Buyout Remedy For Oppressed Minority Shareholders: A Comparative Analysis of Turkish, Swiss and English Laws∗

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Abstract
This article presents an economic analysis of Turkish Commercial Code Article 531 which grants to minority shareholders the right to request dissolution of company for good cause. The court may, in its sole discretion, order purchase at real value of the claimant’s shares or adopt a different solution. This paper focuses on the buyout remedy for oppressed minority shareholders. The remedy is supposed to provide an ex post control on the majority’s conduct, since it is to operate as a put option conditional upon serious oppression. It is argued that the current provision is not designed so as to provide the expected incentives. Hence, economic analysis may contribute to judicial interpretation and/or potential reform of the current provision. We suggest that (i) the claimant must be able to specify the remedy sought rather than giving total discretion to the court, (ii) the oppressive majority, rather than the company, should be the purchaser of claimant’s shares, (iii) the remedy to be adopted by the court has to vary according to the level of oppressive conduct present at the case, and remedy of corporate dissolution should not be applied where there is a profit making going concern, and (iv) valuation of the minority shares should be made, in principle, on a going concern and pro rata basis. The article also explores differences and similarities amongst English, Swiss and Turkish laws in terms of the minority’s buyout remedy, since similar protection mechanisms are foreseen in UK Companies Act 2006 Sections 994-996 and Swiss Code of Obligations Article 736/4.

Key words: Minority protection, buyout, corporate dissolution, put option

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Introduction

Minority shareholders in public companies representing at least 10% of the share capital are granted the right to request corporate dissolution for good causes under the Turkish Code of Commerce No. 6102 ("TCC") Article 531. This is regarded as one of the ‘novelties’ regarding public companies introduced by the TCC. The provision gives the court a wide power of discretion to order buyout of the claimant at real value or to adopt other conscionable solutions appropriate in the case. Given the going concern value of companies and traditional avoidance of courts from intervening in corporate affairs, we are in the opinion that buyout will be the most frequently applied solution.\(^1\) Hence this paper focuses on the buyout remedy.

The first part explains the contractarian theory of corporate law and corporate contract in order to explain the theoretical infrastructure of our analysis. Second and third parts show market failures regarding the corporate contract and the role that the buyout remedy plays therein. Following a comparison of the provision with its equivalents in English and Swiss laws, the last part conducts a normative analysis, shows the shortcomings of the rule and makes suggestions for a more efficient mechanism.

I. Setting the Scene: Contractarian corporate law and corporate contract

According to the contractarian theory, the firm is seen as a more efficient alternative to contracts and exchanges in the market\(^2\). The theory describes the firm as a ‘nexus of contracts’\(^3\), around which capital, credit and labour providers conduct their economic activity. Since the firm is defined as a complex set of contracts\(^4\), corporate law is a specialist branch of contract law\(^5\) acting as a standard-form contract. It’s principal function is to supply default

\(^1\) See the Turkish Court of Appeal's decisions numbered E. 2015/9088, K. 2016/2352, dated 3.3.2016: “It is essential to maintain continuity of the company; pursuant to the provision [TCC 531] the judge is required to evaluate other solutions that would keep alive the company carrying economic value, rather than dissolution”.

\(^2\) Adam Smith shows the benefits of specialisation in society and explains the firm’s role in facilitating specialized economic activity. See Smith, p. 10-17. The firm replaces the price mechanism of the market, thus reduces transactional costs arising from discovering the relevant prices, negotiating and concluding separate contracts for each exchange. See Coase, p. 390-391.

\(^3\) Jensen/Meckling, p. 315; Easterbrook/Fischel, p. 12.

\(^4\) Alchian/Demsetz, p. 794; Jensen/Meckling, p. 315. In Turkish law the firm is considered as a special case of long-term contract. See Çamouflage, Dissolution, p. 673; Yasaman, p. 715; Şahin, p. 58-59.

\(^5\) Armour/Whincop, p. 429. One of the purposes of contract law is “...to reduce the costs of contract
rules into the ‘corporate contract’ in order to reduce transactional costs. The ‘corporate contract’ consists of the terms of a corporation’s articles of association (“AoA”) and the corporate law the firm selects by virtue of incorporating in a particular jurisdiction.

However the contractarian theory of corporate law relies on fictive, rather than legal contracts. First, the AoA is a ‘statutory contract’ and can be altered by special majority rather than unanimity. In addition, the firm, having separate legal personality, differs from other networks of contracts by serving as the common counterparty in contracts with participants. Therefore, the firm is more accurately described as a ‘nexus for contracts’.

Combined with the agency theory, the contractarian corporate law focuses primarily on reducing agency costs mainly related to informational asymmetries among corporate constituencies, and providing companies with separate legal personality to lower the costs of conducting business.

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6 Easterbrook/Fischel, p. 15.
7 A distinction is made between ‘corporative terms’ and ‘contractual terms’ of the AoA according to whether they are simply contractual or not. See Okutan Nilsson, p. 95.
8 Mäntysaari, p. 69. The broadest interpretation of ‘corporate contract’ may comprise all understandings and agreements be it written (shareholders’ agreement) or unwritten. See Riley, p. 785-786.
9 Mäntysaari, p. 70-71.
10 Davies/Worthington, p. 70; Manavgat (Kırca/Şehirali Çelik), p. 299; Okutan Nilsson, p. 95. Once the company is registered, the provisions of AoA become objective norms, rather than ordinary contractual terms.
11 Hansmann/Kraakman, p. 391.
12 Armour/Hansmann/Kraakman, p. 6
14 Three principal sources of conflicts are between i) managers and shareholders, ii) shareholders and other corporate constituencies, and among ii) shareholders inter se. See Armour/Hansmann/Kraakman, p. 2.
II. Market Failures

The assumption of ‘complete’ corporate contract means every contingency is internalized in the corporate contract\(^{15}\), and hence, both express and implied terms in corporate contract must be enforced. However, there are market failures arising from the long-term nature\(^{16}\) of corporate contract. Therefore the corporate law fills the gaps in corporate contracts by supplying default terms and regulates the market failures by mandatory rules\(^{17}\).

First, due to transactional costs it is practically impossible and financially undesirable to make express provisions covering all future events. Even if parties conclude a comprehensive contract, the terms become ‘unbargained for’ with the passage of time. Second, informational asymmetry among shareholders and the tendency to undervalue remoter risks aggravate incompleteness of the contract\(^{18}\). Moreover, constraints on minority shareholders may prevent them from stipulating protective mechanisms, such as put options against oppression of the majority. On the contrary, minority shareholders are locked in the company when there is no liquid market for shares\(^{19}\). Particularly the minority in closely held companies is devoid of the market-related governance mechanisms\(^{20}\) available for shareholders in listed companies. Since the capital markets are shallow and share ownership patterns are not dispered in Turkey\(^{21}\), even shareholders in listed companies cannot rely on these systems.

\(^{15}\) Sanlı, pp. 46-47.

\(^{16}\) In Turkish law, legal basis of ‘action for dissolution for good cause’ is based on the long-term nature of contracts. See Çamoğlu, Partnership, p. 63; Yasaman, p. 715 and the other authors mentioned at Şahin, p.40-42.

\(^{17}\) While default terms lead to minimize transactions costs by reducing negotiation costs, mandatory rules are justified by the presence of market failures. See Cooter/Ulen, p. 292-295. According to Easterbrook & Fischel mandatory rules of corporate law operate, in particular, with respect to shareholders. Because they are the residual claim-holders who “claim to what is left over” rather than a fixed income, such as creditors. See Easterbrook/Fischel, p. 25.

\(^{18}\) Riley, p. 789.

\(^{19}\) Çamoğlu, Partnership, p. 59.

\(^{20}\) Another mechanism is the market for corporate control. It is claimed that the shares’ price decreases in parallel with the managers’ poor performance; the threat of the company’s becoming target for a takeover disciplines the management who wants to keep their office. Manne, p. 119. According to the ‘efficient capital markets hypothesis’ all relevant information is impounded into the share price, thus internalized \textit{ex ante} in the bargain, see Gilson/Kraakman, p. 569-572.

\(^{21}\) Demirağ/Serter, p. 40-41. Turkish corporate governance system approximates to the bank-based system, rather than the market-based system.
III. Put option against oppression: gap-filling or regulation?

In public companies, decisions of both general assembly and board of directors are taken by majority without unanimous consent. On the one hand, the majority rule minimizes transaction costs by reducing *ex ante* contracting and by solving potential hold up problems. On the other hand, the rule relies on shareholders’ democracy, albeit it has certain limitations. The majority rule leads to the separation of ownership and control. To clarify, the minority’s share capital is managed by the majority shareholder, who thus acts as the agent of the former. Agency costs arise where agent acts in parallel with her own interests, rather than that of principal. Consequently, the majority rule may operate to the detriment of the minority. For this reason the majority rule’s operation must be controlled *ex post* by courts.

Courts enforce implied terms of corporate contract as an *ex post* control of the majority rule. The concept of ‘hypothetical bargain’ plays a central role here. It consists in the terms the parties would have stipulated if they had filled the gaps in the contract by actual negotiation. In this regard, put option against oppression of the majority can be seen as an implied term of the corporate contract. The alternative view considers granting such an option as regulation of corporate contract, rather than gap-filling. Accordingly, courts do not only imply contractual terms or fill gaps, but also regulate contract due to informational asymmetries and constraints. In particular, law can prescribe exit opportunities for principals to escape opportunistic agents.

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22 Poroy (Tekinalp/Çamoğlu), N. 750; Riley, p. 786.
23 Riley, p. 787.
24 Cooter/Ulen, p. 294. In the context of a dispute between shareholders it is assumed that behind the veil of ignorance a shareholder would choose a joint-wealth maximizing term. The concept of “real and common will of the parties” is also found in the Turkish Code of Obligations Article 19. See Sanlı, p. 56.
25 According to Prentice, the court provides hypothetically bargained default provisions while applying the ‘unfair prejudice remedy’ under the section 994 of Companies Act 2006, which is the equivalent of the TCC 531. See Prentice, 81-82; Cheffins, p. 785.
26 The term ‘regulation’ is not used in this paper as an alternative method to Pigouvian taxation. It stands for intervention in contracts through mandatory norms, rather than gap-filling or interpretation with default rules of law.
27 In reality shareholders are aware of their position as majority or minority, and they would prefer the terms maximizing their own benefit, if asked *ex ante*. It is thus asserted that the court is regulating corporate contract, rather than filling gaps by the ‘hypothetical bargain’ criteria. See Riley, p. 797.
28 Armour/Hansmann/Kraakman, p. 41. Most of the jurisdictions give the minority the right to force a corporate dissolution in the cases of egregious abuse and systematic appropriation of corporate profits. *ibid*, p. 161.
In our view, TCC Article 531 is enacted to provide the minority with a right of put option where there are ‘good causes’, i.e. the majority’s oppression. The provision implies a non-excludable term *ex ante* into the corporate contract which may be triggered upon oppression. Therefore, it makes sense to consider this mandatory term as a regulation of corporate contract, rather than an implied term thereof.

**IV. Turkish, Swiss and English Legislations**

The right to request dissolution of public companies for good causes was first recognized with the new TCC that has entered into force on 1 July 2012. Similar provisions for public companies are found in the Swiss Code of Obligations (“SCO”) Article 736/4 and the UK Companies Act (“CA”) 2006 Sections 994 - 999.

The TCC Article 531 reads as:

“In the event that there is a good cause, the shareholders owning shares that represent at least one-tenth of the capital and one-twentieth of the capital for publicly held joint stock companies, may request the dissolution of the company from the commercial court of first instance present in the place where the company’s headquarters is located. The court may decide that the claimant shareholders shall be paid the real value of the shares which shall be determined by taking into account the real value on the closest date to the date of the decision and removed from the company or any other solution that is compatible with the situation instead of dissolution.”

The SCO Article 736 reads as:

“The company is dissolved: ...

4) by court judgment if shareholders together representing at least ten per cent of the share capital request its dissolution for good cause. The court may order a different solution if appropriate and conscionable for the interested parties.”.

29 In force since 1.7.1992.

30 Just and equitable winding up exists since the Joint Stock Companies Winding Up Act 1848. It is now found in the Insolvency Act (IA) 1986 Section 122/1-g. With the Companies Act 1948 Section 210, the request for just and equitable winding up and petition against unfair prejudice were dissociated to strengthen the minority’s position. We compare the petition against unfair prejudice of the section 994 CA 2006 with the TCC 531, since the article 122 of IA 1986 permits only to dissolution of companies. Furthermore unfair prejudice remedy has crowded out winding-up petitions (*Armour/Hansmann/Kraakman*, p. 161).
The CA 2006 Section 994/1 reads as:

“A member of a company may apply to the court on the ground:

(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. According to the CA 996/2-e

The CA 2006 Section 996 reads as:

“(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court’s order may—

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.”

It seems that the Turkish legislator adopted an approach similar to the Swiss provision by giving the right to request a corporate dissolution to the minority, rather than the individual shareholder, and by providing all remedies in the action for dissolution. However, unlike the Swiss provision, TCC Article 531 guides the court\(^{31}\) to order buyout of the minority and thus approximates to English law in this regard.

In Switzerland there has been no case where the minority is permitted to leave the company since 1992\(^{32}\), while in the UK ordering the buyout of the minority is the most frequently

\(^{31}\) Tekinalp, Procedure, p. 214.

\(^{32}\) Şahin, p. 391.
applied solution. The Turkish Court of Appeal has adopted a steady position in prioritizing the buyout remedy over other remedies. Since TCC Article 531 entered into force in July 2012, there are only five published decisions where the Court confirmed good cause claims. The Court gave buyout order in four of these cases, and dissolution order in only one. Moreover the Court overturned a decision of the court of first instance just because the latter had refused claimant’s case without considering a buyout remedy. Therefore it is expected that the purchase of the claimant’s shares will be the most preferred solution, particularly for closely held companies, as it seems to be the most efficient solution compared to corporate dissolution or involvement of the court into the affairs of the company.

V. Normative Analysis of the TCC Article 531

A. Purpose of the Rule and Expected Incentives

The majority shareholder, by abusing her power of control, may obtain private benefits, e.g. appropriation of corporate funds. She can achieve this end by receiving exorbitant payments as a board member while consistently depriving other shareholders of dividend. In this way, she can raise her wealth by transferring corporate assets to her personal patrimony. However, the majority’s self-seeking conducts generate, in mid-term and long-term, indirect losses to all shareholders. The company may lose credibility in the eyes of its creditors and potential investors, hence the company’s financing options may be limited and it may not raise finance as cost-effective as before. In addition, company’s value, thus shares’ price may decrease as well as distributable profit with the reduction of corporate assets.

In the absence of TCC Article 531, the majority would make a cost and benefit analysis while consuming corporate funds. In such cases where there is net profit, it would be expected that the majority would act to the detriment of the minority. Therefore, there would be negative

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33 Sealy/Worthington, p. 647. Of 233 petitions against unfair prejudice issued only between January 1994 and December 1996 in the UK, 69.5% sought an order that the petitioner’s shares be bought and 23.6% sought an order that the respondents sell their shares. See Law Com Report, p. 28-29.

34 The Turkish Court of Appeal decision no. 2014 3669/10238.

35 For an unusual perspective towards private benefits of control, see Ronald Gilson / Alan Schwartz, “Corporate Control and Credible Commitment”, http://ccl.yale.edu/sites/default/files/files/Corporate_Control_and_Credible_Commitment.pdf, pp. 39-41. The authors assert that there is an optimal share that can be consumed by the controller which would incentivize them to monitor managers.

36 The majority’s appropriation need not come from an obvious illegal transaction, she can profit by circumventing the law or operating the company solely in parallel with her interests.
externalities stemming from the agency conflict between shareholders. Nonetheless, the threat of buyout of the minority may function as a kind of put option conditional upon the existence of good causes. The oppressed minority’s request will involve litigation and valuation of the shares in question. Such costs, plus the purchase price itself will constitute the implicit price\textsuperscript{37} of the majority’s oppressive conduct. Therefore the threat of a buyout remedy may increase the cost side of the equation, and the negative externality on the minority may be internalized \textit{ex ante}. As a result, the buyout remedy is supposed to incentivize the majority to respect the minority’s interests. This may be then considered as a negotiation tool in situations of minority oppression, discouraging extreme forms of abuse \textit{ex ante}\textsuperscript{38}.

However the current provision is not designed so as to provide the expected incentives. Quite to contrary, the below explained shortcomings may lead to opportunistic behaviours of both sides, ie. minority and majority shareholders. And the gaps of the provision (\textit{lücken intra legem}) due to it’s framework law nature, generate serious ambiguities for practice.

\textbf{B. Shortcomings of the Provision}

\textit{1. Courts’ wide discretionary power and uncertainty of the outcome}

TCC Article 531 grants to minority shareholders merely the right to request corporate dissolution where there is a good cause. To be more precise, the minority does not have a ‘right’ to leave the company by requesting to be bought out. The power of discretion to order either dissolution or purchase of shares belongs solely to the court\textsuperscript{39}. Accordingly this may be better characterized as an ‘opportunity’ to leave the company. The uncertainty of the outcome affects the \textit{threat value} and complicates the incentives on both sides. This may either create \textit{hold up} problems on the minority side or, conversely, decrease the majority’s incentives to respect the former’s interests.

On the one hand, the minority may use the threat of corporate dissolution as a tactical litigation and expect to profit out of it even though the majority’s behaviour is not as oppressive as to constitute ‘good cause’ for dissolution. The lack of safeguards, such as

\begin{itemize}
  \item \textsuperscript{37} Cooter/Ulen, p. 3.
  \item \textsuperscript{38} Tekinalp, Dissolution, p. 322; Armour/Hansmann/Kraakman, p. 162.
  \item \textsuperscript{39} Since this paper focuses on the buyout of the minority, other solutions and dissolution are not analysed separately.
\end{itemize}
requirement of collateral by the claimant in order to proceed, raises the risks. Assume that the
cost of dissolution for the majority is $100 and the ‘real value’ of the minority shares is $40.
The majority would be *ex ante* ready to pay any amount below $100 for the minority’s shares
in order to evade from dissolution. The minority can thus profit by applying to court for any
amount she receives above the real value of her shares.

On the other hand, the minority may abstain from using this legal tool, since she cannot
request a specific remedy and the court’s order may deviate from the claimant’s will. For
instance, the court may give a buyout order, even if the claimant only expected a dividend
distribution. A similar case would be the order of corporate dissolution where the minority
sought for a buyout. This uncertainty may operate as a disincentive for the minority to use
her right, which eventually decreases the incentives on the majority to respect minority rights.

In our view the claimant must have a say on the outcome of the proceedings. Unfortunately
this cannot be achieved through judicial interpretation while the provision does not permit the
claimant to request for a specific remedy except for applying for corporate dissolution. Hence
a legislative reform is necessary to achieve to this end.

2. *The company being the purchaser of the shares*

The wording of TCC Article 531 implies that the purchaser of the shares is not the oppressive
majority, but the company itself. The provision specifically sets out an ‘action for corporate
dissolution’, and so the company is the respondent of such action. According to Turkish
procedural law, the court cannot deliver a judgment that binds a third person who is neither a
party nor an intervenor. Therefore the majority shareholder cannot be ordered to buy the
claimant’s shares. It follows that the majority is not directly liable for the *implicit price* of her
unfair conducts, and is not sufficiently incentivized.

Unlike English law, TCC Article 531 does not explicitly permit the court to oblige the
oppressive majority to purchase the claimant’s shares. However this problem might be

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40 There might be an argument that the minority is deemed to have accepted to leave the company *a fortiori* by filing an action for corporate dissolution in the first place. Although both of the demands aim to end the membership to the company, the results diverge, in that the applicant receives only the liquidation value of the shares if the company dissolves, whereas she receives the ‘real value’ if bought out.

41 Çamoglu, Dissolution, p 683-684; Tekinalp, Procedure, p. 218; Sahin, p. 418-421; Erdem, p. 267.
overcome by making the majority shareholder party to the litigation. The majority may voluntarily join on-going litigation if she is willing to buy the claimant’s shares, or the judge may give an order of intervention as the majority has close connection with the case.

3. Threshold of ‘good causes’

Pursuant to TCC Article 531, the court may order one of the remedies (dissolution, buyout or other solutions) only if there is a ‘good cause’ justifying dissolution of company. According to the wording of the current provision, the court may order a remedy once the claimant’s request for corporate dissolution is accepted. Otherwise, the court must refuse the case. It follows that the same threshold of ‘good cause’ is adopted for every kind of remedy, such as dissolution, buyout or other solution.

In our view application of the same threshold for each remedy distorts the incentives sought by the provision. Therefore, the remedy to be adopted by the court has to vary according to the threshold of ‘good cause’ in the present case. The court should not refuse the case even if the cause does not justify dissolution of the company. In other words, the court should be able to give a buyout or another order in that case. Otherwise setting the same threshold for each remedy may decrease the majority’s incentives. Assume that the cost of dissolution for the majority is $100 and the majority appropriated $40 through her abusive conducts.\(^{42}\) Since such good causes cannot justify dissolution of the company, the court cannot give an order of buyout and thus the majority is not obliged to pay the implicit price of her oppressive conducts.

It must be noted that potential effects of an order for corporate dissolution is much wider than other remedies. Corporate dissolution not only deprives the majority from private benefits of control, it also creates devastating costs for other stakeholders, such as creditors, employees and the society. Corporate dissolution, thus, seems to be an inefficient remedy in cases where there is a going concern. Even setting the threshold of good causes at high level may not be a solution unless the company is already financially distressed and at the verge of bankruptcy.

\(^{42}\) In some cases the level of good causes may not be directly associated with the amount of private benefits that the majority has made.
4. Valuation of the claimant’s shares

There are two questions about the valuation of the claimant’s shares: i) which basis of valuation to be used and ii) the date on which they are to be valued. TCC Article 531 reads as: ‘...real value of their shares that are valued on the closest date to the judgment...’. It can be understood that neither the liquidation nor the market value of the shares are taken as a basis. However the ‘real value’ does not evoke a specific valuation method, and can be confused with ‘full’, ‘adequate’, ‘reasonable’ or ‘fair’ value that are used in various legislations.

The ‘real value’ is a quite abstract and ambiguous concept that is not able to guide the court as to whether shareholding is valued on a pro rata\textsuperscript{43} or a discounted basis\textsuperscript{44}. However economic analysis can shed a light on the issue.

According to the bargain theory, the promisee is entitled to the ‘benefit of the bargain’, which means the benefit she would have obtained from performance of the promise\textsuperscript{45}. Correspondingly, the purpose of the payment of ‘real value’ is ‘to provide the leaving shareholder with the same economic condition as she would have, if she remained in the company’\textsuperscript{46}. Given these, valuation must be made, in principle, on a going concern and pro rata basis. However, as applied in English law, discount basis seems more adequate where the minority shareholder holds her shares purely as a form of investment, rather than using her administrative shareholding rights\textsuperscript{47}.

In respect of the date to be taken as a basis, the date closest to the judgment is the choice of the legislator. Yet, this may impair the minority’s rights by providing less than she would have obtained if there was no oppressive conduct at all. Oppressive conducts in all likelihood are reflected in the value of the company, hence that of shares. The valuation at the closest date to the judgment, thus, transfers to the minority a part of the costs generated by the majority. Furthermore, the majority is incentivized to further attempt to decrease the company’s value until the date of the judgment.

\begin{itemize}
\item Pro rata value of the shares excludes the control prime by simply dividing the total value of the company by the proportion of the shareholding.
\item Contrary to pro rata basis, this valuation method does not ignore the private benefits of control. Thus discounted basis values each minority share less than that of the majority.
\item \textit{Cooter/Ulen}, p. 281.
\item Şahin, p. 462.
\item The fact that the shareholder does not have an active involvement in the company may show that her utility of being a shareholder is less than another shareholder who actively uses her administrative rights as well. See \textit{Consultative Report}, p. 98.
\end{itemize}
5. Pricing problem

The buyout remedy can be seen as a liability rule in terms of Calabresi-Melamed taxonomy\(^48\). While the majority rule enables the controller in the first plan to manage the company according to its own interests, the buyout remedy offers real value of the claimant’s shares in cases where her rights qua shareholder are heavily infringed. Therefore a buyout order is supposed to operate as the implicit price of the controller’s conduct.

However there is a clear pricing problem with the current mechanism. First, the provision does not take into account valuation of negative externalities upon the claimant. Second, indexing the implicit price of the controller’s conducts to the value of the claimant’s shares does not offer an efficient tool. The claimant minority may have had losses less (or more) than the total value of her shares. The problematic wording of the provision may be partially overcome by adopting a relative threshold of ‘good causes’ that would vary according to the remedy sought in the case. While considering whether there are good causes to accept the buyout claim, the court is to take into account alternative remedies and the claimant’s losses. If the latter is below the value of the claimant’s shares, then an alternative remedy may be ordered, such as distribution of profit or modification of the articles of association.

Conclusion

The remedy of the minority’s buyout under TCC Article 531 is supposed to operate as a put option conditional upon serious oppression. The threat of a buyout order incentivizes the majority to respect the minority’s interests. However the current provision is not designed so as to provide the expected incentives.

First, the court has a wide power of discretion and the claimant cannot request a specific remedy. In order to prevent distortion of incentives on both sides, the claimant must have a say on the remedy. Second the company’s being the purchaser of the claimant’s shares, rather than the oppressive majority, seems to decrease the implicit price of corporate abuses. The court should be able to oblige the majority to purchase the shares. Third, the same level of threshold for ‘good causes’ is incompatible with the purpose of minority protection. Hence

the remedy to be adopted must be proportionate to the level of oppression. Finally valuation of the claimant’s shares should be made on a going concern and pro rata basis, unless the minority is only a passive investor.
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