

COMMENT

A further reply to Jean-Philippe Robé on the firm

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Abstract

Despite agreement on many points, including our shared insistence that ‘corporation’ and ‘firm’ are different concepts, Jean-Philippe Robé still maintains that they are mutually exclusive: no corporation is a firm, and no firm is a corporation. In contrast, we follow standard nomenclature when we point out that all (business) corporations are firms, but some firms are not corporations. We show here that this is a standard practice among lawyers writing in leading law journals and note that Robé seems to have abandoned the task of defining the firm.

Key words: Business corporations; firms; legal institutionalism; legal personality

JEL classifications: B52; D20; K10; L20

1. Introduction

Our conversation with Jean-Philippe Robé has underlined several important points of agreement. Some of these are generously acknowledged by Robé himself. But differences remain (Deakin *et al.*, 2017, 2021; Robé, 2020, 2021). We all agree that social scientists need to consider more broadly the constitutive role of law in modern socio-economic systems. We concur on the need to address the nature and power of the modern corporation and the actual and desirable roles of its stakeholders and shareholders. We agree that shareholders do not own corporations (Ciepley, 2020; Ireland, 1999), and are sympathetic to the normative implications Robé and others draw from this fact.

We also concur that the concepts of ‘firm’ and ‘corporation’ are neither synonymous nor interchangeable. But we do not share Robé’s insistence on their mutual exclusivity: that no firm is a corporation, and no (business) corporation is a firm. Corporations are widely described as a specific type of (incorporated) firm, in economics, management, sociology, law journals and elsewhere. For most legal scholars in this area, but not for Robé, all corporations are firms, but not all firms are corporations.

2. Robé’s departure from common usage among lawyers

As long as we are careful about meanings, we see no reason to depart from this view. It is widespread not only in the social sciences but also found in law journals. A JSTOR search of its 139 designated law journals for articles (in English) including the terms ‘corporation’ and ‘the firm’ or ‘firms’ found 19,924 occurrences. Prominent among these were articles in the *California Law Review* (520 occurrences), *Columbia Law Review* (856 occurrences), *Harvard Law Review* (697 occurrences), *Michigan Law Review* (544 occurrences), *Stanford Law Review* (424 occurrences), *University of Chicago Law*

Review (484 occurrences), *University of Pennsylvania Law Review* (724 occurrences), *Virginia Law Review* (712 occurrences), and *Yale Law Review* (788 occurrences).¹

This gives us a large set of texts to scrutinise usages of the words ‘firm’ and ‘corporation’. An attempt was made to find articles (among the 19,924) that followed Robé and regarded firms and corporations as mutually exclusive. Several search phrases were tried, including ‘corporations are not firms’, ‘corporation is not a firm’, ‘firms are mutually exclusive’ and ‘corporations are mutually exclusive’. These searches found nothing. A search for ‘firms are not legal*’ found one (1981) article, referring (accurately) to firms not strictly being legal persons in the USSR. We could find no article that adopted Robé’s position that firms and corporations are mutually exclusive categories. There seems to be a widespread acceptance, among legal scholars as well as others, that the corporation is a type of firm. We are in accord with this widespread usage. Robé is not.

A casual sampling of these 19,924 texts confirms that many of them regard corporations as firms, without necessarily regarding them as synonyms. In addition, textual analyses were performed on the 54 most ‘relevant’ articles from the nine top-ranking university law reviews listed above.² None of the 54 articles upholds that firms and corporations are mutually exclusive categories. Three articles were then disregarded because they focus on law firms, and in this context ‘firm’ has a special meaning. Out of the remainder, 49 clearly regarded corporations as a type of firm, while two provided insufficient evidence on that point. The evidence in the 49 cases consists in descriptions of de facto corporations as firms, or statements where corporations are more generally described as firms.

Given that legal scholarship overwhelmingly regards corporations as a type of firm, we feel rather privileged to be selected by Robé (2020) as the only authors named to have made this alleged mistake. We do not deserve this accolade, as we are following the majority.

Robé disagrees with our definition of a firm as ‘individuals or organizations with the legally recognized capacity to produce goods or services for sale’ (Deakin *et al.*, 2021: 869). Robé (2021: 1–2) protested that ‘this definition gives the impression that firms are legal persons ... Firms are not creatures of the law. ... In all legal systems, having a ‘legally recognized capacity to produce goods or services for sale’ implies, at least, having legal personality.’ For Robé, the law does not perceive the firm as such and only sees individual legal persons or incorporated legal persons.

But we repeatedly made it clear that some firms are not incorporated as legal persons. We wrote of legal recognition of relevant *capacities* of all firms, not of its legal incorporation or registration. The law recognises a riot, but that does not mean that it makes a riot a legal person. Firms operate in a legal system. Operating in a legal system is not the same as having a singular legal personality. Having a ‘legally recognised capacity’ is not the same as being a legally incorporated person.

3. Adopting prevalent usages of words does not mean replicating common misunderstandings

After pressure from us to distinguish taxonomic definitions from descriptions, Robé now seems to have abandoned the task of defining the firm. Hence Robé (2021: 5–7) changed his former definition of the firm (an ‘organised economic activity’) to ‘my description of what a firm is’. In short, Robé (2021) now refrains from definitions and has switched to descriptions.

The task of definition is difficult. But it is vital to distinguish the kind of phenomenon that we are talking about from other phenomena (Robinson, 1950). Definitions may involve descriptive elements,

¹The JSTOR search criterion was (((‘the firm’) OR (firms)) AND (corporation)) AND la:(eng OR en) AND disc:(law-discipline). The nine listed journals are all US-based. Google Scholar ranks all these nine law journals among the top 16 globally (https://scholar.google.com/citations?view_op=top_venues&hl=en&vq=soc_law). The nine are all in the top 19 in the Washington and Lee School of Law 2020 global rankings (<https://managementtools4.wlu.edu/LawJournals/>). Search completed and rankings retrieved 23 January 2022.

²The JSTOR search criterion was the same as in the preceding footnote, except among the nine leading (US-based) university law reviews only. The JSTOR relevance criteria are noted here: <https://guides.jstor.org/howto-search/results> (retrieved 23 January 2022). The criteria include the number of appearances of the search terms, with more recent articles given a ‘slight boost’. The earliest article in the 54 was from 2003.

but they must serve as parsimonious devices for taxonomic demarcation (Hodgson, 2019). We may *describe* a mammal as having four limbs, or a firm as consisting of people who get together to produce something. But neither description is adequate as a taxonomic definition. Reptiles also have four limbs, but they are not mammals. Two people sharing tasks in a vegetable garden often do not qualify as a firm.

As well as its parsimonious but effective criteria, a taxonomic definition requires a label to communicate what we are defining. We pointed to an ‘advisory rather than compulsory’ rule in the construction of taxonomic definitions that they should ‘where possible be close everyday meanings’ of the descriptive terms (Deakin *et al.*, 2021: 863). We noted that several major thinkers took the same view, including Aristotle, Malthus, Marshall and Menger. For example, Marshall (1920: 43) argued that definitions should ‘conform ... to the familiar terms of everyday life, and so far as possible [economists] must use them as they are commonly used.’ Menger (1888: 2) wrote similarly that ‘a mistake that cannot be disapproved of enough when a science ... denotes completely new concepts by words that, in common parlance, already describe a fundamentally different category of phenomena’ (translation from Braun, 2015).

We turned to dictionary definitions and other sources to note the everyday meaning for the noun ‘firm’. We agree with Robé (2021: 7) that ‘there is great confusion in the use of the words “company”, “business”, “firm”, “corporation”, “enterprise”, and so on.’ But our search of dictionaries and other relevant sources established – contra Robé – that standard usage considers a corporation as a type of firm (Deakin *et al.*, 2021: 863–865). This itself does not imply confusion. It does not imply that all firms are seen as incorporated. It simply means that a broad definition of ‘firm’ prevails, where corporations are regarded as a type of firm.

Robé rejects all this. Once again, he goes it alone. His ‘description’ of ‘firm’ is the right one; the majority usage is wrong. But his arguments for neglecting common usage in definitions are slapdash. Robé (2021: 8–9) goes off at a tangent to argue that ‘day-to-day language can be an impediment to scientific understanding’. Of course it can. Robé confuses *understandings* with *definitions* of phenomena. The specific advice of Aristotle, Malthus, Marshall, Menger, Robinson and others does not concern analysis or deeper understanding. It refers to the use of terms to define or classify phenomena that require analysis. None of these authors argued in favour of commonplace *understandings*.

Contrary to Robé (2021: 8), we do not say that ‘everyday meaning’ must prevail, even with definitions. There are many cases where ‘everyday meanings’ are unhelpful, even for definitions. But, with the firm, there seems to be broad agreement (including among legal scholars) that corporations are a type of firm. That evidence of informed usage is important. It should guide our definition of the firm.

We fully agree that common beliefs are often highly misleading, especially when trying to *understand* the nature of the phenomenon in question. In medieval times, people believed that the Earth is flat and fixed at the centre of the universe. When this was challenged, words were needed to refer to the phenomena in question. People initially understood ‘Earth’ as the ground beneath our feet. So when discussing the nature and shape of that mass, it was (and still is) useful to use the term ‘Earth’ to signify the referent. Although its meaning changed, this commonplace term was still used to refer to the mass upon which we live. But that did not require that everyone had to continue to believe that the Earth was flat. By its nature, science often overturns common understandings. But scientists must have some shared interpretations of what words mean to communicate, investigate and do their job.

4. Conclusion

We agree with Robé on many things. But we do not think that his insistence that corporations are not firms, or his claim that the law does not recognise the firm, are tenable. We have provided evidence that his view is exceptional among legal scholars. Robé has several important and valuable points to make, but by insisting on the mutual exclusiveness of firms and corporations and confining the phenomenon of the firm to the non-legal domain, he makes his task of persuading others of their value more difficult. Going it alone in the usage of key terms can seriously inhibit one’s influence on others.

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