

GONG SI ZHI LI YU DU LI DONG SHI YAN JIU

公司治理与

独立董事研究

王天习 著

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序

——独立董事制度的理念

漆多俊

公司治理是公司法领域的一个前沿问题，也是目前各国共同面临的一大难题。虽然这一问题自亚当·斯密提出后，前人早已有所涉足，但真正受到人们广泛关注和高度重视则始于20世纪70年代。时至今日，随着各国股份公司的迅猛发展，公司治理问题比以往任何时候都要显得尖锐和突出。目前，各国在相互借鉴的基础上，均在探索和完善适合本国国情的公司治理模式。独立董事制度的兴起，是这种探索的尝试之一。

独立董事制度起源于美国，后来其他国家纷纷仿效。2001年中国证监会发布《关于在上市公司建立独立董事制度的指导意见》，开始在我国推行独立董事制度。对证监会采取的这一公司治理举措，人们褒贬不一。有赞成的，也有反对的。对于独立董事的地位、功能和价值的定位，对于其中各种具体制度的设计，意见颇为分歧，各有各的方案。

我认为，对于独立董事制度，应当把它放在公司社会化进程和由其决定的公司治理结构演进的视野中加以思考，探寻这种制度产生和发展的基本原由和理念。应当指出，独立董事制度乃是公司社会化对于公司治理结构改革的一种呼唤，或者说，它是公司社会化的一种制度回应。

在公司制度兴起初期，开办公司是投资者的私事。在公司治

理上是“谁出钱谁管理”，实行“股东会中心主义”。后来主要由于社会化的原因，加强了董事会的职权，实行“董事会中心主义”。20世纪后半叶，公司社会化进程加速。公司除了大股东之外还有许多中小股东，要防止大股东控制公司损害中小股东权益；不仅如此，公司还应当注意维护广大职工、债权人和广大社会消费者的正当权益，注意维护社会公共利益。主要由股东、特别是控制股东推选的董事所组成的董事会，往往不能很好代表中小股东、公司其他利益相关者和社会公共利益。人们想通过独立董事制度来达到目的。独立董事既然是公司的董事，他们当然要代表股东、包括大股东的正当利益，只是不仅仅如此；他们思考问题和处事的立场和方式应是全面兼顾，而以注重维护中小股东、其他利益相关者和社会公共利益为侧重。独立董事有参与决策和监督两大职能。这两类职能行使方式与公司内部董事或监事都有所不同。独立董事发挥作用的关键在于其独立性和工作效率性。所有具体制度设计都应紧紧围绕和体现上述精神。否则，独立董事制度的理念就难免落空。

现在王天习博士的著作《公司治理与独立董事研究》要出版了。本书作者在系统研究两大法系公司治理模式、全面考察他国经验之后，对我国公司独立董事制度作了较深入的研究。他既没有全盘否定，也没有全盘肯定，而是通过论证提出了自己独特的见解。他的结论是否正确，可以由读者各自做出判断，但起码应当肯定作者这种独立思考、不盲从跟风的治学态度是好的。

独立董事制度是公司治理的一个组成部分。研究独立董事制度，不能脱离公司治理。本书的题目《公司治理与独立董事研究》和其中的内容都紧扣了两者之间的内在联系，并注意到把它们都放在公司社会化大背景下来思考。早在2002年本书作者撰写这篇博士学位论文时，我就向他提出了这一观点，并指出独立董事制度乃是公司社会化在公司治理结构上的一种制度回应。后来他虽然并未完全按照我的思路贯彻下去，但在本书各篇的有关

论述中仍然体现了这种思想。

我希望王天习博士这部书的出版发行，能够引起学界、企业界和管理层对于独立董事制度研究的兴趣，并能使我国公司治理结构逐步走向完善。

2005年元旦于长沙岳麓山

中文摘要

本书分上、中、下三篇，共九章。上篇主要研究公司治理基本理论，并从不同角度探讨公司治理与独立董事的关系。

第一章从研究委托代理与道德风险着手，探讨独立董事产生的前提与必要条件。该章指出，企业法律形态经历了由古典企业向现代企业的演变，企业权力结构经历了由“两权合一”向“两权分离”的演变，企业资本形态经历了由物质资本与人力资本的结合向两者分化的演变。伴随着上述三大变化，股份公司内部形成了一种民事代理法律关系，公司内部权力重心则发生了由“股东会中心主义”向“董事会中心主义”、又由“董事会中心主义”向“经理中心主义”的两次转变，最终导致了“内部人控制”局面，产生了公司经营的道德风险。这就是公司治理的由来。独立董事的设置，就是为克服“内部人控制”下的道德风险而采取的一大公司治理举措。

第二章从考察公司治理与两大模式出发，揭示独立董事产生的背景及生存土壤。该章指出，独立董事是在公司治理大背景下产生的，具有适合自己生存的土壤，它一方面受制于英美法系“股权加市场控制主导型”外部治理模式，另一方面又是英美“一元制”内部治理模式的必然产物。不同于大陆法系国家，独立董事是为解决在英美高度分散股权结构下产生的“内部人控制”问题，弥补“一元制”内部治理模式和“股权加市场控制主导型”外部治理模式之缺陷与不足进行的一项制度设计，是英美法系国家的特产与独创。

第三章从分析两大学派及其治理理念着手,探究它们同独立董事人选范围与责任对象之间的关系。该章指出,从人选范围来看,新古典产权学派恪守传统公司治理理念,认为公司是股东的公司,唯有股东才是公司所有者和内部成员。为了使公司控制权牢牢掌握在股东手中,不让那些与公司无利害关系的人管理公司和损害股东利益,有些国家以前的公司法甚至现行公司法(授权公司章程)规定董事资格以股东为限,不允许那些没有股东身份的外部人士担任董事,这为外部董事或独立董事的产生设置了障碍。与此相反,利益相关者学派认为,公司不仅仅是股东的公司,公司的治理权不应只配置给股东,其他利益相关者均应分享。在这种治理理念的支配下,为了对外广纳管理人才,现行各国公司法基本上不再要求董事资格以股东为限,并且大多没有资格股要求。这就为外部董事或独立董事的产生创造了条件。另外,从责任对象来看,如果奉行新古典产权学派固守的“股东利益至上”传统公司治理理念,独立董事就只应对股东负责,不必考虑公司的社会责任,但如果奉行利益相关者学派所崇尚的公司治理新理念,独立董事就应对全体利益相关者负责,践行公司的社会责任。现代英美公司法至今虽仍奉行“股东主权”治理理念,但已明显受了利益相关者学派之影响。现实中,英美公司在追求股东利益之同时均不同程度地考虑了其他相关者的利益。独立董事作为外部董事参与公司治理,顺应了董事职能的这一社会化发展趋势,他在履行决策及监督职责时,虽仍以追求股东利益为主导,但却同时肩负起平衡全体利害相关者之间利益的使命。该章还对“谁拥有公司”所涉及的法律问题进行了探讨,认为在公司财产权性质问题上,国内外学者产生“股东所有权说”与“公司法人所有权说”根本分歧的原因在于这两派学说对法人本质的认识不同,而对法人本质的认识不同,又根源于两者所奉行的理念不同。

对作为公司治理一大举措的独立董事制度进行评说，必须建立在对该项制度全面了解和客观认识的基础上。为此，中篇对独立董事制度进行了全面系统的考察。

第四章先从几个相关术语的联系和区别着手，探讨了独立董事的内涵与外延。第一节指出，外部董事与内部董事相对应、独立董事与非独立董事相对应、非执行董事与执行董事相对应、兼职董事与专职董事相对应、独立的外部董事与非独立的外部董事相对应、独立的非执行董事与非独立的非执行董事相对应。这六对术语是从不同角度而言的，是采用不同标准划分后形成的几对范畴，在内涵和外延上不完全相同。为了消除误解，最好尽量避免在同一语意上交叉使用其中某些术语。第二节对独立董事立法界定的规范、方式和重心进行了探讨，指出独立董事的立法界定有“硬法”与“软法”两种规范以及概括式、列举式、结合式三种方式，界定重心应放在“独立性”而不只是外部性和兼职性上。文章列举了英美两国对独立董事的立法界定，归纳了影响董事“独立性”的各种因素。

第五章探讨了独立董事的立法沿革及法律功能。该章指出，独立董事的立法是与其产生和发展相伴而生的。从角色上看，它经历了由内部董事向外部董事、又由外部董事向独立董事的转变阶段。从地域上看，则经历了由美国向其它英美法系国家传播、又由英美法系向大陆法系国家传播以及两大法系的相互借鉴与融合几个阶段。独立董事具有决策与监督两大功能，这两大功能是其通过参与到董事会下设的有关委员会中并占据一定席位而得以发挥的。

第六章考察了英美独立董事的具体法律制度，这些制度主要包括资格任免法律制度、声誉报酬激励机制、利益保护法律机制和权利义务责任制度四个方面。从这些具体制度的设计中我们发现，要使外部董事既保持独立又具有动力确实面临着两难之选

择。如果撇开了制度环境、具体国情等因素，我们很难评说它的优劣。对一个国家证明是好的制度，对另一个国家并不一定适合。

在总览英美独立董事制度全貌后，应对我国引进该项法制进行冷静思考。下篇联系实际，审视了我国独立董事制度，并提出了我国上市公司的治理方案。

第七章分析和回顾了我国推行独立董事制度的原因及概况。该章指出，我国上市公司治理结构存在着三大缺陷，这三大缺陷使得大股东对上市公司资产的侵占、大股东与上市公司的关联交易和上市公司的弄虚作假等问题日显突出，频频引发了一系列丑闻案件。这彻底动摇了中国证监会对监事会的信心，并把希望寄托在英美独立董事制度上。但是，我国上市公司实行独立董事制度的实践中暴露出了不少问题。人们对此褒贬不一，说法各异。

第八章对我国推行独立董事制度的可行性进行了探讨。该章指出，大量实证结果、相关案例及学者批评表明，独立董事制度在英美上市公司治理中并非灵丹妙药。由于英美独立董事与大陆监事会两者价值理念不同、外部环境各异、职能重叠冲突，因此，英美独立董事制度与我国监事会制度很难兼容。以上表明，独立董事制度在我国不可行。然而，这并不意味着该制度对我国毫无借鉴价值。我国虽不能引进独立董事制度本身，但可以也应该弘扬其精神和优点——“独立性”和“事前监控”。受英美独立董事制度的这两大启示，我们可以建立独立监事制度，塑造“决策监控型”监事会并强化其职能。

第九章分两节分别着力论述了英美独立董事制度给我国的两大启示，并就如何建立独立监事制度，重塑我国监事会并强化其职能提出了自己的方案。第一节指出，我国监事会制度失灵的一个重要原因是监事会缺乏独立性。因此，我国应模仿英美增强董事会独立性的做法，大力增强监事会的独立性，建立独立监事制

度。因为就监督功能而言，增强英美董事会的独立性与增强大陆监事会的独立性，两者宗旨基本同一，两者理念也大致相同。关于如何把独立董事制度之精神融入我国监事会制度之中，作者提出了“改名易嫁”方略，并论证了该方略优越于现行的“制度拼凑”方略。所谓“改名易嫁”，就是“改”独立董事之“名”为独立监事之“名”，并对独立董事制度进行若干变通（即“易”），然后把经过改名换姓、改头易面的独立监事（其前身为独立董事），“嫁”到我国监事会中来。这种“改名易嫁”方略优越于现行“制度拼凑”方略的原因在于前者较之后者可以实现两种制度的有机结合、无缝接入，减少制度的摩擦、冲突与不和谐，从而大大提高监督的合力和效率。那么，如何“改名易嫁”呢？简单地说，就是把英美独立董事的任职资格制度、提名任免制度、声誉报酬激励机制和权义责制度作一番取舍与变通后，建立我国独立监事相对应的具体制度，同时，模仿英美在董事会下设审计委员会、提名委员会和报酬委员会的做法，把这三个委员会搬到监事会之下设置，将其组成人员——董事改为监事，并在这三个委员会中为独立监事保留过半数席位。为了避免遇到独立董事制度同样的功能障碍（如时间、信息、提名、独立性与动力之间的冲突等），作者在勾画上述总体设想后，提出了具体方案，重点是对独立监事的提名任免程序和报酬发放程序进行了设计。

第二节指出，我国监事会制度失灵的另一个原因是监事会监督滞后和职能弱化。因此，应吸取英美独立董事“事前监控”之优点并模仿其强化董事会功能之做法，把我国监事会重塑为“决策监控型”监事会并强化其职能。鉴于德国监事会在一定程度上也可进行事前监控，因董事会一些重大决策只有得到它同意才能实施，我们可以借鉴德国双层机制，确立监事会高于董事会的法律地位，并对德国型监事会进行改造，在监事会中设置独立监事（外部监事），同时提高监事素质，赋予监事会享有董事会成员的

任免权、对重大决策的否决权、特定情况下的公司代表权、股东大会提案权、临时股东大会召集权，完善我国监事会的知情权、财务监督权和业务执行阻却权，并建立监事的身份保障制度，健全监事报酬激励机制，强化监事义务及责任。这种经改造后的我国监事会兼具监督的前瞻性、独立性、权威性和经常性，不仅能在某种程度上达到对公司决策事前监控的效果，而且还因为这种监事会只对决策的合法性进行监控，不像独立董事还积极参与决策的制定，对决策的科学性进行判断，这就可以避免类似独立董事事前监控过程中的自我监督之弊端。同时，这种监事会还具有经常性监督的优点，这也是独立董事制度所不具备的。所以，我国不必机械地照搬英美独立董事制度。只要我国监事会制度建设搞好了，并不比独立董事制度差，反而还会比它强。

关键词：公司治理 独立董事 治理方案

Abstract

The dissertation is divided into three parts and nine chapters . In Part I the author studies the fundamental principles of corporate governance and discusses the connections between corporate governance & independent directors at different angles.

In Chapter I, starting with the agent theory and moral risk, the author studies the precondition of independent directors' birth . The author points out that the legal forms of enterprises experienced an evolution from classical firms to modern corporations. The power construction of enterprises experienced an evolution from the consolidation of ownership and control to their separation. The capital forms of enterprises experienced an evolution from the consolidation of corporeal capital and human capital to their separation . These three changes resulted in the formation of agency in Joint - Stock Companies and the two changes of the centre of interior power in corporations from "the centralism of shareholders general meetings" to "the centralism of board of directors" and then from "the centralism of board of directors" to "the centralism of managers' group". In the end "control by insiders" was formed and the moral risk emerged in corporation management. It is the cause of corporate governance. In such circumstances, as a great measure of corporate governance independent directors came into being in order to overcome the moral risk from "control by insiders".

In Chapter II , beginning with corporate governance and its two

models, the author probes into the background under which independent directors were born. The author thinks that independent directors came into being under the background of corporate governance and exist in the suitable soil. On one hand, the independent director system is influenced by the exterior governance model called “dominated by stock equity & market control” under Anglo – American law system. On the other hand, it is the inevitable result of the interior governance model called “unified board of directors”. Different from the continental law system, the independent director system is a design to solve the problem of “control by insiders” in high degree of decentralized stock equity construction and remedy the defects of the model called “unified board of directors” and the model called “dominated by stock equity & market control”. It is the native product and original creation of Anglo – American law system. .

In Chapter III , studying two opposite schools of thought and their governance thought, the author probes into the relations between governance thought and the candidates’ scope & responsible objects of independent directors . In the view of the author, as for the candidates’ scope, the “new classical property school” strictly abides by the traditional thought of corporate governance. It thinks that a company is the shareholders’ company, only shareholders are the owners and internal members of the company. In order to let the power of the company firmly controlled in the hands of shareholders and forbid the persons without relations of interests with the company to administer the company and harm the interests of shareholders, in some countries corporate laws (or by the bylaw) provide that only shareholders may serve as directors and those external persons without qualification of shareholders can not serve as directors . These provisions become the barrier for the birth of outside directors and independent directors . On the contrary, the “stakeholders

school” thinks that a company is not only shareholders’ company, the power of corporate governance shouldn’t only be granted shareholders, all other stakeholders should share the power. Dominated by this thought, in order to recruit the talented administration persons, present corporate laws of most countries provide that directors needn’t be shareholders and they needn’t hold qualification shares. These provisions make the birth of outside directors and independent directors possible. In addition, as for responsible objects, if the traditional thought of corporate governance is strictly abided by that “shareholders’ interests are paramount”, independent directors should only be responsible for shareholders and needn’t think about corporate social duties, but if the new thought of corporate governance is strictly abided by, independent directors should be responsible for all stakeholders and perform corporate social duties. Modern corporate laws under Anglo – American law system still insist on the thought of corporate governance called “shareholders’ sovereignty”, but they have been obviously influenced by the “stakeholders school”. In reality, the corporations in England and America all think about interests of other stakeholders in different degrees while they seek the profits of shareholders. Taking part in corporate governance as outside directors, independent directors conform to this socialization trend of directors’ functions . While they excute responsibilities of decision – making and supervision, they are burdened with the historical missions of balancing the interests of all stakeholders. In this chapter, the author also probes into the legal problems which have relation to the question Who owns a company ? About the problem of the nature of right to corporate property, the author thinks that the reason of different points of “the school of thought of shareholder’s ownership” and “the school of thought of corporate property ownership” lies in their different points on artificial person’s essence,

but the fundamental cause of their different points on artificial person's essence lies in their different thought .

In order to evaluate it, we should first understand totally and realize deeply the independent director system as a measure of corporate governance . So the author introduces the system completely and systematically in Part II .

In Chapter IV the author studies both the connections and differences between several relative terms and the intension and extension of independent directors . In Section 1 the author points out that the concept of "outside directors" is the opposite of "inside directors", "independent directors" is the opposite of "non - independent directors", "non - executive directors" is the opposite of "executive directors", "part - time directors" is the opposite of "full - time directors", "independent outside directors" is the opposite of "non - independent outside directors", "independent non - executive directors" is the opposite of "non - independent non - executive directors". These six pairs of terms are expressed from different angles and form several pairs of categories divided by different standards . They have different intension and extension. We had better not use some terms of them in the same sense in case of being misunderstood . In Section 2 the author also studies the legal norms, methods and emphasis of defining independent directors. The author thinks there are two kinds of legal norms of defining called "hard law" and "soft law", three kinds of methods of legal definition called "summarization, listing and combining". The emphasis of legal definition shouldn't be put in the "outside and part - time" characters but in the "independence". The author gives the examples of legal definition in England and America and summarizes the different factors which may influence the independence of directors.

In Chapter V the author studies the legal history and functions of independent directors. The author states that the legislation of independent directors started and developed with the emergence and development of independent directors. As for the role – playing, they experienced the transformation from inside directors to outside directors and then from outside directors to independent directors. As for the sphere of areas, they experienced the periods of spreading from America to other countries of Anglo – American law system, from some countries of Anglo – American law system to some countries of continental law system and experienced the period of the two law systems’ learning from each other. Independent directors have two functions of decision – making and supervision. They execute these two functions by taking part in the committees under board of directors and taking the majority of seats in the committees.

In Chapter VI the author studies the concrete law systems of independent directors. These concrete law systems involve mainly their qualification, their being appointed and dismissed, their reputation and reward, the protection of their interests, their rights and duties and liabilities. From the design of these particular law systems, we find we will be in a dilemma if we want to make directors both keep independence and have motive force. If we do not consider the system’s environment and particular condition of a country, it is very difficult for us to judge whether a system is good or not. A system is proved to be good for a country but it may be unsuitable for another country.

We should ponder over the independent director system of our country calmly and deeply. In Part III the author applies theory to reality, comments on the independent director system of our country and designs the scheme of the governance of the Listed Companies of our country.

In Chapter VII the author analyses the reasons our country practises

the independent director system and reviews general situation about the practice. The author thinks that there are three defects in the governance structure of the Listed Companies of our country . Because of the three defects, the problems become more and more serious that the holding shareholders embezzle the property of the Listed Companies uninhibitedly, conduct large numbers of connected deals with the Listed Companies and cheat mid - size and small shareholders . A series of scandal takes place in China's Listed Companies frequently. All these make the China Securities Regulatory Commission completely lose confidence on the Supervisory Board and place great hope on the independent director system . But a lot of problems are exposed in the practice of the system in our country. Some speak highly of this system, but others criticize this system. .

In Chapter VIII the author studies the feasibility of practising the independent director system in our country. The author thinks that many research results, relative cases and scholars' criticism show that the independent director system is not a wonder drug in the governance of the listed companies of England and USA. Independent Directors and the Supervisory Board have different value and thought, different outer environment and overlapping and conflicting functions, so they are not compatible. From all these we can draw a conclusion that the independent director system is not feasible in our country. But this doesn't mean that there are not any virtues in the independent director system our country can make use of . Though it cannot introduce the system itself, China may and must absorb its spirit and advantages—— “independence” and “pre - supervising”. Gaining two revelations from the independent director system, we may establish the independent supervisor system, mould the supervisory board characterized by pre - supervising the decision - making and strengthen its functions .