

# *Improving the Organizational Forms of Private Colleges from the Perspective of the Common Benefit Company System*

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**Abstract:** The “profit-making” attribute of commercial subjects shapes the classification system of legal representatives and the contents of corresponding norms in the Civil Code of the People’s Republic of China. The division of non-profit and non-commercial in the Law of the People’s Republic of China on Promotion of Privately-Run Schools not only conforms to the provisions of General Principles of the Civil Law of the People’s Republic of China, but also lays an institutional foundation for the classified management of private colleges. However, it cannot solve the problem of substantial profit-making behaviors of non-profit private colleges. As an important organizational form of enterprise organizations, the “Common Benefit Company” has changed the rule-making for traditional for-profit companies, so that the organizational form can be applied to both profit and public welfare enterprises. The functional design of the common benefit company system can now be applied to standardize the organizational structures of private colleges in China. Drawing lessons from the legislative experience regarding the common benefit company, we can enhance the organizational structures of our private colleges by implementing the common benefit company.

**Keywords:** non-profit, legal representative, social responsibility, private colleges and universities, benefit corporation

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### **Question Raised: the Legal Dilemma of the Substantial Profit-making Behaviors of Private Non-profits Colleges**

**T**he General Principles of the Civil Law of the People's Republic of China classifies legal representatives into three types: profit-making legal representatives, non-profit legal representatives and special legal representatives by referring to the "profit-making" attribute of commercial subjects, and reclassifies and arranges the original legal representative system to adapt to the functional allocation and mechanism construction of different social organizations. In the regulation of non-profit legal representatives, the aims of establishing non-profit legal representatives are clear: one is for the public interest, the other is for non-profit purposes other than public interests, which are, mutually beneficial legal representatives, such as trade associations, chambers of commerce, alumni associations, etc. The attribute of non-profit legal representative does not restrict its own profit-making behaviors, but it has strict constraints on the income distribution after profit-making behaviors: First, it cannot distribute the profits obtained to investors, founders or members; second, when a non-profit legal representative established for public welfare ends, it is not allowed to distribute surplus property to the aforesaid subjects. The classification of legal representatives in General Principles of the Civil Law of the People's Republic of China provides a legal basis for regulating the behaviors of non-profit legal representatives. On the whole, however, there are still some problems within the non-profit legal representative system, such as "the combination of legal systems," "overlapping bedsteads" and "hollow holes," which bring about the distortion of legislation and practice (Wang, 2017, p. 610).

Take private colleges as an example. By 2018, there were 183,500 private colleges at all levels with a total of 53,782,100 students. Schools are public welfare legal representatives, not for profit, but in reality, they often participate in profit-making activities and even become the core assets of listed companies. The Law of the People's Republic of China on Promotion of Privately-Run Schools stipulates that the sponsors of private colleges can independently choose to set up non-profit or for-profit private colleges, but cannot set up not-for-profit private colleges that implement compulsory education. After the implementation of the "Law of the People's Republic of China on Promotion of Privately-Run Schools," private college investors are faced with these choices: First, set up a profit-making legal representative, and the balance of running a school is handled in accordance with the provisions of relevant laws and administrative regulations such as the Company Law, which can distribute profits and recover investments; second, set up a non-profit legal representative where the sponsor will not obtain the income from running a school, and any excess balance shall be retained for running a school. This kind of institutional arrangement seems reasonable, but it is very difficult to operate in practice. If private colleges are set up in the form of profit-making legal representatives, they will pay taxes according to the standards of ordinary companies, and cannot receive government subsidies. Their business scope will be strictly restricted. On the other hand, the possibility of making profits will be negatively affected, and the enthusiasm of investors will be diminished. If we choose to

set up private colleges in the form of non-profit legal representative, we can neither distribute profits nor recover investments, which is inconsistent with the original intention of setting up schools. At the same time, according to the “Law of the People’s Republic of China on Promotion of Privately-run Schools,” the surplus property of non-profit private colleges can continue to be used for running schools, but it is not clearly stipulated that the ownership of surplus property belongs to the legal representative organization of non-profit private colleges.

The lack of legal representative legislation theory and the disconnect between the existing legal theory and practice have, in recent years, led to the prominent problem of how to distinguish the regulations for profit and non-profit in private education. Formal non-profit and substantial profit-making make non-profit private schools separate from non-profit legal representative and profit-making legal representative in the application of law, which leads to long-term entanglement between educational public welfare and capital profit-making in the development of private education in China, and hinders the healthy and sustainable development of private education in China.

## **The Appropriateness of the Profit-making Behaviors of Non-profit Private Colleges**

### **Public Welfare is the Essential Attribute of the Education Industry**

From the emergence of the word “Education,” it has had the characteristic of public welfare, that is, it provides services for the public.

According to economic theories, education has obvious “spillover benefit” and “neighborhood benefit.” The public welfare of education is reflected in the obtained social benefits from the spillover of educational activities. British educational economist Mark Blaug once categorized the spillover social benefits of education into nine functions, such as generating extra profits, continuous profit creation, promoting the development of science and technology, and preserving common cultural traditions, discover personal potential and provide sufficient labor force, teaching citizens to abide by the law, to ensure the political stability of the country, develop good habits of recreation (Shui, 2008, p. 153). That “Education has the characteristic of public welfare” does not mean that educational units that provide public goods have public welfare characteristic, but that no matter what kind of products they belong to, their essence and actual results bring huge common benefits to the whole society, that is, education is a public welfare product regardless of its process and profitability. The public welfare characteristic of education is not determined by the investment capital of education, but by the nature and function of education service itself. Milton Friedman once pointed out that all educational services produced by schools have the attribute of public goods, and private education also serves public interests and bears social responsibilities. From this perspective, all schools are public schools. Education is regarded as the most typical public welfare behavior in the legislative cases of all countries in the world, so both public schools and private colleges affect public welfare. China’s Education Law and the Law of the People’s Republic of China on Promotion of Privately-Run Schools also expressly stipulate the public welfare of

education. As an important undertaker of educational activities, no matter what the capital attribute of its organizers may be, the public welfare of its activities is beyond doubt.

### **Profitability is the Driving Force Behind the Development of the Education Market**

China is in and will be in the primary stage of socialism for a long time. At the level of the education market, there is a contradiction between people's increasing demand for quality education and the unbalanced and insufficient development of education. Looking at the background of the new era, it is necessary to speed up the popularization of quality education at all levels to better promote the shared development, fair development and high-quality development of education. Therefore, governments at all levels must further deepen the reform of school operating system and mobilize more social forces to participate in running schools in order to enhance the diversified supply and personalized choice of education services while increasing financial investment in education and improving the supply level of public education resources. Private education is an important part of China's education at present. The special national conditions determine that investments in running schools is the main reason for the rise and development of private education in China at present (Pan, 2012, p. 2). According to a recent random survey of 640 private colleges, the proportion of schools run by natural persons, joint ventures or private enterprises is as high as 95 percent; In the choice of future school operating mode, 77 percent of the sponsors are interested in investing in schools and hope to preserve property rights and obtain economic returns, while only 4 percent of the sponsors of private colleges are willing to donate money to run schools (Dong, 2019, p. 3). At the same time, the survey revealed that the founder's investment and tuition income are the main sources of funding for private colleges, and making profits is a necessary condition for the survival and healthy development of private colleges. As an important part of the education market, private colleges play an active role in expanding the education market and improving the level of education services. Acknowledging profit as the driving force can better support the development of the education market.

### **Private Colleges and Non-profit Legal Representatives are "Seemingly in Harmony but are Actually at Variance"**

The revision of the Law of the People's Republic of China on Promotion of Privately-Run Schools in 2016 clearly recognized the legal status of for-profit private colleges for the first time, which clearly laid a legal foundation for further classified management. However, the design of its specific system continued the legislative approach of holism, and private colleges were divided into either-or-both "profit legal representative" and "non-profit legal representative." Among them, non-profit private colleges belong to non-profit legal representatives, which have obvious public welfare nature, and seem to have natural priority in the design of social responsibility system. In order to ensure the realization of its public welfare purpose, the existing legal system locks its assets in the internal organization, which is only used for public welfare purposes and cannot distribute a surplus to the members of the organization. Although non-profit schools enjoy preferential policies and support from

the state in terms of taxation, policies and land, they need to be constrained by the principles of non-profit and non-distribution. In the development of schools, they cannot raise funds by issuing stocks or bonds like for-profit organizations, so their expansion is limited, and they cannot determine their charging basis according to market rules and give investors corresponding profit distribution returns. As a result, non-profit schools have a single source of funds and limited ability to sustain growth, which also limits their ability to undertake social responsibility.

Article 87 and Article 95 of the Civil Code of the People's Republic of China clearly define whether to distribute profits to its members as the core criterion for distinguishing profit-making legal representatives from non-profit legal representatives.<sup>①</sup> But can the surplus property or profit be distributed to non-profit private colleges and universities? This issue, even on the principle of "prohibiting distribution," which has relatively consistent opinions, is actually controversial. For example, in the subject of prohibiting distribution, some people think that none of the non-profit organizations are allowed to distribute profits, while others think that mutually beneficial legal representatives can distribute profits to members when certain conditions are met (Luo, 2016, p. 122). Article 95 also clarifies that "When a non-profit legal person established for the purpose of public welfare terminates, it shall not distribute the residual assets among its capital contributors, incorporators, or members. The residual assets shall continue to be used for the purpose of public welfare, as is stipulated in the articles of association or the resolution made by the governing body; where it is not possible to dispose of such residual assets in accordance with the articles of association or the resolution made by the governing body, the competent authority shall take the charge transferring the assets to another legal person with the same or similar purposes and then make a public notice." However, there is no question about whether non-profit legal representatives can distribute surplus property or profits. Article 19 of the "Law of the People's Republic of China on Promotion of Privately-run Schools" stipulates that "The organizers of non-profit private colleges shall not obtain school income, and the school's balance shall be used for running schools." Therefore, the surplus property can continue to be used for running schools, but there is still no clear stipulation that the ownership of surplus property belongs to the organizers of non-profit private colleges. The organizers of non-profit private colleges do not enjoy the property ownership of investing in running schools, nor do they enjoy the income right of investment property. The invested assets do not enjoy management and use rights during the existence of private colleges. However, after the liquidation of private colleges, there is no legal basis for claiming the return of surplus property, which is obviously inconsistent with the investment logic of rational people, for the organizers of private education who take "investing in running schools" as their initial motivation, they have to bear investment risks without enjoying their rights and interests. Under the norms of the non-profit system, profit motivated behaviors cannot realize expected returns, and the actual controller of private colleges may take some irregular measures to implement "self-help": For example, the funders of private colleges often control private colleges by

① Article 87 and Article 95 of "the Civil Law of the People's Republic of China."

acting as school managers or principals, paying unreasonably high wages to themselves or relatives and friends, outsourcing the business of schools to enterprises related to their own interests at unfair prices and conditions, monopolizing the logistical services of schools (Chen, 2012, p. 111). The essence of profit-making behavior in the form of non-profit legal representative makes private colleges and non-profit legal representatives “seemingly in harmony but actually at variance.”

### **The Theoretical Agreement between the Functional Orientation of Common Benefit Companies and Private Colleges**

#### **The Internalization of Corporate Social Responsibility in the System of Common Benefit Companies**

Profitability is the essential attribute of a company. Since its birth, the company system has been carrying out institutional innovation around profitability. Whether it is company doctrine law or company legal economics, its original intention is to maximize the company's interests. As the main body of market activities, the realization of the goal of maximizing the company's interests cannot be achieved without the support of stakeholders. Only when the company can do what it can to “benefit the people while benefiting the public,” do not limit the pursuit of profit maximization to the benefit of major shareholders, take into account the interests of the company's stakeholders in its business activities, and correctly handle the relationship between social responsibility and profit maximization can the company's interests be maximized. This consideration and commitment to the interests of stakeholders, such as the interests of workers, consumers and social environment, essentially constitutes the social responsibility of the company. The undertaking of corporate social responsibility has the dual attributes of altruism and egoism. Consciously undertaking social responsibility is conducive to enhancing the company's integrity, improving the company's image, reducing the company's financing and production and operation costs, and attracting consumers, thus helping the company to achieve the goal of maximizing profits. It has become a social consensus that companies should assume social responsibility. The Company Law also clearly stipulates that companies must bear social responsibility. However, due to the moralization of corporate social responsibility, it leads to the abstraction and inoperability of normative content, which restricts the institutionalization and legalization of corporate social responsibility content. It is a principled expression in the Company Law that companies should bear social responsibility, which is not supported by specific institutional rules, and the purpose of maximizing shareholders' interests has been deeply rooted in the hearts of the people. If the concept of social purpose is included in the corporate form setting, it may not be understood by entrepreneurs, investors and wider stakeholders, thus questioning the feasibility of its social purpose. As a brand-new organizational form of the company, the common benefit company system structure clarifies the commitment of corporate social responsibility in the way stipulated in the articles of association, and defines and aligns corporate social responsibility with the general public and special welfare purposes

and special public welfare purposes, which is conducive to meeting the practical needs of shareholders, directors, stakeholders and the public for transparency, standardization and responsibility of corporate governance, which is conducive to the improvement of the company's social image and reputation, and also further promotes the improvement of the company's economic benefits.

### **Profit-making Rooted in the Corporate Social Responsibility of Common Benefit**

When a company undertakes social responsibility, it must respect its profit-making nature. Social responsibility is a form of company's contribution to the public good, which needs to be established on a certain material basis. The for-profit attribute and public welfare are unified. The for-profit attribute provides material basis for public welfare activities, while public welfare provides institutional guarantees for maximizing profit-making operations. The commonweal purpose in the system of the common benefit company is realized by carriers of the general commonweal purpose and the special commonweal purpose, which could be guaranteed if being stipulated in the articles of association of the company. As Sima Qian said: "Sufficiency of stored foods makes people know etiquette, and food and clothing know honor and disgrace. Rites are born in existence but wasted in nothing. Therefore, a rich gentleman will be good at his virtue; while a rich tough man would do what he wants. Water deep and fish are born, mountains deep and animals go, people rich and benevolence and righteousness attached." This discussion fully proves that the possession of fortune and the accumulation of wealth can effectively promote the upgrading of virtue and education, and achieve the purpose of improving the public welfare. On the basis that the company's profit-making source guarantee meets the requirements of self-interest, it is possible to promote its altruistic behaviors. To respect the profit-making property of the company, we must guarantee the legal rights and interests of the company and encourage the company to make profits within the legal scope. Under this premise, the company's performance of social responsibility first requires it not to harm others, and to abide by the legal bottom line and second to encourage companies with material conditions to make certain contributions to society. Therefore, the company's social responsibility and the company's pursuit of profits go hand in hand, and they have equal values. We should establish a mechanism to undertake social responsibility while satisfying or stimulating the company's pursuit of interests. Marxist jurisprudence holds that the evolution of law has the color of material restriction. Furthermore, it can be seen that the emergence and development of the system of the common benefit company is also determined by material, and the commitment of social responsibility of common community of shared interests is not limited to the provisions of the company's articles of association, but also can be guaranteed by a strong material foundation of the company. Solid material conditions can effectively promote the realization of public welfare goals, realize the organic unity and good promotion of profit-making activities and public welfare goals under the organizational form of common benefit companies, optimize corporate governance, and integrate altruistic and self-interested behaviors, so that profitability is rooted in the commitment to social responsibility of common benefit companies.

## **Public Welfare and Profit-making Integration in the Value Pursuit of Private Colleges**

Common community of shared interestss are both public welfare and profit-making, which is different from traditional companies. Private colleges belong to the education industry, and their essential attributes are public welfare. However, in the actual operation of private colleges, there are frequent behaviors of making profits in the name of non-profit, and the contradiction between educational public welfare and capital profit is prominent. There is no suitable type of legislation in our country to solve the conflict dilemma between educational public welfare and capital profit in private colleges, and neither for-profit legal representative nor non-profit legal representative can relieve this dilemma. In the process of continuous economic and social development, the type of common benefit corporation created in the legal system of American common benefit corporations can effectively meet the realistic commitment of the company to social responsibility, give concrete support to optimize the overall environment of the society in terms of environmental protection, resource conservation, and assistance to vulnerable groups, and also play an exemplary role in the formation and promotion of a good social atmosphere. It can meet the needs of diversified development and operation, and the public welfare clauses in the company's articles of association can be added, changed or cancelled by the resolution of the shareholders in the form of capital majority. After the profit-making company develops to a certain extent, it may adjust its development strategy by changing the articles of association. Internalizing the public welfare clauses in the articles of association can optimize corporate governance more effectively, integrate altruistic and egoistic behaviors, and further promote the long-term economic benefits of the company to achieve the profit-making goal.

The industry characteristics of private colleges determine their public welfare attributes, and the factual behavior cannot be divorced from the pursuit of profit. The organizational form of common benefit company can meet the practical needs of private colleges and also eliminate the conflict risk between educational public welfare and capital profit-making for private colleges. The logic of the system of "common community of shared interests" is highly consistent with the practice of private colleges in China, so it is necessary to learn from the beneficial experience of the system of common community of shared interests to promote the reform of the legal system of private colleges.

## **The Theoretical Basis of the Common Benefit Company System**

### **The Origin and Logic of the Common Benefit Company System**

As one of the organizational forms of companies, the concept of the benefit corporation was first put forward by the American non-profit organization Benefit Enterprise Laboratory in 2006. It aims to practice sustainable business model based on the triple bottom line of "economy, society and environment," to bridge the gap between the market-driven extreme orientation of enterprises and the creation of social values, and to achieve the balance of organizational dual goals through the mixing of

organizational missions so as to carry out sustainable corporate social responsibility practice, promote the symbiotic evolution of economy, society and environment, and finally realize the sustainability of the whole economic form and competitive structure. Co-beneficial companies come into being from satisfying the needs of social enterprises to effectively fulfill their dual purposes. However, unlike traditional social mission-oriented enterprises, which prioritize social over profit-making purposes, co-beneficial companies serve two major goals at the same time—equal pursuit of the coordination of social and commercial purposes and taking both economic and social performance as the standard of company success. In terms of legal form, the common benefit company belongs to the for-profit legal representative, which can distribute profits to investors, but it cancels or changes the limitation that the directors of the company must aim at maximizing shareholders' profits, so that they can achieve social public welfare goals and interests at the same time under the framework of the for-profit company. The birth of community of shared interests effectively combines the advantages of existing commercial organizations, non-profit organizations and social enterprises, which can avoid many of the social problems caused by the myopic economic value creation of commercial organizations. It can also avoid the premature death of social enterprises due to the lack of stable economic support. Enterprises with common benefits can form a mixed sustainable business model in the process of creating economic and social value, promote the mutual interweaving and indivisibility of public and private interests, realize the compatibility of economic value and social value, and accordingly promote the sustainable growth of enterprises.

As an important legal entity form of social enterprises, the system of common benefit corporation was specially adjusted and created by American state governments under the existing legal framework of corporate law (Li, 2018, p. 9). The reason why the system of common benefit company in the US was reformed under the corporate law rather than the legal system of non-profit organizations is that the gradual development of non-profit organizations needs the support of developed social and economic traditions and it is relatively easy to design the legal system by using the existing organizational structure of the company, which can reduce the increase of legal costs caused by restructuring the law. The legislation for the common benefit company can't meet the needs of the mixed organizational form of value based on the current legislative situation. The establishment of its legislative model will bring an impact on the existing company law system, break the single interest thinking of shareholder priority theory, integrate public welfare matters in the process of company operation, better integrate the interest demands of stakeholders with the value pursuit of company reputation and shareholders' financial returns, and gradually push for-profit companies closer to the substantive development track of common benefit companies. In October, 2010, Maryland first approved the adoption of the United States Model Business Corporation Act. At present, 30 states and the District of Columbia have passed the law. Twelve states passed the bill by a unanimous vote of 30 votes. The United States Model Business Corporation Act has an important influence on the world in terms of rule design and style arrangement, so it is of positive significance to explore its legislative characteristics.

### **The Rules and Characteristics of the Model Common Benefit Company Law**

Although there are differences in the details of the specific provisions of the legal system of common benefit companies in the US, in the framework of basic content, all are based on the American Model Business Corporation Act, and there are similarities in legal provisions, which have the following characteristics in summary:

#### **The combination of general public interest and specific public interest.**

The United States Model Business Corporation Act stipulates that when a company for common benefit is established, it should indicate the general public welfare purpose in its articles of association, which is attached to the purpose stipulated in the original company law, and at the same time, it needs to list more than one specific public welfare purpose. Besides the general public interest, the articles of association can also determine the specific public interest. It does not limit the obligation of the public welfare company to create general public welfare, but can make the common benefit company a company with both profit and public welfare purposes. The definition of general public welfare purpose refers to the fact that the business and operation of a company have a substantial positive impact on society and the environment as a whole according to the standards of a third party. General public welfare purposes require enterprises to consider the overall social and environmental impacts, follow the three public welfare lines of finance, society and environment, and avoid the shackles of single and narrow specific public interests. Specific public welfare purposes are specifically listed: Providing welfare products or services to low-income or needy individuals or communities, enhancing the economic opportunities of individuals or communities, protecting the environment, improving personal health, promoting the progress of art, science and knowledge, promoting the flow of capital to organizations beneficial to society and the environment, and any other circumstances that are particularly beneficial to society and the environment, in addition to the employment opportunities created by general business activities. The profit-seeking goal of public welfare companies can coexist with public interests, but it does not require the realization of public welfare goals to exceed the sum of profit and income. Companies can also add general clauses in addition to specific public welfare purposes, so as to increase the operating flexibility of the company and incorporate the public welfare purposes recognized by the operators and shareholders, without changing the articles of association constantly. Third-party standards are generally accepted standards for defining, reporting and evaluating corporate social and environmental performance. It should be formulated by an independent organization and must be credible and transparent. The third-party standard tries to define every feature, but it does not specify anything for the standard. In addition, it does not explain how or by whom to apply the standards, and neither the government nor the standard makers have any enforcement power. Therefore, as long as the company operators fulfill their obligations in accordance with the provisions of the articles of association, even if there are situations that do not conform to the maximization of shareholders' interests, there is no need to worry about violating the fiduciary duty.

### **The formation of corporate responsibility mechanism for common benefit.**

Different from traditional companies focusing on profit-making behavior, common benefit companies consider more diverse factors in the course of operation. In order to avoid confusion by the company operators, the model common benefit corporation law provides a set of guidelines. The mandatory consideration of non-shareholder interests is the key feature of legislation of common benefit companies, which is different from traditional legislation regarding corporate stakeholders. According to the United States Model Business Corporation Act, the board of directors and directors in a common benefit corporation should be divided into what should be considered and what can be considered when considering the best interests of the common benefit corporation. Matters that should be considered include: shareholders, staffs, affiliated companies and suppliers, consumers' interests as the beneficiaries of half or specific public interests of common benefit companies, community and social factors, local and global environment, short-term and long-term interests of the company, and the ability of the common benefit company to achieve its general public welfare purpose and any specific public welfare purpose. The contents that can be considered include: the interests listed in the company's stakeholder clause that are not within the above scope, and other relevant factors or other group interests considered appropriate by other directors. When considering the above-mentioned interests, directors do not have certain priority requirements unless the articles of association specifically stipulate priority. This provision is the core of the legislation for the company with common benefits. There is no obligation to give priority to any specific related interests to company directors in the legislation of common benefit companies, which also includes the traditional corporate purpose requirement of giving priority to shareholders' wealth maximization interests, so that company directors can avoid the restriction of shareholders' wealth maximization purpose in management decision-making, reduce the possibility of friction between shareholders' wealth maximization purpose and social welfare purpose, and give directors more discretion to realize the duty requirements of social interests purpose. In addition, in order to prevent directors from being accused of violating their obligations, the United States Model Business Corporation Act clearly stipulates that, unless otherwise stipulated in the articles of association, when directors of common benefit companies perform their duties, they shall not be liable for monetary compensation for their actions or omissions in accordance with the obligations of the company law and the provisions of the common benefit companies. At the same time, when the common benefit company fails to pursue or create general public welfare or specific public welfare matters, the individual directors will also be exempted from monetary damages unless otherwise stipulated in the articles of association.

### **Fulfilling the obligation of compulsory information disclosure.**

Compulsory information disclosure is an important means by which to ensure that the common benefit company complies with laws and regulations, that is, it requires the company to publish public welfare reports regularly and disclose the actual results of the company's goals, so as to reduce information asymmetry, save time and expenses for investors and consumers to collect information, and facilitate shareholders and external supervision. The report includes the following contents: First, narrative matters, including the realization of general and specific public welfare matters pursued by

the company, any situation that affects or may affect the company, and the procedures and reasons for selecting or changing third-party standards; second, contact information and address of public welfare directors and public welfare managers; third, remuneration paid to directors by benefit corporation in the past year; fourth, opinions of public welfare directors on the annual public welfare report. In addition, if a public welfare director resigns, refuses to be re-elected or is dismissed in the past year, and the public welfare director submits a written statement on this matter and the document shall be listed as an annex to the annual public welfare report. The annual public welfare report and the evaluation of public welfare achievement in the report do not need to be checked and certified by a third party. The publicity and disclosure of this information can promote the operators of common benefit companies to seriously treat and implement the public welfare purpose of the company. If the public welfare effectiveness of the company fails to meet expectations, shareholders can protest by selling their shares or not continuing to support re-election.

The purpose of realizing public welfare is to help the outside world check whether public welfare companies take seriously and really implement the public welfare aims they pursue, and to prevent the use of the brand of public welfare companies to seek private interests. At the same time, in order to ensure the transparency of the operation of the common benefit company, it is stipulated that the common benefit company should use the third-party standard to make up the annual public welfare report. The third-party standard is an indicator used to report the overall social and environmental impact of the company, which mainly includes the following elements: First, comprehensiveness, which requires an overall evaluation of the company's business and operational effects, and should also consider the interests of multi-stakeholders; second, independence, the evaluated common benefit corporation has no control relationship with the third-party standard organization; third, trustworthiness and willfulness, the third-party standard organization has the necessary professional methods to evaluate the overall social and environmental performance, and uses the method of balancing multiple stakeholders; fourth, transparency: information, such as evaluation indicators, weights and setters, standard changes, etc., should be made public. The adoption of the third-party standard is the main innovation and core of the legislation of the common benefit company, and it is also the most controversial and easily misunderstood clause. First, the third-party standard is the independent use of the company, and the law does not force the audit, because the audit will greatly increase the cost, which is not conducive to the promotion and adoption of small and medium-sized enterprises. The common benefit corporation can be regarded as a qualified checker through specific identification means to gain the trust of society. Second, the law does not require the certification of a specific institution or the development of a universally applicable measurement standard, so as to avoid the chilling effect of market innovation. Because it is difficult to clearly define the connotation of social welfare purpose, there are many opinions, and common benefit companies will have different social influences, which cannot be measured by a single standard. Therefore, the law does not force the definition of social welfare purpose and its specific connotation, but leaves it to the company to choose third-party standards formulated by different third-party organizations to

shape and measure diversified social welfare content, and finally, it is tested by the market through information disclosure mechanism.

### **The establishment of litigation mechanism for public welfare performance.**

If the directors fail to properly perform the public welfare purpose in the articles of association, there should be a set of compulsory performance mechanism to ensure that most companies can be worthy of the name, and timely disclose the business information to maintain the brand benefit of the enterprise, which is also a particularity of the common benefit company. Therefore, there are provisions of the system of benefit enforcement proceedings in the United States Model Business Corporation Act stipulating that a company may file a lawsuit for public welfare performance in its own name or with persons who meet the following qualifications, including those who hold more than 2 percent of the issued shares of the same class or series of shares of the company, directors who hold more than 5 percent of all shares of the parent company of the common benefit company, and those listed in the articles of association or by-laws. The public stakeholders stipulated in the articles of association are not qualified to request the company to fulfill its public welfare goals. Moreover, the law of model common benefit corporation excludes the possibility that the plaintiff claims money damages from the company. In the absence of monetary compensation as the motive of prosecution, it is doubtful how enthusiastic shareholders are to prosecute. Furthermore, the ambiguity of directors' performance of their obligations will also become a difficulty in the determination of responsibilities in court cases. If the public interest performance litigation cannot be fully implemented, the director's violation of fiduciary duty will be lack of restraint, which will affect the business development and external reputation evaluation of benefit corporation. Therefore, the existing legislation should expand the scope of the subjects of the related parties, such as employees, consumers, beneficiaries of public welfare tasks, etc., to ensure that the company will not neglect the original intention of giving priority to the performance of public welfare goals in pursuit of profit (Zhou & Ning, 2010, p. 56).

### **Evaluation of the Common Benefit Company Law**

The common benefit company law has changed the traditional company's rule-making with profit as its essence, and required the company's organizational form take into account both profit-making and public welfare. At the same time, the common benefit company law can also effectively enrich the path for companies to realize their social responsibility. Existing companies cannot take into account the interests of related parties while pursuing the maximization of shareholders' interests, which causes some related parties to be confused and even disrespectful of the company system. However, the common benefit company has changed the behavior of only focusing on pursuing profits, and attracted the attention of many entrepreneurs, the public and legislators. Under the combination of general and specific public interests, a relatively perfect system has been formed in terms of the determination of public welfare objectives, the formation of corporate responsibility mechanism for common benefits, the performance of compulsory information disclosure obligations and the establishment of litigation mechanism for public welfare performance. Of course, there is

still room for improvement, regardless of the shortcomings of the model company law or the state corporate law. For example, the law should require companies to prioritize social welfare tasks over profit, rather than the goal of double equality, which would make the distinction between the common benefit companies and the general companies more meaningful. For another example, there are still considerations about the actual benefits of litigation for public welfare performance. Finally, if the information provided by the public welfare report is incomplete and there is no uniform standard, it is difficult for the outside world to judge the implementation of the company's public welfare tasks. These are all issues and contents that need attention in the process of system evolution and perfection.

### **The Improvement of the Organizational Form of Private Colleges from the Perspective of Common Benefit Companies**

The revision of the Law of the People's Republic of China on Promotion of Privately-Run Schools provides a legal basis for the classified management of private colleges. However, under the realistic background of investment in running schools in China, it is difficult for private colleges that choose non-profit legal representatives to make logical self-consistency through their own actions, and the choice of profit-making legal representatives lacks practical motivation and system to support the commitment of social responsibility. It is inevitable to promote the healthy development of private education, promote private colleges to fulfill their social responsibilities and explore the third way of private education development, and the system of common community of shared interests undoubtedly provides an effective reference for properly solving this problem.

### **Make the Access System and Alteration Procedures Clear under the Regulation of Public Rights**

The perfection of the organizational form of private colleges can be regulated according to the framework of the existing company law, which exists as an independent organizational form. Common benefit private colleges can coexist with non-profit private colleges and for-profit private colleges. However, common benefit private colleges must clearly set the goal of common benefit in the school charter and issue an annual public welfare report to society (Liu, 2007, p. 19). At the initial stage, private colleges with common benefits should adopt the way of initiating, establishing and combining subjects in a closed way. An already established non-profit private college can move to become a common benefit private colleges by adopting the system of "application, examination and approval," and the shareholders' meeting of private colleges decides whether to become common benefit private colleges by formulating and revising the articles of association according to the capital majority decision. After the shareholders determine the direction to take, the school decision-making department applies to the education administrative department, and after the approval of the education department, its legal representative nature is determined. Examination and approval should be based on the path of essentialism, and whether the common benefit private colleges meet the formal requirements will not thus promote the gradual improvement of the system of common

benefit private colleges. After the common benefit private colleges are registered as enterprise legal representatives, the state should give appropriate preferential tax policies to help the development and growth of common benefit private colleges. The establishment and change of common benefit private colleges should be regulated procedurally through the revision of the articles of association, and the frequency of change of company types should be limited, and at least two fiscal years should be kept as the lower limit, so as to protect the legitimate rights and interests of stakeholders of common benefit private colleges. The existing non-profit private colleges and for-profit private colleges can be converted to common benefit private colleges through the formulation and revision of their articles of association. Among them, the conversion mechanism of for-profit private colleges is that the school board of directors modifies the school articles of association and applies to the competent authority for change; to transform a non-profit private college into a mutually beneficial private college, it is necessary to change its non-profit legal representative nature first. The specific procedures can refer to the relevant provisions of the Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on Promotion of Privately-Run Schools. After being transformed into a mutually beneficial private college, the non-profit private college should be managed according to Company Law. In addition, it should be noted that there are some differences between the for-profit private colleges and non-profit private colleges that operate legally according to the law in the process of transforming into mutually beneficial private colleges. The transition from profit to common benefits should be handled with a more active strategy, while the transition from non-profit to common benefit should be rather cautious and strict. There should be special differences between the two situations in the formulation of specific rules.

### **The Boundaries of the Contents of the Articles of Association under the Autonomy of Private Rights**

The school charter is the soul of the operation and management of mutually beneficial private colleges. The charter of mutually beneficial private colleges should be formulated by schools according to their own actual conditions under the provisions of the Company Law and the Law of the People's Republic of China on Promotion of Privately-Run Schools. In principle, the articles of association of common benefit private colleges should specify the following contents:

First, the nature of common benefit private colleges. In the articles of association of the school, it is necessary to show the nature of private colleges with common benefit, and list their general public welfare matters and special public welfare matters. General public welfare matters mainly include, but are not limited to, environmental and social aspects, and can be assessed without adopting specific indicators. Particularity and common benefit matters shall be clearly determined by enumeration and evaluated at the end of the year. The directors shall submit the third-party independent evaluation report at the shareholders' meeting, which shall be approved after being reviewed and approved by the shareholders' meeting. The report that fails to pass the approval shall be investigated by relevant responsible persons. General and special common interests should be combined and matched, and

cannot exist in a single way, so as to achieve the implementation effect from macro to micro, from abstract to concrete.

Second, the surplus distribution of the common benefit private colleges. Earnings distribution directly determines the material basis for the implementation of common benefits. Private colleges with common benefits should define the profit distribution mechanism and distribution ratio, and set the expenditure ratio of social welfare funding in the annual balance. Different private colleges with common benefits may have differences, but the minimum ratio should not be less than 10 percent. The distribution of earnings of common benefit private colleges should comply with the provisions of the Company Law, and other provisions on the relief of shareholders' profit distribution claims should refer to the contents of the Company Law.

Third, the organizational structure and the division of functions and powers of private colleges with common benefits. The articles of association of a school can refine the organization of the school, including setting up the office of the president of the school as the executive body of the school, and defining the authority of the executive body through the articles of association. After the application and approval, the shareholders elect the board of directors to be responsible for the decision-making of the daily business intention and cooperate with the executive authorities to promote the development of the common benefit private colleges. Shareholders exist as the highest authority of private colleges for common benefit. In the follow-up, if the common benefit private colleges pass the application and the examination, they should further standardize and optimize the organization, and set up a board of supervisors to supervise daily business decisions.

Fourth, the governance structure of the common benefit private colleges. The governance structure of common benefit private colleges is similar to that of for-profit private colleges. The difference is that in the governance structure of common benefit private colleges, besides the participation of directors, more emphasis should be placed on the participation of stakeholders such as school management, school staff, students, parents, employment units and members of local education management departments. In terms of specific governance procedures, we can follow the relevant provisions of the Civil Law of the People's Republic of China and the Company Law, design the governance structure within the school according to the framework of authorities and executive agencies, and separate the sponsor (capital owner) of the common benefit private colleges from the board of directors as the power institution of the common benefit private colleges, which has the authority to modify the school charter, decide the profit distribution plan and major issues such as the separation, merger and termination of the school. The board of directors composed of the remaining members should be positioned as the executive body of the common benefit private colleges, which is responsible for executing the resolutions of the authority, formulating the basic management system of the school, and deciding the establishment of the internal management institutions of the school. It should be clearly stipulated that the sponsor should not take the initiative to intervene in matters within the scope of duties of the board of directors; otherwise, it can apply the principle of denial of personality of the user and require the sponsor to bear personal responsibility for the decision result.

### **The Establishment of Information Disclosure Norms and Standards**

The attribute of public welfare determines that the legal basis of the system of common benefit private colleges is liberalism and disclosure philosophy, which requires the complete information disclosure system to protect the public interest. In terms of information disclosure, in addition to publishing the annual school operation quality report in accordance with the Education Law, the Law of the People's Republic of China on Promotion of Privately-Run Schools and the regulations of educational administrative departments at all levels, and disclosing the information related to school operation and management in accordance with the Company Law, public welfare reports should also be prepared and disclosed regularly. The content of the public welfare report is mainly about the goals set by the school to create general and specific social and environmental influences, the measures taken, the achievement of the goals, the measurement standards, the obstacles and the expected solutions, etc., so as to effectively supervise the completion of the school's public welfare goals and prevent the school from seeking personal gain in the name of public welfare. As for the standards of public welfare report disclosure, schools should use independent, comprehensive, transparent and reliable third-party standards to measure their social and environmental influence to prevent schools from improperly describing or limiting the transparency requirements. Information disclosure mechanism plays a key role in the organization and operation of common benefit private colleges. If the information provided by the public welfare reports involved in the information disclosure mechanism is incomplete and has no uniform standards, it is difficult for the outside world to judge the information on the implementation of the company's public welfare goals, which will also restrict the actual effect of the company's operation. In addition to the requirement of mandatory information disclosure in the common benefit company law, it may be wise to prepare stakeholder reports every six months to disclose specific information to inform the interests of stakeholders.

### **The Accountability and Exit Mechanism of Private Colleges for Common Benefit Should be Clear**

The design of any system should be guaranteed by relief methods. In the traditional company law, shareholder derivative action plays an active role in the relief of shareholders' rights and the protection of company interests. There are bugs in the existing system regulation when violating special public welfare purposes or legal obligations and behavioral standards. As a special organizational form, private colleges with common benefits should also design a unique accountability mechanism to promote the realization of public welfare goals stipulated in their articles of corporation, so it is necessary to determine the litigation of public welfare execution. The qualification of prosecution for public welfare execution can also refer to the requirements and limitations of the Company Law on the shareholding ratio and time of shareholders. The shareholding ratio shall not exceed 2 percent, and the continuous shareholding time shall not be less than 180 days. The cause of prosecution is mainly limited to the violation of the obligations and behavior standards stipulated in the relevant

laws or articles of association of the common benefit private colleges when the directors or executors of the common benefit private colleges fail to fulfill their public welfare purposes, loyalty obligations and diligence obligations. Combining the litigation of public welfare execution with the litigation of shareholders' derivation, and effectively integrating the relief and protection capabilities of the two systems can effectively meet the needs of shareholders' rights and corporate interest protection. Therefore, the litigation of public welfare execution should be clearly regulated at the institutional regulation level of public welfare private colleges.

The implementation effect of public welfare goals in common benefit private colleges may affect the reduction of specific public welfare goals, and even the compulsory loss of the qualifications of common benefit private colleges. According to the public welfare report issued by the third party, the operation of common benefit private colleges can be divided into three types: good, qualified and unqualified. If good and qualified, it proves that the operation of common benefit private colleges conforms to the provisions of laws and articles of association. In case of disqualification for the first time, it is necessary to reduce the implementation of inappropriate specific public welfare goals by means of resolutions. In case of disqualification twice, it is necessary to cancel the qualification of common benefit private colleges and restrict them from becoming common benefit private colleges again within five years. If there is no legal situation within five years and the internal operation of private colleges is legal and normal, it is possible to restore their qualification as common benefit private colleges. This withdrawal mechanism of the common benefit private colleges' qualification will not affect subject qualification of the legal representative in private colleges themselves, but only limit the common benefit form, so we should establish a more perfect cohesion mechanism to avoid any deadlock in the internal governance of the company.

## **Conclusion**

Private colleges are an important part of the socialist education cause. To explore the reform and improvement of the management system of private colleges, we must fully consider China's special national conditions and the specific stage of the development of private education, focusing on exploring and establishing both a proper education and governance system for private colleges with Chinese characteristics. As a special organizational form for unifying profit-making and public welfare, setting up private colleges with common benefits recognizes the realistic demands of private colleges for profit and emphasizes the implementation of educational public welfare responsibility, which is a realistic need to promote the consistency of value pursuit of positive values and positive behavioral practices of private colleges at present. Establishing private colleges with common benefits is also an effective way to promote the rapid development of private colleges.

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