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Corporation

Reification of the corporate form

Jeroen Veldman

Introduction

The corporation is commonly perceived as a self-evident way of understanding what a business is and how it operates. And yet, almost all of the specific properties that make up the modern corporation would have been unthinkable less than two centuries ago. Until the start of the nineteenth century, the partnership form remained dominant for private ventures and the law of partnerships ruled the ventures that did receive a corporate charter (Ireland, 2010; Mclean, 2004). Most of the ideas that define the modern corporation, including incorporation and perpetuity for private ventures; limited liability; the separate legal entity; attributions of ownership; attributions of (citizenship) rights and (contractual) agency to a separate legal 'entity'; the capacity for a corporate entity to 'own' another corporate entity; and the capacity for groups of such entities to operate over jurisdictional borders are concepts that have been developed mostly during the nineteenth century.

Arguably, the development and application of these ideas has turned the corporate form into a very successful and highly dominant type of business representation, which during the twentieth century replaced the partnership form as the most prevalent legal form for private ventures in the US (Guinnane *et al.*, 2007). However, the fact that the overall success of the corporation may well rely on a set of very specific concepts is often forgotten. In a remarkable

article Berger and Pullberg argued that *reification* can make us take a social construct for granted (Berger and Pullberg, 1965: 206). The problem with reification, they argued, is that we bestow an 'ontological status on social roles and institutions' (Berger and Pullberg, 1965: 206), but that we then perceive of such a social role or institution unconnected from 'the human activity by which it has been produced' (Berger and Pullberg, 1965: 199). If this happens, we end up with institutions that 'are reified by mystifying their true character as human objectifications and by defining them, again, as supra-human facticities analogous to the facticities of nature' (Berger and Pullberg, 1965: 207). Such reification, they argue, leads to 'a narrow empiricism oblivious of its own theoretical foundations or to build highly abstract theoretical systems emptied of empirical content' (Berger and Pullberg, 1965: 211) and 'minimizes the range of reflection and choice, automatizes conduct in the socially prescribed channels and fixates the taken-for-granted perception of the world' (Berger and Pullberg, 1965: 208).

Following Berger and Pullberg, I will problematize the corporate form as a reified social construct. To do this, I will ask two types of questions with regard to the corporate form. The first is a question about its ontological status (see also Al-Amoudi and O'Mahoney, Chapter 1, this volume): what is the corporation? The second is a question about its epistemological status (see also Duberley and Johnson, Chapter 4 this volume; Scherer *et al.*, Chapter 2 this volume): how can we establish criteria 'by which we can know what does and does not constitute warranted, or scientific, knowledge' (Duberley and Johnson, Chapter 4 this volume) in relation to the corporate form? To answer these questions I will first show that currently dominant accounts of the corporation and of corporate governance (the theory of how corporation should be governed) assumes that corporations share the same ontological status as all other types of organizations, i.e. that all organizations essentially exist as aggregations of individuals. I will then show how the corporate form provides a construct that in theory and in practice operates on very different ontological assumptions. Finally, this will lead me to a critical analysis of the reified nature of the corporate form and to a number of suggestions about how we can start to demystify

The corporate form as an aggregation of individuals

In the 2011 presidential campaign, Mitt Romney responded to a heckler by making a strong statement: ‘Corporations are people, my friend!’¹ ([www.nytimes.com/2011/08/12/us/politics/](http://www.nytimes.com/2011/08/12/us/politics/12romney.html?_r=1&)

[12romney.html?_r=1&](http://www.nytimes.com/2011/08/12/us/politics/12romney.html?_r=1&)). Equating a corporation to a (legal) person connects to the history of the corporate form, in which the corporation was increasingly projected as a personified social construct (see next section). Such personified approaches to the status of the corporation have been countered in legal and economic scholarship by those who argue that in essence, the corporation is no more than a collection of individuals. Lord Hoffman argued in the Meridian case that there is no such thing as a company ‘of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as a company as such’ (Meridian Global Funds Management Asia Ltd v. Securities Commission [1995] 2 AC 500 at 507). From this perspective, it can be said that ‘Corporations, whatever they are, are not individuals and do not act as unitary individuals’ (Wells, 2005: 147) and we can arrive at the conclusion that ‘despite its long history of entity, a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name’ (Berle, 1954: 352). Such approaches that focus on the individuals that constitute the corporation to understand its ontological status as a social and legal construct fit well with wider pragmatic, political (Bowman, 1996) and epistemological (Elster, 2007) arguments that would urge us to ‘bracket’ any imputation of agency, ownership, and rights to social constructs, whether organizations, corporations, or states.

From the 1950s onwards the Chicago schools of law and economics turned this view into a strong ontological argument. Rather than ‘bracketing’ the ontological status of the corporate form for the sake of convenience, they reduced the status of the corporation to an aggregation of individuals: ‘It finds the firm’s separate characteristics to be insignificant and attaches determinant significance to the relationship’s aggregate parts’ (Bratton, 1989: 423). As a result,

it could be argued that ‘Individuals are ontologically prior to corporations, which, as fictions, have significance only because of the freely contracted arrangements of their human constituents’ (Scruton and Finnis, 1989: 254). With such strong ontological assumptions in place all types of social constructs – whether corporations, organizations, or states, were in essence merely aggregations of ‘individuals’ (Jensen and Meckling, 1976: 310–11), while the ontological status of the corporation as a specific kind of social or legal representation was reduced to that of a mere ‘legal fiction’ (Friedman, 1970). Any imputation of consciousness (Lederman in Fisse and Braithwaite, 1993: 488), intent (Cressey in Fisse and Braithwaite, 1993: 490; Jensen and Meckling, 1976: 310–11), agency (Fisse and Braithwaite, 1993: 475), responsibility (Friedman, 1970: 1), or liability to a social construct such as the corporation was, therefore, squarely redirected toward the individuals making up that social construct. Since the 1970s, the ontological and epistemological assumptions of this seductively simple theory have become dominant in company law, economics, and in corporate governance and have had a strong influence on court decisions and regulatory changes (Becker, 1974; Bratton, 1989; Daily *et al.*, 2003; Foucault, 2008[1979]; Ghoshal, 2005: 81; Perrow, 1986: 15).

Singular and multiple

The ontological approach developed in the Chicago School of law and economics seemed to connect well to a methodological approach based on methodological individualism (Hodgson, 2007; Schrader 1993: 159). However, the reduction all organizational forms to an aggregation of individuals went well beyond the ‘bracketing’ of the corporate form as a social construct. In practice, this approach denied the conceptual possibility for an ontological status for the corporate form as a construct in the legal, economic, and political imaginaries (Veldman and Willmott, 2013). The denial of the possibility for an explanation of this separate status is problematic when we take a closer look at the historical development of this construct. Until the end of the eighteenth century, corporations, even when used for private purposes, were conceptualized in a way similar to other business ventures: corporate charters were

conditional, and limited liability was a feature that was only sparingly attributed (Djelic, 2013; McLean, 2004; Handlin and Handlin, 1945) and they were ruled by the partnership law (Ireland, 2010; Perrow, 2002). In this setting, the legal representation produced by incorporation did not convey a strong conception of an 'entity', separate from the aggregation of individuals. Without a strong ontological status for the corporate form in the legal imaginary, attributions of agency, ownership or rights, and, by extension, attributions of responsibility and liability, were mostly attributed directly to the individuals within the corporation (see Post, 1934). This perception started to shift during the nineteenth century when the pooling of capital by increasing numbers of shareholders created a growing separation between shareholders and 'the company' (Veldman and Willmott, 2013). To accommodate the increasing distance of shareholder from ownership functions, shareholders were separated from the assets, operations, and risks of the corporation by shifting these onto the separate legal entity. This conceptual shift allowed for the protection of the rights of minority shareholders; the general grant of limited liability; and the development of liquid shareholding and thus the trading of shares in a share market. However, this move also meant that the separate legal entity increasingly came to represent 'the corporation' as a conceptual construct that could be attributed with ownership over the assets and liabilities of the corporation in the legal and economic domain. The exact status of this 'entity' was never really settled in legal scholarship (Avi-Yonah and Sivan, 2007; Dewey, 1926; Hallis, 1978; Harris, 2006).

By the end of the nineteenth century, Freund related to the idea of a 'corporate personality' as a convenient shortcut – 'in most cases in which we speak of an act or an attribute as corporate, it is not corporate in the psychologically collective sense, but merely representative, and imputed to the corporation for reasons of policy and convenience' (Freund, 1897: 39). Others however, argued that the separate legal entity creates 'a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted' (Dicey, 1894–95 in Maitland, 2003: 63). Fully separate from the aggregation of individuals, this 'body' could be inserted into the slot of the legal 'subject': 'As legal subjects they are distinct and in

kind different from the visible aggregate of their individual members. These individuals do not constitute the substance of that entity to which the law ascribes personality when it recognizes a corporation aggregate as a legal subject' (Hallis, 1978: xliii).

The status of the corporate form as a legal construct thus slipped to that of singularized 'entity', existing as a separate 'body', apart from the aggregation of individuals. Inserted as a construct into the slot of the legal 'subject', it could then be understood as a 'body corporate', 'legal person', 'legal personality' or 'legal subject' (Freund, 1897; Horwitz, 1985; Nace, 2003). Subsequently, the use of all kinds of anthropomorphic imagery (Nace, 2003) resulted in a rapid increase in the attribution of agency, ownership, and rights (Bowman, 1996; Harris, 2006; Ireland, 1999; McLean, 2004) to this construct that was increasingly depicted as singular legal 'subject' in and by itself. By the end of the nineteenth century, this process had progressed to the extent that the corporate form allowed for one 'entity' holding ownership over another 'entity', which enabled the holding company and operations across jurisdictional borders (Veldman, 2013). As a result of such singularization and objectification, it became possible to imagine that the corporate form would also be attributable with contracting agency, and would contract as a 'legal subject', not just outside the corporation or on behalf of the corporation, but also with the individuals inside the corporation (Maitland, 2003).

To shift the corporate form as a legal construct from the status of a technical and passive construct that would 'hold' ownership in lieu of the shareholders, to a legal construct that could be attributed with agency, ownership and rights as an 'entity' that would exist in the form of a singular 'legal subject' apart from the aggregation of individuals, legal scholars had to introduce multiple inconsistent assumptions about the status of the corporate form. To justify the wide variety of attributions made to this construct, both in its perceived capacity as an 'entity' and in its perceived capacity as an aggregation of individuals, multiple assumptions about the ontological status of this construct had to be kept in play at the same time (Veldman, 2010). By the 1920s, it was generally accepted in US and British legal scholarship that in order to maintain all properties and functions attributed to the corporate form, it was necessary to

understand the corporate form as *both* an aggregate construct (an ‘aggregation of individuals’, a ‘nexus of contracts’) *and* as a singular construct (an ‘entity’, ‘subject’, ‘person’, or ‘agent’) (Dewey, 1926; Harris, 2006). This inherent multiplicity of ontological assumptions and referents would have wide consequences.

Corporations and organizations

Generally speaking, we can argue that the corporate form rests on multiple, mutually exclusive, philosophical conceptions in the domains of law and economics and that, for this reason, it functions as a social construct with an extremely weak theoretical foundation (Berle and Means, 2007[1932]; Freund, 1897; Gamble *et al.*, 2000; Ireland, 2003; Laufer, 2006; Wells, 2005). Some have argued that this is not a real issue, because we can develop pragmatic ways of dealing with the corporate form (see Dan-Cohen, 1986; French, 1984). Others have argued that it is imperative that this weak theoretical status is treated with pragmatism, because of the perceived economic benefits the corporate form provides (Hessen, 1979; Osborne, 2007).

There are three main reasons to question such calls for pragmatism.

First, it is important to recognize that at the most basic level, the contemporary corporate form is structurally built on two competing ontological assumptions. The simultaneous use of these ontological assumptions means that the corporate form acquires two referents for theorizing in the legal and economic domains: it can be understood as a reduced aggregation of individuals, *and* it can be understood as a fully reified ‘entity’.² The effect of this double referent is that the corporate form can relate to a wide set of possible ontological positions. The corporate form can, for instance, be understood as a legal ‘subject’, attributable with citizenship rights and liability for manslaughter; as an ideal-typical economic ‘agent’ contracting with employees and operating in a broader market; as an object of property that can be bought and sold at will; or as a ‘nexus of contracts’. As such, the corporate form presents a highly problematic social construct, which escapes a clear and defined relation to ontological reasoning. With no possibility to exclude one or the other position, it becomes very hard to establish the epistemological basis that establishes

the 'criteria by which we can know what does and does not constitute warranted, or scientific, knowledge' (Duberley and Johnson, Chapter 4 this volume) in relation to the corporate form. Second, the weak theoretical foundation of the corporate form and the resulting multiplicity of referents are quite relevant beyond academic theorizing. In both the legal and the economic imaginaries (Veldman and Willmott, 2013) the corporate form constitutes a reified singular construct with attributions of agency, ownership, and rights. At the same time, we find that the dominant perception of the corporate form in contemporary law and economics and in corporate governance theory strongly denies the ontological status of this construct. This is highly problematic, because it denies and makes invisible many of the functions and outcomes of the reified status of the corporate form in law and in economics. I will give two examples, relating to liability and to the attribution of contractual agency.

The first example focuses on the attribution of liability to the corporation in the legal sphere. Given the reified status of the corporate form in company law, not just the employees or 'the company', but the corporate itself can be used for direct attributions of civil and criminal agency and liability (Fisse and Braithwaite, 1993; Laufer, 2006) for any valid legal or economic actions (Guinnane *et al.*, 2007). At the same time, the dominant ontological understanding of the corporate form in contemporary corporate governance requires that all attributions of agency, responsibility, and liability are explicitly redirected toward individual members of the corporation (Clarkson, 1996; Jensen and Meckling, 1976: 310; Wells, 2005). The combination of mutually exclusive ontological assumptions thus produces the corporate form as a very slippery construct, with the abilities of a schizophrenic (Allen, 1992) Cheshire Cat³ (Naffine, 2003), which is 'notoriously nimble' (Dewey, 1926: 669) and confers a theoretical 'elasticity' that gives 'considerable room in which to manoeuvre' (Dewey 1926: 667–8) and to produce a 'corporate vanishing trick' (Ireland, 1999: 56) in relation to the attribution of responsibility and liability (Bratton, 1989; Fisse and Braithwaite, 1993; Law Reform Commission (Ireland), 2002; Lederman, 2000; Wells, 2005).

The second example concerns the attribution of contractual agency in the economic domain.

Notwithstanding the emphatic rejection of an ontological status for the corporate form in contemporary law and economics, the corporate form contracts with individuals and groups inside and outside the corporation as a separate legal entity. By presenting a separate legal entity that can be attributed with its own contractual agency as an economic 'agent' in the economic domain, the corporate form negates the strong ontological program by which it was qualified as a 'purely conceptual artifact' (Jensen and Meckling, 1994: 24), a simple technical necessity or a 'legal fiction' (Friedman, 1970) and is reconstructed in the economic domain as a full-blown 'entity' with contracting agency. In this conceptual model it becomes acceptable to argue that 'the corporation' can be afforded with contractual agency in the economic domain, but the same multiplicity of ontological assumptions that applies to the corporate form in the legal imaginary obscures the answer to the question what is the exact status of this construct that is attributed with contractual agency in the economic domain.

Apart from problems with the identification of the exact point of attribution for contractual and wider agency attributed to the corporate form in the legal and economic imaginary, the unclear status of the corporate form affects the category of the 'subject' and the 'agent' more generally (see also Veldman, forthcoming). Remember that in law and economics, a strong ontological program restricted all attributions of agency to social constructs with a singular status, such as 'individuals', 'persons', and 'agents' (see Friedman, 1970; Jensen and Meckling, 1994). With a theory of organizations in which the individual agent is 'the elementary unit of analysis' (Jensen, 1983: 15), the contractual agency attributed to the corporate form by necessity is also attributed to such an 'individual' or 'agent'. Projecting the corporate form as an 'individual' in the economic domain for purposes of attributing contractual agency, therefore, provides a concrete ontology, in which the corporate form engages as a singular economic 'individual' or 'agent' in contractual relations, both within the corporation and in the wider marketplace (Maitland, 2003). In so far as this construct is attributed with contractual 'agency' it doesn't contract as an ordinary 'individual', but typically answers to ideal-type behavioural attributions coming from neoclassical economics, e.g. the corporate form projects the idea of an ideal-type 'individual'

'agent' in the possession of full knowledge and an indefinite time horizon (Bratton, 1989). The denial of a clear ontological status for the corporate form thus means that, as a construct, it is projected into the slot of the singular economic 'agent' as an 'agent' with ideal-type ontological properties, while retaining both its singular and aggregate referents and the attributions of agency, ownership, and rights that have been granted on the basis of the use of this duplicitous status (Veldman and Parker, 2012). This is a problematic situation, because it creates a highly elusive construct in the legal and economic domains; because it restructures the notion of contract in such a way that ideal-type ontology and ideal-type agency come to govern that relation in the economic and in the legal imaginary (Aglietta and Rebérioux, 2005; Bratton, 1989; Ghoshal, 2005; Schrader, 1993; Sen, 1977; Williamson and Winter, 1991); and because it makes the ontological and behavioural assumptions pertaining to such an ideal-type economic 'agent' the default for the ontological status of other constructs in the category of the legal 'subject' and the economic 'agent' (Veldman, forthcoming).

Conclusions: the political economy of reification

In this chapter, I have showed how an engagement with philosophy can be instructive for interrogating the ontological and epistemological status of the corporate form and showed some outcomes in the domains of law and economics. To provide the means for further critical inquiry, I will connect this status and these outcomes to the critique of reification provided by Berger and Pullberg in this section.

Berger and Pullberg argue that by reifying a social construct we run the risk of developing conceptual systems in which we end up with 'a narrow empiricism oblivious of its own theoretical foundations or to build highly abstract theoretical systems emptied of empirical content' (Berger and Pullberg, 1965: 211). We saw how a specific 'ontological status' (Berger and Pullberg, 1965: 206) has been devised for the corporate form as a social institution in law and in economics, which allowed to endow this social construct with a large set of specific properties, including ownership, agency, and rights. We also saw how the contemporary idea of the corporate form

in law and economics essentially negated the specificity of the corporate form and its status. As a result, we have an ontological status of the corporate form that refers to multiple referents and a set of hegemonic assumptions in law and economics that negates the specificity of the corporate form as a social construct.

As shown, the structurally inconsistent basis this creates for theorizing about the corporate form is highly problematic, both in terms of the development of a coherent understanding of the corporate form in the domains of law and economics, and in terms of coming to grips with its outcomes. What's more, the strong ontological program in law and economics as well as the unclear ontological and epistemological status of the corporate form spill over into adjacent academic domains, such as accounting, management, and politics, most particularly by informing the way other social constructs, such as individuals, organizations, and states are imagined, both by themselves, and in relation to each other (Bowman, 1996; Naffine, 2003; Lederman, 2000; Schrader, 1993; Veldman, 2013; Wilks, 2013). The epistemological outcome of the reified status of the corporate form is, therefore, that it 'minimizes the range of reflection and choice, automatizes conduct in the socially prescribed channels and fixates the taken-for-granted perception of the world' (Berger and Pullberg, 1965: 208).

To address these problems, I argue that we need to become aware again that the corporate form is a social construct that is produced by human beings (Berger and Pullberg, 1965: 200, 204). From this perspective, it becomes clear that the strong ontological assumptions underlying the treatment of the corporate form in contemporary law and economics and in corporate governance theory obscure the fact that the corporate form presents a social construct, which is based on multiple referents. To understand the status of this corporate form, we need to return to an approach, in which we do not simply deny and obscure the de facto status of the corporate form, but rather 'bracket' our assumptions with regard to the corporate form as a social construct. By bracketing our assumptions, we find that the corporate form presents a de facto singularized social construct in law and economics, and that historical attributions of agency, ownership, and rights to this social construct have established it firmly as a construct with a de

facto ontological status. Acknowledging the reality of this de facto social construct is important, because the de facto existence of this construct, as well as its weak theoretical underpinnings, has broad effects in relation to other (social) constructs, such as individuals, organizations, and states. In this sense, this chapter on the corporate form presents an example of 'ontological theorizing', which 'has the power to emancipate organization studies from conventional restrictions relative to the research questions; the scope of analysis; the methods of study; the objects of study posited and the doubts raised' (see Chapter 1, this volume).

Beyond ontological theorizing, bracketing our assumptions and finding the problematic status of the corporate form provides the basis for a critical perspective. It has become clear in this chapter that a long history of conceptual slippages in law and economics created the corporate form became as a highly specific social construct. I showed how inserting the corporate form as an ideal-type construct in contractual relations has turned the corporate form into a central organizing concept for the construction of an economic 'grid' in which all kinds of constructs, including individuals, organizations, and states, are re-conceptualized as nominally equivalent 'entities' with nominally equivalent 'agency' (Veldman, forthcoming; see also the 'individualistic approaches' in Chapter 1, this volume). In this sense, the corporate form has been central to the construction of an overarching economic 'grid' that legitimates a fetishized kind of knowledge of ourselves and our social and economic relations with other social constructs (see Berger and Pullberg, 1965: 199). More to the point, this 'grid' allows for a broad reinterpretation of the relative ontological status of individuals, corporations, organizations, and states, which has empowered corporations *vis a vis* individuals and states (Veldman, forthcoming). Also, within this grid, the ontological status of the corporate remains uncontested and continues to provide ample possibilities to enhance attributions of agency, ownership and rights, while at the same time obscuring possibilities for the attribution of responsibility and liability in the legal, economic, and political domains (Veldman and Parker, 2012).

This analysis informs a critical perspective, in which we focus on 'the inherent connection

between power, politics, values and knowledge and thereby provokes a deeper consideration of the politics and values which underpin and legitimise the authority of scientific knowledge' (Alvesson *et al.*, 2009). Taking into account that knowledge always serves certain purposes and groups (Alvesson and Willmott, 1992), we may reimagine the construction of the corporate form as a set of discursive operations (see Chapters 1, 2 and 5, this volume), primarily in the domains of law and economics, that create 'artificial social constructs that are formulated in the context of social relations of power' (Al-Amoudi and O'Mahoney, Chapter 1 this volume). From this perspective, it becomes clear that further reification of the corporate form will make sure that it will remain unconnected from 'the human activity by which it has been produced' (Berger and Pullberg, 1965: 199) and will, therefore, remain being taken for granted (Berger and Pullberg, 1965: 206) as a construct that is 'analogous to the facticities of nature' (Berger and Pullberg, 1965: 207). From this perspective, it also becomes clear that it is this reified status of the corporate form as a social construct that allows it to continue to function as a highly evasive kind of social construct at the heart of the global legal, economic, and political system, which shields individuals with managerial positions and (controlling) shareholders; allows for the further concentration of economic (Perrow, 2002), legal (Buxbaum, 1984: 518–19; Robé, 1997: 59) and political power (Barley, 2007: 201; Wilks, 2013); and to a large extent supports (Aglietta and Rebérioux, 2005) the current worldwide division of wealth (Piketty, 2014) on behalf of small subsets of individuals (Ireland, 2010).

Combining the reified status of the corporate form with its convenience for the perpetuation of a particular kind of political economy, it can be argued that the highly problematic ontological and epistemological status of the corporate form may very well not be the result of simple theoretical and methodological aberration, and will probably not be solved by better theory formation. Instead, what is needed is a more critical approach, in which the ongoing reification of the corporate form is related to its effects for global political economy.

Notes

1 See also www.youtube.com/watch?v=E2h8ujX6T0A.

2 Please note that in the dominant contemporary perspective on corporate governance, such a dualistic notion of supra-individual ontology is explicitly denied for other types of supra-individual representation, such as the state (see Veldman, 2013).

3 The Cheshire Cat is a figure from Lewis Carroll's *Alice's Adventures in Wonderland*. It can appear and disappear at will. In the story, the cat disappears at some point, leaving nothing but its grin. Alice then remarks she has seen a cat without a grin before, but never a grin without a cat.

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