

◎ 范健 王建文 著

英美法学文丛

商法论

高等教育出版社



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内容提要

商法基础理论是构建商法学科体系的理论支柱。本书从商本体、商主体和商行为的视角对商法的内涵与外延、商法的历史演进、商法的独立性、商法的调整对象、商法的立法模式、商法的体系、商主体制度与商行为制度等商法基础理论问题,进行了系统的探讨和研究。本书对商法规范内在特征和关联性的理论研究,是为推动中国商事立法的系统化和规范化,为促进商法学科体系的建立的一次重要探索。

本书为高等教育出版社法学学术专著系列丛书——“高教法学文丛”之一,可作为全国高等学校法学专业研究生教材,并可作为全国高等学校法学专业核心课程教材——《商法》(第二版)的主要教学参考书。

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前 言

中国民法典制定的理论与实务准备,使民商合一的立法模式得到了理论及实务界的普遍认同,商法基础理论的研究再一次被推到了民商法理论研究的边缘地带。关于商法的内涵与外延、商法的独立性、商法的调整对象、商法的立法模式、商法的体系、商主体制度与商行为制度等商法基础理论问题,也成为少有问津的研究课题。在商法研究中,学者们普遍关注的是诸如公司法、证券法等具体问题,缺乏对商法基本理论加以深入研究的兴趣,那么,在已经形成民商合一立法模式之共识背景下,是否还有必要进行以推动我国商法典的制定及商法体系的完善为基本出发点的商法基础理论的体系化研究呢?

毫无疑问,答案应当是肯定的。因为,选择民商合一立法模式制定民法典并不意味着中国民商法已经实现了体系上的完美设计,已经无须进行理论上的研究。相反,由于民商法自身的内在差异性以及大量商事单行法规客观上的独立性及体系上的系统性要求,对商法规范内在特征和关联性的理论研究更成为立法和司法实践中的迫切任务。至为明显的例证是,上个世纪上半叶意大利等国由民商分立转向民商合一立法模式。表面上,这种转变印证了民商合一论者主张的“合理性”与“合潮流性”,然而,立法模式的重大转变同时说明,理论界关于民商法立法模式的认识实际上仅具有相对的合理性,并非永恒不变的真理。尤其,学者们普遍承认,所谓民商合一,实质上只不过仅仅否认了商法形式上的独立性而已,在具体民法与商法的“合一”上,根本不可能做到将商法规范囊括于民法典之中。这一立法安排,不仅表现于由民商分立而改采民商合一的《意大利民法典》中,也表现于我国于1929—1930年

间制定的“民法典”中,还表现于我国民法典的各学者建议稿及全国人大法工委提交全国人大常委会审议过的《中华人民共和国民法(草案)》之中。在民法典之外,实际上已经并必然还要继续存在着大量的不能为民法典所包容,甚至不能为民法典体系所包容的单行商事立法。对于这些零乱的单行商事立法,究竟能否及应否通过系统的体系化研究,使之实现法典化?正是这一客观现实,令我们正视商法基础理论研究的价值。

本书是我们力图构建中国商法基础理论体系的一次探索。14年前,由德国大众基金会资助,我赴德国哥廷根大学学习,开始研究德国商法和欧洲大陆国家商法,也因此在法律素养和法学思维方式等方面一定程度受德国商法熏陶。回国以后,无论在对外国商法的介绍、还是起草中国商法教学大纲、主编全国高等学校法学专业核心课程教材《商法》以及在商法理论研究方面,我对商法的研究都受到大陆法系商法,尤其德国商法的影响。大陆法系商法的最大特点是商法基本理论不及民法基本理论完整、严密、深邃。2000年,由华英文教基金资助,我有机会赴美国哥伦比亚大学法学院做访问学者,着重研究美国商法,虽然在美国商法的研究中,我没有能找到理想的商法基本理论,但美国统一商法典的诞生过程给我以重要启迪:每一个国家的商法都是该国特定的法律传统和现实社会需求相结合的产物。同时我也更加确信,中国需要创造适合自己经济和社会发展的商法,需要逐步创建适合自身需要的商法理论。

在编写法学核心课程教材《商法》一书时,自己就计划撰写一部商法基础理论著作,以推动中国商法学研究基础性工程建设。几年来,无论在国内还是在国外期间,一直思考并研究着这方面的问题,但苦于杂务繁多、精力不济,难以实现夙愿。可幸的是,两年前我从美国回来后不久,王建文同学随我研究商法理论,逐渐显现出独有的才华和极其勤奋的精神。近两年来,我们共同思考、讨论商法学理论问题,相互磋商学术观点和对学术争议的看法,我真正

II

感受到教学相长的乐趣并从中受益。继《商法的价值、源流及本体》一书之后,本书是我们共同探索商法理论的又一阶段性成果。

本书对商法基础理论的研究,在内容方面一定程度上跳出了传统大陆法系商法理论的局限,但在体系结构方面,仍然很强地保留着大陆法系商法的风格。本书中的一系列论断,仅仅是我们对商法基础理论的思考和探索,许多提法与设想确实还欠成熟。然而,我国的商法基础理论研究客观上又确实需要得到大力加强,使之能够与我国商法具体问题研究以及商事立法和司法实践的发展相协调。因此,我们还是决定将凝聚了我们大量心血的关于我国商法的体系性思考以著作的形式发表出来。如果本书的出版能够引发民商法学界尤其是商法学界对商法基础理论的研究兴趣与热情,我们将会感到欣慰。促进中国商法基础理论研究及商法体系化建设乃作者之所愿!

范 健

2003年夏于南京

Preface

Theoretical and practical preparation of establishment of Chinese Civil Code makes the legislative model of combination of civil law and commercial law obtain the unanimous recognition in both theoretical and practice circle. Once again, research on basic theory of commercial law is pushed to the edge of the theoretical research on civil and commercial law. The basic theoretical issues of commercial law including its connotation and extension, its independence, its regulatory objects, the legislative mode, the legal system of commercial law, as well as the commercial subjects and commercial acts system, are sinking into rarely mentioned topics. In the commercial law research, it is the specific issues such as company law or securities law that arouse popular attention of scholars. They have no interest to make deep research on basic theory of commercial law. Then under the circumstances that the unanimous understanding of legislative model of combination of civil and commercial law has reached, is it still necessary to make systematic research on basic theory of commercial law with the jumping-off point to push the establishment of Chinese Civil Code and to perfect the commercial legal system?

Without doubt, the answer is positive. It is because that, the choice of legislative model of combination of civil and commercial law does not mean that Chinese civil and commercial law has achieved systematically perfect design, nor does it mean that there is no need of theoretical research. On the contrary, due to the internal diver-

gence in the civil and commercial law itself, and more important, due to the requirement set by the objective independence of numerous single commercial laws or regulations, we are crying for the theoretical research on intrinsic features as well as its relevancy of commercial law in legislation and judicial practice. An evident example is that, some states including Italy turned from legislative model of separation of civil and commercial law to that of combination of civil and commercial law in the first half of last century. On the surface, this transformation proved the reasonability and confluence of the opinions held by those supporting combination of civil and commercial law. However in the meantime, this fundamental change of legislative model told us that our knowledge to the legislative model concerning civil and commercial law is just of relative reasonability. It is not the eternal truth. Especially it is commonly acknowledged by the scholars that, the so-called combination of civil and commercial law is, in essence, a denial of the formal independence of commercial law. It is totally impossible to embrace all commercial laws and regulations into the civil code in the specific "combination" of civil and commercial law. This legislative arrangement is reflected not only in the Italian Civil Code which transformed from separation to combination of civil and commercial law, but also in the Civil Code compiled during 1929 to 1930 in China. It is even reflected in the various suggesting drafts of Chinese Civil Code provided by legal scholars as well as Civil Code of PRC (Draft) submitted by Commission of Legislative Affairs of the NPC to Standing Committee of the National People's Congress. It is inevitable that numerous single laws and regulations that could not be embraced by Civil Code, even by the system of civil law, will be kept in the future separately besides the existence of Civil Code. Considering these single commer-

cial laws and regulations, we have to answer one question: can the codification be realized through the systematic research? It is this objective fact that makes us envisage the value of research on basic theory of commercial law.

This book is just a result of our probe into the construction of the basic theoretic system of Chinese commercial law. Fourteen years ago, I went to Gotingen University for the study of commercial law of Germany and other countries in Continental law system sponsored by German Volkswagon Foundation. When I finished my study and came back to China, I found that my study on commercial law was with the imprint of Continental commercial law, especially German commercial law since my legal background and way of legal thinking were deeply influenced by German commercial law. It is reflected in whatever the introduction to the foreign commercial law, the draft of Chinese commercial law syllabus, the compilation of the core legal text for law major of Chinese higher education—*Commercial Law*, or the research on commercial legal theory. In 2000, I had the chance to go to law School of Columbia University as a visiting scholar for the research on American commercial law sponsored by Hua Ying Culture and Education Foundation. Although I did not find the most satisfactory theory of commercial law in my research of American commercial law, I was deeply inspired by the birth process of American Unified Commercial Code (UCC). Each commercial law in a specific state is the product of its own legal tradition and the social need. I firmly believe that China needs to create commercial law suitable for its economic and social development and thus it needs to establish step by step the corresponding commercial legal theory.

During the compilation of *Commercial Law*, I was planning to

write a book on the basic theory of commercial law to push the construction of basis project of Chinese commercial law forward. In these recent years, I never gave up this idea whether I was at home or studied abroad. Yet this dream has not been realized due to the daily busyness. Fortunately, shortly after I came back from U. S. two year ago, Mr. Wang Jianwen followed me to study commercial legal theory. His outstanding talent and diligence have been fully revealed during this period. We together think over and discuss theoretical issues on commercial law and exchange viewpoints on academic opinions and disputes. I deeply feel the happiness of reciprocal teaching and learning and benefit a lot from this process. After the writing of *Value, Source And Noumenon of Commercial Law*, this book is another academic result of our exploration of commercial legal theory.

To some extent, the research on basic theory of commercial law in this book has jumped out of the limitation of the traditional commercial legal theory of Continental law system in the aspect of context, yet in the aspect of systematic structure, a distinct style of Continental commercial law is still kept. The several conclusions in this book are just our exploration over basic theory of commercial law and many of which are quite unsophisticated. However, it is a fact that Chinese commercial legal theory are indeed eager for strengthening in order to be harmonized with the research on specific issues of Chinese commercial law as well as legislative and judicial practices of commercial law. Therefore, we finally decide to publish our thoughts on systematic construction of Chinese commercial law in the form of monograph which is a cohesion of our painstaking efforts. We will be gratified if the publication of this book will solicit the interest and passion of Chinese civil and commercial law circle

especially commercial law circle on research of basic theory of commercial law. It is our wish to promote research on basic theory of Chinese commercial law and construction of commercial legal system.

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