Principles of Prevailing Dutch Company Law

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Abstract

Dutch company law is undergoing tumultuous times. Much is changing in the legislation, for example, a major revision of private limited company law is imminent. The courts are constantly presented with an increasing number of difficult issues. It is precisely in such times that there is a need for guiding ideas, and I went searching for them. In this paper, I have relied on the American theory of pragmatism to help find a method to trace principles of law (section 1). I present nine principles of Dutch company law (section 2) and finally enlist the aid of these principles to solve a problem of present Dutch company law (section 3). Based on these principles, I take a fresh look at Dutch company law. In my search, I came to the conclusion that, as a result of the increasing importance of ‘duties of care’, it is becoming less important who does and who does not belong to the company. To ensure that courts review the actions of corporate executives with restraint, I consider it important to make a distinction between standards of conduct and standards of liability.

Keywords: plurality of interests, shareholders’ interests, directors’ liability, conflict of interests, duty of care, restrained judicial review.

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1 Adapted and updated version of the text of the oratio the author gave at Erasmus University Rotterdam on 19 December 2008.
We shall not cease from exploring.
At the end of all our exploring
we will arrive where we started
and know the place for the first time

T.S. Eliot, Little Gidding, No. 4 of Four Quartets

1. PRAGMATIC FUNDAMENTALS

Fundamentals are important ideas for a certain part of the law and are the same as principles. Principles are not rigid concepts, they are flexible and less directive than rules. They are not absolute. ‘Damn the absolute’ was the splendid motto of the 19th century American philosopher William James. This great man founded the philosophical school of pragmatism. A lot can be said about James. One of his pleasant characteristics is that his writing is so uninhibited: he talks to you on paper. He was an exceptional person. He did not want to exclude the truth of anything. For instance, he was interested in dancing tables: how can it be that sometimes a table starts to dance at a spiritual séance? On his deathbed, he asked his brother – the famous novelist Henry James – to remain at his graveside for some time after the burial; it could not be ruled out that they would still be able to talk to each other even after his death.

1.1 How does one find principles?

I have wrestled with this question, but James offers a solution. His scientific thought was based on people’s current actions. This ‘actional’ point of view is useful to jurists. Jurists are always in action, as statutes constantly have to be made and disputes have to be settled by court. James says: ‘We don’t act because we have ideas; we have ideas, because we must act’; a splendid insight. In other words: we are able to think up principles because we have legislation and all kinds of court decisions at our disposal and because we are able to analyse this material. Consequently, I derive principles from existing company law in Jamesian style and not from abstract theories of ‘proper’ philosophers such as Plato and Kant.


3 A very good summary of pragmatic thought can be found in L. Menand, The Metaphysical Club (New York, Farrar Straus and Giroux 2001), at pp. 337-375.

4 For this fascinating train of thought we are also indebted to Darwin’s theory of evolution, which emerged at about the same time. For connections between the pragmatic thinkers and Darwin’s theory of evolution, see Menand, supra n. 3, at pp. 97-148.