

Conservative Theory of Expanding Supervision Compensation from the Perspective of Behavioral Economics

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Abstract. Based on the reflection on the traditional theory of expanding compensation, protecting human rights, and urging the exercise of rights, using cybernetics and behavioral economics tools, the expansion of supervision compensation will make market norms erode social norms, coupled with the confrontational sense of the subject and object of compensation. According to empirical research, it has been proved that inspection compensation will be further transmitted into a disguised “redemption” claim. On the contrary, it loses the basic proof in general jurisprudence and welfare school. Based on acknowledging the “post-welfare school” and general jurisprudence, in order to increase the marginal amount of social welfare, safeguard human rights and promote the return of legal order, inspection compensation should be treated conservatively, including refinement, orderly limitation, and policy-oriented compensation and relief substitution.

Keywords: Supervision Compensation; Cybernetics; Compensation for Mental Damage; Behavioral Economics.

1. Proposing Questions

Based on the inertia that academic research must expand the compensation to limit public power, various scholars advocate expanding the supervision compensation to meet the value of the system’s trust interest protection, control power and protect the people. However, in order to control the value of rights and protect the people, the author believes that the measure of advocating the expansion of the supervision compensation is not effective. At present, the theories that can be included in the expansion of supervision compensation generally consist of Yasuhei Taniguchi’s theory of “procedural guarantee”, social insurance theory, public burden theory, people’s sovereignty theory, and the theory of supervising the exercise of rights. Some few views and the main motivation for introducing compensation norms are the “appeasement theory” that aims to appease representative victims of “lobby groups”. After considering the basis of the legal philosophy of all theories, it can be found that once the issue of compensation is involved, some basic views of the welfare school and law and economics must be admitted in advance. In other words, scholars advocate the expansion and clarification of supervision compensation, so they must admit that the utility of law includes the increasing total welfare of individuals or citizens. Besides, the increasing utility of compensation and the decreasing utility of infringement can be transformed into each other, which is generally the same as the cost-benefit calculation from the “efficiency” aspect of law and economics.

The above-mentioned theoretical hypotheses of the welfare school are effective in the general state compensation system. Nonetheless, as for the extremely special regulations of the supervision law, the theoretical hypotheses must be re-examined, especially whether the supervision compensation for the objects regulated by the supervision law promotes the increase of the marginal welfare of individuals or citizens as a whole, whether the regulation method of the supervision law is still applicable to the atomization research method, whether the increasing utility of compensation and the decreasing utility of infringement in the supervision compensation can be transformed into each other, and whether the academic inertia of restricting public power equal to expanding the compensation is still valid. The author asserts that the above-mentioned issues urgently need to be reconsidered by the welfare school. Based on this analysis and experiment of previous literature, using the monetary compensation theory and risk attention theory of behavioral economics, there is a conclusion that

expanding the supervision compensation cannot limit public power, which is not conducive to protecting the human rights of the parties. Taking the compensation for mental damage caused by supervision behavior as an example, it can be treated conservatively with restrictions. Because of the author's insufficient legal basis and the utility basis of the welfare school, it cannot continue to be the basis for safeguarding human rights and regulating power operations.

2. Particularity of the Supervision Compensation Adjustment Mechanism from the Perspective of Behavioral Economics

The particularity of supervision law norms means that based on the legal construction significance of public law legal norms, its normative object, duty crime, has huge damage to the legal system. Empirically and specifically speaking, it is manifested that the legal purpose of supervision law norms is extremely political, and the regulatory objects are extremely confrontational.

2.1. Political Nature: Hidden Benefits of Anti-Corruption

In fact, the current Chinese jurists are often unwilling to admit the political nature of supervision law due to the constraints of humanism. However, it is hypocritical, just as capitalist public law scholars believe that "public law is only a complex form of political discourse; debates in the field of public law are just an extension of political debates." Marxism affirms the political struggle of public law. President Xi proposed that "people's happy life is the greatest human right." To optimize the legal order, politics is a necessary attribute to ensure the happy life of all people, which is also in line with the value of humanistic supervision law.

From the perspective of economic cybernetics, it is the implicit income of law application. In fact, from the perspective of economic cybernetics, we must first admit that the supervisory agency, as a subsystem of the state agency, is a people's government that serves the people, so the income of the supervisory agency's investigation and punishment of corruption is the income of the whole society without externality. While there are indeed hidden benefits that scholars have not considered, which are identical to the political nature above. That is to say, the benefits of investigating and handling a corruption case, in addition to the return and pure benefits of the entire legal order of the case itself, have positive benefits of anti-corruption, fairness and justice for the whole society. From the perspective of actual effects, this social benefit is much better than that of the case itself. This is closely related to practice. How to build a clean and honest official team and how to eliminate the bad influence of official duty-related crime is in stark contrast to the worthless theory of criminal law, instead of recovering the money embezzled by the official. Hence, the embezzlement of the official is only a sign of its damage to the national social system and civil servant system, which is different from the crime of homicide to protect the legal interests of life. The prohibition of duels in the crime of homicide reflects its damage to the legal order, but the marginal cost is very low. However, every case of corruption and duty-related crimes is a serious damage to the national legal order. The return of the damaged legal system is implicit income.

As shown in Figure 1, the observable reality is that when a certain countermeasure is more effective, the regulated object will have demand. The more effective countermeasures the supervisory agency faces, the higher the cost and the smaller the demand will be. When the income of the regulated object has hidden income, the curve of "application of supervisory measures" shifts to the right, and the supervisory agency will apply more costly measures, while the general legal norms have no hidden income with relatively cheap means. This tendency to apply costly countermeasures is political.

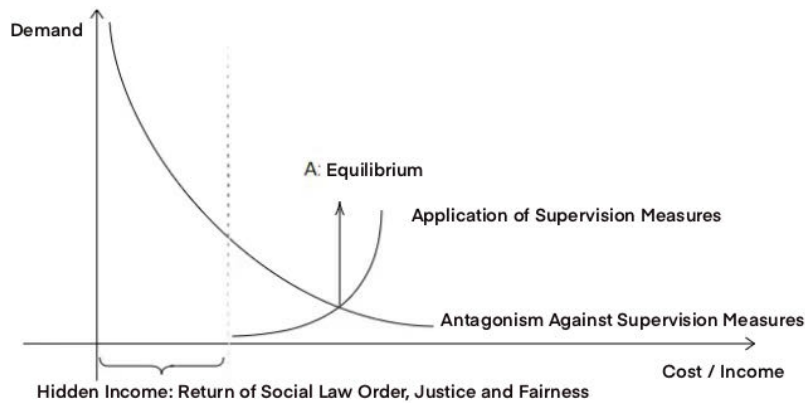


Figure 1. Diagram of Cost/Benefit—Demand of Anti-Corruption (Made by the Author)

2.2. Confrontation: Information Asymmetry

The special and extremely high antagonism of the regulated object can be manifested as the inversion of information asymmetry. In general criminal or administrative cases, it is often the public authority that has relatively complete information, while the object of prosecution is in information asymmetry and risk aversion. In the supervision law, information asymmetry is inverted, and the subject of regulation has complete information. For example, in the bribery case of Yu *hui in Henan Province, when the parties were questioned, the other party formed an “offensive and defensive alliance”, the same is true for the bribery case in District J of H City, Zhejiang Province. Based on the choice under risk and uncertainty theory, the supervisory committee often adopts risk-reducing behaviors, which will make it easier for the supervision law to compromise and make generalized accusation transactions. Another manifestation of this confrontation represents that the scholars of the previous state compensation law have inverted the relationship between confrontation and relief. The duty of care has been transferred to the public authority, and wrongly estimating the risk by the regulated objects is not vital, because they expect their losses to be fully compensated. In this regard, the attitude of the supervision law is quite similar to the theory of “reducing the duty of care of civil servants” in Japan and Germany , and the principle of illegal liability is adopted. Even in the “two-class” utility theory of law and economics, the use of fault or no-fault liability can better maintain the fairness and justice of the second class. At least, Japanese legislators believe that the efficiency of the law cannot continue to be compromised here.

3. Negation of Expanding Supervision Compensation from the Perspective of Behavioral Economics

The author discussed the two aspects of transferability and superimposition of welfare. It is worth mentioning that the discussion of transferability and superimposition is in line with the “two-class utility theory” of law and economics. It is very similar. In other words, the efficiency elements of the first class benefit the overall social welfare, and the second class pursues long-term and spiritual utility such as fairness and justice, legal order, and good faith. This similarity comes from the value of law, which is caused by the full enumeration of the route.

3.1. Negation of Welfare Transformability of Compensation and Tort: Monetary Compensation Effect

The particularity of the supervision law negates the welfare transformability of compensation and compensation elements, that is, the behavior to which the compensation elements of the supervision law are attributed and the material compensation cannot be a unified variable. In other words, no matter how serious or not, the compensation elements of the regulated object with ancillary behaviors cannot be compared with material compensation.

In fact, the key is that behavioral economics negates the validity of the input variable—the expansion and application of compensation norms—the impact factor of transmission. In behavioral economics, the validity of the impact factor is rejected, which fundamentally negates the operability of the possibility interval. Its negation principle is the transposition of market norms and social norms, which believes that once market norms enter a certain social field, they will exclude social norms until social norms are completely replaced by market norms. This process will lead to “the inclusion of monetary compensation effect”, which will eventually expand and apply compensation norms, violating procedural justice and human rights protection. Social norms are a vital concept in the theory of sociology and behavioral economics. It links micro-individuals and macro-groups, leads to output results, and ultimately changes the allocation of social resources (including legal values and economic resources). In this regard, scholars have constructed the system of “meta-norms”—“social sanctions”—“social norms” is established, and the transmission of social norms to maintain order is proposed.

Then, the author tries to prove that when social norms are replaced by market norms, the expansion of supervisory compensation will not restrict the operation of public power as scheduled. When social norms are replaced by market norms, even if the punishment is increased, it cannot constitute restricted research and will cause negative effects. A similar realistic research of the “monetary compensation effect” has been used in equity financing in private law and environmental pollution in the field of public law, which has been empirically proved. The “green investment” research of pure economic research also supports related views. By integrating relevant empirical research and an experimental result, the author demonstrated that monetary compensation reduces the coordination and sociality of public authorities. The introduction of market norms leads to short-term rational cost-benefit analysis and related risk avoidance mechanisms, but violates human rights and procedural justice in terms of legal value.

In the case of the use of fines, the perpetrator will generate a prediction that it will reduce its sociality (perceiving the self as unique and separate from others) and interdependence (perceiving the self as similar to others and socially connected). When money is not involved (i.e. when there is no currency or other monetary equivalent), monitoring the implementation of measures is considered a social norm. According to scholars’ social statistics, if daycare centers impose fines on parents for being late, daycare centers irrevocably replace social norms with market norms. Since parents pay for their lateness, they use market norms to interpret this matter. In other words, now that there is a fine system, they can decide whether to come early or late, so they are often late.

(1) Experiment of “Monetary Compensation Effect”

The experiment of “monetary compensation effect” tested these hypotheses through a game experiment, in which respondents were asked to complete a short homework exercise within a time limit and counted whether students’ use of fines effectively limited their answer time. While hypothetical scenarios cannot test real behavior, they can test participants’ intuition. As for hypothesis 1, because there is a fine, and participants with low fines take more time to answer questions than no fine. As for hypothesis 2, there is a positive correlation between the amount of fines and the participant’s answer time.

(i) Experimental Operation

Based on the observation statistics of scholars and similar experiments, the author conducted similar experiments. 719 students from a university in Northwestern China, a University of Economics and Law, a University of Political Science and Law, a university in Gansu, a school of Political Science and Law, and a polytechnic institute underwent experiments at different campus locations and were asked to complete a short game. The experimental design between participants was that Participant A was asked to copy an article, including ideological and political, simple sociology and French proverbs. When he completed the transcription, within 2 minutes of the game time, the finisher will get the final prize (not cash). In Group 1, Participant A received 20 yuan in cash in advance. In Group

2, Participant A also received 20 yuan in cash in advance, but participants were fined to reduce part of the cash every 30 seconds overtime.

(ii) Results and Discussions

According to Figure 2, the results support all hypotheses. As predicted in hypothesis 2, when the penalty increases from low to medium, the transcription time in the cash condition (money market) decreases, $F(1,717)=5.03, p<.001$, which is a model similar to the cash market return. This result also supports hypothesis 1. The answering time under the low payment of the cash condition (money market) is higher than the copying time under the no payment control condition, $F(1,607)=4.65, p<.001$. In contrast, there was no significant difference between the transcription time without penalty and the transcription time under the higher penalty control condition, $F(1,607)=0.2, p=.84$.

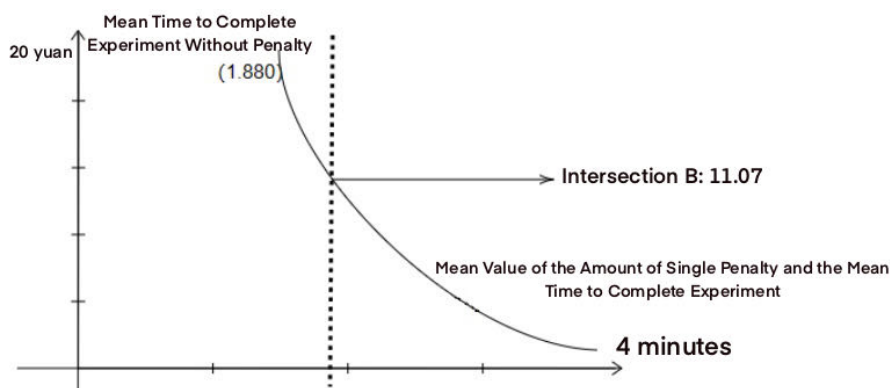


Figure 2. Experimental Results of “Monetary Compensation Effect” (Made by the Author)

(2) Role of “Monetary Compensation Effect” in the Supervision Law

Since social norms are often in the second class of benefits in law and economics, they are ineffective in the investigation range, just because of the soft constraints of jurists’ theories in one way or another. Once market norms are included, they will quickly exclude social norms because of their high efficiency, fast action, and natural coordination with external market norms. In other words, entities actively choose market norms. Once the expansion and application of compensation norms become normative law, everything will become a game of law and economics. Supervisory subjects will evaluate the expectation of compensation and behavior. Once there is a behavior whose income is greater than compensation, they will spare no effort to use the behavior without calculating the constraints of social norms. In this section, the author will put forward that even if we believe that the infringement is not intentional, then the attention risk theory can still support the author’s conclusion. It is worth mentioning that social norms can be understood as soft law or Pashukanis’ naturally generated private law, rather than norms in the normative school of law. In this transmission process, scholars often have two doubts. One is the approach of the analogy method. Why does this happen only in the supervision law? The compensation must reach a fixed ratio P of the total income to have a binding effect compared with social norms. Based on Figure 2, this ratio P is about 0.5. Taking this ratio as an example, the binding effect in a single supervision law case is evaluated.

$$\text{Total Income of a Single Supervision Law Case} = \text{Hidden Income} + \text{Return of Single Legal Norm} + \text{Pure Income} + \text{Remainder}$$

Based on the 415 cases that can be retrieved from Peking University’s Legal Website, the final pure income of corruption and bribery cases is estimated to be 320,400 yuan on average. The return of the single legal norm is estimated based on embezzlement of stolen money, illegal profit-making, income from unknown sources, and official rank. Each rank is estimated based on its 50-year salary, with an average of 5.0061 million. Then, for the compensation whose restraint effect in a single supervision law case is equal to that of social norms, the fixed ratio is set at P, at least P (hidden income, return of single law norm, pure income, remainder). Based on the above data and experimental data, it is estimated that it is at least 5 thousand (hidden income+500.61+32.04+remainder). Even if the huge

hidden income is not considered, the compensation is not in line with the principle of proportionality, which will greatly enhance the confrontation of the claimant, and the supervisory agency will not be able to exercise the right.

The perspective of behavioral economics opposes the intervention of market norms, and denies the exit after the intervention of market norms and the retention of social norms. Once market norms intervene, they will encroach on the application of the original social norms. Empirical research shows that people tend to choose market norms. Once market norms are included, they will not easily withdraw, just like the statistical observation of daycare centers above general. Unless there are other stronger “trade-off” elements, the above experiment mentioned that once experiment participants learned they could avoid the blame of the experimenter through fines for similar transactions, they’re likely to join the market norms and trade.

As some scholars pointed out in Freud’s case, compensation does not regulate the operation of public power. In the end, the state government used a method similar to civil reconciliation to buy Freud’s rights. If the right heirs of Freud do not choose reconciliation, they can meet the expectations of natural law scholars. This is why some German and French scholars define compensation as “monetary redemption for the crime”, In other words, paying money to the victim of an accident is in exchange for killing or injuring him, so they argue that people should be forced to conduct such transactions. In the practice of China, the most transactional one is the regulatory object of “both bribery and corruption”. The supervisory committee tends to reach an evidence transaction with the briber, rather than strictly following the constraints of the procedural law. In fact, this makes no sense in classic jurisprudence, because the transaction of proof is different from that of prosecution and defense. This transaction outside the order and involving a third party can only be interpreted in classic jurisprudence, that is, the proof transaction of the briber should offset the responsibility elements in the penalty for the performance of major meritorious service. However, according to the analysis of semantics, the major meritorious service has to be traced back to the briber itself of the proof transaction, that is, the infringement of legal interests by the briber can surpass other violations and be a major meritorious service. There is a simpler expression in the welfare school and unified jurisprudence that the destruction of the legal order by the proof transaction is too small compared with the corruption crime of the bribe-taker itself, so that the proof transaction has become a means, not an end.

3.2. Negation of Welfare Transformability of Compensation and Tort: Effect of Duty of Care

As a national supervisory organ, the theoretical basis should admit its stable operation as a supervisory organ, while it should not admit that even if the principle of cost-effectiveness allows, the entire supervisory organ acquiesces to abandon social norms, especially the constraints of intra-party regulations. Therefore, the author tries to regard the occurrence of infringements as random. In other words, only the attention of both parties can be avoided, rather than the result of the active choice of the public authority.

Another research evidence is the theory of the limited liability imputation system. That is to say, the limited scope of compensation is the basic incentive of duty of care. Shavell and Miyazawa analyzed the optimal planning of state compensation from the perspective of duty of care. After using neoclassical analysis tools, they did not prove why both parties can use the rational person model, but the monetary compensation effect fills this gap.

Duty of care refers to the result of intentionally evading the infringement of the legal order. The hypothesis of this theory means that all unfavorable results of infringement of legal interests should be regarded as something that both parties can work hard to derogate from, otherwise, the compensated party will become arbitrary until it is deliberately infringed to claim compensation. If the scope of liability is too large or when there are other uncertainties surrounding the determination of fault, and the infringing party is a risk aversion, the result will not be efficient, because the infringing party will bear the risk. In addition, they may be overly cautious to avoid liability. When

the compensating party is always a risk aversion, this caution has reached the extreme value of economic cybernetics. In fact, this caution may cause public authorities to use expensive and complex means of maintaining stability, which will affect the normal exercise of rights. In other words, if the harmers are risk-averse, then completely “internalizing” the harm they inflict is not what society wants. Scholars have mentioned in the research on accident law that the responsible party with too large responsibility will adopt excessive or insufficient attention. Empirical studies have concluded that the reason for the decrease in attention may be behavioral psychology, that is, the “broken windows” effect. However, an excessively high scope of compensation will limit the claimant’s duty of care, and instead will intentionally pursue the unfavorable results of the infringement of legal interests. Because even if the amount of compensation is equivalent to the infringement of legal interests, there are still claimants who have a higher demand for compensation, that is, people who intentionally self-harm and obtain compensation in reality.

Shinjiro Miyazawa has researched economic cybernetics and supported the author’s theory of limiting the compensation scope. According to this diagram, an excessively high scope of compensation will limit the planning area of the duty of care of both parties.

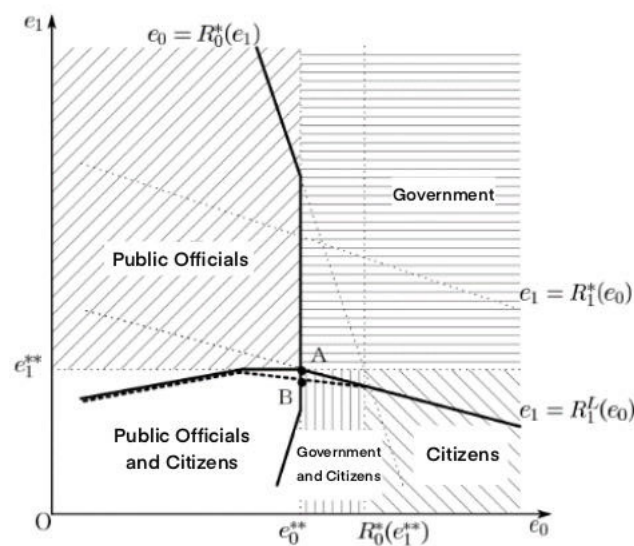


Figure 3. Planning Diagram of the Compensation Scope and the Duty of Care of Both Parties
Source: Shinjiro Miyazawa

3.3. Negation of the Superposability of Output Welfare of Regulated Objects: Externalities

The particularity of supervision law denies the superposability of the output welfare of the regulated object, or denies the atomization research of the welfare calculation. It can be expressed as the externality of modulation behavior from the perspective of law and economics. The narrative structure of the theory of people’s sovereignty believes that a small number of corrupt elements must be the enemy of the broad masses of the people. According to Marxism, the law serves the social order on which these class governance structures depend. The destruction of the legal order by a small number of corrupt elements is huge. It is also a huge damage to the class governance structure. In fact, the public interest attribute of anti-corruption can be compared with “national security”, which should be a major public interest. The supervisory power should be a necessary means to determine violations or crimes as an important institutional guarantee for national anti-corruption, priority and advantage. Its essence is that the regulation of this possibility range has produced great externalities, which can be expressed as the expansion and establishment of the compensation mechanism, leading to restrictions on supervision and investigation. When corrupt elements or other regulated objects continue to go unpunished or engage in negative confrontation with the law in the process, the infringement of social legal interests increases, so that the welfare output by the regulated object in this case is still negative compared with the negative externalities of the case, leading to the

inadmissibility of the superposition result as the output welfare of the law. Instead, it recognizes the methodology of comparing the sum of output welfare with the superimposed negative externalities.

As for the justification of externalities, just like the refutation of the market by Chinese Marxist scholars, the author can make a similar expression for the right of claim, that is, the unflawed application of the right of claim, instead of making social welfare reach equilibrium in public and private constraints. The reason for all this is externalities that represent the social significance of the parties' rights protection, which clarifies the social organization of rights protection. From the perspective of political science, this is different from prosecution-defense confrontation and legal review. Because in terms of scale and power, it is far larger than that of lawyers. In terms of political status, it does not belong to the sovereignty of the procuratorate (or government inspection in the Anglo-American law system). This represents the peace and confrontation between corrupt criminal organizations and public power, which is full of externalities that may be manifested in the transformation of the right to claim compensation from the individuals' relief to the evasion of legal responsibility by corrupt criminal organizations. Externalities can also be indicated by the attack on individuals, which has become an element of returning to the legal order. Such an externality can be seen in the elements of responsibility. For example, when a criminal commits suicide, the trial is often terminated and the loss of the responsible subject is recognized. However, in corruption crimes, supporters of radical natural law often do not recognize the adequacy of abandoning the investigation. In the unified jurisprudence point of view, the responsible subject is not lost because it is the entire criminal organization, which is another proof of the externality of a single case.

In fact, the Standing Committee of the Thirteenth National People's Congress took a cautious attitude towards this and did not even include supervision and compensation in the third category of legislative items announced in the legislative plan. In other words, legislative items do not fully meet the legislative conditions and need to continue to study and demonstrate. Another example is the National Compensation Law, which advocates that compensation should be given only for "illegal" damage caused by the monist "illegal exercise of power". The original intention of the legislation is to limit the scope of compensation.

4. Construction Approach of Conservative Treatment of Supervision Damage Compensation

Based on the above arguments, the expansion of supervision compensation has been proven to be unable to achieve an overall increase in social welfare. On the basis of still recognizing the welfare school and Marxist theory of people's sovereignty, the conservative adjustment of supervision compensation and other auxiliary measures can expand the interpretation of interpreters.

Auxiliary measures include the strengthening of variable transmission impact factors or the selection of variables with the highest impact factors. This path in essence is to increase the amount of compensation to reach a limit that can restrain the supervisory agency. However, its cost is too high. If it does not conform to the principle of proportionality, it will endow it with great antagonism. But the superposition of welfare is negated by atomization research. After atomization research is carried out, any welfare cannot act on the regulatory object alone, but can be transmitted to the whole society.

The only way to implement is to choose measures with welfare transformability. In this regard, Chairman Mao put forward policy relief measures worthy of reflection on how to deal with the relief problem after the transformation from class opponents in the "people's external contradictions" to the people. Policy relief measures include arranging work, solving living difficulties, granting administrative licenses, letters and visits, and reputational replies. In the case of Deng Yujiao who was violated by the personnel of the public power agency, she took policy relief for arranging work. In the vast law enforcement practice, policy relief has shown strong Chinese characteristics and institutional advantages. The supervision and compensation will not give the regulatory object antagonism. Since it is in the fixed framework of policy relief, it is weakened antagonism, which is even possible to achieve the "transformation" mentioned by Chairman Mao. In the era when

collective ownership is popular, policy relief plays a vital role in the relief and transformation of declining landlords and class opponents, which proves that the regulated objects will not be endowed with confrontation, and the regulated objects should solve their living difficulties. Those who have lost their jobs should get work. In addition, the supervisory compensation claimants who have been illegally damaged should restore their reputation and maintain their lives in the policy relief. The class opponents in the supervision and compensation should be "transformed" in the work and labor. Those who have exhausted relief in the judicial system should be supported and guided to use the petition system and discipline inspection system led by the Communist Party of China in a healthy, reasonable, legal, and objective manner. The people's enthusiasm for policy relief also reflects its superiority. Scholars cannot abandon the effective policy relief measures since the base period of China because of the reflection on the legal system of the Soviet Union.

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