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## Shareholder Democracy a la Dworkin

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# Shareholder Democracy à la Dworkin

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*Large institutions have a great deal of say, minor shareholders do not.  
'It is the same everywhere, for that is democracy: the majority decides.'*<sup>1</sup>

## 1. INTRODUCTION

The output of the Enterprise Department, the special division of the Amsterdam Court of Appeals exclusively charged with corporate disputes, can be called impressive.<sup>2</sup> Particularly the case law in the context of inquiry proceedings has assumed large proportions.<sup>3</sup> Most of those decisions relate to disputes among shareholders or between shareholders on the one hand and the company's management board affiliated with one or some of those shareholders on the other. Although, of course, this case law is embedded in the rules and principles of Dutch company law as it has developed over the years, partially as a result of the activities of the same Enterprise Department, it has still grown on a more or less spontaneous and ad hoc basis. I feel that an underlying legal theory foundation is missing. Below I will make a modest attempt at providing particularly the position of the shareholders in inquiry law within such a more structured theoretic foundation, hoping to contribute to some more consistency in the Enterprise Department's case law on the issue of 'shareholder democracy'.

My analysis is inspired by the vision of the legal philosopher Ronald Dworkin on the situation of the American democracy in the period preceding the election of President Obama. When reading his latest book, *Is Democracy Possible Here? Principles for a New Political Debate*, I was captured by the parallel that can be drawn between the debate in the United States on political democracy and the theme of shareholder democracy.<sup>4</sup> I will immediately add that I have no legal philosophic pretensions writing this essay. I am simply not sufficiently equipped for that. I do, however, hope that it can add something to the discourse about corporate governance, in particular with a view to the position of shareholders, if only to give the notion that, reflecting

on the basic principles of our company law from a different legal, or other, discipline, cannot only be useful but also great fun.

Although I, as a Dutch lawyer, will illustrate my legal theory argument based on Dutch company law, I think that Dworkin's legacy of ideas can be relevant to other legal systems as well as it regards the core of corporate order in the western world.

## 2. POLITICAL DEMOCRACY AND SHAREHOLDER DEMOCRACY

On the face of it, the subject of shareholder democracy has little to do with democracy as a political system, as rooted in the way in which the citizens of Ancient Athens handled government power and decision-making processes, if only because of the fact that democracy as a political system, as it developed later, is based on the premise of free elections in which every citizen has one vote, irrespective of his background, income or sex, whereas the shareholders decision-making process in the company is, in principle, based on the amount of each shareholder's capital contribution. Although Dutch law sets a minimum limit of at least one vote per shareholder, here too, the basic principle is: capital rules the company.<sup>5</sup> Moreover, in many a jurisdiction shareholders can be entirely deprived of their voting rights, whereas other shareholders can be allocated multiple voting rights or a certain additional control. So even the idea of share democracy – one share one vote – is certainly not accepted and consistently applied everywhere. It only recently had to back down, in an attempt to elevate it to a leading principle of European company law, after research had shown that no causal link can be demonstrated between proportionality – or the lack thereof – of capital interest and control on the one hand and the performance of a business on the other.<sup>6</sup> Our system is one of shareholder plutocracy rather than shareholder democracy.<sup>7</sup>

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1 Ben Verwaayen, CEO of Alcatel-Lucent, in an interview in *Effect*, 2009, no. 18, 22.

2 About this special court: Marius Josephus Jitta (ed.), *The Companies and Business Court from a Comparative Law Perspective* (Deventer: Kluwer, 2004).

3 For recent figures see 'Het recht van enquête' (The right of inquiry). *An Empirical Survey* (Deventer: Kluwer, 2009).

4 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2008).

5 Cf. Art. 2:118/228 BW.

6 See the speech by European Commissioner McGreevy dated 7 Oct. 2007, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592&format=HTML&aged=0&language=EN&guiLanguage=en>>. On the same subject, cf. Steven Hijink, 'Report on the Proportionality Principle in the European Union', *Ondernemingsrecht* (Company Law Journal) 13 (2007): 505. On the development of shareholders' rights in the EU, see Fidy Xiangxing Hong, 'Protection of Shareholders' Rights at EU Level: How Far Does It Go?', *European Company Law* 6, no. 3 (2009): 124.

The allocation of control among shareholders in the company is not even determined by money power alone but by what I call *occasional power* gained – or the lack thereof – which depends on a complex of many factors, such as the phase of the business to be joined, the existing position of power of the other capital providers, the knowledge a shareholder brings and wishes to contribute, his willingness to provide the company with loan capital as well, and his intention to be intensively or less intensively involved in the company's management. The positions of the parent company that carries out the central management, the status as a participant, the holder of depositary receipts, the preference shares foundation, the joint venture partner, the incorporator who wants to keep his distance, the credit provider who seeks security, the institutional investor, and the hobby investor are incomparable.<sup>8</sup> Still we put all those parties under the not very distinguishing heading of 'shareholder'. It was with good reason that in his preface to the latest (fifteenth) edition of *Van de BV en de NV* (On the private and public limited company), Jaap Winter noted that he would limit the contents of the next edition of this well-known 'yellow book' to private companies with share capital and announced a new book on listed companies.<sup>9</sup> Of course, when it comes to acquiring occasional power, money does play an important role. This is also covered by our legal system. According to the Dutch Supreme Court, it is not unreasonable for a shareholder to stipulate an additional compensation – the so-called 'package compensation' or 'control premium' – in consideration of his majority interest or control attached to a certain capacity (priority shares), in comparison with the price received by the other shareholders, provided that everything is transparent.<sup>10</sup> On the other hand, a minority shareholder just has to accept that he will usually taste defeat in the decision-making process, simply because of that capacity. In its *Versatel* decision the Supreme Court held that the outlined use of the legal (triangle) merger, with a view to a subsequent expulsion of minority shareholders, was, in principle, not improper. After all, according to the Supreme Court in ground no. 4.3 of its decision:

When buying a minority package or holding a minority interest, a minority shareholder will have to take into consideration the possibility that, due to a merger, split-off or conversion, the company may undergo a transformation as a result of which the minority shareholders' interest will fall below the 5% sell-out limit.<sup>11</sup>

In other words, occasional power ultimately controls the company and is allowed to do so under our legal system. It is occasional power that enabled the Google founders to issue A-shares carrying each one tenth of the voting power of their own B-shares when Google went public in 2004. In the Netherlands the legislative proposal to make the law on private limited companies more flexible, *inter alia* by offering more room for contractual agreements between shareholders, the (unrestricted) introduction of shares without voting rights, the creation of shares with multiple voting rights and, hence, the possibility to concentrate control at the general meeting of shareholders in one shareholder, shows that occasional power is even further embraced and facilitated as a leading principle in our (private limited) company law, with optimum freedom of organization for the incorporators/shareholders as a necessary pendant.<sup>12</sup> I agree with Portier that the legislature has, thus, consciously opted for a system in which the parties are entirely free 'to determine the proportion between control and capital contribution and, if so desired, to marginalize, or reduce to zero, the control of capital providers by means of issue of shares without voting rights'.<sup>13</sup> The idea behind this is, of course, a more or less conscious choice for an economic order in which occasional power is the initiating and evolving factor for the benefit of us all. A liberal Darwinist model that has brought us – and I do not just mean the Western world – incredible growth of material welfare, particularly over the past few decades. The fact that this material welfare also has a downside should not tempt us to get rid of the entire system of our company law, but rather to look for adjustment, maintaining the essence of that system. Especially here it may be useful to re-evaluate the ethics. However, I do not see that re-evaluation as an alternative for rules of a company law nature – either set forth in legislation or in codes of conduct – but primarily as a source of inspiration for a different, somewhat adjusted redivision of control in the company. If we were all better people, we would not need the law. Abuse of power simply is one of the basic premises of existence of company law. Therefore, a re-evaluation of ethics will, in my opinion, primarily lead to institutional consequences. After all, allocation of powers is the core business of company law.

### 3. RONALD DWORKIN: IS DEMOCRACY POSSIBLE HERE?

Recognizing the fact that political democracy and shareholder democracy have little in common need not discourage us from

7 Cf. Adriaan F.M. Dorresteyn & Cornelis de Groot, 'Corporate Governance Code: Origins and Perspectives', in *European Company Law in Accelerated Progress*, ed. Steef M. Bartman, CECL book series, vol. 1, Kluwer Law International, 2006, 33.

8 In this respect see W.J. Slagter, Rotterdam Foundation Day Speech on *Macht en onmacht van de aandeelhouder* (The power and powerlessness of shareholders) (Deventer: Kluwer, 1988), as well as H.J. de Kluiver in his Maastricht inaugural speech on *Machtstrijd en machtsovername in kapitaalvennootschappen* (Power struggle and assumption of power in companies with share capital) (Deventer: Kluwer, 1996).

9 Van Schilfgaarde & Winter, *Van de BV en de NV* (Deventer: Kluwer, 2009), Preface.

10 Decision of the Dutch Supreme Court [HR] 24 Sep. 1976, NJ 1978, 135, annotated by BW (Erdal).

11 HR 14 Sep. 2007, JOR 2007/237, annotated by Assink (Centaurus et al.-Versatel et al.).

12 For a technical analysis of the Flex proposal on this point see P.J. Dortmond, 'Flexibel aandeelhouderschap' [Flexible shareholdership], *Ondernemingsrecht* 9 (2007): 350.

13 Cf. G.M. Portier, in *Het nieuwe BV-recht voor de praktijk* (Practical guide to new private limited company law), preliminary advice KNB (The Hague: Sdu, 2008), 243 based on the draft Art. 2:228 of the Dutch Civil Code [BW] from legislative proposal 31 058. L. Timmerman, *Grondslagen van geldend ondernemingsrecht* (Principles of applicable company law), *Ondernemingsrecht* 1, (2009): 4, oddly enough, calls this an example of 'company law without principles'.

looking for conceptions and principles derived from political theory building in the re-evaluation of ethics from a company law point of view that I have just advocated. Political democracy then becomes a more idealistic concept, which, like the company, regards the decision-making process in a target organization by all sorts and conditions of interested parties. And that is where Dworkin comes in. In his book he presents two forms of (political) democracy. For the sake of convenience as well as safety, I will use his English terms: the majoritarian view and the partnership view. As the reader will understand, being a company lawyer, it is particularly the latter term that intrigues me.

According to the majoritarian view, from a democratic perspective, the majority vote is always the best outcome. That majority wish may be disadvantageous or even harmful to the minority in society or to certain minority groups, but that does not make the outcome any less democratic.<sup>14</sup> This is different in the partnership view. In that conception – steadily – denying or ignoring the interests of the minority does indeed affect the democratic level of the political decision-making process. Let us hear what Dworkin himself has to say on the subject:

‘(...) a community that steadily ignores the interests of some minority or other group is just for that reason not democratic even though it elects officials by impeccably majoritarian means.’<sup>15</sup> ‘He continues: (...) on the partnership conception, democracy is a substantive, not a merely procedural, ideal.’<sup>16</sup>

Principles of integrity and human dignity have traditionally played a central role in Dworkin’s legal philosophy.<sup>17</sup> In close coherence with the above-mentioned partnership view on the political system, therefore, he formulates two principles of human dignity that, in his eyes, are acceptable on rational grounds to the vast majority of society and can thus form a common ground for a productive democratic debate. Principles that can also serve as a counterweight for thinking and debating in stereotypes and caricatures, like the often exaggerated and misleading difference between ‘blue culture’ and ‘red culture’ America (that is, Democrats versus Republicans or the progressive versus the conservative). Those two principles are:

- (1) the principle of intrinsic value;
- (2) the principle of personal value.

The former principle means that the successful development of each individual has an objective value, the promotion of which is in everyone’s best interest. There are two explanations for this. First of all, Dworkin – in any event from a methodological point of view – is a legal philosopher in the utilistic-Anglo-Saxon line running from Thomas Hobbes, via Jeremy Bentham and John Stuart Mill, finally to the rational choice doctrine of John Rawls in his ‘A Theory of Justice’.<sup>18</sup> By analogy with Rawls’ philosophy we are all – not just in the prenatal state, but also during the various phases of our lives – placed behind a veil of ignorance to some extent. No one knows exactly what the future will bring him and how his individual well-being will develop over time. Therefore, we all benefit from a minimum degree of institutionalized ‘social empathy’ for that future well-being.<sup>19</sup> So, it is completely rational, for it can be traced back to our well-understood own interest, for us to opt for Dworkin’s principle of intrinsic value in shaping our society. But Dworkin bases this principle also as a deontological principle, partly on Kant’s morale philosophy. After all, if we embrace the concept that, in itself, it is valuable for us to lead a successful life – irrespective of how we define that success – then there is no reason why that would not be equally true for everyone else’s life as well. As Dworkin puts it, referring to Kant’s categorical imperative: ‘(...) respect for our own humanity means respect for humanity as such’.<sup>20</sup> In a democratic society guided by the partnership view, we can be held accountable for that.

The principle of personal value means that each of us has our own responsibility for the course and organization of our lives. Of course, we are thereby factually influenced by numerous external factors, but eventually we will have to decide our own course, even if we thereby submit to the insights and convictions of others. In that sense Dworkin calls our personal responsibility ‘unsubordinated’.<sup>21</sup> Dworkin links his two principles by stipulating that, in the end, our definition of ‘successful’ or ‘worth pursuing’ is our own choice as well. We ourselves fill in the details of those terms, each in our own entirely subjective way. Dworkin’s conception shows great similarities with the so-called ‘formal conception of welfare’ from the welfare theory, a movement in political economy in the Netherlands particularly disseminated by Pieter Hennipman.<sup>22</sup>

14 The quote from Ben Verwaayen at the top of this essay typically expresses this view.

15 Dworkin, *supra*, 131.

16 Dworkin, *supra*, 134.

17 Cf. his *Taking Rights Seriously* (New Impression with a reply to Critics) (London: Duckworth, 2005) (1st edn 1977). For a critical analysis of Dworkin’s work, see Koen Raes, *Rechtsbeginselen en de morele eenheid van het recht* (Legal principles and the moral unity of the law), in *Rechtsbeginselen* (Legal Principles), *Ars Aequi* (1991): 57.

18 For a recent analysis of Rawls, see Peter Van Schilfgaarde, ‘Vertrouwen’ (Trust), vol. 71, no. 5 in the series *Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen* (Communications of the Royal Netherlands Academy of Arts and Sciences) (Amsterdam: KNAW Press, 2009). For an inventory – that is still beautiful – of the pros and cons of utilitarianism, see J.J.C. Smart & Bernard Williams, *Utilitarianism, for & against* (Cambridge: Cambridge University Press, 1973).

19 My own expression (as far as I know).

20 Dworkin, *supra*, 16.

21 Dworkin, *supra*, 17.

22 See his analysis titled *Doeleinden en criteria der economische politiek* (Purposes and criteria of economic politics) – still extraordinarily worth reading – in the compilation *Theorie van de economische politiek* (Theory of economic politics), J.E. Andriessen & M.A.G. van Meerhaeghe (editor and year not stated). About the welfare theory, see my article in the series ‘jeugdsondes’ (sins of youth), titled *De welvaartstheorie als grondslag voor rechtsaanspraken; over misvattingen, misverstanden en dreigend misbruik* (The welfare theory as a cause of action; on misinterpretations, misunderstandings and impending abuse), *NJB*, no. 27 (1981): 704.

So, in Dworkin's words, the personal value principle comprises 'the responsibility to make and execute ultimate decisions about what life would be a good one to lead'.<sup>23</sup> This means that the political system should also guarantee us that we can make the choices to organize our lives as we see fit. Dworkin is however aware of the liberal nature of his proposals, or in his own words: 'I offer these opinions as the basis for a contemporary restatement of the liberal position'.<sup>24</sup> Yet, it would be good to emphasize again that it is not just Dworkin's intention to force a liberal-individualistic legacy on his readers. Again, he is primarily interested in finding a common, rational ground for taking the democratic debate to a higher level. The rationale behind that is that of the homo economicus. There is certainly something to be said against that, but as long as there is no real alternative for social theory building, this is what I feel most comfortable with.

#### 4. IS SHAREHOLDER DEMOCRACY POSSIBLE HERE?

When reading Dworkin's book, I noticed the similarity between the lack of democracy in the United States depicted by him and the corporate governance debate in the Western world. After all, is the latter debate not also characterized by the same exaggerated and – consequently – misleading use of stereotypes and caricatures? Of course, we all know that, on further, more objective, consideration, the American court also takes into account other interests than just the shareholders' in disputes within a company. In actual practice, the shareholders' primacy rule has a lot less priority than it is sometimes made out to have. Even in the United States the so-called 'Revlon doctrine', expressly rejected by the Dutch Supreme Court in the VEB-Bank of America decision,<sup>25</sup> regards a highly extraordinary situation.<sup>26</sup> Likewise, we are aware that the national and international interests of investors play a dominant, if not decisive, role in the practice of our European-continental stakeholders' approach. The Dutch Supreme Court's decision in the RNA-Westfield inquiry is a good example. That decision has set the tone in the Netherlands for the assessment of antitakeover measures against an attempted takeover undesired by the management. Of course, in this decision the Supreme Court emphasized once again the broad company interests and the role of the management in pursuing those interests. Yet, what is more

striking is that, in its assessment of antitakeover measures, as a specific part of that management policy, the Supreme Court's basic principle is 'that enforcing an antitakeover measure for an indefinite period of time will, in general, not be justified'.<sup>27</sup> In his annotation Maeijer correctly points out that this decision corresponds with the position of the government at the time, that is: 'that it is, in general, undesirable for the management of a company to ignore a shift in the balance of power in the general meeting of shareholders for too long'. Although the company's management should be given some time to determine its position vis-à-vis the party taking over the company considering all interests involved, at the end of the day the interest of the (majority) shareholder cannot be ignored. This is also expressed in Article 5:71 (1) (c) of the Dutch Financial Supervision Act [Wft], which provides that a protective foundation will hold its preference shares 'for a maximum term of two years to protect the target company'. According to the Explanatory Memorandum, this means that the shares must be repurchased or cancelled by the target company within two years of issue.<sup>28</sup> After that term the law of occasional power will once again fully apply to the general meeting of shareholders. In reality, therefore, there is not such a dramatic difference between the shareholders model and the stakeholders model. The latter approach merely seems – entirely in accordance with our 'polder model' of reaching consensus – to attach some more value and, hence, allocate some more time to the consultation between the management and the party taking over the company.<sup>29</sup>

Still, for some reason or other, we are unable to bridge the gap that seems to exist between the two approaches. Granted, the English legislature made an admirable attempt in the new Companies Act 2006 by introducing the so-called 'enlightened shareholders model', but so far this seems to lead mainly to a play on words.<sup>30</sup> It sometimes seems as though the participants in the corporate governance debate do not want to bridge this gap. Perhaps it is easy, just as the distinction between red culture America and blue culture America, to label society and categorize its members as conservatives and progressives, capitalists and socialists, pursuers of hard profits and advocates of corporate ethics and corporate social responsibility, followers of the shareholders value model and followers of the 'Rijnland' stakeholders

23 Dworkin, *supra*, 17.

24 Dworkin, *supra*, 143.

25 HR 13 Jul. 2007, NJ 2007, 434, annotated by Ma, JOR 2007/178, annotated by Nieuwe Weme, *Ondernemingsrecht* 2007-10/11, 433, with comments from M.J. van Ginneken (VEB-Bank of America).

26 Cf. Franklin A. Gevurtz, 'Shareholders Democracy: United States' Perspective', *TvOB* 6 (2008): 146–149. In his opinion to the Dutch Supreme Court's VEB-Bank of America decision the Advocate-General Timmerman also notes that, because of the extraordinary nature of the Revlon doctrine, it is highly doubtful whether, under the laws of the State of Delaware, this doctrine should be applied to the ABN AMRO case (Advocate-General's Opinion, para. 3.19).

27 HR 18 Apr. 2003, NJ 2003, 286, annotated by Ma (RNA-Westfield).

28 Parliamentary Papers II 2005/06, 30 419, no. 3, Explanatory Memorandum.

29 In this respect, see also B.T.M. Steins Bisschop in *Bescherming tegen niet geïnvieterde overnames en ongewenst aandeelhoudersactivisme* (Protection against unsolicited takeovers and undesired shareholders' activism) (Zutphen: Paris, 2008), who, on page 70 of his Maastricht oration, thinks he can identify 'a certain convergence' between the shareholders model and the stakeholders model.

30 Cf. Dan Prentice, 'Some Observations on Shareholders Rights', *TvOB* 6 (2008): 150–154. See also H.J. de Kluiver, *Vennootschappelijke replek op Timmerman's grondslagen* (Company law comments to Timmerman's principles), *Ondernemingsrecht* 4 (2009): 19, as well as G.T.M.J. Raaijmakers, *De financiële markt en het ondernemingsrecht* (The financial market and company law), *Ondernemingsrecht* 10 (2009): 430.

model. I think that, here too, Dworkin's insights can guide us. He provides the tools to cross the borders existing in our own minds that prevent us from truly exchanging ideas. Once we realize that Dworkin's principles of human dignity can also fit into, and be recognized in, elements of our company law, here too, they can form the common ground for a productive debate. Below I will make a careful attempt at applying Dworkin's principles to the area of shareholder democracy in the Netherlands.

##### 5. THE INTRINSIC VALUE PRINCIPLE IN DUTCH COMPANY LAW

It is not difficult to see Article 2:8 of the Dutch Civil Code ('DCC') – partly – as a manifestation of Dworkin's principle of intrinsic value, where it provides that all those involved in the legal entity must act in accordance with principles of reasonableness and fairness. The fact that this is a compelling *principle* is shown by the second paragraph, based on which – after all – even rules of mandatory law can be disregarded under certain circumstances. Especially the Enterprise Department has worked out concrete details of this principle by imposing a duty of care on the management – which is often affiliated with the controlling shareholder – vis-à-vis the minority shareholder. Detailed provisions that were upheld by the Supreme Court in its Zwagerman decision.<sup>31</sup> If the majority shareholder's position is combined – as is quite common – with that of (sole) director, his duty of care is tightened even further.<sup>32</sup> The supervisory board has a special responsibility in the performance of this duty of care,<sup>33</sup> which is expressed in numerous subjects and policy domains, such as the adoption and implementation of a (parent) company's dividend and reservation policy,<sup>34</sup> the company's decision-making process,<sup>35</sup> the contacts with joint venture partners,<sup>36</sup> the transfer of assets and shareholdings,<sup>37</sup> a demerger,<sup>38</sup> taking advantage of corporate opportunities,<sup>39</sup> observing sufficient transparency in impending conflicts of interest<sup>40</sup> and, of course, in takeover disputes.<sup>41</sup> In actual practice, the duty of care will often come down to a duty to refrain from doing something, but under

certain circumstances, even a proactive attitude and active intervention may be expected of the management and/or the controlling shareholder, for example when stipulating an adequate exit in the private admission of a (new) controlling shareholder,<sup>42</sup> or of provisions for – deferred – liabilities when splitting up a company into viable and non-viable units or a similar scenario, such as the Fortis 'nationalization' in early October 2008.<sup>43</sup> In such event observing due care in respecting other parties' interests becomes a real duty of care actively to promote those interests.<sup>44</sup>

The dogmatic basis for this duty of care can be compared with that on which Dworkin's intrinsic value principle is based. This can only be seen from a meta-angle. Although the differences between shareholders, in terms of financial interest, control and knowledge, can, of course, be substantial, from a metaperspective, attributing more weight to one shareholder's interest than to the other's cannot be justified. Objectively seen, all shareholders are equal. A director or controlling shareholder who disregards the interest of the minority shareholder undermines the shareholder-ship as such. If Immanuel Kant were a company lawyer, he could have put it (in English) as follows: 'A controlling shareholder who does not appreciate minority protection lacks respect for shareholdership as such.' Furthermore, a controlling shareholder may, in a changed situation, in a different time phase, or in a different company, very well have or obtain the role of a minority shareholder himself. From a (macro) legal economic perspective, therefore, he himself also has an interest in a legal system offering a certain degree of security to protect the position of minority shareholders. This is also good for the company and thus, again, for the controlling shareholder. After all, the bonding hypothesis teaches us that a company operating in a legal system that forces it to respect the minority shareholders' interests will more easily have access to the capital market and can eventually reduce its costs of raising shareholders' equity and loan capital.<sup>45</sup>

Does the duty of care vis-à-vis minority shareholders imposed by the Enterprise Department on the management, as outlined

31 HR 1 Mar. 2002, BJ 2002, 296, annotated by Ma, JOR 2002/79, annotated by I (Zwagerman).

32 Decision of the Enterprise Department [OK] dated 17 Dec. 2007, JOR 2008/35 (De Bruin-De Hasker).

33 OK 7 May 2008, JOR 2008/195 (Staal Satelliet et al.-Vialle).

34 OK 15 Mar. 2005, JOR 2005/88 (EMBA). This decision was upheld by the Supreme Court; HR 1 Sep. 2006, JOR 2006/262 (Sirvana-EMBA).

35 OK 15 Nov. 2005, JOR 2006/40 (Global Green).

36 See, e.g., OK 20 May 1999, JOR 2000/72, annotated by Blanco Fernández (Versatel), OK 8 May 2002, JOR 2002/112, annotated by Blanco Fernández (ETH-Broadnet) and OK 22 Feb. 2006, JOR 2006/123 (Carboply).

37 28 Feb. 2007, JOR 2007/141, annotated by Schmieman (Dialog ID Holdings).

38 OK 28 Apr. 2004, JOR 2004/193 (SCUA Holding).

39 OK 24 Feb. 2006, JOR 2006/125 (CDG Holding).

40 OK 3 May 2006, JOR 2006/211 (Bonne Route), OK 19 Apr. 2007, JOR 2007/142, annotated by Josephus Jitta (Begemann).

41 HR 14 Sep. 2007, JOR 2007/239, annotated by Bartman (Tele2-Centaurus et al.).

42 OK 16 Oct. 2001, JOR 2001, 251, annotated by Blanco Fernández (Westfield-RNA I), ground for decision no. 3.18. The eventual theme of the relief ordered by the Enterprise Department in a series of decisions in the takeover battle regarding Versatel was also securing a reasonable exit for the minority shareholders. See OK 27 Sep. 2005, JOR 2005/272, OK 14 Dec. 2005, JOR 2006/7, annotated by I, OK 24 Mar. 2006, JOR 2006/98, OK 8 Dec. 2006, JOR 2007/14, and OK 12 Feb. 2007, JOR 2007, 69, as well as the decision of the Amsterdam District Court dated 13 Jun. 2007, JOR 2007/176.

43 See my comments in *Ondernemingsrecht* 4 (2009): 216, on OK 9 Feb. 2009, JOR 2009/70, annotated by Josephus Jitta (Fortis II).

44 About the distinction between due care and duty of care, see my earlier comments on the VIBA decision, 'Minderheidsaandeelhouders: tussen exit en zorgplicht' (Minority shareholders, between exit and duty of care), in *Concernverhoudingen* (Group relations) (Deventer: Kluwer, 2002), 29 (41). About the same nuance in connection with the doctrine of wrongful act, in particular that of pure omission, see T.F.E. Tjong Tjin Tai, *Zorgplichten en zorgethiek* (Duties of care and care ethics) (Deventer: Kluwer, 2007), 160 (169). In relation to the creditors of its subsidiary, the Supreme Court under certain circumstances imposes a 'special duty of care' on the parent company; its latest decision confirming this approach is dated 11 Sep. 2009, NJ 2009, 565, annotated by Van Schilfgaarde (Comsys-Van den End q.q.).

45 John C. Coffee, 'Competition among Securities Markets: A Path Dependent Perspective, Columbia Law & Economics', Working Paper, no. 192, 2002, 31.

above, work out in sufficient detail Dworkin's intrinsic value principle? I don't think so. But to illustrate that, I will first have to go deeper into Dworkin's second principle – the principle of personal responsibility – and how that is, or *could be*, shaped in the context of Dutch company law. After all – I have said it before – Dworkin's two principles are closely coherent. In fact, they are two sides to the same coin. Pursuing every party's intrinsic value is inconceivable without the possibility for each person having legal rights to take his personal responsibility, but the latter, on the other hand, would be drifting if one is not free to determine for himself what he thinks is valuable and worth pursuing. As this analysis is about to become a sermon, I will try to explain myself below.

## 6. THE PERSONAL VALUE PRINCIPLE IN DUTCH COMPANY LAW

Dworkin's second principle requires people to be able to make their own choices in their pursuit of happiness, success, welfare, or whatever one wishes to call it. A condition is that everyone can decide for themselves what the latter means to them. Transposed to company law, here too, the area of overlap is obvious: the shareholder's voting right on key issues in the company, such as adoption of the annual accounts, appointment of new directors, determining the remuneration policy, approval of important board resolutions and amendment of the company's articles of association. In the Netherlands the followers of the so-called 'institutional view' on the company usually have trouble plainly accepting that a shareholder can vote the way he sees fit considering his own interests without any restrictions.<sup>46</sup> Of course, the shareholder is to observe the rules of proper conduct as well, and under certain circumstances his voting behaviour may even be wrongful against third parties, like in the dividend resolution in the Nimox decision,<sup>47</sup> but that is a condition that goes for any exercise of powers. Furthermore, it would be obvious to assume that, the greater a shareholder's factual influence in the company the sooner he can be held accountable for his actions and omissions, for example, in the context of inquiry proceedings, but that does not affect the principle of the shareholder's voting autonomy as such either. What I think is sometimes overlooked in discussions on this subject, which usually focus on the validity of a voting agreement, is the fact that in the well-known series of decisions by the Dutch Supreme Court in the matters of Melchers Distilleerderij, Wennex and Aurora, it has consistently held that the shareholder's voting right '(...) is an independent right,

conferred to serve his interest *in the company*'.<sup>48</sup> In my opinion, the italicized part contains an important restriction imposed by the Supreme Court. As soon as a shareholder votes to promote only his own interests *outside the company*, he also steps beyond the company context and, thus, also beyond the scope of effect of the normative principle of voting autonomy. Think, for example, of the corporate raider, who is interested only in his own proceeds from (re)sale after a quick split-up of the company, or a hedge fund that, in a short period of time, burdens the company with great debts only with a view to its own dividend and interest income and subsequently abandons the ship.<sup>49</sup> In other words: the shareholder's own interest may be his *Leitmotiv* when voting, provided that his voting behaviour at the same time serves the continuity and further development of the company. Within that context the shareholder may optimize his position at his own discretion. One could also say that, as long as the shareholder forms part of the company context, he, too, may be required to observe a certain extent of loyalty with the other parties involved. He is to exercise his voting right with due observance of that loyalty. The shareholder's voting autonomy forms part of – and is, therefore, limited by – what Dworkin would call the company as a partnership democracy. But *within that context* it applies to the full extent. In my opinion, the restriction imposed on the voting right by the Supreme Court does not, in the least, imply that it attaches little value to the general meeting as a consultative body, as Van Schilfgaarde and Winter argue.<sup>50</sup> Rather the opposite: the Supreme Court, in fact, emphasizes the company context within which that voting right is to be given shape.

## 7. SHAREHOLDER DEMOCRACY À LA DWORKIN

Transposing Dworkin's ideas on political democracy to a company context means that the principle of the shareholder's voting autonomy is one of the basic principles of our company law. Furthermore, it becomes clear that the duty of care of the company's management – which is often affiliated with the controlling shareholder – vis-à-vis minority shareholders as developed by the Enterprise Department can find a solid dogmatic basis in Dworkin's intrinsic value principle. The consequences for legal practice in the Netherlands are twofold.

Firstly, it means that, where applicable, the court – typically the Enterprise Department – will have to be extremely reluctant to award a request for an order, by way of preliminary relief, prohibiting the company from placing a certain issue on the agenda

46 See, recently, J.B. Huizink, *Rechtspersoon, vennootschap en onderneming* (Legal entity, company and enterprise) (Deventer: Kluwer, 2009), 135, who feels that the basic principle of the shareholder's voting autonomy should be 'strongly played down'. P.J. Dortmund does, however, not agree to the thought that this voting autonomy is an obsolete and abandoned concept. Cf. his Leiden inaugural address titled *Stemovereenkomsten rond de eeuwwisseling* (Voting agreements around the turn of the century) (Deventer: Kluwer, 2000), 11. A rabid advocate of the shareholders vision on the company in the Netherlands is J.M. Blanco Fernández. See, e.g., his annotation to the decision of the Enterprise Department in the Stork inquiry dated 17 Jan. 2007, JOR 2007/42.

47 HR 8 Nov. 1991, NJ 1992, 174, annotated by Ma (Nimox).

48 HR 30 Jun. 1944, NJ 1944, 465 (Wennex), HR 13 Nov. 1959, NJ 1960, 472 (Distilleerderij Melchers) and HR 19 Feb. 1969, NJ 1960, 473 (Aurora). Italics made by the author.

49 Cf. OK 10 Jan. 2008, JOR 2008/39, annotated by Brink (NVJ et al./PCM).

50 Unlike Van Schilfgaarde & Winter, *Van de BV en de NV* (Deventer: Kluwer, 2009), 228.

of the general meeting or prohibiting the shareholders from voting on that issue. It would be improper beforehand to interfere with the shareholders' voting autonomy and the decision-making process in the company, where interested parties often also have sufficient means to suspend or even prevent *implementation* thereof, if necessary. Admittedly, that may be different where a voting right is concerned that was conferred solely in the context of an antitakeover measure, like in the matters of Gucci, Stork or ASMI.<sup>51</sup> But otherwise I feel that there is room for preventive interference with the voting rights of (actual) shareholders only if the intended exercise thereof would evidently threaten to damage the company or third parties. So, only in 'Nimox-like' situations. Therefore, I do not agree with the weak 'serious interests' criterion used by the Supreme Court, as shown in its DSM decision, for the Enterprise Department's ordering preliminary relief at the stage preceding the decision on an inquiry application, at least not to the extent that this also regards the voting rights of shareholders.<sup>52</sup> After all, not only is that kind of interference with shareholders' voting autonomy 'patronizing' – to put it in the Advocate-General Timmerman's words<sup>53</sup> – it is also irreconcilable with the principles of shareholder democracy à la Dworkin. In this respect I also refer to the decision of the Enterprise Department in the AHAM matter.<sup>54</sup> Since I am involved in this case as a cassation lawyer, I cannot discuss this matter in further detail, but this decision also shows what I feel is an ill-timed – for premature – interference with shareholders' voting rights.

A second consequence of application of Dworkin's ideas on (Dutch) company law is of an institutional nature. As we have seen, the Enterprise Department, supported by the Supreme Court, is trying to safeguard the interest of minority shareholders by testing the management conduct against a certain duty of care, which under certain circumstances can also necessitate active intervention. This is a good development, but its relevance should not be overrated. Firstly, these are rules of conduct which, by definition, always intervene after the fact. A certain preventive effect of the duty of care approach cannot be ruled out, but in general I feel that that effect will be minimal at best. The duty of care concept is too vague and, consequently, too little directive for that. We are confronted with an organizational problem here.<sup>55</sup> To the extent that we are looking at an *active* duty of care, moreover, this

is a matter that can only relate to the performance of the management and the supervisory board. A future controlling shareholder cannot be held accountable in this respect. Although he will have to observe due care in relation to minority shareholders, he does not have any active company duty of care.<sup>56</sup> That is also hardly conceivable, as that kind of duty of care should pre-eminently be shaped in acts that are indeed reserved to the management, such as representing the company in private takeover negotiations or splitting up a company into viable and non-viable units. Even if in the new regime of the flexible private limited company a concrete right under the articles of association to issue instructions would be conferred on the *general meeting*,<sup>57</sup> that would still not give the controlling *shareholder* the right to force the management to make certain provisions in the interest of minority shareholders. Finally, I feel that we should also be somewhat reluctant to impose duties of care to all sorts and conditions of persons having legal rights; the concept threatens to become somewhat inflationary.

In my opinion, adequately transposing Dworkin's legacy of thought to company law not only requires further development of the above-mentioned duty of care of the management in case law but also the introduction of a compulsory supervisory body in the structure of any company of some substance. As far as I am concerned, the employees should also have a certain direct influence on the composition of that body. I have expressed that thought before<sup>58</sup> and I will now confine myself to referring to those publications, albeit with the addition that the thought of reserving at least one independent supervisory director for a listed company is, of course, highly sympathetic to me.<sup>59</sup> The Enterprise Department's decisions on inquiries also tend, where possible, to find such an institutional solution to disputes among shareholders, although the Enterprise Department can, of course, do so on an ad hoc basis only. Think, for example, of all those situations where the Enterprise Department, where applicable supported by the Supreme Court, appoints one or more neutral supervisory directors, whether or not conferring specific decision-making and/or representative powers within the company, to secure fair treatment of minority shareholders.<sup>60</sup> Therefore, I strongly disagree with Timmerman where he states in this respect that this institutional approach '(...) has built up

51 On the 'handbag war' involving Gucci, see my series of comments on the Enterprise Department decisions in *Ondernemingsrecht* 5 (1999): 138, vol. 9 (1999): 246, vol. 15 (2000): 444, and vol. 6 (2001): 168. See also OK 17 Jan. 2007, JOR 2007/42, annotated by Blanco Fernández (Centaurus et al./Stork et al.). The latest Enterprise Department decision in the ASMI power battle is OK 5 Aug. 2009, JOR 2009/254, annotated by Hermans (Hermes c.s./ASMI c.s.).

52 HR 14 Dec. 2007, JOR 2008/11, annotated by Doorman (DSM), ground for decision no. 3.6.

53 Cf. his opinion on the Supreme Court's DSM decision, para. 3.93.

54 OK 10 Dec. 2008, JOR 2009/38 (AHAM Employee Representative Body/AHAM).

55 Cf. Van Schilfgaarde in his discussion with Timmerman in the report on the Nijmegen conference on *Concernverhoudingen* (Deventer: Kluwer, 2002), 125.

56 See my earlier comments in this respect in the compilation titled *Concernverhoudingen* (Deventer: Kluwer, 2002), 45.

57 Cf. draft Art. 2:239 (4) DCC.

58 See my editorial 'A Convenient Truth', *European Company Law* 4, no. 3 (2007): 102, my article on *De verweesde onderneming* (The orphaned company), in the compilation titled 'Geschriften vanwege de Vereniging' (Documents on behalf of the association), *Corporate Litigation 2007–2008* (Deventer: Kluwer, 2008), 269, as well as S.M. Bartman & M. Holtzer, 'Evenwichtig ondernemingsbestuur in de polder' (Balanced company management in the polder), *TvOB* (June 2008): 57.

59 Harm Jan de Kluijver, 'Onafhankelijke commissaris als waarborg' (Independent supervisory director as security), *Het Financieel Dagblad* dated 4 Jul. 2009, 19.

60 Cf. HR 1 Mar. 2002, JOR 2002/79, annotated by I (Zwagerman), OK 14 Dec. 2005, JOR 2006/7, annotated by I (Centaurus/Tele2), and OK 17 Jan. 2007, JOR 2007/42, annotated by Blanco Fernández (Stork).

the reputation that it is not effective and rather ideological and is not applied in countries with the most authoritative corporate systems, because it is less suitable when it comes to giving priority to shareholders' interests, like in England and the United States.<sup>61</sup> In my view, this is based too much on a majoritarian view of company order rather than on a partnership view that suits our time better. Moreover, if there is one thing the current crisis could teach us, I think it is that the corporate systems in those countries should not, beforehand, be considered (qualitatively) authoritative as compared to the continental European systems. Quite the contrary may be true: perhaps, at this juncture, the Anglo-Saxon world could also do with a company law reorientation on Dworkin's legacy of thought.

61 L. Timmerman, *Grondslagen van geldend ondernemingsrecht* (Principles of applicable company law), *Ondernemingsrecht* 1, (2009): 4, p. 7

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