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Rights and Interests of Investors  
and corporate Governance

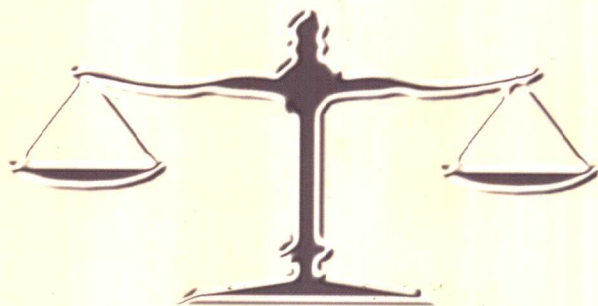
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—— fight for the investor's rights

# 投资者权益与公司治理

—— 为投资者的权利而斗争

郭 锋 / 著

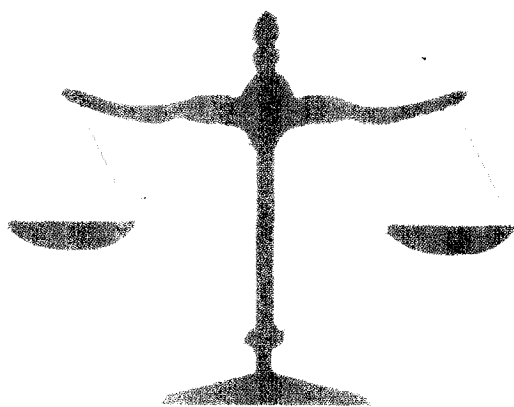


经济科学出版社

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## 投资者权益与公司治理 ——为投资者的权利而斗争

郭 锋 著

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## 前 言

权益，大致亦可称为“权利”。权利，乃权利主体享有之法益。罗马法学家指出：“一切权利均因人而设立”（*hominum causa dmne ius constitutum est*）<sup>①</sup>。可见，一切权利均因人之存在而存在。根据私法理论，每个民事主体，不论其出生、种族、年龄、文化程度、宗教信仰，均享有权利能力。人类法律的发展史，本质上就是承认权利、创制权利、扩展权利、救济权利之历史。

投资者权益是契约社会里个人、团体或机构作为“经济人”所享有的法益。经济学家认为，从个人和企业的相互作用可以划分为产品市场（Product market）、劳动市场（Labor market）、资本市场（Capital market）<sup>②</sup>。在资本市场中，个人的身份即为投资者（Investors）。当然，这里的个人还应扩展到团体、机构等拟制主体。投资者的权益之所以要被保护，归根结底的原因是，资本市场是以投资者为基础性因素的市场，没有投资者，就没有资本市场。

投资者权益涵盖甚广，缔约权、知情权、管理权等均是，但核心是财产权，包括以占有、使用、收益、处分为要素的所有权和以

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① [意] 彼德罗·彭梵得：《罗马法教科书》，中国政法大学出版社1992年版，第29页。

② [美] 斯蒂格利茨：《经济学》上册，中国人民大学出版社2000年版，第15页。

请求权为基础的债权。在现代社会，投资者广泛享有由法律所确认的客观权利，但其主观权利却受到各种袭扰和侵犯。证券市场里，基于信息不对称，管理者的“有限理性”、“机会主义”，<sup>①</sup>违法者的成本偏低，以及政府管制失灵等原因，投资者的主观权利经常被践踏。从美国的安然、世界通讯财务舞弊案，到中国的中科创业、亿安科技、银广夏等股价操纵、利润作假案，均反映出投资者权益屡遭损害的现状。

权利被侵犯，这是一种不可根除的社会现象。从一定意义上可以说，权利正因为遭侵犯才显示出了它的价值和尊严。因此，我们不必为权利受侵犯而大惊小怪或反应过度，关键是要探求保护权利的社会机制。一句古老的拉丁法律谚语“有救济才有权利”足以留给我们丰富的启迪和思考。国人目前正在进行的建立证券市场民事赔偿机制的努力，正是在寻求救济之道。

救济投资者业遭损害的权利，其难点不在于探寻救济之道（诸如因果关系、损失计算、举证责任、诉讼形式等专业课题），而在于培养全社会正确的权利意识。学者认为，权利意识包含三个要素：权利认知、权利主张和权利要求。权利认知是对权利主体已经或应该享有的利益、自由的了解；权利主张是对权利主体已经或应该享有的权利予以确认、维护的意识；权利要求是根据社会环境的变化而提出新的权利请求的意识。权利意识固然属于权利主体，但在广义上也包括公共权力机构，私人自律组织，其他社会成员对权利主体应享权利的认知。

我国证券市场上的权利意识非常模糊。这不仅表现在作为权利主体的投资者对个人权利认知不足，也表现在管制机构往往将客观权利视同为主观权利，忽视对个体权利的援助。尤为不幸的是，拥

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<sup>①</sup> 参见 Oliver Williamson: *The Economic Institution of Capitalism*, New York: The Free Press.

有司法权的审判机关可以对投资者的诉权进行限制或剥夺。不论其理由如何冠冕堂皇，实际上暴露了其权利意识的薄弱或错误。当审判机关将无数投资者的合法诉求拒之于门外之时，我们更感受到了200年前拿破仑主持制定的《法国民法典》第4条之英明伟大，该条规定：“审判员借口没有法律或法律不明确不完备而拒绝受理，得依拒绝审判罪追诉之”。<sup>①</sup>

社会的进步有赖于对个人权利、个人自由的尊重。任何机构和个人均没有权力剥夺、侵犯社会成员的合法权利和自然权利。权利一旦受到损害，在法律上必须具有相应的救济机制。经过全社会的共同努力，我国证券市场投资者保护的民事赔偿机制已初步建立，目前正在向深度、广度发展。这表明，投资者权益一旦遭受损害，可以寻求司法上的救助。这是完善我国投资者权益保护制度的重要举措，对市场规范和投资者利益必将产生重要而深远的影响。

本书收录了近几年来，特别是2001年5月以来作者对国内证券市场投资者权益保护、证券民事赔偿、法人治理结构、市场规范与管制、法律完善等方面的思考与谏言，以及围绕投资者民事索赔的有关媒体报道（进行了必要的技术加工，如删除或改写了涉及到作者本人的“溢美之词”）。一家之言，贻笑大方，恳请业内专家和广大投资者批评指正。

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① 《拿破仑法典》（法国民法典），商务印书馆1983年版，第1页。

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## 第一编

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# 投资者权益与民事赔偿