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Organising the Firm

Theories of Commercial Law, Corporate Governance and Corporate Law

Springer

Chapter 10
Theory of Corporate Law: Proposed Theory

10.1 General Remarks

Earlier in this book previous theories of corporate law were divided into theories of corporate law and theories of corporations. Both have their characteristic failings. Theories of corporations tend to be narrow and based on a small group of existing norms. Theories of corporate law tend to be broader but not perfectly aligned with existing norms. In addition, theories of corporate law in the US focus on corporate governance and fail to address a large part of the regulation of companies.[1]

There is room for a new theory of corporate law. The new theory should help to define the scope of corporate law and explain the contents of existing norms. The theory should be broad enough and, as far as possible, aligned with existing norms.

10.2 Three Categories of Issues

According to MBCL, corporations are legal tools used by firms. Corporations are not the only legal tools used by firms. For example, even the smallest firms can use a very large number of contracts (Chap. 4). Corporations are thus used as an alternative mechanism, and different alternative mechanisms can be chosen during the life of the firm.[2]

[1] See, for example, Bruner CM, The Enduring Ambivalence of Corporate Law, Alabama L Rev 59 (2008) pp 1386 (three fundamental and related issues) and 1408 (problems with models that focus on pure corporate governance); Bainbridge S, The New Corporate Governance in Theory and Practice. OUP, Oxford (2008) pp 14–15.

[2] To say that a corporation is a contract, or that a corporation is a nexus of contracts, or that the board is the nexus, would not explain why corporations are used and why the legal structure of the firm can change over time.

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The existence of corporations is facilitated by corporate law. Corporate law should address three kinds of issues: existential; governance-related; and financial. (1) During its life, the corporation needs an organisation and a governance structure in order to operate. Many provisions of corporate law are therefore governance-related. (2) Each transaction will raise not only governance-related questions but even questions that can be described as financial. (3) And finally, the life of the corporation has two ends. Corporations come into existence and expire. Both situations raise governance-related and financial questions.

As a result, corporate law must consist of a matrix of three regulatory systems consisting of: (1) legal norms on corporate governance; (2) legal norms on transactions and corporate finance; and (3) legal norms on the incorporation, restructuring, and expiry of companies. A theory of corporate law must consist of three sectoral theories: (1) a theory of the law of corporate governance; (2) a theory of the law of corporate finance; and (3) a theory that describes the incorporation, restructuring, and expiry of companies.[3] In addition to these systems, corporate law will always contain (4) norms that reflect the public policy preferences of the state.

Two of these areas – corporate governance and corporate finance – are functional areas of law rather than a collection of norms found in certain statutes or cases regarded as company law statutes or cases. These areas can be defined in a meaningful way provided that the firm is chosen as the hypothetical user of law and the principal. The third area is dominated by public policy. It is therefore a collection of norms typically found in certain company and insolvency law statutes and cases.

These issues will now be discussed one by one.

10.3 Corporate Governance

A legal theory of corporate governance was already proposed in Chap. 7. It defines the law of corporate governance as a functional area of law and as a branch of MBCL. The theory identifies the particular issues that are addressed by firms in the context of corporate governance.

A legal theory of corporate governance is also an integral part of a broader theory of corporate law. Corporate governance norms address issues raised by: the separate

[3] Compare Fleischer H, Zur Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung, ZGR 4/2007 p 506: "Innerhalb des Gesellschafts- und Kapitalmarktrechts sehe ich zwei Kermgebiete, die Corporate Governane als zukünftige Megathemen ablösen könnten: Corporate Finance und Corporate Insolvency." From a historical perspective, see Bratton WW, *op cit*, p 1485: from the 1850s to the 1880s, the American states enacted "general corporation laws" that included "provisions respecting corporate purposes, directors' powers, capital structure, dividends, amendments, and mergers". Bratton cites Hurst JW, The Legitimacy of the Business Corporation in the Law of the United States 1780–1970. The University Press of Virginia, the USA (1970) p 82.

legal personality of companies (asset partitioning, representation, guidance, motivation)[4]; the organisation of firms (allocation of power, risk, and information); and the fact that there can be differences between the firm's real organisation and its legal organisation (the regulation of groups, see Sect. 7.2). In addition, corporate governance norms define the interests to be served by designating the principal and defining its legally relevant interests (Sects. 7.3 and 7.4).

The self-enforcement of the governance structure (Chap. 8) is an important design principle in corporate law. Companies are designed as self-contained legal entities. They have corporate bodies responsible for their internal decision-making and dealings with third parties. Corporate law provides for the separation of functions. Shareholders have only limited powers, and the court or the administrative authority is only rarely responsible for decision-making.

Like self-enforcement, ensuring the firm's ability to innovate is an important design principle (Chap. 9). First, it is customarily accepted that corporate law should be flexible and not too prescriptive.[5] Second, corporate law vests important management powers in the board rather than shareholders in general meeting. Third, risk-taking is made easier by the business judgment rule and other constraints on shareholders rights to claim compensation in the event of failure.

10.4 Corporate Finance

A legal theory of corporate finance describes the law of corporate finance as a functional area of law. Like the legal theory of corporate governance, it can be defined as a branch of MBCL.

In the context of corporate finance, the firm tries to manage the four generic issues (cash flow and the exchange of goods and services; risk; principal-agency relationships; and information) in four characteristic contexts: investment decisions; funding decisions; exit decisions; and existential decisions.[6]

Corporate law facilitates such decisions by providing a legal framework. This explains why corporate law contains rules on: transactions in general (investments); the issuing of shares and the raising of capital (funding); distributions and share

[4] To whom do assets linked to the company belong? Who is to be regarded as acting as or on behalf of the company? How should the persons acting as or on behalf of the company act? How should the various stakeholders act? How are these persons and stakeholders motivated?

[5] See, for example, Regulation 2157/2001 (SE Regulation); The Department of Trade and Industry, Company Law Reform, White Paper, Cm 6456 (March 2005); Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG).

[6] Mäntysaari P, The Law of Corporate Finance. Volume I. Springer, Berlin Heidelberg (2010) pp 1–2.

buybacks (exit); corporate insolvency and takeovers (existential decisions); and similar matters.[7]

The exact contents of these rules depend on many governance-related issues. First, the legal framework for investment, funding, exit, and existential decisions cannot be designed without choosing the interests that the framework should protect (Sects. 6.3, 7.3, 7.4, and 7.7). Second, it will often mean the allocation of risk between the firm and its stakeholders and between stakeholders inter se (Sect. 7.2). There are many examples of this. The allocation of power to shareholders is designed to reduce their perceived risk and, indirectly, the firm's funding costs. Restrictions on distributions to shareholders and the equity-insolvency rule are designed to lock in assets and protect the firm against the company's shareholders, shareholders against other shareholders, and lenders against shareholders. Corporate insolvency rules are designed to allocate risk between creditors, shareholders, and the firm. Third, the management of agency relationships is particularly important in the context of matters relating to corporate finance (Sect. 7.2). Fourth, the duty to disclose information is particularly important as a corporate governance tool in these situations (Sect. 7.2).

10.5 Existential Issues

Existential issues relate to incorporation (the coming into existence of the company), restructuring, or expiry of the entity. For public policy, governance-related, and financial reasons, each of these situations may require a different regulatory approach.

Before incorporation. Before incorporation, a company does not exist as a legal person. The regulation of companies at this stage is influenced by various factors.

Public policy reasons will dictate much of the regulation of the founding of companies. The founding of companies can be made difficult or easy, it can require plenty of capital or no capital, it can require government permits or mere registration, the participation of a lawyer or a notary public may be necessary or not necessary, the founding of companies can take a couple of days or several months, and so forth. These differences can be explained by different approaches to business, the regulation of business, the protection of the public, other public policy concerns, or sleaze.

Even governance-related issues will require plenty of regulation at this stage. This is because normal rules on the representation of the company internally and in its dealings with third parties cannot apply unless adapted to this special situation. There is a difference in time between the stage when no steps have been taken and the moment when the person responsible takes the final step required for the

[7] Generally, see Mäntysaari P, The Law of Corporate Finance. Volume III. Springer, Berlin Heidelberg (2010).

attainment of legal personality through incorporation. Whereas normal rules on the representation of the company clearly cannot apply when the incorporation process is about to start, they may gradually become applicable the closer one gets to the point in time when the entity becomes the finished product and a legal person.

Some norms are necessary for financial reasons. First, there may be particular capital requirements because of public policy. Capital requirements may be general and part of a legal capital regime (for example, requirements implementing the Second Company Law Directive in the EU), or sector-specific (for example, requirements implementing the Capital Requirements Directive). Second, somebody should subscribe for shares and pay the amount payable for the shares, and somebody should ensure that the shares are paid in full.

After incorporation. After incorporation, the company is a legal person. Public policy, governance-related, and financial reasons will again influence the regulation of the restructuring of companies and corporate insolvency.

Public policy reasons play an important role in corporate insolvency. Corporate insolvency rules allocate risk between the firm and its stakeholders, and between stakeholders inter se. First, they give incentives not to let the company become insolvent in the first place. For example, there may be general standards, bright-line rules, and liability rules for the company's representatives. Second, there may be rules designed to protect the firm as a going concern. For example, there may be restrictions on payments to creditors and shareholders, and rules that enable creditors to convert their claims to shares at the cost of existing shareholders. Third, there can also be rules regulating the right of creditors to realise the assets of the company.

The choice of the regulatory framework will thus require a policy choice. In the US, Chap. 11 is an example of a corporate insolvency mechanism that protects the firm as a going concern. Traditional continental European bankruptcy laws are the opposite. They provide an example of a mechanism that favours existing creditors to the detriment of members of the firm's organisation (employees, network members) and the company's shareholders.

In corporate insolvency, public policy objectives will also influence many governance-related issues. The allocation of power is a major issue because of the conflicting interests of the various stakeholder classes and the firm in "pathological" situations. The allocation of power to a certain stakeholder class means that its interests have a better chance to prevail.

Governance-related issues predominate in corporate restructurings for three reasons. First, restructurings (such as mergers and demergers) may benefit one stakeholder category at the expense of other stakeholders. For example, they may have an adverse effect on the interests of existing shareholders and creditors. Second, they are important decisions – "rules of the game decisions"[8] – that should not be made lightly and not without the separation of initiation and ratification

[8] Bebchuk LA, The Case for Increasing Shareholder Power, Harv L Rev 118 (2005) pp 833–917.

powers. Third, the choice of principal is a key factor explaining the reason for restructuring. For example, a takeover might make industrial sense and bring long-term benefits to the firm under the circumstances, but if it reduces the amount of distributable funds in the short-term, many short-term shareholders of the buyer may vote against it. Corporate law sets out whose interests should matter.

Financial aspects are important in restructurings and corporate insolvency. Both can result in a change in the funding and share ownership structure of the company. Company laws can increase the survival chances of firms by facilitating restructurings and the refinancing of companies.

Expiry. After incorporation, it may become necessary to end the company's life. The regulation of companies will even in this case address different kinds of legal concerns.

There are obvious public policy issues. Some companies should not be permitted to exist as legal persons. And when any company expires, the interests of its existing contract parties must be protected.

Governance-related issues play an important role because of the impact that the company's expiry will have on its shareholders and other stakeholders. This raises again questions about the principal (Sects. 7.3 and 7.4). Shareholders are often regarded as residual claimants who have a claim to whatever is left after the company's debts have been paid. If shareholders may decide on the liquidation of the company (the carrier of the firm), one might ask whether the firm can be regarded as the principal at all. The answer is, first, that somebody must be able to decide on the liquidation of the company and that a decision of this kind requires a decision-making process that reflects its magnitude. It can be difficult to separate decision management (initiation) and decision control (ratification) in this case. One of the ways to achieve it is by vesting decision rights in shareholders or the court, or both. Second, the allocation of power to decide on the liquidation of the company can also be explained by financial aspects.

What happens at the end of the company's life will influence the risk exposure of investors, the availability and cost of funding, and the firm's long-term survival chances. If the power to decide on liquidation is reserved for shareholders, their perceived risk exposure is reduced. If it is reserved for somebody else, shareholders' perceived risk exposure is increased. Their perceived risk exposure will influence the availability and cost of equity capital and the long-term survival chances of the firm.

10.6 Public Policy Preferences of the State

Corporate law can contain various norms that reflect the state's particular public policy preferences. These norms do not have to be designed to foster "economic efficiency" or the "joint welfare of all stakeholders". The state can use corporate law as a means to achieve a wide range of social goals. Depending on the state, they could include: equality (prohibition of discrimination, gender-based board quotas,

other quotas); discrimination (on the basis of gender, race, religion, ethnic origin, nationality, or political views); rent-seeking by the ruling class (business activities, share ownership, or board membership totally or partly reserved for members of a certain class); national security (restrictions on who may control companies in certain sectors); governance of risk in general; management of systemic risk (financial industry); or other goals.

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