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虞政平 著

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序

虞政平的这本著作是在他的博士论文基础上完成的。作为他的博士论文指导教师，我对于他的论文能够问世、能够在更大范围内发挥其影响，当然感到很高兴。

公司制度是一个历史现象，它的历史发展也有一个轨迹。对于中国人来说，公司制度当然是一种舶来品，它并不源于本土文化，也不扎根于本国的历史。只有深入研究公司制度的昨天和前天，才能更好的了解它的今天。

公司制度是一个社会现象，它是社会经济组织的一种形式。它之所以能存在并不断变化，乃至今天成为社会经济组织的主要形态，必然有其深刻的社会基础及经济合理内核。社会企业形态总是朝着低风险、低成本、低税负的轨迹前进，股东有限责任制度正是这方面的表现。

公司制度是一个法律现象。从公司设立的第一天起，就始终在法律关注圈内，并在法律的规范下操作、发展、演变、前进。公司制度发展中的决定因素是社会经济发展的需求，但我们也可以看到内中法律家们的设计。

政平的著作是力图从以上几方面去剖析公司制度。他潜心研究了股东有限责任制度的发展及其对现代公司诸方面的影响，为人们了解现代公司的基本特征与其灵魂以及历史发展脉络给予了明确的答案。书中资料翔实、论点正确、分析透彻、条理清晰。尤其值得指出的是，由于中国公司和企业法人制度的立法特点，人们一般都认为法人制度就必然意味着法人责任的独立；而政平则从历史分析得出结论：公司法人人格并不等于法人责任的必然独立，公司法人责任的

独立乃渊源于股东有限责任的形成与支撑。从西方国家一些公司立法来看确是如此，从公司发展历史来看亦是如此。这一论证和这一结论无疑是很可贵的，也是很有意义的。

每看到我的博士生获得学位，每看到我的博士生论文出版，都感到我国法学研究工作的不断成长和发展。自然规律使我这样一个年过七旬的学者逐渐退出这一舞台，但是更多的年轻人正在步入这一舞台，何其令人欣慰！

是为序

前　言

一直以来，我对公司法有着浓厚的兴趣；在我入学攻读博士学位期间，我的导师江平教授将我的研究方向定位于商法学，主攻研究领域即为公司法；在国内学习以及美国哥伦比亚大学法学院从事访问研究期间，主要关注与研究的领域亦为公司法。

现所展现于读者面前的这本著作，是在我的博士论文基础上完成的。记得我最初的博士论文选题曾为："论现代企业的渊源与变迁"，以此为主题我也曾收集了大量的文献资料。但在博士论文开题报告论证会时，各位教授提出了许多意见，尤其是我的导师江平先生，他认为这样的选题可能太大，而我也的确有力不从心之感。之后，我便选择了主题范畴更小、然而却是公司法的核心课题之一，即"股东有限责任制度"。进一步的研究表明，股东有限责任制度与以现代公司为主要形态的现代企业制度，无论是历史渊源还是现代的完善发展，皆有着相当密切的关系。从某种程度而言，研究股东有限责任制度，亦正好可以从一侧面探寻现代企业的渊源与变迁，甚至现代公司法律的灵魂构架。如此，最初选题之思考与资料收集，为之后的选题正好打下了扎实的基础。而且，之后的选题亦得到了导师江平先生的认同与鼓励，江老师对所拟定的基本写作提纲提出了许多宝贵的意见。正是这样的原因，使我积极地投入到之后选题亦即本书主题的深入研究与写作之中。

应当说，无论是论文的写作还是专著的出版，都是很匆忙的。一方面，由于回国后主编并校对《英国公司法规汇编》一书，因字数较多占去了大量的原本即很有限的写作时间；另一方面，由于毕业分配等一些客观而琐碎之事，使集中精力写作的时间亦更为有限。而论文

完成之后至论文交付出版之前，用来修正的时间亦并不充分。正因如此，书中构架以及所提出的各种观点，皆未能细致地去斟酌。尽管对于书中的很多观点，我也曾尽可能地去搜集资料予以论证，但仍不免有不充分之处，有些难免是不正确的。不过，我想还是尽可能地将自己的所问所思展现出来，算是抛砖引玉吧！

股东有限责任乃明悟商事主体法律尤其是公司法律的关键所在，其与法人人格共为支撑商事主体理论发展的两大重要支柱。国外关于股东有限责任的专著或专题论文均不少见，而国内关于股东有限责任的专题论文虽有所见，但屈指可数，至于股东有限责任的专题博士论文与专著则仍为空白。国内对股东有限责任的认识，多停留在公司股东以出资为限承担责任的原则上，多数教材及相关论文在介绍或论及股东有限责任之时，均只作原则或概括之表述，人们从中很难了解股东有限责任的历史渊源与变迁，亦很难弄清股东有限责任与其他公司法律制度的关系，至于通过股东有限责任的法律研究，来把握商事主体法律之发展方向，以及推动商事主体的法律进程，则更显不足。可以说，国内对于股东有限责任制度的系统研究，的确仍需深入与开拓。正是基于国内关于股东有限责任系统研究的空白与不足，本专著之选题与写作，即意在为此作出力所能及之填补贡献。

书中全文主要通过**上、下两篇**不同视角的论述来具体地展开。**上篇为历史论，**意在揭示股东有限责任的历史渊源与发展轨迹。通过该篇的论述，充分揭示出，股东有限责任乃人类长期商业经验及立法努力之成果，而且自其形成之后，即一直处于不断扩张的发展态势。事实上，股东有限责任并非无源之水，它与人类自古罗马以来的债权理念的发展以及以特有产、限定继承等为代表的有限责任方式的尝试，均有着历史的渊源关系，**第二章“罗马时代有限责任的萌芽”，**即对此作了必要的探讨。当然，股东有限责任与法人理念以及人们的商业实践更是密不可分，中世纪的商业组织以及特许公司的

法律发展模式，既为现代公司的形成提供了雏形，亦为股东有限责任提供了直接孕育的土壤，**第三章“十二至十八世纪股东有限责任的发展”**，便较为详尽的就此展开了讨论。至于**第四章“股东有限责任的立法形成及扩展”**，则更是十分清楚地叙述了股东有限责任最终于世界范围内立法形成及扩展的轨迹；应当说，股东有限责任的立法形成，不仅有着其深厚的社会背景，而且亦有着其激烈的斗争历程；至于对股东及债权人利益之保护，则自始既为股东有限责任立法所关注的焦点，亦为股东有限责任制度所并重的内容之列；尤为值得注意的是，公司法人之独立责任乃为股东有限责任制度的核心内容所在，世界上唯一一部以“有限责任法”命名的英国《1855 年有限责任法》，即对此作了清楚而明确的规定；正是由于股东有限责任所具有的这一核心内容与价值功能，致使其通过股份有限公司的主导发展、有限责任公司的蓬勃兴起、法人持股的势力延伸、一人公司以及合伙企业的有限化进程，得以在世界两大法系之中普遍地形成，并无疑成为商事主体领域最为主要的责任形态。

下篇为关系论，意在弄清股东有限责任与各相关公司法律制度的关系。通过该篇的论述，具体地展示了现代公司各主体以及资产等相关法律制度与股东有限责任的密切法律关系。就有限责任型公司与无限责任型公司以及合伙等企业比较而言，本篇所展示的现代公司各项主要的法律制度，皆是由于股东有限责任的运用，才不得不被创设或重新审视与定位。可以说，离开股东有限责任所设定的基础与框架，这些法律制度则必然迷失方向，而它们所存在的法律价值与意义亦必然令人怀疑。本篇**第五章“股东有限责任的利益主体”**，则首先在前篇历史论述的基础上，进一步探讨了现代公司法人的独立责任与股东有限责任不可分割的法律关系，进一步指出法人人格不等于法人责任的必然独立，法人责任的独立乃渊源于、并依托于股东有限责任的形成与支撑；至于除现代公司本身之外的其他各现代公司的利益主体，即股东、债权人以及管理人，它们的法律角色与定

位,随着股东有限责任的形成与运用,亦都发生着深刻的法律变化;股东与债权人成为公司必须双重维护的利益主体,管理人则不再只是如传统一般地只对股东负责,而是对公司这一独立的主体负责,并通过其负责,让公司这一主体真正成为实现股东及债权人利益双重平衡的舞台。**第六章"股东有限责任的依托资产"**,则将影响现代公司资产法律变化的各个环节及相关制度作了较为细致的论述,并具体分析了这些资产方面的法律制度与股东有限责任的相互关系;不同的资本模式,皆以股东有限责任为其创设的基点,并在不同地影响着公司资产建立与维护之同时,亦不同地对股东有限责任的价值发挥着影响;而原始出资制度下的出资责任,则经常被人们作为股东有限责任的代名词加以混同使用,出资责任的履行完毕,就某种程度而言即为股东有限责任之履行完毕,有关出资责任的不同定位理论,同样也对股东有限责任发挥着不可忽视的影响;至于增减资本,则不仅不能规避股东之出资责任,亦不能损害债权人之利益;而公司利益分配的机制与准则,则更是以股东有限责任为其设计之前提,世界两大法系公司法之中,皆以资本不得用于分配作为其核心的理念。**第七章"股东有限责任的例外适用"**,则通过与公司法人人格否认制度的比较,阐明了公司人格否认并不必然引发股东有限责任的限制与排除适用,而股东有限责任的限制与排除适用亦同样不以公司人格之否认为其前提,从而明确区分了股东有限责任例外适用制度与公司法人人格否认制度的不同特性与范畴;在此,人们亦可再一次地体会到公司法人人格与公司责任独立的非必然附随关系,同时,亦能更为具体的领悟股东有限责任最为核心的法律功能——分离价值。

在以上、下篇为主线展开关于股东有限责任的历史之论以及关系之论的同时,**第一章"绪论"**之中,则主要介绍了股东有限责任的基本法律特征,以及其制度层面的基本法律意义,同时亦点出了本文主题之所在。而最后一章,亦即**第八章"股东有限责任与我国公司法的完善"**,在介绍中国股东有限责任制度法律进程的基础上,结合本文

以上研究的心得与体会，拙抒己见，阐述了本人对中国当代公司企业立法现状与不足之认识，并提出了“统一公司法”的修正思想与完善之建议，以此为中国现实的法制进程，尽一份微薄之力！

A Study on the Limited Liability of Shareholders

——the Cornerstone of Modern Corporate Laws

Abstract

The limited liability of shareholders is the key to understand the laws of the commercial entity especially the corporate laws, which constitutes the two important pillars for the development of theories on the commercial entity together with the juristic personality. There are many books or dissertations about the limited liability of shareholders published aboard. However, in our country there exist only few dissertations and no doctoral dissertations addressing the subject yet. The knowledge of the domestic scholars on the limited liability of shareholders is restricted to the principle that the shareholder takes limited responsibility in accordance with the capital subscribed. While most teaching materials and relevant thesises can only make a general description in the introduction or discussion of the limited liability of shareholders, it is very hard for one to well understand the history and evolution of the limited liability of shareholders and its relationship with other legal systems of corporations, let alone to control the development of laws of the commercial entity and promote the legal process of the commercial entity through the legal study on the limited liability

of shareholders. Therefore, the systematic research on the system of the limited liability of shareholders in our country certainly needs to be deepened and expanded. Due to the inadequacy of the systematic research on the subject, the doctoral dissertation was written to make contributions to fill out the academic blank in our country.

The whole article is divided into two parts, which expound the subject matter in details from the different perspectives. **The first part** is the Historical Study, which is aimed to reveal the historical origins and development tracks of the limited liability of shareholders. Through the study in this part, it is fully revealed that the limited liability of shareholders is the result of the long – standing commercial experience and legislative efforts of human beings, which has been under the constant expansion since the date of its forming. In fact, the limited liability of shareholders has a historical relationship with the development of the logic of obligation since the Ancient Rome and the attempts represented by peculiar property and the entailment. **The second chapter "The Seeds of the Limited Liability of Shareholders in Roman Time"** makes a necessary exploration in the subject. Of course, the limited liability of shareholders is inseparable with the concept of legal person and the commercial practices. The legal development mode of commercial organizations and chartered companies in the Middle Age provides both the embryonic form of the modern corporations and the rich soil directly fostering the limited liability of shareholders. **The third chapter "The Evolution of Limited Liability of Shareholders from 12th Century to 18th Century"** makes a detailed discussion on the above topic. As for **the fourth chapter "The Legislative Forming and Expansion of the Limited Liability of Shareholders"** draws a clear picture about how the legislation of the limited liability of shareholders is

formed and expanded all over the world. It ought to be stated that the legislative forming of the limited liability of shareholders not only owns a profound social background, but also has a historical course full of fierce conflicts. The protection of the interest of shareholders and creditors has always been the focus of the legislation on the limited liability of shareholders and the content emphasized by the system of limited liability of shareholders. Especially it is worthwhile to note that the independent liability of the corporations is the essence of the system of the limited liability of shareholders. The British the Limited Liability Act, 1855, the only legal document named after the limited liability act in the world, made clear and definite provisions on the subject. Just because of the core content and value function it has, the limited liability of shareholders has extensively come into being in the two systems of law worldwide through the leading development and the flourishing of limited liability companies, the strength extension of institutional shareholders and the process of limitation of one－man companies and enterprises of partnership, and undoubtedly become the most popular form of liability in the field of commercial entity.

The second part of this dissertation is focused on the relationship, which means to clarify the relationship between the limited liability of shareholders and other relevant legal systems of corporation. In this part the close legal relationship between the relevant legal systems such as the different entities of modern companies and assets and the limited liability of shareholders is fully revealed. Through the comparison between the type of limited liability corporation and the type of unlimited liability corporation and the enterprise of partnership, the major legal systems about the modern corporations discussed in this part have to be established or reviewed and re－positioned just owing to the application

of the limited liability of shareholders. It may be said that without the foundation and framework set by the limited liability of shareholders, all these legal systems would lose directions. What 's more, the legal values and meanings of their existence would consequentially become doubtful. **The fifth chapter of this part "The Beneficial Entity of the Limited Liability of Shareholders"** further explores the inseparable legal relationship between the independent liability of modern corporations and the limited liability of shareholders on the basis of the above historical study at first, and then further points out that the legal personality is not equal to the inevitable independence of the liability of legal person, which originates from and depends on the forming and support of the limited liability of shareholders. As for other beneficial entities besides the modern corporations themselves, namely the shareholder, the creditor and the controller, their legal roles and positions have also experienced profound legal changes along with the forming and application of the limited liability of shareholders. The shareholder and creditor become the beneficial entities the corporation must double maintain. Unlike the tradition that the controller generally takes responsibility for shareholders, he is responsible for the independent corporation, which makes the corporation entity the stage for balancing the interests of shareholders and the creditors in the real tem. **The sixth chapter "The Supporting Assets of the Limited Liability of Shareholders"** makes a detailed description on all the links affecting the legal changes of assets of modern corporations and other systems, makes a specific analysis on the legal systems in the aspect of assets and the mutual relationship with the limited liability of shareholders. Different capital modes, all established on the basis of the limited liability of shareholders, affect the establishment and maintenance of the corpo-

rate capital in different ways, while influencing the value of the limited liability of shareholders variably. However, under the primitive system of subscribing the capital, the liability to pay the subscribed capital is often taken to be the limited liability of shareholders. The completion of performance of the liability to pay the subscribed capital simply means the end of performance of the limited liability of shareholders to some extent. All kinds of theories on positioning the liability to pay the subscribed capital also have an important influence on the limited liability of shareholders. The capital increase or decrease can not evade the shareholder's liability to pay the subscribed capital or harm the interest of the creditor. The mechanism and rule for the distribution of the corporate profits are also based on the limited liability of shareholders. The non－distribution of the corporate capital is the core concept in the company laws under the two systems of laws in the world. **The seventh chapter "The Exceptional Application of the Limited Liability of Shareholders"** in comparison with the system of disregard of the corporation, illustrates the disregard of the corporation does not necessarily result in the restriction and the exclusive application of the limited liability of shareholders. Likewise, the restriction and exclusive application of the limited liability of shareholders is not preconditioned by the disregard of the corporation, thus clearly highlighting the different characteristics and scope of the exceptional application of limited liability of shareholders and the system of disregard of the corporation. Therefore, people can once again realize that the legal personality of the corporation is not the inevitable and collateral result of the independence of corporate liability and at the same time more specifically understand the legal function in the core of the limited liability of shareholders－the separation value.

While addressing the research on the history of the limited liability of shareholders and its relationship with other systems with the two parts as the main thread, the author mainly introduces the fundamental legal characteristics of the limited liability of shareholders and the basic legal significance at the system level in the first chapter of "General Introduction", in which the subject matter of this dissertation is also pinpointed. In the last chapter of this article, namely the eighth chapter "The Limited Liability of Shareholders and the Improvement of the Company Law in Our Country", based on the introduction to the legal process of the limited liability of shareholders in China and connecting with the above research and understanding, the author expresses his personal opinion on the status quo and weakness of the legislation on the corporations and enterprises in the contemporary China, consequently put forward some proposals on the revision and improvement of "The Companies Consolidation Act", hoping to make little contributions to the actual legal process in China.

Key word: the limited liability of shareholders、the independent liability of corporations、the logic of obligation、the system of capital、the type of enterprise、peculium、the chartered joint－stock company、disregard of the corporation、Modern Corporations.

目　录