



L 论国家补偿

LUN GUOJIA BUCHANG

■ 司坡森 著

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序

司坡森的《论国家补偿》一书，是在他的博士论文基础上修改而成的。近几年来，随着我国市场经济的发展，国家征用土地及私有财产和其他各种影响财产权的情况大量增加，矛盾和纠纷也随之发展，补偿问题已成为社会生活中引人注目的重大问题。虽然我国已有一些单行法作了一些有关补偿的规定，但远没有形成一项比较完善的法律制度。2004年宪法修改后，第20条和第23条都明确规定国家在征用土地或征收私有财产时，应该给予赔偿和补偿。补偿制度已成为一项宪法制度，但法学理论研究显然滞后，坡森的这项研究成果，可以说是适时地填补学术空白之作。全书视野开阔，从探讨国家补偿的基本理论开始，就补偿的类型划分，国家补偿的原因、要件、范围，国家补偿的方式、标准和计算，以及国家补偿的程序和救济等各个方面进行开拓研究，多有创见，如关于国家补偿的三种类型的划分；国家合法侵害补偿、国家公务受益补偿和国家衡平补偿；在国家补偿标准确立上引入主观标准和客观标准；提出在国家补偿领域建立公益诉讼制度等等，特别是关于将人性尊严原则引入国家补偿领域进行探讨，对公共利益目的进行较为完整的阐述，或道前人所未道，或作富有新意的发挥，都给人以启迪，诱人以深思。记得坡森在毕业答辩时，正是这种深入开拓和敏锐创见，获得诸位导师的一致好评。自然，经过修改完善，本书自比当时的毕业论文更胜一筹。它的出版，必将引发行政法学界和关心我国补偿制度的广大

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读者的瞩目。

犹记十年前的冬天，坡森在河南当警察的时候，千里迢迢跑来北京向我讨问学术问题。从那时起，这位年轻人的执著、好学给我留下了深刻的印象。后来，坡森先后考上了中国政法大学行政法专业硕士和博士研究生。坡森的硕士论文和博士论文答辩时，我都是答辩委员会的主席，平时也多所接触，由于这层师生的渊源，不仅悉见其学术上的勤奋和苦索，且深感其待人接物的热情和自律，这自是促成学业、事业的重要品格。寒窗数年，坡森毕业了，现正从事能源和安全生产领域有关理论研究和立法起草的新工作，相信他在新的征程中，更当奋发前行。路漫漫其修远，我衷心祝愿他能保持一贯的良好精神风貌和求索精神，在新领域中取得更大突破。

坡森在此著付梓之际，嘱我为序，面对这样一部颇富创意、很有学术分量的新作，其欣喜之情自不待言，遂欣然命笔。

廖松年

2005年初春于北京世纪城春荫园

自序

这本书的基本观点是：中国应当建立公平合理的国家补偿制度。

随着人们法治观念和人权保护意识的不断增强，因补偿不公而引起的人们对国家公权力主体立法、执法、司法质量水准的质疑和批评越来越多，一些与补偿有关的立法被认为缺乏对人性尊严的必要维护；执法、司法行为中随意侵犯人民群众正当权益的现象时有发生。令人震惊而又不得不正视的一个问题是：国家补偿制度的不合理事实上很微妙地助长了超越职权、滥用职权等违法行为的发生。显然，如果有合理的国家补偿制度，不少所谓“合法”的侵权损害本来是可以避免的；如果有合理的国家补偿制度，公权力主体本来也不需事必躬亲，疲于奔忙。

简言之，国家补偿制度不健全，不利于改进政府执法、司法，不利于增强国家公权力主体与人民群众之间的感情，不利于增强政府和人民之间的联系，不利于增强国家的向心力和凝聚力，不利于政府动员全体国民万众一心地完成国家战略目标和任务……

也许对于我国当今总体上并不合理的国家补偿制度来说，确立合理的补偿制度本身就必然意味着国库或者说全体纳税人负担的加重，国家财政支出的增多，甚至是巨大增加，因而，对我国来讲，构建合理补偿制度显得代价太大、成本过高，但笔者却不这样认为。

不错，建立公平合理的国家补偿制度，作为推动改革的一剂

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猛药，也许会给我们带来阵痛。猛药是苦的，甚至苦不堪言，初喝下去，会引起身体的极度不适和强烈反应。但谁能否认，猛药往往能医沉疴、治重病，比葡萄糖、淀粉之类的安慰剂，疗效要强出许多。

而且，短期内看似增加的合理费用支出比之于人民群众因对公正补偿制度的满意、拥护而激发的积极性所创造的价值和效益，难道不是微不足道的吗？何况我国作为严格的成文法国家，还有那么多公权力主体的实质性违法行为，因为立法规定的欠缺以及执法、司法的疲软难以被认定为违法，本属于违法侵权的行为却有了“合法”的名号和外衣，只要给受害人支付低廉的补偿费就可以了，仅此一端，就会助长多少公权力的不慎行使甚至滥用，给国家和社会造成多大损失！这种在成文法上不好认定为违法，但事实上严重侵权的行为，本可以通过合理补偿制度的建立，使相关行为的决定者和实施者因无利可图或因干系重大知难而退，从而使所谓的“合法”侵权对公民或组织造成的损害消解于无形。这样看来，确立合理的国家补偿制度又能为国家减少多少费用开支！放眼长远，合理的国家补偿制度确立和实施一段时间后，补偿费用的支出一定会再降下来，并维持在相对稳定的水平上。甚至有朝一日，补偿费用的年度支出会低于现在的年度平均水平。

当然，究竟如何建立起公平合理的国家补偿制度，是一个仁者见仁、智者见智的问题，笔者在书中所提的一些观点，也不过是个人的一管之见。但无论意见如何纷纭，观点怎样相左，国家补偿制度的健全完善，都必须充分体现我国宪法修正案所规定的“国家尊重和保障人权”要求，这是我们立论的基础和出发点。

无论是一个人、一个组织，还是一个国家，始终要不断面对并必须处理的一个问题，就是冲突与合作的问题。在崭新的 21

世纪，如何在社会不断发展、文明日趋进步的形势下，从错综复杂的矛盾对立中，通过民主程序构建起一个各方都满意和接受的、科学合理的、能充分体现公平正义要求的国家补偿制度，尽可能实现政府和每一位奉公守法的公民之间最大程度的谅解与合作、尽可能实现公益与私益之间的相对完美的平衡与统一，值得每一位有识之士深入思考和探索。我的这本愚作，只能算是引发大方之家金玉良言的一块儿烂砖。当然，我对国家补偿制度的思考也并不会因为这本书的出版而停止下来。

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2005年初春于北京朝阳区和平里寓所

内容摘要

国家补偿,是国家责任的一种。在我国,无论是理论研究,还是有关立法规定,都远远落后于时代的发展,相应代价也极为惨痛。本文考察国内外国家补偿法律制度的相关理论,借鉴私法赔偿若干原理,结合我国国家补偿实践领域中存在的突出问题,以类型化研究为主轴,分析和探讨我国国家补偿的理论问题,并以此为基础对我国国家补偿立法和相关制度的完善稍作建言,期为国家补偿问题的进一步深入研究提供些许参考。全文共分六章:

第一章内容为“国家补偿的基本理论”。本章主要探讨国家补偿的基本观念、理论基础以及宪法基础和依据。基本观念部分主要界定国家补偿的概念,并对国家补偿的性质、特征和功能进行讨论,进一步将国家补偿划分为三种基本类型:国家合法侵害补偿、国家公务受益补偿和国家衡平补偿。在此基础上,提出国家补偿基本制度设计所必须关注和解决的三个前提问题:人的标准问题;损害补偿请求权人的范围问题和应予补偿的损害程度问题。最后对国内外国家补偿的历史发展和现实立法与实践作一简介,为后文联系实际进行研究预作铺垫。

在国家补偿的基础理论部分,在介绍和评述国内外几种主要学说基础上,进一步探讨我国国家补偿所应采取的基础理论,认为:我国国家补偿的基础理论,不是单一的,而是复数多元的。在此基础上,结合笔者对国家补偿基本类型的划分,指出国家合

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法侵害补偿和国家公务受益补偿的理论基础应当是“特别牺牲理论”，而我国国家衡平补偿的理论基础应当是社会主义“法治国”原则。

在国家补偿的宪法基础和依据部分，阐述了外国和我国国家补偿的宪法基础和依据，指出如能在我国宪法上进一步规定和确立下述原则，对我国国家补偿制度的健全和完善，必然影响深远，这些原则包括：财产权的使用限制及补偿原则、正当程序原则、人性尊严原则和公正补偿原则。

第二章为“国家补偿的原因种类和成立要件”。国家补偿的原因种类是我国国家补偿研究最为薄弱的环节。本章主要按第一章对国家补偿三种基本类型的划分，提出各基本类型中引起国家补偿的具体原因，并探讨了国家补偿原因的其他分类方法。

鉴于我国至今尚未有一部对国家补偿作出专门规定的法律，就要依据各个分散立法的有关规定和国家补偿的有关法理，结合国家补偿的三种基本类型，分别探讨国家补偿的成立要件。

鉴于公共利益和公共利益目的是国家补偿原因和国家补偿构成要件的重要内容和组成部分，本章还结合美国、法国、日本等国的补偿立法和实践，探讨了公共利益及公共利益目的（用途）的表现和认定。

第三章为“国家补偿的范围”。本章结合国家补偿的三种基本类型，详细探讨了国家补偿的主体范围、客体范围、损害范围和原因范围。

国家补偿主体范围论证了国家补偿的基本结构。根据国家补偿的三种基本类型详细分析了导致国家补偿权利人资格获得的一般事由和例外事由。论述了国家作为补偿义务人的原因。对立法时国家补偿义务机关的方案设计提出并论证了四种方案。

国家补偿的客体部分分析了国家补偿客体的构成要件，并从不利利益的属性出发，对不利利益作了分类，指出并不是每一类不利

益都能成为国家补偿的客体，对各类不利益能否成为国家补偿客体，进行了详细探讨。

损害的认定方法与认定结果直接关系到国家补偿是否公平和合理。笔者结合民事侵权理论的利益说和组织说两种基本学说，提出我国国家补偿界定损害的学说应当是以组织说为原则，以利益说为例外，并进一步探讨了国家补偿的损害分类，以及对各类损害国家应否承担补偿责任的确定原则。

国家补偿原因范围对引起国家补偿责任的各类行为和事件进行了分析归纳和论证。

第四章为“国家补偿的方式”。本章从理论和实践上对国家补偿方式进行探讨。国家补偿的基本方式为金钱补偿和恢复原状，此外还有其他方式。我国实践中采取的补偿方式是多样的，直接补偿和间接补偿方式在现实中均有体现。我国国家补偿方式，应以金钱补偿方式为原则，以恢复原状等其他方式为例外。

第五章为“国家补偿标准和国家损害补偿的计算”。鉴于国家衡平补偿的标准，由补偿义务机关依法根据社会公平正义原则裁量决定，本章主要研究的是国家合法侵害补偿和国家公务受益补偿的标准。在分析外国国家补偿标准和我国现有国家补偿立法标准的基础上，提出我国国家补偿应当采取的标准为正当补偿或者说公正补偿。具体贯彻时，一般应当坚持：以“全额补偿”为原则；补偿应当以公平市场价格为基准；不排除在特定情形下“适当补偿”原则的适用可能。

损害补偿的计算兼具事实、法律问题两种性质。损害的构成因素可以分为普通因素与特别因素。损害的计算方式也相应地分为客观和主观两种不同的计算方式。同一损害事实，因计算方式不同，损害大小可能随之而异。我国应区分不同国家补偿基本类型，分别采取客观和主观不同的计算方式。当然，通常应以采取客观计算方式为原则。

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第六章为“国家补偿程序和国家补偿诉讼”。由于种种原因，我国国家补偿程序违法问题较为突出，应当尽快健全和完善以听证和听证会制度为核心的国家补偿程序，并将损害评估市场化作为国家补偿程序的关键一环。

对受害者的补偿机制，很重要的一环是受害人（或其他相关人）起诉的权利保障和激励机制。我国国家补偿诉讼立法最突出的问题是缺乏补偿诉讼救济的明确法律依据，应尽快健全有关国家补偿的诉讼救济立法，有力维护和保障当事人正当权益。同时，为防止补偿义务主体违法给付补偿侵害，公共利益，具体说一是不应该补偿的而给付补偿，二是应当少给付补偿的而多给付补偿，必须在建立我国公益补偿诉讼制度时，将其适用范围涵盖违法给付补偿损害公共利益的情形。

关键词：国家补偿 基本类型 理论基础 宪法依据 成立要件 补偿范围 公共利益 补偿方式 补偿标准 补偿计算 补偿程序 补偿诉讼

Abstract

National compensation is one of the national liabilities, but in China both its theoretical studies and the establishment of relevant laws and rules lag far behind the global development, which results in serious problems. Here in this book, the theories of national compensation laws and systems developed home and abroad are examined. With reference to some theories of compensation in private laws as well as the primary problems in legal practice of national compensation in China, by taking classification study as the axis, the theoretical problems of national compensation in China are explored and analyzed. Furthermore, some suggestions are made to improve national compensation law and relevant systems in China, in hopes of contributing a little to further study on this issue. This book is composed of six chapters.

Chapter 1 is *The basic theories of national compensation*. It mainly explores basic concepts, and theoretical and constitutional grounds for national compensation. In the part of the basic concepts, the national compensation is defined and its nature, characteristics and functions are discussed. The national compensation is further classified into three basic types, i. e. national compensation for nation's rightful infringement, national compensation based on public - service interests and national compensation for equity, on the basis of which three preconditions are brought forward to be emphasized and resolved at the time of designing the basic system of national compensation: the standard of

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human, i. e., from whose perspective to ascertain the damage, the compensator, the obligee or an abstract reasonable person, the scope of obligee for damages, and the degree of damage that should be compensated for. At the end, a brief introduction is made to historical development and present legislation and practice of national compensation home and abroad, which sets a beforehand foundation for the further studies based on the practice in the following chapters.

In the part of the theoretical grounds for national compensation, after the introduction and review of the major theories worldwide, the basic theories that should be adopted for national compensation in China are explored. It is argued that the basic theories of China's national compensation should not be single but be multiple. Considering the primary types of national compensation classified above, it is asserted that the theoretical grounds of national compensation for nation's rightful infringement and national compensation based on public - service interests should follow "the theory of special sacrifice", while those of national compensation for equity should be the socialist doctrine of "rule - of - law country".

In the part of the constitutional grounds for national compensation, the constitutional grounds are illustrated for global national compensation, and it is pointed out that the improvement and perfecting of China's national compensation system will definitely be influenced profoundly by further establishment of the following rules in China's constitution: limit on property rights and its compensation, the rule of proper procedure, the rule of human dignity and the rule of just compensation.

Chapter 2 is *The types of the reasons and the constituting elements for the establishment of the liability for national compensation*. "The types of the reasons" is the weakest part of the research on the national

compensation in China. In this chapter, in accordance with the classification of three basic types of national compensation in Chapter 1, the specific causes for national compensation in each basic type are provided; other classifications of reasons for national compensation are also discussed.

Given that there is not yet a law that exclusively regulates national compensation in China, it is necessary to explore each of the constituting elements respectively for the establishment of the three different primary types of national compensation liabilities in accordance with separate rules and relative legal theories.

The purpose of public interests is the important content of the reasons for national compensation as well as the ingredient of constituting elements of national compensation. With reference to the legislation and practice of national compensation in USA, France, Japan, etc. the expressions and cognizance of public interests and their goals (functions) are detailed.

Chapter 3 discusses *The scope of national compensation*. Based on the three basic types of national compensation, the scopes of subjects, objects, damages and causes for the national compensation are explored.

The scope of subjects deals with the basic structure of national compensation. In this part, the general and exceptional causes that enable the party to become an obligee are analyzed; the reasons why the nation should act as a compensator are discussed. Concerning the legal designing of national compensatory organ, four proposals are offered and demonstrated. The scope of objects analyzes the necessary components of the objects, classifies the disadvantages according to their different natures, and further argues that not all disadvantages could be

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the objects of national compensation, which naturally leads to a detailed discussion about whether each disadvantage could be the object of national compensation.

The ways and results of ascertaining damage directly decide whether national compensation is fair and reasonable. By combining the two primary theories of civil torts, the theory of interests and the theory of organization, it is argued that the theory of organization should be mainly adopted to define damage, with the theory of interests as an exceptional complement. In addition, further explored is the damage classification of national compensation as well as the ascertaining rules about whether the country should be liable for each type of damage.

The scope of the reasons for national compensation analyzes, induces and demonstrates a variety of behaviors and events that cause national compensation.

Chapter 4 deals with *The ways of national compensation*. This chapter explores the ways of national compensation both in theory and in practice. The primary ways of national compensation are damages and restitution; besides, there are also other ways. The ways of national compensation in China are varied, among which the direct compensation and the indirect compensation can both be seen in practice. To set up the ways of China's national compensation, damages should be taken as the principle and other ways like restitution as exceptions.

Chapter 5 is *The standard and the calculation of national compensation*. In consideration that the standard of national compensation for equity should be legally established by the compensatory organ in accordance with the principle of being socially equal and just, this chapter focuses on the standards of national compensation for nation's rightful infringement and national compensation based on public - service

interests. Based on the analysis of the standards of foreign national compensation and the existing legislative standard of national compensation in China, it is argued that the standard of national compensation adopted by China should be *rightful or just compensation*. In specific practice, the following rules should be persisted in: the principle is “overall compensation”, compensation takes the reasonable market price as the benchmark, and the possible adoption of the principle of “proper compensation” is not excluded.

The problem of compensation calculation has a mixed nature of facts and law. The constituting elements of damage can be classified as common and special. Accordingly, the calculation of damage can follow two different ways: objective and subjective. The damage may vary with different ways of calculation, even if the facts remain exactly the same. In China, different primary types of national compensation should be classified, with objective or subjective calculation adopted accordingly. But surely objective calculation should be taken as the principle.

Chapter 6 discusses *Procedure and litigation of national compensation*. For various reasons, the problem of illegality in the procedure of national compensation in China is rather serious. Therefore, the improvement and perfecting of the national compensation procedure centered on hearing and the hearing system should be speeded up, and the marketization of damage evaluation should be treated as a key step.

As to the compensatory system for victims, one of the important parts is the mechanism that secures the right of victims or other relevant individuals to sue and encourages them to sue. The most urgent problem of the legislation of national compensation in China is the lack of expressed legal grounds for remedies. Therefore, to maintain and pro-