

DR. QIAN XIAOPING*

Criminal Legislation against Bribery in the People's Republic of China: Formation, Evolution and Evaluation**

1. Formation and Evolution of Criminal Legislation against Bribery in PRC

1.1. Formation of criminal legislation against bribery crime in PRC

In order to support the War to Resist U.S. Aggression and Aid Korea and overcome the financial

Since the People's Republic of China (PRC) was founded in October 1949, modern criminal legislation against bribery had blazed a trail of development from nothing to a footstone of anti-corruption system. The delimiting of crime and the penalty is stamped with the times. Due to the internal relationship between bribery crime and economic model, the different stage of the economic system decides the different character of criminal legislation against bribery in China. During the period of planned economy, the state's intervention of economic administration intensively restricted the condition of bribery objectively. That means slack legislation against bribery also have some effect. During the period of economy transition, the space of seeking rent made by "dual-track system" of the transformation model provides the hotbed for bribery crimes and causes bribery crime to increase sharply, which promote dramatic changes and adjustments of anti-bribery criminal legislation, especially in enlarging the scope of bribery crime and enhancing the severity of penalty. However, compared with the general rule of anti-bribery in market economy, the criminal legislation against bribery in China still has many deficiencies need to be amended timely.

difficulties of the state, the Central Committee of the Communist Party of China launched the Patriotic Increase of Production Movement in October 1951, a large number of problems regarding corruption, wasting and bureaucracy were exposed. Corruption shocked the the Central Committee of the Party, which caused another movement nationwide latter in December 1951, the Movement against Three Evils (corruption, waste and bureaucracy). This movement lasted a year, thousands of corruption cases were detected,¹ Liu Qinshan and Zhang Zishan's case was the most famous among all.² Liu Qinshan and Zhang Zishan were heroes in the war, while fell down on the corruption in the peace time. Their case triggered the high attention from the center government on fighting embezzlement crime, directly led to *Act of the People's Republic of China on Punishment of embezzlement* (hereafter referred to as "Act 1952") enacted on April 21, 1952, as the form of special criminal law.

Bribery was only described as a kind of embezzlement in Act 1952,³ but it still was the prelude of criminalization of bribery in New China. The

¹ According to statistics of embezzlement crime during this movement, about 9942 perpetrators were sentenced to imprisonment, 67 perpetrators were sentenced to life imprisonment and 42 perpetrators were sentenced to death penalty. See Historical documentary compilation committee of the communist party of China edits, *Record of actual events of Chinese Communist Party (the Sixth)*, Beijing: People's Press, 2003, p82.

² When he was a government leader in Tian Jing from 1950–1951, Liu Qinshan embezzled as much as 184 million yuan (old currency) and Zhang Zishan embezzled 1.94 million yuan (old currency). They were sentenced to death penalty, executed in February 1952. Because of the large amount of corruption and the high administrative rank of the perpetrators, their case is regarded as the First Major Case against Corruption in New China.

³ Article 2 of Regulation stipulates "any personnel of state organs, enterprises, school and its affiliates, embezzle, steal, fraud, extract national property, extort or accept bribery and other jobbery for illegal benefits, should be embezzlement crime."

* QIAN Xiaoping, PhD, associate professor, Nanjing Audit University, China.

** This article is funded by Sino-Hungarian Academic and Cultural Research Center of Nanjing University Foundation "Comparative Research on Criminal Legislation against Bribery between China and Eastern European Countries" and also by the National Social Science Foundation "Research on the Legislation Boundary of economic criminal law" (12BFX052).

legislation against bribery in Act 1952 had the following characteristics: Firstly, not only embezzlement crime, offering bribe and introducing bribe crime were stipulated, but also shielding embezzlement crime (including bribery) was set as a subsequent crime of corruption, the mechanism of anti-bribery in criminal law was formed preliminary. Secondly, amount of bribes was primary factor while the circumstance was a secondary one in deciding the penalty. Besides this, the model of the same penalty between embezzlement crime and the crime of accepting bribes was formed. Thirdly, Chinese traditional policy of punishment of corruption severely was inherited, which led to a severe penalty system based on imprisonment and death penalty under special circumstance.

In general, the foundations paradigm of criminal legislation against bribery crime were confirmed in Act 1952, which represented the beginning of criminal legislation against bribery in new China.

Regardless of the fact that bribery crime was stipulated in Act 1952, it still had not been codified until Criminal Code 1979. After the People's Republic of China was founded in 1949, the criminal code under period of Nationalist party was abolished, the work of drafting new criminal code started in 1950. While affected by kinds of political movements, the process of criminal legislation was interrupted several times. In October 1976, ten years of the Great Cultural Revolution was terminated, China entered a significant new period of recovering and constructing a socialist legal system. Based on the thirty-third draft of criminal code in 1963,⁴ Criminal Code 1979 was promulgated by the Second Session of the Fifth National People's Congress on 6 July 1979 and put in force on 1 January, 1980. Criminal Code 1979 inherited the criminal legislation against bribery from Act 1952 and stipulated accepting bribe crime, offering bribe crime and introducing bribe crime were in Chapter VIII "malfeasance crime".

It's the first time to separate accepting bribe crime from embezzlement crime. In the aspect of constituent crime, "taking advantage of his position" was stipulated for the first time, extort and accept bribery were simplified as an act of "accepting bribe". In the aspect of penalty, the model of the same penalty between embezzlement crime and bribery crime were changed, each crime was stipulated different penalty grades, for example, maximum statutory penalty of embezzlement crime was death penalty, while maximum statutory penalty of accepting bribe crime was fixed-term imprisonment of fifteen years. Obviously, the punishment of bribery crime showed a tendency of mitigation in Criminal Code 1979.

1.2. Evolution of criminal legislation against bribery in PRC

The Third Plenary Session of the Eleventh Central Committee of the Communist Party announced a decision of opening up as basic state policy in December 1978, China entered a new period of transformation from the planned economy to the socialist market economy. In the process of economic transition, bribery crime takes on a trend of spreading from public power area to market area. The contagion of bribery in economic transition forces the criminal legislation against bribery to be amended accordingly.

1.2.1. Criminal legislation against bribery crime at a nascent level of economic transition (1982–1997)

Facing the tide of bribery at the beginning of economic transition, three special criminal laws were promulgated by Standing Committee of the National People's Congress (SCNPC) as a response. The amendments to the Criminal Code 1979 from three special criminal laws include the following respects:

Firstly, new bribery crimes were stipulated. Unit crime didn't be stipulated in the Criminal Code 1979, because units didn't have an unfettered pursuit of economic profits in the planned economy period and lacked the basic conditions of bribery.⁵ However, during the economic transition, the bribery of units emerged from the water, which led to the complicated situation of the coexistence of natural person and unit's bribery. As a response to the change of bribery, SCNPC enacted *Supplementary Provisions on Cracking Down on the Crime of Corruption or Bribery* in January 21, 1988 (hereafter referred to as "Supplementary Provisions 1988"), stipulated the crime of unit offering bribes and the crime of unit accepting bribes. Moreover, in order to fight bribery in non-public economy field, SCNPC promulgated *Decision on Cracking Down on the Crime of Violating the Company Law* in February 28, 1995, stipulated the crime of company or enterprises' personnel accepting bribes. The scope of anti-bribery crime was expanded from public area to private area, which marked the beginning of dual legislative system characterized by identity in fighting bribery crimes.

Secondly, new types of bribery behavior were added. Supplementary Provisions 1988 stipulated economic bribery, that means, "any State functionary who, in economic activities, violates State regulations by accepting rebates or service charges of various descriptions and taking them into his own possession, shall be regarded as guilty of accepting bribes and punished for it", at the same time offering rebates or service charges was also be stipulated as offering

⁴ Gao Mingxuan&Zhao Bingzhi, *The Evolution of Chinese Criminal Legislation*, Beijing: Law Press, 2007, p41.

⁵ In Chinese criminal code, the conception of unit includes any company, enterprise, institution, State organ, or group.

bribes accordingly. It's the first time to confirm the commercial bribe crime in criminal code in China.

Thirdly, the elements of accepting bribes crime was changed. As an element of accepting bribes, 'taking advantage of his position' first appeared in Criminal Code 1979, while *Decision on Severely Punishing Criminals Who Seriously Undermine the Economy* enacted by SCNPC in March 8, 1982 (hereafter referred to as the "Decision 1982") deleted this element in order to enlarge the scope of crimes,⁶ while Supplementary Provisions 1988 recovered this element again. In addition, Supplementary Provisions 1988 also stipulated "securing benefits for the person" as a constituent element of accepting bribes for the first time.

Fourthly, extorting bribery and ordinary bribery was distinguished. Under the premise of extorting bribes reconfirmed as an independent behavior of accepting bribes in Decision 1982, Supplementary Provisions 1988 distinguished social harmfulness between extorting bribes and accepting bribes in the further, stipulated "taking advantage of his position" as the constitutive elements of accepting bribes, while this element is not necessary for for extorting bribes. Supplementary Provisions 1988 also stipulated extorting bribes should be paid heavier punishment than ordinary bribery.

Fifthly, the juxtaposition model of amount and circumstance of bribes as evaluation criteria of criminal responsibility was established. The model of "the amount is primary factor while the circumstance is a secondary one" in evaluating bribery criminal responsibility was confirmed by Act 1952 and Criminal Code 1979, but this model was changed as "the amount and circumstance as equal condition to choose the statutory penalty" by Supplementary Provisions 1988.⁷

Sixthly, death penalty of accepting bribes crime was restored. Decision 1982 improved the maximum statutory penalty of accepting bribes crime from imprisonment to the death penalty, which restored the model of the same penalty between embezzlement crime and accepting bribes crime created in Act 1952.

These amendments above are all absorbed and confirmed by Criminal Code 1997.⁸ On the base of

inheriting "the dual identity", the biggest innovation of Criminal Code 1997 is the adjustment of legislation system: bribery crimes involve in State functionary are stipulated in an independent chapter, that is, Chapter IIIV "Crimes of Embezzlement and Bribery"⁹; while the bribery crimes of company or enterprise's personnel are stipulated in Section 3 "Crimes of Disrupting the Order of Administration of Companies and Enterprise" of Chapter III "Crimes of Undermining the Order of Socialist Market Economy".¹⁰ Criminal

previous provisions of criminal law of China. Therefore, the Criminal Code 1997 surpasses and improves the Criminal Code 1979 in many aspects.

⁹ There are 6 bribery crimes in this chapter. (1) The crime of accepting bribes. Article 385 stipulates the "Any State functionary who, by taking advantage of his position, extorts money or property from another person, or illegally accepts another person's money or property in return for securing benefits for the person shall be guilty of acceptance of bribes." "Any State functionary who, in economic activities, violates State regulations by accepting rebates or service charges of various descriptions and taking them into his own possession shall be regarded as guilty of acceptance of bribes and punished for it." (2) The crime of unit accepting bribes. Article 387 stipulates "Where a State organ, State-owned company, enterprise, institution or people's organization extorts from another person or illegally accepts another person's money or property in return for securing benefits for the person, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offence shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention." "Any of the units mentioned in the preceding paragraph that, in economic activities, secretly accepts off-the-book rebates or service charges of various descriptions shall be regarded as guilty of acceptance of bribes and punished in accordance with the provisions of the preceding paragraph." (3) The crime of offering bribes. Article 389 stipulates "Whoever, for the purpose of securing illegitimate benefits, gives money or property to a State functionary shall be guilty of offering bribes." "Whoever, in economic activities, violates State regulations by giving a relatively large amount of money or property to a State functionary or by giving him rebates or service charges of various descriptions shall be regarded as guilty of offering bribes and punished for it." "Any person who offers money or property to a State functionary through extortion but gains no illegitimate benefits shall not be regarded as offering bribes." (4) The crime of offering bribes to unit. Article 391 stipulates "Whoever, for the purpose of securing illegitimate benefits, gives money or property to a State organ, State-owned company, enterprise, institution or people's organization or, in economic activities, violates State regulations by giving rebates or service charges of various descriptions shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention." (5) The crime of introducing bribery. Article 392 stipulates "Whoever introduces a bribe to a State functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention." "Any person who introduces a bribe but voluntarily confesses the act before he is investigated for criminal responsibility may be given a mitigated punishment or exempted from punishment." (6) The crime of unit offering bribes. Article 393 stipulates "Where a unit offers bribes for the purpose of securing illegitimate benefits or, in violation of State regulations, gives rebates or service charges to a State functionary, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offence shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. Any person who takes into his own possession the illegal gains derived from bribing shall be convicted and punished in accordance with the provisions of Articles 389 and 390 of this Law."

¹⁰ There are 2 bribery crimes in this chapter. (1) The crime of companies or enterprises' personnel accepting bribes. Article 163 stipulates "Where an employee of a company or enterprise who, taking advantage of his position, demands money or property from another person or illegally accepts another person's money or property in return for the benefits he seeks for such person, if the amount involved is relatively large, he shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention; if the amount is huge, he shall be sentenced to fixed-term imprisonment of not less than five years and may also be sentenced to confiscation of property." (2) The crime of offering bribes to company or enterprise's personnel. Article 164 stipulates "Whoever, for the purpose of seeking illegitimate benefits, gives money or property to any employee of a company or enterprise, if the amount involved is relatively large, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the amount involved is huge, he shall

⁶ Liu Guangxia, "Brief Review bribery crime", *Democracy and Legal System*, Vol 9, 1982, p32.

⁷ Article 5 of Supplementary Provisions stipulates "For accepting bribes, anyone should be sentenced dependents on the bribery income amount and circumstance, in accordance with the provisions of article 2 of these provisions; if the amount of bribes less than ten thousand yuan, resulting in serious losses to the interests of the state or collective interests, shall be sentenced to fixed-term imprisonment of not less than 10 years; if the amount of bribery is above ten thousand yuan, resulting in serious losses to the interests of the state or collective interests, should be sentenced to life imprisonment or death, and concurrently to confiscation of property."

⁸ Criminal Code 1997 is the second criminal code in new China, passed by the fifth Session of the Eighth National People's Congress on 14 March, 1997 and came into force on 1 October, 1997. The proposal of revising criminal code 1979 by top legislature of China started in 1982, the work of researching and revising the new criminal law stretched over a period of 15 years. Criminal Code 1997 is not a simple collection of the past criminal legislations, but is revised and worked out on the basis of compiling anew and completely the

Code 1997 maintains momentum of criminalization: mediatory-bribe is stipulated as a kind of accepting bribes,¹¹ accepting rebates or service charges violated State regulation is criminalized as “economic bribery” in the crime of company or enterprises’ personnel accepting bribes, offering bribes to units and offering bribes to company or enterprise’s personnel are adopted as two new crimes. As for the criminal sanctions, Criminal Code 1997 sustains the penalty stipulated in Supplementary Provisions 1988 and other special criminal law, only the penalty of the crime of offering bribes and the crime of offering bribes to units are a little lighter than before.

1.2.2. Further improvement of criminal legislation against bribery during the period of deepening reform of economic transformation(2000–)

Coming into the 21st century, the structure of economy of China moves to the phase of accelerating transition, the characteristics of economy are changed from production-oriented to circulation-oriented, from resource-restraint to demand-restraint, from approved-economy to legalization-economy and free-economy.¹² Enlargement of the market causes different forms of bribery, which bring new goals to improve criminal legislation against bribery. Furthermore, China became the contracting party of *the United Nations Convention Against Transnational Organized Crime* on 12 December, 2000 (operated in the domestic on 27 August 2003) and *the United Nations Convention against Corruption* on 10 December, 2003 (operated in the domestic on 12 February, 2006), these two international treaties demand China to improve criminal legislation against bribery according to the international standard. All these amendments in this period can be summarized as the following aspects:

Firstly, bribery crimes of company or enterprise’s personnel were amended. With expansion of the market-like behavior during the deepening reform period, some special bribery crime cases emerged in judicial practice, in which the subject of crime was non-state functionary other than the personnel of company or enterprise, for example, football referee or doctor and so on.¹³ Given that the narrow scope of

the company or enterprise’s personnel in Criminal Code 1997, SCNPC passed *the Amendment VI to Criminal law* (29 June, 2006) to expand the scope of the subject. According to Article 7 and Article 8 of the Amendment VI, the subject of the crime of company or enterprise’s personnel accepting bribes and the object of conduct of the crime of offering bribes to company or enterprise’s personnel were all extended to “personnel of any other entities”. Accordingly, these two crimes were renamed as non-state functionary accepting bribes and offering bribes to non-state functionary.

Secondly, the bribery was stipulated as upstream crimes of money laundering. Originally, there were three upstream crimes of money laundering in the Criminal Code 1997, that was, narcotics crimes, organized crimes in the nature of a criminal syndicate, the crimes of smuggling. In order to coordinate with *the United Nations Convention Against Transnational Organized Crime* and *the United Nations Convention against Corruption*, which advocates the broadest upstream crimes of money laundering, the Amendment VI(2006) stipulated crimes of embezzlement and bribery as the new upstream crimes of money laundering.

Thirdly, the crime of using the influence to accept bribes was stipulated. There are some new changes of bribery crimes at the beginning of 21st century: bribery made by the state functionary directly shows a downward trend, while the intimate persons around the state functionary, such as spouse, adult children and lovers often take part in accepting bribes become an important form of bribery. These behaviors can be defined as joint crime of accepting bribes in judicial practice, but if the conspiracy between the state functionary and intimate persons can’t be proved, these intimate persons would have a high possibility to escape from the guilty, although their behaviors bring much damage to the probity of the state functionary. Article 18 of *the United Nations Convention against Corruption* stipulates the crime of trading in influence. States parties are required to criminalize the behavior of abusing the influence if the purity of public behaviors is infringed. In accordance with the request of domestic anti-bribery practice and international treaty, the new crime of using the influence to accept bribes was stipulated in *the Amendment VII to Criminal law* on 28 February, 2009.¹⁴ On the base of this new crime, the

be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined.”

¹¹ Article 388 stipulates “Any State functionary who, by taking advantage of his own functions and powers or position, secures illegitimate benefits for an entrusting person through another State functionary’s performance of his duties and extorts from the entrusting person or accepts the entrusting person’s money or property shall be regarded as guilty of acceptance of bribes and punished for it.”

¹² Macroeconomic research institute national development and reform commission (NDRC), “Research on the development problems in Chinese accelerating transition period,” *Review of Economic Research*, vol.16 (Feb 2004), p10.

¹³ The most typical case in this aspect is “Gong Jianping’s Black Whistle Case”. Gong Jianping was an international football referee and also a teacher of Capital Institute of Physical Education. He took the advantage of his position to received bribes for 9 times in return for securing benefits for relevant football teams and clubs when he was appointed as the chief referee of the National

Football League during 2000–2001, the amount of bribes added up to 370,000 yuan. He was prosecuted for the crime of company or enterprise’s personnel accepting bribes, while the court of first instance defined his status of referee as the state functionary and sentenced him to imprisonment of 10 years for the crime of accepting bribes in Jan 2003, court of second instance affirmed the verdict of the first trial in Mar 2003. This case sparked vigorous debate about whether the football referee was the state functionary, also made the legislative body noticed the legislative flaw, which finally caused Amendment VI to solve this problem.

¹⁴ Article 13 of the Amendment VII stipulates “an article is inserted after Article 388 of the Criminal Law Article 388 (A): Where any close relative of a state functionary or any other person who has a close relationship with the said state functionary seeks any improper benefit for a requester for such

subject of bribery crime is extended to close relative or close relationship of the state functionary and the state functionary who has left his position, a more extensive criminal legislation system against bribery has been constructed.

Fourthly, the crime of offering bribes to officials of foreign party, officials of international public organizations was stipulated. According to the request of the *United Nations Convention against Corruption, the Amendment VIII to Criminal law* (29 June, 2011) stipulated the crime of offering bribes to officials of foreign party, officials of international public organizations as paragraph 2 of article 164 of Criminal Code 1997, this crime was also stipulated as unit crime.

2. Evaluation of the Criminal Legislation against Bribery of PRC

Based on its social backgrounds and phase of economic development, the criminal legislation against bribery exhibits a trend from restriction to expansion. In the improvement of the framework of legislation, it became rational in consideration of the evaluation of social harm and conformed to the need for national treatment of bribery. However, the effects were influenced by the structural defects of rigorousness other than thorough model and asymmetrical development of accepting and offering bribery which needs to be coped with.

2.1. Apparent trends of criminalization satisfying the needs of economic transformation

From 1952 to 1979 China was under a planned economy when possession and distribution of resources were manipulated by the state according to the economic plan, the legislation focused on embezzlement crime and the urge of criminalization of bribery was relatively little. The legislation against

a benefit through the official act of the said state functionary or through the official act of any other state functionary by using the advantages generated from the authority or position of the said state functionary, and asks or accepts property from the requester for such a benefit, and the amount is relatively large or there is any other relatively serious circumstance, he shall be sentenced to fixed-term imprisonment not more than three years or criminal detention, and be fined; if the amount is huge or there is any other serious circumstance, shall be sentenced to fixed-term imprisonment not less than three years but not more than seven years, and be fined; or if the amount is extremely huge or there is any other extremely serious circumstance, shall be sentenced to fixed-term imprisonment not less than seven years, and be fined or be sentenced to confiscation of property.” “Where any state functionary who has left his position, any close relative of him or any other person who has a close relationship with him commits the act as prescribed in the preceding paragraph by using the advantages generated from the former authority or position of the said state functionary, he shall be convicted and punished under the preceding paragraph.”

bribery crime was basically stable and its scope was limited. From 1980 a new era of market economy arrived and to ensure the stability of transition, China embraced the model of gradualism. Its core was the admittance of coexistence of planned and market economy in a certain period and the direct management power of resource of the market by the governments. The reform of gradualism had brought forward problems such as the contradiction of new and old systems, the weakening of social control over bribery and the awaken of the awareness of economic person, all of which led to the typical mode of bribery of the period of economic transition which was essentially characterized in the exchange of power and resource based on the distribution power of market resources.¹⁵ Criminal legislation responded actively by criminalizing economic bribery and establishing the crimes of unit bribery. As the reform of the economy went deeper, the social structure began to transform from a traditionally centralized society to triple elements of government, market and society. It became obvious that the bribery could do serious damage to the honest market competition and the bribery had evolved to a worse stage due to the pursuit of business interests and competitive advantage. To adapt to the change of form of bribery, the legislation expanded to cover the bribery of business and other non-official personnel which eventually formed a criminal system covering both public and private bribery. As a result, the number of bribery crimes related expanded from 3 to 10 and satisfied the basic need to combat bribery during the transformation of the economy.

2.2. Rational standards of harm evaluation meeting basic requirements of modern anti-corruption

The early legislation against bribery was characterized in its temporary adjustment which lacked the insight of the essential nature of bribery and caused irrationality in standard of evaluation of social harm. Act 1952 put the bribery under the stipulation of the crime of embezzlement and used the amount of money involved as the configuration and sentencing standard. Such standard blurred the difference between bribery and property crimes which the former caused damage to the probity of public officials.¹⁶ “The price of bribery caused is not bribery itself but the loss of low efficiency aftermath,”¹⁷ the nature of the public power, the extent of the violation and the bending of law for someone’s own

¹⁵ Wei Changdong, “Studies on Emergence Mechanism and Controlling Strategy of Rent-Seeking Crime,” *Social Sciences*, Vol.305 (January 2006), p134.

¹⁶ Hao Lihui, Liu Jie, “Rethinking of the Object of bribery crime”, *Chinese Journal of Law*, Vol.3 (June 1991), p37.

¹⁷ Ackerman. S. R., *Corruption and Government*, Beijing: Xinhua Press (2000), p304.

profit represent the social harm of bribery better. Considering the disadvantage of standard of amount of money, the Supplementary Provisions 1988 and the Criminal Code 1997 took circumstance and amount as a whole to evaluate the social harm. "The amount of money is an important index but not the sole one. In deciding sentence other circumstance shall also be considered with the amount of money".¹⁸ Such theory made a more precise conception of legal nature and social harm of bribery.¹⁹ Besides, the Criminal Code 1979 stipulated bribery as crimes of misprision while ignoring the difference between bribery and other crimes of misprision that bribery was a more severe crime as it involved exchange of power and money. The Criminal Code 1997 established a new independent chapter for bribery which was in accordance of principle of crime categorization and the global trend of emphasis on punishing and preventing corruption.²⁰ The new criminal code served better in fighting bribery.

2.3. "Severe other than thorough" mode influencing the positive resolution of bribery

As the criminalization process continued and a more wholesome system of anti-bribery established, the prescription of crimes of bribery was adjusted many times influenced by criminal policies over the last 60 years. The criminal policies were the means of national and social treatment based on the condition of crimes aiming to punish and preventing them.²¹ Since the founding of new China, the criminal policies upon bribery followed two leads. One was severe punishment and the other was focusing on the major case while omitting the petty ones. The former could be dated back to ancient China and adopted by criminal legislation of the new China. Act 1952 stipulated that the highest penalty for embezzlement was the death penalty. Though the Criminal Code 1979 took a more lenient policy under which the maximum penalty of bribery was restricted to imprisonment of fifteen years, the Decision 1982 reinstated death penalty under the pressure of rapid growth of bribery in the early years of economic reform which was reaffirmed in the Criminal Code 1997. The policy of focusing on the major case while omitting petty ones was mainly enforced in the judicial practice with a certain impact on the

¹⁸ Xiong Xuanguo, "Strengthen Trial Quality of Criminal Major Cases to Provide Judicial Guarantee for the Social Development and Social Harmony", in Criminal Division of the Supreme People's Court, eds. *Reference of Criminal Trial*, Vol.57, Beijing: Law Press (2007), p114.

¹⁹ There's a view point out that a evaluation system of convict and sentence with circumstance as a core should be established in bribery crime, in which the amount of money should only be seen as a factor to evaluate circumstance. Sun Guoxiang, Wei Changdong, *A research on Legislation of Bribery and Anti-Corruption Convention*, Beijing: Law Press, 2011, p302.

²⁰ Gao Mingxuan & Zhao Bingzhi, *The Evolution of Chinese Criminal Legislation*, Beijing: Law Press, 2007, pp91-92.

²¹ Cu Huaizhi, *Criminal integration*, Beijing: Law Press, 2005, p258.

legislation. The embodiment of such was that the Criminal Code 1979 and the Supplementary Provisions 1988 added "taking advantage of his position" and 'securing benefits for the person' as the constituent element of bribery which restricted the punishing scope of bribery.²² In the joint effects of the two divided policies, the criminal legislation against bribery turned out to be a "severe other than thorough" mode,²³ in which the punishment was rigorous while the application was restricted for the excessive constituent element. It was contradictory in the legislation that fighting and indulging bribery coexisted which was the main reason that it was hard to crack down on bribery.²⁴ As a matter of fact, in the view of the market economy, the crimes of corruption fell into the category of interest pursuit crimes and the criminals were economic persons sophisticated in calculating the cost and profit of crimes. The emphasis of social prevention should not lie in the severity of punishment but the construction of a thorough criminal system accompanied with the rise of the economic and social costs and the fall of interest anticipation to eliminate motives of crimes. Therefore, a 'thorough other than severe' mode was a better one.

2.4. The difference between accepting and offering bribery hindering the source control

Both the accepting and the offering parties were responsible for the crimes. It was meaningful to strengthen the suppression of offering as the upper crimes and it was the priority one requested by the international convention of anti-corruption. However, current legislation still focuses on the suppression of accepting which caused asymmetrical conditions between the above two in light of configuration mode, case forming standard, special surrender and punishment.²⁵ For instance, if the offering party voluntarily makes confession before being indicted, the punishment could be less or even exempted. And there is no such situation on the other side. Such asymmetrical legislation results in the scarce indictment against the offering party. As a result the interests of offering weigh heavier than its costs and it was hard to find a radical cure. Hence a symmetrical mode should be established and the emphasis should be laid on the offering bribes.

²² Liu Mingxiang, Stipulated the constituent of "taking advantage of his position" is the need of reality, *The Procuratorate Daily*, July 7, 2003.

²³ According to the scope and severity, criminal law could be classified into 4 models in general: both severe and thorough mode (thorough dragnet of criminal law from which it's hard to escape with severe punishment); neither severe nor thorough mode (slack dragnet of criminal law with light punishment); severe other than thorough mode (slack dragnet of criminal law with severe punishment); thorough other than severe mode (thorough dragnet of criminal law with light punishment). Cu Huaizhi, Talking about the Modernization of Criminal Law, *Peking University Law Journal*, Vol.71 (October 2000), p56.

²⁴ Sun Guoxiang, Wei Changdong, *A research on Legislation of Bribery and Anti-Corruption Convention*, Beijing: Law Press, 2011, p179.

²⁵ Qian Xiaoping, Advocacy of the Criminal Policy of Bribery Crime, *Criminal Science*, Vol.108, (December 2009), p15.

2.5. The excessive elements of bribery crime impeding achievement of legislation objective

The state expects to curb the deteriorating trend of bribery crime by expanding the scope of bribery, while this objective is difficult to achieve because of some unnecessary elements designed in the crime. In the theory of criminal legislation, the more complex of constituent elements, the more content should be considered when these elements are used to evaluate the concrete crime.²⁶ The constituent elements are the boundary of the crime actually, that means, excessive elements will restrain the scope of crime improperly, which also debase the evaluation and treatment ability of the law against the crime in the end. For example, "taking advantage of his position" and "securing benefits for the person", these two constituent elements of accepting bribes crime actually become the additional element to restrain the scope of the crime. Therefore, in order to insure evaluation ability of criminal legislation, it's necessary to delete some unnecessary constituent elements of bribery crime according to the reference of simplified constituent model of bribery crime advocated by *the United Nations Convention against Corruption*.

²⁶ Sun Guoxiang, Wei Changdong, *A research on Legislation of Bribery and Anti-Corruption Convention*, Beijing: Law Press, 2011, p163.

3. Conclusion

In the past more than 60 years, the criminal legislation against bribery accomplished a great deal, especially during the economic reform. However, the shortcomings are an objective fact and issues such as unnecessary constituent of crimes, death penalty, asymmetrical conditions between accepting and offering bribes should be dealt with. In the meantime, China is in the era of deep reform and with the weakening or even withdraws of administrative regulation of market the entity of market would gradually play the main role in originating bribery. To form and maintain an honest competition order would be the guiding concept of anti-corruption. *The United Nations Convention against Corruption, OECD Council Recommendation on Bribery in International Business Transactions* and other international conventions are all oriented in such concept by fighting bribery offering and structural management of business.²⁷ – As a result, future legislation should also adopt international experiences by adjusting idea, emphasizing probity of marketing entity and establishing criminal rules focusing on the prevention of offering bribes and the fostering of integrity culture among business. ■

²⁷ Qian Xiaoping, Development of Anti-Bribery Treaties in International Society and Its Reference, *Criminal Research*, Vol 194, (October 2012), p84.

KORRUPCIÓS BŰNCSELEKMÉNYEK AZ ÚJ BÜNTETŐKÓDEXBEN

SZERZŐ: Hollán Miklós

A korrupció legveszélyesebb (vagy legalábbis hivatalosan annak nyilvánított) szegmense a korrupciós bűnözés, azaz a korrupciós bűncselekmények összessége. A könyv célja a kapcsolódó hazai büntetőtörvények, egyéb jogszabályok, joggyakorlat és jogirodalom részletes feldolgozása. Elemzésének fókuszában azon újdonságok állnak, amelyek az új büntetőkodekx (2012. évi C. törvény) rendelkezéseit a korábbi tényállásokhoz képest jellemzik. Megvizsgálja azt is, hogy a korábbi felsőbbbírósi iránymutatások, eseti döntések és jogirodalmi álláspontok mennyiben tarthatók fenn az új kodekx alkalmazása esetén. Abban a kérdésben is segítséget nyújt a jogalkalmazóknak, hogy a 2013. július 1. napját megelőzően elkövetett cselekmények esetén a régi vagy az új szabályozás tekinthető-e enyhébbnek. A mű nemcsak a hatályos joganyagot rendszerezi, hanem olyan problémákra is megoldást keres, amelyek felmerülése ma még csupán várható. A könyv elsősorban azoknak a bírácoknak, ügyészeknek, ügyvédeknek és rendőröknek kíván nélkülözhetetlen segítőtársa lenni, akik napi munkájuk során szembesülnek a korrupciós bűncselekményekre vonatkozó rendelkezések alkalmazásának komplex feladatával.



Ára: 4500 Ft

WEBES MEGRENDELÉS
-5%