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Is There a Chinese "Code of Capital"?

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KATHARINA PISTOR. *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton, NJ: Princeton University Press, 2019.

Professor Katharina Pistor has accomplished a rare feat in her book *The Code of Capital: How the Law Creates Wealth and Inequality*. She has provided a compelling explanation for how private law encodes certain assets as capital and, in so doing, facilitates wealth accumulation as well as economic stratification; moreover, she does so using an effortless style that renders the complexity of private law readily comprehensible for a general audience. In the face of increasing gaps in many countries' income levels and between countries in the North and the South, exacerbated by the COVID-19 pandemic, Pistor's call to action is all the more urgent.

In this review, I want to express my appreciation for the scope of Professor Pistor's persuasive argument by extending her analysis to a phenomenon that largely lies outside the purview of her discussion—that of the People's Republic of China (PRC) and its ascent from the margins to the center of global capitalism. This approach might be deemed unfair as Pistor's universe of examples—from the House of Medici to the Lehman Brothers—derive from the history of Euro-American jurisdictions, for these were the traditional pivots of capitalism. The reason for this is that it has been mostly English and New York law that have provided the substantive and procedural law for capital's "code."

Yet consider the following assertions: China, by most indicators, will soon surpass the US as the largest economy in the world, and is on track to become the largest capital-exporter globally. Chinese state-owned enterprises are some of the world's largest corporate entities. As a consequence of the foregoing, whether in regards to global supply chains or public health, the well-being of consumers and citizens anywhere is deeply intertwined with China's domestic economy and governance.

Hence the question: is there a Chinese "Code of Capital"? In posing the question of whether Professor Pistor's analysis provides an explanatory lens for understanding comparative law and development and, specifically, Chinese law and development (Erie 2021, 54–55), I recognize that the litmus test of any theory is its ability to explain cases that may have been outside the purview of its original formulation. At the same time, this extension of her work falls squarely within comparative law, a project which

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Professor Pistor has herself championed. This query is important as China—and potentially its "code"—is shaping not only global capital through trade and investment but also contested questions of the twenty-first century, including development, data governance, and human rights. Pursuant to the notion of "varieties of capitalism" (Hall and Soskice 2001) there may be varieties of codes that copy from each other but they may also have their own inputs, expressions, operators, and outcomes.

ANGLO-AMERICAN LAW AS CODE

I first review Professor Pistor's main argument before turning to China. Professor Pistor's thesis is that the private law of specific jurisdictions has coded certain assets as capital, imbuing them with a select number of characteristics, in a process that has grown global capitalism (Pistor 2019, 3). Taking these elements in turn, it is the domains of private law, namely, contract law, property rights, collateral law, trust, corporate law, and bankruptcy law that have done the most work in transforming some assets into capital (ibid.). The specific characteristics of capital these "modules" (or building blocks) of the code impart on those assets include priority, durability, universality, and convertibility (ibid., 13–14). Briefly, priority refers to the ranking of claims for specific assets; durability extends those priority claims through time; convertibility addresses the need to change capital to state money, and lastly, universality addresses the requirement of ensuring that the foregoing attributes are upheld against anyone (ibid.).

Further, it has been the law of specific jurisdictions which has done most of this heavy lifting, namely, English common law and New York law (ibid., 8, 132). The reason for the prevailing role of these jurisdictions' laws is historical. English common law benefitted from the legacy of empire and the US has been largely successful in integrating its legal rules and priorities into international law. This "legal infrastructure" for global capitalism (ibid., 17, 134) was built by English and American lawyers working for international law firms. While much of the design aspects of the global coding of assets has been conducted within this private sphere, the role of the state is indispensable to enforce contracts, create property rights, and recognize foreign judgments and arbitral awards (ibid., 9, 17, 132).

Professor Pistor's paradigm helps explains the contemporary topography of global capitalism: the concentration of financial and legal expertise in London and New York, as well as the roles of tax havens, which function, respectively, to transform and shield capital accumulation as financial assets. Yet there is another growing sphere of activity within this topography that warrants attention—that of China. The question is whether China presents its own version of the code and, if so, what this means not just for capitalism but for the winners and losers it creates.

CHINA AND STATE CAPITALISM

There have been many explanations for the "great divergence" between Europe and China in terms of why the former became the center of the eighteenth-century

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Industrial Revolution which witnessed a surge in productivity as well as the creation of systems of finance and credit (see, e.g., Pomeranz 2000, Weber 1978 [1922]). Other scholars have emphasized that Europe, and specifically, England's ascendance, was an exception during the long durée of Chinese economic salience (e.g., Frank 2015). While China scholars have argued that there were "seeds" of capitalism during China's imperial history (e.g., Gates 1996), it was not until Deng Xiaoping's "reform and opening" policy in the 1980s that modern China grappled head-on with global capitalism. Importantly, China did not follow the neoliberal prescriptions of the Bretton Woods institutions to modernize its economy, but rather, pursued a path of gradual and state-led marketization, selective privatization, and trade liberalization (Weber 2021, 7).

Central to China's integration into global capitalism was the role of the Chinese Communist Party (CCP), which, although formally separate from the state, has been grafted onto the administration and guides all aspects of the government. This "Party-State" maintains a relationship to industry that has evolved through a different set of institutional and ideological conditions than, say, that of the UK or US government to their private sectors. The Party-State has grown a robust state sector in the form of state-owned enterprises (SOEs) which dominate major sectors of the economy. At the same time, and supported, in part, by a mixture of state subsidies and foreign-direct investment, China's private sector has experienced massive growth over the last several decades.

China thus shows its own "variety" of capitalism. In the comparative capitalism literature, Hall and Soskice's seminal study contrasts two ideal type of economies, including "liberal market economies" and "coordinated market economies" (Hall and Soskice 2001, 8). In the former, firms engage in arm's-length transactions and compete via market arrangements; in the latter, firms rely more heavily on nonmarket relationships (ibid.). Chinese companies may demonstrate either behavior. Chinese companies (including SOEs) have also been known to compete against each other, a contradiction in a pure coordinated economy. Branko Milanović has proposed his own typology of "liberal meritocratic capitalism" and "political capitalism" and explicitly identifies China as an instance of the latter (Milanović 2019, 98). Milanović defines political capitalism as one sustained by economic growth at all costs and which features a selective application of law (ibid., 91). Milanović's "political capitalism" is akin in many respects to what China scholars have called "state capitalism" (Liebman and Milhaupt 2016). One feature of state capitalism is that control of companies—rather than ownership—may be a defining element, with control applying just as much to private as to state-owned enterprises (Milhaupt and Zheng 2015). Hence one of the core attributes of state capitalism is the nature of law that underlies and enables that system, and critically, unlike the UK or US, China is not a rule-of-law state, but a Party-State.

CHINESE LAW AS CODE?

In liberal democracies, private law played a constitutive function in building and sustaining capitalism, but what about the role of private law in building state capitalism?

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I suggest that private law has also played an important role in the Chinese case, although there are differences. Whereas some of the modules may at least categorically approximate those identified by Professor Pistor, they may operate in ways that constrain party autonomy and strengthen Party-State control, outcomes that work contrary to the conventional coding of capital. Further, there may also be other modules that are unaccounted for outside of the China context.

Modules may require modification. I provide three examples. First, during the early part of the "opening and reform" period, contract law supplemented state planning by servicing vertically arranged hierarchical organs of government rather than enabling horizontal and equal relations between parties (Cheng and Rosett 1991, 181–82). While contract law has transformed in ensuing years, it continues to have an administrative flavor in specific industries such as real estate. Likewise, the notion of freedom of contract itself has been a late-comer to the evolution of Chinese contract law (Zhang 2000). These observations suggest that cultural factors may shape contracts, as is certainly the case in reform-era China.

As a second example, Chinese property law further marks divergence from familiar private notions of property rights. For instance, whereas the state has traditionally owned urban land, a use right of a limited term was introduced in legislation that was subsequently permitted to be "automatically renewed," although the relevant law does not clarify the conditions under which this renewal may take place (Erie 2007, 942). Potential insecurity in real estate is exacerbated by the wide discretion of municipal governments to expropriate land (Qiao and Upham 2017). Hence, property law in China does not assume the conventional form of private property rights.

Bankruptcy law offers a third example. Whereas China enacted legislation for corporate insolvency, the legislation suffers from lack of clarity in terms of priority of distribution: it prioritizes employees but in fact limits their claims and instead ranks employee claims behind those of secured creditors (Halliday 2007, 5). Whereas the law has been in the books for fifteen years, it is underused by debtors and creditors for a number of reasons, including intervention by the Party-State (Mrockova 2021, 105). In sum, while the bankruptcy law grapples with universal issues of priority, the competing demands of socialist principles and market exigencies have resulted in a law that mostly fails to address either.

Each of these examples show how the modules of Chinese law endeavor to codify capital (to varying degrees of success) in China's "transition" from a planned economy to one predicated more on market behavior. In the course of its ongoing legal evolution, China has made massive progress in making certain modules more congruent with international practice; for instance, China has gone from being a chronic intellectual property violator to a country that aims to lead intellectual property protection in China and beyond (Prud'homme 2019). Nonetheless the examples above show how the Party-State continues to intervene in reshaping modules in ways that may introduce uncertainty.

In Chinese state capitalism, the administrative or regulatory state is perhaps its own (meta-)module as it is constantly affecting corporate behavior, whether through such mundane measures as approvals and registrations, licensing, and price controls or steeper interventions such as anti-trust investigations (Zhang 2021, 23–24, Keller 1994, 722–23). Hence, regulators may have more traction when it comes to encoding

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(or decoding) assets as capital than lawyers do. Complicating this picture further, internal CCP rules may also shape corporate governance, particularly in areas of anti-corruption (Erie 2019). While it is a mistake to assume that the Party-State has complete control over Chinese companies, and Chinese companies may push back against the reach of state regulators or Party organs, nonetheless, in many instances, companies may have insufficient bargaining power vis-à-vis the Party-State.

In short, the particular configuration of modules operative in Chinese state capitalism affects the attributes of priority, durability, universality, and convertibility through which law codes assets as capital. Although not to be overstated, as liberal democracies also feature aspects of state capitalism (Michaels 2020), outcomes of the encoding process may result in effects that diverge from Anglo-American expectations. For instance, rather than a competitive relationship between the legal code and digital code as in the U.S. case, there is probably no jurisdiction in the world that is outpacing China in integrating artificial intelligence and machine learning into judicial processes (Wang 2020), even if that process is far from a fait accompli.

Recent events seem to give credence to the idea that rather than increasing economic liberalization, the Party-State is concentrating even more authority over industry. The Chinese Party-State has certainly grounded its legitimacy in the drive for economic growth as opposed to the distribution of wealth, a problem that Professor Pistor identifies for capitalist countries writ large (2019, 20). The consequences, namely, a gap between the wealthy and poor, may be particularly acute for China, as Milanović diagnosed. In 2021, the leadership of the Party-State has emphasized "common prosperity" (*gongtong fuyu*) which is aimed precisely at some of the excesses that Professor Pistor finds as endemic to capitalism. Yet the methods by which the Party-State ensures "common prosperity" may illustrate more administrative discretion and Party nontransparency than rule-of-law, as can be seen in the disappearance of CEOs, the famous charged with dubious crimes, and the stark politics of China's #MeToo movement. The current crisis of Evergrande, one of the largest real estate companies in the country, is, in many respects, a consequence of the Party-State's intervention in the real estate market, and one that will likely be resolved by more intervention.

CHINESE STATE CAPITALISM GOES GLOBAL

In short, the case of China shows the promise of extending Professor Pistor's analysis to questions of comparative law and development, although in doing so, some of its assumptions and features require adjustment. Capturing both the commonalities and differences of legal development lies at the heart of the comparative law project, and Professor Pistor's study provides a foundation for such work. Understanding how Chinese law (plus administrative regulation and CCP rules) may code state capitalism has never before been more important, especially for jurisdictions outside of China. Since the 1990s, Chinese SOEs have begun investing outside of the PRC, a trend that intensified in 2013 under the much-vaunted "Belt and Road Initiative," which saw a hyperactivity by Chinese companies to build, finance, and operate infrastructural, energy, and digital projects in developing countries. While the COVID-19 pandemic has scaled back some of these projects and China's domestic economies woes have also

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recalibrated priorities, the trend of Chinese investment, trade, lending to overseas projects, and aid will likely only continue.

One question, pursuant to Professor Pistor's study, is whether Chinese companies will simply forum shop for the optimal foreign law for their transactions or if China will follow in the footsteps of Anglo-American empires—formal and informal—and build out its own domestic law capacity (e.g., onshoring foreign-related disputes, training PRC judges in foreign law, fine-tuning conflict of laws, etc.). There are signs that both these trends are happening (Erie 2021, 66).

To the extent that cross-border contracts are governed by PRC law and their disputes are resolved by Chinese courts or arbitration commissions, then the issues attendant to Chinese law as code will permeate beyond the PRC. Professor Pistor rightfully raises the alarm against what she sees as the challenges that arise when asset holders control the modules of the code of capital (2019, 224). Her analysis is centrally focused on the Western democracies which, while facing various strains of dedemocratization, are nonetheless systems of checks and balances. The calculation looks quite different in the Party-State, yet it is one in which stakeholders almost everywhere will need to acquire proficiency.

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