



张广荣 / 著

# 我国农村集体土地 民事立法研究论纲

——从保护农民个体土地权利的视角

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**图书在版编目 (CIP) 数据**

我国农村集体土地民事立法研究论纲/张广荣著. —北京: 中国法制出版社, 2007. 7

ISBN 978 - 7 - 80226 - 235 - 5

I. 我… II. 张… III. 农村 - 集体所有制 - 土地法 - 立法 - 研究 - 中国 IV. D922. 301

中国版本图书馆 CIP 数据核字 (2007) 第 107166 号

**我国农村集体土地民事立法研究论纲**

WOGUO NONGCUN JITI TUDI MINSHI LIFA YANJIU LUNANG

著者/张广荣

经销/新华书店

印刷/涿州市新华印刷有限公司

开本/850 × 1168 毫米 32

版次/2007 年 9 月第 1 版

印张/7.875 字数/171 千

2007 年 9 月印刷

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中国法制出版社出版

书号 ISBN 978 - 7 - 80226 - 235 - 5

定价: 18.00 元

北京西单横二条 2 号 邮政编码 100031

传真: 66031119

网址: <http://www.zgfs.com>

编辑部电话: 66078158

市场营销部电话: 66033393

邮购部电话: 66033288

**谨以此书献给那些  
勤劳善良的中国农民和  
为维护农民权利做出贡献的人们！**

## 作者简介

张广荣，男，1974年生，籍贯山东，现居北京；北京大学民商法法学博士，中国社会科学院财政与贸易经济研究所应用经济学博士后；在《法学杂志》、《南京师范大学学报》、《北京商学院学报》、《北大法律信息网》、《中国经济时报》、《中国改革报》、《中国国土资源报》、《法制日报》、《金融时报》等发表文章十余篇，参与国家社会科学基金项目课题组；有国有大型金融机构、部委研究机构、国家机关工作经历。

## 自序

2007年3月16日,《中华人民共和国物权法》由十届全国人大五次会议表决通过,并于同年10月1日起施行。我们知道,民法是确认和保障市民社会之市民民事权利的基本法律,而物权法作为民法的一部分,对民事主体的各种各样的财产权利加以确认和保护,其重要性不言而喻。正因为如此,英国学者约翰·洛克认为“没有个人物权的地方,就没有公正”,法国大思想家孟德斯鸠也曾说过:“在民法的慈母般的眼里,每一个个人就是整个的国家”。

本书所讨论的农村集体土地民事立法问题恰恰是我国物权法所要调整和规范的重要对象之一。本书从保护农民个体土地权利的视角,对我国现行农村集体土地制度的历史形成、既存立法、农民土地权利的行使实践进行了系统研究,并进而提出应当以农村社区法人土地制度对其进行改造。

刚刚颁布的《物权法》在农村集体土地制度问题

上,明确了农民土地承包经营权为用益物权,土地承包期届满由土地承包经营权人按照国家有关规定继续承包;列出了农村集体成员有权决定的具体事项;进一步加强了对被征收土地的农民的权益保护,增加了对失地农民的社会保障、居住等生活保障规定。

作者认为,《物权法》相比于之前颁布的有关农村集体土地的立法,对农民个体权利的保护有一定程度的进步,但在农村集体土地制度设计上采取了基本沿袭的“保守”态度,没有进行较大幅度的制度创新,这样的做法有它时代合理的立法原因。也正因为如此,随着我国改革开放实践的深入和经济发展,随着广大农民对个体财产权利的进一步要求,我们需要站在保护农民个体土地权利的角度继续完善农村集体土地制度,我国农村集体土地立法仍然有很大的制度设计空间和任务。

此次,作者值今年物权法出台之际将完稿于2006年的本论文整理出版,主要有三个目的:一是希望本书的出版能够深化人们对民法物权法,特别是农村集体土地制度的认识,也算赶个“时髦”;二是希望本书观点能够对我国将来的物权法司法解释和民法典起草工作有些微启示;三是以此“载体”纪念自己的学习和研究过程。

另,为较为清晰地说明我国关于农村集体土地立法的发展轨迹,本书最后依立法时间顺序附录我国《民法通则》、《村民委员会组织法》、《农村土地承包法》、《农业法》、《宪法》、《土地管理法》、《物权法》等相关重要法律之部分条文(或全文)于后。

需要说明的是,为了保持论文写作时的原貌,本书凡涉及新出台物权法的内容,大多仍引用《物权法(草案)》的相关条文。诚如上文所言,这样处理的目的是以期对未来的物权法司法解释和民法典起草工作有些微启示。有兴趣的读者阅读时可参考本书附录中的《中华人民共和国物权法》对照使用。

书中不妥和疏漏之处,敬请各界前辈和同仁批评指正。

作者

二〇〇七年七月

## 内容摘要

论文从保护农民个体在农村集体土地上的民事权利的角度,对我国现行农村集体土地制度的历史形成、既存立法、农民土地权利的行使实践进行了系统研究,并进而提出应当以农村社区法人土地制度对其进行改造。

论文通过历史考察,认为我国农村“集体土地”制度并不是经济自然演进的结果,“集体”的概念并不符合传统民法理论。论文通过对我国农村集体土地制度的法律规定及其演变的考察,认为我国立法发展脉络是朝着保护农民土地权利迈进的。论文通过分析我国民法学界关于农村集体土地制度基本概念的表述,认为现有的理论并没有能够解释清楚农村集体土地所有权的基本问题,尤其是集体所有权的主体问题、集体成员权利问题等,因此,论文认为,针对实践中存在的侵犯农民土地权利问题,用民法理论改造现有的农村集体土地制度实为



必要。

论文从有利于保护农民个体民事权利的角度出发,通过对当前我国农村集体土地制度立法进行详细梳理,分析讨论了当前我国立法在关于农村集体土地所有权和农民土地权利行使、保护规定上存在的问题。论文通过考察立法,认为我国立法并没有明确“集体”的法律内涵,现行制度下抽象“集体”作为权利主体的缺位,给侵害农民个体土地权利带来了可能。论文通过具体分析农村集体土地所有权权能缺失的立法局限,认为这种权能缺失违反了民法平等精神,带来的后果必然是现有集体土地所有权主体不能从可产生巨大经济效益的土地商业性利用中获得应得利益,难以避免基层政府由于利益的驱使和现存集体土地所有权行使主体相互勾结,合谋侵犯农民权益。解决问题的着眼点应该在民法保护私权的框架内,即通过改造集体土地所有权及其行使主体实现保护农民土地承包权益的目标。论文在具体分析了当前我国民法学者对农村集体土地所有权主体性质的不同学理解释后,指出,在现代物权法强调财产权利的重心逐渐由所有权向使用权转变的情况下,更加重视对农村土地使用权的关注也许才更具有实际意义。论文针对学者在起草物权法过程中产生的关于所有权类型之争,指出,学者都承认在我国现实中存在着集体所有权,并认为应该在物权法中加以规定。学者观点的差别在于将集体所有权置于何种地位加以规定。我们不能由于将焦点和争议集中在“空洞”的法律章节安排而停滞物权法立法进程,而应当从实际出发,推动立法进程,将立法讨论重点放在更加具体和有效的条文上来。论文认为,集体土地所有权如何行使问题颇值得关注,因为它关系到集体土地所有权存在的意义。论文通过对农村集体土地使用权立法演进的考察,指出我国在农村集体土地使用权立法方面的用语混乱且不一致,但仍能得出农民的集体土地

使用权权利体系构成。论文就农村土地承包经营权的性质及我国农村土地上的权利称谓进行了深入探讨,认为采用物权说是民法学界当然的选择,应以地上权和农地承包权来命名我国土地上的权利称谓。

论文集中讨论了农民土地权利的行使实践。论文通过阐述农民土地承包经营权基本实践形式及土地规模化经营创新实践,指出,虽然这些农村土地利用创新实践能够发挥一定的积极作用,但由于当前我国农村集体土地所有权行使主体运作模式存在问题,立法对承包土地的个体农民权益保护不够,使得这些土地利用创新实践过程中极易发生“集体”所有权行使主体(主要是村民委员会等组织)及基层政府等公权违背农民意愿、侵犯个体农户自主权利的现象。所以,土地流转是必要的,但必须以通过完善“集体”和个体农户权利合理分配和权利保护的立法为前提,否则,任何土地权利流转制度创新都将发生侵犯农民土地权利的危险。论文通过对我国关于农民土地承包经营权流转方式的立法进行分析,指出,立法虽然迫于农民和农业市场发展的实践需要承认了农民土地承包经营权的流转,但却附加了许多不合法理和实践的限制性条款,将一些本该属于个体农民的权利以及可以由政府通过行政管理手段对耕地和农业进行保护的职责,赋予了存在诸多问题的集体经济组织或村民委员会,必然带来极大弊端,不利于保护农民土地权利。论文阐述了土地征收(征用)和农民宅基地使用权制度实践中存在的问题。论文指出,应当严格限制土地征收,征收过程中应当强调土地承包农户而非抽象“集体”的利益保护。在当前客观情况下,立法应当允许农民宅基地使用权流转,限制是不可能也是不必要的。

论文在最后结尾部分提出要以农村社区法人土地所有权制度改造现行农村集体土地制度。论文通过对农村集体土地国有化和

私有化方案的简评，否定了这两种革命性的改革方案。论文认为，采用农村“社区法人”概念用语具有先进性、合理性，符合民法科学；而既有的“农民集体”概念用语具有落后性，也不符合民法规范。论文认为，构建农村社区法人应以我国民法之社团法人为基础，仿照公司法人治理结构进行。论文努力尝试对农村社区法人土地所有权制度进行细致深入的设计，创新性地提出以社区法人替代村民委员会作为农村集体土地所有权的行使主体，认为，村民委员会作为农村集体土地所有权行使主体存在极大弊端，在村民小组（或自然村）基础上构建独立于村民委员会之外的社区法人，不仅是必要的，而且具有可行性。论文提出，农村社区法人土地制度必须以保护农民权利为具体制度设计之前提，同时必须弱化社区法人权利，这样才能实现保护个体农民土地权利的立法目的。论文结合我国的物权法，就社区法人土地所有权及农民土地权利保护提出了具体的立法条文建议。

**关键词：**农村集体土地所有权 农民土地承包经营权 农村社区法人土地所有权

## Abstract

From the angle of safeguarding individual farmer's civil rights on rural collective land, the dissertation renders a systemic research on such problems as the formation of collective land system, the existing legislation, exertion of farmers' rights on land and further proposes that rural communal legal person land system should be established.

Based on research on history, the thesis demonstrates that "collective land" system in our country is not the result of natural economic evolvement. The concept of "collective" does not accord with traditional theories of civil law. Through research on the stipulation of rural collective land system in our country and its evolvement, the dissertation demonstrates that the development orientation of legislation in our country is towards safeguarding of farmers' rights on land. Through

analyzing statements for the basic concept of rural collective land system in the academic field of civil law, the dissertation holds the view that the existing theories do not have a clear understanding of the basic issues of rural collective land ownership, especially subjects of collective ownership and rights of members of collectives and etc.. Therefore the dissertation demonstrates that regarding issues of encroachment on farmers' rights on land, it is truly necessary to reform the current rural collective land system with theories of civil law.

From the angle of assisting safeguarding of individual farmer's civil rights, through a complete review of the current of rural collective land system the dissertation discusses the existing problems in the stipulations in our country in the aspects of rural collective land ownership, exertion of farmers' rights on land and protective regulations. Through research on stipulations the thesis holds the views that the stipulations in our country do not provide a definite legal connotation for "collective". In the current system abstract "collective" being the subject of rights increases the possibilities of encroachment on farmers' rights on land. By analyzing the loss of contents of rural collective land ownership, the thesis demonstrates that the loss goes against the equality spirit of civil law, and the result will be the current subjects of collective land ownership can not obtain interests they deserve from the commercial utilization which can produce great financial benefits and the phenomenon occurs that driven by interests and benefits the basic-level governments collude with the current subjects collective ownership to encroach on farmers' legal rights. The key resolution is to achieve the aim of safeguarding farmers' right to contract for management of land through reforming collective

land ownership and its subjects within the frame of civil law protective rights. After analyzing the various academic explanations by scholars in the field of civil law science for the nature of subject of rural collective land ownership, the thesis demonstrates that taking more importance of rural land utilization right will be more practically significant under the condition that modern real right law emphasizes on the gradual transition of barycentre of property right from ownership to utilization right. Regarding the differences among scholars on the types of ownership during the process of drafting Real Right Law, the thesis demonstrates that scholars all agree that there exists collective ownership in our country and it should be included in Real Right Law. The difference among scholars is on what position collective ownership should be regulated. We should not terminate the legislation process just because of concentrating on differences on orders of law articles. Instead we should promote the legislation process starting from the reality and emphasize the discussion point in legislation on more specific and effective articles. The thesis holds the view that how the collective land ownership is performed should be quite concerned about, for it relates to the significance of existence of collective land ownership. Through research on evolvement of legislation on rural collective land utilization right, the thesis demonstrates that words used in legislation on rural collective land utilization right in our country is quite confusing and divergent, but they can still formulate the right system of farmers' collective land utilization right. The thesis further explores and discusses the nature of rural right to contract for management of land and titles of right on rural land in our country. The thesis demonstrates that utilizing theories of real rights is the certain choice in the academic

field of civil law, and superficies and right to contract of rural land should be used to nominate the title of right on land in our country.

The thesis discusses the practice of farmers' performing rights on land. Through stating the basic practice ways of farmers' right to contract for management of land and the creative practice of land massive management, the thesis demonstrates that although these creative rural land utilization practices can play certain active role, during the process of creative land utilization practices takes place the phenomenon that subjects of "collective" ownership (mainly village committee) and basic - level governments go against farmers' wishes and encroach on individual farmer's self-determination right, for there exist problems in operation patterns of subjects of current rural collective land ownership and legislation does not safeguard farmers' rights and interests in an effective way. Therefore rural land right transfer is essential, but it must be based on complete legislation on reasonable distribution between "collective" and individual farmer and right protection. Otherwise any rural land right transfer creativity may bring the risk of encroachments on farmers' right on land. Through analyzing legislation on transfer of farmers' right to contract for management of land in our country, the thesis demonstrates that although because of requests by farmer and agricultural market development acknowledges transfer of farmers' right to contract for management of land, it adds many limited articles against theories of law and practice. It endows collective economic organizations or village committee with many problems with some rights individual farmer deserves and some duties by the government in an administrative way to safeguard land and agriculture. This action will certainly bring large malpractices which is

not helpful in safeguarding farmers' right on land. The thesis elaborates the problems that exist in land imposition (expropriation) and practice of system of farmers' usufructuary of land for building, and demonstrates that serious limits should be set on land imposition and we should emphasize on safeguarding of interests of farmer who contract land instead of abstract "collective". On current condition, legislation should allow transfer of farmers' usufructuary of land for building, and it is impossible and unnecessary to set limits on this.

In the end the thesis demonstrates that rural collective land system should be replaced by rural communal legal person's land ownership. Through remark on rural collective land nationalization and privatization, the thesis denies the two revolutionary reform schemes. The thesis holds the view that utilizing the concept of rural "communal legal person" is advanced and reasonable which conforms to civil law science, while the existing concept of "farmer collective" is backward which does not accord with civil law standard. The thesis demonstrates that formulating rural communal legal person should take the juridical association in civil law in our country as its basis imitating the managing structure of corporation legal person. The thesis tries to make an extensive and further design on rural communal legal person's land ownership, puts forward in a creative way the replacement of village committee by communal legal person as the performing subject of rural collective land ownership. The thesis holds that there exist large malpractices with village committee as the subject of rural collective land ownership. It is necessary and reasonable to construct communal legal person independent from village committee on the basis of farmer groups (or natural villages). The thesis puts forward that rural



communal legal person' s land system should be established on the premise of safeguarding farmers' rights, and at the same time communal legal person' s rights must be weakened to achieve the aim of safeguarding individual farmer' s rights on land. In link with the real rights in our country, the thesis puts forward specific suggestions on legislation articles in communal legal person' s land ownership and safeguarding of farmers' rights on land.

**Keywords:** Rural collective land ownership, Farmers' right to land contractual management, Rural communal legal person' s land ownership