Regulation between Legal Norms and Economic Reality. Intentions, Effects, and Adaptation: The German and American Experiences

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Datum, Ort: 28.04.2011-30.04.2011, Washington
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Currently, the terms regulation and deregulation are on everyone's lips; however, those who use them frequently forget that regulation, in its strict sense, is a mechanism to either restrain competition or to induce it where there is none or too little. Natural monopolies are the most prominent targets for regulation because, in such cases, efficient competition will not emerge by itself. Situated at the intersection of legal and economic history, this conference focused on the regulation of natural monopolies in network industries such as railways, energy, or telecommunications. It brought together both established and younger scholars from the United States, Germany, Switzerland, and Israel to analyze constitutional and legal frameworks, as well as to investigate the development of markets and the political influence of market participants.

The event kicked off with MATHIAS SCHMOECKEL's (Bonn) keynote lecture on „Legal Tradition and Economic Success" comparing the American and the German regulatory systems. Both countries have generally had successful economies over more than the last hundred years, but their approaches to legally addressing the so-called natural monopolies have been quite different, Schmoeckel argued. Throughout the nineteenth and twentieth century, the U.S. Supreme Court defended a strong liberal tradition, including the freedom of contract as a constitutional principle. Before 1949, Germany had no comparable institution for maintaining continuity in regulatory questions; there was, however, a strong tradition of public administration. As a result, in the U.S., independent regulatory agencies that generally favored market freedom were established, while in Germany the state itself acted as a market participant providing state operated networks instead of controlling private business. In the U.S., the Sherman Act prohibited cartels, while in Germany they were regarded as a useful economic instrument. Thus, both regulatory systems grew out of the economic understanding of freedom, equality, and justice deeply grounded in each nation's traditions and mentalities. This explains why legal transplant concerning regulation is hardly possible and why, as Schmoeckel noted, „there is no abstract general legal system for the economy."

GÜNTHER SCHULZ (Bonn) started the second day with introductory remarks that once again summarized the general aim of the conference and explained the cooperation between the German Historical Institute and the research project „Designing Freedom - The Implications of Historic Legacy and Standardization on the Regulation of the Economy" funded by the German Ministry of Education and Research.[1] Starting with a quotation by the general secretary of the Deutsche Handelstag (German Association of Chambers of Commerce) from 1875, who said „that it seems that the more one deals with these (regulatory) questions, the more one struggles to find an answer," Schulz stressed both the complexity and relevance of regulating natural monopolies. He pointed out that, aside from the historic and the modern dimensions of this issue, a variety of other perspectives make the topic well-suited to generating an inspiring and fruitful discussion.

WILLIAM HAUSMAN (Williamsburg, VA) chaired the first session, which was designed to give a general overview of some core regulatory problems. Serving as a translator between German and American regulatory researchers, JEFFREY FEAR (Redlands, CA) laid the groundwork for the discussions to follow. In his presentation, „Funny Words - Important Concepts," he explained governance in Germany since the late nineteenth century, introducing special German terms to the au-

[1] Please visit the project webpage http://www.regulatoryhistory.com for detailed information.

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dience such as *Selbstverwaltung*, best translated as self-regulation. If one understands the entire semantic meaning behind the plain translation - and such culturally constructed terms are never easy to translate - it becomes a lot easier to answer the focal question of whether there has ever been a German idea of regulation. As Fear explained, Germany has no continuous history of regulation like the United States have nor any coherent concept of it across time. But there are mechanisms of self-regulation that German industry has enacted for its own benefit. Furthermore, Germany has traditionally been skeptical of free markets, deeming them disorderly and in need of management. And last but not least, Germany views markets as embedded in a broader (national) social system, making social distributional goals integral to the regulatory system. Next, MARKUS WAGNER (Miami, FL) presented a paper on „Legal Perspectives and Regulatory Philosophies on Natural Monopolies in the United States and Germany." He explained and subsequently compared the nations' different regulatory philosophies and how they have diverged considerably from one another since the early twentieth century. The United States has a laissez-faire approach with an emphasis on private autonomy and enforcement, whereas German regulatory philosophy exhibits distinct elements of public control and framework setting. Referring to the electricity industry, Wagner showed that the leitmotif in the Federal Republic has changed since the Gesetz gegen Wettbewerbsbeschränkung (Act against Restraints of Competition) went into effect „from one which allowed polypolistic structures to one which now emphasizes the functioning of competition." Although there are more similarities in regulatory strategy than ever before as the emphasis in both countries now lies in the idea of the free market, Wagner affirmed that important differences remain.

Günther Schulz moderated the second session, which turned to „Legal Norms and the Establishment of Path Dependencies, circa 1870/80 to 1930/35." FRANK SCHORKOPF (Göttingen) began the session by taking the audience on a journey through the constitutional principles that have addressed regulatory questions since the foundation of the German Reich in 1871. As the European Union now governs most regulatory questions while the nation state serves more as a secondary guarantor, Schorkopf concluded that the national constitution builds a framework for economic governance made in Brussels, for the constitution is unable to reflect the dynamics of the economy. That said, he argued that the much more important parameter in the national constitution is the decision to support fundamental economic rights such as freedom of business, freedom of trade and freedom of association or property. BILL NOVAK (Ann Arbor, MI) then presented a paper called „Law and the Social Control of American Capitalism, 1877-1932," which is part of his ongoing research on the role of law in the creation of the modern American regulatory state during this formative period. He described the decline of a world of local, common-law self-government and the rise of a considerable modern administrative state regulatory apparatus in the United States. Novak located the roots of this new legal-political regime in three inter-linked developments: the centralization of public power, the individualization of private rights, and the constitutionalization of the rule of law. JAMES W. ELY Jr.'s (Nashville, TN) paper followed with an investigation of U. S. railroad regulation in the nineteenth century. America's first big business railroads were subject to extensive regulation very early on. But even though there were a lot of statutes and legal cases concerning railroad regulation during this period, the U.S. never designed a comprehensive policy for regulating the railroads. Ely concluded that the record of railway regulation was mixed. On the one hand, the state was reasonably successful at imposing measures to protect rail safety, but, on the other hand, rate regulation by the Congress failed because effective rate controls were constantly undermined by several actors especially the public, which was torn between the desire of cheap costs and greater transportation facilities. The session continued with YAIR SAGY's (Haifa) presentation, „A Tale of Two Revolutions: On the Rise of Railroad Regulation and Evolution in the Late-Nineteenth-Century United States."

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Sagy concentrated on the previously unnoticed fact that public regulation of the U.S. railroad industry arose during a period when theories of evolution were very popular in American academic discourse. Focusing on the ideas of Charles Francis Adams Jr., one of the leading theoreticians of regulation in America at that time, Sagy demonstrated that evolutionary thinking had a profound influence on the mid-nineteenth century debate on state regulation. BORIS GEHLEN (Bonn) concluded the session with a talk on the influence of interest groups on railway, telecommunications, and electric industry legislation between 1871 and 1935, which ranged between the poles of regulation and nationalization. Gehlen's analysis of the driving forces behind regulatory legislation in these three natural monopolies was influenced by George J. Stigler's general thoughts and assumptions about the regulation of natural monopolies in Stigler's view, such regulation results from political negotiations that are largely influenced by interest groups. Gehlen showed that no specific German regulatory pattern has ever existed although some general observations - for example, that there is a strong correlation between regulatory policies and the state budget - can be made.

The third session, chaired by HARTMUT BERGHOFF (Washington), dealt with regulatory discourses after World War II. NIELS KRIEGHOFF (Bonn/London) started it off with a talk about the reorganization of banking regulation in Germany after World War II, which was characterized by the American influence and the legacy of the Third Reich. As Krieghoff showed, the United States attempted to restructure the West German banking system by forcing far-reaching structural changes in the German regulatory regime, the central bank, and the universal banks, in an effort to create a decentralized banking system similar to that of the United States. However, these changes were rolled back after initial successes. MARC LEVINSON (independent scholar) then investigated „An Unnatural Monopoly: Evasion as a Driving Force in U.S. Transport Deregulation." His paper reflected upon the ways in which market forces created pressure for the regulation of transport in the United States. As his research focuses on the twentieth century Levinson's understanding of transport goes beyond railroad traffic, also including water, air and road transportation. These alternatives to rail transport created intermodal competition that significantly weakened the railroads financially. When Congress first attempted to heal this state of affairs, it became apparent that any change in the regulatory structure inevitably favored one form of transportation over another, so no significant changes were made. Thus, the origin of rail deregulation, according to Levinson, lies in the fact that partial reform of the regulatory structure proved impossible: „evasion as a driving force."

The fourth and last session, moderated by Jeffrey Fear, turned once again to the regulation of natural monopolies, this time since World War II. ALFRED C. MIERZEJEWSKI (Denton, TX) compared the historical development of railways in the United States and Germany, which is like „Comparing Apples and Oranges" according to the title of his paper. Although there are big differences in the geographical circumstances between the countries, one can also find remarkable similarities. Mierzejewski argued that the performance of the privately owned railroads of the United States was strikingly similar to that of the state owned and state operated German railways up to 1980. He presumed that the reason for this lay in the common basic technological trends, consumer preferences, and the operation of fundamental laws of economics. The differences that the two systems exhibit derive from differences in government policy, primarily the lack of regulation before 1890 and deregulation beginning in 1976 in the United States. KENNETH LIPARTITO (in absentia) followed this with a contribution on „The Public Network in Eclipse: National Experiences in Telecommunications, 1945-1990" (read by DAVID B. SICILIA (Maryland)). Looking at the United States and several countries in Europe first, Lipartito's paper argued that no country had a stable regulatory structure or policy concerning telecommunications at the time they were invented-a state of affairs usually explained by means of a structure-conduct-performance model. Contrary to this explanation, Lipartito maintained

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that experience, learning, and history have shaped developments and the fundamental specifics in telecommunications in each nation and have led to differences in structures, innovation, technology, pricing, and investment. KLAUS F. GÄRDITZ's (Bonn) presentation then portrayed „The Law of Telecommunications: From State Monopoly to Regulated Competition in Markets" for the German case. The German telecommunications market, he asserted, doubtlessly exemplifies the most successful conversion of a former state monopoly into a competitive market. However, in his opinion, regulation has created a completely new type of administration that could threaten the system of public administrative law, because regulatory agencies in Germany and the rest of the European Union have broad authority to design the future market structure without direct democratic legitimation. In the next presentation, William J. Hausman and JOHN L. NEUFELD (North Carolina at Greensboro) investigated „Regulation and Restructuring of the U.S. Electric Utility Industry in the Twentieth Century." They presented several attempts to organize electricity regulation in the United States beginning with the decision Munn vs. Illinois in 1877 and ending with the California crisis in the early twenty-first century. Every system that had been employed, they concluded, had its pros and cons; there is no universally best solution for regulating the energy industry in a way that perfectly reconciles both private and public interests, which demonstrates that regulation consists primarily of a search process. ALEXANDRA VON KÜNSBERG-LANGENSTADT (Mannheim) finally concluded the session with a paper on „The Powers behind the Throne? Reasons for the Persistence of the Regulated Electricity Industry in Germany, 1950-1980." Like most European network industries, the German electric industry was strictly regulated during the twentieth century. The Utilities Law passed in 1935 was not reorganized until 1998-and then only under constant pressure from the European Union. This points to great powers of persistence which von Künsberg-Langenstadt explained by the structure of the German electric industry, its actors, and their information and communication channels. Moreover, she showed that the regulation of the electric industry was often instrumentalized to achieve other goals that were not necessarily related to the supply of energy itself, like the political desire to use coal for energy production.

All comments prefaced vivid discussions by challenging and re-evaluating the presented arguments. Thereby they also draw attention to the different approaches in both countries. In particular about the role of the regulatory agencies and the question if there is a lack of democratic legitimation a controversial discussion took place. The final discussion clearly showed that most differences can be ascribed by different national development paths, even though astonishing parallels could be found in the specific markets that were examined. That points to the fact that not least the political creative will influenced the market development.

In sum, the conference showed that the different reactions to market failure in the form of natural monopolies in the United States and Germany can better be explained historically than conceptually.

Conference Overview:

Section 1: General Overview

Jeffrey Fear (University of California at Redlands): Governance in Germany since the late 19th Century

Markus Wagner (University of Miami): Legal Perspectives and Regulatory Philosophies on Natural Monopolies in the United States and Germany

Section 2: Legal Norms and the Establishment of Path Dependencies, ca. 1870/80 – 1930/35

Frank Schorkopf (University of Göttingen): Constitutional Principles and Regulation in Germany

Bill Novak University of Michigan Law School): Law and the Social Control of American Capitalism, 1877–1932

James W. Ely Jr. Vanderbilt University Law School): Railroad Regulatory Policy in the Nineteenth Century

Yaïr Sagy (Haifa University): A Tale of Two Revolutions: On the Rise of Railroad Regulation and Evolution in Late Nineteenth-

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Century United States

Boris Gehlen (University of Bonn): Between Regulation and Nationalization: The Influence of Interest Groups on Railways, Telecommunications, and Electricity Industry Legislation in Germany, 1871–1935

Section 3: Regulatory Discourses after World War II

Niels Krieghoff (University of Bonn/London School of Economics): A Failed Institutional Assimilation. The Allies' Attempt to Restructure German Banking Regulation after the Second World War

Marc Levinson (independent scholar): Unnatural Monopoly: Evasion as a Driving Force in U.S. Transport Deregulation

SECTION 4: Regulation of Natural Monopolies since World War II

Alfred C. Mierzejewski (University of North Texas): Comparing Apples and Oranges: A Comparison of the Historical Development of Railways in the United States and Germany

Kenneth Lipartito Florida International University): The Public Network in Eclipse: National Experiences in Telecommunications, 1945-1990

Klaus F. Gärditz (University of Bonn): The Law of Telecommunications: From State Monopoly to Regulated Competition in Markets

William J. Hausman (College of William and Mary)/ John L. Neufeld (University of North Carolina at Greensboro): Regulation and Restructuring of the US Electric Utility Industry in the 20th Century

Alexandra v. Künsberg-Langenstadt (University of Mannheim): The Powers behind the Throne – Reasons for the Persistence of the Regulated Electricity Industry in Germany, 1950–1980

Tagungsbericht *Regulation between Legal Norms and Economic Reality. Intentions, Effects, and Adaptation: The German and American Experiences*. 28.04.2011-30.04.2011, Washington, in: H-Soz-u-Kult 26.09.2011.

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