

# The Strategic Choice of Criminal Legislation of Anti-bribery in the Transition Countries – Comparison of Criminal Legislations of Bribery between China and Hungary and Reference for China<sup>1</sup> –

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## **Abstract:**

*Both China and Hungary are in the course of economic transition and have the characteristics of commonality and comparability in corruption. Under the framework of the fundamental policy of cracking down the crime of corruption, the criminal legislations of anti-bribery display many differences between China and Hungary, which reflects the different ideas of anti-bribery in criminal law. Unlike the aggressive strategy with expanding the criminal legislation to the front preventive area of anti-corruption adopted by Hungary, the criminal legislation of anti-corruption in China is still guided by the traditional defensive strategy with limited the criminal law in the back end area of anti-corruption, which leads to the environmental and systematic corruption caused by inadequate capacity of criminal legislation. For all this, the positive idea of anti-corruption should be introduced to China and the aggressive strategy of criminal legislation should be established according to the experience of Hungary, which would be a direction for further improving the criminal legislation system of anti-bribery in China.*

**Key words:** *anti-corruption; criminal legislation; comparison of Sino-Hungary; reference.*

China and Hungary both adopt the stress-restraint model in initiating modernization,<sup>2</sup> under which the state plays a dominant role in the process of modernization transition and public officials have the power to decide whether to conduct market-oriented transformation of public resources and the extent thereof as the agent of the state, increasing the risk of abuse of power and giving rise to the rampant corruption in modernization transition of China and Hungary. Facing the corruption “mushroom” in the transition period, Hungary has timely adjusted the

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<sup>2</sup> According to western scholars, “endogenous modernization” means, in pre-modern traditional societies, modern nature is highly compatible with tradition nature, modernization of these societies is mainly realized by constantly generating factors conducive to modernization from the society itself. “Stress-based modernization” means, modernization is gradually realized by responding to the external stimulus generated after the initiation of modernization in such countries as Britain, the U.S., etc, or rather external stress. [US] edited by Cyril ·E· Black, translated by YANG Yu & CHEN Zuzhou: Comparative Studies on Modernization, Shanghai: Shanghai Translation Publishing House, 1996, Preface, Page 19-20.

philosophy of criminally cracking down on corruption, emphasized the preventive function of criminal laws and regulations and expanded criminal legislation into the “front line” of crime, generating positive effects in control of crimes. In contrast, despite intensified efforts to combat corruption and frequently updated criminal legislation for the crime of corruption, China’s criminal system of anti-corruption remains at the stage of traditional ex post governance, and lacks of effective strategies and means responding to environment-based and systematic corruption, putting the criminal law for public officials in a legislative dilemma of “disorientation”. *Criminal Law Amendment (IX)* (hereinafter referred to as CLA (IX)) adopted at the 16<sup>th</sup> session of the 12<sup>th</sup> National People’s Congress Standing Committee on Aug. 9, 2015 represents the most extensive amendment to the legislation of the crime of corruption since China’s enactment of criminal code in 1997, which further intensifies the efforts to crack down on bribery and being known as “further tightening the system cage of anti-corruption”.<sup>3</sup> However, the newly amended legislation still inherits the traditional idea of ex post control of corruption and focuses on and supplementation of omissions and modification of defects, being far from leap-frog innovation. In the context of new era of anti-corruption, China should learn from Hungary, change the ideas of fighting against the crime of corruption and establish more effective criminal strategies against corruption and institutional measures.

## I. Corruption in Modernization of China and Hungary

China and Hungary initiated national modernization transition in 1980s respectively. Different from the pure democratic transformation of South European counties, Hungary’s modern state transformation consists of political<sup>4</sup> and economic transformation, involves radical reform of property right system and institutional change of the way of allocation of resources.<sup>5</sup> Hence, Hungary and China are similar and comparable in many aspects in terms of corruption in the period of economic transformation.

### (I) Corruption in Modernization of Hungary

In 1989 after “Fall of Communism in Eastern Europe”, Hungary officially launched state transformation aimed at “democratization”, “market orientation” and “Europeanization” and established the transition model of giving priority to democracy, i.e. abandoning the socialist path first, and embark on market-oriented development path aimed at westernization. The most significant feature was economic transformation orientated at democratization and westernization.<sup>6</sup> Hungary adopted Keynesianism and progressive reform strategy to promote the development of the

<sup>3</sup> YU Hao: *Seven Major Changes in the Draft of Criminal Law Amendment (IX)*, China NPC Journal, 2014, no. 21.

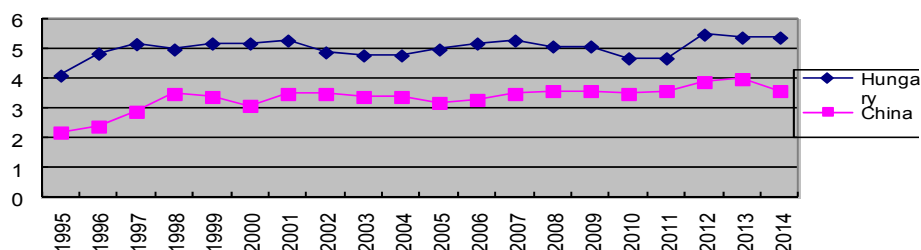
<sup>4</sup> Gál István László: *A gazdasági vesztegetés mint a büntetőjog része és a politikai korrupció egyik kísérőjelensége* In: Csefkó Ferenc, Horváth Csaba (szerk.) *Politika és korrupció: A törvényesség és törvénytelség határai*. 312 p. Pécs: PTE ÁJK, Pécs-Baranyai Értelmiségi Egyesület, 2010. pp. 306-312. Gál István László: *A korrupciós bűncselekmények* In: Polt Péter (szerk.) *Új Btk. kommentár: 5. kötet: Különös rész*. Budapest: Nemzeti Közszerkesztési és Tankönyv Kiadó Zrt., 2013. pp. 183-210. **[English translation]**

<sup>5</sup> GAO, Ge: *Relationship between Economic Transition and Political Transition of Eastern European Countries*, Research on Eastern Europe and Central Asia, 2001, no. 4.

<sup>6</sup> YIN Hong: *Analysis of Democratic Leading Transformation: Reflections 20 Years after Drastic Change of Soviet Union and Eastern Europe*, Liaoning University Journal, 2010, no. 3.

market economy through gradual privatization. Over 10 years afterwards, private market economy was established. Private economy only accounted for 18% in GDP in 1989, but increased to 85% in 2000.<sup>7</sup> In the process of privatization, the dominant player of “shadow economy” (underground economy beyond the control and regulation of the State) gained the upper hand relying on its advantage in information, change the direction of the course of privatization by means of bribery, sought personal benefits,<sup>8</sup> resulting in high frequency of corruption occurrence. According to the statistics of United Nations, the number of corruption crime cases nationwide in Hungary was 897 in 1988, 335 in 1990, which was the lowest in history. However, the total number of cases had been on the rise with high volatility. The total number of cases every year from 1991 to 1997 was 344, 782, 464, 796, 509, 967 and 865 respectively.<sup>9</sup> In the regular assessment report on the applicant countries issued by European Commission in 1999, it was pointed that the number of corruption cases in Hungary in 1999 increased by 4% over the previous year, and corruption became one of the two major issues resulting in incompliance of Hungary with EU political criteria.<sup>10</sup> According to the statistics of Corruption Perceptions Index (CPI) of Transparency International (See Figure 1), CPI score in 1995 was the lowest, indicating the public considered the corruption situation was serious then. Facing the rampant corruption, Hungarian government focused on corruption control as the top domestic policy priority, constantly increased input into anti-corruption and made progress to some extent. From 1998 to 2001, CPI score of Hungary was stable and slightly rose, indicating corruption was curbed to some extent. Thereafter, the subject feeling of the public about corruption fluctuated: CPI score declined during 2002-2004 and 2008-2011, indicating the public perceived corruption deteriorated, CPI rose during 2005-2007 and 2011-2014, indicating the public perceived corruption mitigated.

**Figure 1**



(Source: Transparency International, <http://www.transparency.org/>)<sup>11</sup>

<sup>7</sup> The delegation of Institute of Economics of Chinese Academy of Social Science to Hungary: *Economy and Policy of Hungary under the Crisis*, Economic Perspectives, 2011, no. 10.

<sup>8</sup> KONG Tianping: *Ups and Downs of Hungary*, Research Dynamics of Politics and Economics of Transition Countries, 2012, no. 12.

<sup>9</sup> UN, *Joint Project against Corruption in the Republic of Hungary*, 2000, p. 16.

<sup>10</sup> European Commission, *1999 Regular Report from the Commission on Hungary's Progress towards Accession*, p. 76.

<sup>11</sup> As of 2012, Transparency International CPI changes from ten-point system to hundred-mark system. To maintain the integrity of statistics, this paper will convert the scores of 2012-2014 under hundred-mark system into ten-point system by “score/10”.

## II. Corruption in Modernization Transition of China

To avoid turbulence of social order, China adopted the progressive approach in economic transition. The State still reserved extensive power of allocating public resources while promoting market economy reform. To obtain the right to use or allocate particular scarce resources, the stakeholders would inevitably desire to corrupt public powers with economic benefits. Institutional power restraint mechanism in modernization was underdeveloped, further increasing the probability of occurrence of corruption. In realization of the overall reform goal, the lack of institutional development led to lag in the State's restriction and control of powers and deviation evaluation capacity development, resulting in rampancy of institutional corruption in China. As HU Angang said, "current corruption was mainly institutional corruption. Corruption mainly stemmed from institutional defect, i.e. institutional defect in the transition period of market economy."<sup>12</sup>

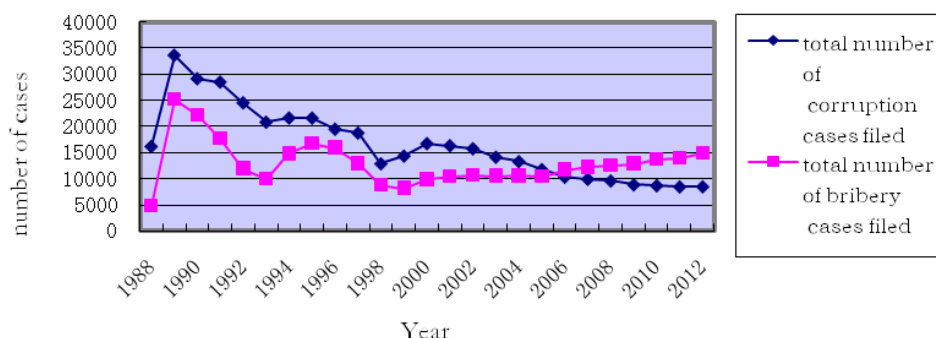
Over the past three decades of reform the opening-up, the characteristics of evolution of corruption in China were manifested as follows: (1) transaction-based corruption replaced possession-based corruption and became the main type of corruption. Seen from Figure 2, the total number of corruption cases filed at the national procuratorial organ has steadily decreased since 1990, but the total number of bribery cases has steadily increased since 1999, and exceeds the number of corruption cases after 2006, becoming the main type of corruption cases. In light of scope of corruption, corrupting gradually expanded from economic field to political field and judicial field, consolidating the root of corruption and stabilizing the order of distribution of illegal gains. Economic subjects sought the status of political subject and became CPPCC member and other quasi-national public officials. Political subjects arranged their interested parties to enter the economic subject and directly participate in economic activities, accelerating the combination of corruption of economic subjects and the corruption of political subjects, giving rise to cross corruption. To realize the safe transfer and possession of corruption interests, "judicial corruption" also became a new link in the corruption interests chain. (2) Group and family-based corruption cases increased obviously. In the industries where market resources were monopolized, individual corruption was dominant in early 1980s, then gradually evolved into group corruption. Corruption organization became communized, manifested as unit corruption crime in the extreme form, especially in traffic, energy, customs and other system featured by power management. Besides, under the framework of administration-based personnel appointment system, unit corruption gradually extended to corruption in the industry system. The units in monopolized industry were correlated in corruption and formed a community of interests. In the case of such group corruption, exposure of one person tended to implicate a group of persons. For instance, in "oil system" interrelated cases, 46 persons in PetroChina system were ousted due to corruption from Mar. 2012 to Dec. 2014, most of which had cooperation relationship or subordination relationship in work. In addition, based on the traditional clanship in China, individual corruption evolved into family- and even clan-based corruption. The whole family of a public official will benefit

<sup>12</sup> HU Angang, KANG Xiaoguang: *Eradicating Corruption by Institutional Innovation, Reform and Theory*, 1994, no. 3.

from his/her public office, and will be implicated in case of downfall of the public official, forming a complete interests chain of corruption. (3)The rank of corrupt officials constantly increased. In Chinese judicial system, the corruption cases involving public officials above the county and section level were referred to as “important case”. Seen from Figure 3, the number of persons involved in bribery crime had been on the rise since 1998. Since the 18th national congress of the communist party of China on Nov. 18, 2012, 68 senior officials above provincial and ministerial level were involved in the crime of corruption in two years, 34 senior officials were investigated every year on average, the number of ousted senior officials was more than 10 times of that before the 18th national congress,<sup>13</sup> “Cave-in Corruption”, and even state-level “oligarchic corruption” occurred in medium- and high-ranking officials(ZHOU Yongkang case and BO Xilai case). (4)The amount of corruption rose acutely. In Chinese judicial system, the cases of corruption with the amount above RMB50,000Yuan were referred to as “major case”. However, in fact, it is normal that the amount of illegal gains of corruption crime reached tens of millions, and even hundreds of millions. It is also true for low-ranking public officials. For example, the former general manger MAO Chaoqun of Beidaihe Water Supply Corporation was just a deputy director level cadre in charge of tap water operation, construction project water consumption, water supply facilities construction etc., but received bribes of cash amounting to RMB120,000,000Yuan, 37kg gold and 68 sets of house property. “Major corruption of minor officials” emerged as the new issue of Chinese-style corruption.<sup>14</sup>

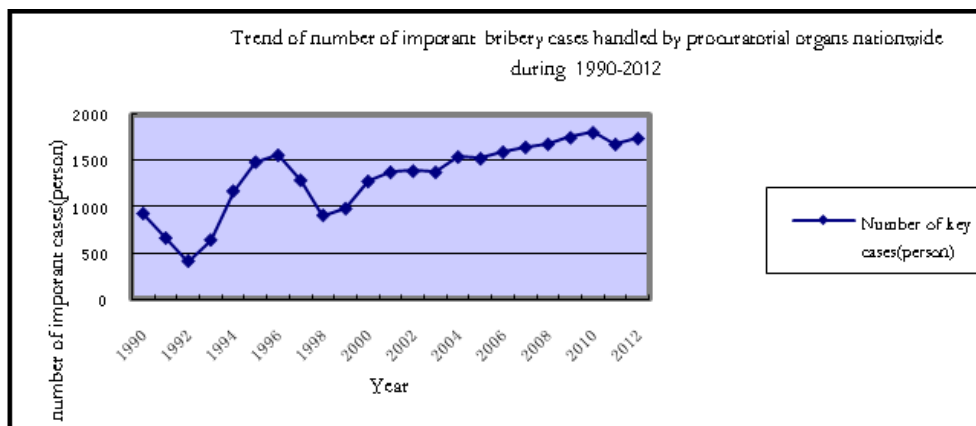
**Figure 2:**

Trend of corruption and bribery cases accepted and filed by procuratorial organs nationwide during 1988-2012



<sup>13</sup> WU Gaoqing and QIAN Wenjie: *Mass Data of Fight against Major Corrupt Officials: What messages does it convey*, Procuratorate Daily, Jan. 13, 2015.

<sup>14</sup> Zhan Yong: *Solving to Power Crux of Major Corruption of Minor Officials*, People's Daily, Nov. 8, 2014.

**Figure 3:**

### III. Comparison of Corruption of China and Hungary in Modernization

Both China and Hungary implemented highly centralized planning economy system. During 1950-1990, due to highly uniform political, economic and social life, corruption case seldom occurred in Hungary seldom.<sup>15</sup> However, before reform and opening-up of China, few corruption cases occurred in China due to lack of the environment breeding corruption. In the context of “stress-based” modernization, the two countries were common in the following aspects: both adopted the approach of progressive economic transformation, high occurrence of corruption was resulted by underdeveloped system of transition, the main type of corruption was transaction-based corruption, the corruption was concentrated in the cross fields of private sectors and public sectors, such as public procurement and so on.

However, Hungary realized market economy by privatization<sup>16</sup>, but China developed market economy by gradually opening-up market resources, resulted in the difference of two countries in structural relationship of corruption: the corruption in China was featured by dominance of politics over economy, i.e. corruption stemmed from active intervention of the State in economy; the corruption in Hungary was featured by dominance of economy over politics due to more radical market-oriented transformation and fierce market competition, i.e. corruption stemmed from pressure imposed by economic subjects on political subjects. In Hungary, 99% of the companies were small and medium-sized enterprises, many companies were sole proprietary enterprise (67%). Most companies relied on the contracts of one client (government or company), which made them dependent and unsafe. Hence, many small and medium-sized enterprises were prone to feel the pressure of income sources, leading to survival-based corruption.<sup>17</sup>

<sup>15</sup> Greco, *First Evaluation Round Evaluation Report on Hungary* (Strasbourg, 2003), p. 3.

<sup>16</sup> Gal Istvan Laszlo: Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption (In: Wang Huijin, Wei Changdong (szerk.): *Society of Rule of Law, National Governance and Government Audit*. Nanjing: Law Press China, 2015. pp. 329-342.)

<sup>17</sup> Transparency International, *National Integrity System: Corruption Risks in the Business Sector-Hungary* (2008), p. 12.

In addition, the modernization of Hungary was carried out in the historic context of returning to Europe and joining the EU, which enabled Hungary to accelerate anti-corruption system construction at the end of the last century. It established the corruption governance system in compliance with the standards of EU convention against corruption, timely addressed the problem of institutional loophole in the period of transition, as a result of which CPI of Hungary increased to a certain extent, higher than that of China (see Figure 1). In contrast, China's corruption governance mainly depended on political demand of domestic anti-corruption, leading to underdeveloped institution and low CPI. Of course, the two countries had significant differences in terms of political system, economic size, geographic location, area, population and cultural tradition. CPI of "Transparency International" and its ranking could only serve as reference but was not necessarily meaningful. In EU system, Hungary was still a corrupt country,<sup>18</sup> but the relatively high CPI score could reflect that the corruption system of Hungary fit in with international standards to a greater extent, and its corruption was less severe than China, despite fluctuation in corruption situation.

#### IV. Corruption Control in Modernization of China and Hungary: Comparison Focusing on Criminal Legislation

Advocated by United Nations Convention against Corruption and other international conventions, "prevention first" became the dominant philosophy of international corruption governance. Although criminal punishment ceased to be the main approach to corruption governance, it was still the most important ultimate guarantee mechanism. Criminal governance was an important part of national anti-corruption system construction, and scientific criminal anti-corruption system construction was significant for enhancing the overall effects of anti-corruption. In corruption crime, bribery crime was undoubtedly the most typical and severe crime.<sup>19</sup> Under the influence of "Soviet model", China and Hungary established the bribery governance system featured by severe criminal punishment. But Hungary learned from anti-corruption experience of Europe and rest of the world in national transition, gradually forming the criminal governance strategy of bribery crime and institutional construction with its own characteristics.

#### Development of Hungarian criminal legislation of bribery crime

##### 1. Criminal legislation of bribery crime before national modernization transition

Hungarian criminal law belongs to the continental law system, with the first criminal code established in 1878. After the World War II, Hungary amended the general

<sup>18</sup> According to the investigation result released by "Transparency International-Hungary" on Dec. 9, 2013, i.e. "World Anti-corruption Day", Hungary remains one of most corrupt one-third countries in EU. LIU Siyue: Hungary Becomes One of the Most Corrupt Countries in EU, UJ SZEMLE, Dec. 17, 2013, <http://www.xindb.com/news/xiongyalixinwen/2013/1217/10874.html>, last access time: Aug. 25, 2015.

<sup>19</sup> Chapter 27 of Criminal Code of Hungary stipulates the crime of corruption as the crime of transaction-based bribery. The crime of corruption, the crime of misappropriating public funds and other embezzlement-based corruption are stipulated in Chapter 36 "crimes against property". To ensure consistency of the concept of corruption in the context, the crime of corruption mentioned hereinafter only refers to bribery crime in the narrowest sense.

provisions and specific provisions of criminal code in 1951 and 1961 respectively, established the socialist criminal code system with unified feature (the second criminal code), and formed 1978 criminal code (the second criminal code) thereafter. Take 1978 criminal code as an example, Hungarian criminal legislation formed the bribery crime system of dualization of public officials and non-public officials and displayed its own characteristics in standard establishment of crimes, which were similar to capitalist countries. For example, it established the crime of transaction by taking advantage of influence and the crime of judicial bribery, with "incorruptibility" as the legal interest position of bribery crime.

## 2. Criminal legislation of bribery crime in modernization transition

(1) Innovation period of criminal legislation of bribery crime (mid 1990 – early 2000). After transition of Hungary in 1989, it amended criminal legislation of bribery crime for several times due to changes in political situation and the requirements of joining the EU. Hungary signed two important European anti-corruption conventions in 1998 and 1999, i.e. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter OECD Convention) and Criminal Law Convention on Corruption of European Commission) (hereinafter European Convention against Corruption). According to the requirements of OECD Convention, Hungary adopted Act LXXXVII in 1998 and added the crime of offering bribes to foreign public officials, the crime of receiving bribes from foreign public officials and the crime of taking bribes by taking advantage of international influence.<sup>20</sup> According to the requirements of European Convention against Corruption, Hungary adopted Act CXXI in 2001, added the crime of misprision of bribery of public officials, added the criminal liability of legal entity manager for failure in prevention of bribery and "bilateral" special surrender system, intensified the fight against bribery crime, increased the punishment of bribery crime. For example, the statutory sentence of the crime of receiving bribes was increased from less than 3 years to less than 5 years of imprisonment, the statutory sentence of the crime of offering bribes was increased from less than 2 years to less than 3 years, the nature of crime was changed from minor offense to felony.<sup>21</sup> Hungary formed the basic framework of criminal law legislation for corruption governance during the transition era, which was marked by Act CXXI.

(2) Supplementation and improvement period of criminal legislation of bribery crime (2004-2012). After accession to EU, United Nations Convention against Transnational Organized Crimes came into force in Hungary in 2005 and 2006 respectively, posing further demand on improvement of criminal system of controlling corruption. According to the requirements of international convention against corruption and domestic anti-corruption practice, new criminal code of Hungary amended the criminal legislation of bribery crime again in a systematic way in 2012. However, different from the previous creative amendment, this amendment was supplementary amendment and highlighted the reasonableness of crime and punishment standards. For example, the legislation prescribed the crime of corruption collectively in Chapter 27 "crime of corruption", combined the crime of endangering the honesty of public office and the crime of endangering the honesty of international offices, and integrated crime and constitution of a crime, expanded the scope of subjects of offering bribes, further intensified the fight against the crime of offering crimes, amended and improved the

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<sup>20</sup> 1998. évi LXXXVII. Törvény.

<sup>21</sup> 2001. évi CXXI. Törvény.



special surrender system, increased the statutory sentence of some crimes including the crime of misprision of bribery of public officials etc.

### **Development of Chinese criminal legislation of bribery crime**

#### **1. Criminal legislation of bribery crime before national modernization transition**

(1) Creation of criminal legislation of bribery crime. After the founding of new China, the Regulations of the People's Republic of China on Punishment of Corruption (hereinafter Regulations), effective as of Apr. 21, 1952, prescribed the crime of corruption for the first time in the form of specific criminal law, and stipulated bribe-taking as a behavioral type of the crime of corruption.<sup>22</sup> Although the Regulations did not directly stipulate bribe-taking as a separate crime, it unprecedentedly recognized the behavior of bribery as a crime in new China, established the assessment model based on the amount of crime and considering the circumstances of crime and the punishment model with punishment against freedom and applying death sentence to the offender under particularly serious circumstances. On the whole, the Regulations established the basic paradigm and system structure of China's criminal legislation of bribery crime and marked the emergence of China's criminal legislation of bribery crime.

(2) Codification of bribery crime. The criminal code realized codification of bribery crime in 1979, the crime of acceptance of bribes was separated from the crime of corruption as an independent crime. The legislation incorporated "taking advantage of duty" into the constitution elements of crime for the first time, changed the model of identical punishment of the crime of corruption and the crime of acceptance of bribes, set different statutory sentence range for the two crimes. The highest statutory sentence of the crime of corruption was death penalty, the highest statutory sentence of the crime of acceptance of bribes was fixed-term imprisonment of more than 5 years, indicating decreased intensity of criminal punishment.

### **V. Criminal legislation of bribery crime in modernization transition**

(1) Active period of criminal legislation of bribery crime (1982-1997. After the reform and opening-up, due to obvious spread and expansion of bribery crime and deteriorated crime situation, "to accommodating the social transformation and rapid development, China's criminal legislation of bribery crime entered the most active period of adjustment and change".<sup>23</sup> During 1980-1990, the main approach to amendment of criminal legislation of bribery crime was realize criminalization and aggravated penalty by separate criminal law. To cope with new types of corruption, criminal legislation constantly expanded the scope of regulations. Supplementary Provisions on Punishment of the Crime of Corruption and Bribery of the Standing Committee of NPC, effective as of Jan. 21, 1988 added the crime of entity offering bribers and the crime of entity taking bribes and created the "dual subject" bribery crime punishment system. Decision on Punishment of the Crime of Violation of Company Law

<sup>22</sup> Article 2 of Regulations stipulates: "the staff member of any state authorities, enterprises, schools and affiliated institutions thereof whoever embezzles, steals, swindles or extracts national properties, demand properties from others, taking bribes and otherwise seek illicit gains by jobbery, shall be convicted of the crime of corruption."

<sup>23</sup> SUN Guoxiang and WEI Changdong: A Study on International Convention against Corruption and Legislation of Crime of Corruption and Bribery, Beijing: Law Press, 2011, Page 95.

of the Standing Committee of NPC, effective as of Feb. 28, 1995 added the independent crime of taking bribes by personnel of companies and enterprises, extended punishment of bribery crime to non-public field and non-national public officials, further created the "dual status" bribery crime punishment system. Besides, Supplementary Provisions in 1988 stipulated the economic bribery of accepting kickbacks and handling fees, and prescribed the commercial bribery crime. Besides, another feature of legislation of bribery crime in this period was aggravated penalty. The Standing Committee of NPC adopted the Decision on Severe Punishment of the Crime of Undermining Economy on Mar. 8, 1982, increased the maximum statutory penalty for the crime of taking bribes to death penalty, resume the legislation model of meting out equivalent punishment to the crime of corruption and the crime of acceptance of bribes in Regulations 1952. The legislation amendments made in the aforesaid separate criminal law were affirmed by legislation in Criminal Code Amendment 1997. Moreover, Criminal Code 1997 continued to maintain the trend of criminalization, added the behavior type of "mediatory bribery" in the crime of acceptance of bribes,<sup>24</sup> added "economic bribery" in the crime of taking bribes by personnel of companies and enterprises, added the crime of offering bribes to entities and the crime of offering bribes to personnel of companies and enterprises, thus building a systematic criminal punishment system of bribery crime.

(2) International requirements of criminal legislation of bribery crime. In the 21<sup>st</sup> century, China signed United Nations Convention against Transnational Organized Crimes (effective as of Oct. 2003) and United Nations Convention against Corruption (effective as of Oct. 2005 in China) in Dec. 2000 and Dec. 2003 respectively. According to the requirements of these two international conventions, Chinese criminal legislation of bribery crime maintained the trend of criminalization, further expanded the scope of crime regulation, expanded the scope of subjects of bribery crime of non-public officials and stipulates the crime of corruption and bribery as upstream crime of money laundering through Criminal Law Amendment (VI) (2006), added the crime of accepting bribes by taking advantage of influence through Criminal Law Amendment (VII) (2009), added the crime of offering bribes to foreign public officials and international public organization officers through Criminal Law Amendment (VIII) (2011) and added the crime of offering bribes to particular interested persons through Criminal Law Amendment (IX) (2015).

### (III) Comparison of Chinese and Hungarian criminal legislation of bribery crime

Seen from the development of legislation, China and Hungary both emphasized the severe punishment of bribery crime, amended criminal legislation frequently and constantly expanded the regulation scope of legislation. However, there were many differences between the two countries in legislation in terms of charge of a crime, constitution of a crime and criminal punishment, as described below:

#### **Difference in governance structure**

Chinese criminal legislation has stressed on fight against the crime of taking bribes, as a result of which the crime of offering bribes and the crime of taking bribes were "asymmetric" in terms of constitution of a crime, the criteria for filing a criminal case,

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<sup>24</sup> Article 388, "any public official who takes advantage of favorable conditions of duty or position to seek undue interests for the entrusting person through official conduct of other public officials, and takes or receives property from the entrusting person shall be convicted of the crime of bribery".

special surrender and criminal punishment.<sup>25</sup> For example, the crime of taking bribes was required to have the constitutive element of “seek benefits for others”, while the crime of offering bribes was required to have the constitutive element of “seek legitimate benefits”. The amount of filing a crime of taking bribes was RMB 5000Yuan, and the amount of filing a crime of offering bribes was RMB10,000Yuan. The maximum statutory penalty for the crime of taking bribes was death penalty while the maximum statutory penalty for the crime of offering bribes was life imprisonment. The briber who voluntarily confesses his/her act before being prosecuted may be given a mitigated punishment or be exempted from punishment. But there were no corresponding stipulations for the crime of taking bribes. Hungary emphasized on the fight against the crime of offering bribes and formed the symmetrical control structure between the crime of offering bribes and the crime of taking bribes. For example, criminal code 2012 amended the crime of offering bribes significantly, placed the crime of offering bribes before the crime of taking bribes in legislation compiling system, which was more aligned with the occurrence mechanism of bribery crime; increased the basic statutory sentence of the crime of offering bribes increased from less than 2 years to less than 3 years, changes the nature of crime from minor offense to felony, which was the same with the crime of taking bribes; deleted the stipulation of mitigated punishment of the crime of offering bribes under the circumstance of extortion; added the crime of offering bribes by taking advantage of influence to correspond to the crime of accepting bribes by taking advantage of influence etc.

### **Difference in conviction criteria**

To avoid that the regulation scope of criminal law was too large to give rise to tension in social order in transition period, China adhered to the criminal policy of “punishment in the minority of cases and education in the majority of cases, also referred to as the policy of focusing on major crimes while relaxing control over minor ones, set higher conviction criteria in legislation of bribery crime through such constructive elements as “the amount of crime”, “taking advantage of duty” and “seeking benefits for others”, and restricted the regulation scope of criminal law. In contrast, Hungary simplified the constructive elements in legislation of bribery crime, broaden the regulation scope of legislation. As long as the actor “requests or accepts illegal interests related to official duty or interests commitment”,<sup>26</sup> it shall constitute the crime of accepting bribes.

### **Difference in behavior type**

According to the behavior theory of the continental law system, to avoid excessive interference of criminal law with the rights of citizens, liberal dangerous acts were generally manifested as action, and as inaction in exceptional case. Bribery crime in Chinese criminal law could be only committed in the form of action. However, as hidden and indirect transactions of bribery crime became increasingly common, “corruption community” emerged based on official appointment system, diminishing the control of legislation over bribery crime. The given action model legislation imposed a very limited control over bribery crime. To enhance the capacity of criminal legislation for corruption control, Hungary created misprision of bribery in Paragraph B of Article 255

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<sup>25</sup> QIAN, Xiaoping: *Advocating Criminal Policies of Punishing Bribery Crime*, China Criminal Science, 2009, No. 12.

<sup>26</sup> Article 249 of Hungary Criminal Code 2012.

of Act CXXI 2001, set reporting the bribery crime clues discovered as the statutory obligation of public officials, and stipulated the inaction crime of breach of statutory obligation.<sup>27</sup> Such provision incorporated the guarantor principle of inaction crime into development of the legislation system, set the particular public officials as guarantor of maintaining honest operation of powers, established the type of inaction crime of bribery crime, thus helping solving the problem of “corruption community”.

### **Difference in subject type**

Based on the utilitarian requirements of severe punishment of corruption, Chinese criminal legislation broke through the theoretical limits of traditional natural person crime, directly identified criminal liability of entities and built the crime system of entity-based bribery crime with reference to natural persons. Article 387 of criminal code of China stipulated the crime of entity taking bribes, Article 393 stipulated the crime of entity offering bribes, forming the dual model of natural persons and entities. However, Hungary denied legal person crime based on the traditional criminal theory of continental law system and still adopted the unitary subject model of bribery crime.<sup>28</sup>

### **Difference in liability type**

In light of the traditional ideas of corruption control, Chinese criminal law maintained that the basis of inculcation of bribery crime was the social hazard arising from bribery, thus recognized bribery crime as typical behavioral liability in terms of liability type. However, bribery crime was the result of personal free choice as well as improper prevention of environment. If the organization could effectively supervise the generation, operation and distribution of public power, it could reduce the probability of occurrence of bribery crime. To this end, Hungarian criminal laws added supervision responsibility on the basis of behavioral liability, i.e. stipulated the personal supervision responsibility of manager of the organization. Act CXXI 2001 added Paragraph 3 and 4 following Article 253 and Subparagraph B of Article 258, criminalized the act of negligence of legal person manager in exercising prevention of bribery, i.e. the person in charge of the legal person or the internal subject of the legal person having the power of decision-making and control may take responsibility for the act of bribery of the legal person, except the case where it could demonstrate it had performed the obligation of control and supervision.<sup>29</sup> Such provision was incorporated into Criminal Code 2012 as a special type of bribery crime.<sup>30</sup>

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<sup>27</sup> Criminal Law 2012 stipulates this crime in Article 297, i.e. “Any public official who is supposed to know the behavior of bribery undiscovered, but fails to immediately report to the authority shall be convicted of heavy offence and condemned to imprisonment of less than 3 year”.

<sup>28</sup> According to the requirements of OECD Convention and European Convention Against Corruption, Hungary roughly stipulated criminal liability of legal persons in principle in Act CIV 2001 (“Criminal Law Measures Applicable to Legal Persons”). Pursuant to such Act, in the case that a natural person commits crime for the account of a legal person, the legal person may be imposed a fine, but there is no specific charge of the legal person crime. Hence, such liability is similar to administrative liability to a large extent, and it is questionable whether it can be referred to as criminal liability.

<sup>29</sup> OECD. *Review of Implementation of the Convention and 1997 Recommendation Phase 1 Bis Report* [EB/OL]. [2014-7-10]. <http://www.oecd.org>, last access time: Aug. 2, 2015.

<sup>30</sup> According to the provisions of Paragraph 4 and 5 of Article 293 Bribery Crime of Hungary New Criminal Code 2012, “where the person in charge of an economic organization, or any person employed by or acting on behalf of the operator and granted the power of operation, control or supervision, fails to duly perform the obligation of control and supervision, as a result of which the person employed by or

### **Difference in special surrender**

Based on the theory of “prisoner’s dilemma”, special surrender system was an important vehicle for the State to break the “conspiracy of silence” between the bribe giver and bribe taker. Special surrender in Chinese criminal law was unilateral surrender, and lenient punishment was only applicable to the bribers in the event of special surrender. Criminal Code 2012 of Hungary adjusted the design approach of “prisoner’s dilemma”, established “bilateral” special surrender system. In the case of offering bribes, “any offender who confesses the crime to the authority in person, exposes the crime”, “may be given unlimited commutation or be acquitted of charge through special consideration”. Meanwhile, in the case of taking bribes, “any offender who confesses to the authority in person, turned in the illegal benefits gained in all forms and exposes the crime”, “may be given unlimited commutation or be acquitted of charge under special circumstances”.<sup>31</sup> By granting leniency to the bribe receiver in the case of special surrender, it may form the competition situation of “whoever surrenders first will be given leniency first” among the subjects of bribery, increase the prosecution efficiency, and effectively contain the motive of offering bribes, thus enhance the preventive control effects of regulation.

### **Difference in sentencing status**

The status in bribe crime in the meaning of Chinese criminal law was only conviction status rather than sentencing status, i.e. public office status was not the statutory factor affecting sentencing. However, the attributes of the power actually abused by public officials in bribery crime determined different degree of social hazard caused by their act. In general, the hazard of abuse of power by senior public officials was more severe than the harm caused by the bribery committed by junior public officials. Senior public officials shall also assume more responsibilities than junior public officials based on their power rank and degree of importance. It was necessary for the State to distinguish the sentencing status according to power-responsibility relationship so as to effectively control corruption. Hungarian criminal legislation actively explored this point. Criminal Code 1978 stipulated statutory aggravating circumstances of bribe-taking by senior public officials. Act CXXI 2001 increased the statutory basic sentence for bribe-taking by ordinary public officials to imprisonment of 1-5 years from imprisonment of less than 3 years, and increased the statutory sentence range for bribe-taking by senior public officials to imprisonment of 2-8 years from imprisonment of 1-5 years, increased the statutory sentence range for bribe-taking and breach of responsibilities by senior public officials to imprisonment of 5-10 years from imprisonment of 2-8 years. Criminal Code 2012 confirmed and inherited the aforesaid

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acting on behalf of the operator commits the crime as set forth in Paragraph 1-3 for the account of or on behalf of the operator, such person shall assume criminal liability and be punished pursuant to Paragraph 1.”“where the person in charge of an economic organization, or any person employed by or acting on behalf of the operator and granted the power of operation, control or supervision negligently commits the crime as set forth in Paragraph 4 , such person shall be convicted of a minor crime and imposed imprisonment of less than 2 years.”

<sup>31</sup> Hungary Criminal Code 2012 sets forth three groups of symmetrical provisions on bribery crime, including Article 290 (the crime of offering bribes to personnel of an economic organization) and Article 291 (the crime of taking bribes by personnel of an economic organization), Article 293 (the crime of offering bribes to civil servants) and Article 294 (the crime of taking bribes by civil servants) and Article 295 (the crime of offering bribes in judicial or administrative procedures) and Article 296 (the crime of taking bribes in judicial or administrative procedures), to which “bilateral” special surrender applies.

stipulations, further reflected the criminal punishment position of “punishment with severity”.

### **Difference in imposing heavy penalty**

The criminal punishment of bribery crime of China was featured by emphasis on deterrence by heavy penalty. Since high criteria were imposed on the constitution of a crime, the scope of regulation of criminal law was narrow. It was an important choice for criminal legislation to substitute severe punishment for severe regulation and enhance the deterrence of criminal law by increasing the degree of severity of punishment. The criminal punishment setting of bribery crime was characteristic of heavy penalty. Death penalty was the most severe method of punishment, and was not likely to be abolished in a long term.<sup>32</sup> Long-term punishment against freedom was the most common punishment applicable to bribery crime. In contrast, in Hungarian criminal code, the maximum statutory sentence of bribery crime was imprisonment of less than 10 years. It was also classified as heavy penalty, but was light penalty compared with the death penalty and life imprisonment of China.

## **VI. Implications of Hungarian’s experience in criminal legislation of bribery crime for China**

### **(I) Evaluation of Chinese and Hungarian strategies dealing with criminal legislation of bribery crime**

Under the fundamental guideline of cracking down on bribery crime, China and Hungary have many differences in criminal legislation of bribery crime, demonstrating the different strategies of the two counties dealing with criminal legislation of bribery crime.

Based on the attribute of modest and restrained principle of criminal law, criminal legislation is naturally “defensive” and follows the principle of ex-post punishment. However, Hungarian criminal legislation of bribery crime adopts “offensive” strategy, realize defense by offense, breaks through the traditional principles and ideas of criminal law, extends to the field of corruption prevention. For instance, it introduces guarantor principle, added the type of inaction of bribery crime, establishes the supervision responsibility of supervisors in the organization, etc. The extension of criminal legislation changes the previous ex post model of evaluation of actual results of corruption. Criminal legislation highlights ex ante and preventive control, fits in with the modern philosophy of prevention-based corruption control, reflects the Hungary’s flexibility in adjusting the strategy of corruption control in the course of modernization transition. The ideas reflected by such strategy may be also summarized as “Governance Activism”. “Governance Activism” means focusing on “opportunity containment” in derivation of corruption, reasonably extending criminal legislation to the field of ex ante prevention and ex post monitoring, forming the integrated “criminal domain” of source control, process monitoring and ex post punishment, thus giving play to the positive role of criminal laws in cleansing corruption environment. It is worth notice that Hungary remains a highly corrupt country in Europe at present. The questionnaire investigation

<sup>32</sup> Of course, currently China adopts the death penalty policy of “retaining death penalty, but the less the better, the more cautious the better”, the death penalty consists of immediate execution and stay of execution, but in effect, immediate execution is applicable to very few cases of corruption crime.

of Transparency International in 2013 indicates that 83% of the Hungarian respondents think corruption is a common issue of Hungary (the average proportion of EU is 76%);<sup>33</sup> another recent statistics ranks Hungary at the third place among the most corrupt countries, next only to Romania and Bulgaria.<sup>34</sup> In this respect, the following points should be fully considered: firstly, corruption control is a comprehensive task and criminal law is only one approach thereof. The absence of progress in corruption control is not necessarily attributable to criminal law, for the loopholes in public procurement law, tax law, budget law and other ex ante legislation could give rise to serious corruption. Secondly, the effects of legislation will not be necessarily unleashed in a short term, and need to be tracked and assessed in a long term. The new criminal code of Hungary takes effect in 2013, and it is not possible to judge the effects of legislation of bribery crime in the short term. Thirdly, Hungarian criminal legislation of bribery crime is aligned with the philosophy of giving top priority to prevention. Similar stipulations are also available in anti-corruption legislation of Britain and the U.S. It is undoubtedly of positive significance as a new attempt of exploring the criminal approach to anti-corruption in modern countries.

In contrast, China's strategy dealing with criminal legislation of bribery crime remains at the traditional "defensive" stage, highlights ex post punishment and focuses on punishment of individual corruption, which is ineffective in prevention of group corruption, incremental corruption and potential corruption. The ideas of corruption control reflected by such strategy of criminal anti-corruption may be summarized as "Governance Passivism". Governance Passivism does not mean the State's negative attitude, inaction and negligence in anti-corruption, but means the conservative attitude of following the beaten track in choosing the strategy of anti-corruption given material changes in the corruption type has undergone and upgraded demand on anti-corruption. Governance passivism emphasizes simplified interpretation of corruption regulation of criminal law as expansion of the regulation scope and increase of the degree of severity of criminal punishment. However, because it does not radically eradicate the root of corruption based on the derivative mechanism of corruption in modern times, it is ineffective in upstream control and environment control of bribery crime, and fails to address the issues of group corruption, clan corruption and ecological corruption facing the countries in modernization transition. Moreover, input of criminal law resources by unduly following the traditional system would even give rise to "saturation of state anti-corruption capacity", result in diminishing marginal benefits of crime control. As shown in Figure 2 above, the amendments to criminal legislation of bribery crime since 1997 have not effectively reduced the quantity of crimes, the quantity of bribery crime has been on the rise after 1998, and the bribery crime has worsened.<sup>35</sup>

(II) Improvement of Chinese criminal legislation of bribery crime: drawing on Hungary's experience

Since the 18<sup>th</sup> NPC of Communist Party of China, China has seen another round of "anti-corruption storm", highlighted by "Chinese style" anti-corruption manifested by

<sup>33</sup> European Commission, *EU Anti-Corruption Report*, (Brussels, 2014), p4.

<sup>34</sup> Attila Weinhardt, Hungary near top on the *corrupt countries* list, [http://www.budapesttelegraph.com/news/883/hungary\\_near\\_top\\_on\\_the\\_%E2%80%9Ccorrupt\\_countries%E2%80%9D\\_list](http://www.budapesttelegraph.com/news/883/hungary_near_top_on_the_%E2%80%9Ccorrupt_countries%E2%80%9D_list), last access time: Aug. 25, 2015.

<sup>35</sup> SUN Guoxiang and WEI Changdong: *A Study on International Convention against Corruption and Legislation of Crime of Corruption and Bribery*, Beijing: Law Press, 2011, Page 224.

“combating the major corrupt officials”, “depriving corrupt officials of authority” and “cracking down on major and minor cases together”. The severe crackdown without dead zone and limits facilitated the initial formation of the situation of “fear of corruption”,<sup>36</sup> and ushered in an important period of historic transformation for China’s anti-corruption of China. Many new issues have become the concern of strategic choice. The most important issue is to change the philosophy and strategy of legislation. Criminal Law Amendment (IX) effective as of Aug. 2015 changes the feature of single crime of criminal legislation of corruption crime, focuses on scientific establishment of criminal punishment of bribery. In particular, it stipulates life imprisonment for the death sentence with reprieve for corruption crime, representing a major innovation in China’s criminal rule of law of anti-corruption. However, it turns out that Criminal Law Amendment (IX) does not reserve Chinese philosophy of ex post control over the crime of corruption and bribery, criminal law intervention is limited to the back-end domain of crime, and the active prevention function of criminal legislation in front-end domain of crime has not been activated. Hence, in future legislation amendment to criminal law of public office, it is necessary to draw lessons from Hungary’s experience, introduce governance activism, establish “offensive” legislation strategy and improve China’s criminal legislation system of bribery crime. Accordingly, it is advised to make the following amendments to the current criminal legislation:

### **Adjustment of behavior type**

Criminal legislation should shift from traditional ex post governance to preventive governance, extend the traditional single action type to the inaction type featured by failure in prevention, form the “dual” behavior structure focusing on action, supplemented by inaction, in order to effectively address the problem of “environment corruption”. In specific, firstly, adding inaction crime of natural persons. Cleansing the internal environment of civil service system is an important way of effectively preventing occurrence of corruption. Given that Civil Servants Law explicitly stipulated the statutory obligation of civil servants of reporting bribery crime, “misprision of bribery” is added under the crime of bribe-taking, the act of any civil servant who is informed of the facts of bribery crime of any other person in performing duties but fails to report is stipulated as crime under severe circumstances. Secondly, adding inaction crime of entities. The practice of corruption control shows that corporate culture of corruption is the important reason for wanton bribery of companies and their employees. To build honest corporate culture and contain bribery from the source, companies shall assume statutory responsibility for preventing corruption. Given that Company Law, Unfair Competition Law and other front end laws explicitly stipulated statutory responsibility of companies and other market subjects for preventing bribery, the case where any entity is negligent in establishing effective prevention mechanism of bribery as a result of which its employee offers bribes for the benefit of the entity constitutes inaction crime of the entity, and graded criminal punishment criteria are imposed depending on different crimes.

### **Simplification of constitutive elements of a crime**

Bribery crime is featured by power-for-money deal, which violates the incorruptibility of public power the public powers in essence. Hence, the constitutive elements of

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<sup>36</sup> Refer to Zhang Lei: *Going Far at a Consistent Pace*, China Discipline Inspection and Supervision Journal, Mar. 17, 2015.



bribery crime shall revolve around the incorruptibility of public power, so as to maximize the deterrence and prevention effects of criminal law. Currently the elements of “seeking interests for others” and “taking advantage of duty” constituting bribery crime do not precisely reflect the social hazard of incorruptibility of public power. Excessive constitutive elements of a crime result in backward shift of legislation defense front. It does not only give rise to doubts and barriers in litigation proof, but also caused delay in criminal legislation governance, impairing the actual effects of anti-corruption. In this respect, the following suggestions are given: firstly, timely delete the foregoing redundant elements, expand the regulation scope of criminal law for public officials. Where any person requests, consents to acceptance of or actually accepts property benefits, takes action for performance or non-performance of his/her duties, it constitutes the crime of bribe-taking. Secondly, establish graded statutory sentencing circumstance. “Act+ undue performance of responsibility” constitutes the basic constitutive element of bribery crime, “taking advantage of duty” or “seeking benefits for others” constitutes the constitutive element of aggravated crime. Thirdly, delete the element of amount. Although Criminal Law Amendment (IX) deletes the stipulation on specific amount of bribery crime, changes the specific amount-related crime to the model of “circumstance crime +abstract amount crime”, it does not change the legal status of abstract amount as constitutive element of a crime, thus does not facilitate the creation of “zero tolerance” corruption environment. For this problem, it is advised to further delete the amount element from the legislation. However, considering the progressive nature of anti-corruption and practical issues of judicial operation, amount should still be clarified as a reference factor of crime circumstance through judicial interpretation.

### **Building “symmetrical” control structure**

In general, bribe-taking derives from offering bribes. To strengthen criminal control over bribe-taking is the necessary choice for modern countries to control corruption. China’s legislation for the crime of offering bribes and the crime of taking bribes is “asymmetrical”, which is not aligned with the requirements of governance at the source of corruption and should be timely revised. The specific measures are as follows: firstly, correspondingly adjust the constitutive elements of the crime of offering bribes and the crime of taking bribes, delete redundant elements such as seeking benefits for others, seeking undue benefits etc., form concise and rigorous corresponding relationship. Secondly, draw on Hungary’s experience, expand the positive role of “prisoner’s dilemma” theory in the legislation design of bribery crime, and establish “bilateral” special surrender system; adjust and amend the ground of not constituting the crime of offering bribes, i.e. “where any person is extorted to offer properties to national staff or other personnel engaged in public office without receiving undue benefits, it shall not constitute offering bribes”, as the statutory mitigation circumstance of the crime of offering bribes; add special surrender system designed for the crime of taking bribes, with the application conditions slightly more rigorous than those of the crime of offering bribes; set multi-level leniency types for whoever confesses bribery crime in the form of special surrender in view of the specific attributes of the affected power of bribery crime.

**Establishing “rigorous and severe” criminal liability system**

Introduce the principle of alignment of responsibility and power to the establishment of criminal liability system of bribery crime with reference to Hungary’s experience, set different crime and punishment system depending on different rank and nature of public office. In specific, firstly, distinguish the nature of public office, convict judicial bribery as a separate crime, impose heavier statutory sentence to crack down on judicial corruption with severity. Secondly, distinguish the statutory sentencing status of senior public officials and ordinary public officials, stipulate “bribe-taking of senior civil servants” and “offering bribes to senior civil servants” as statutory aggravating circumstance of the crime of taking bribes and the crime of offering bribes respectively.