

Business and the Law. Historical Perspectives on Legal Change

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Bericht von: Raphael Hennecke, University of Bayreuth

The purpose of the workshop was to take a historical perspective on the interconnection of business and the law. How did new products and economic practices question their legal environment? How did legal changes influence business practice? Did firms comply with new legal regulations? To clarify these questions, historians, economists and legal scholars presented and discussed a wide range of research topics related to the interplay of business and law. This workshop did not include an actual presentation of the papers by the authors and instead limited presentation to a short comment by another participant to enable thorough discussions.

In his introduction, LOUIS PAHLOW (Frankfurt am Main) stressed the relevance of the workshop, pointing out that legal history traditionally has a narrow legal perspective, and would profit by input from business and economic history. He touched on the very different relevance of legal codification in the French and British Industrial Revolution and stated that law is always fluid and not static.

The first panel began with MARTHA PREVEZER's (London) paper comparing the relationship between firm behaviour and the law in the UK and Germany, contrasting the civil law system with the common law system and their implications for business regulation. The focus was on the dichotomy between the 'adversarial legalism' of the UK and the 'bureaucratic legalism' in Germany and the differing levels of shareholder protection. Started with the comment by SEBASTIAN TEUPE (Bayreuth) the following discussion revolved around the 'varieties of capitalism' approach the paper was largely in line with, arguing that it presents very neatly fitting arguments, but neglects historical change and tends to overlook empirical findings. The discussion

debated the role and prevalence of lawyers while also mentioning historical counter tendencies in common law systems.

SEBASTIAN TEUPE's (Bayreuth) paper dealt with the role of the law in business history, contrasting the determining role of legal institutions in the writings of Douglass North with newer works on the history of fraud. To structure the diverging standpoints about the role of law for business history, he argues for a three-fold typology, covering firm behaviour inside the law, scandals and 'defensive' crimes outside the law as well as 'Schumpeterian rule breaking' where the refusal to follow legal rules leads towards their abolition or reform. The comment by MICHAEL SCHNEIDER (Dusseldorf) and the following discussion asked if inside/outside the law was too much of a schematic differentiation given the uncertainty of outcome in court cases. The role of lawyers and the differentiation between firms and their managers were also debated, as well as the definition of 'defensive crimes'.

SAMUEL KLEBANER's (Bordeaux) paper described a bureaucratic conflict within the European Commission about a German fiscal policy incentive in the 1980s to subsidize cleaning technology in cars. Other countries saw this as a breach of fair competition. JAN-OTMAR HESSE's (Bayreuth) comment gave additional insights into the contemporary context, namely the strong Japanese competition and the strengthening environmental movement. The further discussion revolved around the role of the law in this bureaucratic process, the motivation and aims of the car industry, and the role of older legislation for the current Dieselgate.

HARALD ESPELI's (Oslo) paper described how Norwegian legal scholars pushed towards a company act in the late 19th century and how the shipping industry successfully opposed to be included, only to see the passing of a similar act for this industry in 1916. Both acts were eventually unsuccessful in preventing economic crashes caused by speculation. The following discussion asked about the actors behind the push towards company legislation and their interests, clarified the role of global trade links for the Norwegian shipping industry and the role of different co-

existing national legislative regimes for this globally operating industry.

The keynote speech by BRIAN CHEFFINS (Cambridge) dealt with law and its role for the divorce of ownership and control in Corporate America. Cheffins demonstrated how economic history can serve as a heuristic tool to test the plausibility of economic and judicial hypotheses. As an example, he chose the 'law matters' thesis by La Porta et al.¹ It seems to plausibly explain the separation of ownership and control in American corporations through legislation for minority shareholder protection. However, its explanatory value crumbles when tracing the actual legal and economic development throughout the 19th and 20th century, showing that legal framework and separation of ownership and control did not develop causally. Instead a number of reasons, among them the economic situation on the stock market, tax incentives, the value of a single stock and the availability of savings among small investors throughout history caused original owners to sell and smaller investors to purchase company shares. The following discussion raised the question of cultural factors as well as other legal factors, such as inheritance tax and competition laws.

The first panel on the second day of the workshop began with FRANZ HEDERER's (Frankfurt am Main) paper about the Reich Economic Council (Reichswirtschaftsrat, RWR) during the Weimar Republic. While this institution has traditionally been seen as a failed and ineffective revolutionary relic, Hederer argued instead that it represents an institution successfully portrayed by its actors as a non-partisan, 'apolitical' parliament in contrast to the polarized Reichstag. The discussion, opened by a comment by KIM PRIEMEL (Oslo), attempted to clarify the chosen empirical example of premiums (Zugaben) on the RWR's agenda and its contemporary economic and moral implications, dealt with personal composition of the RWR and the significance of economic lobbying.

The second part of the panel was opened by PETER LABUZA's (Los Angeles) paper about how the lawyers Arthur Krim and Robert Benjamin took over the ailing motion picture studio United Artists in the early 1950s, over-

hauling its business model by largely outsourcing the actual production process, leading towards a financialization of the company's value creation. RAPHAEL HENNECKE's (Bayreuth) comment asked about underlying legal changes and the role of business ethics during the controversial transformation process. Other debated topics were the question when lawyers become managers and what qualifies them for this process and the possible use of transaction cost theory for the analysis of a company heavily based on a web of contracts.

The panel was closed by a general discussion about lobbying and legal change. It was debated whether economic lobbying, a fairly new term, which today is negatively connoted, was historically seen more positively and less likely to be scandalized and what the reasons for this development were.

The following panel was opened by MICHAEL BUCHNER's (Saarbücken) paper, which dealt with the legal codification of established business practices in the 19th century German securities trade. The entrance of new players into a formerly small and closed community of traders lead towards the codification of informal 'Handelsbräuche' (commercial usages). The comment provided by ALEXANDER DONGES (Mannheim) asked whether the legal change could be perceived as endogenous or exogenous and differentiated between institutional and private investors. The broader context of common practice as a part of law, the concept of 'soft law' and its transformation into 'hard law' and comparisons to the English securities markets were also elaborated.

This was followed by the paper from THOMAS STORRS (Greensboro), which described how the combative and ambitious James Saxon used the hitherto relatively obscure and unimportant post of the Comptroller of the Currency to transform the US banking system from 1961 to 1966. By chartering new federal banks, he brought fresh competition into a static banking sector characterized by New Deal legislation prioritizing stability. FRANZ HEDERER's (Frankfurt am Main) comment focused on

¹ Rafael La Porta et al., Law and Finance, in: Journal of Political Economy 106 (1998), No. 6, pp. 1113-1155.

the relevance of legal loopholes and sought to clarify the long term effects of Saxon's measures. The further discussion placed the term into the broader context of a power shift between the state and federal level at that time, pointed out who the allies and enemies of Saxon and his agenda were and debated the concept of institutional entrepreneurship.

A discussion about business practices and regulation, which debated the validity of the concept of exogenous shocks, concluded this panel.

The last panel of the day began with a discussion of EVA SCHÄFFLER's (Berlin) paper about legal loopholes in the Czech Privatization Process in the early 1990s, in which a weak legal framework and a hesitant liberal government led to numerous scandals in the voucher privatizations of former state companies. Investment funds accumulated a large number of shares and used the newly gained power to plunder the companies and move assets abroad, despite laws against this approach. ROBERT BERNSEE's (Göttingen) comment questioned how a weak legal framework was defined, brought up the lack of legal professionals and its possible consequences and sought to define the concept of 'legal loopholes'. Furthermore, the term 'kleptocracy' was discussed and predecessors for voucher privatization mentioned.

SVERRE FLAATTEN's (Oslo) paper about business scandals and securities laws in Norway traced how bankruptcy ceased to be seen as a moral failure over the 19th century and pointed out the role of legal codification in this process, which shifted control of the securities market from criminal to civil law, thereby helping to remove the moral stigma from economic failures. EVA SCHÄFFLER's (Berlin) comment and the following discussion clarified the role of some of the paper's sources like the Nordic Conference of Legal Scholars, asked about the relevance of system theory for this case study and debated the usage of Edwin Sutherland's criminological theories for the paper.

The participants wrapped the panel up by a general discussions about rule breaking and business scandals, questioning if the term 'scandal' isn't too wide and imprecise a term to be precisely defined and debating the role

of the media in business scandals.

The workshop's final panel began with Alexander Donges' paper about the adoption of the Prussian patenting system in the German states annexed after the Austro-Prussian War of 1866 and its effects on innovation. Unlike many of the defeated states, the Prussian system set high technical thresholds for new patents. Using the German inventions presented at world fairs alongside statistical data about registered patents, Donges argued that the adoption of the Prussian patenting regime had a positive effect on innovation despite a lower number of new patents. MARTHA PREVEZER'S (London) comment elaborated the difference between patenting as an administrative versus a legal act and the relevance of free trade attitudes for the patenting process. Furthermore, the suitability of world fair exhibitions as measurement for innovation as well as some of the variables in the regression were discussed.

MICHAEL SCHNEIDER's (Dusseldorf) paper about innovations and their international patent protection in the German chemical industry showed the lengthy and costly process to achieve international patent protection for Merck's D-vitamin marketed under the name 'Vigantol'. Despite the German Reich joining the Paris Convention in 1903, which was supposed to internationally protect patents, securing this patent in the US proved a lengthy endeavor which required both legal trials and cooperation with other companies. SVERRE FLAATTEN (Oslo) commented on how the Paris agreement influenced the transnational patenting process as well as on the effects of World War I for the German company. The discussion brought up the role of patent lawyers, the fact that the company only filed for patents in countries with a strong chemical industry and the process of formation of the Paris Convention.

MIRIAM FREY's (Bayreuth) paper contributed a more contemporary comparison between arbitration and litigation. While the theoretical literature argues vastly in preference of arbitration over litigation, actual empirical insights from surveys among companies involved in legal conflicts show an ambiguous picture. HARALD ESPEL's (Oslo) comment asked who the decisive actors in

firms were, remarked the difference between branches of multinationals and smaller national firms and brought up amicable solutions as alternative. The following discussion also discussed the effects of role of the EU, the place of arbitration processes and the relevance of the frequency of trade.

The workshop then came to its end after concluding remarks summing up the numerous results and insights of the conference. The final discussion elaborated the fluidity between business practice and legal rules, the distinction between civil and common law systems, which becomes less clear-cut when taking a closer look at multinational commerce, as well as the prevalence of unwritten rules in different societies.

Conference Overview:

Louis Pahlow (Goethe University Frankfurt am Main) / Sebastian Teupe (University of Bayreuth): Welcome and Introduction

Panel 1: Conceptual Clarifications

Chair: Louis Pahlow (Goethe University Frankfurt am Main)

Martha Prevezer (Queen Mary University of London): Relationship between Firm Behaviour and the Law. Conceptual Clarifications and Historical Perspectives

Comment by Sebastian Teupe (University of Bayreuth)

Sebastian Teupe (University of Bayreuth): Business History and the Law

Comment by Michael Schneider (Heinrich-Heine-University Dusseldorf)

Panel 2: Lobbying, Legal Entrepreneurs and Legal change. Pt. 1. Chair: Kim Priemel (University of Oslo)

Samuel Klebaner (University of Bordeaux): Managing Technical Changes from the Scales of Legal Regulation. German Clean Cars against the European Pollutant Emissions Regulations in the 1980s

Comment by Jan-Otmar Hesse (University of Bayreuth)

Harald Espeli (BI Norwegian Business School, Oslo): Business Influence on the Late Enactment of Limited Liability Companies in Nor-

way. The Role of Shipping Interests (1880-1916)

No comment due to short-notice dropout

Keynote by Brian Cheffins (University of Cambridge): Law and the Divorce of Ownership and Control in Corporate America

Panel 3: Lobbying, Legal Entrepreneurs and Legal Change. Pt. 2. Chair: Sebastian Teupe University of Bayreuth

Franz Hederer (Goethe University Frankfurt am Main): Lobbyists as Lawmakers? The Economic Council in Weimar Germany as an Actor in Economic Policy

Comment by Kim Priemel (University of Oslo)

Peter Labuza (USC School of Cinematic Arts, Los Angeles): United Arithmetic. Legal Contracts and the Financialization of Corporate Governance and Executive Labor in the Motion Picture Industry

Comment by Raphael Hennecke (University of Bayreuth)

Discussion about Lobbying, Legal 'Entrepreneurs' and Legal Change

Panel 4: Business Practices and Regulation

Chair: Robert Bernsee (University of Göttingen)

Michael Buchner (Universität des Saarlandes, Saarbrücken): Legal Change and Business Practices: The Role of Commercial Usages. Some Examples from Securities Trading in 19th Century Germany

Comment by Alexander Donges (University of Mannheim)

Thomas Storrs (University of North Carolina at Greensboro): This Will Drive Them Wild...Wild. Comptroller James Saxon's Transformation of American Banking, 1961-1966

Comment by Franz Hederer (Goethe University Frankfurt)

Discussion of „Business Practices and Regulation“

Panel 5: Rule-Breaking and Business Scandals

Chair: Sebastian Teupe (University of Bayreuth)

Eva Schäffler (Institut für Zeitgeschichte, Berlin): What Is Not Prohibited Is Allowed. Legal Loopholes in the Czech Privatization Process

Comment by Robert Bernsee (University of Göttingen)

Sverre Flaatten (The Norwegian Police University College): Decriminalizing Creative Destruction in Norway. Business Scandals and the Securities Laws of the late 19th Century

Comment by Eva Schäffler (Institut für Zeitgeschichte, Berlin)

Discussion of Rule-Breaking and Business Scandals

Panel 6: Business Law and Effects: Patents and International Law Chair: Jan-Otmar Hesse (University of Bayreuth)

Alexander Donges (University of Mannheim): The Consequences of a Radical Patent Regime Change. A Natural Experiment

Comment by Martha Prevezer (Queen Mary University of London)

Michael Schneider (Heinrich-Heine-University Dusseldorf): The German Chemical Industry in Transnational Perspective. Innovations and Global Patent Protection in the Early 20th Century

Comment by Sverre Flaatten (The Norwegian Police University College)

Miriam Frey (University of Bayreuth): Which Countries Mutually Recognize Commercial Court Decisions?

Comment by Harald Espeli (BI Norwegian Business School, Oslo)

Discussion of Business Law and Its Effects and Final Discussion

Tagungsbericht *Business and the Law. Historical Perspectives on Legal Change*. 21.06.2018–23.06.2018, Bayreuth, in: H-Soz-Kult 03.08.2018.