司法介入公司治理：理由与进路

Judicial Intervention to Corporate Governance: Causes and Approaches

一、引言

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公司是法律□□出来的具有□体人格的法人，作□私法主体，被□□享有自治的自由。公司也被□□是股东□取利益的工具，被股东尤其是大股□控制，是股东□的□筝。公司□被□□是一□契约的□合，是利益相关者的聚集地，是社会的□成□胞。公司被描□成理想国，被□作□托邦。……公司、股东、董事、□理、□□人、□工等有着不同利益□求的主体，通□□一定形式的公司治理□构共存于公司躯壳。

Introduction

A corporation is a legal person with group personality created by the law and is considered to have the freedom of autonomy as a subject of private law. A corporation is also considered as shareholders’ tool to pursue profit just like a kite flown by shareholders especially substantial shareholders. A corporation is considered as a contractual combination, a gathering place of stakeholders and constituting a cell of society. A corporation is described as a Utopia. …With different interest claims, subjects such as management, shareholders, directors, creditors, employees and others who coexist in a corporation through the certain formal structure of corporate governance.
Whether according to opinion which demands building a corporate governance structure with shareholder’s rights as the core, or according to corporate contract theory, which stresses that multiple stakeholders should be subject to a common governance, a corporation always depends on articles of association to realize its autonomy. It seems to be an independent kingdom with a high-degree of autonomy relying on a rights and obligations structure between corporate stakeholders that is constructed by the inner system of board of shareholders, board of directors, managers and board of supervisors. Based on either theoretical analysis or empirical study, the feasance or nonfeasance of company, shareholders, directors and other subjects usually leads to low efficiency, invalidity, injustice and inequality and unbalanced rights during corporate governance. However, the corporate autonomy mechanism is not able to correct itself.

The various company laws in all countries inordinately improve corporate governance through shareholders’ rights protection mechanisms by which shareholders protect their or the corporation’s

1. For instance, “the sales regulation that clients in Putian, Fujian province are recorded as dishonest clients” referred to in the arbitration between Alibaba and its employee in 2014, and the inner recruitment regulations with differentiation and discrimination about gender, health, education background, etc.

如2014年阿里巴巴和员工仲裁案涉及的“福建莆田客户被列为不诚信客户的销售制度”。又如公司在招聘方面对性别的内部分歧、身体、学识等方面的歧视等。
rights and ensure that a company runs efficiently through direct action and representative action. However, judicial intervention under this circumstance, just like other private rights protected by public power by virtue of judicial intervention, does not belong within the scope of issues discussed in the article. The judicial intervention to corporate governance discussed in this text, beyond the concept of “judicial nonintervention to corporate governance”, refers to the judicial involvement and correction to the unjust, unfair and invalid or expired corporate performance shielded by the rights stipulated by the articles of association and resolutions of shareholder meetings affecting a corporation’s operations (inner affairs management). Judicial intervention includes the review and correction of discriminatory and unequal corporate regulations, the resolution of obstacles to convening shareholder meetings and director meetings, special service or recall of company directors, the “tyranny” of prevention of majority decisions regarding capital expenditure which hampers justice, the prevention of director’s illegal behavior, the precaution of harmful connected transaction, etc. Such problems are difficult solve through inner settlement mechanisms within the scope of corporate governance, and therefore judicial intervention is required to make judgments and correction that will uphold justice and fairness.

Justice can satisfy the “need” of corporate governance, but the question is how to “supply” it? In other words, what is the approach of judicial intervention to corporate governance? Specifically, how to effectively construct a litigation system, judgment methods and the limitations to abide by in judicial intervention in corporate governance in the present judicial system? Should courts change their approach of judicial intervention from negative and hysteretic judgment to positive and beforehand intervention? Should the limited intervention turn to a broader scope? How can justice guarantee the company formal and healthy operation during its intervention to corporate governance? How can the effectiveness of the intervention be ensured? Accordingly, there are so many problems need researching. Due to the limitation of space and the author’s capability, the article makes an outline and preliminary discussion of the approach of judicial intervention to corporate governance.
二、公司治理需要司法介入

制度是一种演化秩序。英美法通过判例逐步确立的司法对公司有限制的干预史迹，已证明了公司治理需要司法干预。本法治理需要司法介入的理由，也可以从多角度加以分析，本文在里合两种类型的公司治理——股□自治治理和利益相关者共同治理治理□，合公司治理的效力□，分析和明司法介入公司治理的必要性和重要性。

Corporate governance needs judicial intervention

A system is a kind of evolutionary order. The historical track along which common law gradually established the limits to judicial intervention in a company through legal precedents has proved that corporate governance needs judicial intervention. The cause of the need can be analyzed from various perspectives, and this article tries to analyze and explain the necessity and importance of judicial intervention to corporate governance through combining two concepts of corporate governance—shareholder autonomy and stakeholder co-governance with the corporate effectiveness goal.

（一）股□自治下的少数股□□保□的需要

公司的□□理□□持公司工具□，□□，公司的法人性□是公司外在的特征，股□是公司的所有者□益的承担者，公司□股□投□的工具□是公司最□基□的本□。股□作□公司的所有者在公司自治中处于核心地位，代公司自治□□上即□股□的自治。公司及公司制度的□生与□展均是以股□□核心力量□行的，公司制度功能的□□关□在于股□自治的□□。但是，股□自治□中心的公司治理表明，在公司□□管理□中，多数股□的意□会被接受采□。公司的多数股□□有最□决□。多数股□□普通决□或者特□决□□任何事□所做出的决定，

2Some scholars point out the necessity of legal interference into corporate governance based on multiple demands of power balance, the privatization of public law, reducing organization cost, improving long-run bargain, adjusting interest conflicts and enhancing cooperation between economic subjects. See Ren Zongli & Yu Qun, “The Legitimacy of Law Governing into the Corporate Governance from the Perspective of Legal Philosophy”. (2003)8 Journal of Shaoguan College.
1. The need to protect the rights of minority shareholder under shareholder autonomy.

The traditional theory of company law insists on company law theory which considers that a company’s legal personality is just its superficial characteristic and shareholders are undertakers of owner’s equity and therefore the fundamental corporate nature is that of a shareholders’ investment tool. Shareholders occupy the core positions as company owners in corporate autonomy and hence modern company autonomy is shareholder’s autonomy in essence. The emergence and development of a company and company systems take place with shareholders as the core pushing power, and the function performance of the company system mainly depends on the realization of shareholder autonomy. However, the corporate governance with shareholder autonomy at its center indicates that the majority shareholders’ opinions will be adopted to deal with company business and management affairs. Therefore, the majority shareholders in a company have the final decision-making right and their decision on any matter made through an ordinary or special resolution shall be binding on all shareholders. As to the matter decided by majority voting, the minority shareholders have to comply with the majority shareholders’ will.3

理□上以及□践□察所□，多数股□会利用其控制地位，□制少数股□、□避公司章程中的特定条款或者□制少数股□自身从公司□取最大利益和□富。当多数股□任意□用所□的民主□利□，公司将无法确保公平交易，股□个人□利也得不到尊重，股□多数决原□的□用在非上市□中表□得更□明□。因□“在一个非上市公司中，公司集中控制的□范和多数决□□容易□成□制性的工具。一些□公司成□十分重要的决策，例如有关用工、薪酬的决策，都由董事□会决定。当成□之□的关系不再和睦，少数成□会□□多数成□会以意想不到的方式管理公司□事□。控制着董事会的多数股□可以□止少数股□的雇佣关系，从而减少□其投□的回□。公司□可以不支付股□股利，以避免双重征税，但是多数股□可以通□□□□、或者收取租金或公司□金□款的利息等方式□得他□的投□回□。在排除了少数股□后，□些收益□□会增□。公司□式的□久存□性更使得少数股□□于□□□□。没有工作，没有股利，少数股□□□□的是□一个不确定的未来，他□她得不到□公司□本投□的回□。多数股□甚至能□通□高□或租金的□式抽取公司□□，来拒□□予少数股□□期投□的回□，并假□商□□□□□来□□□□。另外，多数股□□□会以□公正□的理由逼□少数股□离开公司”4.

3 See Joseph E. U. Abugu, "A Comparative Analysis of The Extent of Judicial Discretion In Minority Pro -tection Litigation; The United Kingdom and United States," International Company and Commercial Law Review(2007) , pp. 181-183.

4 R. B. Thompson, "The Shareholder’s Cause of Action for Oppression ", (1993) 48 Bus. Law. p. 703.
According to theoretical study and practical observation, the majority shareholders take advantage of their controlling position to suppress the minority shareholders, to avoid certain items in articles of association or to gain the maximum interest and wealth from the company for themselves. When the majority shareholders abuse the so-called democratic rights arbitrarily the company will not ensure an even bargain and shareholders’ individual rights will not be respected. The abuse of majority rule shows more obviously in a non-listed company, because “In a closed setting, the corporate norms of centralized control and majority rule can become instruments of oppression. Some decisions vitally important to participants, such as their employment and salary, are left to the board of directors to make. When harmony between participants disappears, the minority participants may find that the majority interest can manage the affairs of the corporation in unexpected ways. The minority dominating the board can terminate minority shareholders’ employment as officers, thereby diminishing the return on their investments. The corporation may not pay dividends to any shareholders to avoid double taxation, yet the majority shareholders will continue to receive a return on their investment in the form of salary or perhaps rent or interest on money loaned to the corporation. Indeed, these amounts may increase after the minority shareholders are excluded.

Traditionally, the minority shareholders have had no way to protect themselves against such an occurrence. If minority shareholders attempt to establish a contract for protection against this possibility, such as by agreements that the minority shareholder retain a corporate office and a salary, courts earlier this century struck down the agreement as an unlawful interference with the unfettered discretion of directors. The performance of the corporate form further compounds the minority shareholder’s dilemma. Without a job and in the absence of dividends, the minority shareholder may face an indefinite future with no return on the capital he or she contribution to the enterprise. The majority may even be able to deny the minority shareholders any return in the long run by siphoning off corporate assets in the form of high salaries or rents, insulated from judicial review by the business judgment rule. In addition, the majority may force the minority to leave the company with unjust excuses.”

在中国大□，国有企业□以及家族企□在上市公司中普遍存在，□□的集中□□型体制以及文化筑□造就了上市公司高度集中的股□□构。又由于上市公司股□人数众多且多□散□，□繁□股，集体行□“搭便□”消极参与公司治理，□些因素□致“内部控制”普遍存在于上市公司。在□些公司中控制股□□有□□超□中小股□的□□特□，不□□□有股□□，□操□控制□事、董事甚至于□□者的□利行使。大股东利用其□股□大会、董事会的控制形成决策，□达成自己的特殊目的而漠□中小□□者利益，甚至不惜侵犯中小股□利益。□□□□在上市公司中□出不□，如关□交易、侵吞公司□□等。董事会的独立地位□失很□形成独立的□□决
There are many state-owned firms and family businesses among listed firms in China mainland. The traditional centralized economic system and cultural atmosphere have resulted in a highly centralized ownership structure in the listed companies. Moreover, the listed firms have a large number of shareholders who are retail investors. A majority of these can exchange shares frequently that is their collective “hitch-hiking” impacts on a corporation’s share price, and negatively on corporate governance. All of these factors lead to the ubiquity of “insider control” in listed firms. In these firms, the controlling shareholders enjoy far more practical privileges than the minority shareholders, and they not only own the shareholders’ rights but also manipulate and control the practice of the rights of supervisors, directors, even operators. By taking advantage of their control on the general meeting of shareholders and the board of directors, the big shareholders reach resolutions so as to achieve their special purposes while disregarding, even infringing the rights and benefits of small investors. These sorts of disputes frequently occur in the listed companies in respect to affiliate transactions, and annexation of firms’ properties.

The board of directors loses its independent status, which makes it difficult to achieve a decision independently and at the same time, fails to perform its function of supervision. There is an obvious shortcoming of company law; in response, it is reasonable to use resolutions of the shareholders’ meetings to replace the common-interest rights of shareholders when the law lacks a legitimate basis to replace and suppress the self-interest actions of shareholders.

(二)共同治理下多元利益均衡保□的需要

2. The demand of balanced protection for multiple interests under common governance

基于公司契员员，公司是股员、员理、雇员、供员商、员客、员员人等在内的各主体之员一一系列契员关系的员员 (a nexus of contracts)，公司利益相关者当共同参与治理。因此，需

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5 See Peng Zhenming, Lu Jian, Judiciary Intervention and Inner Governance of Listed Companies: the Dilemma of Localization and its Solutions, Social Science Front 2011(05), PP.197
Based on the company contract theory, a company is a nexus of contracts between shareholders, managers, employees, suppliers, customers, creditors and others. This paper argues that the company stakeholders should participate in its governance. For this purpose, it is necessary to build channels and platforms where multiple stakeholders can voice their demands and requirements; for staff, creditors and shareholders representing the interests of disadvantaged organizations, a third party is necessary to judge and correct unjust autonomous conduct, and properly protect the interests of each party.

A company is an individual pursuing profit from head to toe, or alternatively is a miniature cell in society that shoulders responsibility for workers, customers, community members, and the government; the debate will continue. In fact, the theory that shareholders are the center of corporate
governance has dominated governance in mainland China. Company legislation and justice are deeply influenced by it. 

控股股员与中小股员，公司与董事，股员与董事，股员与股员，股员与公司，股员与董事，股员与董事，员员人与公司、股员及董事，公司与员工之员关系的复员性，以股员员中心的公司治理员性思员，公司法没有员利益相关者的员利救员员员予以重员和员置有效的救员制度，需要依员借员英美法上的“信员员员员员员员”“商员判断”等理念，由法官自由裁量个案中相关利益相关者的正当性及其利益保员。在中国大员司法体制下，可以先行通员最高法院员布指员判例的方式，而通员司法解员的途径，最终通员修改公司法，确定司法员公司治理介入的原员、途径以及必要的限制。

The shortcomings of company law are: since the relationships between controlling shareholders and minority shareholders, companies and directors, shareholders and directors, debtors and companies, shareholders and directors, and companies and staff are very complicated, and the habitual thought of governing companies centers on shareholders, company law neither emphasizes the rights or problems of many shareholders, nor sets an effective relief system. It is necessary to depend on and learn from some concepts and values in Anglo-American Law such as “fiduciary obligation” “judgment of operators” and “business judgment”, so that judges can discretionarily judge the legitimacy of shareholders and protect their rights and benefits in certain cases. In the Chinese mainland judicial system, it may be through the way of a Supreme Court case to guide the Primary Court firstly, and then by way of judicial interpretation, and ultimately by modifying the Companies Act, to determine the principles of judicial intervention on corporate governance, ways and necessary restrictions.

（三）公司治理追求有效秩序的需求

3. The demand of pursuing effective order in company governance

公司治理的法秩序□□是公司自治和国家□制（立法□制、司法介入）的□一。司法介入公司治理本□上体□□公司自治的一种国家意志之□正。加拿大著名公司法□家柴芬斯从促员效率和□□公平的两重目□角度，□司法介入公司的运□作了分析。就效率目□而言，首先，由于不完整的信息□□，包括系□性□息□□和信息不均衡□□，可能□致公司合同存在□暇、合同制□存在欺□以及存□“□檬市□”等□象，造成□源的浪□，□此，司法有必要介入。其次，私人□立合同成本巨大，国家通□□制性的法律模本可以减少□□成本。再次，国家□制可以解决消极“外部化”□□以及集体行□□□（博弈□解□了□什么个体交易者以最大化自己利益的策略行事，却可能得到无效率的□果）。就公平目□而言，国家□制会适当地阻止那

8 参□[加]布莱恩R.柴芬斯:《公司法:理□、□构和运作》，林□□等□，法律出版社2001年版，第1135 -168□。
8. See (Canadian) Brlan R.Cheffins, "Company Law: Theory, Structure, and Operation", translated by Lin Weihua, etc., Law Press China (2001), PP.135-168.
The realization of lawful order in company governance is through unification between company autonomy and national enforcement (legislative regulation and judicial intervention). The judicial intervention in company management substantially reflects the state’s will to correct company autonomy. Cheffins, a Canadian expert on company law analyzes judicial intervention in the operation of company from the dual goals of promoting efficiency and realizing fairness. When it comes to the goal of efficiency, firstly, it is necessary for the judiciary to get intervention since the problem of incomplete information, including the problem of systematic information and unbalanced information, may cause the existence of a gap in a company contract, fraud in contract system, and a "lemons market", resulting in the waste of company resources; secondly, the cost of private conclusion to a contract is very huge, and the contracting cost can be reduced through mandatory law texts of the state; and thirdly, national enforcement can solve the problem of negative "externalization" as well as collective actions (game theory explains the reason why an individual trader practices in a way that can maximize his own benefits but obtain a result without efficiency). As for a fair goal, national enforcement can appropriately prevent those fraudulent, misleading, and coercive conduct while paying more attention to the underprivileged ones. Moreover, the actual controllers of the company will have to shoulder strict fiduciary duties so that fair treatment to small and big shareholders and balanced interests among them can be realized. Furthermore, national enforcement can also restrict disordered competition and create a market mechanism with fair competition, ensuring that market participants observe the basic moral codes.

三、司法能介入公司治理

Feasibility of judiciary intervention into company management

（一）司法功能包含着公司治理的外部保障

1. Judiciary function including an exterior safeguard for company management

公司治理是一个复杂系统，涵盖了公司内部和外部不同的制度结构。司法与行政部门共同构成公司治理的外部控制机制，司法机构及其代表的法律制度，又是公司治理的外部保障机制。司法机构代表国家意志，判公司自治（私人）行，正非正的、利益失衡的自治行，保障相关当事人的利，公司自治的良好秩序。司法通过民事途径介入公司自治，可以保障利，公司内部利益关系和公司与外部的关系，促公司自治的有序有效地行。
As a recheck system, company management covers different system structures inside and outside companies. The judiciary and administration together constitute an exterior monitoring mechanism of company management. Judiciary organizations and legal systems represented by the organizations are also an exterior safeguard mechanism of company management. Judiciary organizations represent the will of the state to judge company autonomy (private) conducts, correct autonomy conducts of injustice and imbalanced interests, safeguard the rights of relevant parties, and maintain a sound order of company autonomy. Jurisdiction intervention to company autonomy in the way of civil action can safeguard the rights, coordinate benefits relationships inside companies and the relationship between companies and the outside, and promote company autonomy in ways that are both orderly and efficient.

1. 司法的□利保障功能（□利保□救□型介入）。

(1) Rights safeguard function of jurisdiction (intervention to a rights safeguard and relief type)

公司中存在□利生□□。股□□利是公司中其他□利的母体。□由股□的行□而□生了公司的□体人格。股□□利和公司□利的分隔保持了各自的独立人格。□持公司独立人格的最佳□□构造模式，□当是□立一个□大的董事会而不是股□会。董事会成□不一定是股□，只有未必全由股□构成的□□□，才能相□独立地考□另一个人格主体——公司的利益。股□、公司、董事是公司□利生□□中的主要□接点，此外□有□□□人、公司□工等其他□利人。每个□

9 (Japanese) Shindō Kōji, “New Civil Procedural Law”, Lin Feng, Law Press China (2008), p.3
10 (Japanese) Shindō Kōji, "New Civil Procedural Law", Lin Feng, Law Press China (2008), p.7
11 Jiang Daxing, “Concepts of Company Law and Explanations”, Law Press China (2009), p.142.
条上利益的度膨或明薄弱，都会破坏公司利益的“生平衡”。因此利益的救是持公司利益生平衡的外部手段。公司法上相关主体是否解决，利益有否得到保障，是衡量司法介入公司治理有效性基本准。

There is a rights chain in companies, and shareholders’ rights are the base for other rights in the companies. It is through shareholders’ conduct that a group personality of companies is established. The separation of the shareholders’ rights and companies’ rights maintain their own independent personality. The best organization and structure mode for maintaining companies’ independent personality should be the establishment of a powerful board of directors not a board of shareholders. The members in a board of directors do not have to be shareholders themselves.

Only by an operations group which is not comprised of shareholders completely, can the other personality subject—companies’ benefits--- be taken into consideration independently. Besides some main linking points in the rights chain of companies such as shareholders, companies, and directors, there are debtors, staff in companies and other rights-holders. The “ecological balance” of companies’ rights will be destroyed if the rights of each chain are too strong or too weak. Therefore, the remedy on rights is an exterior practice to maintain the ecological balance of companies’ rights. The fundamental standards on evaluating the effectiveness of the jurisdiction’s intervention to company management are whether disputes among relevant parties in company law get settled, and whether the rights get safeguarded.

2. 司法的秩序维持功能（秩序维持型介入）。

(2). Order maintenance function of jurisdiction (intervention in an order maintenance type)

民事使当事人得程序上置的保障，而使当事人行可以裁判果，自律地依据体法基准来相互生活，社会生活整体得以安定。公司自治是以公司治理构支撑的公司内、外部私人秩序。好的公司治理是公司、股、董事、理、人、工等多元利益主体的形成的公平、有序和有效的自治构系。司法介入公司治理，除了化解、保障利益，正公司自治的失灵与无序。

参[(日)新堂幸司著，林：《新民事程序法》，法律出版社2008年版，第7。]
12. See (Japanese) Shindō Kōji, “New Civil Procedural Law”, Lin Feng, Law Press China (2008), p.7
Civil action enables parties to obtain safeguards when successful, so that the parties can predict the result of planning and performing in accordance with the norms and regulations of substantial law. Self-discipline in compliance results in an overall stable social life.\textsuperscript{12} Company autonomy is a private order inside and outside companies supported by a company management structure. Good company management is a fair, orderly, and effective autonomous structural system formed by multiple rights-holders such as companies, shareholders, directors, managers, debtors, staffs. Jurisdiction’s intervention in company management can correct the malfunction and disorder of company autonomy besides settling disputes and safeguarding rights.

(二) 司法具有能动性

2. Jurisdiction with activity.

司法机构作公司治理系的组成部分，有效及公司自治活，引公司完善公司的治理□构，使公司自治回正□、公平和有效的公司治理目□。

As a part of a corporate governance system, the judicial body gives effective and timely intervention to corporate autonomy, and leads to a perfect corporate governance structure so as to achieve the goal of justice, fairness, and effectiveness for corporate governance.

司法能□主□是普通法制度的□品,□格□是□□司法□□与□法的□史关系而展开的一个□□。布莱克法律辞典作了一□典定□，指一种司法裁决的哲学，它允□法官根据他□□有关公共政策等因素的个人□□指引裁判□就暗示着□种哲学具有□向于打破□章、罔□先例的禀性。\textsuperscript{13} 司法能□主□与司法限制主□此消彼□。司法能□性的运用，□□上是□法官自由裁量□的□可，□法官站在法律的缺口与流□的社会生活的交接□，□□□□、□□□□，以□大法律的内涵，开放法律的□延，避免法律的具体适用与正□决裂。丹宁□爵曾□妙地□明了法官自由裁量之弥□法律局限性的功能以及□遵循的基本准□: “法官□不可以改□法律□物的□□材料，但是他可以，也□□把褶□熨平。”\textsuperscript{14}

Judicial activism, a product of the common law system, is a term surrounding the historical relationship of judicial reviews and constitutions. The \textit{Black's Law Dictionary} defines judicial activism as “a philosophy of judicial decision-making whereby judges allow their personal views

\textsuperscript{13} Bryan A. Garner, \textit{Black's Law Dictionary} (8th edition), West Thomson Bussiness (2004), P862.

\textsuperscript{14} [英] 丹宁□爵: 《法律的□□》，刘庸安、□百撰、丁健□，法律出版社1999年版，P112.

14(Britain) Lord Denning: \textit{The Discipline of Law}. Translated by Liu Yong’an, Yang Baikui, Ding Jian, Law Press China(1999), P.112.
about public policy, among other factors, to guide their decisions, usually suggesting that adherents of this philosophy tend to make constitutional violations and are willing to ignore precedent.” 13 There exists a trade-off relationship between judicial activism and judicial restraint. The application of judicial activism is a confirmation on judicial discretion, which allows judges to extract rules and bridge law gaps to ensure the integration of specific application of laws and justice. Lord Denning had explained the complementary function of judicial discretion for legal limits, and described the basic principle to be followed by judicial discretion as “Judges must not change the texture of laws but ironing the folds”. 14

Conservative judicial concepts need to be alert while judicial activism is followed. One of the conservative judicial concepts is that the court should not intervene in corporate internal management, corporate operations and decision-making activities, or corporate business judgments. Jurisdiction pursues a judicial criterion of “ruling follows disputes”. “The court shall not reject to adjudicate civil disputes on the ground of no provision provided in law” is the basic norms of civil justice. The conception that justice never intervenes in corporate affairs does not accord with the principle of final judicial adjudication. Another conservative judicial concept is that a judicial view on corporate internal affairs is equal to intervening in corporate management, which is similar to the governmental over-controlling of companies in China’s planned economy era. Jurisdiction plays a different role from that of administration. Jurisdiction should respect corporate operations, which does not mean jurisdiction needs to be away from corporate operations such as administration.

(三)司法审慎介入公司事务

3. Wary Judicial intervention to the company affairs.

司法审慎介入公司自治，基于不同事态和不同领域，呈现的介入极性完全不同。公司法已作出禁止性定型事态，法官在裁判中可审慎介入。司法审慎介入公司自治事态，比如涉及到商事判断事态，法官由于并非从事商事活动的商人，此事态的介入不得不审慎从事。
Judicial intervention in corporate autonomy has different intervention initiatives based on different affairs and fields. The company law has prescribed the adjusting affairs of prohibitions on which judges can be actively involved. When intervening in corporate autonomy related to business judgment, judges should be wary of the intervention, because judges are not specialized in commercial activities. If shareholders appeal corporate internal affairs to the court for settlement before going through the remedy procedures within the corporation the court should reject the request to intervene.

In the field of corporate governance disputes, judicial activism exceeds the connotation of review by public power, and is added to with a new connotation of intervention in the private order. It needs to deal with both judicial discretion under the uncertainty of company law, and the range and mechanisms of judicial intervention to corporate business. Judicial intervention to corporate autonomy is limited. “Judicial expansion and discretion have been throughout the development history of company laws in the Anglo-American countries”, which is worthy summarizing. Active judicial intervention often occurs when corporate governance faces risks, and aims to uphold the social justice and correct market disordering.

在美国，司法能○主○多○霍姆斯开○的法律○○主○学派所运用，在○理具体争○，除了左手小心翼翼捧着法典外，右手○要伸出，来充分触摸到具体案件的事○，案件的社会影响、道德、○理、政策、法律原○等○合因素，在衡平的基○上作出最后决定。因此，在通○法官的活○而进入到公司治理司法○程中，法官○公司事○的○○当○持合法性○○主，合理性○○○，○○主，○○○○的○○方○，○公司事○保持○慎的○度，尊重公司自治、○○公司秩序。

15 Luo Peixin:《公司法的合同解释》, 北京大学出版社, 2004年版第336○。
In the US judicial activism is mostly used by the legal realism school created by Holmes. When a judge deals with a specific dispute, a balance needs to be made between codes tightly held in his left hand and some integrated factors such as specific case contents, social influences, mortality, ethics, policies, and legal principles touched by his right hand. Based on this balance, a final decision is made. Therefore, when a judge is involved in corporate governance affairs in the name of judicial review, he/she has to adhere to the principles of legality review first while a rationality review is second, and a formal examination first while a substantial examination second, so as to be wary of corporate affairs, respect corporate autonomy, and maintain corporate ordering.

Judicial intervention to corporate governance could prevent some shareholders’ opportunism. If the cost of suing, or judicial remedies without suing, is low, it may cause the disadvantages associated with opportunism while easing the rights protection of minority stockholders. Once justice intervenes in corporate disputes, the corporate management must make efforts to deal with the intervention, causing some damages to the whole corporation’s benefits. Considering this risk, many shareholders may make use of this risk to blackmail a corporation in exchange for improper benefits.

Under the guidance of shareholder autonomy, company law is gradually inclined to take a court as the center. However, it does not mean that the court can make judgments for shareholders or infringe the corporate autonomous rights of shareholders. The concept of shareholder autonomy suggests that “individuals are the best judges of their own interests”. The court should respect shareholders’
arrangements on corporate affairs in judicial review, and the judicial intervention to corporate affairs should insist on the principle of limited intervention. As the last defensive line of personal rights, judicial remedy is of great importance for defending personal rights. The defense of personal rights needs to be firstly handled according to the principle with private settlement processes as a priority. If the private settlement process does not work, the public power can intervene in the private fields. And it is true of handling internal disputes of a corporation. The court should respect shareholder’s autonomy on corporate affairs, and can intervene in the corporate affairs only when the shareholders fail to settle the disputes. The realization of shareholder autonomy depends on establishing the concept of respecting shareholder autonomy from the perspective of the court and judges.

四、司法介入公司治理的路径

**Approaches of Judicial Intervention to Corporate Governance**

（一）完善普通民事程序介入公司治理的制度

1. Perfecting the system of introducing ordinary civil procedure to corporate governance

The Company Law has provisions on protection of substantive rights. In those cases heard through ordinary civil procedure and involving active judicial intervention in the internal decisions of the company and the policymaking of the operator, however, the judicial bodies shall specify and fulfill the mechanism of judicial remedies on substantive rights protection stipulated in the Company Law through the approach of judicial interpretation. The protection of shareholders' rights is an example.

In the existing Company Law, considerable protection has been given to the rights of shareholders, but it is relatively conservative and rigid. It lacks a broader remedy and protection mechanism towards those behaviors that are harmful to the rights of shareholders and are not listed in the Company Law. Examples are lacking a mechanism or policy to remove invalid decisions that could
damage parts of the shareholders' rights; to confirm or forbid the stock right transfer that could damage the rights of other shareholders; to force the company or other shareholders to purchase the stock of the shareholder who is treated with unfair prejudice from a resolution of a shareholder meeting. In the framework of existing Company Law, the following situations shall be handled through the ordinary civil procedure by judicial interpretation: the expansion of shareholder derivative action, the confirmation and valuation of targeted share repurchases and the disputes in corporate governance such as the examination of the legality to the rules, regulation and articles of incorporation.

英国公司法上的不公平侵害之救济制度值得借鉴。当不公平行为足公司章程反同，通常也是股东个人利的侵害。普通法公司章程予予的股东的个人利采用了一种比略苛的行使方法，股东不能就“内部不正当”起诉。英国学者认为，股东的个人利是多数股东没有利决定更或放弃的，主股东的股东的多数的利，从章程范的利到合理期待下的其他利。1962年公司法律委员会(Company Law Committee，即金肯斯委员会，Jenkins Committee)提出了替代“内制行”的不公平侵害救助，建大法院的司法，使法院能基于衡平原，干涉公司事，不公平侵害行予救。一建直到1980年才得以在公司法中加以定。

The unfair prejudice remedy mechanism in British Company Law is worth drawing on. Unfair conducts violating the by-laws of the company usually infringe the personal rights of the shareholders. In the Common Law, shareholders exercise their personal rights endowed by the by-laws of the company in a limited way. They cannot file a lawsuit against internal irregularity. British scholars believe that the personal rights of a shareholder shall not be changed or removed by other shareholders and they advocate the protection of shareholder's rights by expanding their rights endowed by the by-laws to other rights within reasonable anticipation. In 1962, the Company Law Committee also known as Jenkins Committee put up a remedy to unfair prejudicial actions and proposed to expand the judicial power of the court so as to enable the court to interfere with the affairs of the company by offering remedies to unfair prejudicial actions based on the principle of equity. This proposal was not adopted by the British Company Law until 1980.

16 The original text is: A member of a company may apply to the court by petition for an order under this Part on the ground-(a) that the company’s affairs are being or have been conducted in a manner that is unfairly
Article 994 in British Company Law stipulates that a member of a company may apply to the court by petition for an order on the grounds that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or that an actual or proposed act or omission of the company is or would be so prejudicial. The Jenkins Committee's report points out that unfairness obviously deviates from fair trade standards, violating the fair game rule set by the shareholders who invest money into the company. The legal precedent considers the test criterion of an unfair prejudice as objective rather than subjective, which means that the applicant is not required to testify whether the behavior of the defendant is out of malice. That is to say the court will affirm the establishment of an unfair prejudice when the result leads to unfair prejudice no matter whether the behavior of the defendant is out of malice or not.

The most commonly used remedies for unfair prejudice are command and writ. When the rights of a shareholder are infringed by unfair conduct, the court will order the company or other shareholders in prejudicial to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

17Quoted in John Lowry, The Pursuit of Effective Minority Shareholder Protection: S 459 of the Companies Act 1985, The Company Lawyer Vo1.17 No.3,1996,P.68.
18Fan Yunhui, The Research on British Minority Shareholders Rights Litigation Relief System, China Legal
19Re a Company (No 002612 of 1984) (1986) 2 .BCC 99,at P453,492-499.
20Re London School of Electronics Ltd (1986).Ch .211.
the company to buy the stock of the shareholder so as to help the shareholder get rid of the awkward situation in which he/she is forced to leave the company. But it is fair only when the stock of the shareholder is not sold at a low price with a discount.\textsuperscript{18} With regard to the base date, the court may choose one from the following options: the date of occurrence of unfair behavior, the date of filing the application, the date of issuing the stock purchase warrant or the date of evaluating the price warrant. The judges’ opinions vary from one to another when it comes to choosing the date in a specific case. The judge Vinelott J believed that the evaluation date shall be the date of filing the application on the grounds that on this day the applicant decides to file a lawsuit against the unfair prejudice and the cooperative foundation of the two sides no longer exists on the same day.\textsuperscript{19} The judge Nourse J believes that the base date shall be the date of issuing the stock purchase warrant on the grounds that it is appropriate to evaluate the basic interest when it is decided to be purchased.\textsuperscript{20}

When the unfair infringement is caused by the misconduct of the company itself, the judicial court will issue a writ that the company should perform an act based on the case in which the company is conducting or will conduct an act, or even an omission, if it infringes the shareholder’s rights. After the petition for litigation relief, there will be a period of time before the court issues the writ, causing delay of actions and untimely prevention from actual harm of unfair practices to the claimant, like being expelled from the shareholders. Under such a circumstance, the claimant should apply for a temporary command, which will take into full consideration in the decisions, the command effects on the operation order of the company and the protection of the claimant rights. More often, the court will also issue a present-situation-maintenance command for the purpose of guarding the petitioner’s rights under a fixed situation.

我建议引入不公平害救济制度，在普通民事程序中，予法院以命令（令状）的，从而有效地干公司中的“多数人暴政”，保多数股东的正当性来受到不公平害。至于股价股价，当只在的股份没有折扣低出才是公平的“原”；关于估价的，从公平的角度而言，自原告提出之日起，原告股与其他股东及其公司董事之的信任或者信托关系宣告破裂，由此原告不能要求分享申日之后，基于被告或者其他者方法得当的得的收益；相反，当公司被所困致精力削减、减少、公司信誉降

\textsuperscript{18} With regard to the base date, the court may choose one from the following options: the date of occurrence of unfair behavior, the date of filing the application, the date of issuing the stock purchase warrant or the date of evaluating the price warrant. The judges’ opinions vary from one to another when it comes to choosing the date in a specific case. The judge Vinelott J believed that the evaluation date shall be the date of filing the application on the grounds that on this day the applicant decides to file a lawsuit against the unfair prejudice and the cooperative foundation of the two sides no longer exists on the same day.\textsuperscript{19} The judge Nourse J believes that the base date shall be the date of issuing the stock purchase warrant on the grounds that it is appropriate to evaluate the basic interest when it is decided to be purchased.\textsuperscript{20}

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低等造成不利后果，原告也不当分担由此生的不利后果。因此，将定日期确定提出之次日，个价格于双方均是不确定的，以便更好地保障股公平的价目的的。

The adoption of an unfair infringement remedy system, in ordinary civil procedural lawsuits, and granting the court the authority of command (writ) to intervene in the phenomenon of “tyranny of the majority” in the company and protect the property rights of a few shareholders from unfair infringement. As to stock price, the principle should be “it is fair only when one’s stock is not sold at a low price with discount”; and as to the date of evaluation, from the perspective of equity, from the day the claimant institutes the legal proceedings to the day he/she submits the application, he/she could not continue to require sharing the profits gained from the proper management of the accused or other managers caused by the breach of trust deeds between the claimant and other shareholders or directors of the company; on the contrary, the claimant shall not assume unfavorable consequences would be caused by a reduction of management vigor, business hours or the company’s reputation resulting from the proceeding. Accordingly, we should fix the date of evaluation on the second day of the proceeding, which is a price indeterminate for both sides. In this way, the value target of ensuring stock equality can be better realized.

（二）构建商事特程序介入公司治理

2. Setting up special business procedure for corporate governance

大法系国家多以特的程序（非程序）提前介入到公司的内部治理，日本最典型。在《日本商法典》中定了司法介入公司治理的特程序，2006年4月开始施行的公司法中，增加置了有关公司的非程序的定。法特定了非程序的定，如董事的解任、董事会的召集等。法院不是以裁判形式理，而是以司法命令的方式介入公司管理，正、公司的正常运作。

The civil law countries mostly concentrate on special procedures (non-litigation procedures) to intervene in the company’s inner governance ahead of time, as is typically the case in Japan. More specifically, the Japanese Commercial Code has an exclusive chapter on special procedures for judicial intervention into corporate governance. Moreover, in its company law, that came into force in April 2006, there is an additional provision on the non-litigation procedural law of companies, including the dismissal of director, the convening of board of directors and so on. In order to rectify and coordinate the operations of a company, the court intervenes in the company’s management via judicial order instead of judgment when dealing with disputes.
According to experience from some countries concentrating on judicial judgment, all disputes possibly arising from the establishment to the dissolution of a company are summarized as 48 types.\(^{21}\) However, adopting ordinary civil procedure to solve every company dispute has been obstructed by enormous difficulties and challenges. Existing types of company disputes possess at least the following cases that are available to special procedure when the company fails to obtain favorable judgment through ordinary civil procedure. In terms of function, the special procedure focuses on prevention while the usual procedure is on remedy afterwards and supervision. The special procedure does not aim to make a judgment on the dispute of rights and obligations between parties, but takes some detailed measures to intervene in the company operation. By means of judicial intervention, it is possible to promote the effective operation, prevent unfair behaviors and avoid the infringement of company’s as well as the related parties’ interests.

The cases of special business procedure related to company are as follows:

1. 股权利表彰性案件，如股东请求公司填写并在公司置备股东名册，股东请求出□明□，股东求公司□□更□等案件。

1. The case of rights recognition of shareholders such as shareholders request the company to prepare and fill in a roster of the shareholders, sign and issue an investment certificate, and register the modification of shares.

2. 股东知情权案件。具体包括：股东、复制公司章程等材料，股东会监事会；股东请求公司披露董事、监事、高级管理人员的□酬，公众公司股东□求知悉公司□□话□和重大并□、□□等信息。

2. The case of shareholder’s right to be informed; specifically including: reviewing and duplicating company materials, reviewing the financial reports; requesting the company to disclose the information about remunerations received by the directors, supervisors and senior managers. The

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\(^{21}\) 奚明、金建：《公司□□的理□和□□□□□研究》，人民法院出版社2008年版。

21 Xi Xiaoming, Jin Jianfeng: ResearchonTheoryandPractice of CorporationLitigation, the People’s Court Press, 2008.
public shareholders can request the company to disclose the information about business activities, major acquisition and litigation.

3. 股东会、董事会、监事会的召集纠纷案件，包括不合的召集、消极不作以及有召集人依法召集纠纷求司法的支持等案件。

(3). The case of dispute on the convening of shareholders’ assembly, board of directors and board of supervisors; including the cases like irregular convening, negative omission, and if the entitled convener appeals to judicial support to conducting a temporary board meeting in accordance with the law.

4. 董事、监事、高级管理人员的任免与解任纠纷案件。

(4). The case of dispute on appointment and dismissal of director, supervisors and senior Managers;

5. 监事等的行使。如监事依法行使监督公司的极端配合、障碍消除以及用的支持。

(5). The case of exercising power; including supervisors exercise of authority in accordance with law under the circumstance where the company actively participates in, eliminates obstacles and offers financial support.

6. 股份的估价纠纷案件。包括股份回购中价格纠纷，特定情形下强制大股东收购小股东股份。

(6). The case of disputes on share valuation; including price dispute in share repurchase and share dispute where the major shareholder is forced to purchase the minor shareholder’s share under the specific instance.

7. 公司清算纠纷。公司清算由一系列行为构成，清理公司，通知或者公告，清理由清算公司的未了的，清欠税款，清理，分配剩余，参加有关。清算的特殊性决定其使用特司法程序。

(7). The case of dispute on the liquidation of company; the following functions during the process of liquidation may be exercised: liquidating the properties of the company; notifying creditors by mail or public announcement; handling and liquidating the unfinished business of the company; paying off the outstanding taxes and the taxes incurred in the process of liquidation; distributing the remaining
properties; and participating in the civil proceedings of the company. The liquidation specialists decide when the special procedure should be involved.

In judicial practices, the Supreme People's Court of China has made special provisions on part of the said cases, like the liquidation of company by judicial interpretation. This provision, however, is still exercised within the framework of existing ordinary civil procedure. A professional and systematic special procedure needs to be further established and improved.

This paper argues that China should learn the concepts, institutions and measures of judicial intervention to company governance from western countries and build a non-litigation intervening mechanism paired with China’s civil action system to solve company disputes. Courts should be entrusted some rights to punish violating and unfair conduct by company staff, including the right of judicial curb (ban), the right of invalidation, the right of judicial selection, the right of judicial dismissal and the right of judicially convening stockholders’ meeting. Thereby, it is possible to defuse injustice and unfairness, maintain the normal order and enhance the efficiency of corporate governance.

3. Drawing support from judicial experts

Judicial officials should have a profound professional knowledge of corporate governance, and the intrinsic nature of company law as putting judicial intervention into company governance. In the face of professional problems related to company affairs, it is necessary to draw the experts of this field to
participate in a collegiate bench, ensuring the quality of judicial intervention and exerting positive
effect of the judicature on corporate governance.

In Delaware of the US the cases of company law are exclusively accepted by the court of chancery,
where judges spend 70 percent of their time on company affairs. Due to having a professional
background in the field of capital markets before getting into the court, these judges gain experience
and are honored as the most learned people who deal with company affair in the US. In the court
system of Britain, there are usually 12 judges from court of the chancery to tackle company affairs,
which is a better reflection of the key mechanism of company litigation than that of North America.[22]

司 法 介 入 公 司 治 理，□ 有 的 司 法 □ 源 有 的 有 限 局，尤 其 是 普 通 法 官 的 □ □ 水 准 与 此 □ 案 件 所
要 求 的 有 有 一 定 距 离，尤 其 在 自 由 裁 量 □ 的 把 握 上。因 此，法 院 □ □ 立 独 立、□ □ 的 商 事 法 庭，
向“□ 家 会 □” 的 □ 理 模 式 □ 化。由 于 公 司 治 理 □ □ □ 有 的 性、□ □ 性 要 求 高，可 明 确 由 公 司 住 所
地 的 法 院 有 有 □ 属 管 □ □、□ 于 上 市 公 司 由 公 司 住 所 地 的
中□人民法院管□，以保障此□案件的受理与管□便利、高效地□行。而且，可以通□□建陪
□□、吸 收 公 司 法 律、会□、管 理 方 面 的□ 家 学 者 和 企□、商 会 德 高 望 重 人 士 加 盟，使 案 件 □
理 向“□ 家 会 □” 模 式 □ 型。

Existing judicial resources are limited, especially the professional level of common judges cannot
meet the requirements that case law expects. For example, a court’s discretionary power is not
exercised well. Therefore courts should set up independent and special commercial courts and shift
the hearing model to “consulting specialists”. Considering the high professional skill involved in the
case of corporate governance, the court in the domicile of a company should be given a clear
exclusive jurisdiction and a listed company should be under the jurisdiction of the local intermediate
people’s court.

[22] (Cannada) Brian R. Cheffins: Company Law: Theory, Structure and Functioning, translated by Lin Weihua, Law Press China, 2001, P. 1337.
These measures guarantee that cases are accepted and administered more easily and effectively. At the same time, other feasible measures should be taken to include “specialist consultants”, including organizing the jury, drawing experts in the field of law, accounting and administration of a company, as well as drawing highly respected people from enterprises and chambers of commerce.

由于缺乏公司法的确定，即使最高人民法院可以通司法解释的方法，对某些案件的理作出解，但是，司法解释的出台堪比公司法修改的奏，而出不的践，最高院以及各地高院，通判例指的方法，指引司法适度介入公司治理，无疑是比妥当的和成本低的做法。

The speed to modify company law is much slower than that of unveiling of judicial interpretation, on the basis of which the Supreme People's Court of China deals with a certain case, causing a lack of provision of company law. In face of boundless issues in practice, the Supreme People's Court and the supreme courts of various regions direct the judiciary to moderately intervene in company governance by the guidance of precedents, which undoubtedly is a relatively appropriate and low-cost way.