII] Harro van Asselt (n 15).
[LIV] Paris Agreement (2015) Art.7(5).

[LV] Ibid. Art.6(4)(b).
[LVI] Ibid. Art. 6(8)(b).
[LVII] Ibid. Art. 11(2).
[LVIII] Ibid. Art 12.
[LIX] Paris Agreement (2015) Art.13(7)(a).
[LX] Ibid.13(8).
[LXI] Harro van Asselt (n 15).
[LXII] Paris Agreement (2015) Art.16(8).
[LXIII] Paris Agreement (2015) Preamble.
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[LXXIII] See European Court of Auditors, 'Transparency of EU funds implemented by NGOs: more effort needed' (2018).
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[LXXVI] Encyclopaedia Britannica (link to the website: https://www.britannica.com/topic/nongovernmental-organization).
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[LXXXII] Rajavuori (n 21).
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[XCV] See Christof Heyns, Magnus Killander, 'Africa' in Moeckli, Shah, and Sivakumaran (eds.) *International Human Rights Law* (2018) Oxford University Press, 472. As the scholars observe, 'while the Charter is silent on who can bring communications, the Commission has in practice accepted complaints from individuals as well as from NGOs'.
[XCVI] See Urgenda Foundation v. State of the Netherlands (2015).
[XCVII] See Neubauer et al. v. Germany (2020).
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[CIV] Ibid. Art.9(2).
[CV] See Kyoto Protocol (1997) Art.15(1) & Paris Agreement (2015) Art.18(1).
[CVI] See, among the others, decision 2/CP.17 (2011) on issues relating to agriculture & decision 4/CP.23 (2017) on the Koronivia Joint Work on Agriculture.
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