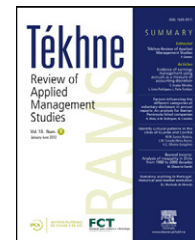




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ARTICLE

The erosion of the rule of law in crisis times

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Abstract In Portugal we are living crisis times as it is well known. Therefore, we strongly believe that there is a dangerous relation between the “crisis management”, of the government in the name of State, and a clear material sense of justice and legitimacy. In Portugal we do not need a reform of the judicial system but a reform of how the government thinks and acts about it. The “Rule of Law” is not only an organizational and formal concept of the welfare state, a philosophic category of the XVIII sec. scientists. We can perfectly identify what are the effects of the crisis on the economic, political and judicial Portuguese system. In Portugal, there is a strong feeling about political partiality and disrespect to about impunity of the political class and corruption crimes. It is an issue of legitimacy of state and not only an issue of governability of the people.

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1. Introduction

This paper is about the double bind and dialectic relationship between Capital Governance and the State Rule of Law. It appears that, in a first look, there is not any significant logic relation of consequence between these two concepts, but we think that they are linked in the bad way: Capital Governance is a tricky concept when in a political order there are no limits between what is it correct and legal and what is crime and corruption. In a political democratic regime, the level of transparency in Capital Governance about political decisions is a criteria or an important indicator to see if the government is respecting the Rule of Law. In democracy, the concept of Rule of Law is directly involved with the primary premise of: “we are equals before the law” and “nobody is

above the law” ... even the chief of the government or the chief of the State. So, when we see news about convictions of corruption crimes and fraud activities by politicians, but nobody is in jail or there is no investigation activity, or the convicted are not in jail ... in a sort of State of impunity. ... it is difficult to believe in the mechanism of check and balance powers that are the corollaries of the principle of separation of powers. This grave introduction is because we think that we are living in Portugal in times of a profound crisis, not only economical but indeed a political one, a crisis about the erosion of the democracy that our fathers had conquered thirteen years ago. It is not a sufficient reason to give up our country, and to stand in the idea that is a sort of unavoidable state of things, so we have to accept these unfortunate circumstances and we have to raise our children in a feeling of complete inaction before the inoperability and ineffectiveness of the judicial system. So we have to tell our children that they must invert their ethic values of “trust”, “justice” and “honesty”, and substitute

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them by “dishonesty”, “immoral”, “corrupt” because this is the best way to have success in their future? We are double bind between our bad example and our incapacity of (re)construction of “social contract” understanding like the meaningful sense of “Rule of Law”, the radical of justice and impassable limit of responsibility.

The question is about what kind of State do we want? We can have two sorts of answers: we want a State with a formal kind of Rule of Law, or we want a material conception of the Rule of Law. And if we want the second one, what can we do to achieve it? The Rule of Law is usually thought of as a political or legal matter; however, in this time it is more than due to its recent economical nuances. In the name of financial and economic survival, we have to deal with the European pressure and the international rules and to accept that we do not decide anymore the set of political decisions that we think are the best to combat the crisis. So this mixture between the limitations of capital governance (with European limitations and accountability), the lack of political ideology, the impunity of the corruption crimes of the political class and general ineffectiveness of the judicial system before this deadly virus, give us a very bad ratio of legality in political system and a low level of operability of the Rule of Law, because we are living in a poor legitimate state.

This paper seeks to explain the risks to the Rule of Law in a state dominated with the “crisis speech”, and to show what is happening when the state loses legitimacy because of the austerity measures. This introduction is about introducing the theme and showing why the “Rule of Law” is not just a juridical or political concept anymore, but an economic one too. In part 2, we examine in a summary the context of the crisis in Portugal, and the reforms taken by the government trying to reduce the public debt. In part 3 we try to define the traditional concept of the “Rule of law” and in what ways this concept is still very actual and accurate to understand the distance between a state of law and a state manipulated by political interests and groups. In part 4 we give two antagonists examples about the role of the Portuguese Constitutional Court in pursuing the legality (or not). Finally, we conclude at 5, that Portugal does not need a reform of the judicial system, but to cultivate equilibrium between the “Rule of Law” and equality, a true model of justice, an effective one.

2. The “crisis Portuguese context”

The financial crisis¹ of Greece, Portugal and Spain has revealed that the Public Administration reforms implemented in the 1980s were not well adjusted, since the new Public Management. The reforms of the public sector have been insufficient, the public debt is a white elephant to the Government. The financial rescue program of Portugal has a Memorandum of Understanding – MoU – detailing the policies to be applied in the public sector to achieve

balance in the Government accounts. Portuguese Government priority's is the public debt and the people are paying for the crisis. Portugal has lived in times in which people thought they had conquered civil liberties, social and economic rights over won just by living in Democracy.

The “Portuguese economic crisis” in the context where the European Union insists that all its members satisfy minimum standards for the Rule of Law, as it understands the concept, based only on the GDP (gross domestic product), not viewing this as a politic issue but only as an economical one, is a complicated way to approximate the problem. How to understand the growth and development in Portugal today is a crucial question because of the crisis of the Eurozone. Portugal is in a difficult spot for several reasons. Basically, Portugal left the vast growth opportunities of EU and euro area membership unexploited. In the absence of serious structural reforms, Portugal could not exploit the growth opportunity offered by the availability of relatively easy and cheap funds for financing productive investments. Instead higher public and private debts effectively supported consumption-based growth. The high public debt constrains the current government to accomplish structural reforms to set the country back on tracks... but the reform process that is to financial support by troika attempts to do this through a series of liberalization measures... but in terms of economic growth the government is silent. As a result, the more profitable but less growth-generating non-tradable sector grew, with labor cost and prices fueling a significant real exchange rate appreciation that undermined the country's external price competitiveness and exports.

To strengthen fiscal solvency, Portugal is taking measures such as restructuring and privatizing state-owned enterprises, cutting pensions and salaries in public administration, reducing the number of government employees, raising consumer taxes, and increasing personal income and corporate taxes (IMF, 2012: 83–121).

Failing to meet the reform plan's targets would result in troika withholding funds and ultimately in Portugal defaulting on its debt. As a consequence, not implementing the reform plan is not a real option for the Portuguese government.

To increase competitiveness and growth, Portugal has to reform its Code of Civil Procedure and move toward arbitration to improve efficiency of the court system. Eliminating excessive rents and liberalized tariff-setting increases market pressure on the state-owned electricity company. A comprehensive reform of competition law and additional steps remove bureaucratic restraints on companies. Further measures of the Portuguese government include a reform of the labor market toward more flexibility, reducing the cost of dismissals, weakening collective bargaining mechanisms, and the elimination of two national holidays. To strengthen fiscal solvency, Portugal is taking measures such as restructuring and privatizing state-owned enterprises, cutting pensions and salaries in public administration, reducing the number of government employees, raising consumer taxes, and increasing personal income and corporate taxes (IMF, 2012: 83–121).

With the possible exception of higher taxes, all measures that make part of the reform plan move control over the allocation of resources away from the state to market-based

¹ ‘Financial crisis’ is used here as an umbrella concept which covers the crisis in financial markets, erupting in autumn 2008 after the collapse of Lehmann Brothers, as well as the fiscal and sovereign debt crisis in the EU and, more particularly, the euro area (the EMU).

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