

The Historical Evolution of China's Administrative Compensation System and its Recent Amendments*

by YANG Yin

ABSTRACT

The Law of the People's Republic of China on State Compensation entered into force on 1 December 2010, after its amendment. In China's first Constitution (1954), there were fundamental provisions on the administrative compensation system, which were restored later in the Constitution of 1982. In 1989, the administrative compensation system was embodied in the Law on Administrative Litigation of the People's Republic of China. The State Compensation Law was formally enacted and promulgated in 1994, but a series of defects in terms of its legal provisions and practical effect emerged in its subsequent implementation. Amendments were made to the State Compensation Law in 2010, for example, with regard to the imputation principle, the scope of compensation, the procedure of compensation, the rules of evidence, the standard of compensation, the payment of compensation, and time limitations on actions for claims for compensation. The amendments revealed the improvements made in China regarding administrative legitimacy and human rights and the difficulties encountered in the enforcement of the State Compensation Law.

1. THE ORIGIN AND DEVELOPMENT OF THE ADMINISTRATIVE COMPENSATION SYSTEM IN CHINA

The administrative compensation system is a legal system within the framework of which the state provides compensation for damages incurred when its administrative subjects, in exercising their functions and powers, infringe upon the lawful rights and interests of a citizen, a legal person or organisation, thereby causing them harm. As a key component of state compensation in China, administrative compensation must be studied in close connection with the state compensation system.

The original idea of formulating a State Compensation Law in China can be traced back to the period of the Republic of China before 1949.¹ Fundamental provisions on state compensation were formulated in the first Constitution of China.² It was a very long time before these provisions in the Constitution were put into effect

YANG Yin is Director of the Shanghai Institute for Justice Studies; Professor of Law at the Shanghai University of Political Science and Law; and Doctor of Judicial Science at the University of Melbourne, Australia.

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1 Handian Pan, a well-known scholar and professor of comparative law, was a student at the College of Law of Dongwu University before 1949. He had this idea when he was teaching Foreign Administrative Law which the author attended at the China University of Political Science and Law in the early 1990s.

2 It is provided for in Article 97 of Constitution of 1954 that people suffering loss by reason of the infringement of their rights as citizens by persons working in organs of the state have the right to compensation.

through the formulation of a special law on state compensation. Furthermore, provisions on the compensatory responsibility of the state were rescinded in the Constitution of 1975 and 1978, only to be restored in Article 41 of the Constitution of 1982: »Citizens who have suffered losses as a result of the infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law.«

The compensatory responsibility of the state is stated in Article 121 of the 1986 General Principles of the Civil Law, as follows: »If a state organ or its personnel, while executing its duties, infringes upon the lawful rights and interests of a citizen or legal person and causes them damage, it shall bear civil liability.« This was the first time this had been provided for in a special law.

It was provided for in Article 67 of the Administrative Litigation Law of 1989 that a citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have the right to claim compensation. Furthermore, it was provided for in Article 68 that »If a specific administrative act undertaken by an administrative organ or the personnel of an administrative organ infringes upon the lawful rights and interests of a citizen, a legal person or any other organisation and causes damage, the administrative organ or the administrative organ to which the abovementioned personnel belongs shall be liable for compensation.« The abovementioned two provisions in the Administrative Litigation Law which may be deemed to be the origin of the Administrative Compensation System marked the first specific legal provisions on the state's responsibility for administrative compensation, namely: administrative acts undertaken by an administrative organ or the personnel of an administrative organ which infringe citizens' rights and interests shall be subject to public compensatory responsibility different from civil nature.

It was the implementation and enforcement of the provisions on administrative compensatory responsibility in the Administrative Litigation Law that prompted the formulation and promulgation of the State Compensation

Law. The State Compensation Law (draft) was completed in 1992. The State Compensation Law was promulgated in 1994, and entered into force on 1 January 1995, signifying the official establishment of the state compensation system (including administrative compensation and judicial compensation). This was a milestone in the transformation of China from the »rule of man« to the »rule of law«. The administrative compensation system implements China's administrative litigation system (Articles 67–69, Law on Administrative Litigation) and symbolises responsible government under the rule of law.

The State Compensation Law was revised in April 2010 in view of practical needs and essential problems in implementation. The revised law (hereinafter: the »new State Compensation Law«) entered into force on 1 December 2010.

2. MAIN DEFECTS AND ENFORCEMENT OF THE ORIGINAL STATE COMPENSATION LAW

2.1 INADEQUACIES IN LEGISLATIVE CONTENT

(1) Single imputation principle. The imputation principle is the basis and premise on which the state bears administrative compensatory responsibility. It is the concentrated embodiment of the legislative value of administrative compensation, exerting a direct influence on the scope of administrative compensation, constitutive elements and obligations related to the presentation of evidence. Although various imputation principles were put forward by academics – such as »subjective fault«, »objective fault«, »no-fault liability« and »violation of law« – violation of law was chosen as the imputation principle to be laid down³ in Article 2: »If a state organ or a member of its personnel, when exercising functions and powers in violation of the law, infringes upon the lawful rights and interests of a citizen, a legal person or other organizations and causes damages, the aggrieved person shall have the right to recover damages from the state in accordance with this law.« In accordance with this Article, the state shall bear the responsibility for administrative compensation, under the sole condition that the damage is caused by an administrative act in viola-

3 See 《国家赔偿法释论》, Pi Xiechun, Feng Jun, China Legal Publishing House, 1994, pp. 69–70.

tion of the law.

In the early 1990s, the imputation principle as applied to legal violations was adequate in terms of legal theory and the level of development of the rule of law,⁴ but subsequently it proved to be deficient and inadequate in practice.

First, the standard used in the recognition of an act as a »legal violation« is vague. China's legal system is based on statute law, in which judicial judgments are not regarded as direct sources of law. Therefore, legal violations are generally violations of the Constitution, laws, administrative regulations, local regulations and administrative rules. The system as such does not recognise violations of judicial interpretations, of the rules of international law, or of general principles or the spirit of the law as legal violations in the strict sense. Meanwhile, in administrative law, opinion is not unanimous concerning whether acts without a legal basis and acts involving abuses of power constitute violations of administrative law without exception.⁵

Second, damage due to causes other than »legal violations« cannot be compensated under the single imputation principle pertaining to »legal violations« (examples include the damage caused by abuses of administrative discretionary power, placement of public facilities and improper management).

Third, the problem of sharing responsibility in circumstances in which there is joint tort and combined fault will remain unsolvable under the imputation principle: responsibility for compensation cannot be fairly distributed to multiple administrative subjects who infringe upon administrative counterparts and cause damage. Moreover, this principle cannot be applied to responsibility sharing between the infringer and the victim when the victim himself also commits torts.

(2) Narrow scope of compensation. In accordance

with Articles 3 and 4 of the State Compensation Law, administrative compensation applies only to circumstances in which administrative subjects, when exercising their functions and powers in violation of the law, infringe upon the personal or property rights of administrative counterparts. Such provisions limit the scope of administrative compensation.

First, administrative omission and the act of making administrative normative documents (abstract administrative acts) are not within the scope of administrative compensation.⁶

Second, personal and property rights fall under civil law, whereas the rights to education, work, and fair competition, under public law, are not included within the scope of compensation. Psychological damage which is part of personal rights is excluded from the scope of administrative (pecuniary) compensation. Other things not within the scope of administrative compensation include acts of administrative guidance and administrative planning; damage caused by a state administrative organ when it undertakes improper disciplinary actions concerning its personnel in violation of the law; and, as previously mentioned, damage caused by the abuse of administrative discretionary power, placement of public facilities and improper management.

(3) Low standard of pecuniary compensation. The standard of pecuniary compensation and the method of calculating compensation in three different circumstances in which personal rights and freedoms, rights of life and health, or property rights are infringed upon are provided for, respectively, in Articles 26, 27 and 28 of the State Compensation Law. The low standard of compensation consists of three aspects: first, with regard to personal damage, only bodily injury is compensated for, whereas psychological damage is ruled out; second, among property damage, only direct damage is compensated for, whereas indirect property damage is ex-

4 The imputation principle as applied to legal violations was adopted for three reasons. First, this principle is consistent with the principle of administrative legality and the review principle of lawfulness as it applies to specific administrative acts in the Administrative Litigation Law. Second, this principle can avoid the difficulties arising from subjective judgment based on the fault principle and the complexity of combining responsibility with regard to fault and the imputation principle as it applies to legal violations. Third, this principle is helpful for differentiating administrative compensation from administrative recuperation.

5 See 《国家赔偿法的理论与实务》, Ma Huaide, China Legal Publishing House, 1994, p. 104.

6 In practice, it is stated in the Official Reply of the Supreme People's Court on the Issue of Whether a Public Security Organ Failing to Comply with Its Legal Responsibility Shall Bear Administrative Compensatory Responsibility (Fa Shi [2001] No. 23) in July 2010 that damage caused by administrative omission can be included within the scope of administrative compensation.

cluded;⁷ and third, when the law was enacted, the standard of compensation was set with the purpose of providing consolation rather than penalty or compensation. For example, it is provided for in Article 26 of the State Compensation Law that, where the personal rights and freedom of a citizen are infringed, the amount of money for compensation shall be calculated according to »the daily salary on average of public employees in the preceding year«.⁸

(4) Improper compensation procedure. In accordance with the provisions in Article 67 of the Administrative Litigation Law and in Article 9 of the State Compensation Law, there are two ways in which victims can obtain administrative compensation. The first is a separate procedure, also known as a unilateral procedure, in which the victim first claims compensation from the administrative organ; if the victim is not satisfied with the amount of compensation, they may file a suit with the People's Court. The second method is to claim compensation when reconsideration and administrative procedures are applied for. There is a drawback with regard to the separate procedure, in which the victim first claims compensation from the administrative organ which is liable, which means that the said organ is the judge in its own case. It is extremely unlikely that a particular body will accept that it has violated the law and assume compensatory responsibility. Meanwhile, there are no provisions on the procedural rights of the victim, such as hearing of witnesses and consultation, which puts plaintiffs at a disadvantage and greatly decreases the likelihood of success of separate procedures for compensation.

(5) Single compensation subject. In accordance with the provisions of Article 2 of the State Compensation Law, the subject of administrative tort is limited only to administrative organs of the state, but in accordance with Section 3 of Article 7 of the Law, an organisation

authorised by law and regulations when exercising authorised administrative power may become the subject of administrative tort and be considered as an administrative organ with compensatory obligations. As a general principle, Article 2 does not cover the provisions in Article 7, thus bringing about a discrepancy between the two provisions. More importantly, this discrepancy makes it impossible for organisations authorised by law or regulations to assume administrative compensatory obligations. However, in practice there are cases of organisations authorised by law or regulations being defendants in administrative procedures.

2.2 IN PRACTICE

(1) The support system is not being implemented. First, it is provided for in Article 29 of the State Compensation Law that the expenses incurred by the payment of compensation shall be listed in the fiscal budget of governments at all levels. This provision is not fulfilled in many places where expenses for compensation cannot be guaranteed.⁹ In practice, the organ liable for compensation in most places firstly pays for damage against the victim before it applies to the fiscal budget for compensation. In some places, all expenses for compensation are paid from a free account of the organs under a compensatory obligation, as there are not any fiscal budget. Second, there is no clear provision on the distinction and connection between administrative and civil tort and damages.¹⁰

(2) Owing to the single imputation principle as applied to legal violations in the State Compensation Law, administrative organs are not willing to compensate even if they are capable of doing so, because they do not want to have a bad name for violating the law. Based on their inclination to avoid paying compensation in general, administrative organs usually fail to pay at all or pay a smaller amount.

7 Specifically, (1) only the principal is returned and interest excluded when fines or confiscations of property are illegally imposed. (2) If the property has been auctioned, only the proceeds from the auction, however obviously lower than the true value, are returned. (3) Where property is illegally sealed up or frozen, the only compensation to the victim is lifting such distraintment or freezing. The loss of acquirable interests of the victim is not compensated for: for example, the loss of the normal operating income of vehicles during the sealing-up period and the loss of interest on savings while they are frozen. (4) In case of the rescission of a permit or license, or an order to suspend production or business operations, only necessary running expenses during the suspension period, such as rents and charges for water and electricity, are compensated for, whereas the loss of the acquirable profit during the suspension period is not compensated for.

8 In accordance with the provisions in the Interpretation of the Supreme People's Court of Several Issues Concerning the Enforcement of the Law of the People's Republic of China on State Compensation published in 1996, the amount of the average daily salary of public sector employees in the previous year shall be calculated as the total annual salary divided by the total number of legal working days. The amount of average annual salary shall be according to the figure published by the National Bureau of Statistics, regardless of whether it is lower than the actual income of staff.

(3) Within ten years of 1995, when the State Compensation Law went into effect, the Standing Committee of the National People's Congress, the legislator, made no attempt to control or investigate its enforcement. Nor was much attention paid to it by the Standing Committees of People's Congresses in provinces, autonomous regions or municipalities directly under the central government. Expenses for state compensation made up a very small proportion of their budgets. Some provinces had no expenses for this purpose for several consecutive years.

3. MAIN REVISIONS AND EVALUATION OF THE NEW STATE COMPENSATION LAW

3.1 IMPUTATION PRINCIPLE ADOPTED WITH REGARD TO LEGAL DAMAGE

Article 2 of the new State Compensation Law provides that »where state organs or state functionaries, in exercising their functions and powers, infringe the lawful rights and interests of the citizens, legal persons and other organisations, thereby causing them damage, the victims shall have the right to state compensation in accordance with this law.« In comparison with Article 2 of the original State Compensation Law, the provision on legal violations was rescinded and replaced by the imputation principle to legal damage. This is the most important revision.

3.2 SCOPE OF COMPENSATION EXPANDED

In comparison with the scope of compensation in Article 3 of the previous State Compensation Law, the provisions are expanded here, in two respects: (i) in addition to violence and instigating violence, more forms of tort are listed, such as permitting violence causing bodily injury or death to a citizen. (ii) Article 35 of the new State Compensation Law provides that in the event of serious outcome or injury, compensation for psychological injury shall be paid, filling the gap in the original State

Compensation Law as a result of which psychological injury was not compensated.

3.3 ADMINISTRATIVE COMPENSATION PROCEDURE BETTERED

Compared to the original State Compensation Law, the procedure of administrative compensation has been bettered in accordance with Article 13 of the new State Compensation Law. (1) When making decisions about compensation, the organ liable for compensation shall take full consideration of the opinions of the claimant. (2) The organ liable for compensation may confer with the claimant on the forms, items and amounts of compensation. (3) If the organ liable for compensation decides to pay compensation, it shall prepare the written decision on compensation and send it to the claimant within 10 days of the decision. (4) If the organ liable for compensation decides to make no compensation, it shall notify the claimant within 10 days of the decision in writing and explain the reasons for non-compensation.

3.4 PRINCIPLE OF EVIDENCE PRESENTATION BETTERED

Article 15 of the new State Compensation Law is amended as follows: (1) in pursuit of a case of administrative compensation by a people's court, the claimant and the organ liable for compensation shall provide evidence for their claims. (2) In special circumstances, the organ liable for compensation shall provide evidence.¹¹ These provisions virtually mean in ordinary cases of administrative compensation that both parties to the case shall provide evidence for their claims. In special cases, the organ liable for compensation shall provide evidence. The above amendments close the gap of provisions on the principle of evidence presentation by both parties in the original State Compensation Law.

3.5 STANDARD OF COMPENSATION RAISED

Compared with Article 27 of the original State Compens-

9 Shishi Li, Interpretation of the Amendment to the Law of the People's Republic of China on State Compensation (draft) at the Fifth Meeting of the Standing Committee of the Eleventh National People's Congress on 23 October 2008.

10 There are two principal circumstances. First, administrative acts in violation of the law constitute the premise and condition under which civil tort is realised. Second, administrative acts in violation of the law are combined with civil tort, making it impossible to clearly and entirely differentiate the causes of damage, whether it be administrative act or civil act.

11 It is provided for in Section 2 of Article 15 of the new State Compensation Law that »during the period when the organ liable for compensation administratively detains a citizen or takes compulsory administrative measures in restraint of his personal freedom, if the citizen dies or loses his capacity, the organ liable for compensation shall produce evidence proving whether there is any causal relationship between its act and the death or loss of capacity of the citizen.«

sation Law, the standard of compensation is raised in accordance with the provisions on the standard of compensation for bodily injury in Article 34 and the provisions on compensation for property damage in Article 35 in the new State Compensation Law. The details are as follows: (1) Nursing costs are added to the original medical expenses in the case of bodily injury. (2) In case of the loss of part or the whole of a person's working capability, compensation for medical expenses shall be expanded to include nursing costs, the costs of medical aids for the disabled and necessary expenses which have increased due to disability and for continuous care, including rehabilitation expenses. (3) The maximum amount of disability compensation is increased to an amount 20 times the state average annual wage in the previous year from the previous ten times. (4) If the selling price of the property auctioned or sold is obviously lower than the true value of the property, corresponding compensation shall be paid.

3.6 MORE PRACTICAL AND FEASIBLE PROVISIONS ON THE PAYMENT OF COMPENSATION

Given the fact that there is no provision in the original State Compensation Law on how the claimant shall obtain compensation payments, it is provided for in Article 37 of the new State Compensation Law that a claimant shall apply for the payment of compensation to the organ liable for compensation on the strength of the effective judgment. The organ liable for compensation shall, according to its jurisdiction with regard to budget administration, apply to the relevant fiscal department for payment within seven days of receiving the application for payment of compensation. The fiscal department shall pay the compensation within 15 days of receiving the application for payment.

3.7 MORE REASONABLE CALCULATION OF TIME LIMITATION

It is provided for in Article 32 of the original State Compensation Law that the prescription of claims for state compensation shall be calculated from the day on which the act of exercising the relevant functions and powers is confirmed unlawful, which is inconsistent with the provisions in other relevant laws and judicial interpretations.

More importantly, this provision is obviously unreasonable in that the administrative organ could delay the confirmation of unlawful administrative acts. For this reason, it is provided for in Article 39 of the new State Compensation Law that the limitation on actions for claims for state compensation shall be counted from the day the claimant knows or ought to know that the exercise of the relevant functions and powers infringes upon his personal rights or property rights, but the period during which he is detained or his freedom is restricted shall not be counted.

4. CONCLUSION

4.1 NATURE OF ADMINISTRATIVE COMPENSATION

(1) The nature of administrative compensation is generally recognised in both academic circles and in practice as liability for violation of public law; more specifically, administrative and civil compensation differ in nature. Administrative compensation is the liability incurred when exercising the administrative power of the state, whereas civil compensation is a debtor-creditor relationship between equal subjects. There is also a difference between administrative compensation and administrative recuperation. The former is the responsibility incurred from the act of tort by administrative subjects, while the latter is a kind of responsibility on the part of administrative subjects to indemnify the loss of the rights and interests of administrative counterparts.

The administrative compensation system is often related to the basic value of a government. In a country with a welfare state and a responsible government, the imputation principle and the scope of compensation will be advantageous for citizens or victims of the state. On the contrary, in a state with an absolute authoritarian administration, the conditions of administrative compensation will be harsh, and the scope will be narrow.

(2) The nature of administrative compensation shall be comprehended in a larger sense than violations of public law and modern administrative acts. Although the administrative functions of modern government have been continuously enhanced, partial administration has never been completely eliminated. Meanwhile, modern society is full of risks, including market risks, disaster risks

and accident risks, which means that government activities can be potentially dangerous for more administrative counterparts and uncertain in terms of consequences. In such circumstances, administrative compensation becomes an indispensable method for government to remove risks and establish citizens' trust. Administrative compensation is a legal responsibility in pursuit of a fair result,¹² aimed at rehabilitating and guaranteeing fairness in administrative procedures and realising the harmony and stability of society through administrative compensation.

4.2 CHARACTERISTICS OF CHINA'S ADMINISTRATIVE COMPENSATION SYSTEM

(1) Similar to the Federal Tort Compensation Act of the United States and the Crown Proceedings Act of Great Britain, a special law has been enacted for the state compensation system in China. In Germany and France, however, the administrative compensation system is mainly based on judicial cases.

(2) The administrative compensation system and the criminal compensation system are provided for in the same law. In other words, the State Compensation Law is a code for both administrative compensation and judicial compensation.

(3) There is a difference between the obligations of administrative and of civil compensation. In accordance with the Administrative Litigation Law, the State Compensation Law, the General Principles of the Civil Law and the Tort Liability Law, administrative compensation and civil compensation differ in terms of the imputation principle and the scope, procedure and nature of compensation.

(4) There is a difference between administrative compensation and administrative recuperation. The criterion for differentiating between the two responsibilities

concerns whether the administrative act causing damage to the administrative counterpart is in violation of the law. Administrative tort in violation of the law incurs administrative compensation, whereas a lawful or unreasonable administrative act incurs administrative recuperation.¹³ This provision is different from those of Germany, the United States and other countries.

(5) This development is in response to practice in administrative procedure. The original formulation and promulgation of the State Compensation Law is the result of implementing and enforcing the Administrative Procedure Law. Practice in administrative procedure is the fundamental driving force for the establishment, evolution and development of the administrative compensation system in China. Many provisions, such as the evidence principle in the new State Compensation Law, are based directly on the experiences of administrative trials.

(6) Further supplements and perfection are necessary. In the new State Compensation Law, there is no provision on the compensatory responsibility of civil servants incurred due to wrongful management by administrative organs of the state, which is stated in the Civil Servant Law.¹⁴ Damage to public facilities is not listed in the scope of administrative compensation.¹⁵ There is still vagueness and inconsistency with regard to the circumstance in which an organisation other than an administrative organ of the state is the subject liable for administrative compensation.

In sum, the evolution of administrative compensation is interwoven with the developmental process of the rule of law. On the one hand, the level of the rule of law determines the level of the administrative compensation system. On the other hand, progress in the administrative compensation system objectively propels and illustrates the enhancement of the responsibility of the Chinese government to citizens, and improvements in the

12 See 《论国家赔偿的性质》, Gao Jiawei, *Journal of Shanghai University of Political Science & Law* (The Rule of Law Forum), No. 6, 2009, p. 31.

13 The difference between administrative compensation and administrative recuperation will tend to be vague as the imputation principle of violations of the law has been revised in the new State Compensation Law.

14 It is provided for in Article 103 of the Civil Servant Law of the People's Republic of China that »where an organ causes any damage to the reputation of a civil servant due to the imposition of a specific and incorrect punishment, it shall make a formal apology to the civil servant, rehabilitate his reputation and eliminate the adverse impact; where any economic damage has been caused, compensation shall be paid according to the law.«

15 It is provided for in Article 5 of the State Compensation Law of Korea and in Article 2 of the State Compensation Law of Japan that the State shall bear responsibility to compensate for public facilities.

rule of law and human rights. Despite its deficiencies, the new State Compensation Law is obviously much better than the original one in terms of objective imputation, fairness and legal responsibility. Meanwhile, in view of the obstruction of old concepts, increasing administrative costs and the implementation of support systems,

it can be stated that much remains to be done in terms of the practical implementation of the administrative compensation system as laid down in the new State Compensation Law.

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Contact

Friedrich-Ebert-Stiftung (Beijing), Ta Yuan Diplomatic Compound, Building 5, Entrance 1, 12th Floor, Office 5-1-121, Xindong Lu 1/Chao Yang Qu, 100600 Beijing, VR China, e-mail: fesbeijing@fesbj.com

Friedrich-Ebert-Stiftung (Shanghai), 7A Da An Plaza East Tower, 829 Yan An Zhong Lu, Shanghai 200040, VR China, e-mail: info@feschina.net

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Responsible: Dr. Rudolf Traub-Merz, Resident Director, FES Shanghai Coordination Office for International Cooperation