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中国公民

养老权

刘灵芝·著

研究

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序 言

人口老龄化是 21 世纪人类发展的主要特征之一，也是当今世界各国面临的一个重大社会问题。中国已于 20 世纪末进入人口老龄化社会，并且人口老龄化速度在加快，2009 年，中国 60 岁及以上老年人口已达到 1.67 亿，占总人口的 12.5%。中国养老问题正面临着两难境地，一方面是传统家庭养老功能在弱化，另一方面是社会化养老助老事业还没有充分地发展，因而养老问题已成为带有全局性、战略性的重大问题。

在法哲学的视野中，老年人养老保障问题的核心可以归结为养老权问题。刘灵芝博士在攻读博士学位期间，以中国公民养老权作为其博士论文的选题，进行了专门的研究，并有一系列的相关成果发表，其研究成果已在学界产生了一定的学术影响。《中国公民养老权研究》一书是刘灵芝博士在其博士论文基础上修改完成的，是她对公民养老权问题潜心研究的最终成果，倾注了她多年的心血。

《中国公民养老权研究》一书立足于中国已进入人口老龄化社会的现实，从法哲学的视角，对中国公民养老权的权利属性、中国公民养老权的历史发展和现状、中国公民养老权的正当性、中国公民养老权的权利结构、中国公民养老权实现的对策以及中国公民养老权的可诉性等进行了较为系统的论证。近年来，法学界对中国公民养老保障及其制度建设问题已经进行了大量的、有意义的研究，但现有的研究很少有将公民养老问题上升到权利理论的高度，上升到人权理论高度的论证则更少，刘灵芝博士能在

这些方面进行积极而有益的探索是难能可贵的，反映了她所具备的理论功底和理论素养。

当然，书中难免存在不足之处，如在外文资料的收集和运用方面还稍有欠缺，但总体上来看，本书不失为一本具有较高理论深度的著作。我作为刘灵芝的导师，希望她以此为起点，在学术研究的道路上能继续潜心研究，以取得更加优异的成绩。

是为序。

吉林大学法学院教授

马新福

2010年6月15日于长春

Abstract

Our era is an era towards the right, an era in which right is much more concerned and respected, and an era in which the discourse of right becomes more public. We are increasingly accustomed to a right-based approach to understand legal issues, to think and solve social problems.

The aging of the population is one of the main features of the development of the mankind in the 21st century, and is a very serious social problem which the world is facing. China has entered into the community of the old-age and the aging speed is even faster. The problem of pension has become an overall and strategic problem. From the respective of jurisprudence, the core of the problem of pension can be attributed to old-age right.

The purpose of this article is: from the perspective of Jurisprudence, making the jurisprudence analysis of the old-age right of Chinese citizen based on the reality that China is facing an era of social transition and has been entering into old-age society. The article analysis the legal character and significance of insurance of old-age right based on defining the concept of old-age right. It also discusses the properness, the right structure and consisting elements of old-age right based on the reviewing of the development history of old age right. The article also researches the status and actual problems of old-age right of

Chinese citizen and proposes that the government should improve the legislation and legal relief system to realize the old-age right.

The core viewpoints of this article: Old-age right is one of basic human rights. Old-age right belongs to one of constitutional rights and is one of the civic social rights. Old age right in China refers to existence insurance right, health insurance right, attendance right to the social development, and mentality satisfaction right. Old-age security system is logically started with and based on the citizen's old-age right. Old-age right in China possesses its justifiability because of the moral support and the protection of the institutionalized form. The essence of old-age right is that people have the survival right when they are old. Respecting and prospecting the old-age right is the inherent requirement of the substantive justice and is coincidental with the principle of social Justice. It is based on the basic human right conception of pursuing and maintaining the people's freedom and dignity.

The innovative viewpoints of this article:

Firstly, the article researches old-age right in China from the respective of the theory of right on Jurisprudence for the first time. The article raises and defines the concept of old-age right and discusses the characters, legal attributes of it. The article argues that old-age right bears the characters of human right and constitutional right.

Secondly, the article discusses the properness of old-age right in China. The article argues that Chinese tradition of culture and the formal insurance of the present rules is the institutional and moral basement of the properness of old-age right. In the article, the theory of social law, the theory of social justice, and the theory of continual development are used to

prove the justification to offer old-age right in China.

Third, the article analyzes and expounds the structure and constitutive elements of old-age right of Chinese citizen. It also discusses the right subjects of rights and obligations, the main contents of the right and the object of the right.

Forthly, the article analyzes the statues and problems of age-old right of Chinese citizen. It also discusses the security system and action ability of the right and offers suggestions on how to perfect the judicial relief system.

The article has six chapters:

The introduction contains three parts. The first part demonstrates the background, the academic and practical significance of the topic of this article: old-age right of Chinese citizens. It discusses the problem of old-age right from the respective of Jurisprudence and right. It is reflected that the old-age right is a matter-of-course right when people get old and is an obligation if the government, the society and the members of families. The second part concludes and criticizes the status of old-age right in China. It points out that the research of old-age right from law respective is getting deeper, but not enough. The essential method of law protection is from the respective of right. In order to research old-age right in a higher level, it is necessary to research it from respective of right and human right. It is the obligation of the time of right for academic law to pay attention to old-age problem. The third part briefly introduces the research methods, core points, logic of demonstration and builds the structure of this article.

The first chapter: general principles of old-age right of Chinese citizen. Firstly, the concept of old-age right in China is set up. The article discusses the relationship between the old-age

right in China and some other rights, for example namely citizen's qualification right, equality right, right of existence, right of social insurance, labor right. Secondly, the article discusses the legal characters of old-age right. It argues that old-age right belongs to human right and constitutional right. At last, the article discusses the significance of confirming and protecting old-age right. It argues that the most efficient method to protect old people's existence, health and taking part in the social development. Besides that, the methods of right protection are stable and continual, which could make old people feel being respected.

The second chapter: the historical development of people's old-age right. The article discusses and criticizes the historical development of old-age right both in China and in western countries. It pointed out that the old-age system in western countries could bring us reference and apocalypse.

The third chapter: the justification of old-age right in China. Firstly, the article discusses the culture tradition basement of the justification of old-age right in China. The Chinese traditional culture of filial piety is regarded as the moral basement of the justification of old-age right in China. Secondly, the theory of social law, the theory of social justice, and the theory of continual development are used to prove the justification to offer old-age right in China. The Social Right, which extends the state's obligation citizens and which means to keep the citizens away from dread and shortage. The protection of old-age right is a basic requirement of social justice. The substance of old-age right is the right of existence when people get old. The insurance of living and health of old people is a basic requirement of the social justice and a part of the continual

Abstract

development of the society. The article argues that on the level of institution, old-age right in China possesses justification because of the insurance of legal system.

The fourth chapter: the structure of old-age right of Chinese citizen. The subjects of old-age right in China are citizens over sixty. The obligation bodies are government, society, families and citizens themselves. Citizens, as obligation subject, refers to the people who bear the aging insurance fee. The basic content of the right is existence insurance right, health insurance right, attendance right to the social development, educated right and mental satisfaction right. The objects of the right are represented physically as living maintenance, home and mentally as careens and gratification.

The fifth chapter: the status of old-age right in China. Firstly, the article analyzes the status on old-age right in Chinese urban and rural areas. Secondly, the article analyzes the problems of old-age right in China, that is, the faultiness of legislation and institution. At the same time, the system develops unevenly in China because of the dual economic structure. The economic structure in China is divided into two units: urban and countryside. Besides that, some other problems exist as well. The faultiness of law leads to the systemic loss of old-age right. The comedown of traditional culture of filial piety leads to the comedown of the concept of old-age right.

The sixth chapter: realization of age-old right of Chinese citizen. Firstly, the article discusses the enjoyment and realization of old-age right in China. It points out that legal right is a static, possible and objective right. The confirmation and declaration of people's right by the law only provides a precondition for the people to enjoy the right and obtain the

benefits contained in the right. In order to fulfill the perfect status of human right, the legal right has to be transformed into actual right through perfect system, proper and effective methods. The realization of old-age right in China is to transform the right from legal right to actual right. Secondly, this chapter discusses the countermeasure to the development of old-age right in China. It points out that we should build up and perfect a new model of old-age insurance, conform the existing methods of aging, build up a uniform aging insurance system both in urban and rural areas step by step, and an social aging service institution is our development goal. Thirdly, the article discusses the old-age right insurance system in China. The article discusses the legal status of Chinese old-age right and how to perfect it. It also analyzes the action ability of Chinese old-age right and how to perfect the legal relief system on old-age right in China. At last, the article argues that there should be a necessary limitation on old-age right in China. The balance between private profits and public profits should be considered. The realization of old-age right in China should be adapted for the development level of the social economy.

摘 要

我们的时代是一个迈向权利的时代，是一个权利备受关注和尊重的时代，是一个权利话语越来越彰显和张扬的时代。我们越来越习惯于从权利的角度来理解法律问题，来思考和解决社会问题。

人口老龄化是 21 世纪人类发展的主要特征之一，也是当今世界各国面临的一个重大社会问题。我国已进入人口老龄化社会，并且人口老龄化速度在加快，养老问题已成为带有全局性、战略性的重大问题。在法哲学的视野中，养老保障问题的核心可以归结为养老权问题。

本书的研究目的：立足于当下中国处于社会转型期和已进入人口老龄化社会的现实，从法哲学的视角，对中国公民养老权进行法理分析。通过提出并界定公民养老权的概念，分析公民养老权的权利属性，探讨确认和保障公民养老权的意义。考察公民养老权的历史发展；论述中国公民养老权的正当性；分析中国公民养老权的权利结构及其构成要素；并对中国公民养老权的现状和存在的问题进行探讨；提出我国应完善立法和健全司法救济制度，以保障公民养老权的实现。

本书的核心观点：公民养老权是一项基本人权，也是公民基于公民资格享有的一项宪法性基本权利，也是一项具体的法律权利。中国公民养老权是指公民年老时享有的生活保障权、健康保障权、参与社会发展权和精神慰藉权。养老保障制度以公民享有养老权为逻辑起点，国家建立养老保障制度是基于公民享有养老权。中国公民养老权因其有道德支撑和制度化保障而具有正当

性。公民养老权的实质是公民年老时享有的生存权。对公民养老权的尊重和保护立基于现代社会追求和维护人的自由和尊严这一最基本的人权理念，它是实质正义观的内在要求，符合社会正义原则。

本书的创新观点：

第一，首次以法哲学的权利理论为视角审视中国公民养老问题，提出并界定了公民养老权的概念，探讨了公民养老权的特点；论述了公民养老权的权利属性，认为公民养老权具有人权属性、宪法权利属性以及法律权利属性。

第二，论述了中国公民养老权的正当性。认为中国文化传统以及现行制度化的保障是公民养老权正当性的道德基础和制度基础；并运用社会法理论、社会正义理论和可持续发展理论等，对中国公民养老权的正当性进行了理论上的证成。

第三，分析和阐述了中国公民养老权的权利结构及其构成要素，探讨了中国公民养老权的权利主体、义务主体、权利的基本内容和权利的客体。

第四，分析了中国公民养老权的现状和存在的问题，探讨了中国公民养老权实现的对策，论证了中国公民养老权的可诉性，并对司法救济制度的完善提出了建议。

全书除导论和结束语共分六章。

导论包括三部分内容。一是探讨本书主题——中国公民养老权的问题背景以及进行这一研究的理论意义和实践意义。指出以法哲学为视角，以权利为题研究公民养老问题，以此昭示一种观念，即社会养老保障不是政府和社会的恩赐，而是公民年老时享有的权利和国家、社会应履行的义务；赡养扶助老年人是成年子女及其他家庭成员应履行的义务。二是对中国公民养老问题研究现状进行梳理和评析，指出法学领域的研究逐渐将养老问题的研究推向深化，但从现有的研究成果来看，法学方面对我国公民养老问题的研究尚待进一步深入。法律保护的实质是权利的保护，因而只有从权利的角度、从人权的角度来研究公民养老的问题才

能彰显法学研究的特色，并且能将对我国养老问题的研究提升到一个新的高度。理论法学对当代中国养老问题进行关注，是权利时代的使命。三是概括地介绍本书研究目的、研究方法、核心观点和论证逻辑，为全书描绘一个整体性框架。

第一章公民养老权的一般理论。首先，对公民养老权的概念进行界定，并探讨公民养老权与权利谱系中相关权利——公民资格权、平等权、生存权、社会保障权、劳动权等的关系，分析了公民养老权的特点。其次，论述公民养老权的权利属性，认为公民养老权具有人权属性、基本权利属性和法律权利属性。最后，论述确认与保障公民养老权的意义，认为确立权利的方式能最有效地保障老年人的生存、健康和参与社会发展；并认为权利保护的方式具有稳定性和连续性，能使人在晚年同样感受到做人的尊严。

第二章公民养老权的历史发展。对西方国家公民养老权的历史发展和中国公民养老权的历史发展进行阐述和分析，指出西方国家养老制度的有益经验可以给中国以启示和借鉴。

第三章中国公民养老权的正当性。首先，运用社会法理论、社会正义理论和可持续发展理论等对中国公民养老权的正当性进行理论证成。认为社会法的核心范畴是社会权利，社会权利从某种意义上来说是扩大了国家对公民的义务——使公民免于恐惧和匮乏的义务；对公民养老权的保护是社会公正的基本诉求；对公民养老权的保障是社会可持续发展的内容之一。其次，阐述中国公民养老权正当性的文化传统基础，认为中国传统孝道文化是中国公民养老权正当性的道德基础。最后，论述中国公民养老权正当性的制度基础。认为在制度层面上，中国公民养老权因其有养老法律制度的保障而具有正当性。

第四章中国公民养老权的权利结构。根据我国法律的规定，认为中国公民养老权的权利主体是60岁以上的老年公民；义务主体是国家（即政府）、社会、家庭以及公民个人。其中公民个人作为义务主体，是指公民个人也是养老保险费的承担者。公民养老权的基本

内容包括公民年老时享有的生活保障权、健康保障权、参与社会发展权和精神慰藉权。公民养老权的客体是物质和行为,即表现为物质形式的老年人所需要的生活用品、住房等财物,以及表现为非物质形式的对老年人进行照料的行为和精神慰藉的行为。

第五章中国公民养老权的现状。首先,分别阐述中国城镇公民养老权和农村公民养老权的现状。其次,分析中国公民养老权存在的问题,即实践中存在着立法不完善导致养老权制度化缺失的问题。同时,由于城乡二元经济结构导致中国养老保障制度发展不平衡,被分为城镇和农村两大基本单元,造成城乡公民养老权不平等。此外,还存在着传统孝道文化衰微导致敬老养老的道德观念滑坡、老年人维权意识不强导致公民养老权的司法救济利用不足等问题。

第六章中国公民养老权的实现。首先,论述中国公民养老权的享有与实现,指出法定权利是静态的、可能的、客观的权利形态,只是国家通过立法对公民权利的确认与宣示,只为公民实际享有权利、获得权利所蕴含的利益提供了前提。只有通过完善的制度、适当的措施和有效的方式把法定权利转化为实有权利,才是达到人权的理想状态。中国公民养老权的实现,就是把法定的养老权转化为现实中公民实际拥有的养老权。其次,论述中国公民养老权实现的对策。指出我国应依法平等保护公民养老权,建立城乡统一的养老保障制度,探索和发展多种养老模式,提高老年人的维权意识,并积极发展为老社会服务事业。再次,论述中国公民养老权的制度保障。阐述中国公民养老权的立法现状及其完善,对中国公民养老权的可诉性进行分析,并对完善中国公民养老权的司法救济制度进行论述。最后,探讨中国公民养老权实现的必要限度,即提出应注意个人利益与公共利益的平衡与一致;公民养老权的实现应当与社会经济发展水平相适应。

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