

个人破产法律制度研究

——兼论我国个人破产制度的构建

文秀峰 著

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GEREN POCHAN FALU ZHIDU YANJIU
文秀峰 著

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E - mail: cpep@public. bta. net. cn

www. phcpsu. com. cn

作者简介

文秀峰，男，1967年12月生，山西省孝义市人。1990年毕业于山西大学中文系，获文学学士学位，同年分配至山西省人民检察院工作；1998年毕业于中国政法大学研究生院，获法学硕士学位；2004年获中国政法大学法学博士学位；现为中国政法大学民事经济司法研究中心特邀研究员、律师。1997年起，先后在《人民检察》、《法制日报》、《国家检察官学院学报》、《诉讼法学研究》等刊物上发表《论我国民事检察监督制度之重构》、《司法公正的保障机制研究》、《1999年发现程序的来历——争论与妥协》等论文及译著十余篇。

序

随着我国市场经济体制的确立和发展，个体经济和民营经济一直是我国经济的最大亮点。党的十六大对个人创业的鼓励，宪法修改后对私有财产保护的完善，将使越来越多的个人投入到创业之中；同时，住房、汽车等大宗耐用品的消费信贷高速增长，也已成为刺激我国经济增长的重要因素。在这种形势下，市场经济竞争的加剧与人们对消费需求的膨胀的共同作用，必然会产生越来越多的个人支付不能的问题。如何解决这个问题，不仅关系到个人创业和消费的健康发展，也关系到社会的稳定和经济流转的安全。在国外，破产一直是解决个人支付不能问题的重要手段；但在我国，对个人破产的研究还属于探索阶段。当前正值我国破产法的修改阶段，如何认识个人破产制度，我国的新破产法应否确立个人破产制度，已成为立法争议的一个重要问题。本书作者此时选择个人破产制度作为研究对象，从研究个人破产与实体破产的不同出发，将个人破产中的特殊问题置于整个破产程序中进行审视和剖析，以把握个人破产制度的整体特征，并提出具体的立法建议，无疑是很强的理论意义和现实意义的。

以个人破产为独特视点，对个人破产情形下破产程序制度所产生的特殊问题进行系统性的归纳总结和深入研究，是本书的最大创新之处。目前，关注个人破产问题的学者并不算少，但多是将个人破产作为破产主体的范畴来研究，其着眼点一般

只在个人应否赋予破产能力上。而本书能够从个人破产出发，对个人的破产能力、破产原因，到个人破产的申请和受理，再到个人破产的和解和清算进行全程序性的考察和研究，探寻个人破产在不同程序阶段所体现的不同特征；同时，对个人破产中的特有制度，如自由财产制度、免责制度和失权与复权制度进行历史考察和价值分析，实际上是将个人破产从破产程序制度中进行了纵向性的分离研究，这应该说是一种大胆的探索和尝试，有助于我们对个人破产制度形成一个更为清晰明确的认识，并在了解和把握个人破产的所有细节问题之基础上，来把握个人破产的整体特征。

破产制度不仅涉及程序性问题，也涉及实体性问题，这就要求研究者必须具备程序法和实体法两方面的理论功底和专业知识。本书作者在研究个人破产制度时，虽然着眼点在于程序制度的研究，但并不局限于程序性问题，而是将程序观和实体观相结合，对涉及的一些实体性问题也能发表自己的见解，展现了较为宽阔的研究视野。在本书中，作者能够敏锐地发现和归纳个人破产中的特有问题，并运用法历史学、比较法学、法理学、法社会学等研究方法展开论述，反映了作者较为全面的知识结构。在组织结构上，本书并不对个人破产中的所有问题进行泛泛谈论，而是只针对个人破产中的特色问题和难点问题进行提炼和研究，避免了行文的烦琐，这也体现了作者对题材的取舍和把握能力。

本书研究个人破产制度之目的，在于为构建我国的个人破产制度进行理论准备。在本书中，作者始终以我国的司法实践和立法修改为关注点，研究时注重理论联系实际，并对每一个问题都能结合我国国情提出自己的立法建议，体现出作者对我国司法实践情况的了解和掌握，展示了作者务实的科研作风。

同时，也表明作者有较高的学术水平和较强的科研能力。

本书是作者 2004 年博士研究生毕业时撰写的博士学位论文，在其论文答辩后，即被博士论文答辩委员会的校内外专家评为优秀博士论文。我作为作者博士学位论文的指导教师，对作者取得这样的科研成绩也感到非常的欣慰。值本书付梓之际，我希望作者能够继续钻研，勇于创新，为我国破产法理论的丰富和发展做出更大的贡献，谨以为序。

杨荣新

2006 年 4 月于昆玉河畔

内容提要

本书运用法历史学、比较法学、法理学、法社会学等研究方法，重点论述个人破产程序法律制度中的特别问题和难点问题，同时结合我国具体情况进行理论联系实际探讨，并提出立法建议，目的在于为构建我国的个人破产制度进行理论准备。论文正文部分共分七章，主要内容包括：

第一章：导论。本章介绍破产制度及个人破产制度相关的基本理论问题，对一些国家和我国有关个人破产的立法情况进行了比较研究。其中第一节对破产制度的产生和演变的历史过程进行了回顾，对破产的定义和法律特征进行了剖析，并介绍了破产法律制度在当代的最新发展趋势，为论述个人破产制度进行铺垫。第二节进入本书正题，首先对个人破产的定义进行了新的界定，尤其对“个人”与“自然人”两个概念在程序法与实体法上的微妙区别加以澄清，主张以“个人破产”代替“自然人破产”，并将非法人组织的破产从个人破产的概念中撇除，继而明确“个人破产”所包含的具体内容，最后通过与其他制度的比较，获得对个人破产法律特征及制度价值的认识。第三节介绍了一些主要国家个人破产制度发展演变的过程及所采取的立法例，并结合我国的破产立法史，对我国个人破产制度的发展史及目前我国破产法不适用于个人的现状进行了简要评述。

第二章：对我国建立个人破产制度的前瞻性研究。本章以

构建我国的个人破产制度为论点，论述我国建立个人破产制度的必要性和可行性，并初步设计了我国建立个人破产制度应确立的理念和原则。其中，第一节用实证主义的方法，以我国确立市场经济体制后的巨大变化为时代背景，从鼓励个人创业、满足消费信贷快速增长的需求以及全球经济一体化对法律接轨的要求等方面论证我国建立个人破产制度的必要性。第二节则从我国经济的快速发展、公民法律意识的提高、信用体系的初步建立及社会保障制度的完善等方面作出“在我国建立个人破产制度是可行的”这一结论。在第三节笔者探寻破产法发展的轨迹，提出我国的个人破产制度不应照搬当代西方国家所谓的“债务救济理念”，而应从我国国情出发，以保障债权人利益、培育信用经济为个人破产的基本理念。同时，将公平、高效、债权人自治、检察监督、与国际接轨等作为我国个人破产制度应当确立的基本原则，以指导具体程序和制度的设计。

第三章：个人破产程序的开始。本章根据个人破产的特点，结合我国现行破产法和新破产法草案的规定，对个人破产程序的主体、破产原因、程序的开始等重要问题进行研究，并力图为构建我国的个人破产程序提供参考方案。其中，第一节以论述破产能力为切入点，对个人破产的不同主体进行划分，实质上也是划分了不同的个人破产类型，并建议我国立法引进遗产破产制度和针对负有责任的破产法人、企业领导人而适用的制裁性破产制度。第二节在一般性地论述支付不能、停止支付、债务超过等不同破产原因的基础上，针对个人破产的不同类型，提出不同的破产原因论。在第三节笔者论述了个人破产程序启动所涉及的主管、管辖、申请、受理等问题，并提出了相应的立法建议。

第四章：个人破产的处理——和解和清算。和解、重整与

清算是处理破产案件的三大程序制度，每种程序都要涉及非常多且复杂的程序性和实体性问题。而且三者之间还存在转换关系，被认为是破产制度研究的核心内容。但本书既然定位于个人破产，并不对所有问题进行泛泛而谈，而是围绕个人破产这一主题，首先将一般不适用于个人的重整制度排除在论题之外，其次对和解和清算程序操作中的问题，只选择对个人破产来说有独特意义的进行研究和探讨，并提出相应的立法建议。在第一节中，笔者分析了个人破产中个人债务人财产的特点，提出应建立管理人制度，在破产程序受理后破产宣告前即接管债务人的财产。同时，从贯彻公平原则出发，对个人破产中债权人的知悉问题进行了讨论，提出应强化债务人的诚信责任，利用免责、破产犯罪等制度，促使债务人主动全面地提交债务清册，保证债权人知悉和参加破产程序。本节还对内部人的债权及其限制问题进行了探讨。第二节论述了个人破产中的和解制度，首先是对和解在个人破产中所具有的特别重要意义予以阐述，接下来对一些国家和地区有关个人和解的专门规定详加比较，最后提出了我国个人破产和解程序的构建方案，主张我国应采取彻底的和解分离主义，将和解程序前移，由当事人选择适用和解程序还是清算程序。第三节就个人破产情形下清算程序所出现的一些特别问题进行探讨：一是借鉴其他国家和地区的立法，详细列出了法院应当作出个人破产宣告的情形、个人破产宣告的阻却事由及个人破产宣告后应对个人债务人产生什么效力等；二是提出了个人破产中独有的自由财产问题，强调应对破产财产与自由财产进行区分；三是对个人破产情形下的撤销权、取回权、抵消权、别除权的行使问题进行了探讨，也对不同的个人破产类型在清算中应注意的问题进行归纳总结。最后，对清算人职务的解除问题在个人破产与经济实体破

产之间存在的不同之处进行了比较。

第五章：个人破产中的自由财产制度。自由财产制度是个人破产所特有的一项重要制度，本章对此详加论述。第一节主要论述自由财产的含义、特征及意义等基本理论问题。第二节论述自由财产的范围。指出自由财产范围的确定应以保障破产人的基本生活为中心任务，而基本生活应以当地生活水平为参照，但在不损害债权人根本利益的前提下，还应兼顾破产人将来的重新起步。接着对一些国家和地区对自由财产范围的规定进行比较研究。最后对建立我国的自由财产制度提出了立法建议，主张在自由财产的范围上改用列举主义，内容上按不同性质进行划分，不同性质不同对待，有关基本生活的无条件保留，有关重新再起的或对破产人有特定精神价值的则服从于债权人的分配利益。自由财产还应进行限额。第三节首先论述了自由财产权的行使程序，包括行使主体、申请的提出、异议的提出以及法院如何对自由财产申请进行裁定等一系列问题。其次论述了自由财产权行使中的争议问题，主张自由财产可以用来清偿债务，但不得影响其抚养人的权益；主张自由财产之上的司法担保权无效，协议担保权和法定担保权虽有效，但破产人也应有一定的撤销权；主张破产前将其他财产转为自由财产的行为一般应认为有效。

第六章：个人破产中的免责制度。法人或其他组织一般在破产后注销，无所谓免责问题，因此免责制度也是个人破产中一项特有的制度。第一节是免责制度概述。回顾了从不免责主义到免责主义的破产发展史，指出免责的本质不是权利，而是一种特许利益，应注意免责利益与债权人的清偿利益之间的平衡，并对免责制度立法例进行了比较研究。第二节介绍各国为达到利益平衡之目的，对免责设定了种种条件和限制，包括什

么情形之下不许可破产人免责、哪些债务不能被免责以及免责裁定作出后特定情形下撤销免责裁定等。第三节先从我国现行立法出发，指出逃避债务与免责制度并无必然联系，接着评析了我国新破产法草案中有关免责制度的具体规定，并提出对该草案进行修改的具体立法建议。

第七章：个人破产中的失权与复权制度。失权与复权制度体现出个人破产所特有的制度价值，是个人破产制度得以长盛不衰的重要平衡机制之一。第一节是讨论破产失权制度，从对债务人进行处罚的历史演进中，指出失权制度代替破产有罪主义的历史意义，接着对失权的特征和制度价值进行论述，并比较了有关国家和地区破产法及破产法以外的其他法律对失权的具体规定。第二节是破产复权制度，指出复权制度是现代社会的为解决失权与人权冲突而设立的制度，但复权制度的价值不仅在于保障人权，也有助于更好地发挥失权制度对破产人的制裁作用。本节还对当然复权与申请复权两种方式下不同的复权条件进行了比较研究，并论述了复权的程序。第三节在考察我国现行法律有关失权规定的基础上，提出了构建我国的破产失权与复权制度的具体设想。

在结论部分，笔者认为，个人破产是破产制度产生的本源，其所体现出的制度价值和理念，是其他执行制度所无法替代的。一般破产主义是世界破产法发展的潮流，我国实施个人破产的条件也已经成熟。笔者坚信，在我国全面建立个人破产制度只是时间的问题，我国的个人破产制度应当从我国的国情出发进行构建。

Abstract

This dissertation addresses some special and difficult problems of bankruptcy law system of individuals , and intends to provide a legal proposal based on the reality of China and theories for the establishing of bankruptcy law system of individuals in China. The subject of this dissertation will be discussed from legal history , comparative study , jurisprudence and legal sociology perspectives. Except the preface and conclusion , the content of this dissertation will be divided into seven parts :

Chapter 1 is the introduction. This chapter introduces the basic theories related to bankruptcy system and bankruptcy system of individuals , and does some comparative research on the legislations between China and some countries and districts. Section 1 provides a historic retrospection of the initiation and evolvement of bankruptcy system , and a analytic demonstration of the definition and features of bankruptcy. The latest development trend of bankruptcy system will be introduced here ,too. Section 2 , the author points out that the definition of bankruptcy of individuals will be redefined at first. Especially , the subtle differences between individual and natural person in substantive law and procedural law will be illuminated. The author 's opinion is to substitute the bankruptcy of individuals for bankruptcy of natural persons , and specify the meaning of

bankruptcy of individuals. At last , this section reveals the legal feature and system value of bankruptcy of individuals by comparing this system with other system. In section 3 ,this dissertation discusses the development of bankruptcy and the legislations in major countries , and the history of legislative of bankruptcy in China , and gives a brief evaluation of the bankruptcy of individuals and the drawbacks of the current bankruptcy law in China.

Chapter 2 talks over the fore - research problems about the establishing of bankruptcy of individuals in China. This chapter addresses the necessity and practicability of establishing the bankruptcy of individuals in China , and the basic ideas and principles of this legal system. In section 1 ,the author uses the positivism methods to explore the necessity of establishing the system of bankruptcy of individuals against the background of market economy. In section 2 ,the author explores the practicability of establishing the bankruptcy of individuals in China against the background of the rapid development of economy ,the improvement of citizens ' legal knowledge , the preliminary establishing of credit system , and the improvement of social security. In section 3 , the author draws the conclusion that we should not copy the idea of “ debtor relief ” in foreign countries , instead ,the basic idea is to protect the interest of creditor and to cultivate the credit system. At the same time , we should adopt fairness , efficiency , autonomy of the creditors , procurational supervision as the basic principles in drafting the bankruptcy system of individuals , and use them as the guidance in the framing of specific proceedings and systems.

Chapter 3 discusses the initiation of bankruptcy of individuals.

This chapter addresses some important problems such as the participators , the reasons for bankruptcy and the initiation of bankruptcy proceedings , and tries to provide an framework for drafting our own proceedings of bankruptcy of individuals. Section 1 divides the bankruptcy of individuals into different types according to the capacity of participators. The author suggests introduce legacy bankruptcy law system and adopt the sanctionative bankruptcy system to the responsible leaderships of entity. Section 2 discusses the different reasons for bankruptcy. Section 3 addresses the jurisdiction , petition and register in the proceedings of bankruptcy of individuals , and provides a legislative proposal.

Chapter 4 is about the handling of the bankruptcy of individuals —— compromise and liquidation. Compromise , reorganization and liquidation are the three procedures systems to handle the bankruptcy cases , which are regarded as the core content of the bankruptcy law system , each relate to many complicated problems of procedures and substantiality , and the three procedures transfer each other. Now that this paper is focus on the bankruptcy of individuals , the author will concentrate on this topic instead of talking about everything. In section 1 , the author analyzes the characteristic of the individual debtor 's property in the bankruptcy cases , and points out that the trustee system should been established so that the debtor 's property can be take over as soon as the court receiving the petition for bankruptcy before the declare of bankruptcy. At the same time , on the basis of the justice principle , the author discuss the notification of the creditors in bankruptcy of individuals , and suggest that the liability of good faith should be enforce and these

systems such as denial of discharge , bankruptcy crime should be used to urge the debtors to put in debt list initiatively , so that the creditors can be aware of the bankruptcy case in time and take part in the proceeding. In addition , the author also studies the problems of creditor 's rights of insiders and the limit of their rights. Section 2 is about procedure of compromise in bankruptcy of individuals. At first , the author sets forth the important meaning of compromise in bankruptcy of individuals. Secondly , the author compares provision of compromise in legislation among some countries and districts. Finally , the author brings forward the blue print of compromise system in china , which suggests that the thorough separatism of compromise be adopted , and procedure of compromise should be moved forward in the proceeding so that the parties can choice to apply the compromise or the liquidation. Section 3 discusses some specious problems in liquidation proceeding in bankruptcy of individuals. Firstly , the author lists the conditions particularly that the court should make a declaration of bankruptcy of individuals , the declaration should be obstructed and what kinds of obligations should be put to the debtors after the declaration by using the legislation of some counties and districts for reference. Secondly , the author puts forward the issue of exempt property which is particular in bankruptcy of individuals , and emphasizes that the exempt property should be told from the property of estate. Thirdly , the author discusses the avoidance powers , the right of eviction , the right of set-off and the priority in the light of bankruptcy of individuals , concludes the attentive problems in liquidation in different type of bankruptcy of individuals , and compares the issue of removing the

liquidator's duty between the bankruptcy of individuals and the bankruptcy of economic entities.

Chapter 5 discusses the exempt property system in the bankruptcy of individual. Exempt property system is a very important system in the bankruptcy of individuals and deserves detailed analysis. Section 1 discusses the basis theory problems of exempt property such as signification, character and meaning, and the section 2 defines the scope of the exempt property, and points out that ascertaining the scope of the exempt property should safeguard the basic living standard of the bankrupts, and the basic living standard should refer to the regional living level, on the premise of not damaging the profits of the creditors, the bankrupt's re-fresh should be given more attentions to. Following that, the author compares the provisions of the exempt property scope of some countries and regions, and gives some legislation advices about how to establish exempt property system of China, which include defining the scope of exempt property by enumerating, subdividing them according to different quality in content, and giving different treating according to different quality, the property related basis living be retained on any condition, the property related re-fresh or something useful to special spirit value of the bankrupt submitting to the distribution benefits of the creditors. On the other hand, the amount of exempt property should be limited. Section 3 discuss the action procedure of the exempt property right at first, include the action parties, filing petition, filing the objection, and the court how to judge the petition of the exempt property so on. Secondly, this section discusses the disputing problems about how to use the exempt property right.

The author insists that exempt property can be used to pay off the debt, but mustn't affect the rights of the persons who need to be fostered, and the justice hypothec is invalid on the exempt property. Though the agreement of hypothec and legal hypothec is valid, the bankrupt should have some rights of withdraw. The author also insists that the action of transferring other property to exempt property before bankruptcy should be valid.

Chapter 6 is about the discharge system in bankruptcy of individuals. Corporations or other organizations are usually dismissed after bankruptcy, so the discharge issue is nonsense to them. Therefore, the discharge system is a peculiar system in the bankruptcy system of individuals. Section 1 is the summary of the discharge system, the author points out that the essence of discharge is a kind of special permission interests other than right by reviewing the bankruptcy law development history of the discharge. So more attentions should be paid to the balance of the discharge interests and the payment interests of the creditors. This section also gives some comparative research in different legislation. Section 2 introduces all kinds of conditions and limitations that different countries set up to achieve the balanced interests purpose, including the situations that the bankrupt can't be discharged, the debts that can't be discharged and the situations that the judgement can be removed. Section 3 sets out from the current legislation of china and points out that there is not positive connection between the abolishment of debts and the discharge system, then evaluates and analyses the provisions of the discharge system in the new bankruptcy law draft of China, and puts forward the detailed legislative proposals to this draft.