

# 残疾人社会保障 法律制度研究

余向东◎著

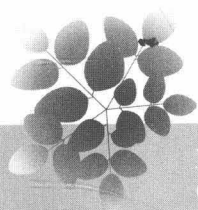


Researches on the Legal System  
Concerning Social Securities for  
the Disabled

中国法制出版社  
CHINA LEGAL PUBLISHING HOUSE

# 残疾人社会保障 法律制度研究

余向东◎著



Researches on the Legal System  
Concerning Social Securities for  
the Disabled

中国法制出版社

CHINA LEGAL PUBLISHING HOUSE

## 图书在版编目 (CIP) 数据

残疾人社会保障法律制度研究/余向东著. —北京:  
中国法制出版社, 2012. 3  
ISBN 978 - 7 - 5093 - 3457 - 7

I. ①残… II. ①余… III. ①残疾人保障法 - 研究 -  
中国 IV. ①D922. 182. 34

中国版本图书馆 CIP 数据核字 (2012) 第 010221 号

策划编辑 舒丹

责任编辑 王玥

封面设计 李宁

---

## 残疾人社会保障法律制度研究

CANJIREN SHEHUI BAOZHANG FALU ZHIDU YANJIU

著者/余向东

经销/新华书店

印刷/三河市紫恒印装有限公司

开本/640×960 毫米 16

版次/2012 年 3 月第 1 版

印张/16.75 字数/230 千

2012 年 3 月第 1 次印刷

---

中国法制出版社出版

书号 ISBN 978 - 7 - 5093 - 3457 - 7

定价: 48.00 元

北京西单横二条 2 号 邮政编码 100031

传真: 66031119

网址: <http://www.zgfsz.com>

编辑部电话: 66078191

市场营销部电话: 66017726

邮购部电话: 66033288

## 序 言

向东同志的博士论文《残疾人社会保障法律制度研究》就要出版了，我感到由衷的高兴，向东同志在工作之余坚持学习和研究，并最终获得博士学位，还分别在国家核心期刊上发表了数篇学术论文，承担中国残联年度研究课题并担任课题主持人，这种孜孜以求的精神和攻坚克难的勇气值得称赞。这部论文以残疾人社会保障法律制度为选题，融合了他多年从事残疾人工作的实践经验，也体现了一名残疾人工作者的强烈事业心和高度责任感。

众所周知，在我们这个地球上有 60 多亿人口，其中有 6 亿多残疾人，我国就有 8300 多万残疾人。这个庞大的数字包含着非常复杂的内容。残疾人这个词汇叠加着无数的痛苦和不幸，它蕴含着残疾人美好的梦想、热切的渴望，还有不屈的抗争。生命的残缺是人类进化和发展的必然代价，残疾人问题说到底，还是社会环境造成的，正是一部分人对残疾人的歧视、偏见和排斥的存在，才使人的残疾成了问题。只有消除歧视和偏见，保障和实现残疾人的平等权利，残疾人才能回归社会主流生活，身心获得全面解放，创造美好的生活。其实，从生命的历程来看，每个人都面临着残疾的潜在威胁，只是造成的原因、发生的时间、持续的时段和造成的影响不同。生命的本质都是高贵的，对那些忍受残疾之痛却依然能面带微笑生活的兄弟姐妹，我们应该怀有深切的同情和敬意。生命的形态总是不完整的，这种不完整性正是人类进化的必然，不完整促使人们认识完整，并且为美好的生命前景做不懈的努力。残疾人问题不仅是生命个体的健康问题，更是一个有关公正和进步的社会问题。对残疾人问题认识的深入意味着社会文明的进步，通过对残疾人问题的研究，我们会更好地认识生命，维护人的尊严，创造符合人的生命多样性的生存环境。

《残疾人社会保障法律制度研究》一书以一个残疾人工作者和社会学者的角度探讨残疾人的生存与发展，非常有意义。残疾人社会保障是残疾人最基本的需求，也是基本人权保障的重要内容。人

权发展首先要着眼于弱势群体的生存状况，残疾人在医疗、康复、教育、就业、脱贫等方面有很多需要解决的问题。残疾人社会保障是整个社会保障体系的重要组成部分，有别于一般意义上的社会保障体系，应当给予更多的关注和重视。从生命的质量来说，残疾人贫困程度更大，社会竞争力更小，他们需要更多的关心和帮助。

近年来，我国残疾人社会保障状况正在逐步改善，中国残疾人联合会也正在积极推动残疾人社会保障和服务体系的建设。但是，我国残疾人社会保障水平仍然很低，法制的健全是制约残疾人社会保障权利实现的重要原因，而残疾人社会保障最终还是要以法律的形式来实现。因此，研究残疾人社会保障法律制度是解决残疾人问题的根本，这也是残疾人事业发展的重要实践。

《残疾人社会保障法律制度研究》是一本注重理论与实践相结合、具有自己独特风格的学术著作。作者以法学学科为基础进行多领域交叉研究，以法律制度建设为主旨开展多角度充分论证，用鲜明的立场对残疾人社会保障问题进行分析，对问题的成因追根求源，注重对残疾人保障理论基础、立法模式、主要原则的阐释和选择，并且对残疾人社会保障法律制度总体设想进行了虚拟搭建。可以说，作者的研究全面系统、思路清晰明确，特别是从人权发展的角度阐述了保障残疾人生存权与发展权的重要性，这对发展残疾人事业是有益的探索。

残疾人事业是崇高的人道主义事业，它的发展和完善需要依靠政府和社会的支持和帮助，创造良好的人文环境，从观念上消除歧视和偏见。理论是行动的先导，残疾人事业研究需要有坚实的理论支撑。虽然近年来这项研究有很大进步，但残疾人社会保障和相关法律研究还落后于实践，总体理论框架还需要有新的建设高度。作为一个残疾人工作者，向东同志对此进行了可贵的探索。我热切地期待理论界的专家学者能更多地关注残疾人事业，为残疾人问题的研究拓展更深远的道路。我也希望更多的残疾人工作者加强理论学习，为改善残疾人状况、发展残疾人事业作出积极的贡献。

最后，我要把美好祝愿送给向东同志，并且期待他的学术研究不断进步。

张海迪

2011年10月27日

## 摘 要

我国有 8300 多万残疾人，直接影响 2.6 亿家庭人口。残疾人是社会中长期存在、数量庞大，最为困难而又最不具备竞争力的特殊群体，再也没有其他弱势群体可以在困难程度上、受困时间上与残疾人相提并论。一方面广大残疾人饱受伤病痛苦和偏见歧视的双重折磨，另一方面社会致残因素不断增多和残疾影响持续放大。没有残疾人的小康不是真正意义上的全面小康，没有残疾人事业的发展不是真正意义上的科学发展，没有残健和谐不是真正意义上的社会和谐。

从历史角度和自身传统看，我国古代包含丰富的残疾人社会保障思想，但囿于著录缺失和历史局限，其表现是初步、零散和不成体系的。以逻辑主线循纳，可内涵于仁德兼爱、民本仁政、因果慈悲、宗族救助四个维度，这些思想或在当时已成为立法依据，或尚停留于社会理想层面，其思想精髓和制度精华为后世所承袭，不但促进了传统残疾人社会保障制度之蔚起，而且指导历代王朝颁行了一系列涉残规范。其中，得到有效执行且能革故鼎新者有之，未能有效实施或流于形式者亦有之。综论之，具体项目层面以国家收养、减免赋役、实物救助和量能授事最具代表性，制度理念层面以国家责任观最具先进性。为保障残疾人社会保障法律规范的实施和救助项目的推行，我国历代中央和地方政府作为责任主体，设立机构和官职作为体制支撑，筹措经费与物资作为财政保障，助推民间互助与义行构成官方救助之有效补充。这些思想和做法有其契合时代价值的一面，具有先进性、国家主导性和基础性，但受制于时代和阶级的局限，亦存在缺失权利本位性、人格独立性和法制性的不足。构建现代残疾人社会保障制度，必须秉持据史务实之态度，科学甄别和评估其价值，在延续制度历史惯性之基础上实现制度的革故鼎新。

当今世界,残疾人社会保障在社会保障体系中的作用和地位日渐提升,并取得长足发展。从二战中对伤残者的救助开始,包括联合国在内的国际组织围绕残疾人的就业保障、生活保障、康复保障、教育保障和环境保障等,达成了一系列公约、决议、宣言和行动纲领,这构成了残疾人社会保障的国际法渊源。特别是被视为联合国本世纪最大工程之一和作为联合国历史上首部专门保障残疾人权益的国际公约,《残疾人权利公约》使全球 6.5 亿残疾人有了保护自身权利的专门国际公约。在 100 多年的发展历程中,各国社会保障法律制度都日趋完善,西方发达国家更是独领风骚。美国强调就业与劳动自助,突出教育与转换服务,注重康复与融入社会,更加发挥市场作用和动员社会力量,其特色做法和典型经验具有开创性和实用性。德国许多法律中都把残疾人作为特殊的法律事实加以规定,其对残疾人实施了特惠的福利津贴、严格的就业保护和完善的社会服务,注重把国家干预与社会服务相结合、生活保障与就业促进相结合。日本自战后开始,已系统建立了涉及就业、教育、康复、福利、残疾恤金等残疾人社会保障法律制度,并且深刻结合本国传统文化,坚持立法与体制保障并重、扶助与促进就业兼顾、政府与社会各界合力,以多层次的立法、多机构的履职、多项目的实施,保障残疾人的基本生活和权利诉求。我国港台地区既融合了当今国际社会的现代理念和先进制度,又继承了中华传统文化和道德伦理规范,法律制度比较健全、保障项目比较齐全、社会服务比较周全。概言之,域外经验的主要优点是在更新理念中推进法制建设、在全面保障中满足特殊需求、在消极保障中力促积极保障、在政府主导中动员各方力量。当然,因保障支出递增带来巨大压力、实施效果比之目标差距较大、残疾人公民权缺乏有效支撑等缺陷和问题,同样需要引起关注和警惕。

我国现代残疾社会保障法律制度始创于建国初期,先后经历了初创和起步阶段、停顿和挫折阶段、恢复和重建阶段、改革和拓展阶段。当前,我国残疾人的康复、教育、就业、生活以及环境等社会保障状况得到明显改善,在组织建设与人员配备、工作机构与服务设施、政府投入与社会支持、监督检查与法律援助等实施层面采取了一系列具体措施,并已初步形成了以宪法为指导、以残疾人保障法为核心、以相关法律法规为基础、以其他规范性文件为补充的

残疾人社会保障法律体系。然而，残疾人贫困状况改善的速度和缓解的程度比较有限，在社会保险、社会救助、福利津贴等方面均大幅落后与社会平均水平，甚至还存在继续拉大的趋势，突出表现在特惠保障缺失、特供保障缺失、均衡保障缺失，以及体制不顺、机构不全、设施滞后、队伍匮乏等服务保障缺失。究其根源，主要是思想理念落后、法律保护缺失、市场调控乏力和制度体系欠缺。这种低水平的残疾人社会保障，与广大残疾人的困难和需求相比极为不符，与我国人权事业的快速进步、和谐社会的加速构建相比极不相称。

残疾人社会保障具有整个社会保障的普遍性，但更具有在普遍性基础上的特殊性。我国残疾人社会保障法律制度的理论基础，应凸显人道主义思想、公平正义理论、人权保障理念和现代残疾人观。由此，作为残疾人观的派生物和具体化的残疾人社会保障模式应是残疾人社会保障劳动福利模式：立足于社会保障的总体制度框架，以满足基本生活为基础，以维护平等权利为重点，以优化参与环境为手段，建立涵盖残疾人保险、救助、福利三项基本内容和就业、教育、康复三项基本需求，以及社会保障法律、责任、服务三个保障体系的三维立体结构。残疾人社会保障在遵循社会保障的普遍规律和基本原则的同时，更应强调其个性特征和内在要求，坚持特殊保障与适度保障相协调、需求导向与分类施保相匹配、消极保障与积极保障相统一、政府主导与社会参与相结合等主要法律原则。

基本的经验教训表明，残疾人社会保障能否得以发展的根本原因在于是否构建了科学合理的法律制度。要实现残疾人社会保障事业质的飞跃，就必须摆脱主要依靠政策推动的固有局限，代之以建立科学合理、功能完善的法律体系。在重点研究残疾人社会保障立法、突出法律体系横向设计和平面组合的同时，应当涵纳国际国内两个视野、立法执法司法三个级次，以构建周延合理、科学可行的法律制度。在其构成上，一般、专项、相关三项法律制度既相对界定又紧密配合：一般法律制度包括残疾人保险、救助、福利等基本内容，通过提高标准明确体现对残疾人的普惠加特惠；专项法律制度涵盖就业、教育、康复、无障碍环境等基本需求，通过分类施救满足特别需要，从而突出体现对残疾人的优保加特保；相关法律制



度涉及残疾人社会保障的责任、服务及法律救济等方面，特别是优先纳入慈善事业、社区保障、法律援助等制度，着力体现对残疾人社会保障的重视和支持。在立法模式上，世界各国残疾人社会保障法律制度大体上可归结为统一模式、分立模式和统分模式三种类型。基于与残疾人权利保障模式相匹配、与整个社会保障立法模式相统一以及尊重本国传统和正视现实矛盾的考虑，我国应选择“统分结合”模式或称“整合模式”，既要统合我国残疾人一般性社会保障制度，又要在差异性基础上统中有分地构建特殊性社会保障制度。在责任体系上，必须在法律制度构建中明确国家、政府、社会、残联、家庭、个人等主体的权责边界，形成支柱有力、梯度分明的社会保障责任体系，最终促成从道义责任向法定责任的根本性转变。申言之，只有真正实现扶残助残方式“从契约到身份”的转变，建立完善残疾人社会保障法律制度，我国构建社会主义和谐社会的理念才会深入人心，广大残疾人充分享有社会保障权利的理想才能如愿以偿。

## Abstract

More than 83 million people in China are disabled, who are directly affecting the life of their family members, reaching 260 million in total. The disabled will exist in the society for a long time and they are a special group of people who are large in number, faring hard in life and lacking competitiveness. No other groups of people low in social status are comparable to them in extent and duration of hardship. On the one hand, the disabled are tortured not only by their diseases and disability but by social prejudice and discrimination. On the other hand, the factors causing disability in the society are on a rise, which gives an increasingly bigger impact. A fairly well-off society is not totally well off if the disabled are not well off. The scientific development is not true in the real sense of the word if the cause of improving the life of the disabled is not properly developing. The social harmony is no harmony at all if there is no harmony between those with disability and those without.

From the perspective of Chinese history and its tradition, China had in her ancient times bumper ideas of social securities for the disabled. However, due to the absence of records and as a result of historical limitations, those ideas appear to be preliminary, sporadic and non-systematic. If viewed from the angle of logic, those ideas can be put into four categories: humanity and universal humanitarianism, man-orientedness and benevolent government, causal effect of being kind and sympathetic, and relief through the efforts of the patriarchal clan. These ideas were either used as the basis for legislation of the time or existing in the ideal of the society then. The best of those ideas and the core institutions resulting from them are inherited by later generations, which not only prompted the establishment of the traditional social security

system for the disabled but also gave guidance to the policy-makers in the following dynasties as to the formation of regulations concerning the disabled. Some of the regulations were effectively enacted, causing innovative impact to the society and some were not put into effect or became merely formalistic. To sum up, regarding concrete programs, what is the most representative form of the relief for the disabled is adoption by the state, reduction or exemption from taxes and corvees, relief in kind and job offers to the disabled based on ability evaluations. With a view to systems and conceptions, what is the most advanced is the conception of the state obligations. In order to carry out the relief programs and enact the laws and regulations concerning the social security of the disabled, the local and the central government in all the dynasties in Chinese history acted as the main force in shouldering the responsibility, supporting the cause by establishing necessary social systems, setting up institutions and appointing officials. Funds and resources were raised for material and financial guarantees. Civilians were encouraged to help each other and give donations which led to effective enhancement for government relief. The above-mentioned ideas and practices were in concord to a degree with the social values of the time, showing progressiveness, with the state as the leading role and basic force. But owing to the limitations of the time and social classes, the relief for the disabled had its inherent defects in failure to give regard to natural rights of the disabled, their independent personality and legality. To establish the modern system of the social security for the disabled, a practical attitude should be adopted that sticks to the facts of history, based on scientific researches that assess the values of those ideas and practices so that innovations can be achieved in the present social systems on the basis of inheriting the old system.

In today's world, the social security for the disabled has achieved great development, becoming more and more important in the whole system of social securities and its status is constantly improving. Beginning with the relief work for the wounded and disabled in the World War II, international organizations, including the United Nations, have come up with a series of conventions, resolutions, manifestoes, and guiding

principles for actions concerning the guarantees for the disabled in terms of employment, daily life, recuperation, education, proper environment and so on. Those documents have formed the basis for the international laws concerning the social security of the disabled. Especially prominent is United Nation's Convention on the Rights of Persons with Disabilities which is regarded by the United Nations as one of the biggest projects of the century and as the first international convention especially intended to guarantee the rights of the disabled. This UN document has enabled the 650 million people with disabilities to have a special international convention to protect themselves. In the past 100 years of development, all the countries have been on the road to improve the legal system for social security, with the western developed countries taking the lead. In helping the disabled, America lays stress on their employment and their self-reliance through helping them finding jobs, on education and placement service and on recuperation and integrating themselves into the society. The states take advantage of the market and mobilize the power of the society. The method adopted by America has its own special character and uniqueness, showing originality and practicality. In Germany, many laws have special stipulations, regarding the disabled as a special legal fact. It gives the disabled the special favor and welfare pensions, solid job security and perfect social service, paying attention to combining state's intervention with social services, guarantees for daily life with employment promotions. In Japan, since the end of the Second World War, the country has established its own legal system for the social security of the disabled, concerning employment, education, recuperation, welfare, disability pensions. Adhering to its own traditional culture, it combines the efforts in legislation with the establishment of security systems, paying attention to giving aids as well as to promoting employment. The Japanese government works together with all walks of the society, making laws on all levels, with different institutions to carry out their functions and with multiple programs being carried out to guarantee the basic life and rights of the disabled. In Hong Kong and Taiwan of our country, the legal systems, combining the modern conceptions of the international

community and advanced systems with an eye to China's excellent traditional culture and ethical rules, are in a healthy state, with all-round guarantee programs and social services. In a word, experience from foreign countries is advantageous in that it can help promote the construction of legal systems by renovating conceptions, satisfy special needs while providing all-round guarantees, promote active guarantees by offering passive guarantees and mobilize the power of all sides to work with the government, the leading force. Of course, it is also important to take care and to be on the watch for the defects and problems such as the huge pressure caused by the increased expenditure in guarantees, the fairly big disparity between the actual result and the goals and the lack of the effective support for the civil rights of the disabled.

China's modern legal system of social security for the disabled started at the beginning of the founding of our country, going through the periods of initiation stage, beginning stage, pause and setback stage, reinstatement and reconstruction stage, and reform and development stage. At present the social security of the disabled in our country has been markedly improved in terms of recuperation, education, employment, daily life, environment and so on. In the respect of establishing organizations, staffing, functional institutions, government funding and social support, supervising and legal aids, China has adopted a series of measures and basically formulated the legal system of social security for the disabled, with constitution as the guidance, with the Law on the Rights of Persons with Disabilities as the core, and with the related laws as the foundation and with the other regulations as complements. Nevertheless, the speed of helping the disabled out of poverty is not fast enough and the general extent of relief is still limited. In the aspect of social insurance, social aids, welfare pensions, the disabled are still falling far behind the average level of the society and disparity is even having the tendency to become wider. The most obvious is the lack of guarantees in service, including the lack of special-favor guarantees, the lack of special provision and balanced provision. The cause also suffers from unreasonable system, lack of necessary organizations and institutions, insufficient facilities, insufficient staff and so on. The

social security system for the disabled is still on a low level which forms a sharp contrast with the difficulties and the needs of the disabled in China, incomparable with the fast progress in the cause of human rights and the quickened step in the building of a harmonious society.

The social security for the disabled carries with it the universal elements in the whole social security and more importantly it carries the special character on the basis of universality. The theoretical basis for the legal system of the social security in China should give a prominent position to humanitarianism, justice theory, the concept of human rights guarantee and modern views about the disabled. Therefore, the pattern of social security, which is the derivative and embodiment of the conceptions about the disabled, should be the pattern of social security with the work benefits for the disabled: We need to optimize the participation environment for the disabled and use it as a means to construct a three-dimensional structure which covers the three basic elements—insurance, relief and welfare for the disabled—and includes three basic needs—employment, education and recuperation—with the framework of the general system of the social security as the basic point, and with emphasis put on the efforts to satisfy the basic needs in life and to maintain equal rights. The social security for the disabled, in following the general law and basic principles of social security, should lay emphasis on its individual character and its inherent demands, sticking to the legal principle of coordinating special guarantees with moderate guarantees, upholding the principle to keep a balance between demand guidance, carrying out guarantees with an eye to different classifications, adhering to the unification of passive and active guarantees and keeping the strategy of combining the leading efforts from the government with the participation of the society.

The basic experience and lessons have shown that whether the social security for the disabled can development or not depends decisively on whether or not the society has formulated a reasonable and scientific legal system. In order to effect a fast qualitative development we need to replace with a reasonable, scientific legal system complete in functions the conventional way that relies on the driving force of policies. While

researching into the law-making mechanisms concerning the social security for the disabled and giving prominence to latitudinal design and interconnection of legal systems, we should at the same time keep an eye on the development at home and abroad, paying attention to the three stages—legislation, execution and jurisdiction—so as to construct a inclusive, reasonable, scientific and feasible legal system. In terms of its constituents, the three—general, special and relevant—legal systems should have their respective areas as well as interconnections: The general legal system includes such basic elements as the insurance, relief, welfare etc. In raising the standard, the state can grant the disabled the general favors and special favors. Special legal system covers the basic needs such as employment, education, recuperation, barrier-free environment and so on. According to different classifications, special needs of the disabled are satisfied so as to deliver to them the high quality guarantees and special guarantees. Relevant legal system concerns the obligation of social security for the disabled, services and legal aids etc. It gives priority to include the systems in social welfare, community guarantees, legal aids, etc. showing the special attention and support given to the social security for the disabled. In terms of the mode of legislation, the legal systems of social security for the disabled in all the countries of the world can be roughly categorized into three basic type: the unified mode, the separate mode and the mixed mode.

In order to match the mode of guaranteeing the rights of the disabled, and in order to be in concord with the mode of legislation in terms of social security on the whole, and in order to give respect to the tradition of our country and face up to the actual conflicts, our country should choose the “mixed mode” or the “integrity mode”, which, on the one hand, should unifying the general social security system of our country and, on the other hand, should give separate consideration to the construction of special social security system based on the differences. In terms of obligation systems, the obligations on the part of the state, government, society, the associations for the disabled, families, individual persons etc. should be clearly stated in the formulation of legal systems, establishing a powerful

social security responsibility system with each realizing its areas of obligations, which will ultimately promote the thorough transition from the moral obligation to legal obligation.

Only when the way to give relief and aids to the disabled has actually transformed “from contract to status” can the job of establishing the healthy legal system of social security for the disabled be done and only in this way can the theory of constructing a harmonious socialist society be well received and only in this way can the disabled realize their dream to fully enjoy the right of social security.



# 目 录

序 言	1
摘 要	1
Abstract	1
第一章 中国传统残疾人社会保障的思想及法律制度	1
第一节 传统残疾人社会保障的主要思想	2
一、仁德兼爱	2
二、民本仁政	5
三、因果慈悲	8
四、宗族救助	10
第二节 传统残疾人社会保障的法律政策	13
一、国家收养	13
二、减免赋役	16
三、实物救助	18
四、量能授事	21
第三节 传统残疾人社会保障的制度保证	24
一、设立机构官职	24
二、筹措经费物资	26
三、助推民间互助	29
第四节 评析与借鉴	32
一、积极与肯定方面	32
二、缺陷与否定方面	37