Special Issue
Democracy and Financial Order—Legal Perspectives

Introduction: Democracy and Financial Order—Legal Perspectives

By Matthias Goldmann & Silvia Steininger[*]

This special issue assembles eight articles on the relationship between democracy and the financial order from various legal perspectives. Each contribution adopts a unique perspective on the legal and political challenges brought to the fore by the Global Financial Crisis. This crisis and the ensuing sovereign debt crisis in Europe are only the latest in a long series of financial crises in the last decades all over the world. By their very existence, but also by the political turmoil they have created, these financial crises testify to the well-known tensions between democracy and a market-based economic and financial order.

To explain these tensions, two basic positions emerge: On one hand, some fear that the interests of the market will harm democracy. The accumulation of capital will not remain without political repercussions. Rather, if economic power is concentrated in the hands of few people, it might equip that minority with disproportionate political clout. The result might be policies favoring the interests of the wealthy at the expense of the democratic majority, endangering equality and social rights. On the other hand, there is the belief that democratic decision-making may undermine the economy. Majority votes might not lead to the adoption of economically efficient or sustainable solutions. It might entice popular policies that are beneficial only in the short term, not in the long term. At worst, majority voting might lead to policies that cater to the special interests of whichever group happens to be in power, to the detriment of the common interest. Naturally, these arguments appear in as many varieties as there are varieties of capitalism and democracy.

Yet, there is one factor that remains largely ignored in these debates—law. Only a few studies put the concept of law center stage.[1] This is quite surprising. Both theories of democracy and political economy regularly assign a central role to law. Law is the conveyor of the popular will and keeps it in check at the same time. Law delineates the spheres of freedom of different economic actors, establishes the institutions that keep the economy

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[1] Most notably, *see* Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315 (2013).

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running, and entrenches private economic interests against state intervention. Our surprise derives from the fact that the concept of law is all but uncontroversial in legal theory.

This special issue attempts to fill this lacuna. It focuses on the controversy surrounding the concept of law, thereby adding another variable to the debate about the relation between democracy and capitalism. Each article engages with the concept of law from a particular theoretical angle, be it a full-grown legal theory or an approach in political economy that has a particular view of the law. We have arranged the special issue in order to reflect certain debates. Thus, the special issue begins with a debate between two contemporary German theories of law by Jürgen Habermas *(Goldmann and Steininger)* and Niklas Luhmann (*Viellechner)*. Next is a transatlantic debate between rational choice conceptions of law *(Towfigh)* and ideas of constitutional pluralism *(Avbelj)*. Different traditions of mostly Anglo-Saxon liberalism are reflected in the contribution by *Suttle*. Eventually, three contributions engage with conceptions of law in neoliberalism and ordoliberalism and the way they have shaped our perceptions of public finance, including budgetary rules, taxes, and money (*Biebricher, Saffie, Feichtner)*. Of course, this list by no means reflects the entire spectrum of available legal theories, but rather attempts to strike a balance between a plurality of approaches and the need to keep the project manageable. Notable lacunae therefore exist, for example French poststructuralism or developmental perspectives.

To connect theory with life, each contribution elaborates its salient theoretical points by using an example of a particular case study or issue area that faces challenges in the aftermath of the financial crisis. Thus, while all articles address the law's capacity to accommodate both democracy and capitalism, each individually contributes to the development of law and policy in a particular issue area. Topics range from sovereign debt issues *(Goldmann and Steininger, Viellechner, Suttle*) to budgetary restrictions *(Biebricher)*, banking regulation *(Avbelj)*, money and the ECB *(Towfigh and Feichtner)*, and taxes *(Saffie)*.

The selected articles do not account for universality. The authors neither claim to present the most fitting theory nor to provide an all-encompassing analysis of the financial order; instead, each author aims to scrutinize the currently accepted ideas on the relationship between democracy and capitalism. They generally argue that the current frameworks are not without alternatives and prompt us to rethink and reimagine the relationship between democracy and a market-based financial order along the lines of their chosen approach. In this respect, the articles composing this special issue highlight the imperative of legal scholarship to go beyond the black letter of the legal measures adopted in the aftermath of a financial crisis and theorize about them with an awareness of the tensions between democracy and capitalism.

Specifically, *Matthias Goldmann and Silvia Steininger* argue that Habermas' theory of social integration assigns certain properties to the law, such as centralized governmental

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enforcement, a distinction between law-making and law-application, and a definition of the public as opposed to the private. Current sovereign debt restructuring practice calls each of these properties into question. The article shows that a contemporary conceptualization of international public authority, a democratization of international courts and tribunals, and the development of legitimate articulations of public interest that accounts for the different sides of emerging transnational cleavages might vindicate the discourse theoretical version of the relationship between democracy and capitalism.

In contrast, *Lars Viellechner* adopts a systems theoretical perspective on the Eurozone debt crisis. He finds that the current sovereign debt restructuring framework challenges and partly contradicts Luhmann's description of the performance, the relevance, and the function of law. Apart from explaining the limits of law in dealing with sovereign debt crises, a systems theoretical perspective also highlights the potential of the politicization, contestation, and debate surrounding the crisis for improving the legitimacy of European integration.

By applying insights of rational choice, *Emanuel Towfigh* claims—in opposition to theories like those by Habermas and Rawls—that actors in a democracy behave according to an economic logic. He argues that the discussion about a conflict between democracy and the economy is therefore misleading; it is the primarily economic structure of democratic decision-making itself which puts the economy at risk. The economic interests of democratic actors endanger financial stability and economic welfare. To remedy these institutional flaws, Towfigh looks to independent, expert-driven institutions such as the ECB.

Matej Avbelj analyzes the European banking union from the perspective of constitutional pluralism. While this approach has been extraordinarily successful in making sense of European integration in the last decades, it is hard-pressed to accommodate the complex and rapidly developing framework of EU banking supervision. EU banking supervision features a plurality of regimes, constituencies, regulatory levels, and institutions—and it often acts on a sub-constitutional level. With this in mind, Avbelj proposes thinking of the banking union in terms of administrative pluralism to describe, explain, and normatively guide the current, multilevel framework.

Oisin Suttle juxtaposes two varieties of liberalism: (1) a Humean, contextual one which dominates debates about domestic private debt, with (2) a Lockean, decontextualized one which permeates discourse about sovereign debt. He argues that the difference cannot be reconciled in terms of a coherent account of global justice. Instead, he advocates adopting a Humean approach to sovereign debt restructuring and elaborates the consequences of this approach for the duties of debtors and creditors.

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Neoliberalism is undeniably the most prominent and controversial theoretical approach. *Thomas Biebricher* opens the debate on neoliberalism by providing an extensive account on the development of neoliberal thought and practice. He analyzes the role of juridical neoliberalism; in other words, he looks at how judicial norms contribute to the success of neoliberal economic activities. Paradigmatic for this debate is Buchanan's idea of a balanced-budget amendment, which finds its real life counterpart in the European fiscal compact. *Francisco Saffie Gatica* and *Isabel Feichtner* analyze how current law and practice in various jurisdictions is framed by neoliberal ideas of taxation (Saffie) and ordoliberal ideas of money (Feichter). Saffie, in an analysis based on the work of Wolfgang Streeck and Colin Crouch, shows how neoliberalism has decoupled the idea of taxation from notions of solidarity. He is skeptical about the potential of the OECD's 2015 recommendations on Base Erosion and Profit Sharing to remedy this problem. Feichtner explores how the ordoliberal idea of money prevalent in the European Monetary Union has been called in question by the European sovereign debt crisis, especially by the ECB's Outright Monetary Transactions Program and the court decisions it entailed. She shows the contingency of this debate by contrasting it with the alternative theory of money devised by Abba Lerner.

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