

BOOK REVIEW*

The Open Corporation: Effective Self-Regulation and Democracy

by CHRISTINE PARKER

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The blurb of Christine Parker's new book beckons. It says that she 'examines the conditions under which corporate self-regulation of social and legal responsibility is likely to be effective'. I venture forward tentatively. Some of us have been grumpy for a long time about corporate social responsibility.

In the corporate law literature this grumpiness has led to a treasure trove of exasperated discourses about why corporations are not responsible to their communities, why workers' rights are never really taken into account in corporate law, and why the rights of families are subordinated. The exasperation posited a different conception of the corporation — the communitarian view — that treats the corporation as a community of many stakeholders rather than a nexus of contracts. The communitarian conception attempts to deflect the model of shareholder primacy by focusing upon the legitimacy of the claims of non-shareholder constituencies. Yet, despite an impressive output of literature by the communitarians,¹ it has been asserted that 'the communitarian model has not held up well'.² Whincop, for example, cites empirical evidence indicating that the most communitarian of actual governance paradigms (those used in Germany and Japan) are now feeling the pinch of global competition.³

Despondently, we turned to systems theory to explain why the makers, interpreters and users of corporate law had not taken up the communitarian message with the same fervour. Systems theory suggests that corporate law is an autopoietic system that keeps its autonomy because it is normatively closed.⁴ While this leads to the reproduction of particular norms, it also leads to the exclusion of certain interests from its operation. Thus, while certain interests — those of shareholders — are fostered, other interests, for example those of employees and women (particularly in family companies), are excluded.

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¹ See, eg, Lawrence E Mitchell (ed), *Progressive Corporate Law* (1995); various authors, 'New Directions in Corporate Law' (1993) 50 *Washington and Lee Law Review* 1372-1713.

² Michael Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001) 214.

³ Ibid, citing Michael Bradley et al, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at the Crossroads' (1999) 62 *Law and Contemporary Problems* 3.

⁴ Niklas Luhmann, *The Differentiation of Society* (1982) 122.

Occasionally the system (corporate law) is 'forced by the uproar outside, by the "noise" of the economic actors, to vary its internal 'order' until relative quiet returns'.⁵ Although the 'uproar outside' causes some variation of the internal order of corporate law, this variation mainly operates within the realm of corporate governance. The 'variation' is superficial without effecting structural change. Thus, systems theory has considerable explanatory power, but provides no pathways forward for stakeholders. The pessimism engendered by these shortcomings of systems theory, combined with the unresponsiveness of the law to the communitarian model, has led to a hiatus.

Now, with the publication of *The Open Corporation*,⁶ Christine Parker has thrown down the glove, challenging us to move beyond our complacent desperation and offering us a practical plan of attack. The blurb says it all: Parker has provided an innovative and realistic blueprint for effective corporate self-regulation, offering practical strategies for managers, stakeholders and regulators to build successful self-regulation management systems.

I hasten to add that this is not a book about corporate law. Indeed, the challenge is to move away from the conception of the corporation as a separate monolithic entity that is hammered into successive generations of law students. Parker argues that 'by seeing the company as an "entity" we are forced to recognise that it has its own regulatory mechanisms that (frequently at least) have their own integrity'.⁷ Moreover, we need to ensure that legal and social values permeate the internal working of the corporation rather than bouncing off the corporate veil.⁸ Thus, large institutions can and should regulate themselves in a way that is responsive to social and community concerns. This is the 'open' corporation: democratically responsive through its permeability to external values.

Citing Selznick, she argues that responsible institutions must have an inner commitment to moral restraint and aspiration.⁹ Clearly, corporations are populated by a lot of people and those individuals are a resource for integrity.¹⁰ However, there is a countervailing institutional morality, which deflects or overpowers individual moral choices.¹¹ In a similar vein, Habermas reminds us that the business 'system' dominates the lifeworld of individual employees and managers. It defines their concerns and renders normative judgments irrelevant.¹² At this point, it seems, the pessimism of systems theory is slipping back in.

Parker, however, will have none of it. Arguing that corporations do have an inherent capacity to manage their own social responsibility,¹³ she constructs an

5 Gunther Teubner, 'Social Order from Legislative Noise' in Gunther Teubner (ed) *State, Law and Economy as Autopoietic Systems* (1992).

6 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

7 Ibid 213.

8 Ibid 28.

9 Ibid, citing Phillip Selznick, *The Moral Commonwealth* (1992) 345.

10 Ibid 294.

11 Robert Jackall, *Moral Mazes: The World of Corporate Managers* (1988).

12 Jürgen Habermas, *The Theory of Communicative Action — Volume Two: Lifeworld and System: A Critique of Functionalist Reason* (Thomas McCarthy trans, 1987).

13 Parker, above n 6, 43.

elaborate diagram (helpfully described as a 'fish skeleton')¹⁴ to explain how self-regulation might work. Importantly, it shows that democratic responsiveness or corporate citizenship cannot be achieved by copying public institutions of representative democracy.¹⁵ Instead the model is deliberative democracy, particularly the Pettit model of contestatory democracy. On this model decisions are legitimate if they are open to contestation in forums and through procedures that are acceptable to all concerned after they are made.¹⁶

Parker thus constructs an elaborate framework within which corporate self-regulation of social and legal responsibilities is likely to be effective. In her study she wisely confines the content of the external responsibility to regulatory compliance, thereby avoiding a spiralling normative question about how far corporations must go to service the needs of stakeholders.¹⁷ While she focuses upon particular areas of compliance in her own empirical fieldwork (environmental obligations and EEO/affirmative action), the book is replete with examples drawn from other people's studies.

Parker uses the word 'compliance' in a broad sense to refer to corporate accomplishment of regulatory objectives.¹⁸ A significant question that is posed early in the book is what if the corporation is not *genuinely* responsive and open to the norms that underpin the compliance? In other words, what if the only motivation for self-regulation is a rational calculation about the possible costs of being caught for non-compliance versus the benefits of breach? For example, what if the company follows the creed of law and economics theorists who see compliance as merely the outcome of an equation which measures the benefits of non-compliance against the probability of being discovered and the severity of the penalty?¹⁹

Parker's answer is that this picture of the corporation as an amoral calculator is simplistic and must be supplemented and nuanced by recognition of further characteristics. For example, organisations can be persuaded to do the right thing without the direct threat of sanctions, they do wish to maintain legitimacy and will commonly respond to informal ramifications such as shame and negative publicity.²⁰ Further, some influential human actors in the corporation will be highly motivated to be socially responsible for its own sake. She also brings us the work of the 'new institutional' scholarship in organisational theory which shows that companies can be responsive to normative cognitive influences. Such cognitive influences may give rise to 'unconscious compliance on the basis that it is almost unthinkable to do anything else'.²¹ This ties in nicely with the current

14 Ibid 60.

15 Ibid 37.

16 Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (1997), 183–200.

17 As Parker says, 'there need be no assumption here that there are some community values with which everyone agrees': Parker, above n 6, 42.

18 Ibid 67.

19 Ibid 66–7.

20 Ibid 76.

21 Ibid 73.

work by law academics on cognitive theory that seeks to further understand judicial reasoning.²²

A substantial part of the book consists of methodologies for the implementation of self-regulation, providing many examples of corporations as good citizens. This is well documented but it is not as interesting to read as the case studies in Chapter 6 dealing with the pathologies of self-regulation. Parker presents two case studies of corporations behaving badly — Monsanto and Shell — then pinpoints causative failures in their self-regulation regimes.

A related question is the effectiveness of external stakeholders and there is an engrossing analysis in Chapter 4 of the relative influence of consumer and social movement activists compared to financial stakeholders. Parker also examines the rise of ethical investment, but does not regard the ‘paradigm shift’ as going far enough in motivating the company (or the shareholders collectively) to consider their broader obligations to, for example, employees and local communities.²³ In this regard, she suggests that corporations should disclose relevant and reliable internal information about their processes for managing legal and social responsibilities, and their performance or outcomes, to stakeholders affected by their actions. The disclosure of such information is consistent with the principle of allowing shareholders with social responsibility concerns to improve the efficiency of markets with socially responsive investing. This is a compelling idea. Put the information into the market and then let the efficient capital market hypothesis do the work. I must confess to a little scepticism at first. After all, the disclosure regime for listed companies in Australia has not yet achieved disclosure of basic information about corporate governance, which is mandated in other jurisdictions.²⁴

However, Parker suggests that the initiative might work within the broader framework of strategies which she constructs to achieve ‘permeability’ of the corporation.²⁵ One of those strategies is the justice plan. Parker states that ‘one of the most significant things that companies can do to make themselves good “stakeholder corporations” is to ensure that they give real rights ... to stakeholders with legitimate complaints about the company’.²⁶ Accordingly, companies above a certain size should be required to have ‘access to justice plans’ for those affected by their power.²⁷ Although it is important that internal access to justice policies comply with benchmarks from the external law, she appears to envisage that the external benchmarks or judicial scrutiny operate as

22 See Steven Winter, *A Clearing in the Forest: Law, Life, and Mind* (2001); various authors, ‘Cognitive Legal Studies: Categorization and Imagination in the Mind of Law’ (2002) 67 *Brooklyn Law Review* 941–1219.

23 Parker, above n 5, 108.

24 In August 2002, David Knott, chairman of the Australian Securities and Investments Commission, noted ASX’s refusal to endorse a set of corporate governance best practice guidelines and contrasted that approach with overseas exchanges such as the NYSE, Nasdaq and Hong Kong Stock Exchange. See ‘ASX “in Disclosure Business” not Corporate Governance Says Hamilton’ (2002) *Butterworths Company Law Bulletin* [340].

25 Parker, above n 6, 220–1.

26 *Ibid* 227.

27 *Ibid*.

procedural review rather than as substantive law.²⁸ For example, she states that when judicial review of access to justice plans is undertaken, 'judges and lawyers should take a reflexive approach in pointing out where the organisation has failed and sending the matter back to the organisation to internally come up with its own way to respect rule of law values and implement a solution'.²⁹ A further strategy is an immunity policy for self-disclosure and correction of compliance breaches and problems. Like legal professional privilege, the immunity would be available to protect from disclosure in litigation the product of any corporate self-evaluation of self-regulatory activities.³⁰

In my view, both of these suggestions — limiting the scrutiny of the substantive rights underlying the access to justice plans and extending immunity against disclosure in litigation — are a little dangerous. They seem to interfere with the contestation aspect of deliberative democracy by ousting the deliberation of the courts on substantive rights and by creating caches of information which are not subject to judicial scrutiny.

The book is a product of exhaustive research and presents a rich exploration of the literature on regulation and related topics. Sometimes the examination of other people's work is overly inclusive and it becomes a bit cluttered. Moreover there seemed to be some repetition in Chapters 4 to 7, as Parker approached the model from different angles.

In *The Open Corporation*, Parker warns us against institutional reductionism and underestimating the complex nature of the personal and institutional relationships which comprise the corporation. This should not make us flinch from insisting upon corporate social responsibility. It does, however, make me wonder about the construct of the corporation that we require of law students as we berate them in their exam books for the failure to grasp the conceptual integrity of separate legal personality.

Therefore, if you are genuinely interested in moving the debate about corporate social responsibility from nihilism to potentially achievable aspiration, I do recommend that you read this book.

28 Ibid 231.

29 Ibid.

30 Ibid 284.