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### Of law(s) and capitalism(s)

[Review of: G. Baars (2019) *The corporation, law and capitalism : a radical perspective on the role of law in the global political economy*]

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# Of law(s) and capitalism(s)

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Klaas Eller

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The thrive for corporate accountability has given rise to some of the most vivid legal developments since the post-war era. In a liberal logic and from the vantage point of the rule of law, these have generally been championed. Pioneering cases against industrialists in the Nuremberg war criminal trials, a surge of civil liability claims brought against lead firms in the Global North, the recent [openness of the European Commission](#) towards a European due diligence initiative—each of the pieces of the puzzle of corporate accountability came after public campaigns and require some conceptual adjustment in the law's architecture. Taken together, they purport to illustrate that 'rights violations' in the global economy should not remain unsanctioned. It is via the deterrence effects of liability that Ruggie's well-ordered paradigm of [embedded liberalism](#) shall be extended globally.

Grietje Baars in their book '[The Corporation, Law and Capitalism](#)' (Brill, 2019) makes the astute claim that corporate accountability not only falls short of its ambitions, but that it is even captured by and inevitably nourishes a capitalist logic. The argument instantly resonates with Boltanski and Chiapello in their '[New Spirit of Capitalism](#)', diagnosing that capitalism subliminally recycles and incorporates what aims at is overcoming. Baars, however, treats corporate accountability as a genuinely legal project and grounds its futurity in a sweeping historical-materialist narrative of the symbiosis of law and capital ever since the emergence of the business corporation. Baars unfolds their argument from a decidedly (neo-)Marxist perspective drawing on the commodity theory of the legal form as formulated by [Pashukanis](#) and employed by a growing related line of thought in international law. The legal coding of capitalism materializes not only at the substantive level of singular legal acts but more fundamentally at the level of the legal form.

Going back to the colonial Dutch and British East India Companies, law was characterized by a careful division of labor between private and public international law to facilitate largely unhampered commerce. The profit-seeking programming of the corporation structurally prevails over states' regulatory leverage when political institutions are unwilling—or deliberately restrict themselves, as is the case under investment law. A lacking sensitivity for economic power as manifested in the institutions which arise from the use of legal freedoms such as markets or production chains, runs through legal history until today. It has not even been on top of the agenda of the critical movement, which has been chiefly preoccupied with laying bare how political power transforms into law. This only changed recently in cross-disciplinary approaches that are brought together under the umbrella of '[transnational law](#)' and connect macro- with anthropologically informed micro-level analysis.

**Uniform vs janus-headed legal form**

Importantly, in Baars' account, the legal form becomes pervasive both in the inner workings of the law and beyond, namely as a legal ideology sustaining preconceptions of power and telos of the state and the role of business in society. As [Marx](#) found in his critique of human rights, law then desolidarizes and fosters agony while putting a spoke in the wheel of struggles for social justice. Consequently, in Baars' view, law (both as an institution and a specific legal act) cannot form part of a solution—the way to overcome capitalism includes overcoming law as its intimate ally. What is more, because of law's form, lawmakers, lawyers and lay users cannot but process the legal code of capitalism in its systemic biases and become coopted.

While certainly true for certain legal fields and already observed by [Weber's](#) account of legal clerks and jurists, it seems doubtful if the legal form can be reduced to a specific rationale. Under the premise of an essentializing conception of both capitalism and the legal form, the work of legal activist and strategic litigants for instance would appear in new light, both practically and analytically. Theirs then would seem like a fight against windmills, even egoistic since counterproductive at the outset on the macro-level. The history of rights movements tells a different story and suggests law can at least attempt to strip off even intense expressions of hegemony. This narrows down the question: Under what circumstances then can such legal struggles, eclectic and limited as they may be, have positive effects? The legal form, in other words, appears as more fluid and ambivalent, both curtailing and facilitating emancipatory change, particularly by enabling societal and normative [pluralism](#). Transformation, not to say revolution, through law is [not unthinkable](#), just that their legal surface will highlight continuation and persistence over rupture. More radically, [Menke](#) has recently invited to imagine a 'revolution of the legal form' as an inward turn to the political in law's processes and operations. Just like Benjamin's [Critique of Violence](#) only seemingly advocated the abrogation of law—while actually suggesting its liberation—this suggests that 'legal form' is not an exogenous constant, but an evolving medium of social practice. As much as law serves as repository of past societal experience and thereby restricts our possibilities of voicing societal change, the form of law is dynamic and inherently pluralistic. For [Kelsen](#), in his critique of Pashukanis, this suggested to not equate a pre-legal understanding of property with the *law* of property but rather assume its constructive nature and democratic design.

### **The legal form of value chain capitalism**

Besides the legal form, also patterns of capitalism are highly dynamic, the most recent emanations being global value chains and digital platforms. Both examples, [industrial](#) and [digital](#) chains, provide clear illustrations of the co-constitutive nature of capitalism and law. Value chains unfold in an overall legal architecture that is irreducible to specific doctrines of a single field, such as corporate law. As anthropologist Anna [Tsing](#) pointed out, the animating logics of global value chains are difference and heterogeneity between states, regulations, and identities, not a comprehensive and stable idea of capitalism. Law forms part of constructing these differences on multiple levels, from the fine-grained rules of contractual liability to the large-scale determinants of preferential trading areas. Baars rightly highlights the blind spot of the contemporary 'business and human rights' initiatives, namely

to generate norms to hold lead firms accountable while leaving unaffected those norms that induce rights violations in the first place. Accountability and change in value chains hinge upon the technicalities of the enabling structures of private law predominantly. The rhetoric and doctrines of human rights often fall short of making a difference at the level of technicalities ‘deep down’ in private law. Ultimately, this shows the constructive effort necessary to implement calls to ‘end impunity’ in the field of value chain wrongs. While the history of international criminal law was dependent primarily on political will, the trajectory of value chain accountability raises basic questions of attributability and legal doctrine: What are the boundaries of a corporate actor and its sphere of responsibility? What role do lead firms’ knowledge or purposeful ignorance of rights violations along the chain play? These are central tropes in a nascent and highly dynamic [‘law of global supply chains’](#).

Grietje Baars’ book breaks new ground in tracing and disenchanting corporate accountability through numerous contemporary discourses. With elegance and rigor, the author connects the dots between business and human rights, corporate social responsibility (CSR) and corporate complicity in criminal law to provide an immensely thought-provoking and internally persuasive argument that takes the reader to the forefront of Marxist scholarship on international law.

Grietje Baars, [The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy](#) (Brill 2019 & Haymarket 2020).

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