



大国治理书系

主编 陈潭

# 农村宅基地产权制度研究

吴远来 著



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## 农村宅基地产权制度研究

吴远来 著

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## 总序

地球是圆的，世界是平的。世界历史波澜壮阔，大国兴衰构成了其中重要的篇章，此所谓“三十年河东，四十年河西”。然而，无论是“兴”还是“衰”，人类文明总是向前踏步，时代的发展和社会的进步往往相伴相随。大国崛起背后的经验教训催促人们缅怀既往、面向未来，从而在历史的伤痕中烙下文明的印记、延展人类的理性。历史经验和人类实践反复证明，实现大国崛起必然需要良好的制度安排和合理的治理结构以及人类处理公共事务的理性行为。毫无疑问，无论是人口地理、军事力量还是经济总量，无论所经历过的辉煌、曾经的没落还是现在的崛起，中国一直以来都是大国。令人兴奋的，经过若干年的自力更生和艰苦奋斗，依赖英明的领导和民族的智慧，中国走向了大国崛起之路，这是千百年来中华民族的集体努力和不懈追求。然而，要真正实现大国崛起需要良好的大国治理。

001 ▶

2006年11月，CCTV推出了一部以世界性大国的强国历史为题材并跨国摄制的大型电视纪录片《大国崛起》，全片以15世纪后陆续崛起的葡萄牙、西班牙、荷兰、英国、法国、德国、日本、俄罗斯、美国等九个国家作为解读的对象，分析世界性大国崛起的历史，展现它们通过不同方式、在不同时期内完成的强国历程，探究其兴盛背后的原因及其经验教训。这是一部发人深省的电视纪录片，也是一部回味无穷的强国教科书。综观西方大国早期的崛起之路，多数国家无不体现利用“坚船利炮”进行殖民扩张的历史痕迹。实际上，西方资本主义的成功有两个非常重要的因素：一是地理大发现；二是机器革命。地理大发现使早期的葡萄牙、西班牙、荷兰乃至英国等国都大为受益，它们从全球范围内占领土地、攫取资源、分流人口、寻求财富，最终形成殖民帝国。而机器革命促使资本主义内部生产率大为提高，资本积聚

的速度大大加快，财富累积的总量大大增加，因而全球范围内的“坚船利炮”和“资本统帅”显现出巨大威力，武力输出、商品输出、资本输出、品牌输出、文化输出的帝国路线至今还残留于世。然而，20世纪30年代至40年代，跃居军事强国的德国、日本，选择了以坦克大炮为先驱的“强力崛起”之路，这种以武力输出的法西斯模式无可避免地导向幻灭和灾难。而作为一个后起的资本主义国家，美国在大约一个世纪的时间里，赶上并超过当时世界上最先进的资本主义国家——英国，并由此而崛起、发展、壮大起来。除了天然的地理位置和丰富的自然资源之外，以生产力的高速发展、顺畅的法律机制以及争取更多的国际资源支持为美国崛起提供了契机。

历史不可复制，历史拒绝假设。中国无法重走西方列强所走过的资本主义道路，无法照抄照搬英国模式或者美国模式，中国有着自己的国情和特色发展道路，但大国崛起的各国历程对于正在崛起的中国无疑起着“以史为鉴、面向未来”的启迪和警示作用。今天我们可以看到，大国崛起需要“内外兼修”：对内要求建立合理的治理结构和现代国家制度，促进经济发展、政治文明、社会和谐；对外要求和平共处、担当责任，做一个负责任的大国。建设一个强大的国家，必须要有凝聚力，需要有支撑一个国家的法律和政治制度。一个国家的公共政策、法律及其法治不但可以维护和保障一个社会的稳定秩序、树立起国家权威，而且还可以促进人民自由和幸福。法治昌明，政体稳定，人民才有追求财富的欲望和恒心，国家的税收才会源源不断，公民美德才会发扬光大。良好的公共政策和治理机制构建对于一个国家消除社会弊病、催化社会发展、保障社会健康无疑发挥着基础性作用。

◀ 002

众所周知，中国三十年来的改革开放取得了举世瞩目的成就，无论在经济、政治、文化、社会建设方面长足不少。然而，“崛起困境”也不可小视。在世界市场经济已经相当发达的今天，中国市场经济才刚刚起步，市场经济发展面临着资源过度开发、市场空间狭小、产业结构不合理的矛盾，一种以劳动密集型和资源密集型为主导的发展模式影响着经济社会的可持续发展。资源约束与资源配置机制扭曲的存在导致了某些领域出现“烂尾楼”工程，“劣币驱逐良币”的格雷欣法则以及阶层差异、城乡差异、区域差异所导致的马太效应不可避免地显现，腐败现象、农民负担过重、中央与地方利益冲突、公司治理结构难以改善、产权保护不足、环境污染、能源危机等等问题不同程度地影响着社会的和谐机理。显然，我们还远未到能为改革而大唱赞歌的

时段。作为一个发展中国家而且是最大的发展中国家，没有任何条件允许中国低估发展中的矛盾和前进中的困难，更没有称霸世界的野心和决心，只能在对外关系中长期处于战略守势，一种毫无根据的“中国威胁论”和“中国崩溃论”只能博取强势者的笑颜和西方话语霸权的狂欢。

如今，中国的经济社会格局与利益格局发生了重大变化，多元化的利益阶层和利益群体正在形成，利益平衡和利益调整成为中国改革与转轨实践的重大政治命题。在解决温饱问题之后，生活在农村和城市的人们对教育、医疗、社会保障、生活环境等公共产品的需求持续上升，如何在继续深化市场化改革、促进经济高效运行的同时，解决好公共产品和服务的供给问题，如何促进社会公平正义以及解决好收入分配、城乡二元结构和增长方式等问题，是中国改革进入新时期新阶段所面临的重大公共政策问题。因此，中国改革开放的深化和经济社会的全面发展需要公共政策的适时调整和公共管理的有效变革。中国新一轮改革必然要求从局部试点、单项突破转为综合配套和整体推进，必然需要完成从主要重视提高效率转为重视促进公平和推动均衡协调发展、从着重解决基本物质供给不足问题转为着重解决公共需求与效益的平衡、从以红利为动力和以普遍受惠为基点转为更多涉及利益格局的调整。

与此相适应，加快转变政府职能、建设服务型政府，培育壮大市场主体、全面建设现代企业制度，合理配置城乡公共资源、建设公共服务体系，建立公平与效率并重的分配机制、调整利益分配格局，这些均将成为走向共享式改革的主要着力点，并以此全面推动体制改革和制度创新。因此，立足于公共领域之上的现时的大国治理必须扭转原有改革中的利益失衡，要求实现由“少数人先富”走向“多数人共富”；必须改变“内部人改革”的某些不合理做法，要求由扭曲式改革走向共享式改革；必须改变片面追求效率和速度的做法，要求由单一的经济改革走向全面的综合改革；必须降低改革的不协调成本，要求剔除思想和行动中的“改革疲劳”甚至“改革厌倦”。我们始终认为，“科学的发展观”并非一种智力蓝图或公式化语言，而是一种实实在在需要付诸实践行动的改革哲学。

大国问题和崛起困境的解决，一方面需要普通公众的参与和热情，另一方面需要知识精英的声音和在场。在突破体制转轨的艰难时段，众多瓶颈的攻坚尤其需要知识精英们的专业素养和改革技术，需要依赖于关注改革和现代化事业的知识人可贵的道德勇气与牺牲精神。作为以学术为业的研究者们，

我们应该告别那种脱离现实生活的玄虚的致思方式，以关注现实、关怀民生的学术伦理和脚踏实地、开拓创新的学术精神直面中国公共管理实践，从而确立大国治理研究的问题意识、研究旨趣和学术路向。在走过概念引进和理论移植的学术早期岁月之后，公共行政、公共政策、公共事务以及公共管理研究的本土化路径已经确认，我们要做的也许只有正直、勤奋和付出。或许，面向大国治理研究的微观进路和实证视角对于中国公共管理研究的本土化应该会有所裨益。

21 世纪是中国的世纪，21 世纪的中国是崛起的中国。

陈 潭

## 摘 要

改革开放以来,农村经济迅速发展,农村宅基地面积不断增加,占用了大量耕地,国家采取了越来越严格的措施管理农村宅基地。但是宅基地扩张的同时也开始大量闲置,一些地方开始出现“空心村”。同期,大量农村人口前往城镇就业、生活,占用了部分城镇用地,他们又保留了农村宅基地,形成了我国特有的“两栖占地”现象。城镇建设用地的同时增长,加剧了我国土地资源的供求矛盾,使我国耕地保护形势日益严峻,促使国家采取更严厉的手段管理和控制农村宅基地。

2007年,在宅基地方面有两件大事。其一,讨论十年之久的《中华人民共和国物权法》终于颁布实施,对于饱经争议的宅基地使用权及其权能,《物权法》一方面专章规定,体现了法律对宅基地使用权前所未有的重视;另一方面规定,“宅基地使用权的取得、行使和转让,适用土地管理法等法律和国家有关规定”,给宅基地权能留下了变革空间。其二,出现十多年的“小产权房”首次引起全国范围内的争论,而且上了国务院常务会议,但就算是利用宅基地建设的“小产权房”也被国务院叫停。

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法律上国家、农民集体和农民在宅基地产权上没有明确的权利边界,实践中,政府、村民委员会的宅基地权利与农民的宅基地使用权发生冲突,有关宅基地的法规政策被农民集体和农民挑战、被地方政府违反,耕地保护、农村社会稳定、法律与政府权威都受到影响。本文通过对农村宅基地产权制度的分析,试图从宅基地产权制度的形成、现状和下一步变迁的研究中,确定国家、农民集体和农民在宅基地产权上的权利边界,规范宅基地取得制度,建立国家对农村宅基地调整的一套正式规则,既保障农民的宅基地使用权,又能促进宅基地的充分利用。





第一章介绍本书的研究背景、意义，对相关文献进行综述，对已有研究成果作了分类述评，提出研究的范围、方法和思路，明确研究的内容。

第二章研究农村宅基地产权制度研究的理论基础，包括土地产权理论、制度与制度变迁理论和国家理论等。主要分析上述理论与农村宅基地产权制度变迁的理论逻辑，为下文的宅基地产权制度分析提供理论依据。

第三章研究农村宅基地产权制度的变迁过程、变迁特点，并对农村宅基地产权制度的建立和形成进行经济分析。新中国成立以来宅基地产权制度的变迁分为三个阶段，在宅基地产权制度变迁中，宅基地主要依据政策文件调整权利，农民宅基地产权被逐步削弱，农民集体宅基地产权相应扩展。我国农村宅基地产权制度是在特定时代建立和实施的，宅基地产权制度建立时达到了静态均衡；随着我国人地关系的紧张、宅基地控制的管理惯性等，宅基地产权逐步成为模糊产权，政府代表国家取得了宅基地的大部分处分权。

第四章研究现行农村宅基地产权制度的安排、缺陷和绩效。首先明确农村宅基地产权制度的现状安排：现行农村宅基地产权主体，宅基地使用权的取得、消灭和权能，我国不同利益主体享有的宅基地产权和宅基地产权制度的国家目标。在此基础上，分析现行宅基地产权制度有以下缺陷，宅基地产权制度的国家目标之间存在内在冲突，宅基地产权主体之间有权益争议，宅基地产权制度的正规规则与相关制度不配套，农村居民的宅基地产权不稳定等。现行宅基地产权制度的缺陷与宅基地产权制度实施机制的不健全，造成农村常住人口减少而宅基地的持续扩张的局面，形成了宅基地闲置与两栖占地问题，耕地保护目标受到影响，部分地区农户基本居住权难以得到保障。

第五章是对农村宅基地产权制度变迁路径的比较分析。宅基地产权的模糊性，使中央政府、地方政府和农民在宅基地产权制度变迁时都有自己的利益倾向，而且相关主体产生利益冲突。一是中央政府继续推行的宅基地产权保持模糊化、宅基地管理严格化的倾向。二是农民自发的宅基地产权强化、部分地方政府应和的宅基地产权制度的诱致性变迁。三是地方政府主导的弱化农民集体和农民宅基地产权的创新。这种创新曾得到中央政府的支持。如宅基地有偿取得和有偿使用，弱化农民的宅基地产权，增加了农民建房负担；迁村并点和宅基地置换，弱化农民的宅基地产权，引起了农民的上访和抗议。出于耕地保护和对农村社会的公平稳定的担心，在没有一个比较确切的解决措施之前，中央政府还会继续控制宅基地的处分权。

第六章对农村居民宅基地权利认识进行调查分析。在北京、湖北两地四村,大部分农村居民的宅基地“私有”观念比较强烈,认为他们的宅基地权利包括继承权、转让权(如买卖权、租赁权)等,但是他们认同国家对宅基地的严格管理,主张国家严格控制宅基地用地指标,如果需要收费(税)限制,则希望由国家超标准面积的宅基地部分征税。在宅基地审批方面国土部门官员已经具有最关键的作用,其次则是村干部。如果国家放开宅基地转让限制,可以促进宅基地的利用与流转,但可能导致农民占用更多的耕地作为宅基地。

第七章研究农村宅基地产权制度的构建。在21世纪,我国已经进入城乡一体化阶段,土地资源日益稀缺,农村宅基地产权制度已经处于非均衡状态。借鉴中国香港、美国、韩国的宅基地政策和管理经验,以公平与效率兼顾,明晰产权、促进交易,正规规则与非正规制约相协调等为原则,建立符合国情的农村宅基地产权制度,切实保障农村居民的宅基地产权和农村社会的公平、稳定。在此基础上系统构建我国宅基地产权制度的框架,即规范宅基地使用权取得制度,明确国家、农民集体和农民的宅基地产权边界,完善现行的“一户一宅”原则,设立不动产保有税和资源税对农村宅基地进行调节,建设规范的农村宅基地交易市场,完善农村宅基地和房屋的登记制度,分地区、分阶段地逐步实行宅基地产权制度的新安排,并提出宅基地产权制度的配套制度建设与保障措施等。

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本书的创新表现在:

一是在宅基地取得制度、宅基地权利行使、宅基地利用调节等方面对宅基地产权制度进行了重新构建。在宅基地取得制度设计上,提出新的一套取得规则,规范宅基地取得的申请资格、分户标准、申请条件 and 申请程序,以人均宅基地面积替代宅基地总面积作为控制标准;在宅基地权利行使上,明确国家、农民集体和农民的宅基地产权边界,弱化国家和集体的宅基地权利,强化农民享有的宅基地权利;在宅基地利用调节上,设计不动产保有税和资源税调节资源利用,对税收收入进行合理安排,建立农村宅基地市场引导资源配置优化。

二是提出宅基地产权制度的国家目标是耕地保护和保障农民的基本居住权,二者之间存在内在冲突;现状宅基地产权制度设计的缺陷与宅基地产权制度实施机制的不健全,使农村宅基地的扩张与闲置并存,且使农民的宅基

地权利没有稳定保障，影响宅基地制度国家目标的实现。

三是通过对宅基地产权制度变迁路径的比较，认为现状宅基地产权的模糊性，使中央政府、地方政府和农民在宅基地产权制度变迁上均有自己的利益倾向，中央政府继续严格管理，地方政府和农民则不断创新，宅基地产权制度变迁方向不稳定。

本书的不足之处在于，关于宅基地产权制度形成与下一步变迁的经济分析比较薄弱，前者还需要足够的资料进行分析，后者还需要日后的事实来验证。

**关键词：**农村宅基地；产权制度；制度变迁

## Abstract

Since the reform and open – up of China, the rural area has achieved rapid economic growth and seen an increase in rural residential land, which takes more farming land. Therefore, the government issued increasingly strict rules to regulate the use of rural residential land. In some villages, however, the villagers move to the outside and leave the central areas of the villages unused. Meanwhile, more people migrate to live and work in cities and hence use the land there. At the same time, they retain their residential land in their hometown villages, creating a unique phenomenon of one household taking two residential land. The spontaneous increases of residential land in rural and urban areas accelerate the unbalance between the demand and supply of China’ s land resources. To relieve the unbalance and help protect farming land, the government has to take more measures to regulate and limit the land used for rural housing. More attention is paid to farming land protection, harsher punishments are taken for illegal land usages, and higher standards are applied for large scale residential land. Some local governments have tried the policies like combining several small villages into a bigger one and changing villagers’ residential land for farming land. During the process, the villagers’ concerns may not be respected and their property rights in residential land and houses not be protected. The new policies may result in higher cost of the villagers, who sue the local governments or protest in other ways.

The year of 2007 witnessed two important events for residential land. Firstly, China issued the Law of Property Rights of the People’ s Republic of China after ten years of debates. The Law of Property Rights uses one chapter to regulate the contro-

versial use right and property right of residential land, which reflects the legislative emphasis for the issue. On the other hand, the law says that “the Law of Land Administration and other laws and regulations apply to the acquisition, execution and transfer of the use right of residential land”, leaving much room for changes in the rights of residential land. Secondly, a national debate was initiated concerning “small houses of property rights”. The issue was even discussed by the session conference of the standing committee of the State Council. However, even the small houses of property rights built on residential land were called for close - down by the State Council.

Legally, there is no clear line among the property rights of the state, the community of villagers and the individual villagers. Practically, conflicts keep arising between the rights of the government and the village administration and the use right of villagers concerning housing plot. The related laws and regulations are often challenged by villagers and flouted by local governments, which affects farming land protection, social security in rural areas, and the authority of laws and governments.

002 Through an analysis of the property right system of rural residential land, this dissertation attempts to study the causes, status quo and prospects of the property right system of residential land. The findings are applied to define the rights of the state, the community of villagers and the individual villagers concerning the property rights of residential land so as to regulate the acquisition system of residential land. A set of formal rules are suggested for the state to reform the rural housing plot system to both protect the villagers’ use rights of housing plot and optimize the resource of residential land.

Chapter 1 offers an introduction to the background and significance of this dissertation, a review on related literature and a summary of the findings made by previous studies. This research’ s scope, methodology and logic are also elaborated to define the content of this dissertation.

Chapter 2 lays down the theoretical foundation for analyzing the rural housing plot system, including the land property right theory, the theory of system and system changing, and the theory of states. The emphasis is given to exploring the theoretical logic between the above mentioned theories and the changing process of rural

housing plot system so as to provide a theoretical basis for analyzing the property right system of rural residential land.

Chapter 3 discusses the changing process and features of the property right system of rural residential land and conducts an economic analysis on the establishment and formation of the property right system of rural residential land. After the founding of the People's Republic of China, the property right system of rural residential land went through three stages: in the first stage, the ownership of residential land belonged to individual villagers; in the second stage, China started to build its use right system of rural residential land; in the third stage, a reform was implemented on the property right and use right of rural residential land. The changing process of China's property right system of rural residential land has three features: firstly, the rights are altered mainly according to the state's policies; secondly, the property rights of rural residential land are decreased for individual villagers and more rights are allocated for the community of villagers. Established and implemented in a special age, the property right system of rural residential land reached a balanced state at that time. As the contradiction between humankind and land resource becomes more serious and the control of rural residential land is affected by administrative inertia, the property rights of rural residential land are blurred with the governments acquiring many of the rights on behalf of the state.

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Chapter 4 explores the status quo, flaws and performance of the current property right system of rural residential land. The first part clarifies the status quo of the property right system of rural residential land, including the bearers of the current property rights of rural residential land, the acquisition, elimination and functions of the use right of residential land, different rights enjoyed by different bearers, and the state's objective for the property right system of rural residential land. Based on this introduction, the second part analyzes the flaws of the current property right system of rural residential land: the different bearers of residential land have controversies on their rights; there is a lack of implementation regulations in accordance to the related systems; the individual villagers' rights of residential land can not be ensured; the area used for housing keeps increasing due to the choice of some interest bearers. The flaws of the current property right system of residential land result in

some problems: some residential lands are unused; some villagers take two residential lands; the protection of farming land is negatively affected; the living rights of some villagers cannot be ensured.

Chapter 5 compares the changing process of the property right system of rural residential land. Due to the illegibility of the property rights of rural residential land, the central government, local governments and individual villagers have their own interests, which leads to conflicts among them. Firstly, the central government promotes the policy of blurring the property rights of residential land and controlling the allocation of residential land. Secondly, individual villagers realize their own rights and demand a reform on the current property right system of residential land, which is supported by some local governments. Villagers rent and sell houses by their own, actively strive for earning rights of residential land and aggrandize their earning rights through developing and constructing “some houses of property rights”. To stimulate local economies and improve villagers’ life, some local governments try the policy of using houses as a mortgage. The Guangdong Province even proposed to list residential land and introduce residential land into free exchange market. Thirdly, some local governments try new policies to decrease the property rights of individual villagers and the community of villagers, which are supported by the central government. After late 1980s, some local governments charged villagers for acquiring and using residential land to decrease their rights of residential land, which increased their housing costs and was stopped by the central government. After 1990s, some local governments implemented the policy of combining villages and exchanging residential land to decrease their rights of residential land, causing suits and protests of the villagers. To protect farming land and ensure social security, the central government may continue to control the disposing right of residential land before a formal regulation is issued.

Chapter 6 investigates rural residents on their understanding of residential land rights. The residential land “private” idea of the majority of countryside residents is quite intense, thought that their residential land rights including the right of inheritance, the transferring power (for example business power, to rent power) and so on, but they approve the country to the residential land strict management, advocate

the national strict control residential land target, if needs to collect fees (tax) to limit, then hoped that levies taxes by the country to the above - norm area's residential land part. The national territory department officials already had the most essential function in the residential land examination aspect, next is the village cadre. If the country lets loose the residential land transfer limit, may promote the residential land use and the circulation, but possibly causes the farmer to take more arable land as the residential land.

Chapter 7 focuses on the prospect of the property right system of rural residential land. In the 21st century, China is in a situation of rural and urban integration with land becoming a rare resource and the property right system of residential land reaching an unbalanced state. This forms the background of constructing a new property right system of rural residential land. From the policies and administration experience of residential land in Hong Kong, the U. S. and South Korea, we can learn the following lessons: both equality and efficiency should be emphasized; the property rights should be stated clearly; trade of residential land should be encouraged; formal rules and informal ones should be balanced; the property right system of rural residential land should be in accordance to the specific conditions of a country so as to ensure the villagers' rights and the equality and security in rural areas. Based on these lessons, this dissertation proposes to construct China's property right system of rural residential land so as to standardize the acquisition of the use rights of rural residential land, clarify the rights of the state, the community of villagers, and individual villagers, promote the current policy of one - household - one - house, establish real property tax and resource tax to adjust rural residential land, build standard trade market of rural residential land, improve the registration policy of rural residential land and houses and implement the policy step by step in different regions and levels, and develop accessory systems and measurements to guarantee the system.

This dissertation is innovative in three ways. Firstly, it re - constructs the property right system of rural residential land in three aspects. In the aspect of acquisition, it proposes a set of acquisition rules to standardize the applying qualification, conditions and process and the household - differentiation criteria and replaces the total area with the housing area per person as the standard to control residential land.



In the aspect of implementation, this dissertation clarifies the borders among the property rights of the state, the community of villagers and individual villagers, weakens the rights of the state and the community and strengthens the rights of individual villagers. In the aspect of regulating the usage of residential land, this dissertation proposes to set real property tax and resource tax to relocate the resource, balance the tax incomes, establish the residential land market and optimize the resources. Secondly, the paper proposed that the national objective of the residential land property system is the farming protects and safeguards farmer's basic right of occupancy, between the two has the intrinsic conflict; The design of present property system of residential land has flaw and the implementation mechanism of present property system of residential land is not perfect, that cause the residential land the expansion and idle coexisting, and enable farmer's residential land rights not to have the stable safeguard, affects the national objective of residential land system realization. Finally this dissertation analyzes the changing process of China's property right system of rural residential land from the aspect of system changing, using the theories of property right, system economy and states to conduct economic analysis on the formation, status quo and changing route of China's property right system of rural residential land. Due to the blurred property rights, the central government, the local governments and individual villagers have their own interests in the changing process, with the central government strengthening its control and the local governments and individual villagers creating ways for their own benefits, which makes the direction of reforming the property right system very unstable. This dissertation is also limited in several ways. The economic analysis is not deep enough for the formation of the property right system and the prospect for the future reform, with the former calling for richer data and the latter waiting for further experimental confirmation.

Key words: rural residential land; property right system; institutional change