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A Review of the Crime of Bribery in China

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A REVIEW OF THE CRIME OF BRIBERY IN CHINA

LIANG GENLIN

Abstract:

This paper examines the crime of taking bribes under contemporary Chinese criminal law, and analyzes both the existing provisions and the loopholes in the law. The paper also suggests ways in which the law could be improved, and in particular how stricter liability for bribery could be achieved.

I. INTRODUCTION

Contemporary China is not only experiencing unprecedented social transformation, it is also facing serious corruption. Corruption has affected China's social and political stability, and has also attracted adverse public attention. The reasons for China's widespread corruption are twofold: firstly, there are serious loopholes in the administrative regulations designed to deal with the problem, and secondly, both the legislation and its implementation fail to catch and punish those who act corruptly. Corruption has become so endemic that many officials see taking bribes as an acceptable source of income – an attitude which both the criminal law and the legal system need to address.

II. THE DEFINITION OF THE CRIME OF TAKING BRIBES

According to Article 385 of Chinese Criminal Code,¹ state officials who take advantage of their office to demand money or goods from other people, or who illegally accept money or goods from other people and give favours in return, are guilty of the crime of taking bribes.

In China, “bribe” thus refers specifically to money or to goods with economic value. According to the Chinese dictionary, the meaning of “bribe” refers only to “property.”²

However, as society has developed, many forms of bribery which are not committed by directly trading "public power" with "private wealth" have also developed. For example, in the exercise of their duties, state officials may demand or receive illegal gains in the form of settling claims or waiving debts, or obtain free labour, free home renovations, free tours abroad, the reduction of interest on loans, the transfer of personnel, promotions, the chance to study abroad, free entertainment, or even sexual services.

In a strict sense, these benefits cannot be directly equated with "money or goods", so state personnel who obtain them do not commit the crime of taking bribes. This is the reason why so many officials escape criminal punishment.

¹ *Criminal Law of the People's Republic of China*, 1997 (8th Session), c. 9.

² *Language Institute of Chinese Academy of Social Sciences: Modern Chinese Dictionary*, rev. ed., (Beijing: Business Press, 2001) at 567.

In contrast, most other countries extend the definition of “bribe” to cover property, property interests and non-property interests. Some countries (such as Japan), generally define the crime of taking bribes simply as “bribes,”³ some (such as Germany) define it as “interest,”⁴ and some (such as Taiwan) define it as “bribes or other improper benefits.”⁵ In these countries, it is up to the judge to determine the specific meaning of “bribe” in any given case. By comparison, China's current Criminal Code lags behind in today's world of anti-corruption legislation and judicial practice, and does not assist with the government’s anti-corruption campaign.

In order to address the level of corruption in China, the definition of “the crime of taking bribes” under the Chinese Criminal Code should be expanded to include non-property interests. However, even before that is done, it is necessary to recognize the social implications of bribery. The value of a bribe is only one of the factors to be considered. In addition, we have to consider the means by which a bribe is made, the circumstances in which it is made, its social impact, and the extent of the damage to the integrity of the system which takes place when an official accepts a bribe.

Until the existing criminal law provisions defining the crime of taking bribes are revised and improved to include non-property interests, is there any way for other corrupt acts to be punished? As the law currently stands, if judges apply the provisions literally, it will be difficult for them to interpret “property” to include other things. However, in interpreting the law, it is acceptable to include explanations, even expanded explanations. It could, therefore, be argued that the existing definition of bribes should not be interpreted narrowly, and that the kinds of corrupt acts referred to above could reasonably be construed as relating to “property”. According to this interpretation, an act by a state official which leads to the wrongful acquisition of any benefit could result in criminal liability under the existing crime of “taking bribes”.

III. THE NATURE OF THE CRIME OF TAKING BRIBES

According to Article 385 of the Chinese Criminal Code,⁶ a government official commits the crime of taking bribes if he takes advantage of his office to demand money or goods from other people or illegally accepts money or goods from other people and gives favours in return. There are some particular points to note:

First, the perpetrator must take advantage of his office. If the official simply illegally accepts money or goods without take advantage of his office, then he does not commit a crime. So even though such conduct damages the integrity of the system, and should be treated as bribery, under the existing provisions it is not a criminal act, and can only be dealt with under extra-legal disciplinary procedures.

Second, the basic way to perpetrate the crime of taking bribes is (a) to demand money or goods from other people, or (b) to accept money or goods from other people in return for favours. The second, (b), requires two objective elements: demanding money or goods and giving favours. This regulation can lead to the absurd conclusion that an official who

³ Criminal Law of Japan, Law No. 45 of 1908, Article 197.

⁴ German Criminal Code (Strafgesetzbuch StGB) 1999, Article 331.

⁵ Criminal Law of the Republic of China (2005), Article 121.

⁶ *Supra* note 1.

accepts money but does not immediately do any favour for the person who pays him will not be guilty of a criminal offence. This regulation is also a legal barrier to investigating and prosecuting bribery, since the prosecutor must prove that the accused has taken advantage of his office before he can be prosecuted.

As a result of these shortcomings in the legislation, scholars and judges have suggested that the interpretation of giving a favour should be expanded to cover promising a favour or starting the procedure to give a favour. While this is a reasonable solution, it is by no means perfect. What is really needed is the removal of the requirement that the official must give a favour at all.

There are also other forms of bribery:

- i. State officials who accept various kickbacks and handling fees for their personal use in violation of state provisions are also guilty of the crime of taking bribes and are to be punished accordingly.
- ii. State officials who help others to seek illegitimate gain, exact or accept articles of property by taking advantage of the facilities created by their position, or who use other state officials to achieve such ends, are also treated as having committed the crime of accepting bribes.

IV. THE PERSONS WHO MAY COMMIT THE CRIME OF TAKING BRIBES

The persons who may commit the crime of taking bribes are state officials. According to Article 93 of the Chinese Criminal Code,⁷ the term "state official" in criminal law refers to any employee of a state organ – ie, personnel engaged in public service in state-owned corporations, enterprises, institutions, and people's organizations; and personnel whom state organs, state-owned corporations, enterprises, and institutions assign to engage in public service in non state-owned corporations, enterprises, institutions, and social organizations; as well as other working personnel engaged in public service according to the law.

A. The meaning of "state organs" and "engaged in public service".

"State organs" refers to the authorities which exercise state power according to the law and regulations, including the national legislative, executive, judicial and the military authorities.

"Engaged in public service" refers to exercising public power in accordance with the law, and engaging in administrative activities, rather than directly engaging in production and business activities. The key point in determining whether employees are state officials is whether they perform public duties.

According to the Chinese Criminal Code,⁸ a state official is a person who performs public services in state organizations exercising administrative power, or who is entrusted by state organs to exercise power on behalf thereof, or who, even if not technically employed as a state official, performs public services in or on behalf of state organs.

⁷ *Ibid.*

⁸ *Ibid.*

B. The meaning and scope of state-owned corporations, enterprises, institutions and people's organizations

State-owned corporations include solely state-owned limited liability companies and joint stock limited companies sponsored solely by state-owned corporations. State-owned enterprises refer to economic entities which belong to the State. State-owned institutions include those engaged in science, education, cultural, health, sports, broadcast and publishing which are established and managed by state. People's organizations are also financed by the state, and are responsible for organizing and coordinating social and public affairs, such as the Communist Youth League, Trade Unions, Women's Federations, etc.

C. The definition of "other working personnel engaged in public service according to the law"

This refers to staff elected or appointed according to the law, besides those mentioned above who engage in public service. According to legislative interpretation, when a member of a villagers' committee or of any other village grassroots organization assists the people's government to exercise the following administrative tasks, he shall be regarded as "other working personnel engaged in public service according to the law" under the second paragraph of Article 93 of the Chinese Criminal Code:⁹

- (1) The administration of funds and materials for disaster relief, emergency rescue, flood prevention and control, special care for disabled servicemen and the families of revolutionary martyrs and servicemen, aid to the poor, relocating people and social relief;
- (2) The administration of funds and materials donated by the public for public welfare undertakings;
- (3) The administration, operation and management of land, as well as the management of house sites;
- (4) The administration of compensation for land requisition;
- (5) Withholding taxes;
- (6) The performance of tasks relating to family planning, permanent residence, etc;
- (7) Assisting the people's government to exercise other administrative tasks.

In addition, Article 163¹⁰ relates to non-state officials taking bribes. It concerns any employee of any company or enterprise or any other entity who demands any property by taking advantage of his position or accepts any money or property from any other person so as to seek any benefits for such person, if the amount is sufficiently large. The main difference between this crime and crime of taking bribes is the fact that the subject is not a state official.

Thus, where anyone who is engaged in public services in any state-owned company, enterprise or any other state-owned entity, or anyone who is delegated by any state-owned company or enterprise or any other state-owned entity to any non-state-owned company or enterprise or any other entity to engage in public services, commits any of the acts as described in either of the preceding paragraphs, he will be convicted of, and punished for, the crime of taking bribes.

⁹ *Ibid.*

¹⁰ *Ibid.*

V. THE NEED FOR CRIMINAL INTENTION IN THE CRIME OF TAKING BRIBES

The crime of taking bribes is committed only where intention can be established.

The relevant intention is not the intention to accept the money or goods from the briber in exchange for a benefit but rather acknowledgment that the benefit is being paid for by the money or goods received. So it does not matter whether the official first accepts the money or goods then secures the benefit or first secures the benefit then accepts the money or goods or whether the two are contemporaneous.

If a gift is unsolicited or forced upon a state official, he will not be guilty of bribery. According to the relevant regulations, a state official who, in a timely manner, returns or surrenders money or goods, shall not be determined as having accepted a bribe. However, the return or surrender of money or goods by a state official after acceptance of a bribe for the purpose of covering up the crime shall not prevent it from being treated as a bribe.

It is immaterial whether an official is actually in office when he receives a bribe. A state official who agrees that to accept money or goods from a person after he leaves office by making use of his or her official status, and who then accepts the money or goods after leaving office, shall be punished for accepting a bribe. Where a state official accepts money or goods from a person both before and after leaving office, all such money or goods shall be counted in determining the relevant bribes.

VI. THE JOINT CRIME OF TAKING BRIBES

A joint crime is an intentional crime committed by two or more persons jointly. So if the two state officials use their respective offices to demand bribes, or illegally accept bribes from other people and secure benefit for them, they will be punished for the joint crime of taking bribes. If a state official hints to a briber that items should be given to a third party, or if he and the briber have a tacit agreement that the official will seek a benefit for the briber using his official status and the briber will give money or goods to an affiliate of the official, this also counts as the joint crime of taking bribes. Some state officials accept illegal gains through their spouses, relatives, friends or lovers while superficially appearing to act honestly. In most cases, such officials feign ignorance of any illegality, but tacitly encourage or consent to the bribes. Once the conspiracy is disclosed, the state official and his relatives agree in secret to maintain that the official has no knowledge of the matter so that he may avoid criminal prosecution. However, as long as the conspiracy can be proved, it does not matter that the official never himself actually has possession of the illegal gain.

A state official who hints to a person that the person should give money or goods to a particular affiliate in order to secure a benefit through use of his official status shall also be punished for the crime of taking bribes.

Where a particular affiliate conspires with a state official in committing the crime of taking bribes, the affiliate shall be punished as an accomplice. Where a person other than a particular affiliate conspires with a state official jointly to acquire an item accepted by the state official from another person in order to secure a benefit for that other person by

making use of his official status, he shall be punished as an accomplice in the crime of taking bribes.

“Particular affiliate” as interpreted in judicial Opinions¹¹ refers to a person who is a close relative or lover of the state official, or who has any other common interest with the official.

VII. THE DISTINCTION BETWEEN THE CRIME OF TAKING BRIBES AND NON-CRIMINAL ACTIVITIES

A. The distinction between the crime of taking bribes and the acceptance of legal gains, proper gifts and loans

In determining whether money or goods which appear to be a gift really constitute a bribe, the following factors are relevant: 1) the relationship between the donor and the recipient; 2) whether the donor asked for a favor, and whether the recipient promised to benefit the donor; 3) whether the recipient used his official status; 4) whether the transaction was conducted in secret; 5) the number and value of the money or goods which changed hands.

A legitimate reward is different from a bribe in the sense that the former is obtained without corruption, while the latter is obtained by wrongful use of the state official’s office.

If a state official demands or accepts money or goods as a loan, he may also be suspected of taking a bribe. Several factors are relevant in this respect: 1) whether there is any proper justification for the loan; 2) what it is to be used for; 3) whether there are any economic exchanges between the two parties; 4) whether the lender has asked the state official for any favour; 5) whether the official has done anything to indicate that he genuinely intends to repay the loan; 6) whether the official has the ability to repay the loan; 7) if the loan is not repaid, what reason is given.

The failure to register a change of name by a state official who accepts housing, a car, or any other item from a person in order to secure a benefit for that other person by making use of his or her official status will not affect the thing being treated as a bribe.

B. The distinction between the bribery and business-related benefits and entertainment

Judicial interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate¹² prescribes that:

- 1) A state official who accepts goods from a person in any of the following forms of transaction in order to secure benefits for such person by making use of his or her official status shall be punished for the of acceptance of bribes:
 - (a) Purchasing any house, car or any other item from such a person at a price that is obviously lower than the market price;

¹¹ Supreme People’s Court of P.R.C. and Supreme People’s Procuratorate: “Issues of Criminal Law Involving Criminal Cases of Bribery” (2007).

¹² *Ibid.*

- (b) Selling housing, a car or any other item to such a person at a price that is obviously higher than the market price; and
- (c) Accepting illegally an item from a person in any other form of transaction. The amount of the bribe shall be calculated as the difference between the local market price and the actual paid price at the time of the transaction.

The market price as mentioned in the preceding paragraph shall include the minimum preferential price that is made in advance by a commodity dealer and is not intended for a particular person. The purchase of a commodity at a preferential price according to various preferential conditions negotiated in advance by a commodity dealer shall not constitute the acceptance of a bribe.

- 2) A state official who accepts free shares from a person in order to secure a benefit for that person through use of his official status shall also be punished for the acceptance of a bribe. Where share transfer registration has been made, or the relevant evidence proves that the share has actually been transferred, the amount of the bribe will be calculated as the value of shares at the time of transfer, and any bonus received shall be handled as the fruit of the bribe. Where the shares have actually been transferred, and the benefit is received in the name of a share bonus, the amount of benefit actually obtained shall be deemed as the amount of bribe.
- 3) A state official who “jointly” runs a company (or makes a “joint” investment in a company) but whose contribution is made by another person to secure a benefit for that person by making use of his or her official status, shall also be punished for the acceptance of a bribe. The amount of the bribe shall be the amount of the contribution made by such person for the state official.

A state official who accepts “profits” for jointly running a company or making any other joint investment but does not make an actual contribution or take part in the management and business operation in order to secure a benefit for the person by making use of his or her official status, shall also be punished for the acceptance of a bribe.

- 4) A state official who accepts, without making a contribution, “proceeds” in the name of another a person from investment in securities or futures or any other financial management, or accepts, though he actually makes a contribution, “proceeds” that are obviously higher than the proceeds receivable based on that contribution, in order to secure a benefit for such a person by making use of his or her official status, shall also be punished for the acceptance of a bribe. The amount of the bribe shall be calculated as the amount of “proceeds” in the former circumstance, and as the difference between the amount of “proceeds” and the amount of proceeds receivable on the contribution in the latter circumstance.
- 5) Pursuant to Article 7 of the Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate,¹³ a state official who accepts money or goods from a person in the form of gambling in order to secure the benefit of such a person by making use of his or her official status shall be punished for the

¹³ *Ibid.*

acceptance of a bribe.

In practice, attention is paid to distinguishing the acceptance of bribes from legitimate gambling activities or entertainment, taking account of factors such as: (a) the background, place, time and number of occasions on which gambling took place; (b) the source of gambling stakes; (c) any conspiracy with other gamblers; and (d) the amount of the money or goods won or lost.

- 6) A state official who requests or accepts that a person arrange a job for a particular affiliate so that the particular affiliate collects so-called wages or salaries without actual work in order to secure a benefit for such a person by making use of his or her official status shall also be punished for the acceptance of a bribe.

VIII. THE PROBLEMS INHERENT IN THE CURRENT LAW ON THE TAKING OF BRIBES

Paragraph I of Article 385 of the Chinese Criminal Code¹⁴ describes the basic act of bribery, and Article 388 of the Code describes acts of bribery in disguise. However, the existing criminal provisions make it too difficult to prosecute an official for taking bribes. These are some of the problems inherent in the current law:

- 1) It is not a crime for a state official simply to accept property or other gains.
- 2) The definition of “bribes” is too narrow, and excludes non-property interests.
- 3) The requirement that the person making a bribe must seek a direct benefit makes it too difficult to prove that an official has been bribed.
- 4) The law is not clear where a state official deliberately accepts money and only later benefits the person paying him.
- 5) The law is not clear where a particular affiliate possesses bribes.
- 6) The law is not clear where trading in influence is concerned. Trading in influence includes acts such as a public official abusing his real or supposed influence with a view to obtaining an undue advantage from a public authority.

So in order to improve the existing law with respect to the crime of taking bribes, further legislation is required. The legislative framework adopted in Japan, which adopts a principal-subordinate system, would be ideally suited to conditions in China. If, in particular, trading in influence were to be introduced as a crime under new legislation, this would go a long way to improving the current law.

¹⁴ *Supra* note 1.