## 现代公司机关权力构造论

一公司治理结构的法律分析

梅慎实 著



中国政法大学出版社

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### 内容提要

本书综合运用法解释学、比较法学、经济学、历史学以及社会学等多学科的研究方法,在比较分析了古典企业、全民所有制企业以及美、德、英、日等国家公司(企业)治理权力构造模式的基础上,重点探讨了现代公司机关即股东大会、董事会、监事会的权力来源及其诸机关之间权力、义务、责任与利益的制衡关系,揭示了公司机关权力构造的本质要求以及权力分配的民主性、效率性、机动性、公平性与正义性的要求,指出我国公司机关权力构造模式的选择问题是我国现代公司规范运转的关键点且任重道远。

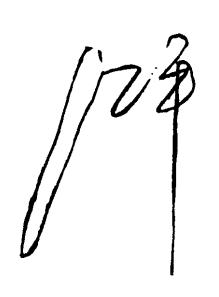
现代公司机关的权力构造迥然不同于传统的企业,尤其不同于我国的国有企业。管理机关的模式显然取决于企业的产权形态,有什么样的产权形态就会有什么样的管理机关的模式。产权形态固然非常重要,管理机关的结构模式也直接影响着企业的经营效率。国营企业的管理模式相对比较简单,而现代公司的管理模式(股东会、董事会、监事会)就复杂得多。这种权力分工与制约的机制是建立在科学与民主的基础之上的。现代公司的管理机制是现代国家的缩影。从这个意义上说,研究现代公司的机关权力构造是有极其丰富内容的,而且应作为一门科学来加以研究。

公司机关是法人机关的一种,而法人机关的学说在我国是研究得很不充分的一个领域,其中一个原因是 1986 年通过的《民法通则》只有法人的法定代表人、而没有法人机关的规定,这不能不说是一个重大缺陷。在国有企业中,厂长是法定代表人,法人机关被隐没了;在现代公司中,作为法人意思机关的股东会、董事会、监事会就充分显现出来。只讲法定代表人而不讲法人机关的时代已经过去了。认真研究法人机关学说并且深入研究法人各个机关权力间的相互结构也是当前需要认真研究的一个课题。

从公司的产权结构状况来看,可以有股权相对集中和股权高度分散两种模式。在这两种不同模式的公司中,其机关权力构造也有所不同。随着世界各国现代化大公司越来越多,股权越来越分散,研究其权力构造演变的历史和趋势也同样有着重要意义。

梅慎实 1992 年开始在我的指导下攻读博士学位。他从本科到硕士研究生均在复旦大学学习,有着良好的法学功底;他曾任教

于该大学法律系,发表过一些论文与著作,有着较强的研究能力与素质;在攻读博士学位期间,曾参与多家国有企业公司制改组工作,有着丰富的实践经验;同时他曾经到加拿大多所大学访问,有着较高的外语水平和比较公司法方面的知识。他勤奋治学,刻苦钻研,以优异成绩完成了博士学位的学习。这篇著作就是以他的博士论文为基础修改而成的,其中有一些理论上的创新和独到的见解。这本著作也是对我国法学研究的一个贡献,我为他的这本著作问世而感到高兴并欣然为之作序。



1996年8月

#### 现代公司机关权力构造论

(Studies in the Structures of the Modern Corporate Organs' Powers)

#### 一内容提要—

- 1. 本文既有宏观的公司机关权力分立与制衡制度模式的比较研究,又有微观史实的考察以及具体规定的阐释和评析。既原原本本地论证了各种机关权力实现的具体制度规定,又揭示了公司机关权力构造的本质要求以及权力分配的民主性、效率性、机动性、公平性与正义性的要求;最后,就我国公司立法相关问题的修正、完善提出了一些浅见。本文综合运用法解释学、比较法学、经济学、历史学以及社会学等多学科的研究方法,在探讨古典企业和法人财产权的基础上,主要探讨了公司诸机关之间权力、义务、责任与利益的制衡关系;并且在借鉴国外成功立法的基础上,指出我国公司机关权力构造模式的选择问题是我国现代公司规范运转的关键点且任重道远。
- 2. 第一章作为本书一个引子,旨在显现研究公司机关权力构造的背景、现实意义要求以及学术价值。
- 3. 第二章探讨古典企业(独资企业和合伙组织)的产权特征 及其缺陷、古典公有制性质的全民所有制企业行政权力与经济权力的高度结合、全民所有制企业低效运转的治理结构。在各国企业形态中,古典企业的数量虽多,但其规模一直保持着较小的状况,组织上少有制度创新。本章认为,随着社会分工的发展,古典企业或全民所有制企业高度合一的权力结构与单一的组织制度

已成为企业规模扩张和交易安全的障碍,必须进行制度创新,向现代公司扩张。当然,本章研究之旨趣并不是否定古典企业或全民所有制企业的存在;恰恰相反,它们的存在有其客观需要和合理性,只不过应退居现代社会的非主导企业形态地位。

- 4. 第三章是论述现代公司的兴起、产权特征、法人财产权的性质以及"分立——制衡"型的现代公司产权关系和现代公司治理结构的确立与完善。本章认为,现代公司是社会分工的必然产物。对于这种规模巨大和分工细化的庞然大物,我们在进行权力分立与制衡、义务、责任与利益定位的制度设计时,应旨在为该分工体系中的每一个角色提供足够的刺激,以最大限度地使每一利益关系主体释放其积极性。
- 5. 第四章论述公司的表意机关——股东大会——的权力来源、价值取向、会议体功能、实现表决权间接行使机制之一的表决权信托设计以及将其移植中国的思考;股东大会与职工代表大会关系的理顺问题。本文指出,尽管"股东大会中心主义"已形式化,但此首脑机关不可或缺,并且公司立法应不断完善股东权的实现机制,以促使消极股东转变为积极股东。
- 6. 第五章探讨公司的业务执行与代表机关——董事与董事会。现代公司由于董事会权力十分强大、地位显赫,因此,我们必须重点探讨董事与公司的关系(即董事的法律地位)、资格要求、权力界区、任免机制、义务、责任以及现代公司董事会的运行机制、权力行使以及"董事会中心主义"强化趋势下股东大会对其制衡关系、董事会与党委会的关系。本章认为,为适应现代公司经营的特点,公司立法赋予董事及董事会几乎完全自主的业务执行权与代表权是正确的,但同时应从义务、责任等机制的完善方面制约其权力。
- 7. 第六章旨在探讨经营监督之专设机关——监事会——的价值功效、任免机制、人数构成、权力界区、义务与责任监控设

计、与董事会的制衡关系以及对世界四大现代公司经营监督模式的比较与我国的取向等问题。本章认为,在董事会权力极大时,腐败和专横不可避免,故必须实施以权力制约权力的机制,强化监事会的权力,以使其可与董事会相抗衡,充分发挥监事会的制衡力量。为防止监事会与董事会共谋,我们必须明确监事的义务与责任,使监事切实"监事"。此外,本章还论及了监事会本身地位的建设问题,以使监事会确有能力"监其事"。

#### Summary

1, In this dissertation, a comparative research was made macroscopically on the model of separation, check and balance of powers of corporate organs, and an investigation was made into macroscopic historical facts. This dissertation explained and evaluated concrete stipupations, fully expounded and proved stipulations on concrete systems exercising powers of various organs, revealed essential requirements of the structure of corporate organs'powers along with democracy, efficiency, mobility, fairness and justice in the distribution of powers, and finally. gave some humble opinions on revision and improvement concerning corporate legislation. Comprehensively utilizing study methods on many subjects such as the science of law explanation, comparative law, economics, history and sociology, the dissertation, on the basis of inquiring into classical firm and corporate property rights, mainly probed into the relationship of check and balance of powers, duties, liablities and interests between different corporate organs; moreover, on the basis of inquiring into classical firm and corporate property rights, mainly probed into the relationship of check and balance of powers, duties. liablilties and interests among different corporate organs; moreover, on the basis of using successful foreign legislation for reference, the dissertation pointed out that the selection of the model of power structure of corporate organs of our country was the crux of operation of the corporation of our country, shouldering heavy responsibilities.

- 2. Chapter One, as an introduction of this dissertation, revealed the research on the background, practical significance, scholasitic value of the power structure of corporate organs.
- 3, Chapter Two probed into the property rights' features and their defects of classsical firm (individual proprietorship and partnership), high combination of admisistrative and economic powers of classical firm or firm by the whole people, and inefficiently-operating governance structure of firm by the whole people. In foreign firm, classical firm are numerous but on a small scale, and have few innovations in system. This chapter held that, with the development of social divesion of labour, the highly-centralized power structure and unitary organization system of calssic firm or firm by the whole people had prevented the firm from scope expansion and safe transactions, requiring innovation and expansion toward modern corporations as well. Of course, the research of this chapter doesn't deny the existence of classical firm or firm by the whole people. On the contrary, their existence has its objectivity and rationality. However, they must retreat on firms which are not leading position in modern society.
- 4. Chapter Three expounded the upgrade of modern corporation and the features of their property rights. the nature of corporate property rights, property relationship of modern corporations of "separation-check and balance" style, and the establishment and improvement of governance structure of modern corporation. This chapter held that modern corporations were neces-

sary development of modern society, and that, for the giant which was on a large scale and had more and more detailed division of labour, we should, when planning the separation of check and balance of powers as well as the fixation system of duties, liabilities and interests, sufficiently stimulate every role in the system of division of labour so as to bring the initiative of every party interested into full play.

- 5, Chapter Four touched upon the power origin, value orientation, and the function of the meeting body of the corporate organ expressing its intention—General Meeting; the voting trust design—one of the schemes of indirectly exercised voting power—and reflections on its transplant to China; and the regulation of the relationship between the General Meeting and the Congress of Workers and Staff. This chapter had it that, in spite of the formalization of "centralism of General Meeting"; this prime organ was requisite, and corporate legislation should gradually improve the exercising scheme of stockholders' rights, changing passive stockholders into active one.
- 6, Chapter Five probed into corporations' executive and representative organs—Directors and Board of Directors. The Board of Directors of modern corporation have great powers and infulential status, so we mainly probed into the relationship bewteen directors and corporation (namely the legal status of directors), qualifications, division of powers, scheme of appointment and removal, duties and liabilities, operational scheme of the Board of Directors of modern corporation and their exercise of powers, the relationship of check and balance between General Meetings and Board of Directors, and the relationship between Board of

Directors and the Party's committees in pace with consolidation of "centralism of Board of Directors". This chapter was of the opinion that, for the purpose of adapting to the features of the management of modern corporation, it was right for corporate legislatiom to give directors and their boards almost completely independent executive and representative powers, but their powes should be restricted in improving the scheme of their duties, liabilities, etc.

7. Chapter Six inquired into the value function of the exclusive institution of management and supervision - Supervisory Board, its scheme of appointment and removal, formation of its members, division of its powers and the design supervising and controlling its duties and liabilities, the relationship of check and balance between Supervisory Board and Board of Directors; the contrast between the management and supervision models of the four modern corporation in the world; and the orientation of our country, etc. This chapter had it that, corruption and imperiousness were inevitable when Board of Directors had great powers, therefore we should perform the scheme in which powers would restrict powers, strengthen the powers of the Supervisory Board for it to match with the Board of Directors, and bring its check and balance into full play, with a view to avoding the conspiracy of Supervisory Board and the Board of Directors, we should make clear the duties and liabilities of supervisors, making them "supervise" conscientiously. In addition, the construction of the status of the Supervisory Board was touched upon in this chapter so as to make the Supervisory Board really have the ability to "supervise."

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