

## Four Theses on Katharina Pistor's *The Code of Capital*

The central argument of Katharina Pistor's latest book is straightforward: capital wouldn't exist without a code, *The Code of Capital*. And it wouldn't exist without an asset<sup>1</sup> to which this code relates either. In fact, the German jurist suggests that history is coined by major shifts in the assets which are coded as capital. Already in the 16<sup>th</sup> century, English landlords massively turned their land into capital (pp. 29), colonialism lived from human capital – slaves – and most recently, our own DNA and digital code have been turned into property (pp. 109, pp. 129). Nevertheless, Pistor argues that “the legal devices that have been used for coding every one of these assets have remained remarkably constant over time. The most important ones are contract law, property rights, collateral law, trust, corporate, and bankruptcy law” (p. 3). These devices “bestow important attributes on assets and therefore privilege its holder”: priority, durability, universality and convertibility (ib.). As this conceptualization results from numerous insightful historical analyses, it's a very powerful one. And of course, the more powerful the argument, the more it deserves attention – and this necessarily results in more critique. Hence, I put forward the four following theses on *The Code of Capital*.

### #1 Pistor's anti-Marxism is problematic

Whenever Pistor explicitly refers to Marx or the Marxists, it is to reject them.<sup>2</sup> Yet, many of her conclusions fit extremely well with Marx's thinking.<sup>3</sup> Most importantly, she often argues in the name of the interest of capital<sup>4</sup> and submits that fundamentally, the lawyers who code capital pursue “the interest of private clients” (p. 169). This leads her to the conclusion that “the interests of states and capital” are most often closely aligned (p. 182). At the same time, she maintains that her book allows to “explain the political economy of capitalism without having to construct class identities, as Marxists feel compelled to do” (p. 208). This is one of the end points of her argumentation. However, it is an end point which provokes at least two important question-objections. First, one could reformulate this hypothesis and say that if capital has itself an interest, this interest cannot but show up in law. Marx himself writes in *Das Kapital* that private property as a content of law is given by the existing economic relations

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<sup>1</sup> The definition of this term is very broad, it includes human beings, and that is of course one of her arguments against both Polanyi and neoclassical economics (more specifically against the hypothesis of two factors of production)(p. 11).

<sup>2</sup> There's one exception to this rule: Pistor agrees with Marx that capital and money are not the same (p. 9).

<sup>3</sup> My arguments on Marx are based on *Das Kapital*, I don't know sufficiently well his other major works to engage with them coherently.

<sup>4</sup> On p. 21, 61, 76, 126, 169, 182, 228, 229.

(Vol. I, p. 99) – there’s no need for him to fetishize some individuals or their identities to observe this. Of course, for Marx, anyone is “*Träger von bestimmten Klassenverhältnissen und Interessen*“ (p. 16) but identity causes nothing *per se*.<sup>5</sup> Put differently, by referring to Marxists and not Marx, Pistor circumvents the major theoretical problem of the relation between law and the interest of capital that she herself restates.<sup>6</sup> However, if we combine this with her affirmation that “one of the major lessons of coding capital is that persistent incrementalism has advanced the interests of capital holders” (p. 229), we’re extremely close to determinism, or maybe, philosophy of history. This is arguably just one example of a general theoretical blind spot of recent historiography of capitalism: researchers often find strong historical patterns but don’t discuss them and their implications for political action theoretically.<sup>7</sup> Thus, Pistor suggests without further elaboration to counter the persistent incrementalism of capital with an incrementalism of democratic rule. Easier said than done. A confrontation with *Das Kapital* and Engels’ writings on the state in *Der Ursprung der Familie, des Privateigentums und des Staats* could advance the reflection at this point. With a small portion of interpretation, one could for instance draw on the latter’s strategical reflections on the pertinent form of change according to a country’s constitutional situation.<sup>8,9</sup>

## #2 *The Code of Capital* reifies law

As the above citations show, Pistor argues that the code of capital *explains* political economy, she wants to address thereby the “root causes of inequality” (p. 3). Still, her historical studies establish multiple causalities between law, capital, crises, labor, commodification and popular action. For example, Pistor draws on Minsky when speaking of “the logic of the rise and fall of assets” (p. 51) to explain the Great Recession – and Minsky surely doesn’t ground his elaborations in law but in human affects and balance sheets. With a bit of Hegelianism, I would argue that the limits of this, causal, argument show up most clearly when law is apparently substituted by something else: digital code, for instance.<sup>10</sup> She argues that “only states can

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<sup>5</sup> For sure, Pistor speaks of Marxists and not Marx – but why should we target the former while not developing the analysis of the latter?

<sup>6</sup> Or the people that aren’t prioritized by the code of capital, to formulate it correctly.

<sup>7</sup> One might think of Piketty’s *Capital in the Twenty-First Century* – he observes that  $r > g$  but refuses to discuss the implications of this finding and to take it into account for his political proposals (I spoke about this with Jonathan Hopkin of LSE and he agreed with me).

<sup>8</sup> For instance, one could replace his “state” by “code of capital” and punition and rethink e.g. p. 165-168. [This article](#) (in German) is also interesting on the question.

<sup>9</sup> If I don’t make it sufficiently clear, my more general point is of course that we have less of a problem with *marxisme universitaire* (as Foucault did) than with academic anti-marxism.

<sup>10</sup> This is not simply a Foucauldian argumentation against traces of Weber in Pistor, which would be too easy and barely new.

effectively back money [...]. The digital code, however, offers an alternative. The future costs of a financial crisis may be built into the code in such a way that all who benefited from the asset in question [...], will have to chip in when its survival is at stake.” (p. 183). For sure, it may be possible to write digital code that is more just than its analogue counterpart – but first, this would itself correspond to a modification of law, and second, the reason why today’s law isn’t just is society and not its analogue character. And society won’t disappear with digitalization. In other words, the Pistor’s claim that the code of capital explains political economy can itself be explained by her inconsistent drawing on social theory: the reification of law is this claim’s condition of possibility.<sup>11,12,13</sup>

### #3 Pistor doesn’t play out a strong argument against Menke – and Marx

At the end of the book, Pistor joins Christoph Menke by calling for perpetual change through “an open political process in which [...] rights are purposefully forged to achieve change and lose at least some of their power once a given purpose has been achieved to make way for new rights and new purposes” (p. 232). Yet, it remains unclear how exactly she articulates her historical and theoretical elaborations with Menke’s conception of capitalism. As the quote shows, subjective or equal rights are essential as much to Menke’s critique as to his proposition. This is rooted in Marx’s analysis of bourgeois private law, “the only type of law that Marx critically analyzed, since he thought that it was bourgeois society’s only structurally necessary form of law” (Menke, p. 195). Indeed, Marx situates bourgeois private law in the heritage of Roman persona law, but he also conceives of the modern ideas of equality and liberty as a rupture. This is why he ignores the crucial role of law in the English enclosures of the 16<sup>th</sup> and 17<sup>th</sup> centuries: “*Die Gesetzgebung erschrak vor dieser Umwälzung*” (Kapital Vol. I, p. 746).<sup>14,15</sup> Pistor’s analysis of the English enclosures would thus permit to push further Menke’s *Critique*

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<sup>11</sup> This is of course related to my first thesis – a confrontation with Marx’s elaborations on law could have been interesting.

<sup>12</sup> The same argument applies to Pistor’s theorization of IPR and financial instruments such as CDOs. She repeatedly writes that these codes, and thus this capital, exist only in law – they’re legal fictions (p. 3, 8, 13, 47, 87.). Yet, CDOs are anything but unreal. They may be a strange way to organize relations between creditors and debtors, still, they refer to an asset. So here too, law doesn’t create anything entirely new but it formalizes it differently.

<sup>13</sup> In the last chapter of the book only, one can find some Marx, Bernstein, Sen, Schumpeter, Becker, Demsetz, some ordoliberalism and some monetarism. One can find them not simply as sources of inspiration but they’re directly affirmed, and this would, it seems to me, need further theoretical elaboration to be coherent.

<sup>14</sup> The, most probably bad, translation of this sentence would be: “legislation was shocked by this revolution”.

<sup>15</sup> I’m also drawing on Heldring, Robinson, Vollmer: *The Economic Effects of the English Enclosures* ([forthcoming](#)).

*of Rights*: what about the aspects of the code of capital that would remain unaffected by a collective redefinition of *equal* rights – the *priority* asset holders enjoy, most prominently?<sup>16</sup>

#### #4 Climate change can no longer be excluded from an analysis of capital

Climate change is often understood as a topic and analyzed as such from existing economic, political, legal or technological viewpoints. Nothing could be worse to seriously address the gigantic problems we face – yet, it’s arguably what Pistor suggests. I suggest in return to bake these problems into the book’s reasoning at the following three passages. First, as I already pointed out, Pistor’s definition of the term asset refuses Polanyi’s essentialist definition of ‘fictitious’ commodities (land, labor and money). Indeed, this part of Polanyi is outdated. However, we should today define some commodities as fictitious, or destructive, not because of what they are but because of how we want to relate them to our production system.<sup>17</sup> Only such a conceptualization allows the fight against climate change to appear as something inherent to productive objectives. Second and in consequence, a contemporary historical analysis cannot simply present wealth as something positive – as Pistor does – but should conceive of it mainly as the flipside of environmental destruction. Put differently, *The Code of Capital* should not only show “how the law creates wealth and inequality”<sup>18</sup> but also how the law creates the degradation of our environment. Hence, if Pistor proposes that persistent incrementalism is a viable strategy to push back the interests of capital and to ensure democratic decision-making, climate change gives us an idea of how fast this incrementalism has to happen in order to achieve, at least, the Paris Agreement’s two-degree target. Quite fast, arguably.

This might be a way to put aside the question about the good or bad human nature that Pistor presents as the decisive one when it comes to define alternatives to the current state of our societies (p. 232). Instead, as *The Code of Capital* decodes capital for us, it might as well be a way to focus on giving priority to the debtors, pulling down the international law which renders capital ever more universal, and democratically coding not capital but cooperative production. For, if there’s anything we cannot complain about today, it’s a lack of urgent social action.

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<sup>16</sup> A question which is somehow parallel to this is the question of the starting point of capitalism. Pistor joins in passing Menke’s position that capitalism was born with the modern combination of property and contract law and the liberal political rights. Yet, does this fit with her analyses of the multiple origins and continuities of the code of capital not just in Roman law but in common law etc. (e.g. pp. 43)?

<sup>17</sup> Most importantly, when we want (not) to use which ‘natural asset’ and for which purpose.

<sup>18</sup> This is the book’s subtitle, of course.

## References

Engels, Friedrich (1884). *Der Ursprung der Familie, des Privateigentums und des Staats*. Hottingen-Zürich: *Verlag der Schweizerischen Volksbuchhandlung*.

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