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THE REASONS FOR CHINA TO SENTENCE SOME BRIBERY OFFENDERS TO DEATH*
— FROM AN INTERNATIONAL COMPARATIVE PERSPECTIVE —

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Introduction

Recently in China, the death penalty has been employed against some public officials just for bribe-receiving offences. The Chinese Penal Code (Articles 383 and 385) prescribes that a bribe-receiving offender can be sentenced to death when the amount of bribe received reaches "especially large" sums and causes "especially serious damage" to the state and the people. In fact, Chinese courts have sentenced some public officials to death just for bribe-receiving and some of them have actually been executed. It is very rare and unusual to sentence public officials to death and actually execute them just for bribe-receiving in today's world. Why does China sentence some public officials to death and actually execute them just for bribe-receiving? This paper will try to answer this question by comparing the contents of bribery offence laws, especially the so-called "protected benefits or purposes" of bribery offence laws in the U.S.A., Japan, and China.

I. *What is a "Bribery Offence" or "Corruption Offence"?*

1. The Emergence of "Bribery" or "Corruption" as a Word

In the East, for example, in ancient China, there were no special words like "bribery" or "corruption" for a very long time. The word "bribery" first appeared in a book entitled *Zuoshi Chunqiu Zhuan*, which is supposed to have been written in about 500 B.C., and was used to express the act of giving money or something else to public state officials or public military members, or the act of receiving money or something else by public state officials or public military members beside their formal salary.[1]

In the West, including ancient Greece and ancient Rome, there was no word like "bribery" or "corruption" until Cicero, a famous Roman orator, began to use a word "corrupere" in about 70 B.C. to express the act of paying money or something else to judges, or judges' receiving money or something else beside their formal salary.[2]

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[1] Wang Yunhai, *Bribery and its Regulation: a comparative study of China, the United States and Japan* (Tokyo: Nihonhyouronsha, 1998), p.4.

2. The Emergence of "Bribery" or "Corruption" as a Value

The awareness that giving or receiving money or something else to or by public officials in connection with their official acts beside their due salary is condemnable, undue, or unjust, however, did not emerge as early as the words "bribery" or "corruption" had done. It was later on that such awareness appeared and expanded in human history. In China, the first time that state and law began to regard such giving or receiving as illegal and proscribe them as offences was the Han Dynasty (about 200 B.C.).[3] In the West, it was the middle of 16th century that most European countries started regarding such giving and receiving as illegal and proscribing them as offences.[4] "Bribery" or "corruption" as a formal word with a strong negative meaning was eventually established in our human society along with the emergence of awareness of "bribery" or "corruption".

3. Trial, Judge, State, Public Official, and Bribery or Corruption

What made people become conscious that bribery or corruption was wrong, condemnable, and unjust? The first stage at which people began to consider bribery or corruption to be wrong, condemnable, and unjust usually started in connection with trials and judges. Regarding this aspect, there has been no difference between the West and the East. This is because people think that trials are state behaviors or public events and that judges are state staff or public characters. So, they must be "equal", "objective", and "neutral" according to their "state" or "public" nature. However, giving or receiving money and other things to or by judges in connection with their trials beside their due salary (bribery or corruption) can influence or destroy the trials' and the judges' "equality", "objectiveness", and "neutrality" as state behaviors or public events, and make such trials unjust.

The consciousness that trials and judges must be "equal", "objective", and "neutral" according to their "state" or "public" nature has eventually expanded to all state behaviors and public events conducted by all public officials although it first emerged in connection only with trials and judges.

In brief, a bribery offence or corruption offence is originally one kind of "public crime" or "official crime" committed only in connection with state behavior or public event by a public official constituting at least one of the parties. Today, there are certain terms like "business bribery offence," "economic offence," and "trade corruption offence"; these offences should not be called "bribery offence" or "corruption offence" in their original strict meaning, however, when there is no any public official concerned in it in connection with their official behaviors.

So, in this paper, a bribery offence or corruption offence means one committed by a public official constituting at least one of the parties in connection with their official acts.

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[2] John T. Noonan, Jr., *Bribes*: *The Intellectual History of a Moral Idea* (Los Angeles: University of California Press, 1984), p.38.

[3] Wang Yuhhai, supra note 1, p.1.

[4] John T. Noonan, Jr., supra note 2, p.313.

II. *The Elements or Components of a Bribery Offence*

In the current world, especially in those countries where the "rule of law" has been prescribed as a constitutional principle, it is necessary for their penal codes to satisfy the demands of a principle called "legality of criminal law." One of the main contents of this legality of criminal law is to declare in advance to all citizens including public officials the elements or components of bribery offence by statute law (law written and passed by congress) and case law (explanations of rules or laws made by courts), that is, the circumstances under which one would be charged as an offender of a bribery offence and sentenced to criminal punishment.

So far, four common elements or components of a bribery offence have been prescribed and declared in many countries including China, Japan, and the United States although the concrete contents or standards usually differ among these countries. These four common elements are "bribe," "public official," "quid pro quo" ("relevance to official acts"), and "distinction between bribery and social custom or bribery and political contribution."

1. Bribe

The basic element of bribery offence is a "bribe." A bribe is money or something else given to or received by public officials in connection with their official acts. A bribery offence cannot be committed without giving or receiving money or something else. Money is the most common content or form of a bribe, but the content or form of a bribe is not limited only to money; besides normal money, "something else" has also been regarded as the content or form of "bribery" in many countries' penal codes and courts. It is very clear what money is, but it is not clear what something else is. With regard to what something else is, in other words, the meaning or scope of the bribe, the standards are very different among China, Japan, and U.S.A.

① China

The Chinese Penal Code limits bribe to "a certain amount of property," and Chinese courts explain that "property" means money or other monetary or economic benefit, and "a certain amount" means that the money or other monetary or economic benefit has reached over 5 thousand renminyuan (about 7 hundred U.S. dollars). So, in China, Chinese public officials are charged with a bribery offence where the bribe they received is nothing other but money or other monetary or economic benefit and where the money and other monetary or economic benefit received has reached over 5 thousand renminyuan. A bribe does not include such benefit that is not money itself or something that cannot be exchanged for money and other monetary or economic benefit or cannot be accounted for by money Also, Chinese public officials cannot be charged when the money and other monetary or economic benefit they received does not extend to over 5 thousand renminyuan.

② Japan

Although Japanese Penal Code (Article 197) uses the word "bribe," it does not specify its concrete meaning and scope, and Japanese courts provide a clear and concrete standard to test what a bribe means and what the scope is in many judgments and sentences for bribery offence

cases. According to that standard, a bribe in Japanese law means "anything that can satisfy a human being's desire." A bribe includes not only money or other monetary economic benefit, but also non-money or non-monetary economic benefit that can satisfy a human being's desire. Even sexual favors can be deemed as a bribe. Moreover, "anything that is able to satisfy a human being's desire" has been explained as a subjective and temporary concept. That is, it should be tested based on the subjective feeling or cognition of the receiver regarding whether something can satisfy a human being's desire. Something should be regarded as a bribe when the receiver thinks or feels it is something that can satisfy his or her desire even though it may not be able to do so actually or objectively or can only do so temporarily or just in the very short term.

③ U.S.A.

In the U. S. A., the Federal Bribery Law (18 U. S. C. § 201) describes "bribe" in federal law as "anything of value." Case law made by the federal courts so far has shown a concrete standard called the "subjective testing approach" in order to judge whether something given or received in a bribery offence case comes under the scope of "anything of value" and constitutes the contents of a bribe. Through this subjective approach, it depends on a human being's subjective awareness or knowledge regarding whether something is of value or not. A public official will be judged as guilty and sentenced if he or she believed the thing received was valuable and had value even if it was not valuable and had no actual or objective value at all. So, in federal courts, forged currency or false stocks can be dealt with as a bribe and a guilty judgment can be made against the offender if the offender wrongly thought that such money or stocks were real when he or she received them.

2. "Public Officials"

As mentioned at the beginning of this article, a bribery offence is one kind of public crime or official crime committed by a public official who constitutes at least one of the parties in connection with their official acts. A public official is one basic element in a bribery offence. Without any public official concerned as at least one of the parties in such act, the offence of bribery would not exist at all. In the laws of many countries, especially administrative law and personal affairs law, there are usually some definitions or meanings of "public official". The definition or meaning of "public official" in their penal codes, especially in the clauses on bribery offences, however, are apt to differ from the general definition or meaning of "public official" and tend to be broader and more inclusive than the general definition or meaning. This means that certain persons could be charged with a bribery offence even if they do not have the status of "public official" in law, especially administrative law and personal affairs law, when they receive a bribe in connection with certain acts they have done or will do. Courts usually provide concrete standards for a definition or meaning of "public official" in the penal codes, especially in the clauses on bribery offences.

① China

The Chinese Penal Code (Article 93) itself lists certain kinds of individuals subject to bribery offence laws and they include formal public officials, their family members and near relatives, or others that have a close relationship with the public officials. Chinese courts have

used a testing approach called the "Influencing Power Standard" to provide a definition or meaning of "public official" in the Chinese Penal Code, especially in the clauses on bribery offences. According to this approach, everyone who has the same or similar power as that of a public official to influence official acts or public affairs because of a relationship with formal public officials should be classified as a public official as prescribed in Chinese Penal Code and can be deemed as subject to bribe-receiving offence laws prescribed in the clauses on bribery offences, even without holding any formal status of public official as defined in law, especially administrative law and personal affairs law. The key point is not "status" but "influence."

② U.S.A.

In the U.S.A., a federal criminal law on bribery of public officials and witnesses (U.S.C. § 201) defines public official as follows: "the term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror."

This definition shows certain kinds of "public official" who are subject to bribe-receiving offence laws, but not all of them. In fact, the leading cases issued by the federal courts have been used to explain "public official" much more broadly. There have been two approaches used by the federal courts to test whether the defendant accused of a bribe-receiving offence actually falls under the definition of "public official" in a bribery offence. One is called "substantial testing." The other is called "formal testing." In substantial testing, the focus is put on the attributes of the individual's position, and the key point is whether the individual had been in a position that was accompanied with any "public trust" or "official responsibility." The defendant would be guilty and sentenced to punishment if he or she had been a position of some public trust or official responsibility even without having any formal status of "public official".

In the U.S.A., the federal government usually grants money or funds for special purposes to state governments or local governments, and the state governments or local governments usually delegate a so-called third section or private company to arrange such money or funds after actually receiving them. In such cases, the civil person should be charged and sentenced for a bribe-receiving offence if he or she worked at the so-called third section or private company, arranged the federal money or funds concretely, and received a bribe in connection with the federal money or funds under this substantial testing.

Contrary to this substantial testing, however, formal testing demands a formal relationship in some way (for example, there is a contract entrusting the civil person to arrange federal money or funds) between the civil person and the federal government when the courts judge him or her to be guilty and sentence him or her to punishment for a bribe-receiving offence. The civil person will be not charged and sentenced for a bribe-receiving offence if there is no any formal relationship between them even if he or she actually worked at the so-called third section or private company, arranged federal money or funds concretely, and received a bribe in connection with federal money or funds.

③ Japan

The Japanese Penal Code (Article 7) defines "public official" as follows: "'Public official' means a staff member of a national or local public organization, member of the National Assembly or a local assembly, committee and other staff member engaged in public service in accordance with the law."

Under this definition, it is easy for the court to make a judgment on whether the defendant is a "public official" recognized in the Japanese Penal Code; in particular, in the bribery offence clause, when the defendant holds some formal status like a staff member of a public organization, or a member of an assembly or committee. However, the problem is the last phrase "other staff member engaged in public service in accordance with the law." What does this mean? For instance, should the court determine the defendant guilty and sentence him or her to punishment in the case where the defendant was actually engaged in public service while he or she had no any formal status of "staff member" or "committee member"? In answering this question, the leading cases handled by Japanese courts so far have shown two different approaches.

One can be called the "status approach." The other can be called the "functional approach." The status approach was a traditional way for Japanese courts to test the scope of "public official" in bribery offences and can be found from leading cases until the 1960s. This approach focuses on the formal status of the defendant and asks that the defendant has the same formal status as public official if the court deems the defendant guilty of a bribe-receiving offence. Japanese criminal law scholars usually classify such approach or such criminal theory in terms like "status criminal law" or "status penal theory." However, the attitude of the Japanese courts and the theories of criminal law study have changed since the late 1960s. They have turned from status criminal law or status penal theory to functional criminal law or functional penal theory. That means that the courts and criminal law study theories began to emphasize the substantial "function" of the defendant but not the formal "status." So, within the scope of "public official" in bribe-receiving cases, the functional approach has now become mainstream in leading cases in Japanese courts. Today, the defendant will be recognized as a public official and judged guilty and sentenced to punishment by any Japanese court if he or she had functionally engaged in official acts or affairs even without any status as public official at all.

3. "Quid Pro Quo" ("Relevance to the Official Act" or "in Connection with the Official Act")

Does any giving or receiving of money or other benefits with public officials constitute a bribery offence without any exception? The answer is "No." The most important element or component of bribery offence is "quid pro quo" (the "relevance to the official act" or "in connection with the official act"). This means that such giving or receiving constitutes a bribery offence only in the case where the money or other benefits are relevant to or in connection with the official act of the public official. The public official even has the right to exchange money or other benefits with others as long as there is no relevance to or connection with the official act of the public official. Therefore, "relevance" or "connection" is the key point regarding whether such exchange is a legal exchange or an illegal bribery offence.

In order to test whether or not there is relevance or connection between the exchange and

the official act, courts or criminal law studies usually begin from two concrete aspects: one is the scope of the "official act" that can be the object of the bribe; the other is the concrete relationship between the bribe and the official act.

① China

The Chinese Penal Code limits the scope of "official act" to the public official's "official authority" specified by law and the "convenience" resulting from such "official authority". There is no great difficulty in judging what the "official authority" specified by law is, but it is very difficult to determine what the "convenience" resulting from such "official authority" is. As a matter of fact, there have been a lot of disagreements among Chinese courts and criminal law studies.

Some courts and criminal law scholars explain the "convenience" resulting from such "official authority" as the same as "official authority", and argue that the "convenience" is only another expression for "official authority". This explanation makes the scope of "official acts" so narrow that the court has to find some concrete prescription in law regarding the defendant's official authority in order to find the defendant guilty.

The second explanation among Chinese courts and criminal law scholars is that "official authority" and "convenience" resulting from such "official authority" are two different things. The scope of official acts in the Chinese Penal Code means both "official authority" itself and the "convenience" resulting from such "official authority". This explanation has a more expanded scope of "official acts" than the first explanation. Under this explanation, it is not necessary for the court to find some concrete prescription or clause regarding the defendant's "official authority" in law when it finds the defendant guilty. What is necessary is only to find that there had been some convenience resulting from the defendant's "official authority".

Moreover, there is also a third explanation in the Chinese courts and criminal law studies. According to this explanation, the scope of "official acts" includes not only the defendant's "official authority" and the convenience resulting from such "official authority", but also the convenience resulting from the defendant's "official position". It becomes possible for the court to find the defendant guilty if some convenience resulting from the defendant's "official position" was the object of the bribe in exchange for money or other benefit with the defendant. This third explanation has become the mainstream in Chinese courts and criminal law studies today.

As pointed out above, the other aspect or problem is to test whether there is "relevance" or "connection" between the bribe and the official act as a concrete relationship. In Chinese courts and criminal law studies, the leading opinion is that there must be a concrete equivalent relationship between the bribe and the official act. This means that the giving or receiving of money or other benefit must be "for or to" some concrete official act and must be compensation for some concrete official act. It is necessary for the public attorney to prove that such concrete equivalent relationship truly existed in order to obtain a guilty judgment. It is not sufficient only to prove that there is an abstract or general equivalent relationship. "Which money is for which official act" must be proved clearly by sufficient evidence.

② U.S.A.

In the U.S.A., the federal criminal law on bribery offences (U.S.C. § 201) defines "official act" as follows: "the term 'official act' means any decision or action on any question, matter,

cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official capacity, or in such official's place of trust or profit."

With this definition of "official act," some federal courts still insist that "official act" must have clear grounds in law and must be expressly stated in law. However, the majority of federal courts have been apt to explain the scope of "official act" much more broadly than the definition itself prescribed by federal criminal law without there being a clear and express statement in law.

Some different approaches have been used in their explanations. Some federal courts have used an approach that can be called the "legal duty doctrine." Under this approach, all of the legal duties that the public official owes or bears should be simultaneously deemed as his or her "official act," and such legal duties can arise not only from federal statutory law but also an un-statutory lawful requirement, even an un-statutory legal custom that had existed in the department where the public official had worked.

Some other federal courts have gone much further and shown a standard that can be called the "moral duty doctrine." According to this "moral duty doctrine", not only legal duty but also moral duty can become the ground and basis of an official act, and the defendant can be found guilty even if he or she received money or other benefit only with a breach of his or her moral duty as a public official. This explanation has made the scope of "official act" so broad that any exchange with a public official would be deemed as a bribery offence, and the federal law that proscribes bribery offences has lost its function as a legal rule required by the principle of legality of criminal law.

In recent years, in order to avoid criticism that the courts' explanation is too broad and violates the principle of legality of criminal law, some federal courts have changed their attitude and begun to limit the scope of an "official act" to a statutory legal duty and an un-statutory legal duty. It is now almost impossible for a federal court to find a defendant guilty of bribery offence just based on so-called moral duty.

The second aspect in determining whether there is "quid pro quo" or "relevance" or "connection" between the bribe and the official act as a concrete relationship. In the U.S.A., the federal criminal penal code proscribes two kinds of bribery offence: one is called "bribery," meaning the giving or receiving of money or other benefits to or with a public official "to influence any official act" or "to be influenced in the performance of any official act." In the case of "bribery", it is necessary that there is "a specific and contemplated quid pro quo," namely, a concrete equivalent relationship between the bribe and the official act. The giver must have a concrete intent to influence some concrete official act or the receiver must have a concrete intent to be influenced in the performance of some concrete official act. The prosecutor must prove that there is a concrete "corrupt intent" and a concrete equivalent relationship ("in return for") between the bribe and the official act. "Which money is for which official act" must be proved clearly by sufficient evidence.

However, there is also another kind of bribery offence in federal criminal law called "gratuity." In the case of "gratuity", what is necessary is only that the giving or receiving of a bribe is "for or because of any official act." It is absolutely sufficient that there is an abstract or general equivalent relationship between the bribe and the official act. A concrete corrupt intent to "influence or to be influenced" is not necessary at all. What is necessary is only a "simple mens rea," namely that the giving or receiving takes place not by mistake but "knowingly and

purposefully," in other words, it takes place just for or because of the official act. The prosecutor does not need to prove that there is an "in return for" relationship, and it is not necessary to show "which money is for which official act." Proving that the money is not for or because of others but for an official act is sufficient.

③ Japan

The Japanese Penal Code (Article 197) does not specify the concrete meaning although it requests there be "relevance" or "connection" between the bribe and the official act when the bribery offence comes into existence. Instead of that, Japanese courts have explained the scope of "official act" and the concrete contents of the relationship between the bribe and the official act very carefully and clearly.

As to the scope of "official act", Japanese courts have shown that "official act" means all performances that the official should do as his or her official duty according to his or her public official position. The Japanese courts have also made the judgment that the "official act" involved in a bribery offence includes not only the "original official act" but also "the act that is closely relevant to the original official act"—the "close relevant act." Both the "original official act" and the "close relevant act" can be the target of bribe and are within the scope of "official act".

As to the concrete contents of the relationship between the bribe and the official act, Japanese courts have declared that an equivalent relationship is absolutely necessary. However, at the same time, the Japanese courts have explained that such equivalent relationship means a general or abstract one, and the existence of a concrete equivalent relationship is not necessary. In a trial of bribery offence, the prosecutor does not need to produce a significant amount of evidence until a concrete equivalent relationship has been proved. What is necessary is only to prove that the exchange is relevant to or in connection with the defendant's official act, but "which money is for which official act" is not under question.

4. Distinction between Bribery and Social Custom or Bribery and Political Contribution

The fourth element of a bribery offence is the "distinction between bribery and social custom or bribery and political contribution."

In many societies, there are some social customs that are relevant to the exchange of gifts or presents. For instance, at New Year, people, even including public officials, are used to exchanging New Year's gifts with each other. When someone is going to marry, attractive gifts are usually to be given for congratulations. Does such gift giving or taking to or by a public official as a social custom constitute a bribery offence?

Moreover, in a democratic society with a complete election system of politics, political election campaigns need to be run in order to win the election and such campaigns need money. It is necessary for politicians to raise as much money as possible. So, in many democratic societies, there have been some political contribution or donation systems that allow politicians to obtain money from civil organizations or individuals and encourage civil organizations or individuals to give money to politicians. A democratic election system is supported by such money. However, are such political contributions or donations always to be deemed legal and never constituting any bribery offence in any cases?

① China

In China, the distinction between social custom and bribery offence is the "amount" of the gift or present. It will be deemed a bribery offence if the gift or present is exchanged in connection with the public official's official act and reaches the "amount" prescribed by the Chinese Criminal Code or Chinese courts, even if such a gift or present is given or received following social custom. In today's China, there is no problem of whether political contribution or donation constitutes a bribery offence because there is not yet a Western-type democratic election system.

② U.S.A.

In the U.S.A., the federal courts usually use two different standards to make a judgment on whether or not an exchange of money or other benefit with a public official constitutes a bribery offence. One is for bureaucrats, namely professional public officials appointed as public officials based on examination. The other is for politicians, namely those public officials elected as public officials based on election results.

Bureaucrats are subject to both gratuity offence and bribery offence laws by the federal courts, and a guilty judgment will be issued by the court to the defendant if the prosecutor can prove that the giving or receiving of money or other benefit was "for or because of any official act" even if such giving or receiving had taken place following social custom.

However, politicians are subject to only bribery offence laws by the federal courts, and a guilty judgment will be not issued by the court to the defendant just because the defendant as a politician received money or other benefit "for or because of any official act." It is necessary for the prosecutor to prove that such receiving had taken place with a concrete corrupt intent, namely, "being influenced in the performance of any official act." It is not enough just to prove that such receiving is "for or because of any official act." This standard has in fact allowed American politicians much freedom to obtain money from civil political organizations or individuals following social custom.

The relationship between political contribution and bribery offence has always been a big problem in the U.S.A. On the one hand, in order to legalize and regulate such political funds, the so-called Political Fund Regulation Law was passed very early and has been revised many times so far. On the other hand, many cases of political contributions have been confirmed by the federal courts as illegal bribery offences. What is the border between them? In the U.S.A., the key point is the Political Fund Regulation Law. The attitude of the federal courts mirrors this law. Namely, there is no bribery offence as long as the politician who received the political contribution has reported and recorded such money according to the rules prescribed by the Political Fund Regulation Law even if such money was given in connection with his or her official act. This means that the Political Fund Regulation Law has great priority over bribery offence laws. In other words, the Political Fund Regulation Law can be used as a defense against a charge of bribery offence. American politicians can avoid a guilty judgment of bribery offence when they have reported and recorded the money that they have received as political contribution or donation even in connection with their official acts. For American politicians, the Political Fund Regulation Law has allowed them exemption from being charged with bribery offence in some circumstances.

③ Japan

Japanese prosecutors and Japanese courts have a very equal and strict standard for both bureaucrats and politicians as the same "public officials." There has never been any distinction between Japanese bureaucrats and Japanese politicians during charging and sentencing for bribery offences by the Japanese justice system.

With respect to the relationship of social custom and bribery offence, Japanese prosecutors and Japanese courts have shown very consistent judgment. The key point is "relevance to or in connection with an official act." The actor will be charged and sentenced for a bribery offence if the giving or receiving of money or other benefit is relevant to or in connection with the public official's official act without considering whether it is consistent with social custom. Even if the giving or receiving of money or other benefit comes from some social custom, it will still be found to be a bribery offence as long as it is relevant to or in connection with the defendant's official act.

With respect to the relationship of political contribution or donation and bribery offence, Japanese prosecutors and Japanese courts have also shown a very clear judgment. That is, the proscription of bribery offences in the Japanese Penal Code has strong priority over the Japanese Political Fund Regulation Law. Political contribution or donation will be charged and sentenced as a bribery offence if it is relevant to or in connection with the politician's concrete official act even though the politician has reported and recorded it in a correct way as the Political Fund Regulation Law requests. The Political Fund Regulation Law cannot work as a defense or exemption in any case as long as the received political contribution or donation is relevant or in connection with the politician's concrete official act.

The ways of dealing with the relationship between political contribution and bribery offence in the U.S.A. and Japan are completely different: In the U.S.A., the Political Fund Regulation Law has greater priority over bribery offence laws. In Japan, conversely, bribery offence laws have stronger priority over the Political Fund Regulation Law.

III. *Types of Bribery Offences*

It is also possible to find some differences in the types of bribery offences in China, the U. S. A., and Japan, and such differences reflect what the bribery offence laws makes more important in each country.

1. Types of Bribery Offences in China

The Chinese Penal Code divides bribery offence generally into three types: bribe-receiving, bribe-giving, and bribe-introducing. It further divides bribe-receiving into five basic types and bribe-giving into two basic types although there is only one type of bribe-introducing.

The five basic bribe-receiving offences are as follows.

Bribe-receiving offence for offering benefit: This means a bribe-receiving offence where the public official receives a bribe using the convenience resulting from his or her official position and offers benefit or promises to offer benefit to the giver in return for such bribe.

Bribe-forcing offence: This is a type of bribe-receiving where the public official forces the

bribe-giver to supply a bribe by extortion or other ways using the convenience resulting from his or her official position.

Single bribe-receiving offence in economic activity: This is a type of bribe-receiving where the public official just receives a bribe or repayment in connection with economic activity without offering or promising to offer benefit to the giver.

Bribe-receiving offence using another public official's authority: This is a type of bribe-receiving where the public official receives a bribe or extorts a bribe based on the convenience resulting from his or her official position and using another public official's official act, and offers or promises to offer benefit to the giver.

Bribe-receiving offence using influence: This is a type of bribe-receiving where the individual who is a family member or relative of a public official or is in close relationship with the public official receives a bribe by using the public official's official act or the convenience resulting from the official position, and offers or promises to offer undue benefit to the giver in return for the bribe.

There are two types of bribe-giving offence.

Bribe-giving offence for seeking undue benefit: This is a type of bribe-giving where the giver sends a bribe to the public official with intent to seek undue benefit in return for the bribe.

Single bribe-giving offence in economic activity: This is a type of bribe-giving where the giver just sends a bribe or repayment to the public official in economic activity without special intent to seek undue benefit.

Bribe-introducing offence is of one type and is an offence where the defendant arranges for the bribe-giver and bribe-receiver to set up a relationship of bribe-giving and -receiving, and makes it possible, but without giving or receiving any bribe him or herself.

It is clear from the above classification that the Chinese Penal Code puts greater weight on bribe-receiving offences than bribe-giving offences or bribe-introducing offence.

2. Types of Bribery Offence in the U.S.A.

In the U.S.A., the federal criminal law on bribery offence (U.S.C. § 201) does not differentiate between bribe-giving and bribe-receiving as an offence type at all. Instead, it does make a clear and strict difference between so-called "gratuity" and "bribery" based on the depth of the relationship between the receiver and the giver.

In the case of "gratuity", the relationship between the giving and the receiving is just "for or because of any official act." This means that the giving and the receiving of a bribe takes place knowingly and purposely, and not by any mistake. It is sufficient just to prove that there was a simple mens rea and it is not necessary to prove any special corrupt intent.

Contrary to gratuity, however, in the case of "bribery", the relationship between the giving and the receiving is more deep and concrete. The giver must have a concrete intent "to influence any official act" or the receiver must have a concrete intent "to be influenced in the performance of an official act." It is absolutely necessary to prove that there was a concrete and special corrupt intent that is beyond the simple mens rea of "for or because of any official act." In other words, it is necessary to prove a special and contemplated quid pro quo to find a

defendant guilty of bribery. "Which money is for which official act" must be proved and specified in the case of "bribery", and the mens rea of "for or because of any official act" is absolutely insufficient for the case of "bribery".

3. Types of Bribery Offences in Japan

The Japanese Penal Code divides bribery offences generally into two types: bribe-receiving and bribe-giving. It divides bribe-receiving further into seven basic types although there is only one type of bribe-giving.

The seven basic bribe-receiving offences are as follows.

Simple Bribe-receiving: This an offence of bribe-receiving in which the public official receives a bribe just with relevance to or in connection with his or her official act.

Bribe-receiving with acceptance of the request of the giver: This is an offence of bribe-receiving in which the public official accepts the request of the bribe-giver and receives a bribe from the giver with relevance to or in connection with his or her official act.

Beforehand Bribe-receiving: This is an offence of bribe-receiving in which a person who will become a public official accepts the request of the bribe-giver and receives a bribe from the giver with relevance to or in connection with the official act that he or she will undertake when he or she becomes public official in the future.

Third-party Bribe-receiving: This is an offence of bribe-receiving in which a public official accepts the request of the bribe-giver and makes the giver give a bribe to another person with relevance to or in connection with his or her official act.

Corrupt Bribe-receiving: This is an offence of bribe-receiving in which the public official committed an undue act or did not perform a due act that he or should perform as a public official since he or she had received a bribe from the giver with relevance to or in connection with his or her official act.

After Bribe-receiving: This is an offence of bribe-receiving in which an ex-public official receives a bribe in return for accepting the request of the bribe-giver and committing undue act or not performing a due act during the term in which he or she had worked as a public official.

Bribe-receiving by Using Another Official's Authority: This is an offence of bribe-receiving in which a public official accepts the request of the bribe-giver and receives a bribe by making the other public official commit an undue act or not perform a due act.

IV. *Punishments for Bribery Offences*

What punishments have been prescribed in the penal codes of China, Japan and the U.S.A.? And what are the features of the punishments prescribed in each penal code?

1. China.

The Chinese Penal Code has prescribed eight punishments of the offender of bribery offence, and they are the death penalty, unfixed-term imprisonment, fixed-term imprisonment,

short-term detention, fine, forfeit of property, confiscation of bribe, and deprivation of political rights.

The death penalty is possible only for the offender of bribe-receiving. A death sentence will be possible in the circumstances where the amount of bribe received by the offender of bribe-receiving reaches an "especially large" sum and the damage caused by the bribe-receiving is "especially serious" (Articles 383 and 385). However, the maximum punishment for the offender of bribe-giving is unfixed-term imprisonment. The maximum punishment for the offender of bribe-introducing is only three years' imprisonment.

2. U.S.A.

Under federal criminal law, imprisonment, fine, and disqualification of holding any office of honor, trust, or profit under the United States have been prescribed as punishments for offenders of bribery and gratuity.

However, there is no any difference at all in the punishments prescribed by the law between the offender of bribe-receiving and the offender of bribe-giving. Both of them are punished under the same punishments prescribed by law. Instead of that, there is a difference between the punishments of the offender of gratuity and the offender of bribery without considering whether he or she is a bribe-giver or a bribe-receiver. For the offender of gratuity, the maximum punishment is two years' imprisonment. But for the offender of bribery, the maximum punishment is 15 years' imprisonment. It is also possible for the defender of bribery to be sentenced to 20 years' imprisonment when the RICO Act is employed.

3. Japan

Fixed-term imprisonment, confiscation of the bribe or collection of the corresponding value, and fine are the punishments prescribed by the Japanese Penal Code. For the offender of bribe-receiving (the offender of corrupt bribe-receiving), the maximum punishment can be 20 years' imprisonment. Contrarily, the maximum punishment of bribe-giving is only three years' imprisonment.

V. *Conclusion*

1. What Are the Differences?

Through the comparison so far, we can find some differences among China, U.S.A., and Japan although all of them have the same bribery offence law.

The Chinese Penal Code has made a clear difference between bribe-receiving and bribe-giving and put greater weight of punishments for bribe-receiving offences than bribe-giving offences and bribe-introducing offence, and the death penalty is only possible for bribe-receiving offences. The countermeasures against bribery offences or corruption can be called "narrow but heavy."[5] This means that the scope of bribery offences established by the elements

[5] Wang Yunhai, "China's Death Penalty in a State-Power-Based Society," in Liang Bin and Lu Hong (eds.), *The*

in the Chinese Penal Code is very narrow. There is no bribery offence that can be charged and sentenced by criminal punishment as a criminal case if the bribe that the public official received has not reached a certain amount. However, the punishments for bribery offences are very heavy and serious once the bribe received by the public official has reached a very large amount, and the death penalty and execution become potential punishments.[6]

The Japanese Penal Code differentiates between bribe-receiving and bribe-giving and puts the weight of punishment on the bribe-receiving offence. This is same as China. However, the countermeasures against bribery offence or corruption in Japan are very different from China. The countermeasures in Japan can be termed "broad but lenient."[7] This means that the scope of bribery offence established by the elements in the Japanese Penal Code is very broad. For example, there is no requirement of "amount" for the existence of a bribery crime; anything that can satisfy a human being's desire can become the content of a bribe. An "official act" includes not only the original official act itself but also an act that is closely relevant to the original official act. However, the punishments or the sentences for bribery offences in Japan are usually very lenient. The probation rate of bribery offence defendants has consistently remained over 90%. Most defendants of bribery offences are eventually sentenced to imprisonment with probation and they do not actually go to prison.

In the U.S.A., there has been no idea or concept differentiating between bribe-giving and bribe-receiving in federal criminal law although it divides bribery offences into gratuity and bribery based on the concrete content of the equivalent relationship between the bribe and the official act, and the extent of the mens rea between the giver and the receiver. The punishments for bribe-receiving and bribe-giving are exactly the same. In return, federal law and federal courts do substantially differentiate between bureaucrats and politicians. They deal with politicians more leniently than bureaucrats. Only in the case of politicians it is necessary to prove a concrete quid pro quo—"which bribe is for which official act." This is very difficult and, in many cases, almost impossible. Moreover, the Political Fund Regulation Law can often be used as an effective defense against a charge of bribery only by politicians. In a word, a double standard has been used between politicians and bureaucrats in federal criminal law and federal courts.

2. Why the Differences?

In the study of criminal law, we usually use a concept called "benefit to be protected" or "protected benefit." This means the benefit that the law is trying to protect when the state and its laws proscribe certain acts as crimes or offences subject to punishment. In other words, "benefit to be protected" or "protected benefit" means the purpose or motive when the state and its laws proscribes certain acts as crimes and make them subject to punishment. The differences among China, Japan, and the U.S.A. in the law of bribery offence described above can be explained in the differences in "benefit to be protected" or "protected benefit" in these countries.

Death Penalty in China: Policy, Practice, and Reform (New York: Columbia University Press, 2016), p. 109.

[6] Wang Yunhai, *When Does China Sentence a Bribery Offender to Death?* (Tokyo: Kokusaishoin, 2013), p. 72.

[7] Wang Yunhai, *Is Japanese Punishment Heavy or Light?* (Tokyo: Shuueisha, 2008), p. 176.

① U.S.A: Bribery as "economic crime"

From the legislation history of the federal bribery offence law, it is very possible to find that the "protected benefit" or the purpose of punishing bribery offence in the U.S.A. is to keep the economic market free or independent from public or state power or authority and maintain the purity of free market competition. For Americans, bribery offence can cause undue intervention by public or state power in the free market, violate the rules of the free market, and damage the purity of free competition. In this meaning, there is no necessity to make any distinction between bribe-receiving and bribe-giving. Both bribe-receiving and bribe-giving have the same power to cause undue intervention in the free market, violating its rules and damaging its purity. Moreover, in the U.S.A., for a long time, political activities, especially election campaigns, have been understood as one part or political form of free market competition, political contribution as a tool of such competition, and politicians as the players in the competition. It is also one "protected benefit" or purpose of the federal bribery law to protect or encourage political competition. So, federal law and federal courts usually apply a more lenient standard to politicians than bureaucrats and try to exempt the receiving of political contribution from bribery offence regulation to the extent possible. This is the reason that there has been a double standard between politicians and bureaucrats in the enforcement of bribery law.

② Japan: Bribery as "cultural crime"

In Japan, there has been a cultural concept of the "public official" from the Meiji Reformation. Most Japanese people think that all public officials, without dividing them into politicians and bureaucrats, must be moral models of Japanese society and Japanese people before they can make good policy. For Japanese public officials, what is most important to them is to keep a perfect personality and show it to the citizens. In Japan it means much more than just a job or profession to be a public official. They are and must be the shoulders of Japanese morality or culture. The strictest moral requirements have been always placed on Japanese public officials. The law on bribery offence in Japan is also based on this moral or cultural concept of the public official. The "protected benefit" of bribery offence in Japan is firstly to require a public official to keep perfect morality and satisfy such cultural imagination or assumption of Japanese society and Japanese people. Under this "protected benefit", any bribery will be deemed as an offence without considering the amount because all such bribery would be considered immoral from a cultural perspective even if such amount is small. This is the reason that the scope of bribery offence in Japan is so broad. At the same time, bribe-receiving by a public official is considered worse than bribe-giving by a civilian. This is why there is a distinction between bribe-receiving and bribe-giving. Meanwhile, the "worse" nature of the public official who receives a bribe is mainly based on moral valuation, so moral cultural condemnation shown by society is sufficient to act as a countermeasure against bribery offence. Criminal punishment issued by court is only a secondary condemnation. This is the reason that the punishments for bribery offences in Japan are "light" or "lenient".

③ China: Bribery offence as "political crime"

The "protected benefit" of bribery offence in China is the "One-Party Rule."[8] As is well

[8] Wang Yunhai. Supra note 5, P.112.

known, One-Party Rule has been the most fundamental principle in contemporary China, and the CCP (Chinese Communist Party) and its government have always adhered to this principle without any uncertainty. The CCP and its government justify their adamant adherence to this principle with the following rationale. As a historical fact, it is the CCP that had mostly sacrificed themselves, led the whole of China and the Chinese people to resist Western imperial nations and Japan's invasion and colonization, and finally built a New China as a people's government. Today, it is also the CCP and its government that have managed to keep the New China independent, peaceful, and developing as a great country in the world. Such a fact has automatically proved, according to the rationale, that it is the CCP that first sacrificed for the Chinese nation and Chinese people and has been insistent in seeking the greatest benefits for the Chinese nation and Chinese people without considering any self-interest and privileges. So, it is logical for the CCP to rule China. However, this legitimacy would be seriously damaged and challenged if some members of the CCP and some officials of its government take bribes, as such crimes would show that those members of the CCP and officials of its government had sought self-benefit and privileges rather than the general happiness and welfare of the whole Chinese nation and Chinese people. In this political context, public official crimes like bribery offence in today's China are not viewed as some kind of ordinary crime only but also a political crime that could destroy the legitimacy of the CCP's One-Party Rule. In order to recover the legitimacy damaged by public official crimes, and to show their unchanged will to sacrifice for the whole nation and Chinese people, it is necessary for the CCP and its government to punish corrupt officials more harshly than civil givers, even by the death penalty.[9] This is the main reason that China sentences some bribery offenders to death and executes them.

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[9] Wang Yunhai, "Corruption and Anti-Corruption Policy in Today's China," *Hitotsubashi Journal of Law and Politics* 33 (Tokyo, February 2005), p. 2.