Perspectives in Company Law and Financial Regulation

EDITED BY MICHEL TISON,
HANS DE WULF,
CHRISTOPH VAN DER ELST AND
REINHARD STEENNOT

CAMBRIDGE

PART III

Miscellaneous

33

The practitioner and the professor – is there a theory of commercial law?

JEAN NICOLAS DRUEY

Of course, my title indicates a reverence to Eddy Wymeersch. He has shown that in commercial law both practical and theoretical functions of a highest level can be united in one person. And the lesson he teaches goes one step further: he certainly did not undertake all the burdens simply for honours, but because he saw a professional need to follow both tracks. Practice requires guidelines from theory and theory the feedback from practice.

But I am hesitating: what exactly does theory offer to commercial practice? In our actual world, is not the flow going more and more the other way in that innovative practice gets faster and faster, and, be it just for the changing allocation of forces, theory slower and slower? The two seem to become increasingly unequal, the one trying breathlessly to run behind the other.

My question has two branches. First, it applies a sociological view on those having to do with commercial law. This is kind of an outward look. Then, the inward look has to follow, i.e. an analysis of the actual state of commercial legal theory, its possible deficits and chances. All that will necessarily be limited to some observations and ideas from one of many possible viewpoints.

But before all, let us start by an *example*. It will allow a closer view to the problem, and will set more players into the field than the professor and the one applying the law in commercial practice; in particular lawmakers and courts have to come into the picture. On the other hand, the retarding factors in the evolution of theory will be better seen. The introductory example which I choose is the one which has particularly brought Eddy and me together.

I. The law on corporate groups as an example

Groups of companies being directed by a common policy determined by a parent company are a phenomenon going back to the nineteenth

century. Since then they have continuously increased – maybe not so much in application fantasy, but in size and number, the multi-corporate structure having become organizational routine everywhere in the world.

The legal world reacted quite promptly. Typically, in a country like the United States the reaction was aimed at particular issues such as accepting the group as not being a conspiracy in restraint of trade, whereas the *Deutscher Juristentag* of 1902 placed the subject of groups *as such* on its agenda. Sixty-three years later, the Federal Republic promulgated a chapter in the *Aktiengesetz* titled '*Verbundene Unternehmen*' (related companies), thus claiming to systematically regulate the group phenomenon (if composed by companies limited by shares). Some other countries followed to a various extent. 'The rest is silence' – incredibly enough after more than a century!

Having been, like Eddy Wymeersch, one of those sitting over this group law subject for innumerable hours, be it reading and writing at my desk, teaching in the classroom, or listening and discussing in many, many conferences, seminar and meetings, I ask myself: Was all that fruitless? I would insist on the statement that we tried hard from the side of theory and that none of these hours was dull. But the point of departure and the object of interest were *facts* and *phenomena*. Legal theory tried to cope with the inventions of commercial practice – and failed to cope with itself!

What I mean is a failure to get the new legal tools ready, which always are necessary to grasp a new phenomenon. Without that, all is mere subsumption; all is measured by the pre-existing standards. Groups thereby are an issue under minority protection, under creditors' protection, workers' protection, contract law or whatever: legal action about groups is, then, instigated by the view that groups might create a danger under such aspects. The German *Aktiengesetz* of 1965 is the protagonist for some of these purposes. This kind of legal thought, however, runs a serious risk to be counterproductive, creating injustice instead of justice. Subjecting groups to a cumbersome minority protection, for example, raises the question whether the situation is actually better or worse in others than affiliated companies, and whether it is for those concerned even more of an advantage than a disadvantage to be integrated in a group etc. This is to say that, truth being on both sides, general rules in favour of one side will soon prove to be a Procrustian bed. In other words, to have no group law might be the better solution than *this* group law. One way or the other, the start from pre-existing concepts is too

rough because theory lacks the patience to analyse the group as a phenomenon of its own, as a mix of centripetal and centrifugal tendencies which requires its proper institutions.

This example indicates a need and, at the same time, a deficit, of a switch in paradigm. Legal thought tends by nature to be positivistic, and lets others do the work of conceiving policies and preparing new laws. However, groups of companies, like most issues in commercial law, are a problem of *insufficiency* of the existing law, and lawyers therefore as the 'users' of law would have a primordial signalling function. But practice has not the time and the systematic approach to produce such signals. So the problem is: if practice sees no problem, it is by far not certain that there is none.

II. The power of practice

This brings me to my question. There is in commercial law a strong interrelationship between the phenomena and the law. Our times are more and more departing from the one-sided perspective that there are facts ruled upon by laws, in favour of a cybernetic approach viewing facts as law producers by themselves in the sense of feedbacks given to the law. Thus, when we speak of a *system* this is not only the question of whether there is, and what is, the system of commercial law, but of the system *generating* the law.

I am well aware that describing the situation in this manner implies a statement of *weakness* of the law. It certainly would be worth an in-depth investigation – none is known to me from my angle – to show the various manifestations of this position-loss in politics, in legislative, legal or academic practice etc. This is not necessarily to blame our guild of lawyers, but may equally well indicate a courageous opening towards the *non-legal* considerations, from economic theory to statistics, or from great scandals to innocent day-to-day-practice, and to a *global* or at least *European* view. An opening always is a concession of weakness, but who does it first might be the final winner.

And this is also to say that, within the legal professions, the role of the practitioner has been enhanced. Practice has become the focus on which these various perspectives converge. And practice, in turn, has not only the option to consider them, but it *must* find its way in order to eliminate the major risks coming from any side whatsoever. This creates an autonomy increasingly enlarging the gap to legislated law. Commercial practice builds its own world by establishing standard contracts, by

concentrating know-how in certain places (a merger between two middle-sized Swiss companies is normally managed from downtown Manhattan) or by developing its own, usually abbreviated, language or its rules of thumb.

I do not think that we *must* accept this evolution forever, and neither that we *should* do so. Let me somewhat elaborate on these two questions.

III. Securing the connection of theory and practice

If, referring to the authority of established law, one does not accept the autonomy of practice, one must show how the two can be tied together. Essentially, there are two ways: either the gap is bridged over by *persons* or by *procedures*. The first is to have persons available who are in hybrid positions, having functions on both sides, being practitioners and simultaneously, say, professors – I would mean by 'professors' any legal professionals having the overview over the existing body of law and the theory behind it. The second is to offer channels of understanding between the practitioners and the professors, such as common seminars, periodicals publishing the views of both sides, a severe legal education of the future practitioners safeguarding a lifetime interest for the legal basics, or, to the contrary, trainings of professors in practice – I am serious on that too!

Both ways have their specific advantages and specific cost. To unite all aspects in one person is to avoid all transferring and processing of information; what is available is so at any time. But all the more restricted are the capacities and thus the available quantities of information. Of course, I would not dare to express a formal choice in my few thoughts presented here. Generally speaking, it is not entirely a matter of voluntary choice, not an issue of strategy of whomsoever. Rather it is rooted in *traditions* which will not follow an order to change, and, in varying proportions, there will always be a *mix* of both. Thus, I will limit myself to some considerations related to this weighing. These will favour a separation of powers, specifically suggesting to let professors just be professors. That may appear to be more daring than any other proposal when I write this precisely to the honour of Eddy Wymeersch. But I trust he will understand what I mean.

Looking at those traditions, we might observe a difference between bigger and smaller countries. I am not able to make final statements on this, my view being to a great deal limited to my home country,

Switzerland. But there is a chance of more parallels to Eddy's country, Belgium, than for example to Germany, England or the United States. Smaller countries are more limited in their personal resources and therefore tend to attribute to their best people a plurality of functions. I do not overlook that other European countries like France or Italy, although being important, also have a tendency to combine advocacy and (full) professorship; I will not discuss their particular motives.

IV. The trend toward double-bind positions

If I consider the developments in Switzerland, the trend in the field of commercial law clearly is in favour of the combination. To be sure, professors in this area used to write opinions, to be a part in arbitration courts or in legislative commissions in prior times as well. But today an increasing number even of *ordinarii* actually mix functions particularly by being partners in a legal office. On the other hand, members particularly of big law firms tend to undertake an academic kind of tasks by teaching courses and/or being active in publishing.

The reasons for this trend have to do, as I see it, with the better awareness for career planning, both on the side of the young people and of their potential employers. The brilliant law students and graduates are looked for by their academic teachers and also by the big law firms, and to ride on both tracks is for the young candidates sort of a natural way of solving the dilemma, or rather of avoiding a solution. Differences are merely gradual, depending on how well the inner academic fire survives the immense challenge which is encountered in a glamorous legal business. The amount of energy and time-management skills shown by the runners of such hybrid careers is admirable.

Now, the *evaluation* of this double-bind as a bridge between practice and theory raises positive but also negative aspects. The tie to theory secures, I may say, a certain cleanness of practical arguing referring it to the legal bases, but also inspires the fantasy to find maybe unusual lines of argument, which is in the interest of the case *and* of the evolution of law as such. The familiarity with practice also protects theory against growing grey and contributes to the authenticity of academic teaching. On the negative side I see mainly the problem that this kind of career cannot, by simple limitations of time and attention, focus on theory as such; the thinking is either pragmatic or positivistic. Theory, then, is a body more or less well conserved since the times of studying and thesis writing, and not itself the object of elaboration. In publications and

courses, the choice of topics and the answers given are often preceded by work on specific cases, which serve clients and, even if they are not biased, there is a natural tendency to stick mentally with those cases.

However, all this starts from one presumption, namely that there is a value in developing legal theory. The impression is rather the opposite: commercial law practice seems to have learned to swim, to stay at the surface without need of a solid bottom, and does so for the sake of being faster and more flexible. We have to consider that now.

V. Commercial law in need of a theory

I understand a legal theory to be a system of sentences lying behind the specific rules prescribing any kind of behaviour. The assertion is that law cannot do without, and that commercial law is no exception. Quite to the contrary: the more flexible the law is, the stronger has to be the construction holding it together. And a theory is not just a purpose, because purposes never can be followed up to their end, but are subject to a legislative dosage which is a matter of policy, not of theory. And theory also is more than denominating a field of action. To say that Sarbanes-Oxley is aimed to improve corporate governance does not relate the substance of the rules to their conceptual roots, thus has no theoretical leverage.

Theory is a guideline for interpretation and to determine the inherent limits of legal rules. And lack of theory may therefore be of great cost. For example, we should have more theory on the requirement of *independence* of decision makers. As a concept, independence bears hardly a limitation in itself; however, it is clear that our segmented business world needs an immense number of decision makers and that we may not exclude, for reasons of bias, any friend of a friend of any person possibly interested in the outcome of a decision. The law has to draw a line, it has to sort out the forbidden from the acceptable cases, but it cannot specifically name all cases which should not be tolerated. Theory could help to prepare the selection, it could systematically analyse the causes of bias and show, as a first thing, that there are many other sources of unwanted influences beside proper interest and relations to interested parties, such as opinions previously expressed, political or religious views, informal quid-pro-quos etc. Then, theory could systematize the countervailing virtues of double-bind positions. And clarity should be elaborated on a general level about the consequences for the decisions taken with the collaboration of excluded persons: are they invalid? Is the election of the

person invalid from the outset or only the respective contribution (vote etc.)? Or is all valid under the provision of liability for damages? What about confidential information given to excluded persons? And so on.

It is not without purpose that I am going into some length with this example: uncertainties on points like those mentioned may have an important destabilizing effect. And by no means can we expect that the insular provisions in laws or governmental or private regulations will actually cover the subject in the multitude of its aspects. Nor are the short-cut methods satisfactory which usually are applied in legal uncertainty, such as weighing of interests or conclusions by analogy. Weighing of interests is by far not able to give the precise guidelines required in advance on issues of independence. And analogy blurs the limits which, as stated, always are necessary in matters of incompatibility. It cannot do without a theory indicating in turn the limits of arguing by analogy.

It would be easy to multiply the examples of areas of strong, but too pragmatic evolution of modern commercial and economic law. Probably the most important today would be the world of financial reporting, but we could also revert to the corporate groups and show how creditors and shareholders of Sabena could have been helped against Swissair by a more solid state of theory.

Why is there no uproar of practice against so much uncertainty, so much imprecision in core issues of commercial law? Why do the practitioners, being the professional wolves in their cases, behave like lambs in face of issues of legal development?

VI. Commercial law theory in need of professors

Is there at all something which may be called a body of theory of commercial law? Every commercialist anywhere in the world might give the ready-made answer 'Yes, of course' and will with pride point to the company law. I am not so sure. History of companies, especially of those with limited liability, might with good reasons rather be called a distorting of theory, a fruit of marketing more than of legal doctrine, in that investors of desperately needed risk capital were called 'members' or 'shareholders', although others were clearly the entrepreneurs conceiving and initiating the business. Time worked with respect to such initial shortcomings of theory more in the sense of forgetting than clearing. For sure, there are other examples, where the long time available helped steady improvement of the institution like in case of bills of exchange:

here, precision was the goal since the beginnings in the late Middle Ages, and led to an admirable mechanics of rules spread over the world thanks to its clarity.

More recent institutions such as capital market law often do have their underlying theories, but the discussion got out of breath too soon. The parallelism of market and investors' protection, which seems to be the prevailing answer with respect to the purpose of capital market law, is not much of a statement. Naturally, legislators tend to give to their products a broad scope, such as drugs are claimed to cure from top to toe. Theory is all the more asked to indicate the unavoidably necessary limitations.

One point is clear, however: *economic* theory is not by itself legal theory. Law can obviously not neglect what economic science is asserting and opening the law for this kind of reflection has been one of the most deserving efforts in legal theory of the last decades. But economic theories are models based on certain assumptions; they start with an 'If …', and law has to look behind such 'Ifs', and this always brings contrary considerations into light. For example, market theory calls for transparency, but a firm only can work when privacy is granted to its internal developments. Maybe that economic theory itself will deal with such conflicting aspects, possibly by taking into the picture behavioural economy, but legal theory at least has to ask the questions and usually has to care for finding the equilibrium. And there will always be considerations flowing exclusively from the legal system. Law is based on fundamental rights which are not derived from anywhere else. In this sense, conceptions of social values put forward by economic theory have necessarily to be complemented by individual values and freedoms. Property rights, for example, will never be sufficiently explained by functions ascribed to them in the general economic process.

VII. Professorship or practice

In the networks of the legal professions, theory is allocated with the professors. They are not freed from this task by the fact that nobody cares for theory, but it makes it all the more cumbersome. For one thing, it puts the additional burden on them to awake the need for theory as such, i.e. to make the community again sensible for the indispensability of theory, to profess a 'theory on theory'. Theoretical statements, if they are good, have little rhetoric power and thus little chance to have a

direct impact on practice. Theory, therefore, must grow in the seclusion of pondering and discussing, and requires the recognition of the value of theory per se.

Secondly, we observe an intriguing phenomenon of divergence: whereas awareness of theory diminishes, the fields of theory are becoming more and more large. My observations above have alluded to economics, but the same is true for sociology or psychology. The classical task of ascertaining the law in the respective field can no longer restrict itself to collecting judicial precedents and scholarly opinions under the applicable keywords, but has to look into constitutional, procedural and other branches of law, into linguistic, historical and philosophical aspects as constituents of the law. And all that should not be limited to one country or one language area. On top of this, working on theory calls for an effort of synthesis, not just accumulating an immense pile of materials, but extracting therefrom generalized statements, which is no fast business.

This sounds utopian, taking into account the very small number of professors as compared with other legal professions. But there lies no justification for doing nothing. Thus, I plead in favour of *professorship to be a pure professorship*, and of selecting professors in view of their ability and willingness to dig into the bases of their legal fields.

Of course, theory under circumstances whatsoever will not die. People wanting to look into larger contexts will continue to show up. But we should be afraid of the *dissociation* of theory and practice. Practice and theory must understand and watch each other. Both are subject to fashions, and even a theory working in the unnoticed 'underground' may, due precisely to its one-sidedness, one day get sufficient power to break into a practical environment inspired by a very different culture. We lived this after World War II with radical ideas on antitrust law, and we continue to observe it with claims for transparency.

As stated before, the 'purity' of professorship therefore implies the introduction of other institutional warranties to safeguard the contacts with practice. My own way was to stay in practice for some years between the termination of studies and entering a full professorship. It proved to be a good experience, but it has periodically to be brushed up. Without looking at other options, I should eliminate at least one source of misunderstanding: an important role in filling the gap lies certainly with those part-time university teachers who not only provide the students with a sense of the practical impact of legal regulations,

but also are active as legal writers making known successes and failures of the law.

I think I have sufficiently distinguished my case from that of Eddy Wymeersch. When an academic career as his, fully devoted to teaching and research, is crowned by one of the highest practical functions which his country has to offer, he has deserved it – among others by his academic merits.