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EDITORIAL

ESSAYS

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The Legitimacy of Discriminatory Disenfranchisement? The Impact of the Rules on the Right to Vote in the Bremain/Brexit Referendum

by

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Abstract

The Divisional Court of the Queen's Bench Division of the England and Wales High Court handed down its decision on 20 April 2016 in the judicial review case of *Shindler*. This ruling confirmed that British citizens living in other EU Member States for more than 15 years remain barred from voting in the June 2016 referendum.

The case sparks further consideration of the voting rules in general and may therefore be of interest to others in considering questions of legitimacy in respect of the eventual outcome of the popular vote on 23 June. Unlike other states, the UK has no established rules on referendums and each such popular vote (and the franchise for it) is therefore treated on an *ad hoc* basis. Fears have been expressed that the government could manipulate the outcome of a referendum, particularly in determining a different franchise for each popular vote.

Key-words

United Kingdom, Brexit referendum, disenfranchisement

1. Introduction

Amid the tumult of the ongoing EU referendum campaign in the United Kingdom, the Divisional Court of the Queen's Bench Division of the England and Wales High Court handed down its decision on 20 April 2016 in the judicial review case of *Shindler*.[I] This ruling confirmed that British citizens living in other EU Member States for more than 15 years remain barred from voting in the June 2016 referendum.

The case sparks further consideration of the voting rules in general and may therefore be of interest to others in considering questions of legitimacy in respect of the eventual outcome of the popular vote on 23 June. Unlike other states, the UK has no established rules on referendums and each such popular vote (and the franchise for it) is therefore treated on an *ad hoc* basis. Fears have been expressed that the government could manipulate the outcome of a referendum, particularly in determining a different franchise for each popular vote: in the June vote, the effective disenfranchisement of possibly three million prospective voters could allow the scales to tip in favour of Brexit and thus against the current Conservative Government's avowed policy of Bremain.

2. Background

When the Conservative Government under David Cameron decided to adopt the UK rules on the franchise in nationwide general elections for the forthcoming EU referendum,[II] it was following in the footsteps of the Labour Government under Harold Wilson that had done the same in the 1975 referendum on continuing EEC membership.[III] Since then, the European Union has created the concept of EU citizenship including the active and passive right to vote in local and European parliamentary elections,[IV] with the Court of Justice (CJEU) evolving such citizenship rights in a series of cases.[V] The EU Charter of Fundamental Rights merely reiterates the voting rights under the Treaties and does not contain a general right to vote.[VI]

The position taken by the British Government and Parliament to the franchise in the EU referendum may be contrasted to the one decided for the Scottish Independence Referendum of September 2014: this latter franchise was much more extensive and

inclusive, thereby seeking to gain more legitimacy for the final decision rendered by the electorate in that vote. Pursuant to the 2012 Memorandum of Understanding[VII] concluded between the British and Scottish governments, the Scottish Parliament decided to use the voting rules for Scottish parliamentary and local elections in the Independence Referendum as well as to lower the usual voting age from 18 to 16. Grounding the eligibility criteria on residency rather than on citizenship alone, EU citizens in Scotland were able to vote as well as Irish and Commonwealth citizens resident there. However, a line was drawn at giving Scottish people living in other parts of the UK or in other EU Member States the right to vote. It could be argued that it would have been difficult (absent some form of nascent concept of Scottish citizenship) to determine who these people were as ancestry and links would have needed to be considered; and that such voters represented a bloc more broadly in favour of keeping Scotland in the UK (BBC News 2012).

The British Parliament's decision then has clear consequences: on the one hand, it excludes 16 and 17 year olds; most EU citizens resident in the UK; and British citizens resident for more than 15 years abroad,[VIII] whether or not in another EU Member State;[IX] while, on the other, resident Irish and Commonwealth (including Cypriot and Maltese) citizens – who have the right to stand and vote in general elections in the UK – will have the right to vote in the referendum.[X] Further anomalies abound: for example, British citizens living abroad for up to 15 years can vote whereas EU citizens living in Britain for 15 years or more are unable to vote despite extensive ties to the country.

3. The *Shindler* case

The claimants, Shindler and MacLennan, had not been registered to vote in British elections for more than 15 years. They brought a judicial review of the European Union Referendum Act 2015 on the grounds that its provisions restricted their directly effective EU law rights of freedom of movement in a manner that was not objectively justifiable. They submitted that their exclusion from the EU referendum franchise, on the basis that they had exercised their EU free movement rights for too long, fell within the scope of and was incompatible with EU law because it disadvantaged them for having exercised their rights in EU law; and further it discouraged them from continuing to exercise their free

movement rights, since they would be required to return home to the UK in order to be able to vote in the EU referendum.

The judges on the bench of the Divisional Court made a meticulous examination of the previous relevant case-law on the CJEU as well as of the European Court of Human Rights in Strasbourg before which one of the present claimants, Shindler, had previously brought an action against the UK.[XI] In fact, the Divisional Court extensively quoted with approval the Strasbourg Court in *Shindler v United Kingdom*, which latter court had ruled that there had been no violation of Article 3 of Protocol No. 1 (right to free elections) of the European Convention on Human Rights 1950 and determined that the UK had legitimately confined the parliamentary franchise to those citizens who had "a close connection to the UK and who would therefore be most directly affected by its laws." The Strasbourg Court had further stated in relation to the 15-year rule:[XII]

> The justification for the restriction was based on several factors: first, the presumption that non-resident citizens were less directly or less continually concerned with their country's day-to-day problems and had less knowledge of them; second, the fact that non-resident citizens had less influence on the selection of candidates or on the formulation of their electoral programmes; third, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and fourth, the legitimate concern the legislature might have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.

The Divisional Court accepted that recent statements on behalf of the British Government which described the 15-year rule as arbitrary and which showed that it was committed to repealing it in its application to the parliamentary franchise. In fact, the Conservative Party had promised in its *2015 Election Manifesto* to abolish the 15-year limit altogether[XIII] and the bringing forward of the Votes for Life Bill to that effect had been promised in the Queen's Speech (setting out the present Government's legislative programme) on 27 May 2015.[XIV] However this government position did not undermine the justification for the British Parliament's decision to retain that rule for the 2016 referendum. The Court evidently considered that this was a matter solely for national law

and therefore there was no consideration of an Article 267 TFEU reference: it therefore ruled in favour of the British Government, recognizing that Parliament was entitled to conclude that applying the 15-year rule to the EU referendum was justified as a measure in support of a legitimate aim, namely requiring a relevant connection to the UK as a qualification for the franchise.

4. Clear implications of legitimate discriminatory disenfranchisement

The implications of this legitimate discriminatory disenfranchisement, however, were not far from the minds of the judges on the bench of the Divisional Court, when they observed:[XV]

> We acknowledge the very real and personal interest which these claimants have in the outcome of the EU referendum. If the United Kingdom leaves the European Union, they, in common with an estimated 1 to 2 million British citizens currently resident in other Member States of the European Union, will certainly be deprived of their EU citizenship and the important rights which accompany that status. In these circumstances it would clearly have been open to Parliament to decide that the franchise for the referendum should be extended to all citizens of the United Kingdom resident in other Member States of the European Union who wish to register to vote.

The iniquity of such rules is not just linked to the UK. A 2013 Study prepared for the European Parliament's Constitutional Affairs Committee (Arrighi *et al.* 2013) highlighted the discrepancies of rules for expatriate voters in national elections in their home State. At one end of the spectrum, citizens in the overwhelming majority of expatriate citizens in EU Member States retain their right to vote in such elections irrespective of their residency, while those of other Member States (Cyprus, Denmark, Ireland, Malta and the UK) lose such rights when taking up permanent residency in a third country, subject to certain qualifications. The expatriate franchise for national referendums is more restricted with Germany, Hungary, Portugal and Slovakia added to the five states listed above.

The discriminatory nature of these differences in the EU and their result was underlined in the 2010 *EU Citizenship Report*[XVI] in that EU citizens from certain Member

States are disenfranchised in national elections of their home Member State once they have resided in another Member State for a given period of time. In fact, no Member State has a general policy granting Union citizens from other Member States residing on its territory the right to vote in national elections. Consequently, disenfranchised Union citizens are usually left without the right to vote in national elections in any of the Member States. In order to alleviate such differences, the European Commission recommended in 2014[XVII] that where Member States' policies limited the rights of their nationals to vote in national elections based exclusively on a residence condition, such States should enable their expatriate nationals (who make use of their right to free movement and residence in the EU) to demonstrate a continuing interest in the political life in their State of origin, including through an application or a reapplication (by electronic means) after a number of years in order to remain registered on the electoral roll and, by doing so, to retain their right to vote.

Stepping aside from the purely legal aspects of the matter, the *Shindler* case actually raises a couple of interesting points more political in effect than legal. First, the Divisional Court acknowledged that it had been open to the British Parliament to extend the franchise to British citizens resident in other EU Member States, irrespective of time spent living there: one might ask the question, "Why then did the British Government/Parliament not so extend the franchise, especially in regard to 'the very real and personal interest which [such persons] have in the outcome of the EU referendum'"?

Indeed, challenging the words of the Strasbourg Court in *Shindler v. United Kingdom*, the Hansard Society has previously observed:[XVIII] "[T]his state of affairs causes huge resentment among our fellow countrymen and women in other countries. Most of them have gone abroad to work and to advance British interests; they represent an immensely important source of soft power for the United Kingdom." Moreover, British citizens living in EU Member States are not indifferent to, or ignorant of, what is happening in their own country. Modern technology enables them to follow closely what is going on and take part in social and political developments in their home State, whether through satellite television, the internet or various social media or through the extensive network of low-cost airlines and frequent travel back to family and friends in "the mother country."

Even more telling is another issue raised above: the Strasbourg Court focused on the legitimacy of the UK in restricting voting rights in general elections of non-resident British

citizens. But turning the words of this Court on their head, then what happens when British rules on the referendum discriminate not on grounds of free movement but on grounds of actual nationality? According to British election rules, adopted for the 2016 referendum, there are now effectively two classes of EU citizen living in the UK – the first, privileged group contains British, Irish, Cypriot and Maltese citizens while the second-class group contains all the rest. One wonders whether a Hungarian, a Dutch or another citizen from an EU Member State from the second group, resident in the UK, could not have challenged the referendum voting rules on the grounds of discrimination of nationality. After all, the Scottish Parliament allowed such citizens to vote in the 2014 Independence Referendum and, as noted by the Divisional Court in *Shindler* in reference to the 15-year rule discussed above, it would clearly have been open to the British Parliament to decide that the franchise for the referendum should be extended to all citizens from the EU: Why then did this not happen?

It might be claimed that both points were logistically impossible to achieve, within the timeframe provided, once the referendum was to become a reality rather than a distant possibility, following the May 2015 general election victory by the Conservative Party. Still EU citizens are required to register for the elections for May 2016 in the three smaller nations of the UK as well as for local ones in England, so that part is not problematic on grounds of organization. For British citizens abroad, a public awareness campaign (targeted at expatriate communities in particular, through printed and virtual media) could have encouraged more citizens to register to vote but the official view of such British nationals abroad is perhaps best summed up in the words of the Hansard Society: "[T]here is a lack of political will to safeguard and promote the interests of British citizens overseas. They are the forgotten voters."

Misgivings in relation to the 2016 referendum franchise already been raised online and in the media although, as might be imagined, not on the part of the Tory tabloids or broadsheets. Alberto Nardelli's article for *The Guardian* newspaper (Nardelli 2015) provided some thought-provoking ideas when he considered that a variety of possible factors based on nationality, residency and age might sway the EU referendum by as many as 7.6 million votes and thus change the result. For British expats living more than 15 years in other EU Member States, he notes that "the outcome of the referendum may have an impact on [their] lives…. At the very least it could curtail ease of doing business and access to benefits

and services. At the extreme, it could lead to some having to return to Britain." For EU citizens, he employs this argument again, observing that many have lived in the UK for a number of years (perhaps longer than in their country of origin): "They consider Britain to be their home. They have family here. They pay their taxes here. Yet, they may not have a say in a decision that would have a huge impact on their lives."

Moreover, Katie Ghose blogging on the website of the Electoral Reform Society (Ghose 2015) has noted that a further problem with a government's ability to alter the franchise for each referendum was "a perception that the voting intentions of one or another group are second guessed and factored into the decision. This can add to the general sense – fairly or unfairly – that politicians are gaming the system to suit themselves, rather than embarking on an open conversation about a matter of huge national significance."

So one begs the question again: Why would the British Parliament (and the Conservative Government) pass up on the opportunity of allowing two voting constituencies to participate in the June 2016 referendum, members of which would probably be broadly in favour of continuing EU membership (without discussing the preferences of 16 and 17 year-old voters).

One might point to opposition within the Eurosceptic ranks of the Conservative Party itself to do so and/or the potential negative reaction in the right-wing Tory press that could be used by opposing forces to undermine the message of "sceptical Bremain," promoted by the Cameron Government. Perhaps the voting force of 1.8 million British citizens in the EU and the 2.7 million EU citizens in the UK[XIX] that could eventually carry the day to remain, was too much to bear for an intensely insular electorate?

And if the Conservative Party is actually wedded to the idea of the probable one million Commonwealth citizens (Migration Watch UK 2013)[XX] being able to carry the vote for Bremain, might not this be undermined by the almost complete lack of reciprocity that such rights accrue to British citizens resident in Commonwealth states which, for the most part,[XXI] do not grant the right to such Britons to vote in their own national elections? Even if British citizenship is not an option for other citizens from the Union, perhaps one should ask their governments to expose such anachronism to the British public by seeking Commonwealth membership, some of whose states (Mozambique and Rwanda) have

never been under British rule unlike[XXII] Austria, Croatia, Denmark, France, Germany, Greece, Netherlands and Portugal?

In whatever way it may be considered, on the eve of the referendum, discriminatory disenfranchisement of two large, important voting constituencies certainly runs the risk of undermining the democratic legitimacy of the eventual result.

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I *Shindler and MacLennan v. Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin).

II European Union Referendum Act 2015 (c. 36), s. 2: http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted accessed 1 May 2016.

III On the 1975 referendum, see Tatham 2009: 23-25.

IV Articles 20(2)(b) and 22 TFEU.

V As the CJEU stated in Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, at paragraph 31: "Union Citizenship is destined to be the fundamental status of nationals of the Member States." See also, e.g., Case C-413/99 *Baumbast and R. v. Secretary of State for the Home Department*, ECLI:EU:C:2002:493; and Case C-200/02 *Zhu and Chen v. Secretary of State for the Home Department*, ECLI:EU:C:2004:639.

VI Articles 39 and 40 CFR.

VII For full details and documents, see http://www.gov.scot/About/Government/concordats/Referendum-on-independence accessed 2 May 2016.

VIII The Representation of the People Act 1985 provided for British citizens resident abroad to be able to remain on the electoral register for a period of five years while the Representation of the People Act 1989 extended the period to 20 years. The Political Parties Elections and Referendums Act 2000 reduced the period to 15 years. For an excellent discussion of this issue, see I. White, "Overseas voters," *Briefing Paper* No. 5923, House of Commons Library, 7 March 2016: http://researchbriefings.files.parliament.uk/documents/SN05923/SN05923.pdf accessed 3 May 2016.

IX In 2015, an Overseas Voters Bill was presented to Parliament as a private member's bill, proposing the removal of the 15-year limit to the ability to register. The legislation did not proceed but the present Government expressed sympathy with the aim and intends to bring forward a "Votes for Life" Bill that would abolish the 15-year period.

X This means, in effect, that one group of EU citizens – Irish, Cypriot and Maltese citizens (Cyprus and Malta are part of the Commonwealth) – are privileged over the others.

XI *Shindler v. United Kingdom* (2013) 58 EHHR 9.

XII *Ibid.*, at paragraph 105.

XIII Conservative Party, "Strong Leadership. A Clear Economic Plan. A Brighter, More Secure Future," *2015 Conservative Party Manifesto*, at 49 when it said, "We will introduce votes for life, scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting.": https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf accessed 2 May 2016.

XIV For the relevant part on this Bill, see pages 96-97 of this Speech: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf accessed 5 May 2016.

XV *Shindler*, footnote 1 above, at paragraph 51.

XVI COM(2010) 603.

XVII European Commission, Recommendation of 29.1.2014 "Addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement": C(2014) 391 final.

XVIII See Hansard Society website: http://www.hansardsociety.org.uk/our-forgotten-voters-british-citizens-abroad/ accessed 2 May 2016.

XIX These figures are taken from Nardelli 2015.

XX Migration Watch UK is an immigration and asylum research organisation and think-tank, which describes itself as independent and non-political, but which has been characterized by some commentators and academics as a right-wing pressure group.

[xxi] Out of the 53 states currently in the Commonwealth, only the following (largely Caribbean) states grant such reciprocal voting rights to British citizens: such citizens can vote in Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Mauritius, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. New Zealand gives the right to vote to foreign citizens only if they are granted permanent residence status while in Malawi foreign citizens who have been resident for seven years can vote.

[xxii] While, generally speaking, only parts of these countries have at any time been under British rule that fact was enough to allow Cameroon to join the Commonwealth in 1995: this country gained independence in 1960 from France, with the British-administered Southern Cameroons voting to join Cameroon after a plebiscite in 1961.

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Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law

by

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Abstract

European Union, and criminal, laws had been interacting in many ways even before explicit competence in criminal matters was acquired by the Union in the Treaty of Maastricht. Such intersections between supranational and national provisions have frequently been handled by the CJEU. In the main, the intervention of the Court is triggered by Member States' recourse to penal sanctions in situations covered by EU law. In such cases, the CJEU is called upon to strike a complicated balance: it has to deal with Member States' claims of competence in criminal law, whilst ensuring that that power is used consistently with EU law. By making reference to selected cases, this paper highlights the impact that principles established in the context of the fundamental freedoms can have on EU criminal law.

Key-words

Free movement, EU criminal law, mutual recognition, proportionality, fundamental rights, Court of Justice of the European Union

1. Introduction

European Union (EU)[I] law is not just a framework of coexisting watertight areas. Quite the opposite, it is a 'whole' whose constituent parts are highly connected and influence each other. As time has gone by, many bricks have built up and strengthened such a connection, with the Court of Justice of the European Union ('the Court' or the 'CJEU') playing a major role in this respect. This paper aims to put another brick in this 'whole', and to discuss how the Court's case-law on free movement can improve fundamental rights' protection in EU criminal law. By EU criminal law, I mean: the instruments adopted by the Union according to the competences conferred in the Treaty,[II] as well as the law of the former 'third pillar'; the interaction between EU and national criminal law.

Interdependence is an inherent feature in the EU; where interaction takes place not only among the different areas of Union law, but also between the latter and national systems. This is even truer as far as penal law is concerned. Many principles usually traced back to EU criminal law have been firstly stated and developed in the context of free movement. What is more, in many cases this has resulted in heightening the standard of protection of individual rights. Three different expressions of interaction can be seen here.[III] Firstly, the impact of EU law on Member States' (MS) law has concerned the infringements of EU law provisions, criminalised at national level, where the CJEU has set aside those MS' rules that limited the rights established by EU law in a disproportionate manner.[IV]

Secondly, the use of criminal penalties has been upheld by the EU as a tool in maintaining the effectiveness of EU law. The "*Greek Maize*" case is the landmark judgment in this respect.[V] The Court, by founding its reasoning on effectiveness, established the *principle of assimilation*. Here the obligation is for MS to treat comparable violations of Community and national law with analogous means, for MS reactions to amount to *effective, proportionate and dissuasive* penalties, and for these to be enforced with the *same diligence* as those applied to national situations. Though initially used in isolation, the *Greek Maize* 'formula' has progressively been accompanied by an explicit obligation for MS to impose penalties involving deprivation of liberty.

In the third way of interaction, criminal law principles have been regarded as general principles of EU law, particularly in order to ensure the application of Union law in compliance with the principles of legal certainty and non-retroactivity in criminal proceedings.[VI] The Treaty of Lisbon has resulted in the enhancement of the potential in terms of mutual impact among the different areas of EU law; which can be mostly ascribed to the collapse of the pillar-based structure of the EU.

In this respect, the existing case-law of the Court offers further opportunities to strengthen the protection of individuals in EU criminal law through the use of the principles stated in the context of free movement. Broadly speaking, the interplay between criminal law and free movement has increased at the EU level over the years, with two broad fronts of interaction emerging in particular. On the one hand, we have seen the use of the legal rules, and their interpretation by the CJEU, where criminal law is overtly resorted to. In the Area of Freedom Security and Justice (AFSJ), criminal law is explicitly used in EU instruments since the Union has specific competences in this respect. On the other hand, there are extensive areas of EU law where criminal law is not mentioned, since this would fall outside the Union powers; this is the case of the internal market and fundamental freedoms. In this way penal rules are put under the spotlight by the interaction between EU and national laws, with the Court deliberating on the role attached to criminal penalties.

The high relevance of the interaction between fundamental freedoms (or, more broadly, Union law) and criminal law has been extensively analysed.[VII] Indeed, free movement has been, and is, the core of EU law since the latter was born, though many other areas have been gaining ground over the years (such as citizenship and criminal law). Right from the establishment of the EU, national provisions of criminal law have been increasingly covered by the law of the four freedoms (consisting of the Treaty and secondary law). Thereby, the chance for both kinds of rules (national and supranational) to interact has significantly heightened. Such dynamics have triggered many interpretative dilemmas, the resolution of which have been referred to the CJEU by national judges. In these contexts, the CJEU has been asked to find an equilibrium between economic freedoms and state sovereignty in criminal law. Two fundamental questions arise in this respect: is criminal law restricting, or capable of restricting, a fundamental freedom; and if so, may such a restriction be allowed?

Many studies have focused on the use of general principles by the CJEU in this area,[VIII] and its impact on criminal law. Therefore, in this paper I discuss possible consequences for EU criminal law that have not been explored in-depth so far. I select a restricted number of Court's rulings, and outline two main scenarios. As for the choice of the judgments, a key criterion has been the value of primary law taken on by the Charter of Fundamental Rights of the EU (CFREU or the Charter). I am interested in dealing with the possible impact of free movement case-law on fundamental rights in EU criminal law. Therefore, I analyse those judgments explicitly referring to a fundamental right or a general principle now enshrined in the Charter.

The first scenario regards the use of the principle of proportionality; here I argue that the CJEU's use of the principle where criminal law encounters the fundamental freedoms has been largely beneficial to individuals. Such interactions have given the Court the opportunity to develop a manifold application of the principle of proportionality to criminal penalties featured at the national level. In this part I present the cases of *Skanavi* [IX] and *Awoyemi*.[X] As mentioned above, there is an extensive case-law of the Court's limitation of MS's use of criminal penalties in light of the principle of proportionality. Such a restraint has often been based on the argument that the measure in question was so disproportionate that it hampered the exercise of free movement. I decided to focus on *Skanavi* and *Awoyemi* as they examined exactly the same situation (driving in a host Member State with a non-recognised licence) and the same penalty (criminal sanctions, in particular imprisonment and a fine). The only difference lies in that Mrs Skanavi was an EU national, while Mr Awoyemi was not. Therefore, I jointly read these two decisions to contrast the differences between the proportionality test applied by the Court to an EU citizen, and that applied to a third-country national.

From this, I stress the importance of EU citizenship to the application of proportionality in criminal law. Admittedly, these judgments were issued before the adoption of the Charter; however, the CFREU now provides for the universal principle of proportionality of penalties in Article 49(3). I argue that the relationship established by the Court between the enjoyment of such a principle and the entitlement to free movement requires clarification, in light of the legally-binding value taken on by the Charter.

The second scenario concerns the possible non-implementation of EU secondary law on fundamental rights grounds, where I deal with the *Berlusconi*[XI] and *Caronna*[XII] rulings. In

this scenario, the cases form part of a consistent case-law of the Court of Justice, according to which criminal liability cannot be directly determined or aggravated by EU law, without a national law of implementation. Here I argue that the Court allowed the possible non-compliance of national law with EU secondary law. It did so by arguing that the implementation of the latter might have caused the infringement of a general principle or a fundamental right. At stake in particular was the principle of legality now enshrined in Article 49 CFREU. The first reason for choosing these cases is that the CJEU backed up its argument by explicitly referring to a general principle (as is the case of *Berlusconi*) or a fundamental right of criminal law (Article 49 Charter in *Caronna*).

Furthermore, in *Berlusconi* the Court was faced with the contrasting effect of three subsequent laws: (1) EU company law; (2) the first Italian law which correctly implemented it, by the introduction of effective (criminal) penalties for violations of EU law; (3) the subsequent Italian law, which partially decriminalised offences provided for in the first law, and posed for that reason serious doubts of compatibility with the Union rules concerned.

The preliminary ruling arose in the context of criminal proceedings, which regarded conducts (allegedly) committed under the first Italian law, but which were then decriminalised by the second one. However, the latter law was potentially not in compliance with EU law for lack of effectiveness. The Court was essentially asked as to whether such non-compliance could result in setting aside the subsequent Italian law, so opening the door to the criminal liability of the persons concerned.

The scenario depicted makes *Berlusconi* a perfect showcase for analysing the relationship between the implementation of EU secondary law and the protection of fundamental rights. Likewise, *Caronna* concerned the possibility of determining criminal liability directly on the basis of an EU directive. In that judgment the Court was clear in finding that respect for the Charter would prevail even where national law is contrary to EU law. As clarified below, I argue that the rationale behind the decisions in the second scenario provides EU criminal law with an important tool to better protect fundamental rights in the context of mutual recognition.

The article is structured as follows. I firstly deal with the scenario regarding proportionality, and I present the cases of *Skanavi* and *Awoyemi*. I then discuss their importance for EU criminal law, taking into consideration in particular Article 49(3) CFREU. Secondly, I address *Berlusconi* and *Caronna*. In this part I try to show how the cases

can be highly relevant to mutual recognition in criminal matters. Lastly, I recall the topics touched upon, and I argue that the case-law of the CJEU can be used to enhance protection of individuals.

2. EU Citizenship and Proportionality

2.1. *Skanavi* and *Awoyemi*

The question in *Skanavi* arose in the context of criminal proceedings against Mrs Skanavi and her husband, Mr Chryssanthakopoulos, who were charged with driving without a licence. According to German Law, the conduct was an offence punishable by imprisonment or a fine. As far as EU law is concerned, driving licences were first harmonised by First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence.[XIII] That instrument in particular set a system for the mutual recognition and the exchange of driving licences, when the holder had her/his residence or workplace in another MS. By virtue of that directive, when the holder of a valid driving licence took up residence in another MS, the licence would remain valid for up to a maximum of a year after the establishment of residency. At the request of the holder within that period, and against surrender of the licence, the host MS was to issue the driver with a Community model driving licence for the corresponding category or categories without requiring the holder, *inter alia,* to pass a practical and theoretical test or to meet medical standards. According to the subsequent Directive 91/439/EEC,[XIV] the holder of a valid driving licence residing in another MS was not obliged to exchange it.

The Court was firstly asked whether, as EU law stood prior to the implementation of the latter directive, a MS could require the holder of a driving licence issued by another MS to exchange that licence within one year from the establishment of the residence in the host State, in order to retain the entitlement to drive in the state. The Court recognised that the rules concerning driving licence can have a significant impact on the freedom of movement for workers, as well as on the freedom of establishment and provision of services.[XV] The Court also found that the gradual harmonisation carried out at EU law level allowed MS to retain some powers in this respect. Such a latitude included requiring the holder of a valid licence to exchange it in the MS where s/he had moved to.

The Court was further asked whether the Treaty precluded the act of driving of a motor vehicle by a person who had not exchanged licences from being treated as driving without a licence, and thus rendered punishable by imprisonment or a fine. The Court acknowledged that the obligation to exchange the licence was compatible with EU law, but also that it constituted a mere administrative requirement.

Though the MS remain competent with regard to the use of criminal law, the latter must be used in such a way as not to obstruct free movement. This is especially the case when it comes to imprisonment,[XVI] where on that ground the CJEU ruled that EU law prohibited MS from treating driving without the exchanging of the licence as a criminal offence, since it would jeopardise the enjoyment of free movement.[XVII]

Awoyemi regarded exactly the same situation as that occurred in *Skanavi*, but the difference laid in the fact that the person concerned was a third-country national. The Court was asked whether EU law precluded MS from treating driving without exchanging a licence as a criminal offence. The Court found that the former directive applied irrespective of nationality, and also recalled *Skanavi*, when stating that MS must use criminal law in compliance with EU law and the principle of free movement.[XVIII] However, the Court found that a person such as Mr Awoyemi, as a third-country national, may not rely on the principle of free movement of persons, which applies only to a national of a MS.[XIX] As the law stood at that moment, the position of the person concerned was not governed by provisions of EU law, as he was not entitled to free movement.

The Court mitigated this statement by means of the principle of retroactivity of a more favourable norm. The Court relied on the applicability of Directive 91/439/EEC on driving licences, which in the interim had substituted Directive 80/1263/EEC. The newest directive imposed on MS the prohibition of the requirement to exchange driving licences issued by another MS, regardless of the nationality of the holder. The Court recognised that the situation of Mr Awoyemi fell under the principle that an individual may rely - against the State - on provisions of a directive which are unconditional and sufficiently precise, where that State failed to: transpose the directive within the prescribed period, or implement the directive correctly.[XX] On that ground, the Court found that EU law allowed a national judge, by reason of the principle that forms part of national law in certain MS of the retroactive effect of more favourable provisions of criminal law, to apply such a provision even where the offence took place before the date set for compliance with that

directive. The Court recalled the principle of the retroactive effect of more favourable provisions of criminal law.

2.1. Impact in Terms of Proportionality

The cases discussed above are highly relevant to EU criminal law, and they are also interesting because judgements were given when the Charter did not have legally-binding value. Therefore, it is appropriate to raise the question as to how the principle stated therein can be upheld in the EU legal framework as developed by the Treaty of Lisbon. At stake there is in particular the interaction between different understandings of the principle of proportionality. As is well-known, that principle has been used to balance (*inter alia*) fundamental freedoms and national laws. Eminent scholars have debated on the principle of proportionality in general terms,[XXI] as well as with particular reference to EU law.[XXII] In the latter area, it has been highlighted that the multiform application of proportionality depends on the peculiarities of the area of law at stake, and the nature of the interests involved.[XXIII]

As provided for in Article 5 of the Treaty of EU (TEU), proportionality is a polestar (jointly with the principle of subsidiarity) for the Union in the application of its competences. The proportionality test famously provides that: the means adopted are appropriate to achieve the objectives legitimately pursued (suitability test); the means adopted are necessary in order to achieve the objectives legitimately pursued (necessity test); and the means adopted should not impose an excessive burden on the individual (proportionality *stricto sensu*). Put simply, the principle of proportionality under EU law requires that a legitimate aim be pursued through the least intrusive measure for individuals. Furthermore, Article 52 CFREU states that limitations on the exercise of the rights and freedoms recognised by the Charter are subject to the principle of proportionality. In this sense, evaluating criminal law on the basis of *this* principle of proportionality is to examine how the MS justify their use of criminal law, and more specifically, how criminal law is related to a given objective, and which function the former is supposed to fulfil.

However, this principle has also a criminal law understanding.[XXIV] Scholars have written extensively on the reach of proportionality[XXV] at EU criminal law level, and on its interaction with the principle of subsidiarity in criminal law.[XXVI] Given that the debate on

the meaning of these principles is huge, I can just try to simplify it for the purposes of this paper. The interaction between the meanings of proportionality and subsidiarity in EU law and (EU) criminal law is highly relevant. As they can overlap and be understood in more than one way, their interaction can significantly impact on the individuals concerned.

Subsidiarity in criminal law (also known as *ultima ratio* or last resort principle) means that penal sanctions should be resorted to only where other instruments would be insufficient to protect the interests at stake. This is the *outer dimension* of ultima ratio,[XXVII] which looks at criminal law in relation to other less intrusive legislative means. As Husak states, it focuses on the alternatives *to* punishment, rather than on what kind *of* punishment to prefer and alternative means *of* punishment.[XXVIII]

In this sense, Giudicelli-Delage argued that the *necessity* under EU law proportionality test is imbued not only with a utilitarian logic (relation between means and end), but also with the principle of criminal law as *ultima ratio*. Therefore, such a *necessity* would cover two fundamental guarantees: punishing "as long as it is useful and as long as it is fair. The legitimacy of punishment rests on its fairness and usefulness. The combination of these two principles is key to establishing conditions and limits of punishment (…), since considering both of them in isolation would lead to dangerous consequences".[XXIX]

Such a picture is made even more complicated by the advent of the Charter with a legally-binding value, where Art. 49,[XXX] established the proportionality test between the level of punishment and the seriousness of the offence. Furthermore, the evaluation of proportionality under criminal law involves both the legislative and the sentencing levels, that is to say the penalties as provided by the law and applied to the concrete cases by the judges.[XXXI]

The Court's judgments in *Skanavi* and *Awoyemi* show exactly the importance of these different understandings. In the cases, the application of the principle of proportionality has been linked to the entitlement to free movement, which applies to persons satisfying the following conditions: being an EU citizen; having moved to another MS; having been, or being engaged in some economic activity in the MS where s/he has moved to. The reach of the Treaty freedoms is expanded to include covering the driving licence system. As such the protection offered by free movement law is significantly enhanced, so that the compatibility of criminal sanctions with EU law is tested in light of this enlarged dimension. The consequence is evident: the broader the area within which criminal law is

required to be consistent, the higher the chances that it will be found not in compliance with EU law. Personal liberty might have been treated as an instrument for the purposes of exercising an economic freedom. More than one question arises in this respect: are there penalties which are disproportionate while not hindering free movement, and if so, how could they be justified? However, one should not overlook that in cases such as those discussed, the Court ruled on the compliance of a national measure with Treaty freedoms, so that the latter are assumed as a benchmark of lawfulness. Furthermore, in a way the CJEU is deciding on the fairness of a national criminal law system, in a moment where a (weak) Union competence in criminal matters had just come into being.

Nonetheless, such an approach may have its drawbacks, as seen in *Awoyemi*; in this case the Court was true to the general principle according to which the free movement law applies only to EU citizens, so that an individual may be subject to a penalty which the Court has explicitly recognised as disproportionate, if applied to EU citizens. One may uphold the CJEU coherence as follows; a criminal penalty is disproportionate where related to the exercise of free movement, that sanction ceases to be disproportionate, when applied to a person not entitled to free movement.

Granted, there are at least two elements that must be considered in the analysis of the case. Firstly, at that time the Charter had not yet been adopted. Secondly, the Court might have opted for that interpretation because there were no elements capable of triggering the application of EU law. Indeed, at stake there was the protection of the exercise of free movement. The principle of free movement could not apply, because in that case Mr Awoyemi fell outside the scope of EU law: neither the Treaty, nor secondary law, governed that situation.

That said, it must be pointed out that there was relevant EU law in the area, namely Directive 91/439/EEC, confirmed by the fact that the Court resorted to it when applying the principle of retroactivity of more favourable provisions of criminal law. However, it was not considered a matter of EU law because the person concerned did not enjoy free movement.

The main problem in upholding such a hands-off approach is that it takes for granted the link between the application of the principle of proportionality and the entitlement to free movement. Indeed, the Court found that the penalty was lawful, and proportionality did not apply exactly, because that principle was subject to the exercise of free movement.

This caveat notwithstanding, I submit that *Awoyemi* should be regarded as a case on the proportionality of penalties, rather than a case on the application of free movement.

The advent of legally-binding value with the CFREU seems to corroborate such an interpretation. If the Court were to be asked the same question today, the following circumstances would be taken into account. Firstly, Article 51 CFREU states that the Charter applies when MS *implement* EU law. In a case such as *Awoyemi*, it would be difficult affirming the non-application of the CFREU, since the national law would be implementing EU law.[XXXII]

Secondly, Article 49(3) lays down the universal principle that the entity of penalties must be proportionate to the seriousness of the offences. Arguing for the application of such a principle to EU citizens only would seem rather unsound. In light of these arguments, there appears to be the possibility that the Charter challenges the well-established link between the entitlement to free movement and the principle of proportionality of penalties.[XXXIII] Otherwise, the right to free movement would become a prerequisite of the enjoyment of fundamental rights, which appears in sharp contrast to the framework provided for in the Treaties. Now I move on to the second scenario, where I discuss *Berlusconi* and *Caronna*, and their possible importance for judicial cooperation in criminal matters within the EU.

3. Hierarchy and Compliance with EU Law and Refusal of Mutual Recognition

3.1. *Berlusconi* and *Caronna*

The *Berlusconi* case concerned the interaction between EU company law and the implementing Italian law, where, in compliance with EU company law, Italian law initially provided for effective (criminal) penalties. However, the law was subsequently amended by a subsequent law, which decriminalised the specified conducts to some extent. The referral for a preliminary ruling arose in the context of criminal proceedings that concerned facts dating back the first version of the Italian law. As a consequence, the alleged behaviour could have been subject (in theory) to criminal liability. On the other hand, the subsequent legal framework introduced by the newer law set a regime more favourable to the accused, but potentially less effective than the former one. Therefore, at stake here was a contrast

between the need for effective penalties at national law level for infringements of EU law (embodied by the first Italian law), and the respect of the principle of retroactivity of more lenient penalties in criminal law.

The Court firstly stated that the principle of the retroactive application of the more lenient penalty is a general principle of EU law, which '*national courts must respect when applying the national legislation adopted for the purpose of implementing EU law*' (emphasis added).[XXXIV] Following the latter principle would have led to the application of the subsequent Italian law, potentially contrary to EU law.

The Court further found that, in case of non-compliance of the national law with EU law, 'the national courts would be required to set aside, under their own authority, those new articles without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.'[XXXV] However, the Court also recalled the principle that a directive cannot determine or aggravate criminal liability, in the absence of a national law of implementation.[XXXVI] As the application of EU law, and the consequent disapplication of the newer Italian law, could have set aside those two principles (retroactivity and requirement of national law for criminal liability), the Court concluded that the provisions of EU secondary law in question 'cannot be relied on as such against accused persons by the authorities of a MS within the context of criminal proceedings.'[XXXVII]

Caronna regarded the interpretation of Directive 2001/83/EC on medicinal products for human use,[XXXVIII] and the Italian law implementing it. The Directive imposed on the MS a general obligation to make the wholesale distribution of medicinal products subject to the possession of a special authorisation. Such an obligation should also apply to 'persons authorised or entitled to supply medicinal products to the public if they may also engage in wholesale business.'[XXXIX] This also concerned pharmacists, who according to Italian law are authorised to operate as wholesalers in medicinal products. The Italian law correctly implemented the Directive through Decree 219/2006. Following amendments introduced over the years, that law also treated wholesale distribution without authorisation as a criminal offence.

The criminal liability of Mr Caronna was precisely based on the Italian law implementing the Directive. Doubts arose as to whether the law applicable at the material time in the main proceedings made pharmacists subject to *the requirement of a special*

authorisation and, in case of infringement, *to criminal liability*. If not, criminal liability could have been established only by means of an interpretation consistent with EU law, as it was not explicitly stated by a national provision. In this regard, the Court firstly reaffirmed the principle that a directive cannot, of itself and independently of a national law adopted by a MS for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.[XL] More interestingly, the Court concluded that 'the principle that criminal penalties must have a proper legal basis, enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, would prohibit the imposition of criminal penalties for such a conduct, *even if the national rule were contrary to European Union law* (emphasis added).'[XLI]

What emerges from these judgments is that the CJEU establishes a hierarchy in different levels of compliance with Union law. The Court states that fundamental rights and general principles prevail over the full implementation of EU secondary law by MS. In both cases the Court confirmed the adage that EU law can never result in aggravating or determining criminal liability without a national legal basis. More broadly, respect for the principle of legality and the Charter outweighs compliance with EU secondary law.

In the next section, I argue that this case-law can be highly relevant for European criminal law, with particular regard to the possibility to refuse mutual recognition on fundamental rights grounds.

3.2. The Importance of Mutual Recognition in Criminal Matters

The application of mutual recognition to judicial cooperation in criminal matters within the EU was firstly decided at the European Council of Tampere in 1998,[XLII] and, as known, is a principle borrowed from internal market law.[XLIII] Introduced by the CJEU with the *Cassis de Dijon* judgment,[XLIV] it required that a product/economic activity, that has been lawfully produced/marketed/exercised in one MS, should be capable of being marketed into another MS without further burdens or conditions. Such a principle finds a limit in the Treaty exceptions (e.g. public policy or public health) and the mandatory requirements/justifications as elaborated by the Court of Justice.[XLV] Thereby, mutual recognition is mostly a sort of negative integration, which facilitates the enjoyment of Treaty rights by the free movements of products and persons under a de-regulatory logic.

The application of this logic to criminal law has caused a heated debate.[XLVI] Indeed, in criminal matters, each instrument of mutual recognition concerns one or more kinds of judicial decisions (arrest warrant, custodial sentence, and probation measure) and abolishes the requirement of double criminality for a list of 32 offences. According to this requirement, the conduct at the basis of the judicial act at stake must constitute an offence in the jurisdictions of both the requesting and the requested states. Once that requirement has been removed, the balance in cooperation substantially changes. Indeed, when one of these judicial decisions is issued for one of the 32 conducts by MS 'A' (the issuing MS) to MS 'B' (the executing MS), the latter has to recognise and execute the decision without any further formality. For those offences not included in the list, the double criminality principle remains. However, although the executing MS does not treat that conduct as a crime in its own legal order, it may surrender the person concerned all the same, once the issuing MS has required it. The automaticity of mutual recognition in criminal matters is mitigated by mandatory and optional grounds for refusing the execution, as well as by specific rules leaving some discretion to the executing judge.

The first and most prominent example of mutual recognition in criminal matters is the European Arrest Warrant Framework Decision (EAW FD),[XLVII] which aimed at replacing the previous system of extradition between MS. The operation of the EAW in practice brought to the fore the thorny issue of the possible refusal of mutual recognition on fundamental rights grounds.[XLVIII] That is mainly so because the EAW FD (as many other framework decisions on mutual recognition in criminal matters) do not provide an explicit ground for refusal based on fundamental rights reasons. On the other hand, a standard clause is used, according to which the FD should not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU. This article states that the CFREU has the same values as the Treaties, and that the European Convention of Human Rights and the constitutional traditions common to MS form part of the general principles of EU law.

What followed from this was the flourishing of a heated debate,[XLIX] fuelled by the case-law of the Court of Justice on the EAW FD. Indeed, the Court in *Radu* excluded the refusal of mutual recognition even where it can result in a violation of fundamental rights.[L] Thereafter, in *Lanigan,* the CJEU seemed to open a space by arguing that the EAW FD

must be interpreted in light of the Charter.[11] Whether or not such a statement can also imply refusal on fundamental rights grounds remains to be seen.

I argue that the case-law discussed above (*Berlusconi* and *Caronna*) can be helpful to overcome the stalemate. Whilst concerning different situations, the rationale behind these decisions can be described as follows: the need to comply with 'higher' sources (general principles and fundamental rights) prevails over the full implementation of EU secondary law. Such a principle can be perfectly applied also to mutual recognition. Where there are serious reasons to believe that the execution e.g. of an EAW would result in a violation of a general principle, the relevant mutual recognition instrument of EU secondary law should be set aside. This would be consistent with the broader case-law of the Court, and enhance the protection of individual rights across the EU.

4. Concluding Remarks

In this paper, I have tried to show how the case-law of the CJEU issued in the context of free movement can be highly relevant to European Criminal Law.

Firstly, in *Skanavi* and *Awoyemi* the Court linked the application of the principle of proportionality to entitlement to free movement. Thereby, EU citizenship comes to the fore as a requirement of the proportionality review. The consequence is that a measure can be regarded as lawful (or not) depending on whether the person concerned is a national of a MS, as such entitled to the exercise of the fundamental freedoms. The advent of the principle of proportionality of penalties under Article 49 CFREU will require clarifications in this respect. Indeed, that provision states a universal principle, and cannot be made subject to requirement of nationality. In this context, one can envisage two possible, unprecedented scenarios. If proportionality were to be applied to third-country nationals, the relationship between entitlement to free movement and the application of the principle of proportionality of penalties would be challenged. Were this not to be the case, free movement could be read as a precondition of access to fundamental rights and personal liberty.

The second way in which the case-law on free movement can be linked to European criminal law regards in particular fundamental rights and mutual recognition. In *Berlusconi* and *Caronna*, the Court seems to establish a hierarchy of levels of compliance within EU

law. The full implementation of EU secondary law should be set aside, when the latter can result in a violation of fundamental rights or general principles. Such a principle can prove helpful to the highly debated possibility to refuse mutual recognition on fundamental rights grounds. Where there is a serious risk of fundamental rights infringement, the relevant legislation should give the way to EU primary law. In this light, a refusal of execution seems to be not only admitted, but also required by EU law to some extent. These scenarios discussed shows that EU law must be considered as a 'whole', and that there is great potential to heighten the standard of protection of the individual throughout the Union.

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I For the purposes of this article, by 'EU law' I mean the legal framework both post and pre Maastricht.

II In particular, Articles 82 and 83 TFEU.

III See Mitsilegas (2009: 60).

IV ECJ, Case C-203/80, *Casati*, 1981 ECR 2595; ECJ, Case C-274/96, *Bickel and Franz*, 1998 ECR I-7637; ECJ, Joint cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese and Sorricchio*, 2007 ECR I-1891.

V ECJ, Case C-68/88, *Commission v. Greece*, 1989 ECR 2965. See also the forerunner Court's decision, Case C-50/76, *Amsterdam Bulb*, 1977 ECR 137.

VI ECJ, Case C-168/95, *Arcaro*, 1996 ECR I-06065, paras 36-37; ECJ, Case 384/02 *Grøngaard and Bang*, 2005 ECR I-09939, paras 29-30.

VII Mitsilegas, 2009; Klip, 2012.

VIII On general principles, see above all Tridimas (2006).

IX ECJ, Case C-193/94, *Skanavi and Chryssanthakopoulos*, 1996 ECR I-929.

X ECJ, Case C-230/97, *Awoyemi*, 1998 ECR I-06781.

XI ECJ, Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, 2005 ECR I-03565.

XII ECJ, Case C-7/11, *Caronna*, 2012.

XIII First Council Directive 80/1263/EEC on the introduction of a Community driving licence, OJ L 375/1, 31.12.80.

XIV Council Directive of 29 July 1991 on driving licences, OJ L 237/1, 24.8.1991.

XV ECJ, Case C-16/78, *Choquet*, 1978 ECR 2293, para 4.

XVI Case C-265/88 *Messner*, 1989 ECR 4209, para 14.

XVII *Skanavi* (n VII), Court's judgment, para 39.

XVIII *Ibidem*, paras 36 and 38.

XIX ECJ, Case C-147/91, *Laderer*, 1992 ECR I-4097, para 7.

XX *Awoyemi* (n VIII), Court's judgment, paras 39-45.

XXI See in particular Alexy (2010: 21-32); Barak (2010: 1-16); Beatty (2004); Endicott (2012); Gerards (2009).

XXII Among many, see De Búrca (1993: 105-150); Craig (2010: 265- 302); Fontanelli and Martinico (2013: 32-58); Jacobs (1999: 1-22); Reich (2011); Tridimas (2006).

XXIII See Harbo (2010: 180).

XXIV On the subject Ashworth (2010: 104-155); Robinson and Darley (2004: 173-205); von Hirsch (1992: 55-98); von Hirsch and Ashworth (2010: 131-163).

XXV See Asp (2007: 207–219) Bernardi (2012: 15-65); Böse (2011: 34-42); Fichera and Herlin-Karnell (2013: 759–788); Gibbs (2011: 121–137); Sotis (2012: 111-122).

XXVI See on this Asp (2011: 44-55); Donini (2003: 141-183); Herlin-Karnell (2009: 351–361); Kaiafa-Gbandi (2011: 6-33); Melander (2013: 45-64).

XXVII Melander (2013: 51).

XXVIII Husak (2004: 214).

XXIX Giudicelli-Delage (2010: 69). According to the original version, the EU law *necessity* would imply punishing "pas plus qu'il n'est juste, pas plus qu'il n'est utile. Les principes du juste et de l'utile constituant les

deux éléments sur lesquels repose la légitimité de la peine en se combinant pour en tracer les conditions et limites - combinaison indispensable, (...), car, isolés l'un de l'autre, le juste et l'utile conduiraient à des conséquences également dangereuses".

[XXX] For a commentary on Article 49 Charter, see Mitsilegas (2014: 1351-1372).

[XXXI] On the importance of proportionality in sentencing, see van Zyl Smit and Ashworth (2004: 541-560).

[XXXII] For a recent and thorough assessment of the academic debate on the CFREU's scope of application, also in the light of the recent judgments of the CJEU, see Fontanelli (2014a, b).

XXXIII As noted, the Charter 'puts into the limelight two issues that have been discretely managed in the past by the CJEU, but now demand a clear and direct answer: the division of competences between the Union and its Member States, and the status of the individual as a Union citizen'. See Sarmiento (2013:70).

[XXXIV] *Berlusconi* (n IX), Court's judgment, paras 67-69.

[XXXV] ECJ, Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal*, 1978 ECR 629, paras 21 and 24; ECJ, Joined Cases C-13/91 and C-113/91, *Debus*, 1992 ECR I-03617, para 32; ECJ, Joined Cases C-10/97 to C-22/97, *Ministero delle Finanze v IN.CO.GE.'90 and Others*, 1998 ECR I-06307, para 20.

[XXXVI] ECJ, Case C-80/86, *Kolpinghuis Nijmegen*, 1987 ECR 03969, para 13.

[XXXVII] *Berlusconi* (n IX), Court's judgment, para 78.

XXXVIII Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311/67, 28.11.2001.

[XXXIX] *Ibidem*, Article 77, paras 1-2.

[XL] ECJ, Case C-60/02, *X*, ECR 2004 I-00651, para 61.

[XLI] *Caronna* (n X), Court's judgment, para 55.

XLII Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.

[XLIII] Janssen, 2013; Snell, 2014.

XLIV ECJ, Case C-120/78, *Rewe v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 1979 ECR 00649.

[XLV] Rosas, 2010; Barnard, 2013.

XLVI Among countless publications on the topic, see Mitsilegas (2006: 1277-1311); Peers (2004: 5-36); Lavenex (2007: 762-779). For a state-by-state overview of the application of mutual recognition across EU area, see Vernimmen-Van Tiggelen, Surano, Weyembergh (2009). On mutual recognition and extraterritoriality, see Nicolaidis and Shaffer (2005: 267).

[XLVII] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.7.2002, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009.

[XLVIII] Keijzer and van Sliedregt, 2005; Herlin-Karnell, 2013; Marin, 2014.

[XLIX] Weyembergh, Armada, Brière, 2014.

[L] ECJ, Case C-396/11, *Radu,* para 43.

[LI] ECJ, Case C-237/15 PPU, *Minister for Justice and Equality v Francis Lanigan*, nyp, para 54.

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Sovereignty and Democracy: Overcoming Supranational Mutual Double-Binds from the Eurozone

by

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Abstract

EU and EMU are facing a hastened phase of structural rather than episodic crisis, following the progressive shift of the world order from a bipolar toward a multi-polar system. From the sovereign debt trap to migratory pressures and security threats, all European crisis are intimately interdependent and long awaited rather than unexpected, since their origins trace back to a lack of reactivity of the European unification process to the progressive weakening of US hegemony in the world from 1971 onward. In this paper I point out that two double-binds mutually prevent a full (and widespread) understanding of Europe's situation and avoid for this reason a fully structural approach to the institutional reforming process in the EU: a 'sovereignty double-bind' and a 'democracy double-bind'. An effective roadmap toward political unification should primarily aim at tackling these misrepresentations instead of embracing them in the form of a gradualist approach to legitimacy issues.

Key-words

Eurozone, crisis, sovereignty, democracy, identity, double-binds

Since the beginning of the sovereign debt crisis in Europe, following the 2007-2008 US financial crisis, European Council meetings took place at an unprecedented rate, alternating formal meetings with 'special', 'extraordinary' or 'Euro Area' ones. A total of fifty-seven (formal or informal) meetings were held between July 2008 and March 2016, with an average of around 7.6 meetings per year compared to 4.8 in the previous period (October 2000 - June 2008). As Carl Schmitt says: 'The exception is more interesting than the rule. The rule proves nothing; the exception proves everything.' (Schmitt 2005: 15). This exceptional series of summits perfectly matches the exceptional nature of the European crisis, where the monetary union and the entire European integration process seemed already 'gripped with an existential crisis that is slowly, but inexorably, destroying' (de Grauwe 2013) their very foundations *before* the migration crisis and other recent developments explicitly added new dimensions to the political puzzle. But while Heads of State and Government have clearly proved that Europe's sovereignty ultimately belongs to them, they could not yet give a sustainable and structural solution to financial, economic, social, security and political worries about Eurozone unity, the future of the European Union (EU, the Union) and its geopolitical role in the world. This is true despite the fact that, on the one hand, macroeconomic fundamentals of the Euro area as a whole are still considerably better than those of the United States (US), United Kingdom (UK) and Japan, and on the other hand, that the EU didn't exploit its enormous potential power yet in the fields of foreign, security and defence policies (besides, a single European defence would be extremely cost-effective, generating economies of scale and releasing resources for sustainable growth). What if today the 'state of exception' in Europe proved altogether the limits of intergovernmental methods in dealing with systemic crisis?

Eurostat's Selected Principal European Economic Indicators for March 2016 (Eurostat 2016) show that the Eurozone still runs significant current account and trade balance surpluses. A comparative assessment of some macroeconomic indicators over the period 2013-2017 confirms that both the EU and the Eurozone are in many cases in a better position than the US (see below, chart 1). The current crisis is actually envisaged as a financial and economic one, while its older and heavier institutional and political origins are still overlooked by the public debate and perniciously hidden behind its frightful economic

and social consequences. Eight years after the crisis began, no serious economic recovery is in sight for either the Euro area or the EU in general - whose growth prospects, that were remarkably peculiar in 2013 world context (see below, chart 2), remain all in all weak (https://www.imf.org/external/pubs/ft/weo/2016/update/01/) despite the efforts of the European Central Bank and the Junker Commission.

The European Council's (EC) right to rule can be perceived as an unavoidable consequence of the EU's institutional architecture, but its strikingly ineffective results have nonetheless allowed its paradoxical meaning to emerge: Europe's public good is ultimately defined and interpreted by the less accountable and less *supranational* of its institutions. This is not just a curious crisis side effect. The EC's supremacy is at the core of the crisis itself, a sort of preliminary condition for the currency union's vulnerability. Ironically enough, the Lisbon Treaty signing and its entry into force cover the exact period from the Global Financial Crisis to the specific European emergency with the Greek debt crisis and scandal. That Treaty was supposed to close, for a long period, the permanent 'reforming process' dating back to the birth of the EU itself with the Maastricht Treaty. A few years and many failures later, the EC now has to acknowledge that deep Treaty changes are needed to structurally overcome the Eurozone crisis and save (making it 'genuine') the Economic and Monetary Union within the EU.

In this short paper, I draw on three main arguments against the mainstream approach to crisis management in Europe: firstly, I stress that this crisis is political rather than economic, both at the global and European level. The relevance of International Relations and power struggles to explain global monetary and financial instability today is largely underestimated. Secondly, I will point out that Europe as a whole is facing a hastened phase of a structural rather than episodic crisis, following the progressive shift of the world order from a bipolar toward a multi-polar system. Thirdly, I will stress that today's crisis in Europe has been long awaited rather than unexpected, since its origins trace back to a lack of reactivity of the European unification process to the progressive weakening of US hegemony in the world from 1971 onward.

I propose, on this basis, a significantly different criterion be used to draw a roadmap to genuinely achieve the European Monetary Union (EMU), as the roadmap included in the 'Five Presidents' Report' of June 2015 (Juncker 2015) will prove ineffective because it still relies on two double-binds that mutually prevent a full (and widespread) understanding of

Europe's situation: the 'sovereignty double-bind', following which sovereignty is either legitimate (national level) or effective (Europe); and the 'democracy double-bind', for which democracy should be either diminished (for the sake of effectiveness) or restored (for the sake of legitimacy). Europe's agenda toward its political unification should primarily aim at tackling these misrepresentations instead of embracing them by means of a gradualist approach to legitimacy issues. One may observe that while Europe's ruling class is by now fully aware of the fact that only European unity can save (national) democracy, there is still a dangerous lack of awareness about the inverse relation: only (supranational) democracy can save European unity, since this long-term, structural crisis is by now taking new shapes that are only apparently unconnected and is rapidly eroding the pro-European consensus all over the continent. Little more than three years is left for the European ruling class to fully involve European citizens in the unification process and the next step of its institution-building — otherwise, the 2019 European elections are very likely to become a definitive rejection of European unity and of an unprecedented experiment to genuinely 'unite in diversity' human beings at a supranational level. What if the seventy year old constitutional method of Altiero Spinelli proved to be the right answer this time?

1. A Political, Structural and Long Awaited Rather Than an Economic, Short-Term and Unexpected Crisis

With a high unemployment rate in the Euro area (10.5% in 2016, corresponding to almost 17 million unemployed people), it is by now generally acknowledged that the sovereign debt crisis, subsequent austerity measures in many countries of the Euro area and a persistent credit crunch — despite the European Central Bank's (ECB) extraordinary efforts to support the transmission of interest rate decisions to the economy and to inject liquidity into the real economy— resulted in deep economic and social downfall of the whole continent. But, as a logician would put it, this is nothing more than a 'joint effect' fallacy: both the sovereign debt and the subsequent social crisis are made possible in the Euro area, and would not be possible in any other monetary area in the world, by a distinguishing political and institutional factor. That is to say, to use Mario Draghi words, 'the political unsustainability of a Union in which the countries that pay and the countries

that receive are always the same' or of a Union 'without a single Union government and economic policy' (Draghi 2013).

In other words, from a logical point of view, the public debate at all levels systematically reverses the cause-and-effect relation. It treats the crisis consequences as if they were its causes, very often completely overlooking the political side of the matter, like one could do with a minor detail or a taken-for-granted and unchangeable element of Europe's situation. That is why even the 'Five Presidents' Report' alone, despite its undeniable progress compared to the 'Four Presidents Report' (Van Rompuy 2012), cannot avoid mainstream public debates at national level to keep on quibblingly unbundling the problem in order to postpone and dilute the core measures it necessitates. Yes, this time the President of the Commission - the first one nominated following the European Elections results - coordinated the work; yes, he promoted a thorough discussion with Member States and part of the civil society; yes, he looked at last for the collaboration of the President of the European Parliament, who had been significantly overlooked by Herman Van Rompuy; and lastly yes, the document calls for a 'future euro area treasury accountable at the European level'. Nonetheless, it still applies to the 'Five Presidents' Report' what Roberto Castaldi wrote about the 'Four Presidents Report' (italics mine): 'The unbundling of problems may be instrumental to their solution, *provided that their interaction and a vision of the whole structural solution is kept in mind*.' (Castaldi 2012) The 'Five Presidents' Report' gives back supranational institutions a central role, but it falls short of the need to foster a debate on the 'vision of the whole structural solution'. This should be the role of the European Parliament and political groups. Despite its formal participation, the European Parliament will ultimately remain an object rather than a subject of reforming initiatives, in exactly the same way in which European citizens are regularly the object rather than the subject of the European integration process, until it will take a serious initiative on its own. Inter-institutional cooperation should not distract from the fact that the 'structural solution' for the euro area entails inter-institutional power struggles, since 'it does not seem possible to reconcile the institutional functioning of the EU with the principles of representative democracy except by a modification of the existing Treaties and the establishing of a European federal entity (not necessarily the presidential model of the US)' (Ponzano 2012).

This fundamental weakness not only accounts for the structural inefficiency of any EU plan to achieve an admittedly fake monetary union and fully overcome a crisis that is expanding today to the free movement right, but also explains why the sovereign debt crisis itself could burst forth. Twenty-four years ago, European leaders were confronted with a difficult choice. Two ways were available to achieve an Economic and Monetary Union: let's name them 'convergence through mutual and communitarian supervision' and 'convergence through a unique fiscal and economic policy' (that is to say a European federal government). Convergence through mutual and communitarian supervision (CMCS) was the predictable choice of the Heads of State and Government: it allowed the EC to fulfil its core mission, which is well digested in the maxim 'making Europe run with the hares and hunt with the hounds'. The 'hares' are the two centuries old identities and institutions of national (self-styled 'sovereign') democracies; while the 'hounds' are the increasingly needed identity and institutions of a multilevel, supranational, fully accountable democracy. CMCS had the great advantage of further delaying the core political issues at stake since the birth of the first European community[I], but it could not completely get rid of them. It kept working as long as the world economic and monetary context was favourable enough to beguile public opinion about the effectiveness of such a system. The 2007-8 crisis simply unveiled some well-known truisms: the Euro does not rely on a genuine economic and monetary union; the Euro area has no Treasury and no momentous policies for true European growth and solidarity; lacking a political union, Europe cannot seriously tackle structural loss of technological and economic competitiveness nor can it save its welfare system short of a far-reaching continental plan to relaunch its development on a socially and environmentally sustainable basis. All of this was already evident before the current crisis, whose sole peculiarity is to finally enforce a sharp choice for the survival of the Euro.

> 'There is no national way out of the crisis. Expansionary measures are impossible at the level of Member States, which are obliged to choose fiscal consolidation as a priority; and in any case they would be domestically ineffective since most of the effects resulting from national measures would be lost through increased imports from other European countries. Therefore, every country will try to behave as a free rider, waiting

for expansionary measures to be implemented by other Eurozone Member States, and stabilisation policy will prove sub-optimal' (Majocchi 2013).

Therefore, expansionary measures need to be truly European. In other words, this time the only possible way to overcome the crisis is to overtly grapple with the political and cultural problems that the evolution of the EMU toward a full federation inevitably brings about.

Long before today's emergency, it nonetheless had to be clear— at least since the 1970s and the end of the Bretton Woods system— that a sum of national behaviours does not equate a supranational behaviour, just like the sum of national public investments does not equate a European public investment: it is obviously a matter of economies of scale. The CMCS method is basically wasteful and unfit to fully develop Europe's potentialities. What inevitably becomes a problem, in front of an increasing number of compelling challenges simply incommensurable both with Nation-States and intergovernmental powers. Until the world order was guaranteed by a relatively stable system of continental states (the US and USSR, and the US alone after 1991), Europe could slowly upgrade to the economies of scale needed by an increasing global interdependence. The beginning of the XXI century has clearly shown that this stable framework has come to an end; the US alone cannot provide for a global order both in the security and economic domains. The Lehman Bros. collapse is symbolically akin to the collapse of the Twin Towers. A new multi-polar world is in the making, conflicts are less predictable, and global history has accelerated its rhythm. Europe must move faster towards the economies of scales it needs to actively take part in this history.

UN Climate Change conferences are a good example of the political and behavioural meaning of this concept, mostly applied by economists but generally relevant for the social sciences. Despite its strong and unanimously accepted negotiating position, the EU's bargaining power has been largely undermined by its institutional set-up; the UN Framework Convention on Climate Change does not benefit from any real European behaviour, but only from a sum of European national behaviours *plus* the participation of the Commission (Afionis 2009: 44). As a result, Europe is both weaker and more irresponsible than it should be in such a vital negotiation. The same applies to many other external contexts, but also to domestic ones. Let us take a less common example: Europe's

linguistic diversity. Our persistent notion of irreducible national identities is strictly linked with linguistic diversities and the limits to mutual understanding. The EU is with reason ostensibly committed to the preservation and enhancement of this cultural richness (without ever giving up the necessity of preeminent working languages among national ones), just as the EC is committed to capitalizing on European unity (without ever giving up the ideal of preeminent national sovereignties). But is this the best way to preserve linguistic diversity as much as national sovereignties? Taking into account empirical evidence, the answer is clearly 'No'. Even in the Euro area, the English linguistic hegemony is pervasive more than ever, just as national sovereignties are steadily fading away wherever no European sovereignty is put in place to protect and fertilize them. Sooner or later, running with the hares and hunting with the hounds leaves you without both. If France had approved the European Defence and Political Community in 1954, the French language would probably still be alive at the international level today— with a concomitant political union, the monetary union would now allow for more divergences among national fiscal policies.

A supranational level of democratic government would perform much better for both the progressive and the conservative needs of the Europeans. For example, it would naturally and adequately boost the European economy through a plan for sustainable and smart development, thus creating a positive framework for national reforming processes. Likewise, it would more equitably address the need for a common linguistic tool that should not bestow any competitive advantage on particular groups of European citizens and that would not dare substitute or defeat natural languages in any social context.

These are the truths of which each new global crisis recurrently reminds us since the beginning of the European integration process. The difference with today's crisis is that it not only confronts European Nation-States with the one hundred year old alternative between: more (supranational) economies of scales or more rapid (national) declines? Today's specific crisis is at the same time political, long-awaited and *structural*, because a century after World War I it confronts Europe with the original dilemma: unite or perish, overcome national monisms and absolute divisions, or destroy your achievements. A century ago, Europe ultimately abdicated its historical responsibilities, violently stepping down from its leading role in the world system. Today, the Eurozone crisis endangers sixty

years of communitarian (partial) achievements that have kept Europeans at least connected with global developments.

It is indeed clear that the single currency and the political goal of the European integration process will not survive without a genuine fiscal union. Such a union not only requires legitimacy, but it also entails: a totally different conception and practice of the European citizenship; and a new comprehensive approach to all the taboos of national sovereignties, namely the security, defence, and economic policies.

What are the main hurdles on the road toward the United States of Europe? One would instinctively reduce them to economic and/or political realities. Without entirely embracing a social constructivist credo, I want here to deal with the cultural hurdle which prevents European citizens and their ruling class from frankly facing up to their formerly long-term, by now immediate, interests.

2. Double-Binds

The building of European supranational institutions is traditionally interpreted as an injurious but sometimes necessary 'transfer of sovereignty' from the national to the European level. This is what I call the 'sovereignty double-bind', following which sovereignty is either legitimate (national level) or effective (Europe). But is this the only or best point of view from which to describe this process? As long as nationalist methodology is the undisputed reference frame of any scientific analysis, public debate and political approach to this question, the answer cannot be anything other than 'Yes'. Let's take global history as a frame of reference. There is no doubt in this case that European institutions mean a 'regain of sovereignty' for all European citizens, because their Nation-States and national societies are increasingly irrelevant in a world of continental states. From this perspective, the European integration process does no harm to national sovereignties, since they are doomed to disappear as long as they play at being self-sufficient in a globally interdependent world. A problem nonetheless remains, however: if European citizens are first of all national citizens of a single European Member State, is there any absolute reference frame, any solid criterion on which to conclusively base a profit and loss account of this process?

The problem lies in the expression 'first of all'. Individuals do not in principle, and should not in practice, belong 'first of all' to any specific group, because they statutorily belong 'at the same time' to an infinite number of groups, otherwise they would not be 'individuals' at all, i.e. irreducible to each other. It has been a specific feature of nationalist paradigms to nurture the illusion of a privileged membership. Now, the fact that we cannot rationally identify any 'absolute' reference frame does not mean that we do not have the right to assess which frames are 'better' and which are 'worse' in relation to specific objectives and value scales. Nor does it mean that we can ignore the role of history (i.e. past individual and collective experiences) in the selection and institutionalization of belongings. But that is exactly what is at stake in the European integration process: a historical negation of absolute belongings and their institutions, a first applied example of institution-building led by bi-directional subsidiarity. Concerning sovereignty, we should therefore compare multiple frames with multiple objectives in order to establish step by step a sort of ideal chart. We shall then compare such a chart with a similar EU chart, describing the actual situation for European citizens. We would see that the 'sovereignty double-bind' is nothing more than a nationalist misunderstanding, which plays against the best sovereignty distribution from the point of view of individuals' reference frames. Any national citizen of any European Member State cannot generally hope to be 'sovereign' without the full development of institutions that enable him/her to act as a European; for example, he/she cannot specifically and satisfactorily self-determine his/her life in security and economic matters.

The 'sovereignty double-bind' relies on a 'democracy double-bind'. Nationalist methodology, a way of conceiving our social life as if there could be any absolute reference frame, has accustomed us to think of democracy as if it could fully or primarily develop one level of our territorial belongings. From this perspective, the European integration process inevitably means that democracy should be either diminished (for the sake of effectiveness) or restored at the national level (for the sake of legitimacy). Even the great innovation of an elected European Parliament in 1979, and its increasing number of powers and competences during its first forty years of life, could not break up this idea. With an inverse trend, the European elections turnout inexorably decreased over this period. Voters had their reasons. The Parliament has little or no competence in those matters which are traditionally considered an exclusive prerogative of national

sovereignties, it even underuses the powers conferred by the Treaties and it shows little inclination to engage in an institutional conflict with the European Council's ineffectiveness in dealing with European crisis. But after 2014 European elections, with a turnout almost equal to 2009 and euroscepticism in the rise, pro-EU political groups in the Parliament seem to have understood that a new role for European citizens representatives is urgently needed in the debate about the future of the EMU and the EU: the Parliament must now come to grips with the difference between the EU and the Euro area governance issues while the AFCO committee is finally discussing how to employ the EP new powers in the Treaty reforming process.

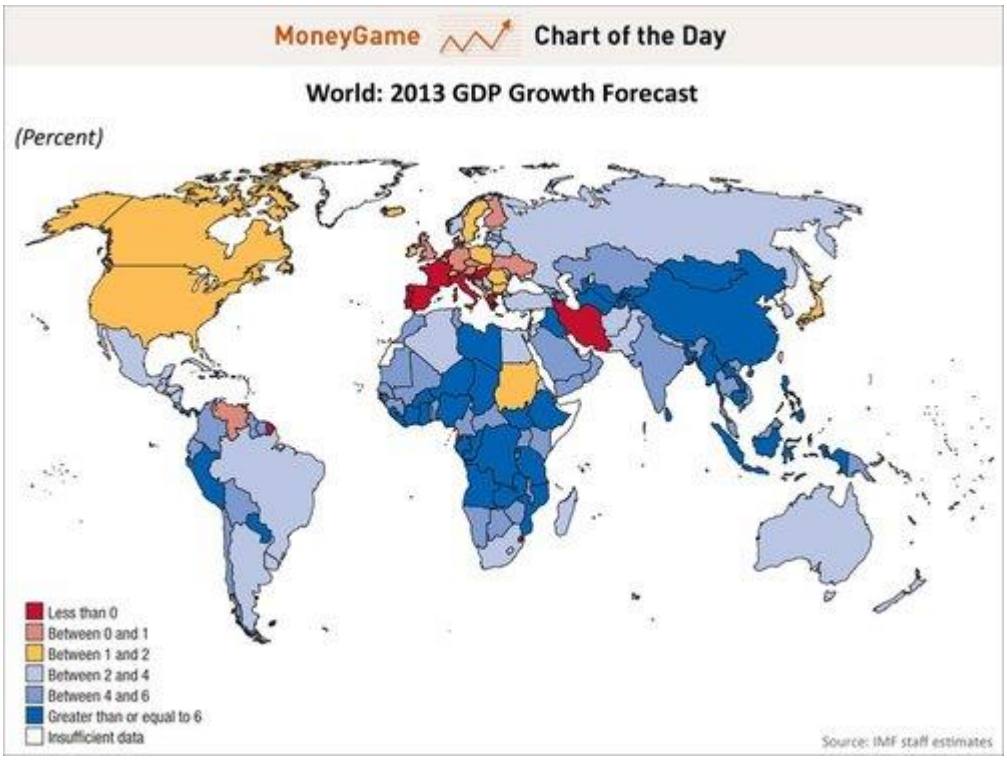
Overcoming both double-binds I defined above is the main cultural challenge Europe must face if it is to survive its structural crisis: the Eurozone has naturally the biggest duties and interests from this point of view. Along with a fully bi-directional subsidiarity, a fully democratic system based on the division of powers is required at all institutional/territorial levels to guarantee effectiveness and legitimacy at the same time; in other words, that the best available means of empowering an individual's sovereignty in a globalized world have been put in place in the very continent that engendered the culture of absolute political divisions between human beings. This momentous shift in our traditional political paradigms cannot be divided into definite steps, nor can it be concealed under a plethora of technical solutions to short-term problems. It should explicitly inspire a genuine roadmap toward a European political union. A sound roadmap requires a shared view of its goals by the people who are supposed to draw and implement it.

Chart 1 – Public deficit, debt, reserves and savings in Europe and the US (2013-2015 - forecasts for 2016-2017) - ratio of GDP where not otherwise indicated

	2013	2014	2015	2016	2017
	Net public lending (+) or borrowing (-) [EUR billions/GDP ratio]				
EU	-445.2/-3.3	-418.2/-3	-366.4/-2.5	-319.9/-2.1	-267.1/-2.7
Euro Area	-294.4/-3	-260.9/-2.6	-225.3/-2.2	-208.4/-1.9	-177.2/-1.6
USA	-664.1/-5.3	-634.0/-4.9	-676.6/-4.2	-750.9/-4.3	-792.1/-4.4
	Public debt				
EU	87.2	88.6	87.2	86.9	85.7
Euro Area	93.4	94.5	93.5	92.7	91.3
USA	104.8	104.8	105.6	106.3	106.4
	Reserves (excluding gold - billions of US dollars)				
Euro Area	291	282			
USA	133	119			
	Reserves (billions of US dollars)				
Euro Area	690	680			
USA	448	434			
	Gross savings in the public sector				
EU	0.3	0.5	0.8	1	1.4
Euro Area	0.6	0.9	1.1	1.1	1.4
USA	-2	-1.7	-0.9	-0.9	-0.9

Source: processed data from AMECO, Eurostat, World Bank, ECB and FED.

Chart 2 – International Monetary Fund, Word Economic Outlook, April 2013.



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[I] One should never forget that the Schuman Declaration, which gave birth to the European Community of Coal and Steel, clearly stated: 'The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe.' (Schuman 1950).

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Clarifying Limbo: Disentangling Indigenous Autonomy from the Mexican Constitutional Order

by

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Abstract

In contrast to U.S. Federal Indian law, which has classified indigenous tribes as "domestic dependent nations" since the early 19th century, Mexican law has only recently begun to define the political and territorial autonomy of indigenous groups. This paper contrasts the Mexican approach to this problem to that of the United States, first describing Mexico's 2001's constitutional reforms and their failure to clarify the nature of tribal sovereignty. It then analyzes recent court cases that protect tribal political and territorial autonomy by applying rights to consultation contained in the International Labor Organization's Indigenous and Tribal People's Convention 169 ("ILO 169") and the Mexican Constitution. It concludes by arguing that in spite of this effort by the courts, Mexican law still requires a comprehensive legislative or diplomatic resolution of the lack of clarity surrounding the political and territorial autonomy of its indigenous groups.

Key-words

Mexico, Native American, Indigenous, Federal Indian Law, Chéran, Zapatista, EZLN, Sovereignty, Federalism

1. Introduction

Since it achieved independence from Spain, Mexico's relationship with its indigenous cultural origins has been somewhat paradoxical. As one Mexican academic described it, 'the construction of the national identity is ambivalent and contradictory: it exalts the precolonial past of its ethnic societies, but it rejects and negates their continuing force.' Sitton (2011: 99). As indigenous people in Mexico in recent years have demanded recognition of their cultural and political autonomy, this observation has never been more apt. Bárcenas (2008: 56-60). The direct descendants of the precolombian societies still exist today (by some measures, 13 million out of a total population of 120 million), and despite having been marginalized culturally, socially, and economically, many have continued to speak their languages and observe their customs and culture. León-Portilla (2011: 108).[I] Nevertheless, throughout its history, Mexico's constitutions and courts have ignored indigenous peoples' existence and failed to develop a legal doctrine that defines the level of sovereignty of indigenous tribes under Mexican law.[II] León-Portilla (2011: 108). This lack of clarity stands in the way of indigenous groups' efforts to achieve some measure of political and territorial autonomy today, leaving them in "limbo."

In contrast, courts in the United States have engaged with indigenous tribes from an early date, interpreting treaties and defining the tribes' relationship to the federal-state hierarchy established by the U.S. Constitution of 1788. These early court cases, which established that indigenous tribes were "domestic dependent nations" with inherent, if limited, sovereignty, have proved crucial in the development of legal doctrines that preserve tribal self-government and territory in the U.S. to the present day.

Below, I discuss in greater depth U.S. courts' approach to clarifying the status of tribal sovereignty. Next, I provide a short background of Mexican indigenous law, and argue that in spite of a recent trend of Mexican federal courts protecting indigenous political and territorial autonomy, Mexican law still fails to clarify the position of indigenous groups within the legal order, leaving them vulnerable to exploitation by local authorities. While this vulnerability affects all aspects of indigenous life and sovereignty, I

focus specifically on the way current law impairs tribal rights to self-government ("political autonomy") and to land and resources ("territorial autonomy").

Before beginning my analysis, I would like to present several reasons why this particular comparison between U.S. and Mexican law is important. First, the two nations are federalist, and thus confront the same conceptual challenge of defining how tribal sovereignty can fit within a system of sovereign states and a sovereign national government. Next, because the two countries are neighbors, many indigenous people that live in both nations are ethnically and culturally related. Indeed, there are even tribes like the Yaquis of Sonora and Arizona that have been bisected by the U.S.-Mexico border. Third, many of the millions of Mexican immigrants who have arrived in the U.S. in recent decades are indigenous. Fourth, this is an area of Mexican law that has developed considerably in recent years, calling for a comparative perspective on the recent changes. Finally, this topic is intimately related with economic marriage of the two nations under the North American Free Trade Agreement (NAFTA). The Zapatista rebellion of 1994, which led to many of the legal changes I discuss below, began on the very day that NAFTA took effect. Understanding how indigenous groups are treated in U.S. and Mexican law will help transnational policymakers, investors, and defenders of indigenous rights.

While the focus of this paper is primarily the recent developments in Mexican indigenous law, viewed through the lens of U.S. law, I do not mean to suggest that U.S. Indian law is ideal or fully realized. If any lesson is to be learned from the comparison, it is that indigenous people must always be watchful against usurpations of their autonomy and territory.

2. U.S. Tribes: Domestic Dependent Nations

"Vulnerable" and "in limbo" are apt ways to describe the state of tribal sovereignty in the United States since the ratification of the U.S. Constitution in 1788. Nevertheless, tribes have enjoyed some measure of legal certainty because U.S. courts have historically recognized their inherent, if limited, sovereignty and vindicated tribal rights contained in treaties. This approach has been echoed by federal legislation like the Indian Self Determination and Educational Assistance Act of 1975 and the scholarship of Felix Cohen, both of which emphasize the inherent sovereignty of tribes originating in their

status as foreign entities that pre-existed the formation of the United States. 25. U.S.C. Sections 471 et. Seq.; Cohen (1945).

The first U.S. jurist to attempt to explain the place of native tribes in relation to the federal and state governments was Chief Justice of the U.S. Supreme Court John Marshall. In his trilogy of Indian law cases, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, John Marshall established the basic legal definition of Indian tribes in the United States—as "domestic dependent nations," not accorded the status of foreign nations, but at the same time enjoying whatever inherent sovereignty the Federal Government did not explicitly take from them. *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), *Worcester v. Georgia,* 31 U.S. 515 (1832). This juridical innovation reflected the historical practice of treatymaking with the Indian tribes, which lasted until 1871 and presupposed the sovereignty of tribal counterparties. In *Worcester*, the court invalidated a Georgia law that purported to regulate the activities of the Cherokee tribe on their reservation. 31 U.S. 515. Chief Justice Marshall mined the language of treaties between the U.S. Government and tribes to support the following endorsement of tribal political and territorial sovereignty:

> 'The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress.' 31 U.S. at 562.

In addition to affirming the potency of the Cherokee tribe's sovereignty, Marshall here established its place within the Federalist system—potentially subject to the federal government, but not to the states.

In the years since Marshall, the doctrine of domestic dependent nations has persisted, and courts have continued to recognize the tribes' political and territorial sovereignty. In the 1896 case *Talton v. Mayes* 163 U.S. 376, the Supreme Court held that the U.S. Constitution's individual rights protections did not apply against tribal governments, because the tribe's prosecutorial power derived from inherent sovereignty that pre-existed the United States, while the Constitution only protected individuals against the Federal

Government. *Talton v. Mayes*, 163 U.S. 376 (1896). With respect to land and resources, courts developed a canon construing treaties in favor of pre-existing tribal rights not expressly derogated in treaties. *See United States* v. *Winans*, 198 U.S. 371 (1905) (construing an 1855 treaty to protect the Yakima tribe's reservation fishing rights); *Winters v. United States*, 207 U.S. 564 (1908) (construing a treaty in favor of protecting tribal rights to irrigation water).

As the nation continued to industrialize and modernize throughout the 20th Century, courts continued to conceive of tribes as domestic dependent nations, with pre-existing and independent political and territorial sovereignty. In the seminal 1959 case *Williams v. Lee*, the U.S. Supreme Court dismissed an Arizona state court judgment against several Navajo defendants who had failed to pay for goods from a store on the reservation that was operated by a non-Indian. Citing John Marshall extensively, Supreme Court Justice Black noted, 'originally the Indian tribes were separate nations within what is now the United States,' and strongly rejected the state court's attempt to exercise jurisdiction over a matter within the competence of tribal courts: 'absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee*, 358 U.S. 217, 269-71 (1959). *Williams v. Lee* signaled the seriousness with which the modern court viewed the doctrine of Indian sovereignty expounded by John Marshall, and ushered in a period of increased court protection of Indian self-government.

Similarly, in the 1978 case *U.S. v. Wheeler*, 435 U.S. 313 (1978), the U.S. Supreme Court upheld a federal indictment for statutory rape arising out of the same incident which had given rise to a previous Navajo tribal court conviction, holding there was no danger of double jeopardy.[III] The Court based its judgment on the independent origin of tribal power:

> 'In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.' *U.S. v. Wheeler*, 435 U.S. 313 at 398.

U.S. states also benefit from this avoidance of the double jeopardy prohibition, reflecting the strength of tribal sovereignty as conceived by the court.

As a final point, it must be noted that U.S. law has also always included limitations on indigenous sovereignty, highlighting the fragility of tribal autonomy. Beginning with Marshall in *Johnson v. McIntosh*, the U.S. Supreme Court recognized that Indians had only limited title to the land they inhabited, and could not treat with foreign powers other than the United States. Later in the 19th Century, the court in the cases *U.S. v. Kagama*, 118 U.S. 375 (1886), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), developed the concept of the unchecked "plenary power" of Congress to legislate on Indian matters. This doctrine is reflected by the "reserved" nature of Indian sovereignty described above—as long as the U.S. Congress has not said otherwise, sovereignty is reserved to tribes. More recently, in the case *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the court added an additional limitation on indigenous sovereignty—tribes could not prosecute non-members for offenses committed on reservation grounds. In spite of these threatening developments for the future of Indian self-government, the reality as it stands today is that tribal self-government is alive and well within clearly demarcated reservations throughout the United States.

3. Limbo Persists: A Brief Review of Mexican Indigenous Law

In contrast, Mexican law has only recently begun to grapple with the status of its indigenous tribes. Before a 1992 constitutional amendment that explicitly recognized the "pluricultural" nature of the Mexican Republic, the Mexican Constitution of 1917 (as well as those previous to it) lacked any clear references to indigenous people at all. Vargas (1994: 42-43). In addition, there is no general historical practice of treatymaking with indigenous tribes in Mexico.[IV] This is all especially surprising because Mexico's indigenous population is far greater in absolute and proportional terms than that of the United States, comprising at least 10% of a total population of about 120 million (≈13 million).[V] León-Portilla (2011). Further, the revolution that produced the current 1917 Mexican Constitution was propelled by indigenous people seeking the restoration of their patrimonial lands and redress against the tyrannies of local non-Indian capitalists and landowners. León-Portilla (2011). One need look only to the example of the pure-blooded

Zapotec Benito Juarez, considered one of Mexico's greatest jurists and reformers, to observe the influence of indigenous people on the development of Mexican legal institutions.[VI]

However, after the 1992 Amendment and the Zapatista Rebellion of January 1, 1994, the Mexican government has begun to address the political autonomy of indigenous tribes in Mexico. The most important example of this are the historic San Andrés Accords of 1996, the fruit of negotiations between the Mexican government and indigenous groups led by the Zapatista National Liberation Army (EZLN) after their 1994 uprising. While the Accords could have set the precedent for a new practice of treatymaking between tribes and the government, they were not recognized as a treaty obligation after their signing in 1996. Zamora et al. (2004). Instead, the Mexican government responded to them by passing the constitutional amendments of August 14, 2001, which included unilateral modifications to the Accords. On their face, the Amendments of 2001 recognize some forms of tribal autonomy, but in reality they are significantly short of what was bargained for between the EZLN and the Mexican Government in the 1990s, and have been rejected as ineffective by indigenous law scholars in Mexico. Sitton (2011); Bárcenas (2008); Corres (2011). Below, I will discuss how the 2001 amendments failed to implement the San Andrés Accords with respect to clarifying the boundaries of tribal political and territorial autonomy.

3.1. The 2001 Amendments and their failure to establish indigenous political autonomy

In spite of the 2001 amendments´ apparent endorsement of indigenous autonomy, they are limited by a lack of clarity regarding the place of indigenous groups within Mexican constitutional structure. This deficiency differentiates Mexican from U.S. law on the subject, which has we have discussed above has a long tradition of refining the nature of tribes as "domestic dependent nations." In Mexico, while the San Andrés Accords granted full autonomy to indigenous groups on a scale from the smallest settlements to region-wide agglomerations of settlements, the 2001 Amendments delegate the definition and recognition of autonomy to the states, and only explicitly grant legal status to indigenous *comunidades*, which are small-scale settlements. De la Rosa (2014: 31).[VII] This is especially insufficient because, as in the United States, Mexican state governments have traditionally

been the most aggressive expropriators of tribal lands and oppressors of indigenous people. Bárcenas (2008). [VIII] Unsurprisingly, the response to the constitutional amendments by the states was tepid: as of 2011, only 21 of 32 states' constitutions mentioned indigenous people in any way. Of those, half are obsolete because they predate the 2001 constitutional amendments. In addition, by 2011 only 11 states had conformed their constitutions to the 2001 constitutional amendments, and 9 of those only passed the minimum that would conform to the constitutional mandates. Corres (2011).

Further, the legal status granted to *comunidades* fails to meet the terms of the Accords or clarify their nature. Instead of amending the constitutional provisions establishing the structure of local and state government to include indigenous communities as full-fledged local governments, the 2001 amendments only establish them as entities of *interés publico*, an undefined term. Díaz (2002: 155); Diaz-Polanco (2009); De la Rosa (2014:31); Stavenhagen (2014: 40). According to some interpretations by Mexican law scholars, these entities are comparable to political parties and other voluntary associations. Díaz (2002: 155); Diaz-Polanco (2009); De la Rosa (2014:31); Stavenhagen (2014: 40). The 2001 amendments also fail to carry out the Accords' provision calling for the redistricting of municipal and sub-municipal boundaries within states in order to improve the political participation of indigenous people in local, state, and federal representative bodies. De la Rosa (2014). The lines demarcated by these entities not only ignore indigenous communities, they slice them up into political oblivion. After the creation of the federal system in 1821,

> 'Not a single state, excepting Tlaxcala, corresponded to the indigenous peoples that lived within them, often splitting them into several states, and internally, splitting them among local government entities. This prevented the political unity of indigenous peoples and avoided their political or economic strengthening.' Sitton (2011: 99).

The result of these weaknesses is a reform that grants very little in the way of political autonomy to indigenous tribes in México.

This perception is reinforced by the language of the 2001 amendments themselves, which condition their grant of free determination to indigenous groups on the requirement that it be exercised 'in a constitutional frame of autonomy that assures national unity.' Constitución Política de los Estados Unidos Mexicanos, Art. 2. Indeed, the title of Article

II (pertaining to Indigenous Mexicans) is 'The Mexican Nation is unified and indivisible.' José Ramón Cossío Díaz, a Mexican Supreme Court Justice, explains the circularity of this simultaneous grant and limitation: 'free determination can only be exercised under the terms and conditions of the juridical order, while the juridical order itself grants free determination.' Díaz (2002: 154). Justice Cossío Díaz resolves this quandary by suggesting that "free determination" really means only those powers of self-government explicitly provided in Article II. Díaz (2002: 154). As a result, Mexico's 2001 amendments grant autonomy in a context that is highly limited by obligations to conform to the preexisting majority constitutional structure. This is in striking contrast to the U.S. approach, illustrated by the case *U.S. v. Wheeler*, where the Supreme Court has conceived of indigenous autonomy as inherent and reserved, because 'before the coming of the Europeans, the tribes were self-governing sovereign political communities.' 435 U.S. 313, at 322-3.

In sum, the lack of clarity with respect to the nature of indigenous groups' political autonomy prevents the 2001 amendments from meeting the terms of the San Andrés Accords or helping eliminate tribal "limbo." As we have seen in the U.S., the clear legal and territorial demarcation of Indian Tribes have been essential to the protection of tribal autonomy in court. As long as the nature of Mexican tribal sovereignty remains undefined, indigenous rights to self-govern will be extremely difficult to vindicate.

3.2. The 2001 Amendments and their failure to sufficiently protect indigenous territorial autonomy

The 2001 amendments' lack of clarity also obstructs indigenous efforts to protect territorial integrity. The special rights to land and resources granted to indigenous groups by the 2001 amendments are unclear and limited by entanglement with the majority constitutional order. Like in the United States, tribal control over land and resources has been a key point of contention in Mexico since the first Europeans arrived. Unlike the U.S., however, indigenous groups in Mexico lack treaties that clearly define the extent of their territories and territorial rights. The protection of indigenous-owned lands and the restoration of wrongly taken lands were important topics in the San Andrés negotiations, especially because of the EZLN's locus in the state of Chiapas and that state's notorious record of illegal expropriation. Vargas (1994); León Portilla (2011); Bárcenas (2008).[IX] As

foreign investment in Mexico has increased in recent years, the problem of land insecurity has only worsened—from 1993 to 2012, the government granted 43,675 mining concessions, which represent a surface area covering nearly half of Mexico. Veloz (2014: 24). In addition, between 2000 and 2010 gold mines in Mexico produced 420 tons of gold, more than double the amount produced in three centuries of Spanish colonial rule. Veloz (2014: 24).

The absence of clear territorial rights is particularly obvious in 2001's amendments, which allow for the "preferential use" by indigenous people of natural resources in the areas they inhabit, subject to the rights of third parties, individual property owners within their communities, the forms of property and tenancy recognized by the Constitution, and excepting "strategic areas," also defined by the constitution (but beyond the scope of this paper). From the start, this grant did not meet the requirement of the Accords, which called for access and use rights to the "lands and territories" of the tribes. De la Rosa (2014: 30). "Lands and territories" was understood to include a sphere much greater than lands where indigenous people live and practice agriculture, encompassing sites of religious and cultural interest, but in the 2001 amendments, the area is limited to that which is inhabited by indigenous people. De la Rosa (2014: 30). Beyond the concerns over the highly limited nature of this grant of rights, Professor Francisco Bárcenas points out that the amendments diverge from the Accords in that they grant access to the *use* of resources in the areas where they live, rather than to actual ownership of the land or repatriation of expropriated territories. Bárcenas (2008: 100). While in the U.S., tribal property rights are also restricted, the tribes at least have the advantage of treaties that demarcate the extent of the lands they control and grant them possession and many other reserved rights.[X] In contrast, the 2001 amendments' 'grant' of rights is so adulterated by the conditions of prevailing constitutional order as to be null.

4. 2011- present: The Mexican Federal Courts and the Right to Consultation

Mexican jurisprudence in the area of indigenous rights has historically been rigid and formalistic: for example, in response to 300 legal challenges to the validity of 2001's constitutional amendments, the Mexican Supreme Court refused to hear the cases on

separation of powers grounds (as well as a special power afforded Congress as the reformer of the constitution). Bárcenas (2008: 102-103). Since 2011's constitutional reforms to the Mexican court system, which elevated international treaty obligations in the area of human rights to constitutional guarantees, the federal courts have turned away from formalism and begun to expand upon the limited protections of indigenous political and territorial autonomy granted by the 2001 amendments.[XI] This protection has been accomplished most successfully through the vindication of indigenous peoples' rights to consultation, contained in Article 6 of the International Labor Organization's Indigenous and Tribal People's Convention 169 ("ILO 169") and Article 2 of the Mexican Constitution. Article 6 (a) of ILO 169, signed by Mexico in 1990, requires governments to 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.' Below, I will discuss several recent cases where indigenous tribes defended their political autonomy and access to natural resources by successfully asking the Mexican Supreme Court to vindicate this right.

4.1. Cherán—self-government by uses and customs through consultation

The most striking example of the use of consultation rights to protect political autonomy is the case of Cherán, Michoacán, a community of some 18,000 Purépecha people. *La Jornada* 20 April 2015. In a series of recent litigations in federal courts against a hostile state government, the Purépechas successfully established Cherán as an indigenous municipality governed by their own uses and customs. A silvicultural community that relies on the maintenance and careful exploitation of forests, the Purépecha in Cherán suffered for years from illegal logging and organized crime that was permitted and encouraged by local municipal authorities. Arévalo and Andrade (2013); *La Jornada* 20 April 2015; *El Universal* 29 May 2014. In 2011, a group of residents set up barricades in their town, directly confronting illegal loggers and driving corrupt local officials out. Arévalo and Andrade (2013); *La Jornada* 20 April 2015; *El Universal* 29 May 2014. The next local election cycle, the people of Cherán attempted to elect their local leaders according to their tribal customs, and petitioned the regional electoral authority to be allowed to do so. Arévalo and Andrade (2013); *La Jornada* 20 April 2015; *El Universal* 29 May 2014. After their request was rejected by the regional agency, they sued in the Federal Election Court, and won a

judgment ordering the regional agency to hold a consultation process to verify that the community did indeed want to elect local leaders according to their customs. Arévalo and Andrade (2013); *La Jornada* 20 April 2015; *El Universal* 29 May 2014. The process resulted in a resounding 'yes' for the customary election. Arévalo and Andrade (2013); *La Jornada* 20 April 2015; *El Universal* 29 May 2014. Shortly after this favorable ruling in 2012, the legislature of Michoacán enacted a state constitutional reform directly disallowing Cherán's freedom to elect its own leaders according to tribal customs. Mosso (2014). This resulted in further litigation, culminating in a Supreme Court judgment in May 2014 invalidating the state constitutional reform as it applied to Cherán because of the state legislature's lack of consultation with the town. Controversia Constitucional 32/2012; Aranda (2014).[XII] This ruling was especially notable for two reasons: first, because it was the first ruling to recognize that indigenous communities have standing to litigate their constitutional rights against states. Secondly, because the ruling affirmed the parity between "normal" municipalities, structured as direct democracies according to Article 115 of the Mexican constitution, and indigenous municipalities, governed by "customs and uses." Dávila (2014); Aranda and Martinez (2011). By taking action to protect their right to consultation, the people of Cherán successfully protected their freedom to self-govern.

4.2. The Yaquis and the Mayas—territorial autonomy through consultation

In the 2013 Supreme Court case "Amparo en Revisión 631/2012," the court granted constitutional protection to the Yaqui Tribe's rights to 50% of the water contained in the Angostura Dam in the state of Sonora. Amparo en Revisión, 613/2012; La Red Internacional. While the state had already constructed and begun to operate the Aqueducto de la Independencia taking water from the Angostura reservoir to the city of Hermosillo, the court ruled that the construction of the reservoir was illegal. It invalidated the aqueduct's operating permits because of a failure to adequately consult with the tribe, which depended on the reservoir for irrigation. Amparo en Revisión, 613/2012; La Red Internacional. Importantly, the basis of the tribe's claim to 50% of the water in the dam was an agreement with the Mexican government, signed in 1937, and followed by a presidential decree in 1940. Vázquez (2012). In this respect, the Yaqui were the exception: a Mexican indigenous group that could rely upon a written agreement similar to those relied upon by U.S. tribes to protect territorial rights. *See Winters v. United States*, 207 U.S.

564 (1908). In another recent case from the fall of 2015, the Mexican Supreme Court invalidated licenses issued by a federal agency for the planting of genetically modified soy in the Yucatán, based on complaints by Maya peoples. Notimex (2015). The court similarly relied on the agency's failure to properly consult with the tribes before issuing the license that would profoundly affect their agricultural and honey-harvesting practices. Notimex (2015).

4.3. The limitations of courts in vindicating political and territorial autonomy

The successful court battles described above sadly reveal the limitations of the court's role in protecting indigenous political and territorial sovereignty in today's Mexico. In the case of the Yaquis of Sonora, the implementation of court's original judgment has been delayed and ignored by local authorities and the litigation continues to this day. Román (2015); La Red Internacional. In the case of Cherán, while the town has successfully governed itself since 2011, in 2015 the state legislature passed a law that again restricted their local autonomy, clearly violating the Supreme Court Judgment of 2014.[XIII] Moreover, the application of the 2011 reforms by courts has been irregular—in Baja California, the Cucapá tribe's constitutional challenge to environmental fishing limits that were passed without consultation was rejected by a federal district judge in 2014, in spite of widespread agreement among experts that their rights had been violated. Díaz (2014); Navarro-Smith et al. (2014).

Unsurprisingly, in the face of courts' limited potency, intransigent local authorities, and growing threats from organized crime, indigenous groups have increasingly turned to the practice of *de facto* autonomy. A longstanding example of this has been the EZLN's regional autonomous governments in the mountainous jungles of Chiapas. Diaz-Polanco (2009: 67). More recently, the rise of cartel violence and local corruption in southern Mexico has spurred additional attempts at *de facto* autonomy.[XIV] In Guerrero, rural indigenous militias have been formed to protect communities from narcotraffickers and corrupt government officials. Agren (2015); Stavenhagen (2014: 46).

5. Conclusion—comprehensive solutions needed

After hundreds of years without explicit legal recognition, in recent years indigenous people can finally see themselves in the text of the Mexican Constitution. By clarifying the political and territorial boundaries of indigenous tribal sovereignty, indigenous and non-indigenous people alike can further benefit from some measure of legal certainty.

While the recent rulings in Mexican courts with respect to consultation rights are admirable, the judicial branch is limited by the laws and treaties it implements and the constrained remedies that adjudication can afford. Even in the U.S., where courts have recognized inherent tribal sovereignty for nearly 200 years, they did not labor alone. Tribal sovereignty has been supported by executive and legislative action throughout the years, in the form of treaty negotiation and ratification, and the passage of laws like as the Indian Reorganization Act of 1934 and the Indian Self Determination and Educational Assistance Act of 1975. Indeed, Marshall's most resounding endorsement of tribal sovereignty and territory, his opinion in the case *Worcester v. Georgia*, did nothing to prevent the forcible removal of Cherokees from their land that was occurring at the time.

Viewing the 2001 amendments and recent Mexican Supreme Court rulings through the lens of U.S. Federal Indian Law, it is clear that indigenous people in Mexico suffer from a lack of clarity with respect to their tribal political and territorial autonomy. In addition to the court participation of the last few years, there is a great need for a complete resolution of tribal "limbo" through legislation or constitutional reforms recognizing clear territorial boundaries and well-defined political autonomy. A clear answer, accepted by all branches of government and the states, is essential. As always, the San Andrés Accords stand as a reminder of an agreement that apparently satisfied all parties at the bargaining table—it would never be too late to re-adopt the Accords as a treaty, giving it constitutional status and assuring its implementation.

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[I] Under some U.S. tribes' blood-quantum requirements, Mexican "mestizos" would qualify, rendering the vast majority of the Mexican population as "indigenous" as many U.S. tribal members. *See Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2556 (2013).

[II] While the word "tribes" has a different meaning in Mexico, where it refers primarily to northern indigenous groups, for uniformity's sake, I use it throughout this paper in the U.S. sense of the word to describe

culturally distinct and self-governing (in fact, if not in law) groups of indigenous people.

[III] "Double Jeopardy," is a defense that can be used to prevent the trial of a defendant for the same offense for which he/she was already acquitted or convicted.

[IV] An exception to this rule is the Yaqui tribe of Sonora, whose history of successful violent resistance against the Mexican State has allowed it to benefit from treaties, agreements and presidential decrees giving it a sphere of *de jure* autonomy. As we will see below, this history has helped the tribe to vindicate water rights in court in recent years. SV Vázquez (2012).

[V] According to the 2010 U.S. Census, there are 5.2 million American Indians and Native Alaskans in the U.S., comprising 1.7% of the total population.

[VI] The case of Benito Juarez also serves to illustrate the paradox of Mexican-Indigenous relations—the process of Liberal constitutional reform in which he participated denied Indian tribes any collective rights and greatly aided the expropriation of lands held by indigenous people. León-Portilla (2011).

[VII] In addition to its limited scope, this reform doesn't appear to add much—*comunidades* are already recognized as units of collective property ownership under the Constitution's provisions on Agrarian Reform. They do not have an explicit connection to indigenous Mexicans, however. Constitución Política de los Estados Unidos Mexicanos, Art. 27.

[VIII] Nevertheless, it must be noted that given the cultural and geographic heterogeneity of Mexico, there is also a good-faith rationale for delegation of this matter to the states.

[IX] 'Chiapas is Mexico's poorest state for Indians, but a paradise for caciques.' Vargas (1994: n. 8). Caciques are local political bosses, often large landowners.

[X] Around 56 million acres of U.S. tribal land is held in trust, for the benefit of tribes, by the Federal government. This means there are restrictions on the ability of indigenous people to sell or lease the land, but they are presumed to have the "full beneficial ownership of the land, minerals, timber, and other associated property interests. Fletcher (2011: 20-21, 248); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938). This limited "indian title" can be traced to *Johnson v. McIntosh*, 21 U.S. 543 (1823).

[XI] In other words, actions against the government for violations of rights can now claim violations to human rights ensured by international treaties signed by Mexico. 'Que hace el SCJN?'

[XII] Without getting into the weeds of Mexican constitutional procedure, the ruling was limited in its effect to Cherán—it is rare for courts to strike laws facially in Mexico.

[XIII] After the threat of another lawsuit, the legislature finally corrected the law. PM Vázquez, (2015).

[XIV] The most extreme example of this is the disappearance of 43 students from the Normal School of Ayotzinapa, Guerrero, the majority of whom were indigenous and training to be teachers in indigenous communities. "You have to be poor, from the working or agricultural class, and usually indigenous to become an Ayotzi . . . . . The teachers who graduate from the school, who usually go out into isolated and impoverished rural communities to teach . . ." Goldman, (2015).

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Some considerations on the relationship between economic and social cohesion and implementation of the cohesion policy

by

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Abstract

The processes of deepening economic integration and regional development contribute to the intensification of inter-regional disparities. The EU's efforts to achieve cohesion are intended to contribute to lifting the level of socio-economic development, improving the quality of life of residents, and also solving emerging problems, including social ones, so that the benefits of growth spread evenly across the EU. This inevitably has the implication, in the name of solidarity principle, of the need to provide support to countries and regions at a disadvantage to achieve cohesion within the EU. The Union promotes economic, social and territorial cohesion among Member States (MS) through grants of financial assistance and in the many benefits achieved from the implementation of EU policies. One of these policies is the cohesion policy, the aim of which is to achieve a social, economic and territorial cohesion within the Union.

This paper aims to identify current perceptions of cohesion in the EU. Here we will argue that there is no conflictual relationship between economic and social cohesion; that both dimensions are self-reinforcing, and economic cohesion presupposes social cohesion. The paper also discusses the socio-economic cohesion of Poland and its regions against the background of the new EU MS. It will also assess the contribution of EU cohesion policy in the socio-economic development of Polish regions.

Key-words

Cohesion policy, economic and social cohesion, structural funds

1. Introduction

The EU's primary concern is fostering solidarity among the MS, e.g. through the implementation of common policies (Mik 2009: 49-50). It has a practical application in the activities undertaken to achieve cohesion in the economic, social and territorial dimensions of the Union. The processes of deepening economic integration and regional development contribute to the intensification of inter-regional disparities.[I] A view to ensure cohesion in its three dimensions is born in mind here; as stated in Art. 3 (3) TEU 'The Union [...] promotes economic, social and territorial cohesion and solidarity among Member States.'[II]

Cohesion policy provides financial aid to the poorer EU MS and their regions, and the operation of this policy is subordinate to the principle of solidarity. Financial resources are largely directed to the least developed regions. In 2007-2013, the financial resources allocated to this category of regions accounted for approximately 81.5% of the cohesion policy budget.[III] The intensity of this aid in the poorest regions is expected to reach €180 per capita in 2014-2020, which means a significant reduction compared to the period 2000-2004 when it accounted for €259. Cohesion policy has to fulfil many tasks, although its budget is relatively small, representing 0.36% of GNI (gross national income) in 2012.[IV] However, it is the main source of funding for projects aimed at counteracting existing disparities and improving the competitiveness of regions. Since the inception of this policy, its objectives and principles have been reframed. Still, without its operation, it would be impossible to create social and economic model of the EU, of which the foundations are basic values such as solidarity, and which distinguishes the EU from other players of the world economy.

Economic solidarity in the context of cohesion policy should not be achieved only through the institutionalised transfers of funds made from relatively wealthy countries to less-favoured countries or regions, but would look much more widely, through the prism of mutual benefits gained by both donors and beneficiaries of this aid and the whole the EU.[V] The implementation of this policy in regions is now necessary to overcome the negative consequences of the economic crisis, as will be reflected in the decreased disparity,

or nett improvement of living standards, and the improved level of development in the group of countries and their regions included in the mechanism of this solidarity.

This paper aims to identify the current perception of cohesion in the EU and discusses the socio-economic cohesion of Poland and its regions against the background of the new EU MS. It will also assess the contribution of EU cohesion policy to the socio-economic development of Polish regions. The author makes an attempt to verify the hypothesis that there is no conflictual relationship between economic and social cohesion policies, and that moreover both dimensions are self-reinforcing and the economic cohesion presupposes social cohesion.

2. Achieving economic, social and territorial cohesion in the context of implementing the EU socio-economic model

The developing process of European integration takes place in the economic, as well as the social sphere, and these are closely interwoven (Schiek 2013: 49-51). The actions implemented in the framework of EU economic policy, shaped by complex conditions, contribute to the implementation of the European economic and social model. In the Europe 2020 Strategy, which is the exit program from the crisis of the Union, a vision of the development of this group is outlined, whilst also offering a model of the economy whose achievement will be sought by taking appropriate measures. The proposed model for economic growth in this strategy should not only be associated with an increase in GDP. Indeed, the priorities of the EU will be smart, sustainable and inclusive growth. Support for the economy will be promoted in such a way as to achieve a high level of employment, improved efficiency in the EU, and improved competitiveness, without harming the social market economy model implemented in the EU (European Commission 2010: 2-3, 5, 11-12; European Commission 2014: 3).

The development of the economic and social model of the EU was influenced by the financial and economic crisis and affected the solutions adopted by the Union's policy-makers in the sense that it was necessary to use appropriate instruments, and to introduce such management methods in the EU as to reduce its negative consequences. This model can be equated with a set of complex mechanisms and instruments to enable the functioning of the EU, contributing to the achievement of its complex objectives, including

economic and social cohesion at different levels: European, within individual MS, as well as on the regional level, at the same time conditioning further development of this group (Dziembała 2013: 372).

Achieving economic and social cohesion took on special significance in the EU due to the asymmetric impact of the financial and economic crisis in different regions within the EU. It is also a result of policies being implemented in the EU – restrictive macroeconomic, fiscal policies, and macroeconomic effects of the crisis. One should take into account the fact that in the period of economic downturn the resilience of the MS to this kind of phenomenon varies, as well as the outcome of the implementation of different policies. At the same time, the presence of weaker states and their regions in the EMU makes the impact of negative economic phenomena on regional development in each country different, embodied in the form of so-called 'domestic effects' (when considering the economic results achieved in all regions of the EU). The effects of the crisis have an asymmetric spatial dimension because of the diversity of economic structures of the regions and their allocation of territorial capital. There are also different effects on the demand side, inter alia, visible in the decline in investment, mainly affecting regions dependent on the industry with a high proportion of SMEs. Moreover, in the subsequent phases of the crisis, different types of regions were affected by its consequences in different ways, not only the less developed regions, outermost and farming regions, but also export-oriented regions or industrial regions (Camagni, Capello 2015: 28-32).

According to the last report from the Commission on economic and social cohesion, a deceleration of the process of reducing disparities between regions in 2008-2011 occurred, not only in terms of GDP per capita, but also with regard to other indicators such as levels of employment, and unemployment. Deepening regional disparities took place after 2008. The consequences of the crisis affected regions with different levels of economic development (European Commission 2014a: 1-7), thereby impacting on economic and social cohesion in the EU.

As a consequence, much attention was needed in the direction of policy actions which would contribute to the achievement of cohesion, both in the economic and social dimension (Rodrígues-Pose, Tselios 2015: 31). Indeed, the social consequences inherent in a period of economic downturn cannot be forgotten; here, issues of strengthening social cohesion in the EU have been undertaken in the Europe 2020 strategy. In fact, sustainable

development is promoted here, it is noted that while taking action not only economic criteria, economic growth, should be accounted for, but also social categories should be included (European Commission 2010). Therefore, a discussion was conducted regarding growth and its sustainability in the context of achieving cohesion in both dimensions, and at the same time implications that are associated with its attainment.

The existence of regional disparities impacts on national economies. Unused labour resources, and production potential, lowers national prosperity. Thus, the relevant policies aimed at these resources affect the economic results achieved by a national economy, improve the efficiency and quality of life, and hence social well-being in the regions. However, it may turn out that while some regions benefit from the adopted strategy of development of a given national economy, in others, where capital and resources are not utilized, there may be a need to implement policies aimed at achieving social equality in the regions lagging behind (Martin 2008: 3-4).

Cohesion is a multifaceted concept, and it can be argued that it is a 'state of community of interests' that is to be achieved. It also means targeting entities, and individuals, with the objectives established in the EU system (Tondl 1995: 8-11). The categories of economic and social cohesion are difficult to be treated separately, not least in the formulation of policies and directions of the proposed support. These two dimensions of cohesion contribute to each other and are characterised by interconnectedness and feedback.

Economic cohesion is associated with actions aimed at not only reducing disparities in development, but also at improving the dynamics of development of regions and increasing their competitiveness.[VI] As pointed out by M.G. Woźniak, economic cohesion is an instrument for achieving social cohesion as the former 'is [...] to serve business entities and local communities to achieve well-being and enable them to limit the differences in the level and quality of life by eliminating sources of exclusion from the processes of modernisation'(Woźniak 2012: 7). Efforts to improve the situation on the labour market will also affect the living standards of the population, and thus the existing degree of exclusion of the population (Ministry of Infrastructure and Development, 2014: 86). Therefore, the issues of social cohesion cannot be neglected, as they have been so far, and are becoming pivotal to the achievement of economic cohesion, and thus development, which should be more inclusive. Social cohesion has been associated with such positive

dimensions as a sense of belonging, active participation, and perhaps even trust, as well as being defined in the light of existing inequalities, such as exclusion (OECD 2011: 53).

According to the OECD, social cohesion can be seen through three components: social inclusion, social capital (combining trust and various forms of social engagement), and social mobility (OECD 2011: 17, 53-54), seen as 'measuring the degree to which people may or believe that they will change their position in society' (OECD 2011: 54). It is emphasized that the existence of social cohesion contributes to economic growth, to the reduction of poverty, to the effectiveness of public policies, and moreover it affects the sustainability of economic growth (OECD 2011: 54, 58).

The assessment of economic cohesion perceived in the light of the ongoing development processes, and thus convergence, is the subject of numerous analyses (Barro, Sala-i-Martin 1991: 107-182). Analysis of the importance of social cohesion for the growth of regional economies, or the EU, has also been conducted. The importance of social cohesion on a regional basis for maintaining sustainable growth is emphasized by Ch. Benner, and M. Pastor, who studied growth within 184 metropolitan areas in the United States in the years 1990-2011. They proved that the durability of growth spells, through the creation of increased employment and higher real wages, are related to factors such as low levels of dependency on processing industries, and a higher proportion of people who hold secondary education level. However, as they argue, the length of growth spells is also influenced by factors related to social cohesion and, therefore, political fragmentation – fragmentation of local government, a high level of racial segregation, and a high level of income inequality which may contribute to shorter growth spells in the economy. The sustainability of this growth is impacted by the levels of inequality; the region which is more socially integrated will be able to sustain this growth (Benner, Pastor 2014: 1-18).

In contrast, A. Rodrígues-Pose and V. Tselios examine social cohesion in the field of social welfare considered in the light of Sen's social welfare index. They emphasize that the process of convergence at the regional level in the EU takes place not only in the economic field, but also social one. A lack of existing process of economic convergence is not necessarily linked to the same phenomenon in the social sphere. Indeed, the social convergence process is advancing, and regions with a lower initial level/degree of welfare 'grow' much faster. Additionally, clusters of regions with similar levels of welfare can be identified. A gap in welfare is less visible due to the intensification of social policy activities.

Many factors influence the progressive process of convergence in welfare (growth rate) and the authors identify them with structural and institutional factors, among others, such as: level of education attained, access to work (participation in the labour market), participation of women in the labour market, which is the most important factor, urbanisation, infrastructure, etc. (Rodrígues-Pose, Tselios 2015: 30-60). In this context, promoting the EU's economic model, attention should be paid to actions for social cohesion in order to ensure its long-term and sustainable development.

Nevertheless, the category of cohesion has been enriched by its territorial dimension. It has been indicated that 'this cohesion serves a means of transforming diversity into an asset that contributes to sustainable development of the entire EU' (European Commission 2010a: 3). According to the Green Paper, territorial cohesion will address three areas, concentration, connectivity and cooperation.

The first of these, concentration, relates to measures relating to excessive concentration of growth areas, as well as access to the benefits connected with the functioning of an agglomeration, based on cooperation, interactions and connections with the areas surrounding cities. Despite the benefits arising from the concentration of economic activity, it will be necessary to overcome the negative externalities of agglomeration, suppressing differences in distance when it comes to the intermediate regions, i.e. the rural areas. The second, connectivity, relates to the development of links between the territories by overcoming the distance and is related to, among others, the connectivity of intermodal transport, access to services, access to the sources of energy, energy network connections, Internet access, links between enterprises and research centres. The third dimension is in cooperation, promoting bridging differences through implementation of multi-level cooperation structures involving public and private entities to solve the problems of each area. Territorial cohesion will be manifested in directing actions to regions with specific geographical features which include: mountainous regions, island regions and sparsely populated regions, and other regions with specific conditions (European Commission 2010a: 6-9; *Green Paper on Territorial Cohesion, the way ahead*, 2008: 4-6). The framework for the development of the territorial dimension of Europe and identified priorities for territorial development in the EU is presented in Agenda 2020 (*Agenda Terytorialna Unii Europejskiej*). The territorial dimension must also be reflected in the implementation of the Europe 2020 Strategy and the implementation of EU policies. Therefore, those key aspects,

which need to be considered while preparing appropriate planning documents related to cohesion policy, include: accessibility, services of general economic interest, territorial potential, networks of cities, and functional regions (Ministry of Regional Development 2011: 7-9).

3. Economic and social cohesion in the new EU Member States

A wide variety of political, cultural and social factors have resulted in the boundary defining the economic division of Europe into its richer and poorer part now running between the western and eastern part of the continent, where in the middle of the twentieth century it existed between the north and the south. In fact, in 1950-1989, the countries of Central and Eastern Europe (CEE) were subjected to economic degradation, and at the end of this period they were in the group of least developed European countries (Orlowski 2010a: 19-22).[VII] With EU membership their economic development has accelerated, not only as a result of their membership in the EU structures, but also the ongoing process of transformation in these countries.

However, the CEE countries, despite convergence processes, remain in the group of EU countries with lowest levels of socio-economic development. In 2011, Cyprus achieved the best results in terms of GDP per capita in this group of countries, which amounted to 94% of the average values for the EU-28 (according to PPS), and the worst - Bulgaria, whose GDP per capita was 47% of the EU average. In 2011, the richest region in the EU-13 was Bratislava, with a GDP per capita of 186% of the EU average, followed by Prague (171% of the EU-28 average) and only 9 regions had a GDP per capita higher than 75% of the EU average. The poorest was the Romanian region of Nord-Est (29% of the EU average GDP). In 2003, the ratio between the richest and the poorest regions of the CEE countries, which have become members of the EU, represented 7.3: 1, in 2011 it was 6.4: 1.[VIII] Most of the regions belonging to this group of countries are beneficiaries of aid from EU funds earmarked for the least favoured regions. Following this, how is economic and social cohesion shaped in this group of countries and what changes are taking place in their regions in terms of membership in the EU in the scope of economic and social cohesion?

In order to obtain an answer to the questions, a study was conducted using a set of variables characterising economic and social cohesion. The following variables were used:

unemployment rate (%), economic activity rate (%), average life expectancy, fertility rate, and households' disposable income (HDI), expressed in euros per inhabitant (Dziembała 2013). The study covered the following three-year periods: 2003-2005, 2006-2008 and 2009-2011, for which average values of the data were calculated.[IX] The analysis of economic and social cohesion was carried out for the CEE countries, as well as for their regions. Initially 58 regions in the EU-13 were selected for analysis, but Cyprus, two Croatian regions and Malta were not included in the calculation due to lack of data. Croatia, Cyprus and Malta were excluded from the countries' analysis due to the lack of data on HDI.

The cluster analysis carried out according to J.H. Ward's method made it possible to define groups of countries similar to each other following the adopted set of variables. Three clusters were identified; however, due to interpretation issues, a division at a lower level was adopted by selecting four clusters for economic and social cohesion, covering the period of 2003-2005. Slovenia was included in the first cluster (Class I) characterised by *the best economic potential* due to very favourable indicators among the other classes: above average HDI per capita, the highest rate of life expectancy, a relatively low unemployment rate, a relatively high economic activity rate of the population. Still, attention needs to be paid to the demographic potential due to a below average fertility rate. In contrast, Class IV included Romania and Bulgaria, namely countries that were characterised by *the lowest economic potential* of the analysed group of countries, taking into account the HDI per capita, low economic activity rates, low life expectancy, where these variables are below average for this group of countries. In contrast, cluster III covered Hungary and the Czech Republic due to the very high, above average HDI per capita, and low unemployment rate. The remaining group, which includes class II, included countries with an average HDI per capita and *moderate growth prospects*, in which attention should be paid to the need for human resource management.

The results of clustering for the period of 2006-2008 demonstrated the sustainability of the current situation of countries in each group (i.e. according to four classes). Class III included the Czech Republic only, and Hungary was among 'inbetweeners', there were no other changes in the countries belonging to various classes. These results were confirmed by the analysis for the years 2009-2011, only in Class III Slovakia joined the Czech Republic. Slovakia came out of the group of average regions, since it improved, except for

the labour activity rate, all factors included in the analysis, in particular HDI per capita. The indices analysed for this country were above average and they included: the economic activity rate, life expectancy and HDI per capita. The high unemployment rate still remains a problem, which indicates the need for human resources management. The countries' classification results according to J.H. Ward's method for the years 2009-2011 are shown in Fig. 1.

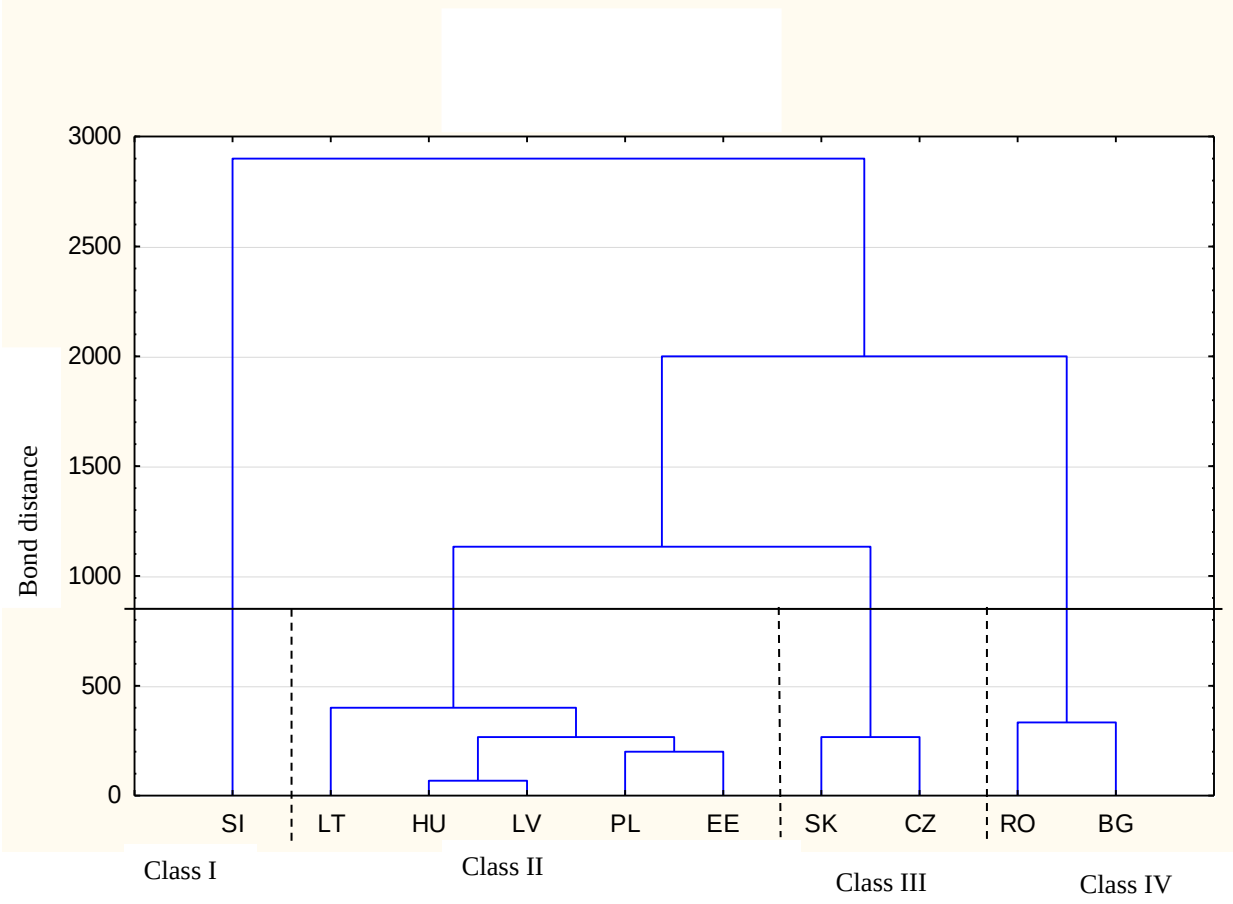

Fig. 1. Classification of the EU-10 [x] according to the economic and social cohesion in 2009-2011

Source: own elaboration.

The results confirm that changes in the EU-10 countries are slowly taking place, as countries' identification with particular groups is relatively stable. The analysis of the average values of the data for subsequent periods shows that there was a gradual improvement, with the exception of the unemployment rate. The gradual advancement in the level of welfare is not only proved by improved HDI per capita, but also the average

life expectancy, which is affected by active interventions implemented within the framework of national economic policies. On the other hand, the analysis of the average rate of unemployment for this group of countries shows that there was a decline in this respect in the period of 2006-2008, and then the rate increased, exceeding the average values for a group of countries at the baseline. Thus, this indicates that despite the still improving economic capacities of these countries, the problem of social cohesion is an urgent matter to be solved, especially under the conditions of economic turbulence.

How is, then, economic and social cohesion shaped on a regional basis in the group of countries analysed? The regions were divided into 3 clusters using the method of k-means. In order to identify the optimal number of clusters, the agglomeration method of J.H. Ward was applied.

Based on average values calculated for economic and social cohesion for the period of 2003-2005, clustering of the regions was carried out. The best cluster following the adopted set of variables was cluster 2 covering 14 regions (representing 25.9% of the analysed regions): all Czech regions with the exception of Moravskoslezsko region, 2 out of 7 Hungarian regions including the capital, Bucharest region, 2 regions of Slovenia and 2 Slovak regions, including Bratislava. Analysis of average values of variables for each cluster showed that cluster 2 has the best values for the adopted coefficients. Only the fertility rate for this group of countries was the lowest. Therefore, these regions are *of high economic potential*, but attention should be paid to the improvement of the demographic potential.

Cluster 1 included 21 regions representing 38.9% of all analysed regions and these were all Bulgarian regions, Estonia, Lithuania, Latvia, 6 Hungarian regions and 7 out of 8 Romanian regions. This cluster is characterised by the lowest HDI per capita, and an average life expectancy, the lowest coefficient of labour economic activity and the highest fertility rate. This group of regions is characterised by *the lowest economic potential*, whereas it has good demographic potential and satisfactory use of human resources.

In contrast, cluster 3 covered all Polish regions, one Czech region and 2 Slovak regions characterised by great demographic potential, but untapped human capital due to the highest average unemployment rate.

In the next period of the analysis, covering the average data for the period of 2006-2008, in the group of the best regions there were already 17 regions, and the 'worst' – 16 regions.

Based on average data for the period of 2009-2011, clustering of regions was carried out. Cluster 3 consisted of 12 regions, and included countries characterised by the best economic potential, the average demographic potential and a relatively good use of human resources. This cluster comprised all Czech regions, Mazowieckie Voivodship (a Polish region), all Slovenian regions and Bratislava. This means that some regions definitely improved their socio-economic situation while considering their belonging to the various clusters, in particular, these were the capitals compared to the first period covered by the analysis.

In contrast, cluster 1 included countries characterised by the lowest HDI and average life expectancy, and, therefore, the lowest economic potential, but significant demographic potential and untapped human capital. This cluster was made up of 11 regions, i.e. 5 out of 6 Bulgarian regions, Lithuania, Latvia, Estonia, 1 Hungarian region and 2 Slovak regions.

Compared to the analysis of the first period, the number of regions classified in the cluster with the worst economic performance decreased. In addition, the unemployment rate was the highest among all analysed clusters, which, as it can be assumed, was affected by the economic crisis and its consequences in the social sphere. These regions which improved or worsened their position were in cluster 2. Cluster 2 consisted of 31 regions, representing 57% of the regions covered by the analysis. It was one Bulgarian region – the capital Sofia, 6 Hungarian regions, all Polish regions with the exception of the capital and all Romanian regions and one Slovak region. Particular attention should be paid to Romanian regions, which clearly passed from the group of regions with the worst position to the regions with average results. The analysis of the average data for the period of 2009-2011 compared to the period of 2003-2005 indicates a decrease in the unemployment rate, increase in the labour activity ratio and life expectancy, and improvement of the HDI in Romanian regions. They were in the same group as the Hungarian regions, due to the decline in their unemployment rate, but there was an increase in HDI and in labour activity ratio.

The analysis showed that while countries allocation to each cluster is relatively stable, the regional situation is different as there is a reduction in the number of regions with the best or worst performance when comparing the results of the analysis for the period 2009-2011 with those for the period 2003-2005. The repercussions of the crisis had an impact on

social cohesion, and activities that would counteract them should be given special attention.

Gradually, CEE countries and regions are improving their level of socio-economic development. While formulating goals and taking action within the framework of economic policy these two should not exclusively be seen in the context of short-term objectives, but also the long-term ones, of which social cohesion ought to be a determinant.

In a broader view, the adoption of convergence processes can be understood to be a prerequisite for the cohesion of this group of countries and the EU, not only in the economic and social aspect, but also in political one (Tondl 1995: 9).

4. Benefits versus contributions of the cohesion policy

In 2014-2020, the volume of financial resources for cohesion policy will be €351.8bn (at current prices).[XI] Determining this element of the EU budget, and adopting solutions, was accompanied by numerous debates; some questioned the legitimacy of policy and questioned the meaning of its continued functioning.

However, solidarity should not be seen in the light of the costs of immediate compensation, but in the mutual benefits accruing to the members of the Union (Vignon 2011). The benefits of implementing a cohesion policy also apply to those countries which make the greatest contribution to the EU budget, and postulate its reduction. This assistance is becoming an important development impulse for them. As for A. Prusek writes, 'a membership fee to the EU budget is in fact a proportional contribution to the benefits gained by the country from the common market and, therefore, a specific turnover tax on economic benefits derived from the EU single market' (Prusek 2009: 99). These benefits are significant when considered from the perspective of both the EU as a whole and individual MS. Stronger EU countries have access to the markets of the weaker countries, and the recognised economic benefits are much higher than those achieved by the 'catching up' countries, for whom financial transfers from cohesion policy are provided. These transfers also help offset the costs of opening the countries and regions vulnerable to increased competition. Comparative advantages are generated in all EU countries (Prusek 2009: 98-102).

This is confirmed by the results of research on the consequences of the implementation of cohesion policy in the Visegrad countries, the so-called V-4 (Poland, the Czech Republic, Slovakia, and Hungary). The benefits recognised by the EU-15 countries for the implementation of EU projects are macroeconomic, where employment growth takes place through increasing exports from countries in the EU-15 to the new MS enjoying economic development. Moreover, the EU-15 countries largely export medium and high technology products. Further integration of the economies occurs, where demand for products and services related to the implementation of EU projects comes largely from countries with which the beneficiaries of the aid have strong economic ties. There are also direct benefits, as companies implementing EU projects in the new MS develop additional production, they are reaping the benefits of capital. There are positive external effects reflected in the areas of R&D and innovation, as development of cooperation in science and research takes place, followed by improving conditions for research and development centres, human capital development, fuelling with their resources the EU-15 countries. The absorption capacity of companies from the new MS in the field of new technologies is improving, which contributes to the growth of technology exports from the EU-15 countries. There is also an increase in ecological safety, reducing pollution, and a development of infrastructure and transport links. In this way, cohesion policy funding costs incurred by the countries of 'old' EU are significantly reduced (Institute for Structural Research 2011).

Despite the undoubtedly positive effects of the implementation of cohesion policy, it is, however, necessary to take measures to increase positive public awareness of the EU's policies. EU politicians see the benefits gained from the implementation of cohesion policy, in particular in the EU-15 countries, as a means to gain greater support for joint integration actions, and for cohesion through the implementation of this policy. This is especially pertinent, given that the level of confidence in the EU among the EU population is still relatively low and amounted to 37% in 2014 (spring), a significant decrease compared to 2007 (autumn), when it accounted for 57%, in a period of prosperity (European Commission 2014b: 8).

What is, then, the perception of cohesion policy among EU citizens? According to the results of Eurobarometer 2013, about a third of respondents indicated that they knew about the projects co-financed from EU funds, which contributed to the development of

the area in which they live. At the same time, in countries where the majority of regions were convergence objective regions, knowledge of the projects co-financed with these funds is much greater. While 64% of respondents in the EU-13 countries (whose regions were in the majority covered by the convergence objective) indicated some knowledge of EU projects, in the EU-15 countries the awareness was only 26%. In Poland, about 80% of the respondents indicated knowledge about projects co-financed with the EU, while in Great Britain only 10% of respondents, in Germany 15%, France 28% and Portugal 51%. Among the respondents with knowledge of EU funds, 77% of them pointed to the positive impact of the funds on the development of regions (cities), and the result is more favourable for the EU-13 (89%) than for the EU-15 (69%). In Poland, this percentage was 93% in 2013. It should be noted that the perception of current priorities for this assistance has changed. As many as 52% of Europeans said that measures of this policy should be directed to all regions (in 2010 - 49%) and not only the poorest regions (Citizen's awareness and perceptions of EU regional policy: 4, 6-7, 10, 12, 29-30).

In post-crisis conditions one direction for the revival of solidarity and a restoration of support for the idea of the EU is to promote convergence, but a process of economic slowdown has also affected the countries of Central Europe. It partly resulted from the slowdown in reforms taking place in these countries and from the need to pursue a model of development based on innovation. Thus, the support of citizens for the European project will be gained. This is also in the interest of richer countries (Swieboda 2014: 44).

Moreover, as emphasised by R. Camagni, R. Capello, as a result of the crisis, additional divisions may be caused and the emergence of a two-speed Europe – less developing regions of the southern countries and regions of the northern countries may occur. The convergence process will slow down and it will not be sufficient to enable Eastern European countries to reach the level of GDP per capita of the countries in Western Europe by 2030. Thus, the effects of the crisis will be permanent and it will be difficult to overcome them (Camagni, Capello 2015: 30-31).

Varied activities to strengthen and intensify the process of convergence have been proposed, both at the EU level and in the MS, but the selection of actions that are most appropriate is an open issue (Swieboda 2014: 44-45). Undoubtedly, such actions have to be implemented by the cohesion policy. However, the assessment of the effects of the cohesion policy, its contribution to the process of economic growth, and hence

convergence in the EU, is ambiguous. Some authors emphasise that the effectiveness of the policy depends on the fulfilment of certain conditions for positive processes to turn out to be reality (Baun, Marek 2014: 178-208).

5. Implementation of cohesion policy in Poland and its effects

With accession to the EU, Poland was included in the European cohesion policy. The role of this policy should be the creation of development impulses that will foster positive changes in areas that are at various stages of development. In particular, this concerns the first phase, during which an economy based on traditional factors of development, without innovative structures, develops by the expansion of production capacity and the improvement of the quality of the workforce. The second phase is associated with the qualitative restructuring of the economy, but with a low share of knowledge-based economy, and it is only the third phase that is associated with the development of an economy based on knowledge and innovation (Prusek 2009: 101-103). What, therefore, was the role of cohesion policy in the transformation of the Polish socio-economic area and in stimulating the development after more than 10 years of membership in the EU and what role can it play in the 2014-2020 period?

Under the conditions of EU membership, Polish GDP growth was high in the period of 2003-2011, as GDP grew by 43.1% (constant prices), with average annual growth rate of about 4.6%, while for the EU-27 it amounted to 1.3% per year. On the other hand, if the analysis also included 2012, the average growth rate for Poland dropped to 4.3% per annum. These positive changes were a reflection of the faster growth of Polish economy in relation to the EU as a whole and in the process of 'catching up' (Misiąg, Misiąg, Tomalak 2013: 13). But it should not be forgotten that processes of transformation worked in parallel with the process of European integration, giving rise to a complex interrelationship in their progress.

In 2004-2006, Structural Funds that were provided for Poland amounted to €8.3bn, €0.35bn from INTERREG and EQUAL Community Initiatives, €4.2bn from the Cohesion Fund (according to current prices). The Structural Funds were channelled through five operational programs (horizontal), one technical assistance program and the Integrated Operational Programme for Regional Development (Ministry of Regional

Development 2007: 13-14). In the years 2007-2013 the allocation of funds from the EU budget for Poland amounted to €67.3bn, from this amount from the Convergence objective was allocated €66.5bn. If, however, the funds of the Common Agricultural Policy and Common Fisheries Policy were added, and contributions from other programmes supporting competitiveness, then the total amount of EU funds for Poland would amount to €85.4bn (Ministry of Regional Development 2007: 115-116). The distribution of structural funds and the Cohesion Fund broken down into specific operational programmes for the period 2007-2013 is presented in Table 1.[XII]

Table 1. Distribution of EU funds from the cohesion policy allocated to Poland for 2007-2013 under the operational programmes

Operational programme	Share of the programme in total fund allocation (in bn euros)	Percentage share	Source of funding
Infrastructure and Environment	27.9	41.9	ERDF, Cohesion Fund
Regional Operational Programmes (16 Regional Operational Programmes)	16.6	24.9	ERDF
Human Capital	9.7	14.6	ESF
Innovative Economy	8.3	12.4	ERDF
Development of Eastern Poland	2.3	3.4	ERDF (including additional 992m euros granted by the European Council)
Technical Assistance	0.5	0.8	ERDF

Source: Ministry of Regional Development 2007: 116.

The size of payments made to Poland under the Cohesion Policy (including the ISPA Fund) was €13.1bn euros for payments made in the period of 2004-2006 and €45.6bn for 2007-2013. Poland is also the biggest net beneficiary among EU MS; in the years 2004-2012 the balance of EU transfers for Poland amounted to €53.6bn. By contrast, in terms of payments made per inhabitant Poland took 7th place among EU countries, exceeding the EU average. Poland utilizes the EU funds effectively, as the repayment did not exceed 0.2% (Ministry of Infrastructure and Development, 2014: 13-15). However, the importance of these funds should be seen through their participation (including national co-financing) in public investment in Poland, which in 2010-2012 was above 50% (c.f. Slovakia with 90%) (European Commission 2014a: XVI). Therefore, this means that a significant part of the development investments in Poland could not be implemented without these funds. At the same time, such a significant share of EU funds indicates that cohesion policy impacts on the creation of domestic regional policy priorities, not always coinciding with the priorities of the EU, which also must be taken into account.

Thus, what are the effects of this policy? It is emphasized that transfers of EU funds contributed to the relatively high economic growth recorded by Poland in the years 2004-2013, as well as cushioning the effects of the economic crisis in 2009-2010. And so in 2012, the GDP growth in Poland amounted to 1.9%, with the impact of the funds estimated at 0.9 percentage points. European funds also had an impact on the process of raising the level of socio-economic development of the country (Ministry of Infrastructure and Development, 2014: 21-22). It should be emphasized that the gap between Polish regions and other European regions is closing, since 9 Polish voivodeships (regions) belonged to the 20 regions with the fastest rate of convergence in the EU in the period of 2004-2010. However, following expansion interregional disparities are developing, as the convergence process is carried out unevenly spatially (Ministry of Infrastructure and Development 2014: 7). It should also be noted that the improvement in the GDP per capita in the less favoured Eastern Polish regions, in relation to the EU average, is the result of GDP growth in both Poland and its regions, and of lower growth of GDP in the EU countries (Misiąg, Misiąg, Tomalak 2013: 85). What should be pointed out is the fact that the years 2004-2011 were followed by a more rapid development of these regions with a high initial level of GDP, and, even with lower dynamics in some regions these too were higher than the average for the EU. At the same time, however, the spread in terms of GDP did not decrease, but on the contrary, the gap between GDP per capita and the average national level in the Eastern Polish voivodeships is widening (Misiąg, Misiąg, Tomalak 2013: 15). In the years 2006-2011 Polish GDP grew by 43.7% and in the Eastern Polish regions by 42.5%, and this gap is expected to widen (Misiąg, Misiąg, Tomalak 2013: 44).

However, the impact of EU funds depends mainly on their total value, rather than their value per inhabitant. If we consider the value of EU funds provided per inhabitant (from all sources), they were, first of all, directed to the less developed regions in the period of 2004-2011. Nevertheless, these funds did not sufficiently contribute to boosting the economic development of the weakest regions, as their growth rate did not exceed that recorded by the more developed regions. If the size of these funds was analysed per inhabitant, they did not considerably affect the growth rate of regions, especially Eastern Polish regions, because there was no acceleration in the economic growth, as had been assumed. Regions where there are large cities are developing faster. However, further analysis of the size of these funds spent in the NUTS 3 territorial units reveals that they

were largely concentrated in cities, which may be partly due to both their better absorption capacity or the activities of the authorities to invest these funds in these centres (Gorzelak 2014: 18-20; Misiąg, Misiąg, Tomalak 2013: 45-49). While there is no link between the amount of funds per capita and economic dynamics, there is a relationship between their absolute size and economic dynamics (Gorzelak 2014: 18-22; Misiąg, Misiąg, Tomalak 2013). In the period of 2004-2013, the largest EU funding was spent in relatively few voivodeships (Ministry of Infrastructure and Development, 2014: 15).

On the other hand, the analysis of the funding structure in 2004-2013 in individual voivodeships shows that European funding was mainly allocated to the improvement of territorial accessibility, with lesser amounts given to the development of human resources, research and development, entrepreneurship and environmental protection. The expenditure in the field of transport in the regions generally amounted from 25% to 45% of the funds, the development of human resources was allocated from 15% to 20% of the funds (in the general structure of expenditure), and funds allocated to research and technological development (the share of this category of expenditure in individual voivodeships accounted for 10% to 20%). As much as 36% of the value of all contracts is related to transportation (Ministry of Infrastructure and Development 2014: 7-8, 19-20). As it is indicated, the EU funds had the primary impact on improving living conditions, and, therefore, the effect of strong investment demand supported by European funds was highlighted (Gorzelak 2014; Misiąg, Misiąg, Tomalak 2013).

From this analysis it can be argued that there was excessive emphasis on removing growth barriers through the expansion of basic social and technical infrastructure, to the detriment of other connected conditions: lack of personnel, research facilities, and business services. Also, the investments at the local and central level were mainly related to those aimed at improving living conditions, and to a lesser extent to the achievement of supply effects. At the same time, the ability to run pro-development projects was limited. In the less developed regions, the specific characteristics of the region and their potential were insufficiently taken into account when planning the utilization of the aid (Misiąg, Misiąg, Tomalak 2013: 85-86).

What, therefore, will be the shape of cohesion policy in Poland in the period of 2014-2020? The size of the allocation granted to Poland during this period will amount to €82.5bn, of which €76.9bn will be allocated to the implementation of operational

programs, of which those implemented in the regions will receive around 40%.[XIII] Still, European structural and investment funds will be an important source of investment financing in order to ensure its sustainability, as approximately one third of development costs will be borne by the EU (*Programowanie perspektywy finansowej 2014-2020,* 2014: 9). An important direction of support will be infrastructure, as an increase in funds for innovation and business support is expected.[XIV]

Table 2. Distribution of EU funds within the framework of programmes (in bn euros) for the period of 2014-2020

Name of programme	Amount of funds	Financial sourcing
Infrastructure and Environment Programme	27.41	ERDF, CF
Intelligent Development Programme	8.61	ERDF
Digital Poland Programme	2.17	ERDF
Knowledge Education Development Programme	4.69	ESF
Eastern Poland Programme	2	ERDF
Technical Assistance Operational Programme	0.700	CF
Regional Operational Programmes	31.28	ERDF, ESF

Source: http://www.mir.gov.pl/fundusze/fundusze_europejskie_2014_2020/strony/start.aspx; *Programowanie perspektywy finansowej 2014-2020,* 2014: 158.

The financial resources made available under cohesion policy during this period will be addressed to two categories of regions that were subject to separate rules of programming, but their identification has taken place in accordance with the principles of the framework Regulation. The first group consists of less developed regions which included 15 regions (voivodeships) at NUTS 2 level, as their GDP per capita does not exceed 75% of the average GDP for the EU. However, the status of the Mazowieckie region, now more developed, has changed; it has now left the category of less developed regions. This is due to the presence of the capital in the region – Warsaw with a significant growth potential, while smaller territorial units are characterised by a lower level of development similar to that of the poorest Polish regions. As a consequence, within this region there is very high internal differentiation, the highest among regions. The territorial dimension is reflected in the new cohesion policy, and, the connected regional policy implemented in Poland. The Partnership Agreement which sets out the strategy of activities undertaken under the cohesion policy, the common agricultural policy and the common fisheries policy in 2014-2020 indicates that interventions will be implemented corresponding to the existing potentials of individual territories and their needs. Areas of strategic intervention are

pointed out, also supported by the Cohesion Policy funds, will include five Polish, less-favoured regions of Eastern Poland, regional capitals with their functional areas, cities and city districts that require revitalisation due to the cumulative negative socio-economic phenomena, spatial and environmental issues, these are also rural areas insufficiently involved in the development processes and border areas as well as coastal (*Programowanie perspektywy finansowej 2014-2020*, 2014).

6. Conclusion

In summary, the achievement of the socio-economic model of the EU requires adherence to the principle of solidarity, of which cohesion policy is the practical dimension. But now this cohesion needs to be supported not only in the economic dimension, but also in the social one, to pursue the sustainable development path adopted by the EU. Thus, European cohesion policies should be built on both economic and social pillars. This could, in the long run, also be an important contribution to the creation of European solidarity. As we have argued in the paper there is no conflictual relationship between economic and social cohesion. The importance of social cohesion on the regional level and its contribution to the economic growth should be further discussed. The financial assistance granted under the cohesion policy supports the achievement of both dimensions of cohesion. It cannot be forgotten that the benefits from the implementation of this policy apply all MS, not just the beneficiaries of the aid.

Cohesion policy has evolved – from a purely redistributive policy to a policy supporting all regions, a determining factor in both its current and future importance in the EU. Currently, cohesion policy must be directed at fostering development to a greater extent, not only at equalizing differences.

In Poland, cohesion policy has led to a significant transformation in various spheres of socio-economic life. However, the focus should be on development-oriented activities, including projects related to the improvement of human and social capital, and in the sphere of education, which all play a fundamental role. In the current programming period, Poland needs to mobilise its own financial resources to support development projects as much as possible. When, in the next financial perspective, it will receive reduced funding from the EU, as it can be imagined, thanks to the improvement of its socio-economic

situation, it will be necessary to continue the investments initiated thanks to EU funds to support the competitiveness of the economy.

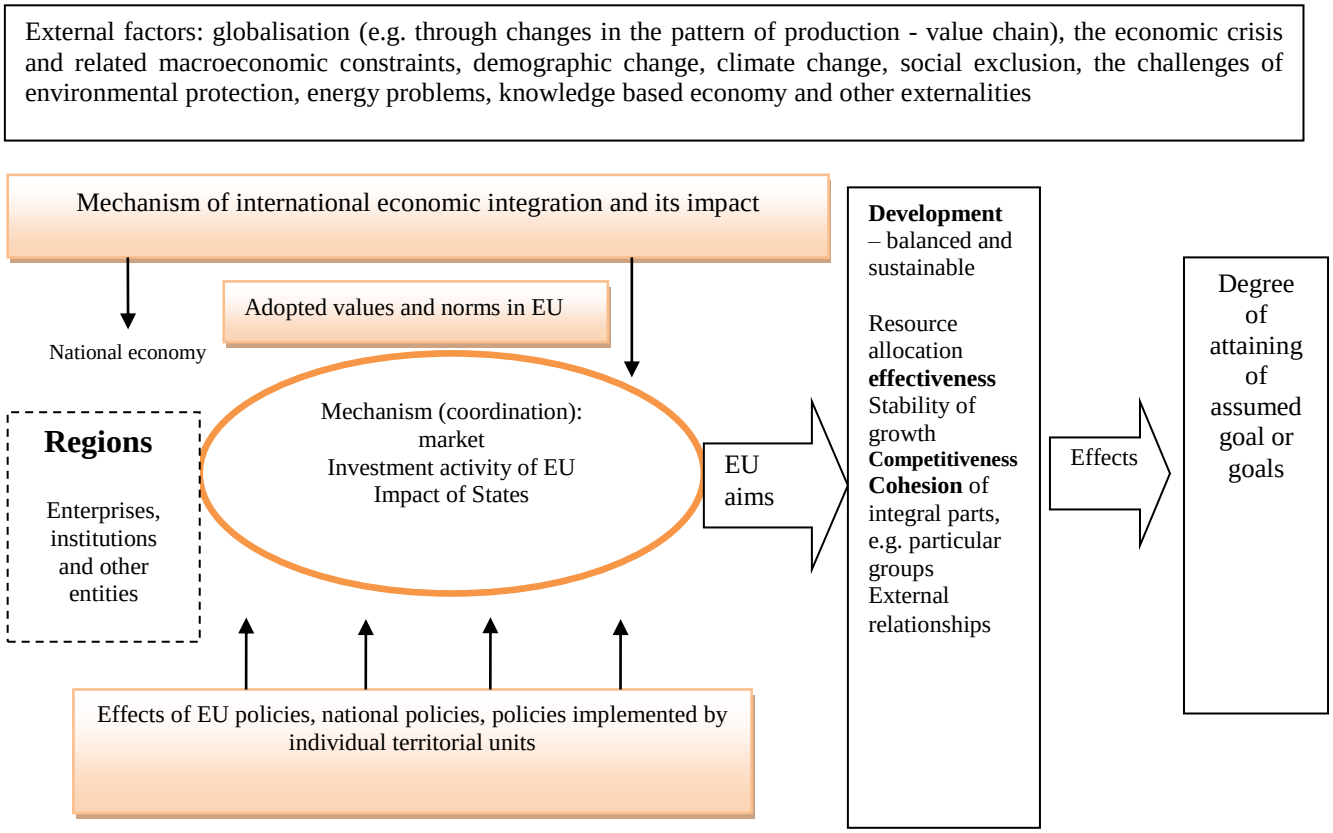

Figure 1. EU socio-economic model from the regional perspective – some assumptions
Source: Dziembała 2013: 166, figure 2.5 and some modifications with the use of: Ministry of Regional Development 2011: 12.

Table 1. Average values of variables for particular clusters: data for the period of 2003-2005

Cluster No.	Unemployment rate (%)	Economic activity rate (%)	Average life expectancy	Fertility rate	HDI per capita (in euro)	Number of cases	Per cent (%)
1	9.30	62.37	72.02	1.332	2260	21	38.89
2	7.21	69.25	75.57	1.190	5145	14	25.93
3	19.25	64.53	74.76	1.249	3502	19	35.19

Source: own calculations.

Table 2. Average values of variables for particular clusters: data for the period of 2006-2008

Cluster No.	Unemployment rate (%)	Economic activity rate (%)	Average life expectancy	Fertility rate	HDI per capita (in euro)	Number of cases	Per cent (%)
1	7.056	64.79	72.70	1.421	2952	16	29.63
2	10.97	62.18	74.87	1.330	4654	21	38.89
3	5.66	69.69	76.37	1.372	6755	17	31.48

Source: own calculations.

Table 3. Average values of variables for particular clusters: data for the period of 2009-2011

Cluster No.	Unemployment rate (%)	Economic activity rate (%)	Average life expectancy	Fertility rate	HDI per capita (in euro)	Number of cases	Per cent (%)
1	13.81	66.33	73.94	1.583	4258	11	20.37
2	9.12	64.20	75.41	1.303	4573	31	57.41
3	6.87	70.72	77.92	1.486	8256	12	22.22

Source: own calculations.

Table 4. Clustering results of the regions of CEE countries by the k-mean method according to economic and social cohesion in the period of 2009-2011

Regions	Result classification	Unemployment rate (%)	Economic activity ratio (%)	Average life expectancy	Fertility rate	HDI per capita (euro)	Distance from the cluster's centre
BG33 - Severoiztochen	1	13.43	66.20	73.40	1.63	2500.0	0.222
BG42 - Yuzhen tsentralen	1	10.53	64.63	74.47	1.62	2533.3	0.328
LT00 - Lietuva	1	15.67	70.40	73.30	1.52	6066.7	0.363
BG32 - Severen tsentralen	1	10.90	62.73	73.40	1.51	2400.0	0.384
SK04 - Východné Slovensko	1	17.70	66.30	75.33	1.65	6066.7	0.394
SK03 - Stredné Slovensko	1	15.67	67.53	75.23	1.38	6866.7	0.467
BG34 - Yugoiztochen	1	9.57	65.47	72.97	1.84	2733.3	0.517
BG31 - Severozapaden	1	10.60	61.53	72.87	1.78	2200.0	0.530
EE00 - Eesti	1	14.17	74.20	75.97	1.68	5666.7	0.566
LV00 - Latvija	1	17.73	73.10	73.27	1.38	5200.0	0.576
HU31 - Észak-Magyarország	1	15.97	57.53	73.17	1.43	4600.0	0.591
PL43 - Lubuskie	2	9.87	63.03	75.77	1.36	4800.0	0.131
PL31 - Lubelskie	2	9.93	65.73	76.07	1.36	4400.0	0.159
HU21 - Közép-Dunántúl	2	9.57	63.93	74.57	1.23	5100.0	0.161
PL61 - Kujawsko-Pomorskie	2	10.67	63.50	75.90	1.37	4833.3	0.163
PL51 - Dolnoslaskie	2	10.67	64.50	76.07	1.27	5600.0	0.185
PL11 - Lódzkie	2	8.73	67.03	74.67	1.33	5400.0	0.218
PL22 - Slaskie	2	8.37	62.53	75.67	1.31	6233.3	0.222

PL62 - Warminsko-Mazurskie	2	9.27	61.17	75.97	1.40	4500.0	0.232
HU22 - Nyugat-Dunántúl	2	8.43	64.73	75.20	1.14	5233.3	0.244
PL34 - Podlaskie	2	8.87	66.27	77.23	1.30	4500.0	0.255
HU10 - Közép-Magyarország	2	8.13	65.90	76.23	1.18	5800.0	0.269
PL42 - Zachodniopomorskie	2	11.53	61.17	76.00	1.30	5300.0	0.270
PL33 - Swietokrzyskie	2	11.90	66.97	76.40	1.30	4666.7	0.282
PL41 - Wielkopolskie	2	8.30	65.90	76.60	1.45	5666.7	0.300
RO31 - Sud - Muntenia	2	8.60	65.07	73.70	1.33	2733.3	0.305
PL21 - Malopolskie	2	8.77	65.53	77.70	1.38	4933.3	0.314
PL52 - Opolskie	2	9.60	64.63	77.13	1.13	4766.7	0.328
HU33 - Dél-Alföld	2	10.50	60.07	74.47	1.19	4666.7	0.330
PL63 - Pomorskie	2	8.07	63.70	77.13	1.48	5266.7	0.340
PL32 - Podkarpackie	2	11.37	65.10	77.80	1.31	4066.7	0.342
RO22 - Sud-Est	2	8.43	61.27	73.63	1.28	2900.0	0.342
RO12 - Centru	2	10.60	60.50	74.37	1.38	2866.7	0.352
RO41 - Sud-Vest Oltenia	2	6.90	65.73	73.83	1.19	2866.7	0.362
RO32 - Bucuresti - Ilfov	2	4.77	67.30	75.77	1.25	6033.3	0.403
RO42 - Vest	2	5.90	62.03	73.50	1.20	3300.0	0.405
RO11 - Nord-Vest	2	5.73	62.07	73.53	1.32	2833.3	0.406
HU23 - Dél-Dunántúl	2	12.17	58.93	74.37	1.24	4766.7	0.410
SK02 - Západné Slovensko	2	11.10	69.43	75.73	1.26	7200.0	0.458
RO21 - Nord-Est	2	5.40	67.23	73.67	1.41	2466.7	0.473
BG41 - Yugozapaden	2	6.13	72.07	74.90	1.41	3633.3	0.544
HU32 - Észak-Alföld	2	14.37	57.27	74.17	1.35	4433.3	0.575
CZ06 - Jihovýchod	3	7.07	69.83	78.47	1.47	7266.7	0.144
CZ05 - Severovýchod	3	6.97	69.47	78.07	1.52	7100.0	0.158
CZ03 - Jihozápad	3	5.37	71.00	77.87	1.47	7233.3	0.160
CZ02 - Strední Cechy	3	4.90	71.33	77.60	1.56	8133.3	0.184
PL12 - Mazowieckie	3	7.10	69.63	76.80	1.43	7200.0	0.211
SI01 - Vzhodna Slovenija (NUTS 2010)	3	7.97	70.47	78.73	1.50	9833.3	0.220
CZ07 - Strední Morava	3	7.97	68.83	77.57	1.42	6866.7	0.230
CZ08 - Moravskoslezsko	3	9.73	68.50	76.37	1.46	6900.0	0.345
SK01 - Bratislavský kraj	3	5.53	74.13	77.30	1.45	11000.0	0.393
CZ04 - Severozápad	3	10.30	69.17	75.90	1.55	6766.7	0.405
CZ01 - Praha	3	3.47	74.20	79.37	1.40	9800.0	0.421
SI02 - Zahodna Slovenija (NUTS 2010)	3	6.10	72.03	81.03	1.62	10966.7	0.533

Source: own calculation.

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[I] See: Pike, Rodríques-Pose, Tomaney 2006; Vanhove 1999: 252-291.

[II] Art. 3 (3), *The Treaty on the Functioning of the European Union (consolidated version),* The Official Journal of the EU, 2012/C 326/01.

[III] European Commission, 2014a: 179. In the previous programming periods, the amount of aid for the poorest regions was much smaller, because it accounted for 76% of the total aid going to the Structural

Funds and the Cohesion Fund in 1989-1993. However, in the period 2014-2020 it is expected that helping the poorest regions will constitute nearly 73% of the total assistance which will be passed within the framework of cohesion policy. European Commission, 2014a: 186-187.

[IV] European Commission, 2014a: 180, 187.

[V] The definition of economic solidarity was developed on the basis of: Van Parijs: 2004: 375.

[VI] See discussion in: Dziembała 2013.

[VII] See also: Orłowski 2010b.

[VIII] Among them Malta and Cyprus regarded as single regions of NUTS2 level. Data obtained from Eurostat database (http://ec.europa.eu/eurostat/data/database, retrieved: 23.04.2015).

[IX] Data obtained from Eurostat database: (http://ec.europa.eu/eurostat/data/database, retrieved: 23.04.2015), analysis covered the period of 2003-2011 due to data availability.

[X] In this analysis, EU-10 includes all currently new MS, except for Croatia, Malta and Cyprus.

[XI] http://ec.europa.eu/regional_policy/en/funding/available-budget/, retrieved: 14.04.2015.

[XII] Unless stated otherwise, the point 4 of the paper was prepared on the basis: Ministry of Infrastructure and Development, 2014.

[XIII] http://www.mir.gov.pl/fundusze/fundusze_europejskie_2014_2020/strony/start.aspx, retrieved: 28.04.2015.

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U.S. States' fiscal constraints and effects on budget policies

by

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Abstract

The article looks at fiscal constraints adopted by the U.S. States. It questions the ability of those rules to determine sound budgetary policies. To assess this point it analyses, in the general part, the major kind of constraints so far adopted. Of each major category the focus is upon institutional weaknesses that create the room for the adoption of circumventing practices. The following section focuses instead on three case studies, to show examples of the way in which the constraints influenced policy-making without mining the ability of government to adopt unbalanced budgetary policies. The weaknesses are combined with the adoption of a deferential approach by the Courts that generally legitimized the accounting devices adopted by the States. The outcome is a system in which budget policies are influenced by several factors that go beyond the institutional framework. On the other side, legal boundaries create distortions and unwanted effects in policies implemented by the States.

Key-words

Balanced Budget Rules, U.S. States' Budget Constraints, Effectiveness of fiscal constraints, Effects on BBRs upon States policy, Courts' evaluation of budget constraints

1. Introduction

The scope of this article is the analysis of fiscal constraints adopted by States in the U.S.A, looking particularly at the effectiveness of the rules they included, and the way in which they were able to influence fiscal policies. Two aspects in particular can be considered reasons for our interest in this matter: the different behaviour of States and the influence of their fiscal institutions on this, and the development of large state deficits, notwithstanding the constraints which were meant to limit this development (Poterba 1997: 56). In particular, during the last economic downturn the budget troubles of the States raised serious questions about the ability of some of them to afford their economic obligations. These concerns have affected the Federal Government, and have been addressed in the scholarship. The first adopted a series of measures that directly, or indirectly, helped the States to be able to afford the costs of the economic downturn, amongst which the Patient Protection and Affordable Care Act[I] and the American Recovery and Reinvestment Act[II] played a key role. The scholarship focused instead on the availability of different tools to solve the debt crisis, such as the creation of a State Bankruptcy mechanism (see as an example Skeel 2012). This article takes advantage of the ending of harsher times to look at the picture from a more detached standpoint. This allows us to fulfil the purpose of analysing the institutional framework of budgetary policies that have been placed under particular stress in the fiscal crisis.

In order to consider the issues that lie behind budgetary constraints, it is germane to note a preliminary point and clearly focus on the key problem of the instruments. This preliminary remark is connected to the origins of fiscal constitutional limitation among the U.S. States. The first wave of limitations dates back to the financial crisis of the1840s and is particularly connected to the default of several States.[III] Moreover, after the Civil War, the new States admitted to the Union adopted a Constitution that included a debt limit clause (Ratchford 1941: 122). This element is relevant in two directions. On the one hand, the reasons that pushed for the constitutional brakes are all of an internal nature: this marked a clear difference with the contemporary European examples. In fact, the Federal Government did not intervene in the adoption of the budgetary constraints. Moreover, no

duty or mandate to impose them existed upon the States.[IV] On the other hand, the gradual and internal formation of these rules has resulted in broad differences between the tools States used and the goals that they tried to achieve. It links us to the key problem of the constraints: their effectiveness in binding the behaviour of the different administrations and their effects on the policies adopted by public governments. While several States have encountered financial difficulties, overall debt exposition in terms of GDP percentage remains low: moreover fiscal discipline varies considerably between States. This forces us to introduce some factors that could be relevant in assessing the effectiveness, and the effects, of the constraints. Firstly, several studies connect different rules to different behaviour among States:[V] it is important to note that what appear as influencing factors are not only rules that directly affect the budget, but also certain States' constitutional provisions such as the way in which the judges of the States' Supreme Court are individuated.[VI] Other studies have focused on the implicit purpose of these rules: particularly looking at the way in which they are perceived, by the market, and by the States that adopted them, and how this element modified the financing debt costs.[VII] Other areas of scholarship note that the effectiveness of the constraints could be influenced by the politics within the States, for example being more effective in the very States that, for political and cultural reasons, have less need for them.[VIII]

The intent of this article is to focus on aspects of each kind of constraint that erode their effectiveness. This phenomenon is created because of two elements: deficiencies in the articles of States' Constitutions or laws providing them and the interpretative approach of the Courts when challenged. Section II analyses the different budget constraints adopted by the States, grouping them in four categories: public purpose requirements, debt limits, tax and expenditure limits and budget bill rules. In each one we offer an interpretation of the weakness of the provisions and of the constraints that States adopted to circumvent them. Section III evaluates the consequences and the roles that these rules can generate in the budgetary process. The analysis of California, New York and Illinois will offer a useful perspective on the coherence of this approach. The States differ as regard to the constraints provided by their institutional framework. They all face severe fiscal crisis, notwithstanding that the budgetary, economic and political issues that they face are quite different. The analysis of these States allows us to assess the concept of the general inability of those rules to determine sound budgetary policy. In section IV we move on to a

summary of the interpretative approach taken by the courts as regards the budget constraints; the intent here is to describe an overall trend that contributes to defining the general weakness of those clauses. Lastly, in Section V, we conclude by assessing some points on the effectiveness of the constraints and the role they play in determining the budget policies of States.

2. A Taxonomy of Budget Constraints. Weakness and Ways of Circumventing

States have adopted very different budget constraints, and thus the first element to be analysed is the typology of those adopted and their effectiveness. As we have also noted, constraints that were implemented were not a single moment's choice, but the result of a progressive modification of State Constitutions, often in response to the perceived weakness of earlier constraints.[IX] The research summarizes four major categories of these, and to fulfil the purpose of our research in each subsection we try to highlight three elements: (1) features and scopes; (2) weakness; (3) ways of circumventing.

2.1. Public purpose requirements

The first type of constraint provided for in many State Constitutions was the public purpose requirement,[X] usually considered the weakest form of budgetary constraint. It basically consists of an explicit limit on the authority of the State Government to provide financial assistance to private enterprises (Rubin 1993: 143). The origins of these limitations date to the crisis of the 1840s, when the finances of most States collapsed due to the large amount of debt contracted to finance private projects, - projects that failed to generate the expected revenues.[XI] The scope of the provisions implemented in consequence was to protect the public finance from uses that were not considered to be of public interest.[XII] The courts originally adopted an approach of strict scrutiny of these requirements, but they gradually eroded the constraints, beginning in the 1930s by admitting certain forms of development assistance, and in the decades after World War II by allowing some forms of direct government assistance to private firms.[XIII] The reasoning of the courts is marked by their deference to the legislatures in determining the nature of the public interest that the Constitutions require, insofar as the limitations operate only in extremely clear cases where

the public interest is absent, while also in doubtful cases the deferential approach works in favour of the legislatures.[XIV] This explains why the public purpose requirement, in the absence of judicial enforcement, is now considered a weak limitation or a merely theoretical one.[XV]

2.2. Debt limits

The majority of State Constitutions include limitations on debt (see e.g. Sterk and Goldman 1991: 1315), which can generally be divided between procedural and substantial. In the latter case the constraints range from a general prohibition of debt,[XVI] to an amount limit,[XVII] to a cap using as reference wealth, revenues,[XVIII] or property –particularly for local government.[XIX] However, the more common debt limitations have a procedural nature. A very common one used is the enforcement of the requirements for approval, through a majority in the legislature, or as a voters' referendum, or in some combination of these.[XX] Some constitutions combined this requirement with substantive debt limitations.[XXI] It is important to note that given the simple majority requirements in many State Constitutions for approving constitutional amendments, substantial limitations could also be considered to be procedural. Here the case of Alabama is illuminating, as it had a strong constitutional requirement[XXII] and numerous amendments authorizing bonds (see White 2002: 561-565). The passive force of constitutions imposing debt limitations – considered as the procedural requirements for transformations – becomes in fact the measure of the strength of the debt limitations (in this way, see Briffault 2003: 916-917).

The main issue about debt limit was the breadth of their application.[XXIII] The constraints were generally designed to limit the contracting of debt to which state and local governments could respond with "full faith and credit": the debt limited - both in substantial and in procedural terms - is the one that takes the form of an obligation covered by the overall revenue capacity of the government.[XXIV] So, the State avoided the application of the constraints by developing several means to borrow without implicating their "full faith and credit" and full revenues' coverage.[XXV] The first tool adopted was revenue bonds: their emission was originally financed through giving to creditors the gains connected to the project – as for example a toll on bridge construction – to repay the contracted loan. The creation of a special fund to manage the project was considered by the courts as a valid reason to retain these debts not subject to the limits (see Ratchford

1941: 446-466). Progressively, however, the connection between project, bond and revenue has been eroded: the courts started to adopt a reasoning that also considered that new revenue sources or a percentage of an existing one could be reserved to this kind of project, if it could cause a relevant increase in the amount of the same.[XXVI]

The other way to circumvent the debt limitation was to combine the restricted applicative perimeter of the constraint with a contractual form, through lease-financing and subject-to-appropriation debt: the bonds were emitted by private firms or public authorities to finance building activities – in the lease model - or projects that the government decided to entrust to them. At the same time the State made a lease contract for the use of the infrastructure or the services provided, that is used to cover the cost of the debt. The courts considered that the financial activities of these entities were not subject to the debt limits - even when they were fully public in terms of both ownership and management - because they lacked authority over taxes and expenditures of the government and so of the "full faith and credit" requirement.[XXVII] At the same time the contract made by the government is not considered debt - and thus subject to the constraints - when directly connected, as an amount, to the debt service costs of the authority. This arose from different reasoning: from the nature of a payment for a service,[XXVIII] to the element that they are annually subjected to the budget and, particularly, to the annual legislative appropriation.[XXIX] Moreover, in the subject-to-appropriation debt the similarity to a loan is particularly strong: these are generally connected to a project of a public authority or a service provided and the annual financing from the government is individuated in the debt costs. The court, in particular in this case, had to strongly evaluate two elements to consider this kind of contract external to the debt concept inherent in the constraint: namely the procedural element of the appropriation and the substantive element of annual limited liability.[XXX] In fact, the only purpose of this instrument is to avoid the accounting of the operation as borrowing in the budget, and to consider in it only the annual finance cost to the public authority: the purpose of the entire operation is to circumvent the State Constitution (Briffault 2003: 921-922). This is confirmed by the evaluations of rating agencies, which considered these instruments as debt issuance (see as example Marino and Waddell 2001). Moreover, the same courts, whilst recognizing the formal reason for excluding these contracts from the debt limitations, stated that they are well aware of the nature of borrowings that they cover on a substantial ground.[XXXI] Judgements on those

measures have created conflicts inside Supreme Courts; in the end, only the New Jersey Supreme Court took a more rigid position. In Lonegan v. State, the subject-to-appropriation was saved only for the purposes of the projects – educational ones, particularly enforced in the State Constitution -, while on a procedural ground the Court noted the effect of alteration of the debt limitation clause that comes following these procedures.[XXXII]

The application of such circumventing instruments has seriously eroded the effectiveness of debt limit norms: in quantitative terms, between two-thirds and three-quarters of the total local and State indebtedness is contracted using them (according to Valente et al. 2001: 647). The effects are so broad that several authors have pointed out the absence of any evidence of an impact of these norms upon level of debt (Clingermayer and Wood 1995: 116), and noted that the procedural limits often become mere formal obstacles, considering that State Governments, unable to pass policies following the reinforced procedures, made the same borrowing policies using circumventing techniques (see Gillette 2004: 13-17). However, there are consequences to this kind of institutional compromise: to avoid debt limits, States and local governments have gradually surrendered more and more of their powers and functions to public authorities or agencies (see Bunch 1991).

2.3. Tax and Expenditure Limits

In contrast to the previous categories, limitations on tax and expenditure are newer and less widespread among the States. While almost all State Constitutions provide regulations for certain aspects of the taxation regime, only half of them provide any substantive or procedural constraints on levels of taxation or spending (see Hellerstein and Hellerstein 1997: 34). Moreover, within these tax limits, the main focus has generally been on the limitation of property tax, while few State Constitutions have limited sales,[XXXIII] income,[XXXIV] or general taxation.[XXXV] These limits may concern the tax rate,[XXXVI] annual variations,[XXXVII] or expenditure financed with own revenues.[XXXVIII] In procedural terms, the focus has been largely on approval by qualified majorities or through a referendum of voters.[XXXIX] This kind of limitation became widespread after the approval in 1978 of California's Proposition 13, which combined a substantial cap on property taxes, limits to diminish inflation effects upon properties, and procedural requirements.[XL] In the following

years, several States introduced into their constitutions some of these limitations, or a combination of them.[XLI] Some States, - like Michigan[XLII] and Missouri[XLIII] - went further, imposing both procedural and substantial limits on overall taxation. The following step, in a significant number of States, was the adoption of expenditure and revenue limitations connected to extra budgetary factors, such as population or economic growth, which could be combined with restrictions on future modification based on special rules for approval.[XLIV]

The impact of these limits on property taxes was particularly pronounced (see Sexton et al. 1999: 107). However, the overall influence on the level of taxation and expenditures seems to have been limited (see, e.g., Shadbegian 1996). One of the main consequences of these kinds of requirements has been the development of forms of revenue that are not considered taxes, such as fees, charges, and special assessments (see Galles and Sexton 1998). Notably, while the courts generally enforced the limitations on property tax, they have been less restrictive with regard to limitations on other forms of revenue,[XLV] where a permissive interpretation was generally adopted with regard to special assessments, fees and charges. In all these cases the courts identified the absence of at least one of the features needed to identify something as a tax: coercion and potential for redistribution.[XLVI] The courts also generally validated the loss of the connection between a type of revenue and its purposes, consenting to allow the financing of an increasing number of activities through those non-tax revenues.[XLVII] While this interpretative trend was carried out to differing degrees among various courts, it is possible to identify an overall reduction in the applicability perimeter of tax limitation, as a result of the development of these policies by State Legislatures and the consent of courts to them.[XLVIII]

2.4. Budget Bill Rules

Lastly, we take a closer look at States' rules that became directly entangled with budget bills. It is worth noting that generally States adopted the institutional choice of budget proceedings in which the executive branch covers the central role – only in three States can the Governors' budget be fully subverted by the legislatures-.[XLIX] While the powers of legislatures to modify the budgets vary significantly, there are also differences in respect to executive powers in budget proceedings. This helps to explain why major constraints on procedural grounds regulate the powers of executives and legislatives, and the balance

between them. It is possible to group them in three main categories: (1) the most widespread powers regulate the role of the Governor in starting the budget process and in manipulating the items provided therein;[L] (2) limits on legislative modifications of the proposed bill;[LI] and (3) qualified majority approval to enact the budget, or approve specific items in it.[LII] The other procedural rules category concerns the timeline of the budget, with less than half of the States providing a biennial one (see National Conference of State Legislatures 2010: 3). This shows two critical points: on the one side only three States consider two years as a base for consolidated expenditure, on the other no modification in control and management practices has been registered in the shift to a biennial budget (see Musso, Graddy and Bravo Grizard 2009: 260-263).

Looking at substantial rules for budget bills, it quickly becomes evident that it is difficult to determine how they may best be characterized, considering both the lack of clarity and the depth of differences between the provisions of constitutional texts. However, four major types of constraints can be identified. (1) The Governor must propose a balanced budget to the legislature,[LIII] although this kind of provision could be weakened if the legislature itself is under no obligation to pass a balanced budget, or if it is possible for the budget to be balanced using borrowing (National Conference of State Legislatures 2010: 6-8). (2) Forty-one States require their legislature to pass a balanced budget.[LIV] The main problem with this kind of constraint is the lack of any proper enforcement mechanism. In several cases this balance is considered achieved through the use of estimated expenditures and revenues, and not to fiscal year-end results.[LV] (3) This helps to explain why some State Constitutions also provide controls designed to keep the budget balanced throughout the fiscal year, as in the case of Louisiana.[LVI] (4) Lastly, some State Constitutions explicitly prohibit the carrying over of deficits, a technique that is often used to achieve a balanced budget in annual systems (National Conference of State Legislatures 2010: 3).[LVII]

There are several factors that can play a role in determining the effectiveness of budget constraints. One concerns the sources of fiscal limits: while all but one of the States require a balanced budget, only thirty-six do so at the constitutional level, while for the others there are only statutory provisions (National Conference of State Legislatures 2010: 3). In many cases, constitutional limitations have resulted from interpretations of State Constitutions by the States' Supreme Courts, often on the basis of very broad provisions,

like that in New Hampshire requiring that the State Government act with "frugality." There is also no real correlation between constitutional provisions requiring a balanced budget and those providing debt limits. Enforcement of constitutional provisions requiring a balanced budget also varied greatly, with some limiting only long-term debt and thus allowing an annual deficit, and others allowing some borrowing activity to pay expenditures (see Briffault 1996: 7-9).

Another weakness of the constraints lay in the ambiguity as to what constitutes a budget for this purpose. As mentioned, as a consequence of efforts to circumvent debt limits, State financing was generally divided between a general fund and a number of special, dedicated capital and special trust funds. This meant that the larger part of States' activities lay outside procedures of management tied to the general fund approval process, and there is no evidence that this division reflected that between current and capital expenditures, with the latter generally considered financeable by deficits (see Briffault 1996: 11-14; U.S. General Accounting Office 1995: 3). It is not always clear from the text of budget balancing requirements alone when these requirements applied to specific as well as to general funds, and often the question would simply be remitted to the judgment of the State's accounting offices. Moreover, while according to some studies it is possible to estimate in about three-quarters the percentage of the State budget covered by these constraints (National Association of State Budget Officers 2008: 1), generally the required balance has only a formal nature, with allowance made for the inclusion of funds gained by borrowing activity as revenues in these special funds categories (Eucalitto 2013: 201, and Luppino-Esposito 2014).[LVIII]

The analysis of financial policies of States confirms that they took advantage of these weaknesses to create various ways to circumvent budgetary constraints. The least sophisticated of these was the use in proposed budgets of optimistic expectations of revenues and expenses (Wolman and Peterson 1981). Another method was timeline alteration: allocating anticipated revenues or shifting expenditures to following years, as well as making use of accrual rather than cash accounting methods so that some expenses would occur in a later year than the revenues with which they would otherwise be tied (see Wolman and Peterson 1981), or the postponement of payments of salaries or for services received by the government (see U.S. General Accounting Office 1995: 72, McCall 1996: 11, and Wallin 1995: 256). A more complicated method of deferring expenses is the

postponement or underfinancing of pension plan liabilities: in this case the individual rights find, in fact, requirements for a tougher guarantees.[LIX]

States also made use of certain accounting tricks to achieve balanced budgets. One involved including in the budget expected earnings from the sale of particular assets: these estimated items have been revealed to be tricky both in the sense that they did not rely upon an estimated and credible perspective of assets for sale, and because they achieved a balance between una tantum revenues and recurrent expenditures (see McCall 1996: 17). Another widely-used stratagem was in accounting for a net gain achieved by an extension of debt, through the substitution of higher short-term interest rates with lower long-term ones, which improved the annual budget's ratio of income to expenses, but which increases the State's overall indebtedness. Lastly, States can use weaknesses in areas of the budget covered by those provisions to balance the budget with debt created in systems in which there is, in theory, a borrowing prohibition: they consider as positive items inter-fund transfers, so they can achieve, as an example, a positive item by a transfer from a special district that was financed by borrowing activity (McCall 1996: 27-28, U.S. General Accounting Office 1995: 64).

In the last decades, the impact of intergovernmental transfers on States' budgetary systems has grown to the point that the manipulation of these funds has become a major way to circumvent constitutional budgetary constraints. This happens through combining a reduction in expenditure achieved through spending cuts transferred to local governments, and an increase in funds gained from the federal level. In the first case, local finances have no guarantees in constitutions – except for some acknowledgments in respect of the education sector - and so it is possible to achieve the goal of a balanced budget through cuts in funds given to them.[LX] In this case, the effects of the constraints are transferred to local taxpayers, who see an increase in local taxation, which compensates for the loss in transfers. In the second case, the States adapt their expenditure items in such a way as to shift them inside federal programs - especially matching ones which could also give an increase in the transfer received - so reducing the costs for them in their budget (see Briffault 1996: 27-30).

3. The Influence of Constraints on Budget Policies of States Facing Fiscal Crisis

The analysis presented above provides several reasons to doubt the effectiveness of financial constraints adopted by States. In this section the article examines the role played by these norms in determining the policies adopted by three of the largest States - California, New York and Illinois – that faced financial troubles during the crisis. Each State studied offers an overview of their budget structure, main problems in managing it and, particularly, the reaction to the financial crisis in 2008. The analysis shows the similarity between budgetary difficulties faced by the States, but also shows how none of the different rules adopted have been instrumental in determining sound budgetary policies, and moreover have had severe effects in other sectors.

3.1. California

In the case of California, the budgetary issues include the use of borrowing to achieve a balanced budget, the unfunded liabilities of the retirement system, the increasing costs of Medicaid expenditures, and the volatility of the State's tax structure, which is focused on capital gains as well as income taxes.[LXI] The state budget of California generally reveals a structural insufficiency of the State's revenues to finance all of its principal obligations. Seventy percent of the State's spending is focused on two items of about the same relevance: Health and Human Services, and Education (including Higher Education). Other large expense categories include the corrections system, transportation, housing, environmental resources and funding for the functioning of the legislative, executive, and judiciary branches of the State Government.[LXII] The criteria for the calculation of such items is a historical one, called "work load", that is based on the amount of money expended in the prior year and makes some adjustment related to political goals. This tends to have the effect of freezing a large amount of expenditure and restricting political debate on budget issues to a very restricted domain.[LXIII]

California has used several instruments to bridge the budget gap that, in the present crisis that began in 2007, have been focused on temporary measures and not on a revision of levels of expenditures and tax revenues. Federal funds obtained as a result of the American Recovery and Reinvestment Act were used to maintain the level of services

provided in the two biggest sectors, Health, and Education. The legislature made use of certain forms of temporary tax increases, mainly focused on sales and personal income tax. The State took recourse to accounting stratagem to balance its budget, mainly the deferral of spending obligations and contracting loans.[LXIV] In the 2012-13 budget, for example, the measures amounted to about $28 billion, of which only $4 billion was supplied directly by loans contracted with the direct coverage of the General Fund.[LXV] Such forms of budget deferral, combined with the use of overly optimistic previsions about economic growth, create a situation of continuing operating deficits and the absence of corrective action.[LXVI]

What is distinctive to California's system is the role played by direct modifications of the State's financial constitution by voters. The first initiative of this kind was Proposition 13, approved by voters in 1978.[LXVII] This initiative capped both the rate of local property tax related to the value of the property, and any increases in assessed values linked to the rate of inflation. To prevent any state tax increase to compensate for this limitation, Proposition 13 also required the approval of two-thirds of the State Legislature for tax increases. The main consequence of this reform was to shift several public services from local to state funding, in particular the public school system. The limitation on education funding that Proposition 13 entailed led to the approval of Proposition 98,[LXVIII] intended to increase spending on specific sectors, fixing a minimum level of State revenues and property taxes dedicated to them. However, the measure did not really work, considering that its very nature - a ceiling or a floor – remains subject to question. The same proposition prescribed that the annual budget includes a "prudent reserve", a provision not effectively binding, given the absence of a definition of 'prudent'. The introduction of a stronger reserve requirement was the object of California Proposition 58 in 2004,[LXIX] which required that 3% of General Fund revenue be transferred each year to a special reserve account called a BSA until the value of this account reached indicated targets. Here, the ease with which the Governor can suspend these transfers in times of fiscal emergency presents a problem. In fact, the trend has been to consider each economic downturn, even small ones, as legitimating such suspensions. Thus, in recent times, the legislature has had to intervene in two directions: increasing the amount of reserves in the BSA that trigger the automatic cessation of transfers, and prescribing the use of unexpected revenues to finance it.[LXX]

In respect of the ways in which constraints influenced budgetary choices, certain points are worth remarking. As mentioned, the passage of Proposition 13 had particular consequences for the state's educational system. American public schools are financed by a combination of local property taxes and state funding. Given the limits introduced by Proposition 13 on local property taxes, the effect was to change the balance between the two sources, increasing the percentage of the state contribution. The sums required were first obtained by a combination of an increase in the general item of Education in the budget, but with a decrease in the share allocated to Higher Education. Proposition 98, approved in 1988, stopped this second element, resulting in an increase in the contribution provided by the State to education, that is one of the biggest, – in terms of percentage – among the States, amounting to about 57 % – with local and federal shares amounting to about 30 % and 13 % respectively. [LXXI]

The influence of a reliance on intergovernmental fiscal measures has been particularly evident for Health expenditure. Being one of the States that provides a more generous eligibility criteria for access to the system of Medicaid – thorough the California Medical Assistance Program -, this was one of the main items that the Governor tried to reduce in times of fiscal troubles. But the combination of federal lack of approval – following successful legal challenges – and the expansive policies of assistance provided at federal level made these cuts to the Health provisions quite ineffective.[LXXII]

The debt situation is another significant element in the California case. As in other States, debt exposure seems quite irrelevant if measured, taking as reference, % of personal incomes or %GDP – especially if compared to States that are dealing with financial troubles in other contexts, such as those in the Europe. But these measurements are misleading: they do not take into consideration the different roles played in the economic and intergovernmental context by the States in the U.S. compared to those other systems. When the very restricted taxation and expenditure as a percentage of GDP of U.S. States is taken into consideration, a proper evaluation of debt exposure must consider other factors as a reference. This could help to explain why California, notwithstanding a debt at about 20% of GDP,[LXXIII] has incurred numerous financial problems. Considering that one of the peculiarities of California's budget is the concentration of debt financed as general obligation bonds, or supported in some way by the general fund,[LXXIV] it becomes clear that the connection between revenues and debt service costs becomes the key data in

understanding the budgetary behaviour of the State: in the proper State estimates until 2020 over 8 % of the revenue must be used to cover this kind of expenditure.[LXXV] Moreover, California presents also a problem of short term debt, typical in a system in which in the general fund, revenues are collected at the end of the fiscal year, while expenditure must be financed for short term purposes. In this situation, the State uses both external and internal borrowings to cover these costs. The first are typically Revenue Anticipation Notes, that formally are not considered as debt in the constraint view because they are payable before the end of the same year of emission. The internal borrowings are, instead, examples of the use of inter funds manipulation to hide budget troubles: the State meets the expenditure costs with a loan from the special funds. After the crisis that involved California in 2009, the State was also forced to issue a series of promissory notes, or IOUs, as a way to delay payments and maintain general fund expenditures.[LXXVI]

Budgetary difficulties forced the State to adopt – beginning in 2010 - a number of modifications to the legislative framework of the process. These reforms focused on procedural requirements: the majority required for approval of the budget was modified from two-thirds to a simple majority.[LXXVII] Other reforms focused on manipulation of the timeline of the budgetary process, particularly on the timeline of the calculations and on the time coincidence between items.[LXXVIII] Moreover, reforms also impacted on fiscal policy, with the approval of Proposition 30 that temporarily increased personal income and sales tax.[LXXIX] The effect of the last provision in particular was to strengthen the budgetary status of the State. In any case, several analysts have noted that the temporary nature of the increase of revenue in Proposition 30 is a risk for the evolution of California's budget.[LXXX]

3.2. New York

To understand the budgetary policies of New York State, certain specificities must be noted. In the last fifty years the State has been characterized by a progressive separation between the economically and demographically growing New York City area, and the rest of the state, which registered a decline in its economic situation connected to the crisis in manufacturing industry. Within this general trend, the crisis of 2008 particularly affected the State's budgetary situation. Naturally, the Wall Street crisis particularly affected the State of New York, resulting in a loss of jobs greater than the national median.[LXXXI] The State's budget, strongly connected to the financial revenue of the City, registered a deficit,

worsened by efforts to enact temporary policies to cushion the impact of the crisis. The first measure to meet the budgetary troubles was a modification that tried to limit spending growth. This was effected through two-year, instead of the classic annual, appropriations for education aid and Medicaid expenditures and through the introduction of new tools to check and monitor spending and balances. Moreover, an annual cap was applied to any increase of expenditures for the two biggest items of the state budget, defined by external parameters. Lastly, the executive was empowered with the facility to reduce Medicaid spending during the fiscal year.[LXXXII]

The New York system is noteworthy for two elements that have made it one of the States in which many of the accounting tricks mentioned before were developed (see as an example Ravitch 2010). One was the choice to use as a parameter a cash budget, while the GAAP (Generally Accepted Accounting Principles) criteria were used only for reports. The other was that, after the Budget Reform Act of 2007, only the general fund budget in New York has to be balanced.[LXXXIII] Effectively, as the general fund covers less than half of the total budget of the State, no such kind of balancing provision was provided for the overall exercise. Moreover, there was also no requirement for the budget, once approved, to remain balanced throughout the fiscal year, and this opens the door to practices such as timeline manipulations or overestimation. Finally, the requirements of general fund balances, where extended into an evaluation of a multi-annual framework, are only contained in the Budget Reform Act, a merely statutory requirement that could be easily circumvented by the approval of subsequent legislation.[LXXXIV]

In the fiscal behaviour of New York State a central issue to analyse is the constitutional fiscal framework. Article VII of the Constitution is totally dedicated to State finances. In this context, the powers of the Governor are particularly interesting. The budget procedure is, in fact, characterized by the strong role of the executive in the formulation, presentation and execution phases of the budget. To enforce these kind of rules there are exclusive powers provided for the Governor in the submission of items concerning the expenditure of the executive branch. Moreover, once presented he possesses a veto power, albeit not absolute, on items modified by the legislature, and can also modify some items approved in the executive phase.[LXXXV] So it is clear why, in this kind of system, the boundaries for a balanced budget concern, first of all, the Governor himself. The legislature affords several limits in the matter of budget choices. In a general way, the power that it possesses is

concentrated on the negative side, in terms of the possibility of reducing the authority for spending or reducing proposed appropriations made by the Executive. However, in the positive direction, the legislature finds it impossible to substitute items proposed by the Governor or significantly modify the proposed appropriations.[LXXXVI] As a consequence the system is structured in a way that makes it clear that policy budgetary choices are part of the Governor's tools.

The New York Supreme Court, in Potaki v. New York State Assembly, rigorously evaluated such an understanding, clarifying different elements. It identified the scope of constitutional mutation in the alteration of the roles of executive and legislative in the budget process: the first must be considered the "constructor" of the budget, while the second has a "critical" role, in which approval is needed.[LXXXVII] Moreover, executive powers have also been extended with two considerations concerning the possibility to challenge the budget contents. Firstly distinctions between appropriation and policy are now considered non-existent, thus expanding the political doctrine perimeter. Secondly, there is no legal constraint that could be judicially enforced on the Governor that might prevent him from inserting substantive law changes in the budget bill. These elements have been combined with the exclusion of the amendment power of the legislative both regarding the budget bill and the policy conditions connected. This kind of instrument could modify the balance of power provided for in the N.Y. Constitution, which sought that the executive might not provide a "rival constructor" role to the legislative branch.[LXXXVIII] The effect of the procedural budgetary framework, combined with this interpretative approach, deeply influences the balance of power. The legislative power has no choice as to whether to approve or, through a refusal to act, to force an impasse with potentially devastating effects. As a consequence, the executive powers were broadly extended, including the ability to make policies beyond the budget,[LXXXIX] while the ability of the legislative to check the executive compliance to constraints has been severely eroded.

The use of accounting devices has been confirmed in the recent fiscal troubles: the primary way in which the Governor achieved a balanced budget was through cash manipulation, in particular through delaying payments to subsequent years. When the legislature blocked such moves, the only way to submit to the requirement was to make repeated use of temporary loans allowed for by the constitution.[XC] Moreover, this kind of policy received a positive evaluation from the New York Courts. In Wein v. Carey, the

issue was about a short-term debt contracted to cover a year-end deficit. This case is particularly effective in demonstrating the misleading use of the legislature framework regarding States' budgetary constraints: the conclusion of the judgement was that the budget was not unbalanced even if there were successive years of unpredictable shortfalls that would force the use of short-term debt.[XCI] As a consequence, a nominally balanced budget – achieved through borrowing – can be successfully challenged only in the case of a planned shortfall, or a deliberate alteration of fiscal estimates (in this direction, see Briffault 2009: 428-429).

Let me summarize some points helpful for this research. In the New York case, the difficulties resulting from the economic crisis were combined with a structural deficit imbalance in the state budget. The revenues were both inadequate to fund the spending indicated, and they increased at a slower rate than the latter. The formal balance was achieved through a combination of accounting devices: transfers from other authorities, delays in payments, and manipulating existing debts and assets. This element, combined with the annual need for a balanced budget, created a trend in which the budget would be balanced by the year's end, while projections for the following year continued to worsen. As in the general reconstruction mentioned the constitutional framework encouraged the use of such stratagem: providing a constraint only for the general fund creates a strong incentive for the creation of a broad system of special funds. As a result, the manipulation of funds became widespread as a reaction to the fiscal troubles connected to the crisis. [XCII]

3.3. Illinois

The last of the case studies is selected to analyse the ways in which a State can operate under a budget that is fiscally unsustainable. Illinois is ranked in the lower half of States in several areas involving fiscal conditions, particularly with regard to bond ratings, unfunded pension liabilities, and unpaid bills (Topinka 2012). The reasons are not connected to any particular weakness in the economy of the state, but at the beginning of the crisis, it found itself in a position of both budgetary and political weakness. In fact, the State's budget had no reserve and had made a massive use of accounting devices and borrowings in previous years.[XCIII] Moreover, one Governor found himself subject to federal investigations and his successor in difficult relationships with the legislature. So, in Illinois quite soon the

economic crisis became the "perfect storm" of financial difficulties, in a situation in which each one of the theoretical budgetary problems for a State were present concurrently.

The University of Illinois' Institute of Government summarized the main features of this financial crisis in a report covering the fiscal years 2011-13.[XCIV] In this research, for the 2011 budget the estimated deficit, which used a form of consolidated budget, was about $11 billion dollars plus $6 billion carried over from prior years. The impact of this sum on the State budget was modelled in a dramatization using a hypothesis of measures that would be able to resolve the situation, such as collecting all income, sales, and consumption tax for the next five years. The Legislature reacted by temporarily increasing corporate and personal income tax and by capping General Fund expenditure.[XCV] The projections of such measures on the following years predicted a persistent deficit situation, forcing the legislature to enact several stabilization reforms in the following years. Although the budgetary situation became more sustainable, two problems remain unresolved in the fiscal policy: the costs of pensions, and Medicaid, which were crowding out the rest of the budget, and the deficiencies of the budget process.[XCVI]

Two primary factors emerge when we examine the politics that lead the State to its situation of weakness. The balance of the annual cash budget had been obtained several times by avoiding putting aside all the required sums for future pension benefits – thus also increasing unfunded liabilities – and by policies of expenditure growth in good economic times, practiced without raising taxes or putting away cash reserves – thus creating a structural deficit -.[XCVII]In the second element in particular, a key role was played by conflicts between the Governor's programs to increase state services and the legislature that fiercely opposed, until 2011 at least, any kind of tax increase. This is particularly germane to this research; this budgetary behaviour is connected to the lack of electoral support for fair budget policy. Illinois is considered a fragmented political state, with very different economic interests between the city of Chicago and the remaining part of the State, and also with the main town classically democratic and the southern part more devoted to the Republican Party. This situation explains why it has been so difficult to create proper budgetary politics, with a balanced system of expenditures and revenues, given that different parts of the State were pushing for totally different politics. Electoral support plays a key role in the effectiveness of budgetary constraints, and the Illinois case could be a convincing example in support of this theory.

Looking at the institutional framework, a first element to be noted is that the offices of the Governor play a key role in the budget formation procedure. The contents of the budget are determined by the cooperation between the Governor – fixing the budgetary objectives and directives for state agencies – and the Governor's Office of Management and Budget (GOMB) – that both collect the expenditure requirements from the agencies and make estimates for the fiscal exigencies required to accomplish the goals determined. This process, built into the executive branch of the government, allows only a few actors to play a strong role in determining budgetary decisions. The legislature only has the power to vote on the final budget proposed, usually within a timeframe that makes a deep analysis of the budget difficult to achieve (see Nowlan, Gore and Winkel 2010: 215).

One of the interesting points for this research, is that this situation of budgetary troubles has been created in a system in which the constitution requires that "the proposed expenditure shall not exceed the funds estimated to be available" for the budget year in question.[XCVIII] The weakness of this constraint is connected to the possibility of adopting temporary accounting devices and in creating unrealistic estimates of available funds. Moreover, also in the case of Illinois, the budget is a cash annual concept, which excludes accruals. These factors explain why the government has been able to achieve the required balance by postponing payments for pension benefits, so creating the massive amount of unfunded liabilities still present. The institutional weakness of the budget helps to explain the huge number of unpaid bills registered; considering that they are not considered in a cash budget as negative items, as avoiding or delaying payment could be a way to achieve the required balance.[XCIX]

The budgetary devices that contributed to the financial troubles of Illinois included timeline and funds manipulation, and misleading information and planning. The more influential practice of timeline shifting was registered in pension obligation bonds. As mentioned before, the government also broadly implemented payment delay practices. Funds manipulation, on the other hand, exploited the composition of the Illinois budget: with the general fund covering only half of expenditure, one of the more common ways to achieve the required balance was to shift unbalanced items to special funds not considered as being in the constraint mechanism. Moreover, special funds were also exploited to create revenue: through sweeps and chargebacks, the government could take back, in the case of positive operating results, profits from special funds to finance general operations, through

inter-fund borrowing or transfers, although this kind of operation, when challenged in the judiciary, did receive the approval of the Illinois Supreme Court (Wetterich 2011). Lastly, Illinois lacked two key elements that are considered central to assuring the financial stability of a State: a provision for multi-annual budgetary planning, and a duty to form reserves as rainy day funds.[C]

The crisis partially modified this situation. As a first step, the legislature decided to force the Governor to make cuts by financing appropriation in lump sum amounts for the federal agencies. In 2012, where normal proceedings were resumed, the Governor introduced detailed controls in respect of the predetermined expenditure by the agencies and started to release official three-year projections of the General Fund budget.[CI] This confirms that also in this latter case, the institutional weakness has been perceived as a cause of the financial distress.

4. The interpretative approach of Courts

The data of deficit budgetary policies of these States require us to seriously question the extent to which constraints proved legally binding. By looking at both the general analysis and the case studies, we can see how States have been able to reduce the effectiveness of constraints through their evaluation in a restrictive interpretation. This behaviour has been possible for two reasons: one is the weakness of the rules as discussed earlier, and the other is the permissive position assumed by States' Supreme Courts. According to Briffault (see Briffault 2003: 939-949), it is possible to individuate some common motivations among the courts for this interpretative trend, which regards these provisions as a "disfavoured Constitution".

The first is that courts consider that financial constraints have more similarity with ordinary legislation than with matters concerning fundamental rights or government structure. This approach explains why different courts, when looking at these rules, make the point that, without the involvement of any individual right, questions concerning them are best solved by elected representatives,[CII] and that the courts must adopt a deferential approach to the legislature that has the responsibility of adopting States' fiscal policy.[CIII] These interpretative trends show some similarities with the deferential approach taken by the U.S. Supreme Court after the New Deal, but within a completely different framework:

while the Federal Constitution is almost silent on fiscal elements, the States' courts must downgrade several parts of their constitutional texts into mere technical norms and circumvent them to achieve the same goal.

This leads us to a second element: the courts, perhaps considering the elective nature of their appointment,[CIV] adopt in the formulation of their judgements an approach that explicitly shares the policy goals of their governments. The broad interpretation of the clause of public purpose testified to this trend: considering that almost every kind of public expenditure could increase the economic growth of the State by being an expansive policy, the courts shared the same motivation that politicians had in disabling the clause.[CV] Moreover, when looking at debt limits, several courts had explicitly seen the deficit-financed activities as a public interest to be promoted, so they considered the extensive use of accounting devices as discussed as a means to guarantee necessary flexibility for their governments.[CVI] It seems clear that a similar approach, evaluating purpose against constitutional rules, is a key element in explaining the ineffectiveness of the debt limits illustrated above.[CVII] This approach to the rules could also be connected to two other elements that could help explain the adoption of a more stringent one when looking at taxation rules. One factor is the absence of a right directly affected by the violation of the constraints, where in taxation rules, it is easier to find a subject that has had a direct loss connected to an increase. The other factor may be that the TELs rules are quite recent, while the other constraints are generally old and this could explain the consideration that in one case they reflect a value, and continue to have support, while in the other this element could be questioned or not considered.

5. Conclusions

Our research has focused on the dynamics between fiscal institutional rules and their effect on policy. Trying to summarize the points, while it is possible to argue some kind of positive effect in respect of financing costs (Poterba and Rueben 1999) a question arose concerning the effectiveness of the constraints. This article has tried to demonstrate that all institutional tools present legal weaknesses that created the grounds for the adoption of circumventing techniques. This point, firstly assessed in a general analysis, was stressed through looking at the behaviour of some States that faced very similar budgetary troubles,

notwithstanding differences in their budgetary constraints. Several studies have demonstrated that, by looking deeper than a general balanced budget provision, differences can be seen between the behaviour of States, for example, in terms of timelines of budget, or ways of nominating the Supreme Court judges, or conditions for borrowing (see Bohn and Inman 1996: 13-76; Mahdavi and Westerlund 2011). But each kind of constraint seems to be unable to reach the goal of a sound budgetary policy, while differences emerged in terms of what kind of institutional effect and influence on the contents of budget they can determine. The overall effectiveness of constraints to impose balanced budget policies can be called into question: fiscal excesses are simply manifested in off-budget forms (Greve 2012: 20). This leads us to an analysis of another factor that helps to explain the legal weakness of the constraints, the interpretative approach of courts. As shown before, the deferential approach of the judiciary strongly contributes to the erosion of the binding nature of requirements.

We have seen that the weakness of the constraints allows for the adoption of different means to circumvent them, and so achieve a formal policy of imbalanced budget. But, in some States, and in some constraints this does not happen: the constraints are instead respected. The analysis of these constraints shows that the institutional framework works with other factors in determining the fiscal behaviour of States. The study evidenced three other elements that strongly influence budgetary behaviour. (1) The economic cycle. While there are, at the federal level, several ways of minimizing the impact of this on the budget, at the state level both the composition of expenditure and revenues, and the scope of the budget in respect to the economy make the government's financial behaviour more receptive to economic boom and crisis.[CVIII] (2) The political support for a determined budget policy. It is possible to affirm that the endogenous support for a determined budgetary policy can both push for the adoption of a constraint and strengthen the binding nature of the same: it increases the costs – electoral ones – of political circumvention and leads to stricter scrutiny by the courts.[CIX] Moreover, the element of political support connected to budgetary constraints may be considered as the main effect of a conflict between bond holders and taxpayers: while the first are generally interested in a balanced politics in order to guarantee their credit, the interest of the second can vary. Governments generally, looking to electoral support, tend to support the interests of taxpayers, and so their fiscal behaviour may or may not be "responsible" as a consequence of political

support (see Schragger 2012: 885-886).[CX] (3) The research seems to lead to the conclusion that federal intervention is one of the main elements that gives stability to the system: constant policies, implicit bailouts, and counter-cyclical programs partially absorbed the troubles of States, moreover they give them the financial space to follow voters' favoured budgetary politics (in this direction see also Henning and Kessler 2012: 14-15).

This article has shown that the effectiveness of fiscal rules can be questioned on several grounds. However, these rules exist and, whilst ineffective, their presence is not without consequences. It is possible to summarize some distortive effects connected to them. The main effect is connected to the behaviour of States between economic cycles: reflecting a negative vision of deficit spending and debt, constraints that seriously undermined the ability of States to take counter-cyclical policies and had, instead, pro-cyclical effects. The other distortions are connected to the tools used by States to circumvent constraints. Each kind of constraint caused a modification in the budget composition; the balanced budget requirement generated incentives to leave off costs and activities, to underfund long-term commitments, and to move costs between years. Tax limitations - focused on property tax - created an incentive for the growth of sales and capital gains taxes and a system in which States and local governments rely heavily on fees and intergovernmental transfers to gain sufficient revenues. Alongside this, there was an increase in the use of special districts or authorities to circumvent both the tax-increment limits and to finance services in deficit. As previously shown, the composition of indebtedness is another element distorted by the combination of the fiscal rules and by the interpretative activities of the courts that "concede" some kind of debt. Moreover, the combination of the commitment assumed through distorted financing mechanisms and the limited autonomy in the revenue sector created an overall restriction of spaces for policies in the budget, restricting the percentage of modifiable items present.

The weakness in the constraints, and the deferential interpretative approach of the courts, erodes the effectiveness of constraints. As a consequence, States' governments have been able to follow their preferred policies without being seriously confined by those provisions. This has been confirmed by the behaviour of administrations throughout the fiscal crisis: more receptive of economical and political exigencies than worried about complying with the requirements. If constraints are not able to autonomously determine sound budgetary policies, they cause, for sure, the creation of a number of adaptive

techniques. The uses of gimmicks, devices, stratagem and instruments widely illustrated seriously questions the utility of constraints, at least in the weak legally binding version so far analysed, and generate a series of unintended distortions in the budget processes, the balance of power and the outcomes in policy terms.

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* PhD Candidate, Scuola Superiore Sant'Anna. I would like to thank Professor Richard Briffault for comments.

[I] Patient Protection and Affordable Care Act, Pub. L. n. 111 -148, 124 Stat 119, 2010.

[II] Pub. L. n. 111 – 5, 123 Stat. 115.

[III] According to Wallis 2002, the problem of tax-less finance played a central role in both this crisis and the efforts to address it. The indebtedness of many states has been analysed in several studies. See, e.g., English 1996; McGrane 1935; Ratchford 1941.

[IV] The difference is particularly evaluated in Henning and Kessler 2012: 10-11.

[V] In this directions, see Hou and Smith 2009; Mahdavi and Westerlund 2011.

[VI] The connection between ways of selection of judges and the degree of enforcement of the budget rules is marked in See Bohn and Inman 1996.

[VII] Particularly focused on those elements is the analysis of Poterba and Rueben 1999.

[VIII] This is one of the conclusions on the theme adopted by Briffault 1996: 60. The research of J.E. Alt and R.C. Lowry (Alt and Lowry 1994) is instead focused on the degree of control of the houses by the parties.

[IX] In their establishment, also economic and political pressures played a role. This is the approach taken, for example, in Rodriguez Tejedo and Wallis 2012.

[X] According to R. Briffault, (Briffault 2003: 910), forty-six states require such a measure, while the others all have judicial doctrines that provide the same result.

[XI] According to Ratchford 1941: 105-114, this constraint originally applied only to state governments. The circumvention of these limitations by delegations to local government of debtors made necessary a further expansion of these constraints.

[XII] This idea is also confirmed in certain court judgements that admitted the use of public funds to finance private railroads, taken into consideration throughout the public interest behind such infrastructures. See Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

[XIII] See, as examples, Albritton v. City of Winona, 178 So. 799, 804 (Miss. 1938), State *ex rel* Beck v. City of York, 82 N.W.2d 269 (Neb. 1957). For a reconstruction of this evolution, see Briffault 2003: 912-915.

[XIV] The more explicit case in this direction, admitting that a spending will be considered as pursuing the public purpose as long as is it "not irrational" is Delogu v. State, 720 A.2d 1153, 1155 (Me. 1998).

[XV] Maybe one of the few effects that those provisions still have is to limit the possibility of state investment in business corporations, on this see Pinsky 1963: 278-79.

[XVI] See IND. CONST. art. X, § 5, prohibiting state debt except "to meet casual deficits in revenue," repel invasion, suppress insurrection or provide for state defense.

[XVII] See ARIz. CONST. art. IX, § 5 "*the aggregate amount of such debts (…)shall never exceed the sum of three hundred and fifty thousand dollars*."

[XVIII] See as an example GA. CONST. art. VII, § IV, 1 II, limiting debt service on state debt to 10% of state revenue.

[XIX] See as an example, N.Y. CONST. art. VIII, § 2-a.

[XX] See as an example, CAL. CONST. that provides the first for the state in art. XVI, § 1 and the voters' referendum for other administrations in art. XVI, § 18 "*No county, city, (etc.) shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose*".

[XXI] See as an example, WASH. CONST. art. VIII, § 1.

[XXII] AL. CONST. art. X, § 213 "*After the ratification of this Constitution, no new debt shall be created against, or incurred by this state(…)*".

[XXIII] To fully evaluate the weakness here exposed it is important to mark that the debt limitations were the main result of a series of reforms implemented after the financial crisis of the 1840s, with the last constitutional provisions aimed at placing restrictions on debt of this kind adopted at the beginning of the twentieth century. The oldness of these constraints may help to explain certain problems with regard to their

effectiveness. See Ratchford 1941: 73-104.
[XXIV] See as an example, Flushing National Bank v. Mun. Assistance Corp., 358 N.E.2d 848 (N.Y. 1976).
[XXV] R. Briffault defines this kind of obligation as "non-debt debts", an efficient way to describe the tension between formal consideration and substantial role of those actions, see Briffault 2003: 918 (e Part. III.C.).
[XXVI] See, Okla. Capitol Improvement Auth., 958 P.2d 759 (Okla. 1998); Convention Ctr. Auth. v. Anzai, 890 P.2d 1197 (Haw. 1995).
[XXVII] See Train Unlimited Corp. v. Iowa Ry. Fin. Auth., 362 N.W.2d 489 (Iowa 1985); Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994); Dykes v. N. Va. Trans. Dist. Comm'n, 411 S.E.2d 1 (Va. 1991).
[XXVIII] See, e.g., Crowder v. Town of Sullivan, 28 N.E. 94 (Ind. 1891); Struble v. Nelson, 15 N.W.2d 101, 104 (Minn. 1944); Bd. of Supervisors of Fairfax Co. v. Massey, 169 S.E.2d 556, 559 (Va. 1969); State ex rel. City of Charleston v. Hall, 441 S.E.2d 386, 389 (W. Va. 1994).
[XXIX] See Bulman v. McCrane, 312 A.2d 857 (N.J. 1973); Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241 (Wash. 1991); Dieck v. Unified Sch. Dist. of Antigo, 477 N.W.2d 613 (Wis. 1991). But see Montano v. Gabaldon, 766 P.2d 1328 (N.M. 1989).
[XXX] See Carr-Gottstein Props. v. State, 899 P.2d 136 (Alaska 1995); In re Anzai, 936 P.2d 637 (Haw. 1997); Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641 (Ky. 1994); Employers Ins. Co. of Nev. v. State Bd. Of Exam'rs, 21 P.3d 628 (Nev. 2001); Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994); Fent v. Okla. Capitol Improvement Auth., 984 P.2d 200 (Okla. 1999); Dykes v. N. Va. Transp. Dist. Comm'n, 411 S.E.2d I (Va. 1991).
[XXXI] See for example Rider v. City of San Diego, 959 P.2d 347, 358 (Cal. 1998).
[XXXII] Lonegan v. State, 809 A.2d 91 (N.J. 2002). However, in a following judgment – take by a simple majority of the judges - the same court saved similar measures looking to the absence of any legal enforceability of them against the state, see Lonegan II, 819 A.2d 395 (N.J. 2002).
[XXXIII] See MICH. CONST. art. IX, § 8 (capping the sales tax rate).
[XXXIV] See FLA. CONST. art. V, § 5 (prohibiting personal income tax); MICH. CONST. art. IX § 7 (prohibiting graduated income tax); N.C. CONST. art. V § 6 (limiting income tax); TEX. CONST. art. VIII, § 9 (prohibiting personal income tax without voter approval).
[XXXV] See CAL. CONST. art. XIIIA, § 3 (requiring state legislative supermajorities in order to increase state taxes); id. art. XIIID (making voter approval a requirement for all tax increases); DEL. CONST. art. VIII, § 10, 11 (requiring legislative supermajorities for imposing or increasing a tax or a fee); MICH. CONST. art. IX, § 25 (requiring voter approval as condition for new or increased state or local taxes); Mo. CONST. art. X, §§ 18, 22 (setting tax limits and conditioning new or increased taxes and fees on voter approval); S.D. CONST. art. XI, §§ 13, 14 (requiring either legislative supermajority or voter approval in order to increase state taxes or the property tax).
[XXXVI] See ARIZ. CONST. art. IX § 18; CAL. CONST. art. XIIIA, § 2; FLA. CONST. art. VII, § 9; LA. CONST. art. VI, § 6; MO. CONST. art. X, § 11; NEB. CONST. art. VIII, § 5; NEV. CONST. art. X, § 2; N.Y. CONST. art. VIII, § 10; OHIO CONST. art. XII, § 2; WASH. CONST. art. VII, § 2; W. VA. CONST. art. X, § 1; WYO. CONST. art. XV, §§ 5-7.
[XXXVII] See ARIZ. CONST. art. IX, § 19; CAL. CONST. art. XIIIA, § 2; FLA. CONST. art. VII, § 4; LA. CONST. art. VI, § 3; MICH. CONST. art. IX, § 3; OKLA. CONST. art. IX, § 8B; OR. CONST. art. XI, § 1l(1)(b).
[XXXVIII] See ARIZ. CONST. art. IX, § 17.
[XXXIX] See ARIZ. CONST. art. IX, § 22; CAL. CONST. arts. XIIIA, XIIIC, XIIID; COLO. CONST. art. X, § 20; 11; GA. CONST. art. VIII, § 6, 11; HAW. CONST. art. VII, § 9; LA. CONST. art. VI, § 25; id. art. VII, § 2; MICH. CONST. art. IX, § 25; MO. CONST. art. X, §§ 18, 22; S.C. CONST. art. X, § 7.
[XL] We will specific evaluate this provision in our case study about California in section III.i).
[XLI] For a complete reconstruction, see Skidmore 1999: 77, 83, and 88.
[XLII] MICH. CONST. art. IX, §§ 25-32.
[XLIII] Mo. CONST. art. X, §§ 16-22.
[XLIV] See, as examples, ALASKA CONST. art. IX § 16 (connecting increases in state appropriation to population growth and inflation) and S.C. CONST: art. X § 7 (providing a limit in state spending that could be changed only by two-thirds legislative vote). For a dissertation on those constraints, see Briffault 2003: 929-932.

[XLV] See for example the position of the California Supreme Court about limitations of other taxes as special and the consideration of the special districts, City & County of San Francisco v. Farrell, 648 P.2d 935 (Cal. 1982); L.A. County Transp. Comm'n v. Richmond, 643 P.2d 941, 947 (Cal. 1982).
[XLVI] See for examples, McNally v. Township of Teaneck, 379 A.2d 446, 451 (N.J. 1977) (finding a special assessment not a tax subject to certain constitutional requirements because the purpose of the assessment was to reimburse the municipality for its expenditure); Lakewood Park Cemetery Ass'n v. Metro. St. Louis Sewer Dist., 530 S.W.2d 240, 245-46 (Mo. 1975) (finding that charitable property constitutionally exempt from taxation may be required to pay a special assessment): Briffault 2003: 934-935.
[XLVII] See for example Knox, 841 P.2d at 151 (allowing special assessment for parks); City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); 2d Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d I (N.J. 1999) (allowing assessment for business improvement district).
[XLVIII] Particularly clear about the effects of such kinds of circumventing techniques has been the Supreme Court of Michigan, that assessed that "the imposition of mandatory 'user fees' by local units of government has been characterized as one of the most frequent abridgements 'of the spirit, if not the letter,'" of that state's anti-tax amendment. (Bolt, 587 N.W.2d at 273). Also the courts of Missouri and California tried to distinguish and categorize fees, in order to reconduit some of them to the applicability of the tax limit. The case law has been particularly analysed by Briffault 2003: 935-937.
[XLIX] According to National Conference of State Legislatures 2010, these are Arizona, Colorado and Texas. A similar reconstruction, that focuses on the powers of executive and legislative among the budget procedure, from the initiative to the execution phase is offered in O'Connor 2015: 355 – 368.
[L] In half of the States, the governor initiates the budget approval process. In approximately four-fifths of the States, the governor holds the power to remove items from the budget approved by the legislature, while the power to reduce the amount of single items is far less common: only one-quarter of the States providing it. The great majority of States provide some limits to the modifications that the executive can make after the enactment of a budget, also in terms of reducing budget spending items. See Hou and Smith 2006; U.S. General Accounting Office 1995: 15.
[LI] As an example, half of the States provide rules to contain supplemental appropriations approved by the legislature on a timeline basis, consenting to them only in the legislative session, see Musso, Graddy and Bravo Grizard 2009: 252-254.
[LII] A few, mostly north-eastern, States require a supermajority to enact a budget, only three States require a qualified majority to enact the state budget and another six require this majority for votes upon some particular items of it, see data from Council of State Governments 2008. Requirements of a supermajority are much more commonly used to limit tax increases or revenues (thirteen providing it), see Knight 2000.
[LIII] See for example the Rhode Island Code, Title 35, ch 3, s 13.
[LIV] National Association of State Budget Officers 2008, and the following reports. See, for example, The Delaware Code, Title 29, ch 63, s 6337.
[LV] According to Hou and Smith 2006: 34-35, six states have a constitutional requirement and twenty-nine have a statutory requirement to avoid that deficit could be carried to the next fiscal year. They explicitly links the unpopularity of this measures to the fact that it leaves a narrow space for circumvention, Hou and Smith 2006: 42. O'Connor 2015: 359-360 shows that as counter-balance some states provide the admissibility to re-balance the budget among the fiscal year with supplementary appropriation, see See ALA. CONST. art. XI, § 213.
[LVI] See The Louisiana Code, Title 39, s 72(A).
[LVII] See as example The Montana Code, Title 17, ch 7, s 131(2).
[LVIII] Moreover, also in the general fund, generally the States balance only their operating budget; see O'Connor 2015: 356 – 358. The operating budget generally includes expenditures like salaries and wages, aid to local governments, health and welfare benefits, and other annual outlays, while excluding such expenditures as construction and land purchases, see National Conference of State Legislatures 1996.
[LIX] See for example Musselman v. Governor, 533 NW2d 237, 241 (S.Ct.Mich. 1995).
[LX] See Michigan Association of Counties v. Department of Management and Budget, 345 NW2d 584, 592 (Mich. 1984).
[LXI] The state's revenue structure is based on personal income tax source, and contributing to this is a trend in recent decades towards a decreasing use of sales and use taxes. (See California Legislative Analyst's Office, http://www.lao.ca.gov/Budget) An interesting point is that roughly 70% of these revenues go to the general fund, with the remainder being used to fund special ones. The trend towards an increasing reliance on

income tax is particularly remarkable, because it can contribute to one of the more problematic issues of a state budget: the behaviour during economic downturns. In fact, the personal income tax revenue amplifies the effect of decrease of revenue in these occasions. This happened to the revenues of California during the crises of 2001 and 2007, in a way that strongly contributed to the state's financial troubles. See The State Budget Crisis Task Force, *California Report*, 2012 p. 12.

[LXII] See California Department of Finance, *Enacted State Budget 2012-13 Summary,* as an example, available at http://www.ebudget.ca.gov/FullBudgetSummary.pdf.

[LXIII] The "work load" is an example of conventional budgets that have been fiercely criticized for the aforementioned reasons by the scholars. See as examples, Tobin 1996: 155; Williams 2013.

[LXIV] In 2011, when the governor used $11 billion of loaned money from bonds to lower the deficit from $20.6 billion to $9.6 billion (Lusvardi 2011).

[LXV] See California Department of Finance, *Multi-Year General Fund Budget Projection,* available at http://www.dof.ca.gov/reports_and_periodicals/documents/MY_Website_Workbook_2016-17_GB.pdf.

[LXVI] See California Department of Finance, *Multi-Year General Fund Budget Projection 2012-13*.

[LXVII] Prop. 13, *People's Initiative to Limit Property Taxation,* 1978.

[LXVIII] Prop. 98, *School Funding. Initiative Constitutional Amendment and Statute*, 1988.

[LXIX] Prop. 58, *California Balanced Budget Act,* 2004.

[LXX] See The State Budget Crisis Task Force, *California Report*, pp. 13-14.

[LXXI] See U.S. Department of Education, National Center for Education Statistics, *Common Core of Data,* available at https://nces.ed.gov/ccd/.

[LXXII] See The State Budget Crisis Task Force, *California Report*, pp. 19-20.

[LXXIII] Source U.S. Census Bureau, *State Government Finances Summary Report*, at https://www.census.gov/govs/state/.

[LXXIV] This percentage amounts to about 90% of the total debt of California, while the other states had a much more significant exposure supported by special funds, see Office of the State Treasurer, *State of California Debt Affordability Report*, 2011.

[LXXV] See Office of the State Treasurer, *State of California Debt Affordability Report, 2011*.

[LXXVI] See *State of California Revenue Anticipation Note Office Statement*, September 2011, available at http://www.sco.ca.gov/files-eo/9-11summary.pdf. California issued in 2009 a peculiar form of these promissory notes, called Registered Warrants, see http://www.sco.ca.gov/eo_news_registeredwarrants.html.

[LXXVII] California Secretary of State. *Official Voter Information Guide. Proposition 25 Analysis by the Legislative Analyst*, November 2010, http:// www.voterguide.sos.ca.gov/past/2010/general/propositions/25/analysis.htm.

[LXXVIII] California Secretary of State. *Official Voter Information Guide. Proposition 39 Analysis by the Legislative Analyst*, November 2012, http:// www.voterguide.sos.ca.gov/past/2012/general/propositions/39/analysis.htm.

[LXXIX] California Secretary of State. *Official Voter Information Guide. Proposition 30 Analysis by the Legislative Analyst*, November 2012, http:// www.voterguide.sos.ca.gov/past/2012/general/propositions/30/analysis.htm.

[LXXX] These are, as an example, the evaluations presented in the report of The Volker Alliance, T*ruth and Integrity in State Budgeting. Lessons from three States*, Initial Report of the Truth and Integrity in Government Finance Project, New York, 2015, pp. 19-20.

[LXXXI] New York State Office of the State Comptroller, *Economic Trends in New York State, October 2010;* New York State Office of the State Comptroller, *Economic Trends in New York State, May 2012*; available at http://www.osc.state.ny.us.

[LXXXII] See The State Budget Crisis Task Force, *New York Report*, 2012, p. 15.

[LXXXIII] State Education Budget and Reform Act of 2007-Article VII (S.2107-C/A.4307-C).

[LXXXIV] New York State Legislative Law, Sec. 54.2.a. See, for example, Ravitch 2010; New York State Office of the State Comptroller, *Fiscal Update: Closeout Analysis of SFY 2009-10* April 2010, p. 3, http://www.osc.state.ny.us/reports/budget/2010/yearend0410.pdf.

[LXXXV] See The State Budget Crisis Task Force, *New York Report*, 2012, p. 18.

[LXXXVI] N.Y. Const. Art. VII § 4.

[LXXXVII] Potaki v. New York State Assembly, 4 N.Y.3d at 82-83.

[LXXXVIII] Potaki v. New York State Assembly, 4 N.Y.3d at 89-101.

[LXXXIX] It became also possible to insert substantive law changes in the budget bills and force in such way a legislative approval. see Briffault 2009: 432-436.

[XC] New York State Office of the State Comptroller, *Fiscal Update: Closeout Analysis of SFY 2009-10*, 2010, pp. 1-5.
[XCI] Wein v. Carey, 41 N.Y.2d 498, 504 (N.Y. 1977).
[XCII] See The State Budget Crisis Task Force, *New York Report*, pp. 18-20.
[XCIII] As an example in 2009 the state borrowed over two billion dollars to finance the current service of state employees, Institute For Truth in Accounting, *The Truth About Balanced Budgets: A Fifty State Study,* State Data Lab 25, 2009, p. 27.
[XCIV] IGPA Fiscal Futures Project at http://igpa.uillinois.edu/fiscalfutures.
[XCV] See The State Budget Crisis Task Force, *Illinois Report*, 2012, p. 15.
[XCVI] Illinois temporary avoided the first problem, by manipulating funds. At the end t fails to make Medicaid payments to health care providers in order to make the budget appear balanced, despite Medicaid receiving insufficient funding. *State Medicaid Programs Face Funding Challenges,* FISCAL FOCUS 1, 3-6**,** 2008), available at http://www.ioc.state.il.us/index.cfm/resources/fiscal-focus/july-2008-medicaid/.
[XCVII] See The State Budget Crisis Task Force, *Illinois Report*, p. 19. For example, Illinois had delayed payments to such an extent that the state comptroller announced in 2008 that there was an unprecedented billions of dollars worth of backlog of deferred payments. *The Section 25 Budget "Loophole,"* FISCAL Focus 7, 2008, *available at* http://www.ioc.state.il.us/index.cfm/resources/fiscal-focus/july-2008-medicaid/,
[XCVIII] Illinois Constitution (Art. VIII, Sec. 2).
[XCIX] Illinois government adopted a fund sweeping in 2009 when the governor proposed to move $350 million from the state trust fund, which does not need to be balanced, to the state general fund, which does need to be balanced, See Institute For Truth in Accounting, *The Truth About Balanced Budgets* 27-28.
[C] See The State Budget Crisis Task Force*, Illinois Report*, pp. 28-31.
[CI] See The State Budget Crisis Task Force, *Illinois Report*, p. 21.
[CII] See for example, CLEAN v. State, 928 P.2d 1054, 1061 (Wash. 1996), Richmond, 643 P.2d at 945; see also City & County of San Francisco v. Farrell, 648 P.2d 935, 938 (Cal. 1982).
[CIII] See for example, Fent v. Okla. Capitol Improvement Auth., 984 P.2d 200,204 (Okla. 1999); Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641, 646 (Ky. 1994).
[CIV] According to Croley 1995: 725-726, in thirty-eight states, most or all judges are elected.
[CV] See for example, WDW Props., Inc. v. City of Sumter, 535 S.E.2d 631, 635-36 (S.C. 2000), finding that "economic welfare is one of the main concerns of the city, state, and the federal government".
[CVI] See Employers Ins. Co. of Nev. v. State Bd. of Exam'rs, 21 P.3d 628, 633 (Nev. 2001).
[CVII] For others examples of courts adopting this interpretative behaviour, see McCrane, 292 A.2d at 557 (quoting Clayton v. Kervick, 244 A.2d 281, 288 (N.J. 1968)); Dieck v. Unified Sch. Dist. of Antigo, 477 N.W.2d 613,619-20 (Wis. 1991); see also In re Okla. Improvement Auth., 958 P.2d 759, 763 (Okla. 1998) holding that "[i]t is not unconstitutional to accomplish a desired result, lawful in itself, by innovative legal measures".
[CVIII] This element particularly emerged in the analysis of the New York State budget troubles after the crisis, look supra, Sec. III, par. ii).
[CIX] It is also possible to see a close connection between fiscally conservative states and strict rules: considering the budgetary rules as a self-commitment, in which the endogeneity issue almost deletes the real limiting effects of those rules (See Briffault 1996: 60). This helps to explain why the more recent constraints seem more effective than the older – classically, debt limit – ones. The main role of the political factors in determining the budget policy, considering the legal weakness of the institutional framework has been particularly emphasized in Briffault 2003: 955-957.
[CX] But it is important to note that rules become an effective constraint on policies only when they are not merely an expression of society's preferences; in that case they tend to be perceived, most of all, as obstacles by the relevant political actors, particularly because of the difficulty to change them, see Alesina and Perotti 1996.

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