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Wealth and poverty law: a review of Katharina Pistor's *The Code of Capital*

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INTRODUCTION

Katharina Pistor has long been recognised as a prominent voice in scholarly debates on law and economics. Her most recent book *The Code of Capital: How the Law Creates Wealth and Inequality*[1] is no exception, having been acclaimed in various circles including non-academic outlets. This is, indeed, a commendable interdisciplinary contribution to inquiries into the seemingly unprompted inner workings of global capital. Set out to reach a broader, non-legal readership, I contend in this review that the book is a timely source for legal scholars and practitioners to reconsider the socioeconomic implications of their crafts, ie the creation of wealth and the stability of its unequal distribution in society.

OVERVIEW

The book opens by unravelling the basic legal infrastructures of the financial system in terms of contracts, property, collateral, trust, corporate and bankruptcy law. Behind the complexity of global financial markets and their intangible assets transactions, there rest basic legal instruments, forms, modules, actors, institutions, procedures, safeguards, entitlements, rights and obligations. As an investigation into the legal fabrication of privileges, Pistor exposes the

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1 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2020).

making of capital itself as the effects of legal coding. For this frame of analysis, I take this book as a remarkable invitation to re-examine legal participation in the creation of both wealth and poverty, or as this review's title suggests, the intricacies of what could be framed as the changing forms of wealth and poverty law.

Chapter 1 outlines Pistor's view of capital as legally coded assets by which wealth is generated in the world to the benefit of the assets' holders and to the disadvantage of the have-nots. This is how law – in fact lawyers – creates wealth as well as inequality. Pistor's approach suggests a subtle alignment with the currently prominent perspectives on legal materiality, following the traces of core legal modules that historically shape financial markets whilst such ingenious formations are 'blackboxed', or efficiently invisible.[2] A core ingenuity to be underscored by this approach is how *private* codifications in law are secured by the *public* structures of coercive enforcements. Made into an 'invisible hand', the code of capital secures an entire market economy premised on private enterprise and enrichment. Capitalism, as a system of private law imbricated in the public order, has risen and expanded globally by means of an increasingly globalised legal coding endorsed by states.

Chapters 2 to 5 provide the material basis of the book, retracing a legal history of capital's transmutations from the perspective of four assets (land, firms, debt and know-how) which are made into capital by asset-creating legal modules such as contracts, property rights, collateral, trust, corporate and bankruptcy law. These modules, Pistor argues, graft legal attributes onto material or fictional assets, conferring priorities between competing claims, durability in time, convertibility of values, and universality in the global landscape. As a result, land-based property, corporations, financial assets and intellectual property rights emerge as repositories of wealth (and bedrocks of poverty). It is by this stable mechanism of legal-coding devices and techniques that any asset is turned into capital, ie the means of wealth creation, accumulation and concentration. In this light, the changing emphases of capitalism, such as the current turn towards financialisation, are construed as mere implementation of longstanding legal techniques

2 The works of Annelise Riles and Mary Poovey could be highlighted as particularly relevant for readers looking for further references on such approaches to law and finance. Riles develops an ethnography of legal experts in the financial markets from the perspective of the collaterals as documents rather than norms. Poovey addresses the global financial crisis as resulting from neoliberal financial models which are operationalised by professionals and thus actualised in the world: Annelise Riles, 'Collateral expertise: legal knowledge in the global financial markets' (2010) 51(6) Current Anthropology 795; Mary Poovey, 'On "the limits to financialization"' (2015) 5(2) Dialogues in Human Geography 220.

to new assets – this time intangible, fictional and, themselves, legally made assets.

However, having traced the legal building blocks of capital as such, an elementary question could be raised: if there is no unified global legal system, how can global capitalism be presented as legally coded? Pistor addresses this question in chapter 6 by revealing a global legal infrastructure that is portable and dominated, in practice, by the domestic legal systems of England and New York State which are, in fact, remarkedly recognised and enforced all over the world in the service of capital. This ubiquity is undeniably imperialist and it mirrors a long history of exporting Western legal systems to subjected jurisdictions and territories across the world. But rather than a state-led offensive, this expansion required a relatively recent regulatory transformation in the international arena of treaties and bilateral agreements in which nation states adhere to foreign dispute settlement mechanisms and private arbitration and give private autonomy to parties to decide their jurisdiction and conflict of law rules – particularly when it comes to financial assets whose intangibility evades territorial control. As a result, a wide network of micro-practices, contracts, private agents, arbitration and litigation strategies uphold the global code of capital. As Pistor puts the various pieces of this puzzle together, it becomes clear that the global legal infrastructure is a contingent effect of legal actors which directly or indirectly make an 'empire of law' and through it the creation and distribution of wealth in the world.

The craftmanship of private lawyers, whom Pistor designates the masters of the code of capital, is explored in chapter 7, the most thought-provoking chapter for a legal readership. Contrary to common construal of the holders of capital as the self-interested agents of change and their lawyers as the tools that enable their manoeuvres, Pistor centralizes transactional lawyers and law firms as the key performers of innovative coding strategies. Through lawyers, the coding of capital springs from multiple small-scale private transactions which actively create new law. As such, legal coding techniques are advanced by private lawyers, attorneys and arbitrators rather than public magistrates or legislators. In other words, capital's legal code derives less from a grand masterplan from a superior force than from the amassed practices, cases, deals and knowhow of legal experts incrementing laws and expanding legal boundaries from previous legal materials. The rise of a global legal profession is retraced both in civil law and in common law families, as a relatively recent formation growing from the nineteenth century into hybrid law-making systems that are (at least partially) immune from public scrutiny. Lobbying for legislative reforms is only a secondary strategy followed by asset holders in the broader spectrum

of coding innovations made available by the master coders who work from existing files, cases, contracts, recorded precedents and so forth.

Thus, far from a superior source of legal authority, law emerges as a coding technique similar to other forms of coding social, political and economic life. Indeed, in the contemporary rise of digital modes of ordering, chapter 8 contrasts legal and digital codes as holding competing and complementary roles in enhancing private gains. Whilst getting into the intricacies of the digital–legal crossroads – blockchain, smart contracts, cryptocurrencies, digital property title registration, and digital autonomous organisations – important implications of Pistor's framing of the law as code unfold. Most notably is that the process is decentralised in terms of control and increasingly global in scope. Moreover, 'law' can be viewed as a practical operation which is shaped by its own processes, turning out to be permanently incomplete and malleable.[3]

The book ends, with chapter 9, in an analytical recompilation of global capitalism in terms of the dynamic recursivity between capital, private law and state power, offering insight for a critical philosophy of rights. Departing from Marxist critique or other forms of 'post-political' analyses such as rational choice theories, Pistor's focus on the role of law in the making of capital and private wealth enables readers to engage with a new form of critique, one that is centred on the process by which private actors manufacture legal codes premised on individual subjective rights that are protected by states. Beyond interests, ideologies or influences, what guides the configuration of power lies in capital's rule by law, in which the contingent coding of capital in private law is raised to the foundations of public law. In view of this, Pistor's horizon of change rests in statutory control over the coding of capital, putting forward an eight-tiered programmatic agenda to limit the ample scope of unregulated choices by which lawyers operate and defer the legal mobility of global capital. It also entails an ethical restructuring of legal education and the legal career.

Somewhat ironically, then, the book starts with a compelling critique of the legal role in the production of inequality and ends with a defence of more law, more regulation and more state institutions, rights and

3 Cornelia Vismann's media-technological approach offers an important contribution to this point, by placing the historical transformations of law in the material basis of record-keeping, files, lists and inventories which form a file-based system of power: Cornelia Vismann, *Files: Law and Media Technology* (Stanford University Press 2008) 9.

enforcements.[4] Law and its practitioners are placed at the centre stage of both the problem and of the solution. Pistor's proposition is to foster at least a certain balance to a system of unequal distribution, as a pragmatic approach in the face of no viable radical alternative.

Although readers might be reluctant to concede such an extensive power within lawyers' everyday practices and thus admit a sense of inescapable structural injustice of access, Pistor's compelling argument raises fundamental questions about the potentials of legal practices to advance social transformation, opening up new frontiers of theoretical inquiry about social justice. Decoding capital to find that the source of private wealth rests in law also entails acknowledging that socioeconomic injustices are legal constructs which, at least in theory, could be legally reversed. Of course, to suggest that social change may come from lawyers' change in practice, as if persuasion could work to redress the path of an entire global legal profession, would be unsatisfactory. Not only does this proposition disconcertingly assume that lawyers are disinterested agents – ie mere experts doing their work – it also undermines the integral connection between modern legal systems to capitalism.

Whilst raising limits to legal manoeuvres in coding capital certainly offers an important practical agenda towards fairer distributions of wealth in society, I would like to stress, instead, a stronger potential in the book's argument to be further explored as a new direction for research on the relationship between economics and law. It regards Pistor's crucial redefinition of wealth in legal terms which, I argue, also enables a timely reconceptualisation of poverty. In other words, it is through law that both wealth and poverty are made in the world. To be disenfranchised and dispossessed, rather than reflecting a basic material deprivation which economists attempt to remedy, becomes a matter of lack of access to legal codes and its masters. Although Pistor's focus on wealth creation conveys a comprehension of poverty as inequality – that is, as a negative by-product of wealth creation and distribution – the book can be seen to enable a novel understanding of poverty as a legal construction beyond a simple and essential material maldistribution of resources. What poverty lacks, indeed, is access and, as a result, poverty can be seen as first and foremost a legal injustice. In other words, rather then a negative effect, poverty is a positive wrong forged by law. It is in this stable legal role that we can combine spatial and temporal transfigurations of wealth and poverty

4 A point made in line with Sundhya Pahuja's analysis of a sort of a recurrent deadlock in legal critique which works to continually reinforce law's own expansion, 'Global poverty and the politics of good intentions' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Hart 2014).

law in the hands of legal practitioners, often oblivious to the effects of their craft on the lives of others. It is also in the legal realm, rather than in economic redistributive policies, that the problem of poverty and inequality needs to be urgently tackled.