

# Research on the Mental Damage of State Infringement

## --Reconsideration based on the thirty-fifth article of the State Compensation Law

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**Abstract:** The enactment of the state compensation law in 1994 is an important milestone in the legal construction of our country. In 2010, the revised "state compensation law" in national compensation system to implement and practice needs, on the basis of the mental damage compensation issues such as the correction and supplement, the state compensation system is increasingly perfect. Among them, the article 35: "there are referred to in article 3 or the circumstances as provided in article 17, cause person damage spirit, and thereby causing serious consequences, shall be paid corresponding mental damages". This provision implements the constitution's spirit of respecting and safeguarding human rights and advancing the process of democratic rule of law. However, the terms and conditions of the procedure are obvious, and there are few such issues as the specific criteria of mental damages and the "corresponding" of spiritual comfort.

### 1. Background and problem extraction

#### 1.1 Background.

After eighteen, one of the important measures to boost the people's central authority is corruption, another major move at the same time, although not like that corruption triggered nationwide discussion and attention, but it has touched many core issues of the rule of law. The move is to correct miscarriages of justice, especially to correct serious the criminal miscarriages of justice. From the quantitative point of view, from 2013 to 2015, the media reported more than 20 pieces of death penalty unjust case rehabilitated, including "the case of Liu Zhongming in Hubei", "two Mei case" and "Nie Shu Bin case" and a number of suspected unjust case has entered the verification procedures. The number of death penalty cases, the total error correction in 2006 to 2012 seven years reported.

#### 1.2 The application of emotional damages in the case.

In the case of "huge case", the result of state compensation is: 1. The payment of death compensation and funeral expenses of li sanren, the claimant for compensation, and the funeral expenses totalling 104,580 yuan; 2. To compensate the claimant for the personal freedom of the person who has been detained for 60 days before the death of his parents, li sanren and shang aiyun. 3. Pay compensation to the claimant li sanren and shang aiyun to pay spiritual damages of 1 million yuan. The above items total 2059621.40 yuan.

#### 1.3 Problem extraction.

Although the spiritual damage is difficult to be measured by money, but it is undeniable that one of a certain amount of money for compensation is still so far we can find the best remedy. Through the analysis of "vocative case" state compensation decision, foraging spirit to pursuit, tracing the source of the intention of trying to restore the court in this case to determine the mental distress of the plot and the idea of considering the gold, and then gradually try to answer the following questions: what is the State Compensation Law thirty-fifth a legal basis? What is constitutive state tort? State tort caused

by the" serious circumstances "will be how to better define the court? Consider what factors in determining the damage to the spirit of solatium"? The spirit of solatium "corresponding" amount should be how to determine?

## **2. The basis of Article 35 of the State Compensation Act**

### **2.1 Theoretical basis.**

The public burden is equal. The public burden of equality comes from France, which is the theoretical basis for French national compensation. The doctrine that the state should be based on an equal basis for their citizens to set obligations. The activities of the executive and the judiciary are for the public good and the costs that should be borne by the society as a whole. If the activity causes damage to a particular citizen, it is actually equal to the extra burden borne by a particular citizen or victim under the general burden. In order to make the burden equal, the State should compensate the victim for the loss so that this additional burden is equally distributed among all members of society.

Human rights protection. One of the basic aims and tasks of a democratic State is the protection of human rights, the responsibility of the State to protect citizens from other citizens or organizations, and of course the obligation to ensure that citizens are not protected by the State, once the State organs and their staff Of the illegal acts cause damage to the citizens, it must be compensated.

Legal fiction. The so-called fiction refers to the meaning of drafting. The country is fictitious as a legal person, legal person and ordinary citizens enjoy the same rights, and bear the corresponding obligations. Article 1 of the Royal Lawsuits Act states: "The royalties bear the same tort liability as the obligatory adult." Damage caused by national tort and private infringement is also the same. From the legal nature of the point of view, there is no difference between the responsibility of state compensation and civil liability. This theory is more prevalent in the UK and has become the theoretical basis of British national compensation.

### **2.2 The constitutional basis.**

The principle of equality of citizens under article 33 of the Constitution. Citizens are equal before the law, meaning that citizens have the right to participate in state management activities on an equal footing and are equally obliged to bear the costs of management. At the same time, citizens must also be equitably responsible for the risk of management, including liability for damage to specific counterparts for various reasons, that is, from the concept of fairness and justice, all citizens enjoy equal rights and opportunities, equal responsibility and obligation.

Article 41 of the Constitution provides that a person who is injured in the violation of civil rights by a State organ and a State organ is entitled to compensation in accordance with the law. In addition, the Constitution is in Chapter II Provides for the basic rights of citizens, which are not subject to all violations by States, administrative organs, administrative bodies, social organizations and individuals.

Article 5 of the Constitution provides that any State organ, administrative body, social organization and individual must comply with the provisions of the Constitution, the law, or will be held accountable. No organization or individual has the privilege of transcending the constitution and the law. All acts of the State should be consistent with the Constitution and the law, and shall not be inconsistent with it. In short, to be consistent with the right to have the responsibility, the responsibility must be the right and responsibility of the principle of unity.

## **3. On the State Compensation Law thirty-fifth**

### **3.1 People moral damage caused by the infringement of national identification of elements.**

The national right infringement spirit damage is defined according to the provisions of the state compensation law, the state organs and their staff in the exercise of authority in the process of invasion of the natural right to life, right to health and personal freedom, caused by natural

physiological or psychological pain and loss of spiritual interests or impairment. Compared with the general tort law, characteristic four aspects of the national right infringement spirit damage: one is caused by the national right infringement spirit damage tort can only be defined by law. In accordance with the provisions of the State Compensation Law > < thirty-fifth, only in the nature of people's right to life, right to health and personal freedom right infringement cases, it may cause the national right infringement spirit damage other property, mental damage caused by the infringement, cannot be called the national right infringement spirit damage. The two is the national right infringement spirit damage injured subject can only be a natural person, legal person and other the organization can become the national right infringement spirit damage injured subjects. The three is the national right infringement spirit damage is the national tort damages, instead of national tort against the object. Four is the national right infringement spirit damage victim is the only state tort refers to the object, other people can become the national right infringement spirit damage the victim may not therefore apply for state compensation.

### 3.2 Consideration and quantitative analysis of serious consequences.

Consideration of "serious consequences". According to the provisions of "State Compensation Law > thirty-fifth, the national right infringement spirit damage only" serious consequences ", the organ liable for compensation shall be paid to the damage to the spirit of solatium, otherwise the organ liable for compensation can only take non pecuniary compensation remedy, namely "for the victims to eliminate the impact of rehabilitation, an apology. What is "serious consequences"? Is to clarify the "consequences", but also the consequences of the "severe" metric. For example: the victim for mental damage and depression, hurt his own body, or as the right of reputation, the right of honour, parental rights, marriage rights, personal interests such as reproductive rights, direct damage identification the interests of the loss or impairment of the consequences, all belong to the mental damage caused by" consequences ". consequences "can be listed and summarized the way of the combination to determine the so-called" severe consequences "Refers to the general situation of the listed in the meeting or at the same time, but also to some degree of infringement. "" what should be based on the level of damage to the spirit of the "results"? And depends on the judge's subjective judgment. The judge's judgment, mainly depends on the following factors: the legal principle, legal rules, in the past the case, code of ethics and the political and economic prejudice. In order to prevent the cover in so-called legitimacy under the abuse of discretion, it is necessary through a quantitative method to identify the "serious" is more serious.

Quantitative analysis of "serious consequences". Quantitative research is a description of the quantitative relationship between subjects. As a supplement to qualitative research, quantitative research has been widely used in legal research. Quantitative research is not only the inexorable trend of the development of legal science, but also the necessary means to promote the scientific nature of legislation and to overcome the arbitrariness of judicature. At present, in our country, free judgment of distinction and appropriate restrictions under the guidance of the principle, including approximate method, comparative method, reference method and full compensation method. From the point of view of local legislation and judicial interpretation, it can be roughly divided into several categories: the budget estimate method, the ceiling law, the minimum quota method, the numerical magnitude formula, the daily wage type, the living standard and the multiplying rate method. Because of the lack of sufficient quantitative research in the existing legislation and judicial, causing legal provisions on quantity are not clear, which makes the judge discretion in judicial practice is different, the implementation effect of judicial and legislative purpose even far. The author suggests that in the quantification of "serious consequences", "appropriate" can make the following attempts: (1) the standard quantitative method: the total amount of compensation equal to each factor coefficient and multiplied by the average number of mathematical formula is  $Z = (Y1 + Y2 + Y3 + Y4 + Y5) \times P + Z \times X$ . Where Y1 represents the degree of subjective fault, Y2 damage means, occasion and manner, Y3 damage, Y4 on behalf of violations, P represents the average number of X, on behalf of the victim living standards change ratio, Z represents the amount of compensation for the final. (2) Standard quantitative method: base amount \* scale factor \* share factor. (3) The expert advice system design:

mental damage by experts on the hypothetical case from the infringer's subjective purpose, the victim, the degree of injury, the infringer and the victim, frightened of the external performance and future potential adverse consequences, such as damage to the six aspects to determine the compensation for mental damage. The system classifies the previous cases, and experts give different kinds of compensation according to different types of cases. (4) The establishment of artificial intelligence model: an automatic iterative process, the result tends to balance, that is, the compensation benchmark can reflect the average compensation amount of authority samples. Therefore, as long as the input of discretion is the same, the amount of compensation will be relatively stable and determined.

Identification of the "corresponding". The court in the case of state compensation can be compared with the "State Compensation Law" Article 3 or Article 17 of the strict implementation of the situation, "the situation" itself is not controversial, but 35 of the "corresponding" mental damage solatium, The difference is greater. The reason is that: for the "situation" that the judicial discretion is small, the dispute is also smaller; for "corresponding" that the judicial discretion, the controversy is greater. The judgment of the court is not only the act of strict enforcement of the rules of law, but also the subjective judgment of the discretion of the discretion of the discretion of the law is not an accurate copy of the law. Judges' judgments are influenced by themselves and their environment, and there are more uncertainties in the discretionary power, which makes the legislator vaguer about the amount of mental damage solatium, and also causes the difference in the objective discretion of the judge larger problem is particularly prominent. Although the Supreme Court issued a "Opinion on Several Issues Concerning the Application of Spiritual Damages to Compensation in National Compensation Cases" (hereinafter referred to as "opinions"), which stipulates: "The specific amount of mental damage solatium does not exceed Personal freedom compensation, life and health compensation of 35% of the total, the minimum not less than 1,000 yuan. " But in my opinion, "in principle not more than" judicial discretion discretion did not get the limit, but there is increased suspected. For example, in accordance with the above calculation method, in the "call", the parents can get about 1.04 million to 1.41 million yuan of state compensation. But in fact the father plans finally received 2059621.40 yuan compensation, including spiritual solatium up to 100 million. It is not difficult to see that the discretion of "in principle not exceeding" has played a decisive role. The amount of mental solatium may vary depending on the region, the judge, and so on. As in judicial practice, discretionary factors are more, and in "opinion", only qualitative provisions, not to the necessary quantitative. I suggest that the Provincial High Court in how to clear, refine, quantify the above factors and other issues of national compensation efforts, and then develop the appropriate implementation details. For example, to calculate a national compensation standard that meets territorial claims, the judge may float on this basis and publish it once a year, focusing on its timeliness and so on.

#### **4. In conclusion**

Since the system of compensation for mental damages in China's state compensation is relatively late, until the new article of the State Compensation Law adopted in 2010, it is clear that the compensation for mental damage compensation is still too simple, vague and incomplete, There are also many problems and blind spots in the practice, which is not conducive to the comprehensive protection of the legitimate rights and interests of citizens, it is necessary to improve China's state compensation in the spirit of compensation system. Therefore, in our country at this stage gradually establish a perfect national tort tort system, in particular, "State Compensation Law" 35 and its "opinions" in the "serious consequences", "corresponding", "in principle not More than "and other issues of objective benchmarking, quantitative analysis and other issues have been urgent. As a lawyer, we expect the state compensation system of mental damage to be able to continuously improve with the deepening of our legal process.

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