

Kolloquium “Law and Finance”

Schwerpunktbereiche 1, 2 und 3
LL.M. in Legal Theory, Module E5

SS 2020

Juniorprofessor Dr. Matthias Goldmann, LL.M. (NYU)

Syllabus and Reading List

Course time: Wednesdays from 15h c.t. -18h on the following dates:

~~15 April~~, 22 April, 29 April, 13 May, 20 May, 27 May, 3 June, 10 June, 24 June, 1 July.

The course will start on 22 April due to the time required for Goethe University for providing online teaching facilities.

Room: Via Zoom until further notice.

Enrolment: Please drop an email to Benjamin Arens (arens@hof.uni-frankfurt.de) to enrol and get access to Zoom. You may also enrol via OLAT, but please write to Benjamin in any case.

In addition, students wishing to take this course for credit towards their “Schwerpunktbereich” as part of the Staatsexamen need to enrol with the exam office (Prüfungsamt) via QIS.

Learning goals and competencies:

- Familiarize students with key concepts in economics and finance, as well as with leading cases in the field;
- Develop a profound understanding of the role of the law and the state for the financial sector, and the role of economic knowledge in the law. This will be a truly interdisciplinary experience;
- Engage with crucial contemporary challenges like social equality, or the digitalization of the financial sector (including blockchain technology);
- Learn to critically engage with state-of-the-art research at the intersection of law and finance;
- Learn to write reaction papers, i.e. short, critical comments on readings or case notes. This is a key competence for lawyers. Each reaction paper is individually marked;
- Learn to develop own research questions.

Module description:

The objective of the Kolloquium/Module is for students to acquire a profound understanding of the multiple, intricate relationships between the law and the financial sector, how they mutually shape each other, and how our understanding changed over time. Each session is divided into three parts and requires the preparation of two texts. The first part of each session consists in an introduction into a certain stage of the evolution of the world economy. The sequence of these stages follow a chronological order. This part serves to familiarize students with key economic concepts. The second part consist in a discussion of a theoretical text prepared by the students, which gives an idea about the understanding of law emerging in reaction to this stage of economic evolution. The theoretical texts will introduce participants to important strands of past and contemporary research on the role of law in the economy. Authors include Max Weber, Karl Polanyi, Friedrich Hayek, the law & economics literature, Jürgen Habermas, and recent scholarship related to the financial crisis. In the third part, students discuss a case, the second text prepared for the session, which reflects, or contrasts

with, the concept of law discussed in the second part. These cases address various aspects of the financial sector, including sovereign debt litigation, investment law, as well as monetary and regulatory issues from Europe and beyond. Where the reading list proposes more than one case, students can choose which one they would like to read.

The introductory session on 22 April 2020 will provide an overview of the subjects to be covered and train students in writing a reaction paper. The introductory reading by Desautels-Stein is recommended as a preparatory reading for this class. The text will be circulated to those enrolled in the class.

Course requirements:

Interest in and/or basic knowledge of questions of finance, law and society.

Grade requirements:

Students have to write two reaction papers that engage critically with one of the mandatory readings of the course, i.e. either a theoretical text or a court decision. Each reaction paper may comprise between 1,500 and 2,500 words and may be written in English, German, French, Italian, or Spanish. Reaction papers have to be sent to goldmann@jur.uni-frankfurt.de by the date and time indicated for each session below. The reaction papers will be assigned to students based on their preferences as indicated in a doodle poll after the first class. In addition, active class participation is required. This includes doing the readings on a regular basis. The mandatory readings were selected with a view to keeping the amount of time necessary for their preparation within reasonable limits. Skipping the readings for one class will create difficulties in subsequent classes, as students will find it difficult to draw comparisons and identify differences.

Course Program (as of 8 April 2020)

22 APRIL 2020 - CLASS NO. 1 – THE ROLE OF LAW IN FINANCIAL CAPITALISM

Course Introduction

Purpose and overview of the Kolloquium/Module
How to write a reaction paper?

Part 1: Finance and Economics

Key concepts: Money, Capitalism, Banking

Part 2: Legal Theory

Classical (legal) liberalism and its critics: Locke, Smith, Kant, Rousseau, Marx (no text)

Background reading (not compulsory):

Justin Desautels-Stein, “The market as a legal concept: classical liberalism, modern liberalism, pragmatic liberalism”, in U. Mattei and J. D. Haskell (eds.), *Research Handbook on Political Economy and Law* (Elgar 2015) 29-43.

29 APRIL 2020 – CLASS NO. 2 – INDUSTRIALIZATION AND LEGAL RATIONALITY

Reaction paper deadline: 29 April 2020, 9am

Part 1: Finance and Economics

History: Industrialization, war economics. Theory: inflation crises.

Part 2: Legal Theory

Max Weber, *Economy and Society* (1922):
vol. 1, pp. 212-223, 311-315; vol. 2, 654-658, 775-776, 784-788, 880-892.

Part 3: Case

RGZ 103, 328 (German), English translation: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=954>.

Background readings:

Max Weber, *Economy and Society* (1922):
vol. 2, 729-731, 789-791, 892-895.
Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (1904-1905), ch. 5.
Emile Durkheim, *The Division of Labour in Society* (1893), extracts.

13 MAY 2020 – CLASS NO. 3 – EARLY 20 TH CENTURY CRISES: DISEMBEDDED LAW
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Reaction paper deadline: 12 May 2020, 3pm

Part 1: Finance and Economics

History: The Great Depression. Theory: Asset crises.

Part 2: Legal Theory

Karl Polanyi, *The Great Transformation* (1944):
Ch. 1 and 2 (pp. 3-32), Ch. 11 (136-140).

Part 3: Case

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, available at <https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>, only the following sections (pages): Sec. I (pp. 1-6), ch. V.1 (p. 99), Sec. V.3.C (pp. 132-154), Sec. V.4.C.(1) (only para. 586 on p. 174 and para. 602 on p. 178), Sec. V.4.C.(2)(a)-(c) (p. 180-186).

Background readings:

Karl Polanyi, *The Great Transformation* (1944): Ch. 5 (59-70), Ch. 10 (116-135).
John Maynard Keynes, *The end of laissez-faire* (1926)
<https://www.panarchy.org/keynes/laissezfaire.1926.html>.
Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 38 *Political Science Quarterly* (1923) 470-494.
Poul F. Kjær, "From the Crisis of Corporatism to the Crisis of Governance", in Poul F. Kjær and Niklas Olsen (ed.), *Critical Theories of Crisis in Europe: From Weimar to the Euro* (Rowman & Littlefield International, 2016) 125-139.

20 MAY 2020 – CLASS NO. 4 – THE WELFARE STATE AND SOCIAL JUSTICE
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Reaction paper deadline: 19 May 2020, 3pm

Part 1: Finance and Economics

History: Postwar order, Bretton Woods, "trente glorieuse". Theory: The Welfare State.

Part 2: Legal Theory

Samuel Moyn, *Not Enough. Human Rights in an Unequal World* (2018): Introduction (pp. 11-11) and Ch. 2 (pp. 41-67)

Part 3: Cases

European Court of Human Rights, *Koufaki and Adedy v. Greece*, App. Nos. 57665/12 and 57657/12, Decision of 7 May 2013.

ECJ, Case C-8/15 P et al., *Ledra*, ECLI:EU:C:2016:701, judgment of 20 September 2016.

ICSID, *Urbaser S.A. et al. v. Argentina*, Case No. ARB/07/26, Award of 8 December 2016, https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

Background readings:

Samuel Moyn, *Not Enough. Human Rights in an Unequal World* (2018): Chapters 1 and 3.

Juan Pablo Bohoslavsky, "Economic Inequality, Debt Crises and Human Rights", 41 *Yale J. of International Law Online* (2016).

Brinks, Daniel, Julia Dehm and Karen Engle, "Introduction: Human Rights and Economic Inequality", 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2019) 363-375.

Slaughter, Joseph R., "Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World" 40 *Human Rights Quarterly* 735.

Matthias Goldmann, "Contesting Austerity: Genealogies of Human Rights Discourse" (March 26, 2020).

Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-09, <http://dx.doi.org/10.2139/ssrn.3561660>.

27 MAY 2020 – CLASS NO. 5 – NEOLIBERALISM AND THE LAW

Reaction paper deadline: 26 May 2020, 3pm

Part 1: Finance and Economics

History: The crisis of the 1970s. Theory: sovereign debt crises, deflation.

Part 2: Legal Theory

F.A. von Hayek, *Law, Legislation and Liberty* (1973), vol. 1, ch. 1 ("Reason and Evolution").

Part 3: Cases

NML Capital, Ltd. v. Republic of Argentina, United States Court of Appeals, 2d Circuit, October 26, 2012 (699 F.3d 246).

Bundesverfassungsgericht, Order of 8 May 2007 - 2 BvM 1/03, BVerfGE 118, 124 (134-146) (available in D and E).

Background readings:

Friedrich A. von Hayek, *The road to serfdom* (1944).

Thomas Biebricher, "Neoliberalism and Law: The Case of the Balanced Budget Amendment" 17 *German Law Journal* (2016) 835.

Quinn Slobodian, *Globalists: The end of empire and the birth of neoliberalism* (Harvard University Press, 2018).

B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making", 15 *European Journal of International Law* (2004) 1-37.

Anna Gelpern, "Sovereign Debt: Now What?" 41 *Yale Journal of International Law Online* (2016) 45.

3 JUNE 2020 – CLASS NO. 6 – GLOBALIZATION, LAW & ECONOMICS AND ITS LIMITS

Reaction paper deadline: 2 June 2020, 3pm

Part 1: Finance and Economics

Globalization, the “Great Moderation”, Deregulation

Part 2: Legal Theory

Gary Becker, *The Economic Way of Looking at Life*, Nobel Lecture (1992).

Part 3: Cases

SEC v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir. 1996);

Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, available at <https://www.italaw.com/sites/default/files/case-documents/italaw4238.pdf>, parts I. (p. 5), III. (pp. 13-25), and V.1.b (only pp. 85-106).

Background readings:

Richard A. Posner, “Utilitarianism, Economics, and Legal Theory”, 8 *The Journal of Legal Studies* (1979) 103-140.

Chris Brummer, "Why soft law dominates international finance – and not trade", 13 *J Int'l Econ L* (2010) 623-43.

La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer and Robert W. Vishny, “Law and Finance”, 106 *Journal of Political Economy* (1998) 1113-1155.

Michael J. Sandel, “What Money Can’t Buy: The Moral Limits of Markets”, Tanner Lectures on Human Values, 1998.

Michel Foucault, “Governmentality”, in *The Foucault Effect* (Graham Burchell et al. eds.), 87-104 (1991).

Miller, Geoffrey P. and Gerald Rosenfeld, "Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008", 33 *Harvard J. of Law and Policy* (2008) 807-840.

10 JUNE 2020 – CLASS NO. 7 – THE GLOBAL FINANCIAL CRISIS AND THE CODE OF CAPITAL

Reaction paper deadline: 9 June 2020, 3pm

Part 1: Finance and Economics

History: The Global Financial Crisis. Theory: Banking crises.

Part 2: Legal Theory

Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019), pp. 1-22 (ch. 1), 158-182 (ch. 2).

Part 3: Case

ECJ, Case C-370/12 *Pringle*, ECLI:EU:C:2012:756, judgment of 27 November 2012.

Background reading:

Thomas Piketty, *Capital in the 21st Century* (2014), Introduction, pp. 1-35, Ch. 5 (The Capital/Income Ratio over the Long Run, incl. the Second Law of Capitalism)

Pistor, Katharina, "Towards a Legal Theory of Finance", *Columbia Public Law Research Paper* (2012), No. 12-323.

Lang, Andrew T. F., "The Legal Construction of Economic Rationalities?", 40 *Journal of Law and Society* (2013) 155-171.

Minsky, Hyman P., “The Financial Instability Hypothesis”, *Levy Economics Institute Working Paper* No 74 (1992).

Reaction paper deadline: 23 June 2020, 3pm

Part 1: Finance and Economics

History: The Tragedy of the Eurozone. From banking crisis to sovereign debt crisis to the Banking Union

Part 2: Legal Theory

Jürgen Habermas, “The Lure of Technocracy: A Plea for European Solidarity”, in id., *The Lure of Technocracy* (2015) 3-28.

Part 3: Case

ECJ, Case C-62/14, *Gauweiler et al.*, Judgment of 16 June 2015.

Background reading:

Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Repr. edn., Polity Press, Cambridge 2008), chapter 1.

Amartya K. Sen, *The Idea of Justice* (Harvard University Press, Cambridge, MA 2009), 355 et seq.

Wolfgang Streeck, "The Rise of the European Consolidation State", *MPIfG Discussion Paper 15/1* (2015), Cologne.

Matthias Goldmann and Silvia Steininger, "A Discourse Theoretical Approach to Sovereign Debt Restructuring: Towards a Democratic Financial Order", *17 German Law Journal* (2016) 709-746.

Reaction paper deadline: 30 June 2020, 3pm

Part 1: Finance and Economics

Digitalization in the Financial Sector

Part 2: Legal Theory

Vlad Zamfir, *Against Szabo's Law, For A New Crypto Legal System*, 26 January 2019,

<https://medium.com/cryptolawreview/against-szabos-law-for-a-new-crypto-legal-system-d00d0f3d3827>

Part 3: Case

ECJ, Case C-264/14, *Skatteverket*, ECLI:EU:C:2015:718, judgment of 22 October 2015.

Libra Association, *An Introduction to Libra* (2019), https://libra.org/en-US/wp-content/uploads/sites/23/2019/06/LibraWhitePaper_en_US.pdf.

Background reading:

Nick Szabo, *Money, Blockchains, and Social Scalability*, 9 February 2017, <https://nakamotoinstitute.org/money-blockchains-and-social-scalability/>

Aaron Wright and Primavera De Filippi, “Decentralized Blockchain Technology and the Rise of Lex Cryptographia” (March 10, 2015). Available at SSRN: <https://ssrn.com/abstract=2580664>

Yanis Varoufakis, “Bitcoin and the dangerous fantasy of ‘apolitical’ money”, 22 April 2013, <https://www.yanisvaroufakis.eu/2013/04/22/bitcoin-and-the-dangerous-fantasy-of-apolitical-money/>.

Bjerg, Ole, “How is Bitcoin Money?”, 33 *Theory, Culture & Society* (2016) 53-72.

Finck, Michèle, *Blockchain Regulation* (August 7, 2017). *German Law Journal*, 2018, Forthcoming; Max Planck Institute for Innovation & Competition Research Paper No. 17-13 . Available at SSRN: <https://ssrn.com/abstract=3014641>.