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拆迁冲突 化解机制



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| 序 |

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这是一部现实关怀很强的著作，以作者的博士学位论文为基础，问题直指近年来频繁发生的城市拆迁冲突。撰著者樊成玮，深圳律师，因工作关系，他收集了不少这方面的资料，又有对拆迁冲突案例的实际体验，所以，著作一路写来，少了些传统学院派的迂阔，却更多了对所研究问题本身的关切。

不知从什么时候起，城市的房屋拆迁开始引人牵挂。随拆迁而引发的频繁、暴烈的冲突，经媒体传播，在人们心目中叠化作抗拆孤岛中挥舞国旗自保和自焚抗拆这两个极具象征性的符号化形象。在引发社会极大震撼的同时，也引起了人们的深思，思考为什么城市的建设和发展会带来如此剧烈的社会矛盾。

房屋拆迁处处有，但构成一个突出的社会问题，确是具有中国特色的体制性现象。在现有的发展评价体系下，房屋拆迁不仅与城市改造相联系，更与地方政府的政绩和财政收入挂钩，这样，拆迁也就自然成为衡量城市发展快慢的一个重要标志。因此，才有“拆出一个新中国”的自嘲，也才有“不拆迁你们吃什么”这一在遭遇指责后的不平与自辩。可以说，中国城市快速发展中的拆迁以及由此引发的公共事件，已经成为人们观察和分析目下渐成气候的“中国奇迹”，或说是“中国模式”的一个标杆。

前些年，由拆迁所引发的矛盾好像还不那么突出。那个时候，城市的发展可以通过随意征用农村的土地来“摊大饼”。以低价征用农村土地来扩大城市规模，为城市发展积累资金，成为了我国城市发展的重要特征。可是，随着国家耕地保护的政策日益严格，靠征用农村土地来解决城市发展问题这条路越来越不好走，于是，旧城改造，大拆大建，便成了许多地方城市发展和建设的首选。这种大拆大建，不仅能刺激 GDP 增长，能带动地方财政收入增加，还因为提升了城市的功能和形象而凸显出一方长官的政绩，因此，曾有一种说法，如果说有锐意为官者不抓紧时间在任期内顶住骂声大拆大建，那是真要后悔的。有此，拆迁焉能不火？

老百姓对拆迁的态度是矛盾的，一方面，改善居住和环境条件的需求使他们从根本上不反对拆迁，但另一方面，房屋又是他们最为重大的利益关切，所以，拆迁补偿、拆迁安居后的利益损益，都会成为被拆迁者关心的问题。可也正是在这些问题上，被拆迁者发现，他们所面临的选择其实不多，开发商，尤其是开发商背后的地方政府，在绝大多数时候早就已经为他们安排好了一切，他们所能做的就是接受。

不像一些开发商，政府自然是应该要为老百姓着想的，但是，这并不等于说政府在拆迁中就完全没有其他的考虑。许多时候，面对不同的利益权衡，作为公权力也难免会有自身的需求，更何况这种需求一旦被贴上“公共利益”的标签，就更容易获得不容置疑的优先地位。这种官与民之间不一致的权益考量，其实就是当代中国城市拆迁冲突频发的根本原因，它所反映的，也就是开发商、城市政府和被拆迁者围绕拆迁所展开的利益之争。这

种利益之争在中国特色的转型背景下，又被放大到最大的限度。作为被拆迁者，是否愿意配合拆迁，一是要看拆迁的补偿是否合理，二是要看搬迁后自身的综合利益是否受损；而作为开发商和政府，则希望通过拆迁改造来创造效益、塑造政绩，以最小的补偿换取最大的收益。双方利益错位，自然易生冲突，所以，拆迁的过程实际上也就是商、官、民三方（许多时候可以简化为官民两方）围绕由拆迁带来的利益的分配进行谈判和博弈的过程。这个现象本来各国皆然，并非我们所独有，只不过在我们这里，它又极具鲜明的特色，即谈判和博弈从一开始就不可能是各方地位和权利平等，被拆迁者必须顾全城市发展稳定的大局。土地由政府控制，游戏规则政府说了算，就已经使被拆迁者想通过谈判和各种博弈手段获得理想的补偿几乎没有可能。能够在政府允许的范围内获得相对可以接受的补偿，其实是绝大多数被拆迁者的实际预期。只是在许多情况下，要实现这一目标也并不容易，无奈之下，就不得不要么选择妥协，要么选择维权了。好在社会逐渐开放，网络媒体日益发达，于是，在公权与私权之间，便发生了越来越多的矛盾和冲突。

从冲突的结果来看，被拆迁者未必都是输家，可对于政府，则不论输赢都会自损形象，更与和谐稳定的目标不符。为此，中央政府出台了越来越严厉的法规和政策来治理这一问题。应该说，这些法规和政策正在产生作用，但由于拆迁冲突从更深层次上是透射了社会转型中从制度到文化及价值理念等多方面的结构性矛盾，所以，要想仅仅依靠某项单一的制度或政策跟进就从根本上化解矛盾也很难，必须要从综合性的制度和机制建设入手才

可解决问题，而这也正是作者在书中所呼吁的。

作为法律人，作者是制度主义的信奉者，他思考了一整套化解拆迁冲突的方案，这些方案涉及化解拆迁冲突的利益平衡机制、化解拆迁冲突的社会管控机制和化解拆迁冲突的现代市场机制等诸多方面。可谓面面俱到，构思缜密。我虽不专做拆迁冲突研究，读后也觉得受到启发。而作者则相信若能以他所指明的路径去开展相关的制度和价值建设，愈益激化的城市拆迁冲突终有化解的一天。对此，作者有信心，进而也带动了我的心，觉得这终非如一些博士论文在谈论国家大事时所表现出的书生气和纸上谈兵了，应当予以充分肯定。但仔细思量，却又觉得事情还不那么简单，例如，我至少还可以追问作者所思考的制度建设凭何就可以顺利展开，如果这些制度建设得以展开的前提——那些作为支撑条件的基础性社会与法律制度及其相应的价值理念与文化从根本上还远不成熟，甚至不具备，又如何可能展开作者所讲的具体法律、制度和机制的建设？或者它们即使出现了又如何能够有效运转？所以，从这个角度看，我就更愿意相信作者其实还主要是在提出问题，而真正的解决问题，恐怕还有相当长的路要走。

2012年6月17日于武昌喻家山

拆迁，本是任何国家和地区在建设发展过程中不可避免的社会活动。然而，中国三十年来经济社会发展所推行的城镇化开发、新农村建设，使得名目繁多的工程建设项目远远超过当地的发展需要和地域容量，用地资源难以为继，土地供求矛盾日趋加大，由此导致拆迁活动遍地开花，引发各类冲突层出不穷，并造成部分人的合法权益、人格尊严、基本生存条件受到侵害，甚至付出了生命的代价，在一定范围内已经直接影响到社会的和谐、人心的稳定、社会诚信和民众对政府的信心，成为一个相当严重的社会问题。

笔者依据马克思所创立的社会学冲突理论观点，运用社会学的分析方法，认为在拆迁冲突问题上，土地资源的不平等占有，利益集团和公权力的强制威慑，以及土地开发利用利益分配不公平，当属拆迁冲突的直接根源。如果我们武断地堵塞民众宣泄渠道，而非科学地进行引导、疏通，则令利益表达机制不畅通、公众民怨积聚得不到排解和化解，就必然逼使民怨转向非理性表达和付诸暴力，导致拆迁冲突性质升级，暴力不断。

本研究首先分析了中国大陆房屋拆迁的不同历史背景和社会需要。在计划经济时代，拆迁甚至成为人们渴望的“福利”，国家法律、各级政府也把拆迁视为理所当然应予奖励的“业绩”。而随着改革开放政策的推行，经济社会现代化的推进，房屋产权

制度的确立，房地产商品化体制的转变，原有的拆迁定性、拆迁制度、拆迁手段都成为了与人民利益冲突，与宪法精神相悖的社会顽疾。虽然新的《国有土地上房屋征收与补偿条例》试图以宣示性的表态安抚社会大众，然而其刻意回避“拆迁”这一社会现实的立法硬伤，以及未能全面规范乡村土地上房屋征收与补偿的立法缺口，不但未能有效遏制非法拆迁现象，解决拆迁冲突矛盾，反而更出现了以“拆违”、“农民被上楼”、“名胜古迹抢救性拆迁”等花样翻新的拆迁案例。这些逆风而行、胆大妄为的行为的幕后，是巨额土地财政、GDP 高指标的业绩诱惑，是政府行为失范、官商利益联手的暗箱操作。同时也体现了土地强权、房屋弱权的权利体制设计上的可商榷之处。

基于拆迁冲突的社会现状，笔者从以下三大方面着手构建化解拆迁冲突的系统化机制。

首先，经济因素、利益驱动是社会结构和社会活动及其变革的基本的决定性因素，且利益问题在拆迁冲突中永远是“量”的问题，而不会是冲突行为“质”的定性问题。在坚守公共价值观、审慎遵循应有程序来界定公共利益的同时，确定私人权益的法定地位，并予有效维护和切实保障，实则是实现公共利益整体性、认同性、普惠性的社会责任之所在。构建利益交换机制，既可杜绝假借公共利益“滥权”，又可防止过分强调私人权益而索求无度，从而令拆迁冲突各方的认识方向趋同，矛盾分歧聚焦。所以，在处理拆迁冲突问题上，既要维护公共利益的实现，推进公共政策的落实，又要切实保障被拆迁人的合法权益和合理诉求，这既是社会共生关系建立与发展所表现的不同方面，同时也

是构建和谐社会极其广泛而重要的因素之一，更是化解拆迁冲突的社会基础。

其次，强调拆迁冲突化解机制的公平正义，并将公平正义作为评价拆迁体制、法律规范、政策措施、政府施政的首要价值观念和研判标尺。政府公权力的一项重要功能就是以自身程序的公正和实体的公正，来维护社会公正，消除不公正现象，并防止不公正现象的发生。拆迁冲突是人为的冲突，因而也就蕴藏着随着人的意志而变化的社会风险，导致管控失度，处置失当，判断失误，手段失措，就必然激化冲突性质，引发新的社会风险。因此，我们无论从决策层面、施政层面，还是立法理念，执法举措，都应具备科学应对拆迁冲突的防范对策，戒除人治恶习，强化法治观念，树立法治威权，依法平衡权利与义务，合理配置权利与权力，尤其是要有效遏制公权利的泛滥和公权机构的“滥权”，同时，也要防止司法为社会舆论所左右，执法因非法抗争而摇摆，使法律真正成为维护执政秩序，矫正利益失衡，纠正社会不公，制止违法拆迁，防范拆迁冲突发生的防火墙，真正成为化解拆迁冲突的社会管控机制的切实保障。

再次，拆迁冲突难以化解还有一个社会结构性的因素，即房地产的“伪商品化”和房地产的“非市场性”，使得房地产开发市场多头争食、无序竞争。这种“多轨制”既搞乱了体制标准，也搞乱了市场规律，更加大了争夺土地资源，激化拆迁冲突的几率。在市场经济规律得不到尊重的情况下，政府不断地根据自身需要来进行行政干预，效果适得其反。而政府对“居者有其屋”的误读，使得保障房在花费了巨额财政，浪费了用地空间，制造

了购房不公，引发了住房腐败的同时，偏离了社会救济性而非福利性的本质，也助长了社会公众不但要有房住，还要有产权的不正当期许。商品房与保障房不同的内在性质与社会作用，时下绝不存在同存并行的客观条件。房地产市场结构应当规范化，必须推行资质法定化开发的“单轨”机制，政府、事业单位及不具备房地产开发资质的任何实体，理应干净彻底地退出房地产开发市场。只有抓住房地产行业改革的要害进行制度改革、体制创新，同时设立公益拆迁和商业拆迁的分隔机制，以及拆迁项目的听证机制，拆迁补偿的评估机制，达到系统化、规范化、制度化、法定化，就可配套建构起从根本上化解拆迁冲突的机制体系。

Demolition in nature is part of inevitable social activities in a country's historical development process. But, China, the world's fastest-growing major economy has been eagerly promoting the urbanization and the new rural construction initiatives over the past three decades. It is found difficult for the limited land space to supply enough resource for the numerous construction projects undertaken each year. This has caused the intensified demolition conflict and brought in various society problems jeopardizing citizen's legal rights and interests, basic living condition, and human dignity. To the worst, people could lose their lives. This has, to some degree, placed a negative impact on social harmony and credit building efforts and may cause the public's confidence melt down in the government. A very serious social problem may arise from this.

In this study, according to the sociology conflict theory by Marx, the use of sociological analysis the root causes of demolition of conflict are the unequal possession of the land resources, interest groups' power to force deterrence, and unfair distribution of land development and utilization. If we ignore the inherent interests of demolition of conflict and not to hear the voice of our citizens, it will not support but to hinder a healthy communication between

the government and the public; and to the worst, it will upgrade the conflicts and inevitably force the grievances to a non-rational expression.

This study focuses on analyzing the different historical backgrounds and social needs of the Chinese mainland house demolition. During the planned economy era in China, demolition even became a type of “welfare” when people viewed it as a reward/bonus for their annual performance. However, due to the economic reform and opening policy, the promotion of economic and social modernization, property rights establishment, the institutional transformation of real estate commercialization, it has changed the nature of demolition in terms of its policies and methods, creating conflicts to residence’s interests, and contrary to the spirit of the Constitution.

Although the purpose of newly passed “Levy and Compensation” bill is to comfort the public in a declaratory manner, it did not contribute much to resolving the conflicts caused by the “demolition” and closing the legislation gap between rural areas land/property levying and compensation. It did not effectively curb the illegal demolition phenomenon and address the demolition conflict, instead, it appeared to give a break for those who committed to “illegal demolition”, “farmers upstairs”, “monuments rescue demolition” guise demolition case. The motivations are the huge amount of construction project budget and pressures from achieving a high

GDP. The government silently supports enterprise for such operation. The existence of land power and the design weakness of property rights also play roles in contributing to the phenomenon.

Based on the social phenomenon arise from the demolition of conflict, solution alternatives for demolition conflicts can be developed from the following three aspects.

Firstly, Economic factors and benefit-driven are the essential determinant factors for social structure and activities evolution, and the interests topic involved in the demolition issue should always be dealt with “quantitatively”, but not “qualitatively”. Adhere to public values, carefully follow the due process to define the public interest to determine the legal status of private equity, and to effectively maintain such protection are in fact our social responsibility to achieve the integrity of public interest as a whole. Building the interests exchange mechanism can prevent the abuse of power under the guise of public interest, and will also prevent too much emphasis on private interests and demand excessively; thus on the core issues, both parties in the demolition issue should recognize the direction of convergence, instead of contradictions.

Therefore, when we deal with demolition conflict, it is necessary to safeguard the realization of public interest, promote the implementation of public policy, and also effectively protect resident’s legitimate interests and reasonable demands. It shows the different aspects of the establishment and development of social

symbiotic; at the same time, it is the foundation to resolve the demolition conflict.

Secondly, it can never be emphasize enough on the justice and fairness when dealing with demolition conflict. Justice should be the primary values and measurement to evaluate demolition system, legislation, policies and governance. An important function of government authority is its own procedural fairness and impartiality of the entity to maintain social justice, to eliminate injustice, and to prevent the occurrence of injustice, which is the premise of the mechanism to resolve the demolition of conflict. Demolition of conflict is man-made conflicts; thus, it bears with man-made social risk, internal control risk, misconduct, misjudgment, and incorrect methods. This would intensify the conflict and give arise to new social risks, which should be classified to both social governance and economic development's failure.

Therefore, a top-down risk management should be adopted. It helps effective decision-making, policy development, law making and enforcement initiatives. A scientific response to the demolition of conflict should be used to prevent misbehavior, strengthen the rule of law, establish law authoritarian, balance the rights and obligations, and the rational allocation of rights and powers. In particular, efforts should be made to effectively curb the "abuse of power" by the public agencies, prevent justice interfered by public opinion, law enforcement impeded by illegal protest so that legislation can truly

execute the law order, correct imbalance between the interests, correct social injustice, and stop the illegal demolition. It acts as a firewall to prevent the demolition conflict, and genuinely become the effective protection of the social control mechanisms to resolve the demolition conflict.

Thirdly, another reason why demolition of conflict is difficult to resolve is due to a social structural factor, the “pseudo-commercialization” of the real estate and “non-market” real estate, which result in disorderly competition in the real estate market. This “multi-track system” not only confuses the institutional standards, but also confuses the laws of the market. It upsurges the competition for land resources and the intensification of the demolition of conflict.

If rules of market economy are not followed, the government has to administratively intervene, which could lead to undesirable effects. Government spent a huge amount of financial budget on land space due to the misinterpretation of “Home Ownership Scheme”, which created unfair trade and buyers could incur unnecessary costs. Corruption and deviation could be one of the consequences; it may also mislead the public into believing that they would have houses to live and own the title. The distinct differences between the commercial house and welfare house do not have the objective conditions that are in parallel with the popular “dual track” scheme. Real estate market structure should be standardized and must pursue

the legitimate “monorail” mechanisms. The governments, institutions and entities that do not have real estate development license should be prohibited to do business in the real estate market. By identifying and understanding the real estate sector’s characteristics in the institutional reforms and innovation, conducting hearings, implementing evaluation management system and streamlining the legal processes for its related policy making, we can expect to develop a comprehensive and systematic methodology to resolve demolition conflicts.