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Tel: 1-847-281-9862
Fax: 1-847-281-9855
E-mail: jurist@davidpublishing.com; lawyer1658@hotmail.com; law.review1658@yahoo.com.

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EMPIRICAL RESEARCH ON THE FACTORS OF UNUTILIZED PATENTS FROM FOUR ASPECTS BASED ON PATENTS REGISTERED AT PLDB

Hirokazu Matsuno * & Yoshitoshi Tanaka **

In advanced countries, especially in Japan, there are many unutilized patents owned by Japanese enterprises. These unutilized patents consume much money without contribution to business profits directly. In order to reduce unutilized patents and acquire utilized patents, it is necessary for the enterprises to make analyses on the factors related with unutilized patents. There are, however, few previous researches having analyzed the factors. In this research, we formed four hypotheses, related to “basic-ness of patent”, “evaluation by applicant”, “fit between technological fields” and “intensity of patent application competition”. And we analyzed the factors through these hypotheses by using a logistic regression model based on Patent Licensing Database (PLDB) that we can check whether registered patents have been utilized or not. Especially, we focused on patents owned by Panasonic Corp.. As a result, briefly speaking, it was found that the basic-ness of patent, the fit between technological fields affected the probability that patents became unutilized negatively, and the evaluation by applicant affected the probability both positively and negatively, it


** Yoshitoshi Tanaka is a Professor at the Graduate School of Innovation Management, Tokyo Institute of Technology. He graduated at the Tokyo Institute of Technology in 1980, and joined Japan Patent Office, Science and Technology Agency, a research fellow at UCLA in the US, until 1991. He is a registered Patent attorney since 1994, and a member of Japan Intellectual Property Academic Association, AIPPI, Japan MOT Society, etc.. Research field: Intellectual Property Management.
depended on the concrete variable. Implications obtained from this result are as follows. Enterprises need to (1) give priority to an acquisition of basic patents, less priority on improvement patents, (2) revise contents of patent applications and the criterion or process in the use of patent systems supporting applicants, for example, divisional application system, filings of foreign patent applications based on the criterion or process in request for examination or in the use of claiming priority, (3) review own strength and perform R&D in the technological field close to the technological field related to the strength irrespective of the intensity of patent application competition while they grope the way of utilization of patents that is, open innovation in a broad sense. Meanwhile, the government and authority need to (1) encourage enterprises to acquire basic patents as in the past in addition to improvement patents, (2) review some of patent systems supporting applicants, for example, divisional application system, and to assist enterprises to review contents of patent applications and filings of foreign patent applications, (3) encourage enterprises to reconfirm their technological strength and carry out R&D in the technological field related to the strength while they also stimulate them to pay attention to open innovation in a broad sense. These implications are also useful for an inventory clearance of patents. However, these were derived from PLDB data, so development researches are necessary in the future, for example, an analysis of the factors of patents registered at PLDB.

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INTRODUCTION

A. Background

During 1980’s, when the US faced on losing industrial competitiveness, they changed their policy concerning intellectual property rights, putting its importance on IP protection. This policy is called Pro-Patent Policy with convert actions to strengthen IP protection, for example, the foundation of
Court of Appeals for the Federal Circuit (CAFC), the expansion of patent protection in biotechnology and software fields. And it is said that this policy contributed to the improvement of competitiveness of US. On the other hand, Japan also faced on the similar satiation in 1990s and adopted the same concept of Pro-Patent Policy in the late 1990s to recover from a recession.

The main idea of the Pro-Patent Policy in Japan is the Intellectual Creation Cycle consisting of three stages (Figure 1), that is, Intellectual creation (R&D), Establishment of rights (Obtaining patents), Utilization of rights (Return of investment and cost the cost of R&D).¹

![Figure 1 Intellectual Creation Cycle](image)

When we look the situation in Japan, both R&D expenditures and the number of patent applications are positioned in very high level from Figures 2-4.² According to Figure 2 and Figure 3, Japan has large R&D expenditures.

![Figure 2 R&D Expenditures among Major Countries](image)

---

Especially, R&D expenditures on GDP is the largest among advanced countries. And according to Figure 4, Japan still keeps large number of patent applications although the number has been decreasing gradually. Moreover, figure 5 shows that the number of registered patents in Japan is over 1 million\(^3\). It seems that intellectual creation and establishment of rights have been activated in some extent.

However, Figure 5 also shows the existence of unutilized patents in Japan. Unutilized patents mean the patents which have never been used or licensed. Roughly speaking, about 50% patents including defense purpose patents out of all registered patents are unutilized, that is, utilized patents are only about a half of all. We can say that Utilization of rights has not yet been activated enough. According to Tanaka (2010)\textsuperscript{4}, several reasons that patents become unutilized are discussed, for example, a lack of collaboration between IP department and the other functional departments, a lack of considerations of commercialization for patent applications and so on. In Europe and USA, there are some researches, for instance, Palomeras (2003)\textsuperscript{5}, C. Katrin et al. (2006)\textsuperscript{6}, indicate that the ratio of unutilized patents is about 30-40%.

If unutilized patents require acquisition and maintenance costs but do not basically generate profits, worse yet, they are just generating the outflow of technological information to public without their utilization; we have to say that unutilized patents do not directly contribute to the economic growth, the improvement of competitiveness or the innovations in enterprises and countries directly. In this situation, it is necessary to reduce unutilized patents, expecting to acquire the patents which can be utilized efficiently for the economic growth, the improvement of competitiveness or

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{unutilized_patents.png}
\caption{Ratio of Utilized and Unutilized Patents in Japan}
\end{figure}


the innovations in enterprises and countries.

B. **Prior Researches**

Recently, some researches focusing on unutilized patents in a broad sense have been carried out. Palomeras (2003)\textsuperscript{8} analyzed factors of unutilized patents which were registered at USPTO and offered for sales at yet2.com by using some regression models. The yet2.com is the site that stores open patents and anyone can access the site and search open patents, with free of charge. According to Palomeras (2003), roughly speaking, the probability that patents become unutilized is affected positively by the number of inventors of the patent and the frequency of the primary class of the patent assigned in the enterprise’s patent portfolio, these are referred as proxy variables of “Strategic fit”, the number of claims in the patent and the Herfindhal-Hershman index (HHI) on the spread of citations received from different patent classes, these are referred as proxy variables of “Scope”, the HHI on the spread of citations made to different patent classes and the mean lag between the application year of the patent and that of the citing patents, these are referred as proxy variables of “Innovativeness”. On the other hand, the probability is affected negatively by the number of citations that the patent makes to previous patents and share of citations made to patents by the same enterprise; these are referred as proxy variables of the Innovativeness. As a result, considering expected signs, the probability is affected positively by the strategic fit and the scope, and the innovativeness affects the probability positively and negatively, it depends on concrete proxy variables.

Nishimura (2006) analyzed factors of unutilized patents which were registered at JPO and were open to a technology market by using some regression models. According to Nishimura (2006), the probability that patents become unutilized is affected positively by the payroll number of a enterprise referred as a proxy variable of “enterprise size”, the technological distance between the patent and the patents of patent portfolio of the enterprise referred as a proxy variable of “technological fit” between the patent and the assets of the enterprise, the number of countries which the patent is filed to referred as a proxy variable of “quality of invention”. On the other hand, the probability is affected negatively by the accumulated number of claims of patents in enterprise’s patent portfolio belong to the same technological field as the patent referred as a proxy variable of the technological fit, the HHI based on the number of claims and R&D intensity (R&D expenditures/sales) and an increase of the number of claims in the
technological field of the patent referred as proxy variables of “R&D competition” in the technological field of the patent. As a result, considering expected signs, the probability is affected positively by the enterprise size and the intensity of the R&D competition and is affected negatively by the degree of the technological fit, and the quality of invention affects the probability positively and negatively, it depends on concrete proxy variables. As above mentioned, there are some researches about unutilized patents in US and JP. However, Palomeras (2003) defined open patents registered at yet2.com as unutilized patents, so there is the probability that his definition is not appropriate, because the patents which have already been utilized are also included and registered in yet2.com, and the unutilized patents which are not registered at yet2.com are existing. On the other hand, Nishimura (2006)10 focused on patents open to a technology market, that is, registered at Patent Licensing Database (PLDB)7 and described them as unutilized patents. However his definition that all other patents except for unutilized open patents are utilized patents is not also appropriate in terms of JPO survey saying the ratio of unutilized patents is around 50% including defense purpose patents. Therefore, it is necessary to make analyses according to more precise definition. In the first place, the researches on unutilized patents are not enough due to a delay of DB building. Moreover, these past researches did not include the quality or value of inventions or patents, there are other hypotheses to be verified and indexes used in prior researches are not enough though various indexes were considered in the prior researches. Especially, there is a lack of analyses from some important aspects, such as “Basic-ness of patent”, “Evaluation by applicant” etc., therefore we focus on these viewpoints which will be significant to reveal factors of unutilized patents.

C. The Aim of Research

This research aims to analyze the factors generating unutilized patents to reduce them efficiently and to promote utilization of patents obtained. So this research analyzes them from four aspects including new aspects different from prior researches.

In this research, we define a pioneer patent such as a patent having no prior arts, having high technological advancement from prior arts or having a high originality as a basic patent or a patent having high basic-ness, while we can define a patent which is not a pioneer patent as an improvement.

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patent or a patent having low basic-ness. According to Tsushima (1996)\(^8\), enterprises think that patents having high originality or creativity, that is, high basic-ness become more utilized. Generally speaking, a basic patent has high applicability and a wide scope of right due to its basic-ness. From these viewpoints, we can suppose that “If the basic-ness of a patent is low, the probability that the patent becomes unutilized increases.” and we adopt this idea as Hypothesis 1 related to “basic-ness of patent”. Hypothesis 1 is seemingly an ordinary idea but has never been verified so far with comprehensive approaches. So we assume that it is important to reveal the relationship between the basic-ness of a patent and the probability of utilization of the patent.

Meanwhile, recently intellectual property strategies of enterprises become indispensable and strategies about patents are the most important in almost all enterprises. Needless to say, each value of patents is different and enterprises holding patents recognize each value of patents respectively at least depending on their subjectivity. For example, patents evaluated high by an applicant are also filed to foreign countries. According to Tsushima (1996), enterprises think that patents with patent families are utilized, that is, it would appear that patents evaluated high are utilized in the enterprise consciousness. From these viewpoints, we can suppose that applicants normally concentrate resources on patents protecting inventions they evaluate high in acquisitions of patents because of various costs, and these patents are utilized than patents protecting inventions evaluated low by applicants, that is, “If the evaluation of a patent by an applicant is low, the probability that the patent becomes unutilized increases”. And we adopt this idea as Hypothesis 2 related to “evaluation by applicant”.

Then, we also consider viewpoints similar to concepts adopted in prior researches. These standpoints are from internal and external environments, concretely speaking, “If the fit between the technological field of a patent and the technological field of patents an applicant have filed in the past is low, the probability that the patent becomes unutilized increases”, “If the intensity of patent application competition in the technological field of a patent is high, the probability that the patent becomes unutilized increases”. And we adopt these ideas as Hypothesis 3 related to “fit between technological fields” and Hypothesis 4 related to “intensity of patent application competition”.

These hypotheses may be common-sense but it is valuable to verify them based on objective data. And if we analyze factors of unutilized patent

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by verifying these hypotheses, we can get valuable knowledge and we believe that this knowledge contributes to the development in this research field.

Part I explains our research design consists of data and methodology including hypotheses, Part II examines our hypotheses based on 1000 patents and states results and considerations, Part III summarizes our research.

I. RESEARCH DESIGN

A. Data

In this research, we use PLDB data and the same definition of unutilized patents as Nishimura(2006)\textsuperscript{10}, that is, patents described neither “used” nor “licensed” in PLDB are defined as unutilized patents, and we define patents registered at PLDB except for unutilized patents as utilized patents, that is, patents are described “used” or “licensed” in PLDB. We should not miss this information which shows the status of utilization of patents. So we confine the data to patents registered at PLDB. This is the difference from Nishimura (2006)\textsuperscript{10}. Therefore the definition of utilized patent and unutilized patent in our research is more accurate though our data are confined to patents registered at PLDB.

PLDB was built up as part of measures of encouraging patent licensing under the initiative of JPO. This DB is open system in which anyone can register patents with license information etc. in Japan and enables both licensors and licensees to search open patents and get useful information to make license agreements or purchase and sell the patents. At present, about 45,000 patents are registered at PLDB and there are about 2,700 registrants including about 1,200 enterprises, 1,300 individuals and 200 laboratories, TLO, universities.

![Figure 6: The Distribution of Surveyed Patents](image-url)
In this research, we focused on patents owned by one leading enterprise in Japan, Panasonic Corporation as the first step, to expand our research in the future, and the number of patents is 1000, which is about 40% out of Panasonic’s patents registered at PLDB. Figure 6 shows the distribution of surveyed patents. The number of utilized patents is 326, the number of unutilized patents is 674.

| Table 1 The Number of Surveyed Patents in Each IPC Section |
|-----------------------------------------------|-----------------|-----------------|-----------------|
| Section | Description                                      | Utilized | Unutilized | Total |
| A       | Human necessities                                | 10       | 28          | 38    |
| B       | Performing operations, transporting              | 6        | 23          | 29    |
| C       | Chemistry, metallurgy                            | 4        | 16          | 20    |
| D       | Textiles, paper                                  | 5        | 1           | 6     |
| E       | Fixed constructions                              | 2        | 8           | 10    |
| F       | Mechanical engineering, lighting, heating, weapons, blasting | 11       | 40          | 51    |
| G       | Physics                                          | 144      | 248         | 392   |
| H       | Electricity                                      | 144      | 310         | 454   |

Technological fields of these patents are related to semiconductors, products related to cars, disc devices etc.. Table 1 shows the number of surveyed patents in each IPC section\(^9\). According to Table 1, the number of patents in section G and H is large because these sections are main technological fields of Panasonic.

**B. Methodology**

In this research, we also use a discrete model as Palomeras (2003)\(^8\) and Nishimura (2006)\(^10\) described as follows (Ex. (1)).

\[ y_i = \alpha_i + \beta_i X_i + \gamma_i Y_i + \epsilon \]

Where \(y_i\) denotes whether patent “i” is an utilized patent (1) or not (0). \(X_i, Y_i\) are a vector of various characteristics of applicants and patents, epsilon is an error term. We use a logistic regression which is a popular method for a binary objective variable to estimate above formula. In a logistic regression, \(y_i\) expresses log odds ratio, and this odds ratio means the probability that a patent becomes unutilized divided by the probability that a patent becomes utilized. So we need to be careful to interpret results of the logistic regression.

Then we explain each hypothesis in line with this regression model. It is used in all hypotheses to use a binary variable, that is, utilized (1) or not (0) as an objective variable.

\(^9\) http://www.wipo.int/ipcpub/.
Hypothesis 1 related to "basic-ness of patent"

If the basic-ness of a patent is low, the probability that the patent becomes unutilized increases.

According to Trajtenberg et al. (1997)\textsuperscript{10}, the basic-ness of an invention in a patent can be estimated by indexes based on backward/forward citation data. Backward citations of a patent is defined as citations made by subsequent patents or a patent examiner in process of patent examination for the patent, and forward citations of a patent is defined as citations that a patent subsequently receives from other patents or citations by a patent examiner in process of patent examination for other subsequent patent applications. Though some indexes based on backward/forward citation data are defined in prior researches, we use the number of backward/forward citations by a patent examiner in process of patent examination. So we use two indexes based on citation data as proxy variables of “basic-ness of patent”. One is the existence of backward citations made by a patent examiner in patent examination. If there are no prior technologies or literatures for a patent, we regard the patent as a basic patent or a patent with high basic-ness because we can regard the patent as a pioneer patent. And this variable name is “ex_citing” and this is a qualitative variable. The other is the number of forward citations made by a patent examiner and we regard the patent whose the number of forward citations is large as a basic patent or a patent with high basic-ness because of the similar reason as the above reason. In the use of the number of forward citations, we consider the application year to exclude an effect that a patent filed early is more cited, so we use the index, the number of forward citations/transitional period from application year, that is, the number of forward citations per year, and a variable name is “cited” and this is a quantitative variable.

An expected sign of “ex_citing” is positive, so we suppose that a patent having no backward citations made by a patent examiner is a basic one, therefore utilized. That is, if “ex_citing” is not zero, the probability that a patent becomes unutilized increases and this effect can be expressed “positive” as stated above. In other word, a patent having no backward citations made by a patent examiner is a patent which has never been noticed a lack of novelty or inventive step, non-obviousness in office actions. In contrast, an expected sign of “cited” is negative because we suppose that a patent cited by examiner many times is a basic one.

\textsuperscript{10} Manuel Trajtenberga, Rebecca Hendersonb, Adam Jaffe, University versus Corporate Patent: A Window on the Basicness of Invention, 5 ECONOMICS OF INNOVATION AND NEW TECHNOLOGY, 19-50 (1997).
In addition, Trajtenberg (1990)\textsuperscript{11} and Nishimura et al. (2005)\textsuperscript{12} state that forward citation indexes denote economic or technical values of patents. From this point of view, we can maybe understand that Hypothesis 1 includes not only the idea of the basic-ness but the idea of those values.

**Hypothesis 2 related to “Evaluation by applicant”**

If the evaluation of a patent by an applicant is low, the probability that the patent becomes unutilized increases.

According to Institute of Intellectual Property (2007)\textsuperscript{13}, it is indicated that a patent requested for examination early is evaluated as an important patent by an applicant. In Japan, not all patents applications filed to JPO are examined. So applicants can select patent applications to be examined within a period of time and this system is called request for examination system. Based on this idea, we use the timing of request for examination as a proxy variable of “evaluation by applicant” and we use the existence of request for accelerated examination by the same reason. A variable name is respectively “req\_timing” and “acc\_exam”, the former is a quantitative variable and the latter is a qualitative variable. In addition, “req\_timing” is normalized by the period of examination request. The period of patents filed before October 1st 2001 is 7 years, on the other hand, the period of patents filed after that date is 3 years.

In addition, Harhoff (2003)\textsuperscript{14} and Suzuki (2008)\textsuperscript{15} indicate that a large patent family size reflects high evaluations by applicant. In general, patent families, which are patent applications filed to foreign countries corresponding to a domestic patent, are costly, therefore patents having many patent families can be regarded as patents evaluated high by applicants. This attitude may be cost approach known as one of evaluation methods. Cost approach is very popular and simple to evaluate various objects. Based on this idea, we use the number of patent families of a patent as a proxy variable of “evaluation by applicant”. A variable name is

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\textsuperscript{12} Yoichiro Nishimura, Koichiro Onishi, Tomoyuki Shimbo, *Quality of Patents and Economics of Clusters*. (Center for Japanese Business Studies (HJBS), Graduate School of Commerce and Management Hitotsubashi University, Working Paper Series No.16, 2005).


“families” and this is a quantitative variable. Moreover, we use the number of pages and claims in a patent application as the proxy variable based on the cost approach. Also, generally speaking, a patent evaluated high by an applicant consists of many pages and claims to include more information to prepare for the office actions, the litigations and so on. The use of the number of pages and claims are also based on this idea. A variable name is “pages”, “claims” and these are quantitative variables. And we use whether a patent is a divisional application or not as the proxy variable because the patent which is a divisional application can be regarded as a necessary and important patent for an applicant, so we can regard the patent as a high evaluated patent. The divisional application is one of the patent system supporting applicants. If they use this system, they can generate new patent applications derived from an original patent application filed early. A variable name is “div_app” and this is a qualitative variable. In addition to “div_app”, we also consider a patent claiming priority based on the similar reason. The claim of priority is also one of the patent system supporting applicants. If they use this system, patents claiming priority based on an original patent application can be regarded as patents filed on the date of filing the original patent application. A variable name is “priority” and this is a qualitative variable.

An expected signs of all variable are negative. For example, about “req_timing”, we suppose that a patent requested for examination early is more utilized. And about “families”, we assume that a patent having many patent families is more utilized. About “pages” and “claims”, we suppose that a patent having many pages and claims is more utilized because the patent is more valuable in terms of cost approach etc.

**Hypothesis 3 related to “Fit between technological fields”**

If the fit between the technological field of a patent and the technological field of patents an applicant have filed in the past is low, the probability that the patent becomes unutilized increases.

We also consider an internal and external environment. Hypothesis 3 means an internal environment of enterprise. If the fit between the technological field of a patent and the technological field of patents an applicant have filed in the past is high, the applicant can use his complementary assets, for example, various facilities, machines, sales channel and so on, in the utilization of the patent. Meanwhile if the fit is low, the applicant cannot use his complementary assets in the utilization of the patent and has to construct new complementary assets. This construction discourages the applicant to utilize the patent.
In this research, we define the main group of IPC as the technological field and calculate the fit by following formula (Ex. (2)). In Ex. (2), \(ipc\) means the main group of IPC\(^{16}\). If the \(Fit_{ipc}\) is high, we assume that the technological field of the target patent is similar to the technological field which the enterprise, Panasonic Corp., belongs to. A variable name is “fit” and this is a quantitative variable. An expected sign of “fit” is negative.

\[
Fit_{ipc} = \frac{\text{total number of Panasonic patents filed with the main ipc of the target patent until the year n of target patent}}{\text{total number of Panasonic patents filed until the year n of the target patent}}
\]

**Hypothesis 4 related to "Intensity of patent application competition"**

If the intensity of patent application competition in the technological field of a patent is high, the probability that the patent becomes unutilized increases.

In addition to the internal environment, we also consider the intensity of patent application competition as an external environment. If the intensity of patent application competition in the technological field of a patent is high, enterprises file patent applications and establish the patent right quickly without considering the utilization of the patent in the field. As a result, the patent in the technological filed having high intensity of patent application competition becomes unutilized. In this research, we define the past 5-year average Herfindhal-Hershman index (HHI)\(^{17}\) in the technological field of the target patent as the intensity of patent application competition and this is indicated by \(HHI_{ipc}\) as described below (Ex. (3)). \(HHI_{ipc}\) is calculated based on top 150 enterprises in each \(ipc\) and the past 5-year means 5 years before the application year of the target patent. In Ex. (3), \(ipc\) means the main group of IPC. If the \(HHI_{ipc}\) is low, we assume that the intensity of patent application competition is high. A variable name is “hhi” and this is a quantitative variable. An expected sign of “hhi” is negative.

\[
HHI_{ipc} = \frac{1}{5} \sum_{i=0}^{year-5} \sum_{j=1}^{150} \left( \frac{\text{total number of the j enterprise patent applications with the ipc as main classification in the i year}}{\text{total number of patent applications with the ipc as main classification in the i year}} \right)^2
\]

II. VERIFICATION RESULTS

A. Data Summary

Examples of data format (Table 2), descriptive statistics (Table 3) and correlation data (Table 4) are described as below, for reference. In data


format, as for “req\_timing”, “1” shows that a patent is requested for examination at the same time as a filing of the patent.

Table 2 Data Format

<table>
<thead>
<tr>
<th>Unutilization</th>
<th>Ex-citing</th>
<th>Cited</th>
<th>Req_timing</th>
<th>Acc_exam</th>
<th>Div_app</th>
<th>Priority</th>
<th>Claims</th>
<th>Pages</th>
<th>Families</th>
<th>Fit</th>
<th>Hhi</th>
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<td>10</td>
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<td>0.045</td>
</tr>
<tr>
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<td>0.066</td>
</tr>
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<td>0.401</td>
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<td>0</td>
<td>0</td>
<td>16</td>
<td>20</td>
<td>3</td>
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<td>1</td>
<td>8</td>
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<td>0.068</td>
<td>0.047</td>
</tr>
<tr>
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<td>0.320</td>
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<td>1</td>
<td>5</td>
<td>12</td>
<td>0</td>
<td>0.081</td>
<td>0.069</td>
</tr>
</tbody>
</table>

Table 3 Descriptive Statistics

| Average       | 0.674     | 0.687  | 0.133      | 0.391    | 0.032   | 0.047   | 0.165   | 6.186  | 12.929   | 0.904 | 0.041 | 0.078 |
| Standard error| 0.015     | 0.015  | 0.007      | 0.010    | 0.006   | 0.007   | 0.012   | 0.218  | 0.306    | 0.092 | 0.001 | 0.004 |
| Median        | 1         | 1      | 0.060      | 0.387    | 0       | 0       | 4       | 10     | 0        | 0.021 | 0.059 |
| Mode          | 1         | 1      | 0         | 1       | 0       | 0       | 2       | 7      | 0        | 0.085 | 0.062 |
| Standard deviation | 0.469 | 0.464  | 0.236    | 0.306   | 0.176   | 0.212   | 0.371   | 6.884  | 9.674    | 2.924 | 0.038 | 0.139 |
| Variance      | 0.220     | 0.215  | 0.056     | 0.094    | 0.031   | 0.045   | 0.138   | 47.389 | 93.590   | 8.549 | 0.001 | 0.019 |
| Kurtosis      | -1.450    | -1.350 | 23.913    | 0.846    | 26.421  | 16.414  | 1.271   | 21.822 | 96.727   | 30.469 | -1.394 | 70.693 |
| Skewness      | -0.744    | -0.808 | 3.928     | 0.418    | 5.326   | 4.287   | 1.808   | 3.639  | 2.598    | 5.263 | 0.464 | 8.327 |
| Range         | 1         | 1      | 2.698     | 1        | 1       | 1       | 1       | 78     | 78       | 20 | 0.136 | 1.330 |
| Minimum       | 0         | 0      | 0         | 0       | 0       | 0       | 1       | 3      | 0        | 0.000 | 0.019 |
| Maximum       | 1         | 1      | 2.698     | 1        | 1       | 1       | 1       | 79     | 81       | 20 | 0.136 | 1.348 |
| Sum           | 674       | 687    | 133494    | 390586   | 32      | 47      | 165     | 6186   | 12929    | 904 | 41.105 | 77.960 |
| Sample size   | 1000      | 1000   | 1000      | 1000     | 1000    | 1000    | 1000    | 1000   | 1000     | 1000 | 1000 | 1000 |

The correlation data is very useful to confirm a relationship among variables but this data do not represent a causal relationship directly. To analyze the causal relationship, regression model is regarded as a more appropriate method.

B. Results and Considerations

Table 5 shows results of hypotheses 1-4. In a logistic regression model, generally, pseudo determination coefficients are used to measure an explanation capability instead of the determination coefficient R^2. We adopted McFadden coefficient which is one of pseudo determination coefficients and McFadden coefficient in this model indicates about 0.1. It is said that there are the correspondence relation between McFadden
coefficient ($\rho$) and determination coefficient $R^2$, that is,

$$\rho[0.1, 0.2, 0.3, 0.4, 0.5] = R^2[0.3, 0.5, 0.6, 0.8, 0.9],$$

so this model can explain about 30% of all and there is room for improvement but we think that this model has an explanation capability in a measure.

### Table 4 Correlation Data

<table>
<thead>
<tr>
<th></th>
<th>Unutilization</th>
<th>Ex_citing</th>
<th>Cited</th>
<th>Req_timing</th>
<th>Acc_exam</th>
<th>Div_app</th>
<th>Priority</th>
<th>Claims</th>
<th>Pages</th>
<th>Families</th>
<th>Fit</th>
<th>Hhi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unutilization</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ex_citing</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cited</td>
<td>0.041</td>
<td>0.112</td>
<td>1</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Req_timing</td>
<td>-0.025</td>
<td>0.026</td>
<td>0.070</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acc_exam</td>
<td>0.029</td>
<td>0.012</td>
<td>0.037</td>
<td>0.072</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Div_app</td>
<td>0.114</td>
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<td>-0.089</td>
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<td>0.013</td>
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<td></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Priority</td>
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<td>0.060</td>
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<td>0.105</td>
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<tr>
<td>Claims</td>
<td>0.174</td>
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<td>0.078</td>
<td>0.160</td>
<td>0.057</td>
<td>0.048</td>
<td>0.401</td>
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<td></td>
<td></td>
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<tr>
<td>Pages</td>
<td>0.183</td>
<td>0.046</td>
<td>0.135</td>
<td>0.138</td>
<td>0.082</td>
<td>0.078</td>
<td>0.450</td>
<td>0.529</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Families</td>
<td>0.124</td>
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<td>0.001</td>
<td>0.120</td>
<td>0.270</td>
<td>0.067</td>
<td>0.427</td>
<td>0.136</td>
<td>0.260</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fit</td>
<td>-0.182</td>
<td>-0.081</td>
<td>-0.007</td>
<td>0.060</td>
<td>-0.030</td>
<td>-0.077</td>
<td>0.001</td>
<td>-0.016</td>
<td>0.070</td>
<td>-0.036</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Hhi</td>
<td>-0.043</td>
<td>-0.031</td>
<td>-0.018</td>
<td>0.002</td>
<td>-0.039</td>
<td>0.056</td>
<td>-0.071</td>
<td>-0.066</td>
<td>-0.072</td>
<td>-0.048</td>
<td>-0.060</td>
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</tr>
</tbody>
</table>

### Table 5 Verification Results

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard deviation</th>
<th>Pr</th>
</tr>
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<tr>
<td>(Intercept)</td>
<td>0.34944</td>
<td>0.21215</td>
<td>0.099523</td>
</tr>
<tr>
<td>Ex_citing</td>
<td>0.33316</td>
<td>0.15451</td>
<td>0.031063 *</td>
</tr>
<tr>
<td>Cited</td>
<td>0.19846</td>
<td>0.3247</td>
<td>0.541065</td>
</tr>
<tr>
<td>Req_timing</td>
<td>-0.98497</td>
<td>0.28074</td>
<td>0.000451 ***</td>
</tr>
<tr>
<td>Acc_exam</td>
<td>-0.29441</td>
<td>0.45724</td>
<td>0.519649</td>
</tr>
<tr>
<td>Div_app</td>
<td>2.24485</td>
<td>0.57234</td>
<td>0.0000877 ***</td>
</tr>
<tr>
<td>Priority</td>
<td>-0.65677</td>
<td>0.25711</td>
<td>0.010636 *</td>
</tr>
<tr>
<td>Claims</td>
<td>0.07819</td>
<td>0.01969</td>
<td>0.0000718 ***</td>
</tr>
<tr>
<td>Pages</td>
<td>0.04265</td>
<td>0.01275</td>
<td>0.000826 ***</td>
</tr>
<tr>
<td>Families</td>
<td>0.13722</td>
<td>0.04757</td>
<td>0.00000318 ***</td>
</tr>
<tr>
<td>Fit</td>
<td>-9.80059</td>
<td>1.91698</td>
<td>0.020548</td>
</tr>
<tr>
<td>Hhi</td>
<td>-0.61739</td>
<td>0.48341</td>
<td></td>
</tr>
</tbody>
</table>

Signif. codes:  0 ‘***’ 0.001 ‘**’ 0.01 ‘*’ 0.05 ‘.’ 1

1 McFadden 0.1094238

Hypothesis 1 was accepted in terms of “ex_citing” showing 5% statistical significance with the expected sign but “cited” did not show any statistical significance. Therefore patents having no similar prior technologies, that is, the patents having a certain basic-ness are more utilized. In Japan, the policy that enterprises have to acquire basic patents
intensively has been proposed by Japan Patent Office since the late 1990s\textsuperscript{18} and from the result of hypothesis 1, this policy is appropriate to generate utilized patents. According to the annual report of Panasonic Corp., carrying out medium-to-long-term R&D and R&D in corporation with universities is described clearly.\textsuperscript{19} It would appear that the policy like this enables Panasonic Corp. to generate utilized patents and those R&D policies are also important for other enterprises. On the other hand, the government and authorities also need to encourage enterprises to acquire basic patents as in the past.

Hypothesis 2 was accepted in terms of “req\_timing” and “priority” showing 0.1% and 5% statistical significance with the expected sign but “div\_app”, “claims”, “pages” and “families” showed some statistical significance with the contrary sign. From this result, patents requested for examination early or claiming priority become more utilized, and patents with many pages, claims and patent families or which are divisional applications become more unutilized. Therefore we assume that the evaluation by the applicant, Panasonic Corp., is appropriate in request for examination and the use of claiming priority, while we also assume that the evaluation is inadequacy when the applicant decides contents of patents, the use of divisional application and filings of foreign applications. Especially, from the result of “pages” and “claims”, we can maybe say that patents having many pages and claims are not focused on particular products or purposes, therefore these patents become unutilized. It may be important to acquire patents targeting particular products or intended purposes. And from the result of “families”, enterprises have to revise own overseas strategy. According to the prior literature of Panasonic Corp.\textsuperscript{20}, foreign applications have been promoted since 1990s but there is a high probability that this action has not worked well. Because filings of foreign applications cost much time and money, it is needed to review overseas strategy as soon as possible. The government and authorities, of course, have to assist these activities and review patent systems supporting applicants, such as, divisional application system and so on.

Hypothesis 3 was accepted because “fit” showed 0.1% statistical significance with the expected sign, that is, in case that the fit between the technological field of a patent and the technological field of patents an

\textsuperscript{19} PANASONIC CORP., ANN. REP. 2005, at 6; PANASONIC CORP., ANN. REP. 2007, at 46-47.
applicant have filed in the past is low, the probability that the patent becomes unutilized increases. Accordingly, it would appear that enterprises need to review own strength and perform R&D in the technological field close to the technological filed related to the strength to generate utilized patents. So, enterprises can use own complementary assets to utilized patents in that field. In terms of open innovation in a broad sense\textsuperscript{21,22}, however, this situation may be unfavorable. Enterprises have to connect with other enterprises or public sectors to use external resources and grope the way of utilization of patents from now.

Hypothesis 4 was rejected because “hhi” did not show any statistical significance. From this result, it would appear that enterprises are able to perform R&D and file patents regardless of the intensity of patent application competition. Considering the result of Hypothesis 3, enterprises had better select R&D field based on own technological strength and carry out R&D in the field without considering the intensity of patent application competition. But this result may be change if we consider not only the intensity of patent applications but also the position in the field, for instance, a leader, a follower and so on. This is one of the future works.

These results are very meaningful to reduce unutilized patents and acquire utilized patents efficiently but are obtained from PLDB data of Panasonic Corp., that is, data is limited. In the future, further developed researches are expected to reveal the factors at a deeper level, such as, an analysis of the factors of patents registered at PLDB, an analysis including patents of other enterprises and so on.

CONCLUSION

In this research, we verified the factors of unutilized patents from four aspects, “basic-ness of patent”, “evaluation by applicant”, “fit between technological fields”, “intensity of patent application competition”, based on Panasonic Corp. patents registered at PLDB. As discussed before, Hypothesis 1 related “basic-ness of patent” was accepted in terms of “ex_citing”, Hypothesis 2 related to “Evaluation by applicant” was accepted in terms of “req_timing”, “priority” but “pages”, “claims”, “families” and “div_app” showed some statistical significance with the contrary sign. Hypothesis 3 related to “Fit between technological fields” was accepted in terms of “fit” and Hypothesis 4 related to “Intensity of patent application

\textsuperscript{21} HENRY CHESBROUGH, OPEN INNOVATION: THE NEW IMPERATIVE FOR CREATING AND PROFITING FROM TECHNOLOGY (HBS Press 2003).
\textsuperscript{22} HENRY CHESBROUGH, OPEN BUSINESS MODELS (HBS Press 2006).
competition” was rejected. We focused on certain valuable conclusions by the factors of patents data, which have been verified with objective data.

Implications to acquire utilized patents for enterprises obtained from these results are as follows. They need to (1) give priority to acquisition of basic patents as compared with improvement patents, (2) revise contents of patent applications and the criterion or process in the use of patent systems supporting applicants, for example, divisional application system, and filings of foreign patent applications based on the criterion or process in request for examination or in the use of claiming priority, (3) review own strength and perform R&D in the technological field close to the technological filed related to the strength irrespective of the intensity of patent application competition while they grope the way of utilization of patents, that is, open innovation in a broad sense.

Meanwhile, implications to generate utilized patents for the government and authorities obtained from the results are as follows. They need to (1) encourage enterprises to acquire basic patents as in the past in addition to improvement patents, (2) review some of patent systems supporting applicants, for example, divisional application system, and to assist enterprises to review contents of patent applications and filings of foreign patent applications, (3) encourage enterprises to reconfirm their technological strength and carry out R&D in the technological field close to the strength while they also stimulate them to pay attention to open innovation in a broad sense.

As stated previously, these results are very meaningful to reduce unutilized patents and acquire utilized patents efficiently but are obtained from PLDB data of Panasonic Corp., that is, data is limited. In the future, further developed researches are expected to reveal the factors at a deeper level, for instance, an analysis of the factors of patents registered at PLDB, an analysis including patents of other enterprises, case studies of the particular patents and an analysis with other variables or hypotheses. We believe that these researches definitely contribute to understand reasons of generating unutilized patents therefore we need to carry out these researches in the future.
A COMPARISON OF CHINA AND INDIA IN FDI TAX LAWS

Peng Lifeng*

While either China or India is magnet of FDI (Foreign Direct Investment) inflow, there is significant dissimilarity in the tax laws of using FDI. After a comparative study of the two countries’ FDI tax laws, mainly including their attitude to FDI, tax treatment and tax privilege etc., the essay draws the conclusion that China can learn some valuable lessons from India’s strengths in the FDI tax laws.

INTRODUCTION

As a big developing country, either China or India is eager to FDI inflow. In fact the two countries obtained resplendent achievement in the past more than twenty years, especially from the beginning of the 21st century. However, their FDI tax laws are dissimilarity, which have resulted in different influence to the FDI flow into the two countries. By a comparison of China and India in FDI tax laws, the essay tries to find the limitation of China’s FDI tax laws and give some suggestions to perfect it.

* Peng Lifeng, Associate Professor, School of Economic Law, Northwest University of Politic and Law, Xi’an, P.R.China. Research field: Fiscal Law.
I. COMPARISON IN MAKING USE OF FDI

A. Comparison in Quantity

With regard to the quantity of FDI inflow, China has exceeded India absolutely. China has been the No. 1 among all developing countries concerning the amount of FDI inflow since 1993. The average number of FDI flux into China reached USD4.57 billion annually from 1994 to 2004, while the quantity of FDI into India was only USD0.3 billion (Table 1).

However, the fact should not be ignored that foreign fund flowed into India with very fast speed. Along with the implement of new FDI policy in India, it is expected that the quantity of FDI flow into India will be enlarged quickly and continually. But China is still magnet of FDI flow. According to the FDI confidence index survey in 2005 by AT Kearney Consultation Company, China still was the most attractive country to FDI. In fact, China absorbed over USD105 billion FDI and ranked the second biggest country in the world in 2010. Taking into account all these factors, we may safely reach the conclusion that there is no hope for India to surpass China’s achievement in quantity in the short run, but India is a powerful rival to China in the long run.

Table 1 The Statistics Form of FDI Quantity (USD 100 million)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total amount into developing countries</th>
<th>China</th>
<th></th>
<th>India</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Amount</td>
<td>Percent</td>
<td></td>
<td>Amount</td>
<td>Percent</td>
</tr>
<tr>
<td>1994</td>
<td>1,051</td>
<td>337.67</td>
<td>32.13</td>
<td>9.74</td>
<td>0.93</td>
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<tr>
<td>1995</td>
<td>1,075</td>
<td>375.21</td>
<td>34.90</td>
<td>21.51</td>
<td>2.00</td>
</tr>
<tr>
<td>1996</td>
<td>1,517</td>
<td>417.26</td>
<td>27.51</td>
<td>25.25</td>
<td>1.66</td>
</tr>
<tr>
<td>1997</td>
<td>1,918</td>
<td>510.04</td>
<td>26.59</td>
<td>36.19</td>
<td>1.89</td>
</tr>
<tr>
<td>1998</td>
<td>1,866</td>
<td>437.51</td>
<td>23.45</td>
<td>26.33</td>
<td>1.41</td>
</tr>
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<td>1999</td>
<td>2,325</td>
<td>404.00</td>
<td>17.38</td>
<td>21.68</td>
<td>0.93</td>
</tr>
<tr>
<td>2000</td>
<td>2,532</td>
<td>407.15</td>
<td>16.08</td>
<td>23.19</td>
<td>0.92</td>
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<td>2,178</td>
<td>469.80</td>
<td>21.52</td>
<td>34.03</td>
<td>1.56</td>
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<tr>
<td>2002</td>
<td>1,555</td>
<td>527.40</td>
<td>33.92</td>
<td>34.49</td>
<td>2.22</td>
</tr>
<tr>
<td>2003</td>
<td>1,663</td>
<td>535.10</td>
<td>32.18</td>
<td>42.69</td>
<td>2.57</td>
</tr>
<tr>
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<td>2,332</td>
<td>606.30</td>
<td>26.00</td>
<td>53.35</td>
<td>2.29</td>
</tr>
</tbody>
</table>


B. Comparison in Source

Concerning the source of FDI, India surpassed China obviously (Table 2). The main source of foreign funds absorbed by China was Asia, about 60
percent of the total funds coming from Asia including 30% from Hong Kong. However, the investment from west developed countries was far more less, only sharing 15% of the total amount including 5.07% from the United States and 9.35% from Europe. The separate between the source of fund and the source of technique indicated the limitation of China’ using FDI because the effect of technology transfer and spillovers was little. Contrary to China, India paid more attention to absorb FDI from west developed countries with advanced technique and manage empirical. Among all foreign funds invested in India, the American investment shared 18% and the European nations’ fund also enjoyed nearly 19%. The FDI source matched to the technique source in India, which established the foundation of making full use of FDI. From what has been discussed above, the conclusion is self-evident that China is inferior to India in the source of FDI.

Table 2 The Statistics Form of Source and Investment Field

<table>
<thead>
<tr>
<th>No.</th>
<th>Source</th>
<th>Per</th>
<th>Source</th>
<th>Per</th>
<th>China Investment field</th>
<th>India Investment field</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Hong Kong</td>
<td>29.75</td>
<td>Mauritius</td>
<td>30.07</td>
<td>Manufacturing</td>
<td>Services</td>
</tr>
<tr>
<td>2</td>
<td>Virgin islands</td>
<td>14.96</td>
<td>America</td>
<td>17.82</td>
<td>Real estate</td>
<td>Chemical</td>
</tr>
<tr>
<td>3</td>
<td>Japan</td>
<td>10.82</td>
<td>Holland</td>
<td>7.11</td>
<td>Leasing and business services</td>
<td>Electronic equipments</td>
</tr>
<tr>
<td>4</td>
<td>Korea</td>
<td>8.57</td>
<td>Singapore</td>
<td>4.90</td>
<td>Transport, storage and post</td>
<td>Transport</td>
</tr>
<tr>
<td>5</td>
<td>America</td>
<td>5.07</td>
<td>Germany</td>
<td>3.86</td>
<td>Production and supply of electricity, gas and water</td>
<td>Energy</td>
</tr>
</tbody>
</table>


C. Comparison in Investment Direction

The direction of foreign funds invested in China was quite different from that in India. Most of the foreign capitals absorbed by China were invested in manufacturing, especially those labor-intensive businesses such as textile, clothing and shoes etc., FDI in manufacturing enjoyed sixty percent of the total foreign funds drew on China in 2005. By comparison with China, India guarded a majority of FDI inflow to capital-intensive and hi-tech businesses such as software, compute and electronic information etc. (Table 2). Judging from all evidence offered, we find that China assimilated FDI mainly in manufacturing and India drew on it to services.

In a word, China surpassed India in quantity and India exceeded China in quality.
II. COMPARISON IN FDI TAX LAWS

Why does so magnificent dissimilarity in making use of FDI lie in between China and India? The difference in FDI tax laws is one of the most important reasons.

A. Different Attitude

China has encouraged FDI inflow since 1978. As early as 1970’s China recognized the opportunity of economic development caused by globalization and opened to FDI. As the main characteristic of the international labor division at that time was that labor-intensive manufacturing was transferred from developed countries toward developing countries, China encouraged FDI inflow under the principle of the more the better. A good example is that China set the floor level of FDI, which required foreign capital generally should enjoy at least twenty-five percent of the total investment of overseas-funded enterprises in China. In order to absorb FDI as much as possible, China reformed tax laws completely with the main idea of lowering the foreign capitals duty. Though China carried on some readjustment of FDI tax laws since 1996, including the uniform of corporate income tax law in 2007, China has never changed its active attitude to FDI.

Compared with China, India holds prudent attitude to FDI and guards its use discreetly. India ruled an upper limit for FDI (51%), which was quite different from China’ lower limit (25%). That attitude was decided by India’ economic rule “depending on native fund and guarding foreign capital”, which also indicated India’s economic independence and traditional conservatism. As soon as India was independent, it adopted an introverted economic development strategy and rejected FDI. Until 1991, the government transformed the introvert economy toward an extrovert economy and began to loosen the restriction toward FDI. Although the old guard and the reformed are conflicted with each other fiercely, the trend of loosening restriction toward FDI was expressed gradually and discontinuously. Among all the FDI policy in India, the tax arrangement never occupied an outstanding position. The tax burden of overseas-funded enterprises in India was not light on average, except those companies working in software industry etc., or ones lied in the particular areas such as

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1 Fang Hui (方慧), Zhongyin Liyong FDI de Bijiao Fenxi (中印利用FDI的比较分析) [Comparative Analysis of China and India in Using of FDI], 1 SHANDONG DA XUE XUEBAO (山东大学学报) [JOURNAL OF SHANDONG UNIVERSITY] 72 (2006).
Software Park and special economical area etc.. This selective and optional preferential tax policy reflected India’s discretion attitude to FDI.

B. Different Way toward National Treatment

China has transferred super national treatment to national treatment. In the past twenty-seven years, China gave overseas-funded companies super national treatment and therefore FDI enjoyed super national treatment almost covered all aspects of China’s tax laws, which was incomparable to national enterprises. Take corporate income tax as an example: The central government gave overseas-funded enterprises many tax privileges, such as “duty free in the first two years since getting net profit and half duty in the next three years” etc.. Besides that, each local government made many excessive special tax breaks in order to attract FDI, which resulted in harmful tax competition and sunk into “policy trap” inevitably. As the result of those tax policies, the tax duty of overseas-funded enterprises was just about half of the duty of national companies. The super national treatment attracted huge number of FDI flowing into China, but also resulted in the unfair competition between foreign capital and native funds at the same time. Because the super national treatment distorted market excellent function of resources allocation, it has been queried and criticized recently in China and induced the legislation of PRC Corporate Income Tax Law in 2007. China has transferred to national treatment from the beginning of 2008.

India transformed discriminative treatment toward national treatment during the economic reformation. Before the reformations, India treated FDI discriminatively and cautiously. Besides many limitations in investment direction and the upper limit of investment amount etc., India tax laws treated FDI discriminatively by collecting heavy duty upon overseas-funded enterprises. Since 1985, India began to relax the restriction toward FDI. The government canceled the restriction of the combination FDI with technique in 1991. Since 1994 India declined the rate of overseas-funded enterprise income tax from 51.75% or 57.75% to 46%, the rate of multinational company subsidiary income tax from 65% to 55%. The rate of foreign long-term capital income tax was 10% and the rate of short-term capital income was 30%. Through economic reformation, India came to treat FDI equal to native capital gradually.

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C. Different Tax Privilege

China has been giving FDI wide and powerful tax privileges since the economic reformation in 1978. The super national treatment means all overseas-funded enterprises can enjoy widespread tax break. Besides that, the government arranged various preferential tax policies for foreign funds invested in special areas. For example: overseas-funded enterprises in the economic special area and etc. collected enterprise income tax at the rate 10%. It is seldom for a country to give so widespread and vigorous tax preference in such long period in the world. However, China began to mount preferential duty at the base of industry strategy in 1998, which prefigured China came to transform traditional preferential duty mainly considering identity and location to new arrangement in view of industry structure. This transformation has actualized widely and generally from 2008 as the PRC Corporate Income Tax Law brought into effect. According to the law, only those enterprises (including overseas-funded enterprises and domestic companies) running in some given fields or engaging some special programs encouraged by government can enjoy some legal tax allowance in principle. However all the tax privileges still focus on decreasing tax burden level and pay little attention to perfect the tax laws system.

India has designed FDI preferential duty selectively and cautiously. As early as 1985, India allowed overseas-funded enterprises running in the field of electronics component; electronics material, computer, broadcasting equipments and controlling instrument etc. enjoy some special tax preference. Until now, the software corporation still enjoys free income duty for ten years. Along with the process of economic reformation, India became to expand the scope of tax allowance to FDI from special businesses toward certain areas in order to enlarge the amount of FDI inflows in 2000. Now enterprises in Software Park, free-trade area and special economic area etc. also enjoy some tax privilege. But no overseas-funded enterprise can benefit from any tax privilege only because of its identity in India. To sum up, India framed its preferential duty to FDI mainly according its industry strategy and economic development plan.

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3 Qiao Ying (乔颖), FDI Xingxin Zhishu: Zhongguo, Yindu, Moxige de Bijiao Fenxi (FDI信心指数：中国、印度，墨西哥的比较分析) [Comparative Analysis of China, India and Mexico in FDI Confidence Index], 12 DANGDAI CAIJING (当代财经) [CONTEMPORARY FINANCE AND ECONOMICS] 107 (2006).
D. Different Traits

Due to focusing on reducing the tax duty of FDI, there are some evident characters of China’s tax laws which reflected the fact that China has paid little attention to perfect the whole tax laws system. First, since there are 24 disparate categories of tax in China, the structure of tax laws is complex. The intricacy of tax laws was censured seriously as one of the leading reasons for the poor commerce environment in China, according the commerce environment investigation in 2006 by the World Bank. Second, by reason of the short length and the scanty clauses in tax laws, China’s tax laws appeared blurry and unspecific. For example, the PRC personal income tax law has only 15 items, which makes it impossible for any taxpayer to know his duty adequately and arrange his economic activity efficiently. Finally, the level of China’s tax administration is unappreciative, which was proved by many facts including the unsuccessful personal income tax revenue collection and management of high-income class in 2007. The dated technology is another crucial reason besides the imperfectness of the tax laws.

By contrast with China, India has paid more attention to perfect the tax laws system than to lighten the tax duty of FDI, which has brought some remarkably dissimilar traits to India’s tax laws. First, the structure of India’s tax laws is quite simple, comprising only 10 categories of tax. Second, compared with the insufficiency and the illegibility of China’s tax laws, the terms in India’s tax law are sufficient and explicit. For example, India’s personal income tax law enacted wage and salary duty considering four different kinds of sources and eleven varied conditions, which ensured that every taxing officer can collect tax by rule and line and every contributor can know his duty adequately. Lastly, India’s revenue offices run efficiently. Take personal income tax as an example: On the base of the personal bank account compulsive rule, India has established a countrywide tax collect and manage network and adopted the administer strategy emphasized on expenditure. By all those means, India has collected personal income tax, especially from high-income class adequately and efficiently.

4 Li Jie (李洁), Zhongguo, Baxi, Yindu Sanguo Liyong Waizi Zhengce he Jixiao Bijiao (中国、巴西、印度三国利用外资政策和绩效比较) [A Comparison of China, Brazil and India in the Policy and Effect of Using FDI], 6 SHIJIE JINGJI YU ZHENGZHI LUN TAN (世界经济与政治论坛) [THE WORLD FORUM OF ECONOMIC AND POLITIC] 66 (2005).
E. Different Effect

China’s FDI tax laws brought China brilliant achievement and serious problems at the same time. The tax laws attracted over USD1060 billion FDI flowing into China by September 2010, which fetch up the lack of capital in China and help the country possess obvious predominance in manufacturing industry. Benefited from it, China’s GDP increased with the average speed of 9.5% every year during the past 25 years, which created the “China miracle”. However, the truth on the other side of the coin was some rigorous problems. Those problems resulted from the strategy of using FDI emphasizing too much on the quantity and overlooking the quality, which mainly included the low degree in the international labor division, the inferior industry structure, the failure of Market for Technology, the enlargement of dependence to foreign funds, the crowding of domestic capital, the unfair competition between overseas-funded corporate and domestic enterprise, the lag of national business and the pollution of environment etc. In the long-term, all the problems mentioned above will strap China’s economic development.

Although India’s FDI tax laws has not resulted in such splendid success in the short-term as China’s tax laws has done, it has established the solid bedrock of economic growth in the future. The amount of FDI absorbed by India was only 15 per cent of that in China, but by being used efficiently, it helped India optimize its industry structure and advance its technique level, which aroused the whole national economy. Though either the amount or the growth rate of GDP in India has been inferior to that in China, it is generally accepted that India will become one of the biggest economy and one of the strongest countries in the near half century.\(^5\) That gorgeous future should partly attribute to India’s favorable financial laws, reasonable capital market, sound law system, fair competitive environment, optimized industry structure and advanced technique etc.. As India mainly depends on organic growth and making use of domestic resources adequately, the development road choose by India may be better than the pattern of depending on FDI to drive economic growth adopted by China from the view of long-term\(^6\).

When the advantages and disadvantages of the two countries’ FDI tax laws are carefully compared, the most striking conclusion is self-evident. China adopted super national treatment and widespread tax privilege to


encourage FDI inflow, which succeeded in quantity but failed in quality in some degree. India arranged special preferential duty selectively according to industry strategy based on national treatment, which failed in quantity in some degree but succeeded in quality.

CONCLUSION

After the comparative study of China and India in FDI tax laws, we may safely reach the following conclusions.

First, although China and India are significant different in FDI tax laws, they can learn a lot from each other. China should draw on some experiences of India in the process of reform of tax laws.

Second, during the proceed of transiting to national treatment and transforming traditional preferential duty as smoothly as possible; to perfect the tax laws system is the most important task facing China in the tax reform. China should recognize that reasonable tax laws system, instead of relative lighter tax duty, is the most attractive magnet to FDI inflow in the long term.

Finally, since China has transferred super national treatment to national treatment in FDI tax laws, the attraction of China’ tax laws to FDI will be limited in the future. In order to absorb FDI successfully in both quantity and quality, China should pay more attention to perfect the financial policy, the law system and the competitive environment etc.
ESSAYS

PLIGHT AND OUTLET OF COMMERCIAL LIEN IN LEGAL APPLICATION: IN THE VIEW OF CHINA’S JUDICIAL PRACTICE

Liu Yuanzhi *

Chinese Real Right Law recognizes the differences between commercial lien and civil lien from the uniform legislation of the State level for the first time, but just a proviso “except for the lien between enterprises” is not enough to host commercial lien system as a whole. In fact, in no way prevents people from simultaneously regarding the law as a body of definite, but the tree of life is green for ever. There are a lot of difficulties in the legal application of commercial lien, and the judges will be at a loss when they face such cases. So the objective of this article is to study and reveal what the commercial lien is and how to apply it in judicial practice. Then the author wants to present his own views to solve it on the basis of the relevant legislations in other legal systems, combined with the provisions of the present Chinese law.

INTRODUCTION

After 30 years of reform and opening up, China has built a relatively perfect commercial law system. And the level of Chinese commercial judges is growing up greatly in this process. So, it should have no serious questions in commercial cases judgement. However most of the judges are still solving commercial cases in the value orientation of civil law. In fact, “law that cannot apply neatly” or “law without available” still exist in various degrees. In order to find the outlet of legal application of commercial lien, I will quote relevant provisions of other legal system and discuss the conception, principles and logic of commercial lien. I wish this essay can contribute to the commercial judgement in China. This essay contains four parts. Part I is a brief discussion of commercial lien’s judicial plight. I will take a case for example to talk about “law that cannot apply

* Liu Yuanzhi, Judge of Xiamen Intermediate People’s Court, Master of Xiamen University Law School. He is major in International Investment Law and International Trade Law. He wishes to express warm appreciation to his colleague Li Hua who is an outstanding commercial judge. In the course of a stimulating experience in her department, she broadened the perspective of this essay and enriched its legal matrix.
neatly”. Part II discusses the concept and features of commercial lien and the commercial lien legislations in different legal systems. Part III is the argument between numeros clausus and maintaining transaction securities. And the latter is preferred in commercial trials. In part IV legislation methods are tentatively suggested.

I. JUDICIAL PLIGHT OF COMMERCIAL LIEN APPLICATION BECAUSE OF “LAW THAT CANNOT APPLY NEATLY”

Imagine this situation: Company A and B has kept business relationship for many years. They follow a settled commercial custom: pay firstly, then write a receipt, and deliver goods in the end. At the beginning of 2008, B suffered the cash-flow difficulties by accident, it could not make payment timely. After consulting by the two parties, B gave its bearer shares as a pledge to A. Then the transactions could continue smoothly. Some days later, B made an upturn quickly, it paid off the arrears but forgot to claim back the shares. At the end of 2008, the global economic crisis broke out, and spread to both sides, and made their relationship deteriorated. B made a suit against A for requesting to return the shares, at the meantime A wanted to use lien on the shares as a defence, because B still owned A lots of money for some other businesses.

The fact what we can confirm of this case is: It is different between the rights guaranteed by the shares and the rights because of payment in arrears; the former has been satisfied, while the latter have reached the amortization period without repayment. Therefore the disputed focus of the case is: In commercial transactions, could the creditor make the securities which have no relationship with the creditor’s rights as a lien? In order to answer it, let’s have a look at the Article 231 of the Chinese Real Right Law: The chattels taken as lien by the obligee and the obligee’s right shall fall into a same legal relationship except for the lien between enterprises. The author want to find the answer from the article, but meet with “proviso” dilemma, because the Supreme Court makes it clear that this does not mean China’s judicial practice accept commercial lien.¹ This is the topic of discussion of this article is about.

¹ HUANG SONGYOU (黄松有), ZHONGHUA RENMIN GONGHEGUO WUQUANFA TIAOWEN LIJIE YU SHIYONG (《中华人民共和国物权法》条文理解与适用) [UNDERSTANDING AND APPLICATION OF REAL RIGHT LAW] (The People’s Court Press 2007).
II. Summarization of Commercial Lien

Lien have two kinds: civil lien and commercial lien. There are both production and historical evolution differences between them. Civil lien originates from malicious defence right of Rome Law, and has no property right of effect, means where an obligor fails to pay off its due debts, the obligee may take lien of the chattels that are owned by the obligor and lawfully occupied by the obligee, and has the right to seek preferred payment from such chattels. But commercial lien originates from commercial customary law of medieval Italy, its role lies in maintaining credit among businessmen, to ensure real and secure transactions relationship.

A. Concept of Commercial Lien

1. Definition of Commercial Lien

The scope of Commercial lien is much larger than that of civil lien, and its effectiveness is significantly different from the latter, with nature of property rights; refers to the obligee can distrain the debtor’s chattels and securities that have no legal relationship with the obligee’s right.2 “Lien among enterprises” in Article231 of Real Right Law is such a situation, that is, commercial lien.

2. Features of Commercial Lien

From the concept of commercial lien, we can see that commercial lien has the following three distinguishing characteristics:

a. Subjects of commercial lien. The creditor and the debtor must be merchant, that is corporate enterprises in China Law.

b. Object of commercial lien. The creditor’s right must be a monetary debt that go beyond expiry date, and is due to commercial action.

c. Subject-matter. It must be chattels or securities, no other rights can be available; real estate shall not be retained. And the creditor has gained possession on the retained property based on certain commercial action. Security can be considered as a chattel, to be the subject of commercial lien.

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2 Xie Zaiquan (谢在权), Minfa Wuquan Lun (民法物权论(下)) [The Real Right of Civil Law (II)] 850 (China University of Political Science and Law Publishing House 1999).
B. Legislation of Commercial Lien

There are two methods of commercial lien legislation, that are obligatory right lien in civil law countries such as Germany and Italy, and real right lien in civil law countries such as Switzerland and Japan. There are common law lien and equity law lien in Anglo-American law countries.

1. Provisions of Civil Law Countries

a. Just Provide Obligatory Right Effectiveness

Germany is the representative country, Section 369 of Germany Commercial Code writes that:

1️⃣ A mercantile trader has in respect of debts due to him from another mercantile trader and arising out of bilateral mercantile transactions concluded between them, a right of lien over any objects of moveable property or any negotiable instruments belonging to the debtor, which have come into his possession with the consent of the debt or and by reason of any mercantile transactions, so long as he retains them in his possession, including constructive possession, arising from his right of disposal, which he can exercise over them by means of bills of lading, carrier’s receipts and warehouse receipts. The lien arises equally in cases where the property in the object thereof has been transferred from the creditor, but retransferred by him to the debtor. 2️⃣ As against a third party the right of lien holds good if the defences which can be set up against the debtor’s claim to the right to dispose of the object of the lien can be set up against the third party also.

Germany scholars believe that this commercial lien is similar to the pledge, it does not have a validity of real right, but belongs to rights towards human.3 France and Italy has the same legislation as Germany, France only has various provisions of right to refuse payment of the debtor and sets no uniform liens.

b. Provide Real Right Effectiveness

Let’s take Switzerland as representative, Switzerland Civil Code of the “pledge of movable property” prescribes lien system. Article 895 writes that:

1️⃣ Creditor can detain the debtor’s property or portfolio that under the possession of creditor before the creditor is in discharge, when claims has expired, and the creditor’s right has relationship with the subject by its very nature, 2️⃣ the preceding relationship occurs between the businessmen, as long as the possession and the right to request are from commercial transactions.4

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3 HANDELSGESETZBUCH, THE GERMAN COMMERCIAL CODE 178 (London: Stevens and Sons 1911).
Japan and Chinese Taiwan have the similar regulations, the obligee can enjoy a direct right towards the subject, including the right to control and ask price compensation.

2. Provisions of Common Law Countries

a. Commercial lien on common law. Commercial lien on common law gives the creditor a right to satisfy his debt by a sale of the property which forms the object of it until a request is met. The retained property has no association with the lien on the subject of a request, that is not associated. It has three modes: ① transactions based on industry practices; ② express and determine based on contract, and; ③ precedent or custom based on the recognition of parties. This rule applies only to customers such as lawyers, agents, brokers and bankers.

b. Commercial liens on equity law. It is a pleading right toward a certain of property. It can be produced without physical possession, which is usually for immovable property. It generally appears in the land sale cases, has no meaning in China, because Chinese can not own lands.

C. Commercial Liens Excluded

Above is the positive condition to set up a commercial lien; of course there are some excluded aspects as following:

a. Agreed by the parties. Commercial liens can be excluded through the convention of commercial transaction parties. As China’s guarantee law article 84 provides: “the parties can arrange the property that shall not be retained in the contract”.

b. The lien is inconsistent with the obligations of the debtor. As the Germany commercial code article 369 provides: “The right of lien is excluded, if the retention of the object thereof is inconsistent with any direction given by the debtor at the time of or before the delivery thereof, or with any obligation on the creditors part to deal in a specified manner therewith”.

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6 FAN JIAN (范健) & WANG JIANWEN (王建文), *SHANGFA LUN (商法论) [THE THEORY OF COMMERCIAL LAW]* 695 (Higher Education Press 2003).
c. The public order will be violated if the creditor detains the object.7

III. JURISPRUDENTIAL ANALYSIS OF COMMERCIAL LIEN

The value of lien is to guarantee debt fulfillment. In order to realize this feature, the creditor makes a lien on debtor’s property to urge the debtor pay off his debt. So are commercial liens, for which gives the debtor a pressure, forcing him discharge of the debt. It is one of the fundamental principles of commercial law: principle of protecting transaction security.

But on the other hand, commercial lien is a special form of lien. Lien belongs to real right. And the most important legal principle of real right is the principle of numerus clausus; it requires the kinds and contents of real right are all according to law, that is Typenzwang and Typenfixierung, no one can create freely.

So the focus of the case of this article is how to judge the two principles.

A. Re-definition of Numerus Clausus

From the above definition of numerus clausus, some scholar think that lien is just apply to the contractual relationship that the law expressly provides it, just as China Guarantees Law prescribed. However, some scholars believe that this is inappropriate because (1) it cannot be understood as the legal provisions which apply in the specific contract, but use in statutory conditions, of course, cannot be freely changed by the parties; (2) contract relationship is growing in modern economic life, legal provisions cannot prescribe completely all specific types of contracts which can be used in lien, if you limit the lien to a fixed type, it is an inappropriate legislative technique.8

Let’s have a look at the legislation history of China. (1) Guaranty Law of China which is put in force in 1995 Article 84 provides: In the event of any costs arising from a storage, transportation or processing contract, if the debtor defaults, the creditor shall have the right to retain the property. The provisions of the preceding paragraph shall be applicable to other contracts

whereby the creditor has the right of retention as provided by law. The parties may specify in the contract the property that may not be retained. This is a closed legislation on lien’s applying, which limits its application range from the following several aspects: first, only produced in contract claims; second, only statutory contract type to apply lien; third, even in statutory contract type, parties can also agree with each other to exclude lien’s applying. (2) Contract law which is enacted in 1999 increases warehouse contract and brokerage contract that can be retained. So for many years, there are just five contracts that can be used lien in China’s civil law-transportation contracts, storage contracts, warehousing contracts, brokerage contract, processing contract. (3) Real Right Law of 2007 is no longer qualified for several contracts, but just prescribe what shall not be retained because of legal provisions as well as agreed by the Parties.

From the above legislative changes, we can see clearly that it ultimate points to not only several contracts, but makes a huge breakthrough, the scope of lien is significantly expanded.

B. Maintaining Transaction Security Is Preferred in Commercial Trials

China’s market economy which is immature and imperfect is still in the initial stage of socialism. It is important to foster stable economic order, and promote transactions security. The current legal system of property needs to promote the efficient use of limited resources, and the use and exchangeable value, in addition to the functions of fixing boundaries of distinction and maintaining public order. It is an important advantage of property legal system, as is certainly the main reason for the market economy.9

Commercial lien is a method of mental pressure on the debtor who would have to repay debts in order to recover the possession of his property. In judicial practice, it is very common to make malicious flight of capital. The amount of contract cases for sales and loans is very large in civil and commercial trial practice.

According to this phenomenon, Vice-president Hongbing Dai of Guangxi High Court thinks the trial of commercial cases has its unique value orientation, comparing with the trial of civil cases. The judges should follow several principles: firstly, maintain transactions convenient, encourage legitimate transactions behavior; secondly, maintain transactions

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9 WANG ZEJIAN (王泽鉴), 15 FAXUE QUANJI (法学全集) [COLLECTED EDITION OF LAW]18 (China University of Political Science and Law Press 2003).
security, make sure the foresee ability of legal consequences; thirdly, maintain transactions fair, ensure honest and credibility.\textsuperscript{10}

In addition, some judges also point out that the main target of establishing, changing and destroying the real right relationship are to play the maximum utility and economic benefits, so as to make the fullest use of limited resources and to apply the principle of best use.\textsuperscript{11} In fact Article 1 of Chinese Real Right Law expressly states that: The present law is enacted with a view to maintaining the basic economic system of the state, protecting the socialist market economic order, clearly defining the attribution of the res, bringing into play the utilities of the res and safeguarding the real right of the right holder.

Actually the relationship of the above two principles precisely reflects the most important problem of commercial legal application of China currently: to solve commercial cases in civil law thinking. Some scholars sharply point out that: This relates to our country’s private legal system that is the syncretism of civil law and commercial law. We should establish the commercial law thinkings and ideas though commercial terminology, commercial norm and commercial procedure when we apply commercial law.

IV. OUTLET OF SOLVING JUDICIAL DILEMMA TOWARDS CHINA’S COMMERCIAL LIEN

A. Legislative Methods

What was very worth mentioning was that Shenzhen enacted commercial statute in 1999. Article 62 prescribes: the creditor who enjoys the right to detain the debtor’s goods or securities, when the discharge period has expired and has not been paying off, except for the lien that is prohibited by law or agreed otherwise by the parties. And real right law also provides for this timely, although not much, but enough to guide the direction of judicial practice.

B. Development

A legal system, if doesn’t keep pace with the demands of the times, and just clasps old ideas with temporary significance, is of no merit. In such a

\textsuperscript{10} PEOPLE’S COURT DAILY (人民法院报) (Oct. 17, 2008).

\textsuperscript{11} PEOPLE’S COURT DAILY (人民法院报) (May 15, 2009).
volatile world, if law is just made as a eternal tool, it cannot play its role effectively.\textsuperscript{12}

According to this, some scholars point out that: the choice of commercial lien legislation is the choice of commercial legislative mode. It is important to emphasize the relative independence of commercial law both in theoretical research and legislative practice.\textsuperscript{13} We should stipulate a special chapter for commercial lien in commercial law. All of this is paving the way for future development of the market economy of China.

CONCLUSION

Let us return to the case in front of the article. That B makes the plea for returning its stock is a requesting right, because the stock itself is property. The right of A is a guarantee property right. The former is a kind of ownership rights that is more preferential than the latter in current legal system; and they belongs to different legal relationships, the defence of A is not support in current judicial practice. But there are indications that, if A returns the stock, its obligatory right will not be discharged. So the article 231 of real right law should protect A’s right in this case. In commercial transactions, the creditors can detain the debtor’s stock which is in possession of the creditor. If the amount secured by a lien is not paid within some days after the day on with it becomes payable, the lien claimant may realize on the goods in accordance with law, and the lien claimant has all the rights and obligations of a secured party. The stock can have no association with the obligatory right. This is because commercial trial has close relationship with the social and economic development. Commercial trial judges should always take development as the first priority of law enforcement, ensure the perfection of the economic system, coordinate various benefit relations properly, and promotes a more unified and open market.\textsuperscript{14}

\textsuperscript{13} Liu Hongwei (刘宏渭), Chuyi Shangshi Liuzhiquan de Chengli Tiaojian (刍议商事留置权的成立条件) [The Establishing Condition of Commercial Lien], 2 QILU XUEKAN (齐鲁学刊) [QILU JOURNAL] 153 (2005).
\textsuperscript{14} PEOPLE’S COURT DAILY (人民法院报) (Oct. 17, 2008).
HOMOSEXUAL’S STEREOTYPE v. FATHER’S STEREOTYPE: A DISCUSSION ON PERSONAL INTERVIEWS

Demetra Fr. Sorvatzioti*

This paper examines the results of a qualitative research regarding homosexuality from the homosexuals’ perspective. Based on no theories and no prejudice we try to examine if they face any kind of violence and/or discrimination in a modern Mediterranean society as Cyprus. The data we have shows that some of them faced extreme domestic violence during their childhood while some others did not. The vast majority avoids disclosing their homosexuality to their parents and especially to their father since they believe that he will feel deep depression, disappointment and he will most probably react violently against them. The father is a person who looks rather more hostile than the mother regarding his reaction against his homosexual child. Children pretend to be straight even in their friendly environment although they believe that their personal life is absolutely private and no one has the right to say or do anything against them. When asked the question of discrimination against them, they support that even if it exists they don’t often face it personally. From the interviews, it is clear that a socially obvious, but at the same time, invisible rejection of homosexuals exists. Pretention for homosexuals looks like a necessity for daily life and it’s only in their private sexual life, behind closed doors, that they feel free. If this is true, invisible violence is well located somewhere in modern society while equality and non discrimination is well established by legislation.

INTRODUCTION

Cyprus is a post colonial state with a young independent democracy fifty years old. The Anglo-Saxon system of law and administration has influenced the legal system and the state’s administration. Located in the South East Europe above Middle East, it has a patriarchic model of society, strong religious beliefs in Christianity and tight family bonds. The state of Cyprus accessed the European Union in 2004. In this state the legislation

* Dr. Demetra Fr. Sorvatzioti, Lecturer in Department of Law, European University Cyprus. She is also a lawyer in criminal law in Greece since 1990 and in Cyprus since 2005. Research fields include Criminology, Human Rights, Marginalized Groups, Poverty, Criminal Law and Criminal Justice. This paper was presented in York Deviancy Conference, Critical Perspectives on Crime, Deviance, Disorder and Social Harm, York 2011.
regarding decriminalization of homosexuality changed in 1998 despite strong social and church objections.

This research takes issue with the assumption that legal civilization presupposes social maturity in all levels of society or at least in the majority of the population. After two years of research we might say that we touched the starting point for studying in depth the social boundaries of this specific society. Studying the case of homosexuality in this Mediterranean society we saw that for some groups of people, pretention looks rather necessary for avoiding harm. There is violence in family and social level but the justice system cannot protect people who face violence, especially invisible, and they don’t report it to the authorities. The motto looks closer to “the more pretention the less discrimination”, but in such a way legislation for specific vulnerable social groups remains inactive and unable to substitute for social changes. The principal choice for those who are forced to pretend remains “the less harm the better”. In this paper part I, explores the Criminal Law in Cyprus, the reasons of decriminalization of homosexuality and the social reactions. Part II, analyzes the research method and the way we collected the qualitative data. Part III, examines the research data in detail and presents parts of the interviews integrally. Subtitle A, focuses on family reactions regarding the disclosing of their boy’s homosexuality and the subtitle B, approaches the heterosexuals’ reaction. Subtitle C, examines the way the school environment reacts towards homosexual boys. Subtitle D, investigates the tolerance or intolerance of Cypriot society concerning homosexuality and the secondary title E focuses on the working environment’s reaction regarding homosexuality. Finally subtitle F, examines both views of homosexuals’ and heterosexuals’ in relation with the modernity of the Cypriot society’s perceptions. Part IV, is a discussion on the interviews we gathered and the related theory. Those parts are followed by the final conclusion.

I. THE LEGAL FRAMEWORK IN CYPRUS REGARDING HOMOSEXUALITY

Cyprus has a sui generis legal system influenced by both continental and common law systems. The legislation of the country has its origins in the different legal systems which reflect the civilizations of the island during its history. France, Germany, Greece, Turkey, the United States and England have had a strong impact on the development of the common law of Cyprus as it operates nowadays\(^1\).

\(^{1}\) ANDREAS NEOCLEOUS & CO., NEOCLEOUS’S INTRODUCTION TO CYPRUS LAW 13 (Center for International Legal Studies 2000).
Since 1878 the island was a British Colony and became independent in 1960 with a new Constitution in force. Focusing on the Criminal Code many sections have remained the same since colonization, but many others have been reformed. Especially male homosexuality was a crime till 1998. Female homosexuality had not been considered as crime and according to the previous Criminal Code and sections 171,172,173:

171. Any person who (a) Has carnal knowledge of any person against the order of nature; or (b) permits a male person to have carnal knowledge of him against the order of nature, is guilty of a felony and is liable to imprisonment for five years.

172. Any person who with violence commits either of the offences specified in the last preceding Section is guilty of a felony and liable to imprisonment for fourteen years.

173. Any person who attempts to commit either of the offences specified in Section 171 is guilty of a felony and is liable to imprisonment for three years, and if the attempt is accompanied with violence he is liable to imprisonment for seven years.

These sections of the Criminal Code were in force parallel to article 15 of the Cypriot Constitution which provides that:

1. Every person has the right to respect for his private and family life.
2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person.

In a landmark case of the European Court of Human Rights (Modinos v. Cyprus, application 7/1992/352/426)\(^2\), regarding homosexuality as it was provided by the previous Criminal Code, the applicant claimed that the specific articles of the Criminal Code infringe on his freedom to his private life as established by the European Convention of Human Rights (art.8). According to the facts of the case, as they were stated in the Court decision, the applicant was a homosexual who was currently involved in a sexual relationship with another male adult. He was the President of the “Liberation Movement of Homosexuals in Cyprus” and he stated that he suffered great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalize certain homosexual acts.

The Court in this particular case found that there was a breach of the article 8 (Right to respect for private and family life) of the Convention.

\(^2\) [http://www.unhcr.org/refworld/country, ECHR,CYP,402a21a04,0.html (10/06/2011)].
In 1998, some years after the Court decision (March 23, 1993), the Criminal Code abolished the crime of homosexuality between adults who consent and in 2002 the age of consent of a man for sexual activity became the seventeenth year of age.

The abolition of the crime of homosexuality cannot be seen as irrelevant to Cyprus accession in the EU. The treatment of gays, lesbians and bisexuals has been considered as a major European Community issue and Cyprus had a mandatory obligation to abolish the crime of homosexuality and to reform the law before its accession to the European Community which was completed in 2004. But this law reform didn’t actually follow a Cypriot social change in relation to the respect of every human being right to follow his/her sexual orientation without criminal consequences.

The society was not ready for such a legal change and in the case of Modinos v. Cyprus, in section 9 of the Facts, we can read that:

Various Ministers of Justice had indicated in statements to newspapers dated May 11, 1986, June 16, 1988 and July 29, 1990, that they were not in favour of introducing legislation to amend the law relating to homosexuality. In a statement to a newspaper on October 25, 1992 the Minister of the Interior stated, inter alia, that although the law was not being enforced he did not support its abolition.

Actually homosexuality was considered as a crime against morals and the Minister’s reaction was quite sensible since the majority of the society could not tolerate the homosexuality as normal sexual behavior. We can understand now that the reasons of delay for the abolition of the section 171 of the previous Criminal Code were, from a first sight of view, mainly social. We could also say that the Cypriot social reaction to this particular law reform reflected the intolerance of the society to practices which spoiled morals.

If we look behind in 1982 in the case Costa v. The Republic the Supreme Court of Cyprus didn’t accept the appeal of the accused and adopted the dissenting opinion of the judge in the case of Dudgeon v. the United Kingdom (judgment of October 22, 1981). According to the facts of the case Costa v. The Republic, the accused-a 19 year-old soldier-was convicted of the offence of permitting another male person to have carnal knowledge of him contrary to section 171(b) of the Criminal Code. The offence was committed in a tent within the sight of another soldier using the same tent. The accused had contended that section 171(b) was contrary to

4 Costa v. The Republic, [1982] 2 C.L.R.120, Supreme Court of Cyprus.
Article 15 of the Constitution and/or Article 8 (art. 8) of the European Convention on Human Rights.

We see that once again as in the Modinos case, the article 8 of ECHR and the article fifteen of Cyprus Constitution were in conflict. Nevertheless, the Supreme Court in its judgment of June 8, 1982 noted that, since the offence was not committed in private and since the accused was a soldier who was nineteen years of age at the time, the constitutional and legal issues raised by the case fell outside the ambit of the construction given to Article 8 (art. 8) by the European Court of Human Rights in *Dudgeon v. the United Kingdom*[^5]. The Supreme Court, added that it could not follow the majority view of the Court in the Dudgeon case and adopted the dissenting opinion of Judge Zekia, which we will state as written since we believe it reflects the social beliefs of that time:

In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European conception of morals; that, furthermore, it has been held that state authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country; in view of these principles this Court has decided not to follow the majority view in the Dudgeon case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this country; therefore, in the light of the aforesaid principles and viewing the Cypriot realities, this Court is not prepared to come to the conclusion that Section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country.

It’s worth mentioning that the above statement can also be found in the case of *Modinos v. Cyprus*, eleven years later and especially in the part of the decision where the dissenting opinion of Judge Pikis (the Cypriot judge) inter alias referred to.

The common point in the decision of the Supreme Court of Cyprus and the dissenting opinion of the Cypriot judge is that since there is no uniformity in moral conceptions in Europe, the states are in a better position to estimate the prevailing standards in their societies. So it’s quite clear that the Supreme Court of Cyprus in 1982 left the discretion power to the state to decide whether the law had to change or not because the Cypriot realities did not prove any moral necessity for any change at that moment. And in

1993, eleven years later, the dissenting opinion of the Cypriot Judge mentions among others the same opinion as it was stated by Judge Zekia (dissenting) in Dudgeon v. the United Kingdom, which proves that the social morals in Cyprus had not changed during the last decade.

But Cyprus was and still remains a country with strong Christianity beliefs. So the second sight of our approach to the non decriminalization of homosexuality or at least the delay of this legal reform brought in light the role of the Church of Cyprus. The Church resisted strongly and exercised pressure over the parliament members not to vote for the reform of the Criminal Code. Such a resistance of course could not be considered as unexpected since historically the Christian Church has showed intolerance towards homosexuality and the morals it spoils.\(^6\) It is also well known that Christian teaching had a lasting influence on legislation in Europe\(^7\) and, in general, condemns homosexual behaviour.\(^8\) Cyprus of course was not a European Country yet, but this didn’t play any role to the above interference because it is well known that when the Christian Church has strong and tight bonds in society it can influence and manipulate the public opinion more easily. Additionally to that, we have to take into consideration the fact that Cyprus among others has a traditional family model which indicates the patriarchic model of society and it is located above Middle East. Such a kind of society is well known for its intolerance for sexual behaviours that destroy its dominant male model as the stereotype of the feminine or passive homosexual does. And as Davies\(^9\) remarked for this kind of societies, the more religious, ethnic and institutional boundaries are, the stronger the taboos are against forms of social deviance such as homosexuality.

Concluding, we could say that the law changed by force and this legislative change is not a substitute for social change. In our research, the society morals are underlined over all the interviews and we could strongly support that this is totally connected with the discrimination the homosexuals face by the Cypriot society and their family environment, even in 2011. Homosexuality crime was abolished just some years ago and this could not but have an additional weight over the remained discrimination. This society looks more or less quite young to adopt in depth social changes through domestic law reform which finally reflects on its morals.

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\(^7\) Venetia Newall, *Folklore and Male Homosexuality*, 97 *Folklore* 123, 123(1986).


II. THE METHODOLOGY OF THE RESEARCH

In 2010, with my law students we decided to conduct a research regarding homosexuality. The basic question from my students was on what theory we have to be based on and what we should prove from this research. My answer to them was the Becker’s one\(^{10}\): “[g]et in there and see what is going on” and more precisely “[l]et’s go to see what we will find in Cyprus regarding homosexuality”.

We prepared a semi-structured questionnaire, flexible to open for more questions if needed. The target group was defined as homosexual men and women and we didn’t focus on specific groups of age or specific family status. With some of the students we also decided to take interviews from heterosexuals by changing the type of some questions and remaining in the same topics. Finally, we gathered fifty-five interviews from homosexual men, twenty-four from women and thirty-one interviews from heterosexuals.

The main topics of the interview regarding homosexuality were: the age they realized their homosexuality, the existence or not of any particular violence against them during childhood, the family relations, the family reactions regarding the disclosure or not of their homosexuality to them and the effects of this, potential discrimination in society and in their working environment, marriage between homosexuals and child adoption.

For the purposes of this paper we separated the male homosexual interviews and we focused on the topic regarding the disclosure of their homosexuality to their parents and the discrimination matters in the Cypriot society. Then we took the heterosexuals’ questionnaires and we crosschecked their reactions regarding potential disclosure of their children’s homosexuality to them and homosexuals’ discrimination in Cyprus with the homosexuals’ answers.

We found that both homosexuals and heterosexuals describe the effect of disclosure of homosexuality to the parents in the same way. Actually the second group, from their own point of view, explains why homosexual boys are afraid to reveal their homosexuality to their parents, especially the father, and they confirm the discrimination against homosexuals in Cyprus.

Finally, the research established that although the necessary legislation for non discrimination had been enacted in Cyprus since 1998 and onwards invisible violence is still exercised upon the group of homosexuals.

A. Family Reactions towards Homosexuality

As we have said for the paper purposes we focus only on homosexual men and not on women because firstly they are too afraid to disclose their homosexuality to their father and secondly if they have a feminine type of behavior and attitude they face the greatest discrimination in society. Women, on the other hand, do not have such a fear in front of their father. Their parents accept the disclosure of their homosexuality more easily and since they have no extreme masculine appearance they don’t face discrimination. Besides, women’s homosexuality contrary to the men’s one was not considered as a crime in Cyprus Society.

Among the questions of our research, there was one regarding the family reactions as for their homosexuality. We found that the father in comparison to the mother, usually reacts more violently and most of the times is the person not to be told the truth about his son homosexuality.

In some cases the father knows the truth and he believes that homosexuality is an illness:

My father says that is because of my hormones …and he believes that homosexuality is an illness.

My father is still looking for the antidote for homosexuality, he thinks it’s an illness. (27 yrs)

The father took his son abroad and the doctors gave him hormones, he got so hairy that he got completely mad and committed suicide.

But sometimes the father reacts violently:

My father used to show his disgust against me and sometimes he used to snuff out his cigarettes on my body… and he was a PhD holder in Law. (43 yrs)

He doesn’t want to have any relation with me, because I am gay. My brother doesn’t speak to me either. (37 yrs)

When I disclosed my homosexuality to my father he didn’t tell me anything, he was so cool that I got scared, later on he told me that if I don’t change my mind I’d better forget him. I told him I won’t. Immediately he stopped paying for my studies, sending me money and generally he has no relation with me. (30 yrs)

My father was the first who learned it, he wanted to kill me and then to commit suicide, then he asked me if I was active or not. It was so crucial for him that I was active. We agreed not to say anything to anyone. When my mother found out my father experienced the feeling of death. It was so tragic. He was a living dead. I was unable to comfort him. My mother paralyzed completely for 15 days, she could not go to work. Both my parents couldn’t go out of the house. They send me to a psychologist. They believed I was insane, psychologically ill. (27 yrs)
My father doesn’t speak to me…. he doesn’t want to have any relation with me because of my sexual preference. (37 yrs)

In some other cases we found that homosexuals prefer not to tell the truth to their father because they are afraid of his potential reaction:

I can’t tell him that I am gay, I am sure he will get completely mad, as I know he is against them” or “if my father knew that I am gay, he would either kill me or commit suicide. (20 yrs)

I never dared to say anything to my moustached father who is such a woman-chaser. (37 yrs)

Some of the reasons homosexuals choose not to say anything to their parents are because they believe that either: “[I]f I tell to my parents anything, they will throw me out of the house and I will not manage to finish my studies and especially my father will lose his senses” (20 yrs) or: “[I]f I say something I will hurt them deeply” (23 yrs, 57 yrs). Another one says: “[I] will make them feel deep sorrow and disappointment” or “[i]f I say something to them they won’t talk to me again because I will insult my family’s social status. I will definitely cause them deep feelings of sorrow, disappointment and bitterness” (23 yrs). Another one prefers not to say anything because he is sure that “[t]heir family relationships will break and his parents will not speak to him anymore”. Another one says: “[I] tried many times to tell them the truth before I get married (with my wife). It was so hard for me to give them such a disappointment and sorrow” (47 yrs).

But sometimes homosexuals say that they don’t disclose their homosexuality to their parents because it’s not their parents’ concern while at the same time they do care about their parents’ feelings: “[I] never disclosed to them anything, it’s not their business. On the other side I love them so much that I would like to tell them about my homosexual relationship but I will hurt them deeply. This scares me so much” (43 yrs). Another one preferred to get married while pretending to be straight: “[I] can’t say anything to them, they can’t afford it. I am getting married soon and I live in lies. I wish they were by my side” (40 yrs). Or they are afraid that something bad will happen to them: “[I] don’t want them to learn anything I have left the family house, I am afraid they will get ill if they learn I am gay” (34 yrs).

Some homosexuals prefer to conceal their homosexuality from their parents because they are either scared of their potential reaction or they avoid hurting them, or both:

I don’t dare to say anything to my parents, I am afraid they will get hurt, I think they know something but on the other hand, they threaten me that if I don’t
get married they will not bequeath the family property to me. I can’t imagine myself speaking up the truth to my father, it’s impossible. (34 yrs)

For the homosexuals the choice of pretention has negative effects, since they say:

I feel so depressed and suppressed, I struggle with my feelings every day, I can’t speak with anyone and because of the fear I haven’t got any homosexual friends either. On the other hand my parents press me to get married. (34 yrs)

“I suffocate my feelings every day for so long, I haven’t a homosexual friend to share my sorrow with. It’s so hard” (32 yrs). Another one says: “My parents threatened me and I got married so I was closing my eyes and I was dreaming of someone else when I was making love with my wife” (38 yrs).

In some cases both parents were aware of their son’s homosexuality and their reactions have been described as:

My parents speak to me very rarely after my disclosure of my homosexuality to them. (22 yrs)
They advised me to be discrete and modest and not to give any right to anyone to say something against me. (27 yrs)
My parents know my homosexuality but we don’t discuss it at all. Actually we haven’t any relationships at the moment. (28 yrs)
They tried to convince me to change my opinion.
I have no relationships with my parents, they know the truth about me because I could not stand keeping it a secret any more, I was so tired of this pretention. Their reaction was panic, anger, disappointment. My father stopped speaking to me. They send me to a psychologist, in case it was something temporary. Finally after some time they accepted it. (23 yrs)

As for the mother, the interviews prove that she is the person who accepts the reality more easily even though she might experience difficult emotions till that point. Furthermore, we noticed that the mother does not create the same feelings of fear to her son as the father does:

When I said that to my mum she stared at me and she started crying, I explained to her that it is not my fault, I was born like this and she hugged me crying. (21 yrs)
My mother got almost crazy but her love for me helped her to overcome it. (20 yrs)
My mother, in the beginning, resisted to my homosexuality and we stopped communicating for some time but in the end she accepted it. (22 yrs)
When I disclosed the truth to my mother, she hugged me and she told me that she would stay by my side but after 3 days she stopped cooking for me and she didn’t want to take me to the school, she took me to a sexologist because she believed it was an illness and I would get cured…The most important for her is
not to behave as a feminine gay… She is dreaming of me getting married and having children. (20 yrs)

But in another case it was not like the above described reactions: “[M]y mother never said anything to me but among her words I could clearly understand that she wouldn’t ever accept me as her son if I was gay” (43 yrs). However another one says: “[I]t needs courage to disclose it to my mother although I had the chance to do it. I am thinking of it maybe one day I will tell it to her.” (30 yrs)

B. Heterosexuals’ Approach towards Homosexuality

Let’s see now what the heterosexuals answer to the potential question regarding their son’s homosexuality or their brother’s/sister’s homosexuality and their reaction to this:

If my son told me that he is gay I wouldn’t like it but I would ask to behave himself, it’s like an illness you can’t correct it. (55 yrs)

If my sister told me that she is gay I wouldn’t like to consider her as my sister. (38 yrs, woman).

If my son told me he is gay I would beat him to death. It’s a personal choice but I can’t afford it. If it was my brother I would try to convince him to change his opinion. (31 yrs)

If my son or my brother told me he is gay I would beat them to death. They wouldn’t exist for me any more…these people are not human beings. They are another kind of creature. (20 yrs)

If my brother told me he is gay I would beat him, I wouldn’t speak to him, he would be a shame for our family, and insult us. (21 yrs)

If my brother was gay I wouldn’t speak to him again and I would ask my parents to disinherit him. I would be so ashamed of him. If they asked me if I have a brother I would definitely say no. (18 yrs, woman)

If my sister was gay either she or I would stay in home. Homosexuality is nature’s mistake. If you can’t respect your gender identity, you are obliged to respect your family and not to insult them. (18 yrs)

If one of my relatives was gay I would get shocked but I would be obliged to accept it. (19 yrs)

If my son was homosexual it would be so difficult for me to admit that I am his father. (22 yrs)

C. The School Environment “Opposes” to Homosexuality

Except family environment, homosexuals feel discrimination in three more environments, school, work and the social environment in general. Let’s see what they say for each one of these, starting from the school one:
Because I had a feminine attitude the boys used to yell at me very often at school” or according to another one “many times, at school, they would verbally assault and humiliate me.

So many times they had humiliated and mocked me at school. (28 yrs)

Even if I was never provoking or giving the right to anyone to speak against me at school, my schoolmates were always laughing me that I was behaving like a girl. I had no one to support me, I was feeling so uncomfortable. (43 yrs)

The first three years of high school were horrible, it was a nightmare, I was completely alone reading a book for the reason that I was afraid someone would find out about my homosexuality. I relaxed when I went to the last three classes of high school and the class had 28 girls and 6 boys. (28 yrs)

But as we see from the interviews, isolation seems like a necessary effect of homosexuality. On the one hand, isolation is a result of others’ discrimination and on the other, isolation is a choice of the homosexual for no discrimination or no more discrimination: “[A]t school I was isolated because I didn’t play football, but as I couldn’t play only with girls since it was not ‘correct’, I isolated myself completely and till today I live in the same way, self isolated” (28 yrs).

D. The Social Environment “Disapproves” Homosexuality

As for the social environment the homosexual’s interviews say that:

A man was sitting with some friends of mine and when he saw me he called me on my phone threatening that I have to die. He was screaming at me that he would kill me because I am gay.

I was walking on the street and I heard someone saying: do they walk around free? (22 yrs)

Most of the people around me will criticize me negatively because I have not at all, the so called human dignity.

Most of the gays, we are hiding, we play the straight role and we choose double lives and the worst is that some of us they give an end to their lives. I had to walk in a straight way so today I finally walk as a robot. (28 yrs)

Since my homosexuality is not obvious I faced no discriminations.

I used to hear people around me saying that homosexuals have to be thrown out of the country. (31 yrs)

But let’s see now what the heterossexuals say regarding homosexuals discrimination by the social environment:

If I see a gay I will laugh at him with my friends. (31 yrs)

If he is provocative I yell at him saying: what a sissy. (31 yrs)

Yes, I yell at them, everyone does it…. If someone was committing suicide because of any comment of mine, I wouldn’t care; his life is full of shame and so ridiculous. (20 yrs)

If we see a gay we call him “parasite” we laugh at him….if he commits suicide because of my comments, notice that I am not the only one who mocks
him…I know someone who finally committed suicide in the army. He unsuccessfully attempted to commit it before the army too. Even his family played a negative role to this. (20 yrs)

I had a friend but when I learned he is gay I didn’t speak to him again. Even from my best friend I would keep a distance if I learned he is gay…. We are not equal to homosexuals….I would comment all about the appearance and attitude of a gay... Even the church doesn’t accept them. (18 yrs, woman)

It’s very risky to be in company with gays …society will think that you are gay…if a friend told me he is gay I would not speak to him again ….if my son told me such a thing I would get so disappointed… I don’t know where my sadness would lead me. (21 yrs, woman)

When I learned that a friend was homosexual I stopped speaking to him…it’s against my principals to speak to gays. (22 yrs woman)

E. The Work Environment “Prefers” Pretention

As for the working environment and the possible discrimination homosexuals face we received the following answers by them:

They dismissed my friend because he was gay. (21 yrs)

There were times that I was refused a job because of my sexual orientation. (20 yrs)

When I was an employee I had to cover my homosexuality from my boss. (37 yrs)

With my friends I have no problem, my brother is also homosexual but at work I have to pretend to be straight. (37 yrs)

I have a bachelor on business administration; if I hadn’t concealed the straight no one would hire me in Cyprus. (36 yrs)

But let’s see now what the heterosexuals say for the same subject:

We have a gay in the office and everyone is laughing at him but he looks like he doesn’t care. (31 yrs)

There are companies that can’t accept homosexuals, so homosexuals are forced to pretend being straights. (21 yrs woman)

F. The Cypriot Society through Homosexuals’ and Heterosexuals View

Trying to have an overall estimation regarding the Cypriot Society and the way it perceives homosexuality, homosexuals said:

The Cypriot society is racist. (28 yrs)

Humiliation and insult is in our everyday life by our society. (37 yrs)

It’s a necessity to pretend the straight in our society.

Every day I hear humiliating words against us.

The Cypriot society is so conservative. (37 yrs)

If you pretend the straight there is no discrimination around.
Our society considers homosexuality as a disease it’s so tiring to pretend the straight and not to be. (36 yrs)
The Cypriot society does not actually protect us.
The Cypriot society doesn’t accept us. (20 yrs, 26 yrs)
Our society is homophobic. (53 yrs)
Our society is conservative and the people have old fashioned ideas. (22 yrs, 36 yrs, 23 yrs, 38 yrs)

In the heterosexuals’ interviews we find the following statements:

I would speak with a gay if he didn’t look like one. It is better for him to pretend and hide. (18 yrs)
What gays do is against morals, against nature… they are against the Christian rules. (21 yrs)
Our society can’t accept them. Gays are against our Cypriot culture. (19 yrs)
Cypriot society can’t accept them. Our society is prejudiced and racist against them. (45 yrs woman)
We live in a closed conservative society; we can’t accept something different. (19 yrs)
Christians blame the homosexuals… our society is very conservative. (23 yrs woman)
Homosexuals in Cyprus have a big problem, the society can’t accept them. (23 yrs)
Homosexuals are not like heterosexuals….it’s an anomaly to be homosexual… you may treat them friendly but they are not like us…homosexuality is so disgusting…. Homosexuals have to know that they are problematic and we hardly tolerate them. (22 yrs)

These were the views from both homosexuals and heterosexuals regarding homosexuality, the Cyprus society tolerance and discrimination. Now we will try to find out if these interviews were crosschecked or not by other kind of data in Cyprus in order to manage to triangle the findings of our qualitative research to prove it reliable, as Zavalloni\textsuperscript{11} supports.

IV. DISCUSSION: BETWEEN THEORY AND PRACTICE

Parents react with shock, denial, isolation, anger and depression after their children’s disclosure regarding their homosexuality as many empirical studies indicate.\textsuperscript{12} The data we collected allows us some additional observations regarding the European State of Cyprus and the discrimination against homosexuals under the prism of the equality principle.

\textsuperscript{11} GREGORIS LAZOS, THE PROBLEM OF QUALITATIVE RESEARCH IN SOCIAL SCIENCES 318 (Papazisis ed., in Greek, Athens 1998).
We noticed that homosexuals don’t feel free in any typical environment of the modern Cypriot society. Most of them feel insecure to behave as they feel and disclose their homosexuality to their parents. The father looks like a stereotype which homosexuals avoid to break or confront, since they believe he will react violently as a result of their disclosure. Unfortunately this belief is not false and was proven through many interviews as we stated above. The father, in fact, reacts violently either with physical, verbal or in general psychological harm or by imposing economic suffocation on the son or by threats and the cutting off of the family relations. Consequently, some of the homosexuals we interviewed entered marriage for the purpose of putting up a heterosexual front.

In this research, the data found from the homosexuals’ interviews was crosschecked with those of the heterosexuals’ and showed that both sides accept the existence of discrimination and social exclusion.

We think that among the environments (family, school, working, social) a very crucial discriminatory one is that of school since after family, school is the main place where the child becomes socialized and starts building up his/her personality away from their parents’ influence. We can imagine how difficult it can be for a child to keep his homosexuality a secret from the parents especially under the fear of his father while at the same time he has to conceal everything from his schoolmates to avoid potential bullying behaviors.

It’s not advisable that such deprivations take place in a modern society, especially when these kinds of deprivations lead to a pretention “of the straight stereotype of man”. Such a pretention, which most of the times is for safety reasons, has the additional negative effect of the inability of the homosexual to claim his rights. Pretention is rather impossible to allow efficient application of the right to equality. The decriminalization of homosexuality from the Cypriot Criminal Code was a major step towards the freedom of behavior of homosexuals but although the law is in force parallel to EU legislation it cannot strongly eliminate discrimination in the family and the social environment.

A report of the University of Cyprus, Department of Social and Political Sciences, regarding marginalized groups showed that a survey in 2006 indicated that 75% of the population disapproved of homosexuality and many thought that it can be cured.

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The 2010 Report\textsuperscript{14} of U.S. Department State for Cyprus on Human Rights mentions among others the following observations:

Despite legal protections, gays and lesbians faced significant societal discrimination, and few lesbian, gay, bisexual, or transgender (LGBT) persons were open about their sexual orientation... A 2009 report by the Gay Liberation Movement of Cyprus (AKOK) and the International Lesbian, Gay, Bisexual, Trans-and Intersex Association (ILGA) noted that there was no significant LGBT movement in the country, and a general stigma against homosexuality was present in society. The organization reported that some local religious figures and politicians frequently stated in public that gays and lesbians were “immoral persons, bodily and mentally perverted”.

The first LGBT movement, Accept LGBT Cyprus, announced its operation on 2010.

In the European Report\textsuperscript{15} in May 2011 regarding LGBT rights and protection in Europe shows that Cyprus among other countries has a “particular worrying” legal situation for LGBT people. But the report indicates that among the 14 states of Russian Federation, Belarus, Ukraine, Moldova, Georgia, Macedonia, Armenia, Azerbaijan, San Marino, the Vatican City, Monaco and Liechtenstein, which are “in the red zone” of “gross violations of human rights and discrimination are taking place” the only member of the European Union among these countries is Cyprus.

It’s well understandable that these “Red” reports evaluate Cyprus with a deficit of democracy regarding LGBT people’s rights. Homosexuals belong to LGBT groups and our qualitative research comes to lighten up the reasons of discriminations against them and unfortunately confirms the results of the above mentioned reports. Homosexuality for Cypriot social environment looks like a moral crime against a well established conservative society. It looks rather hostile to the Cypriots’ Christian beliefs and it threatens the leading man’s stereotype which assures the future of the society. Probably as Grayson says\textsuperscript{16}: “[h]omophobia helps keep boys and girls “in their place” better than any written rule” and defines homophobia as:


(1) An irrational fear, dislike, or hatred of gay males and lesbians and/or being labeled as gay or lesbian. (2) Bias and discrimination against gay males and lesbians.

It’s obvious that discrimination is deep-rooted in the Cypriot society against homosexuals, so we might say that it could be considered as a homophobic effect. But in order to avoid narrow interpretations of the particular phenomenon, we will support that while researching and evaluating any kind of social phenomenon we can’t avoid considering all the elements of today. So the Mediterranean mentality in a postcolonial state located in the gulf above the Middle East, the deep Christian beliefs and the male dominant society all have to count in the overall estimation regarding the reasons and the explanation of discriminations against homosexuals. Besides, all the participants in our research, homosexuals and heterosexuals, reassure that the Cypriot society is with old-fashioned ideas and conservative perception.

The hostility of the fathers against their homosexual son especially when his attitude is closed to femininity might be as Kane said\textsuperscript{17} because “[t]hey view masculinity as something they feel responsible for crafting”, so “[h]eterosexuality is linked with the successful accomplishment of masculinity”. “[I]f my son was homosexual it would be so difficult for me to admit that I am his father” says someone in our research. In any case, boys are afraid to express their homosexuality although many of them realized it as they disclose in our interviews, while they were between the age of 4 and 7 of their childhood. They had to hide their natural behaviour at school and we can’t but support the Grayson’s\textsuperscript{18} opinion that such form of discrimination leads to a deprivation of the fundamental right of free and safe public education and as he said: “[a]s long as our society is unsafe for any portion of us it is unsafe for us all”. This remark is very crucial for a modern European society. It can’t be claimed that a child who conceals his sexual orientation, for which he was never responsible, because of fear could ever develop his personality in the same level and with the same chances as the other heterosexual children.

“[I]f my parents had warned me about the social discrimination in school and in society in general I would probably be more prepared to face this entire situation” says a 28 years old homosexual. This could be a message to all of us who nurture children. It’s our responsibility to safeguard our child from any social discrimination. Information is the basic

\textsuperscript{17} Emily W. Kane, “No Way My Boys Are Going to Be Like That!” Parents’ Responses to Children’s Gender Nonconformity, 20 GENDER AND SOCIETY 149, 163 (2006).

\textsuperscript{18} Grayson, supra note 16, at 136, 138.
element to create the standards of human rights protection. According to this, there might be a very important reason for more information to societies like Cyprus to understand that homosexuality more often than not, is not a chosen behavior but a situation where the individual has first of all not to fight against it. Furthermore, it has been supported that sexual orientation is “[t]he result of a complex interaction between biological predilections and environmental circumstances”. 19 We believe that discrimination will be eliminated when people realize that respect and protection of human dignity which, is inviolable according to the Charter of Fundamental Rights of the European Union, has nothing to do with sexual orientation but with the absolute idea of the human being instead.

Monitoring discrimination might be the only way to eliminate this form of violence. We think that the voice of the marginalized groups should be unified since pretention can’t help the development of a civilized future in a European society. Lack of democracy can’t assure a safe life. Democracy is the only way for respecting human rights. It’s true that public opinion influenced by law can be more tolerant20 especially when this specific law decriminalizes a crime. But law by itself can’t change morals. It’s the whole concept of our society that has to be influenced so as to respect others and get improved. More activism and more information tailored made for the needs of each social environment, as in our case for Cyprus mentality, would help minimizing discrimination and marginalization.

CONCLUSION

The acceptability of decriminalization of homosexuality in the Cypriot society was enforced in 1998, as analysed above. The law reform didn’t change the social intolerance to homosexuality immediately and furthermore could not replace the social maturity towards such kind of sexual behaviours. The Cypriot society seems to have been forced to adopt social behaviours despite the fact that the morals might be considered as insulted. But progress in equality and non discrimination matters is necessary for a State to be considered as European and Democratic. In this way, we contribute to a better application of the international respect of human rights and this is the point were legal civilization functions as a vital contribution to the progress of our social civilization. Eradicating discrimination within legal systems and societies means respect of others. But above all, we have to respect all human beings no matter what and where they are, since even if a single individual faces discrimination and exclusion, democracy is not applied.

19 West, supra note 8, at 182.
20 Id. at 196.
A COMPARATIVE AND FUNCTIONAL APPROACH TO CORPORATE LAW TEACHING

Horace Yeung*

Traditionally, the major way to teach/study law has been using a doctrinal approach. It focuses on complex legal issues or problems and relies on interpretation and application of the law using legal precedent, law sources and the work of other academics, etc. In the era of globalisation, an innovation of legal education is incorporating a comparative approach. This approach analyses how different legal systems and jurisdictions have dealt with a particular problem. This short article aims to explore the expectations of different stakeholders amid the globalisation of legal education and some theoretical issues concerning a comparative and functional approach to corporate law teaching, predominantly from the perspectives of a practitioner in the UK higher education establishment.

INTRODUCTION

Brookfield proposes four lenses that can be engaged by teachers in a process of critical reflection: (1) the autobiographical, (2) the students’ eyes, (3) our colleagues’ experiences, and (4) theoretical literature.¹ Specifically, these lenses correlate to processes of self-reflection, student feedback, peer assessment, and engagements with scholarly literature. Cogitating upon these processes provides the foundation for good teaching and the means to become an excellent teacher. Regarding the process of designing a curriculum, to interpret these lenses in a slightly different way, it appears that we have to consider the expectations of different stakeholders, such as students, employers and decision makers at different levels within the institution. In this short article, I would like to explore the areas of concern in adopting a comparative and functional approach in teaching corporate law. This is predominantly motivated by the fact that we are living in the era of globalisation. It is no longer adequate to just know what surrounds us. There is a need to have a global perspective. Accordingly, there are various expectations arising from this internationalisation and globalisation trend.

* Horace Yeung, Lecturer in Law, University of Exeter. My research interests lie in Company Law, Financial Law and Comparative Corporate Governance. This article is derived from a project with Exeter’s School of Education. Thanks to Cheryl Hunt for some of the ideas in this paper.

The structure of this article is as follows: Part I summarises these expectations from students, employers and different levels within a higher education establishment. Part II then goes on to explain some theoretical issues in relation to a comparative and functional approach to corporate law teaching. Part III on the other hand endeavours to examine some practical issues before a final conclusion is made.

I. LEGAL EDUCATION IN THE GLOBALISATION ERA

To some, legal education has changed remarkably little in over a century. Law professors or lecturers still teach from legal statutes and casebooks in relatively large classes. The method has taught countless generations of lawyers how to analyse issue and develop legal arguments. As Miguel rightly indicates, law is changing. Legal rules increasingly originate from European and global sources of law. Lawyers increasingly need to work in different jurisdictions and operate in the context of different legal sources. The market for legal services is also increasingly integrated. Therefore, even if a law graduate chooses to work in London, he or she inevitably still needs to deal with legal issues arising from a foreign transaction. The globalisation of legal education is a natural consequence of the globalisation of business and the law.

A. Expectations from Students

The primary goal, among all other objectives, of a law school is to train students to become a lawyer. The training and qualification required to enter the profession, in the context of the UK, is regulated by the Solicitors Regulation Authority or the Bar Standards Board (depending on whether the student wants to become a solicitor or a barrister). In essence, for a law degree to be useful, it must be recognised by the professional bodies.

I believe that almost all students going to a law school wish to become a lawyer. According to a survey carried out jointly by the College of Law and the Times, three quarters of law students believe that a degree is necessary to reach the top of the profession. In the same study, when asked about the type of company they would be least likely to work for, large law

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4 In this study, 1,816 law students responded to an email inviting them to complete the online survey which was live between September 17 and September 29, 2010. The results were published in the Times’ October Student Law supplement.
firms came up top. This implies them to enhance the employability of law students. It is necessary to examine the demands of these mostly international firms, which are examined below. It is interesting to also point out that, corporate law is the area where most students would like to apply (25%), and even more students envisage that they will be likely to/have already applied to work in this area (31%).

B. **Expectations from Employers**

According to the Law Student Report 2011, salary and benefits is the most important criterion in students’ choice of future employer.\(^5\) Whilst top law firms will pay more to attract top talents, other top factors, including career prospects, prestige and international opportunities are also what these firms can offer. The leading and most prestigious UK-headquartered law firms are generally referred to as the “Magic Circle” firms.\(^6\) One of the major characteristics of these firms is that they have multinational operations. For example, Allen & Overy has thirty-six offices worldwide. Also, these firms generally derive their revenues from corporate and financial activities. According to the Lawyer UK two hundreds Annual Report (2010), the four key sectors central to most major law firms are corporate, finance, real estate and litigation.\(^7\) To get into these firms, applicants generally will be asked to demonstrate a strong academic performance (normally by having a good degree–2:1 or above). Beyond this, they want to see evidence of other skills such as teamwork, communication skills, planning and organisation, problem solving, commitment to a career in law and more importantly commercial awareness. Strictly speaking, it is not essential to study law to enter these law firms. However, law graduates, especially those studying corporate and commercial law, will have more advantages in convincing their employers that they possess the required skills. Once employed, it is very likely that they are seconded to a foreign office. Knowledge in some foreign legal systems is potentially a strength that the firms value. Expectations from within an Institution

As mentioned, the motivation to adopt a comparative and functional approach to teach company law is globalisation. In response to the imminent need to globalise, Kumaralingam Amirthalingam, Vice Dean of the Law School at the National University of Singapore, has several remarks on how

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\(^5\) The survey, conducted by Legal Week Intelligence, captured the views of over 3,000 law undergraduates from the UK’s top universities (Russell Group).

\(^6\) The five members of the Magic Circle are: Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters, Slaughter and May.

\(^7\) The report is available at http://www.thelawyer.com.
to adopt a holistic globalisation strategy involving curriculum design, programmes, students and faculty. First and foremost, modules on public and private international law, transnational law and comparative law have to be included in the curriculum. There may be options to include these new modules as standalone modules or to integrate them into existing modules. The latter may be a more viable option because students do not need to take any extra modules. For example, a traditional Contract Law module can be converted into a Comparative Contract Law module. Another point is, having an academic community that is diverse is important. The faculty should also be international enough and hailing from different jurisdictions. Their expertise can contribute to the comparative elements in different modules as said in the first point. In addition to the full-time faculty, visitors from around the world to come and teach at Exeter should be encouraged.

In connection to this, internationalisation strategies which are adopted by many universities in the UK to enhance their competitiveness will be relevant. These strategies are implemented at different levels and can potentially reshape the formulation of a comparative company law module.

It is useful to use the University of Exeter as an example. According to the University’s International Strategy, the priority for Exeter was to increase the number of international fee-paying students. Considering that not all international students will stay in the UK to advance their careers (particularly true amid the increasingly stringent visa requirements), it is useful to offer them a set of skills usable at their home countries. On the other hand, it is essential to add a global scope to the existing skills set of local students so as to prepare them to succeed in the competitive job market. China continues to be a major market for British universities seeking to attract students to the UK. For example, currently about 26% of all international-fee students at Exeter are from China and 39% of all students on postgraduate taught (PGT) programmes in the Business School are of Chinese ethnicity. Recognising that business-related subjects are popular among Chinese students, a module like ‘Comparative Company Law’ can be one of the reasons why they are pulled to Exeter, but not other competitors. One of the priority areas in the International Strategy of Exeter is indeed internationalising the curriculum. “Comparative Company Law” is an example of how an ordinary “Company Law” module which is basically seen in every institution can be twisted a bit to conform to the direction of the University.

But there are certain issues that must be acknowledged. Firstly, adding a comparative element should not compromise the welfare of local students.

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8 Statistics from the University of Exeter, where the author of this article is based.
As mentioned before, a law degree must be “recognised” by the professional bodies. We have to ensure that adding a comparative element will not affect such recognition. Secondly, it follows from the first point that UK law should still be the focus. For example, whilst Chinese law may be interesting to Chinese students, it may be irrelevant to other students who have no intention to work in China. Thirdly, the comparative elements must be appropriately justified. If China is the target market, it makes perfect sense to compare English and Chinese law in the module. However, ultimately, a university may aim to increase the number of international students taking programmes, while ensuring an appropriate balance by nationality, level and programme. So, it may be preferable to add other laws into the mix with a view to attracting students from a variety of countries.

II. A COMPARATIVE APPROACH IN THE STUDY OF LAW

Perhaps one of the widely quoted ideas on legal education is below: Law is a science, and…all the available materials of that science are contained in printed books. …We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.⁹

Indeed, there are three major ways to study law. The traditional one is a doctrinal approach. It focuses on complex legal issues or problems and relies on interpretation and application of the law using legal precedent, law sources and the work of other academics, etc.. It requires critical judgement of existing authorities and analysis and evaluation of relevant debates rather than mere description of the present status of the law. Alternatively, an empirical approach incorporates some original small-scale research with the collection and analysis of primary data to illustrate or form the basis of legal analysis. Also, there is a comparative approach. This approach analyses how different legal systems and jurisdictions have dealt with a particular problem. Legal scholarship can embrace many forms, but it is widely believed that doctrinal approach that has been predominant, “so much so that the academic study of law has become synonymous with it”.¹⁰

Amid the increasing number of cross-border transactions, issues arise from both the host jurisdiction and the home jurisdiction. Comparative law

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⁹ Langdell Christopher, The Harvard Law School, 3 LAW QUARTERLY REVIEW 123, 124 (1887).
techniques inevitably need to be employed to tackle those issues. Comparative law is one method to “compare and contrast norms, institutions, cultures, attitudes, methodologies, and even entire legal systems”. It is regarded as a significant solution to resolve the problems arising from trans-border transactions and events.

Comparative technique is feasible not only because a dispute is generally between two parties, so there is normally a need to look at two systems only, but also because it is not necessary to be an expert of around 320 jurisdictions (e.g., the US has 50 jurisdictions) that currently exist in the world. In fact, there are just three legal origins to all these jurisdictions: Napoleonic with France as main originator, Roman-Germanic with Germany as main originator and finally Anglo-American common law with England as main originator. These polarised legal systems were then exported to nearly every jurisdiction in the world with very few exceptions. Export can be done by colonialism, especially by Britain, France and Holland; or by emulation, fostered by cultural association.

Legal transplant was a term coined by Alan Watson to indicate “the moving of a rule or a system of law from one country to another”. On a general theoretical level, Watson believes that legal transplants between different societies are feasible on the proposition that “there is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law”. Today, legal transplants are often mentioned in the broader process of diffusion and infusion of law. In Twining’s view, instead of direct one-way transfer, reciprocal influences between legal orders at different levels are common. This implies that studying the law system of one country may actually help the understanding of the system in another country.

This is arguable a tendency of convergence. Convergence usually means unplanned coming together of law. Gilson classifies convergence as three types: formal, functional and contractual. Formal convergence involves change in the legal infrastructure and therefore requires political support and resort to the legislative process. Functional convergence occurs when existing governance institutions are flexible enough to respond to the demands of changed circumstances without altering the formal

characteristics of institutions. Contractual convergence occurs when the existing regulatory framework lacks the flexibility to adapt to new circumstances without formal changes and an ad hoc solution is adopted through the medium of contract. Functionalism, which is a method to look at functional convergence and examines the common function served by legal systems, is an important landscape in comparative legal studies. The opposite of convergence is divergence which means that different jurisdictions will have their own characteristics. The debate on convergence/divergence of legal systems is a consequence of globalisation, which increase the interactions between different systems. Divergences between legal regimes remain because of various reasons such as different cultures, national consciousness, judicial systems, histories and politics. But scholars like Reiner Kraakman and Henry Hansmann advocated a convergence trend. The motivation to look for the best set of rules is likely to press all major jurisdictions toward similar rules. One example is company law in the sense that the basic law of the corporate form has already achieved a high degree of uniformity throughout the world, and continued convergence is likely. The direct consequence is that the Anglo-American system will spread over the world owing to the dominance of Anglo-American multinational companies and its resulting apparent superiority. This can be an easy explanation of why students around the world are keen to go to the US and UK to learn about their systems.

III. A COMPARATIVE AND FUNCTIONAL APPROACH TO TEACHING/STUDYING CORPORATE LAW

Reiner Kraakman and Henry Hansmann are pioneers in the study of comparative corporate law. Together with a group of other leading corporate law academics from different jurisdictions, they published a ground-breaking textbook for it. The approach adopted in this textbook has three significant features. Firstly, it is functional. The book highlights the economic logic of corporate law and explores the economic contributions to business life. Secondly, it is international. The authors are from disparate jurisdictions. Also, the book is predicated on the idea of a field of corporate law with problems and legal strategies and is independent of the laws of

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16 Ibid.
18 Ibid. Preface.
specific jurisdictions. To illustrate the concepts, the authors draw on experience in five major jurisdictions: France, Germany, Japan, the UK and the US. Thirdly, the book is neutral. There has been no attempt to conclude that a particular jurisdiction is better than the others. In summary, this book has laid down some fundamental principles for academics who would like to design a comparative company law module.

Naturally, the objective of a comparative company law is to compare the company laws in different jurisdictions. So, the word “comparative” is understandable. However, why is there a need to make it functional? This is actually a methodological issue in the sense that we compare likes for likes, but not apples with oranges. There are certain points of approach that academics must exercise caution.

1. Obtain accurate information and compare only comparable items;
2. Examine the functional values of system components, also within the context of the society as a whole;
3. Duly consider history’s impact on the legal system; and
4. Be aware of the natural distorting tendencies of one’s own perspective.

For example, the very first point to consider is, in the context of the UK, the major legislation will be the Companies Act 2006. If one is to compare the company law of England with a foreign jurisdiction, what will be relevant legislation in that country? Therefore, one must draw a boundary with some specificity around the concept of “company law” and define it in the beginning. A possible frame of reference for a comparison of three major systems of company law will be like this: Aktiengesetz in Germany, Delaware General Corporation Law in the US and finally the Companies Act 2006 in the UK. It looks trivial, but at least in the US, there is a problem. The US has 50 jurisdictions. Why do we choose the State of Delaware to represent US over other states? To dig deeper, it will be interesting to know that in the US, more than 50% of all publicly-traded companies, including 63% of the Fortune 500 have incorporated in Delaware. We choose Delaware primarily because of its importance.

In a ‘traditional’ company law module (e.g. still the case for law undergraduates), the Companies Act is the backbone of discussions because students are just expected to know English law. The curriculum will therefore largely follow the sequence of the Act by looking at the issues related to the birth of a company to its demise. The module at Exeter, for instance, covers topics arising throughout the life of a company from

formation, through administration and management, directors’ duties, shareholder remedies, corporate responsibility, corporate finance and finally to the insolvent liquidation of a company. In contrast, a comparative and functional approach is getting popular, especially at the Masters level. For example, at the School of Oriental and African Studies (University of London), their International and Comparative Corporate Law module examines the evolution of business cultures, corporate forms, and core company law concepts from within the four origin legal systems (England, France, Germany and the US).  

Similarly at the University of Oxford, the Comparative and European Corporate Law consists of a comparative study of major areas of the company laws of the UK, continental Europe (in particular, Germany) and the US as well as an assessment of the work done by the European Union in the field of company law.

The difference between the traditional approach and the comparative and functional approach is that, the former has a bottom up view and the latter a top down view. In the traditional approach, students generally will come across the law first before realising its functions. In the comparative and functional approach, we look at the functions of company law first before finding the relevant laws in different jurisdictions. We discuss the reasons why it is important to look the regulation of companies. It is because there are various parties involved and there are potential conflicts between them. Three generic problems arise in business enterprises. The first involves the conflict between shareholders and the managers. The problem lies in assuring that the managers are responsive to the shareholder interests rather than pursuing their own personal interests. The second problem involves the conflict between the majority and minority shareholders. The final problem involves conflicts between the company itself and outsiders such as creditors, employees, and customers. As a result, different legal strategies are employed accordingly, as shown in the table below. Students will then be asked to draw on the laws of different jurisdictions and fit them, for example, into the table further below.

Table 1  Legal Strategies of Company Law

<table>
<thead>
<tr>
<th>Governance</th>
<th>Regulatory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment rights</td>
<td>Agent constraints</td>
</tr>
<tr>
<td>Ex Ante Selection</td>
<td>Initiative Rules</td>
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<tr>
<td>Ex Post Removal</td>
<td>Veto Reward</td>
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<td></td>
<td></td>
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<td></td>
<td>Ex Post Exit Standards</td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>


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Table 2  Functional Components of Company Law

<table>
<thead>
<tr>
<th></th>
<th>Germany</th>
<th>United Kingdom</th>
<th>Delaware</th>
</tr>
</thead>
<tbody>
<tr>
<td>Main statute</td>
<td>Aktiengesetz</td>
<td>Companies Act 2006</td>
<td>General Corporation Law</td>
</tr>
<tr>
<td>Linked statute</td>
<td>Co-determination act</td>
<td></td>
<td></td>
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<tr>
<td>Linked statute</td>
<td>Transformation act</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Upper-level Regulations</td>
<td>Applicable EU regulations</td>
<td>Applicable EU regulations</td>
<td>Exchang act rules (federal)</td>
</tr>
<tr>
<td>Related area</td>
<td>Takeover act and regulation</td>
<td>Takeover code(linked rules)</td>
<td>(as above)</td>
</tr>
<tr>
<td>Related area</td>
<td>Securities Trading Act and Rules</td>
<td>FSA disclosure and transparency rules under FSMA</td>
<td>(as above)</td>
</tr>
<tr>
<td>Individual rules</td>
<td>Criminal Justice Act 1993</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individual rules</td>
<td>Insolvency Act 1986</td>
<td></td>
<td>Fraudulent Conveyance Rules (state)</td>
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<td></td>
<td></td>
<td></td>
<td>Bankruptcy Rules (federal)</td>
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<tr>
<td>Related area</td>
<td>Listing rules</td>
<td>Listing rules</td>
<td>Listing rules</td>
</tr>
<tr>
<td>Related area</td>
<td>EU regulations &amp; advice</td>
<td>EU regulations &amp; advice</td>
<td></td>
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</tbody>
</table>


**CONCLUSION**

In the globalisation era, the comparative and functional approach is an interesting and timely approach to look at indeed not just company law, but also other subjects such as contract law, criminal law, human rights law and so on. However, extra caution must be exercised when applying it to undergraduate modules. First, the approach is academically challenging. Whether undergraduates are ready for it is questionable. Second, a practical concern is undergraduate law degrees must be “accredited” by relevant professional bodies. Hence, lecturers have less freedom in curriculum design. A solution to this may be designing an optional module for those who are interested in the comparative side of law, rather than altering the contents of core modules.
ANALYSIS OF THE DEVELOPMENT OF FOOD SAFETY RISK ASSESSMENT SYSTEM

Jiang Yi∗

The food safety is becoming a global problem. To establish a perfect food safety risk assessment system has been the focus of public attention. Through analyzing the current situation of the China’s food safety risk assessment system and by means of utilizing foreign advanced food safety risk assessment experience as a source of reference, the article introduces the concept of risk communications and recommends to improve public participation, accomplish the cooperation between risk evaluation expert group and third-party assessment agencies, and work out a uniform, rigorous standard for food safety risk assessment.

INTRODUCTION

Zero risk does not exist in food safety. Without strong risk assessment as a basis, it is difficult to develop appropriate, convincing food safety policies, standards and regulatory measures. Therefore, food safety risk assessment system should be placed at the primary position in the overall food safety regulatory system. This article will discuss how to improve the food risk assessment system in China under the basis of current situation and foreign experience. Part I summarizes the concept of the food risk assessment of World Health Organization (WHO), CAC and China. Part II introduces the risk assessment system in European Union, U.S.A. and Germany. Part III analyses the status quo in China from three aspects. Part IV puts forward some advice for the future development of China’s food safety risk assessment system.

I. OVERVIEW OF FOOD SAFETY RISK ASSESSMENT

The risk assessment of food refers to scientific assessment of bad influence on human health by a variety of food-borne hazards involved in food production, processing, preservation, transportation and sales process according to a certain series of criteria, it is emphasized by WHO and Codex Alimentarius Commission (CAC) to be used as the necessary technical means to develop food safety regulations, and the main basis to

∗ Jiang Yi, Lecturer in Department of Management, Chongqing Medical University, Chongqing, China, research field: Health Care Management.
formulate food safety regulations, food standards, and food policies by government. It is stipulated in Article 62 of the Food Safety Law of the People’s Republic of China that food safety risk assessment, covering hazard identification, hazard characterization, exposure assessment, risk characterization, refers to the scientific assessment of bad influence on human health caused by the biological, chemical and physical hazards in food and food additives.

II. SEVERAL FOREIGN RISK ASSESSMENT SYSTEMS WORTHY OF REFERENCE

A. The European Union: Risk Communication

On January 28, 2002, the European parliament and council declare the establishment of the European Food Safety Agency formally, whose main task is to be in charge of risk assessments and risk communications. The European Food Safety Authority entrusted other professional organizations to do the necessary scientific research work in an open and transparent manner, through the professional cooperation between Member States, European commission, and professional scientists. It can ensure public access to timely, reliable, objective, correct food information on the basis of the experts’ scientific advice on supporting and sharing risk assessment data. The European Food Safety Authority collects public views and opinions and publishes scientific advice, propaganda materials and research results as well as authoritative statements using the Internet, publications, exhibitions and conferences plus other public information exchanges. By constantly increasing public awareness of food risk, explaining the food risk systematically, close co-operating with national food safety authorities, and getting scientific advice provided by Expert Advisory Forum Working Group on the Exchange, it can ensure timely release of the risk communication information1.

B. The United States of America: The Evaluation Monitored by Multi-side Authorities

The United States is one of the first countries that introduce risk analysis to food safety management. Science and risk assessment are the

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1 Wang Fang (王芳), Chen Song (陈松) & Qian Yong-zhong (钱永忠), Fada Guojia Shipin Anquan Fengxian Zhidu Jianli ji Tedian Fenbu (发达国家食品安全风险制度建立及特点分布) [The Establishment of Food Safety Risk Analysis System and Characteristics in Developed Countries], 3 ZHONGGUO MUYE TONGXUN (中国牧业通讯) [CHINA ANIMAL HUSBANDRY BULLETIN], 40-42 (2009).
foundation of food safety policy. The U.S. Federal Government has not set up a special food safety risk assessment agency, but there are many institutions that can participate in the risk assessment, each of which can work independently to carry out risk assessments in its respective field. Among them, U.S. Food and Drug Administration, together with the University of Maryland set up food safety and nutrition centers to be responsible for collecting data of types of food contamination factors and assessment work. However, as for large-scale risk assessment involving a wide range of areas, after having been completed alone or in combination, a piece of risk assessment work will be peer-reviewed through the agency exchanges and cooperation to ensure the accuracy of the assessment results.  

C. Germany: Professional Support

In order to strengthen the protection to consumers, Germany founded Federal Institute for Risk Assessment in the November of 2002. The institute, made up of nine major departments, 51 offices, having a total staff of more than 600 people, is responsible for putting forward safety experts report and opinions about food, feeds, and related products (such as cosmetics, tobacco, food packaging materials, etc.) and materials (such as chemicals and pesticides), including providing technical support for German Federal Food, Agriculture and Consumer Protection Departments.

III. THE STATUS QUO OF THE FOOD SAFETY RISK ASSESSMENT SYSTEM IN CHINA

The Food Safety Law of P.R.C. came into effect on June 1, 2009. The law specified to establish a food safety risk assessment system in our country, and to build up a food safety risk assessment expert committee mainly consisting of experts on medicine, agriculture, food, nutrition and others, formulating that the results of the food safety risk assessment are the scientific bases to formulate and amend the food safety standards and supervise the implementation of food safety administration. However, the

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2 Liu Junmin (刘俊敏), Meiguo de Shipin Anquan Baozhang Tixi jiqi Jingyan Qishi (美国的食品安全保障体系及其经验启示) [U.S. Food Safety System and Its Experience Enlightenment], 6 LILUN TANSUO (理论探索) [THEORETICAL EXPLORATION], 133-136 (2008).

3 Li Ning (李宁) & Yan Weixing (严卫星), Guoneiwai Shipin Anquan Fengxian Pinggu zai Fengxian Guanli zhong de Yingyong Gaikuang (国内外食品安全风险评估在风险管理中的应用概况) [General Situation of Domestic and International Food Safety Risk Assessment in the Application of Risk Management], 23 ZHONGGUO SHIPIN WEISHENG ZAZHI (中国食品卫生杂志) [CHINESE JOURNAL OF FOOD HYGIENE], 13-17 (2011).
food safety risk assessment does not seem to take much effect, and food safety accidents still happen a little now and then.

A. The Behindhand Risk Communication Work

The Food Safety Law of the People’s Republic of China coming into effect on June 1, 2009 specified that whatever food shows to have a higher degree of food safety risk through comprehensive analysis assessment, the health administration department under the state council shall promptly issue food safety risk warning and make it public. But our country is lacking in the food safety risk monitoring information and food safety supervision and management information-gathering mechanism, so it is difficult to proactively identify potential risks in food safety and initiated evaluation actively. The implementation of the system doesn’t change the situation in which the food safety regulatory authorities always release safety information half a beat more slowly. Compared with the EU Food Safety Agency risk assessment system, our risk assessment becomes relatively “hidden”. From the foundation of food safety risk assessment system, little is known about the progress of its work and food risk information.

B. Weak Professional Technical Force

In general, China’s food safety risk monitoring and evaluation standard system is still in the initial stage. It currently faces two major problems: one is the lack of specialized technical support in the food safety risk assessment work given by national institutions, and the technical ability cannot be guaranteed. It is understood that only 30 percent of China’s provincial-level disease prevention and control institutions completed the 2010 national plan of all monitoring projects. In the “San Yuan Milk” incident, among the national testing agencies, only Beijing Disease Prevention and Control Center has the ability to detect sex hormones in food. The other problem is that the number of technical personnel who grasp the food safety risk assessment techniques is fewer, so it is difficult to bear the complete system of food safety risk assessment mission, we can say the overall research force is rather weak.

C. Lack of Uniform Industry Standards

Our country’s existing food industry standard quality, varying from each other greatly, is interwoven old and new; some criteria are not detailed enough, and there are some problems like there being crossover between
food standards, duplication, deletion, and being too old, which gives the unscrupulous businessmen a handle to use against the customers. As to the adoption of international standards, in the early 1980s, Britain, France, Germany and other countries that have adopted international standards have reached 80%, more than 90% of Japan’s newly developed national standards are adopting the international standards, while in China, only 40% of the national standards use the international criteria; moreover, a considerable number of standards discord with the international ones.

D. All Aspects of Food Safety Risks Can Not Be Fully Covered Only Depending on Government Power

The expert committee for national food safety risk assessment guides the national food safety risk assessment in China. The committee established on December 8, 2009 is composed of medical, agricultural, food, nutrition experts, etc.. But in local districts, the agricultural administration, quality supervision, industry and commerce administration, and food and drug administration as well as other relevant administrative departments of public health present food safety risk assessment recommendations and provide relevant information and data, unavoidably leaving management crossover and blank zone. In addition, that risk assessment experts might only draw the limited conclusions; or misused by food enterprises, the interference of external factors like administrative power control, all of above will affect the authenticity of the food safety risk assessment data4.

IV. THE PROSPECT OF THE FUTURE DEVELOPMENT OF CHINA’S FOOD SAFETY RISK ASSESSMENT SYSTEM

A. Improve Public Participation, and Start the Food Safety Risk Communications in Full Swing

On April 21, 2011, the experts and scholars have passed a brand-new concept-risk communications in the “2011 International Forum on Food Safety”. From risk assessment to risk management to the risk communication, this is the emergency frame system used to face food safety accidents within the scope of the world. Risk analysis should be completed by the joint participation of scientists, politicians and the public. The

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4 Peng Feirong (彭飞荣), Shipin Anquan Fengxian Pinggu zhong Zhuanjia Zhili Moshi de Chonggou (食品安全风险评估中专家治理模式的重构) [The Reconstruction of Expert Governance in Food Safety Risk Assessment], 11 GANSU ZHENGFA XUEYUAN XUEBAO (甘肃政法学院学报) [GANSU INSTITUTE OF POLITICAL SCIENCE AND LAW], 6-10 (2009).
scientists put forward the concrete risk measure after risk assessment, while based on scientific research, politicians establish the decision-making system and announce the publication of various types of risk assessment results and some other scientific suggestions and publish the agenda of various meetings and the public records and interests declared by scientific experts. More important is to carry out social and public information exchange transparently, explaining the complex, specialized terms to the community and the public in a straightforward manner. Make the public known to the food safety risk, and they will not panic in case the unexpected happen. In addition, food safety regulatory agencies at all levels should strengthen communication with the media on food safety issues to achieve a timely response, release authoritative information timely, and remove doubts and misgivings at the first place to improve the efficiency, scientificity, and accuracy of the public release of food safety information.

At the same time, the participation of the public should be increased possibly. Varieties of meetings can be held to encourage the public to participate in; invite consumer representatives or other organizations they are interested in to attend them to help the public get broad access to this information. Network and consulting forums can also be used to communicate with the public as frequently as possible, enhancing the food safety risk assessment to find root in public daily life, implementing consumer protection measures aiming at protecting consumers’ rights and interests to the largest extent, and getting concerned about people’s health truly.

B. Enhance Technical Professionalism of the Employees’ and Complete Professional Monitoring Equipment

In contrast with international advanced food safety risk assessment agencies, the introduction of professional evaluation and monitoring equipment must be considered to raise the hardware level first; secondly, the employees’ professionalism is supposed to improve as well. Exchanging experience with other employees both at home and abroad, a study tour to other rating agencies, and communication with each other are certain to enhance their professional standards. In addition, we can set up more relevant professional courses in universities to reserve professional talents.
C. Develop a Comprehensive and Accurate Food Safety Risk Assessment Standard

The food safety risk assessment standard research is to provide the basis and technical support for establishing and perfecting the food safety risk assessment system, and working out the food safety problems. To set a rational, scientific standard for food safety risk assessment is the key to resolving the food safety issues. According to China’s food safety evaluation results, through analyses of dietary structure of different regions, ethnic groups, and population, comparing International standards for comparative analysis, doing special investigations and studies, and after listening to and adopting the views of various sectors, the relevant departments should analyze the current effective food produce quality safety standard, food sanitation standard, food quality standard, and industry standard related to food, comparing our standards with those of Codex Alimentarius Commission, the European Union, Australia and New Zealand, Japan, the United States and other international organizations to work out the food safety risk assessment standard suitable for China’s national conditions and in accordance with international standards.

D. With Third-Party Power, Improve the Ability to Assess Food Safety Risk

Up to now, China has initially established a national food safety risk assessment monitoring network concerning provincial, municipal and countryside levels. According to relevant data, in 2010, national food safety risk monitoring program consisted of 32 provincial-level, 241 municipal (city) level and 65 county-level disease prevention and control center undertaking such monitoring tasks to determine the food-borne illnesses, food contamination and food harmful factors. It has monitored a total of 67 kinds of food, 124,000 samples, providing a scientific basis for the objective assessment of China’s food security situation. These are food safety risk assessments carried out by government agencies, which are not in harmony with the status quo of a broad range of foods in China. They can not complete comprehensive evaluation and monitoring. And in many developed countries, non-governmental organizations and university laboratories have taken up a portion of food risk assessment voluntarily to

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5 Sheng Fengjie (盛风杰), Cao Huijing (曹慧晶) & Li Xu (李旭), Qiantan Woguo Shipin Anquan Fengxian Pinggu Zhidu de Wanshan (浅谈我国食品安全风险评估制度的完善) [On China’s Food Safety Risk Assessment System Improvement], 8 FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 68 (2009).
put forward the corresponding evaluation results from a more objective, professional angle. Therefore, our country can also strengthen cooperation with folk organizations and various research institutions, with the help of professional advantages of scientific research institutions and neutral food risk view, to undertake China’s massive food risk assessment work by multiple systems and improve food safety risk assessment capacity.

CONCLUSION

For food hygiene supervision, with its regulatory targets large-scaled, outnumbered, and scattered, it is impossible for government to cover everything and please everyone. In addition, the resources that put into food safety are limited, so risk assessment must be put in the first place. Scientific methods must be used to analyze risks to nip the potential problems in the bud and put the resource into places where they are needed most.
UKUTHWALA CUSTOM IN SOUTH AFRICA: A CONSTITUTIONAL TEST

Hlako Choma*

Section 31 of the South African Constitution provides that “every person shall have the right to use the language and to participate in the cultural life of his or her chose”. The rights entrenched in the Bill of Rights may be limited by the law of general application, provided such limitation, Shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality, and Shall not negate the essential content of the right in question, and provided further that any limitation, shall in addition to being reasonable as required in (a), (i), also be necessary. The question to be answered is, whether or not Ukuthwala custom is protected by section 31 of the Constitution? If not, does the limitation clause entrenched in the Constitution applies in cultures that appear to infringed the rights entrenched in the Bill of Rights? The paper endeavours to answer these questions.

INTRODUCTION

A. Opening Remarks

Ukuthwala is one of the methods of the formation of customary marriage; however, the Cape Colonial government during the Union of South Africa denied the recognition of the customary marriages of the African people. In the understanding of the Cape Colonial government Ukuthwala in the Cape Colonial government’s understanding of customary law amounted to the crime of abduction. Ukuthwala is still practiced in some of the Communities in South Africa, in particular Nguni Communities.

The engagement between a man and a woman is sealed by the deposit with the girl’s father of a few head of cattle which are held as an earnest of the suitor’s good faith to proceed in due course with the proposed marriage.1 The engagements are not always initiated by negotiations which will involve the bride or the bridegroom, that is, the engagements are not always initiated with orthodoxy, it sometimes initiated by a romantic procedure

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* Hlako Choma, Senior Lecturer and Head of Department Public Law, University of Venda Law School; LLM Howard University, LLM Georgetown University, Washington DC respectively. Advocate of the High Court, South Africa; Commissioner for Small Claims Court, South Africa.

called thwala, particularly when there are some obstacles to a marriage. The obstacle may not necessarily have imposed by the girl’s guardian. The procedure for ukuthwala is as follows, the intending bridegroom, with one or two friends will escort the intended bride in the neighborhood of her own home, quite often late in the day, towards sunset or at early dusk. They will forcibly take the girl to the young man’s home. It happens sometimes that the girl is caught unawares, but in many instances she is caught according to plan and agreement.

“The handing over of the girls need not be a formal ceremony, upon delivery of lobolo or even of earnest cattle or a fine for seduction only, the subsequent thwala of the girl consummates the union, if her guardian suffers her to remain with her suitor on the understanding that further lobolo will be paid in due course”.  
In other word, physical consummation is not necessary, as long as the bride has been sent to the kraal where the bridegroom lives, as his wife, even if the bridegroom is away at the time.

B. The Origin of Ukhuthwala

Ukhuthwala custom originated from Xhosa culture, and was prevalent mostly in the Eastern Cape. The families made marriage arrangements for their girl children without the girl’s consent. In most affected cases the girls will be in the ages between twelve and fifteen. This practice directly and indirectly impacted negatively on the development of the girl child, in that the culture resulted in social isolation, denial of the right to education, poor life skills, psycho-social harm, early pregnancy and childbirth and risk of exposure to HIV/AIDS.

Ukuthwala is understood as a form of abduction that involves kidnapping of a girl or a young woman by a man and his friends or peers with intention of compelling the girl or young women’s family to endorse marriage negotiations. Ukuthwala was condoned although abnormal path to marriage targeted at certain girls or women of

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3 Siluva v Zibonela 1947 NAC (C&O) 41.
5 Bhe v Magistrate, khayelitsha 2005(1)SA580(cc). This no doubt contributed to a situation where, in the words of J. Mokgoro, “customary law is lamentably marginalized and allowed to degerates into a vitrified set of norms alienated from its roots in the community, see also D.S. Koyana & J.C. Bekker, The Indominable Ukhuthwala Custom, 1 De Jure (2007).
Initially the culture did not involve raping or having consensual sex with the girl until marriage requirements had been concluded. The culture is currently abused, in that it is increasingly involves the kidnapping, rape and force marriage of minor girls as young as twelve years, by the grown up men old enough to be their grandfathers. Ukuthwala deprives the young girls opportunity to enjoy their childhood, such that it causes an abrupt cessation to the girls childhood and care free existence that all children are entitled to. It postulates that the girl is suddenly turning to be a wife with a husband.

I. PROTECTION OF CULTURE

A. Opening Remarks

Section 30 of the South African Constitution\(^7\) deals respectively with language and culture, section 31 deals with protection of culture, religious and linguistic communities. Section 30 provides that everyone has the right to use the language and participate in the culture of their choice; however, no-one exercising these rights may do so in a manner inconsistent with any provision of the Constitution.\(^8\)

Section 15(3) of the Constitution allows for the legislative recognition of customary marriages and religious marriages and empowers the state to give effect to such marriages in terms of a system of traditional or religious law. Any such recognition must be consistent with section 15 and the rest of the Constitution.\(^9\)

It raises the problem of compatibility of traditional and religious law with the Constitution. If one analyses these provisions of the Constitution, one will realize that there are numerous areas of conflict. It appears from the provisions of the Constitution that polygamy is discriminatory against women, in that women cannot practice polygamy and that defeats the purpose of equality clause entrenched in the Constitution. In the Jewish and Muslim law, the divorce law seems to favour men than women, such that it is easier for men to divorce women, while under African customary law women are considered perpetual minors, their husbands majors and women

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\(^{7}\) Act 108 of 1996.


are subject to the guardianship of their husbands. The Muslim Personal Law, widows inherit less than they would under civil law and women have a very limited entitlement to maintenance if their husband leaves them.

B. Customary Law and the Constitution

Ntlokwana in his submission to the South African law Commission on Ukuthwala custom, contends that the recognition of customary law in the existence of human rights remains a challenge, in particular in postcolonial democracies. It was mentioned in the early discussion of the paper that the Constitution recognizes customary law in the South African legal system. It is quite clear that provisions of the Constitution put it beyond doubt that customary law should be accommodated, not merely to be tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrenches respect for cultural diversity. The paper has already pointed out that there are challenges of the South Africa Constitution, particularly the contradictions that are raised between universal individual rights guaranteed in the Bill of Rights, on the one hand and long cherished traditional practices on the other, which often violate the rights contained in the Bill of Rights. Ukuthwala custom is one of the examples of such tension. Ukuthwala as currently practiced is in violation of the rights of the child as articulated in the United Nations Convention on the Rights of the Child, South Africa is bound by the Convention on the Rights of the Child and other human rights treatises. South Africa signed it without reservations. The convention on the rights of the child states that every act or decision involving a child must be in the best interests of the child. It is common knowledge that force marriage, child marriage, rape and sometimes trafficking in persons involved in most instances of ukuthwala violate other

11 Ntlokwana N submission to the South Africa law commission on Ukuthwala custom. Codification of customary law led to its marginalization. This consequently denied it of its opportunity to grow in its own right and to adopt itself changing circumstances, see Bhe v Magistrate Khayelitsha 2005(1) SA580(cc).
12 Akrofi v Akrofi 1965 g.l.r.13. If our customs are to survive the test of time, they need to change with the times. If customary law is to retain its place as the greatest adjust to statutory law and the constitutional law, it cannot remain stagnant whilst other aspects of the law are in constant motion. The ukuthwala custom might have been justified by the traditional social economic structure in it developed. It has outlives it usefulness. See also Alexkor Ltd and Another v Richterveld Community and Other 2003 (12)BCLR1301(cc).
14 Convention on the Elimination of all forms of discrimination against women, in particular article 5 on Harmful Traditional practices.
international human rights obligations for South Africa. The Constitution of South Africa states that:

A child’s best interests are of paramount importance in every matter concerning the child (person below 18 yrs). As already stated above, ukuthwala may not be in the best interest of the child, it specifically violates the right of a child to be cared for. This includes the right to be protected from maltreatment, neglect not subjecting children to work or survives that “place at risk the child’s wellbeing, education, physical or mental health or spiritual or social development”.

**CONCLUSION**

Taking into consideration all what was articulated in the paper, it is clear that ukuthwala custom is unlawful and unconstitutional, it is unconstitutional in the sense that it violates the right to have one’s dignity respected and protected, the right to education, the right to freedom and security of the person and is clearly not in the best interests of the child. It is unlawful in that it violates the Children Act, the criminal law (sexual offences and related matters) Amendment Act, Recognition of Customary Marriage Act.

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16 Act 38 of 2005.
17 Act 120 of 1998.