

DEREGULATION-FACETS OF A NEW TREND IN POLITICS

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I. THE END OF NEO-LIBERALISM AND SOCIALISM: THE SOCIAL MARKET ECONOMY AT A CROSSROADS

It seems that the neo-liberal project failed in many countries with the United States being an exception. The socialist experiment, however, failed completely except in North Korea and Cuba. The social market economy, the liberal model with a social basis, seems to be the model which has succeeded world-wide. Open markets, chances for competition for everybody, participation of the individual: that is what people wanted in Warsaw, in the Baltic States, in Prague and in Moscow!

The point which has to be stressed in the following text is, that one has overstretched the social basis of the social market economy. The social state has put on too much weight. People have become used to social security, public services, subsidies, health care, old age care, and so on. One might not go as far as some people do by saying that the politics of our states is bankrupt, but there is no doubt that the social services cannot be afforded any longer. Some economies have almost collapsed: Sweden in recent years took a sharp turn, Great Britain did so before Margaret Thatcher, the United States Reaganomics. The social budget of the Federal Republic of Germany is at the moment more than 30 per cent of its GNP and still increasing. Following reunification, Germany faced the need to bring a quarter of its territory up to the same level of development as the remaining three-quarters, which is a major reason why it seems to be at a financial crossroads.

Our states are too bureaucratic. The tax rates are far too high. Probably the best description of the modern state is fiscal state, a tax-raising state.

And there is another problem. We have a dream: a dream to live in a transparent world of less regulation, to live in a democratic world of less legislation, a dream to enjoy our good old law without too much bureaucracy and without fiscal authorities and tax laws. But, unfortunately, instead we face a growing complexity in our lives. We are confronted with even more laws, a flood of laws. There is a proliferation of laws: if not from Rome, then from Brussels; if not from Berlin and Bonn, then from Strasbourg. It seems that the gap between our world and the world of the Ten Commandments widens.

So there is obviously a need for more liberalism: let's make government slimmer! Small is beautiful! Let's reduce legislation. Let's have more transparent laws. Deregulation is the catch word of our times.

A. The problem

1. The welfare state of our times

Deregulation, privatisation, liberalisation, freedom and autonomy are stimulating terms of great interest in politics everywhere. The state has taken over too much responsibility. Like a good mother who wants to take care of everything, government occupies too much territory in the field of society and economy: government regulates society in a paternalistic manner. And government sometimes regulates badly. We are witnesses of a 'motorised legislator.' The amendment of a law is negotiated before the law has been enacted.

It is true: our states are well organised. We have constitutional states: there is no arbitrary government. We have social and welfare states: we enjoy public services, social security, subsidies, health care, old age care and so on.

And we have rule-of-law states. Anybody can sue governmental agencies before the courts and does so. Some say we are 'litigious societies.' And finally we are well functioning democracies. Citizens are the electors of parliament and participate in public life, such as schools, chambers of commerce, university self-administration, and so on.

2. Bureaucracy and regulation

But it is also true that our states are overburdened, over-bureaucratic, over-regulated. They are responsible for keeping law and order. They take care of the economy: trust control, subsidies for, product quality control, and so on. And they are responsible for social security and, finally, they take care of cultural matters in schools, universities, in research and technology.

3. The fiscal state

And all this is extremely costly. Probably the best description of the modern state is that it is a fiscal state, a tax-raising state.

4. The cascade of norms

All these activities need regulation: by European law, because we want Europe; by national law, because we want Europe as diversity and unity; by law of the states, *Länder* and regions because we want pluralism; and, finally, by statutes of local authorities, because we want autonomy. The result of this over regulation is clear: the law is everything but transparent. Our courts are overburdened. It is difficult to know the law and law which is not known is law in the books, a dead letter that hurts democracy.

5. Deregulation as the catchword of today

There are symptoms that people are unhappy with the overburdened and over-bureaucratic governments. The crime rate is increasing: this is a lack of efficiency in the law. There are increasing black markets: people want to escape from tax laws. We are facing a sort of 'bypass economy.' And there is dissatisfaction with bureaucracy. In fact, bureaucracy sometimes seems to be the exercise of ingenuity to make the possible impossible.

Deregulation is the major trend of our time. Sometimes people say that 'liberal' is a term that everybody uses it to fit his or her own purposes. This stresses the need to explain one's terminology. My suggestion is to use the term 'deregulation' in a threefold manner:

a. Deregulation can mean privatisation. Strengthening private competition instead of holding statal planning responsibility for the production of goods. Privatisation as reducing state responsibility, less government: give the state a chance to go on a diet!

b. Deregulation can be understood as reducing the network of governmental regulation. Let's have less governmental control of public and private activities. Let competition go. Let's produce less laws. Let's reduce the quantity of laws.

c. And finally deregulation can mean reducing the complexity of the law. Make the law more transparent! Stop the proliferation of laws and improve the quality of the law.

II. THE STATE ON A DIET NO LAWS ARE BETTER THAN TOO MANY LAWS

Deregulation as privatisation means to set the state on a diet: no laws are better than too many laws. Privatisation may mean less government, reducing the burden of public authorities.

1. State, public and private responsibilities

There are two lessons to be learned in advance. The first lesson is that not all public duties and functions are necessarily governmental ones. Government verses in administration of public order and in the administration of public services.

Only the primary responsibilities are state responsibilities in a narrow sense. Necessary fields of governmental authority are law and order, justice, policing, the armed forces, raising tolls and so on and so forth. Government authority is necessary in those fields of activity where legislation, commands, compulsion, enforcement and coercion are necessary, and naturally under conditions of the protection of the individual by the bill of rights [what is well known? I don't understand]. This is the philosophy of the rule-of-law state.

In addition, it is not required that all these governmental activities be administered by central government; indeed, in federal states like Germany, Belgium, Austria and Switzerland, they are partly administered by regional authorities.

There is a major part of day to day administration close to the citizen undertaken by local government.

And, finally, in many fields autonomous bodies like universities, chambers of commerce, chambers of lawyers, doctors and dentists have a say. They are regulating their activities autonomously.

In addition to these responsibilities which imprint the authority of the rule-of-law state, there are major fields of the administration of public services and public offerings. These are social state responsibilities: health service, old age pensions and the financing of unemployment, subsidies for agriculture, subsidies for shipbuilding and for fisheries, and so on. Dispensation of these public services may be in the hands of governmental agencies like the subsidies for asylum applicants, assistance for housing and living, and child care. But they may well be in the hands of public agencies under autonomous regulation like social insurance corporations for unemployment and old age pensions, and so on.

Or they may be in the hands of private institutions like churches or charitable foundations, and so on. In fact, this is a tradition to be rediscovered: not all public responsibility must be exercised by governments. Public responsibilities can be dispensed by private institutions and measures.

Again, the administration of public services happens as well as in the first mentioned field on the national regional and local level, from billion Deutschemark budgets to neighbourhood assistance on a low financial scale.

In particular, in this field of social services we need more participation from the individual. This is obviously true in our exploding health care systems as well as in other fields.

This is the second lesson to be learned: it is particularly in the sector of the social services that our states need to reduce their responsibilities. There is a need to concentrate governmental activities on governments' authentic responsibilities. What we need is a reconstruction of the welfare state. More or less 50 per cent of GNP passes through the public budgets. What we need is a consolidation of social security systems. Social insurance costs are too high. They raise the costs of labour, bring on rationalisation and the consequential increase in unemployment and the transfer production to countries with lower production costs. Social security contributions in Germany today equal more than 30 per cent of GNP. During the next thirty years it may climb step by step to 50 per cent. The result will be a cutback in economic growth, an increase in unemployment and unavoidable cuts in the social system.

In advocating the reconstruction of the welfare state and consolidation of our social security system one has, of course, to be aware of its deep implications. It seems that the

legitimacy of the modern state does not rest any longer on ideology, sovereignty, and the monopoly of physical power to enforce the law: democracy seems to be based rather on the welfare state services. Nevertheless, people have to be warned and told that the welfare state has reached its peak due to the unemployment rate, the decline in the birth rate and increasing life expectancy. In fact our social systems cannot afford all social services any longer. This problem has to be taken very seriously because the credibility of politics and the state are at stake. If we promise the people more than we can pay for, this will lead to frustration and this is dangerous for democracy.

2. Example of privatisation (rail, telecom, and so on)

The state on a diet: receding governmental responsibilities or public services can mean privatisation, devolution, individual initiative and participation. As an example of privatisation one may take the German one. During the last few years the government has abolished state monopolies in railways, telecommunications, electricity, gas and water distribution. Even some universities are private and unthinkable prospect for the last 400 years.

At the federal level, the most spectacular examples were the privatisation of railways and telecommunications. For privatisation of the railways, an amendment to the constitution was necessary. The result is more flexibility, a better service for consumers, greater job attractiveness for young people, and a drop in the number of civil servants. The management is carried out by three different businesses. The first one administers the tracks and belongs to the state. The second run passenger transport and the third cargo services. These last two are private.

After its privatisation, telecommunications were managed by three different businesses: radio and telecommunication, banking and mail.

As well as at the state level, privatisation was undertaken for instance in the media and broadcasting sectors, which as a cultural affair is a state responsibility.

At the local level, transport and gas, water and electricity have been privatised.

3. Decentralisation, devolution, subsidiarity

Other important measures to reduce a state's burden are decentralisation, devolution and subsidiarity. Local authorities, for example, took over public bus services from the government. This went from federal to local level! There is a lot of competition and participation in many public sectors along with state control under the law, instead of administration of these services by the government itself.

4. Awakening the individual?

More and more people understand that their own participation in sharing the costs of social services is required. This is true in particular in the field of medical care. Cost reductions that come through increasing the participation of the individual indeed improves the understanding and sense of responsibility of the individual.

The above mentioned examples of privatisation, devolution and decentralisation, seem to be well known in other industrialised countries. But there is a fresh example of privatisation, the details of which may not be familiar to everyone. In fact one of the most thrilling and very costly examples of large-scale privatisation was initiated and necessitated by the unification of Germany. Indeed all experts overestimated the economic capability of the former German Democratic Republic as one of the strongest partners of Comecon. One thought the productivity might be half the productivity of West Germany. In fact, it was more or less a quarter. So, in geographical terms, the former German Democratic Republic

paralleled Bavaria, in demographic terms the State of Northrhine Westfalia (18 million people) and in economic strength the capacity of a medium-size state like Hessen. To raise the economy of the eastern part of Germany, has cost the tax payer more than DM150bn a year since 1990.

The economy of the German Democratic Republic of course was a centrally administered one. The industry was statal, societal, and only to a very small extent private. By law the Federal Republic set up a 'national trust fund' (Treuhand) to sell the heritage of the German Democratic Republic. This was some 10,000 enterprises, 200 of them being big trusts like coal, iron, wismuth and electricity production. These enterprises have been sold, while some 600 businesses are still up for sale. The deficit resulting from this privatisation is more than DM400bn.

As to the extent of desirable privatisation, one should recognise that we have no theory that limits how far nations should go down the road of privatisation and what remaining services a government should produce: no ideology, no constitutional provision. It is finally the decision of parliament and the will of the people who decide on the extent of state responsibility.

III. REDUCED LEGISLATION FEWER LAWS ARE BETTER THAN MANY LAWS

The second meaning of deregulation is to decrease the number of laws, softening the network of governmental regulation. Fewer laws are better than many laws! What is at stake the reduction of governmental interest and intense control in private business.

1. Carter, Reagan, Thatcher and companions

It was the United States which, starting with Carter, and then from 1981, at full speed with Reagan, started deregulation.

2. Aviation, energy, shipping

The federal government eliminated or substantially reduced price regulation of and entry to the following industries:

Domestic aviation, trucking, railways, interstate buses, shipping, long distance communication, energy, financial services. The advantages were astonishing. In aviation the number of cities served has increased by 55 per cent, 140 additional airports have been established, 90 per cent of consumers use discount fares. The benefits to travellers amount to \$11bn, for airlines \$4bn.

In trucking, the number of carriers doubled. In the railway sector ton-miles per employee increased by 44 per cent. There are increasing investments in new tracks and equipment. In long distance communications more than 200 firms were breaking up AT&T's commanding position. In the financial sector, commercial and savings banks have increased significantly. Of course one knows of disadvantages as well. Several airlines and trucking firms went bankrupt, finding that they were unable to be competitive under their prior labour contracts. And one knows about the problems of deposit insurance of banks

There are, however, five essential political lessons from the American experience with deregulation:

a. Deregulation was politically possible and, on occasion, even politically fashionable, despite the forceful opposition of some interests

b. Deregulation generated substantial benefits for consumers and substantial opportunities for new firms

c. Deregulation undermined the wage structures of some unions and the easy life of managers in the previously regulated firms.

d. Deregulation led to a substantial increase in productivity in the affected industries and contributed to a general increase in productivity. In the economy the benefits were much larger than the losses.

e. However, at least in the United States, substantial deregulation can be achieved only by changing the basic regulatory legislation.

3. The German example

Deregulation in the German economy is under way, not through anti-trust legislation, but in the administrative sector like in building houses, road planning, infrastructure operations and management and applying for subsidies. In the tax law, in the law of ecology, in special areas like biotechnology. A new field of deregulation widens in the area of labour conditions. For instance working hours and shop opening and closing times are absurdly over-regulated in the country. This is under increasing attack and appears as though it will be altered in the near future.

4. *Ex post* control instead of *ex ante* control

Deregulation could cover other measures. In fact legislation could be substituted by delegated legislation. Laws as enacted by parliament are predominant and provide protection for the individual before the courts. But delegated legislation adapts more easily to new circumstances: it is not such heavy law. Sometimes law as a measure of *ex ante* control may be substituted by *ex post* control, for example via the auditor general, looking for rationality, efficiency and effectiveness, and proportionality of the administration within a budget.

Less law might mean a strengthening of self-regulation with the autonomous legislation of universities (bylaws), chambers of trade, commerce, industries, doctors and lawyers. And reducing the number of laws might mean relying more on the self-binding norms of administrative bodies (administrative statutes), codes of conduct of the administration, which lay down the regulations of fair procedure and apply the equality principle.

IV. IMPROVING THE LEGISLATIVE PRODUCT: BETTER LAWS ARE PREFERABLE TO BAD LAWS

Deregulation in a third sense may mean improving the quality of norms: better laws are preferable to bad ones. Instead of 're-finishing' the law, we need a 'de-finishing' of the law. Instead of detailing too much we need to encourage ourselves to generalise the norms.

1. Legislative techniques

The legislator may be encouraged to enact laws with more indeterminate legal terms. Rules which leave the final discretion to the administration. Let's give more credit to good administrators!

Another good instrument is to enlarge the flexibility of our budgets. Instead of the detail of the penny, one might have cover clauses to allow administrations to cover personal costs of materials and may introduce transfer clauses which allow surpluses to be carried over to the following year.

It is important to improve the quality of the laws. For instance one might prefer comprehensive codes instead of numerous special laws like in the labour laws, social assistance law and ecology law fields. One might reconsider the measures of sunset and sunrise legislation.

It is important to test and evaluate laws before they are enacted, having the evaluations of judges, advocates and professors. Consolidation of the law is important. In some states, consolidation procedures resulted in the wiping out of one-third of outdated laws.

2. Economy of the law

One important factor in making good and better laws is to calculate the effects of legislation on economy. The economic cost of legislation for enterprises have really never been calculated properly. In fact, one of the first activities of Reagan's administration was to properly evaluate the costs of legislation for the economy. Margaret Thatcher followed, after having taken her decision not from the green table but after consultation with business people.

The costs of legislation for the economy have to be calculated in four sectors: fiscal consequences, costs for enterprises, costs for branches of trade and industry, costs for the national economy.

As far as fiscal consequences are concerned legislation could mean a rise in budget incomes but alternatively, it could just as well mean a short fall in receivables. Certainly legislation means additional costs of administration.

Legislation always has an impact on the budgets of enterprises and this is visible in balances, in profit and in debits. These costs have to be calculated in legislation.

Legislation also has an impact on sectors and branches of industry. Think only of the costs to chemical industries of meeting the necessities of ecological rules.

And, finally, legislation has an impact on the national economy which has to be foreseen. There are external costs and effects of legislation. It is difficult to estimate them quantitatively. Mostly they are indicated qualitatively, descriptively. There are opportunity costs like the costs of product liability legislation, insurance cost legislation, costs of labour protection against dismissal, costs of social insurance and so on.

3. Check lists

These days, in many countries testing the law prior to adopting it means to apply check lists. Before legislating the drafter has to answer some important questions, like:

Is governmental action required at all? Do we really need a law?

What is the necessary scope of legislative regulation?

Do we need a law for eternity or sunset legislation to expire after a given time?

What about the language. A law for everybody or for the 'brotherhood of specialists'?

Is the law practical?

What about cost effectiveness calculations?

What are the budget consequences?

How do you control the effective application of the law?

Does the law do what it is expected to do?

4. Proliferation of law

Finally, improving the legal framework of society and its economy means to combat proliferation of the law. The European Union, for example, between 1980 and 1990 enacted more than 5000 ordinances and directives. Some of them are 'short distance sprinters' like in agriculture. Nevertheless, they are laws which have to be obeyed. The *Federal Gazette* of Germany covers more than 3000 pages a year, the state gazettes some thousand pages, and local authorities enact some more hundreds of norms. Who can know the law? Who can obey the law?

There are lots of reasons for the flood of laws. Some of them, of course, are based on the complexity of modern life. Some reasons are in the legal system. In particular, the role of the courts has to be taken in account. Courts need laws to apply and more and more people go to the courts.

And there are new fields of law like consumer protection, ecology, data protection and so on.

The consequences of the proliferation of laws are severe, in particular for small and medium-sized firms. Not every enterprise can employ a lawyer. Laws are barriers to competition and bring about bureaucratisation.

V. AFTER WAKE UP: REASON AND/OR EMPIRICAL EXERCISE

We have a dream to return to simple and transparent laws. But this is an illusion. There is no way back to the order of the Ten Commandments. There is no way back to the simple, easy to understand, law of the past. We have to face the facts. We are not entitled to disembark.

Legislation is a prognostic business. Foresight, however, is a touchy task. As Mark Twain put it: prognosis is difficult, in particular if it affects the future. Foresight might sometimes be the bluff of policy. One might wonder, for example, whether there are people who can claim to have foreseen in 1985 or so which social changes have come to pass in the nineties in East Europe and Russia.

In trying to improve legislation the legislators and draftsmen should work in close contact with the addressees, the people in the field. This sort of necessary 'adhesion to the ground' seems to be missing with some legislators. It is, however, an indispensable element of legislation

The best therapy for insufficient legislation may be to obey strictly the maxim of the Founding Fathers of the American constitution: "Let us be guided by experience, because reason might mislead us."