"We ought to let companies be socially responsible!"

An interview with Sarah Duggin

Professor Sarah Duggin is Associate Professor and Director of the Law and Public Policy Program at the Catholic University of America. She has experience in many different areas of law, such as corporate law and governance, white-collar criminal defense and complex litigation. Some of the prestigious and responsible offices held by Professor Duggin include Vice President and General Counsel for Amtrak and Chief Counsel of the University of Pennsylvania Health System. She was also a law clerk to the Chief Judge of the US Court of Appeals for the District of Columbia and an editorial assistant to Professor George Haskins. She has recently co-authored an article entitled Natural Born in the USA, which has received much attention in the press with regard to the ongoing US presidential battle.

During her stay in Poland in May 2008, Sarah Duggin conducted an engrossing course on corporate law for the American Law School Program during which she impressed the students by her accuracy, precision and pedagogical skills. She also accompanied the students to Warsaw to observe the Negotiation Workshop, one of this year's ALP special projects.

Joanna Śliwa: *Could you tell us what Phi Beta Kappa, of which you are a member, is?*

Sarah Duggin: It's an honor society for scholars and students in the United States. If you've achieved a certain level in your studies as an undergraduate, you are invited to one of the chapters of the society which is about two hundred years old. It is an honor to be

invited as a student. The active members strive to ensure the quality of scholarship in universities and colleges.

JŚ: *The once secret sign of PBK is three stars and a key. What does that stand for?*

SD: The stars represent reaching to heaven and the key is the key of knowledge.

JŚ: *It's not more an underground type of society, is it?*

SD: (*Laughter*) No, it's not secret at all. It has a website where you can gather all the necessary information.

JŚ: *While at university, you edited a law review. How do you get selected for such a job and what's it like?*

SD: At the time, I attended the University of Pennsylvania, students who did well in their first year of law school were invited to join the University of Pennsylvania Law Review. This is still the case in most American law schools, although many now also use writing competitions. As law journal staff members and editors, students work on articles submitted by professors and practitioners. These journals are generally published several times a year, and almost every university has at least one. However, what's specific about the journals in the legal area is precisely the fact that they are published by the students. Following the usual route, second-year students learn how to find sources, how to check if the authors and quotations are correct, and finally, how to edit a piece to make it a little stronger if anything is missing. Third-year students have an opportunity to run for the editorial board. As an articles editor, I read articles submitted by scholars and practitioners to try to figure out whether the law review would be interested in them, and then led editorial teams in preparing articles for publication.

JŚ: *You were also an editorial assistant to Professor George Haskins. What did you work on?*

SD: Professor Haskins was the author of the second volume of the Oliver Wendell Holmes' Devise History of the United States Supreme Court. This was a bequest from former Supreme Court Justice Holmes, designed to preserve the history of the Court and make it accessible to a broad audience. Professor Haskins was a well-known legal historian who wrote Part I of the volume about the Marshall Court. Chief Justice John Marshall was perhaps the most important Chief Justice in the history of the US Supreme Court because he established the principal of judicial review and a number of doctrines critical to the development of the law of the United States. As an editorial assistant, I helped Professor Haskins with his task. I had amazing opportunities to work with the original papers of Thomas Jefferson, George Washington and other Founders; I would go to the

special reading room of the Library of Congress and read those. It's an extraordinary experience to hold those documents and think about the people who wrote them and how they have been passed down through the centuries. Of course, there was also an armed guard peeping over my shoulder to ensure that I didn't damage anything.

JŚ: *I suppose that working as a law editor involves not only some hard work but also responsibility, as the law reviews constitute a respectful secondary law source which gets cited quite often.*

SD: They get cited very often indeed, and they are, I'd say, a primary research tool at the secondary source level in US law. They also constitute a source for many new ideas.

JŚ: *Let's move on to your work in Amtrak, the National Railroad Passenger Corporation. First, I wanted to verify some gossip: are there really so many negligence cases brought against the railway business?*

SD: No, that's not true... I mean, every common carrier has a special duty towards its passengers and the railroads cross lots of miles, especially in a country as big as the US. Obviously, there is always the potential for an accident to happen, but negligence actions are neither ubiquitous nor a large part of a general counsel's work. I served as Vice-president and General Counsel of Amtrak and my job concerned all of the legal aspects of the company's operations and finance. The negligence cases, although certainly important, took only about ten percent of my time at most. On the whole, I was more occupied with legislative, corporate governance, and financial matters, acquisition of real estate and train sets, environmental matters and construction issues. At that time, we were involved in electrification of the North-East corridor from New York to Boston.

JŚ: *Am I correct in saying that the funding of Amtrak comes mostly from the Government?*

SD: No, actually only about nineteen to twenty percent of the company's operating budget! But that still gives the Government enormous influence over the company, particularly because Amtrak was initially created as a mixed ownership Government corporation. This means that, along with the Government, there were also private owners but, over the years, the number of the latter has diminished. Amtrak was created in 1970 by the Rail Passenger Service Act because passenger railway transportation over long distances was dying out in the States as it was not very profitable. Congress allowed existing railroads to cease carrying passengers and turn over their operations to Amtrak. By doing that, they could either obtain Amtrak stock or a significant tax deduction. The

tax write-off was what most of them chose. Consequently, more than ninety six percent of Amtrak's stock was always held by the Government. Later on, Congress decided that Amtrak would no longer be referred to as a mixed-ownership corporation but a for-profit corporation of the District of Columbia.

I'm not sure that, in reality, it made a lot of difference. Obviously, however, Congress thought that it would. Now, eighty to eighty five percent of Amtrak's revenues come from what we call fare box revenues, that is, the fees paid, and the remaining percentage comes from the US Government. Still, it's far less support than that given to railway companies in European countries.

JŚ: *Perhaps that's the source of the financial problems Amtrak is going through at present? In 2006, it is said to have provided services for the biggest number of people ever, so the need for railway transport surely exists. Nevertheless, Amtrak does not seem to be in a good condition.*

SD: The reason for this state of things is that Amtrak is not allowed to operate as a normal, for-profit company where decisions are made about which product lines are profitable and which are not. The East Coast routes are extremely lucrative, but some of the other areas of the three-thousand-mile-wide USA definitely are not. Over those long stretches, sometimes the train is the only means of public transportation and, although it's unbelievably costly, Amtrak must continue to run those routes. From a practical standpoint, if it were to stop, it would create many difficulties connected with possible private funding. Therefore, although the company is supposed to behave like a for-profit company, practically it can't eliminate the least profitable portions of its services. The other problems are connected with some of the agreements Amtrak had entered and with the employment and waiver issues. In my opinion, there are many wonderful people who work in the company: conductors, engineers, track workers, managers, and many more, but, in reality, some products are only lucrative in specific areas, and the company is always in a money crunch in order to maintain those less profitable routes.

JŚ: *I notice many similarities between Amtrak and PKP – the Polish State Railways. PKP has recently gone through restructuring and, in the nearest future, it is to be privatized. I don't suppose this solution would work in the US?*

SD: There are a lot of reasons why it would be extremely difficult to do. Some of them are connected with labor agreements, others with the law that permits Amtrak to run over tracks owned by freight railroads covering most of the country except for the Northeast Corridor tracks which are essentially owned by the Government. Privatization can certainly work well in some contexts, but e.g. the United Kingdom has had many problems

with it. Privatization is not necessarily a good solution for the United States. There are a lot of concerns.

JŚ: *Talking about companies, I would like to discuss the structure of a company in general. We distinguish two forms of companies: the European one with a two-tier management which consists of the supervisory board and management board, and the Anglo-Saxon one where the managing and the supervisory directors are all gathered in the board of directors. What were the grounds for this distinction and which system do you consider more beneficial for the shareholders?*

SD: First of all, the two-tier framework is an innovation on the basic structure which was the single-tier management. I think there's a lot to be said for the European structure because it allows for more corporate constituents to participate in the corporate governance. That said, the Anglo-American system seems more efficient. I wouldn't pick one system alone over the other, though, but I do think that what makes the American company form so successful from an economic perspective is the comparatively neat and clean management system.

JŚ: *Could the creation of the supervisory board constitute an efficient way of protecting the rights of minority shareholders who don't get much say in the matter as far as the closely-held corporations go?*

SD: Not necessarily. In close corporations there are relatively few shareholders and management resources are usually stretched thin. So, having two boards instead of one would be like having too many heads and not enough workers. I think that the best solution for the American companies' approach is to continue to think about constituencies and protect them as the Massachusetts Supreme Judicial Court did in the Donahue v. Rodd Electrotype case.

Simultaneously, in any corporation, there's the idea that it is a financial investment and the minority shareholders do need to be aware that there are some risks attached to that investment which are mostly borne by those who have the biggest ownership share in the company. This is, of course, reflected in the allocation of power within the company. Unfortunately, if the minority shareholders happen to be at odds with the majority, they have very little recourse. Thus, I'd agree with you that it would be nice to give them some protections, but I wouldn't do that by creating an additional managing board structure. A better way would be to follow the Massachusetts approach and make sure that all the States provide remedies for oppression of minority shareholders.

JŚ: *Moving backwards to the subject of bringing the company to life, I'd like to ask whether the Delaware State is really such a paradise for incorporation and, if yes, why.*

SD: It is true that Delaware is the pre-eminent state as far as the incorporation of companies and the creation of other new business forms are concerned. For many years Delaware has been very welcoming to corporations. The state also has a very sophisticated judicial branch. Judges at the Chancery Court and all the way up to Supreme Court are generally very aware of financial and corporate issues. When business issues arise in litigation, Delaware judges are usually experts at dealing with them; they have a great deal of experience. The legislature, too, is focused on the needs of the business development. The laws are predictable, relatively easy to understand and to apply, which makes it really attractive to business people. It has even been said that the adopted solutions are too pro-management compared with other states, but I'm not sure that's true.

JŚ: *So, if anybody from outside the US wanted to start a business, you would recommend this state?*

SD: It's not quite that simple. There are certainly many reasons to choose Delaware, but one also needs to remember that other important issues have much to do with the specific environment in which the company wants to operate. These include the workforce, tax advantages or other kinds of state-sponsored incentives that make it advisable to incorporate and/or operate in a particular state.

JŚ: *What about Corporate Social Responsibility nowadays? I think it was Milton Friedman who said that companies are created to make profit and they owe an obligation to their shareholders to multiply the money that has been invested in them. This leaves no place really for CSR as long as this kind of action does not, in itself, create profit.*

SD: Milton Friedman was certainly a great economist and a leading voice of the Chicago School. He was also known for his free market approach, i.e., belief in the benefits of the mechanisms of the free market. He really did say that the concept of CSR is subversive in a free society and that the sole obligation of managers is to make profits for the benefit of the shareholders, leaving the issues of charity or other kinds of similar concerns to others. However, Friedman also said that corporate managers need to operate within the rules of the game, meaning that people should be treated fairly, etc. So, I think, he was not against responsible management in general but opposed to the idea of corporate philanthropy and its contribution to the non-profit sector.

Many things may be said for Dr. Friedman's position – if all the people involved in running the company and supplying its funds want to give their money away to charity, they should be allowed to make their own decisions. Also, if the companies do not give something back to the societies that support them, it may be argued that they are not good corporate citizens. Eliminating corporate philanthropy could also have a tremen-

dous impact on the non-profit sector because large companies are often in a position to donate big sums with relatively low impact on the overall entities. If a charity had to go to each shareholder and ask for money, the transactions' costs could well be prohibitive. So there are many reasons to support CSR in the broad sense. Corporate philanthropy in particular was indispensable after Hurricane Katrina and the tsunami in the Pacific when the world really looked up to corporations and their ability to make those kind of gestures. Another reason why corporations engage in CSR is marketing. People may be more drawn to a company which cares for environment or does not exploit its workers by paying the lowest possible wages. I think that, in general, we ought to let companies be socially responsible and find more innovative ways to promote transparent corporate social responsibility.

JŚ: *Would you say that CSR is important for American consumers? Are they willing to pay more in order to obtain services or products of a company that is employee- or environment-friendly?*

SD: I do think we're seeing a trend in that direction, although, on average, people are still interested in getting the products for lowest prices. But there is a decided growth in businesses that represent themselves as environment-friendly, e.g. that serve free-range goods – and it's increasingly popular to patronize those, even though their prices are often significantly higher. There is also a trend to invest in socially responsible businesses. People who have the money decide to give it to companies which are socially friendly, rather than seek the biggest possible return. On the Internet you may find information about companies' CSR, for example Ben and Jerry's, an ice-cream company, different food companies, and even Starbucks, the big coffee company.[1]

JŚ: *At the Catholic University of America you are the head of the Law and Public Policy Program. What does the program look like? Are there any practical classes?*

SD: We usually have about forty-five students on the program, roughly fifteen in each class, whose main interest is working in the public interest area. As a part of their JD degree program, they take series of special courses that focus on policy maintaining and, in their third year, they write a paper on a policy subject. Those papers are very substantial and a number of them gets published. Students do two internships in the specific part of the non-profit sector in which they're most interested, usually policy-related jobs. While doing this, they attend classes weekly, in order to discuss current matters with a faculty member. In the second semester of the second year, students take a course which focuses on the key policy-making functions: the legislative and the administrative process. Students also do individual resource and draft papers on it.

[1] For comparison, see: discussion on CSR with Richard Tropp (*"In search of a human way of doing business." An interview with Richard Tropp.*, p. 67-68).

JŚ: *Speaking about studying law in the US– other ALP professors have been telling us that its negative aspect is the loan the students have to take to finance the studies and, consequently, the huge debt with which they graduate…*

SD: Law schools are very expensive and so are colleges in the States. I left the university with lots of loans, so did other people and this is definitely not good, but that's the reality. Actually, we've been working on programs that would help students with loan repayments, particularly students who are focusing on careers in public policy.

JŚ: *How big is the salary of a young lawyer who has just started working?*

SD: It depends. If you are in the public policy sector the payment may be as low as thirty to thirty-five thousand dollars a year which is not really that great if you have an eighty-thousand-dollar debt. On the other hand, if you are in a private law firm in New York City, it may be as high as one-hundred-and-fifty thousand dollars.[2]

JŚ: *You also conducted courses in managing crises – when was that?*

SD: When I left law school, I was a law clerk to the Chief Judge of the US Court of Appeals for the District of Columbia; after that I worked for almost twelve years for a big, international law firm – Williams & Connolly – and became a partner there for five or six years. After that I was General Council of the University of Pennsylvania Healthcare System. While working at Williams & Connolly, I handled a lot of complex litigation, including white-collar criminal representation, and helped corporate clients in crisis. This would cover, e.g. a criminal proceeding against a corporation, an environmental accident, or the arrest of a key manager.

JŚ: *I notice that Williams & Connolly specialized in different practice areas, such as, among others, intellectual property, torts, securities and financing, national defense and real estate. Which one was your favorite?*

SD: Criminal defense – I really enjoyed it.

JŚ: *You wrote an article entitled Natural Born in the USA about the right of the American citizens to become President and the relevant Constitutional provision which basically says that the top office is reserved only for those who were citizens at the time of the adoption of the Constitution or who have been "natural born" in the US. What were the origins of that constitutional provision?*

SD: Ah, yes… It's come now to the forefront because one of the Presidential candidates, Senator McCain, was born in Panama. I get a lot of calls from the press, as people have

[2] For comparison, see: discussion on legal education with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 56-57).

got really interested in the matter, although this was certainly not the case at the time I wrote the article. (*Laughter*) Obviously, it has become a hot topic. I wrote the article with a former student of mine, Mary Beth Collins. We went back to the original wording of the Constitution and tried to define what it meant initially to be “natural born” in the US. And this question posed serious difficulties because nobody really knows what the expression means. It was not a term of art when the Constitution was adopted, and there is no clear precedent.

It looks as though the Framers of the US Constitution were worried that, at the beginning of the new country, some of the European monarchs might manage to send relatives over to the States to run for Presidency . They feared that the nation that started as a republic might end up as a monarchy. This fear seems to have been the raison d’etre of the provision. Maybe the Framers were thinking that the Europeans might come to America, become naturalized citizens and, subsequently, represent the interests of European nations instead of the ideals of the US. But the wording of the provision makes it almost sound as though it excluded anyone who was not actually born in the United States. If the provision was to be fully applied now, in a country as media-rich as the States, it would be almost impossible for any candidate to succeed without a thorough study of his or her background.

In my view, the natural-born citizenship provision is bad because it creates second-class citizens, especially as many people have come to the US over the years from other countries, and they continue to do so. My grandparents, for instance, came from Ireland. They swore allegiance to the United States and became citizens in every other aspect. Why shouldn’t they have had a chance to be President? Of course, the vast majority of immigrants would never run for office. What counts, however, is the very idea that they wouldn’t be able to do it if they wanted to seek the Presidency. The time has come to eliminate the provision, but the process of doing this is very complicated and tedious.

Some of the most recent controversies have involved Governor Arnold Schwarzenegger of California and Governor Jennifer Granholm of Michigan, who was born in Canada. These people are serious politicians who might one day be viable candidates for President. At present, however, they are explicitly barred from the Presidency by the Constitution. And what about people such as Senator McCain who are the children of Americans serving abroad? I think Senator McCain has a strong argument the he should be considered “natural born” for purposes of the Constitution but, because the Supreme Court has never ruled on such an issue, we cannot say with certainty what the outcome of a legal dispute would be.

JŚ: *I find it particularly strange that those who have been naturalized are not eligible for the office, although naturalization should amount to the same as being a righteous citizen.*

SD: You're right. In every other aspect they are treated equally... We are all equal, except with respect to eligibility for the Presidency.

JŚ: *In October 2007, you took part in a panel discussion organized by the Georgetown Journal. It happened to be also the twenty fifth anniversary of the Corporate Council Association and, accordingly, the discussed topics encompassed the duties and obligations of a company lawyer and the waiver of the attorney-client privilege in the corporate environment. Could you describe this problem in more detail?*

SD: One of the issues in American law thirty years ago was the question whether communication between corporate official and their counsel were subject to the attorney-client privilege and therefore protected from disclosure. This was litigated in the Upjohn Company case in 1981 and the Supreme Court said that the privilege did apply. In this case, the general counsel of Upjohn, following the advice of an outside firm representing the company, set up a questionnaire for Upjohn employees all over the world in order to find out if the company was complying with the tax provisions. The Internal Revenue Service sought to obtain the completed questionnaires, ultimately without success. The Supreme Court ruled that the attorney-client privilege is an important protection available to companies as well as to individuals and a device to encourage the managers and employees to seek legal advice. However, in 1990s, the Department of Justice sought to enlarge its recourses to fight crime and tried to...

JŚ: *Get some more information in a relatively cheap way?*

SD: ...more or less. But it didn't feel like fighting against Upjohn ruling. What they did instead was to tell the managers that they would be expected to waive the attorney-client privilege if the company was investigated. If they didn't do that, they would be deemed uncooperative. By 1999, Eric Holder, Deputy Attorney General for the Criminal Division of the Department of Justice, issued the famous Holder Memorandum, named after its author. It basically said that the question whether to proceed against the company as a whole should be based, at least in part, on its willingness to waive attorney-client privilege protections. A few years later, after the Enron scandal, Mr Holder's successor, Deputy Attorney General, Larry Thompson, made it mandatory for prosecutors to consider companies' cooperation. Decisions whether

to prosecute corporations were to depend, at least to some extent, on whether the company agreed to cooperate in this particular way. As a result, although the corporations theoretically enjoyed the privilege, they were pressured not to make use of it. This became very onerous, because under US law, a company may be held criminally liable for any act of any employee or agent, no matter whether instructed by a manager or not.

The American Bar Association started to object, and many of us wrote articles saying that a coerced waiver allows the Government to come in and gather the fruit of all the in-house interviews and discussions which took place before litigation, whether or not the company will eventually be found liable. Additionally, in the course of corporate internal investigations, the Government's waiver policy can cause employees give up their Fifth Amendment protection against self-incrimination and their Sixth Amendment right to counsel, without understanding what they are doing. At the time of the interviews, they might not be aware of the fact that the council was basically working as a Government agent.

JŚ: *You mean that the lawyers who conducted those interviews were the very lawyers of the company who, prior to the possible litigation, worked alongside the employees as their colleagues or even friends?*

SD: Exactly. Here, the state is extending its power over an individual's life without the individual realizing it; this has caused a great deal of controversy in recent years. The American Bar Association, the Chamber of Commerce, the Business Round Table, the American Civil Liberties Union and other groups are trying to get Congress legislatively to overrule the Department of Justice's waiver policy.

JŚ: *The McNulty Memo was to change the situation...*

SD: It purported to, but it didn't make any significant changes. Arguably, in some ways, the McNulty Memorandum made things worse.

JŚ: *My last question. Which model of conduct do you prefer: the KPMG and the survival of the company that was clearly liable, or the suing of Arthur Andersen, which went bankrupt in no time, despite winning eventually in the Supreme Court?*

SD: I don't think that either is a particularly attractive model. The problems with the Arthur Andersen approach are obvious: the company failed. But I don't like the KPMG way either, because it involved essentially handing employees over to the Government, and threatening to deprive them of advancement of the attorney fees – the equivalent of a financial ruin – unless they cooperated. I do understand the

motivation of Government lawyers and what they are trying to achieve, but we simply cannot forget about some of our most important Constitutional rights.[3]

JŚ: *Professor Duggin, thank you very much for the interview.*

SD: You're most welcome. It was my pleasure! Thanks to you and to all the wonderful people here in Cracow.

[3] For comparison, see: discussion on confidentiality with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 45-48) and with Eric Hirschhorn (*"...Building a plane while flying..."An interview with Eric Hirschhorn*, p. 81-82)