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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.

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 crisis[1] 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 nontradable 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).

mechanisms. The result is what can be called an ''arranged liberalization'' of the Portuguese economy.

The reforms initiated by troika even emphasize this weakness of the theoretical argument. Because troika can be viewed as an outside actor and the reform measures are unilaterally pursued by the government, this is clearly a ''top down'' process. To what extent a pure top down process is able to fundamentally change a nation's institutional environment cannot be answered here but seems highly doubtful.

Because of the pressure on Portugal's finances, the country's already limited welfare provisions for ''outsiders'' are further reduced, increasing workers' dependency on their employment. The welfare ''deficit'' has to be made up by families. This has direct implications on the job market because it undermines job mobility and flexibility. Additionally, the cut in severance pay even generates a new insider/outsider situation because it is only applicable for new contracts. Because the level of severance pay remains relatively high, smaller companies have little incentive to hire new staff. So far, they were able to circumvent those restraints by hiring workers on temporary contracts. Without this possibility, small companies might actually hire less. Today, priority is given to improve the Rule of Law in order to reduce corruption in the public and private sector. Over the past ten years, the Rule of Law has gained an economical relevancy. Indeed, it has become the cornerstone of economic development.

The fiscal strategy of the Portuguese Government (under pressure of ECB/EC/IMF – the troika) was a severe cut in public expenditures through two major items (cut of two subsidies of pensioners and civil servants) and other smaller items of expenditure and to raise several taxes, more through an increase in tax rates than in tax bases. It is now clear that this strategy is not working. If the use of instruments does not achieve the target it is because the strategy is flawed. The social situation is getting worst, unemployment is rising, bankruptcy of firms is increasing, civil servants are frustrated with wage cuts and no career prospects, and yet... public deficit is not decreasing. However, neither the government nor the troika still recognizes this.

In this context of severe ''economic crisis'', one side of the problem is to promote the reform of the economic system, promoting the growth and the development, to come out of the crisis but without undermining the few last civil liberties and social rights that are essentials in this urgent but not clarified economic contours of the reform to reduce the public debt. Or, in a more reductionist and aprioristic sense, how can we survive economically without compromising the Rule of Law (?). We are trying to argue in this paper that this question about the economic crisis of Portugal is not only a financial one, but also a political one, in the sense of that the concept of ''Rule of Law'' does not appear like an external factor or category of the *modus operandi* of the State. The Portuguese Government has the majority in the parliament so it has been regularly legitimated by the voters, but when it comes to not respecting the electoral promises or to act without explaining the austerity measures and implementing them without any regard to the workers, or to the civil servants, or to the poorest, the problem is not anymore a question of supporting bad political decisions of the chief of the government, but a question of violation of the constitutional principle of equity of the sacrifice. In these disturbed times, the rule of equity is not only a constitutional principle but it is also negative limit to economic and finance survival for most of the Portuguese families.

After several reforms of Portugal political and administrative system, without success, because its weight is still not recommended to be effective, efficient and not wasteful, and in order to cut the debt, the question remains on the table. The proposed cuts of the troika are not adequate for the *sue generis* Portuguese political and administrative system and it is still a problematic issue in a wider context ''Capital Governance/Rule of Law''.

3. The concept of ''Rule of Law''

Historically, the concept of rule of law is to being regarded as a global imperative of the democratic regimes. Its journey has been as instructive as it has been complex. The element of most current relevance is the extent to which attempts at defining it have been characterized by assertions that there is no precise definition – or that it cannot be defined – and that its meaning has evolved, often in divergent directions as it spreads across the world.

The Classical Rule of Law theorists were not concerned with economic development, but with the principle of separation of powers, the limitation of powers in the logic of ''checks and balance''. We are speaking about the concept of the ''Constitutional State'' where civil liberties and the respect of human rights are two pillars of this State ruled by law. The Rule of Law theories were about the limitation of powers, the limitation of the government power, and the protection from the risk of disrespecting conducts and violations of liberty and the dignity of the personal rights by other citizens (Mises, 1944: 14–58).

In general, the Rule of Law is based on the principle that no one is above the law. Laws are for public knowledge and should apply equally to everyone. Public authorities accept that the law will be applied to their own action, and the government seeks to be law-abiding. Laws are to protect the political and civic rights and freedoms of the individuals, these being understood as their basic fundamental rights. The main institutions of the political system should act within the limits of the law and respect the boundaries of their own powers. Courts are impartial and not subject to any form of political pressure. Moreover, anyone accused of a crime has the right to a fair trial and is presumed innocent until proven guilty (Carothers, 1998: 96).

Dicey (1885), in chapter four of his Introduction to the Study of the Law of the Constitution, identifies three desirable properties of political systems that embody or abide by the Rule of Law:

1. Absolute supremacy or predominance of regular law as opposed to the influence or arbitrary power;
2. Equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; and
3. The general principles of the constitution emerge as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

The first of these functional criteria is the creation of stable expectations. Individuals should be able to plan their lives with minimal unexpected interference from the state, and without the rules changing ''in the middle of the game.'' This rules out, most obviously, *ex post facto* laws, but also expropriation or uncompensated takings by the government.

In the first half of the twentieth century the rule of law became a highly contested concept as Dicey's opposition to discretionary power was portrayed by the architects of the ''welfare state'' as driven by his opposition to government intervention. Discretion was seen as necessary for the decision-making required in an increasingly complex society.

From the middle of the twentieth century, the rule of law became reconciled to discretionary power. Discretion was accepted, but nevertheless should be constrained by the letter and purpose of the power-conferring law, as well as by other elements of the rule of law, such as that everyone has access to fair procedures before an impartial and independent court, and that the law be applied consistently, equally and in a manner that is not arbitrary or devoid of reason.

The *Rechtsstaat* concept focuses, by definition, much more on the nature of the state, whereas the rule of law emerged from courtrooms, the *Rechtstaat* emerged from written constitutions. The *Rechsstaat* was defined in opposition to the absolutist state, with unlimited powers conferred on the executive. Protection against absolutism had to be provided by the legislature rather than by the courts alone.

The French approach can be foreseen in the Declaration of the Rights of Man and the Citizen (1789). The notion of *Etat de droit* (which followed the positivistic concept of *Etat* legal) puts less emphasis on the nature of the state, which it considers as the guarantor of fundamental rights enshrined in the Constitution against the legislator (Hasnas, 2008: 529–552).

The Rule of Law has been variously interpreted, but it must be distinguished from a purely formalistic concept under which any action of a public official which is authorized by law is said to fulfill its requirements. Over time, the essence of the Rule of Law in some countries was distorted so as to be equivalent to ''rule by law'', or ''rule by the law'', or even ''law by rules''.

The notion of the Rule of Law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The Rule of Law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognize that during recent years due to globalization and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens.

A broad definition of the rule of law refers to a principle of governance in which there are measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. The definition that was made by the Organization for Economic Co-operation and Development (OECD) in 2005 goes in this sense. Pursuant to that definition ''the rule of law is composed of the following separate fundamental elements, which must advance together:

1. The existence of basic rules and values that people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution.
2. The law must govern the government.
3. An independent and impartial judiciary interprets the law.
4. Those who administer the law act consistently, without unfair discrimination.
5. The law is transparent and accessible to all, especially the vulnerable in most need of its protection.
6. Application of the law is efficient and timely.
7. The law protects rights, especially human rights.
8. The law can be changed by an established process that is itself transparent, accountable and democratic.''

The Rule of Law is a term that is often used but difficult to define.

- In one context the term means ''rule according to law''. No individual can be ordered by the government to pay civil damages or suffer criminal punishment except in strict accordance with well-established and clearly defined laws and procedures.
- In a second context the term means ''rule under law''. No branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the law. In a third context the term means rule according to a higher law. No written law may be enforced by the government unless it conforms to certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems.

The Rule According to Law means that the Rule of Law requires the government to exercise its power in accordance with the principle of legality, like as well-established and clearly written rules, regulations, and legal principles. And the second aspect, the rule under the rule of law means no person may be prosecuted for an act that is not punishable by law (it is coincident with the principle of legality). The ''rule of law'' requires that government impose liability only insofar as the law will allow, not exceeding its authority or using a law was retroactively made illegal. This principle is reflected by the prohibition against *Ex Post Facto* Laws in the Portuguese Constitution.

The due process clause of the article 32 of the Portuguese Constitution[2] requires that statutory provisions be

[2] See Article 32° of the Portuguese Constitution ''(Safeguards in criminal proceedings)'' (1) Criminal proceedings shall ensure all necessary safeguards for the defense, including the right to appeal. (2) Every defendant shall be presumed innocent until his sentence has transited *in rem judicatam*, and shall be brought to trial as quickly as is compatible with the safeguards of the defense. (3) Defendants shall possess the right to choose counsel and to be assisted by him in relation to every procedural act. The law shall specify those cases and phases of proceedings in which the assis-

sufficiently definite to prevent arbitrary or discriminatory enforcement by a prosecutor. Before the government may impose civil or criminal liability, a law must be written with sufficient precision and clarity that a person of ordinary intelligence will know that certain conduct is forbidden.

The rule of law also requires the government to exercise its authority under the law. This requirement is sometimes explained with the phrase ''no one is above the law''. Under the Constitution, no single branch of government in Portugal is given unlimited power. The authority granted to one branch of government is limited by the authority granted to the coordinate branches and by the Constitution, national statutory provisions, and historical practice, and this is how the system of checks and balance' works. These unwritten principles of equality, autonomy, dignity, and respect are said to transcend ordinary written laws that are enacted by government. The ''rule of law'' is an essential pre-condition to development and growth, and explains why the governments had made efforts to reform legal institutions.

In these times the attention is now focused upon methods of establishing or enhancing the performance of capitalist economies and in this field it is necessary to consider laws and legal institutions as a key factor to explain how development is possible. Democracy, respect for human rights and the ''welfare state'' are characteristics of developed societies defined and protected by legal norms and institutions, especially constitutions and the courts that interpret them. These insights have led to a consensus that the overall ''quality'' of legal institutions is an important determinant of development.

Hayek (1955, 1973) explains in various texts what the rule of law is and points out that it is not itself freedom, but makes freedom much more likely. When the rule of law is violated, it is usually to permit violations of personal and economic liberty. The rule of law is violated by these laws by virtue of discretionary power given to the executive branch of government to seize assets arbitrarily on the unproven supposition that they are 'proceeds' of or 'instrumentalities' in the commission of unproven crimes. These measures compromise the rule of law in other ways too. There is, for instance, no requirement for due process. Laws and the government do not, in truth, regulate financial markets; they regulate people operating in financial markets. All government laws and policies are targeted at people. All controls are people controls and all property belongs to people. Hayek's view is that the violation of rights occurs routinely under these laws because the erosion of liberty is more likely when the rule of law is compromised. It is conceivable, but unlikely, that such laws could or would be adopted if the rule of law prevails in all respects. The violation of rights facilitated by the violation of the rule of law has the effect that the state becomes a thief in all but name.

4. The best and the worse of the Portuguese Constitutional Court

Portugal also adopted a set of legal reforms in others branches of law, in line with the principles of the democratic Constitution, such as gender equality. Moreover, with the accession to the European Communities, in 1986, Portugal incorporated the *acquis communautaire* into its domestic law, which allowed for the adoption of a new economic law inspired by the principles of a market economy and free competition. Hence, the Portuguese legal order is, in formal terms, fully in line with the legal requisites that support the existence of a liberal democracy and respect for the rule of law. However, there are some dimensions of the Portuguese democracy that clearly face a critical situation. The Rule of Law is, in all likelihood, the one where an idea of crisis is deeply entrenched in the common perception of the citizens.

In Portugal, the rule of law has suffered some rude blows not because the judicial system is an ineffective one, but because it is so chirurgical and oriented by criteria's of ''specialty'' instead of equality: if on one hand we have a judgment of the Constitutional Court that is fundamental to protect the principle of legality and equality, on the other hand we can see how politicians can transform the appeal to the Tribunal Constitutional as a means to impunity. This is a kind of strange lecture of the relationship between the role of Portuguese courts and the political class, and that's why we speak about the erosion of ''the Rule of Law'', because this concept is not understanding in it is formal or material sense, but in a ''confused'', ''twisted'' way.

On the one hand, The Government had decided to cut the holiday pay and Christmas bonuses of workers in public administration in an attempt to fill the gap caused by the public debt. In the 2012 budget, in an effort to cut spending, the government decided to suspend two subsidies (the holiday pay and the Christmas bonus) for public servants until the end of the EU/IMF/ECB Troika agreement was signed. The Constitutional Court judges stated. ''There can be no acceptance of a duality of treatment, which is now clear, between some citizens from whom the state demands sacrifices mainly through taxes, and other citizens who are demanded sacrifices not only through this form but also through salary cuts, namely public servants and pensioners''. The Constitutional Court declared in the ruling it refused measures which ''impose intolerable sacrifices on a limited number of people'', and defended the government should have sought other measures which were more equitably distributed among citizens, or measures that

tance of a lawyer shall be mandatory. (4) Preliminary investigations shall be conducted entirely under the responsibility of a judge, who may, subject to the terms of the law, delegate the practise of such investigative acts as do not directly concern fundamental rights to other persons or bodies. (5) Criminal proceedings shall possess an accusatorial structure, and trial hearings and such preliminary investigative acts as the law may require shall be subject to the principle of pleading and counter-pleading. (6) The law shall define the cases in which, subject to the safeguarding of the rights of the defense, the presence of the defendant or the accused at procedural acts, including trial hearings, may be dispensed with. (7) Victims shall possess the right to take part in proceedings, as laid down by law. (8) All evidence obtained by torture, coercion, infringement of personal physical or moral integrity, improper intromission into personal life, the home, correspondence or telecommunications shall be deemed null and void. (9) No case shall be withdrawn from a court that already had jurisdiction under an earlier law. (10) Defendants in proceedings concerning administrative offenses or in any proceedings in which penalties may be imposed shall possess the right to be heard and to a defense.

would address state expenditure in another form. However, the Constitutional Court also ruled that the cuts would be maintained during 2012 due as the budgetary execution was reaching the middle of the year. The Constitutional Court ruled that the breach in the equality principle was the main reason behind the declaration of unconstitutionality.

We could see at the judgment of the Constitutional Court,[3] that:

> The Constitutional Court had ruled, on the abstract and successive judicial review, by a group of parliament deputies:
>
> (1) To declare laws unconstitutional and immediately void because they violated the equality principle, in the 13.° article of the Portuguese Constitution and the norms of the articles 21.° e 25.°, of the Act n.° 64-B/2011, of 30 December (Budget Act 2012), because they were affecting only public servants and pensioners.
> (2) By the force of the article 282.°, n.° 4, of the Portuguese Constitution to rule that the effects of the declaration of unconstitutionality will not be applicable to the suspension of the payment of the holiday and Christmas bonuses for the year of 2012.

The constitutional court rejected a move to cut back the pay of public-sector workers from 2012 to 2014, and a parliamentary commission warned that the country could miss its deficit targets.

States must take account of the impact of cuts on the most vulnerable in society; and cuts must be effective in a non-discriminatory and transparent way in consultation with affected groups. In Portugal the ''civil servants'' were the target of the ''State reforms'' against the public debt ... but the other forms of misuse of financials resources were not stopped.

After this kind of reversal situation, the Government had to come up with a measure which is equivalent in budgetary terms. The government alternative solution would be to cut only one subsidy in the 2013 budget, and additionally, on public and private sectors, employees' social security rate would be raised from 11 to 18%. For companies, the social security rate would be cut from 23.5 to 18%, as a measure that could act as a brake against rising unemployment.

Well, the announcement by the Prime Minister of a policy increasing the social security contribution of workers with a reduction in employers' contribution was the spark that leads to a strong street manifestation Saturday 15, throughout the country. The people was complained about the perceived unfairness of shifting money from workers to employers, and more broadly the austerity imposed by the financial rescue plan of the troika. The manifestation was shared by several Portuguese cities, and people were basically expressing the concern about the specific ''unsocial'' government policy.

Under the pressure of the gigantic manifestation on 15 September and the protests across the country, the government has been forced to withdraw the amendments to the TSU (single social tax). The people took to the streets against the austerity imposed by the troika and the government, against even more unnecessary and unequal sacrifices, whether they are called TSU or IRS (personal income tax).

On the other hand to show how the judicial system is a ''chirurgical'' and very specific in its modus operandi and justice outputs in the sense of ineffectiveness, and how the Constitutional Court has been used in a twisted way to promote the existence of ''impunity cases'' of convicted (re)elected politicians for crimes of corruption and fiscal fraud. While day-to-day corruption in dealings with the administration is rare in Portugal, there are numerous cases of politicians' corrupt transactions especially in connection with infrastructure projects that are not effectively prevented by the legal system (Guerreiro, 2011: 12).

In such a context, statutes of limitations are often too short to allow the prosecution of crimes, particularly if there are not sufficient options to expand the limitation period in case of delays (Transparency, 2012: 23). However, limitation periods can also constitute obstacles in the prosecution of offenses because, in practice, they typically include the prosecution phase of proceedings, i.e. even if charges are brought against an alleged offender, the proceeding can end due to the limitation period. Particularly in the case of corruption related offenses, which often come to light after a long passage of time, standard statutes of limitations provisions can lead to impunity if they are overly short or do not provide for sufficient flexibility to allow prosecution. In Portugal, particular aspects of the statutes of limitations regime constitute serious problems: proceedings can effectively be closed even if an offender has been found guilty in the first instance (Transparency International, 2012: 24). About this problem, Transparency International had recommended that statute of limitations should not allow for proceedings to be closed after the first instance judgment. Otherwise, there is a risk that a sentence against an alleged offender cannot be enforced because of the case prescribed during the appellate instances.

In Portugal, the cases that end in impunity are usually the ones involving the greatest sums of money and known political actors. Therefore, the related provisions need to be adapted because they leave loopholes for grand corruption to end in impunity (DCIAP-PGR and CIES-ISCTE, 2009: 11–25).

A weakness of the Portuguese regime is that the statutes of limitations period includes all stages of the proceedings, including the appellate instances. When a convicted of a

[3] see ''Acórdão n° 353/2012'' at http://Tribunalconstitucional.pt, accessed 19 September 2012. Initially, to address the unfair burden sharing point raised by the Court, the government had planned to increase the social security contribution rate for all employees from 11 to 18 percent. This had the logic of being the equivalent of one month's cut to private sector employee's pay. But because this generated additional revenues and in order to avoid too large an increase in the tax wedge on labor and costs, the authorities announced that they would partially reduce employers' social security contributions. However, this decision to shift some of the tax burden from employers to employees unleashed strong social and political protests, causing the government to abandon the plan. In response to the Constitutional Court's ruling that the burden of adjustment needs to be more broadly shared, the government is reinstating one of the two monthly wage cuts to public sector employees and slightly more than one-month's public pension payment.

crime of corruption presents an appeal to the Tribunal Constitutional about the presumed unconstitutionality, the time of carrying out his sentence has already passed and the enforcement of the sentence may be over.

The on-going financial crisis has brought into stark relief the price of complacency about corruption in Europe. While caused by a confluence of factors that differ from country to country, the failure to put in place adequate measures to prevent, detect and sanction legal and illegal forms of corruption is among them. Portugal is on the top of the list and it has serious deficits in its integrity systems. Those European countries that perform worst on global indicators measuring the 'control of corruption' also run the highest budget deficits (Transparency International, 2011: 3).

5. Conclusions

Times of crisis justify suspending the rule of law and allow government discretion to address the crises because the temptations for politicians to misuse their powers are especially great. Crisis often is invoked to rationalize both governmental discretion and waiver of the rule of law. But as the economic crisis and its aftermath reveal, it is precisely during times of crisis that it is most important to tie the hands of government with the bonds of the rule of law.

It is tempting for the government under severe financial pressure to say that it ''cannot afford'' social and economic rights, and to conduct politics in disregard of constitutional principle of the equality. But we still need the rule of law and respect for the individual even – or indeed especially – in times of restricted resources and economic uncertainty. Likewise, human rights – the freedoms and responsibilities that we have as human beings and which form part of the rule of law – do not disappear in tougher economic times.

Economists say that the Rule of Law improves the economic growth and that it creates conditions for development, however, in Portugal they do not know what kind of model of ''Rule of Law plus Capital'' is truly a synonym of growth and economic development in general.

How can liberal reforms, or reforms of any nature, be effective if the regulation they are based on is bypassed by a significant part of actors in the economy? Interestingly, this question is not raised by troika and informality and rule of law as general factors are largely ignored in the reform program even though there is emphasis on making the judicial system more effective.

The Government has to develop institutional qualities and governance principles that are critical for developing and implementing effective and equitable policy measures to mitigate the impact of economic crises. The question is why the Portuguese Government does not fight economic problems such as ''shadow economy'' (Dell'Anno, 2007: 270) and ''corrupt politician'' instead of taking measures that blow up the welfare of the citizens.

Reforms can only achieve their policy goals if they are carried out by a reliable government body and state administration. In this respect, it is important to notice that Portugal suffers from relatively poor government effectiveness, with a ranking of 81.8 out of 100 in the corresponding World Bank index of 2010 (World Bank, 2012: 56).

Portugal does not need a reform of the concept of the ''Rule of Law''. Portugal needs a profound reform about the sense of ''Rule of Law'' in the state, or in the conception of the State. The State is not only the Government, and the Government is not the State, but it is the vehicle of the State to the people (Bastiat, 1848: 45).

Rule of law requires generality; laws apply to all and do not subject one individual or group to the discretionary power of another. The state is institutionally in conflict with the rule of law as it promotes inequality of sacrifices among people and as it affords to some subgroup a special capacity to violate general rules of conduct. When the state, the representative sovereign nation-state, allows applying it discretionary power in this way, it inclines in the direction of increasing its scope of violation of general rules. Successfully constraining governments is the essential problem. Hume (1777: 32–41) and Hayek (1973: 87–158) put forward popular 'opinion' as basic determinant of institutions and thus ultimate constraint. Successfully realizing a state under the rule of law would require an elemental readjustment of popular opinion and habit toward that which rejects the legitimacy of violations of general rules by agents of the state. People have to rely on the state, to trust that the political decisions of the state are trustworthy and fair, against partiality and corruption, and this is the sense of material ''Rule of Law''. For example, this is the ultimate power of the taxation: one addresses the state, and each class proceeds in turn to say to it: 'You, who can take fairly and honorably, take from the public and share with us'. The state understands, then, very quickly, the use it can make of the role the public entrusts to it. But if it is not capable of creating this ''trust value'' because it is the first one to show that it does not deserve to be treated trustfully, then it had failed to enlarge the scope of its prerogatives. De Jasay (1985: 54) notes that 'legitimacy' is 'not an attribute of the state, but a state of mind of its subjects.'

Law consists of 'enforced rules of conduct' (Hayek, 1973: 72) or, in similar vein, 'the enterprise of subjecting human behavior to the governance of rules' (Fuller, 1964: 106). Law may be considered effective (i.e. 'law-in-practice') when its general compliance is respected with regularity and, relatedly, violation is sufficiently disincentivized by human enterprise. Effective law is thus a particular form of institution, in the behavioral equilibria sense. As Greif and Kingston (2011: 13–45) put it, regarding 'situations in which enforcement of the ''rules'' must be considered as an endogenous outcome rather than taken as given', operational institutions are best understood as structures of selfenforcing interaction and expectation equilibria.

First, in times of economic crisis there is a special need for government behavior to be predictable and rule-bound to encourage investment and economic recovery in a period of uncertainty. Second, adherence to the rule of law in the face of crisis is important to restrain politicians from using the crisis to pursue their own self-interest or unleashing rent seeking by special interest groups – both of which dampen economic recovery and long-term economic growth. Third, the government's seizure of discretion creates a ratchet effect whereby the discretion and exceptions to the rule of law made during the crisis ossify and never return to pre-crisis levels. Fourth, the dynamics of short-term

interventions tend to invite moral hazard that can be exploited by powerful special interest groups.

Rule of law and good governance require an effective institutional infrastructure where the factors of accountability, transparency and security apply horizontally to the three government powers and which devolve vertically to the commissions, the cabinet consisting of departments, bureaus and other institutions, ultimately delivering efficient service to the public according to constitutional and statutory mandates.

States are legally bound to implement these basic rules; they are not optional. Further, respect for human rights is intertwined with the rule of law in our society. The respect for the rule of law is fundamental to the effective protection of human rights and to sustained economic progress and development. Everyone – from the individual up to the State itself – is accountable to laws that are known to all, enforced equally and adjudicated independently.

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