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TOWARDS A
SOCIAL ONTOLOGY
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Abstract

In his account of the corporation as a ‘community’, Tony Lawson advances a materialist theory of social reality to argue for the existence of emergent social structures based on collective practices and behaviours, distinguishing his position from John Searle’s theory of social reality as consisting of declarative speech acts. Lawson’s and Searle’s accounts are examined for what they imply about the relationship between social structures and legal concepts. It is argued that legal concepts are themselves a feature of social reality and that a consequence of the law’s recognition of the ‘reality’ of the corporation is to open up the activities of business firm to a distinct form of normative ordering.

Key words: social ontology, the corporation, legal evolution.

JEL Codes: B52, K22.

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1. Introduction

Tony Lawson has argued for a conception of the corporation which is rooted in a materialist theory of social reality. As his debate with John Searle makes clear, he rejects the idea that the act of forming a company as a legal entity definitively constitutes a corporation; a corporation must exist or be capable of existing at the level of social reality, that is, as a community which is an emergent and relationally organised totality, in order for it to acquire legal personality. In this paper I aim to use the Lawson-Searle exchange to cast light on the debate on the nature of the corporation in both economics and law. This debate is anything but new in either context, and shows no signs of reaching consensus. I will suggest that the recent attention devoted to the corporation in ontological studies can be useful in helping us to resolve some long-standing questions concerning the nature of business firms and the way they are structured by the legal system. The route to this process of clarification lies, I will suggest, in a more explicit consideration of an issue which Lawson and Searle pass over, or sidestep, which is the social ontology of the legal system itself.

To this end, section 2 below sets out briefly the core points of divergence between Lawson and Searle in their accounts of the corporation, while also noting issues on which they agree, as well as their shared goal of developing a realist approach to social inquiry. Section 3 then builds a bridge between these recent developments in social ontology and discussions in the economics of law concerning the dual legal and economic nature of the corporation. In section 4, continuing in this vein, the problematic idea of the corporation as a ‘fiction’ is addressed. Then sections 5 and 6 present elements of a theory of the social ontology of law, that is to say, an account of the legal system which seeks to explain its nature and mode of operation by reference to its role in simultaneously reflecting and constituting social relations.¹ Section 7 concludes.

2. Lawson’s theory of the corporation and his debate with Searle

A realist theory of social science is one based on ‘insights and assessments whose truth or falsity does not depend on the opinions of observers but on the way the world is’ (Lawson, 2015: 2). In Tony Lawson’s account (Lawson, 2014, 2015), the social realm consists of those phenomena whose existence necessarily depends on human beings and on interactions between them. Human beings operate in the social realm by virtue of being ‘positioned’. Social positioning involves the attribution to human persons of rights and obligations which involve, respectively, positive and negative positional powers. Rights and obligations are ‘real’ in this sense:

‘Matched sets of rights and obligations are the social relations that organise human beings as community members and participants. Like the organising structure of a building they are a form of formal causation. Take them away and human life is unorganised and socially undifferentiated; coordinated social activity as we know it falls apart. Because the structure makes a difference, then by the causal criterion of reality, positional rights and obligations and such like are real’ (Lawson, 2015: 7).

Social reality contains not just human beings but also what Lawson calls ‘artefacts’ and ‘communities’. Artefacts have a material dimension, such as the physical form of a banknote or coin. However, this material form does not capture the essence of the existence of artefacts on the social plane. In social reality, artefacts operate by virtue of being collectively recognised or accepted, by human beings, as having certain properties. Thus a coin or note is only able to perform the functions of currency when, by virtue of an agreement or convention, its particular physical form is practically positioned and relationally organised as one component of a wider system of value accounting which is accepted in a community.

‘Communities’, in Lawson’s account, are emergent and relationally-organised, and hence structured, totalities or entities. Emergence is the appearance of a novel arrangement or structure from a number of antecedent, component parts. Emergent entities have a systemic dimension in two senses.

Firstly, they form a coherent whole which is greater than the sum of various interlocking parts. This means, on the one hand, that the totality cannot be reduced to the pre-existing elements considered separately from the organising structure. On the other hand, it implies that the totality cannot act other than through these elements, constituted as relationally organised and positioned components of the greater whole.

Secondly, emergent entities have a certain relationship to their external context. While the fit need not be exact, features of systems are linked to features of their environment.

Unlike an artefact, a community may not have a single or indivisible material form. Nevertheless, it is not simply a mental representation. Communities emerge from and are constituted by the interactions of human persons. In this sense they have a behavioural, and hence ultimately material, base.

Communities are formed around generally shared conceptions of social positions, implying mutual rights and obligations, which originate in social practices. These beliefs may initially arise and come to be generally shared

through mutual observation and iteration, and hence have a spontaneous aspect. They may, alternatively, originate in negotiations between actors, leading to a formal contract or agreement, or result from a directive or instruction issued by an authority of some kind. However, the constitutive force of an agreement or directive ultimately rests on a wider social acceptance of the means used to record and communicate it. Rights and obligations ‘are irreducible to any documents that might record them’ while directives ‘are only really constitutive if (eventually) they are validated by (through the conformity of the collective practices of) those implicated in the declaration’ (Lawson, 2015: 8).

A corporation is a ‘community’ in this specific sense: it, too, is an emergent totality or structure, originating in the interactions of a number of human agents (Lawson, 2014). It takes its form from the cumulative and iterative effects of the dealings corporate actors (shareholders, managers, employees and others) have with one another, and from the rights and obligations, together forming ‘positionings’, which emerge from these interactions. The existence of a corporation is not bound up with a single physical object, as in the case of a banknote; it does, however, have a material grounding in human behaviour.

It follows that in order for it to assume a legal form through registration or incorporation, a corporation must either already exist, or be capable of coming into existence, as a ‘community’, that is, as an emergent social structure. A corporation is established ‘by positioning a community as it were a person’ (Lawson, 2015: 24). Rights and obligations which normally apply to human beings alone are transferred to entities through a special procedure, incorporation, which itself is regarded, through general consent, as authoritative for this purpose. In Lawson’s view, the act of legal incorporation can only be meaningful if there is an antecedent (or, where the association is in the process of being established, prospective) social entity possessing certain properties.

By contrast, John Searle has argued that the process of registration is a speech act which constitutes the corporation; the corporation has no separate, or prior, existence in social reality (Searle, 2003). The corporation is an example of what Searle refers to as the creation by means of linguistic declaration of a ‘status function’, the approximate equivalent to ‘social positioning’ in Lawson’s theoretical scheme, ‘without there being an existing person or object who is created as the bearer of the status function’ (Searle, 2010: 20). This is an aspect of Searle’s wider claim that social reality is created by speech acts with a particular declarative form, according to which a given physical object is treated as, or constituted as, a social referent in a particular context. Such a declaration creates an ‘institutional fact’ on the plane of social reality. Searle treats the corporation as one of an unusual set of institutional facts,

characteristic of ‘very sophisticated societies’, which are not grounded on a material or physical object of any kind. Thus,

‘the whole idea of the limited liability corporation is that there need not be any person or group of persons who is the corporation because those persons would have to accept the liability of the corporation if they were indeed identical with or constituted the corporation. But as they are not identical with the corporation, the corporation can exist, and can continue to exist, even if it has no physical reality’ (Searle, 2010: 98).

The implication of Searle’s approach is that social reality is constituted through linguistic attributions which, to be effective, may be, but do not need to be, materially grounded. The characteristics of the corporation are derived from the series of speech acts associated with the process of registration and with the ensuing attribution of various status functions (rights and obligations) to the new legal person. The corporation, in this sense, exists entirely independently of the human actors who at any one time make up its members or participants. There is no analytical advantage in requiring the prior existence of an association or other form of ‘community’, and, indeed, much to be gained from avoiding the identification of an unstable third category of ‘social objects’ between the physical reality of human beings and the social reality of ‘institutional facts’.

For Lawson this approach is insufficient because it neglects the sense in which the legal form of the corporation is grounded in certain social routines and practices: ‘there is a material or practical dimension to social reality that grounds the institutional facts that can be generated’ (Lawson, 2015: 23). In the case of the corporation, this entails a recognition that the legal act of incorporation would be meaningless if it did not relate to social practices of some kind. These practices operate at the level of social reality, in the sense that they have causal effects: ‘they are found to make a difference and, by that criterion of reality, are real’ (Lawson, 2015: 23).

It seems that Lawson is not making an empirical observation to the effect that it is not possible, under the rules governing incorporation, to form a company unless some particular type of business structure either already exists or is intended to come into existence. If he were, then his theory would be in some difficulty. The conditions under which firms come to be incorporated differ from one jurisdiction to another, and have changed over time, becoming progressively more liberal virtually everywhere. Companies, as legal persons, do not need to correspond precisely to particular organisational structures in order to be validly formed. Thus within corporate groups, for example, it is normal to find certain entities which do not formally employ any workers, but

are used to structure the capital or holdings of the firm in a certain way, or to facilitate compliance with particular regulations, for example where the enterprise operates on a cross-border basis. Many jurisdictions permit companies to be formed with a single shareholder-member who may also be the sole director, a practice which has encouraged the formation of ‘personal service companies’, although it is common also for this type of corporate form to be set aside if it is a ‘sham’ concealing a more regular employment relationship.

Lawson does not delve into the detail of the rules governing incorporation and it would be surprising if the validity of his theory turned on this detail, much of which is contingent and specific to particular contexts. To deal with the point that the practice of incorporation is not quite as he describes it, we could reformulate it as follows.

It could be read, firstly, as an argument to the effect that, historically, the legal institution of the corporation would not have come into being had there not been the prior, or at least parallel, emergence of certain social structures, that is, the first business firms. There is evidence for this view: the arrival of general incorporation in the nineteenth century was, in many national contexts, the culmination of a process beginning in the early modern period, from the sixteenth century onwards, and associated with the appearance of a number of initially discrete forms of asset partitioning, along with related features of capital formation and enterprise management, which were eventually fused in the modern corporate form (Ireland, 1999; Harris, 2000; Hansmann, Kraakman and Squire, 2006).

Secondly, Lawson’s claim could be interpreted as a hypothesis to the effect that when a company is incorporated by means of legal process, the *normal* case is one in which there is some corresponding (actual or intended) social referent, that is to say, an underlying structure such as a business firm, and that the law treats other cases of incorporation as exceptional or even, in some way, suspect. This view would be compatible with the way incorporation currently works in many jurisdictions and with the way it emerged historically: although requirements for a business entity to have, for example, a certain minimum number of members and directors, and a certain quantity of paid up capital, upon registration, have been loosened over time, they have not entirely been displaced by the more recent trend towards the liberalisation of the conditions for incorporation.

Thirdly, an implication of Lawson’s view is that it would not be meaningful for a company to be incorporated as a legal person unless there were some continuing structure associated with it. This does not mean that the legal person

must have a one-to-one correspondence with a given ‘firm’ or enterprise, however that it is to be defined (there is no general or universal legal definition of an ‘enterprise’ as such: Robé, 2011). Many enterprises, and more or less all those operating on a transnational basis, operate through multiple corporate entities, organised in group structures of one kind or another (Blumberg, 1993; Blumberg and Strasser, 2011). However, for a company to be formed when there is no underlying productive activity of any kind associated with it seems to be in some way a denial of the purpose or function of the corporation. This, again, may explain why the law treats certain forms as ‘shams’ or is able, on occasion, to ‘lift the veil of incorporation’, in effect nullifying the corporation’s distinct legal identity.

What is also important for Lawson, and which distinguishes his view from Searle’s, is that the registration of a corporation does not entail the attribution of legal powers to a ‘fictional’ social form. Rather, it amounts to the attribution to ‘communities’ of the legal rights and obligations normally attached to individual human persons. The process, in other words, is one which ‘allows the community qua corporation access to various positional rights originally intended only for natural persons’. A ‘legal fiction’ of this kind, while it may be understood, in the sense suggested by Searle, as taking the form of a determinative speech act, can only work if there is an ‘occupant’ (actual or potential) of the status that is thereby created (Lawson, 2015: 29). This view follows from Lawson’s theory of social reality which is founded on ‘non-reductive emergent powers materialism’ (Lawson, 2015: 8).

3. Legal and economic conceptions of the corporation

Lawson and Searle do not directly address the point of whether the corporation is best understood as a primarily legal phenomenon or as economic or social one, but their interpretations of corporate law can be seen as throwing light on this issue, which continues to divide opinion. Two recent and influential contributions to this debate are those made by Jean-Philippe Robé (2011) and Masahiko Aoki (2010).

According to Robé, it is a category error to use the term ‘corporation’ to refer to anything except the legal form: ‘a corporation is a legal instrument, with a separate legal personality, which is used to legally structure the firm; a firm is an organized economic activity, corporations being used to legally structure most firms of some significance’ (Robé, 2011: 3). Thus for Robé the corporation is a juridical device, which shapes business associations, but is not to be confused with the operational functioning of the firm or enterprise, whether or not that can be meaningfully understood as an ‘entity’ (Robé is sceptical on this point).

Aoki, on the other hand, maintains that the corporation must be understood first and foremost as a social or economic category. Corporations, he suggests, are ‘voluntary, permanent associations of natural persons engaged in some purposeful associative activities, having unique identity, and embodied in rule-making, self-governing organisations’ (Aoki, 2010: 7). Contrasting legal and economic approaches, he suggests that the juridical terms used to describe the corporate form, including ‘legal personality (i.e. the capacity to become the subject of contracts, property ownerships and formal legal dispute), limited liabilities, shared ownerships and their transferability, and delegated management’, may all be ‘regarded as business-specific substantive representations of the “unique identity” and “self-governing dimensions” of the corporation’ (Aoki, 2010: 14), that is to say, as linguistic constructions which reflect, albeit in the distinctive language of legal discourse, features of the underlying social phenomenon of the corporation.

While the terms used to describe legal and social categories clearly do matter, it may be that Robé goes too far in suggesting that the concept of the ‘corporation’ should be reserved for legal use alone. He is of course right to point out that the term ‘firm’, which has been used by economists at least since Coase (1937) to refer to the business enterprise, should not be equated with the legal concept of the corporation, and that confusion is likely to arise when these categories are conflated. The concept of the ‘corporation’ and the juridical doctrines associated with it form only one part of the legal structuring of business ‘firms’; employment law, tax law and the general private law of obligations are also centrally involved in facilitating the coordinated production of goods and services for commercial sale which is the essential purpose of the business firm (Deakin, 2003). This perspective is consistent with Robé’s argument that to refer to the corporation as a ‘legal fiction’, as economists following Jensen and Meckling (1976) have been prone to do, seriously understates the practical consequences, and hence the normative significance, of the legal ordering of the firm. Terminology aside, then, Robé’s argument is not inconsistent with Aoki’s claim that something which Aoki chooses to call the ‘corporation’ exists at the level of social practice, separately from the legal rules governing it. While it might be ideal for the term ‘corporation’ to be reserved for the legal form which structures the economic practice, no single discipline has a monopoly of terms used in general language, and a merit of Aoki’s use of the term ‘corporation’ in preference to the more normal economic term ‘firm’ is that it directs attention to the common features of associations of various different kinds, of which the business firm is only one (if a particularly important) instance.

Robé’s intention is to show how legal devices are used in commercial practice to overcome coordination problems which, in the absence of the institutional support provided by the legal system, would severely curtail the scale and scope

of business firms; Aoki's aim is to demonstrate how an evolutionary conception of social structure, building on game theoretical insights, can help generate a theory of contemporary corporate governance (understood in a broad sense to mean the governance of the enterprise) which includes a role for law as the symbolic representation of corporate practice. In this sense their approaches, while appearing distinct, can be reconciled. However, between Robé's functional analysis of the 'structuring' role of the legal system, on the one hand, and Aoki's evolutionary account of corporate law as symbolic representation, on the other, there is a gulf to be bridged in terms of understanding exactly how law can simultaneously shape business practice while also being shaped by it.

Searle's account of social reality is not well suited to answering this type of question, perhaps by design. Searle seems to be concerned to present a theory of social reality which is consistent with what is known, through the natural sciences, of the material world, in so far as that consists of various physical and biological states. For Searle, social reality is constituted by linguistic acts which endow material states with social meaning. There is no advantage in interpolating an intermediate category of social objects, the existence of which cannot be derived, Searle believes, from methods of scientific inquiry. Thus the nature of the relationship between the linguistic forms used by lawyers, on the one hand, and the practices of corporate actors, on the other, is not really an issue which his theory is set up to address.

Searle concludes that the corporation is constituted purely by the legally-specific speech act (or acts) of registration, without the need for a parallel social entity of any kind. Searle is surely right to argue that once the corporation is constituted as a legal entity, it takes on an autonomous existence. Such a view might, however, make us want to ask how it is that this very particular kind of speech act came to acquire its current significance as a near-universal mode of structuring business activity. Modifying Searle's argument, it might be more accurate to say that the corporation, following its formal registration, exists independently of the social referent from which it has emerged. The act of incorporation creates an autonomous legal form which nevertheless presupposes the social entity.

This approach would be in line with contemporary functional approaches in the economics of law, which do not see law operating entirely independently of social referents. On the contrary, this line of work is intensely interested in such questions as the nature of the relationship between the historical emergence of the corporate form within legal analysis and discourse, and the appearance of capitalist modes of production, distribution and exchange (Hansmann, Kraakman and Squire, 2006).

Lawson's methodological starting point is potentially more helpful in addressing this type of question. If social structures are real in the sense of having tangible causal and constitutive effects, without which human society would be impossible, they can be studied using appropriate methods of empirical inquiry. Searle and his followers might argue that this is to detach social ontology from any material foundation, a move which renders impossible a unified account of the nature of reality. Lawson does not go this far; his approach is nevertheless still materialist in assuming that, at some point in deep historical time and in ways which are not clearly understood, human society emerged out of a physical and biological substrate in a way which created a distinct sphere of interaction, with separate properties from those of the natural environment. This is an account of society which is 'consistent with [it] (having emerged from and remaining dependent upon) the sorts of things studied in physics and other non-social sciences so I do count the conception here defended a form of naturalism' (Lawson, 2015: 8).

4. The corporation as 'fiction': evolution of an idea

A central aspect of Lawson's recent engagement with Searle is his discussion of the idea that the corporation is a 'fiction':

'A further unfortunate, or anyway additional misleading, use of terminology is that the position (status) Juridical Person is also variously, if informally, known as Juristic or Artificial or Fictitious Person. Use of the latter term is merely to indicate that although positioned as a legal person the entity in question is not positioned as a natural person. There is no suggestion thereby that any entity positioned as a juridical person is not a real entity. The corporation is such a real entity, and specifically a community. And although it is not (positioned as) a natural person it is positioned as a juridical and so legal person, allowing the community qua corporation access to various positional rights originally intended only for natural persons.' (Lawson, 2015: 29).

Elsewhere he writes:

‘The precise term most frequently used for the legal position in which a firm is situated to qualify for rights and obligations is that of *Juridical Person*; and this is to be distinguished from *Natural Person* which is intended only for (some) human beings... On this conception, to be a legal person, sometimes phrased as having “legal personality”, does, as noted and strictly speaking, mean to be capable of having or gaining access to legal rights and duties within a certain legal system. Legal personality is thus a prerequisite to possessing certain various specific rights and obligations. More formally it is a prerequisite to legal capacity, a term that expresses the rights and obligations that the entity in question can acquire and exercise within the framework of the legal system.’ (Lawson, 2014: 20).

As these two passages show, Lawson recognises that attributing legal capacity to a human person is just as much an institutional act as attributing it to an entity. Historically, it was not the case that legal personality was granted to human beings as such before it was extended to organisations. Rather, in the period beginning with the late middle ages and culminating in the industrial revolution, legal systems in western Europe and north America attributed capacity – the power to make contracts, hold property and more generally participate in economic life – to certain groups while, at the same time, gradually expanding the same status to more or less all individuals (Savigny, 1840-9). The process of attributing capacity, via the notion of legal personality, to certain entities predated its extension to all human beings. The idea that legal capacity was an inherent right of ‘every individual human person’ was an invention associated with Enlightenment thought and the ‘Age of Reason’ in the societies of the global north during the eighteenth and nineteenth centuries (Wijffels, 2009). It was only at the end of the nineteenth century and the turn of the twentieth, when the last vestiges of patriarchal conceptions of property rights were removed from private law, and married women were empowered as economic actors in their own right (children continue to lack full contractual capacity in many legal systems), that this goal was fully realised (Steinmetz, 2000). It was also necessary to remove all vestiges of unfree labour, including indenture and slavery, for the principle of universal capacity to be recognised in the labour market (Davis, 1999). The ending of slavery and indenture in the capitalist world overlapped with the extension of legal personality to private business firms in the middle decades of the nineteenth century, but the attribution of corporate status to charter companies and utilities was already well established in the early modern period (Harris, 2000).

We should reject the idea that the attribution of personality to business firms involved the adaptation of a model originally intended principally for human beings. Rather what we can observe is the evolution of a legal concept, ‘capacity’, which was used to shape the terms of participation, by individuals and collectivities alike, in the emerging market order of the global north (Deakin and Supiot, 2009).

This does not mean that we cannot learn something from historical debates over whether the business corporation was a ‘fiction’. Numerous theories of the business corporation emerged in the decades following its appearance as a juridical form in virtually all the industrialising economies of western Europe and north America. The leading theories at end of the nineteenth century were associated with the ‘fictionalist’ and ‘aggregationist’ schools (Gindis, 2009, 2015). The ‘fictionalist’ group maintained that the ‘corporation’ was simply a label attached by the law to individuals participating in the activities of the firm; the ‘aggregationists’ maintained that the company consisted of the shareholders as a collective. Both theories denied that the corporation was an entity in its own right.

We should see these theories not as expressing fundamental truths about the company but rather as indications of the complex coevolution of legal ideas and commercial practices which was going on at this time. The view that the corporation was not an entity made sense at a point when the full implications of the company’s separate legal personality were still being worked out by the courts. Prior to the extension of incorporation to privately-held business firms (as opposed to the state-run ‘charter companies’ and utilities which were recognised at an earlier point: Harris, 2000), variants of the partnership and (in the common law systems) the trust were the legal devices generally used to structure business activities. The partnership consisted of the firm’s members and did not provide them with limited liability. This model lingered on in the new corporate form as it was some time before courts came to accept the full implications of separate legal personality for asset partitioning (the separation of the company’s assets from those of the investors and other members). In addition, many jurisdictions placed limits on shareholders’ limited liability, one model being (as in California until the 1930s: Barger and Lehn, 2011) to hold them residually liable, in the event of the company’s bankruptcy, for claims for lost wages and environmental harms. As these qualifications on the corporate model were gradually removed, courts increasingly came to see the company as distinct from the shareholder-members, and ‘fiction’ theories fell out of fashion (Ireland, 1999).

They began to be replaced by theories of the company as a ‘real entity’ at around the same time. In the 1890s the German jurist Otto von Gierke founded his view of the corporation on the idea that it was ‘a living organism and a real person’ with a ‘group will’ (Gierke, 1900: xxvi). When part of his treatise on the history of German law, *Das deutsche Genossenschaftsrecht*, was translated into English by F.W. Maitland (1905), the idea took on a wider resonance in the common law world. The concept of the ‘group will’ did not survive the American ‘legal realist’ critique of the 1920s and 1930s, in which it was denounced as a ‘mystification’ (Cohen, 1935), but ‘real entity theory’ took hold nevertheless, on the basis that that the firm was more than ‘the sum of the members’ (Machen, 1911: 258). Real entity theory implied a belief in freedom of association and the recognition by the legal system of collective entities operating in the space between the atomised individual and an increasingly powerful regulatory state: ‘the entities the law must recognise are those which act as such, for to act in unified fashion is – formality apart – to act as a corporation’ (Laski, 1916: 422).

Interest in the question of the juridical nature of the corporation began to abate when John Dewey (1926) influentially argued that it was more important to consider the practical effects of attributing legal personality to entities in particular contexts than to engage in an ‘essentialist’ argument about legal forms. However, Dewey too accepted the premises of entity theory, writing that ‘the interaction of human beings one with another’, was an ‘objective reality which has multitudinous physical and mental consequences’ (Dewey, 1926: 163). Adolf Berle (1947: 344), likewise, insisted that the ‘enterprise, and not the incorporation papers’ reflected an underlying reality to which the law should respond, by, among other things, recognising the existence of corporate groups as entities with distinct powers and responsibilities.

Thus the idea of the corporation as a ‘fiction’ has come and gone according to the economic and political context in which company law is embedded at any given time (Bratton, 1989; Gindis, 2009, 2015). The legal transition from the personalised model of the partnership to the conception of the corporation as a ‘real entity’ occurred as industrial enterprises were increasingly being organised around a model of vertically integrated production (Commons, 1909). This was coupled with the growing separation of ownership and control as stock markets expanded and shareholdings became more dispersed and, eventually, institutionalised via pension funds and other collective savings schemes (Berle and Means, 1932). Then, as the ‘managerialist’ corporation of the mid-twentieth century began to be displaced, from the 1970s onwards, by increasingly financialised models of enterprise, and as vertical integration went into reverse with the rise of outsourcing and downsizing (Froud et al., 2006), the gap left by the end of the debate over the legal nature of the corporation was

filled by agency theory, which once again re-emphasised the ‘fictional’ character of the corporation (Jensen and Meckling 1976; Fama and Jensen, 1983), this time using the individualist premises of neoclassical economics to drive a new legal model. As was the case a century ago, however, there is not just one view in company law scholarship; neo-fictionalist accounts have been challenged in various ways by functionalist theories (Hansmann and Kraakman, 2000; Armour et al., 2009), stakeholder-orientated accounts (Blair, 1995, 2003; Blair and Stout, 1999) and the idea of the corporation as commons (Deakin, 2012; Talbot, 2015).

There is evidence to suggest, then, that theories of the corporation evolve, as do the rules of company law, to reflect changes in the law’s environment, which in this context means wider economic and political forces. How, in this light, should we assess Lawson’s conception of the corporation as a ‘community’? In so far as the term ‘community’ is being used by Lawson to refer to generic features of civil associations or organised groups characterised by complex and interlocking positionings, there is nothing in this idea which would confine it to one particular period in the evolution of the capitalist enterprise, nor to the experiences of particular national systems. Thus the rise of financialised business firms from the 1970s onwards and the parallel appearance of agency theory do not, in themselves, render the notion of the ‘community’ inappropriate as a social referent for the corporation, as argued by Veldman and Willmott (2017).

If we wish to be more specific, however, in identifying the essence of the corporation in its social form as opposed to its legal manifestation, we might want to have a clearer grasp of the forces underlying the evolution of legal rules. What are the mechanisms by which law responds to economic change, and in what sense can we speak of the legal system, in its turn, influencing the path of economic development? Does the law operate only at the level of symbolic representation, or can it shape economic outcomes in a more material way? To address these questions, a more systematic analysis of the issue of legal ontology is needed.

5. The social ontology of legal concepts

The issue to be addressed in this part is: what is the significance for social theory and for empirical social science of the concepts used by lawyers to describe objects and structures in the social world? Legal texts are a very rich source of evidence on the nature and functioning of social referents, but the quality of this evidence is not altogether clear. Most social scientists pay little heed to it, perhaps because legal language is, by its nature, technical and self-referential, and so not easily accessed by non-specialists. Ronald Coase is one of the few economists to have paid close regard to what legal texts actually consist of. In 'The Nature of the Firm' (1937), after putting forward a transaction-cost based view of the firm in which a pivotal role is played by the power of the entrepreneur to give directions to the workforce without the need for continual renegotiation of the terms of employment contracts, Coase cites a contemporary (legal) textbook on 'master and servant law' in support of his (economic) theory: 'the definition we have given is one which approximates closely to the firm as it is considered in the real world' (Coase, 1937: 404). Citing a legal treatise (Batt, 1929) as evidence for the existence and nature of a social referent such as the firm might not seem the most obvious thing to do, and Coase did not seek to justify offering this particular source as evidence, but perhaps his intuition was more correct than it might seem.

Legal language makes extensive use of organised categories, which are often called by lawyers and legal theorists 'concepts', to refer to social and economic relationships. It would be impossible to describe any area of law relating to the business firm without using these categories; if they were not available, the law would disintegrate into a series of disconnected commands. Concepts are important, then, for providing some semblance of order or coherence in the law, which is often fleeting and contingent, but nonetheless tangible enough, at least at the level of subjective experience, to those engaged in the practice and interpretation of the law.

There are many such concepts at play in company law and in related areas of the law of the business enterprise: the 'corporation' or 'company' itself is the pivotal or nodal idea which informs other, more specific or subsidiary categories such as the 'share', 'capital', 'director's duties' and so on. The idea of the 'corporation', in its turn, is derived in part from higher-level concepts which operate within general private law, up to and including the notion of the legal 'person' itself. The meaning attached to these concepts does not derive, solely or even mainly, from internal reflection by legal theorists (although that plays a part), but from a practice, in which the legal community at large is engaged, of working out their content and significance in a number of practical contexts, which include the issuing of rulings and judgments, the assembling of

statutory texts, and the drafting of commercial contracts. Certain actors within this process, such as judges in the higher appellate courts, are able, by virtue of the status or position they occupy, to offer interpretations with a certain degree of authority, but few such determinations have a fixed meaning; the content of the law is in a continuous state of flux as new disputes arise as the commercial or social context changes. In the last analysis, the meaning of a term depends on the legal community in general reaching some kind of consensus on its interpretation, that is to say, a shared understanding of its content, even if this is contested and to some degree, depending on the speed of legal and social change, contingent.

Although legal interpretation is in a state of flux, for legal concepts to play a role in stabilising the meaning of texts and lending coherence to a given area of law, they must have a certain stability and resistance to change, and this does indeed seem to be the case; concepts often outlive particular rules, and it is possible, perhaps even normal, to find the same concept being used in different time periods to express different policy outcomes (Deakin and Wilkinson, 2005). Concepts therefore operate at a level of abstraction which, in a sense, places them apart from substantive rules. None of this, however, means that concepts are unchanging. They do evolve, and exploring how this occurs may open a window to understanding the nature of their relationship to social practice.

To return to Coase and ‘The Nature of the Firm’, the legal concept he referred to, generally known as the contract of ‘service’ or ‘employment’, might have seemed to be one of the more stable reference points in the law governing the business firm, but the category is more specific to the time in which Coase was writing than might at first appear. Coase wrote ‘The Nature of the Firm’ at the point in the 1930s when the vertically integrated firm was becoming the normal or paradigm form of business enterprise across the countries of the global north. The integrated enterprise was the site of conflict and contestation. Management directed labour using the delegated power of capital in a context where executive control was becoming separated from the ownership of shares. At this time, the issue of the scope of the enterprise was critical to determining how far managerial power extended, and this question received an extensive legal treatment in the context of such issues as unions’ rights to call industrial action, employers’ liabilities for workplace accidents, and the coverage of social insurance schemes (Deakin and Wilkinson, 2005).

There is nothing ‘natural’ or inevitable about the idea that the worker is bound to the enterprise through the medium of an individual ‘contract’ under which there is an inherent duty to obey managerial instructions. It is a juridical artefact with a number of aspects. There is a liberal market aspect, according to

which the work relationship consists of a bilateral exchange of property rights. There is also a communitarian aspect, according to which the performance of work is embedded in a network of reciprocal rights and obligations associated with, and bounded by, the organisational space of the enterprise (Supiot, 2015).

One of the legal innovations which occurred in the period when the vertical integration of production was on the rise was to characterise the counterparty to the worker within the structure of the contract of employment as the enterprise itself. In legal terms, this counterparty, the ‘employer’, became the ‘company’ or corporate entity. The ‘unitary’ employment contract thereby displaced an earlier legal model in which work relations were more often characterised by multiple levels of ‘internal contracting’ between workers, labour intermediaries, and the ultimate user of labour in the form of the employing enterprise (Deakin and Wilkinson, 2005). This change occurred at the same as there was the parallel shift within company law towards recognising the corporation as a ‘real entity’, separate from the shareholder-members. The effect of this legal shift was two-fold: on the one hand, managers acquired direct power of legal control over a more extensive range of tasks within the process of production; on the other, the enterprise, as the counterparty (via the corporate form) to the employment contract, took on the role of residual bearer of risks, exposing the company’s asset pool to claims in employment and fiscal law which became, in effect, a social charge on capital (Deakin, 2003).

This legal change was incremental and, until after the event, mostly imperceptible; it did not happen overnight, in a single legislative act, but via numerous judgments and statutory amendments occurring over several decades; it was non-linear, with reversals along the way before a consistent interpretive line became clear; and it took place in all countries experiencing similar processes of industrial development, even if the judicial terminology used differed from one national context to another (Deakin, 2006). While the legal changes were in part the consequence of a conscious shift in policy and in politics, as states in market societies sought to sustain the integrated corporate enterprise while also regulating it and using it as instrument of social welfare, they were channelled through modes of legal deliberation and reasoning which, in terms of producing a new conceptual framework for employment relations, had, in part at least, a spontaneous and evolutionary character.

The point of using this example of legal and industrial coevolution (many others could have been given) is to focus attention on the significance of legal interpretation for the social sciences at large. For lawyers, legal concepts are part of the tools of the trade; devices which are essential for legal argumentation and hence for dispute resolution, as well as for related tasks such as the drafting of contracts and statutes. For social scientists looking to legal reasoning as a

source of data or evidence for patterns or continuities in economic behaviour or occupational structure, they have a somewhat different significance. Legal texts are not simple descriptions of social phenomena, and legal concepts or categories do not map straightforwardly on to particular social referents or objects. The formulation of a given legal concept is not direct evidence of the qualities or features of a given social practice, even when there is some connection between them as there is between 'corporation' and 'enterprise'. Nor does the existence of a legal formula referring, for example, to the 'contract of employment' offer a type of proof to the effect that this variety of contract, or employment as a social relationship, exists in social reality. This is because legal texts in general, including the verbal formulations we have been calling legal concepts, are amalgams of the descriptive and normative; they are expressions of values as much as they are restatements of empirical fact. The idea that the work relationship should be expressed as the 'contract of employment' was grounded in the everyday practice of industrial life as revealed in the disputes which came before courts and tribunals, but it was also a normative projection, which served to reinforce and legitimate a particular political conception of the place of the enterprise in mid-twentieth industrial society.

The value dimension of legal forms does not mean that legal concepts and categories are of no interest to social science. On the contrary, the evolution of legal ideas provides a way to understand larger changes occurring in social structure in a given period. Legal texts may operate in a normative sphere set apart from everyday social interactions, but the process of actualising and applying a legal rule requires legal actors to confront the reality of social and commercial practice. At any given moment, juridical concepts will appear remote from this reality: abstract categories, apparently unchanging, expressed in self-referential legal language. When viewed historically, on the other hand, it can be seen that they are anything but fixed: they mutate in response to changes in their context, and as they do so, they reveal something of the forces shaping social change. Thus Coase's invocation of legal concepts to support his theory of the firm (Coase, 1937) was not so wide of the mark: juridical forms, while not corresponding precisely to social ones, also cannot be too far removed from them if they are to be useful in the practice of legal interpretation.

6. Legal reasoning and the ‘constitutive’ role of law

If legal reasoning reflects aspects of social structure, does it also play a role in shaping or constituting relationships operating in the social domain? The legal system could be expected to shape behaviour in various ways: for example, through the application of sanctions attached to particular legal norms and administered by state officials, or through the expression of values which influence perceptions of what is acceptable conduct, to name two of the more likely possibilities. When empirical research is conducted into the impact of laws on behaviour, the issues being addressed are not fundamentally different from those which would arise if the study were focusing instead on some form of private collective action which involve the production of norms of conduct. The claim that the legal system in some sense ‘constitutes’ the conditions for economic and social action (Deakin et al., 2016) is a rather different one: this is an argument to the effect that complex social structures, of the kind which characterise modern market societies (but not just these), require a particular form of normative ordering – one based on a publicly constituted legal system – if they are to hold together in the face of tendencies towards fragmentation and atrophy.

Both Lawson and Searle refer to social reality being ‘constituted’ by the mechanisms they respectively identify as informing social structures: collective behaviour giving rise to emergent positionings in Lawson’s case (Lawson, 2015: 110, and commonly practised declarative speech acts, in Searle’s case (Searle, 2010: 520). The idea of ‘constitutive’ norms or practices, in each case, signifies a process which amounts to more than linear causation operating between an independent and dependent variable; what is implied is a systemic process through which social structure emerges from the interplay of a number of interlocking and mutually reinforcing elements. In Lawson’s formulation (on an issue where he and Searle appear to be in agreement):

‘Social reality is in large part at least structured by interlocking, internally related, often spontaneously emergent collective practices, carrying, in the sense of manifesting, (often contested) rights and obligations inter-relating the human beings who undertake these practices as positioned components of communities, of which the positions and practices in turn are properties. As such this social reality is in a sense both given to individual human beings at the moment each comes to act, as a (typically unacknowledged) condition of their individual (positioned) practices, and also reproduced and/or transformed as a (typically unintended) result of these individual practices taken in total.’ (Lawson, 2015: 9-10).

Without such ‘positioning’, social life ‘falls apart’ (Lawson, 2015: 7).

Legal language is one of the principal means by which ‘rights’ and ‘obligations’, as well as other such legal-normative categories as ‘powers’, ‘privileges’, ‘capacities’, ‘immunities’, ‘liabilities’, and so on (see Hohfeld, 1913), are given formal expression in modern (and other) societies. This does not mean that legal descriptions of social relations *are the same thing* as the emergent positionings which Lawson identifies as constitutive of social order. Legal reasoning is not used to map social structures. Legal concepts do not offer a descriptive sociology; nor are they variants of the ideal types or axiological models which different social sciences might use to generate claims about the world which are then tested using empirical data. Legal concepts are verbal formulas used in *allocating* rights and obligations, not describing them; they *project* positionings on to the social world. As we have seen, for this normative shaping of social relations to have any chance at all of being effective, the legal categories in question must not depart too radically from their context, but nor can they be identical with it.

This way of thinking about the legal system may help to show how it can have a role in the kind of social ontology which Lawson presents. The legal system does more than simply observe, ratify and reinforce emergent social practices. If that were all it did, it would simply be an arm of the state devoted to enforcing the customary morality of the time, whatever that might be. In the same way, while the law can give expression to relations of power and may be a means of objectifying and legitimating inequalities, it can also be an instrument for social change which is capable of recognising, for example, the inalienable capacity of all human agents to participate in economic and social life. The legal system does not simply replicate or enforce social practices. It also benchmarks them against values which a given society, by one means or another, has decided merit communal or public articulation and protection. These communally and publicly articulated values may often be in tension or conflict with emergent social practices and existing power relations.

For it to perform this task the legal system must, to a certain degree, be set aside from, or be autonomous from, everyday social and commercial practice, as well as from the political realm. Only legal discourse which operates in an ‘operatively closed’ or self-referential discursive space (Luhmann, 2004) can offer a mode of adjudication which is anything more than a screen for private interests or political expediency, as the case might be. The ‘rule of law’, so defined, is a fragile instrument as it ultimately rests upon social acceptance of the means used to identify and enforce the publicly enunciated rules of the legal system. There is some evidence that the emergence of a foundational social norm of this kind is correlated with market-based ordering in the economic

sphere coupled with democratic political participation, but, equally, that these conditions are not self-sustaining, nor an inevitable feature of market-led economic development: the norm of legal autonomy needs to be actively instituted and protected (Chen and Deakin, 2014).

The type of legal system which is characteristic of a ‘rule of law state’ coupled with a market economy inscribes a particular function for the law: in order to be able to constitute the conditions for social order in a setting of such complexity, the law must operate at one remove from social relations. This does not mean that legal reasoning, and the devices it uses, legal concepts, are not also part of that social order. Echoing, and slightly adapting, Alf Ross’s formulation, we might think of legal concepts and social relations as ‘not two independent spheres of existence, but different sides of one and the same reality’ (Ross, 1959: 9).

Thus within Lawson’s social ontology, law should be accorded more than a purely technical or instrumental role. The legal system, as an arm of the state with the capacity to generalise and enforce norms of conduct, provides the means to create the conditions for complex social orders characterised by a deep division of labour, and to support market-based exchange through scale and scope effects which are not available through purely private action (Deakin et al., 2016). In performing this role, the law offers more than the actualisation of extant social practices: it provides a mode of evaluation which benchmarks those practices against conceptions of justice which represent and articulate a society’s core values. In particular, the legal system makes it possible to challenge the very concrete inequalities of a market economy by reference to ideas of universal equality and freedom which are inherent in the ideal of the ‘rule of law state’. As an ideal which is more than a social practice, the rule of law is itself a normative projection, and at times can appear to be little more than a screen for the exercise of power, but it also creates a discursive space within which certain injustices can be addressed.

It follows that for the business enterprise to be recognised, via the concept of the ‘corporation’ and related legal ideas, as a juridical form, involves more than providing a solution to problems of coordination, important as these are for supporting economic development and growth. The attribution of legal capacities to corporations creates a space within which the activities of business firms may be evaluated on grounds which are not exclusively confined to considerations of economic efficiency, but also open up normative perspectives. Thus to count a corporation as a legal ‘person’ implies the attribution to enterprises of responsibilities, along with rights. If companies can acquire political rights by virtue of a contested analogy with the constitutional protections accorded to human persons (Avi Yonah, 2011; Bratton, 2011), they

equally cannot escape the logic of justice-based arguments for ‘corporate responsibility’.

7. Conclusion

In this paper, Tony Lawson’s recent exchange with John Searle over the nature of the corporation has been used to throw light on the characteristics and properties of the legal system as a distinct mode of social ordering. To characterise a business firm as a juridical person is to attribute to it the capacity to enter into transactions and relations which are regarded as valid by the legal system. This means that legal sanctions can be applied in a way which facilitates the particular type of economic organisation which has come to be associated with the firm. By these means, the legal system underpins forms of economic coordination associated with market economies characterised by a prominent role for business firms. However, the mode of operation of the legal system is not confined to the material functions of protecting property rights and enforcing contracts. The highly articulated legal discourse of the modern rule of law state operates at a distance from the social and economic relations which it purports to describe and regulate. Law operates in a normative realm in which power relations are acknowledged and confirmed, but may also be questioned and confronted.

Lawson’s argument that the legal form of the corporation must, to be meaningful, refer to an existing or potential social referent, a ‘community’ of interlocking behavioural practices, follows directly from his materialist social ontology, and distinguishes it from John Searle’s account of social reality in terms of declarative speech acts. To regard the corporation, in this way, as linked to, although not synonymous with, a real social referent, is to make a point about the ontology of legal forms which has implications for how research into the legal system, and its relationship to economic development and growth, is conducted. At the same time, the consequences of adopting a substantive ontology of social forms of the kind proposed by Lawson go beyond the purely methodological. After taking due account of the autonomous and self-referential features of legal reasoning, we need to see corporate law in its wider economic and political context. Lawson’s analysis should remind us that in constituting the corporation as a juridical form, the legal system is doing more than facilitating complex forms of economic coordination. It also places the business enterprise in a particular normative space: one in which arguments of justice, alongside those of efficiency, can be brought to bear on the multitudinous activities of business firms.

Notes

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1 For reasons of space I cannot address here the relationship between the theory of social ontology developed by Lawson and other members of the Cambridge Social Ontology Group (see Pratten, 2014), and accounts of legal ontology derived from philosophical approaches to legal theory, some of them based on, or sharing points in common with, Searle's theories (see in particular McCormick, 1998; Ruiters, 1993; Haag, 2005; Bernal, 2013). That, together with the task of developing a more complete social ontology of law drawing on the Cambridge approach to social ontology, is for another day.

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