CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 13

ISSUE 2-3
2021

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 13, ISSUES 2-3, 2021
TABLE OF CONTENTS

ESSAYS

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Intellectual Prejudice and Institutional Shortcomings. The Risks for the Next Generation EU

by

Federica Martiny*

Perspectives on Federalism, Vol. 13, issue 2-3, 2021

Abstract

Despite the fact that during the pandemic emergency the European Union managed to provide an ambitious and courageous response, in contrast to previous decisions, the intergovernmental method undermines European democracy.

Key-words

European Union, multi-level governance, economic crisis, crisis of democracy, pandemic crisis

1. The role of contradictions

In order to understand the reasons behind Europe's crisis, starting with the unresolved issues of the Union's governance, it may perhaps be useful to briefly retrace the paths that have crossed and sometimes overlapped in the process of European integration process. In a recent book-interview, Nadia Urbinati discusses the visions and intellectual contributions to the idea of Europe, underlining how the political cultures that have played a decisive role in this framework were essentially two: the Enlightenment vision, that has also inspired Spinelli, Rossi and Colorni[I]; and the Christian Catholic tradition, to which the main political protagonists of the European integration process belong - from Robert Schuman to Konrad Adenauer and Alcide De Gasperi- (Urbinati, Fico 2019).

The first chapter of this book-interview is significantly entitled "Europe", which means that the term Europe is declined in the plural form in Italian language. This lexical choice invites us to use a careful look at the complexity of the recent history of the integration process idea: in addition to the Enlightenment vision and to the Catholics' one, the author dwells on the theme of the European projects of the neoliberal thought, questioning the interpretation according to which the neo-liberal design was imposed from the beginning in the project of supranational integration of the continent. On the one hand, it is true that for authors such as Hayek, Europe could be a fertile experimental ground for the creation of an economic space made up of exchanges outside and beyond the States, but on the other hand, it is equally true that once the political implication of treaties such as the ECSC and the Treaty of Rome became apparent, the liberalists came to the conclusion that the European space was anything but the expression of minimal public intervention (Urbinati, Fico 2019: 33).

In this regard, it is worth remembering that the European Economic Community was created only afterwards and because of the failure of the European Defence Community (EDC) project: on 30 August 1954, the French National Assembly under the government of Mendès France, rejected the project without engaging in an in-depth debate (Preda 1990; Bertozzi 2003). It is only recently that the neoliberal ideology "has defined the horizon of European political cultures, and little by little it has also conquered the left-wing, which has gradually transformed

the demand for social justice into a question of governability of social processes and economic efficiency" (Urbinati, Fico 2019: 66). At least from Maastricht onwards, the idea of the political dimension of European integration has been replaced by the idea of a frayed governance that feeds on an unresolved contradiction: on the one hand, the rejection of the creation of a European sovereignty dimension and, on the other, the tendency towards the state of emergency, under the aegis of the national executives.

The process of European integration has been interpreted as a process that generates - and at the same time is generated by - growing contradictions, which follow one another and which are particularly visible in the context of economic integration. According to this reading, the stages that have marked recent European history are nothing more than attempts to respond to certain contradictions, which have in turn opened up other inconsistencies (Masini 2018). We can therefore try to interpret the many crises gripping Europe today, such as the economic crisis, or the migration crisis or the crisis of democracy in general, as the result of these growing contradictions.

2. The Economic crisis

Let's take a step back. The financial bubble linked to the American real estate market generated an unprecedented global financial crisis in 2008, showing the unsustainability of that kind of financial capitalism. After the collapse of the giant Lehman Brothers in September 2008, the governments of the world's most powerful countries launched massive public spending interventions for the benefit of the most exposed banks - the world's leading central banks agreed on a liquidity injection of more than four trillion euros - in order to help the recovery of credit activity. The negative effect of this operation was twofold: firstly, the banks kept the funds provided by the Central Banks on deposit, thus cancelling any kind of recovery effect in the economic system; secondly, bank bail-outs by public budgets aggravate the exposure of States, transforming foreign debt contracted to cover structural balance of payments deficits into sovereign debt (Masini 2018: 67).

In this context, the Greek case breaks out, with the consequent concentration of financial speculation. The European governments (represented by their collegiate body, the Council) have opted for the policies of austerity (Bruni, Ispi report 2016), controlled and established by an intergovernmental governance that has presented all its inadequacy: to finance the liquidity problems of Greece (and to ensure the repayment of the credits of the French and German banks, considerably exposed on the Greek debt) the ECB, the IMF and the European Commission (the so-called troika) intervene; but to grant credit they demand the respect of heavy conditions[II].

On the one hand, therefore, the social situation of the Greek population became dramatic, and on the other hand, the management of the sovereign debt crisis increasingly took on the character of a state of emergency. In May 2010, the EFSF, the European Financial Stability Facility, was established from the European budget (and managed by the Commission), with the objective of providing short-term financial assistance in emergency situations, but in October, the Heads of State and Government of the Member States decided to create a special fund (to be launched in October 2012), the European Stability Mechanism, which was supposed not to be subjected to the management of the Commission, but to that of the governments of the countries themselves: it is managed by the Board of Governors, made up of the Euro Area Finance Ministers, a Board of Directors (appointed by the Board of Governors) and a Director General, while the European Commissioner for Economic and Monetary Affairs and the President of the ECB are only observers.

With respect to the European Stability Mechanism, it is particularly interesting to focus on the procedural method for taking decisions: the voting rights of each Member State are proportional to the value of the shares paid into the fund (Germany's share is 27.14% of the total; France's 20.38% and Italy's 17.91%). This is, in other words, the institutionalisation of what Trasimaco called "the advantage of the stronger" (PLATO, Republic: 338c.). On 2 March 2012, an international treaty was approved, signed again by the Heads of State and Government; it was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, or Fiscal Compact.

What seems important to underline, from the perspective of the philosophy of law, is exactly how the economic crisis has been managed in recent years: focusing on the method and procedures does not mean refraining from assessing the eminently economic choices that have been made, but instead implies a reflection on the transformation of political-institutional action at European level. What we have defined as the government of the emergency has assumed an eminently intergovernmental character that has ended up centralising decision-making power in the hands of State representatives alone, to the detriment of supranational institutions - the European Commission reduced to the role of controller/executor and Parliament to the role of spectator-.

The key example is given by the power assumed by a completely opaque body such as the Eurogroup, which brings together the Ministers of Economy and Finance of the countries of the Eurozone: it is an informal body, whose meetings and meetings therefore take place behind closed doors before each Council of Ministers of Economy and Finance (ECOFIN), which is one of the institutional formations in which the Council of the European Union meets. The consequences of this intergovernmental transformation are just as important in a reflection on European democracy as those arising from the fact that governments "look to the markets" to see what they can and cannot do.

Reading the decision-making mechanisms at institutional level shows us how in recent years, at European level, we are witnessing a progressive centralisation of decision-making power in the hands of those bodies representing the Member States - the European Council and the Council of the European Union - to the detriment of the bodies representing the Union and its citizens, precisely in the name of the need to manage the emergency.

The results of this concentration of power take on significant theoretical importance if we consider that the voting method adopted in the European Council is unanimity and that the Council of the European Union takes a decision by a different method depending on the area and subject matter in question. The issue of the crisis of democracy is therefore more complex than generally assumed.

3. The crisis of democracy

This issue, in fact, cannot be reduced to what the sociologist and political scientist Anthony Giddens has defined as the "paradox of democracy" (the fact that if, on the one hand, democratic institutions are continuously spreading throughout the world, on the other hand, in mature democracies discontent and disappointment with these same institutions are emerging, Giddens 2000). To understand in what sense we can refer to the crisis of democracy, it is probably necessary to deviate from the definition of liberal democracy - and in this regard, it is interesting to mention Colin Crounch's idea of post-democracy (Crounch 2003) - and try to read its dichotomies, contradictions, fallacies that unravel between the interstices of the successes of democracy.

The author who seems to have grasped these elements more than others is Norberto Bobbio, who defined democracy as an "extremely complex practice", a delicate mechanism that breaks down at the slightest shock, which clashes with the "first paradox" of the so-called democracy of the moderns, with the fact that it demands "more and more democracy in increasingly unfavourable objective conditions" (Bobbio 1975).

The list of the paradoxes of modern democracy and the unfulfilled promises of democracy proposed by the Italian philosopher is particularly effective in the context of a reflection on European democracy. The so-called second broken promise, for example, can be traced back to the question of the revenge of particular interests versus political representation and general interests; in the context of our reflection, we can try to read through this specific reading-key the emergence of the particular interests of the Member States, and in particular of their governments, versus the common European interest. The third paradox identified by the philosopher, then, postulates that in industrialised societies, where complexity is increasing in many areas, there is an increasing number of problems requiring technical solutions, i.e. reliable only to competent people[III]; this paradox also seems particularly fitting in an attempt to explain the current European system, insofar as the inability to take a shared political position is replaced by the assumption of the obligation to respect parameters and regulations. Another central issue in the Bobbian analysis is that of the failure to defeat invisible power (the

conviction that democratic government could be transparent); in this regard, we are aware of the centrality assumed by an informal body such as the Eurogroup and the opacity of the rules of diplomacy conducted by the various representatives of the States.

Bobbio's analysis seems to be a useful key to read critically and accurately some of the most significant dimensions of the current institutional crisis of the European Union and of the "intergovernmental drift of the Union" (Frosina 2018).

At this point of the reflection we should mention also what Joseph Weiler has defined as the "perversion of democracy" (Weiler et al. 1995), that Laura Frosina reads both as the supremacy of the executive of the EU on the legislative in the normative production, and as the possibility for the national executives to assume scarcely transparent decisions. The decisive point is the fact that the de facto protagonism acquired by the European Council in the management of the most important political and institutional dynamics has led to an involutionary phenomenon attested by an increasingly intense recourse "to informality, atypicality and intergovernmental solutions of an extra-ordinary nature" (Frosina 2018).

Faced with the observation of the impossibility of individual states to address with national instruments those problems that by their nature transcend state borders, the response of the governments of European countries has been that of creating a coordination between distinct national responses rather than seeking a supranational response.

4. The Covid crisis management and the "aristocratic" diplomacy

The management of the economic and social crisis caused by a completely unpredictable event such as the spread of the coronavirus has only partially reversed the trend. In July, during the negotiations between the representatives of the 27 member countries, an important agreement was reached on Next Generation EU, in a very different time frame compared to the 2009 crisis and with a substantially different commitment. The Recovery Plan has an amount of 750 billion, with a specific proportion between transfers (390 billion, 52%) and soft loans (360 billion, 48%); the management of these funds and the governance of their implementation is entrusted to the Commission, including the control over the National Recovery Plans and their

implementation, which the Council will approve by qualified majority, but with the possibility for an individual State to ask to refer the matter to the European Council, thus suspending the decision for a maximum of 3 months.

In reality the compromise and the sacrifices have been made on the less conspicuous but no less important front: the multi-annual financial framework, the EU's multi-annual budget that must finance all European public policies for the next 7 years, well beyond the response to the pandemic. And it is no coincidence that a clash of negotiations with the European Parliament is taking place on this very issue.

In today's Europe, as in that of the 19th century aristocracies, the last word on important decisions is in the hands of the representatives of nations. The European Commission and the European Parliament, the two EU institutions of the Union, naturally have an important role to play, and the ambitious proposal for a 750-billion-euro plan to tackle the Covid-19 crisis is the Commission's proposal, fully supported by Parliament. But the final word here, too, is from the Heads of State and Government, who in the weeks leading up to the July summit held negotiations, and organised bilateral meetings, in search of a compromise. As when in the nineteenth century, during the great court dances, in sumptuous halls with golden stuccoes, with waltz notes in the background, royal weddings were planned, alliances were built, war was prepared. The symbolic image of this approach was unveiled to us at the European Council held in March 2022 in Versailles (the sumptuous palace built by Louis XIV) where the leaders of the Member states met to discuss to dramatic situation of the Russian attack on Ukraine. Surrounded by golden stuccos, they spent hours discussing a common European response, and they appeared like politicians from a bygone era that today seems quaint.

---

* Federica Martiny is Adjunct Professor in Informatica Giuridica and Teoria generale del diritto at e-Campus University and Adjunct Professor in Legal Theory at University of Pisa. Email address: federica.martiny@uniecampus.it

I Authors of the Ventotene Manifesto, clandestinely written and circulated in the circles of the Resistance to Fascism.

II See also https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en.

III Some authors, unlike Bobbio, have identified this element of technocracy as the solution to the crisis of democracy: for example, the famous The Crisis of Democracy: On the Governability of Democracies, a 1975 study written by Michel Crozier, Samuel P. Huntington and Joji Watanuki.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Decriminalizing Abortion in Federal Systems

by

Christine Forster*

Perspectives on Federalism, Vol. 13, issue 2-3, 2021

Abstract

This article considers the decriminalization of abortion in federal systems - decentralised and centralised. While factors external to the governance model influence whether abortion is decriminalized, such as religious views on the fetus's right to life, this article focuses on governance. Drawing on a range of country examples, it explores opportunities for innovation and policy transfer of abortion reforms in decentralized federal systems. In decentralized systems the country examples suggest it is prudent to target receptive subnational units despite resistance in other subnational units for advocacy and reform. Advocates must also recognize and counter conservative actors stifling reform through multiple access points. The article further considers federal countries where the power to regulate abortion is central and assesses the opportunities for country-wide decriminalization by a unified women's movement. The article concludes that decentralized and centralized federal systems present opportunities and limitations and examining case examples leads to more effective strategies.

Key-words

abortion, federalism, international law, comparative law

1. Introduction

This article considers the opportunities and limitations in centralized and decentralized federal governance arrangements to decriminalize abortion and enhance women's reproductive rights. The identification of opportunities and limitations can, this article proposes, contribute to the formulation of strategy for the women's movement and their advocates. Although supported by international human rights law, the decriminalization of abortion has been difficult to achieve in all countries, federal and unitary (Erdman and Cook 2020). In many forums a woman's right to control her body and her reproductive choices are juxtaposed with religious and cultural beliefs about the right to life of the fetus and a patriarchal position that men have a right to control women's reproductive choices (Chesney-Lind and Hadi 2017). Although abortion laws have been gradually liberalized world-wide, approximately 6 percent of the world's 1.64 billion women of reproductive age live in a country where abortion is prohibited and criminalized without any exception, and 21 percent of reproductive age women live in a country where abortion is permitted only to save a woman's life, mostly in Latin America, Africa and Asia (Singh et al 2018). The link between the criminalization of abortion, maternal mortality and maternal morbidity has been established by research which indicates that most deaths from unsafe abortions occur in countries where abortion is severely restricted by law (Latt, Milner and Kavanagh, 2019). Thus, in addition to denying a woman's right to control her body and make reproductive choices the failure to decriminalize abortion and to provide safe, accessible facilities endangers their health and also that of any child born after a failed abortion.[I]

Federal systems vary, are dynamic, and have differing degrees of flexibility (Vickers, Grace and Collier 2020). However they also share many characteristics including a central government and subnational levels with genuine autonomy; a written constitution that identifies and sets out the parameters of the federal system formally allocating legislative and fiscal powers and responsibilities to different units; special arrangements to ensure the representation of subnational levels in the central government often in the form of an upper house; a procedure for resolving constitutional disputes; a judicial review mechanism that

prevents central and subnational governments exceeding their powers; and a mechanism for resolving disputes between the central and subnational levels (Anderson 2016; Aliff 2015; Smith 2020). In federal countries the abortion landscape is complex. There are factors, external to the model of governance, that influence any legislative shift to decriminalisation. The most contentious is religious influences that support a fetal right to life. For example, in Catholic and Evangelical dominated countries opposition to decriminalizing abortion is strong (such as Mexico, Brazil and Argentina), while in less religious countries (Canada and Australia) although there is opposition on moral (largely Christian) grounds, this has been a minority voice rather than a majority one (Calkin and Kaminska 2020; Malca et al 2017). Other factors include political priority (Daire et al 2018; White 2020) health concerns relating to maternal mortality (Yogi and Neupane 2018; Rowe et al 2019; Choudhury et al 2019; Melese et al 2017) population control (Carter 2018) the strength of the women's movement (Sutton and Borland 2019) the level of political representation of women (Malvern and MacLeod 2018) community support for reproductive rights (Udi Sommer and Forman-Rabinovici 2019; McReynolds-Pérez 2017) and the strength of traditional practices and cultural norms which deny women's reproductive rights (Shrestha et al 2018).

However, in addition to social and cultural influences the system of governance also impacts on legislative frameworks regulating abortion. This article considers the influence of federal governance, decentralized and centralized, on reform efforts and argues that federal systems do provide opportunities for decriminalization. This is supported by the extensive body of literature on gender and federalism which finds that decentralization assists gender equality measures and advancement through innovation, policy transfer and the opportunity for the women's movement and their allies to access the multiple access points of decentralized federal systems. (Vickers 2013; Chappell 2013) The article also notes that decentralization can, in some contexts, embolden conservative actors who may also utilise the multiple access points to block progressive reform (Gray 2010).

In addition, this article argues that centralized federal systems also provide opportunities for the advancement of gender equality through strongly framed Bills of Rights typically incorporated into the national constitution, and the ability to deliver uniform country-wide,

uniform laws, programs and services. In support of those arguments this article utilizes a selection of country examples to explore the opportunities and limitations in both centralized and decentralized federal systems to decriminalize abortion and reduce or remove legal restrictions on access.

Part 2 sets out the international human rights law support of the decriminalization of abortion through rights to autonomy, privacy, life, equality and non-discrimination and health. It also identifies three different approaches to regulating abortion in domestic legal contexts. Part 3 considers a selection of federal countries (including the United Kingdom 'UK' which, although not a federal country has devolved the power to regulate abortion) where the power to regulate abortion is decentralized. The countries are chosen as examples to illustrate how innovation, policy transfer and venue shopping have, in some instances, assisted the decriminalization of abortion in decentralized countries. It also shows however, how conservative actors can utilize decentralization to restrict abortion. Part 4 considers a selection of federal countries where the power to regulate abortion is centralized. As in Part 3 the country examples illustrate how a unified women's movement coupled with a strong Bill of Rights can provide an opportunity for uniform country-wide decriminalization of abortion. However, if the central government has a restrictive approach to the regulation of abortion, this can make reform efforts challenging. Part 5, concludes that although there are factors outside the system of governance which influence the regulation of abortion, federal systems do offer opportunities for decriminalization, in both decentralized and centralized federations. Importantly, in developing strategy to approach decriminalization in federal systems an understanding of the limitations and opportunities coupled with an examination of country examples can assist in ensuring targeted and appropriate responses to achieve decriminalization and the removal of restrictive legislative requirements.

2. Decriminalization of Abortion and its Regulation in Domestic Contexts

The decriminalization of abortion has proven controversial in both unitary and federal countries (Stark 2011). A legislative right to an abortion enables women to have control over

whether and when they have children, and how many children they have. Denying abortions through criminalization forces women to become mothers, requires them to perform nine months of reproductive work, to suffer pain, and to assume the risks of childbirth (Htun and Weldon 2010). Abortion also protects women from maternal deaths (Tadele et al 2019). Research has shown that when a mother dies (including because of an unsafe abortion), her surviving children are more likely to die within two years. In addition, motherless children receive less health care and education in their formative years (Chikhungu et al 2017). It also protects girls from giving birth at a young age. Adolescent mothers aged 10–19 years face high risks of eclampsia, puerperal endometritis and systemic infections during pregnancy and an annual number of 3.9 million unsafe abortions among girls aged 15–19 years contribute to maternal mortality, morbidity and ongoing health problems (Chikhungu et al 2017).

Abortion was legally restricted and criminalized in almost every country by the end of the nineteenth century (Berer 2017). However, a right to abortion, primarily through the broadening of other rights (Penovic and Sifris 2018) has had increasing support in international human rights law during the twentieth century (Penovic and Sifris 2018) and has influenced domestic legislative reform (Fine et al 2017). For example, restricting women's access to abortion has been conceptualized as a violation of the right to life and the right to privacy by the Human Rights Committee, which monitors the *International Covenant on Civil and Political Rights* 1976 (Sifris and Belton 2017). Article 12(1) of the *Convention on the Elimination of Discrimination against Women* 1979 (*CEDAW*) on equality in healthcare obligates countries that are party to it to ensure access to family planning services to women on a basis of equality with men but does not specifically refer to abortion.[II] However, the *CEDAW* Committee, which monitors *CEDAW*, in General Recommendation No 24 in 1999, which expands the meaning of Article 12, stated that states should remove "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."[III] Subsequently, the *CEDAW* Committee has increasingly strengthened its comments on abortion (Hunt and Gruszczynski 2019) demanding decriminalization and the removal of all punitive measures imposed on women who seek abortions.[IV] In its 2013 General Recommendation No 30 on women in conflict and post-

conflict situations the *CEDAW* Committee recommended that all states parties guarantee safe abortion access and post abortion care. Under *CEDAW*'s Optional Protocol mechanism through which an individual can bring a complaint against a state party to the *CEDAW* Committee, several complaints have been received in relation to countries criminalizing abortion. In 2018, the *CEDAW* Committee found that the UK had breached the rights of women in Northern Ireland because of restrictive abortion law that criminalizes abortion except when there is a threat to a woman's life or a serious risk to health.[V] The Committee found that the law breached Article 12, "for failing to respect women's right to health by obstructing their access to health services, including through laws criminalizing abortion, which punish women and those assisting them, and by rendering access to post-abortion care, irrespective of the legality of the abortion, inaccessible owing to clinicians' fear of prosecution."[VI] This article categorizes domestic law approaches to the regulation of abortion into three main categories, although many jurisdictions have a combination of these approaches in their laws. The first approach is criminalization which approaches abortion as a criminal activity in some or all circumstances. A criminalization approach can be very strict, for example criminalizing abortions - both the pregnant woman and any person assisting - in all situations without exception. A less strict approach criminalizes abortions but provides exceptions, for example, if the pregnancy is the result of rape, if the fetus has a serious medical condition or if the pregnant woman's life is in danger. Finally, in some countries, abortion is criminalized only if it is not performed in accordance with the law, for example if required authority from a medical practitioner is not properly obtained, if it is performed after a particular gestational cut-off point in the pregnancy or if it is performed by an "unqualified" person (Jain 2019).

In the latter example, some jurisdictions criminalize only the unqualified person and not the pregnant woman herself. The second approach is medicalization, which approaches abortion as a health issue and vests authority for abortions in medical practitioners. Typically, in this approach an abortion can proceed if a medical practitioner authorizes it, usually based on criteria focused on protecting the emotional, physical and financial well-being of the pregnant woman. While the medicalization approach strives to balance the interests of varying

interest groups; conservative, liberal, feminist, and religious, it does not fully recognize a reproductive right held by women and girls to choose for themselves when to proceed with an abortion (Peterson 2017; Keogh et al 2017). A fully decriminalized approach, the third approach identified in this article, conceptualizes abortion in terms of women's reproductive rights and their right to autonomy vesting authority for the decision to abort in pregnant women themselves (Forster and Jivan 2017). This approach treats abortion like any other form of health care that receives expert care and service delivery, has appropriate safety guidelines and recourse to remedies for any negligent practices (Forster and Jivan 2017). This final approach is rare for the duration of the pregnancy, although many jurisdictions adopt this approach up until a set gestational cut-off.

In practice, countries that have moved away from a strict criminalization approach have adopted a combination of these approaches co-existing in their legal frameworks. It is increasingly common for a fully decriminalized approach - where women can proceed with an abortion without authority or permission from a medical practitioner - to be adopted up until a particular gestation period – typically at or between 12 weeks to 24 weeks. This period is often argued to equate to pre-viability although this does not always accord with the science on viability or the particular facilities available in a country to sustain a pre-term fetus (Romanis 2020; Han et al 2018). After the designated gestation period where an abortion is legally available without any requirements or conditions many countries have adopted a medicalization approach where abortion is available if a medical practitioner certifies certain requirements are met - typically a serious risk to the life or health of either the pregnant woman or the fetus. Finally, some countries, despite moving to a hybrid decriminalization approach, have retained criminal offences if unqualified persons perform abortions, or if the prescribed requirements are not met. Some countries have retained criminal offences for pregnant women that fall into these categories, for example, if they obtain abortion drugs without medical authorisation, while some countries have removed pregnant women from the purview of the criminal law altogether.

3. Decentralized Federal Systems: Innovation, Policy Transfer, and Multiple Access Points

Decentralized federal systems, according to some commentators, create an opportunity for policy transfer of innovative and effective measures, initiatives and legal reforms from subnational unit to subnational unit (Vickers 2011). Federal systems provide the ideal conditions, they argue, for subnational units to act as "laboratories" for such measures, initiatives and legal reforms (Beyeler 2014) which will be replicated by policy makers in neighbouring units (Chappell and Curtin 2013). Unsuccessful initiatives are abandoned. This can occur through competition between the subnational units in a "race to the top" (Celis et al 2012) or in a cooperative federal system by providing a positive example for other subnational units to adopt (Sawyer et al 2012). Strengthening that opportunity for policy transfer in federal systems are the multiple access points with multiple institutions, providing more sites for instituting law and policy change (Vickers 2010). For example, local parliaments, unions, courts, and political parties (Vickers 2010). In addition, activists can, if the central government is resistant to reform, move between different levels of government to focus on the institution likely to be most receptive to their policy objectives (Vickers 2013). Other commentators note, however, that multiple access points can also become multiple veto points (Vickers 2013) or an opportunity for conservative actors to initiative reforms that do not support gender equality or to avoid responsibility for positive change (Alonso and Verge 2014) in a "race to the bottom" (Franceshet and Piscopo 2012).

The opportunity for innovation, policy transfer and venue-shopping through multiple access points to achieve the decriminalization of abortion can be seen in some of the case examples below. However, multiple access points, as evidenced by other examples, can also lead to regressive approaches to abortion and a "race to the bottom" as subnational units seek to distance themselves from progressive approaches.

Australia, a federation of six states and two territories, provides a positive example of the potential advantage that decentralization in a federal system can offer. The power to regulate abortion is allocated in Australia to the subnational units and the gradual shift to

decriminalization has been assisted by the federal system in an encouraging example of policy transfer in a "race to the top". Until 1969 all the states and territories had restrictive criminalization approaches to regulating abortion, drawn from legislation in Great Britain, in which women who terminated their pregnancy and anyone who assisted an abortion were liable for criminal offences (*Offences Against the Person Act* 1861 (UK)).

In 1969 South Australia became the first Australian state to partially decriminalize abortion. The legislative reform was not the result of pressure from the women's movement but rather was aimed at providing legislative clarity for medical practitioners who performed abortions (de Costa et al 2015). The new legislation provided that if two medical practitioners certified there was a risk to the life or the physical or mental health of the pregnant woman, or a substantial risk that if born, the child would suffer from 'serious physical or mental abnormalities' an abortion could be authorised in a prescribed hospital or clinic (*Criminal Law Consolidation Act* 1935, s 82A). However, an abortion continued to be criminalized after 28 weeks gestation unless it was necessary to save the mother's life. Although partially decriminalizing abortion the legislation left in place serious criminal offences for any unlawful abortions.

South Australia's reforms did not lead to any immediate policy transfer. In 1998 Western Australia moved to remove offences that criminalized pregnant women who aborted and replaced it with a medicalization approach for abortions up until 20 weeks requiring authorization from two medical practitioners, although retaining criminal offences for medical practitioners that acted outside of the legislation (*Acts Amendment (Abortion) Act* 1998. *Health Act* 1911, s 334, s 335). The most significant period of reform and policy transfer began, however, with the Australian Capital Territory (ACT) which repealed its restrictive criminalization abortion regime in 2002 (*Crimes (Abolition of Offence of Abortion) Act* 2002) after vigorous campaigning by pro-choice community groups which targeted a receptive state government (Baird 2017). The new legal regime provided for lawful abortions if performed in an approved medical facility by a medical practitioner (*Health Act* 1993, s81, s 82). There was no gestational cut-off and no requirements for pregnant women to satisfy. This was a significant and progressive legislative shift although any abortions outside of the registered

facilities would still result in criminal offences. The state of Victoria followed the ACT with abortion law reform 6 years later when it repealed the provisions that criminalized abortion in the *Crimes Act* 1958 (Vic) and introduced the *Abortion Law Reform Act* 2008 (Vic). The new legislation adopted some of the progressive aspects of the ACT legislation (but not all) and adopted some provisions that were more progressive than the ACT. It removed all criminal offences for women aborting in any circumstances. Until 24 weeks gestation women can obtain a surgical abortion without any requirements but in addition a registered pharmacist or a registered nurse who is employed by a hospital can supply or administer a drug to cause a chemical abortion (*Abortion Law Reform Act* 2008, s 4). After 24 weeks gestation however, unlike the ACT, the rules change, and a medical practitioner must reasonably believe "that abortion is appropriate in all the circumstances" and must consult at least one other registered medical practitioner who agrees (*Abortion Law Reform Act* 2008, s 5). Appropriate is defined as requiring consideration of "all relevant medical circumstances" and 'the woman's current and future physical, psychological and social circumstances" (*Abortion Law Reform Act* 2008 s 5). Additionally, a new offence was created in the *Crimes Act* criminalizing the act of a performing an abortion on another person by an unqualified person.[VII] The Victorian legislation, therefore, adopted ACT's fully decriminalization approach to abortions up until 24 weeks gestation. However, for women at more than 24 weeks gestation, it created a medicalization regime which does not fully recognize the reproductive rights of women and girls (Medleson 2012). It is, however, a much more progressive model than the one it replaced and at the time of enactment a much more progressive legislative framework than that in all other subnational units.[VIII]

After the reforms in the ACT and Victoria, which decriminalized abortion in many circumstances including up until 24 weeks gestation in Victoria and throughout pregnancy in the ACT, other subnational units followed, mirroring those reforms, even in conservative units (Forster and Jivan 2017; Peterson 2017). Research indicated (helpfully) that in ACT and Victoria the rate of abortion declined (rather than increased) (Sheldon 2017). By 2020, partial decriminalization had been achieved in 7 of the 8 subnational units, including progressive

reforms in New South Wales, despite a conservative state government (*Reproductive Health Care Reform Act* 2019).

Finally, South Australia, after the law remained unchanged after the reforms of 1969, became the most recent subnational unit to enact reforms fully decriminalizing abortion (*Termination of Pregnancy Bill 2020*). The amendments came after the publication of a comprehensive report that drew heavily on reforms in other jurisdictions in making recommendations to fully decriminalize (South Australian Law Reform Institute 2019).

The Australian abortion example showcases the benefits that federal systems can offer to progressing reforms through innovation, policy transfer and venue shopping. Notably since the federal government has been led by a conservative coalition for most of the past 20 years, it might have been difficult to achieve the country-wide decriminalization of abortion if the power to legislate was centrally held. Instead, reforms in progressive subnational units facilitated a "race to the top" culminating in the eventual decriminalization of abortion across the country. Although no subnational unit has a model that fully recognises women's right to abortion and some reforms are more progressive than others, Australia is illustrative of a federal system that has created opportunities for decriminalization and less strict approaches to the regulation of abortion.

The United Mexican States (Mexico) is a federal republic composed of 31 states and the federal district of Mexico City. It provides, in contrast to Australia, an example of conservative policy transfer in a "race to the bottom". Like Australia, Mexico allocates the power to regulate abortion to the subnational units and, until 2007, abortion was a criminal offence country-wide unless the pregnant woman's life was in danger. In 2007 Mexico City became the first place in Central and South America to legalize and decriminalize abortion after strong feminist mobilization, replacing a criminalization approach with a fully decriminalized approach until 12 weeks gestation. The law additionally, ambitious in scope, made sexual education in public schools of Mexico City mandatory, abortion and post abortion contraception free of charge to Mexico City residents, and set a sliding fee of no more than $100 for residents from other states (Olavarrieta et al. 2020). A Supreme Court challenge brought by the National Action Party with support from the Catholic Church followed arguing that the new law was contrary

to the *Political Constitution of the United Mexican States* 1917 (Beer 2017). It was unsuccessful however when on March 2, 2009, the Supreme Court released its final ruling that while life is legally protected it is not a necessary condition for the existence of other rights. It defended the reforms as measures that protect women's rights to bodily integrity, to physical and mental health, and rejected the plaintiffs' arguments that only the federal government can decide health policy, upholding the autonomy of the capital's assembly to legislate in health matters (Sieder and Espinosa 2021, Zaremberg and Rezende de Almeida 2021). Instead of this positive outcome resulting in a "race to the top" however strong resistance from other subnational units and a conservative pushback signalled a "race to the bottom" (Beer 2017). For example, two months after the ruling the state of Sonora ratified an amendment to the local constitution to protect life "from the moment of conception until natural death". Indeed, by 2013, 18 of the 31 states had moved to restrict abortion further by criminalizing abortion in all cases even if a woman's life is at risk (Lopreite 2014). Some states amended their constitutions to state that life begins at conception making future reform more challenging, and in other states women who terminated pregnancies could be prosecuted for murder (Beer 2017) While in 2019, Oaxaca became the second state, after Mexico City, to fully decriminalize abortion up to 12 weeks gestation, in other states the "race to the bottom" continued, further restricting women's right to abortion and reducing accessibility. In Guanajuato state prosecutions have been actively sought and in 2020 the joint health and justice committee voted resoundingly against decriminalizing abortion up until 12 weeks gestation (The Yucatan Times May 2020). In the neighbouring state of San Luis Potosi (also in 2020) lawmakers voted overwhelmingly against decriminalizing abortion (Catholic News Service 2020). On September 7, 2021 however, the Supreme Court of Mexico in a historic decision, unanimously ruled against a law that criminalized abortion in the state of Coahuila finding that it is unconstitutional to criminalize women and pregnant persons who have abortions because it violates their right to decide (Wadhwa 2021). This decision cleared the way for the decriminalisation and future legalisation of abortions across the country (Wadhwa 2021) by setting a national precedent (Ruibal, 2021). Ultimately, although the decision is positive for abortion rights, federalism did not assist in achieving this outcome.

The United Kingdom (UK) is not a federal system but was highly devolved in 1999 into four legislatures - Westminster which remains sovereign and Wales, Scotland and Northern Ireland each with strengthened powers and autonomy. Although health legislation was devolved, abortion regulation remained a reserved issue (with the exception of Northern Ireland) until the decision to extend the power to regulate abortion to the Scottish Parliament in 2015. Between 1967 and 2015 the *Abortion Act* 1967 (which had replaced a restrictive criminalization approach) applied to all parts of the UK except Northern Ireland, which retained a criminalization approach.[IX] The *Abortion Act* decriminalized abortions performed by a registered practitioner up until 24 weeks gestation if two registered medical practitioners agreed that the continuance of the pregnancy would involve greater risk than if the pregnancy was terminated of injury to the physical or mental health of the pregnant woman or any existing children of her family. The scope of risk included "reasonably foreseeable environment". Alternately, two registered medical practitioners must agree there is a substantial risk that the fetus has serious physical or mental abnormalities. After 24 weeks gestation an abortion is decriminalized only if the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman. (Abortion Act 1967, s 1). Criminal offences remain if an abortion proceeds outside the rules. The *Abortion Act* represents therefore a hybrid medicalization and criminalization approach to regulating abortion (Ottley 2020).

In 2015 the power to regulate abortion was devolved to Scotland, but not Wales where abortion continues to be regulated by the *Abortion Act*. Many feminists argued against devolution on the basis that fragmentation could threaten women's access to abortion and make it easier for anti-abortion campaigners to "divide us, pick us off one by one and target us differently" (Cooper 2015; Thomson 2018). In 2017 positive changes to abortion regulation were, however, introduced in Scotland. Scottish women were authorised to take both pills required for an early medical abortion at home providing greater access to medical abortions, while the UK continued with the approach that only the second pill for early medical abortion can be taken at home with women having to attend an abortion service to take the first pill. The change in Scotland was positively received by women's campaign groups as well as

medical experts, although challenged (unsuccessfully) in the courts by anti-abortion groups. During the COVID-19 pandemic the UK government has put in place a temporary approval in England that mirrors the Scottish reform (in an example of policy transfer) enabling women and girls to take both pills for early medical abortion at home, following a telephone or e-consultation with a clinician, without the need to first attend a hospital or clinic. It is time limited however for 2 years, or until the pandemic is over – whichever is earliest (The Guardian, 2020).

Northern Ireland did not adopt the reforms to abortion provided in the *Abortion Act* 1967 and continued to be governed by the *Offences Against the Persons Act* 1861 and the *Criminal Justice Act (Northern Ireland)* 1945. Although Northern Ireland became subject to direct rule in 1972, successive UK governments were reluctant to make Northern Ireland's abortion law accord with England, Scotland and Wales. The UK was concerned it "would provoke religious and political controversy of a most undesirable kind" that might militate against efforts "to promote a better relationship between the communities in the Province" (Sheldon et al 2020).

Instead, Northern Ireland retained the strict criminalization approach that had been the law prior to the *Abortion Act* across all of the UK. This resulted in an average of less than 20 approved abortions per year in Northern Ireland while an average of 800 women per year travelled from Northern Ireland to England, while hundreds more risked prosecution sourcing abortion medications from online providers (Aiken et al 2019). In 2019 however in response to decades of campaigning, an inquiry by the United Nations *Committee on the Elimination of Discrimination against Women,* an inquiry by the UK parliament's Women and Equalities Committee, and numerous legal cases challenging the restricted access to abortion (Fox et al 2020). Northern Ireland moved to decriminalize abortion and did so resoundingly, placing Northern Ireland in the vanguard of the movement to fully decriminalize abortion in the UK (Dyer, 2019).

Scotland and Northern Ireland, untethered from central control, have made progressive changes to the regulation of abortion (Moon et al 2019). In Northern Ireland a full reproductive rights approach has been adopted until 12 weeks gestation, with the result that Northern Ireland has a more progressive legislative framework than the rest of the UK

(Carnegie and Roth 2019) which is remarkable given the former strict criminalization approach (De Meyer 2020). In Scotland access to medical (chemical) abortions is significantly easier particularly for women in remote and rural locations since both pills can be administered at home. During the COVIV-19 pandemic the UK has temporarily mirrored the Scottish reforms in an example of policy transfer, but it is yet too soon to know whether this could signal a "race to the top". Decentralization has, in any event, provided Scotland and Northern Ireland the opportunity for innovation and venue-shopping by an active women's movement resulting in legal reforms that have decriminalized abortion in many situations.

A final example, but one of how decentralization can lead to inconsistent regulation of abortion, is provided by the United States (US), a federation of 50 states. Although there is a lack of agreement on whether Congress can also legislate abortion, the power to regulate abortion lies with the states.[X] In practice, however, the *Constitution of the United States* 1788 and the Supreme Court's interpretation of the Constitution has been the ultimate arbiter on abortion law. A mix of both progressive and restrictive legislative regimes were in place across the US when the 1973 case of *Roe v. Wade* 410 U.S. 113 (1973) was heard in the Supreme Court. Jane Roe challenged a Texas law that permitted abortion only to save the life of a pregnant woman. The court ruled that the right to privacy in the Constitution protects a pregnant woman's liberty to choose to have an abortion without excessive government restriction. The court adopted a trimester system finding a woman could choose abortion in the first trimester without restriction, in the second trimester reasonable regulation was permitted and in the third trimester regulation to protect the life of the fetus was permitted, although not if abortion was required to protect the life or health of the mother. The court decision struck down many overly restrictive state and federal abortion laws that did not comply with their ruling. Roe was however modified in *Planned Parenthood of South-Eastern Pennsylvania v Casey* 505 U.S. 833(1992). In this case abortion legislation in Pennsylvania was challenged. The legislation required that a woman seeking an abortion give her informed consent, that a minor seeking an abortion obtain parental consent unless waived by a judge, that a married woman notify her husband of her intended abortion, and that clinics must provide certain information to a woman seeking an abortion and wait 24 hours before

performing the abortion. The court held a law is invalid if its "purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." The court's interpretation of "substantial obstacles" left in place many of the requirements in the new legislation striking out only the requirement of spousal notification (Faizer 2020).

Since the two Supreme Court decisions, a number of states have further restricted access to abortion through legislation often couching modifications in terms of public health and safety despite no evidence that these types of policies do contribute to patient health and well-being (Jones et al 2020). Restrictions include counselling mandates and waiting periods, ultrasound requirements, targeted regulation of abortion providers, gestational age limits, personhood laws and insurance coverage limitations (Verma and Shainker 2020). Recently, several conservative judges have been appointed to the US Supreme Court and some states have seen this as an opportunity to enact abortion laws which clearly conflict with *Roe v Wade* and *Casey's "*substantial obstacle" standard. In Alabama for example, the *Alabama Human Life Protection Act* (HB 314) was enacted on May 16, 2019, banning abortion except for cases of medical emergency including pregnancy resulting from sexual assault. A medical practitioner performing an abortion when it is not a medical emergency faces a criminal offence with a penalty of up to 99 years imprisonment (Andrews, 2019).The Alabama legislation has been ruled unlawful in the District Court and a preliminary injunction issued, however, it will likely go on to the Supreme Court where some anticipate *Roe v Wade* will be overturned.[XI] Guindon, 2019) In March 2021 Texas passed a restrictive abortion law which criminalized abortion once there is a detectable heartbeat (6 weeks). A number of abortion providers challenged the Bill (SB 8) but the Supreme Court voted 5-4 to uphold the Bill. In other states including Ohio, Georgia, Kentucky, Louisiana, Mississippi and Missouri legislation has been enacted which criminalizes abortion in any circumstance once a fetal heartbeat can be detected. Some states - Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Tennessee, Texas and West Virginia – have further deemed abortion to be non-essential and therefore not available during periods where non-essential services are limited due to the COVID-19

pandemic (Bayefsky et al 2020). A small number of states have, however, legislatively protected abortion (for example New York).[XII]

The US provides a mixed, but largely unfavourable example of the decentralization of the power to regulate abortion. If states were free to legislate without the constraints imposed by the Supreme Court's interpretation of the Constitution, there would likely be a rapid "race to the bottom" across many states and the imposition of very restrictive abortion laws as indicated by the legislative changes that have already been enacted since the Supreme Court was populated with judges that might potentially rule against *Roe v Wade*.

4. Decriminalizing Abortion in Centralized Federal Systems. Country-Wide Uniformity and a United Women's Movement

Decentralized governance has provided strategic opportunities to decriminalize abortion in some federal systems. However, gender equality experts argue that in some contexts multiple levels of government "limit state capacity to enact and protect women's rights" (Celis et al 2012) and fragment its ability to implement redistributive social policies that benefit women (Collier 2020). They support a strong central government that can deliver country-wide, uniform laws, programs and services. If, they argue, each subnational unit is individually responsible for laws and the delivery of services then women may have more or less access to rights and services according to the wealth and priorities of each unit. The result is likely to be uneven access to rights protection and uneven delivery of services across a nation (Bhatia and Haussman 2014). In relation to abortion this is likely to mean women will have differing access to abortion depending on where they live and whether they have to travel to a neighbouring subnational unit to obtain an abortion. In addition to unevenness of access, some gender equality experts argue that decentralizing the power to make law fragments and isolates women's organisations and lobbyists weakening reform campaigns (Vickers 2020). Instead, if the law-making is centrally held, women can organise more easily, focus on a single access point and overall require less resources and less energy to launch campaigns and interventions

(Franceshet and Piscopo 2010). As illustrated in the following examples the allocation of the power to regulate abortion to the central government in some federal countries has resulted in successful campaigns to decriminalize abortion across the country. In other countries, however, it has resulted in the entrenchment of restrictive laws and the failure to make change despite active campaigns for reform. Additionally, in some countries where decriminalization has been enacted by the federal government, subnational units have restricted services or imposed regulatory restriction on the grounds of health and safety or through different interpretations of the legal framework.

In Belgium, a federation of three communities, three regions and ten provinces, the power to regulate abortion lies with the federal government. Until 1990 abortion was criminalized with no exceptions.[XIII] In 1990, after heated debate, abortion was partially decriminalized. Up until 12 weeks gestation abortion was no longer a criminal offence if a medical practitioner judged the pregnant woman was in a "situation of distress".[XIV] After 12 weeks gestation abortion was decriminalized only if medical practitioners judged there was a serious health risk to either the pregnant woman or the fetus.[XV] With only a single access point to lobby for reform it took until 2018 for any further changes despite strong and continued advocacy from the women's movement (De Meyer 2020). In 2018 new legislation fully decriminalized abortion, with no requirements, up until 12 weeks gestation. Although there was considerable pressure from women's lobbyists to extent this period to 22 weeks, particularly given that many Belgium women regularly travelled to the neighbouring Netherlands where abortion can be obtained until 22 weeks gestation without requirements, this was not adopted (De Meyer 2020). After 12 weeks gestation only two situations can give rise to a lawful abortion, first, severe and incurable disease of the fetus and second serious threat to the health of the pregnant woman. The reform progressed the law to a reproductive rights approach up until 12 weeks gestation. After 12 weeks gestation a hybrid medicalization and criminalization approach continued in most part unchanged from the law it replaced. The replacement of serious threat to life" with "serious threat to life health" however enabled a broader range of circumstances to be considered including both physical and mental health. It did not include socio-economic circumstances, despite attempts to incorporate broader grounds by some lobbyists and

politicians. If the requirements are not met a criminal offence can ensue, including for the pregnant woman. Centralization has led to partial decriminalization across the country, however the opportunity for the women's movement to target select subnational units is absent.

In Switzerland, a federation of 26 cantons, the power to regulate abortion also lies with the federal government. Abortion was criminalized, except for emergency medical reasons, until 2002 when a federal law was enacted decriminalizing abortion until 12 weeks gestation provided the pregnant woman had a detailed consultation with a medical practitioner and received "appropriate" counselling.[XVI] After 12 weeks gestation abortion is decriminalized only if "necessary in order to be able to prevent the pregnant woman from sustaining serious physical injury or serious psychological distress". That requirement, however, after 12 weeks gestation has been interpreted differently by the cantons, leading to permissive regimes in some of the cantons and very restrictive regimes in other cantons (Hofmann et al 2016). Although the opportunity for different interpretations of the law in different cantons does create access points for women to lobby for progressive interpretations this is much harder than to achieve than law reform measures. Like Belgium the centralized power to regulate abortion has achieved uniform decriminalization for abortion up until 12 weeks but the inability to lobby for reform at the subnational level has made decriminalization much more challenging.

In Argentina, a federation of 23 provinces and an autonomous federal capital, the power to regulate abortion lies with the federal government. In the national *Criminal Code* 1921 abortion is a criminal offence unless it results from rape or medical necessity (Lopreite 2020). Although the centralization of the power to regulate abortion has enabled the women's movement to unite and lobby for reform in the single federal venue, women legislators and feminist groups have struggled to achieve progressive change. Indeed, in some provinces even the restrictive requirements have not been upheld with some women who became pregnant after rape unable to access abortions. Although the Supreme Court issued a Protocol requiring the law to be adhered to, some provinces have enacted their own protocols with restrictive interpretations of the law. For example, allowing doctors to be conscientious objectors, limiting services to major

hospitals, and requesting legal consent from parents when girl under 18 even when the pregnancy is the result of rape or the pregnant person's life is in danger (Lopreite 2020). After sustained advocacy over many years in 2018 a bill was submitted to liberalize and decriminalize abortion, but it did not pass through the Senate (Tarducci and Daich 2018). In November 2020, however, another bill passed through the Senate despite opposition from the influential Catholic Church, decriminalizing abortions up until 14 weeks gestation without requirements. After 14 weeks gestation abortion is lawful only in cases of rape or if the mother's health is in danger, similar to Belgium and Switzerland. In comparison to other federal countries where women and their allies have succeeded in achieving reform in subnational units through policy transfer and a "race to the top" this appears to have been a slow and hard-won victory (Loptiete 2020).

In India, a federation of of 28 states and 8 union territories, the power to regulate abortion is allocated to the (federal) Union government. Abortion regulation shifted from a restrictive criminalization approach with no exceptions introduced by the British Imperial colonisers to a hybrid criminalization and medicalization approach in 1971 (*Indian Penal Code* 1860). The *Medical Termination of Pregnancy Act* 1971 decriminalizes abortions until 12 weeks gestation if one medical practitioner agrees and 20 weeks gestation if two medical practitioners agree that "the continuance of the pregnancy involves a risk to the life of the pregnant woman or of grave injury of physical or mental health, or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped".[XVII] After 20 weeks gestation abortion decriminalized only if conducted "in good faith for the purpose of saving the life of the woman."[XVIII].The 1971 reforms were the combined result of advocacy from the women's movement, lobbying from within the medical profession motivated by widespread unsafe abortions resulting in high rates of maternal death and finally to curb population growth in an effort to assist the economic development of the country (Chatterjee and Vig 2019). Additionally, there was a moral context which favoured abortions because, although pregnancy was desirable for married women, it was unacceptable for widows and unmarried women and in these circumstances, abortion saved family honour (Tripathi, 2021). India therefore moved early compared to other federal countries towards

decriminalization. Although liberal at the time, since the enactment of the *Medical Termination of Pregnancy Act* there have been numerous efforts by the women lobbyists and organisations to reform the legislation and to align it more closely to a reproductive rights approach but without success (Patel 2018). In an important recent development, however, the Lower House of the Indian Parliament on 17 March 2020 passed the *Medical Termination of Pregnancy (Amendment) Bill* 2020 which expands the period during which abortion is decriminalized if two medical practitioners agree that there is a risk to the pregnant woman or the fetus from 20 weeks to 24 weeks gestation**.** India provides a further example of the limitations of a centralized power to regulate abortion as despite significant efforts from a united women's movement, reform has been slow and laboured. Additionally, despite a uniform law there is considerable inconsistency across the country in the delivery of safe abortion services as a result of differing levels of funding, differing priorities in different states, and diverse cultural and religious views on abortion including boy preference and sex-determination law.

In Canada, a federation of ten provinces and three territories, the power to regulate abortion lies with the federal government. In 1988 the Supreme Court held that the criminalization of abortion in the national *Criminal Code* 1985 violated section 7 (life, liberty, and security of the person) of the *Charter of Rights and Freedoms* 1982 (Charter). It could not be rescued, according to the court, by section 1 of the Charter which states that rights and freedoms are subject to reasonable limits that are "demonstrably justified in a free and democratic society".[XIX] While a conservative federal government attempted to enact new legislation to re-impose restrictions on abortion it failed, as did future progressive legislative attempts to declare a right to abortion (Burnett et al 2019). Ultimately, by not enacting new legislation criminalizing or restricting abortion, or declaring a right to abortion, it remains unfettered representing the most progressive legal approach to abortion globally aligning fully with a reproductive rights approach to abortion.

Health delivery, however, is a provincial responsibility, and Canada provides an interesting example of where a centralized legal power has resulted in a very progressive legal framework, but where a decentralized health policy power has significantly weakened access to abortion. Some conservative provinces and territories have restricted access through health policy

measures which they argue aim to promote health rather than restrict abortion (White 2013). They have done this by not compelling hospitals and clinics to provide abortion services, by providing very restricted funding for abortion services, by not training medical practitioners in conducting abortions and failing to provide services in remote areas (Burningham 2019). In Prince Edward Island, for example, from 1988 until 2015 no abortion services were provided. In 2016, under threat of legal action, they reversed the policy and began proving some (limited) abortion services (Shaw and Norma 2020). In another example, although Mifepristone (chemical abortion) was introduced in Canada in 2017 and offered free to residents by most provincial governments, in Manitoba and Saskatchewan women are charged $300 (Shaw and Norma 2020). Consequently, working class and poorer women in those subnational units have less access to abortion than more affluent women who can afford the fee (Htun and Weldon 2010). The disjuncture between the legislative framework which decriminalizes abortion (deployed centrally) and the failure of some subnational units to properly fund abortion services illustrates a problematic feature of federalism if the two powers are not aligned (Burningham 2019). It could be argued that in Canada the federal system has not supported the decriminalization of abortion by the judiciary (Burningham 2019).

A final example is Nigeria, a federation of 36 states plus the Federal Capital City Ajuba. Abortion is regulated through two criminal laws. The 17 southern states are governed by the provisions of the *Criminal Code Act* 1990 and 19 northern (predominantly Muslim) states, are governed by the *Penal Code* 1960. Under both legal frameworks abortion is criminalized and can only be performed to save the life of a pregnant woman.[XX] Despite a strong unified women's movement to reform the laws, supported by health providers and advocates concerned by the high rate of maternal deaths no reform to the law has succeeded (Okorie, Olubusola Adebayo Abayomi 2019; Nagarajan 2018). Centralization in this instance provides an example of its limitations when the central government has a conservative approach to abortion regulation. As a result, there are no subnational access points for the women's movement to target for reform.

5. Conclusion: Strategizing to Achieve the Decriminalization of Abortion in Federal Systems

Federal systems both centralized and decentralized create different opportunities and present different barriers to the decriminalization of abortion. Although there are other factors beyond the governance model which must also be considered, the case examples discussed in this article provide rich material for devising strategies to advocate for the decriminalization of abortion.

Based on many of the country examples examined, this article concludes that decentralizing the power to regulate abortion to subnational units creates opportunities, in some contexts, for quicker and more progressive abortion law reform through innovation, policy transfer and venue-shopping. In decentralized systems it is prudent to identify and target receptive subnational units despite resistance in other subnational units, for advocacy and targeted reform efforts Recognizing that success in one subnational unit may result in a 'race to the top' and policy transfer to other subnational units suggests supporting women and their allies to target receptive units is an important component of abortion law reform. The case examples also suggest that advocates must be cognizant, however, of the ability of conservative actors (for example those with strong religious views on the right to life of the fetus) to veto reforms and instigate even more restrictive responses to abortion. Strategies to counter such measures should be developed.

In other federal countries where the legislative power to regulate abortion is centrally held progressive reform has been achieved. A significant advantage in centralized systems is that any progressive reforms are country-wide. In some federal countries, however, decriminalization has occurred much more slowly despite the advantages of a unified women's movement in part because of the lack of opportunity for innovation, policy transfer and multiple access points. In addition, in some countries despite decriminalization by the central government (or judiciary) subnational units have frustrated that reform by utilizing healthcare powers to limit the delivery of services.

Although there is no unified conclusion that can be reached, particularly because of the multiple factors that influence the achievement of decriminalization, this article concludes that valuable strategy lessons can be learnt through the examination of other country examples.

---

* Christine Forster is a Professor and Associate Dean International at the Law and Justice Faculty of the University of New South Wales in Sydney, Australia. Email address: c.forster@unsw.edu.au..

[I] See Raffaela Schiavon and Erika Troncoso, 'Inequalities in Access to and Quality of Abortion Services in Mexico: Can Task-Sharing be an Opportunity to Increase Legal and Safe Abortion Care?' (2020) 1590 *International Journal of Gynecology and Obstetrics* 25 where the authors found that abortion mortality in Mexico City sharply declined after decriminalization.

[II] General Recommendation No 24 *Women and Health*, 1999, 20th Session (UN Doc A/54/38/Rev.1).

[III] Ibid at para [14].

[IV] Concluding Comments of the CEDAW Committee: Kiribati (2020) 75th Session at para [44(d)] (UN Doc CEDAW/C/KIR/CO/1-3); Pakistan, (2020) 75th Session at para [44(c)] (UN Doc CEDAW/C/PAK/CO/3); Zimbabwe (2020) 75th Session at para [40(d)] (UN Doc CEDAW/C/ZWE/CO/6).

[V] CEDAW Committee, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2019) CEDAW/C/OP.8/GBR/3.

[VI] CEDAW Committee, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2019) CEDAW/C/OP.8/GBR/3 at para 72(b).

[VII] *Crimes Act* 1958, s 65 with a penalty 5-10 years imprisonment.

[VIII] *Crimes Act* 1900 (ACT), s 42. Failure to do so creates offences with penalties of a term of imprisonment of up to 5 years and 6 months respectively.

[IX] *Abortion Act* 1967 (UK) replaced the 1861 *Offences Against the Person Act* 1861 (UK).

[X] Justin Dyer, 'The Constitution, Congress and Abortion' (2017) 11 *NYUJL & Liberty* 394. Those who have tried to pass restrictive federal legislation have alternately, but unsuccessfully relied on the Commerce Clause, the Due Process Amendment, and the Equal Protection Clause.

[XI] Amanda Guindon, 'Alabama's Abortion Ban Has Been Blocked for Now.' 4 *The Comment,* (Bridgewater State University, November 7, 2019). <https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1630&context=comment>

[XII] *Reproductive Health Act* 2019 (NY).

[XIII] *Belgium Criminal Code* 1867, Article 348, 350-353.

[XIV] *Act on Termination of Pregnancy* 1990, Article 2, Article 5.

[XV] *Act on Termination of Pregnancy* 1990, Article 2, Article 5.

[XVI] *Swiss Penal Code* 1937, Article 119.

[XVII] *Medical Termination of Pregnancy Act* 1971, s 3.

[XVIII] *Indian Penal Code*, s 312.

[XIX] *R. v. Morgentaler* [1988] 1 SCR 30.

[XX] *Criminal Code Act*, s 297; *Penal Code Act* s 232-234.

References

- Aliff, Seeni, 'New Trends and Models in Federalism' (2015) 20 *IOSR Journal of Humanities and Social Science* 71.

Alonso, Alba and Tania Verge, 'Territorial Dynamics and Gender Equality Polices in Spain' (2014) 14 *Federalisme Regionalisme.* <https://popups.uliege.be/1374-3864/index.php?id=12712>

- Anderson, George, *Federalism. An Introduction* (Forum of Federations, 2016).

- Andrews, Courtney, 'Alabama's Abortion Law Is Not About Protecting Life' (2019) 11(1-2) *Anthropology Now* 85.
- Baird, Barbara 'Decriminalization and Women's Access to Abortion in Australia' (2017) 19(1) *Health and Human Rights* 197.
- Bayefsky, Michelle J, Deborah Bartz and Katie L. Watson, 'Abortion during the Covid-19 Pandemic—Ensuring Access to an Essential Health Service' (2020) 382(19) *New England Journal of Medicine* e47.
- Beer, Caroline, 'Making Abortion Laws in Mexico: Salience and Autonomy in the Policymaking Process' (2017) 50(1) *Comparative Politics* 42.
- Berer, Marge, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19 *Health and Human Rights Journal* 13.
- Beyeler, Michele, 'Direct and Indirect Effects of Federalism on Equality Policies Between Women and Men. Perspectives from Switzerland' (2014) 14 *Federalisme Regionalisme.* <https://popups.uliege.be/1374-3864/index.php?id=12712>.
- Bhatia, Vandna and Melissa Haussman, 'Internal Variations in Health-Care Federalism in Canada and the United States' (2014) 14 *Federalisme Regionalisme* <https://popups.uliege.be/1374-3864/index.php?id=12712>.
- Burnett, Margaret, Kelcey Winchar and Adelicia Yu, 'A History of Women's Reproductive Rights in Canada' (2019) 41(5) *Journal of Obstetrics and Gynaecology Canada* 713.
- Burningham, Sarah, 'Constitutional Law and Abortion in Saskatchewan: The Freedom of Informed Choice (Abortion) Act' (2020) 35(1) *Canadian Journal of Law and Society* 69.
- Burningham, Sarah, 'Provincial Jurisdiction Over Abortion' (2019) 45 *Queens Law Journal* 37.
- Calkin, Sydney and Monika Ewa Kaminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland' (2020) 124(1) *Feminist Review* 86.
- Carnegie, Anna and Rachel Roth, 'From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland' (2019) 21(2) *Health and Human Rights* 109.
- Carter, Eric, 'Population Control, Public Health, and Development in Mid Twentieth Century Latin America' (2018) 62 *Journal of Historical Geography* 96.
- Celis, Karen, Fiona MacKay and Petra Meier, 'Social Movement Organizations and Changing State Architectures: Comparing Women's Movement Organizing in Flanders and Scotland' (2012) 43(1) *Publius. The Journal of Federalism* 44.
- Chappell, Louise and Jennifer Curtin, 'Does Federalism Matter? Evaluating State Architecture and Family and Domestic Violence Policy in Australia and New Zealand' (2013) 43(1) *Publius: The Journal of Federalism* 24.
- Chatterjee, Pyali and Komal Vig, 'The Politics Behind the Reproductive Health in India: Special Reference to Abortion Law' (2019) 10(6) *Indian Journal of Public Health Research and Development* 240.
- Chesney-Lind, Meda and Syeda Tonima Hadi, 'Patriarchy, Abortion, and the Criminal System: Policing Female Bodies' (2017) 27(1) *Women and Criminal Justice* 73.
- Chikhungu, Lana, Marie-Louise Newell, and Nigel Rollins, 'Increased Mortality Risk for Motherless Children aged Less than 5 Years: A Systematic Review and Meta-Analysis' (2017) 95 *Bulletin of the World Health Organisation* 281.
- Collier, Cheryl, 'Comparing Country-Wide Women's Organizations in Canada and the United States in the Age of Decentralization' in Jill Vickers, Joan Grace and Cheryl Collier (eds) *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 91.
- Daire, Judith, Maren O. Kloster and Katerini T. Storeng, 'Political Priority for Abortion Law Reform in Malawi: Transnational and National Influences' (2018) 20(1) *Health and Human Rights* 225.

- De Costa, Caroline, Heather Douglas, Julie Hamblin, Philippa Ramsay and Mandy Shircore, 'Abortion Law across Australia–a Review of Nine Jurisdictions' (2015) 55(2) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 105.
- De Meyer, Fine, 'Abortion Law Reform in Europe. The 1018 Belgian and Irish Acts on Termination of Pregnancy' (2020) 20(1) *Medical Law International* 3.
- De Meyer, Fine, 'Late Termination of Pregnancy in Belgium: Exploring its Legality and Scope' (2020)27 *European Journal of Health Law* 9.
- Erdman, Joanna N and Rebecca J. Cook, 'Decriminalization of Abortion–A Human Rights Imperative' (2020) 62 *Best Practice and Research Clinical Obstetrics and Gynaecology* 11.
- Faizer, M Akram, 'Federal Abortion Rights Under a Conservative United States Supreme Court' (2020) 69 *Drake Law Review Discourse* 101.
- Fine, Johana, Katherine Mayall and Lilian Sepulveda, 'The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally' (2017) 19(1) *Health and Human Rights Journal* 69.
- Forster, Christine and Vedna Jivan, 'Abortion Law in NSW: Shifting from Criminalization to the Reproductive Rights of Women and Girls' (2017) 24 *Journal of Law and Medicine* 850.
- Fox, Marie and Goretti Horgan, 'The Effects of Decriminalisation in Northern Ireland' in Sally Sheldon and Kaye Wellings (eds) *Decriminalising Abortion in the UK: What Would it Mean'* (Policy Press, 2020) 77.
- Franceshet, Susan and Jennifer Piscopo, 'Federalism, Decentralization and Reproductive Rights in Argentina and Chile' (2012) 43(1) *Publius. The Journal of Federalism* 129.
- Gray, Gwendolyn, 'Federalism, Feminism and Multilevel Governance: The Elusive Search for Theory' in Melissa Haussman, Marian Sawer and Jill Vickers (eds) *Federalism, Feminism and Multi-Level Governance* (Ashgate, 2010) 19.
- Guindon, Amanda, 'Alabama's Abortion Ban Has Been Blocked for Now.' 4 *The Comment,* (Bridgewater State University, November 7, 2019). <https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1630&context=comment>.
- Han, Leo, Maria I. Rodriguez, and Aaron B. Caughey, 'Blurred Lines: Disentangling the Concept of Fetal Viability from Abortion Law' (2018) 28(4) *Women's Health Issues* 287.
- Hofmann, Annette, Julia K. Neumann and Peter Zweifel, *Camouflage and Ballooning in Health Insurance: Evidence from Abortion* (2016) 1 <http://egrie2016.ucy.ac.cy/wp-content/uploads/2016/09/54_Hofmann_Neumann_2016-07-20.pdf>.
- Htun, Mala and S. Laurel Weldon, 'When Do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy' (2010) 8(1) *Perspectives on Politics* 207.
- Hunt, Kate and Mike Gruszczynski, 'The Ratification of CEDAW and the Liberalization of Abortion Laws' (2019) 15(4) *Politics and Gender* 722.
- Jain, Dipika, 'Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach' (2019) 12 *NUJS Law Review* 21.
- Jones, Rachel K, Laura Lindberg and Elizabeth Witwer, 'COVID-19 Abortion Bans and their Implications for Public Health' (2020) 52(2) *Perspectives on Sexual and Reproductive Health* 65.
- Keogh, Louise, Danielle Newton, Chris Bayly, Kathleen McNamee, Annarella Hardiman, Adam Webster and Marie Bismark, 'Intended and Unintended Consequences of Abortion Law Reform: Perspectives of Abortion Experts in Victoria, Australia' (2017) 43(1) *Journal of Family Planning and Reproductive Health Care* 18.
- Latt, Su Mon, Allison Milner and Anne Kavanagh, 'Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries' (2019) 19(1) *BMC Women's Health* 1.

- Lopreite, Deborah, 'The Federal Restriction of Women's Rights: Argentina's Politics on Abortion and Contraception' in Jill Vickers, Joan Grace and Cheryl Collier (eds) *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 216.
- Lopreite, Deborah 'Explaining Policy Outcomes in Federal Contexts: The Politics of Reproductive Rights in Argentina and Mexico' (2014) 33(4) *Bulletin of Latin American Research* 389.
- Malca, Camila, Gianella, Rachel Sieder, Angelica Peñas and Marta Rodriguez de Assis Machado, 'A New Conservative Social Movement? Latin America's Regional Strategies to Restrict Abortion Rights' (2017) *CMI Brief* 5.
- Malvern, Chiwesh and Catriona Macleod, 'Cultural De-Colonization versus Liberal Approaches to Abortion in Africa: The Politics of Representation and Voice' (2018) 22(2) *African Journal of Reproductive Health* 49.
- Medleson, Danuta, 'Decriminalisation of Abortion Performed by Qualified Health Practitioners Under the Abortion Law Reform Act 2008 (Vic)' (2012) 19 *Journal of Law and Medicine* 651.
- Melese, Tadele, Dereje Habte, Billy M. Tsima, Keitshokile Dintle Mogobe, Kesegofetse Chabaesele, Goabaone Rankgoane, Tshiamo R. Keakabetse, Mabole Masweu, Mosidi Mokotedi, Mpho Motana and Badani Moreri-Ntshabele, 'High Levels of Post-Abortion Complication in a Setting where Abortion Service is not Legalized' (2017) 12(1) *PloS one*.
- McReynolds-Pérez, Julia, 'Abortion as Empowerment: Reproductive Rights Activism in a Legally Restricted Context' (2017) 17(2) *BMC Pregnancy and Childbirth* 1.
- Moon, David, Jennifer Thompson and Sophie Whiting, 'Lost in the Process? The Impact of Devolution on Abortion Law in the United Kingdom' (2019) 21(4) *British Journal of Politics and International Relations* 728.
- Nagarajan, Chitra, 'Culture/Religion/Tradition vs Modern/Secular/Foreign: Implications of Binary Framings for Women's Rights in Nigeria' (2018) 3 *Feminist Dissent* 114.
- Okorie, Chibueze and Olubusola Adebayo Abayomi, 'Abortion Laws in Nigeria: A Case for Reform' (2019) 23(1) *Annual Survey of International and Comparative Law* 165.
- Ottley, Emily, 'Abortion on Request: A Desirable Response to the Criminalisation of Abortion in England and Wales?' (2020) 11 *King's Student Law Review* 2.
- Parker, Claire 'A Parliament's Right to Choose Abortion Law Reform in South Australia' (2014)
- 11(2) *History Australia* 60.
- Patel, Tulsi, 'Experiencing Abortion Rights in India through issues of Autonomy and Legality: A Few' (2018) 13(6) *Global Public Health* 702.
- Penovic, Tania and Ronli Sifris, 'Expanding the Feminisation Dimension of International Law: Targeted Anti-Abortion Protest as Violence Against Women' (2018) 7(2) *Cambridge International Law Journal* 241.
- Peterson, Kerry, 'Abortion Laws: Criminalization and Decriminalization' in Ian Freckleton (ed) *Tensions and Trauma in Health Law* (Federation Press, 2017) 657.
- Romanis, Elizabeth Chloe, 'Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States' (2020) *Journal of Law and the Biosciences* 1.
- Ruibal, Alba, 'Using Constitutional Courts to Advance Abortion Rights in Latin America' (2021) 23(4) *International Feminist Journal of Politics* 57.
- Sawyer, Marian, Melissa Haussman and Jill Vickers, (eds) 'Conclusion' *Federalism, Feminism and Multilevel Governance* (Ashgate, 2012) 229.
- Schiavon, Raffaela and Erika Troncoso, 'Inequalities in Access to and Quality of Abortion Services in Mexico: Can Task-Sharing be an Opportunity to Increase Legal and Safe Abortion Care?' (2020) 1590 *International Journal of Gynecology and Obstetrics* 25.

- Sieder, Rachel, and Yacotzin Bravo Espinosa. "Abortion Lawfare in Mexico's Supreme Court: Between the Right to Health and Subnational Autonomy." *Revista Direito GV* 17 (2021).
- Shaw, Dorothy and Wendy Norma, 'When There are no Abortion Laws. A Case Study of Canada' (2020) 62 *Best Practices and Research Clinical Obstetrics and Gynaecology* 49.
- Sheldon, Sally, 'Abortion Law Reform in Victoria: Lessons for the UK' (2017) 43(1) *Journal of Family Planning and Reproductive Health Care* 25.
- Sheldon, Sally, Jane O'Neill, Clare Parker, Gayle Davis, 'Too Much, too Indigestible, too Fast'? The Decades of Struggle for Abortion Law Reform in Northern Ireland' (2020) 83(4) *The Modern Law Review* 761.
- Sifris, Ronlyfv and Suzanne Belton, 'Australia and Human Rights' (2017) 19(1) *Health and Human Rights Journal* 209.
- Singh, Susheela, Lisa Remez, Gilda Sedgh, Lorraine Kwok and Tsuyoshi Onda, *Abortion Worldwide 2017: Uneven Progress and Unequal Access* (Guttmacher Institute, 2018) 14.
- Shrestha, Dirgha Raj, Shibesh Chandra Regmi and Ganesh Dangal, 'Abortion: Still Unfinished Agenda in Nepal' (2018) 16(1) *Journal of Nepal Health Research Council* 93.
- Smith, Peter, *Federalism, Gender Equality and Religious Rights* in Jill Vickers, Joan Grace and Cheryl Collier (eds) *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 48.
- Sommer, Udi and Aliza Forman-Rabinovici, *Producing Reproductive Rights: Determining Abortion Policy Worldwide* (Cambridge University Press, 2019).
- Stark, Barbara J, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' (2011) 18(2) *Duke Journal of Gender Law and Policy* 261.
- Sutton, Barbara and Elizabeth Borland, 'Abortion and Human Rights for Women in Argentina' (2019) 40(2) *Frontiers: A Journal of Women Studies* 27.
- Tarducci, Monica, Debora Daich, 'Antropólogas feministas por el derecho a decidir. Aportes para una historia de la lucha por la despenalización y legalización del aborto en Argentina» (2018) 24 *Publicar en Antropología y Ciencias Sociales.*
- Tadele, Getnet, Haldis Haukanes, Astrid Blystad and Karen Marie Moland, 'An Uneasy Compromise': Strategies and Dilemmas in Realizing a Permissive Abortion Law in Ethiopia' (2019) 18(1) *International Journal for Equity in Health* 1.
- The Yucatan Times 'Initiative for the decriminalization of abortion rejected in Guanajuato' May 2020 https://www.theyucatantimes.com/2020/05/initiative-for-the-decriminalization-of-abortion-rejected-in-guanajuato/
- Thomson, Jennifer, 'Abortion Law and Scotland: An Issue of What?' (2018) 89(1) *The Political Quarterly* 100.
- Tripathi, Niharika, 'Does Family Life Education Influence Attitudes towards Sexual and Reproductive Health Matters among Unmarried Young Women in India?' (2021) 16(1) *Plos one.*
- Verma, Nisha and Scott A. Shainker. 'Maternal Mortality, Abortion Access, and Optimizing Care in an Increasingly Restrictive United States: A Review of the Current Climate' *Seminars in Perinatology* (WB Saunders, 2020).
- Vickers, Jill, Joan Grace and Cheryl Collier (eds) 'Introduction' in *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 4.
- Vickers, Jill, 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States' (2010) 40(3) *Publius* 412.
- Vickers, Jill, "Is Federalism Gendered? Incorporating Gender into Studies of Federalism' (2013) 43(1) *Publius: The Journal of Federalism* 1.

- Vickers, Jill, 'Gendering Federalism. Institutions of Decentralization and Power-Sharing' in Mona Krook and Fiona MacKay *Gender, Politics and Institutions* (Palgrave Macmillan, 2011b) 129.
- Vickers, Jill, 'How Can Comparative Studies of Federalism be Gendered? Gendering Inter-Governmental Relations" in Jill Vickers, Joan Grace and Cheryl Collier (eds) *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 16.
- Wadhwa, Tanya, 'Mexico: Abortion Decriminalised in Historic Ruling' (2021) 13 *Green Left Weekly* 1319.
- White, Linda, 'Does Federalism Support Policy Innovation for Children and Families' in Jill Vickers, Joan Grace and Cheryl Collier (eds) *Handbook on Gender, Diversity and Federalism* (Edward Elgar, 2020) 32.
- White, Linda A, 'Federalism and Equality Rights Implementation in Canada' (2013) 44(1) *Publius. The Journal of Federalism* 157.
- Yogi, Abinath, K. C. Prakash and Subas Neupane, 'Prevalence and Factors Associated with Abortion and Unsafe Abortion in Nepal: A Nationwide Cross-Sectional Study' (2018) 18(1) *BMC Pregnancy and Childbirth* 376.
- Yokoe, Ryo, Rachel Rowe, Saswati Sanyal Choudhury, Anjali Rani, Farzana Zahir and Manisha Nair, 'Unsafe Abortion and Abortion-Related Death among 1.8 Million Women in India' (2019) 4(3) *BMJ Global Health*.
- Zaremberg, Gisela, and Debora Rezende de Almeida, "Blocking Anti-Choice Conservatives: Feminist Institutional Networks in Mexico and Brazil (2000–2018)' (2021) 23(4) *International Feminist Journal of Politics* 600.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism in the 2015 and 2018 Peace Agreements in South Sudan – But What Kind of Federalism?

by

Zemelak Ayele, Jaap de Visser and David Ruach Tang*

Perspectives on Federalism, Vol. 13, issue 2-3, 2021

Abstract

The last six decades of the history of what was formerly the Southern Sudan region, now officially called the Republic of South Sudan, have been characterised by conflicts and the concomitant displacement of people and influx of refugees into neighbouring countries and beyond. The Southern Sudan region was a battleground for multiple rounds of civil war. A federal or federal-type arrangement was proposed as the appropriate institutional response for dealing with the civil war, but rebuffed by those at the helm of the political affairs of Sudan. South Sudan became an independent state following an internationally supervised referendum on 11 July 2011. However, barely less than two years after the declaration of independence, South Sudan was once again embroiled in civil war. One of the fundamental causes was the split within the governing SPLM, the ruling party of South Sudan, over what kind of system of governance South Sudan should follow. The civil war has for now ceased, thanks to several rounds of peace talks and extremely shaky peace agreements, which were signed in 2015 and 2018 under the auspices of the Inter-Governmental Authority on Development (IGAD). In the process of peace negotiation, the establishment of a federal system in South Sudan has again emerged as an important political and constitutional agenda. This article explores the options on the table regarding the institutional design of the federal system that South Sudan wants and the prospects of the proposed federal system in resolving the conflict in South Sudan.

Key-words

South Sudan, civil war, federalism, ethnicity, peace agreements

1. Introduction

The last six decades of the history of what was formerly the Southern Sudan region, now officially called the Republic of South Sudan, were characterised by conflicts, the concomitant displacement of people, and an influx of refugees into neighbouring countries and beyond. The Southern Sudan region was a battleground in two rounds of civil war between the government of Sudan and two armed movements (the Anyanya Movement and later the South Sudan Liberation Movement/Army (SPLM/A)), until South Sudan became an independent state in July 2011. The principal cause of the two civil wars was the economic and political marginalisation of and racial and religious discrimination against black South Sudanese by the Arabised Sudanese-dominated government of Sudan.[I]

A federal or federal-type of arrangement was proposed as the appropriate institutional response for dealing with the civil war, but rebuffed by those at the helm of the political affairs of Sudan.[II] The northern authorities even reneged on several agreements and pledges to grant regional autonomy to the Southern Sudan region.[III] The unwillingness of the government of Sudan to grant the Southern Sudan region even a modicum of autonomy led to, as mentioned above, two rounds of civil war, which resulted in the secession of the region from Sudan and the declaration of an independent South Sudan as the result of an internationally supervised referendum on 11 July 2011. However, barely two years after the declaration of independence, South Sudan was once again embroiled in civil war. One of the fundamental causes was the split within the governing SPLM party over what kind of system of governance South Sudan should follow.

After the signing of the peace agreement in 2015, known as the Agreement for the Resolution of Conflict in the Republic of South Sudan (RACSS), the demand for a federal system has now re-emerged following, and as a way out of, the conflicts in the country that began in December 2013. The principal parties to the civil war are Salva Kiir (the president of the country) and his government, and the SPLM in opposition (SPLM-IO), which is led by Riek Machar, the former deputy president of South Sudan. Other smaller groups – which oppose both the government and the SPLM-IO – are also involved.

The causes of the conflict are numerous and complex, and can be linked to elite competition for access to power and resources and to the country's violent history of civil war.[IV] The immediate cause of the conflict was, however, linked to the struggle of Kiir and Machar for the chairmanship of the SPLM. This led to the sacking of Machar and the entire cabinet by Kiir under the pretext of foiling a coup which the former had supposedly plotted.[V] The conflict initially had little to do with ethnicity or federalism. It however took on the characteristics of an inter-ethnic conflict at a later stage, especially after Dinka militias attacked Nuer civilians, and Kiir (a Dinka) and Machar (a Nuer) solicited support from their respective ethnic communities. This then led to a wider conflict between the Dinka and Nuer communities.[VI]

The civil war has for now ceased, thanks to several rounds of peace talks leading to extremely shaky peace agreements, which were signed in 2015 and 2018 under the auspices of the Inter-Governmental Authority on Development (IGAD).[VII] In the process of peace negotiation, the establishment of a federal system in South Sudan has again emerged as an important political and constitutional agenda. In the light of the above, this article raises two questions:

- What are the options on the table regarding the institutional design of the federal system that South Sudan wants?
- What are the prospects of the proposed federal system resolving the conflict in South Sudan?

The article begins with a brief discussion of the debate on federalism as an institutional mechanism for resolving ethnic-based conflicts. This is followed by an introduction to South Sudan and a discussion of the place of federalism in the political discourse of the country. The article then highlights alternative federal designs being proposed by the contesting groups and examines whether they have taken the ethnic factor into account, and if so, how. Finally, it reflects on the prospects of the envisioned federal system contributing to a resolution of the conflict.

2. Federalism and prevention or resolution of conflicts in a multi-ethnic society

Ethnic-based conflicts often arise when a state fails to properly manage the ethno-cultural diversity of its people. Whether and how to deal with diversity has been a major topic of political and scholarly debate for decades. States initially sought to deal with ethnic diversity by eliminating all forms of difference and creating a common national identity. This was especially the case after the birth of the 'nation-state' in the mid-17th century, which led European countries on the quest of nation-building.[VIII] African states also embraced the notion of the nation-state and began implementing a project of nation-building soon after they gained independence from colonial rule. This was underpinned by the belief that diversity of any form was a threat to the very existence of the state.[IX]A demand for the recognition of ethno-cultural diversity was often associated with 'sectarianism, parochialism, narrow-mindedness, and chauvinist bigotry'.[X] States, including independent African states, took various measures to this effect, ranging from imposing the language and region of the majority through a centralised administration and education system, to physically eliminating those having different ethnic or cultural identity.

After the carnage of World War II, which was essentially waged in the name of nation-building, states began reconsidering their stance on ethnic diversity. They implemented various institutional mechanisms ranging from simply recognising the individual equality of members of minority ethno-cultural groups, to restructuring their territories and government institutions to accommodate ethno-cultural minorities. A federal arrangement was among one of the institutions adopted for the purpose of managing diversity.

A federal system principally seeks to balance autonomy with unity. It thus involves the establishment of at least two levels of government, constitutional division of powers and resources between federal and subnational levels of government, and a constitutional scheme for sharing federal institutions by members of the federation. Federal systems are broadly classified into geographic and multi-ethnic, or multi-national.[XI] In the first group are those federations that use federalism for territorial power distribution without considering the territorial management of a people's ethnic and cultural diversity. The US, Australian and the

German federal systems fall in this category. On the other hand, the multi-national federations (also called ethnic or ethno-federal systems), which include Ethiopia, Belgium and Switzerland, are designed with a view to territorially accommodating the ethnically and culturally diverse communities. The defining character of the latter federal system is that subnational units of the federations are 'intentionally associated with a specific group's identity and functional competences are devolved to such units that are relevant for protecting and developing the culture of the relevant ethnic community'.[XII] The composition of shared institutions, such as federal legislative, executive, and administrative organs, is also expected to reflect the ethno-cultural diversity of the relevant country.

Scholars of federalism are not in agreement about the wisdom of adopting ethno-federalism. Proponents of the system defend it by claiming that it allows ethnic communities to autonomously decide on 'affairs of emotional concern' such as education, language, and/or religion. It thus removes 'sources of conflicts', reduces 'ethnic tensions across the system', and therefore 'diminish[es] enthusiasm for secession and preserve[s] the territorial integrity of the common state'.[XIII] Anderson, based on an empirical study of all post-1945 ethno-federations, maintains that ethno-federal systems have been more successful than admitted by their critics. While admitting there are instances where such systems failed to prevent conflicts, or led to the disintegration of countries, he however contends that these occurred mainly in political contexts where no alternative institutional systems would have succeeded in preventing the conflicts or the disintegration. Besides, he maintains that ethno-federal systems have succeeded in political contexts where alternative institutional systems have or would have failed.

Critics, on the other hand, argue that designing federalism along ethnic lines bears the risk of reinforcing ethnic identities. It locks ethnic and tribal groups into 'territorial cages', thereby freezing 'the historical differences' among them, enfeebling their unity and emphasising their differences.[XIV] They maintain that ethno-federalism not only increases the desire of certain groups to secede from a federation, but also provides them with the institutional framework and resources to do so.

The scholarly debate regardless, ethno-federalism has emerged, especially in the post-Cold War period, as an alternative institutional mechanism for resolving or preventing inter-ethnic

disputes or violent conflicts in many countries. A growing number of countries, African ones included, have adopted federal/federal type systems that are designed to resolve inter-ethnic conflicts and maintain peace. African post-conflict states that have adopted federal or quasi-federal systems as institutional mechanisms for resolving conflicts include Nigeria, Ethiopia, South Africa, Kenya, and the Democratic Republic of Congo. Many states adopted ethno-federalism not because it was an ideal system, but because they had run out of other feasible institutional options for dealing with ethnic-based disputes and conflicts.

The relevant question here, therefore, is whether there are feasible institutional alternatives for dealing with the conflicts in South Sudan other than a federal system that takes the ethnic factor into account. Before dealing with this specific issue, the article outlines the historical discourse on federalism in South Sudan.

3. Ethnic conflicts and federalism in South Sudan's political history

Federalism became a political and constitutional issue in pre-independent Sudan within the context of managing racial and ethnic differences of the population of northern and southern regions in the late 1940s when southern politicians demanded that the southern Sudan region should be given a degree of autonomy in the post-colonial government of Sudan, through some federal arrangement.[xv] It became an especially important political topic for southern politicians when political parties of the northern region of Sudan, for example the Umma Party, began to push the agenda of independence for the Sudan. Southern politicians, such as Both Diu of the Liberal Party, expressed their disagreement with the independence agenda, especially if it meant remaining united with Sudan, which was then also a part of Egypt.[xvi] They also demanded the accommodation of the southern region, which was then divided into three provinces (Bahr el Ghazal, Equatoria and Upper Nile) through a federal arrangement as a condition for remaining part of the Sudan. In November 1955, a month before independence, the Southern Sudanese political parties declared that they were going to endorse the independence only if the South were going to be granted considerable autonomy in the new Sudanese state within a federal arrangement.[XVII]

The calls for federalism were principally driven by the Southerners' fear of Northern domination that had already begun manifesting itself in the numerical disparity between the South and the North in the legislative assembly. In the run-up to the grant of independence, a twelve-person commission was appointed to, inter alia, recommend the way to advance towards self-government in Sudan. The Commission produced a draft Constitution which provided for certain safeguards for the South, including the appointment of a minister for Southern affairs who was to be responsible for promoting measures for the economic and social betterment of the peoples of Sudan in the Council and introducing them in Parliament.[XVIII] But these recommendations were rejected by the majority Northern representatives during the ensuing debate in the legislative assembly in January 1952. Later in the same year, Southerners were excluded from crucial constitutional talks that took place in Cairo between the Northern political parties and the Condominium powers.[XIX]

These events increased Southern apprehension about the Northerners' intentions towards the South. To most Southern Sudanese, this was clear proof that the Northerners wanted to include the Southerners in the new constitution and the new Sudan on the terms of the Northerners, and not on the terms that the Southern Sudanese wanted. This increasingly tense situation was aggravated by the policy of 'Sudanisation' through which the working force in the country was to be transformed to a Sudanese one as opposed to a foreign one.[XX]

There was discrimination in employment in the pre-independence Sudanese public service that particularly affected Southern Sudanese. Of the 1 222 jobs which were to be Sudanised, of which 1 069 were held by Britons and 153 by Egyptians, only four were given to Southerners. This, more than anything else at the time, demonstrated to the Southerners that the Northerners were just new colonisers.[XXI] In the heat of the moment, though federalism continued to be their main demand, some of the more radical Southerners of the time began to call for the complete separation of the South from the North. Others called for a referendum under the auspices of the United Nations (UN) to determine the future of the South.[XXII]

It was against this backdrop of political disenchantment, and economic and social exclusions from the very state form that a revolt broke out in the Southern region of Torit on 18 August 1955, a year prior to the outbreak of all-out civil war in the southern part of Sudan.

The unwillingness of the northern politicians to grant this demand was among the root causes of the two rounds of civil war fought between successive northern elite dominated regimes in Khartoum, on the one hand, and Southern Sudanese rebel movements in the southern Sudan region, on the other.

The first round of the civil war that took place from 1955-1972 came to an end only when Jaafar Nimeiri, the then president of Sudan, signed the 1972 Addis Ababa Agreement which recognised the southern region as 'a single self-governing region'.[XXIII] One of the causes of the first civil war in 1956 was the exclusion and marginalisation of the Southern Sudan region during the formation of the state and its subsequent economic, social, and political marginalisation during state- and nation-building in the post-colonial Sudanese state.[XXIV]

No sooner had independence of Sudan from Britain been declared, than the term federalism became a taboo, tantamount to subversion, in the political language of the Northern elite who, on the eve of independence, were assuring their Southern brothers that they sympathised with their cause.[XXV] In 1957, a parliamentary committee set up by the new Sudanese to look into the federal question rejected the idea on the ground that it was unsuitable for the Sudan. It then became apparent that the clause had been inserted as a political manoeuvre rather than as a genuine promise on the part of the North.[XXVI] For example, one of Northern opposition political leaders, Mohammed Ahmed Mahgoub, had this to say regarding the Southern Sudan case:

> We canvassed all the parties to secure unanimity. We encountered some difficulty in convincing the Southerners so we inserted a special resolution to please them pledging that the constituent Assembly would give full consideration to the claims of Southern Members of Parliament for a federal Government for the three Southern provinces.[XXVII]

In November 1958, the Sudanese government was overthrown by a military coup led by General Ibrahim Abboud, and the new military regime set out to deal forcefully with dissent in the South.[XXVIII] It became official government policy that the South introduce Islam and Arabic throughout the country with all speed in order to unite the Southern people and Sudan in general, in the hope that this would discard calls for federalism. African traditional religions

practised mainly in the South were discouraged; in February 1962, all foreign Christian missionaries in the South were expelled.[XXIX] As unrest in the South mounted, Northern forces attacked Southern villages, with as many as half a million Southerners fleeing into exile. The government of Abboud declared a state of emergency and warned that any talk of federalism would be considered treason.[XXX]

As the war continued in the Southern Sudan region, General Abboud's military regime was overthrown through mass popular uprisings, and a civilian transitional government was formed in 1964. While the war was continuing in the Southern Sudan region, another military officer, Colonel Jaafer Mohamed Nimeiri, staged a coup and overthrew the civilian government in May 1969. In 1972 a peace agreement, known as the Addis Ababa Peace Agreement, was signed between the South Sudan Liberation Movement (SSLM) and the Nimeiri regime.

The Addis Ababa Peace Agreement gave Southern Sudan a regional autonomous government, referred to as local autonomy. For the first time, the South had its own Regional Assembly, High Executive Council (HEC), Regional Civil Service, Regional Development Corporation, and a regional principal language (English) in addition to the national official language (Arabic). The question of federalism was instead answered by providing local autonomy to Southern Sudan.[XXXI] At the centre, the South was represented by Southern quotas in the government, national assembly and the army. The country's Second Vice-President was a Southerner and headed the HEC.[XXXII] Article 2 (a) of the Addis Ababa Peace Agreement stipulated that the Southern Provinces Regional Self-Government Act (SPRSA) could only be altered by a vote of three-quarters of the National Assembly and approval by a referendum in the South.[XXXIII]

Despite the fact there appeared to be legal safeguards for the regional autonomy that the South was granted, within the space of little more than a decade the agreement had collapsed and brought down with it the 'federal experiment' in Sudan.[XXXIV] In 1982, President Nimeiri divided Southern Sudan into three regions, and in 1983 he abrogated the Addis Ababa Peace Agreement, dissolved the regional government elected by the people of Southern Sudan, and then appointed a new one. This brought about an end to the Addis Ababa Peace agreement

and the beginning of another civil war in 1983, which ended in 2005 with another peace agreement.[XXXV]

The second round of the civil war, between the SPLA and the government of Sudan, began when the 1972 Agreement was reneged by Nimieri in 1983. It continued until the Comprehensive Peace Agreement (CPA) was signed in 2005. The CPA once again recognised the South Sudan region as a single political entity, with not only extensive autonomy but also the option to secede from Sudan.[XXXVI] A federal arrangement that provided a degree of autonomy to the southern region was thus a matter of peace or war before the country achieved independence. But what makes federalism a relevant political and constitutional issue in an independent South Sudan?

Upon independence in 2011, South Sudan adopted a transitional constitution which entrenched the 'decentralised system' that the country inherited from the Sudan.[XXXVII] Federalism thus seemed no longer relevant for the political agenda, even though the permanent constitution, which was supposed to be adopted in 2011, was to settle this issue once and for all. At the end of the Interim Period of the CPA, when South Sudan became an independent state, the new country was set to have constitutional change from a decentralised to a constitutional federal arrangement by writing a transitional constitution, or amending the Interim Constitution.[XXXVIII]

There was no new transitional Constitution; instead a few amendments were made in the Interim Constitution by the SPLM governing party which claimed that amendment of the existing Interim Constitution was the only thing needed.[XXXIX] Constitutional Review Commission members were appointed by the President. Almost all of them were cadres of the SPLM. There was no representation from other political parties, no representation from civil society organisations, and no other stakeholders. It was these cadres from the SPLM who amended the Interim Constitution.[XL] This happened against the backdrop of the presence of Article 1.4 of the Interim Constitution that recognises South Sudan as a multi-ethnic, multicultural, multi-lingual, multi-religious and multi-racial entity where diversities peacefully co-exist.

The South Sudanese elite's failure to build strong and responsive state intuitions prior to and after independence, and its failure to prioritise nation-building, resulted in manipulation of ethnicity to achieve narrow interests, and endemic corruption, as well as its involvement in conflict.[XLI] The Transitional National Legislative Assembly was divided along ethnic and regional lines when the Transitional Constitution was passed. Members of Parliament from the majority Dinka ethnic community favoured the status quo and retained the decentralised unitary system. Equatorians, as a bloc majority of MPs from Nuer ethnic community, wanted federalism to be adopted as the system of government in South Sudan.

In the end, it was the President who came to Parliament and threatened that those MPs who did not want to pass the amended bill would be dismissed from parliament. A clause for federalism was not inserted in the draft of the amended transitional Constitution.[XLII] The President threatened to dismiss members of parliament, and the Transitional National Legislative Assembly was forced to ratify the Transitional Constitution. This was the beginning of marked political differences between President Kiir, his Vice President Riek Machar, and their factions within the governing party. This later resulted in full-scale war in South Sudan.

Though the Transitional Constitution and its amendments were passed by the parliament as the President wanted, there are still a lot of challenges in the constitutional separation of power between arms of government and the rule of law associated with the implementation of some of the clauses in the text of the Constitution. For example, Article 3 (1–4) of the Transitional Constitution stipulates the supremacy of the Constitution and provides that the authority of the Government at all levels shall be derived from the Constitution.[XLIII] This clause, along with three other clauses in the Constitution which discuss decentralised systems of governance, has been violated several times by the executive. The Constitution has given the right to each level of government, like the state and local government, to elect their own representatives such as state governors and county commissioners.[XLIV] This has not been the case since the 2010 general elections in Sudan, when South Sudan separated and became independent from Sudan. Many elections have been held in South Sudan since 2010. It has been and is still the President of the Republic who appoints or relieves states governors and

counties commissioners from the offices they hold. The Transitional Constitution has been unconstitutionally amended several times to increase the powers of the President.[XLV]

According to Jok,[XLVI] the CPA was built on the premise of two viable states. Expectations for improvement in human security among all Sudanese people were high: state violence and all other types of violence inflicted on them would cease and good governance would become the order of the day – the so-called 'peace dividend', in other words. Instead, the CPA produced two countries that were so weighed down by violence that human security would not return in the absence of a massive national effort on both sides of the former conflict divide. The citizens of both countries, the Republic of Sudan and the Republic of South Sudan, wanted their governments to focus on security and stability.[XLVII]

However, federalism re-emerged as an important political topic less than three years after South Sudan became independent and while the country was still in the transitional period. This time around, the debate about federalism arose, not because of external factors, but because a power struggle that had arisen within the SPLM unearthed old inter-ethnic and intra-ethnic rivalries which had been eclipsed until then by the struggle for independence.

The political crisis of December 2013 that led to the post-independence civil war was not surprising, since this was not the first time that internal political rows had arisen among the politicians of South Sudan during peacetime. For instance, such rivalries and hostilities were among the reasons for the collapse of the regional autonomy of the Southern Sudan region which was put in place by the 1972 Addis Ababa Agreement. In fact, the undoing of the regional structure was demanded by the ethnic communities of the Equatoria province, who, having alleged the domination of the regional structure by the Dinka community, proposed that each of the three constituent units of the region be a region in its own right.[XLVIII] Nimieri used this inter-ethnic division as an excuse to abolish the regional structure and divide the region into its constituent units.

Historical rivalries in South Sudan are also not limited to those between different ethnic communities. Intra-ethnic or tribal rivalries and conflicts exist. The historical rivalry between the Dinka of Bahr el Ghazal (the birthplace of Kiir) and the Dinka of Greater Bor (the birthplace of John Garang) is a case in point. For instance, the political division and

confrontation of 2004 between John Garang and Kiir was predicated on the allegation that the Dinka of Bahr el Ghazal were 'sidelined' in the SPLM.[XLIX]

The inter-ethnic and inter-tribal rivalries and hostilities, which are again making federalism a pertinent political and constitutional subject in South Sudan, have deep historic roots. They were shaped, in part at least, by the political and economic agenda initially of the British colonial authorities and later the government of Sudan. The SPLM adopted them and sought to achieve those objectives.[L] It is particularly important to examine the drawing and redrawing of internal boundaries in South Sudan and how this was used as a mechanism to pursue specific political economic goals both before and after independence. Internal administrative boundaries within the former southern Sudan region were created and recreated first by colonial authorities with a view to managing inter-ethnic rivalries and conflicts and the attendant competition for resources. The colonial authorities in some cases placed different communities within a single provincial administration.

A case in point is the Upper Nile province, where the Nuer, Chollo, Anuak, Murle and Dinka people of Jonglei and northern Upper Nile were placed under a single provincial administration.[LI] In other cases, they placed different tribes of the same ethnic community in a single provincial administration, thereby creating congruence between ethnic boundaries and provincial boundaries. For instance, they placed the Dinka people of 'the two Duks, Kongor and Bor' under a single provincial administration. They also redrew provincial boundaries to incorporate the Nuer in Bahr el Ghazal into the Upper Nile and the Dinka in the Upper Nile province into Bahr el Ghazal.[LII] Importantly, the colonial authorities attempted, albeit not always successfully, to create ethnically or tribally homogenous districts. In some cases, they even 'forcefully relocated communities to new locations' to maintain some level of homogeneity at the district level.[LIII] The rationale was to create conditions favourable for colonial indirect rule through ethnic and tribal chiefs.

The government of Sudan also redrew provincial boundaries on the basis of colonial boundaries. The three provinces in the South Sudan region were abolished and the region was subdivided into ten states. Moreover, SPLM introduced changes to the internal boundaries of the South Sudan region in the areas that it brought under its control during the civil war with

the Sudan. It also introduced different tiers of administration, including 'a three-level local government structure, which consists of counties, payams, and bomas'.[LIV] It is within that historical context that the establishment of a federal system in South Sudan is being debated and negotiated. This brings us back to the main question of the article: What are the federal options on the table?

4. The federal options in the 2015 and 2018 Peace Agreements

The establishment of a federal system has now been put forward by the opposition as a critical condition for the resolution of the conflicts, even if the conflicts are not directly linked to such demands. This is the reason that the establishment of a federal system was at the centre of the negotiations sponsored by IGAD. The negotiations led to the signing by Kiir and Machar of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), in Addis Ababa, in August 2015. This Agreement, which was supposed to be incorporated into the 2011 Constitution of South Sudan, required as an interim measure the enhanced devolution of powers and resources to states and local government.[LV] It also provided for the establishment of a Transitional National Government of Unity (TGNOU).[LVI] The TGONU is tasked to ensure the adoption of a permanent constitution which would entrench a federal system.

The August 2015 Agreement did not, however, explicitly state what kind of a federal system was to be established in South Sudan. The different political groups had different understandings of what kind of federal system the Agreement envisaged. This led to several controversies with respect to the number of states the country was supposed to have and on what basis the boundaries of the states would be defined. Machar proposed the establishment of 22 states that were demarcated along the boundaries of the former colonial districts.[LVII] However, Kiir abolished ten states and created 28 states, later adding four more states, bringing the total number of states to 32.[LVIII] He did this claiming to be implementing the 2015 Agreement and setting the stage for the future federal system. This disagreement was key

amongst the factors that led to the breakdown in the implementation of the August 2015 Agreement, a mere year after it was signed, and to the continuation of the civil war.

When the two parties came face-to-face in Khartoum in June 2018 to negotiate a new ceasefire and peace agreement, the number and boundaries of the states of the future federal dispensation was thus on the agenda. The new agreement that the warring parties signed in September 2018, the R–ARCSS, covers several issues, ranging from the establishment of a 'Revitalised Government of National Unity' (R–TGoNU) to the adoption of a permanent constitution (section 1.2, R–ARCSS). It provides that the R–TGoNU should be established within eight months after the signing of the Agreement (section 1.1, R–ARCSS). The RTGoNU is tasked with taking measures towards creating national cohesion, including securing peace in the country, initiating and supporting a process of national reconciliation, and the like (section 1.2, R–ARCSS).

At the time of writing, the eight-month period for the establishment of the R–TGNU had lapsed. It was extended by six months, a period which is also about to expire. The formation of R–TGONU took nearly two years after the signing of the peace agreement in 2018.The formation of a national unity government was postponed twice for six months due to lack of political commitment from leaders.[LIX] Currently, the implementation of security arrangements that may lead to restructuring of the security organs, including the national armed forces, has begun, but the establishment of the unified forces of these security organs has not yet been realised by the parties. This would revitalise the government of national unity (R–ToGONU).

The Agreement also reiterates that the establishment of a federal system in South Sudan is still a popular demand. This demand has been confirmed by the three regional conferences conducted by the ongoing National Dialogue, which conducted its national conferences on 2 December 2019 in different states as this article was written.[LX] It seeks to resolve the controversy regarding the federal design, especially the issue of the number and boundaries of the states, in two alternative ways. The first, and what appears to be the preferred solution, is the establishment of two bodies by the IGAD that will help the parties resolve their differences on this specific issue. These are a Technical Boundary Committee (TBC) and an Independent Boundary Commission (IBC). According to the Agreement, the TBC would be

composed of members drawn from IGAD member states and the so-called Troika countries (Norway, the United Kingdom, and the US). The IBC would in turn be composed of 15 individuals, five of whom would be 'nominated' by the R–TGoNU and five by opposition parties. The rest would be nominated from and by member states of the AU High level Ad Hoc Committee on South Sudan, which is composed of South Africa, Nigeria, Rwanda, Chad, and Algeria. The IBC would be chaired by a non-South Sudanese.[LXI]

The TBC is charged with the responsibility of defining the country's 'tribal areas' as they stood on 1 January 1956.[LXII] This Committee is also required to finalise its report within 60 days and submit its findings to the IBC. Based on the TBC's findings regarding these 'tribal areas', the IBC would then make recommendations regarding the number and boundaries of the states,[LXIII] amongst other things. The IBC was expected to finalise its work and submit its final report to IGAD within 90 days and the Agreement did not permit an extension. The IBC has not thus far come up with its proposal, even though the 90 days' deadline has lapsed.

The Agreement provides that, if the IBC fails to come up with recommendations,[LXIV] the second alternative kicks in. The government and opposition would come up with their own proposal on how the number and boundaries of the states should be defined.[LXV] The IBC would then automatically become a Referendum Commission on Number and Boundaries of States (RCNBS) and administer the referendum on the proposals of the parties to the agreement.[LXVI] The government's proposal has thus far been the retention of the 32 states that Kiir created after the signing of the 2015 Agreement. The SPLM-IO, on the other hand, is pushing for the establishment of 22 states according to colonial districts, while some politicians from the three Equatoria provinces are in favour of ten states serving as the constituent units of the federal dispensation.[LXVII]

If the first option does not resolve the problem, the three proposals (or any new proposal in this regard) would thus be tabled in a popular referendum. In the course of the delay and failure of the parties to reach an amicable solution as to the number and boundaries of the states, the President came up with a presidential decree taking the country back to the ten states inherited before independence. Now South Sudan is being governed under the old ten

states. Nevertheless, there are still simmering disputes about the boundaries between the counties of the states, or between one state and another.

4.1 Geographic or ethno-federal system?

At the time of writing, there was no concrete proposal on the design of a federal system for South Sudan. The debate about the shape and texture of the federal system that South Sudan is to adopt, especially the number of the subnational units and how they are to be structured, is far from settled. However, looking into the mechanisms that were put in place in the 2018 Agreements for defining the number and boundaries of the states and the proposals of the contending groups, leads inevitably to the conclusion that South Sudan is destined to enter into a federal arrangement that revolves around the territorial accommodation of ethnicity.

As indicated above, the IBC's recommendations are expected to be based on the report of the TBC and the latter is tasked with defining 'tribal areas'. This implies that ethnicity will be a key factor in demarcating the boundaries of the states. Moreover, the federal design is being negotiated with historical inter-ethnic rivalries in mind. These rivalries were in turn shaped by the drawing and redrawing of boundaries in the former Southern Sudan region. Thus, as Mahmood Mamdani (2018) puts it '[t]he new agreement is a sharing of the pie between the tribes of South Sudan: first the major tribes, Dinka and Nuer, and then the lesser ones … Every inch of South Sudan has to be marked as part of one tribal homeland or another. Even areas with multi-ethnic populations must be defined as belonging to one particular tribe.'[LXVIII]

As mentioned above, if the IBC fails to come up with its own recommendations, the three proposals, i.e., the ten-states proposal, Kiir's 32-states proposal, and Machar's 21-states proposal, will be tabled for a referendum. It is often argued that the difference between the proposals relates to ethno-federalism vs geographic federalism. However, it is maintained here that none of the three proposals reflect a purely geographical federalism. All three proposals have the ethnic factor at heart, even though the political motives underpinning the proposals are different, even conflicting. This is not surprising since South Sudan's internal boundaries have been structured and restructured several times since colonial times. Almost always, the

structuring of internal boundaries has centred on the management of ethnic diversity, or the prevention of inter-ethnic conflicts.

Machar's 22-states proposal takes the colonial districts as the basis for demarcating the boundaries of the states. According to Justin and De Vries, the British colonial authorities divided the three provinces of the then southern Sudan region into 21 districts mainly along ethnic lines. In some cases, they 'forcefully relocated communities to new locations', among other actions, with the aim of creating ethnically homogenous districts in order to be able to exercise indirect rule through local chiefs.[LXIX] Machar is thus proposing that these ethnically organised districts should serve as states in the future federal dispensation. Kiir created the 32 states with the ethnic factor in mind. Not only are the states structured along ethnic lines, but the majority of the states are Dinka-dominated. This would supposedly enhance Kiir's or the Dinka's position, should the 32 states serve as the constituent units of the future federal dispensation. For instance, the Dinka community will be able to control the majority of the seats in the Council of States.[LXX]

Likewise, the ten states were also organised along ethnic lines:

> In 1992 the Sudanese government replaced the eight provinces with 26 states—16 in the north and 10 in the south. In the parts of the country under its control, the Sudan People's Liberation Movement (SPLM) established a three-level local government structure, which consists of counties, payams, and bomas two years later. Importantly, both the government and the SPLM used the territorial divisions implemented by the colonial authorities, either by merging colonial districts to create states or by including chieftaincies in the local government structure in the SPLM's "liberated" areas. *Reflecting colonial practices, ethnicity became a prominent aspect of the restructuring of these units, at least in South Sudan*.[LXXI]

It is clear from the above that the territorial structure of South Sudan's federal system is likely to be impacted on by the ethnic factor in one way or the other. It is critical to note that the said Peace Agreement has also established a Ministry for Federal Affairs. The latter has indeed started to organise workshops, seminars, and meetings with a view to studying different federal options; however, the inclination appears to point to fiscal federalism or fiscal and

geographical federalism, bearing in mind, of course, the present fractured and disunited South Sudanese society.

The role of the international actors in the peace negotiations is also important. IGAD, the broker of the peace deal, did not promote any specific federal design for South Sudan. However, the members of this regional organisation, especially Kenya and Ethiopia, have sought to influence the federal design of South Sudan. As Wight[LXXII] observes, 'Ethiopia, proud of its own federal system, favoured an ethnic model, while Kenya, Uganda, and Sudan were opposed to such an approach.' It should be noted, though, that Kenya's system of devolution to counties is also designed with a view to territorially managing the ethnic diversity of the Kenyans, and these counties, save Nairobi, have dominant ethnic communities.

Regardless of how the issues around the number and boundaries of the states are resolved, it seems that the federal model of South Sudan will be decidedly different from the Ethiopian ethnic federal model in one basic way. That is, it will avoid the logic of 'one-state-one-ethnic community' which underpins the Ethiopian federal system. The 1995 Constitution of Ethiopia creates nine states but contains a constitutional principle that allows each ethnic community to establish its own state. If the constitutional principle is to be taken to its logical conclusion, even an ethnic community with a population of a few thousand, settled in a territorial area as small as a district, can make a demand for its own state.

During the first two decades of its rule, the ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), managed to suppress the demands of small ethnic communities to establish unviable mini-states. However, this is changing rapidly. As the ruling party has become less cohesive, more and more ethnic communities have begun demanding their own states. For example, if these demands are granted, the Southern Nations, Nationality and Peoples' Region (SNNPR), one of the nine states, will break up into tens of mini-states and disappear. Moreover, the civil war between the federal government and the Tigray region, which began in November 2020, is directly or indirectly linked to the design of the country's federal system.[LXXIII]

Contrary to the Ethiopian model, none of the three proposals above will result in a single ethnic community being locked within a single state. This will make the South Sudan federal

system more like the Nigerian one, which divides every ethnic community into several states. This should help South Sudan avoid one of the major flaws – in the words of Yonatan Fessha,[LXXIV] 'the original sin' – in the design of the Ethiopian federal system.

4.2 The prospect of ethno-federalism bringing peace in South Sudan

As discussed earlier, well-designed ethno-federalism has great potential to resolve inter-ethnic conflicts and bring about sustainable peace. However, it also harbours a grave danger, especially if poorly designed and implemented, which may lead to the disintegration of a state. What makes the implementation of an ethno-federal system in South Sudan especially risky is that the country has had less than ten years of existence as a state and has yet to create a national identity. Before independence, the civil war encouraged the people of the region to transcend ethnic boundaries and cooperate towards a common cause. With the end of the civil war, that common cause has disappeared. An ethno-federal system is likely to make the creation of a national identity even more difficult.

The question, however, is whether South Sudan has any alternative but to factor the ethnic diversity of its people into its federal design. It does not seem feasible to design a federal system that deliberately ignores the ethnic factor. It is critical to put in place an institutional mechanism that might help manage the ethnic diversity of South Sudan. Moreover, the R–ARCSS (section 6.2) demands it. Thus, factoring ethnicity into the design of the federal system of South Sudan seems inescapable, despite the difficulties it may create. Lasting peace and stability in South Sudan may not be achieved without a system that recognises the diversity of its people. This does not mean, however, that the ethno-federal system would guarantee peace in the country. It simply means inter-ethnic conflicts are more likely to occur in the absence of a federal system that manages the ethnic diversity of the people than without it.

It is maintained here that three critical conditions must be fulfilled if a federal system is to bring about a sustainable peace in South Sudan. First, the federal system should be designed in such a way that it incorporates the views and carefully balances the interests of all contending groups in the country. The federal design should not be, or be perceived to be exclusively based on a single design proposal, lest it lose legitimacy and become a source of conflict. It

should avoid being seen as a design that protects and promotes the views and interests of any single group. The Ethiopian federal system provides a good lesson in this respect. It is perceived by many as an imposition by the EPRDF and the 1995 Constitution as simply the political programme of the TPLF.[LXXV] The federal system thus remains the principal source of political discord in the country.

Secondly, careful attention should be given to designing shared federal institutions in such a manner that they promote national cohesion. This is especially important given that South Sudan desperately needs to establish a national identity and that shared institutions are meant to serve such purposes. As is clear from the discussion above, the disputes, debates and negotiations so far are focused on the number and boundaries of the states and little attention has been given to the design of federal institutions. In the 2015 and 2018 agreements, references to the design of the national government are limited to the issue of how the different warring factions will be represented in the TGNU (R–TGNU). The constitutional principles in the two agreements which are meant to guide the drafting of the permanent constitution are silent on the need to design the federal system in a manner that helps build national cohesion while being explicit on respecting 'ethnic and regional diversity and communal rights'.[LXXVI]

Thirdly, there should be strict adherence to constitutionalism. The second principle in the 2015 Agreement on the drafting of a permanent constitution puts federalism and constitutionalism in the same sentence.[LXXVII] Indeed, once a constitution is adopted that entrenches a federal system and has been designed by balancing various interests and concerns, it must be adhered to. Unfortunately, contending groups in South Sudan are notorious for not adhering to agreements they have entered into and the constitutional principles they have endorsed. One need only note the fact that they were unable to implement the ARCSS and that, at the time of writing, the R–ARCSS was about to collapse. As argued elsewhere, the lack of will to adhere to agreements and constitutional principles '[has been] the missing element in the federal and federal types of arrangements that were attempted in South Sudan but which failed to bring peace'.[LXXVIII]

5. The current status of South Sudan regarding federalisation

The Ministry of Federal Affairs (MOFDA) is one of the institutions created by the Revitalised Peace Agreement of 2018 and is tasked with leading the South Sudan quest for federalisation. It is also charged, along with other relevant institutions, with the responsibility for creating necessary participatory and inclusive platforms for the discussion of options to reinvigorate the constitutional functions, such that states and local governments can exercise their powers accountably and effectively. The accountability of public institutions to citizens at all levels of government is what has been the missing link in the Transitional Constitution 2011, as amended. For example, Article 35 (2) of the Transitional Constitution stipulates that national resources shall be used effectively, managed and efficiently utilised, focusing attention on the provision of gainful employment for the people, and improving their lives and livelihood, by building roads, schools, airports, community institutions and hospitals, and providing clean water, food security, electric power and telecommunication services to every part of the country.[LXXIX]

This is not the case on the ground in practical terms in terms of the implementation of the Constitution, and adherence to constitutionalism and the rule of law. Since 2005, from the Interim Period of the CPA until now, massive public resources, especially revenues from petroleum, oil and other mineral resources, have been embezzled and looted with impunity by a few elites.[LXXX] There are no roads, hospitals or schools which have been built, nor clean and potable water or public security provided to the people of South Sudan by the ruling SPLM party, despite the peace agreement. Despite endemic corruption, no individuals who have been holding or still hold public office have been prosecuted for corruption or other similar offences they may have committed. According to the Corruption Perception Index International Report of 2021, South Sudan is the most corrupt country in the world.[LXXXI] Lack of adherence to constitutionalism and rule of law, due to failed leadership from the top, are considered to be causes of the endemic corruption in the country.

Based on the mandate provided by the Peace Agreement,[LXXXII] MOFDA has been given the responsibility to develop a federal policy framework and blue-print documents that can

guide the move towards the federalisation process. The policy framework rationalises and contextualises some strategic issues and priorities that are inherent in establishing a form of federalism which is tailored to South Sudan.[LXXXIII] The draft policy highlights how constitutional powers, functions, and governing responsibilities can be guaranteed, with reference to three levels of government: national, state, and local government. It also considers the cooperative inter-governmental relations that the three levels might have with each other. It aims to clarify and to remove uncertainties regarding how South Sudanese citizens can interact with federal government institutions and with each other across the constituent states. The draft policy has been developed against the backdrop of shortcomings in the Transitional Constitution 2011 in political, administrative, and economic decentralisation, in which power and resources have become and still remain too centralised and too concentrated in the national government, in the hands of a few political elite.

A typical case is the centralisation of power by the President and national executives that emanates from the series of constitutional amendments which give unlimited power to the President. Examples are the dismissal of elected governors and the appointment of unelected ones to their positions, as well as the appointment of members of parliament at different levels of government, through presidential decree orders. This is contrary to provisions in the Transitional Constitution of 2011. For example, Article 36 of the Constitution states that all levels of government shall promote democratic principles and political pluralism, and shall be guided by the principles of decentralisation and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs.[LXXXIV] This provision, although slightly ambiguous concerning the exact division of power between different levels of government, makes it clear that there is a division of power between levels of government and that each level of government has power of autonomous self-government, despite the absence of constitutional adherence to the rule of law.

The draft policy framework is based on rigorous analysis of the current Transitional Constitution 2011 as Amended. Based on the analysis, the teams found out that more accountable and effective engagement by states and local governments is urgently needed to relieve public pressure on the national government, which currently overloads itself with every

facet of the public life of citizens in all corners of the country. The national government instead needs to be empowered as an actor that safeguards constitutional democracy in a federated country.[LXXXV]

In addition to its focus and its specific references to constitutional options for workable form of federalism in the context of South Sudan, the policy framework seeks a wider impact measured by influencing political and public discourse on federalism more widely. For instance, once the federal Constitution is enacted, the policy framework will continue to serve as a guide for legislative enactments and reforms for its implementation, so as to develop state democratic and inclusive state institutions.

However, there are daunting challenges facing the MoFEDA in policy implementation and institutional leadership in the federalisation process. Among the many challenges is the lack of political will from the R–ToGNU to allocate resources, especially financial resources, to the ministry in order to implement the policy. This lack of political will is caused by lack of trust from the Dinka elite, who equate federalism with the *Kokora* of the 1970s, a policy that the Dinka ruling elite at the time considered as responsible for dividing South Sudanese along ethnic lines and paving the way for the Khartoum regime's divide-and-rule policy in Southern Sudan along regional and ethnic lines. Secondly, the Dinka elite have an unexpressed fear that, if South Sudan goes federal, this may mean loss of power and the loss of resources they have controlled on the pretext of being the majority ethnic community in the country.

Since 2019 to date, several thematic workshops and symposia organised by MoFEDA, with the support of its partners, have addressed aspects of the establishment of federalism in South Sudan.[LXXXVI] Some of these engagements, including those conducted under the aegis of an ad hoc working group on federalism, have altered the nature of informed debates on federalism in the country. Building on such dialogues, the Draft Policy Framework for the Federal Governance of South Sudan is timed to reflect that the country is progressing towards the crucial stage of inviting, analysing, and validating public and stakeholders' submissions for inclusion in a permanent federal constitution. The policy framework is intended to focus stakeholders' debates on well-informed, actionable constitutional proposals to be drafted in a consensus blueprint for a federal constitution. The blueprint is supposed to be sent for

consideration and elaboration by constitution-making organs after their establishment by R–TGoNU. It is intended to provide a focal point for subsequent public and stakeholders' debates.

Nevertheless, while MoFEDA is trying to carry out stakeholders' debates on federal options, the process has been frustrated by the political elite from the President Kiir SPLM's mainstream faction, a 'senior' partner in the Revitalised Government of National Unity (R–TGoNU). They claim that no resources, including funding, are available for conducting state debates on the federal options South Sudan should choose. Without exhausting the options of forms of federal arrangements, there is political contestation amongst the political elite. Some argue that South Sudan will resolve conflicts when it adopts a form of federalism that recognises and empowers diverse ethnic communities. On the other hand, there are those who believe that ethnic federalism may exacerbate conflict in the already fragile and conflict-prone South Sudanese state. As such, there is still no consensus amongst different political parties as to which form of federal system of governance South Sudan might choose and which federal country it should benchmark best practices from and share experiences with.

Regardless of which form of federalism South Sudan chooses, it is necessary to create state-inclusive institutions that can resolve and accommodate South Sudan's ethnic diversity. An inclusive state can be achieved equitably through constitutionally entrenched devolution of power and resources to subnational levels of government. This requires political commitment from the leaders. But the current political climate tells us that it is difficult to achieve the political will, because the most powerful elites from the Dinka ethnic community do not want to relinquish the power they hold. Despite the contestation, most of the parties' leaders seem to hint that South Sudan may choose geographical or territorial federalism. Their argument is that territorial or geographical federalism does not ethnicise political differences within a federation. By contrast, the leaders argue that federalism based on ethnic configuration exacerbates conflicts amongst constituent units. Among the federal states in Africa that South Sudan wants to take experience from are Kenya and Nigeria. From outside the African continent, its want to benchmark best practices from the US and Federal Republic of

Germany. The reason is that these countries have not considered ethnicity as the basis of their formation of federations.

Some political elites from the Dinka ethnic community assert that South Sudan wants a federal Constitution that does not consider ethnicity as a basis of institutional response for managing ethnic diversity and bringing lasting and sustainable peace in the country. The argument is that an ethno-federal arrangement as a basis of political identity may lead to the polarisation of ethnic differences in multi-ethnic South Sudan, rather than solidifying national unity. They also believe that adopting ethnic federalism or multinational federalism may negate the national government's vision of 'bringing development' that in fact they cannot deliver, and that ethnic affiliations may retard economic and political progress, which is completely missing.

6. Conclusions

There is no doubt that the complex conflicts in South Sudan are influenced by a multitude of factors. They relate to matters such as conflicts at different levels and concomitant insecurity and instability, ethnic/tribal diversity, economic difficulties, competition for resources and the history of political rivalry among different groups. It is a very young nation with virtually no experience as an independent country despite seceding from a country (the Sudan) that attained its independence from Britain in 1956. There is an immense expectation amongst the populace and the international community that a federal system or federal-type arrangement will bring a lasting solution to the myriad of problems the country is facing.

Federalism might be, and indeed has been, an appropriate institutional response to challenges emanating from ethnic/tribal diversity. On its own, however, it is not capable of being a credible response to these challenges. It must be complemented with democratic rule, constitutionalism, respect for human rights and the rule of law. This is all the more important given that South Sudan has a multi-ethnic, multicultural and multi-religious population and that the federal system is meant to manage such diversity. It is argued that no federal system is capable of doing so without respect and tolerance for political diversity, trust in democratic

outcomes, respect for constitutional rules and human rights, an independent judiciary and a general adherence to the law.

Expecting a federal design along tribal lines to sustain peace in South Sudan without its being complemented by those elements is naïve. It may even be irresponsible, in that the proposed tribal federalism may then aggravate tension rather than diffuse it. In addition to working out a credible federal design, whether infused by territorial accommodation of ethnic groups or not, South Sudan must put equal effort into becoming a democratic country based on democratic rule, respect for human rights, constitutionalism, and the rule of law.

---

* Zemelak Ayele is Associate Professor at the Centre for Federalism and Governance Studies (CFGS) of Addis Ababa University (AAU); Extra-ordinary Associate Professor: Dullah Omar Institute Dullah Omar Institute for Constitutional Law, Governance and Human Rights of University of the Western Cape (UWC). Email address: zemelak.ayitenew@aau.edu.et.
Jaap de Visser is Director of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights of University of the Western Cape (UWC). Email address: jdevisser@uwc.ac.za.
David Ruach Tang is Ph.D. candidate at the Centre for Federalism and Governance Studies of Addis Ababa University. Email address: ruachtang6@gmail.com.

I John Mwangi Githigaro (2017) 'What went wrong in South Sudan in December 2013' *African Conflict & Peacebuilding Review* 112–122; Patrick Wight (2017) 'South Sudan and the four dimensions of power-sharing: Political, territorial, military, and economic' *African Conflict & Peacebuilding Review* 7(2) 1–35.

II Douglas H Johnson (2014) 'Federalism in the history of South Sudanese political thought' Rift Valley Institute, Research Paper 1.

III *Ibid.*

IV See Jumar Mabor Marial (2016) 'The Doctrine of Constitutionalism in the Republic of South Sudan can only be upheld and/or contravened by Lakes State Scenario' *South Sudan Nation* (23 February 2016); Lotje de Vries & Mareike Schomerus (2017) 'South Sudan's Civil War will not end with a peace deal' *Peace Review,* 333-340.

V See John Mwangi Githigaro (2017) 'What went wrong in South Sudan in December 2013' *African Conflict & Peacebuilding Review* 112–122. There are indeed other complex and fundamental causes to the conflict in South Sudan even if the December 2013 incidents triggered the violence. These include unconstitutional measures that Kiir took to consolidate political powers in his office and person, in effect undermining the decentralised system of the country. See Marial (2016).

VI *Ibid.*

VII Agreement for the Resolution of the Conflict in the Republic of South Sudan (Addis Ababa, 2015). Revitalised Agreement for the Resolution of the Conflict in the Republic of South Sudan (R–ARCSS, 2018).

VIII Diane Orentlicher (1998) 'Separation anxiety: International responses to ethno-separatist claims' 23 Yale Journal of International Law, 9; Töpperwien N (2001) Nation-state and normative diversity Basel: Institute of Federalism Fribourg Switzerland, 67 & 195.

IX ibid; Fessha (2010) Ethnic diversity and federalism: Constitution making in South Africa and Ethiopia Farnham: Ashgate, 10–11; Denise G Réaume (1995) 'Justice between cultures: Autonomy and the protection of cultural affiliation' 29 University of British Columbia Law Review, 121.

X John McGarry Brendan O'Leary (1994) 'The political regulation of national and ethnic conflict' 47(1) Parliamentary Affairs: A Journal of Comparative politics, 103.

[xi] Asnake Kefale (2012) *Federalism and ethnic conflict in Ethiopia: A comparative regional study* New York: Routledge.
[xii] Henry E Hale (2004) 'Divided We Stand: Institutional sources of ethnofederal state survival and collapse' 56:165 *World Politics 165-193*.
[xiii] Liam Anderson (2016) 'Ethnofederalism and the management of ethnic conflict: Assessing the alternatives' 46(1) *Publius: The Journal of Federalism 1-24*.
[xiv] See Henry J Steiner (1991) 'Ideals and counter-ideals in the struggle over autonomy regimes for minorities' *Notre Dame Law Review* 66 1539–1560; Jan Erk & Lawrence Anderson (2010) 'The paradox of federalism: Does self-rule accommodate or exacerbate ethnic divisions?', in Erk & Anderson (eds) *The paradox of federalism: Does self-rule accommodate or exacerbate ethnic divisions?* London: Routledge 1–12.
[xv] See Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa; Douglas H Johnson (2014) 'Federalism in the history of South Sudanese political thought' Rift Valley Institute, Research Paper 1.
[xvi] Federalism became an important topic in the political discourse of the Southern Sudan region (the provinces in the region) especially when the British colonial authorities began exploring the possibility of merging the five northern and the three southern provinces into one political entity. It also became an issue in the early 1950s when various political parties in the northern region, the Umma Party in particular, pushed the agenda of Sudan's independence. There were two issues in this respect. The first issue was whether Sudan would remain part of Egypt or would be an independent state. This was an issue since certain political parties of the north, especially the National Union Party, were in favour of remaining with Egypt, even though the NUP changed its policy in this regard following the 1953 elections. The second issue was whether the then three southern provinces (Bahr el Ghazal, Equatoria and Upper Nile) would remain part of Sudan. Southern politicians were in general against the quest for Sudan's independence, the reason being that the southern provinces were not economically and politically ready to be part of an independent Sudan on equal footing with the northern provinces. It was at this stage that politicians from the southern provinces began demanding a federal arrangement as a condition if at all the southern provinces were to remain within an independent Sudan. Taha (2008).
[xvii] Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[xviii] *Ibid.* See also Douglas H Johnson (2014) 'Federalism in the history of South Sudanese political thought' Rift Valley Institute, Research Paper 1.
[xix] Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[xx] Angelo Lobale Lokoro Loiria (1969) *Political awakening in Southern Sudan 1946–1955: Decolonisation and the problem of national integration*. PhD Thesis, University of California, Los Angeles USA.
[xxi] Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[xxii] *Ibid.*
[xxiii] Art 8, The Addis Ababa Agreement on the Problem of South Sudan, 1972.
[xxiv] Douglas H Johnson (2014) 'Federalism in the history of South Sudanese political thought' Rift Valley Institute, Research Paper 1; Douglas H Johnson (2003) *The Root Causes of Sudan's Civil Wars* (African Series. The International Institute for Africa Affairs: Indiana University Press).
[xxv] Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[xxvi] *Ibid.*

[XXVII] Mohammed Ahmed Mahgoub (1974) *Democracy on trial: Reflections on Arab and African politics* (London: Andre Deutsch).
[XXVIII] Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[XXIX] *Ibid.*
[XXX] *Ibid.*
[XXXI] Addis Ababa Peace Agreement, Art 1 (a – c), 1972; DK Mathews (2016) *Liberation for South Sudan: An account of a participant* (Nairobi: African Books Shop).
[XXXII]Steve Odero Ouma (2005) 'Federalism as a peacemaking device in Sudan's Interim National Constitution'. LLM Thesis, Faculty of Law, Community Law Centre, University of the Western Cape, Cape Town, South Africa.
[XXXIII] *Ibid.*
[XXXIV] *Ibid.*
[XXXV] DK Mathews (2016) *Liberation for South Sudan: An account of a participant* (Nairobi: African Books Shop).
[XXXVI] CPA, 2005, Art 1.3.
[XXXVII] TCSS, 2011, Art 1.5.
[XXXVIII] Isaiah Abraham (2011) 'Opponents of South Sudan draft constitution must give us a break!' Sudan Tribune (19 May 2011) < https://sudantribune.com/article38544/> accessed on 17 June 2022.
[XXXIX] *Ibid.*
[XL] Jok Madut Jok (2021) 'Lessons in Failure: Peacebuilding in South Sudan/Sudan', in McNamee, T & Muyangwa, M (eds) *The State of Peacebuilding in Africa: Lessons learned for policymakers and practitioners*. Palgrave McMillian, Springer International 363–377.
[XLI] Moro, in Bach et al. (2022).
[XLII] Abraham (2011).
[XLIII] TCSS, 2011, Art 3.
[XLIV] CSS, Art 162 and Art 165.
[XLV] Moro, in Bach et al (2022).
[XLVI] Jok Madut Jok (2021) 'Lessons in Failure: Peacebuilding in South Sudan/Sudan', in McNamee, T & Muyangwa, M (eds) *The State of Peacebuilding in Africa: Lessons learned for policymakers and practitioners*. Palgrave McMillian, Springer International 363–377.
[XLVII] *Ibid.*
[XLVIII] This proposal is locally referred to as *kokora,* a Barii word which means 'division', 'to divide'. Rens Willems and David Deng (2015) *The Legacy of Kokora in South Sudan: Intersections of truth, justice and reconciliation in South Sudan* (Briefing paper) < https://www.kpsrl.org/sites/default/files/publications/files/801_the_legacy_of_kokora_in_south_sudan_briefing_paper.pdf> accessed on 17 June 2022.
[XLIX] Øystein H. Rolandsen (2015) 'Another civil war in South Sudan: the failure of Guerrilla Government?' *Journal of Eastern African Studies* 9(1) 163–174.
[L] Johnston, 1982; Mareike Schomerus & Lovise Aalen (eds) (2016) *Considering the state perspectives on South Sudan's subdivision and federalism debate.* (London: Overseas Development Institute. 2016).
[LI] Mareike Schomerus & Lovise Aalen (eds) *Considering the state perspectives on South Sudan's subdivision and federalism debate* (London: Overseas Development Institute, 2016).
[LII] *Ibid.*
[LIII] Justin and De Vries (2019).
[LIV] *Ibid.*

[LV] Chapter II, Art 6(2)(4).
[LVI] Chapter 6, Art 1(2).
[LVII] Stimson Centre, 'The 28 States System in South Sudan', Briefing Note, 9 August 2016. https://www.stimson.org/sites/default/files/file-attachments/Stimson_StatesBriefingNote_9Aug16.pdf.
[LVIII] *Ibid.*
[LIX] Revitalised Joint Monetary Commission, 2020 Report.
[LX] Recommendations of the Regional Conferences, 2019.
[LXI] Section 1.15, R–ARCSS.
[LXII] Section 1.15.18, R–ARCSS.
[LXIII] *Ibid.*
[LXIV] Section 1.15.12, R–ARCSS.
[LXV] Section 1.15.16.
[LXVI] Section 1.15.14.
[LXVII] Patrick Wight (2017) 'South Sudan and the four dimensions of power-sharing: Political, territorial, military, and economic' *African Conflict & Peacebuilding Review* 7(2) 1–35.
[LXVIII] Mamdani (2018).
[LXIX] Lotje de Vries & Peter Hakim Justin (2015) 'A failure of governance: Understanding South Sudan's conflict dynamics beyond the political and humanitarian crisis' (Cape Town: Southern African Liaison Office (SALO)).
[LXX] *Ibid.*
[LXXI] *Ibid*, 35.
[LXXII] Patrick Wight (2017) 'South Sudan and the four dimensions of power-sharing: Political, territorial, military, and economic' *African Conflict & Peacebuilding Review* 7(2) 22.
[LXXIII] Soon after the 2015 elections, a division emerged within the EPRDF, an association of four ethnic-based regional parties of which the TPLF was the most dominant group. The immediate cause of the division is linked to the heavy-handedness of the federal government armed forces, which were supposedly dominated by the TPLF, in the manner in which they responded to the anti-regime public protests that took place in the Oromia and Amhara regions between 2015 and 2018. The intra-party division became a cause for a change in the party leadership, which in turn led to the rise to power of Abiy Ahmed, the current prime minister. The prime minister took various measures to consolidate power in his own hand, including fundamentally restructuring the party. As a result, the TPLF lost its influence in the party and the federal government. Leaders of the TPLF left the federal government and camped in Mekelle, the capital of Tigray, and began acting as an opposition political force. The political altercation between the two parties worsened after the federal government and the Tigray regional government declared mutual non-recognition after the federal government postponed the sixth general election and extended its term beyond its electoral term, while the Tigray region organised a regional election, since each deemed the action of the other unconstitutional. The political dispute finally turned into a military confrontation. The war, which has caused massive humanitarian disasters, is still ongoing despite the intermittent truces declared by either or both of the two warring parties.
[LXXIV] Yonatan Fessha (2017) 'The original sin of Ethiopian federalism' *Ethnopolitics: Special Issue: The Ethnopolitics of Ethnofederalism in Ethiopia* 16(3) 232–245.
[LXXV] GT Hessebon (2013) 'The precarious future of the Ethiopian constitution' *Journal of African Law* 215–233.
[LXXVI] Section 6.2 R–ARCSS.
[LXXVII] Chapter VI, section 1.2, ARCSS 2015.
[LXXVIII] Zemelak Ayele (2019) 'Constitutionalism: The missing element in South Sudan's elusive quest for peace through federalism?', in Charles M Fombad & Nico Steytler (eds) *Decentralisation and Constitutionalism in Africa* (Oxford: Oxford University Press).

[LXXIX] Transitional Constitution (2011).
[LXXX] Jok Madut Jok (2021) 'Lessons in Failure: Peacebuilding in South Sudan/Sudan', in T McNamee & M Muyangwa (eds) *The State of Peacebuilding in Africa: Lessons learned for policymakers and practitioners* (Palgrave McMillan, Springer International) 363–377.
[LXXXI] Corruption Perception Index (2021)
[LXXXII] R–ARCSS (2018).
[LXXXIII] This excerpt is taken from an analysis of a policy draft document entitled, 'Federal Governance in South Sudan: A Policy Framework Draft Document' (2021), drafted and developed by the Ministry of Federal Affairs (MoFEDA), Juba, South Sudan. The policy draft serves as a guide to developing a blueprint for federal constitution–making and the building of inclusive federal and state institutions.
[LXXXIV] Art 36 1 TCSS (2011).
[LXXXV] Policy Draft Document, 2021.
[LXXXVI] Policy Draft Document, 2021.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Climate Change and the Livestock Sector's Mitigation Potential: A Seized Opportunity for the International Climate Regime?

by

Roberto Talenti*

Perspectives on Federalism, Vol. 13, issue 2-3, 2021

Abstract

Climate change is destined to remain a central topic of the international political agenda for the decades to come. Several climate negotiations have been conducted over the last three decades, and a diversified range of climate policies has been adopted at the planetary level over this timeframe. Nevertheless, it appears to exist a particular economic sector having a great impact in terms of greenhouse gas emissions, as well as a terrific potential in terms of climate change mitigation, which has regularly been ignored by national and supranational regulation authorities: the livestock sector. Interestingly, while there is a plethora of scientific studies focusing on the necessity to mitigate livestock sector's emissions through a reduction of animal-food consumption and production, the number of legal and political experts focusing on this issue is particularly meagre. The aim of this article is to try to fill this research gap, by looking for the instruments put at disposal by the International Climate Regime in order to induce the mitigation of livestock emissions Worldwide.

Key-words

Climate Change, Livestock Sector, International Climate Regime.

1. Introduction

Having been defined as a 'threat multiplier',[I] the 'greatest challenge of the 21st Century',[II] and as an 'existential threat to humanity',[III] climate change is destined to remain a central topic of the international political agenda for the decades to come. Several climate negotiations have been conducted over the last three decades,[IV] and a diversified range of climate policies has been adopted at the planetary level over this timeframe.[V]

Nevertheless, it appears to exist a particular economic sector having a great impact in terms of greenhouse gas (GHG) emissions, as well as a terrific potential in terms of climate change mitigation, which has regularly been ignored by national and supranational regulation authorities: the livestock sector.[VI] The livestock sector alone is responsible for at least 14.5% of total anthropogenic GHG emissions (*i.e.*, more emissions than the entire transport sector).[VII] Nonetheless, while public authorities have 'implemented policies and launched communication campaigns to reduce energy demand among motorists, households and industry as part of climate policy-making, […] efforts to moderate meat and dairy consumption are absent from mitigation strategies'.[VIII] This is also evident when we look at the Nationally Determined Contributions (NDCs) that have been produced in the years 2020-2021: only one third of the country Parties have included livestock mitigation measures in their NDCs,[IX] and among these countries, only one (*i.e.,* Ethiopia) 'included a mitigation commitment related to animal-based diets'.[X] In fact, the few livestock mitigation plans mainly focused on manure management (present in 18% of the total NDCs) and feed management (16%)[XI] (*i.e.*, measures that are less effective than dietary changes in mitigating livestock-related GHG emissions).[XII]

Interestingly, while there is a plethora of scientific studies focusing on the necessity to mitigate livestock sector's emissions through a reduction of animal-food consumption and production,[XIII] the number of legal and political experts focusing on this issue is particularly meagre.

One of the first outstanding legal studies focusing on this topic was conducted by Donahue, who defined the livestock sector as an 'elephant in the room' of climate change,[XIV] and who suggested the US government to take measures to reduce meat production and

consumption, already as soon as in 2008. Six years later, in their multi-country study for Chatham House, Bailey, Froggatt and Wellesley underlined that, compared 'to other sectors, the awareness gap for livestock is particularly large',[XV] and this is due to the 'remarkable lack of policies, initiatives or campaigns' aiming at reducing meat and dairy production and consumption.[XVI] The authors also identified a research gap concerning the lack of space provided to the livestock sector in climate policies, and they wished for further studies to be elaborated on this topic.[XVII] The three authors' hopes were at least partially met, as few mono-country legal researches have followed in the succeeding years. Indeed, while Johnson pointed out that Australian government regulation on food consumption patterns does not focus enough on the positive synergies existing between plant-based diets, health, and environment,[XVIII] a further study from Donahue asserts that the US Farm Bill is at odds with US environmental regulation, and it concludes that public-land livestock grazing in the US should be put to an end as soon as possible.[XIX] Finally, Karimi observes that although the existence of measures as the California's Senate Bill 1383 has some positive effects in terms of climate change mitigation, the only sustainable and effective way of dealing with livestock sector's emissions pass through the elimination of support for livestock producers and through a sensibilization of consumers aimed at reducing the demand for meat and dairy products.[XX]

What emerges from the analysis of the state of the art is not only the frequent accent put on the necessity of intervening on the demand-side in order to close the consumers' awareness gap, but also the absence of any study analysing the role and the efforts of the International Climate Regime in mitigating livestock sector's GHG emissions. Provided that climate change is the quintessence of the global phenomenon (that hence requires a global level of governance),[XXI] and provided the lack of studies focusing on the International Climate Regime's efforts in reducing livestock-related GHG emissions, this article will try to answer the following research question: to what extent is the International Climate Regime establishing a legal framework inducing the mitigation of livestock-related GHG emissions?

In order to provide a satisfactory answer to the research question, this article will be structured as follows. Section-2 will shortly introduce the scientific evidence related to the livestock sector's impact on the environment, it will focus on livestock sector-related GHG

emissions, and it will finish by remarking the climate-health cobenefits of reducing animal-food consumption and production patterns. Section-3 will pass through the three main international climate treaties in order to understand whether they include any provision that can be linked to the mitigation of livestock sector's emissions. Section-4 will move to the non-binding documents produced under the UNFCCC regime and, in particular, it will analyse the content of the workstream produced under the Koronivia Joint Work on Agriculture. Lastly, in Section-5, my final considerations will be reported, and the conclusions of the article will be drawn.

2. The scientific base

Before focusing on the climate change impact of the livestock sector, it might be important to remind that the environmental consequences of animal-food production are not limited to GHG emissions. Firstly, animal-food production is terribly water consuming. Indeed, you need 57 litres of water to obtain a gram of proteins form pig meat, 63 litres to obtain the same amount of proteins form sheep meat, and 112 litres of water to obtain one gram of proteins form beef.[XXII] By comparison, you just need 26 litres of water to produce a gram of proteins from vegetables, 21 litres to obtain a gram of proteins from cereals, and 19 litres to obtain a gram of proteins from pulses.[XXIII] On this regard, it is also striking to observe that the sole production of a kilogram of beef requires the consumption of 15,400 litres of water.[XXIV] Furthermore, the livestock sector is also a major source of biodiversity loss, water contamination, and air pollution. Indeed, while this was already clear in 2010, when Reid at al. asserted that 'livestock are having widespread direct and indirect impacts on the foundation of all life',[XXV] in was in 2015 that Leip at al. conducted a study on agriculture in Europe, and they found out that livestock alone contributes to 73% of water pollution, 78% of terrestrial biodiversity loss, and 80% of soil acidification and air pollution related to the agricultural sector at the EU level.[XXVI] A final environmental consideration, before moving to climate change, concerns land use. Indeed, it should be reminded that '26% of the Planet's ice-free land is used for livestock grazing, and 33% of croplands are used for livestock feed

production'.[XXVII] These last findings, beyond having an evident impact in terms of nature conservation and food security implications, also have strong climate change implications. As a matter of facts, the terrific amount of space that is used for livestock grazing could be destined to forests and wildlife areas (for biomass recovery) which could play, *inter alia*, a great role as carbon sinks: eliminating the consumption of a kg of beef is equivalent to emission reductions of 184 kg of CO2 solely related to biomass recovery.[XXVIII]

Accordingly, the climate change impact of the livestock sector is to be reconducted to three main processes: production, processing and transport of feed (it includes the amount of land subtracted to biomass recovery), enteric fermentation, and manure storage and processing.[XXIX] As it has already been stated, on the aggregate level, the livestock sector is deemed responsible for 14.5% of anthropogenic GHG emissions;[XXX] however, this data is quite outdated, and according to Eisen and Brown it underestimates the current livestock sector's emissions.[XXXI] In fact, in order to provide an even clearer picture of the livestock sector's impact on climate change, the two scientists have calculated that a 'rapid global phaseout of animal agriculture [taking place over a period of 15 years] has the potential to stabilize greenhouse gas levels for 30 years and offset 68 percent of CO2 emissions this century'.[XXXII]

Due attention should also be paid to the different amount of CO2-equivalent emitted per kg of animal product: 6 kg of CO2-equivalent are emitted per kg of chicken, 7 kg of CO2-equivalent per kg of pork, and 60 kg of CO2-equivalent are emitted per kg of beef.[XXXIII] By comparison, 1.4 kg of CO2-equivalent is emitted per kg of wheat, 1.0 kg of CO2-equivalent is emitted per kg of maize, and 0.9 kg of CO2-equivalent per kg of peas.[XXXIV] Furthermore, it is also worth to observe the nature of GHGs that are linked to animal agriculture: the livestock sector is indeed responsible for the 5% of global anthropogenic CO2 emissions, 44% of anthropogenic CH4 emissions, and 53% of anthropogenic N2O emissions.[XXXV] Importantly, being CH4 and N2O short-lived climate pollutants (*i.e.* GHGs with a more powerful climate-altering power than CO2, but remaining in the atmosphere for a much shorter period of time), to phase-down their emission is crucial in order to rapidly curb climate change.[XXXVI]

Provided that the current production and consumption of meat and dairy product is already having such a great environmental and climate impact, and considering that according to the FAO we will need to feed 9.7 billion people by 2050,[XXXVII] the necessity to reduce the terribly inefficient production and consumption of animal food seems self-evident. As a matter of facts, 'the total global food demand is expected to increase by 35% to 56% between 2010 and 2050',[XXXVIII] so that the only palpable way to conciliate climate change mitigation and food security, is to drastically reduce animal-food consumption.[XXXIX] For instance, in order to maintain the global temperature within 1.5°C above the pre-industrial level while protecting food security, the EU would need to decrease its ruminant meat consumption by 57.5%, and its non-ruminant meat consumption by 56.7%.[XL] Therefore, 'all potential solutions to the climate crisis likely require some form of large scale dietary change'.[XLI] On the bright side, halving EU's animal-food consumption would not only allow the EU to meet the Paris Agreement's target,[XLII] but it would also have outstanding consequences on Europeans' state of health.[XLIII] As a matter of facts, halving meat and dairy consumption would reduce the spread of cardiovascular diseases (thanks to the 'lower intake of saturated fats'), colorectal cancer, and it would provide further health benefits through the 'lower use of antibiotics, […] improved water quality, […] and improved air quality' associated with a reduction of livestock.[XLIV]

3. The international climate treaties

This section will pass through the three international climate treaties, in order to understand if there is any provision (at least indirectly) incentivizing states to phase-down animal agriculture activities.

Unsurprisingly, none of the three international climate treaties explicitly mentions the livestock sector. However, it can be valuable to highlight treaties' references to agriculture, carbon skinks, LULUCF,[XLV] REDD+,[XLVI] and AFOLU,[XLVII] as they are indirectly related to livestock sector. In fact, any significant large-scale afforestation or reforestation will be impossible without phasing-down animal-food production and consumption.[XLVIII]

3.1. The UNFCCC

As a 'mother convention',[XLIX] the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 does not introduce any clear obligation of result, being its objective the 'stabilization of greenhouse gas concentrations in the atmosphere at a [non-precisely defined] level that would prevent dangerous anthropogenic interference with the climate system'.[L] However, it establishes some commitments for country Parties which, in line with the principle of 'common but differentiated responsibilities and respective capabilities',[LI] impose different obligations for Annex-II, Annex-I, and non-Annex-I Parties.

The most important UNFCCC's provisions that can indirectly be reconducted to the livestock sector are enshrined in Article 4(1) and 4(2) of the Convention. As a matter of facts, Article 4(1) assigns a central role to 'carbon sinks', which all Parties will have to take into account, both in the process of creation of national inventories,[LII] and when formulating climate policies.[LIII] Article 4(1) goes even beyond, as it requires Parties to 'promote […] the development […] of technologies [to] reduce or prevent anthropogenic emissions of GHGs [from, *inter alia*] agriculture, [and] forestry',[LIV] and to 'promote sustainable management and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all GHGs […] including […] forests'.[LV] Moreover, these information shall also be communicated to the Conference of the Parties, through the UNFCCC Secretariat.[LVI]

Afterwards, Article 4(2) devices similar obligations for Annex-I Parties (also in terms of centrality of carbon sinks), with the main differences from Article 4(1) being the obligation for Annex-I Parties to adopt national policies 'limiting' their GHG emissions,[LVII] and the obligation to communicate 'information on [their] policies, [including] removals by sinks' within six months.[LVIII]

Provided that, at this point, the relationship between carbon sinks and the livestock sector should be clear, as well as its connection with agriculture, it can be stated that, by giving a central role to carbon sinks (and to a lesser extent to agriculture) when it comes to all Parties' obligations in terms of carbon accounting, climate policies, and cooperation, the UNFCCC

establishes a system that provides country Parties with the potential of complying with their legal obligation by acting on the livestock sector.

When it comes to the Convention's shortcomings, both the absence of GHG mitigation obligations for non-Annex-I Parties, and the lack of any reduction target for Annex-I Parties remain major limits of the UNFCCC. However, the major weakness of the UNFCCC, when it comes to livestock sector's emissions mitigation, stands in the establishment of a carbon accounting method based on capturing territorial production instead of consumption.[LIX] Indeed, the decision to adopt this less effective and equitable way of calculating GHG emissions has not only generated a situation of 'second degree path dependence' (*i.e.*, it has conditioned the approach adopted by the following climate treaties),[LX] but it has also led Annex-I Parties to dislocate carbon-intensive food production and deforestation in non-Annex-I Parties' territories.[LXI]

3.2. The Kyoto Protocol

The Kyoto Protocol of 1997 supplements the UNFCCC by identifying binding obligations of results for Annex-I Parties, and by establishing market mechanisms helping Parties to achieve their mitigation objectives in a cost-effective manner.[LXII] Particularly important, given the aim of this article, are especially Article 2 and 3 of the Protocol, as well as the content of Annex-A.

More precisely, Article 2(1)(a)(iii) requires Annex-I Parties to implement measures as the promotion of 'sustainable forms of agriculture',[LXIII] while Article 3(3) provides a role for LULUCF in Annex-I Parties' carbon accounting system.[LXIV] Although the Protocol defers the definition of complete accounting rules to subsequent Conferences of the Parties,[LXV] so that a clear identification of all the elements constituting LULUCF will only be provided in the Marrakesh Accords of 2001,[LXVI] it is important to underscore that the Protocol has reiterated the centrality of carbon sinks, both in climate policies and in carbon accounting, through the very identification of the LULUCF sector. Furthermore, the explicit mentioning of the agricultural sector in Article 2 is particularly important, especially if it is read together with the content of Annex-A. As a matter of facts, after listing all the relevant GHGs (including CH4

and N2O) taken into account by the Protocol, Annex-A refers to the relevant sectors and sources of GHGs. Interestingly, the first two sources listed under the category 'agriculture' really are 'enteric fermentation' and 'manure management',[LXVII] and this shows the Protocol's recognition of the role that the livestock sector has to play in climate law and policies.

Overall, the Kyoto Protocol reinforces the role that the livestock sector can play in the international climate regime, and it does so by both assigning a role to the LULUCF sector (that Annex-I states will have to duly consider in order to meet their binding emission-limitation commitments), and by making explicit reference to the need of mitigating agriculture-related emissions, also acknowledging the role of enteric fermentation and manure management as agricultural sources of GHGs.

However, the main pitfalls of the Kyoto Protocol stand not merely in the absence of obligations for non-Annex-I Parties, or in the US deciding not to ratify the Protocol. Indeed, as far as the mitigation of livestock emissions is concerned, the Protocol's main shortcoming is the lack of sector-specific reduction targets, which has resulted in agriculture hardly being included in Annex-I Parties' mitigation policies.[LXVIII] Furthermore, the very modest GHG-limitation commitment of the first period, and the incapacity to timely ratify emission-reduction commitments for further periods, did not put Annex-I Parties in the position of having to choose between livestock sector's mitigations and LULUCF's carbon uptakes. In fact, the emission-reduction targets identified for the first commitment period were so meagre that it has been possible for Annex-I Parties to achieve their target objectives without having to stretch LULUCF to the point of requiring a decrease in livestock production.[LXIX]

3.3. The Paris Agreement

The timid GHG emission limitations identified under the Kyoto Protocol's first commitment period were 'seen as the first step in the development of a process by which obligations could be ratcheted up'.[LXX] However, country Parties' incapacity to find an Agreement in Copenhagen (COP-15), and the belated adoption of the Doha Amendment to the Kyoto Protocol (which officially entered in to force only in December 2020, *i.e.*, at the very end of the second commitment period), led states to look for the establishment of a brand-

new climate treaty adopting a different governance approach. As a result, the Paris Agreement of 2015 identifies global obligations of result,[LXXI] it relies on a bottom-up approach,[LXXII] and it gets rid of the rigid distinction between Annex and non-Annex Parties to the UNFCCC.

Importantly, the Agreement makes no reference to agriculture, it only refers once to food-production (but just as a limitation to climate adaptation and mitigation policies),[LXXIII] and it never mentions the LULUCF sector (though it refers to 'reducing emissions from deforestation and forest degradation' *i.e.*, REDD+)[LXXIV]. Notwithstanding this, carbon removals do not only play a role in the 'enhanced transparency framework',[LXXV] but they also continue constituting a central element in the process of carbon accounting, in accordance with Article 4(13) of the Agreement. Furthermore, most of the references to carbon sinks and forestry provided by the Paris Agreement are enshrined in Article 5 which encourages (though in a non-binding fashion) all Parties to take action to enhance the reduction of 'emissions from deforestation and forest degradation, and [to consider] the role of conservation, sustainable management of forests and enhancement of forest carbon stocks'.[LXXVI]

If the sensibility of the Agreement to carbon removals is considered in conjunction with the ambitious global obligation set forth in Article 2(1)(a) ('holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'), it becomes clear that carbon sinks have the potential to play an essential role in the achievement of the global temperature target. Nevertheless, the most important article enhancing the role of carbon sinks within the Paris Agreement is probably Article 4(1), as it fixes a global obligation of result (*i.e.*, 'to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century')[LXXVII] in which the central role of carbon sinks is just self-evident.

Hence, in line with the Kyoto Protocol, the Paris Agreement continues relying on an accounting method which assigns a role to removals by carbon sinks. Furthermore, the Agreement identifies two global obligations of result which will, *de facto*, require all Parties to intervene on the AFOLU sector in order to respect their legally binding duties. Provided that, according to the best available scientific data, it will be impossible to respect these obligations

of result by acting on the AFOLU sector without drastically decreasing livestock sector production,[LXXVIII] the potential relevance of these provisions on animal agriculture seems quite apparent.

Still, major limits of the Paris Agreement, as far as the subject of this article is considered, concern both the absence of references to sustainable forms of food-production, and the lack of 'indication on the accounting rules to be applied in the [AFOLU] sector'.[LXXIX] Moreover, provided that the Agreement fixes a long-term global objective of result, it allows heads of state to procrastinate the implementation of necessary, but generally unpopular, political decisions as those affecting livestock sector regulations and dietary changes. Undoubtedly, the global stocktake of 2023 will assess the (in)effectiveness of State Parties' NDCs, and it will have the potential of shedding light on the necessity to act on the livestock sector in order to stay on track. However, being the Paris Agreement's compliance mechanism arranged as a non-adversarial and non-punitive system,[LXXX] its ability to successfully modify country Parties' behaviour will be anything but obvious.

4. The UNFCCC soft law documents and the Koronivia Joint Work on Agriculture

Despite having given birth to "just" three international climate treaties, the UNFCCC framework has also produced a huge number of non-binding documents including COPs' statements, subsidiary bodies' ordinary reports, and subsidiary bodies' workshop reports. Interestingly, State Parties meeting in Durban at COP-17 requested for the first time 'the Subsidiary Body for Scientific and Technological Advice [SBSTA] to consider issues related to agriculture'.[LXXXI] This decision led the SBSTA to arrange five workshops between 2014 and 2016 that, despite mainly focusing on agricultural adaptation to climate change, also contain some mitigation elements. Indeed, during the fourth workshop there were, for the first time, 'many Parties' asking for the SBSTA to better address the synergies that exist between agriculture adaptation and mitigation.[LXXXII] Moreover, during the fifth workshop, the necessity to mitigate agriculture-related GHG emissions in order 'to fulfil the goal of the Paris Agreement' was made explicit for the first time.[LXXXIII] Still, it was during COP-23, held in

Bonn, that the Conference of the Parties requested the 'the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation [SBI] to jointly address issues related to agriculture, including through workshops and expert meetings' within the process that has been named Koronivia Joint Work on Agriculture (KJWA).[LXXXIV]

The KJWA has produced a total of six in-session and two intersessional workshop reports between 2019 and 2021, and despite the original mandate required 'the subsidiary bodies to report to the Conference of the Parties on the progress and outcomes of the work […] at its twenty-sixth session',[LXXXV] no conclusive decision on agriculture has been adopted at COP-26, so that subsidiary bodies 'have agreed to continue consideration of this matter […] with a view to reporting on it to and recommending a draft decision for consideration and adoption by the Conference of the Parties at its twenty-seventh session'.[LXXXVI]

Still, the FAO has defined the establishment of the KJWA as a landmark decision.[LXXXVII] Accordingly, it could be useful to look at the reports produced under this workstream, as they provide a picture of high-level dialogues on the relationship between climate change and agriculture conducted at the global level, within the UNFCCC framework, by a wide range of experts and stakeholders.

While the first four workshop reports did not introduce particularly relevant positions, with partial exceptions being report-2, in which an NGO representative stated that 'adaptation in the agriculture sector [must] be addressed jointly with climate change mitigation',[LXXXVIII] and report-4 in which 'many participants' highlighted the 'urgent need to increase mitigation efforts',[LXXXIX] it is possible to identify some outstanding elements from the fifth report onwards. In report-5, not only participants underlined that 'improving livestock management systems can be an important part of the solution for mitigation'[XC]; indeed, in this report 'several participants suggested that making dietary changes, particularly in developed countries […] is a quick and effective way of reducing emissions from livestock',[XCI] and a representative of the 'Women and Gender Constituency' asserted that 'Parties should be assisted in integrating food-related and agricultural objectives into their NDCs, such as […] promoting plant-based diets'.[XCII] Evidently, the fifth report represents a turning point, as it is the first case in which the necessity to reduce both livestock production and (more importantly)

consumption in order to mitigate climate change is explicitly mentioned under a UNFCCC process.

The importance of acting both on the supply and on the demand side is reiterated in the sixth report, in which an IPCC expert highlighted that 'agriculture, food production and deforestation [are] major drivers of climate change', so that 'supply-side practices can be adopted that help to mitigate climate change by reducing emissions from […] livestock agriculture', but also reminding that 'the widespread adoption of a balanced diet presents opportunities for reducing emissions from food systems'.[XCIII] Moreover, in this occasion, an IPES expert[XCIV] 'indicated that twentieth-century conventional agriculture is unsustainable. […] However, incremental improvements to the existing agricultural system will not be enough to enable achievement of the Paris Agreement goals or the SDGs. [In fact,] necessary change is being prevented by several structural lock-ins, including the concentration of power in the agri-food business and the inadequacy of indicators of success in agriculture'.[XCV] Outstandingly, the level of criticism on the present agri-food system reaches an unprecedented level in report-6, as Parties to the workshop have openly criticized the stunning unsustainability of both the system and the underpinning agricultural indexes, while also underlining the negative impact of short-sighted, self-interested actions of some agri-food businesses, and the importance of adopting dietary changes.

Report-7 has mainly focused on the challenges identified by the agri-food sector in relation 'to the implementation of sustainable land and water management in agricultural practices'.[XCVI] Nevertheless, also in this occasion, a UNCCD expert has reminded that 'to achieve land degradation neutrality, a long-term strategy is needed from both the demand and supply sides'.[XCVII] Afterwards, report-8 focused on 'modalities for scaling-up implementation […] of sustainable climate-resilient agricultural solutions'.[XCVIII] On the one hand, during this workshop, an expert from 'Project Drawdown' explained that 'climate solutions with the highest potential for reducing greenhouse gas emissions relate to […] shifting to plant-based diets'.[XCIX] Moreover, the representative of an environmental NGO underlined that 'an equitable reduction of agricultural emissions and transition to diverse plant-rich diets and agricultural systems is essential to meeting that goal', and that best practices include 'less and

better livestock production'.[C] On the other hand, the importance of acting on the livestock sector was also highlighted by country Parties as Mexico,[CI] and by a representative of business and industry NGOs.[CII] However, in these latter cases the focus was put on improving livestock management and not on reducing livestock production, *inter alia,* by intervening on the demand side.

Overall, the content of KJWA's workshop reports defines an increasing recognition, at the global level, of the major role that the mitigation of livestock-related GHG emissions must play in climate policy. Intriguingly, the most innovative and advanced proposals have always been generated by environmental NGOs and scientific or technical experts. Conversely, country Parties' and agri-food business' proposals for mitigating livestock-related GHG emission have been much rarer, and solely focused on improving livestock management, without ever acting on the demand-side. However, as, *inter alia*, the European Court of Auditors observes, there is 'no effective and approved practice that can significantly reduce livestock emissions from feed digestion without reducing production. [Indeed,] practices concerned with animal breeding, feeding, health and fertility management [actually] encourage production expansion, and may thus increase net emissions'.[CIII]

5. Final Considerations and Conclusions

The three international climate treaties constitute a legal framework that is not completely blind to the livestock sector mitigation potential. As a matter of facts, all treaties support a carbon accounting system which assigns a considerable role to carbon removals by sinks (which can substantially be enhanced through a reduction of livestock production); moreover, Article 2 of the Paris Agreement establishes a binding objective of result which can only be achieved if a considerable phase-down of animal agriculture takes place.

Nevertheless, the international climate regime is still very far from adequately inducing a reduction of livestock emissions. Beyond the original sin constituted by the UNFCCC's carbon accounting system focusing on production (instead of consumption) patterns, and allowing for 'livestock-leakage', main pitfalls of the Paris Agreement, that could ideally be addressed through the creation of amendments or annexes to the Agreement,[CIV] need to be underlined.[CV]

As a matter of facts, even by sticking to the Paris Agreement's bottom-up approach, more can be done in order to address livestock emissions' mitigations. As a base, it would be useful to integrate the Agreement with references to agriculture, or even better to sustainable and carbon-efficient agriculture. For instance, these references could complement the content of Article 9, on climate finance, and Article 10, on technology development and transfer, in order to incentivise investments on sustainable alternatives to meat and dairy products (e.g. meat analogues and cultivated meat).[CVI] Even more ambitious would be the proposal of introducing an annex to the Agreement establishing the basis of carbon farming initiatives in the agricultural sector. In order to establish such a system, relevant lessons could be learnt from Australia.[CVII] Finally, as this article has repeatedly underlined, trying to increase consumers' awareness should also be a priority of the Climate Regime. Accordingly, a major enhancement of Article 12 of the Paris Agreement could introduce an obligation for country Parties to work on closing the awareness gap on the terrific environmental and climate impact of the livestock sector, as well as on the health-environmental co-benefits of reducing animal products consumption. This obligation could be implemented in multiple ways, ranging from school and education reforms to the introduction of carbon emission labels on food products.

Thought-provoking results have emerged from the analysis of the KJWA's workshop reports. As a matter of facts, it appears that Parties have increasingly underlined the need of mitigating agriculture-related GHG emissions, they have progressively made more central the theme of livestock sector's emissions, and they have also repeatedly underscored the necessity of phasing-down animal food consumption by inducing dietary changes. Still, as it has been noted, the most outstanding statements and proposals have come from environmental NGOs representatives and scientific and technical experts. Indeed, differently from country Parties, these categories of actors can easily prioritize the undertaking of strong, scientifically-sound positions, over short-sighted economic and political interests. Considering the vital importance of addressing climate change, as well as its complexity and highly technical nature, its regulation should (at least partially) prescind the logic of self-interested, myopic political interests of country Parties' leaders. Accordingly, the findings emerging from the analysis of the KJWA can be valuable food for thought, and they should stimulate the establishment of

further research on the role that different categories of non-state actors could play in the international climate regime, *inter alia*, through a formal institutionalization of their role.

* Roberto Talenti LLM (Tilburg) è research assistant all'Istituto Affari Internazionali (IAI). Email address: robertotalenti97@gmail.com

I Lukas Rüttinger et al., 'A New Climate for Peace: Tacking action on Climate and Fragility Risks' (2015) 5.
II World Health Organization, 'Health and Climate Change' (2018) 1.
III Council of the European Union, 'Council conclusions on Climate and Energy Diplomacy - Delivering on the external dimension of the European Green Deal' (2021) 2.
IV See UNFCCC Platform Website (https://unfccc.int/documents) link accessed on 26th of February 2022.
V Angel Hsu & Ross Rauber, 'Diverse climate actors show limited coordination in a large-scale text analysis of strategy documents' (2021) Communications Earth & Environment.
VI See FAO, 'Livestock's Long Shadow' (2006); FAO, 'Tackling Climate Change Through Livestock' (2013); Henk Westhoek et al., 'Food choices, health and environment: Effects of cutting Europe's meat and dairy intake' (2014) Global Environmental Change; Marco Springmann et al., 'Analysis and valuation of the health and climate change cobenefits of dietary change' (2016) PNAS; Heera Lee et al., 'Implementing land-based mitigation to achieve the Paris Agreement in Europe requires food system transformation' (2019) Environmental Research Letters; Michael B. Eisen & Patrick O. Brown 'Rapid global phaseout of animal agriculture has the potential to stabilize greenhouse gas levels for 30 years and offset 68 percent of CO2 emissions this century' (2022) Plos Climate.
VII FAO, 'Tackling Climate Change Through Livestock' (2013) 14.
VIII Rob Bailey et al., 'Livestock – Climate Change's Forgotten Sector' (2014) Chatham House, 14-15.
IX Sabrina Rose et al., 'Livestock management ambition in the new and updated nationally determined contributions: 2020-2021' (2021) 1 CGIAR Research Program on Climate Change, Agriculture & Food Security.
X Ibid. 3
XI Ibid. 1
XII See IPCC, 'Summary for Policymakers' in *Special Report: Special Report On Climate Change And Land* (2019) 26.
XIII Supra note 6.
XIV Debra L. Donahue, 'Elephant in the Room: Livestock's Role in Climate and Environmental Change' (2008) Michigan State University College of Law Journal of International Law, 104.
XV Robert Bailey (n 8) 22.
XVI Ibid. 22.
XVII Ibid. 23.
XVIII Hope Johnson, 'Eating for Health and the Environment: Australian Regulatory Responses for Dietary Change' (2015) QUT Law Review.
XIX Debra L. Donahue, 'Livestock Production, Climate Change, and Human Health: Closing the Awareness Gap' (2015) Environmental Law Reporter News & Analysis.
XX Kayla Karimi, 'Stopping Livestock's Contribution to Climate Change' (2018) UCLA Journal of Environmental Law and Policy.
XXI Carolyn Deere-Birkbeck, 'Global governance in the context of climate change: the challenges of increasingly complex risk parameters' (2009) International Affairs.
XXII Mesfin M. Mekonnen & Arjen Y. Hoekstra, 'The Green, Blue And Grey Water Footprint Of Farm Animals And Animal Products' (2010) 29 UNESCO-IHE Institute for Water Education
XXIII Ibid. 29.
XXIV Mesfin M. Mekonnen & and Arjen Y. Hoekstra, 'A Global Assessment of the Water Footprint of Farm Animal Products' (2012) 405 Ecosystems
XXV Robin Reid at al., 'Global livestock impacts on biodiversity' in Henning Steinfeld, Harold A. Mooney, Fritz Schneider, Laurie E. Neville (eds.) *Livestock in a Changing Landscape: Drivers, Consequences, and Responses* (2010) 111
XXVI Adrian Leip at al., 'Impacts of European livestock production: nitrogen, sulphur, phosphorus and greenhouse gas emissions, land-use, water eutrophication and biodiversity' (2015) 1 Environmental Research Letters.
XXVII FAO, 'Livestock and Landscapes' (2013) 1.
XXVIII Michael B. Eisen & Patrick O. Brown, 'Rapid global phaseout of animal agriculture has the potential to stabilize greenhouse gas levels for 30 years and offset 68 percent of CO2 emissions this century' (2022) 8 PLOS Climate.
XXIX FAO (n 7) 17.

[XXX] Ibid. 14.
[XXXI] Eisen & Brown (n 28) 2.
[XXXII] Ibid. 1.
[XXXIII] Joseph Poore & Thomas Nemecek, 'Reducing food's environmental impacts through producers and consumers' (2018) 2 Science. It is important to remark that these esteems do not consider the additional value of biomass recovery, and therefore identify a carbon footprint per unit of food product that is smaller than the one identified in Eisen and Brown (n 28).
[XXXIV] Ibid. 2.
[XXXV] FAO (n 7) 15.
[XXXVI] UNEP, 'Keeping warming to 1.5°C impossible without reducing Short-lived Climate Pollutants' (2018) (https://www.unep.org/news-and-stories/press-release/keeping-warming-15c-impossible-without-reducing-short-lived-climate) Link accessed on 27th of February 2022.
[XXXVII] FAO, 'The Future of Food and Agriculture: Alternative Pathways to 2050' (2018) 8.
[XXXVIII] Van Dijk et al., 'A meta-analysis of projected global food demand and population at risk of hunger for the period 2010–2050' (2021) 1 Nature Food.
[XXXIX] Heera Lee et al., 'Implementing land-based mitigation to achieve the Paris Agreement in Europe requires food system transformation' (2019) 4 Environmental Research Letters.
[XL] Ibid. 4.
[XLI] Eisen & Brown (n 28) 13.
[XLII] See Paris Agreement (2015) Art.2(1)(a).
[XLIII] Henk Westhoek et al., 'Food choices, health and environment: Effects of cutting Europe's meat and dairy intake' (2014) Global Environmental Change.
[XLIV] Ibid. 199.
[XLV] Stands for 'Land Use, Land Use Change, And Forestry'.
[XLVI] Stands for 'Reducing Emissions from Deforestation and Forest Degradation'; it also includes conservation and sustainable management of forests.
[XLVII] Stands for 'Agriculture, Forestry, and Other Land Use', it is a more comprehensive category including both agriculture and LULUCF.
[XLVIII] Heera Lee et al. (n 39).
[XLIX] Arro Van Asselt, 'From UN-ity to Diversity? The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change' (2007) 17 Carbon & Climate Law Review.
[L] UNFCC (1992) Art.2.
[LI] Ibid. Art.3(1).
[LII] Ibid. Art.4(1)(a).
[LIII] Ibid. Art.4(1)(b).
[LIV] Ibid. Art.4(1)(c).
[LV] Ibid. Art.4(1)(d).
[LVI] Ibid. Art.12(1).
[LVII] Ibid. Art.4(2)(a).
[LVIII] Ibid. Art.4(2)(b).
[LIX] Navraj Singh Ghaleigh, 'Economics and International Climate Change Law' in Kevin R. Gray, Richard Tarasofsky, Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
[LX] Ibid. 15. Second Degree Path Dependence is defined by Ghaleigh as follows: a situation 'which occurs when the inferiority of a chosen path is unknowable at the time a choice is made, but we later recognize that some alternative path would have yielded greater wealth; dependence on past conditions leads to outcomes that are regrettable and costly to change'.
[LXI] Heera Lee et al. (n 39) 2.
[LXII] Harro van Asselt, 'The Design and Implementation of Greenhouse Gas Emissions Trading' in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
[LXIII] Kyoto Protocol (1997) Art.2(1)(a)(iii).
[LXIV] Ibid. Art.3(3).
[LXV] Ibid. Art.3(4).
[LXVI] The Marrakesh Accords & The Marrakesh Declaration (2001) 122.
[LXVII] Kyoto Protocol (n 63) Annex A.
[LXVIII] Mariagrazia Alabrese, 'Politiche climatiche, politiche agricole e il bisogno di coordinamento' (2021) Rivista di Diritto Agrario.
[LXIX] See Eurostat, 'Agricultural production - livestock and meat' (2021) (https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Agricultural_production_-_livestock_and_meat&oldid=549389). Despite the EU had the most ambitious (but still too low) reduction targets commitments among Annex-I Parties to the Kyoto Protocol, it could achieve its

target objectives without reducing its animal agriculture production between 2008 and 2012 (*i.e.*, during the first commitment period).
[LXX] David Freestone, 'The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime' 6 in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
[LXXI] Paris Agreement (2015) Art.2(1)(a) and 4(1).
[LXXII] Ibid. Art.3.
[LXXIII] Ibid. Art.2(1)(b).
[LXXIV] Ibid. Art.5(2).
[LXXV] Ibid. Art.13(7)(a).
[LXXVI] Ibid. Art.5(2).
[LXXVII] Ibid. Art.4(1).
[LXXVIII] Heera Lee et al. (n 39); Michael B. Eisen & Patrick O. Brown (n 28).
[LXXIX] Annalisa Savaresi and Lucia Perugini, 'Article 5: Sinks, Reservoirs of GHG and Forests', Journal for European Environmental and Planning Law, in G. van Calster and L. Reins (eds.), *The Paris Agreement on Climate Change - A Commentary* (2021).
[LXXX] See Paris Agreement (2015) Art.15(2).
[LXXXI] UNFCCC, 'Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 - Addendum' (2012) paragraph 75.
[LXXXII] FCCC/SBSTA/2016/INF.5 (2016) paragraph 47.
[LXXXIII] FCCC/SBSTA/2016/INF.6 (2016) paragraph 28.
[LXXXIV] UNFCCC, 'Decision 4/CP.23' (2018) paragraph 1.
[LXXXV] Ibid. paragraph 4.
[LXXXVI] FCCC/SB/2021/L.1 (2021) paragraph 12.
[LXXXVII] FAO, 'Understanding The Future Of Koronivia Joint Work On Agriculture' (2021) 17.
[LXXXVIII] FCCC/SB/2019/1 (2019) paragraph 59.
[LXXXIX] FCCC/SB/2020/1 (2020) paragraph 67.
[XC] FCCC/SB/2021/1 (2021) paragraph 52.
[XCI] Ibid. paragraph 47.
[XCII] Ibid. paragraph 29.
[XCIII] FCCC/SB/2021/2 (2021) paragraph 14.
[XCIV] Stands for 'International Panel of Experts on Sustainable Food Systems'.
[XCV] FCCC (n 93) paragraph 15.
[XCVI] FCCC/SB/2021/3 (2021) summary.
[XCVII] Ibid. paragraph 12.
[XCVIII] FCCC/SB/2021/3/Add.1 (2021) summary.
[XCIX] Ibid. paragraph 11.
[C] Ibid. paragraph 30.
[CI] Ibid. paragraph 19.
[CII] Ibid. paragraph 25.
[CIII] European Court of Auditors, 'Common Agricultural Policy and climate - Half of EU climate spending but farm emissions are not decreasing' (2021) paragraph 30.
[CIV] See Paris Agreement (2015) art.22 and 23.
[CV] It is not the case of focusing on the Kyoto Protocol anymore. Indeed, being the second commitment period expired, and given the absence of a third commitment period, the Protocol does no longer produce relevant legal effects.
[CVI] See Hannah Ritchie, David S. Reay, Peter Higgins, 'Meat substitute products have a large potential for reducing GHG emissions and improving nutritional outcomes' (2018) Sustainable Food Systems.
[CVII] Jonhatan Verschuuren, 'Towards a Regulatory Design for Reducing Emissions from Agriculture: Lessons from Australia's Carbon Farming Initiative' (2017) Climate Law.

References

Primary sources

- Council of the European Union, 'Council conclusions on Climate and Energy Diplomacy - Delivering on the external dimension of the European Green Deal' (2021).
- FCCC/SB/2019/1 (2019).
- FCCC/SB/2020/1 (2020).
- FCCC/SB/2021/1 (2021).
- FCCC/SB/2021/2 (2021).
- FCCC/SB/2021/3 (2021).
- FCCC/SB/2021/3/Add.1 (2021).
- FCCC/SB/2021/L.1 (2021).
- FCCC/SBSTA/2016/INF.5 (2016).
- FCCC/SBSTA/2016/INF.6 (2016).
- Kyoto Protocol (1997).
- Paris Agreement (2015).
- The Marrakesh Accords & The Marrakesh Declaration (2001)
- UNFCCC, 'Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 - Addendum' (2012).
- UNFCCC, UNFCCC, 'Decision 4/CP.23' (2018).
- United Nations Framework Convention on Climate Change (1992).

Secondary Sources

- Alabrese Mariagrazia, 'Politiche climatiche, politiche agricole e il bisogno di coordinamento' (2021) Rivista di Diritto Agrario.
- Bailey Rob, Froggatt Antony, Wellesley Laura, 'Livestock – Climate Change's Forgotten Sector' (2014) 14-15 Chatham House.
- Deere-Birkbeck Carolyn , 'Global governance in the context of climate change: the challenges of increasingly complex risk parameters' (2009) International Affairs.
- Donahue Debra L., 'Elephant in the Room: Livestock's Role in Climate and Environmental Change' (2008) Michigan State University College of Law Journal of International Law.
- Donahue Debra L., 'Livestock Production, Climate Change, and Human Health: Closing the Awareness Gap' (2015) Environmental Law Reporter News & Analysis.
- Eisen Michael B. & O. Brown Patrick, 'Rapid global phaseout of animal agriculture has the potential to stabilize greenhouse gas levels for 30 years and offset 68 percent of CO2 emissions this century' (2022) Plos Climate.

- Freestone David, 'The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime' in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
- Ghaleigh Navraj Singh, 'Economics and International Climate Change Law' in Kevin R. Gray, Richard Tarasofsky, Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).
- Hope Johnson, 'Eating for Health and the Environment: Australian Regulatory Responses for Dietary Change' (2015) QUT Law Review.
- Hsu Angel & Rauber Ross, 'Diverse climate actors show limited coordination in a large-scale text analysis of strategy documents' (2021) Communications Earth & Environment.
- Karimi Kayla, 'Stopping Livestock's Contribution to Climate Change' (2018) " UCLA Journal of Environmental Law and Policy.
- Lee Heera, Brown Calum, Seo Bumsuk, Holman Ian, Audsley Eric, Cojocaru George, Rounsevell Mark, 'Implementing land-based mitigation to achieve the Paris Agreement in Europe requires food system transformation' (2019) Environmental Research Letters.
- Leip Adrian, Billen Gilles, Garnier Josette, Grizzetti Bruna, Lassaletta Luis, Reis Stefan, Simpson David, Sutton Mark A., de Vries Wim, Weiss Franz, Westhoek Henk, 'Impacts of European livestock production: nitrogen, sulphur, phosphorus and greenhouse gas emissions, land-use, water eutrophication and biodiversity' (2015) Environmental Research Letters.
- Mekonnen Mesfin M. & and Hoekstra Arjen Y., 'A Global Assessment of the Water Footprint of Farm Animal Products' (2012) Ecosystems.
- Mekonnen Mesfin M. & Hoekstra Arjen Y., 'The Green, Blue And Grey Water Footprint Of Farm Animals And Animal Products' (2010) UNESCO-IHE Institute for Water Education.
- Poore Joseph & Nemecek Thomas, 'Reducing food's environmental impacts through producers and consumers' (2018) Science.
- Reid Robin, Bedelian Claire, Said Mohammed Y., Kruska Russel L, Mauricio Rogerio M., Castel Vincent, Olson Jennifer, Tornton Philip K., 'Global livestock impacts on biodiversity' in Henning Steinfeld, Harold A. Mooney, Fritz Schneider, Laurie E. Neville (eds.) *Livestock in a Changing Landscape: Drivers, Consequences, and Responses* (2010).
- Ritchie Hannah, Reay David S., Higgins Peter, 'Meat substitute products have a large potential for reducing GHG emissions and improving nutritional outcomes' (2018) Sustainable Food Systems.
- Rose Sabrina, Khatri-Chhetri Arun, Stier Milena, Wilkes Andreas, Shelton Sadie, Arndt Claudia, Wollenberg Eva, 'Livestock management ambition in the new and updated nationally determined contributions: 2020-2021' (2021) CGIAR Research Program on Climate Change, Agriculture & Food Security.
- Rüttinger Lukas, Smith Dan, Stang Gerald, Tänzler Dennis, and Vivekananda Janani, 'A New Climate for Peace: Tacking action on Climate and Fragility Risks' (2015).
- Savaresi Annalisa and Perugini Lucia, 'Article 5: Sinks, Reservoirs of GHG and Forests', Journal for European Environmental and Planning Law, in G. van Calster and L. Reins (eds.), T*he Paris Agreement on Climate Change - A Commentary* (2021).
- Springmann Marco, Godfray H. Charles J., Rayner Mike, Scarborough Peter, 'Analysis and valuation of the health and climate change cobenefits of dietary change' (2016) PNAS.
- Van Asselt Arro, 'From UN-ity to Diversity? The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change' (2007) Carbon & Climate Law Review.
- Van Asselt Harro, 'The Design and Implementation of Greenhouse Gas Emissions Trading' in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (eds.) *The Oxford Handbook of International Climate Change Law* (2016).

- Van Dijk Michiel , Morley Tom, Rau Marie Luise, Saghai Yashar, 'A meta-analysis of projected global food demand and population at risk of hunger for the period 2010–2050' (2021) Nature Food.
- Verschuuren Jonhatan, 'Towards a Regulatory Design for Reducing Emissions from Agriculture: Lessons from Australia's Carbon Farming Initiative' (2017) Climate Law.
- Westhoek Henk, Lesschen Jan Peter, Rood Trudy, Wagner Susanne, De Marco Alessandra, Murphy-Bokern Donal, Leip Adrian, van Grinsven Hans, A. Sutton Mark, Oenema Oene, 'Food choices, health and environment: Effects of cutting Europe's meat and dairy intake' (2014) Global Environmental Change.

Technical documents and web sources

- European Court of Auditors, 'Common Agricultural Policy and climate - Half of EU climate spending but farm emissions are not decreasing' (2021).
- FAO, 'Livestock and Landscapes' (2013).
- FAO, 'Livestock's Long Shadow' (2006).
- FAO, 'Tackling Climate Change Through Livestock' (2013).
- FAO, 'The Future of Food and Agriculture: Alternative Pathways to 2050' (2018).
- FAO, 'Understanding The Future Of Koronivia Joint Work On Agriculture' (2021).
- IPCC, 'Summary for Policymakers' in *Special Report: Special Report On Climate Change And Land* (2019).
- UNEP, 'Keeping warming to 1.5°C impossible without reducing Short-lived Climate Pollutants' (2018) (https://www.unep.org/news-and-stories/press-release/keeping-warming-15c-impossible-without-reducing-short-lived-climate) Link accessed on 27th of February 2022.
- UNFCCC Platform Website (https://unfccc.int/documents) link accessed on 26th of February 2022.
- World Health Organization, 'Health and Climate Change' (2018).

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

European Republicanism and the Return of Geopolitics in European Integration Theory

by

Thilo Zimmermann*

Perspectives on Federalism, Vol. 13, issue 2-3, 2021

Abstract

The Russian assault on Ukraine has been described as a turning point for Europe, putting geopolitics back on the top agenda. The war coincidences with a new German government coming into power, which might, after 16 years of continuity with an economic focus, follow a more "value-driven" and "republican" foreign policy. Are we therefore witnessing a turning point in European integration, with a stronger shift from economic to geopolitical considerations? What does that mean for European integration theory? The article gives first an overview of the impact of the Russian war on European (economic) integration. It then analyses the agenda of the new German government, especially regarding the relations to authoritarian and populist regimes and the concept of a "European Federal Republic" as a future vision for Europe put forward by the German Green party. Afterwards, the historic evolution of the economic paradigm in European integration theories is analyzed. Finally, European republicanism is presented as an alternative theoretical approach to European integration, which allows to combine economic and geopolitical aspects in a sounder theoretical framework.

Key-words

European Republicanism, European Integration, Geopolitics, Germany, Ukraine, Liberal Intergovernmentalism, Neo-Functionalism

1. Introduction

Already in its earliest days, the Russian war against Ukraine has been described as a turning point regarding several aspects. The new German Chancellor Olaf Scholz, for example, called it a "Zeitenwende", legitimizing fundamental shifts in German foreign and security policy. Indeed, the Russian aggression has put into question the European security architecture and caused immediately some fundamental changes, especially regarding role of NATO and the security strategy of EU.

What does this development mean for the theory of European integration? The article gives, first, an overview of the impact of the Russian attack on the debate about the European Union (EU). For the EU, which had been so far focusing to a large extend on economic integration, the turning point could mean a stronger emphasis of geopolitical perspectives. Will Europe have to give up its mainly economic view on integration? Will neo-realistic views on power systems and "spheres of influence" play a bigger role?

In Germany, this historic turning point coincided with a new government coming into power, which already sought to adjust the German security strategy and foreign policy after 16 years of continuity. The paper will, in a second step, analyze the election manifestos of all three government parties. The manifestos indicate that a more value driven foreign policy, building on republican principles, might play a bigger role than economic considerations for the new government.

Both developments might impact the theory of European integration. The article will, in a third step, present the two most dominant theories of European integration, neo-functionalism and liberal intergovernmentalism, both describing a path of a primarily *economic* integration. The origin of this economic paradigm in European integration theory is explained. Especially Moravcsik's liberal intergovernmentalism proclaimed the primacy of economics over geopolitical considerations. However, are these theories and their assumption still valid or do we witness a shift from a mainly economic perspective to a more geopolitical one?

Finally, European republicanism is presented as an alternative approach which allows to link economic and geopolitical considerations in a more coherent way by building a bridge between

economics and political philosophy. However, more research is necessary to evolve the insights of European republicanism and its application in political party agendas.

2. The Russian War Against Ukraine as a Turning Point for European Integration?

The military assault launched by Russia against Ukraine on 24 February 2022 brought the debate about the primacy of geopolitics vs. economics back on the European agenda. Since the end of the cold war, Europe was mainly concerned with problems of *economic* integration. After the Maastricht treaty in 1992 and the introduction of the euro, the major concern of Europe had been to solve the problem of an advancing economic integration process without political integration keeping pace (see for example Padoa Schioppa Group 2012). Even the conflict on the Balkans, the major geopolitical challenge of the 1990s, seemed to be eased or even pacified by the perspective of becoming part of the wealth machinery of the Single European Market. This promise did already help to prepare Eastern European countries to join the European Union in 2004, 2007 and 2013 and transform themselves into free markets with a democratic governance (although backslashes in this process are well noticed).

Nevertheless, this economic narrative had not been strong enough for political unification: the attempt to create a European constitution had been rejected in national referenda in France and Netherlands in 2005. When the global financial crisis, breaking out in 2007, hit Europe two or three years later, the markets did increasingly distrust that European politics would be ready to "do whatever it takes" and give up more national sovereignty in order to create a European political governance that would be needed to cope with the economic consequences of a single European currency. Finally, it had been the European Central Bank's president to give that promise in 2012, however, the conflict between the pace of economic and political integration in Europe has not been solved so far. Populist movements sought to "re-establish national sovereignty". Within this debate, the expression of European integration being a "peace project" seemed to have been an empty phrase to argue for more political integration without much links to people's reality.

Putin's assault on Ukraine brought the European "peace project" back on the agenda. The crusade for the re-establishment of a Great Russian Empire is a challenge for the European idea. The attack made it obvious for everyone that the European project is also important to protect its citizens from outside threats. However, the Russian aggression does also force Europeans to redefine their identity. Which price are Europeans willing to pay to defend their freedom? And which countries should be part of this European promise? The images of civilian casualties, the harm of Ukrainian refugees but also the decisive and valiant fight of the Ukrainian people against the aggressor,for freedom and European values did confront European politicians and the European public with a moral dilemma. Didn't Ukraine deserve the same support as a member of the EU or NATO would receive in such a situation? Can Europe and the US limit their role, e.g., by limiting their support mainly to the delivery of arms for defense? Or is there a moral need, based on its self-understanding, for a stronger involvement?

Economic theories cannot evaluate these moral dilemmas and challenges. In order to analyze how Europe reacts to this new development, it is necessary to consider, beyond the well-known economic arguments, also increasingly arguments of geopolitics and political philosophy.

Is the Russian aggression even part of a broader shift in international relations and European integration in particular? The dominance of liberal democracies after the end of the cold war allowed to analyze international relations of states rather from liberal, economic perspectives. However, with the challenge of rising populism and authoritarian powers around the globe, geopolitical and power political factors become more important to analyze behavioral patterns. Putin seemed to have ignored warnings of his economic advisors about the economic price of an assault against Ukraine, he evaluated geo- and power political considerations more and therefore imposed also on Europe and the West to think more in these categories and patterns. In his speech in Warsaw on 26 March 2022, US president characterized the Russian aggression and the reaction of the Western allies as a long-lasting struggle between freedom and autocracy (Biden 2022). The next months and years will still have to demonstrate which side will be stronger.

However, the Russian aspiration of a re-birth of a Great Russian Empire is by far the only challenge for the Western concept of a free world. China is increasingly trying to transform its

growing economic power into geopolitical strength and might seek to secure its "sphere of influence", e.g., by overthrowing the government of Taiwan. The "silk road" is a global strategy to increase China's economic role in the world and redesign the global architecture. The historic connotations of the silk road support a Chinese self-understanding of having been historically the leading power In the globe over more than 5000 years of existence. What can Europe and the West put against this narrative? Can the Western vision of universal human rights and rule-based multilateralism be imbedded in to a bigger narrative with a sound theoretical foundation? Or will Russia and/or China succeed, maybe in alliance with other (semi-) autocratic powers, to substantially change the international framework?

3. A New – value driven – German Foreign and European Policy?

The turning point caused by the Russian war coincided with a new political era in Germany. The new German "traffic light coalition" came into office on 7 December 2021. Two coalition partners, the liberal (yellow) FDP and the Green party, switched from opposition into power, the social democratic (red) SPD had already a place on the government bench in the last election period, this time it could even win the chancellery. The SPD had been in power 19 years between 1998-2021, including 3 Merkel governments, shaping the German foreign policy towards Russia.

The traffic light coalition had been a marriage of convenience, rather than of love or ambition. It had been especially not clear, how to bring the liberal FDP and the social-ecological Green party together. Both follow very different concepts of progressive change. Whereas the liberals belief in market forces to manage change and modernization, the Green party calls for a stronger role of the state in order to deal with the challenges of climate change. Nevertheless, both parties agreed that a fundamental modernization program is needed after 16 years of Merkel's continuity. The title of the coalition treaty "Let's dare more progress" ("Mehr Fortschritt wagen") refers to Willy Brandt's dictum to "dare more democracy", an expression that he used in a government declaration in 1969, when a social-liberal coalition took over the government after 20 years of conservative chancellors in office (Angela Merkel, instead, wanted to "dare more freedom" in her first government declaration in 2005). Whereas both parties differ

very much on the field of economic policy, they agree, however, on many reforms regarding civil society, e.g., the role of the church, gay marriage, liberal drug policy – and a more self-confident value driven foreign policy.

The coalition treaty focuses therefore on reforms of civil society, economic policy aims remain much more blurred. Regarding foreign policy, the coalition treaty seeks to strengthen the role of multilateralism and to re-found a new foreign policy with a stronger emphasis on "freedom, values and human rights" (Coalition Treaty 2021: 104, own translation). Therefore, the coalition treaty announces that the new government will "present a comprehensive national security strategy" within the first year (Coalition Treaty 2021: 114). What had been a verbiage during the coalition negotiations in the end of 2021, became highly relevant after Russia attack on Ukraine. In March 2022, new foreign minister Annalena Baerbock launched a dialogue on the new national strategy, a first draft will be presented until summer 2022. In addition, NATO is working on a new strategy after ending the 20-year long mission in Afghanistan. In addition, the EU is working on a new "security compass".

The election manifestos of all three coalition partners include a clear positioning regarding Russia (all written in 2021)[i]. The SPD's election manifesto emphasizes the problems that exist in Russian-European relations, however, following the SPD agenda in foreign policy of the last 20 years, it proposes a strong cooperation on all levels with Russia as a solution. It had been especially FDP and the Green party, who emphasized a more value driven foreign policy during the election campaign 2021. The FDP manifesto mentions clear and focused demands regarding Russia, which indicate a value driven foreign policy without mentioning much about liberal philosophical foundations. The manifesto calls for the necessity of a European Foreign Energy Policy and to pause North Stream 2 until independent investigations of the poisoning of opposition leader Alexander Nawalny are launched (FDP 2021: 49). Furthermore, the FDP called for strong sanctions as long as the conflict in Ukraine goes on and Russia suppresses democratic movements in neighboring countries, such as Belarus (FDP 2021: 53).

The Green party has a similar position, however, it is trying to develop a more value driven line of arguments. The Green election manifesto seeks a stronger international role of Germany in the struggle between free democracies and authoritarian regimes. The program argues that

"[f]or years, however, in Europe and in the world, Germany has at best moderated, often hesitated and finally gone to ground" (Green Party 2021: 207). It would therefore be necessary "to forge ahead as a shaping force with a multilateral, proactive, coherent and values-led policy" (Green Party 2021: 207), therefore the Green election manifesto claims "[w]e want to defend the fundamental values of the EU within our borders and resolutely champion these values outside our borders: human rights, democracy, freedom and the rule of law" (Green Party 2021: 207). The election program of the Green party argues that "[w]ith their authoritarian hegemonic ambitions, not only do states such as China and Russia, which systematically nullify human and citizens' rights, force other states into economic and political dependence; they also want to divide Europe" (Green Party 2021: 208). Nevertheless, the election program acknowledges that a global transformation is not possible without countries ruled by authoritarian regimes, which demonstrates that the "global systemic competition with authoritarian states and dictatorships is real" (Green Party 2021: 208). The proposed solution is a "democracy offensive", involving "federal states, civil society groups and parliamentarians" (Green Party 2021: 208).

Already in November 2020 the general assembly of the party agreed on a new Manifesto of Principles, which is supposed to describe the political agenda and strategy of the party for the next 15-20 years. The program emphasizes a more value driven foreign policy and proposes to strengthen European institutions outside the EU, such as the Council of Europe and OSCE, in order to create "a truly effective and strong system of collective security across Europe" to become true for "all Europeans" (Green Party 2020: 98 [400]). The Green strategy paper sees the Russian challenge much more as a possible clash of ideas:

> "[I]n the face of Russia's nationalistic and backward-looking policies that undermine Europe's security and the self-determination of Russia's neighbors, the goal remains to win over this eastern neighbor of the European Union to such a perspective on the basis of shared values." (Green Party 2020: 98 [400]).

In the Manifesto of Principles, the Green party is developing a broader approach as a counter strategy against populism and authoritarianism. The manifesto argues that "developing [Europe] further into a Federal Republic of Europe is prerequisite for being able to help shape global issues ecologically, socially and democratically" (Green Party 2020: 17) and therefore a necessity

to deal with the global challenges mentioned above. Only by transforming itself into a republic, so the Manifesto of Principles of the Green party, the EU can "strengthen its ability to act democratically in a globalized world" (Green Party 2020: 64). The program of the Green party argues therefore that Europe needs to proceed in political integration in order to persist in a global context with increasing authoritarian regimes. This is because:

> "To deal with global challenges, the European Union needs to be a power for peace that is aware of its responsibility in the world, especially within the framework of the United Nations, and is committed to the principle of international cooperation. The EU can only live up to this responsibility if it overcomes national divisions and acts together. The answer to the current global challenges is a constant deepening and further development of the EU, with the perspective of a Federal Republic of Europe." (Green Party 2020: 89–90).

The major argument for European integration is therefore not primarily an economic one anymore. Nor is the manifesto stating the narrative of Europe as a "peace project" as an empty word. It does rather present the idea of a Republic of Europe as an answer and an alternative to the authoritarian tendencies in global politics. Economics play only a secondary role. The economic system represents the Western way of life with its value of freedom and equality. However, what does the republican paradigm actually say about freedom? What are the theoretical foundations of a European republic? Could a republican paradigm help to understand and frame the shift from a more economic understanding of European integration towards a theory based on political philosophy, integrating economics aspects? In the second part of this article, I will give an overview about these questions.

4. The Origin of the Economic Paradigm in European Integration Theories

In the public discourse it is often claimed that European integration started after WWII as a process of economic integration that was supposed to lead step by step towards political integration. The European Union itself celebrates the launch of this process at 9 May, the day on which the French Foreign Minister Robert Schuman proposed Germany to create a common market for coal and steel in order to "make war not only unthinkable but materially impossible" (Schuman 1950). The European Coal and Steel Community (ECSC) was supposed to be a first

step towards European unity achieved through economic integration, a strategy of European integration that today is called "Monnet method", referring to the first president of the High Authority of the European Coal and Steel Community.

However, two important factors tend to be overlooked in this this narrative of the founding myth of European integration. Both factors influenced the theoretical framework that had been developed during the next years and decades in order to explain European integration. First, already between 1944-1950 there had been established important institutions to create a peaceful post-WWII order. Under the leadership of the allies and especially the USA, a number of global and international institutions were established, the most prominent being the United Nations with the declaration human rights in 1945. Regarding the economic post-war architecture important institution were born out of the Bretton Woods Agreement (1944), such as the IMF (for monetary stability, 1944), the Word Bank (for investments to rebuild the post-war economies, 1945) and GATT (to relaunch international trade to a level before the world wars, signed in 1947, however, the International Trade Organization ITO was never founded). In order re-establish peace and prosperity in (Western) Europe, NATO was founded in 1949 as a military alliance of collective security. Furthermore, the OEEC was founded in 1948 in order to help administer the fundings of the Marshall Plan to rebuild Europe economically. The Council of Europe was founded in 1948 in order to uphold human rights, democracy, and the rule of law in Europe.

All these institutions did not follow, however, the aim to build up a strong European federation with an own European "statehood". They did rather follow the functional approach of international relations, developed by David Mitrany since the 1930s as a flexible and problem focused way to design international organizations. This approach bypasses therefore also problems of sovereignty, as it argues that international organizations are created by sovereign nation states in order to solve clearly shaped international problems. The main concern of functionalism is to avoid the creation of "economic blocs", as attamed by Japan and Nazi German (as "autarke Großraumwirtschaft"). Mitrany argued in his pamphlet "A working peace system" that "now that we have had some experience of what totalitarian dictators can do with public opinion […], we must look for some foundation that is not so easily changed by

propaganda or shattered if abused by some particular group or unit" (Mitrany 1943: 11). This theoretical consideration did shape the functional institutional framework that had been build up between 1944-1950 (for a more detailed discussion, see Zimmermann 2019: 56–62). Jean Monnet himself argued that his strategy to achieve European unity had been to establish a path to a European federation within the already given functional global framework, provided by the allies and especially the US (Monnet 1976: 344–46).

The second factor neglected in this narrative is the fact that there had existed attempts to launch a European government by creating a European army first, before proceeding more in detail with economic integration. The communist revolution in China 1949 and the start of the Coreen War in 1950 had been a shock for the Western World. European leaders were afraid that the focus of the US could shift from Europe to Asia, leaving Europe alone with the Soviet thread. The communist thread created pressure on both sides of the Atlantic to rearm Germany only few years after the end of WWII. However, the new German army was supposed to be integrated not only into NATO but also into a European army, in order to embed Germany's potential military power (Loth 1996: 91–94). As a consequence, the *Treaty establishing the European Defence Community* had been signed in Paris in 1952, with the aim to create a pan-European military with common budget, common arms, centralized military procurement, and institutions (following the so-called Pleven-Plan). A European Political Community (EPC) was supposed to combine the existing European Coal and Steel Community (ECSC) and the proposed European Defence Community (EDC). In the early 1950s, geo-political integration had therefore been given priority to economic integration. However, in 1954 the French national assembly rejected the EDC treaty, as it feared the loss of national sovereignty. Only after this rejection did the European leaders focus on an economic step-by-step path in order to achieve a European federation in the future. The Messina Conference in 1955 paved the way for the creation of the European Economic Community (EEC) in 1958.

The development of the theoretical framework to describe this economic path of European integration followed in the upcoming years. In 1958 Ernst B. Haas published "The Uniting of Europe", describing the process of step by step integration in which political community is created through "pressure groups" and "spill-over effects" caused by the integration of

economic sectors (Haas 1968). Haas' neo-functional approach described how to reach a European federation within a function global order. In 1961 the economist Béla Balassa provided the according economic framework with the publication of "The Theory of Economic Integration", describing spill-over effects trough the economic channels (Balassa 2013).

The focus on economic aspects on European integration had also been possible, because security issues were addressed already by the functional transatlantic framework that was created earlier, especially by NATO. The original plan, to limit the existence of NATO to 20 years, in order to force Europeans to develop an own security architecture, had been giving up in the 1970s, when the according article was cancelled out of the NATO treaty. NATO provided Europe therefore with a "free lunch" regarding security [ii].

Since the beginning of the 1970s, the global institutional framework in which the (economic) European integration process had been imbedded, came under pressure. In 1973 the Dollar based Bretton Woods System collapsed due to the extensive costs of the Vietnam war for the US. As a consequence, the fixed exchange rate system was substituted by a flexible exchange rate system, global capital movements were no longer suppressed. This new situation changed the way in which national states interacted globally. They became again rivals who had to attract international capital flows. Globalization, as we know it today, with global production chains emerged therefore since the 1970s, increasingly undermining national sovereignty (Zimmermann 2019: 80–93). During this era, markets became more important than politics. The liberal era did also put the Soviet system under pressure, until it collapsed in 1989.

This new global framework did also push European integration. The Single European Act in 1987 aimed to complete the European Single Market, in order to liberate the free flow of capital, goods and people, ultimately aiming at introducing a Single European currency. After the collapse of the Iron curtain, the Maastricht treaty in 1992 paved the way for the introduction of the euro until 1999.

This new era also called for a new theoretical framework to analyze international relations and the process of European integration. Already in the 1970s Keohane and Nye developed the concept of complex interdependency as an alternative to the realist view in international relations. They argued that multiple channels of influence exist on different levels between

societies in different fields and that issues are linked to each other. However, this concept of complex interdependence presupposes explicitly that geopolitical considerations are not dominant and that military force inside a region is not relevant (Keohane und Nye 2001: 20–24). Both assumptions have become obsolete for Eastern European integration with the Russian invasion in Ukraine in 2022.

Robert D. Putnam developed the concept of a "two-level game" in which national governments are playing simultaneously on a national and an international game (Putnam 1988). Building on this approach, Andrew Moravcsik built the theoretical framework of "liberal intergovernmentalism" and argued that European integration should not create its own theory but should be embedded into a "general theory of national policy responses to international interdependence" (Moravcsik 1993: 478). Moravcsik re-emphasized the state as a rational actor, which defines national preferences, and maximizes these preferences in intergovernmental negotiations. The process of European integration is analyzed as a "series of rational choices made by national leaders" (Moravcsik 2003: 18), the European Community is an "international regime designed to promote policy coordination" (Moravcsik 1993: 478) in the global economic word order. Moravcsik's liberal intergovernmentalism sees therefore sovereign nation states as key players, however, European integration proceeds according to Moravcsik only there, were nation states have *economic* preferences to coordinate policies. Liberal intergovernmentalism denies that this process has to lead finally to a kind of European federation. Furthermore, Moravcsik argued that national states have only low preferences regarding integrational steps on security issues. He rejects the realist primacy of geopolitics and argues even that geopolitics is secondary to economic preferences in intergovernmental negotiations (Moravcsik 2003: 5–7).

During the 1990s, Moravcsik's liberal intergovernmentalism became the "baseline theory against which new theoretical conjectures are tested" (Schimmelpfennig 2004: 75). Moravcsik's approach would reflect the view that the European Union would be mainly an "economic club" which was designed according to the economic preferences of its member states. This economic understanding of European integration came under pressure when the euro crisis called for further political integration. Moravcsik himself already conceded that "naked economics preferences would probably have led to a highly institutionalized pan-European free trade area

with flanking policies of regulatory harmonization and monetary stabilization", geopolitical consideration must therefore also play a role to understand the current stage of European Integration (Moravcsik 2003: 5–7).

The liberalization of global capital movements reached its peak until the outbreak of the global financial crisis in 2007, since then, (neo-) liberal arguments became increasingly under pressure, as well as in the public and the academic discourse (see for example Crouch 2011). A major problem of neo-liberal (economic) theories is, that they do not consider issues of sovereignty in their models. The increasing populist movements addressed the undermined sovereignty of national states.

The assumption of a primacy of economics over geopolitical considerations did finally collapse with the Russian invasion of Ukraine, which could therefore also become a turning point regarding the assumptions of European integration theory. Putin seemed to have been deaf to his economic advisors, he probably ignored the potential economic consequences of this war of aggression. The economic price had only been secondary to the geopolitical aim of re-establishing the power of the Soviet Union in a new Russian Empire, destroying Ukraine sovereignty, and to lead an autocratic offensive to overthrow the existing international order. Russia does therefore not fit into the neo-functional assumptions of complex dynamic societies, in which pressure groups can influence decision makers. With the Russian crusade, Putin imposes his geopolitical approach to the European leaders, who have to re-emphasize geopolitical vs. economic factors. By imposing far reaching sanctions against Russia, also European leaders put geo-political over economic considerations.

Furthermore, the Russian invasion touched industry sectors which are highly linked to issues of sovereignty and security. The war in Ukraine influenced the production of wheat, a staple foods item. Nutrition security is one of the basic needs that a government has to provide, in order to be accepted as a sovereign. In addition, the war in Ukraine demonstrated to the European member states, and especially also to Germany, the degree of dependency to Russian energy supply. The (traditional) energy sector, a large-scale industry with a few important companies as major players on an international level, has been a sector between economics and geopolitics.

The consequence of these developments is an increased importance of geopolitical aspects in the course of European integration. As we have seen, the two major theories on European integration, neo-functionalism and liberal intergovernmentalism, put a stronger emphasizes on economic aspects. In what way could European Republicanism be an alternative?

5. European Republicanism as an Alternative Theoretical Framework

European republicanism is a relatively new approach in the field of European integration. It is, however, better equipped to link economic and geopolitical aspects within a theoretical framework and delivers therefore a deeper tool kit to analyze the current developments in international relations and European integration in particular.

European republicanism has its root in the contributions of Phillip Pettit (Pettit 1997) and Quentin Skinner (Skinner 1998). With their neo-republican approach, both authors tried to develop a theoretical alternative to liberalism and communitarianism, which had dominated the academic discourse in the previous decades, especially during the cold war. Neo-Republicanism can therefore also be seen as a synthesis between the hypothesizes of both schools of thought, which defines a new equilibrium between individualism and holism and offers therefore an important toolkit to develop a theoretical framework for a post-cold war order, which is not one-sided dominated by liberalism. It could therefore be an answer to both, an over-emphasis of liberalism that dominated until the financial and euro crisis, as well as the populist and authoritarian backslashes thereafter.

One of the most important theoretical contributions of neo-republicanism was the definition of "freedom as non-domination" instead of the liberal "freedom as non-interference" (Pettit 1997). The liberal definition regards the action itself and supports therefore the ideology of free markets and a reduced role of the state. Freedom as non-domination regards more the context or relation of an action. In this understanding a person is free as long as no "arbitrary or unchecked control over the choices of another" is exerted (Lovett 2009: 14). This definition of freedom allows therefore for a stronger role of the government, which can interfere with the actions of its citizens, as long as citizens have the possibility to control and influence the decisions of the government according to republican principles. It is this definition of freedom

as non-domination, the Ukrainian people are fighting for since the invasion of Russia. They don't want to give away the access to the institutions, which they started to proclaim since the demonstrations and revolutions of 2004 and 2014.

Republican theory has been used in the 1990s in order to analyze the so called "democratic deficit" of the European Union. The Maastricht treaty in 1992 aimed to complete the European Single Market with a European Single Currency till 1999, however, it failed to achieve an according agreement on political integration, the different pace between economic and political integration became more evident. In its rulings on the Maastricht treaty, the German constitutional court did build on republican theory and emphasized that the democratic development most proceed with the pace of economic integration (Zimmermann 2019: 127–33). The most prominent academic dispute on European republicanism had been the so-called Habermas-Grimm debate. Grimm, a former German constitutional court judge, argued that a European demos could not be established, especially because of the lack of a European language (Grimm 1995). Habermas, the most prominent German philosopher, argued that a European constitution would be the only way to create a European actor, based on democratic principles, that would be able to deal with the economic forces of globalization (Habermas 1996: 191).

A comprehensive design for a creation of a "European Republic" had been put forward by Collignon (Collignon 2003) in the course of the debate of a European constitution and the Convention on the Future of the European Union. With the "res publica of public goods" approach, Collignon argued that European economic integration created a number of European public goods, which need, according to the republican paradigm, a European governance. It is this "res publica of public goods" approach, which links economic theory to political philosophy. Collignon' starting point are epistemic constituencies, which "[agree] on a constitution for procedural policy-making rules" (Collignon 2003: 28). In such a polity, citizens own, according to the republican paradigm, public property in common and "the legal community of republican citizens emerges from their status as common property owners" (Collignon 2017: 53). Economic realities, the existence of externalities and public goods problems, e.g., caused by the dynamics of a globalized economy, create therefore the necessity of a shared governance in order to be "free" in the republican understanding of freedom as non-domination. In this understanding,

freedom, economic prosperity and sovereignty are linked together. This theoretical framework allows therefore to evaluate economic development (e.g., in the form of public goods problems) and issues of sovereignty.

This link between republican political philosophy and economic theory has been further developed with the concept of deriving sovereignty from a "hierarchy of social institutions and public goods" (Zimmermann 2019). This approach argues that the categories of public, private, common resource and club goods, on which economic theory is build, derives from the ontological differentiation of a mental and a material world and to build social realities, as John Searle described it (Searle 1996). Building complex social institutions, such as the European Union, is a process to overcome the "state of nature" of a material common resource world without social institutions. Security is the first public goods to create sovereignty and overcome the state of nature and create social institutions. Only then can the sovereign decide about an economic system (introduce private, common resource and club goods), coordinate external relations and realize justice. The approach puts issues of sovereignty and institution building before economic considerations.

Applied to European integration, European republicanism has therefore been used to describe the democratic deficit that derives from economic integration and to describe in what respect it would be possible to build democratic institutions which are appropriate for the degree of economic integration. These arguments have been further developed and pushed forward by Ulrike Guérot in order to put forward reforms after the euro crisis. Building on Bogdandy's proposal that the concept of a European Republic could become a "Leitidee" for European integration (Bogdandy 2005), Guérot argued that the European Republic as an utopia can be used to break the gridlock of the European reform process and to finally answer the "finality" question of European integration. The utopia is based on the assumption that all individuals participating in the European common market have equal political rights. This assumption of the political equality of the individuals participating in the common market would help to overcome the concept of a European Union build on sovereign nation states (Guerot 2018). As a consequence, the political power of the European Council has to be limited, the European parliament, instead, should be strengthened in order to build a real European democracy (Guerot

2018: 160). Guérot argues that this approach would be able to overcome the problems of populism, which we witnessed the last decade, as a European government, build on the political will of politically equal market participants, would be able to address the social and distributional problems caused by a common market. The sovereignty of nation states would then be substituted by the sovereignty of the European citizens, the gap between the degree of economic vs. political integration, which increased significantly since the Maastricht treaty, could finally be closed since (Guerot, Ulrike 2018: 331–33). A European republic would therefore be able to overcome the logic of economic integration and to find way to define a European political will through democratic European decision-making processes, which could strengthen political considerations versus economic ones.

Indeed, the republican approach argues that the driving force for integration is not economic advantage, but rather the fear of domination. Basic security and political integration must therefore pre-empt economic integration (Zimmermann 2019: 269–89). Even economic flagship projects, like the introduction of the euro, follow mainly geopolitical aspects, as for example Martin Feldstein has argued (Feldstein 1997). The ultimate scope of the "res publica of public goods" is therefore not to maximize economic advantage, but to solve problems together in a public process according to the values of the citizens. This approach leaves also much more space to deal with the difficult questions of the Ukraine crisis. Neo-functionalism and liberal intergovernmentalism might be able to deliver explanations for Ukraine's economic interest to join the EU. However, they are not able to analyses Russia's geopolitical influence into this process. Republicanism leaves space for both, economic and geo-political considerations. Economically, the "res publica of public goods" would suggest a common economic governance between Ukraine and all the other EU member states, if economic integration has reached a degree in which considerable externalities emerge. However, politically republicanism also has severe problems with power systems and "spheres of influence" from outside forces and rejects them as form of domination. On a global perspective, republicanism assumes that peace and prosperity is only achievable by creating a federation of republics, as proposed in Immanuel Kant's perpetual peace (Kant 2007). This would, however, presuppose, that all nations become republics and reject authoritarianism and domination.

One effect of the Russian war on Ukraine could therefore be that the importance of political integration within the EU is strengthened, as the need for a common security policy is acknowledged. Republican theories play an important role in this process of institution building, as seen above. However, European republicanism can also play an important role in defining Europe's role towards authoritarian and populist movements within and from outside of the EU. A republican approach would decline a one-sided economic view, e.g., it would reject that a gas pipeline with Russia can be seen as a purely economic project, as the previous German governments did. According to the res publica of public goods approach, all people who are affected by the project have to decide together on how to deal with these effects, if people cannot influence this decision-making process, forms of domination could emerge. Economic arguments are not neglected in this approach, however, they are surrounded by a republican framework.

6. Conclusion

With the Russian assault on Ukraine, the importance of the republican approach of European integration might further increase. The thread that the European idea is exposed to might become a promotor for a stronger European security and defense community. Such a community would be the missing completement to build a European political union that is at pace with the degree of economic integration and might therefore help to overcome the institutional flaws that the European Union is lacking from since the acceleration of economic integration in the 1990s. Republican theory is important to develop a democratic design of stronger European institutions, linking economics considerations to political philosophy and question of sovereignty.

However, it has to be emphasized that under such a framework, Europe will rather be built on a common threat than on a shared dream of prosperity. A militarily stronger and more united Europe might also be tempted to use its military power in international conflicts, for better or for worse. Europe would therefore need strong democratic institutions with a focused set of values to maintain such temptations. Republican theory can also play an important role here to define such institutions and values.

Finally, the idea of a European republic as part of the world community might, building on more than 2000 years of European history of thought, furthermore be a counter concept to the Great Russian Empire, as well as to the Chinese Belt and Road Initiative. European republicanism could therefore contribute to overcome populist tendencies by offering a counter-concepts, on the one side, but also by building, as proposed by Pettit and Skinner, a synthesis between liberalism and communitarianism.

* SDG-Manager at the Global Responsibility Unit, University of Cologne, PhD on European Republicanism from Scuola Superiore Sant'Anna. Email address: thilozimmermann@gmx.de

[i] The manifesto of the conservative CDU/CSU does addresses Russia only in general terms, the manifesto of the socialist LINKE demonstrates much understanding for Russia, the right wing AfD does not mention any problems with Russia.

[ii] Nevertheless, with the election of Charles de Gaulle as French president in 1958, the process of economic integration was paused, as de Gaulle emphasized the role of national sovereignty and geo-politics. Stanley Hoffmann concluded that European integration may proceed in fields of "low politics", such as economics, but stops on the field of "high politics", such as geopolitics.

References

- Balassa, Bela. 2013. *The Theory of Economic Integration*. Routledge.
- Biden, Joe (2022). 2022. „Full transcript of President Biden's speech in Warsaw on Russia's invasion of Ukraine". *ABCNews*.
- Bogdandy, Armin von. 2005. „Die europäische Republik". *Aus Politik und Zeitgeschichte* 36:529–40.
- Coalition Treaty, SPD Grüne und FDP. 2021. *Mehr Fortschritt Wagen - Koalitionsvertrag 2021-2025*. Berlin.
- Collignon, Stefan. 2017. „The European Union as a Republic". in *The Governance of European Public Goods - Towards a Republican Paradigm of European Integration*. Cham, Switzerland: Palgrave Macmillan.
- Collignon, Stefan (2003). 2003. *The European Republic*. London: The Federal Trust Foundation.
- Crouch, Colin. 2011. *The strange non-death of neoliberalism*. Cambridge, UK ;Malden, MA: Polity Press.
- FDP, Germany (2021). 2021. *Election Manifesto - Nie gab es mehr zu tun*.
- Feldstein, Martin (1997). 1997. „The Political Economy of The European Economic And Monetary Union". *NBER Working Papers* Working Paper 6150.
- Green Party, Germany (2020). 2020. *Manifesto of Principles*. Berlin.
- Green Party, Germany (2021). 2021. *Manifesto for the 2021 Parliamentary Elections*. Berlin.
- Grimm, Dieter (1995). 1995. „Braucht Europa eine Verfassung?" *JuristenZeitung* 50(12):581–91.
- Guerot, Ulrike. 2018. „Die politische Utopie einer europäischen Republik". S. 151–62 in *utopisch, dystopisch*, *Leser, I., Schawrz, J. (Hrsg.)*. Wiesbaden: Springer Fachmedien.
- Guerot, Ulrike. 2018. „Kann es ein demokratisches Europa geben und wenn ja, wie?" *Forschungsjournal Soziale Bewegungen* 31(1–2):330–37.
- Haas, Ernst B. (1968/ 1958). 1968. *Haas Uniting Europe*. Stanford, California: Stanford University Press.
- Habermas, Jürgen (1996). 1996. *Die Einbeziehung des Anderen Studien zur politischen Theorie*. Suhrkamp.
- Kant, Immanuel. 2007. *Perpetual Peace*. Filiquarian Publishing, LLC.
- Keohane, Robert O., und Joseph S. (. Nye. 2001. *Power and Interdependence*. 3rd Edition. New York: Longman.
- Loth, Wielfried (1996). 1996. *Der Weg nach Eruopa*. Vandenhoeck & Ruprecht.

- Lovett, Frank. 2009. „Neorepublicanism: A Normative and Institutional Research Program". *The Annual Review of Political Science* 12:11–29.
- Mitrany, David (1943). 1943. *A Working Peace System*. Welwyn, UK: Broadwater Press.
- Monnet, Jean (1976). 1976. *Memoirs*. Paris: Libraire Arthème Fayard.
- Moravcsik, Andrew (1993). 1993. „Preference and Power in the European Community". *Journal of Common Market Studies* 31(4):473–524.
- Moravcsik, Andrew (2003/1998). 2003. *The Choice for Europe*. UK-Edition. London: Routledge.
- Padoa Schioppa Group. 2012. *Completing the Euro - A road map towards fiscal union in Europe*. Paris: Notre Europe.
- Pettit, Philip (1997). 1997. *Republicanism A Theory of Freedom and Government*. UK: Clarendon Press.
- Putnam, Robert D. (1988). 1988. „Diplomacy and domestic politics: the logic of two-level games". *International Organization* 42(3):427–60.
- Schimmelpfennig, Frank (2004). 2004. „Liberal Intergovernmentalism". S. 75–94 in *European Integration theory*. Oxford: Oxford University Press.
- Schuman, Robert (1950). 1950. „Schuman Declaration 9 May 1950".
- Searle, John R. (1996). 1996. *The Construction of Social Reality*. London: Penguin Books Ltd.
- Skinner, Quentin (1998). 1998. *Liberty before liberalism*. Cambridge: Cambridge University Press.
- Zimmermann, Thilo. 2019. *European Republicanism - Combining Political Theory with Economic Rationale*. Cham, Switzerland: Palgrave Macmillan.

PERSPECTIVES ON FEDERALISM
Centro Studi sul Federalismo
Piazza Arbarello, 8
10122 Torino - Italy
Tel. +39 0116705024
Mail to: castaldi@csfederalismo.it,
delledonne@csfederalismo.it