

Katharina Pistor's *The Code of Capital: How the Law Creates Wealth and Inequality*

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The Editorial Board of *Social & Legal Studies* is pleased to present this Dialogue & Debate which features Katharina Pistor's fascinating new book, *The Code of Capital*.¹ We thank our contributors – Marco Goldoni, Iagê Miola, Anna Chadwick, and Sol Picciotto – for their insightful engagements with the book. We also wish to express our particular gratitude to Katharina Pistor for agreeing to contribute a rejoinder to the Dialogue & Debate, and for her support of the initiative.

On the Constitutive Performativity of the Law of Capital

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There is something truly insightful about *The Code of Capital*. This is not only because throughout it the analysis is underpinned by the observation that the vast majority of accounts of the birth and development of capital(ism) have been oblivious – or at best superficially aware – of its legal fabric. Either the law has been reduced to an instrument for pursuing economic ends, as it happens in many instances within the Law & Economics movement, or it has been described as an epiphenomenon overdetermined by economic rationality according to many materialist explanations. Instead, Pistor's account illuminates how law literally makes capital. In order to prove this startling claim, Pistor's first move is to disentangle the concept of capital from those conceptions that represent it either as the dialectic (riddled by contradictions) between factors

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of production on one hand, and the idea that capital is a process of progressive commodification of everything human and non-human, on the other hand. It should be quickly added that she does not deny that commodification actually happens in the creation of capital (and law is obviously involved in that). The problem is that commodification is far from sufficient to explain how capital produces wealth. In other words, capital cannot be defined only on the basis of the formation and circulation of commodities. There is a *quid* to it that the process of commodification cannot account for. Capital is not only wealth extracted from social relations and maintained through competitive markets. There has to be another ingredient to be added to the mix for bringing capital to life. And this ingredient is provided by the operations of law. For these reasons, from a methodological perspective, we are invited 'to shift the attention from class identity and class struggle to the question of who has access to and control over the legal code and its masters: the landed elites; the long-distance traders and merchant banks; the shareholders of corporations that own production facilities or simply hold assets behind a corporate veil' (Pistor, 2019: 8). Instead, the suggestion is to look at how law encodes capital by putting some assets on 'legal steroids' (Pistor, 2019: 11). This is an interesting starting point, as it allows Pistor to avoid the thorny and ambiguous language of value and to focus on a more clearly defined field identified by formal legal operations. An object (it seems *any* object) is potentially an asset that can be transformed into a source of wealth by a process of legal coding. Hence, law operates as the 'magic' factor in transforming assets into wealth. Accordingly, to grasp how capital is generated it is necessary to understand this legal technique of transformation through assemblage.

As is examined in several chapters of the book, this is a technique offered by a specific body of professionals who, through the mastery of a technical language, bestow four legal attributes on an asset and, in this way, bootstrap wealth into existence. Pistor distils the most fundamental legal components of capital and explains the nature of their peculiar function. The identification of these four attributes and their application to different case studies is one of the most important achievements of this book. The legal coding assembles these attributes with a view to obtaining a number of effects on assets. These attributes are mostly managed by what traditionally have been private law modules: property law, contract law, trust, intellectual property, the law of securities and bankruptcy law, though the shadow of the State always looms large behind this set of legal categories. Still, given the creativity of law, there is nothing exhaustive in the list of private law tools for the making of capital.

Looking at the four attributes illuminates important aspects of capital. The first two attributes are priority and universality. Priority applies to the hierarchy of claims over an asset. It shows two essential aspects of capital: first, the fact that it is fundamentally a relation of credit/debt, and, secondly, that the privilege and priority of some creditor over others is its essential component. Universality makes sure that these claims will be valid *erga omnes*. Universality shows another crucial feature of capital: it cannot materialize if there is no third party to ensure that priority claims can be enforced against everyone else. To avoid any misunderstanding: the notion of the third here does not define the legal nature of an institution. It rather ensures that what is already a legal institution becomes also part of the code

of capital. However, priority and universality by themselves are not enough to generate capital. While priority and universality would be sufficient to commodify goods, for Pistor, they do not yet engender capitalism in its full modality. The other two legal attributes of durability and convertibility have to be inserted in the picture. The former ensures that priority is protected over time from too many creditors, while the latter gives access to legal tender, ensuring a link with an asset (state currency) whose nominal value is not subject to fluctuation.

One of the most original theses of the book is that the history of capitalism is one constant deployment of these four attributes in different combinations. Such an approach provides a powerful angle of observation to Pistor, as she can basically reconstruct the development of modern capitalism according to this interpretative scheme. The deep legal structure of capital is therefore the same throughout its various stages, and this is more fundamental than, for example, changes in the modes and relations of production. In a nutshell, capital is legally characterized by the entrenchment of privileges (Pistor calls it the ‘feudal calculus’).

Nonetheless, Pistor is also clear in stating that there are differences between capital as it is shaped in the middle ages, in the industrial age and in the time of financialisation. At this level, an interesting argument can be inferred from the numerous case studies analyzed in the book. Although Pistor does not mention it explicitly, two aspects explain why certain assets acquire or lose value in different epochs. The first one is that the coding of certain assets make possible the emergence of new forms of wealth. A classic case is the rise of the corporation over land ownership as the main source of value. The second aspect is that each epoch of capitalism can be seen as the outcome of a different mix of the four modules. For example, ‘for financial assets, convertibility is more important than durability, indeed, it is an effective substitute’ (Pistor, 2019: 15). Other epochs have seen a different amalgamation of these four modules and this has also changed the understanding of the private law institutions employed for obtaining the right mix. The point forcefully made by Pistor is that different forms of capitalism might have been related to various and changing types of social relations, but the qualifying element has always been the mix of the four legal attributes. It is no surprise, then, that legal expertise is a major protagonist of this story. It is the lawyers of the merchants or the big law firms of financial capital that gave capital its form. They are the true masters of the code.

This reconstruction of the law of capital relies heavily on a certain conception of the legal order and its institutions. While Pistor has provided a healthy and valuable array of arguments for appreciating the importance of law in creating capital, it seems that a lot of work – perhaps, too much – is demanded of law. Two aspects of this demanding conception shall be outlined in what follows. The first maintains that the law is a constitutive and rather malleable instrument. Law as code comes across as a performative which can transform any asset into wealth by virtue of its own performance. The activity and expertise of lawyers are crucial for the performativity of law. One can spot remarkable parallels here with the work of the late Yan Thomas, historian of Roman law. Thomas noted that Roman law marks the autonomization of the legal order and of its specific performance: putting social relations into form through legal description. His intuition is that law is not the instrument in the hands of a previously constituted and naturalized owner (a classic representation

of Roman Law: see Schiavone, 2012), but a *ritual* which qualifies things and connects them to persons. Law is what makes things *res iuris*. Quite tellingly, Thomas expands on the idea that the word that denotes things (*res*) is the same that describes the legal procedure for settling conflicts. In Thomas' reading, law is a performative that names some things as economically valuable and others as outside the sphere of commerce. This original division allows certain things to become marketable. The division in itself is not based on a strict ontology, but it is the product of the legal technique par excellence: *fictio legis* (Thomas, 2011: 133–186). Thomas' lesson is that law can transform assets into appropriable and valuable things. It does not say much about the type of value and about the process of valorization undergirding it. This is the case because his interest lies more in the description of the operations of law than in understanding valorization.

Pistor's description of the performative virtues of the legal order echoes Thomas' reflections. An example can illustrate how far the performative operations of the law can reach. With a remark critical of those approaches that see capital fundamentally as a social relation, Pistor notes that even labor, 'with a little bit of engineering [. . .] can easily be turned into K (capital)' (Pistor, 2019: 11). The performative force of the law is displayed at its maximum power: 'many a freelancer, for example, has discovered that she can *capitalize* her labor by establishing a corporate entity, contributing her services to it in kind and taking out dividends as the corporation's shareholder in lieu of a salary' (Pistor, 2019: 11). Under this account, law can manipulate the factors of production and even reverse them. The description of the relevant social relation itself is a legal exercise.

The risk with this type of reconstruction is that the pendulum swings completely to the other side of the spectrum, where the law does all the work. Crucially, the performative thesis entails that social reality is created by law as a self-description of itself. There seems to be no social remainder beyond the legal description. This position also implies a certain degree of malleability of legal norms as well. Their assemblage and re-combination are feasible because they are just forms, relatively unconstrained by the social context. Hence, the formal legal norms ought to be the main object of study. But, as in the example of labor, the legal norms that declare gig economy employees as self-employed might not be enough to make those 'workers' really autonomous; rather they seem to hide their *de facto* condition as wage workers (see Dukes, 2020; Prassl, 2018). The failure to couple the analysis of the relevant legal norms with social relations runs the risk of producing a disembodied type of legal analysis that misses out on the dynamics of the relevant social practices.²

The same problem surfaces in another important theoretical contribution made by Pistor, that is, the recovery and renewal of the important tradition of institutionalism. In cooperation with other authors (Deakin et al., 2017), Pistor has revived and updated the insights of institutionalist economists (see Commons, 1924). The recovery of this intellectual tradition has made the role of law even more pronounced. In fact, legal institutionalists have put forward a legal understanding of institutions like contract, marriage, property, the firm, and many others. This is particularly true, according to the institutionalists, of capitalist societies as they are based on social rules, and the vast majority of the latter are either created or sanctioned by law (Deakin et al., 2017: 189). Such a view

remains perfectly consistent with the one expounded in *The Code of Capital*. The constitutive view entails that given that certain institutions are the building blocks of capitalism and they are also legal formations, then the legal perspective has a privileged access to the reality of capitalism. Yet, in this way it is assumed that the legal nature of the institution makes legal rationality predominant within the sphere of action regulated by it. Accordingly, the best way to address distortions or abuses in the realm of the political economy is by manipulating and transforming the legal form. Given that the latter is constitutive, tweaking it will engender transformations of the relevant economic actions as well. It is clear that the message conveyed by this type of institutionalism is mostly directed to economists and political economists who have underestimated the function of law for a long time. However, the risk is, once again, that we move from a superficial and ineffective view of the law as an economic epiphenomenon to a perspective that sees social reality (in a capitalist society) constructed almost entirely by the codification and the assemblage of legal institutions. Such a move is based on a conception of the law that ultimately is not socially embedded. The problem arises because the institution is conceived as fundamentally made by a hierarchy of legal norms. While it is undeniable that institutions contain defining legal norms, their connection with social relations is also constitutive and cannot be ignored. Institutions are couplings or hybrids (but see Pistor, 2013, for an investigation of the hybridity of institutions): contract, for example, is both an economic and a legal institution. The logic of action shaped by the institution is not driven only by legal norms (though they clearly have an impact on it) but by economic expectations as well (Teubner, 2017: 325). While most of the rules of contract are formalized legally, the point of the practice of contracting cannot be fully described only from a formalist legal perspective. Hence, a change in the formal legal rules might ‘irritate’ the underlying logic of action of another subsystem, but it would not be enough to produce lasting and impactful effects.

Notes

1. Katharina Pistor (2019), *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton: Princeton University Press.
2. See the recent decision of the French Court of Cassation (March 4, 2020) on the status of an Uber driver, which follows a wave of other European courts on the same topic. The Court confirmed the decision of the Court of Appeal and stated that it is essential to focus, for determining the status of the worker, on a number of legal and factual aspects: ‘the relationship of legal subordination is characterized by the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches’ (paragraph 8).

References

- Commons J (1924) *The Legal Foundations of Capitalism*. New York, NY: MacMillan.
- Deakin S, Gindis D, Hodgson G, et al. (2017) Legal Institutionalism: capitalism and the constitutive role of law. *Journal of Comparative Economics* 45: 188–200.
- Dukes R (2020). Regulating Gigs. *Modern Law Review* 83: 217–228.
- Pistor K (2013). A legal theory of finance. *Journal of Comparative Economics* 41: 315–330.
- Pistor K (2019). *The Code of Capital*. Princeton, NJ: Princeton University Press.

- Prassl J (2018). *Humans as a Service*. Oxford: Oxford University Press.
- Schiavone A (2012). *The Invention of Law in the West*. Cambridge, MA: Harvard University Press.
- Teubner G (2017). Societal Constitutionalism: Nine Variations on a Theme by David Sciulli. In: Blokker Paul and Chris Thornhill (eds) *Sociological Constitutionalism*. Cambridge: Cambridge University Press, pp. 313–340.
- Thomas Y (2011). *Les opérations du droit*. Paris: Seuil.

(De)coding Capital in the Periphery

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As the numerous reviews published worldwide suggest, *The Code of Capital* can be considered a landmark for socio-legal scholars interested in the study of the imbrications between law and the economy. In this book Katharina Pistor provides a refreshing theory of the roles of law in capitalism, that is, in creating wealth and inequality. Pistor's approach resonates with the old institutionalists in how it places legal institutions as central to the functioning of capitalism. It nevertheless adds new flavor to the understanding that capital works through law, both in devising novel categories to conceptualize and explain *how* law is central, and by updating the analysis of capitalism empirically to the current period of financial domination. Pistor does that by taking seriously the power of legal reasoning and legal discourse in shaping power relations, thus avoiding the pitfalls of treating law as pure instrumentalization of power.

The book's main argument is radical in the way it explains the relationship between law and capitalism, as it locates law at the *roots* of capital – neither as an epiphenomenal element, nor as being unidirectionally conditioned by the economy. For Pistor, capital comes to existence and can reproduce itself only by a sort of alchemy performed by lawyers through which different assets – be it physical objects such as land and natural resources, or immaterial ones such as claims, skills and ideas – acquire special attributes in respect to other assets: priority, durability, convertibility and universality. Without these attributes, asset holders can hardly produce wealth from it, store this generated wealth over time, or convert it into state money and claim legitimate control over it against everyone else. Lawyers turn these attributes into assets by deploying what she defines as 'legal devices' or 'legal modules' (p. 3) – broadly speaking, legal institutions and ideas – available in private law: notably property rights, contract, collateral, trust, corporate, and bankruptcy law. These modules are combined and recombined by lawyers, enabling wealth to be privately accumulated and protected over time and against others.

Pistor's analysis thus opens up room for understanding wealth accumulation in capitalism – and thus inequality – not as the pure product of economic factors, but actually of institutions – legal ones, mostly – and how they are designed and deployed – by lawyers, mostly. More importantly, these attributes confer 'an exorbitant privilege' (p. 19) on capital *through* law, as capital holders enjoy 'a comparative advantage in accumulating wealth over others' (p. 4). Pistor thus reveals that a 'feudal calculus' is still 'alive and kicking' (p. 6) in modern law produced within democratic states, which means that some assets and their holders have certain privileges in respect to others – they will have priority, they will endure over time, they will be more easily converted into money and they will have such capacities against anyone else. Through the analysis of how different assets have been historically coded by law to gain these special attributes, Pistor's book provides evidence for the idea that although capitalism relies on the rhetoric of equality and merit that is pervasive of the modern legal grammar, it is actually a system of privileges instituted and perpetuated by law.

The power to inscribe such special attributes into certain assets is extremely concentrated. According to Pistor, coding takes place behind closed doors, in basically two regions of the planet – the City of London and Wall Street –, through the hands of elite lawyers – the 'masters of the code'. Pistor's depiction of how hermetic and insulated from public oversight is the circle of those who code capital certainly generates great anxiety for anyone interested in finding alternatives to counter this power, but it is no less real. The democratic promises of modern law are contradictory to its practice under capitalism, yet entangled with it. To adapt Bruno Latour's (1993) image to Pistor's diagnosis, we have never indeed been modern in how capitalism is legally structured.

The Code of Capital offers a theory of law's role for *global* capital. As such, it is arguably applicable to understand capital's relation to law globally, in a systemic form. As Pistor puts it, 'manifestations of capital and capitalism have changed dramatically, yet capital's source code has remained almost unchanged throughout' (p. 10). The legal modules of private law are depicted as being pervasive (even if not homogeneous everywhere), and the legal attributes bestowed by them, given their formal character, as potentially universal. At the same time, however, Pistor's analysis of capital's legal code stems from what could be seen as illustrations that are limited in at least two ways.

Historically, several of Pistor's empirical descriptions emphasize how the legal modules are put to work in coding capital in 'small, incremental steps' (p. 216) in episodes mostly located in two broad periods. On the one hand, the 19th century, intellectually hegemonized by classical liberalism and what Duncan Kennedy (2006) has conceptualized as the set of 'legal institutions and ideas' that comprise 'classical legal thought'. On the other, the second half of the 20th century, what some describe as a new historical period of capitalism under the dominance of finance (Lapavistas, 2013) and neo-liberalism (Slobodian, 2018). The book doesn't make clear, however, how the timeframe between these two broad periods fits into the analysis, that is, how to make sense of the coding of capital during 'post-war democratic capitalism' (Streeck, 2014) – the *trente glorieuses* or the *Golden Age*. In terms of legal ideas and institutions, this period can be seen as dominated by a 'socially oriented legal thought' that mediated between social and individual rights, opened itself to alternatives to the market as a mechanism of resource allocation, and privileged the institutional translation of such economic policy ideals into legal areas

(or ‘modules’, to use Pistor’s terms) such as administrative law and labor law, rather than contract or property law (Kennedy, 2006). Such considerable differences, however, did not imply a complete systemic rupture; to be clear, those were still capitalist societies. Underplayed in Pistor’s analysis, this period poses some questions to the overall argument of the book. Wasn’t capital coding taking place properly in that period? Why weren’t the ‘masters of the code’ successful throughout 30 years in the center of capitalism? How come states – which in Pistor’s analysis have mostly a ‘passive’ role in respect to legal coding (see Picciotto below) – managed to submit the legal code and its masters to public control? Should this period be interpreted as one of the suspension of attributes such as the ‘priority’ of capital’s holders over other claims? Or is it better conceived as a limitation to capital’s aspirations to ‘universality’, given its submission to national polities? Does it make sense to talk about ‘degrees’ in which the legal attributes conferred to capital can operate in different contexts and historical moments – less (as in the post-war consensus), or more pronounced (as in neo-liberalism)?

The relevance of these questions could be countered by the argument that they simply miss the bigger picture, since the specific articulation of law and capitalism in the post-war period was exceptional, limited to a time-span of only three decades, and thus peripheral to the overall narrative. Understanding the roots of capital’s legal code in classical liberalism and its recombination in contemporary financial capitalism could be enough to ground a theory about how law creates capital and inequality. However, it could also be argued that the relevance of these questions may not be confined to mere historical precision, but lie in their potential to shed light on the reach of Pistor’s theory of the role of law for capitalism. If the legal attributes and modules mapped in the book, as well the ‘masters of the code’ are not permanently powerful, should *The Code of Capital* be better read as a description of the legal code of capital in general, or of *financial or neoliberal* capitalism in particular? In sum, how to reconcile a general theory of the code of capital with approaches that stress the existence of ‘varieties of capitalism’ (Hall and Soskice, 2001) or different capitalist ‘accumulation regimes’ (Jessop and Sum, 2006)?

A second dimension in which Pistor’s illustrations can be considered limited is geographical (with its political and social implications). As Pistor makes explicit, ‘Global capitalism as we know it comes remarkably close to this theoretical possibility: it is built around two domestic legal systems, the laws of England and those of New York State, complemented by a few international treaties, and an extensive network of bilateral trade and investment regimes, which themselves are centered around a handful of advanced economies’ (p. 132). The book is very much focused on the global North, on what can be seen as its financial core – the US and the UK. Other countries of the center such as France and Germany do appear now and then, but at most as contrasting examples to the former. It seems that the periphery – or the global South – occupies the uttermost passive role in the processes of coding capital, as the code seems to come from abroad and impose itself, dismantling existing relations around certain assets.

One example is presented in chapter 2, in the battles Pistor narrates between the Maya peoples of Belize and capitalists (backed by the state) around property rights over land, won by the latter. In chapter 5, Pistor provides what seems to be described as a successful example from the periphery of contestation of the code of capital. Emerging economies

appear in struggles over intellectual property rights. Pistor mentions the example of India that, against the pressures of big pharma to code know-how over drugs, ‘enacted laws that encouraged the production of cheap drugs for their people while also imposing restrictions on the scope of private rights’ (p. 122).

As these examples illustrate, it seems that the periphery should be understood in Pistor’s overall approach through dynamics of colonization and legal imperialism through legal transplants and the export of law – successful most of the time, although not always. As she states explicitly, ‘For most people in most countries, the law that sustains global capitalism is also beyond reach, because *these countries only recognize and enforce laws that were made by others*’ (p. 133). Although she recognizes that in order ‘to be effective’ transplants ‘have to be adapted to local conditions’ (p. 133), the emphasis of the book is that the general result of adaptation has been an effective ‘harmonization of laws’ and ‘the recognition and enforcement of foreign law’ (p. 134). Under these conditions, the legal modules necessary for the code of capital thrive. If, however, these conditions are not met – a situation that according to Pistor is to be found in many countries that tend to have ‘*weaker legal institutions*’ due to colonization and imperialism – ‘the modules of the code will not produce lasting wealth effects’ – meaning that ‘private wealth will be guarded by physical force, stacked in foreign bank accounts, or coded in foreign law with foreign courts standing by to back it’ (p. 17).

It seems that within Pistor’s analysis of global capitalism the periphery can be thus understood as oscillating between two possibilities: it is either a successful destination of transplants that harmonize the legal modules demanded by global capital, or a legal system that doesn’t offer good prospects for coding capital and is thus circumvented by it through other jurisdictions. In either case, the creation and accumulation of wealth seems to demand globally a set of attributes that can be found only in a certain composition of legal modules provided by private law coded in the North. As with the interpretation of the *trente glorieuses*, it is hard to fit into the scheme any variation of capital coding. When applied to countries from the periphery, this difficulty signals a risk of interpreting these countries through a ‘legal fiction of failed law’ (Esquirol, 2008), i.e. understanding that peripheral countries offer corrupt or inefficient institutions and lack the appropriate ones for a certain outcome – in this case, for capital to thrive.

A possible way out of this conundrum is offered by Pistor herself. The book’s take on the ‘feudal calculus’ can be seen as a sort of ‘peripheralization’ of the center, as Pistor finds a dialectic (not a dichotomy) between modern and archaic elements in global capital coding. A similar epistemological approach could be adopted in the opposite direction, that is, to look at the periphery and try to detect elements typical of the ‘centre’ within its particular dynamics, that is, features that could be operating functionally for capital, even if considerably different from institutions in the North in general, and from the legal modules produced in the US and the UK in particular. Paraphrasing Marx’s view of colonization, such an approach could serve not only to understand the specificities of the periphery, but most importantly better to grasp, through the peripheries, the conditions of capitalism in the center – a truly global perspective on the code of global capital.¹

The potential of the decoding of capital on its own terms in the periphery can be illustrated through the issue of the relevance of public law for capital coding. For Pistor, ‘public and private law are intertwined and jointly constitute the system we call capitalism’ (p. 209). Nevertheless, public law, the constitutional order and state power in general are on the backstage, being ‘essential for ensuring that the code’s attributes are respected and enforced’ (p. 216) – but the attributes themselves come from elsewhere, the legal modules of private law. In the periphery, however, it could be argued that frequently public law has performed a much more direct role in coding capital. State and capital have often been enmeshed, as illustrated by ‘developmentalist’ strategies of wealth creation and accumulation that can be observed in the history of different countries, mostly in East Asia and Latin America (Chang, 2002; Chibber, 2003; Evans 1995). In developmental experiences, often based on the assumption that private capital is incapable of or undesirable for performing certain productive tasks, the state has been more than mere ‘custodian’ of the economy, also acting as a ‘demiurge’ (Evans, 1995) – that is, engaging directly in the production of wealth. State-owned corporations are an exemplary instrument for that purpose, and hence public law a key provider of the legal modules necessary to code the corporation. Developmentalism has also been keen for state promotion of (national) capital, for instance, through tariff protection for certain sectors against foreign competition, or the taking over of risky economic activities by the state, notably, in research and development (Evans, 1995) – again instruments that resort to public law to code capital.

Privatization and liberalization policies of the 1990s greatly impacted the strategies of developmental states to code capital, but didn’t hinder a new wave of state activism in emerging economies in the 2000s. As the literature on the emergence of the so-called ‘BRICS’ illustrates, rather than anti-capitalistic ventures, these experiences can be better defined as attempts of capital creation and accumulation on different grounds if compared to the liberal ‘consensus’ of the previous decade. Once again, it seems that state and capital were closely imbricated. Not by chance, a new wave of ‘law and development’ analysis burgeoned in the period, focusing on documenting the new forms of articulation between state, law and the economy and pointing to the relevance of ‘new functionalities’ for law to steer public–private collaboration in wealth creation and accumulation (Trubek et al., 2012). The combination of private law with public law can be thus seen as key to the coding of capital. For instance, industrial policy in Brazil in the first decade of the 2000s resorted to public finance through a state-owned development bank to foster innovation in the private sector (Trubek et al., 2012). For that to happen, devices from contract and corporate law were necessary. As the bank is a state-owned enterprise, structures provided by administrative law were also necessary, as was the establishment of governance mechanisms to enable coordination and monitoring of the public–private joint-ventures initiated by the state. Another example of a possible distinct coding of capital through public power can be found in Pistor’s own description of the battles around patents for drugs in India. While the limitation of patentability by the Indian state cannot be described as entirely anti-capitalist (as other corporations certainly benefited from battles fought in the name of a developing country) it remains antagonistic to what can be taken as the quintessential example of the coding of capital in action, that of enclosing knowledge.

Recent years seem to indicate yet another swing in the pendulum, as several far-right regimes that came to power in countries of the South are associated with ultra-liberal projects to steer peripheral countries toward a convergence with what the legal code of capital demands. However, it is hard to deny that throughout the history of peripheral countries state power and public law have been instrumental for coding capital. Even if most of these attempts failed, China's consolidation in the world economy may be seen as an extremely successful trajectory of wealth production and accumulation that cannot be placed outside the capitalist spectrum, and that at the same time resorts to legal modules that are not confined to private law to do so. Although barely mentioned in the book, the rise of China poses an unavoidable challenge to the way capital has been coded globally by the UK and the US, and raises the question whether public power and its instrumentalization through public law may really be as secondary as depicted to understanding capitalism.

These examples appear to suggest that the coding of capital might take place through legal modules other than those offered by private law, due to the local conditions of different countries. One way of looking at those experiences is to understand them as a sort of 'hacking' or a 'bug' of the code of capital. Another, more promising approach, as Pistor herself emphasizes in her previous work and advocates in a more recent proposal for a 'comparative legal institutionalism', is to understand that 'the relation between institutions and systems is characterized by complex interactions' and to take into account 'the social and political structures in which institutions are embedded' (Pistor, 2011: 1). In this sense, these experiences from the periphery do not contradict the landscape portrayed by Pistor in *The Code of Capital*, but might add complexity to it, enabling one to question whether it is possible to abstract capital from social and political relations. Pistor's theory of the legal attributes demanded by capital certainly holds in the periphery, but often with adaptations to local power struggles. Priority, for instance, may be guaranteed in certain political economy constellations to *national* capital. Durability can be ensured for certain assets, as long as it contributes to certain *objectives* established by the state, as in industrial policy goals. These local adaptations may explain why certain forms of coding capital have been constantly under attack by the 'masters of the code' and their propositions for legal reform, as they potentially contradict the interests of capital holders in the center. Taking into account the diverse forms of coding capital may also enable the comparison and assessment of alternatives to the hegemony of private law modules and its harmful contribution in deepening inequality and reproducing privilege. Given the experiences in the periphery or in the 'post-war consensus' in the center, is it really enough to 'qualify' or modulate the legal attributes demanded by capital through, for instance, 'better' regulation or a close entanglement of state and capital, or is it necessary to consider more seriously that some assets should not be coded as capital in the first place?

Note

1. In the last chapter of *Capital's* volume one – 'The modern theory of colonisation', Marx suggests that 'It is the great merit of E.G. Wakefield to have discovered, not anything new about the Colonies, but to have discovered in the Colonies the truth as to the conditions of capitalist production in the mother country'.

References

- Chang H-J (2002) *Globalization, Economic Development, and the Role of the State*. London: Zed Books.
- Chibber V (2003) *Locked in Place: State-Building and Late Industrialization in India*. Princeton, NJ: Princeton University Press.
- Esquirol J (2008) The failed law of Latin America. *The American Journal of Comparative Law* (56): 75–124.
- Evans P (1995) *Embedded Autonomy: States and Industrial Transformation*. Princeton, NJ: Princeton University Press.
- Hall PA and Soskice D (ed) (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press.
- Jessop B and Sum N-L (2006) *Beyond the Regulation Approach: Putting Capitalist Economies in Their Place*. Cheltenham: Edward Elgar.
- Kennedy D (2006) Three Globalizations of Law and Legal Thought: 1850–2000. In: Trubek D and Santos A. (ed) *The New Law and Economic Development: A Critical Appraisal*. Cambridge: Cambridge University Press, pp. 19–73.
- Lapavistas C (2013) *Profiting Without Producing: How Finance Exploits us All*. London: Verso Books.
- Latour B (1993) *We Have Never Been Modern*. Cambridge: Harvard University Press.
- Pistor K (2011) Contesting property rights: towards an integrated theory of institutional and system change. *Global Jurist* 2(11): article 6.
- Slobodian Q (2018) *Globalists: The End of Empire and the Birth of Neoliberalism*. Cambridge: Harvard University Press
- Streeck W (2014) *Buying Time: The Delayed Crisis of Democratic Capitalism*. London/New York, NY: Verso Books.
- Trubek DM, Coutinho DR and Schapiro MG (2012) Toward a new law and development: new state activism in Brazil and the challenge for legal institutions. In: *The World Bank Legal Review*. Washington, DC: The World Bank, pp. 281–314.

Capital Without Capitalism? Or Capitalism Without Determinism?

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‘Of economic conceptions few are more fundamental and none more obscure than capital’. So opens an 1896 article by the celebrated American economist, Irvine Fisher

(Fisher, 1896). While most economists and businessmen ‘feel that there is such a thing as capital’, Fisher notes, and can likewise agree that ‘specified groups for commodities are capital’, there is remarkable variation in how capital is defined and understood. Fifteen different definitions of capital authored by 15 economists are listed by Fisher, including those given by Smith, Riccardo, Mill, Walras, and Jevons (Fisher, 1896: 511–512). Most of these economists can agree that capital is something that produces a revenue; that it can take the form of money, or of physical goods and infrastructure; and that it can be both an input and an output of production. Yet, when it comes to identifying which types of goods and revenues are and are not capital, or, further to Fisher’s important requalification, at what point in *time* they are operating as capital, consensus is elusive. The debate continues today. Thomas Picketty’s landmark book, *Capital in the 21st Century*, purports to explain contemporary patterns of inequality by identifying a ‘law’ of capitalism pursuant to which the return on capital consistently outpaces the average growth of the economy as a whole (Picketty, 2014). In other words, ‘[C]apital reproduces itself faster than output increases’ (Picketty, 2014: 571). The book has been widely acclaimed, nonetheless, Picketty has come under fire from other leading economists for ‘equating wealth with capital’ (Stiglitz, 2015) and for failing to recognize human capital as capital (Homburg, 2015). Can a legal scholar shed any new light on this centuries old debate?

In her bold and original new book, *The Code of Capital: How the Law Creates Wealth and Inequality*, Katharina Pistor offers a novel approach to understanding the nature of capital. Her primary goal is not to define capital so as to enable some kind of binary coding of assets – ‘capital’ / ‘not capital’ – albeit that her analysis could be used in this vein; rather, her purpose is to demonstrate that ‘with the right legal coding’ any asset can be turned into capital, and can thereby ‘increase its propensity to create wealth for its holders’ (p. 2). Capital, she asserts, is made up of two ingredients: the asset and the legal code. Assets can be anything from land and property to ideas and promises. What matters is that when they are coded in law these assets are furnished with a set of attributes that can be used to create new wealth, as well as to protect old wealth. The legal code is made up of a variety of different legal modules, including, but not limited to, contract law, property rights, collateral law, and trust, corporate, and bankruptcy laws. This ‘mostly private’ legal code has been deployed for hundreds of years by creative legal agents to a changing roster of assets, including land, firms, debt, and certain kinds of knowledge (pp. 2–3). Capital, Pistor underlines, is not a physical thing that inheres in certain goods, nor is it ‘just one set of antagonistic social relations as between the proletariat and the bourgeoisie’ (p. 10). Instead, capital is made via a decentralized process in which lawyers manipulate a set of ‘private’ legal modules that enjoy the backing of the State, and graft them onto new assets for their benefit of their clientele. Importantly, *The Code of Capital* is concerned to demonstrate that the incremental, publically sanctioned but privately driven process of creating capital has significant political consequences: this legal process allows the holders of capital to *rule* the global economy (p. 22).

Very unusually in discussions of what capital is and how capitalism works, the book puts the spotlight on the ordinary lawyers who build on the basic code of the law and embellish it to create new regimes of right and entitlement through which capital

owners can ‘control the levers for the distribution of wealth in society’ (p. 19). In 2014, David Grewal Singh suggested that in order to understand Picketty’s ‘law of capitalism’ – ‘why $r > g$ has generally held’ – greater attention needed to be paid to the ‘laws of capitalism’, in other words, to ‘how the legal foundations of capitalism influence the rate of return on capital and its consistent outpacing of overall growth’ (Grewal Singh, 2016: 652–653). Pistor takes on this challenge. She develops a new vocabulary to explain how lawyers work to confer wealth-generating attributes on assets, and she identifies the particular legal mechanisms through which assets can generate a monetary return over time. Through the application of legal ‘modules’, holders of particular assets are able to claim *priority* and rank their claims to particular assets above competing claims; legal coding can also create *durability*, expanding the lifespan of particular assets, or insulating them from creditors; the third attribute is *universality*, which extends the effect of a legal arrangement beyond the immediate parties and enables it to be upheld *erga omnes*; finally, legal coding ensures that capital assets are *convertible* and can be redeemed for state money, which ensures that the holders of the assets can lock in gains even in conditions of crisis (pp. 13–15). This dimension of Pistor’s work is reminiscent of the work of other legal theorists who have created typologies of different legal rights and their relations. There is something Hohfeldian in the effort to specify the precise nature of the powers that certain legal rights and regimes grant to some actors, and how they correspondingly disempower and disinherit others (Hohfeld, 1913). Albeit that Pistor does not explicitly specify the ‘correlative’ effect of each of the legal powers that she identifies, the text is replete with examples from history, as well as from contemporary financial markets, that highlight the legal experiences of the ‘have nots’ – those on the other side of these newly-minted capital ‘coins’.

The book’s contribution in terms of making visible the legal relations through which wealth is created and protected not only helps to resolve some of the enigmas of capital, it also sheds light on one of the central paradoxes of the liberal legal system(s): Certain kinds of legal rights, notably human rights and constitutional rights, are typically held to be inalienable, fundamental, and paramount – formally, they are equal, if not superior to, other kinds of legal rights and claims. Out there in the world, however, human rights are routinely violated and ignored with impunity, and when people seeking effective protection for their constitutional and human rights do have their day in court, they often find that their ‘fundamental’ and ‘inalienable’ rights are not weighty enough to be *prioritized* over other private claims over land or resources, nor are they *universally* effective against all those who would seek to breach them, and neither do they *convert* into a direct claim on the State’s revenues. One influential take on the fictions of the liberal legal system is that ‘between equal rights, force decides’ (Marx, 1975: 234–235). Another germane explanation advanced in the field of International Law suggests that the meaning of legal rights and principles is fundamentally indeterminate, which means that skillful advocates and judges can effectively argue their content into being, and in directions that suit the needs of those powers that they are representing (Koskeniemi, 2009). By elaborating the concept of legal coding, *The Code of Capital* points to a further possibility: perhaps these purportedly equal legal rights were never

formally equal in the first place because their legal coding is different? Pistor's analysis, like that of Hohfeld, implies that the rights created under different legal regimes carry different legal weights, and that many of the purportedly 'fundamental' rights created in public law may correspond to a weaker constellation of powers and privileges than those created under private law. Contrary to the direction in which many critics of Liberal legalism have tended to argue, this would suggest that economic inequalities are not only the function of insistence upon the juridical equality of persons before the law in conditions of material inequality; they are also the function of the pre-existing juridical inequalities between different legal rights and regimes.

The very active and powerful role for law in *The Code of Capital* counters popular presentations of how law relates to economic globalization, financial crises, and inequality. The dominant account of the 2008 global financial crisis remains one in which law and regulation enter only after the fact, as a means of response to the crisis. Undoubtedly this portrayal is unconvincing to many legal scholars, bankers, and institutional economists, but the story in the media and in policy circles has been one of the removal of capital controls; the dismantling of protections separating investment banking and retail banking; and the deregulation of financial institutions, which have been let loose to realize a vision of 'self-regulating' markets. This book is a powerful counter-narrative to such influential representations of how finance has come to dominate the global economy. It shows that financial 'liberalisation' has been the product of intense legal work in which certain kinds of assets have been legally empowered to cross borders, and to dodge creditors and regulators. Pistor's work contributes to a project that Annalise Riles has advanced in her work on financial collateral, which illuminates how the mundane and routine work of legal professionals who 'paper the deals' is integral to the operation of financial markets (Riles, 2011). Both accounts regard the role of lawyers and the standard-form contracts that they complete for their clients as fundamental to the existence of global financial markets. However, Riles's description of the work of lawyers as 'routine' and 'mundane' contrasts with the presentation of Pistor, who emphasizes the creativity and inventiveness of lawyers who have 'pieced together different portions of legal rules that were adopted in different eras' in order to create the legal infrastructure of the global derivatives market (p. 154).

The book's focus on 'backroom' lawyers and solicitors disrupts other accounts of how the holders of capital have come to dominate the global economy, and with what all of this has to do with law. In recent years, critical scholars writing about neoliberalism have suggested that economic globalization and a coeval trend of rising inequality has come about through the progressive harmonization of laws and legal regimes. International financial institutions have been charged with spearheading initiatives designed to format the domestic legal systems of many countries in the Global South to serve the interests of foreign capital through the promotion of 'rule of law' initiatives, and via bilateral investment treaties (Humphreys, 2010; Schneiderman, 2008). In another influential contribution, Quinn Slobodian foregrounds the efforts of 'Geneva School' neoliberals in lobbying for the creation of a 'global economic constitution' that privileges the private rights and economic freedoms needed to underpin markets

(dominium rights) over the ‘imperium right’ of sovereign states to control economic activity within its territory (Slobodian, 2018). In her discussion of economic globalization and the rise of finance, Pistor protests that harmonization is both slow and, in many instances, unnecessary: recognition regimes in international private law enable the holders of capital to pick and choose between legal regimes, and to select those that best suit their interests. The dominant legal project is not one of encoding and enforcing a global economic constitution; it is a project of jurisdictional arbitrage – of exploiting differences between a patchwork of different legal systems. What are needed are conflict of laws provisions that ‘endorse the choices that private parties make’ (p. 135).

The Code of Capital is also in dialogue with scholarship on ‘transnational’ private law. *Contra* scholarship that has suggested that private financial actors are engaged in making a ‘global law beyond the state’, Pistor argues that no ‘global law’ or ‘global state’ is needed to enable the operations of global financial markets because state-sanctioned private law already enables global transactions to be legally protected in multiple jurisdictions. In theory, a single legal system could be capable of sustaining global capitalism. Indeed, as Pistor contends, ‘global capitalism as we know it comes remarkably close to this theoretical possibility’: it is built around two domestic legal systems the Common Law legal systems of New York and the laws of England, and complemented by a few international treaties and an extensive network of bilateral trade and investment regimes (p. 132). The analysis of the legal construction of the derivatives markets flows into an engagement with some of the questions that have also preoccupied contributors to the ‘Legal Origins’ literature – a body of work that studies why it is that common law jurisdictions appear to have an advantage over civil law jurisdictions in terms of economic development and the growth of financial markets (La Porta et al., 2008). Part of the answer, for Pistor, lies in the historical development of the legal professions in common versus civil law countries. In common law jurisdictions, private lawyers have enjoyed both greater independence from the state, and more creative control over the development of the law, which, unlike in civil law countries with legal codes, is subject to only ‘occasional vetting by a court’ (p. 173). A significant qualification is made to the nature of law-making processes here. Both the American Legal Realists and the Critical Legal Studies movement challenged legal formalist approaches that understand the law as a science of judicial reasoning, and they demonstrated that judges effectively make the law. *The Code of Capital* adds ordinary solicitors into the picture, and it shows that they too ‘take advantage of law’s indeterminacy’ (p. 217) to effectively make new laws and mint new assets with the tacit permission of the State. In doing so, the book inserts a chapter that many other critical accounts of law-making have missed, or have at least only footnoted.

The Code of Capital offers a substantial set of provocations to other influential conceptions of what capital is and how it is created. To take one important example, Pistor argues that not only can human beings be coded as capital, but that *they can code themselves as capital*. On page 11 she gives the example of a freelancer who discovers that she can capitalize on her own labor by establishing a corporate entity, contributing her services in kind, and taking out dividends as the corporation’s

shareholder in lieu of a salary. Pistor's account presents a markedly different take on the nature of capitalist social relations to that of Marx, for whom participation in capitalist production processes for the laborer involves being subjugated to a system which they have to destroy in order to subvert. As Marx writes, 'the means of production and subsistence . . . become capital *only* under circumstances in which they serve at the same time as means of exploitation and subjection of the labourer' (Marx, 1887: 792). It has already been noted that now that many people effectively hold equity in capital assets via pension funds and investment schemes, 'the old distinction between 'capitalists' and "workers"' has been breached (Stiglitz, 2015: 58). Here, however, workers acquire a radical new agency: they can convert themselves into capitalists in a few shrewd legal moves. The identification of new possibilities for agency and strategies for systemic change appear to be an underlying concern of the book. Pistor's analysis builds on her earlier work in *Legal Institutionalism* – a school of thought that extends the insights of Institutional Economics to focus attention on the 'constitutive role of law' in capitalist economic relations (Deakin et al., 2017). The legal system, which in Marxist analysis is sometimes dismissed as a superstructure that has little potential to shift the underlying dynamics of capitalism, is recast as a foundational infrastructure that, if modified, could perhaps alter the trajectory of global capitalism.

The Code of Capital does not claim to conclusively resolve the centuries old debate about what differentiates ordinary money and assets from capital. The focus is more on explicating the process by which capital is made. Capital is understood broadly as an asset – tangible or intangible – that produces wealth for its holder; it is 'not a physical thing, it is a quality', and one that is legally bestowed. Nevertheless, Pistor insists that economists must move away from limiting the definition of capital to physical things that you can see and touch, and she critiques the recent characterization of two economists, Haskel and Westlake, who describe the capture of profit by corporations who deploy intangible assets (copyrights, patents, and trademarks) as *Capitalism without Capital* (Haskell and Westlake, 2018). She is convincing in her argument that economists and accountants have 'clung' to the (false) notion that capital is a physical input, one of the two factors of production, when in fact, capital . . . is never just about output and input, but always about the ability to capture and monetize expected returns' (p. 116). Her book is also a testament to the fact that Marxists have tended to drastically underweight the role of law in the process of wealth creation (p. 116). Nonetheless, it is possible that the balance of the argumentation perhaps tilts too far in another direction. At times, the impression is created that it is possible to have *capital without capitalism*. None of the chapters of the book engages explicitly with how capital is used in, or relates to, more traditional forms of economic production, such as agriculture or manufacturing. Are these basic economic processes that create the means of subsistence not also part of the story of how wealth is generated and how assets are made capable of generating a return? In order for any asset – tangible or intangible – to have an economic value, a particular social world needs to exist in which people pay for things with money instead of producing them themselves; and in which it is believed to be necessary to own things and to make investments. Surely the ability of any 'capital' asset to have a value, or to

generate wealth in the future, also depends on the existence of a capitalist economic system predicated on the generalization of commodity production and exchange; the development of a universal equivalent in the form of money; the division of labor in society; and the establishment of a world market? By virtue of the fact that the broader economic and social processes that constitute capitalism and its markets are not discussed in the book, it is unclear whether they are seen by the author to be necessary to the creation of capital or not. Another issue is that although the definition of capital is drawn expansively, the 'code of capital' is not extended to encompass the legal status and coding of labor. However, if everyone were to be legally entitled to the product of all of their own labor, would capital exist? Moreover, as the insights of New Institutional Economics suggest, if it were not possible to direct production by fiat via an employment contract instead of going to the market for every single transaction, the transaction costs involved in ordinary manufacturing and production might also prohibit the formation and accumulation of capital.

Of course, nowhere does the book claim that capital and capitalism are separable. On the contrary, repeated references are made to capitalism throughout the book. Nonetheless, the elision of the debate about the relationship between capital, labor, and wider economic production does create some issues for the argument. Another question that the analysis in the book throws up is whether the legal coding of capital is always the same thing as the creation of capital. To return to the debate rehearsed by Fisher, the analysis in *The Code of Capital* glides over the efforts of generations of economists to understand when ordinary money or goods act as capital and when they do not. Fisher highlights the difficulties inhering in the attempt to identify and distinguish capital based on Adam Smith's specification that capital should produce a revenue as follows: It is agreed that 'A merchant ship is capital and a private yacht is not. But what shall we say of an excursion steamer which carries freight as well?' (Fisher, 1896: 513). Fisher labors to demonstrate that attempting to delineate capital from other forms of wealth via the terms 'productive' and 'profitable' soon ceases 'to convey a real limitation, for all wealth is productive of some sort of good' (Fisher, 1896: 513). Fisher's argument is that the question of what is and what is not capital cannot be answered by trying to distinguish between different kinds of wealth, but should instead be based on the function that a money or commodities are playing at a given point in time: 'Food in the pantry at any instant is capital, the monthly flow of food through the pantry is income. Machinery existing is capital, its annual replacement or increase is income' (Fisher, 1896: 514). 'Just as the ancients regarded solids, liquids and gases as different kinds of matter (earth, water, air) instead of different states', he emphasizes, 'so economists have thought of capital and income as different kinds of commodities, instead of different aspects of commodity in time' (Fisher, 1896: 516). In his own way, Fisher is interested in trying to 'code' capital definitely in order for it to be able to function as a variable in mathematical calculation. In doing so, he is vulnerable to the same critique that Marx made of his Classical predecessors, which is that his account of what capital is overlooks the social relations that make the accumulation of any 'stock' of capital at any point in *time* possible in the first place. Pistor's analysis also appears to encounter some difficulties in this regard. To be sure, the analysis in

The Code of Capital does much to dislodge economists' predilection for clinging to ideas of capital as an input to production. Indeed, the concept of coding seems to fit awkwardly with some forms of physical capital, say factory machinery, for example. Has factory machinery been assigned all of the legal attributes of priority, durability, universality, convertibility? Is this how it captures and monetizes expected returns? Or is it not capital according to the metrics laid out in the book? In its ambiguous treatment of some types of physical assets, it becomes clearer that it is mainly intangibles and financial assets that are being designated as capital in *The Code of Capital* – assets that do not have to pass through the circuit of commodity production in order to generate a revenue (M-M, not M-C-M, to use Marx's formulation). Indeed, based on the case studies in the book, it seems that only 'fictitious commodities' (land, labor, money, intellectual property) or financial assets (bonds, shares, derivatives) have the quality of capital under this optic. If this reading of the book is in fact correct, it would be interesting to hear more from the author as to how the legal code maps on to infrastructure, or machinery, or, alternatively, why these assets should not be considered as capital. Shifting away from a fixation on capital as a physical thing is usually made by those seeking to underline that capital is a social relation, but this does not appear to be Pistor's project either. Unlike Fisher, both for Pistor, Smith, and other classical economists, a distinguishing feature of capital is that it generates wealth – it produces revenue. But does the legal coding alone give assets their wealth-generating capacities? Or, as already intimated above, is it only and inescapably possible for any asset – tangible or intangible – to produce a revenue that can be accumulated because it exists within a legally-constituted market system of functionally differentiated labor that leads to the creation of demand and the possibility to profit from it? In other words, is the process of *legally coding* capital everywhere and always coterminous with *creating capital*? For Marx, the Classical economists got it wrong when they conceptualized capital as a thing, perhaps as a machine, or even a sum of money, rather than a relationship between people. *The Code of Capital* puts the spotlight on the relationship between an asset and its legal code. Narrating this relationship would certainly seem to tell us a lot about how financial assets are created, and about how wealth can be protected over time, and about how the owners of capital can 'rule by law', but can it tell us the whole story about what capital is and how it is produced?

The Code of Capital overturns the influential narrative of economics that the creation of capital will lead to economic growth, which will mean that wealth will, eventually, trickle down. What follows from the creation of capital is that wealth is being created, protected, and actively funneled up. With its pioneering interdisciplinary and intra-legal method, the book is a promising pedagogical tool. It can be put to use to ensure that future generations of private lawyers are much more conscious of the public consequences of their actions, as well as to educate more public lawyers about why their constitutional and regulatory ambitions may be habitually thwarted by developments in private law. Although some private lawyers are doubtless well aware that they are trying to protect wealth and avert tax for individual clients, not all of them will be fully cognisant of the fact that they are part of a

profession that has been coding capital for hundreds of years – part of a global network that is, in many respects, responsible for helping to produce and entrench economic inequality. To borrow from Michel Foucault, ‘People know what they do; frequently they know why they do what they do; but what they don’t know is what what they do does’ (Foucault, quoted in Dreyfus and Rabinow, 1983: 187). *The Code of Capital* creates new possibilities for raising social consciousness and for generating new ideas for how to disrupt processes whereby the few are enriched at the expense of the many. Some Marxist perspectives on capitalism can produce a fatalistic sense that – short of an armed revolution – there is not much that can be done to improve the socio-economic status quo other than to wait for the machinations of the system to unfold. The presentation of the legal code of capital as being ‘modular’ and modifiable creates interesting possibilities. Can social assets be created and coded in the same way as private capital? Could private lawyers put these legal modules to work for marginalized groups if paid to do so by government or by NGOs? Would it be possible to fashion an Entail that could operate to protect the rights of indigenous communities over certain lands and resources? Or might it be that private lawyers are only able to only code forms of capital that flow with, rather than against, logics of exclusion, dispossession, profit and growth? Could it be that once certain legal coordinates – or modules – are put in place, over time, they format economic and social relations in a particular way, overwriting and excluding other ways of acting and being? *The Code of Capital* is likely to inspire responses in both registers. It will certainly engender an important debate.

References

- Deakin S, Pistor K, Gindis D, et al. (2017) Legal institutionalism: capitalism and the constitutive role of law. *Journal of Comparative Economics* 45(1): 188–200.
- Dreyfus H and Rabinow P (1983) *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press).
- Fisher I (1896) What is capital. *The Economic Journal* 6(24): 509–534.
- Grewal Singh D (2016) Book Review: The Laws of Capitalism Capital in The Twenty-First Century. By Thomas Piketty. The Belknap Press of Harvard University Press. 2014 128: 626 *Harvard Law Review*.
- Haskel J and Westlake S (2018) *Capitalism Without Capital: The Rise of the Intangible Economy*. Princeton, NJ: Princeton University Press.
- Hohfeld W (1913) Some fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal* 23(1): 16–59.
- Homburg S (2015) Critical remarks on Piketty’s capital in the twenty-first century. *Applied Economics* 47: 14.
- Humphreys S (2010) *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice*. Cambridge: Cambridge University Press.
- Koskenniemi M (2009) *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press.
- La Porta R, Lopez-de-Salenes F and Schleifer A (2008) The economic consequences of legal origin. *Journal of Economic Literature* 47: 2.

- Marx K (1975) *Capital: A Critique of Political Economy* Edited and translated by Frederick Engels and Ernest Untermann. Chicago, IL: Charles H. Kerr and Co., 1909–1910.
- Piketty T (2014) *Capital in the Twenty-First Century*. Cambridge, MA: Harvard University Press.
- Riles A (2011) *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*. Chicago, IL: University of Chicago Press.
- Schneiderman D (2008) *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press.
- Slobodian Q (2018) *Globalists: The End of Empire and the Birth of Neoliberalism*. Cambridge, MA: Harvard University Press.
- Stiglitz J (2015) Inequality, wealth, and capital. *Queries*. Available at: <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Inequality%2C%20Wealth%20and%20Capital.pdf> (accessed 14 April 2020).

Private or Public?

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Following the financial crisis it became acceptable, even fashionable, to discuss capitalism in critical terms. The evident failures of regulation that triggered the crisis also brought into the debates the role of law, or more widely regulation. Katharina Pistor's book, written from the key vantage point of Columbia Law School, makes a mighty contribution. Although the book has a wide scope, it seems evident that the main pre-occupation is with how the financial system was subverted to the point of collapse by the construction of Ponzi financial pyramids founded on contracts so complex that few could fathom their wider effects.

In this account, it is private law that takes center stage, as moulded and turbo-charged by the 'masters of the legal code', lawyers acting for the wealthy. The central theme is that it is the basic modules of the legal code, mainly contract, property, collateral, trusts, corporations, and bankruptcy law, that bestow on assets the critical attributes that enable them to create wealth: priority, durability, convertibility and universality (p. 13). This builds on the basic point made by economic lawyers and institutional economists that markets depend on legal institutions, to emphasize also that 'the legal coding accounts for the value of assets, and thus for the creation of wealth and its distribution' (p. 19). The focus is on the power of private law, while stressing that it also requires backing from 'the coercive powers of a state' (p. 4). However, the increasing willingness of states to recognize and enforce each other's laws has facilitated the construction of a global code,

based mainly on the common law of England and the laws of New York state, reinforced by international agreements especially investment protection treaties.

The bulk of the book is devoted to analysis of many episodes and key examples of the codifications and recodifications that have both generated wealth, or capital, and protected its accumulation. The analysis of that most physical of assets, land, shows how it was through battles over rights and their codification that the more powerful interests acquired and preserved control over this valuable asset, from the enclosures and entails of post-feudal Britain to the dispossession of first peoples by colonial settlers in Belize, New Zealand and the USA. The development of the modern corporate form is seen as enabling access to low-cost finance through asset partitioning and structuring chains of corporate vehicles. Financial instruments are shown to have been transformed from their origins in bills of exchange to the residential mortgage-backed securities and collateralized debt obligations that combined trusts and contracts into the ‘quintessential legal steroid’ (p. 87) which wreaked havoc in 2007–2008. Both the intellectual ‘commons’ of scientific investigation, and now information about the patterns of social life coded as data, have been targets for appropriation through the expansion of the legal coding of patents and trade secrets.

The analysis is particularly sophisticated, compared to more conventional institutionalist accounts, by the recognition that the work of codification exploits the inherent malleability of law. The ‘inherent incompleteness’ not only of contracts but of all law ‘makes for fertile ground for legal creativity and imagination in every possible direction’ (p. 210). Realist and critical legal scholars are referred to in debunking the notion of ‘clear property rights’, since legal reasoning is ‘open-ended’ and involves multiple sources of law, so that the fashioning of property rights is ‘a complex process pregnant with value judgments and power’ (p. 28). The importance of the malleability of law comes to the fore when exploring the efforts to replace law with digital code, which would truly hardwire commitments and obligations, precipitating undesirable outcomes (ch. 8). The necessary flexibility of real-world contracting was shown when the obligation in derivative contracts to post collateral based on market prices became inoperable in 2007 as markets froze, so counterparties resorted to ‘offline’ ad hoc negotiation, which it is suggested softened the advent of the crisis (p. 191). Blockchain-based contracts lack the flexibility to respond to either exogenous uncertainty, or indeed their own endogenous flaws.

Pistor aligns with the argument of Christoph Menke (2015) that the capitalist or liberal legal order is founded on a fundamental clash between the primacy of the protection of private rights and the use of law to advance social goals (p. 217). In the final chapter, she outlines two radical solutions that have been put forward to resolve the crisis of capitalist legal liberalism: the ‘radical markets’ proposal of Posner and Weyl (2018) to replace property rights with contingent use rights; and Menke’s proposal to re-found a rights-based system based on relative or reflexive rights, determined through an open political process. Pointing out that both would entail considerable coercion, she puts forward a more pragmatic program for eight key reforms, ranging from the denial of special legal privileges or exemptions, and restrictions on the choice of law in contracts, to reining in the legal ‘masters of the code’ by rethinking the funding of law schools and pay structures in large law firms. While conceding that such gradualism may serve only

to make capitalism more sustainable, the hope is that persistent incrementalism may be a viable push-back strategy.

Like all analyses that depart from private rights and markets, Pistor's thesis constantly runs into the problem of the specification of property rights. These ineluctably require the active exercise of state power, not simply to enforce private agreements. Since Coase's 'The Problem of Social Cost' (1960) institutionalists, while conceding that the 'initial specification of property rights' is key to determining where costs fall, treat it as exogenous. This 'genesis question' underlies the view that 'asset holders' (capitalists) benefit from 'a first mover advantage enshrined in procedural law that governs the enforcement of private claims' (p. 210). In other words, possession is nine-tenths of the law. For Pistor, the key elements that turn assets into wealth-creating capital are 'exemptions' from general law founded on equal rights, or Weber's 'modern particularism' (p. 206).

The genesis of property is discussed particularly in the context of proposals for digital contracting, pointing out that '[c]reating property rights from scratch is, of course, a difficult task' (p. 193). Above all, it depends directly on state coercive power. This lies behind her rejection of both the proposals for 'radical markets' and rights-based refounding, since both entail a fundamental rebalancing of the 'specific relation between private and public power, private code and public law' (p. 218). Pistor points out that this occurs not only in revolutionary moments, but as a continuous process of struggle. Her analyses show that much of this is done through adjustments of rights of 'priority', a cogent concept which helps to analyze the relativity of property rights, and the interactions of property and contract.

However, I suggest that an adjustment of the perspective to focus more clearly on the public and private and their interactions would produce a different picture, perhaps a more convincing portrayal of the changing nature of capitalism itself, and not only 'assets' coded as capital. The separation of the public and private is indeed central to capitalism, as a system in which economic activity appears in the form of relationships of private exchange, while the public sphere of politics and state power consists of interactions between citizens. From that perspective, only contract law can truly be considered private, governing exchange transactions. Property rights always necessitate a prior intervention into the apparently private sphere of exchange by the state. Thus, it is the definition of property rights by state action that sets the conditions for the economic activities that take the form of exchange between equal transacting parties.

Far from being confined to coding private law, the power of lawyers stems from their role in mediating these public-private intersections. Although part of Pistor's picture, this is at its periphery. The interactions of international and domestic law primarily concern the choice of law. State legislation results from 'lobbying', usually to grant privileges or exemptions. Indeed there is more discussion of the important role of 'private legislation', such as the standard form contracts of the ISDA (International Swaps and Derivatives Association). It is surely lawyers who write state legislation as much as contracts, but the state and its agents are seen as generally playing a passive role. It is pointed out that the state does not always side with capital, and that there have been

enactments of social protections and labour rights, but these are seen as defensive attempts to ‘rebalance the playing field’ (p. 217).

The private law perspective is particularly lopsided in explaining the corporation. To be sure, privileged access to finance, resulting from the exploitation of the powerful combination of legal personality and limited liability, played a key part in the rise of large corporations, and was central to the financial crisis and its aftermath of state rescues of financial institutions. However, the corporate form is better viewed as ‘socialized capital’ (Roy, 1997), enabling an institution insulated from the market able to plan large-scale economic activities by exploiting the social power of labor. This was recognized by theorists as apparently divergent as Karl Marx and Ronald Coase,¹ although largely overlooked by most of the latter-day followers of both. Certainly, it has been lawyers who have moulded the contours of the corporate form, and ensured its coding in terms of private property rights. But viewing it purely from the optic of private law surely fails to capture the essence of the framework it has provided for contemporary corporate capitalism.

There is also little mention in the book of the enormous growth of the public law of economic regulation, to the point that many describe as the creation of a ‘regulatory state’. Admittedly, much of this is ‘hyper-regulation’, resulting from the inappropriate specification of initial property rights, and so creates a legal battleground over the balance of private rights and public priorities, generally dominated by corporate power (Picciotto, 2017: 693). The point, however, is that we need a more realistic picture of capitalism than can be provided only from private law and idealized markets. Contemporary capitalism is dominated by giant corporations operating in symbiosis with a plethora of quasi-governmental bodies in private–public ‘partnerships’. For all its failings, regulatory law attempts to frame networks of social relationships that are both far denser and more extensive than could be managed by a purely private law system of individual rights.

In fact, for all its private law perspective, the book has surprisingly little to say about contract law, despite the long-standing debates over the ‘death of contract’. One of Pistor’s eight prescriptions is for the resurrection of ‘age-old limitations on coding capital that have been dismantled over time’, instancing the unenforceability of wagering contracts (p. 227), which could have prevented the expansion of speculative financial derivatives. But the solution proposed involves regulation: a burden of proof on their users, which surely entails consideration of the optimal mix of public and private (Campbell and Picciotto, 2000). There is clearly much more to be said about the implications of the enormous extension of contractualism into administrative fields, and the attempts to rethink ‘regulatory contracts’ in terms of public law (Campbell, 2007; Collins, 1999; Freeman, 2003; Vincent-Jones, 2006). Indeed, the impact of the growth of purposeful ‘regulation’ on the voluntarist private-law perspectives that govern many areas of law needs wider exploration (Parker et al., 2004).

Examples could also be explored of battles over coding that seem to have succeeded in preserving space for egalitarian and non-exploitative interactions. One such is the ‘copyleft’ movement, that generated a technical-legal ecosystem of intellectual property licensing standards (Picciotto, 2011: 433–436). The ‘coding’ of the GPL (General Public Licence) and the ‘creative commons’ licences combines property rights and

contracts as ingeniously as any, but to act as a barrier against private appropriation, not as wealth-generating ‘capital’. Of course, these barriers are not impermeable, and Google and other giants have shown that enormous profits can be derived from the indirect exploitation of labor that takes place in the ‘commons’. The point, however, would be to consider why and especially how these systems of peer-to-peer networked production preferred these coding models, and how they developed and became institutionalized.

Certainly, a key role is played by the lawyers who act as ‘creative ideologists’ operating between the state and the market (Dezalay, 1996). Pistor ascribes the key role to the true ‘masters of the code’, such as Marty Lipton credited with devising the ‘poison pill’ protection against hostile takeovers, rather than the battalions of nevertheless highly paid lawyers engaged in complex but ‘plain vanilla’ transactions (p. 163). However, innovative coding requires suitably fertile ground to take root and resource-intensive maintenance to flourish. Pistor points out that the economically powerful can hire the best lawyers, but this does not necessarily mean the most capable or ingenious, but those with sufficient authority to provide legitimation for profitable activities. She hesitates to go so far as to accept that law is ‘but a disguise for the exercise of naked power’ (p. 28), but the book includes many examples showing how economic power can mould law.

A striking case has been the patentability of genetic sequences, which has been an area of considerable legal uncertainty, not least because it arose in a field of largely publicly funded basic science. Under pressure from business to grant patents and stimulate a biotechnology industry, the patent offices of the EU, Japan and the US attempted to agree technical standards, and began to grant patents, with different degrees of caution. As legal challenges emerged, some patents were invalidated by the courts, and Pistor relates the notable case of Myriad Genetics, which lost protection for its claim to the breast cancer gene sequence in the US Supreme Court (pp. 112–114). Nevertheless, as Pistor relates, Myriad generated billions in profits from selling testing kits, while operating in this legal miasma. This is part of a wider story, as the volatility in corporate valuations due to these legal and other uncertainties led to corporate concentrations, as well as pressures for various public initiatives, including collective and compulsory licensing and patent pooling (Picciotto, 2011: 401–404).

Thus, political and economic power battles also involve debates and conflicts over the legal codes that shape social and economic relations. The inherent indeterminacy of law creates arenas for these battles, providing the ‘first mover’ advantage that Pistor describes, as capital can exploit legal uncertainty. Indeed, lawyers are in their element in legal gray areas, as they battle for what Pierre Bourdieu has called ‘le droit de dire le droit’ (the right to state the law), to justify their interpretation as the ‘correct’ one, and thereby sanctify its representation of the world with ‘the perceived objectivity of orthodoxy’ (Bourdieu, 1987: 839).

This involves a much more complex social process than just the invention of ingenious legal coding. The stabilization of normative expectations also requires domination of the cognitive community that establishes the shared understandings enabling the normalization of favored interpretations of the law. Access to legal resources gives

powerful advantages to ensure domination of this process of normalization through professional techniques and practices. Hence, power in today's corporate capitalism is buttressed by the ability to mobilize lawyers in large numbers, to dominate professional discourses, and deploy complex strategies, moving between the public sphere of politics and the state and the private sphere of structuring and managing commercial and corporate transactions. Pistor's book shines a bright spotlight particularly on the techniques and devices for coding these transactions.

Note

1. Marx captured the contradictory nature of what in his day was the joint-stock company, by describing it as representing 'the abolition of capitalist private industry on the basis of the capitalist private system itself', and involving 'the control of social capital' in which 'social means of production appear as private property' so that 'instead of overcoming the antithesis between the character of wealth as social and as private wealth, the stock companies merely develop it in a new form' (*Capital* vol. 3, chapter 27, text available at www.marxists.org). Coase's seminal article 'The Nature of the Firm' (1937) saw the firm as a system of planned coordination (building on Adam Smith); analyzing the production factors which it would be more efficient to coordinate rather than to buy contractually, he argued that this is most likely to be so when the content of a contract is hard to specify in advance. In finding that this is especially so for labor, due to the power to direct labor in the employment relation, he clearly echoed Marx.

References

- Bourdieu P (1987) The force of law: toward a sociology of the juridical field. *Hastings Law Journal* 38: 805–853. (Translation of Bourdieu P (1986) *La Force du Droit. Elements pour une sociologie du champ juridique. Actes de la Recherche en Sciences Sociales* 64: 3–19.
- Campbell D (2007) Relational contract and the nature of private ordering: a comment on Vincent-Jones. *Indiana Journal of Global Legal Studies* 14(2): 279–300.
- Campbell D and Picciotto S (2000) The Justification of Financial Futures Exchanges. In: Hudson A (ed.) *Modern Financial Techniques, Derivatives, and Law*. The Hague: Kluwer Law International, pp. 121–133.
- Coase RH (1937) The nature of the firm. *Economica* 4(16): 386–405.
- Coase RH (1960) The problem of social cost. *The Journal of Law and Economics* 3(1): 1–44.
- Collins H (1999) *Regulating Contracts*. Oxford: OUP.
- Freeman J (2003) Extending public law norms through privatization. *Harvard Law Review* 116: 1285–1352.
- Menke C (2015) *Kritik der Rechte*. Berlin: Suhrkamp.
- Parker C, Scott C, Lacey N, et al. (2004) *Regulating Law*. Oxford: Oxford University Press.

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- Picciotto S (2011) *Regulating Global Corporate Capitalism*. Cambridge: Cambridge University Press.
- Picciotto S (2017) Regulation: managing the antinomies of economic vice and virtue. *Social & Legal Studies* 26(6): 676–699.
- Posner EA and Weyl EG (2018) *Radical Markets. Uprooting Capitalism and Democracy for a Just Society*. Princeton, NJ: Princeton University Press.
- Roy WG (1997) *Socializing Capital. The Rise of the Large Industrial Corporation in America*. Princeton NJ: Princeton UP.
- Vincent-Jones P (2006) *The New Public Contracting: Regulation, Responsiveness, Relationality*. Oxford: Oxford University Press.

Coding Capital: On the Power and Limits of (Private) Law: A Rejoinder

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I would like to thank Emilios Christodoulidis for putting together this ‘dialogue and debate’ for the journal *Social & Legal Studies* that discusses my recent book ‘The Code of Capital: How the Law Creates Wealth and Inequality’ (2019). Like other authors, academics write books in the hope that they will be read; but more than this, they write books in the hope that others will engage with their arguments. I am thus deeply grateful to the four authors who have contributed to this volume. For my response, I have picked several related themes that I distilled from their critiques: the limits of private law; the limits of a Western legal perspective; and the limits of law. For readers who have not read the book, I offer a brief summary of its core themes before turning to these themes.

The Code of Capital in a Nutshell

Capital, I argue in my book, is not a thing. It is the capacity of assets to generate wealth for their holders and protect it over time. They owe this capacity to a social good, namely law, a social construct that organizes how the states means of coercion can be accessed and employed. The qualities that bestow simply objects, promises or ideas with wealth generating and protecting powers are priority, durability, convertibility and universality. *Priority* ranks rights; it creates stronger over weaker ones. *Durability* extends rights in time, thereby giving the underlying assets a chance to grow and multiply. *Convertibility* locks in past gains by allowing asset holders to convert their assets into safer ones that are more likely to maintain their value; this is how financial assets attain durability. *Universality*, finally, extends all these interests in space by protecting them against

others or the world (*erga omnes*), whether or not they were part of the original agreement or knew about it.

Importantly, these qualities describe rights *to* an object, a promise or an idea, rights that are distinct from the asset itself. This is easier to grasp when talking about intangibles that exist only in law, such as a patent or a securitized asset for example. The legal rights *are* the asset. For physical assets, such as land or machines, you need to abstract from the thing itself and recognize the legal coding that is critical for extracting its economic value.¹ Land has certain use value without any legal coding: to graze sheep or grow crops, for example. Only the proper legal coding, however, gives the land's owner *the right* to enjoy its use, and – and this is critical for capital – to capture its current or expected *monetary* value by selling, leasing, or mortgaging it (Commons, 1924: 16). Oftentimes landowners both consume and benefit from the land's earning powers; for capital the latter is key. Thomas Piketty has shown that by the end of the 19th century, land was still the most important source of wealth in the UK and elsewhere, yet few English landlords actually lived on their land and even fewer tilled it themselves (Piketty, 2014). They had rented or mortgaged it, while using legal techniques like the entail to protect the family's interests in its future use and return value (Anderson, 2010). The same is true for machines. Capital is not about the thing itself, but about the rights to it. These rights determine who can use the machine or hire others (labor) to run it, but also who can lease, collateralize or sell it. In organized production processes, machines are part a pool of assets that is owned not by a natural, but a legal person, i.e. a corporation. The corporation can have one or many shareholders; it can create additional legal persons (subsidiaries) and move assets to them, while protecting the shareholders of the parent company from its liabilities the corporation incurs. If it goes bankrupt, they can simply walk away; conversely, if the shareholders die, the corporation continues its legal existence. These legal structures, I argue, are central to the evolution of capital; indeed, for the creation of private wealth, they are more important than the land, the factories that are built on the land and the machines they house. The corporation itself is, of course, a social structure; it exists only because the idea of legal personality was created under specific political, economic conditions (Ciepley, 2013). Legal forms, however, can be dislodged from the social structures that gave rise to them and re-deployed. They are abstractions from lived social relations, which gives them greater versatility, but does not make them any less social.

If the argument is correct that the legal coding, rather than the thing itself, is key for capital, then with the right legal coding *anything* can be coded as capital: not only tangible objects, but expectations, ideas, even nature's own genetic code. Only a handful of legal modules have done *most* of the work over the past 400 years or so: Property, collateral law and corporate law, the common law trust, bankruptcy and contract law. These are the only legal devices to rank asset, grant them durability or ensure that everyone must respect them. However, these 'legal modules' have dominated the private coding of capital in the Western world for the past 400 years. They have been adapted to fit new purposes, but their core structure has remained remarkably intact.

The book uses this relatively simple framework to show, how different assets have been coded as capital, including land, debt, firms, and knowledge. It also shows how the legal modules, which have their origins in *domestic* legal systems, have been extended to

the transnational context. Conflict of law rules (private international law) has played a key role in this process. They ensure that the law of other countries can be enforced in local courts, if certain conditions are fulfilled.

The Limits of Private Law

The book focuses on private law and mostly on the handful of legal modules described above and ignores public law. Sol Picciotto criticizes this perspective as too narrow and argues that the interaction of public and private law is key for understanding capitalism. In his conceptualization, private law governs the exchange of goods and public law ‘the public sphere of politics and state consists of interactions between citizens’ (Picciotto, above).

I have two responses. The first is to point out that current debates about globalization are too heavily focused on public law, on regulation and de-regulation, on the retreat of the state in favor of markets, while ignoring how deeply the state is and in fact must be involved for these markets to exist. Anne Chadwick captures my intention well when she writes that the book ‘is a powerful counter-narrative’ to representations that see law entering the world of finance and markets ‘only after the fact’ and shows that ‘financial “liberalization” has been the product of intense legal work’ (p.).

The second point is perhaps even more critical. I wish to reframe the conventional distinction between private and public law. *All* law is at its core public. Even contract law, because the choice of couching a private arrangements in legal terms implicitly invokes the possibility of using the state’s coercive powers to enforce it. The key question is not, whether law is or public or private, but what channels are available to different agents for employing the coercive powers of the state in their dealings with others, collectively and individually.

Max Weber associated modern statehood with the centralization of the means of coercion (Weber, 1978). Law, it follows, is an (not the only) institutionalization of state power, and it can take different forms. It can give only public figures (administrators, courts) access to employ it against citizens in a top down fashion, allow citizens to employ it against the state and its agents in a bottom up fashion, and/or allow private parties to avail themselves of this power when organizing their relations with one another. The extent to which private parties have been empowered by law is perhaps most distinctive of different legal systems. It is very pronounced in the Western legal traditions, more so the common law than the civil law; but less so in the Chinese legal tradition, for example. We know from more recent research that Chinese magistrates presided over many private disputes (Zelin, 2005); still, the code of the last major dynasty, the Qing code, was couched primarily in terms of administrative or criminal law (Bodde and Morris, 1973).

The evolution of capitalism coincided with the rise of the modern nation-state and its subsequent transformation in many countries into constitutional democracies. In the latter, public law can be understood, as Sol Picciotto suggests, as the sphere in which citizens meet, deliberate, and self-govern. What I tried to show in the book, however, is that the actual scope of this sphere, or the extent to which state power can be invoked as a collective ordering device, is often curtailed by the legal empowerments that private

parties enjoy. Within a single legal system, it may be possible to rely on public regulation to balance the excesses of private legal ordering. In the context of multiple legal systems with conflict of law rules that give private parties substantial leeway in picking and choosing among them, the ability to keep a public law check and private coding strategies is much attenuated. This is one of the fundamental challenges that democracies face, I argue in Chapter 9 of the book, one that requires rolling back the scope of legal powers that private parties enjoy.

Capital is dependent on state law, because the privileges it enjoys require the subordination of countervailing interests, if necessary by the use of force. To succeed, capitalism therefore needs a friendly state as a host state that is willing to enforce contracts and property rights and curtail public law interventions with private coding strategies. With the free movement of capital, facilitated by states that dismantled entry barriers accommodated capital by legal reforms (including substantive and conflict of law rules), capital has gained the upper hand.

While capital is dependent on states and state law, capital's relation to democracy is more ambiguous – other than in a Polanyian double-movement to ensure that excesses of private coding strategies need to be mitigated from time to time w. Without such counter-movements, capitalism might have long succumbed to its inherent contradictions, as Marx predicted. Yet, capitalism has thrived in different political and public law regimes, including fascism in Germany and Italy, military dictatorships in Latin America and elsewhere, even in the Peoples' Republic of China, which is officially still a communist state, but has developed a thriving shadow banking system (Awrey, 2015). In short, I would maintain that for capital and capitalism, private law is central as long as the state credibly commits not to interfere with private wealth creation.

Still, public law can and does play a role in creating wealth. Public corporations are used to run utilities or sovereign wealth funds; public trusts run conservancies, environmentally protected areas, and national parks. School and university systems can be entirely publicly organized, and even private universities are organized as non-profits, governed by trustees with no real owner to speak of. These examples could be multiplied and with a little imagination, we might harness private law devices for public interests. The public benefit corporation, a privately held corporation that commits to a social goal, has been recognized by many states in the US and will hopefully multiply in the future. The success of these all of these arrangements, however, depends on striking the right balance with the legal empowerment for private agents to harness the powers of the state purely for maximizing their own, private wealth.

The 'Golden Age' of capitalism, the first couple of decades following World War II., have arguably done so. Iago Miola asks in his contribution how within my framework one can make sense of the 'post-war democratic capitalism' (Wolfgang Streeck) with its emphasis on labor law and administrative governance, not only private interests. In my view, this period exemplifies both the promise and the fragility of configuring access to state power in a balanced fashion. The promise is a 'social' market economy (a term coined by the German minister of economic affairs, Ludwig Erhard) that combines vibrant private legal empowerments with safeguards for labor, the environment, and the vulnerable in society. The fragility of this balancing attempts stems from the inherent tensions between private agents with powerful interests to pursue their interests and the

rest. The Bretton Wood System with its public governance over foreign exchange markets began to unravel shortly after it was instituted. Currency swaps eroded capital controls when they were still in place, and one by one, states, repealed them and standardized core rules to facilitate global capital mobility (Abdelal, 2007). International trade rules such as the General Agreement on Tariffs and Trade (GATT) began the process of creating legal conditions for global trade and commerce beyond the reach of individual nation states (Slobodian, 2018). Once states had dismantled barriers to entry and increased private party autonomy for selecting the laws by which parties with the best legal advice were willing to be governed the scope for public constraints over private power diminished. At every step along the way, states actively participated, but not in the dismantling of state of power as often argued; rather they helped reconfigure state power in the interest of private capital.

Striking a good balance between legally empowering private actors and enforcing public interests is difficult, because effective public governance is always, indeed inherently, more difficult than private governance. As the number of interested parties and the heterogeneity of their interests increases, agency problems multiply and so do the costs of decision making and monitoring. Not surprisingly, the costs of public governance and episodes of corruption have always been a powerful weapon in the arsenal of privatization campaigns. Modern information technologies may help reduce these costs, make public governance more transparent and verifiable (through blockchain, for example), but also more inclusive (i.e. through central bank digital currencies). Yet, these technologies are currently used to further expand private rather than public power (Pistor, 2020).

The Limits of a Western Legal Perspective

Iago Miola raises another limitation of the book: its focus on the experience of the Global North. The experience of countries on the periphery, he argues, has been quite different. ‘Public law has played a much more direct role in coding capital’ and states have engaged ‘directly in the production of wealth’ (p.). Changing perspectives and looking to the Global North from the Global South, he suggests, might render very different results.

This comment struck home, because I have spent most of my career teaching and writing about legal systems on the periphery of global capitalism, about countries in transition, emerging markets, and developing countries. The ‘Code of Capital’ is one of very few publications about law in the core countries of capitalism, the UK and the US. In effect, I did the kind of reverse engineering that Miola asks me to do without disclosing it. He captures very astutely the implications my argument in the book has for countries on the periphery when he writes that within its framing these countries oscillate between two extremes: they are ‘either a successful destination of transplants that harmonize the legal modules demanded by global capital’ or are avoided or circumvented because their legal systems do not offer ‘good prospects for coding capital’ (p.).

This, I submit, is the perspective of globally mobile, or ‘roving’ capital, and its roots can be traced to the early days of colonization.² It is interested in private wealth creation, not social welfare, and picks and chooses its laws and destination countries from a menu

of different offerings. The World Bank furthered the utilization of law for private ends since the announcement of the Washington Consensus in 1989 (Williamson, 1990) and has perfected it with its 'Ease of Doing Business Index', an annual ranking of the 'quality' of legal systems, which, as the name suggest is all about private business.³

Transplanting law from the core to the periphery has its origins in colonialism and has always been closely associated with further commerce, trade and investment for the entrepreneurs from the core, or for coding their private wealth. It should therefore come as no surprise that in *transplantees* law does not enjoy the same authority as it does in the *transplantors*. Indeed, an empirical study of the 'transplant effect', which I co-authored, shows a marked difference in the effectiveness of legal institutions today in origin vs. transplant countries (Berkowitz et al., 2003). We interpreted these data to suggest that something went wrong in the *process* of transplanting law, that the absence of contextualization or fitness of the imported rules somehow weakened their effectiveness. There is, however, a different way of interpreting the results: The problem was not the process but the purpose; and the latter was only too well perceived within the recipient countries. In fact, there is evidence that legal systems, which experienced a wholesale legal transplant tend to under-invest in their formal legal institutions. Comparative data are difficult to come by on an international scale. However, historical and comparative research in the US has shown that states that switched from French, Spanish, or German law to English law during the colonial period, invest less in formal legal institutions even today (Berkowitz and Clay, 2005).⁴

It is, of course, true that many peripheral countries have pursued development policies that focused on the creation of *national* rather than private wealth. Some have argued that they did not have a choice, because initial endowments of capital in private hands were so low that they would have never been able to catch up with England had they simply tried to emulate its development trajectory Gerschenrkon, for example, argued that England was able to rely on a slow and decentralized process of gradual private capital accumulation for launching its industrial takeoff (Gerschenkron, 1962).⁵ In comparison, late developers relied more heavily on banks (Germany) or the state (Russia).

I do not address the question of *national* wealth formation in my book. National wealth is clearly important as indicator for economic development, but it says little about the distribution of wealth within countries. Thomas Piketty and his collaborators have tried to compile data on wealth and income distribution for countries around the world, which has proven difficult, because in many countries wealth data are not available.⁶ They do show, however, that private wealth inequalities tend to be higher than income inequalities, Using data on income inequality, his data for South Africa show a huge increase in income inequality after 1994, that is, in the *post*-apartheid era. For Brazil, we see a substantial *increase* in income inequality during the Lula presidency.⁷ In the two countries, the top 10 percent capture 65 (South Africa) and 56 (Brazil) percent of income in 2012, notwithstanding massive efforts in both countries to redistribute wealth through restitution or Bolsa Familia and similar programs.⁸ Claire Debucquois, who has written a dissertation on land rights in Brazil under my supervision, shows, how state law enabled private wealth formation not only historically but to this day (Debucquois, 2019). The close, if not cozy relation between the elites and the government are still present in land transactions inside Brazil, by Brazilian companies overseas as well as in

debt assets. If anything, according to Debuquois, modern financing techniques that use private law have further entrenched this relation.

In short, state-led development does not exclude private capital formation. I do take the point, however, that we need to better understand the relation between the two and this will not only the heroic data collection efforts that Piketty and his collaborators have undertaken, but also a deep dive into the legal structures. My hope is that my book has made a case for the latter, but it is only a first step and much work remains to be done.

The Limits of (all) Law

For all their praise for the analytical framework developed in the book, Goldoni and Chadwick raise an even more fundamental issue, namely the limits of law itself. Both suggest that I might have pushed the argument too far by centering so much on law and legal coding strategies. According to Goldoni, law comes across as ‘performative’ and that in my account the underlying ‘social relation itself is a legal exercise’. This ‘runs the risk of producing a disembedded type of legal analysis that misses out on the dynamics of the relevant social practices’ (p. . . .). Similarly, Chadwick suggests that ‘the balance of the argumentation perhaps tilts too far in another direction. At times, the impression is created that it is possible to have *capital without capitalism*’ (p. . .).

In responding to this critique I return to Max Weber: the limits of law are defined by the limits of law’s authority; and as with authority and legitimacy in general, it cannot be dictated, but must be earned. Law is a social relation, it does not exist outside it; and yes, some social relations do indeed become a ‘legal exercise’ as Goldoni put it. Law is a social relation of a special kind, however, one that is mediated by institutional choices that grant different agents access to the centralized means of coercion directly or indirectly. This varies quite significantly across countries and legal systems. At the same time, we should recognize that legal arrangements can be separated from a specific *local* context, which is where most researchers look for ‘the social’.

Geoffrey Hodgson has argued convincingly that one of the most remarkable *social* transformations has been the delegation of dispute resolution to state institutions, such as courts (Hodgson, 2009). Suppressing social practices of self-help was a critical factor in the rise of the modern nation-state; the other was building trust in the institutions of the state. As Hodgson points out, law did not replace social practices; indeed, formal law tends to be most effective when it is supported by prevailing norms. This insight finds support in the work by Aldashev et al., who have shown that in traditional societies, women will opt into formal law, provided this does not lead to their ostracization by their community (Aldashev et al., 2012). Legal systems, however, also transcend existing communities. Large, heterogenous societies are often governed by multiple sets of norms; they are legally plural or multijural (Breton et al., 2009; Engle Merry, 1988). Religious norms co-exist and partly overlap with civil law, and contractual practices with social norms of trust in exchange relations. It is not uncommon for some to opt out of formal law and rely entirely on social norms and sanctions (Bernstein, 1992; Ellickson, 1991). Transactions among strangers, however, tend to rely to a much greater degree on formal law and the implicit threat of law enforcement. Not membership in the same group, but mutual respect for binding commitments and enforceability is what matters in

national, regional, and global markets. US\$18.89 trillion worth of goods were exported in 2019 according to the World Trade Organization (WTO).⁹ Total debt securities, including sovereign and private debt outstanding by the end of 2019 exceeded US\$ 25 trillion,¹⁰ and global equities reached US\$90 trillion,¹¹ although it is not clear from these statistics what share of debt or equity securities is traded transnationally. Still, many of these transactions involved crossing boundaries of spheres of exchange that are governable by social norms; indeed, they regularly cross legal boundaries. Contrary to widely held beliefs that these transactions take place in a stateless and thus lawless sphere, they are deeply coded in law, and for the most part in private, not public law.

What kinds of societies create such structures, is an excellent question that Anne Chadwick asks. There are two possible answers to this question. One is that societies that have been firmly subordinated to the market principle (Polanyi, 1944); another is that these structures operate quasi-autonomously from societies. They serve primarily participants in global trade and finance who rely on them and trust them as long as societies do not interfere with them. In either case law has clearly been utilized to serve private, rather than social goals, private, not national, capital formation. However, law can do so effectively in the long run only if it enjoys respect especially by the ones who are asked to yield to the demands of law: to the priority rights and durability claims others enjoy. When the legitimacy of law falters, so will our capitalist order.

I agree that law does not operate in limbo outside social structures. However, I would insist that law itself *is* a social relation, one that intersperses human interactions with fairly abstract institutions. As a result, social relations have become scalable beyond anyone's imagination. Benedict Anderson coined the phrase of the nation states as an 'imagined community' (Anderson, 1991). In a similar vein, economic and financial systems that span the globe can also be described as imagined communities that rely not on shared identity, but on a shared reliance on the binding nature and enforceability of legal arrangements. Importantly, these legal arrangements have, indeed demand, effects well beyond the parties to the transactions; they need to be universal and require others to yield to them. Herein lies the limit of law: its effects depend on its legitimacy in the eyes of those who are asked to yield. As the beneficiaries of legal coding strategies maximize their private gains, they are endangering the legitimacy of law as an ordering device that is perceived as fair. In doing so they are eroding the social structures on which they have built their private wealth.

Notes

1. Bernard Rudden, who coined the notion of the 'feudal calculus' that I use in the book, use the terminology of 'things as things' and 'things as value' (Rudden, 1994) in an attempt to translate the concepts of 'Substanzrecht' and 'Wertrecht', the German jurist Josef Kohler had introduced (Kohler, 1901).
2. I used Mancur Olson's image of 'roving' vs. 'stationary' bandits to describe contemporary mobile capital in the book (Olson, 1993). See Chapter 6.
3. For the latest report, see <https://www.doingbusiness.org/en/rankings> (last visited 10 July 2020).
4. For a less systematic attempt on trying to measure the effectiveness of formal law in six Asian jurisdictions, see also (Pistor and Wellons, 1999)

5. On late developers, see also (Amsden, 2003)
6. See also his 'reflections' on his book using data from the US, South Africa and Brazil, presented in Cape Town, September 2015.
7. *Ibid*, slide.
8. See also the World Inequality Database available at <https://wid.world/> (accessed 9 July 2020).
9. WTO press release of 8 April 2020, available at www.wto.org.
10. BIS Debt Securities Statistics, 3 June 2020. Available at: <https://www.bis.org/statistics/secstats.htm>.
11. See Jesse Pound, 'Global Stock Markets Gained 17 trillion in 2019', *CNBC*, 24 December 2019.

References

- Abdelal R (2007) *Capital Rules*. Cambridge, MA: Harvard University Press.
- Aldashev G, Chaara I, Platteau J, et al. (2012). Formal law as a magnet to reform custom. *Economic Development and Cultural Change* 60(1): 795–828.
- Amsden AH (2003) *The Rise of 'the Rest': Challenges to the West from Late-Industrializing Economies*. Oxford: Oxford University Press.
- Anderson B (1991) *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso.
- Anderson JS (2010) Changing the Nature of Real Property Law. In: Cornish W, Anderson JS, Cocks R, Loban M, Polden P and Smith K (eds) *The Oxford History of the Laws of England: 1820-1914 Private Law* (Vol. XII), pp. 179–231. Oxford University Press.
- Awrey D (2015) Law and finance in the Chinese shadow banking system. *Cornell International Law Journal* 48(1): 1–50.
- Berkowitz D and Clay K (2005) Initial conditions, institutional dynamics and economic performance: evidence from the American States. *American Law and Economics Review* 7: 62–84.
- Berkowitz D, Pistor K and Richard J-F (2003) The transplant effect. *American Journal of Comparative Law* 51(2): 163–203.
- Bernstein L (1992) Opting out of the legal system: extralegal contractual relations in the diamond industry. *Journal of Legal Studies* 21(1): 115–157.
- Bodde D and Morris C (1973) Basic Concepts of Chinese Law. In *Law in Imperial China: Exemplified by 1900 Ch'ing Dynasty Cases*. Philadelphia: University of Pennsylvania Press, pp. 3–51.
- Breton A, Des Ormeaux A, Pistor K, et al. (eds) (2009) *Multijuralism: Manifestations, Causes and Consequences*. Williston, VT: Ashgate.
- Ciepley D (2013) Beyond public and private: toward a political theory of the corporation. *American Political Science Review* 107(1): 139–158.
- Commons JR (1924) *The Legal Foundations of Capitalism*. New York, NY: The MacMillan Company.
- Debucquois C (2019) *The Merchant, the Prince, and the (Law) of the Land*. (JSD). New York, NY: Columbia University.
- Ellickson RC (1991) *Order Without Law – How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.
- Engle Merry S (1988) Legal Pluralism. *Law and Society Review* 22(5): 867–896.

- Gerschenkron A (1962) *Economic Backwardness in Historical Perspective*. Cambridge, MA: Harvard University Press.
- Hodgson GM (2009) On the institutional foundations of law: the insufficiency of custom and private ordering. *Journal of Economic Issues* 43(1): 143–166.
- Kohler J (1901) Substanzrecht und Wertrecht. *Archiv für die civilistische Praxis* 41: 155–208.
- Olson M (1993) Dictatorship, democracy, and development. *American Political Science Review* 87(03): 567–576. doi:10.2307/2938736
- Piketty T (2014) *Capital in the 21st Century*. Cambridge, MA: Harvard University Press.
- Pistor K (2020) Statehood in the digital age. *Constellations* 27(3): 3–18.
- Pistor K and Wellons P (1999) *The Role of Law and Legal Institutions in Asian Economic Development*. Hong Kong: Oxford University Press.
- Polanyi K (1944) *The Great Transformation: The Political and Economic Origins of our Time*. Boston: Beacon Press.
- Rudden B (1994) Things as things and things as wealth. *Oxford Journal of Legal Studies* 14(1): 81–97.
- Slobodian Q (2018) *Globalists: The End of Empire and the Birth of Neoliberalism*. Cambridge, MA: Harvard University Press.
- Weber M (1978) *Economy and Society*. Berkeley, CA: University of California Press.
- Williamson J (1990) What Washington means by policy reform. In: Williamson J (ed.) *Latin American Adjustment: How Much Has Happened?* Washington, DC: Institute for International Economics, pp. 7–41.
- Zelin M (2005) *The Merchants of Zigong*. New York, NY: Columbia University Press.