

光华法学文丛

高晋康 主编



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中国农民工

王伦刚 著

非正式的利益抗争

基于讨薪现象的法社会学分析



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出版社2007年版）等专著多部，发表《市民
社会的历史多样性与中国经济法学的选择》
（《现代法学》2008年第3期）等论文多篇，
主持主研教育部《当代中国农民工的非正式利
益抗争——基于讨薪现象的法社会学分析》
（09YJC820091）等课题。

西南财经大学法学院
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高晋康
主编

序

在我看来,《中国农民工非正式的利益抗争》最重要的价值也许在于它以自下而上的视角通过描述农民工群体的某些行为来观察中国法治。它揭示了中国法治发展图景中既耳熟能详又可能未必真知的某些真实画面,让人们看到了中国法治的现实演进,进一步弥补了法治研究在这方面的不足。近年来,作者从各个领域和视角观察研究中国法治。他的第一本专著《中国经济法的根基》从超然的法哲学层面探讨了经济法基础理论领域中的法治问题,它在出版后已经取得了较好的反响。这本书则从现实的法律社会学层面近距离观察劳动法领域中的法治现状。这本书是作者对中国法治问题持续关注不断探索的学术成果,它的出版值得祝贺。

这本书的写作缘于作者对农民工群体的人文情怀和对农民工问题的关注。作者拥有悲天悯人的人文情怀,这使得他将自己的眼光投向了农民工群体。农民工问题持续近三十年了,从最初的盲流到民工潮到农民工讨薪,这是一个世人和学者持续关注的话题。本书写作在于作者提出了一个看起来较为不同甚至有点“异类”的问

题。在全社会掀起“如何保护农民工的利益”的理论讨论和社会实践的热潮中,作者却冷峻地提出“农民工如何保护自己的权益”这个问题。正是这个问题的提出,让他既采用规范法学的研究方法,又采用法律社会学的研究方法。为了了解农民工们讨薪的具体行动,他跟踪民工进行社会调查达到几年之久,直到现在也未曾停止。正是在这种坚持中,他发现了农民工讨薪的内在运行机制,看到了农民工群体的力量,领略到了他们的行动对于中国法治建设的推动意义。顺便提一句,或许是这个问题的新颖和它最初论证的说服力,这个题目得到了教育部人文社科基金的资助。

本书的研究对象是农民工劳动仲裁和诉讼之外的维权活动。作者通过近距离的参与式观察,发现绝大多数农民工讨薪既不是纯粹的依法维权,也不是纯粹的违法抗争,而是在国家宽容之下的合法性模糊的行为,他称之为“非正式的利益抗争”。这种非正式的利益抗争的内在运行机制是通过法律关系非法律化运行,即作者所说的“道德化运行”、“行政化运行”和“政治化运行”。对这种运行机制的描述是本书的主体,它既是对非正式利益抗争的证实,又为对它法律性质的评判奠定了事实基础。在作者看来,非正式的利益抗争行为的实质是断裂社会中底层社会民众以非正式利益抗争为表现形式的法治行动。这样,作者对农民工劳动仲裁和诉讼之外的维权活动的特点、运行机制进行了深入细致的描述和提炼,并对它的法律性质做出了独特的评价。本书的创新之处主要在于,作者提出一个独特的少有人仔细探究的问题,即“农民工如何保护自己的权益”。正是对农民工问题研究视角的转换,作者得到了珍贵的第一手资料,看到了这个堪称“古老”话题蕴涵的新东西,催生了他学术的创新。

伦刚是我的学生。我比较赏识的,是他有着发自内心的学术爱好与兴趣。学术研究已经成为他的一种生活方式,成为做人与冶炼人格融为一体的事务,这在今天尤为难能可贵。学术爱好使得他有着不同寻常的学术毅力。当然,他也常常在世俗功利和超然读书之

间徘徊不已,但他最终坚持下来,这很不容易。作为老师,我希望伦刚能够保有终极的人文情怀。我相信,兴趣爱好和持之以恒会让他拥有持久的学术研究动力并取得更大的进步。

预祝他取得更大的成绩!

马俊驹

二〇一一年十月

内 容 摘 要

自 20 世纪 90 年代末以来,农民工权益受到侵害的问题逐渐成为社会热点,其中工资被拖欠问题最为严重。为保护自己的权益,一些农民工通过劳动仲裁和诉讼的法律途径进行维权,但更多农民工却进行着引人注目且花样不断翻新的劳动仲裁和诉讼外的“维权活动”(借用生活习语),目前还没有停止的迹象。农民工长期进行劳动仲裁和诉讼之外的维权同我们正在追求的现代法治理想似乎南辕北辙,同政府期望相去甚远,社会评价褒贬不一。那么,如何理解和诠释农民工们长期进行的劳动仲裁和诉讼之外的维权活动呢?只有弄清这个问题,才能真正理解当代农民工的维权处境,才能对农民工维权行为作出令人信服的理论解释,才能给急于寻找常规化对策的政府及其相关部门提供基于真实生活的法治对策。因此,研究这个问题就成为本书的任务。

同既有研究不同,本研究集中于“农民工如何保护权益”,将农民工看成“社会行动者”,研究对象是中国农民工在劳动仲裁和诉讼外的维权行为,目的在于揭示农民工这种维权行为的外在社会结构与内在行为逻辑。而既有研究集中于

“如何保护农民工权益”这个论题,或者对保护农民工权益的正式法律制度进行探讨(制度对策模式),或者侧重在国家正式法律之下衡量农民工的维权行为、解释其维权困境(维权行为模式)。既有研究大都将农民工看成“被保护者”,以寻求国家正式法律制度的改进对策。

“国家—社会”是本书的分析框架基础,但本书不囿于此,还引入国家元场域(Meta-field)理论、底层社会(Subaltern)理论、“过程—事件分析”和“策略的行为分析”并对其作重大修正,以期突破国家与社会的整体均质性和二元静态对立性。在研究方法上,规范法学方法是本研究的非常重要方法,没有依据国家法律对民工、企业和政府官员的行为合法性(Legitimate)的判断,就不可能在比较中揭示他们行为背后蕴涵的社会规则。在此基础上,笔者采用实地考察的定性社会科学研究方法,通过对农民工讨薪行为过程的无结构观察和对农民工、用人单位、政府官员进行的非正式访谈,得到大量第一手资料作为基础对民工维权活动进行进一步的法社会学诠释。在研究对象上,尤其是在考察农民工维权原因和过程时,则多采用个案研究方法。

本书在研究过程中将“如何诠释农民工劳动仲裁和诉讼之外的维权活动”分解为如下三个问题:(1)为何很多农民工长期通过劳动仲裁和诉讼之外的途径进行维权活动?(2)他们怎样进行这些维权活动?(3)如何看待这些维权活动?对这三个问题的回答,构成本书三个具有内在逻辑的组成部分。

第一章是理论概念的准备。在既有的“依法维权”和“利益抗争”概念基础上,笔者在实证基础上将当代中国农民工劳动仲裁和诉讼外的“维权活动”抽象提炼为“非正式的利益抗争”,为后几章讨论建立逻辑一致的概念平台。

第二章探讨第一个问题,即为什么农民工进行非正式的利益抗争?为突破既有分析要么注重结构要么注重行为的方法论一元性,笔者尝试运用社会学家布迪厄的场域——惯习理论对农民工非正式的利益抗争提出独特的解释。在全景式地叙述了一群建筑农民工在

班长陈明带领下坚持讨薪的故事后,笔者分析了讨薪行为是打工场域的社会结构及农民工心智结构相互作用的惯习(Habitus)。惯习行为既不是理性的,也不是非理性的,它的实践逻辑具有过程性、变通性和模糊性。

第三、四、五章回答第二个问题,即农民工怎样进行非正式的利益抗争?基于西南边陲一个农民工成功讨薪的真实案例——“太太讨薪队的故事”的个案分析,第三章揭示了案件各方力量包括农民工、包工头、媒体、地方政府和企业的博弈及其社会运行规则,展示了农民工如何借助社会资源,激发道德力量促使法律关系道德化运行的过程。在笔者对农民工行政投诉过程的参与观察和归纳分析基础上,第四章描述了农民工如何借助行政力量讨薪的过程。面对民工的经验性投诉,劳动部门往往通过劳动监察权正式和非正式地灵活运用如催讨、协调等来解决民工工资纠纷,促使用人单位履行劳动合同义务。农民工借助行政力量讨薪的过程实质是法律关系行政化运行的过程。第五章在于揭示农民工借助集体行动力量讨薪使得法律关系政治化运行的过程。通过亲身经历的民工讨薪集体行动典型个案的“过程—事件”分析,笔者描述了民工们借助集体力量执行他们认定的“合法讨薪规则”追讨工资,政府既支持又控制地积极进行协调,建筑开发商被迫履行超越合同规定的义务,从而民工得到部分工资回家过年的过程。总之,农民工非正式的利益抗争往往是借助国家与社会的各种力量,有意无意促使法律关系非法律化运行,从而完全或部分成功地达到维权目标的过程。

第六、七章讨论第三个问题,即如何看待农民工的非正式利益抗争?第六章主要解读国家对农民工非正式利益抗争的态度。笔者首先将国家理解为各种社会势力争夺中央集权资本(Statist Capital)的特定场域,指出我国国家态度由中央政府和地方政府的共同表征。在社会争夺农民工非正式利益抗争符号暴力的语境下,中央政府法律与政策的表达是矛盾的,而地方政府的实践却力求在经济发展与社会公平之间、在用人单位与民工之间保持平衡。最终我们发现,国家的态

度是矛盾的和多样的,这恰恰为农民工非正式的利益抗争留下了行动空间。第七章主要以断裂社会为背景,从法治建设的角度来评判农民工非正式的利益抗争。农民工受到“非理性”、“法盲”等评价不过是精英视角的产物。如果从底层视角出发,就会发现农民工非正式的利益抗争是为了冲破经济精英和地方权力结成的“利益—权力结构之网”,是有自主逻辑和宏大意义的底层法治行动。中国法治已经进入中央政府、地方政府、精英阶层和底层社会相互博弈互动的真实的演进阶段。

结论部分总结出本书的中心命题:农民工劳动仲裁和诉讼之外的维权活动是农民工进行的法律关系非法律化运行的非正式的利益抗争,是断裂社会中底层社会民众冲破社会精英编织的利益权力之网的法治行动。简言之,它是以非正式的利益抗争为表现形式的底层法治行动。本书命题想告诉人们,在我们生活的世界,有一群底层社会民众在进行着不同的法治活动,从而为中国社会法治行动的多样性和复杂性提供现实案例。至于如何将目前农民工维权行动法律化,则需要进一步定量研究。

关键词:农民工维权 非正式的利益抗争 非法律化运行 底层法治行动

Abstract

The infringement of farmer – workers' rights and interests has become a much – discussed problem from the end of 1990s, among which the delayed payment of wage appears to be most conspicuous. To protect their own rights and interests, some farmer – workers take steps legally, such as labour arbitration and lawsuits while the majority others adopt varied, informal, eye – catching ways which exclude legal means and which seem to continue. Social opinions differ sharply about farmer – workers' informal way of protecting rights and interests, which goes south by driving the chariot north with our modern legal ideal and our government' s expectations. Then, how to understand and interpret the long – existing informal way of protecting rights and interests by farmer – workers? Only when we get to the back of this phenomenon, can we have a true understanding of the circumstances for farmer – workers to protect their rights and interests, give a convincing theoretical explanation of their action and provide

legal countermeasures, based on real life, for government and related departments which are in urgent need of routinized countermeasures. Therefore, the task for this dissertation is to make a research on this problem.

The existing research highlights **“how to protect farmer – workers’ rights and interests”**, adopting either a systematic countermeasure mode under which the formal legal system concerning the protection of farmer – workers’ rights and interests is carefully discussed or a rights protecting mode under which farmer – workers’ informal way or dilemma of protecting rights and interests is measured or interpreted according to the formal legal system. The existing research almost always regards farmer – workers as “the protected” and tries to seek for a resolution realized by the improvement of the legal system. Compared with the existing research, this one regards farmer – workers “social movers” and focuses on **“how farmer – workers protect their own rights and interests”**, taking Chinese farmer – workers’ informal ways of protecting rights and interests as research objects and aiming at revealing its external social structure and the internal logic of the said action.

Based on but not confined to the analytic framework of “government – society”, this dissertation strives to make very important modification of the said framework by the introduction of the governmental meta – field theory, subaltern theory, “process – event analysis” and “behavioral analysis of strategies”, hoping to break the overall uniformity and the binary static contrariety of government and society. Normative jurisprudence method is an essential analytic instrument, since we cannot reveal the hidden social rules behind their behaviors without the legitimate judgement of the behaviors of farmer – workers, businesses and public servants according to the law system. Furthermore, based on the firsthand material obtained by on – the – spot investigation, structureless observation

of the whole process of certain farmer – workers' wage demand and informal interview of farmer – workers, employing units and public servants, the author tries to interpret farmer – workers' actions of protecting rights and interests from the perspective of sociology of law. Case study is stressed in research objects, especially in the examination of the reasons and process of farmer – workers' rights and interests protection.

To interpret farmer – workers' informal way of protecting rights and interests, the author answers the following three questions in this dissertation: Why have farmer – workers long preferred informal ways to formal legal ways in protecting their rights and interests? How do they carry out their activities of protecting rights and interests? How to evaluate these activities? Answers to the three questions consist of the three components with intrinsic logic for this dissertation.

Chapter1: preparation of conceptions. In order to build a logically consistent conceptional platform for the discussion in the following chapters, the author abstracts and extracts “informal struggle for rights and interests” from farmer – workers' activities of protecting rights and interests which exclude legal measures, such as labour arbitration and lawsuits, on the basis of existing conceptions, for instance, “protecting rights and interests in accordance with the stipulation of law” and “struggling for rights and interests”.

Chapter 2: to answer the first question (Why do farmer – workers prefer informal struggle for rights and interests?) Not confined by the existing unitary methodology which stresses either structure or action, with Bourdieu's field – habitus theory, the author attempts to come up with unique interpretation for farmer – workers' informal struggle for rights and interests. After panoramically narrating the story of wage demand of a group of farmer – electricians on a building site led by their team leader,

Chen Ming, the author comes to a conclusion that the action of wage demand is the habitus resulting from the interaction between social structure and farmer – workers' mental structure in the part – time job field. Habitus behavior with procedurality, flexibility and ambiguity in its practical logic, is not an either – or question of rationality or irrationality.

Chapter 3 – 5: to answer the second question (How do farmer – workers carry out their informal struggle for rights and interests?). Chapter 3: Based on the case study of “farmer – workers' wives' wage demand story ” which actually occurred on the southwestern border, the author uncovers the game theory among the various forces—farmer – workers, labour contractors, media, local government, and businesses and its social operation rule and furthermore shows how farmer – workers, through social resources, promote **moralization operation of legal relations** by arousing moral forces. Chapter 4: Based on the observation and induction and analysis of farmer – workers' administrative complaints in which the labor departments, faced with farmer – workers' experiential complaints, try their utmost to solve the wage dispute through flexible use of labour supervision power formally or informally, such as an urge to pay or coordination, the author reveals the fact that farmer – workers' wage demand via administrative force is essentially a process of administrativization operation of legal relations. Chapter 5: Based on the analysis of the whole operation organism in which farmer – workers, guided by their own “legal wage demand rules”, demand their wages through collective forces, the government actively coordinates in an attitude both supportive and manipulative, and the developer are obliged to fulfil extra responsibilities, the author aims at unveiling the fact farmer – workers' wage demand via collective forces is essentially a process of **politicalization operation of legal relations**. In a word, farmer – workers' partially or completely achieve their goals in their informal

struggle for rights and interests via various governmental and social forces and in doing so they consciously or unconsciously promote **delegalization operation of legal relations**.

Chapter 6 – 7: to answer the third question (How to evaluate farmer – workers' informal struggle for rights and interests?). Chapter 6: governmental attitude towards farmer – workers' informal struggle for rights and interests. The author regards government as a particular field where various social forces struggle for statist capital, pointing out that the governmental attitude is indicated by that of both central and local governments. Under the circumstances of various social forces competing for symbolic violence over farmer – workers' informal struggle for rights and interests, the central government's stipulation of law and its expression of policies are contradictory with each other and the local government strives for a balanced point between economic development and social equality, employing unit and farmer – workers. The varied and contradictory attitude of the government leaves some room for farmer – workers' informal struggle for rights and interests. Chapter 7: against the fractured social background, to evaluate farmer – workers' informal struggle for rights and interests from the perspective of building a sound legal system. It's natural result from the elite perspective to degrade farmer – workers' informal struggle for rights and interests to “irrational” and “legal illiterate” activities. From the subaltern perspective, we'll find that farmer – workers' informal struggle for rights and interests is a subaltern legal action with its own logic and grandiose meaning, trying to tear open the web of “interest – power structure” elaborately knitted by economic elites and local powers. The building of a sound legal system in China has evolved into a phase where central and local governments, elite and subaltern classes compete and interact.

Central proposition in the conclusion: Farmer – workers' action of