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On Rural Collective Land Ownership Performing Model

董景山◎著



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序

“三农”问题是当前社会发展的“瓶颈”问题,农村集体土地问题是破解“三农”问题的关键点之一。农村集体土地法律制度极具复杂性,农村集体土地上所负载的功能多样且重要,如农村集体土地是农民生存的根本,肩负着社会保障及农民增收的功能;同时,农村集体土地又为我国城市化扩张提供必需的土地资源;另外,土地还是保障粮食安全、维护良好生态环境的物质基础。如何让农村土地充分、可持续地发挥其各种功能,有很多法律问题值得并亟待深入研究。

景山同志选择农村集体土地问题作为研究对象,具有重要理论价值和现实意义。由于农村集体所有权制度在传统民法理论中并不存在,选择农村集体土地所有权行使模式作为切入点,会增加研究的难度,很可能会劳而无功,这需要作者有一定的学术勇气。

本书从理论上梳理了农村集体所有权的含义,并对我国农村集体土地所有权产生发展的历程从所有权行使的视角进行了分析,对农村集体土地所有权不同时期行使模式进行了剖析与评价。难能可贵的是,

在对农村集体所有权行使模式进行分析评价时,能比较冷静客观地评价其利害得失,如人民公社时期“公有公用”的农村集体所有权行使模式,作者认为该模式对农村土地的整理、农村土地的改良(当时很多凌乱分散的低产田被改良为成片的中高产田)、以及农村水利等基础设施建设方面,都因为其“公有公用”的特点避免了分散产权情形下可能出现的冲突从而得以实现上述良好的土地利用形态。但是,作者也认可有学者指出的“公有公用”模式下农村集体经济组织成员的“搭便车”现象,并认为人民公社时期农村集体土地所有权行使模式失败的主要原因在于其制度设计过于粗糙。

本书重点放在当前农村集体土地所有权行使诸多创新模式的研究,作者认为当前农村集体土地所有权行使模式的诸多创新,乃是由于农村土地承包制度的制度红利已近枯竭,随着时代的变迁其已经从推动农村发展的土地利用制度逐步转变为阻碍农村发展的情形,如当前农村水利等基础设施的严峻落后状态、农村土地整理与土地改良的困境,都与以农户为基本单位的土地承包经营权的排他性有直接关系,因此农村集体土地所有权行使模式必须进一步创新。经过对当前农村集体土地所有权行使模式的梳理,认为农村集体土地所有权行使应回归“集体”。从法理上对农村集体土地所有权的价值取向进行了剖解,认为农村集体土地所有权制度的坚持对于缩小农村两极分化具有重要意义。但是,基于现代农业规模化发展的必然要求,又必须改变以农户为基本单位的农村集体土地所有权行使方式。基于上述两方面因素的考量,提出我国农村集体土地的利用应该通过土地承包经营权流转的方式流转向农村社区合作社和农民专业合作社,从而既保证农村土地的利用符合现代农业的发展要求,又达到优化农村土地资源配置、平等保障农民利益、维护生态环境等农地利用的核心目标。

当然,文中有些内容还有值得深入之处,农村社区合作社与农民专

业合作社在进行农村土地利用过程中如何保障农村落后农户入社的机制等尚需进一步探讨。农村社区合作社与村委会之间的关系如何处理也有待于进一步廓清。

从行文中可以看出作者对农村民生的热切关注,也可以看出作者很强的社会责任感与历史使命感,希望其在以后的学术道路上能始终保持这种悲悯情怀,也期盼作者在土地法律制度领域的研究不断深入下去……

是为序。

赵中孚

2012年2月8日

摘 要

“三农”问题已经成为影响我国社会发展的关键问题。从民法视角看,“三农”问题其实际是农村集体所有权问题,因为农村集体所有权是与农民直接相关的权利,是关乎农业和农村发展的重要民事法律制度,可以说正是农村集体所有权将农民、农业和农村贯穿起来。我国农村集体所有权是伴随着社会主义制度而诞生的,农村集体所有权在我国自诞生起就一直处于制度变迁过程中,在不同阶段体现出不同的特点,并体现出不同的行使模式。

农村集体所有权是牵涉范围较广的复杂的民事法律制度,可以从多个角度展开研究。本书主要从农村集体土地所有权行使模式入手,从民法视角梳理出农村集体所有权行使框架的制度变迁路径。对我国现行农村集体所有权的相关立法上的问题进行探讨,并梳理出农村集体土地当前“公有私用”行使模式面临的困境,结合农村集体土地所有权行使模式的创新实践,探讨出农村集体土地所有权行使模式的变革方向。

本书各章的重点内容依次为:导论,简述写作缘起,研究重点及研究方法。

第1章,农村集体所有权内涵辨析。廓清农村集体所有权的内涵、性质,为下面展开研究奠定基础。农村集体所有权本质上而言是一种私权,但这种私权又具有公有的特点。就其性质而言,传统民法理论并没有完全合辙押韵的理论能直接套用到农村集体所有权之上,从其具有的内核来看,农村集体所有权的确具备传统“总有”的许多痕迹,有学者将其概括为“总同共有”或“新型总有”,这在一定程度上有助于更好地把握农村集体所有权的性质。

第2章,制度变迁与农村集体土地所有权的立法演变。从制度变迁角度看,农村集体所有权的产生及制度变迁与农村生产力的发展状况有一定的伴随关系。农村集体所有权是在农村互助合作的基础上演变而来。农户之间让渡相关动产使用权能和劳动力的互助合作可谓是我国农村集体所有权的萌芽。初级社是农村土地所有权“私有共用”的行使模式,农户的土地及主要生产资料的所有权和使用权发生了分离,所有权仍归属于农户,但使用权能由初级社统一行使,即实行“私有共用”。该模式既保障了农户进退自由的权利,又很好实现了农户与合作社对农村土地及生产工具等不动产和动产的使用权能、收益权能的共同支配权,能够保障农户在初级社中的成员权,因此初级社的私人所有权和集体所有权共存的所有权结构在当时不失为成功的制度设计。高级社与人民公社时期农村集体所有权实行“公有公用”的行使模式,即由农村集体经济组织享有所有权,并对使用权能等行使支配权。高级社中农民对土地和主要生产资料的私人所有权转化为农村集体所有权,这种制度变迁有一定强制性制度变迁的色彩。人民公社是高级社的联合,同样带有政府主导的强制性制度变迁色彩。由于人民公社的制度设计过于粗糙:组织机构不健全,社员的成员权模糊不清。进而客

观上导致农村集体经济组织成员权的不平等,这是人民公社时期农村集体所有权行使上的致命缺陷。农村土地承包后,农村集体土地所有权与使用权发生分离,农村集体土地所有权转变为“公有私用”行使模式,即农民集体作为农村集体土地所有权的主体,农户享有土地承包经营权(即农村集体土地的使用权能)。现行立法已经将这种模式固定下来。

第3章,农村集体土地所有权的当前问题及解决思路。着眼于当前农村集体土地所有权“公有私用”的行使模式,从国家层面的立法看,由于农村集体所有权和使用权的二元分离,立法上规定农村集体经济组织、村委会、村民小组等作为农村集体土地所有权的管理主体,农民集体为农村集体土地所有权的归属主体,但是在行使过程中存在农民集体意志与上述管理主体的意志对接问题。地方立法上存在农村集体所有权主体的立法混乱问题,在一定程度上也对农村集体土地所有权的行使产生负面作用。农村集体土地使用权能(即土地承包经营权)的物权化在一定程度上也与农民集体成员平等的成员权相冲突。我国当前农村集体土地所有权“公有私用”的行使模式面临诸多困境,这些困境的根源在于农村集体土地使用权能即土地承包经营权的细碎化状态,由于土地承包经营权的排他性导致农村集体土地使用权能难以规模化行使。因此,农村集体土地所有权“公有私用”的行使模式必须进行变革。针对现行农村集体土地所有权“公有私用”的行使模式面临的困境,理论界提出农村集体土地私有化与国有化的解决思路,但分析后认为这两种思路均不可行。唯一可行的思路是在坚持农村集体土地所有权基础上进行制度创新。

第4章,农村集体土地所有权行使的创新模式。农村社区股份合作改革,以农村集体经济组织改制为基础进行的股份合作。选择广东南海、东莞、浙江宁波北仑区以及上海、北京等地的农村集体所有权股

份合作的实践作为研究对象,考察上述各种模式的利弊得失。认为通过农村集体所有权股份合作改革,实现了农村集体土地使用权能的集中统一行使的目的。农民在农村集体经济组织的成员权转化为股权,并对农村集体经济组织进行组织机构改造,通过设立股东大会、理事会、监事会等组织机构及股东权行使程序,保障了成员权的落实。但是,现行各地的农村集体所有权股份合作改革也存在诸多问题。针对农村集体土地使用权集中行使的其他模式进行考察,以合同为基础的“公司+农户”模式,虽然可以实现农村集体土地使用权能的集中行使,但是其具有不稳定性,不能改变农户作为农业生产经营的基本民事主体地位。土地流转给“农业大户”模式,可能会发生农村土地集中,产生大量失地流民等不良后果。因此土地承包经营权流转应探索系统化的既能解决农村剩余劳动力就业、提高农户收益,又能促进农村集体土地使用权能规模化效应的土地流转模式。土地合作社模式是土地流转的特殊形式,是保留土地承包经营权基础上实现农村集体土地使用权能规模化效应的模式。另外,还对我国现存的农村集体所有权“公有公用”的行使模式进行了探讨,认为只要有周密的保障平等成员权落实的制度设计,能够避免当前农村集体所有权“公有私用”行使模式面临的困境,并能有效实现农村的自我工业化、城市化。

第5章,农村集体土地所有权行使模式的重构。分析认为,我国农村集体所有权追求农民集体成员的互助合作,强调以人为基础的平等的成员权。通过对小岗村的再认识,并结合前几章的讨论,认为我国目前农村集体土地所有权行使模式创新应着重选择两条道路:一是构建农村社区合作社法人,农户将土地承包经营权流转回农村集体经济组织(农村社区合作社)。农村社区合作社法人需按合作社法人要求设立完善的组织机构,清晰界定成员的成员权及其行使和实现程序,以实现农村集体土地使用权能的规模行使。二是通过农民专业合作社实现农

村集体土地使用权能的规模行使。这种模式与我国农村集体所有权追求的目标具有一致性。但是,我国目前的合作社法律体系还不健全,应该立法鼓励设立多层次、多类型的合作社,并立法引导合作社吸收弱势农户入社,防止农村两极分化。上述两种模式的实施与成效还需其他制度的辅助。

关键词:农村集体土地所有权;农民集体;股份合作;合作社;行使模式

Abstract

This issues concerning agriculture, rural areas and farmers have become the crucial issue that is influencing the social development of our country. From the perspective of the civil law, this issues concerning agriculture, rural areas and farmers are actually about the problem of rural collective land ownership, because the rural collective land ownership is both the right directly related to farmers and the important civil law system concerning agriculture and the development of rural areas. It is the rural collective land ownership that connects farmers, agriculture and rural areas together. The rural collective land ownership of our country came into being along with the emergence of the socialism system. The rural collective land ownership of our country has changed constantly since it emerged which shows different characteristics and various modes of execution.

The rural collective land ownership is a

complicated civil law system that involves comparatively wide areas; consequently it can be studied from many different perspectives. This thesis mainly focus on the performing model of the rural collective land ownership, and try to organize the changing path of the rural collective land ownership's performing model from the perspective of the civil law. Moreover, the thesis will probe into the problems concerning the related legislation of the current rural collective land ownership in our country, and then find out the difficulties that the performing model of "publicly-owned but privately-used" for the rural collective land ownership is facing now. Combined with the innovation practice of the performing model for the rural collective land ownership, this thesis will figure out the changing direction of the performing model for the rural collective land ownership.

The important points of the thesis are as follows: The introduction includes the reasons why this thesis is written, the key points and the researching methods.

Chapter I Analyzes the connotation of the rural collective land ownership. This chapter clarifies the connotation and nature of the rural collective land ownership, and lays the foundation for the following researches. The essence of the rural collective land ownership is a kind of private right, but this private right is also marked by the characteristic of public ownership. In terms of the nature of the rural collective land ownership, there are no appropriate or corresponding theories that can be used directly on this ownership. Moreover, in terms of the core of the rural collective land ownership, it is really featured by many marks of the traditional "public ownership". Many scholars summarize it as "public ownership" or "the new-typed public ownership", and to some extent this is

helpful for us to understand the nature of the rural collective land ownership.

Chapter II Illustrates the changing path of the rural collective land ownership system. From the perspective of the changing system, the emergence of the rural collective land ownership and the change of the system are to some extent related accordingly to the development status of the rural productive force. The rural collective land ownership has evolved from the basis of mutual assistance and cooperation in rural areas. Alienation of the right to use movable properties among farmers and mutual assistance and cooperation of labor in rural areas can be called the beginning of our country's rural collective land ownership. The performing model of the elementary agricultural producers' cooperatives is "privately-owned but shared in common", that is to say, the ownership of the farmers' land and major means of production is separated from the right to use them. The ownership still belongs to the farmers, but the right to use is exercised by the elementary agricultural producers' cooperatives, which is called "privately-owned but shared in common". This mode not only protects farmers' rights to advance or retreat freely, but also realizes the farmers and cooperatives' common rights to control the rural land and the right to use the immovable properties such as tools of production, the movable properties, and the income rights. Furthermore, the farmers' right of membership in the elementary agricultural producers' cooperatives can also be guaranteed. Consequently, the ownership structure of the coexistence of private ownership and collective ownership in the elementary agricultural producers' cooperatives is a successful system design at that time. The advanced agricultural producers' cooperatives and the rural collective

ownership of the people's commune implemented the performing model of "publicly-owned and publicly-used", that is, the rural collective economic organizations enjoyed the ownership and exercised the right to control the right to use. In the advanced agricultural producers' cooperatives the farmer members' private ownership of land and major means of production is transferred into rural collective ownership, and this system change is sort of mandatory. People's commune is the union of the advanced agricultural producers' cooperatives, and also featured the government-leading mandatory system change. Due to the rough design of the people's commune system, which includes the imperfect organizations and institutions and the obscure identification of the membership of the commune, the membership of the rural collective economic organizations was objectively made unequal, which is the fatal defect about the exercise of the rural collective ownership during the people's commune period. After the rural land was contracted by the farmers, the ownership of the rural collective land was separated from its right to use, and the ownership of the rural collective ownership was transferred into "public-owned and privately-used" mode of execution, that is, the farmers collectively became the subject of the rural collective land ownership, and they enjoy the land contract and management rights (i. e. the right to use the rural collective land). The current legislation has already stabilized this mode.

Chapter III Covers the legislation problem of the rural collective ownership and the difficulties it is facing, and the solutions towards these problems and difficulties offered by the field of theories. Much attention will be paid to the "publicly-owned and privately-used" performing model of the current rural collective land ownership. From the perspective of the

national legislation, because of the binary separation of the ownership and the right to use, the legislation provides that the rural collective economic organizations, village committees and village members are the management subject, and the farmer's collective is the owning subject of the rural collective land. However, there are coordination problems between the will of farmers collective and the above-mentioned management subject during the process of exercising the law. There are legislative confusion problems with the local legislations about the rural collective ownership subject, and this to some extent has some negative influences on the exercise of the rural collective land ownership. The materialized right of the right to use the rural collective land(i. e. the land contract and management rights) is to some extent contradictory to the equal membership right of the members in the farmers collective. The "publicly-owned and privately-used" mode of execution in our country's current rural collective land ownership is facing many difficulties now, and these difficulties originate from the fragmentally organized rights to use the rural collective land ownership i. e. the land contract and management rights. Due to the exclusiveness of the land contract and management rights, it is hard to exercise the right to use the rural collective land on a large scale. Consequently, the "public-owned and privately-used" performing model of the rural collective land ownership must be reformed. With regard to the difficulties the "public-owned and privately used" performing model of the rural collective land ownership are facing now, the theory field put forward the solution of the privatization or the nationalization of the rural collective land, but these two solutions are considered infeasible after being analyzed carefully. The only feasible solution now is to make system innovations on the basis of the rural