


本书以物业小区治理为研究核心,从社区治理之法律基础到社区治理实践之集体行动、制度选择,从社区产业之发展到公民社会与国家,国内外作者的学术视角从微观展向宏观,在这样的延伸中,理论与实践相得益彰。

美国著名学者埃莉诺·奥斯特罗姆(Elinor Ostrom)教授为本书撰写前言。



社区治理的 多元视角： 理论与实践

Community Governance
from Multicultural Perspectives:
Theory and Practice

陈幽泓 / 主编

Youhong Chen / Editor



北京大学出版社
PEKING UNIVERSITY PRESS

本书出版由 | 美国乔治·华盛顿大学法学院 | 资助
中律原咨询(北京)有限公司



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李云亮 / 执行主编
Yunliang Li / Executive Editor



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图书在版编目 (CIP) 数据

社区治理的多元视角：理论与实践/陈幽泓主编. —北京：北京大学出版社，2009. 4

ISBN 978-7-301-15170-9

I. 社… II. 陈… III. 城市—社区—治理—研究 IV. C912.81

中国版本图书馆 CIP 数据核字 (2009) 第 062182 号

书 名：社区治理的多元视角：理论与实践

著作责任者：陈幽泓 主编

责任编辑：孟 瑶

装帧设计：沈仙卫

标准书号：ISBN 978-7-301-15170-9/D · 2289

出版发行：北京大学出版社，

地 址：北京市海淀区成府路 205 号 I00871

网 址：<http://www.pup.cn> 电子邮箱：law@pup.pku.edu.cn

电 话：邮购部 62752015 发行部 62750672 编辑部 62117788

出版部 62754962

印 刷 者：北京山润国际印务有限公司

经 销 者：新华书店

650 毫米×980 毫米 16 开本 22 印张 371 千字

2009 年 4 月第 1 版 2009 年 4 月第 1 次印刷

定 价：36.00 元

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举报电话：010-62752024 电子邮箱：fd@pup.pku.edu.cn

前 言

研读 2007 年夏那令人振奋的北京国际研讨会之富有建树的论文精要书稿，感受极其美妙。陈幽泓和其同事们就北京、上海、其他亚洲城市，以及世界范围内的重要城市之与市民居住相关、具有创新意义的关键问题进行了研讨。人之居住环境状况是影响生产力、健康和人的价值的最重要因素之一。居住于多层公寓大厦的居民，对获得何种服务与由谁埋单，如何泊车，绿地空间、健身休闲设施是否可得与如何维护，安全保障是否改善，以及如何作出凡此种种与生活直接有关之决策等，若无以发出声音，将会置身于难以设想的不良境地。对北京的未来至关重要，应在允许业主和开发商决定现代公寓大厦中居民之安居的经济、法律、政治和社会等重要问题的制度设计安排方面获得进展。

解决上述问题直接关系社区自主治理之核心问题。所有权概念之具体含义究竟为何？如何分析研究才到位？研究之积累如何能最大程度服务于遍及全球城区之中的居住于公寓大厦结构内的千千万万的人们？如何使所作之安排惠及更广泛多样的人，以使所有权不致沦为仅为部分人用于获取超出个人归因之外的差别待遇的工具？本书深入研讨了针对个人居住单元之有效私有财产的法律制定问题，以及相对应于公寓大厦业主专有权的共有设施之共同产权问题。本书所收录的出色的经验研究论文，包括中国北京、上海，以及英国、法国、美国等地的研究，为人们提供了不同社区组织结构导致不同结果的方法学之比较研究。

本书部分篇目的作者更是研讨了当代社会科学之重要理论问题。某些当代理论预言，公民对于重要社区问题不会予以过多关注，因其认为可通过“搭便车”而从他人之努力中获得相关收益。如此，一些分析家可能感兴趣于本书从事的不同研究结论，以及为何这些研究者所研究的是在理论上认为本不应发生的进程。难道我们不“知道”社区事务中的参与是个体

2 社区治理的多元视角：理论与实践

理性人不会参与的社会困境难题？与这种理论相反，许多（虽非全部）有关公寓大厦的研究篇目之作者，都涉及公寓大厦居民和业主之实实在在的参与行为。此为本书之重要发现，亦为理论进步和经验研究之优良贡献。

现有的关于集体“不行动”之理论正确预言了某些情况下“搭便车”的现象。反复研究显示，集体行动的关联情境在影响人们作出参与还是“搭便车”之决定方面起主要作用。当集体行动之关联情境涉及对于自我最为重要和最直接相关之事物，如家庭和朋友时，更多的人会积极地参与到解决社区问题的行动中去。住房安排的法律结构对于参与和结果也起着重要作用。因此，对于在北京以及北京以外地区的各类公寓大厦中的成功和不成功的集体行动努力之研究越多，则对于影响公民在社区事物中参与之水平、质量、有效性等知识增长的贡献就越大。文森特·奥斯特罗姆和我们为我们在会议期间所闻之热烈讨论而兴奋，并为我们3篇文章被收入文集而感到快乐。我们认为，国际范围的学者会在此文集中发现研究社区治理之重要价值，本书甚至为更深入的政策研究提供了坚实基础。

埃莉诺·奥斯特罗姆

政治理论与政策分析研究所

美国印第安纳大学

2008年11月24日

PREFACE

It has been a wonderful experience to watch this book evolving from an exciting and productive conference held in Beijing during the summer of 2007, to the final manuscript of an important and excellent book. Youhong Chen and colleagues have addressed an innovative and important question of relevance to citizens living in Beijing and other Asian cities, as well as citizens living in all major urban areas throughout the world. The condition of one's living environment is one of the most important factors affecting productivity, health, and human values. Living in huge, multi-story "condos" is a frustrating experience without any voice in what services are provided and who pays, how parking, green spaces, and recreational facilities are to be made available, how they are maintained, how safety is enhanced, and how decisions are made about the lives of many people. What is so important for the future of Beijing is that progress is being made in allowing owners and developers to work out many of the economic, legal, political, and social arrangements for determining these important questions for those living in modern condominium housing.

Working out these issues comes right at the core of community self-governance. What does the concept of ownership mean? How can research be conducted that enables good analytical, cumulative research to be generated that is also of great service to the millions of citizens living in condo structures in urban areas throughout the world? How can these arrangements involve a wide diversity of people so that ownership is not used as a discriminatory tool to keep out those who differ from others in regard to irrelevant personal at-

tributes? The book thoroughly addresses the legal issues of creating effective private property to individual living units as well as the complementary common property of the owners to the joint facilities of the condo itself. Several excellent empirical studies from within China, Beijing, Shanghai, as well as England, France, and the United States, are presented as well as methods for comparing the results of differently structured forms of community organization.

Several chapter authors also address key theoretical questions of great importance to contemporary social sciences. Some contemporary theories predict that citizens will not take much interest or be involved related to important community issues because they think that they can gain all of the relevant benefits while free-riding on the efforts of others. Thus, some analysts might wonder why this study was undertaken at all. Why study a process that should not occur at all? Don't we "know" that participation in community affairs is a social dilemma and that rational individuals will not participate? Contrary to this theory, many (but not all) of the condos studied by the authors of these chapters have involved a substantial participation by condo residents and owners. This is a major finding that makes the book very important, as it contributes both to theoretical advances and good empirical research.

The extant theory of collective inaction does correctly predict free-riding in some settings. Repeated studies are showing that the context of collective action makes a major difference in whether those affected decide to participate or to free ride. When the context of collective action involves the most immediate surroundings of immense importance to self as well as to family and friends, many more individuals do participate actively to solve community problems. The legal structure of the housing arrangement also makes an important difference in participation and results. Thus, learning more about both the successful and not so successful efforts in diverse condos within Beijing and elsewhere is an important contribution to our growing knowledge of factors that affect the level, quality, and effectiveness of citizen participation in community affairs. Vincent Ostrom and I were excited about the discussions we heard during the conference and are very happy that three of our chapters are included in this volume. We know that scholars across the world will find much in this volume of considerable value to the study of community govern-

ance and that this book provides a firm foundation for even further studies of this important policy issue.

Elinor Ostrom
Workshop in Political Theory and Policy Analysis
Indiana University
Nov. 24th, 2008

目 录

一、社区治理的法律基础：

建筑物区分所有权概念与制度的探讨

论多元房地产法律制度 魏耀荣 / 3

商品房住宅小区共用资源产权配置的法律统一性
——建筑物区分所有制度的法律精神 凌效海 / 17

商品房业主的权利制度及其修正
——建筑物区分所有权概念再研究 李云亮 / 26

二、社区治理实践：集体行动与制度选择

基于复制者动态的业主自治条件
——来自南京市富丽山庄小区的电梯案例分析 朱宪辰 屠海良 / 51

寻找社区自主治理的制度基础
——基于北京美丽园小区的案例研究 毛寿龙 陈建国 / 64

物业小区自治创新：业主代表大会制度的理论和实践的探讨
——以北京土地西里为例 郭卫建 / 80

走出“集体行动的困境”：业主自主治理创新的制度评价
——以“业主代表大会制度”与“物业管理权信托制”为例 陈幽泓 / 94

公共治理视阈下的城市社区业主维权
——基于深圳和北京相关案例的分析 陈 文 黄卫平 / 120

2 社区治理的多元视角：理论与实践

“为什么不合作?”：边缘草根组织的行动策略及其解释

何艳玲 张鹏举 周晓锋 / 134

市场选择、公共选择和制度选择研究的发展

文森特·奥斯特罗姆 / 149

三、社区经济与产业发展：公共服务的新思路

大都市社区文化产业发展研究

——以上海为例

姜虹 / 191

城市社区公共维修资金自主管理模式研究

陈建国 / 204

公共产品：从民用热价体系的属性看其治理改革

程宏 / 219

公共企业家精神与公共经济解密

埃莉诺·奥斯特罗姆 / 235

四、社区治理的宏观视野：公民社会与国家

美国地方社区自治实证研究

——以 Greenbelt 市为例

孙英翔 刘朱胜 / 249

美国城市中的邻里组织与社区治理

罗思东 / 259

封闭小区和社区私营治理的全球化兴起

瑞纳德·勒·嘉西 克里斯·韦伯斯特 / 274

论基于盟约的市民社会：一种理想类型的方法

李泉 张昕 / 307

为何 20 世纪有如此多的治理失败?

文森特·奥斯特罗姆 / 323

编者后记

陈幽泓 / 336

Contents

Legal Foundation of Community Self-Governance:

An Inquiry of the Concepts and System of Condominium Act

A System of Law for Multi-Unit Developments Yaorong Wei / 3

The Legal Unity of Common-Resource Property Rights Allocation in
Commercially-Built Housing Neighborhoods

—The Legal Spirit of a Differentiated Building Ownership System
Xiaohai Ling / 17

The Problems of Owners' Rights System in Commercially Built
Housing and Ways to Remedy Them

—A Reexamination of the Concept of Condominium Yunliang Li / 26

Practices of Community Self-Governance: Collective Actions and Institutional Choices

Establishing the Conditions for Owner Self-Governance Based on
Replicator Dynamics

—A Case Study Analysis of Elevators in Nanjing's Fuli
Mountain Villas Neighborhood Xianchen Zhu Hailiang Tu / 51

Seeking the Institutional Foundations of Community Self-Governance

—A Case Study of Beijing's Meiliyuan Neighborhood
Shoulong Mao Jianguo Chen / 65

Innovation in the Self-Governance of Residential Communities;

Investigating the Theory and Practice of Homeowner Representative

2 社区治理的多元视角：理论与实践

Assemblies

—A Case Study of Beijing's Shangdi Xili Neighborhood Weijian Guo / 80

Escaping the Collective Action Problem: An Institutional
Assessment of Innovations in Homeowner Self-Governance

—Examining the “Homeowner Representative Assembly System”
and “Property Management Entrustment System”

Yuhong Chen / 94

A Study of the Rights Protection Movement of Urban Community
Homeowners from the Perspective of Public Governance

—Based on Relevant Cases in Shenzhen and Beijing

Wen Chen Weiping Huang / 121

“Why Noncooperation?”: An Interpretation of Action
Tactics of Marginal Grassroots Organizations

Yanling He Pengju Zhang Xiaofeng Zhou / 135

Some Developments in the Study of Market Choice,
Public Choice, and Institutional Choice

Vincent A. Ostrom / 149

Economic and Enterprise Development: New Vision of Public Service

A Study of the Development of the Community Culture Industry
in a Metropolis—The Case of Shanghai

Hong Jiang / 191

A Study of Self-Management of Public Maintenance Funds in
Urban Communities

Jianguo Chen / 204

Public Products: Viewing the Governance and Reform of the
Civil Heating Price System from the Perspective of
Its Public Nature

Hong Cheng / 219

Unlocking Public Entrepreneurship and Public Economies

Elinor Ostrom / 235

Macroscopic Angle of Community Self-Governance: Civil Society and State

Local Government and Community Governance

—A Case Study of the City of Greenbelt in Maryland, USA

Yingxiang Sun Zhusheng Liu / 249

Neighborhood Organizations and Community Governance in

American Cities Sidong Luo / 259

The Global Emergence of Gated Communities and Privately-Governed

Neighborhoods Renaud Le Goix Chris Webster / 274

Covenant-Based Civil Society: An Ideal Type Approach

Quan Li Xin Zhang / 307

Why Were There So Many Governance Failures in the

Twentieth Century? Vincent A. Ostrom / 323

Postscript

Youhong Chen / 336



社区治理的法律基础：

建筑物区分所有权概念
与制度的探讨

论多元房地产法律制度

魏耀荣

原全国人大常委会法制工作委员会咨询委员、
经济法室主任、民法起草工作小组成员

【摘要】 本文在世界范围内对多元房地产物权的概念和权利范围进行了比较研究，在此基础上，对《中华人民共和国物权法》（以下简称《物权法》）中多元房地产的物权概念和权利范围以及专有部分和共有部分的界定和划分进行了考察，认为《物权法》就多元房地产物权的内涵和覆盖范围以及专有部分和共有部分的界定和划分所作的规定，尚有可进一步探讨之处。

【关键词】 建筑物区分所有权 《物权法》 业主权利

A System of Law for Multi-Unit Developments

Yaorong Wei

Former Consultant, Director of Economic Law Department,
Member of Drafting Group of Civil Law,
Legislative Affairs Commission, NPC, PRC

【Abstract】 This paper discusses the concept of Multi-Unit Developments and the scope of pertinent rights in global perspective. It points out that the definition of and distinction between the individually owned portions and the commonly owned portions in such housing developments, as established in the sixth chapter of China's Property Law, have certain deficiencies that require improvement (such as concerning roads, green space, and garages).

【Keywords】 condominium, property law, homeowner rights

我国城市居民的住房模式主要是多层建筑物和由多栋多层建筑物组成的住宅区，自然也包括由多栋单独别墅或联排别墅组成的住宅区以及

由别墅和多层建筑物混合组成的住宅区。美国、加拿大和我国香港地区的普通法称此类房地产为多元房地产 (Multi-unit Development, MUD, 亦可称多单元房地产)。^① 美国法律界还称之为共有权益房地产 (Common Interest Development, CID)。^② 为研讨相关的法律制度, 笔者在本文中采用多元房地产的称谓。

多元房地产的产生和发展历经久远, 在古巴比伦已见雏形, 经欧洲中世纪的缓步增长, 到 20 世纪特别是其下半叶, 大多数国家的大中城市都出现急剧以至爆炸性发展。由此种新型房地产派生出的财产权, 是一种权利客体多元化、权利主体多边化的新型物权。由此种新型房地产引发的法律关系, 是一种复合型、多层次和多重化的新型法律关系, 较早时期的普通法和民法典均鲜有涉及。一种与多元房地产的特征相适应的新型法律制度, 发轫于 1802 年《法国民法典》第 664 条。经过若干代法律人的不懈努力, 到 20 世纪后期, 该制度已在很多较发达国家和地区陆续面世, 其形式多为单行成文法, 或在民法典中新辟专章。一些先行者的此种法律, 屡屡修改创新, 与时俱进, 几近完备成熟。他们的居民社区秩序良好, 管理有序, 人们相处和谐, 罕有纠纷, 足显其法律的必要性和优良效果。

我国《物权法》关于业主的建筑物区分所有权一章 (第 6 章) 的制定出台, 构建了多元房地产法律制度的基本框架, 对调整城市社区的多边法律关系和保护城市居民的财产权益, 已初步显现其重要的作用和良好的效果。但从公布实施一年多的情况来看, 此项新的法律制度尚有待进一步完善, 尚有疑难课题未获破解, 尚存模糊地带有待厘清。2006 年国庆节期间, 笔者曾发表《关于建筑物区分所有权制度的探讨和商榷》一文。两年来, 笔者又作了进一步比较研究和实地观察, 再趁国庆节期间书就此文。

一、关于多元房地产物权的概念和权利范围

如何使多元房地产物权的概念与其客体相适应、相吻合, 如何使法律规定的权利范围能够对其权利客体包容无余和无隙覆盖? 也就是说,

^① Sarah Niel, *Hong Kong Land Law*, Longman Group (Far-East) Limited, 1992, p. 317.

^② Eranden E Bickel and D. Andrew Sirkin, *2007 Condominium Blue Book*, Piedmont Press, 2007, p. 1.