

吴义茂 著

土地承包经营权 入股有限责任公司 **法律问题研究**



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阅览

国家社科基金 2009 年重点项目 土地承包经营权流转制度"瓶颈"与制度创新(09AFX002) 之阶段性成果

土地承包经营权人股有限责任 公司法律问题研究

Research on Legal Issues of Pooling of Contractual Right of Farmland into Limited Liability Company

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作者简介

吴义茂,1973年6月生,江西省新建县人。法学博士,现任广东 佛山市委党校副教授。在《改革》、《中国土地科学》、《中国法学》等 刊物发表论文多篇,出版著作多部,主要从事土地法学、公司法学的 教学和科研工作。 实现传统农业向现代农业的转型,是当前我国农业发展的路径选择。土地承包经营权入股对于提高我国农业经营的现代化水平意义重大。目前,土地承包经营权的用益物权属性为物权法所明定。然而,在社会保障的城乡一体化尚未完全实现的约束条件下,土地承包经营权事实上承担着农民的生存保障功能。土地承包经营权法律上的物权性与事实上的保障性之间存在冲突与紧张关系,并由此导致我国目前对土地承包经营权入股的调整"政策性"有余而"法律性"不足的局面。基于"政策性"原因使土地承包经营权入股实践游离于"法律性"的调整之外,这造成了土地承包经营权人股实践的扭曲和变形。土地承包经营权人股急需纳入法律的调整范围之内。本书作者以此作为选题,并就"土地承包经营权人股的组织形式"、"农民股东与非农民股东的利益冲突及其平衡"、"农民股东与债权人的利益冲突及其平衡"、"家庭承包经营制度与公司法律制度的冲突与立法选择"等问题展开了较为深入的研究,其浓郁的问题意识和现实针对性,值得肯定。

中央政策叫停土地承包经营权人股有限责任公司试点之后,土 地承包经营权人股农民专业合作社的人股范式得到政策界、理论界 高度认可并在各地大力推行,大有成为土地承包经营权人股的主流 与发展方向之势。本书作者对土地承包经营权的"人社热"进行了 "冷思考",从法律科学的视角,论证了土地承包经营权人股的"资本 化"本质与农民专业合作社"交易型"组织的法律特性之间的内在冲

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突和不兼容性,指出土地承包经营权人股与有限责任公司的法律性 格相契合。作者所表现的理论创新的勇气,值得赞赏。

受制于土地承包经营权事实上的保障功能,在农业公司中对股东进行农民股东与非农民股东实行之区分并对其权利义务进行差异化的配置具有必要性,但由此会产生农民股东与非农民股东的利益冲突。土地承包经营权的"责任财产性"与"保障性"冲突与紧张关系,也会导致农民股东与债权人的利益冲突。本书作者认为,优先股与农民股东的股权具有契合性,应借鉴优先股理论平衡农民股东与农民股东之间的利益冲突。在对目前各种学说的利弊得失进行分析评价的基础上,借鉴"存款保险"的基本原理,对农民股东与债权人之间的利益冲突问题,本书提出了"优先购买权+入股保险"的解决思路。这些观点的提出虽然不乏值得商榷之处,但给人以耳目一新之感,颇具启发性。

土地承包经营权入股目前面临家庭承包经营制度与公司法律制度的冲突,到底是改革公司法律制度去适应家庭承包经营制度还是完善家庭承包经营制度以适应公司法律制度的要求,就成为一个需要学界作出回答和选择的重要问题。本书作者认为,鉴于家庭承包经营制度的变迁性、公司法律制度的成熟性以及对现行家庭承包经营制度一定范围的适应力,以公司法律制度为基准修改完善家庭承包经营制度,应该成为我们的制度选择。这种观点值得重视。

本书作者自 2009 年开始随我攻读法学博士学位,适逢我主持国家社科基金 2009 年重点项目:土地承包经营权流转制度"瓶颈"与制度创新(09AFX002)。作者以课题为平台,勤于思考,勇于探索,取得了较为丰硕的研究成果,其不囿陈见的批判性学术思维和较强的思辨能力,也给我留下了较为深刻的印象。本书是在作者的博士论文的基础上增删修改而成的,作为作者的博士生导师,我乐于将本书

推荐给大家,并期望吴义茂博士取得更多的研究成果,为我国农村土地法制建设作出更大的贡献。

是为序。

西南财经大学法学院教授、博士生导师 德国法兰克福大学法学博士 2012年6月12日

摘要

自周恩来总理在 1954 年的《政府工作报告》中首次提出建设"现代农业"以来,实现传统农业向现代农业的转型一直是我们孜孜以求的目标。现代农业是规模化、专业化、标准化的高效农业,需要变革"均田制"下"细碎化"的土地经营模式。土地承包经营权入股不仅有利于实现低成本、更稳定的土地经营规模化,还能利用有限责任公司这一现代企业组织形式在治理结构、组织化程度、运行机制、经营决策、市场渗透力等方面具有独特的优势,实现农业生产的专业化、标准化;不仅可以破解农业发展资本不足的"瓶颈",还可以引进农村稀缺的管理人才,提高农业经营的现代化水平。

受制于土地承包经营权事实上承载的农民生存保障功能,我国目前对土地承包经营权人股的调整"政策性"有余而"法律性"不足。基于"政策性"原因使土地承包经营权人股实践游离于"法律性"的调整之外,造成了土地承包经营权人股实践的扭曲和变形。土地承包经营权人股急需纳人法律的有效调整范围之内。因此,从法律机制上研究如何化解土地承包经营权人股中"物权性"与"保障性"之间的,冲突与紧张关系,科学选择土地承包经营权人股的组织形式,重构土地承包经营权人股中的法律关系,平衡土地承包经营权人股中各利益相关方的利益冲突,消除土地承包经营权人股的法律障碍,提出完善的法律对策,具有重大理论和现实意义。

除绪论、结语部分外,本文共分七章进行论述。

第一章"土地承包经营权人股的概念界定及相关法律问题"。 概念的准确界定是本书的逻辑起点,诸多学术纷争的产生就与在不 同语境下使用同一概念有关。本章主要围绕土地承包经营权以及土 地承包经营权人股两个概念的界定展开。对于土地承包经营权的界 定,本章研究了土地承包经营权的主体、目的限定性、法律上的物权 性与事实上的保障性等问题,笔者认为,应该将土地承包经营权的 "初始主体"界定为"农户成员"而非"农户","继受主体"的范围应 扩展为一切单位和个人;土地承包经营权农业用途的目的限定性的 实现,关键在于严格的土地用途执法监控,而不在于限制土地承包经 营权的流转以及受让人的组织形式和经营范围:"土地承包经营权 分为承包权和经营权"的观点,既没有法律依据,也不能真正有效解 决农民失地风险问题;土地承包经营权的设立采行"登记要件主 义",有利于维护土地承包经营权流转的市场交易安全,并且,只要 对现行制度进行一定的技术改造也不致增加土地承包经营权的设立 成本;相对集体土地所有权而言,土地承包经营权应该具有优先性和 排他性,"总有"理论不适宜作为目前改造集体土地运行机制的法理 依据。在分析目前理论和实践界存在的"土地承包经营权人股"概 念使用泛化现象的基础上,将土地承包经营权人股界定为将用益物 权性质的土地承包经营权出资于公司,取得公司股权的行为。土地 承包经营权人股将导致土地承包经营权的移转。现行法律将土地承 包经营权人股限于"承包户"之间的"合作生产"是意识形态的产物 而非出于法律科学的妥当考量。本书主要研究土地承包经营权人股 有限责任公司的法律问题。

第二章"土地承包经营权人股的正当性研究"。本章从经济学动因、比较法考察、法规范分析三个纬度对土地承包经营权人股有限责任公司的正当性进行"证成",对土地承包经营权人股引发"圈地运动"的观点进行了"证伪"。从经济学而言,土地承包经营权人股流转在实现土地规模经营中具有独特的优势与价值;土地承包经营权的资本化有利于激活农村土地资产,有利于增加农民财产性收入,有利于提高城市化和农业现代化水平。从法规范角度分析,目前土地承包经营权人股有限责任公司受限于《承包法》第41条的规定,

本章从农民宪法权利保护、土地用途变更之防止、发包人权利保护三个方面论证了该规定的不科学性,从而"证成"土地承包经营权人股有限责任公司的法规范正当性。从比较法而言,尽管社会制度各异、人均资源悬殊、土地所有制不同,在本书所考察的各个国家和地区,土地承包经营权人股有限责任公司均不存在法律上的障碍。"圈地运动"的出现与土地承包经营权流转方式无关,与地方政府能否坚持依法行政密切相关,以"圈地运动"之担忧否认土地承包经营权人股的正当性,难以成立。

第三章"土地承包经营权人股的实证研究"。研究土地承包经营权人股实践的各种典型模式,分析其现实运作机制和成效,不仅可以发现人股实践对法律改革所提出的新的课题,更能启发研究者提出更加符合实际的解决土地承包经营权人股中的各种利益冲突的方案。本章实证研究了实践中影响较大的、较有代表性的"南海模式"、"郑龙模式"、"汤营模式"、"麒麟模式"、"东江模式",分析其利弊得失,并从中提炼出了人股实践提出的需要进一步研究的法律课题,确定了本书的重点研究方向:土地承包经营权人股的组织形式、农民股东与非农民股东的利益冲突与平衡、农民股东与债权人之间的利益冲突与平衡、家庭承包经营制度与公司法律制度的冲突与选择,等等。

第四章"土地承包经营权人股的组织形式选择"。土地承包经营权人股组织形式的选择不仅具有政策性,更具有法律性,我们当然不能因为一味追求所谓政策取向的正确而置法律可行性于不顾。从法律科学的角度分析实践中典型的人股组织形式的利弊得失并作出正确选择,无疑具有重大的理论和实践意义。本章重点研究了股份合作社、农民专业合作社、有限责任公司三种典型人股模式。笔者认为,"股份合作社"是特定历史条件下出于意识形态的原因而被创造出来的,欠缺法律科学的考量,与国际合作社通行的基本原则相去甚远,难以对其进行有效的立法规范和制度设计;土地承包经营权人股的"资本化"本质与农民专业合作社的"交易型"组织的法律特质之

间存在难以兼容的内在冲突。有限责任公司的"资合性"、"营利性"与土地承包经营权人股的"资本化"本质相契合,其"人合性"以及较大的"自治性"更是为对土地承包经营权人股过程中的权利义务关系进行"量体裁衣"式的灵活配置提供了较大的法律空间,有限责任公司适宜作为土地承包经营权人股的组织形式;股份有限公司、独资企业、合伙企业、一人公司尽管作为土地承包经营权人股的组织形式与土地承包经营权人股的资本化特性不相冲突,但实践中难以产生这种需求。

第五章"农民股东与非农民股东的利益冲突与平衡"。受制于土地承包经营权事实上的保障功能,在农业公司中对股东进行农民股东与非农民股东之区分并对其权利义务进行差异化的配置具有必要性,但由此会产生农民股东与非农民股东在利润分配、公司事务管理权和表决权配置上的利益冲突。优先股与农民股东的股权具有契合性,本章运用优先股理论对如何平衡农民股东的股权定位为参加、累积、剩余财产分配优先、附带拒绝权优先股;农民股东的表决权在一定条件下应复活;农民股东享有除表决权以外的其他股东权利;农民股东在特定条件下应享有"退股权"和土地承包经营权的回购请求权;非农民股东对农民股东的"保底收益"承担担保责任。此外,为了解决单个农民股东行使股东共益权存在的维权能力不足和维权成本过高的问题,组建以行使农民股东共益权为目的的农民专业合作社是可行的选择。

第六章"农民股东与债权人的利益冲突与平衡"。在土地承包经营权人股有限责任公司中,其"责任财产性"与"保障性"形成明显的冲突与紧张关系,由此产生农民股东与债权人之间的利益冲突。本章分别探讨了公司设立阶段、运营阶段、清算阶段的农民股东与债权人之间的利益冲突的表现形式及其解决方案。尤其对于清算阶段的利益冲突,本章在评析当前各家学说的利弊得失的基础上,提出了"优先购买权+人股保险"的解决思路。

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第七章"土地承包经营权入股有限责任公司的法律对策——以 立法完善为中心"。研究促进土地承包经营权人股有限责任公司的 法律机制是本书的落脚点。本章首先分析了土地承包经营权人股过 程中面临的家庭承包经营制度与公司法律制度之间的冲突。鉴于家 庭承包经营制度的变迁性、公司法律制度的成熟性及其对现行家庭 承包经营制度一定范围的适应力,笔者认为,应该以公司法律制度为 基准修改完善家庭承包经营制度,并提出了完善家庭承包经营制度 的八个方面的建议:完善土地承包经营权的主体制度,将"初始主 体"界定为"农户成员"而非"农户","继受主体"应扩及一切单位和 个人;取消土地承包经营权人股限于"承包户"之间的"合作生产"的 限制性规定;清理"土地承包经营权人股不转移权属"这一明显与公 司法理相悖的规定:土地承包经营权的设立改"意思主义"为"登记 要件主义";取消土地承包经营权转让的限制,实行土地承包经营权 的自由转让;取消土地承包经营权流转中集体成员的优先权;实行土 地承包经营权长久不变;废止土地承包经营权调整、收回制度。此 外,还应该正确定位政府在土地承包经营权人股过程中的地位和作 用;借鉴"两田制"的合理内核、实行"责任田"入股;分步推进农村社 会保障体系建设。

文章主要的可能创新之处在于:第一,中央政策叫停土地承包经营权人股有限责任公司试点之后,土地承包经营权人股农民专业合作社的人股范式得到政策界、理论界高度认可并在各地大力推行,大有成为土地承包经营权人股的主流与发展方向之势。本书对土地承包经营权"人社热"进行了"冷思考",首次从法律科学的视角论证了土地承包经营权人股的"资本化"本质与农民专业合作社"交易性"组织的法律特性之间的内在冲突和不兼容性,指出土地承包经营权人股与有限责任公司的法律性格相契合。第二,目前学术界研究农民股东与债权人之间的利益冲突的较多,但研究农民股东与非农民股东关系的论著较少。本书从利益冲突的视角分析农民股东与非农民股东之间的权利义务关系,并运用优先股的理论对如何平衡农民

股东与非农民股东的利益冲突提出了自己的构想。第三,对于解决 土地承包经营权人股过程中面临的农民股东与公司债权人之间的利 益冲突,本书在分析目前诸家学说的利弊得失的基础上,提出了"优 先购买权+人股保险"的解决方案。

Abstract

Since premier Zhou Enlai put forward construction of "modern agriculture" on the government report in 1954, the transition from traditional agriculture to modem agriculture has been our pursuit. Modern agriculture is high-efficient agriculture with scale, specialization and standardization, which needs to change land fragmentation caused by "average-land-system". Otherwise, agricultural modernization would never be available for hope.

The pooling of contractual right of farmland is conducive to not only large-scale and more stable land management by lower cost, but also specialization and standardization by limited liability company which has unique advantages of governance structure, organizational degree, operating mechanism, business decision, and market penetration. It breaks the bottleneck of capital shortage in agriculture, brings into management personnels which are scarce in rural area, and therefore helps to improve modernization level of agricultural management.

As a result of the de facto security function of contractual right of farmland, for the time being, the regulation of its pooling is more policy than law. The situation of inadequate legal regulation has caused some distortions in pooling practice. Therefore, the pooling of contractual right of farmland should come back to the path of legal regulation. It is of important theoretical and practical significance to study how to resolve the conflicts between the real right and the de facto security function of

contractual right of farmland, how to choose suitable organizational form of pooling scientifically, how to balance the conflicts of interests among the stakeholders, how to put forward legal countermeasures so as to facilitate the pooling of contractual right of farmland.

Except "introduction" and "epilogue", This dissertation includes seven chapters.

The first chapter is "definition of the pooling of contractual right of farmland and relevant issues". Accurate definition is the foundation of any research. This chapter discusses around the definition of two concepts which include contractual right of farmland and its pooling. As for contractual right of farmland, this chapter analyzes some issues, such as the subject, the control of agricultural use, the real right in law and the de facto security function. The author thinks that the "initial subject" should be "member of household" rather than "household", that the "successor subject" should be expanded to all units and individuals. The control of agricultural use lies in the stringent monitoring of government authority, which has nothing to do with the transfer of contractual right of farmland and the organizational form and business scope of its assignee. The point of view that contractual right of farmland can be divided into contract right and management right, is useless for protecting farmers from losing land, and also without any legal basis. The doctrine of "registry as essential" for the establishment of contractual right of farmland, helps to maintain the security of market transaction without increasing the cost of establishment, as long as certain technical transformations of the present system are implemented. Contractual right of farmland is exclusive, and more preferential than collective land ownership. The theory called "conjoint ownership" cannot be appropriate legal basis for the reform of collective land operation mechanism. Pooling of contractual right of farmland is often generalized in both theory and

practice circles, and should be defined as investing contractual right of farmland which is of usufructuary into limited liability company in order to obtain company equity. Pooling will lead to the transfer of the contractual right of farmland from farmer to company. The current regulations which restrict pooling to "contracting household" and "cooperative production", are more ideology than legal consideration. This dissertation mainly studies the legal issues deriving from pooling of contractual right of farmland into limited liability company.

The second chapter is "research on the legitimacy of pooling of contractual right of farmland". This chapter testifies the legitimacy of pooling of contractual right of farmland from economic motives, legal norm analysis and comparative law, and falsifies the viewpoint that pooling would lead to "enclosure movement". From the points of economics, pooling of contractual right of farmland has unique advantages and value for realizing large-scale land management. The capitalization of contractual right of farmland, will be beneficial to increasing farmers' property income and to improving the level of urbanization and agricultural modernization. At present, the provision of article 41 of "rural land contract law" is a barrier to pooling of contractual right of farmland into limited liability company. This chapter demonstrates that the above provision is not scientific in terms of farmers' constitutional rights , the control of land use, and proprietors' protection. From the perspective of comparative law, there are all no legal barriers to pooling of farmland in the investigated countries and regions, although they have different social system, per capita resource and land ownership. "Enclosure movement" has nothing to do with the transfer of farmland, which can only attribute to the lack of stringent enforcement on land use.

The third chapter is "empirical research on pooling of contractual right of farmland". It studies the actual operation mechanism and effects of typical models in pooling practice. Such study helps to find new legal issues proposed by practice and their more effective solutions. This chapter studies the advantages and disadvantages of several influential models; i. e. "Nanhai model", "ZhengLong model", "TangYing model", "Qilin model", "Dongjiang model", and finds out the legal issues which need in-depth study; i. e., the organizational forms of pooling, the conflicts and balance of interests between farmer shareholders and non-farmer shareholders , the conflicts and legal choice between company law systems and household contract systems, etc..

The fourth chapter is "choice of organizational forms of pooling of contractual right of farmland". The choice of organizational forms is not only a policy issue but also a legal one. Of course, we can't abide by policy regardless of legal feasibility. It is undoubtedly of great theoretical and practical significance to analyze the advantages and disadvantages of typical organizational form in pooling practice, and to make right choice from legal perspectives. This chapter focuses on three typical modes, i. e. shares cooperatives, farmers' professional co-operatives, limited liability company. Shares cooperatives is the product of ideology under specific historical conditions in lack of legal considerations, which is so different from the basic principles of international cooperatives, and therefore it is difficult to regulate by law. There are inner conflicts between the capitalization of pooling of contractual right of farmland and farmers' professional co-operatives as a trading organization. "Property-joint" and "for-profit" that limited liability company is characterized with , agree with the capitalization of pooling of farmland, while "person-joint" and "autonomy" are conducive to flexible arrangements for legal relationships between farmer shareholders and non-farmer shareholders, and therefor appropriate organizational form of pooling should be limited liability