

# Towards a Critical Theory of the Corporate Form

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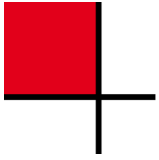
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# Towards a critical theory of the corporate form

Mathias Hein Jessen

## review of

Baars, G. (2019) *The corporation, law and capitalism: A radical perspective on the role of law in the global political economy*. Leiden and Boston: Brill. Historical Materialism Book Series, volume 188, (HB, pp. xx + 498, €155.00/\$186.00, ISBN: 978-90-04-29707-4).

Baars, G. and A. Spicer (eds.) (2017) *The corporation: A critical, multi-disciplinary handbook*. Cambridge: Cambridge University Press (HB, pp. xi + 554, £99.99, ISBN: 978-1-107-07311-1)

In recent years, critical research on the corporation has sprouted in a number of different disciplines, wherein the corporation (or critical research on the corporation) has not earlier been a focal point or a specific point of interest: History (Stern, 2011); intellectual history (Jessen, 2012; 2020); corporate law (Ireland, 1999; 2010); management and organization studies (Veldman, 2013; Veldman and Willmott, 2013); geography (Barkan, 2013); political science (Ciepley, 2013); as well as an issue on corporate governance here in *ephemera* (Jansson, Larsson-Olaison, Veldman and Beverungen, 2016), just to mention a brief selection. This is not to say that

corporations and corporate power have not previously been treated within these disciplines, but given the seemingly increasing political and economic power, coupled with numerous scandals and misuses of this power, critical research on the corporation – or more precisely, research on the specificity of the corporation and the corporate form – is on the rise within a number of different sub-fields and disciplines. The two books reviewed in this essay are an example of, a testament to, and a contribution to this development. The first book is Marxist legal scholar, Grietje Baars', *The corporation, law and capitalism: A radical perspective on the role of law in the global political economy*, which uses the commodity form theory of law to analyze the role of the corporation and corporate accountability, particularly in post-WWII international criminal law. The second is a handbook entitled, *The corporation: A critical, multi-disciplinary handbook*, which is edited by the same Grietje Baars along with André Spicer.

The books are of both qualitative and quantitative magnitude. They both testify to the burgeoning interest in critical, multidisciplinary research on the corporation. Where Baars' book is probably more for the specialized audience, interested in law, capitalism, and the corporation (and their intersection), the handbook may naturally have a broader interest, exactly because it allows the reader to dive into specific sections, fields, or sectors of interest. A handbook is a specific genre consisting of several different entries, in this case more than 40, and thus it is not a book meant necessarily to be read from cover to cover.

As the introduction to the handbook states, the corporation 'has become a dominant form of economic life'. Corporations are among the biggest and most powerful economic entities in the global economy, and if 'we really want to understand the contemporary economy, a good place to start is the corporation' [Baars and Spicer, 2017b: 1]. Another central characteristic, which Baars and Spicer put forth, is that the corporation, as an organizational form, is increasingly edging out other organizational forms, thereby increasingly creating a 'corporate monoculture' [Baars and Spicer, 2017b: 2]. As Baars and Spicer recognize, there is already a vast amount of scholarship on the corporation, mainly in law, but the existing scholarship suffers from two central problems, namely, a lack of interdisciplinarity and a

critical approach. It is these problems that the books seek to rectify (or begin to rectify) through several disciplinary as well as interdisciplinary entry points.

Grietje Baars', *The corporation, law and capitalism*, is, as the title suggests, a book 'about the relationship between law and capital, or, put differently, about the role of law in capitalism' [Baars, 2019: 2]. Baars is a Marxist legal scholar and thus approaches law, capitalism, and the corporation from this perspective. The book highlights that the corporation is a product of law, and builds on a Marxist legal perspective stressing that law and capitalism are co-constitutive. This means that '*because of law's relationship to capital*, law cannot, categorically, be successfully employed to prevent or remedy the many negative effects produced around the world by corporate capitalism' [Baars, 2019: 3, italics in original]. Hence, instead of presuming – as many corporate reformers do – that legal regulations and law restrict or control corporate action, the point is that they actually enable corporate activity. Baars is especially focused on corporate accountability through international criminal law, and the key argument of the book is that 'rather than thinking of corporate accountability as capable of restraining corporate value extracting activity, we should think of it as *facilitating* corporate profit making and corporate capitalism as a whole' [Baars 2019: 2, italics in original]. Therefore, Baars attempts to show, how 'counterintuitively, international criminal law has helped, and continues to help, corporations gain and maintain a legitimate role in the management of global affairs' [Baars, 2019: 2]. Rather than constraining corporations, corporate accountability enables their actions, because accountability (and the potential criminal liability that comes with it) legitimizes corporations as partners in global governance.

### **Critical and interdisciplinary scholarship needed**

As already stated, the main argument of the handbook is that while there is a lot of academic work on the corporation, this work suffers from two fundamental shortcomings: a lack of interdisciplinary scholarship and a lack

of a critical approach [Baars and Spicer, 2017b: 3-5]. Let us start with interdisciplinarity, and why it is important.

As Philip J. Stern points out in the handbook chapter on ‘The corporation in history’, in medieval and early modern Europe, the legal structure of the corporation was not primarily, or to a very large extent, used for commercial business or enterprises, but rather for a large variety of purposes, especially towns, cities, and municipalities [Stern, 2017: 23-24]. A corporation was a legal and political institution that allowed groups of people to unite into one body, to own common property, to be a subject of right, and to enjoy certain privileges, for instance autonomy, tax exemptions and perpetual existence [Stern, 2017: 24]. However, from around the 17<sup>th</sup> century, the corporate form increasingly began to be used for commercial enterprises, especially the colonial and imperial joint-stock trading companies, of which the Dutch and the British East India Companies were the most prominent. In early modern Europe, the state chartered, recognized, accepted, or created several corporations and imbued them with certain privileges and exemptions from law (often autonomy, own jurisdiction, tax and customs exceptions, etc.), in order to govern social life (Barkan, 2013). The corporation was historically a governing entity created, recognized, or accepted by government or the state, and whose business rights and capabilities were only added at a much later stage in history (Ciepley, 2013: 141). Therefore, to understand corporate power, how it wields its power, as well as its relation to state, law and capital, we need to study its historical development.

Additionally, just as the corporation is obviously an *economic* entity, it is also a *political entity*, both in the sense that it is politically constituted, but also in how it wields political power internally over its members, for instance how it governs its employees through rules and regulations beyond those of national laws (see also Anderson, 2017; Ciepley, 2013; Ferreras, 2017). The handbook tries to take this interdisciplinary problem seriously by dividing the book into two parts. The first is a range of disciplinary overviews, focusing on the role of the corporation in different academic disciplines such as history, legal studies, economics, sociology, anthropology, political science, geography, accounting and management studies. The second part consists of so-called ‘interdisciplinary thematic chapters’, which are grouped

into 10 subsections on, respectively, the evolution of the corporate form, the multinational corporate group, the financialization of the corporation, corporate value chains, corporate citizenship, the corporation and crime, the corporation and ideology, corporation and communities, corporations and resistance, and finally, alternatives to the corporation. This structure offers the reader an overview of existing scholarship and challenges within different disciplines, as well as deeper explorations of specific fields of interest.

With regards to the *critical* part, this refers to the fact that most existing scholarship on the corporation is within law. This scholarship is generally uncritical, as it takes the corporation as a given. The problem with such an approach is exactly that it is *not* interdisciplinary.

The dominant conception of the corporation found in corporate law, microeconomics, and corporate governance derives from the neoclassical theories of the corporation as minimization of transaction costs, as nexus of contracts and in agency theory. In Ronald Coase's 'theory of the firm', the hierarchy of organisation in the firm (as opposed to the free market) is justified due to the minimising of 'transaction costs' (1937), a conception further developed in the understanding of the corporation as a 'nexus of contracts' (Jensen and Meckling, 1976). This conception is problematized in a number of entries in the handbook: The paradigm of corporate governance, known as 'agency theory', which is dominant in corporate governance theory and practice, holds that the executives or managers are 'agents' for the shareholders, who are the 'principals' [Deakin, 2017; Lazonick, 2017]. This means that the executives of a corporation have a fiduciary duty to serve the interests of the shareholders and maximize shareholder value, a conception which has led to numerous practices, such as mergers and acquisitions, buy-outs, de-mergers, downsizing, divestment, outsourcing and stock buy-backs, as well as resulted in new incentives for executives, such as performance bonuses and stock options [Veldman and Willmott, 2017; Ireland, 2017].<sup>1</sup> These ways of viewing the corporation treat

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<sup>1</sup> The idea that shareholders in any meaningful way can be said to 'own' the corporation has forcefully been debunked (Ireland, 1999; Ciepley, 2013), and

it as essentially a practical legal arrangement, or an economic necessity, or the result of free contracts, and thereby miss what Baars in *The corporation, law and capitalism* characterizes as the ‘intimate, symbiotic relationship between law and capital and the nature of the corporation’ [Baars, 2019: 3].

## The corporation, law, and capitalism

Baars’ book is a Marxist approach to the corporation, particularly a Marxist legal scholarly perspective on the corporation based on the commodity form theory of law. According to Baars, the task of the Marxist legal scholar is to take the role of law seriously in how it facilitates, structures, and – which is a central notion in the work – ‘congeals’ global capitalism [Baars, 2019: 3]. The book starts with a long chapter on the historical and legal development of the corporate form, and subsequently focuses on international law, and particularly international criminal law post-WWII, focusing on the war tribunals in Nuremberg and Tokyo. The book finally turns its attention to different tribunals in the 1990s and the development of corporate social responsibility and corporate accountability.

As already stated, the key argument of the book is that corporate accountability does not restrain corporate capitalism, but rather facilitates it [Baars, 2019: 2]. The central argument is that law, and particularly international criminal law, on the face of it seemingly (ideologically) safeguards against corporate humanitarian violations – by providing corporate accountability and punishing corporate wrongdoing – but that, in effect, it *legitimizes* corporations as legitimate actors of global governance, and grants corporate impunity. By making them subject to regulation and punishment, they are at the same time legitimized as subjects and citizens. Therefore, law can never be the solution to the problems of corporate power because law, capitalism, and the corporation are characterized by an

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instead it could be said that shares represent not ownership but a right to a (possible, future) profit [Ireland, 2017]. Likewise, Ciepley (2013) has forcefully argued that the defining features of the modern business corporation – limited liability, asset lock-in and entity shielding – cannot be said to derive from individual contracts, but must be understood as governmentally granted privileges.

‘intimate, symbiotic relationship’ [Baars, 2019: 3].<sup>2</sup> It is law which enables the corporation and the corporate form in the first place, and therefore it is not possible to regulate or restrain it through law [Baars, 2019: 3].

For Baars, the point for the Marxist scholar is both to expose ‘structures of domination’ (that is, how the corporate form structures domination and exploitation) and ‘subverting the beliefs and values which sustain them’ (here, specifically company law) [Baars, 2019: 9]. Company law and mainstream legal scholarship, according to Baars, treat the corporation ahistorically, and thereby come to render it natural, necessary and fundamentally beneficial for economic and societal development [Baars, 2019: 11]. In this respect, company law scholarship and textbooks function as a type of ideology that conceals the operation and function of corporations, while at the same time ‘congealing’ the corporation and the relations of production and power within it.

As mentioned, Baars employs the commodity form theory of law to the corporation. The theory was first developed by the Soviet Marxist legal scholar, Evgeny Pashukanis, in his *General theory of law and Marxism*, first published in 1924 (Pashukanis, 2003). Without going into detail with the theory, from such a perspective, capitalism and law are co-constitutive and the necessary conditions of each other. What is central to the argument of the book is that the commodity form theory of law posits property ownership as the *Grundnorm*, not just of company or property law, but of *all* law. And that in this understanding it is the *subject* which is the cell-form of the legal system (as the commodity is the cell-form of the capitalist mode of production to Marx in vol. 1 of *Capital*). This is especially central to an understanding of the corporation, which gains its status and role as the main engine of capitalism in 19<sup>th</sup> century Anglo-American corporate law, precisely because it here becomes a *separate person in law*, as a legal subject. Law in this way functions as the necessary basis of the corporation, as ideologically

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<sup>2</sup> In this sense, the argument is reminiscent to Joshua Barkan’s in *Corporate sovereignty: Law and government under capitalism* (2013). Here Barkan argues – through Giorgio Agamben’s notion of the exception – that it is exactly through law that the corporation gains the privileges and exemptions from law that makes it possible for it to operate the way that it does.



supporting and legitimizing structures in society, and by seemingly being an autonomous, abstract, and general way of regulating human relationships. Law – here specifically in relation to corporate accountability – presents itself as part of the solution to corporate misconduct, rather than as part of the problem [Baars, 2019: 29].

It is the legal *form* of the corporation that is central to understand because it

was developed as a legal concept to “congeal” relations of production ... and minimise capitalists’ risk-exposure while maximising surplus value extraction. In other words, the corporation was constructed as a “structure of irresponsibility” – precisely to ensure ‘corporate impunity’ (and the impunity of the individuals behind the corporation). [Baars, 2019: 11]

The corporation became ‘capital personified’, an amoral calculator, driven by the profit imperative, or the imperialism at the heart of the corporation’. [Baars, 2019: 11]. What Baars terms the ‘imperialism at the heart of the corporation’ refers to the fact that it was the corporate form which was the main engine of imperialism through colonial trading companies. And it also demonstrates how the profit imperative compels the corporation to continually search for profit and expand its operations around the globe (and, perhaps even beyond with current corporate plans to colonize space).

The specific analysis of the book concerns international criminal law (ICL) after WWII. A central part of the analysis is the post-WWII war tribunals held in Nuremberg and Tokyo, as well as the ‘rediscovery’ of ICL after 1989. To Baars, the trials served to legitimise what she calls ‘capitalism’s victor’s justice’ by concealing the economic causes and imperialist nature of the war and thereby excluding economic actors from the scope of ICL, despite the fact that the role of economic actors in instigating the war had been a point of agreement between the allies prior to the tribunals [Baars, 2019: 134-35]. The US in particular feared that future corporate and industrial participation in the government’s war efforts would be curtailed if they were penalized for their role in the war. The trials therefore served to legitimise especially the US’s position as global economic hegemon and enabled capital’s further expansion through colonization. The trials also marked a shift in the conception of the corporate responsibility. The corporate form developed in

the 19<sup>th</sup> century to *minimise individual responsibility*, but the post-WWII trials represented a move toward individual as opposed to corporate responsibility and liability [Baars, 2019: 135]. The tribunals thereby resulted in the disappearance of the economic causes of the war from the mainstream narrative. Instead, economic actors were portrayed as essentially peaceful, and economic development became synonymous securing peace. The result was that the war's economic aspects were hidden, and corporate impunity was constructed [Baars, 2019: 198].

After 1989, ICL once again came into vogue, but the set-up of the tribunals rarely (if ever) placed businesses or businesspersons on trial, leaving this mainly to NGOs and 'cause lawyers'. Often employed in internal armed conflicts away from the Western centre, 'global institutionalised ICL forms part of an effort to shift power to a global governance regime, and is aimed to allow for intervention in less powerful states/against individuals less favourable to prevailing power structures' [Baars, 2019: 310]. This is part of a general movement where corporations are increasingly *partners* in governance. This means that corporate ICL lends

the corporation in taking up this 'public', governance function. Corporate rule is here, perhaps counter-intuitively, because corporations have posited themselves ... as 'good corporate citizens' capable of the same errors as humans, and accountable to the same laws as individual people. [Baars, 2019: 343-44]

The fact that corporations are 'accountable' gives them status as legitimate actors in global governance.

## **Towards a critical theory of the corporate form**

The books reviewed here highlight a central element to scholarship on the corporation, namely that such scholarship must be interdisciplinary and critical. To properly understand what the corporation is, and how it wields political and economic influence and power, we need to push beyond understandings of the corporation as a legal person or creation. We need to approach it from different disciplines, as a historical, political, economic, sociological, anthropological, etc. entity. To this end, the handbook provides

a great resource for exploring both disciplinary, interdisciplinary, and thematic approaches to the corporation. However, I would like to point out two issues that the books do not adequately address: Firstly, like much of the scholarship on the corporation, it is almost exclusively focused on the Anglo-American context, or at least the Anglo-American conception of corporations. This makes a lot of sense given that it was and is in Anglo-American corporate law that the corporation was developed, and it is this conception which has spread around the globe and which to a large degree governs the multinational corporations in the global sphere. However, it could be interesting to see more of how this is translated, or contested, in different national, regional, or local settings, both in the West and elsewhere. Secondly, which is from a more personal point of interest, are the perspectives from other humanities-disciplines than history. For instance, from philosophy or intellectual history. The contributions are mostly, again with good reason, from the different social science disciplines, but the corporation is centrally an *artificial or legal person* which can own property, has (some kind) of responsibility, represents interests, and so on. Insights from intellectual history or philosophy could help elucidate how the corporation has been conceived as a subject with rights, responsibilities, liabilities, etc. and highlight how this is central to understanding how corporate power is legitimized (Jessen 2020).

Moreover, I want to highlight the focus on the corporate *form*, within this new wave of critical research on the corporation (as highlighted by Baars, but also in the handbook). What I mean by this is, to paraphrase Ciepley (2013: 141), the corporation is something different from business in general, which has been and continues to be conducted under a number of different legal forms, such as sole proprietorship, partnerships, family-owned, foundation-owned or cooperatively-owned companies. In this respect, the corporate form is a historical newcomer (particularly compared to the first two). Therefore, the corporation is not simply a business firm or a managerial firm, or a large, capitalist organization. The corporate form is not specific to business entities, but has historically been used for monasteries, universities, towns, colonies, and many others, but also, presently, for different associations and business organizations, such as the

ones mentioned above. The corporate form is thus a form which gives a collective the right to own property, to make contracts, to sue and be sued, be the object and subject of law, and in general to be an entity, a legal or fictitious person. Additionally, the corporate form establishes the right to centralized management of its property and the right to establish and enforce rules within its jurisdiction. The *modern* corporate form specific to *business*, which began to emerge with the 17<sup>th</sup> century joint-stock trading companies (but which was not fully developed until 19<sup>th</sup> century Anglo-American corporate law) is particular with its principles of separation of ownership and control (between shareholders and directors), limited liability (that shareholders are only liable for the amount they have invested), and entity-shielding (that the corporation itself owns its own assets, and that these cannot be repossessed and claimed by investors). It is the combination of these factors that has made possible the pooling of large amounts of capital for risky endeavors by redistributing responsibility and accountability, and which has contributed to making the corporation and the corporate form so powerful – both economically and politically. These features have been central in making the corporation, what Baars terms, ‘global capitalism’s main engine’ [Baars, 2019: 3]. As she points out, we need to understand ‘the nature of the corporation’, this ‘masterpiece of legal technology’ [Baars, 2019: 3].

As a result, I also find strongest those chapters in the handbook that focus specifically on the nature or form of the corporation. This is formulated clearly in the chapter on ‘The corporation in anthropology’. Here, it is specified how corporations ‘loom large in anthropological research on everything from resource extraction to financial trading and pharmaceutical testing to commercial advertising’ [Foster, 2017: 112]. However, it highlights something very central, namely that this is

not the same thing as paying attention to the corporation per se. In other words, *how do we anthropologists attend to the specificity of corporations without instead backsliding into a general critique of capitalism (or neoliberalism instead)?* [Foster, 2017: 112, italics in the original]

To reiterate: The chapters that are strongest are the ones that deal with the corporation itself in its specificity, rather than those in which it becomes a

placeholder for a number of other things, such as more generally large-scale organization, business elites, or social movement studies that oppose corporate power.

In this literature, the important difference is between corporations being presented as representatives of capital, power, exploitation, etc., and then analyzing what is specific and particular about the corporation and the corporate form. What is central about this new and emerging critical scholarship on the corporation is exactly that it puts the very nature and form of the corporation to the fore. Instead of treating corporations as a stand-in or a proxy for ‘capitalism’, ‘neoliberalism’, ‘economic power’ or ‘elites’, or subsuming it under the general headings of ‘organization’ or ‘organizing’, this critical scholarship analyzes what is specific to the corporation. This form, which as the handbook states, and as I quoted in the introduction, is edging out other organizational forms, thereby increasingly creating a ‘corporate monoculture’ [Baars and Spicer, 2017b: 2].

It is also here, in paying attention to the specificity of the corporate form (and its relation to capitalism), that the potential of these books, and of this new scholarship, for management and organization studies is to be found. I would argue that this literature tends to underplay specific key actors or overarching logics (such as the corporation and capitalism). In that sense, the potentially vacuous focus implied by the notions of organization and organizing could be strengthened by a Marxist and legal view of organizational forms, chief among them the corporation and the corporate form. The books thereby provide a great resource for scholars of organization and management studies, who want to dive into the corporation and the corporate form, and also serve as good examples of interdisciplinary research that focuses on for instance law, history, and capitalism. At the same time, both works give strength to critical scholarship on corporate accountability, corporate social responsibility, corporate citizenship, social development goals, as well as the contemporary discourses on responsible, accountable, or stakeholder capitalism and corporations. As especially Baars convincingly shows, more than changing capitalism, such debates are at risk of supporting corporations as legitimate (yet flawed, and thereby ‘human’) responsible actors in global governance.

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