

The Legal Interest Protected by Accepting Bribes in China Criminal Law⁽¹⁾

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Abstract : The “indirect normativeness” of the legal interest and the explanatory function of legal interest to the constitutional elements of criminal law determine the mission of criminal law research. China’s criminal study reveals the legal interest protected by the crime of bribery, has undergone a gradual evolution from the specific abstract to the concrete derivation, and has formed a conclusion with certain explanatory functions. However, it has taken away from the norm-based system and neglected the guidance of criminal policy, with a generalized approach to disclosure, which has weakened the legislative conduction, guidance and evaluation and the critical function of law that the law should have. The reorientation of the legal interest protected by the crime of accepting bribes should be based on the normative system, the criminal policy orientation and the legal tradition. At the same time, it is necessary to adhere to the theory of “honesty and cleanness” and make objective and substantive interpretation to comprehensively improve the evaluation ability of the norm of criminal law.

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What is the legal interest protected by the crime of bribery? How can the legislator accomplish his aim through the legal interest? How does criminal policy affect the orientation of legal interest? It is a question that should be paid attention to in the research of bribery crime. Bribery as a kind of ancient accusation almost has the same life cycle as human beings, and how to promote the perfection of criminal normative system of bribery through legal reorientation is the vitality of the research. In the recent 40 years, the theory of intergeneration has been realized by the Chinese criminal law scholars in the fierce debates over the legal interest protected by the crime of bribery. However, although it has been constantly increasing, the realistic value of criminal policy on bribery has not been given due attention which has become the primary problem to be perfected in the study of law and interests.

I. Legal Interest Protected by the Crime of Accepting Bribery in China's Criminal Law : Revealing the Connotation and Updating It from Generation to Generation

Both in the crime system of representative countries in the civil law system and in the theoretical system of crime constitution in China, the legal interest has the characteristic of “indirect normativeness”. It is indispensable to construct the evaluation system of criminal law as the component of criminal law evaluation. It is the common method of the principle of criminal jurisprudence that the legal interest is revealed according to the distribution of the attribution of elements and elements of the crime. As a result, the

“historical pedigree” of intergenerational updating of the legal interest protected by the crime of bribery in China has been formed.

1. The legal interest protected by the crime of accepting bribes: the formation of the traditional dominant theory and its criticism

Bribery as an independent crime began in the first People’s Republic of China Criminal Code (The Criminal Law of 1979). Paragraphs 1 and 2 of Article 185 in that law stipulate: “When national staff take advantage of their positions to accept bribes, they shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. The crime of the preceding paragraph, resulting in serious losses of the interests of the state or citizens shall be sentenced to fixed-term imprisonment of not less than five years.”⁽⁴⁾ Thereafter, the legislating body successively amended the bribery offense several times, thus starting the legal interest disclosure.

“**The normal management activities of state organs**” was the earliest viewpoint of the legal interest protected by the crime of bribery by scholars. The object of violation of the crime of bribery is the normal management activities of state organs, that is, the correct implementation of all the activities

(3) Regulation on the Punishment for Embezzlement of the People’s Republic of China (Approved by the Central People’s Government of China on April 18, 1952) was the basis for the criminalization of criminal law before the Criminal Code was enacted in 1979. Under the influence of the former Soviet Union’s legislative model, the “Regulations” in the crime of embezzlement, so there was no charge of accepting bribes. See Sun Guoxiang & Wei Changdong. *Studies on the International Convention against Corruption and the Legislation on Corruption and Bribery*, Law Press, 2012, pp. 82-83.

(4) “Unlike the behavioral object, most of the provisions of the criminal law do not expressly protect the object, but need to explain the interpretation of the object of protection. To different interpretations of the protect object, it will affect the interpretation of the article So, the legal interest is an important part of the interpretation of the constitutional elements of the various theories of criminal law.” See [Japan] Hirofumi Hirayu, *Introduction to Criminal Law*, The University of Tokyo Press, 1977, p. 40.

of the state organs on the internal and external functions and tasks. Such violations of the normal management activities of state organs will bring about erosion of the state body, make corruption of state organs reputation, undermine the people's trust in the state organs and their staff, thus jeopardizing the outcome of socialist economic development.⁽⁵⁾ As a starting point for theoretical research, such theory has gained a dominant position.

In fact, in the process of forming the traditional theory, Chinese society has entered a new era of economic reform. With the opening up of the market that has led to the high incidence of new-type economic crimes, China government initiated the process of legislative revision. By 1988, "Supplementary Provisions on Punishing Crimes of Bribery and Corruption" was promulgated by the NPC Standing Committee. A relatively complete legislative system on Embezzlement and Bribery crimes has been basically established. Legislation renewal promoted the deepening of research on the legal interest protected by the crime of bribery, and gradually formed the views of "Complex Objects theory", "Selective Object theory"⁽⁶⁾ and "Structural Object theory"⁽⁷⁾.⁽⁸⁾ Due to the negligence of the independent legislative model of the accepting of bribery, the misinterpretation of the purpose of legislation and the

(5) Gao Mingxuan. *Chinese Criminal Law*, Renmin University of China Press, 1989, p. 601.

(6) The crime of accepting bribes violates the normal activities of state organs, enterprises, institutions, military forces and organizations and infringes on the ownership of public and private property, so it is a serious economic crime although it is a crime of dereliction of duty. See Liu Baibi & Liu Yongsheng. *Economic Criminal Law*, Mass Press, 1989, p. 504.

(7) "In addition to the normal activities of state organs, enterprises, institutions and collective economic organizations, the object infringed upon by bribery is multifaceted and may include the ownership of public and private properties and the normal development of a socialist economy." "In respect of specific bribery Therefore, the object of bribery can be regarded as the selective object. As long as one of the above objects is violated and the other components of the bribery crime are satisfied, it can be regarded as a crime of accepting bribes." See Huang Hailong. *A Study on Some Issues Concerning the Bribery Crime in Criminal Law of China*, A Collection of National Master's Theses on Criminal Law, China Renmin University Press, 1989, p. 788.

confusion between the object and the result of crime, the above three theories cannot serve as a substitute for the traditional dominant theory. However the criticism the traditional dominant theory received has laid the foundation for the birth of a new theory.

2. The legal interest protected by the crime of accepting bribes: the formation of the new dominant theory and its criticism

Initiated in 1987 the “**Honesty and cleanness of official activity theory**” was a powerful alternative theory generated during the spreading period of the traditional theory. On the basis of a comprehensive criticism of the “management activity theory” and its derivative views, this theory asserted that “the strict and fair professional duties and duties of state personnel are based on the integrity of their official duties and actions. Only when they perform official duties with no despicable heart, could their official activity be strict and fair”. “Therefore, the direct object of the crime of accepting bribes is the cleanness and honesty of the official activity of state staff.”⁽⁹⁾ The theory is based on the clean obligation, the consideration of the bribe to official activity and is the first theoretical update based in legal interest.

With the deepening of legislative updates and researches, the “honesty and cleanness theory” had derivatives such as the theory of “profession integrity”,⁽¹⁰⁾ “honesty style”⁽¹¹⁾ and “honesty civil servants system”,⁽¹²⁾ etc. Until the amendment

(8) The object of accepting bribes is a structural object that takes the basic object as its core and combines and chooses the object. Taking the normal conduct of official activities of state organs, collective economic organizations and other social organizations as an example, it means that the reputation of public service as basic objects, a structural combination with the choice of social economic management order and the ownership of public and private property object. See Han Jianguo & Wei YaLi. *A New Theory of the subject of accept bribes*, Law Research, 1991 (3).

(9) Hao Liwei & Liu Jie. *Re-understanding of the Object of Accepting Bribes*, Law Research, 1987 (6).

of the Criminal Code which was enacted in 1997, the new dominant theory has⁽¹³⁾ become the basis for the formulation of the judicial interpretation of the quasi-legislative nature promulgated by the judicial organs of the highest country.

3. The legal interest protected by the crime of accepting bribes: the formation of the post new dominant theory and its criticism

“The honesty and cleanness theory” also faced the theoretical criticism from four representative views after the promulgation of the Criminal Law in 1997.

(1) **The incorruptibility of official activity theory.** This theory was first proposed by Professor Zhang Mingkai in 1997.⁽¹⁴⁾ The theoretical system was completed in 2000.⁽¹⁵⁾ Due to the introduction of Japanese criminal law theory, it is also the beginning of the introduction of the international foundation into the study of the legal interest in China.⁽¹⁶⁾ Professor Zhang argued that “the legal interest protected by accepting bribes is the incorruptibility of official activity of state staff. Namely the official activity cannot be bought off.”⁽¹⁷⁾ The theory is based upon following conclusions: (a) “In our country the purpose of official

(10) Gao Mingxuan & Ma Kechang. *Criminal Law*, Peking University Press & Higher Education Press, 2000, p.635. Zhao Bingzhi. *New Criminal Law Tutorial*, Chinese People’s Public Security University Press, 1997, p.790.

(11) Li Xihui. *Bribery Object and Objective Aspects of the New Theory*, Political Science Journal, 1991 (4).

(12) “The core of the crime of accepting bribes is that public servants violate the obligation to clean government officials and abide by the integrity system of public officials and undermine the integrity and integrity of the public.” See Zhao Changqing. *A New Exploration of the Subject of Bribery*, Modern Law, 1990 (6).

(13) Gao Mingxuan. *New China Criminal Law*, Renmin University of China Press, 1998, pp.970-971. Gao Mingxuan & Ma Kechang. *Criminal Law*, China Legal Publishing House, 1999, pp.1136-1137.

(14) Zhang Mingkai. *Criminal Law (Second edition)*, Law Press, 1997, pp.918-919.

(15) Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, pp.612-641.

activity is to serve the people, specifically in the protection and promotion of all kinds of legal interests; as the government officials have received the corresponding remuneration for their works, they cannot directly receive the remuneration from the citizens, otherwise it should be deemed as improper remuneration.” (b) “The lawfulness and impartiality of an official activity depends firstly on the incorruptibility of the official activity. If the official activity can be bought off and can be exchanged with property, the official activity inevitably only serves the person who pays for and damage the interests of other people, — therefore in order to protect the impartiality and legality of official activity, it must be ensured that the incorruptibility of the official activity protected.” (c) “Citizens trust to the incorruptibility of official activity is an important legal interest worthy of protecting by criminal law. Therefore in the circumstance of the protection of incorruptibility and trust, the incorruptibility of official activity would be infringed, if objectively the official trades the property for official activity, and so long the official promised certain activity while receiving bribes, the trust is damaged.⁽¹⁸⁾

(2) The impartiality of official activity and national trust in public affairs theory. This theory was put forward by Professor Zhou Guangquan in 2003. It also drew conclusions from the research on the crime of accepting bribes in Japanese Criminal Law. Professor Zhou argued that “since in

(16) It is by Japanese scholar Prof. 飛田清弘 that Chinese scholars got to know Japanese criminal law on the crime of bribery legislation, the status of judicial application and the research on the crime of bribery. in his paper named 「日本における公務員収賄概況」, Japan’s theory of criminal law theory of litigation, and affirmed its advocacy of “prestige of public service”, “official fairness” and “national civil service trust in the implementation of official duties” point of view. See [Japan] Hiroyuki. *Overview of Bribery Crimes by Japanese Civil Servants*, Translated by Zhang Ling, *Universal Law Review*, 1989 (1).

(17) Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, p. 627.

(18) Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, pp. 628-629.

the case that civil servant will bear the consequences of improper exercise of official duties though the people who offer bribe have not benefited from the civil servants promised activity. The legal interest of this crime is, first and foremost, the impartiality of the official activity. Meanwhile presumably the official activity is impartially carried out, the public trust in the government will be lost if civil servant associated with the official activity accept bribes. In order to ensure the impartiality and incorruptibility of official activity, the legal interest protected by the law should be interpreted as public belief and trust in the impartiality and incorruptibility of official activity.⁽¹⁹⁾ In the follow-up study, Professor Zhou revised this theory as “the incorruptibility and public trust” theory which is “the standing advocate of trust theory”⁽²⁰⁾.

(3) The non-tradability of public service and official activity theory.

This theory was put forward by Professor Sun Guoxiang in 2012. It focused more on the criticism and reform on the current theories in Chinese Criminal Law. The theory is based on the following conclusions. (a) “The incorruptibility of official activity theory may explain the nature of public power being bought off. But it is a one-sided theory which only emphasizes the bribes provider and cannot explain the situation in which the public official solicits or accepts bribes while his official activity is not influenced”. (b) “As to the one who holds a public office or the one implement official activity, he cannot treat his office or official activity as a commodity and cannot use it as a tool for his personal benefit. No one shall offer any consideration to public service or official activity”⁽²¹⁾. (c) In line with the provisions of the legislation

(19) Zhou Guangquan. *Criminal Law Handbook*, Tsinghua University Press, 2003, p. 531.

(20) Zhou Guangquan. *Criminal Law (third edition)*, Renmin University of China press, 2016, p. 476.

(21) Sun Guoxiang. *Theory and Solution of Bribery Crimes*, Law Press, 2012, pp. 101-103.

on bribery crime, the establishment of bribery crime is a combination of factors such as “exploiting the convenience of one’s service”, “soliciting or accepting property” and “seeking benefits for others” regardless whether taking the initiative or accepting bribes passively or the activity violates the requirements or not. The essence of bribery is to turn the public office or official activity into a commodity to trade for property from other people. As the nature of the bribery crime defined by the actual law and the criminal policy at the present stage, the legal interest is the non-tradability of the public office and official activity.⁽²²⁾

(4) The impartiality of official activity theory. It was advocated by Professor Li Hong. Starting on the effort to explain the impact that the mediatory bribery brings on the overall legal interest protected by the crime of accepting bribery which is stipulated in Article 388 of the Code, it criticized the incorruptibility theory as follows: (a) “The incorruptibility theory encompasses the trust as a legal interest and it may somewhat explain why we should punish the official who has only promised but has not actually sought benefits for his clients. However such trust is vague and subjective as legal interest and has no difference other than the honesty and cleanness theory”. (b) “The legal interest protected by the crime of accepting bribery should be the objective elements such as incorruptibility of official activity other than subjective elements such as trust”. (c) “If the legal interest protected by the crime of accepting bribery also includes public trust, then in the establishment of a bribery crime, it is likely to drift away from specific official activity while to encompass activities which might become misconduct and which are far away from the results of actual misconduct. In that case an official who receives gratitude in his or her normal social life will also be considered a danger to the

⁽²²⁾ Sun Guoxiang. *The Legal Interest of the Accepting Bribery Crime and Its Practical Significance*, Law Science, 2018 (2).

public trust and might even be prosecuted for bribery.⁽²³⁾ To support his theory, Professor Li argues that: (a) “The reason why bribery crime is punishable is that once officials take advantage of their positions to seek or accept bribes from others, they will place official activities which are supposed to be performed in a fair, impartial manner under the danger of improper influences which might interfere with their discretion in official duties.⁽²⁴⁾ (b) The impartiality theory can explain why the law takes “seeking (improper) benefits”⁽²⁵⁾ as a constituent of the crime of bribery which other theory cannot.

II. Problems in the Legal Interest Research Protected by the Crime of Accepting Bribery in China

The intergenerational update of the theories of legal interest protected by the crime of bribery has promoted the study of improving the standard and system of judicial evaluation centered on the essence of the crime of bribery. However, the review of such theoretical research phenomenon reflects the aspects that are worthy of rational thinking and the booming studies reveal the problems in the theoretical research in china.

I. Oriented in criticism, the improvement of systematic theories of legal interest theory is ignored

The current research on the legal interest protected by the Law is characterized in its heated criticism. While affirming its positive value, a

⁽²³⁾ Li Hong. *Legal Interest of the Bribery Crime and Article 388 Interpretation*, Law Research, 2017 (1).

⁽²⁴⁾ Li Hong. *The Legal Interest Protected by the Crime of Accepting Bribery lies in the Fairness of the Past*, Prosecutor’s Daily, 14, Feb, 2017.

⁽²⁵⁾ Li Hong. *Legal Interest of the Bribery Crime and Article 388 Interpretation*, Law Research, 2017 (1).

problem that cannot be ignored is that too much criticism leads to the neglect of the construction and improvement of the basic systematic theories of each legal interest theory.

During the formation of the traditional dominant theory, several kinds of theories were introduced one after another, promoting the first intergenerational upgrade of the theory. **The honesty and cleanness theory** can complete the explanatory mission on the malfeasance crime of the “value exchange” type and as the new dominant theory, it has undergone a series of criticisms. However, shortly after the formation of the new dominant theory, a new round of criticism has emerged long before the research could concentrate on the revelation of the essential connotation, substantive criteria and evaluation functions of “honesty and cleanness” in the academic circles and the theory was stopped from further development. At present, although the honesty and cleanness theory is still in the dominant position, it is constantly under academic attacks from other theories. The academic group seemed to have decided to discard it. Nevertheless except for some limited innovative ideas, most of the new theories have little actual improving influences on it. There seem to be not abundant arguments to veto the honesty and cleanness theory.

The reasons for criticizing the honesty and cleanness theory include :
(1) Lack of certainty. “The biggest drawback to that theory is its uncertainty.” First, the meaning of “honesty and cleanness” is not clear in itself. Though the concept of it needs no explanation, the content of legal interest guides the interpretation of the constituents of the crime. The concept of legal interest cannot function if its meaning is not clear. Secondly, there is no common sense on what it refers to. Whether it is the official activity or the official is not clear. However there is big difference between the two interpretation and will act differently on the interpretation of the constituents of the crime.⁽²⁶⁾

(2) The obligation-based setting. It is not in accordance with the basic theory of legal interest that the obligation of honesty and cleanness or the system of honesty and cleanness as the legal interest of the crime of bribery. “The reason why a certain behavior is prescribed as a crime is by no means because it violates the obligation, but because it damages some kind of legal interest.”⁽²⁷⁾

(3) Causing vagueness to the boundaries of crimes. “The obligation of honesty and cleanness of officials is very broad and banning bribery is only one of the requirements. The duty of honesty and cleanness of civil servants is binding on all non-clean behavior under their own purview, including those that are not related to their official activities, such as restrictions on handling family weddings and funerals. The obligation of honesty and cleanness as the legal interest cannot play the role to distinguish being a crime or not.”⁽²⁸⁾

(4) Causing the punishment is too extensive. “If honesty refers to officials,” “bribery can be established even when there is no connection between the act of soliciting and accepting property and the performance of the official, and this will expand penalties improperly.”⁽²⁹⁾

This article argues that the above criticism did not touch the basis of the honesty and cleanness theory to negate it.⁽³⁰⁾ The reasons are as follows: (1) On the issue of lack of certainty. First, “honesty and cleanness” has a long history in Chinese language with a high social recognition value. Even as the moral standard for an ancient official, it has connotation clearly defined.⁽³¹⁾ The core lies in being “no acceptance of bribes and no degrade” and up to now the

⁽²⁶⁾ Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, p. 625.

⁽²⁷⁾ Zou Zhihong. *Mediation Bribery Crime*, YU Zhiqiang. *Criminal Law Issues and Controversy*, China Founder Publishing House, 2003, p. 109.

⁽²⁸⁾ Sun Guoxiang. *The Legal Interest of the Bribery Crime and Its Practical Significance*, Law Science, 2018 (2).

⁽²⁹⁾ Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, p. 625.

meaning of “honesty and cleanness” has been completely unified.⁽³²⁾ Second, since the modernization, China has worked hard to promote the legalization to foster a clean government. At the end of the 20th century, in order to promote the realization of a clean and honest political goal, China has actively promoted the legal systematization of the “clean and honest” norms, including the constitution, the constitutional law and the party norms governing the ruling party. The norm system of obligation of honesty and cleanness for different power bodies has begun to take shape and laid the foundation for the legal evaluation of the public offices and the official activities oriented in the spirit of “honesty and cleanness” in the criminal law. In the norm system of honesty and cleanness, different modes of responsibility are set according to the types of duty breach. The criminal law is required to interfere with serious violations of “honesty and cleanness”. Third, both the “honesty and cleanness of official activity” and “honesty and cleanness of public office”, the legal interest protected by the crime of accepting bribery as the basis for setting the scope and standards of regulation, the core lies in setting a definite consideration to “bribery”. As long as it is stipulated by law (including

(30) As Lu Tianqi said: “This criticism is not fatal to honesty theory because integrity can be further elucidated to show its position, and in general, the essence of honesty is “no money or fraud Cheating behavior” and “not detrimental to the interests of the public and not to be corrupt”. Therefore, the integrity of the duty behavior, understood in its literal meaning, should be both the unacceptability of both the duty performance and the fairness of the duty performance.” See Lu Tianqi. *Theory and Practice of Bribery*, Guangming Daily Press, 2007, p. 120.

(31) In the cultural tradition, Integrity as a social value orientation emerged as early as in the Warring States Period. Qu Yuan’s “*Spirit of Chu Songs and Souls*”, “It is imperative to practice cleanliness and moral integrity.”

(32) The connotation of “integrity” in “Chinese Modern Dictionary” is defined as “not undermining private ownership and not being embezzled.” See Editorial Board. *Chinese Modern Dictionary*, China Publishing House, 2011, p. 663. Chinese Academy of Social Sciences Institute of language dictionary editing editor: *Modern Chinese Dictionary*, Commercial Press, 2006, p. 847.

criminal law), it can meet the requirement of the definite punishable subject, this goal can be easily achieved especially considering the “duality” mode of criminal law of quality and quantity of crimes and the judicial interpretations which serve as a quasi-legislation in the application of criminal law. (2) On the issue that honesty and cleanness as the legal interest. On the one hand, in the doctrine of German Criminal Law, “legal interest does not necessarily need to have concrete reality as an object.” “National systems, such as the judiciary or the monetary system or other public legal interests, are not tangible objects but necessary to the life of commons. Any damage to them will endanger the effectiveness of society and the life of citizens in the long run.”⁽³³⁾ The incorporation of constitutional obligations into the legal interests does not violate the general principle of legal interests.⁽³⁴⁾ Excluding the constitutional obligations from the scope of criminal law protection violates the nature of “the final protection of laws” of the criminal law. And there are provisions in all criminal laws of different countries that directly infringe the constitutional obligations.⁽³⁵⁾ On the other hand, as a statutory crime, the crime of accepting bribes does not exclude the obligation as the object of protection. Based on the principle of the consistency of rights and obligations, the obligation of honesty and cleanness of the official or the official activity is another expression of the people’s right to trust in the integrity and clean power. And

(33) [German] Claus Roxin. *The task of criminal law is not the protection of legal rights?* Translated by Fan Wen, Chen Xingliang editor: *Criminal Law Review* (Vol. 19), Peking University Press, 2007, p. 151.

(34) [German] Claus Roxin. *A Review of the Legal Concept of Critical Legislation*, Translated by Chen Xuan, “*The Review of Law Science*”, 2015 (1). [German] Claus Roxin. *German Criminal Law General Provision (Volume 1)*, Law Press, 2005, pp. 15-16.

(35) Such as the second paragraph of Article 376 of the Criminal Law of China to refuse and serve to evade the war, it belongs to the constitutional obligations of citizens as the law to provide for the crime, a similar charge, in violation of the constitutional obligation to pay taxes according to law, it would be a guilty.

in the discussion and explanation of legal interest of the incorruptibility theory or the non-tradability theory, it also incorporates the obligation as legal interests which states the obligation that officials shall not trade the public office or official activity to bribes. (3) On the issue of vagueness as a criteria of crime evaluation. The theories against the new dominant theory are all based on the traditional theoretical construction mode that the crime of bribery is completed in a way that “one bribe to one official activity” or “there exists a specific requested deal”. However, this traditional mode is challenged by reality. With the process of fighting against corruption deepens, the behavior pattern of bribery crime has undergone profound changes. The bribery that “the bribe provider has no specific requested matter” has become a popular type and among which other types of bribery have dazzled the judiciary. The norm of honesty and cleanness has taken the type of bribery under its supervision that the officials solicit or accept enormous gratitude or gifts in return in the name of so-called important family’s matter.⁽³⁶⁾ In short there is no legal obstacle that it should be the crime of bribery that officials solicit or accept money or property in the name of gratitude or gifts in return if violating norms of honesty and cleanness seriously. (4) On the issue of excessive punishment. The objection theories apparently gave too much expectation to the function of legal interest while ignoring the dilemma the judiciary will face if they were to abide by their theories. And their theories confused the criteria of the function of legal interest and the constitution of crimes. The key to the evaluation of

⁽³⁶⁾ Article 83 of the “Regulations on Disciplinary Measures of the Communist Party of China” stipulates that the receipt of gifts, cash as giving, consumption cards and the like which may affect the fair execution of official duties shall be given a warning or a serious warning if the circumstances are relatively mild. Where the circumstances are serious, Duty or stay party to see punishment; case of serious, give expelled from the party. Receiving other gifts, gifts, consumption cards, etc. which is obviously beyond normal reciprocity shall be handled in accordance with the provisions of the preceding paragraph.

criminalization lies in the judgment of the conformity of constitution of crimes. Although the legal interests have the function to explain the constituents, it is not just the satisfaction of legal interests to constitute the crime.

In fact, there are problems need to be solved in the objection theories.

(1) The issue of error in the direction. “Incorruptibility of official activity is the legal interest of providing bribes rather than accepting bribes.” The incorruptibility theory did not deny this but explained that “the incorruptibility of official activity means that official activity is not tradable with property. Therefore it means that the briber shall not use property to buy off the official activity and it means the bribee shall not sell the official activity for profit. It is actually two sides of the same issue. As a result foreign criminal theories do not confine their research to the legal interest protected by accepting bribery but expand to the bribery that encompasses acceptance, solicitation and introduction. In another word different types of bribery crimes all infringe the incorruptibility of official activity which only differs in the severity depending on the subjects or the content of behavior.”⁽³⁷⁾ It is obvious that incorruptibility is not the exclusive legal interest of the crime of accepting bribe. It would be an error in the direction to restrict incorruptibility to the crime of accepting bribe.

(2) The issue of the conclusion being one-sided. To explain the adjustment of legal interest caused by the criminalization of mediatory bribery, the impartiality theory negates the interpretation principle of legal interest on the issue of the basic type of bribery. However the mediatory bribery is only one type of bribery in the criminal law in China, it will reach a conclusion that activity “has not impaired the impartiality” should be excluded from criminal evaluation if the legal interest were based on the constituent of mediatory bribery. Such conclusion violates the current criminal law and its rationality

⁽³⁷⁾ Zhang Mingkai. *General Survey on the Legal Interest*, China University of Political and Law Science Press, 2000, p. 629.

would be questioned since China Criminal Law criminalize the activity that “being bribery but the official activity follows the law”. (3) The issue of incompetence. The incorruptibility theory cannot explain the mediatory bribery and such setback in the legal interest theory are faced by scholars domestic and abroad. Though some revisions are made, neither the incorruptibility theory nor the impartiality theory could explain the criminal evaluation on the type of “pure solicitation”, that is the criminal law does not require that the briber sell official activity or the bribee buy the official activity as the constituent of “pure solicitation”. As to this issue the incorruptibility theory cannot explain it either.

2. Oriented in the logic of analysis, the criminal policy guidance of legal interest selection is neglected

After entering the era of post new dominant theory, the research methods on the legal interest has updated. The Dogmatics has become the main method. The conclusions lay much emphasis on the noumenon of norms of crime and penalty. However such researches pursuit the inherence of conclusion excessively while ignoring the issue of guidance of criminal policy and tend to cause misinterpretation of the content of legal interests.

Among the objection theories, the impartiality theory puts too much emphasis on the consistency itself while neglecting the systematic nature of the norms and guiding function of criminal policy of norm interpretation. It is based on the criticism of the honesty and cleanness theory and the resolution of function defects of interpretation of the connotation of legal interest in the case of mediatory bribery. To achieve its logic consistency, it ignored the fact that mediatory bribery was merely a special type of behavior and caused misinterpretation to the whole legal interest theory of bribery. Because of which it has difficulties in explaining the necessity of punishment on new types

of bribery such as “bribery with no damage to the official activity”, “bribery with no threats to the impartiality of official activity”, accepting bribery with no promise beforehand and accepting bribery after resignation. The advocates of the impartiality theory keenly noticed the changes of tides of bribery in China that “the plain process of the trade of money and power in the traditional types of bribery was changing into a more subtle mode of reciprocity of daily life. Both the briber and bribee established a trustful and bonding relationship money-power through all kinds of gratitude or gifts in different ways.” “This type of bribery does not target the officials with specific request nor does it require the briber to promise to offer bribes beforehand. It is a long term emotional investment and actually a more covert operation and has the same damage as the instant trade of money and power of the traditional type of bribery.” Its severity of damage, compared to the instant trade of money and power in separate occasions is bigger and officials resist it with great difficulties. It is also more difficult to investigate. The impartiality theory therefore seriously deviated from the rigorous criminal policy of punishing bribery.⁽³⁸⁾

This article argues that the research on legal interest of specific crime shall stick to two basic principles. First, for the theoretical principle, the research shall root in the analysis of the choice that the legislature undertakes and reveal what the content of legal interest ought to have in order to lay grounds for the application of criminal law. Meanwhile, the research shall be based on the needs of justification of legislation and rationality of its evaluation in order to make progress in legal amendments. Second, for the practical principle, the research shall bind itself with criminal policy. It is the need for the stability of

⁽³⁸⁾ Li Hong. *The Legal Interest Protected by the Crime of Bribery and the Qualification of the Financial Behavior Afterwards*, Chinese Legal Science, 2017 (4).

criminal law that the content of legal interest shall be adjusted to new mode of crimes to enhance its capacity and respond positively to the criminal policy of special periods through updated interpretation. As a matter of fact, in the historical view, the incorruptibility theory of Japanese theory is grounded on the factual basis of the type of “one bribery to one request”. And such fact also causes the necessity of establishing the system of crimes of bribery in Japanese Criminal Law. This kind of theory requires the setup of consideration between official activity and concrete request matter in the constitution of bribery. However under the high pressure of punishing bribery the new deviated mode has emerged and replaced the traditional types in many ways. There will be obstacles of application of criminal law should the contents of legal interest stay the same while the pattern of bribery has undergone such fast transformation in the roaring bribery business. In consideration of the current running of the system, the judicial department expands the scope of the constituents of bribery through teleological interpretation method. In the “Judicial Interpretation on Several Issues Relating the Application of Law in Cases of Bribery” (No. 9th, 2016) jointly promulgated by the Supreme People’s Court and the Supreme People’s Procuratorate, Article 13 states the criterion to establish the constituent of “seeking benefits for others” should be that “the official solicit or accept money or property valued over RMB 30,000 Yuan from subordinates or the relative party in an administrative relationship, and the official activity might be compromised, shall be deemed as the act of promising to seek benefits for others.”⁽³⁹⁾ The provision shows that the urge to modify the incorruptibility theory is quite intense within the judicial bodies.

(39) Pei XianDing. *On the Handling of Corruption Cases of Criminal Law Applicable to the Interpretation of a Number of Issues, the understanding and application*, People’s Justice, 2016 (19).

3. Oriented in the copying of foreign theories, the indigenous value of legal interest is overlooked

Despite its internationalism, the fight against crimes is essentially an indigenous work. Each country develops its unique criminal norms according to tradition and purpose of legislation. The norms of law root in the conscience of people, “only in its people can the law find its roots and only in its people can the law find its momentum to develop.” “The law is such kind of phenomenon that it ties itself closely to the whole culture.”⁽⁴⁰⁾ The norm system is in fact the condensed image of national history, culture, reality and ideals of governance.

In the ear of post new dominant theory, the research on legal interest of bribery focuses on the adoption of foreign theoretical studies especially from those of Japan. It is becoming a leading research mode to modify indigenous theories by comparison with foreign theories. The incorruptibility theory and the impartiality theory can both be found their prototype in the Japanese criminal law theory. The problem of doing so is that little concern is paid to the difference of the norms of crime and penalty of bribery between China and Japan. First, the crimes of bribery in Japanese Criminal Law encompass seven specific crimes, namely, the basic bribery, the entrusted bribery, the beforehand bribery, the bribery to the third party, the aggravated bribery, the afterwards bribery and the mediatory bribery and it took over 70 years to establish the system and improve it.⁽⁴¹⁾ The crimes of bribery fall in the category of misprision. Based on such system, the Japanese scholars mean the whole legal interest of briberies in their studies other than the legal interest of the

⁽⁴⁰⁾ [German] Liszt. *German Criminal Law Textbook (Revised Version)*, Translated by Xu Jiusheng, Law Press, 2006, pp. 6-7.

⁽⁴¹⁾ [Japan] Nishida Code. *The Japanese Criminal Law*, Translated by Liu Mingxiang and Wang Zhaowu, Renmin University of China press, 2007, pp. 387-393.

⁽⁴²⁾ basic bribery. And this is the difference interpretation of legal interest between crimes of bribery and the basic bribery. On the other hand, China Criminal Law only prescribes one specific crime on the acceptance of bribe and divides the crime into 4 different behavior patterns, namely, the soliciting type, the accepting type, the economic bribery type and the mediatory bribery type. After the promulgation of Criminal Code in 1997, the 7th Amendment and the 9th Amendment added the new crimes as influential bribery and the bribery to influential people. In the subject aspect or in the object aspect and the crime of accepting bribe are not modified though the crimes of bribery are expanded. Therefore to define the legal interest of accepting bribery in China, it must cover the entire behavior patterns and shall not reach an independent legal interest for each pattern of behavior. Second, Article 197 of Japanese Criminal Law which prescribes the basic bribery and the entrusted bribery roughly equals Article 385 of China Criminal Law while the constituents “officially” and “accept, demand or agree” of the crime of the basic bribery have different meanings with its China counterpart. On the obvious level, as for the type of pattern of accepting bribe, China Criminal Law requires the constituent of “seeking benefits for other people”. On the hidden level, it forbids the consideration between official activity and seeking benefits for other people. And this leads to the problem that what the evaluation of criminal law concerning the soliciting type is. Is it the consideration of official activity and solicitation or something else? If it is the former one, there will be a discrepancy with the accepting type which will be expressed in the interpretation of legal interest. Therefore to adopt the dominant theory of

⁽⁴²⁾ “On the protection of the interests of bribery, has always been (1) is the impartiality of the profession and the trust of the community to the job, (2) is the unacceptable job performance, (3) is the job of the non-conspiracy and fairness, (4) It is the opposite of the civil servant’s obligation of being honest and clean. [Japan] Otani. *Criminal Law Specific Provisions*, Translated by Li Hong, Law Press, 2003, pp. 450.

Japan Criminal Law, comparison and modification must be fully made.

In the view of the construction of the legislative system of the crime of bribery of standing countries in the world, there are single-layer type and multi-layer type. The former countries include Germany, Japan, Italy, etc. And these legislatures are based on the exchangeability of official activity on which theories such as the incorruptibility theory, the impartiality theory, the trust theory are developed. The latter countries include USA, South Korea, etc. The legal interest theory is based on the exchange mode of public office and official activity and centered in the honesty and cleanness. When it is the exchange of official activity, it is the same with the single-layer type. However when it comes to the exchange of public office or the identity of the officials, the two types detach. For instance, Chapter 11 of Title 18 of the USA code is “Bribery, Graft and Conflicts of interests”, it includes “conflict of interests” as a special type of bribery and treats it almost the same with the traditional bribery.⁽⁴³⁾ In the Improper Solicitation and Graft Act of South Korea (also known as “Kim Young-ran Act”), it prescribes the crime of improper solicitation besides the crime of bribery.⁽⁴⁴⁾ It is the practical need of management of suppression of corruption that the scope of management shall be expanded and the evaluation ability of criminal law enhanced. Though the learning samples of Germany and Japan are still focused on the control of traditional bribery, the traditional ideal of honesty and cleanness of China

(43) The earliest legislation on conflicts of interest in the United States was An Act to Prevent Frauds upon the Treasury of the United States in 1853. Article 2 of the Act stipulates that officials, public officials, under the authority of the executive authorities or in coordination with or under the authority of the National Assembly, A misdemeanor is charged by a person, either as agent or attorney, in prosecuting the United States, or in the case of failure to perform official duties, to support, support the prosecution of the United States, receive remuneration from prosecutions in the United States, benefit from the case, attempt to help prosecute or consider aiding prosecution, Shall be sentenced to a fine of 5,000 U. S. dollars or less, or imprisonment of not more than one year or concurrent punishment.

cannot be fulfilled in such legislative mode.

III. The Cognitive Criterion of Contents of Legal Interest and the Rationality of Honesty and Cleanness Theory

I. The cognitive criterion of contents of legal interest

In the research of legal interest protected by the crime of accepting bribery in China, theories all started with criminal provisions yet reached different conclusions and it seemed that the legal interest of the crime of accepting bribery was just “a little girl dressed and made up by scholars”. To solve the problem the cognitive criterion ought to be established. According to the general principles in the legal interest theory of Germany, it contains principles as follows :

(1) High-level laws : the Constitution and Constitutional Laws

How to define legal interests? It is the problem that concerns Prof. Claus Roxin, the propeller of contemporary law interest theory in Germany. And his basic argument is that “it can be deduced from the constitution.”

⁽⁴⁴⁾ According to the relevant provisions of Korean Criminal Law on bribery crime, most scholars believe that the most important element in the constitution of bribery crime is “bribe”, while “bribe” refers to “undue advantage in respect of job title.” This “improper benefit” is because and unjust remuneration related to the position, so there is a need to pay the price and the relationship between the “payment and the opposite payment.” This is also the position of the Korean judiciary. However, since the parties that bribed and bribed them deliberately obscured the relationship in reality, it is difficult for the judiciary to prove this. As a result, many parties evaded the legal investigation and, in accordance with the “The Improper Solicitation and Graft Act” passed or not, whether or not they have Job relatedness or consideration (the amount of money received reaches a certain amount), as long as public officials receive property, etc., they can be punished. From this perspective, it is the most direct legislative intent to “ask forbidding law” to remedy the loopholes in the penalties for bribery-related crimes in South Korea and to maximize the leakage. See Li Yingfeng. *The Improper Solicitation and Graft Act and South Korean Anti-corruption Legislation New Trends*, Law Review, 2016 (6).

“The correct perspective lies in the understanding that the only pre-limitation set out by criminal legislators is the principle of the constitution. A binding concept of legal interest in the criminal policy aspect can only derive itself from the mission of rule of law in the fundamental law based on the citizens’ freedom. This mission is to set up regulations for the power of criminal penalty.” “The legal interest is a factual or aim definition (Gegebenheiten und Zwecksetzung) that will foster the development of individuals and their freedom or be beneficial to the function of the social system which it is established within. The restriction set by the factual or aim definition substitutes general arrangement by the interest and emphasizes that the concept of legal interest has contained the status determined by Recht and obligations which can only be made by Recht.”⁽⁴⁵⁾ This argument is concurred by Prof. Zhang Mingkai.⁽⁴⁶⁾ The development of Chinese Criminal Law coincides with the argument. Article 1 of Regulation on the Punishment for Embezzlement of the PRC stated that “Based on Article 18 of the Common Program of the Chinese People’s Political Consultative Conference, this ordinance is enacted”. And Article 18 of the Common Program of the Chinese People’s Political Consultative Conference (Sep. 29th, 1949) prescribed that “All state organs of the People’s Republic of China must strictly abide by the revolutionary working style of being honest and clean, frugal, and ready to serve the people. It shall be severely punished if being corrupt and extravagant. Bureaucracy is not acceptable.” It is the first time the term “honest and clean” appeared in the legislative documents of People Republic of China and sort of conformation on the social relationship infringed by corruption and bribery.

In the development of rule of law, China has propelled the construction

⁽⁴⁵⁾ [German] Claus Roxin. *German Criminal Law (Volume 1)*, Law Press, 2005, p. 15.

⁽⁴⁶⁾ Zhang Mingkai. *The Legal interest protected by the crimes of Bribery*, Law Research, 2018 (1).

of the norm system regulating public power on full scale. Article 27 of the Constitution of China provides that “Any state organs and personnel must accept the supervision from the people and strive to serve the people.” It is the provisions of the fundamental law about the essential obligations of persons working in the public offices. However due to its abstractness and stipulation in principle, the Constitution has not laid any concrete regulations on how to fulfill such obligations. Based on the Constitution and assorted to different types of public power the legislative body has promulgated different laws. The Judge Act, the Procuratorate Act and the Public Servant Act of the PRC and other laws all stipulated the obligations of being honest and clean. Characterized by the unique political system of China, the Discipline and Punishment Ordinance of the CPC has a full set of systematic and comprehensive duties of honesty and cleanness on its party members. In short, all persons and organs wielding public power have to abide by this obligation.

(2) Criminal norms : criminal law and its norm systems

Though the Constitution and constitutional laws have established obligations of honesty and cleanness for state officials, it does not require criminal law intervention for all kinds of activities that deviated from the obligations. The principle of legality demands clarity in its subjects of criminal law and the contents of legal interests somehow act as defining tools of “shoot range” of criminal law. This is why the civil law systems have so much emphasis on the research of legal interests.

The legal interests that protected by the criminal law are hidden in the constituents of criminal norms and although theoretical research has brought forward concrete identifying principles.⁽⁴⁷⁾ It is still quite difficult to point out the true contents of legal interests of certain specific crimes. The reason for such

⁽⁴⁷⁾ Zhang Mingkai. *General Survey on the legal interest*, China University of Political and Law Science Press, 2000, p. 162-167.

difficulties is that there are misinterpretations on the elements of constituents of criminal norms especially in case of mala prohibita. The illustration on the legal interest protected by the crime of accepting bribery requires attentions from both inside and outside the criminal norms from an associated perspective. First, from the inner system of criminal norms, the contents of legal interests can only be derived from the interpretation and deduction of constituents. Four provisions in China's criminal law stipulate the crime of accepting bribes, namely article 385, 386, 383 and 388. But these four articles only mean one specific crime. The legal interest shall be established on the four behavior patterns as a whole. Otherwise there will be biased conclusions. Second, from the outer system of criminal norms, the criminal law will be on constant change due to the changing need crime control of bribery. "Criminal law is not a fixed system. In fact it is vivid in every criminal norm. It is in this situation though there are no large scale legislative reform but only amendments that only mean to be supplementary."⁽⁴⁸⁾ "The significance of positive law is changing and it is because the positive law is a comprising element of the whole legal order and it is joining the constant legal reform in accordance to the unity of legal order by adding new meanings to the old provisions and modifying them through new legislation."⁽⁴⁹⁾ China is upgrading its strength in fighting against all kinds of briberies and the behavior patterns of accepting bribes are undergoing profound changes. As results of new laws have to be made and new crimes added to adapt to the changes while extending the application of the current criminal norms at the same time.

Based on the retrospect on the inner and outer criminal norm systems, we

(48) Lao Dongyan. *Value judgments on the Criminal law and Criminal policy interpretation*, Political Forum, 2012 (4).

(49) [Germany] Karl. Engisch. *Introduction to legal thinking*, Translated by Zheng Yongliu, Law Press 2004, p. 109.

can reach the following conclusions. First, due to the obstacles of interpreting the mediatory bribery that the incorruptibility theory faces and the inadequacy of the impartiality theory in determining the basic model of accepting bribery, the honesty and cleanness theory shall be abode by since these theories cannot give a reasonable explanation on the whole legal interest of accepting bribery crime in China. Second, as for the newly added two specific bribery crimes by the amendments, the question is why it includes bribery implemented by non-officials into the current system. The reason of such legislature is that the urge of criminalization is caused by the improper behavior of the officials while doing their duty work and it is a violation of the obligation of honesty and cleanness. Only with this explanation can we reach the conclusion that the crime of influential bribery violates the honesty and cleanness obligation and thus should be punished.

(3) Criminal policy

“How to organize a reasonable and effective response to crime” is an issue that the state should constantly pay attention to. “The contemporary criminal policy aims at prevention and control of crimes and is cored with the contents of criminal measures including the treatment of criminals so as to organize a reasonable yet efficient comprehensive system of crime control. Behind these concrete measures, in fact, they embody a pragmatistic value demand of aim-fulfilling, efficiency and consequence.”⁽⁵⁰⁾ In the period of rapid social development, criminal policies have to undertake a broader mission. The legal interest protected by a specific crime is the result of legislature guided by criminal policy and necessary adjustment coordinated to criminal policy. The guiding function of criminal policy over legal interests is not only manifested in the efforts to put certain important specific legal interest under the protection of

⁽⁵⁰⁾ Du Yu. *The Purpose of Criminal Policy and Criminal Law to Explain*, Law Forum, 2013 (6).

criminal law by initiating legislation procedures but also in the teleological interpretation and re-adjustment of legal interest based on certain requirements of crime control within the current legal systems.

“Some of the provisions of the Criminal Code when they were first legislated. Such domination sometimes interferes with the cognition of the legal interest and bends its contents to the value of criminal policy. In this case the legal interest of certain crime can only be defined correctly combined with criminal policy.”⁽⁵¹⁾ “In the current era, both theoretically and factually, it is no doubt that the criminal legislation and justice are fully influenced by criminal policy. Criminal law alone cannot meet the developing needs of the modern society and rule of law. The criminal policy has strong influences on legislation and justice.”⁽⁵²⁾

Although Liszt has argued that the criminal policy only worked before criminal legislation which might seem improper these days, his ideas that the criminal policy as a defining criterion for the legal interest is still intriguing. As a super-norm over the legal interest, to reveal the true face of the legal interest, the criminal policy needs to work with other means. “The influences over criminal law from criminal policy can be divided into two categories. In case that the social and political needs are urgent and the contents of the criminal policy are clean and well developed. The provisions of criminal law can be added, amended or repealed or the penalty can be adjusted according to criminal policy. However if the anticipation from society and politics is still vague and abstract and there still might be changes in the criminal policy, to ascertain the relative stability of criminal law, the criminal law can only

(51) Lao Dongyan. *Criminal Policy Analyses on the Norms of Criminal Law — a Normative Interpretation of the Meaning of Criminal Law*, Chinese Law Study, 2011 (1).

(52) Nie Huiping. *Criminal Policy Transformation and Limitation of the Criminal Law*, China Criminal Law Journal, 2014 (4).

influence the judicial activity.”⁽⁵³⁾ The reason of a severe policy against bribery is to solve the control of the dilemma of corruption of public power. China’s criminal policy of bribery shall focus on the aspects of norm establishment and actual management. On the one hand, the provisions of accepting bribes have not changed on a large scale as it is first provided in the Criminal Code of 1997 though some of the amendments have changed other constituents of other specific crime of bribery. On the other hand, the behavior pattern of the crime of accepting bribes has changed comparing the model set in the Criminal Code of 1997 in both the aspect of “taking advantage of public power” and “taking advantage of the convenience of public office”. Even the form of “accepting bribes” and “seeking benefits for others” has changed fundamentally. The form of bribery is transforming from direct bribery to indirect bribery, from short term bribery to long term bribery, from one bribery for one request to emotional investment, from bribery only necessary to bribery without concrete cause, from beforehand bribery to afterward bribery, from bribery completed while in power to bribery after retirement. Essentially it is undergoing a transformation from “contract” to “identity” that bribery centered in contract of exchange of official activity with bribes is replaced by bribery centered in relationship of exchange based on the certain public office or official identity. The tension between criminal provisions and urgent need of management has become a problem to be solved.

As a quasi-legislation, judicial interpretation has been constantly the carrier of the newest criminal policy in China which has compensated for the inflexibility of legislation. The judicial interpretation has provided unified solution concerning highlighted problems in the case of bribery and it is inclined to extend the meaning of “taking advantage of official activity”,

⁽⁵³⁾ Nie Huiping. *Criminal Policy Transformation and Limitation of the Criminal Law*, China Criminal Law Journal, 2014 (4).

“illegally accept” and “seeking benefits for others” to meet the requirements of the criminal policy. After the new aim-fulfilling judicial interpretation is promulgated, there will be objective need to expand the legal interest protected by accepting bribes. The application of law inherently requires update and modification of legal interest based on current criminal provisions and it is a general tendency to enhance the capacity of legal interest.

2. The essence of “honesty and cleanness” and its rationality

(1) The essence of “honesty and cleanness” is legal obligation norms

The honesty and cleanness of official activity is an inherent normative requirement of official activity that the officials should implement their power correctly and reasonably according to laws and regulations.⁽⁵⁴⁾ As the legal interest of accepting bribery, the honesty and cleanness is cored with the obligation imposed by constitution and constitutional laws. Therefore honesty and cleanness is a state duty and shall be embodied in criminal law. The protection of honesty and cleanness by criminal law can be realized in two ways. First, obligation imposed on the public office or official identity. Second, obligation imposed on the official activity. The obligation is not conceptual but factual and statutory. It can be divided into two categories, namely prohibition of conflict of interests and prohibition of exchange of public power (including prohibition of sales of public power and prohibition of unjust administration of power). The prohibition of conflict of interests emphasizes on the activity of conflict of interests based on official identity, including solicitation without the purpose of trading power, accepting money or property with no concrete request. It should be punished though it is not based on the consideration of public power and private gains. The prohibition of exchange

⁽⁵⁴⁾ Sun Qian & Chen Fengchao. *Research on Corruption*, Chinese criminal law Journal, 1998 (3).

of public power emphasizes on the obligation of honesty and cleanness abode by while carrying out official duty. The clarity of such obligation not only means that the officials shall not exchange their power for any improper payments but also means that obligation imposed based on the official identity and obligation to regulate officials spouses, family members and minors. These obligations and the public trust set by them shall all be protected by criminal law.

(2) The rationality of “honesty and cleanness” as legal interest protected by the crime of bribery

A. The explanation ability on the current criminal provisions

The purpose of readjustment of the legal interest protected by the crime of accepting bribes is to solve the explanation problems caused by the new behavior pattern of bribery. As the whole legal interest of accepting bribery, the honesty and cleanness theory covers the traditional behavior pattern explained by the incorruptibility theory and the impartiality theory. What’s more important, it covers the new phenomenon appeared in the realm after the intensified crime control of accepting bribery. The honesty and cleanness theory out beat its opposing theory on these new types of bribery and conforms to constituents and general interpretation principle of legal interests. The relationship of the protection of legal interests and assurance of criminal rules is constantly changing with the development of society. In other words, the strengthening of order is the result of social development other than the intentional efforts by the power organs. As the protection of rights is reaching perfection, the reaction towards order reservation shall not be excessively intense and it will not cause tremendous impact on the function and value of legal interests in the social management. As a matter of fact, there are

⁽⁵⁵⁾ Zhao Yunfeng. *Understanding and Function Analysis on the Legal interest*. Northern Law Study, 2017 (1).

no absolute contradictions among the honesty and cleanness theory, the incorruptibility theory and the impartiality theory. Some of the scholars have noted that “the different expression and analyses of the legal interests of accepting bribery might be almost the same if examined closely. For instance, the incorruptibility, honesty and cleanness of official activity are actually quite closely related.”⁽⁵⁶⁾ The damage to the honesty and cleanness is the prerequisite of the incorruptibility theory, the impartiality theory and the non-tradability theory. Thus the honesty and cleanness theory is an appropriate theory and can be improved through some consolidation and enrichment work. As for the issue of excessive expansion of punishment, it can be resolved through the restriction of judicial interpretations.

B. The honesty and cleanness theory adheres to the unity of criminal law evaluation and the aim of state management

As a systematic expression of official will, criminal policies are often closely linked to the current public needs and political needs. To adapt to social development or to keep pace with the times, the current criminal provisions will have to consider criminal policy requirements and the tendency in the interpretation. Not only is the criminal policy often used as a criterion to judge whether a conclusion is better or more reasonable, but also provides reasonable support for the certain aims determined. And it solves the vicious cycle of hermeneutics to a great extent.⁽⁵⁷⁾ In the corruption control in China, the contradiction between the legal interest of accepting bribery and the demand for the regulation of corruption in criminal law reveals that the power arrangement and the operation rules are not perfect. By treating honesty and cleanness as

⁽⁵⁶⁾ Sun Guoxiang. *Theory and Solution on the cases of bribery crime*, Law Press, 2012, p. 99.

⁽⁵⁷⁾ Lao Dongyan. *Criminal Policy Analyses on the Norms of Criminal Law — a normative interpretation of the meaning of criminal law*, Chinese Law Study, 2011 (1).

the legal interest, the current criminal provisions can fulfill their mission on the combating against sorts of bribery and propelling the improvement of norm system of honesty and cleanness. Such system is closely related to the regulation sphere of bribery, as it is the ground norm for punishing bribery crimes. Taking the bribery of gratitude in exchange as an example, it is quite tricky to regulate. The key to this problem is to improve the norm system concerning conflict of interests though criticism to legislation. It can be derived from this theory that acts such as An Act for the Gratitude to Officials shall be made to establish norm system of honesty and cleanness. This is the most positive achievement such theory shall have.

IV. Epilogue

In modern criminal law theory, "the concept of legal interest not only has the methodological function of guiding the interpretation of constituents of crimes, but also is the criteria for testing whether the provisions of crimes and penalty are justified."⁽⁵⁸⁾ The constituents stipulated in the provisions of crime and penalty are the criteria for the determination of the legal interest, and the stereotyped behavior patterns often encounter with the difficulty of evaluating the new type of behavior. As the excessively frequent amendment proposal is deemed to be improper, it can serve as a relieving tool between criminal provisions and urgent social requirements by enhancing the capacity of legal interests through coordination with the criminal policy. It is the changing pattern of behavior of bribery that the legal interest must be expanded and comprehensive. It will solve the current dilemma by adhering to the honesty

⁽⁵⁸⁾ [Germany] *Urs Kindhäuser. The protection of legal interests and the protection of normative effect: the purpose of criminal law*, Translated by Chen Xuan, Chinese and Foreign Law Study, 2015(1).

and cleanness theory which is also compatible with the criminal policy. It is a process of improved insight into the build of legal interest and the update of the legal interest of bribery and it is theoretical grounds for the inter-relationship between criminal policy and legal interests.

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