CONTEMPORARY STUDIES IN CORPORATE LAW

Corporate Governance in the Shadow of the State

Marc T Moore

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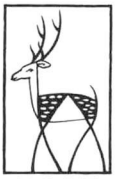

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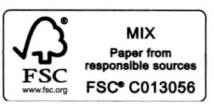

CONTEMPORARY STUDIES IN CORPORATE LAW

Corporate law scholarship has a relatively recent history despite the fact that corporations have existed and been subject to legal regulation for three centuries. The modern flourishing of corporate law scholarship has been matched by some broadening of the field of study to embrace insolvency, corporate finance, corporate governance and regulation of the financial markets. At the same time the intersection between other branches of law such as, for example, labour law, contract, criminal law, competition, and intellectual property law and the introduction of new inter-disciplinary methodologies, affords new possibilities for studying the corporation. This series seeks to foster intellectually diverse approaches to thinking about the law and its role, scope and effectiveness in the context of corporate activity. In so doing the series aims to publish works of high intellectual content and theoretical rigour.

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CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE

Over recent decades corporate governance has developed an increasingly high profile in legal scholarship and practice, especially in the United States and the United Kingdom. But despite widespread interest, there remains considerable uncertainty about how exactly corporate governance should be defined and understood. In this important work, Marc Moore critically analyses the core dimensions of corporate governance law in these two countries, seeking to determine the fundamental nature of corporate governance as a subject of legal enquiry. In particular, Moore examines whether Anglo-American corporate governance is most appropriately understood as an aspect of 'private' (facilitative) law, or as a part of 'public' (regulatory) law. In contrast to the dominant 'contractarian' understanding of the subject, which sees corporate governance as an institutional response to investors' market-driven private preferences, this book defines corporate governance as the manifestly public problem of securing the legitimacy – and, in turn, sustainability – of discretionary administrative power within large economic organisations. It emphasises the central importance of formal accountability norms in legitimating corporate managers' continuing possession and exercise of such power, and demonstrates the structural necessity of mandatory public regulation in this regard. In doing so it highlights the significant and conceptually irreducible role of the regulatory state in determining the key contours of the Anglo-American corporate governance framework. The normative effect is to extend the state's acceptable policy-making role in corporate governance, as an essential supplement to private ordering dynamics.

To my family (present and soon-to-be),
and to John Parkinson

Preface

This was originally supposed to be a book about the global financial crisis. I first thought up the basic idea for the book in late 2008, in the wake of the major banking collapses that occurred in the United States and United Kingdom around this time, and the extensive government action that they entailed. My initial aim was to provide a critical analysis of corporate governance law and theory in these countries in light of the issues that recent events had exposed, especially concerning the essential role of the state in the private sector of the economy. In the intervening four years, though, much ink has been spilt on this general topic, and many people – myself included – have grown tired of reading and talking about the ubiquitous 'c' word ('crisis', that is!). Accordingly, while the experience of the crisis remains highly pertinent for the discussion that follows, this has in fact turned out to be a book about Anglo-American corporate governance more generally. Specifically, it is a book that is concerned principally with how we, as academics and scholars, *think* about the respective bodies of laws relating to corporate governance in the United States and United Kingdom. This is in distinction from, but by no means entirely detached from, the practical questions about how those laws operate within the relevant jurisdictions.

Above all, this book aims to make sense of, and also challenge, the underlying assumptions that we commonly bring to bear on our studies of Anglo-American corporate governance – particularly with respect to the supposedly 'private' nature of the phenomenon, and the limited involvement of the state therein. In approaching this task, I have tried – as best as possible – to adopt a 'neutral' point of view, by analysing the relevant laws and their underpinning theoretical rationales at face value and on their own terms – that is to say, without any particular normative predisposition or bias. Of course, the fallibility of the human condition is such that no scholarly account of any social-scientific phenomenon can ever be truly 'colourless' in this regard, although I hope that my standpoint is sufficiently impartial to elicit the attention of readers from across the political spectrum.

As will become clear fairly early in the following discussion, it has long been my belief that the dominant way of thinking about corporate governance laws in the United States and United Kingdom – namely, the 'contractarian' or 'nexus of contracts' paradigm of the subject – is in many respects not entirely satisfactory. In particular, I feel that the particular ideological 'picture' that contractarian theorists seek to present in their

work – emphasising the primacy of (market-determined) private ordering over (state-determined) public policy in propelling the law's evolution – is, to a significant extent, out of keeping with the 'real' nature and content of its subject-matter. At the same time, I am cognisant of the immense value of this particular school of thought in aiding the teaching and learning of both corporate governance and corporate law more generally. Indeed, few would deny that the contractarian paradigm, for all its arguable faults and limitations, is largely creditable for the status that corporate governance enjoys today as a respectable and intellectually rigorous field of academic enquiry. With this consideration in mind, I am wary about engaging in the practice of 'contractarianism-bashing' that has become popular within progressive varieties of corporate law scholarship over the past two decades. At the same time, though, I believe that there remain some fundamental – and, as yet, unresolved – issues concerning the empirical and logical validity of the contractarian approach, which risk either obstructing – or, at worst, *derailing* – the continuing constructive development of legal scholarship in this field.

Although the actual writing of this book took place exclusively over the last two years, the ideas and thinking behind it have been many years in the making. Since I began teaching my graduate course in Anglo-American corporate governance some seven years ago, it has been my intention to present the subject to students as a subject of distinctly *legal* enquiry. To this end, I have consistently encouraged students to understand and evaluate the key laws and institutions in this field in accordance with what are, at root, characteristically legal criteria. I have always believed that corporate governance – viewed from a law (as opposed to economics or business) student's perspective – should be concerned at least as much with the legalistic concepts of power, accountability and legitimacy, as it should be with the economistic criteria of efficiency, profitability, and regulatory cost-effectiveness. I hope that, in the discussion that follows, I am – at the very least – able to impart this method of thinking about corporate governance to some students and scholars outside the walls of my seminar rooms, regardless of whether they agree with everything that I have to say about the subject.

In researching and writing this book, I have been fortunate to have benefitted from the assistance of a number of people who were kind enough to share their valuable time and expertise with me over recent months and years. I am especially indebted to Iris Chiu, David Kershaw, Harry McVea and Edward Walker-Arnott, for their insightful comments on some earlier draft chapters. I have presented parts of this book at various conferences and workshops over the past few years in both the United Kingdom and United States. I am thankful for invitations, comments, criticisms and words of encouragement received from participants at all of these events. Special thanks in this regard are due to John Armour, Brian

Cheffins, Blanaid Clarke, Paul Davies, Simon Deakin, Alan Dignam, Paddy Ireland, Ciaran O'Kelly, Andreas Kokkinis, Chris Riley and Sally Wheeler. I am also thankful for conversations with Roger Barker, Carrie Bradshaw, Pat Capps, Anna Donovan, Nick Gould, Claire Moore, Antoine Reberioux, Arad Reisberg and William Wright, which have likewise helped to shape my thinking in many important respects. Of course, in acknowledging the above individuals, I am in no way suggesting that they would personally endorse any of the views expressed in this book – on the contrary, I suspect that one or two may strongly disagree with certain aspects of what I have to say!

Thanks also to Panos Koutrakos, for initially encouraging me to get my idea for this book off the ground. I am furthermore grateful to all of the excellent company law and corporate governance students at both UCL and Bristol with whom I have had the privilege of discussing the ideas in this book over the course of my teaching career. And I must make special mention of my JD Business Entities class at Seattle University in spring term 2011, for their willingness to be taught the finer points of US corporate law by a rambling and somewhat idiosyncratic Scotsman!

I wrote a significant part of this book during a four-month spell in early 2011 at the Adolf A Berle, Jr Center on Corporations, Law & Society, based in the Seattle University School of Law. I am grateful to Chuck O'Kelley for inviting me to work at the Center, and also for the many informative and inspiring conversations that we've had about corporate governance, law and political economy both during and since then. My understanding of the complexities of US corporate law would not be what it is without the benefit of Chuck's superb knowledge, insights and time-generosity. I am further indebted to Bob Menanteaux from the Seattle University Law Library, for his generosity in securing for me various pieces of obscure literature from across the US northwest on inter-library loan. These sources turned out to be central to the research that I conducted whilst at the Berle Center. I am also thankful to Randall Thomas, for inviting me to present my work to the corporate law students at Vanderbilt University in spring 2011 – an experience from which I benefited greatly.

Fortunately, a recurrent theme in my career has been the inexplicable willingness of many important people to put their faith in me, despite having little-to-no tangible evidence to justify those beliefs! This list includes John Lowry, my former head of department and current company law teaching colleague at UCL, and also Richard Hart, who as a publisher has consistently been enthusiastic, encouraging and understanding about this project, despite my running over our initially agreed deadline for the book. In this regard, I must also mention the late John Parkinson, who agreed to accept me as his PhD supervisee at the University of Bristol in 2001 on the basis of a five-minute telephone conversation, and with no more than an undergraduate law degree to my

name! I am indebted to John for being such a patient, open-minded and inspirational supervisor to me, up until his tragic and untimely death in early 2004. In my opinion, John's classic 1993 work *Corporate Power and Responsibility* remains one of the most pioneering and conceptually sophisticated works in the history of corporate law academia. I only hope that I have done justice to John's legacy by producing a work that in some way comes close to meeting his high standards, although whether he would have agreed personally with my approach and arguments herein is quite another matter! I must also pay my thanks to Charlotte Villiers, for being a constant source of support and inspiration in her multi-faceted role as my LLB dissertation supervisor at the University of Glasgow, my 'stand-in' PhD supervisor at Bristol after John's death, and – latterly – a valued academic colleague and friend more generally.

Finally, I must thank the two people in the world who have done the most to make this work a reality. First, I am eternally thankful to my mother and friend Catherine McGee, who has contributed in more ways than could be imagined to enabling me to follow my chosen career. Without her persistent self-sacrifices throughout the most testing of circumstances, I would no doubt be in a very different place. Secondly, I am forever grateful to my wife Emily, who has been a constant source of love and support throughout the past 13 years, despite having to deal with some tremendous personal and professional challenges of her own during these times. More recently, Emily has very patiently put up with my many solitary hours over the past months spent in the study, while acting as the best (and worst paid!) research assistant that an author could possibly wish for. I can say in all sincerity that without Emily, this book (like so many other things in our life) would not have existed.

Last but certainly not least, thanks to George – for keeping me sane over the past year in his own unique little way!

Marc Moore
27 July 2012, London

Table of Cases

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