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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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