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The Political Economy of Private Law

Comment on 'The code of capital – how the law creates wealth and inequality'

https://doi.org/10.1515/ael-2020-0077
Published online August 24, 2020

Abstract: Katharina Pistor's book The code of capital – how the law creates wealth and inequality (Pistor, K. (2019). *The code of capital – How the law creates wealth and inequality*. Princeton: Princeton University Press) is an original and insightful intervention in the quest to understand both the rising inequality of the last 40 years, as well as the inner dynamics of capitalism, a social formation that has ruled in western societies for about 200 years now. Pistor shares many of the convictions of the publications in the journal Accounting, Economics and Law, such as the dangers to democracy inherent in the corporate form (Robé, J. P. (2011). The legal structure of the firm. *Accounting, Economics and Law*, 1(1). https://doi.org/10.2202/2152-2820.1001; Strasser, K., & Blumberg, P. (2011). Legal form and economic substance of enterprise groups: Implications for legal policy. *Accounting, Economics and Law*, 1(1). https://doi.org/10.2202/2152-2820.1000), the fact that firms and corporate form need to be distinguished (Y. Biondi, A. Canziani, & T. Kirat (Eds), (2007). *The firm as an entity: Implications for economics, accounting and law*. New York and London: Routledge) and that shareholders do not own corporations, but just their shares, it is only appropriate to discuss and present it to the wider audience of the journal, pointing to its fundamental insights and potential for follow-up research. The title of the book and its set-up evoke both Luhmann's system theory with its penchant for binary code as well as Marx's capital (Marx, K. (1955[1867]). *Das Kapital*. Berlin: Dietz Verlag, Vol. 1). Combining the coding of social systems and their relentless dynamic in innovating and generating new forms by recursively referring to established elements (Luhmann, N. (1984). *Soziale Systeme*. Frankfurt am Main: Suhrkamp Verlag; Luhmann, N. (1995). *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp Verlag) with Marx's focus on the structuring effects capital has on society is making this a very inspiring book, which at the same time evokes many follow-up questions.

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Keywords: trust, regulation, capital

JEL Classification: K11, K12, G28

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1 Introduction

Katharina Pistor's book The code of capital- how the law creates wealth and inequality (2019) is an original and insightful intervention in the quest to understand both the rising inequality of the last 40 years, as well as the inner dynamics of capitalism, a social formation that has ruled in western societies for about 200 years now. Pistor shares many of the convictions of the publications in the journal Accounting, Economics and Law, such as the dangers to democracy inherent in the corporate form (Robé 2011; Strasser and Blumberg 2011), the fact that firms and corporate form need to be distinguished (Biondi, Canziani, and Kirat 2007) and that shareholders do not own corporations, but just their shares. In this sense, it is only appropriate to discuss and present it to the wider audience of the journal, pointing to its fundamental insights and potential for follow-up research. The title of the book and its set-up to me evoke both Luhmann's system theory with its penchant for binary code as well as Marx's capital (1955 [1867]). Her analysis combines the coding

of social systems and their relentless dynamic in innovating and generating new forms by recursively referring to established elements, much as Luhmann suggested (1984, 1995) with Marx's focus on the structuring effects capital has on society is making this a very inspiring book, which at the same time evokes many follow up questions, such as the reasons for the dominance of common law, the importance of public law as well as questions about political dynamics.

But before I go to these linkages, the insights they provide and the questions they provoke, I think it is crucial to appreciate Pistor's intervention in her own right and situate it in the context of the discussions of wealth and inequality in the second decade of the 21st century. Doing so, one sees that Pistor's intervention is framed alongside the intervention of Piketty (2014), who uses a more phenomenological understanding of capital as amassed wealth, which is secured and passed on over generations. This understanding of capital is crucial to see Pistor's intervention in the proper light, even though she will repeatedly return to Marx's more advanced notion of capital as a social relationship. Secondly, when Pistor speaks of wealth creation, there is a certain ambiguity which at times she nurtures herself in the book between on the one hand the hegemonic understanding of this phrase as the actual production of wealth (a dynamic process Marx sought to capture with the creation of surplus value) and on the other hand a more phenomenological understanding of the creation of "wealth" as the **durable ownership of assets**.

Pistor in fact rather focuses on the latter and looks at how assets are coded in modules of private law to gain priority, durability, universality and convertibility for these claims to property, thereby gaining for the asset holder not only priority rights to this asset, but also durability of this claim, universality over all other claimants as well as convertibility into state money (Pistor, 2019, 12f). In that sense, wealth creation is to be taken literally, as the transformation of claims that are easily perishable into claims that are made durable and long lasting, hidden away from creditors and the state, thereby establishing dynastic wealth. These assets cannot simply be taxed or be acquired during bankruptcy, because using the trust, they are made safe from bankruptcy and hidden from the state's view.[1] It is these assets, which are better coded than others and thereby become "more equal than others", which drive the dynamic towards rising inequality. These asset-holders are optimizing the trade-off between the exposure to gain and the risk of loss; or in her words, "business owners … have found ways to capture the upside, while shifting the downside to others" (Pistor 2019, p.59).

In this way, "The Code of Capital" is a book that seeks to theorize rising inequality during neoliberalism. It is a book about the capacity of private law to

1 On this level, Pistor's book can be read as a response to Piketty (2014): to tax the super-rich, you must first understand the constitution of capital as assets clothed in legal modules which make reaching it and taxing it extremely difficult.

make wealth durable and links the increasing success to do so in the neoliberal era to rising wealth inequality. The book thereby is not and cannot be about how law creates revenue growth, although it can speak about how these are capitalized (s. Wansleben, this issue). Instead, it focuses on the structuration of property rights which permits certain asset-holders to better weather the realization of adverse events.[2] But the book also has a broader ambition, as it seeks to theorize dynamics of capitalism in the longue durée, making this not only a book that seeks to theorize the current neoliberal era, but also dynamics of the capitalist formation as a whole.

In this context, Pistor agrees with Marx that capital is a social relation (ibid, 10f), but she insists that it is brought about in the realm of law, with law not being a representation but the form within which capital is formed. In her words, "law is the cloth from which capital is cut". This is an important counterpoint to Marx's analysis, which never fully integrated the role of the state, even though law and the enforcement of property rights are crucial for the accumulation of capital. In particular, the granting of property rights and their defense for assets and the use of contract law, collateral law and trusts to achieve the securing of the wealth accumulated are central, as Pistor shows. Thereby, her focus is not only on accumulation through the appropriation of rights, but also on securing the gains capital has made, an aspect which helps us to make sense both of past dynamics but also of the demand for safe assets by financial investors, as these seek to optimize the trade-off of not only increasing the exposure to gain, but also to minimize the exposure to losses.[3]

This contribution is remarkable and her conversation with Marx is at its most obvious at this point. To Marx's dictum "Accumulate, accumulate! That is Moses and the prophets!" for capitalists, she adds the desire to protect what they have already acquired. Her study suggests that whenever elites managed to tear down a barrier to accumulation, such as the lacking commodification of land, they then use the vestiges of the remaining feudal legal order to prevent from falling backward. It is this persistence of what she, based on Rudd calls "the feudal calculus" (Pistor 2019, 5) which is one of the greatest insights in the larger dynamic of capitalist evolution: elites' use of the legal vestiges of feudalism to protect what has been acquired. By introducing the two-step dynamic of amassing wealth (encroachment into commons) and defending wealth, based on the wealth defense

2 It is thereby rather not on the dynamics of accumulation through productive activity. The aspect of the dynamics of acquisition through productive activity is only touched upon when new legal innovations bring about the capacity to expand credit, which is seen as itself productive (until its overexpansion brings about a bust).

3 As Pistor shows, to achieve this optimal trade-off in financial markets, legal engineering is as important as financial engineering, the two coming together in e.g. CDOS, an example of the "promiscuous use of the corporate form combined with probability calculus based on some bold assumptions" (Pistor 2019, 100).

industry of lawyers, she provides great insights into historical dynamics which can be witnessed in capitalism.[4] It is the survival of feudal legal remnants which are still in use by lawyers in present capitalism to make ownership of assets durable where her greatest insights lie.[5]

2 Structure Through Agency: The Capacities of Lawyering

By focusing on the work of lawyers to generate the durability of wealth for an elite, we gain a better understanding of the creation of the durable structures in which dynamics unfold. Here, her focus on the incremental steps of weaving new legal cloth for capital by recursively referring to elements of past legal constructions puts her in line with Luhmann's system theoretical understanding of law who has insisted upon understanding law as a communication systems which unfolds over time (Fischer-Lescano and Teubner 2004; Luhmann 1995; Teubner 1997). This stance is uniquely apt to capture the dynamics of common law, which is characterized in its evolution by its decentered unfolding: new legal structures do not have to be validated as legal, as long as they are not invalidated by court decisions. Crucial here is that this process can operate under the assumption of as-if legality, maintained by legal opinions of lawyers. It is hence the claim to legality in private law and in property rights which drives this communication system forward.

As the author points out, there is a fuzziness at the edges of property rights and it is at this boundary that the evolution of the system unfolds. By focusing on the work of "the Masters of the Code", which use their ingenuity to "cloak the assets of their clients in new legal cloth", she identifies an engine in the evolution of legal forms that circulate that is persistently innovating, seeking to protect the assets of their clients from all negative eventualities, structuring it to make it secure and offer degrees of freedom to the capitalists, while, and this we might

4 A case in point here is the agency of capitalists installing corporate forms that mimic the limited liability corporation before it itself was reallowed in the UK in 1844 (ibid, p. 61).But also other examples abound, such as the protection of landed estates through the legal forms of the use and the trust or the attempts to expand patent protection and skill protection of employers by using covenants in employment law.

5 In this double movement, I cannot fail but notice a parallel to Marx's observation on the ascendance to power by the bourgeoise, which in its fight against nobility based itself on proclamations of general interest, human rights and freedom, only to limit these claims once they have gained a grasp on power.

want to add with Marx, guaranteeing them exposure to the process of surplus value production (for a similar conception of law and the corporate form as a mechanism to structure the exposure of capital owners to risks of gain and loss in an advantageous way from a neo-marxist perspective, s. Tuerk 1999). Her insight that "the legal code of capital does not follow the rules of competition; instead, it operates according to the logic of power and privilege" (Pistor 2019, p. 118) is crucial here.

In one of the highlights of the book in chapter 2, Pistor theorizes the historical evolution of property rights in enclosure movement, how agents fought against the king and his notion of feudal property rights and then, once they installed the new notion of modern property rights in which something can inalienably belong to a person. There are of course forerunners of that analysis, first and foremost in Marx's chapter on primitive accumulation, where he not only traces the application of modern property rights systems to indigenous population with their horrible implications, but most importantly their application to landed property in early modern Britain and Scotland.[6] In that sense, Marx's account of primitive accumulation is very much an account of a legal revolution, whereby the installation and enforcement of modern property rights takes center-stage, shielding landowners from legal obligations to their tenants and being able to dispel them from the land to place sheep there instead (Marx 1955, 762f). These battles over time made irrelevant the relationship between the lord and the vassal inherent in the property rights understanding of feudal times, which implied that the lord must secure the livelihood of his tenants (ibid, 768). This understanding is made void and a new understanding of law, modern property rights of land come about.

The famous chapter 24 in Marx's Volume 1 of Capital (Marx 1955) has given rise to the theory of accumulation by dispossession, which encompasses the dynamics of encroachment into collectively held property, enclosures and primitive accumulation by including in the realm of commodities social affairs which were excluded beforehand. First formulated by Rosa Luxemburg, this theory has been revived by David Harvey in his work on neoliberalism (Harvey 2005), pointing to the increasing enclosures of services previously supplied as a common good, such as education or healthcare. These analyses of encroachment to secure persistent profitability for capital sit well side by side with Pistor's analysis. What she adds to these analyses of increasing commodification, to open up ever more areas of social life to capitalist production and by accumulating the public wealth by private capital is an analysis of how the wealthy seek to protect their wealth from the vagaries of business.

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6 This change in the first place came about after the split of the Anglican Church from Rome led to a dispossession of the landed Estates of the Catholic church in England.

What Pistor thereby adds to this account of the enclosures is the inverted dynamic, which takes hold once the land is thus accumulated and secured, namely, to protect it with the vestiges of the past. By drawing on the private solicitors which themselves made the law in practice in England at that time, the landed elites drew upon old legal constructs such as the use and the trust to make these landed estates bankruptcy remote. In this vein, her investigation gives empirical material to those calling for non-essential theories of value, which point to the plasticity and path-dependency of value (Konings 2018; Thiemann 2019). Legal constructs forged for one purpose at one point in time are reused at other points and in different circumstances to bring about the conservation of values. And it is here where Professor Pistor provides an important nuance to the broad analytical view of Marx, whereby the partial decommodification of land is not necessarily an act of push-back against capitalist dynamics, or of social re-embedding, as Polanyi (1944) would have it, but rather of the fortification of privilege and power by the ruling elite through law. This narrower focus on legal conditions thereby provides a first deeper understanding of historical dynamics: in essence, inequality rises if the techniques of coding are perfected and left unchallenged.

The rise in inequality becomes the outcome of the prevalence of coding techniques which lead to different strata of society being unequally affected by tail events. In this way, private law structures wealth inequalities and provides the foundation for accumulation. Pistor's book thereby provides a provocative answer to Max Weber (Weber 2013) and his astonishment that common law countries saw the rise of capitalism, whereas he had emphasized the need for predictability which was greater in civil law countries. The answer Pistor's work suggests is that it is because the mechanisms of the coding of capital operate quicker and go longer unchallenged in common law countries, allowing a certain predictability for the owners of capital. It often operates based on an "as-if legality" relationship, whereby constructions of law are deemed valid until found otherwise, if they can be based on similar prior constructions. This facet of the operation of law in common law countries provides the basis for the claim of the structure-generating agency of lawyers, acting as agents of capital, an activity into which this book so superbly provides insights. It is Pistor's claim that these capacities of private lawyers to protect their clients' capital have been amplified by the form globalization has taken over the course of the last 50 years, allowing them to weave new legal cloath, which make many of these assets unreachable for creditors and the state.

3 The Global Dimension of the Empire of Law and the Neoliberal Era

Pistor's most important point is that the coding of capital over the last 50 years has been globalized in a way that allows entrepreneurs to choose to incorporate in any jurisdictions, as the "incorporation theory" of the corporate form was undermined over the years, allowing companies to operate in one country based on laws from another. She therefore analyzes the relationship between splintered authority of sovereigns and the private agents pushing the coding of their capital to escape both private creditors reach as well as the largest "creditor" of them all, the nation state providing the infrastructure for the business of corporations. The tools she details for bringing about such a plurality of legal regimes in the same physical place are the institutions of bilateral and multilateral trade treaties, the WTO as well as the EU as a project to generate a single market.

In this context of collision of systems of law and conflict resolution through courts of arbitration (Fischer-Lescano and Teubner 2004) private arbitration has gained ever greater importance, finding its apex in investor state dispute settlement schemes which permit corporations to sue governments when laws are enacted that are seen to infringe upon their liberty to do business. Operating at the edges of different legal systems, these arbitration schemes recall the Lex Mercatoria, the alleged private law that was used by merchants in the middle ages in Europe to solve legal disputes that went beyond one legal order. And yet, as Pistor points out, these private arbitration courts are insufficient, as there is a need for their rulings to be backed up by the power of a state. Here, her argument is that the realm of private law (dominium) has liberated itself from the reach of the sovereigns (imperium) (Pistor 2019, 138f). Using the Anglo-Saxon legal systems of England and New York State, it has globalized the legal protection of the trust scheme, that was initially invented to protect crusading knights' estate from the reach of the king (Kim 2014) and made it accessible to business owners globally.

The fact that it is these two, and not any other jurisdictions, could be further theorized in the book. While the connection to the fact that New York City and London are financial center and that hence in an era of financialized capitalism it is these two which are responsible for 57% of transnational business transactions, the question remains to what degree we are actually observing a path-dependent process, which has to do with the fact that it is not simply any state which could guarantee the "pacta sunt servanda" for these contracts, but that there is indeed something specific about these two. In this context, it would be interesting to further pursue the metaphor of the empire of law and to inquire into its link to the

actual British empire and its former colony.[7] It would have been worthwhile to link the British colonial rule to the remarkable predominance of English law globally, making up 40% of the total.

Having established the predominance of these two systems further strengthens Pistor's claim about the preponderance of Anglo-Saxon common law in the current phase of globalization. But it would have invited further inquiry into the role of the legal profession in these countries and its impact on the evolution of law as well as the interaction between private and public law. As pointed out by her, judges in these countries are selected from the bar, which she suggests means that these former practitioners are more inclined to accept legal innovations than in code law countries, where judges sit at the apex of the professional hierarchy and are rather distinct from practicing lawyers. She points to the power of private solicitors in the UK in the 19th century, defending the use of feudal contractual constructs to shield the assets of the powerful from outside interference and for 21st century capitalism, she points to the increasing role of out-of-court settlements which allow the masters of the code to operate in an "as-if" kind of legal reality, as legal constructs are not explicitly ruled out. Her book in this sense does shed light on the interaction between public and private law making, but it traces these developments stemming from private initiative.

But what is the role of public agents, of public law and state attorneys? Is there really only constrained space for action to limit the negative consequences of private contractual law for the public? One is left to wonder whether there is no movement within the legal profession against the undermining of public power in the US, e.g. regarding the capacity to tax?[8] And if it exists, how does it find its expression in the interpretations of existing laws and its impact on law making by parliaments? Pistor uses the image of the traffic lights to visualize public law, which has to be aligned to allow private interests to expedite the pursuit of their interests and which are aligned due to pressure on law-makers. This shows that public decision making can indeed be a hindering block for private initiative of asset holders, but the book does not trace the impulses that limit this kind of encroaching behavior on the public side. In other words, in this book we learn a lot about private law and how private lawyers have interacted with public lawmakers to make sure that all lights are green, but we learn little about public law and the historical episodes when the relationships between the two were actually fundamentally changed.

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7 For an attempt, linking American empire to the current phase of globalization, s. Panitch and Gindin 2012.

8 Indeed, one might argue that Pistor's intervention herself expresses such unease and is spearheading such an effort.

This was the case in moments where the reassertion of state authority occurred, such as in the evolution of anti-trust legislation in 1890s in the US, which was carried by a large populist movement. Similar attempts, albeit at a much smaller scale occur today to gain a grip on the tax evading behavior by US citizens and corporations were made by law-makers in the US in the wake of the financial crisis of 2008, when the US used its reach beyond its borders in the Foreign Account Tax Compliance Act to force US citizens to declare and pay their taxes in the US.[9] These attempts to limit dominium by imperium, to limit private law with the help of public law indicate a beginning reversal of the neoliberal triumph Pistors book describes, which from its right beginning sought to limit imperium in order to have dominium rule supreme (Slobodian 2018).[10]

It is here where we might need more understanding of the factors, which are driving these momentous changes between public and private law that the book leaves a bit of a lacunae, making it able to generate an account that explains the movement towards the neoliberal apex of private interests being placed above public ones, but providing the reader with an insufficient understanding for when the pendulum might swing in the other direction. For that to occur we need to shed more light on the sphere of interaction between public and private law, looking at it from the angle of how public law curtails private prerogatives. Here, her brief account of the shift in property rights in 1881 indicates that it is the unsustainability of the prior debt regime and its very negative impact on agricultural production in the 1870s which was an important factor.

4 The Shifting Applicability of the Code of Capital to Different Asset Classes

Once one appreciates the evolutionary understanding of the law that draws upon prior elements and couples it with power and class dynamics in society, the question about the factors that bring about a change of the applicability of modules to different classes of assets comes into clear relief.[11] As Pistor points out at the

9 These attempts find their reflection in attempts by other sovereigns, such as France to assert their taxation prerogatives against multinational corporations operating in France in the context of global attempts to engineer a system of global taxation of large multinational corporations, in particular the GAGFA.

10 One is left to wonder whether it is possible that we are currently witnessing the reawakening of the Schmittian sovereign, who, declaring the state of exception declares the limits imposed upon itself as nullified.

11 E.g. when and why did the coding of human beings as commodities that could be used as collateral stop, that is to say which factors underlie the abolition of slavery, which is several times evoked in the book?.

beginning of the book, "the analysis offered in this book will show that the metamorphosis of capital goes hand in hand with grafting the code's module onto ever new assets, but also from time to time, stripping some assets of key legal modules" (Pistor 2019, p. 5). While this goal is achieved in a very laudable way, there is a certain lack of synthesizing and theorizing regarding the dynamics which are responsible for the shift to which assets the code of capital is applicable. In Luhmann's vocabulary (1986), we are observing a reprogramming of where the codes are applicable, but the question of how these tectonic shifts in the programming of the code themselves could be understood remains open. That is, which factors explain the expansion and limitation of the code of capital to different "raw material" over time?

Here, Pistor's emphasis on the constant, persistent incrementalism that is entailed in the practice of weaving new cloth based on the legal modules of the past by her ever-innovating Masters of the code is important, but insufficient. As her example of the 1881 change in the validity of trusts to protect landed estates shows, these legal modules are undergirded by power relationships (power in law), which requires changes in power relationships to be undone. How this happened in this case is extremely insightful. After a crisis of the 1870s showed the unsustainability of the protection of landed estates from bankruptcy proceeding, shielding them from creditors, the new parliament of 1880, which for the first time did not have a majority of landowners in it decided to change the applicability of the code. It was hence a societal crisis based on the unsustainability of then-current debtor-creditor arrangements protecting one class of asset-holders over others, which brought change to protections of landed property in the UK. Would it be correct to argue that the crises of agricultural production brought about by a lack of investment due to overly generous debtor protection brought about that change in the laws in 1881?.

This question has important implications, as we are trying to understand the fate of the current era of neoliberalism, which seems to suffer from similar problems of unsustainability.

5 Revisiting the Political Economy of Law

By asking, who is made whole and who is set to loose in moments of crises, Pistor places the analytical attention on the distribution of the materialization of losses rather than gains. In this sense, her approach holds the promise to provide us with a better understanding of the current dynamics of widening wealth inequalities over the last two decades, dynamics which can best be summarized as "heads they win, tail, we loose." But when looking at this new constellation that emerged since

1970 and which came to fruition since 2000, what can and cannot be explained by Pistor's account? In a sense, this question also relates to the broader issue in how far her account can at the same time accommodate general dynamics and the historical specificity of the neoliberal era, which is peculiar.

Today, in the neoliberal era, inequality is enshrined in an institutional configuration of splintered state authority and crisis-prone finance as the main driver of growth (Aglietta 2000), making inequality not only self-sustaining, but actually self-propelling. This is the case because we are living in an era of financial dominance (Diessner and Linsi 2020), where central banks are underwriting financial markets' tail risks, countering the decline of asset values through central bank purchases of assets. Central banks are doing so as they are seeking to maintain the stable flow of credit to the economy (Braun 2018) and are seeking to generate welfare effects that are supposed to stimulate the economy through expanding demand. Today, it seems we can state with certainty that these interventions mostly only benefit the top 1% who see their financial wealth reconstituted despite financial crashes, further contributing to rising inequality.[12] By pumping up banks and creditors and making sure shareholders and debt investors are made whole when an unexpected future arrives, the current institutional constellation cements and propels existing inequalities.

To better understand how this institutional edifice of present day capitalism was erected and how it might change, we need a deeper understanding of what motivates state action, which Pistor's empirical work shows to be of crucial importance for the evolution of coding practices,[13] but her theoretical work does little to incorporate. This is a great pity, because the sovereign not only enforces contract and property rights, but is also the agent providing the main material in which wealth today is stored, namely state debt, pointing to the quintessential hybridity of private and public agents in the constitution and preservation of wealth.

When Pistor points out how private lobbying extended the safe harbor provision, which allows repo-creditors to secure the assets they had accepted as collateral in case of bankruptcy of the debtor and which initially applied for treasury securities only to other assets that are used as collateral for repos, she

12 The CoVid crisis, and the extremely quick recovery of financial markets due to central bank interaction has shown once more, that the more crises arise, the more they aggravate inequality due to the way the state intervenes to stabilize the economy and the financial system.

13 Here, her example of the Dutch East Indies Company is crucial: after all, the lock in of capital, which completes the transformation of the corporate form to a potentially eternal form is undertaken by the Dutch Republic to keep shareholders from leaving the company and investing their money in rival companies. On the interaction between states and these companies, s. Philips and Sharman 2020.

downplays the shared interests of the US and the EU, which aligned with interests of finance to push for financial deepening (s. Gabor 2016; Gabor and Ban 2016). It is this shared interest of states and finance for financial market deepening and the provision of instant liquidity brought with it the expansion of infrastructural power of finance (Braun 2018), which underlies central bank action today. It is however very likely that these different, but joint interests are going to clash given the rising indebtedness of states.

In this context, I am wondering if there is any likelihood that the current institutional configuration will be reversed and that asset-holders, which are protected both by private law and the configuration of financial capitalism, which secures their wealth in financial markets based on the systemic importance the latter have gained for the conduct of public policy will be robbed of these prerogatives, reversing the "heads we win, tail you all lose" configuration. Could it be that the instability of finance and the persistent necessity to bail out market-based finance by central banks, both in 2008 and in 2020 (Menand 2020) might lead to a rethinking of the current prerogatives of private asset-holders?

Pistor is uncertain over whether such change can really occur. Her main point, based on a Hegelian philosophy of rights (as pushed for by Menke 2018) is that property not only bestows rights, but also duties upon those who hold them. With Menke, she maintains that all rights need to be assessed in light of other people's rights, that they need to be reflexive (Pistor 2019, p. 231f). The problem with an open re-politicization of economic and social life (Menke), whereby legal change results from an open political process is that altering existing rights of asset holders will be fought against as "expropriation" and hence require recompensation, much like the slavery holders were recompensated when their prerogatives were abolished (Klein 2014). As she sees these sums to be astronomic, she ends her book with a plea for persistent incrementalism, chipping away the edge from capital assets and empowering non-capital holders as the way forward against the persistent incrementalism in the realm of private law driven by the Masters of the Code. But at this point, it remains unclear who is to push for it and how? It seems to remain a very idealistic proposal as the driving force animating such action is missing: whereas the masters of the capital are paid very well to protect their clients, can the public muster comparable pay to motivate lawyers to limit these privileges?

Seeking to re-politicize the question to what the ownership of "capital" actually obliges is an important matter and Pistor is right to point to the dangers of either violent revolutions or the slow demise of the legitimacy of law to justify the ordering of society (Pistor 2019, p. 229ff), which is likely to occur if trends towards inequality persist. If law is replaced by naked power, it might make us all worse off in the process. But pinning one's hope on an incremental process of chipping away

at the edges of capital's prerogatives to stop this process seems to me to be no credible solution either. After all, one might be left with the joke she shares at the end of the book, whereby two peasants asked about how to get to Dublin answer: "not from here" (ibid, 232).

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