

# Legal and Political Regulation of Higher Education in Portugal: An Evolutionary Perspective on the Current Policy Issues and the Problem of Order

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Abstract:

The higher education system in Europe is currently under stress and the debates over its reform and future are gaining momentum. Now that, for most countries, we are in a time for change, in the overall society and the whole education system, the legal and political dimensions have gained prominence, which has not been followed by a more integrative approach of the problem of order, its reform and the issue of regulation, beyond the typical static and classical cost-benefit analyses.

The two classical approaches for studying (and for designing the policy measures of) the problem of the reform of the higher education system - the cost-benefit analysis and the legal scholarship description - have to be integrated. This is the argument of our paper that the very integration of economic and legal approaches, what Warren Samuels called the *legal-economic nexus*, is meaningful and necessary, especially if we want to address the *problem of order* (as formulated by Joseph Spengler) and the overall regulation of the system.

On the one hand, and without neglecting the interest and insights gained from the cost-benefit analysis, or other approaches of value for money assessment, we will focus our study on the legal, social and political aspects of the regulation of the higher education system and its reform in Portugal. On the other hand, the economic and financial problems have to be taken into account, but in a more inclusive way with regard to the indirect and other socio-economic costs not contemplated in traditional or standard assessments of policies for the tertiary education sector.

In the first section of the paper, we will discuss the theoretical and conceptual underpinning of our analysis, focusing on the evolutionary approach, the role of critical

institutions, the legal-economic nexus and the problem of order. All these elements are related to the institutional tradition, from Veblen and Commons to Spengler and Samuels. The second section states the problem of regulation in the higher education system and the issue of policy formulation for tackling the problem. The current situation is clearly one of crisis with the expansion of the cohorts of young students coming to an end and the recurrent scandals in private institutions. In the last decade, after a protracted period of extension or expansion of the system, i. e., the continuous growth of students, universities and other institutions are competing harder to gain students and have seen their financial situation at risk. It seems that we are entering a period of radical uncertainty, higher competition and a new configuration that is slowly building up is the growth in intensity, which means upgrading the quality of the higher learning and getting more involvement in vocational training and life-long learning. With this change, and along with other deep ones in the Portuguese society and economy, the current regulation has shown signs of maladjustment.

The third section consists of our conclusions on the current issue of regulation and policy challenge. First, we underline the importance of an evolutionary approach to a process of change that is essentially dynamic. A special attention will be given to the issues related to an evolutionary construe of policy analysis and formulation. Second, the integration of law and economics, through the notion of legal economic nexus, allows us to better define the issues of regulation and the concrete problems that the universities are facing. One aspect is the instability of the political measures regarding the public administration and on which the higher education system depends financially, legally and institutionally, to say the least. A corollary is the lack of clear strategy in the policy reforms. Third, our research criticizes several studies, such as the one made by the OECD in late 2006 for the Ministry of Science, Technology and Higher Education, for being too static and neglecting fundamental aspects of regulation such as the logic of actors, groups and organizations who are major players in the system. Finally, simply changing the legal rules will not necessary per se change the behaviors that the authorities want to change. By this, we mean that it is not only remiss of the policy maker to ignore some of the critical issues of regulation, namely the continuous non-respect by academic management and administrative bodies of universities of the legal rules that were once promulgated. Changing the rules does not change the problem, especially without the necessary debates form the different relevant quarters that make up the higher education system. The issues of social interaction remain as intact.

Our treatment of the matter will be organized in the following way. In the first section, the theoretical principles are developed in order to be able to study more adequately the higher education transformation with a modest evolutionary theory and a legal and economic nexus of the interactions of the system and the policy challenges. After describing, in the second section, the recent evolution and current working of the higher education in Portugal, we will analyze the legal framework and the current regulatory practices and problems in light of the theoretical framework adopted. We will end with some conclusions on the current problems of regulation and the policy measures that are discusses in recent years.

Keywords: Institutions, higher education, legal framework, organization, mobility  
Code (EAEPE): LAWEC, REGPO, POLIT, ORGTH, VEBLE

## Introduction

The higher education system in Europe is currently under stress and the debates over its reform and future are gaining momentum. Now that, for most countries, we are in a time for change, in the overall society and the whole education system, the legal and political dimensions have gained prominence, which has not been followed by a more integrative approach of the problem of order, its reform and the issue of regulation, beyond the typical static and classical cost-benefit analyses.

The two classical approaches for studying (and for designing the policy measures of) the problem of the reform of the higher education system - the cost-benefit analysis and the legal scholarship description - have to be integrated. This is the argument of our paper that the very integration of economic and legal approaches, what Warren Samuels called the *legal-economic nexus*, is meaningful and necessary, especially if we want to address the *problem of order*, as formulated by Joseph Spengler (Spengler 1948), and the overall regulation of the system. This defense of a different and integrated approach of both law and economics is not new (Campbell and Picciotto 1998).

On the one hand, and without neglecting the interest and insights gained from the cost-benefit analysis, or other approaches of value for money assessment, we will focus our study on the legal, social and political aspects of the regulation of the higher education system and its reform in Portugal. On the other hand, the economic and financial problems have to be taken into account, but in a more inclusive way with regard to the indirect and other socio-economic costs not contemplated in traditional or standard assessments of policies for the tertiary education sector.

In the first section of the paper, we will discuss the theoretical and conceptual underpinning of our analysis, focusing on the evolutionary approach, the role of critical institutions, the legal-economic nexus and the problem of order. All these elements are related to the institutional tradition, from Veblen and Commons to Spengler and Samuels. The second section states the problem of regulation in the higher education system and the issue of policy formulation for tackling the problem. The current situation is clearly one of crisis with the expansion of the cohorts of young students coming to an end and

the recurrent scandals in private institutions.<sup>1</sup> In the last decade, after a protracted period of extension or expansion of the system, i. e., the continuous growth of students, universities and other institutions are competing harder to gain students and have seen their financial situation at risk. It seems that we are entering a period of radical uncertainty, stronger competition and a new configuration that is slowly building up is the growth in intensity, which means upgrading the quality of the higher learning and getting more involvement in vocational training and life-long learning. With this change, and along with other deep ones in the Portuguese society and economy, the current regulation has shown signs of maladjustment (Costa 2001, 2006, 2007, Pedrosa and Queiró 2005, Simão, Santos and Costa 2003).

The third section consists of our conclusions on the current issue of regulation and policy challenge. First, we underline the importance of an evolutionary approach to a process of change that is essentially dynamic. A special attention will be given to the issues related to an evolutionary construe of policy analysis and formulation. Second, the integration of law and economics, through the notion of legal economic nexus, allows us to better define the issues of regulation and the concrete problems that the universities are facing. One aspect is the instability of the political measures regarding the public administration and on which the higher education system depends financially, legally and institutionally, to say the least. A corollary is the lack of clear strategy in the policy reforms. Third, our research criticizes several studies, such as the one made by the OECD in late 2006 for the Ministry of Science, Technology and Higher Education, for being too static and neglecting fundamental aspects of regulation such as the logic of actors, groups and organizations who are major players in the system. Finally, simply changing the legal rules will not necessary per se change the behaviors that the authorities want to change. By this, we mean that it is not only remiss of the policy maker to ignore some of the

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<sup>1</sup> From 2000 to 2005 the number of students decreased in most tertiary education institutions in Portugal. In 2007, there is a little reversal of that trend because of the program of 'second opportunity' in education (*segunda oportunidade*) for getting the secondary diploma for people with professional experience and participation in certain training programs so that they could get the last schooling years required for getting their secondary education up to the 12th grade. But this seems to be a transient feature and things will go back to normal for the first cycle of tertiary education. What might change, nevertheless, is the second and third cycles, with an expected steady increase in the near future. For private institutions, the situation is much worse, after a decade of "easy" business with schools of higher education literally packed with students, the bonanza ended and in the last three years, several private universities and schools closed their doors (Jacquinet 2007).

critical issues of regulation, namely the continuous non-respect by academic management and administrative bodies of universities of the legal rules that were once promulgated. Changing the rules does not change the problem, especially without the necessary debates from the different relevant quarters that make up the higher education system. The issues of social interaction remain as intact.

Our treatment of the matter will be organized in the following way. In the first section, the theoretical principles are developed in order to be able to study more adequately the higher education transformation with a modest evolutionary theory and a legal and economic nexus of the interactions of the system and the policy challenges. After describing, in the second section, the recent evolution and current working of the higher education in Portugal, we will analyze the legal framework and the current regulatory practices and problems in light of the theoretical framework adopted. We will end with some conclusions on the current problems of regulation and the policy measures that are discussed in recent years.

## **1. Theoretical and conceptual underpinnings of the higher education system**

The objective of our analysis is twofold: first, we want to understand better the changes in recent history of higher education in Portugal and, second, we want to shed some light on the current issues in higher education, namely the political issues on the agenda.<sup>2</sup>

The theoretical basis adopted here consists of the following elements: (1) cumulative causation and path dependence; (2) evolutionary analysis of phenomena, focusing on processes and not just outcomes; (3) socio-economic variables beyond the mere analysis of interests and the existence of elements of varying degree and nature; and (4) the complexity principle, i.e., the elements studied combine often in unexpected ways and outcomes are not just the results of axioms but of historical processes. Another element could be added but dismissed for being obvious: the role of institutions in the evolution of the higher education system that Veblen defined as the “prevalent habit of thought” (1918: 34).

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<sup>2</sup> At the moment of writing, the government has launched a series of legal initiatives for giving new statutes for the higher education system, the quality assessment and the elements of the profession of university researchers and teachers.

As Veblen once put it: “Any evolutionary science, on the other hand, is a close-knit body of theory. It is a theory of a process, of an unfolding sequence” (Veblen 1898: 375).

The notion of cumulative causation can be found in every major work of the author: “Business methods and the apparatus of business traffic develop very promptly whenever and wherever the situation calls for them; such is the teaching of economic history. There is nothing recondite about them, little that has to be acquired by a protracted, cumulative experience running over many generations, such as is involved in technological development” (Veblen 1904: 303).

For the study of higher education, Veblen, typically, opposed the traditional scholarship, as in the citation that follows, to the new kind of scholarship that emerged in universities managed by business men and influenced by the pecuniary interest.

*They [the scholars] are, each and several, engaged on the perfecting and conservation of a special line of inquiry, the objective end of which, in the view of its adepts, will necessarily be the final and irreducible truth as touches matters within its scope. But, seen in perspective, these adepts are themselves to be taken as creatures of habit, creatures of that particular manner of group life out of which their preconceptions in matters of knowledge, and the manner of their interest in the run of inquiry, have sprung.* (Veblen 1918: 3)

Here the notion of evolution and the role played by habits is very important and helps us to understand some of the mechanisms of regulation of higher education and how opaque practices pervade the system and reproduce themselves. The lack of transparency in the system is not very obvious if one looks just to the law or legal system but this is very clear when we look at the interaction and conflicts within institutions and between institutions and candidates.

For studying the Portuguese higher education system, Veblen’s analysis can be very enlightening, especially when giving heed to the private sector, i.e. private cooperatives or associations that offer tertiary degrees and insist very much on the formal and material aspects of scholarship (the ceremony of Ph. D defense, the formal and public conferences aiming at giving notoriety to the university, school or department without corresponding research activities of the quality that is ostensibly shown in those occasions. As an illustration to our point, read the following paragraph from Higher learning in America:

*Under the rule imposed by those businesslike preconceptions that decide his selection for office, the first duty of the executive head is to see to the organization*

*of an administrative machinery for the direction of the university's internal affairs, and the establishment of a facile and rigorous system of accountancy for the control and exhibition of the academic work. In the same measure in which such a system goes into effect the principles of competitive business will permeate the administration in all directions; in the personnel of the academic staff, in the control and intercourse of teachers and students, in the schedule of instruction, in the disposition of the material equipment, in the public exhibits and ceremonial of the university, as well as in its pecuniary concerns. (Veblen 1918: 98)*

Consider now the following view of Veblen on higher education:

*the higher learning takes its character from the manner of life enforced on the group by the circumstances in which it is placed. These constraining circumstances that so condition the scope and method of learning are primarily, and perhaps most cogently, the conditions imposed by the state of the industrial arts, the technological situation; but in the second place, and scarcely less exacting in detail, the received scheme of use and wont in its [4] other bearings has its effect in shaping the scheme of knowledge, both as to its content and as touches the norms and methods of its organization. Distinctive and dominant among the constituent factors of this current scheme of use and wont is the pursuit of business, with the outlook and predilections which that pursuit implies. Therefore any inquiry into the effect which recent institutional changes may have upon the pursuit of the higher learning will necessarily be taken up in a peculiar degree with the consequences which an habitual pursuit of business in modern times has had for the ideals, aims and methods of the scholars and schools devoted to the higher learning. (Veblen 1918: 3-4)*

What is interesting in Veblen's analysis is the easy adaptation to the Portuguese case with a small adaptation. The view that Veblen expounds as the mission of the university or higher scholarship in America corresponds to the official discourse of private and public universities in Portugal, insisting on learning as "an avowed end in itself that the increase and diffusion of knowledge among men is now freely rated as the most humane and meritorious work to be taken care of by any enlightened community or any public-spirited friend of civilization" (Veblen 1918: 10), while in reality what criticizes Veblen in America correspond to the practices in higher education in Portugal, especially in the private sector. In the latter case, the following extract fits like a glove:

*the formal incorporation of these technological and professional men in the academic body, with its professedly single-minded interest in learning, has its effect on their frame of mind. They are, without intending it, placed in a false position, which unavoidably leads them to court a specious appearance of*

*scholarship, and so to invest their technological discipline with a degree of pedantry and sophistication; whereby it is hoped to give these schools and their work some scientific and scholarly prestige, and so lift it to that dignity that is pressed to attach to a non-utilitarian pursuit of learning. Doubtless this pursuit of scholarly prestige is commonly successful, to the extent that it produces the desired conviction of awe in the vulgar, who do not know the difference; but all this make-believe scholarship, however successfully staged, is not what these schools are designed for; or at least it is not what is expected of them, nor is it what they can do best and most efficiently. (Veblen 1918: 31-32)*

We will pass now to the study of the Portuguese case, highlighting the recent evolution and the current issues and dynamics.

## **2. Recent evolution, trends and issues in the higher education system in Portugal**

From 1974 onwards, Portugal is changing considerably; politically and socially with the advent of democracy and the steady growth of the population of students getting into the higher education institutions. In the late 1980s, there is one important change, the creation of private universities and other private organizations offering courses in tertiary education. Most of these institutions, while adopting a ceremonial simulation of higher scholarship, their quality is reputedly low, in some cases it is almost an easy but expensive way of getting a formal degree without much higher education or learning.

Our research focused on a sample of universities, faculties, research centers and departments that represent the diversity of the system of tertiary education. We have done interviews of actors and consulted archives of universities and tribunals. For methodological and ethical reasons, we have not identified the person interviewed and used alias.

In the present paper, we will limit ourselves to some details that illustrate the Veblenian concepts of ceremonial adequacy or the notions of normality and the different logics of exit, voice, loyalty and apathy in organizations.

In Europe, higher education grew from the 1970s onward while in Portugal that growth came in later, slowly in the end of the 1970s, increasing in the 1980s and almost exploding in the 1990s, namely with the creation of the private universities and

polytechnics. Growth, as documented in the interviews, has been out of control, much beyond the traditional public higher education institutions.

Even though, there are peculiar institutions and situations specific to each country, a general pattern can be outlined based on some preliminary results. After the 1960s, there is a sharp increase in the enrollment of students followed by a leveling-off. This is a typical structure encountered in innovation of epidemic studies of diffusion.

What is interesting is the socio-economic dynamics behind these broad trends and patterns that occurred at different points in time, partly due to differences in demographic structure and to the characteristics of each country's development path.

The Portuguese case is interesting on two counts: first, the path of evolution of higher education institutions is much related to the national history, namely the evolution of the state and the implementation of the republic (1910), the dictatorship (1926) and the democracy (1974) and, second, the higher education system is deeply related not just to the state policies but to economic and social variables, namely social classes and professional groups.

Although, as we have highlighted above, Veblen cannot be directly applied to the Portuguese case, his hypothesis and the social mechanisms he invoked are enlightening.

We could say that one of the central problems of the universities and institutions studied is not one of bureaucracy, in the sense given by Max Weber, but one of lack of it. Too much interaction and decision (employment control, renewal of contracts, promotion, admission) are based on personal relations and acquaintances and not very much on impersonal relations or mechanisms that mitigate phenomena such as favoritism and the likes.<sup>3</sup> Those interactions are named as the following: inbreeding, endogamy and locally *amizade*, *cunha* or *caciquismo*.<sup>4</sup>

For the selection of professors in four institutions, the ceremonial aspects are obvious, like the ceremony proper, the official meeting of selection, the redaction of the official document justifying the choices but the real reasons are just apparent and are not known

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<sup>3</sup> A network analysis would be useful but it is beyond the scope of the present research and delicate to endeavor. See also the note n° 5 below.

<sup>4</sup> All these words mean, respectively, friendship, influence and local control of power.

before we made interviews to go beyond the rumors.<sup>5</sup> The official documents contain typically more justification of the people that make the selection, answering the question why we have chosen these very members of the jury, than an appreciation of the candidate's merits. The various elements of the jury are also justified, in all cases, on the basis of the argument of authority and formal qualities (holder of a Ph.D for example, publications in the area of the examination, teachers of the same classes, etc.).

At this point the interviews help to detect the ceremonial cases in which the administrative act, with the official and formal document, is the enactment of a less than meritorious decision. The documents that we could look at the courts show very often that the formal documents contained irregularities that could be damaging for the candidate if the decision of the president of the court ruled the examination or selection to be legally flawed. From the selection meeting to the courts, one key variable was the rumor, at least that is one thing we could identify clearly in two cases studied. Rumors are in these case a way to voice one's frustration or dissatisfaction with a decision that was judged either as professionally, or as professionally, or as legally flawed.

### **3. Current problems of regulation and evolutionary dynamics**

The Portuguese higher education system is under reformulation. There have been several new laws for the legal structure of the system defining the governance standards that the universities and other institutions of tertiary education must comply and the implementation of an accreditation and quality assessment system.

There is another aspect that is due for discussion; this is the legal structure of teaching and research that defines the rights and obligations of teachers and researchers as well as the hierarchy of the system.<sup>6</sup>

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<sup>5</sup> The rumors are very interesting in the present cases. They are very often part of the "truth", of what happened and is a way of regulating a system that has many deficiencies. Rumors compensate for the lack of transparency of selection processes and are a common element that exercises pressure on the jury for justifying very well its choice. This theme is worth further research. Often, the rumors are carried over by an adversary that failed or that pertains to another clique or group.

<sup>6</sup> This law is called, for university teachers, ECDU, Estatuto da Carreira Docente Universitária, a statute that has more than two decades and aims at regulating the relation between universities and teachers and define the rights and obligations of both. There has been great difficulty in reforming this law for different reasons, some very political. We will not enter in this debate but we want to insist that this legislation is a landmark for the regulation of the system and a reference in most of court cases.

Our understanding of the regulatory system is not limited to the formal legislation that exists. We studied also the practices and the implementation of the legislation and its respect or disrespect by actors with different strategies.

The practice has shown a much more complex system with clear lack of transparency. The problems in universities and polytechnics sound familiar when we compare the cases. For taking an example, selection process of teachers are frequently flawed with illegalities, favoritism and lack of transparency. The mechanisms reproduce the groups of people exercising influence and the “habits” of the institutions are perpetuated in a fashion that remember the dynamic of groups studied by Georg Simmel (Simmel 1898a, 1898b, 1898c, 1904).

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