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**HANOI LAW UNIVERSITY**

**LUND UNIVERSITY**

**FACULTY OF LAW**

**ĐÀO LỆ THU**

**BRIBERY CRIMES UNDER VIETNAMESE CRIMINAL LAW IN COMPARISON WITH SWEDISH AND  
AUSTRALIAN CRIMINAL LAWS**

**Speciality: International and Comparative Law**

**Code: 62 38 60 01**

**DOCTORAL THESIS**

**Supervisors: Prof. Nguyễn Ngọc Hòa**

**Prof. Per-Ole Traskmån**

**HANOI – 2010**

## **Preface**

If one recently wonders about what kind of crime is of the greatest threat to the stability of the state and the economy, after organized crime, bribery would certainly also be considered. Bribery and organized crime may even make a good combination to develop well together, because the former can support the latter and vice versa. One must be concerned that many of those responsible in state and society close their eyes to the fact that the line between organized crime and bribery appear to be shifting or they even help smooth the way for this to happen.

Through media coverage we are told about bribery practices throughout the world. Breaking news often includes stories of bribery in both the national and international context. Bribery cases receive much attention and concern from politicians, legal practitioners and citizens. It is worth keeping in mind that unlike other dangerous phenomena, bribery is an internal danger. As one perceives such phenomenon has risen in society as an “enemy within,” or like a “cancer,” that can undermine the trustworthiness of state and societal decision-making processes and, thereby, not only damages specifically affected individuals and institutions, but has the ability to destroy the entire structure of state and society (Eser 2003: Preface).

The threat has been recognized for decades, especially so far as concerns the stability of the state. For a long time, developed countries have embraced policies and launched campaigns against corruption, including bribery. These activities have just started in the developing countries; however the perception and determination there are still different to some extent. There have been attempts to address it by way of criminal law and by other programs and measures in different arenas. Of course recourse to criminal law may not be the optimal solution but it is necessary in regard to the gravity and current situation of bribery. As a researcher I see the need to use criminal law as an essential tool and I also identify the difficulties posed by and the problems with such use. These encourage me to study bribery from a criminal law point of view.

This study is essential result of my PhD studies for over four years within the Joint Doctoral Program of International and Comparative Law between Hanoi Law University

of Vietnam and the Faculty of Law at Lund University of Sweden. It would have been impossible without the supervision, encouragement, help and advices from all those to whom I am indebted. It is impossible to acknowledge all these persons by name. First of all, I would like to express my general gratitude to the members of the Faculty of Law at Lund University. I would like to thank specifically the persons who have particularly made invaluable contributions to my research. I am deeply grateful to Assoc. Prof. Christoffer Wong who has taken an interest in my research, introduced me to relevant research and provided advice and comments that made my research process enlightened. I would like to give my special thanks to Asst. Prof. Bengt Lundell and Prof. Christina Moël who have throughout the years provided help, encouragement and sympathy. I must not forget the help provided by the Faculty Library. I would also like to thank My Dung Ho, a master student at the Faculty of Law for her translation into English of the relevant part of the commentaries on the Swedish Penal Code, including several cases, this due to the fact that I cannot read Swedish.

Next I would like to thank the professors participating in the three prolongation seminars for evaluating my research over the last four years and from whom I received many thoughtful and helpful comments and suggestions. Especial thanks must be given to Professor Lê Thị Sơn and Assoc. Prof. Christoffer Wong.

In addition, people at the other academic institutions I have visited during the course of my research have been very kind and helpful. It was my great honour to be a visiting fellow in these institutions, enjoying wonderful research environment and obtaining a good outcome for my own work. In particular, thank so much to the professors, staff and librarians at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany and at the Faculty of Law of New South Wales, Australia for providing me with help and research assistance. I wish to especially express my gratitude to Professor Jill Hunter, Christopher Lemercier, Robyn Bennett-Healy and Thuy Van Nguyen to whom I am indebted not only for help in doing research but also for caring for me during the time I was at the Faculty of Law of New South Wales. Furthermore I had the chance to interview and discuss matters with wonderful and kindhearted people while doing this study. Professor Madelene Lejonhufvud who used to be chairperson at the

Swedish Institute against Corruption and professor at Stockholm University is a person I will never forget because of my interesting meeting with her and a discussion of Swedish criminal law on bribery. In addition, I am really grateful to Lars Korsell at Brottsförebyggande rådet of Sweden (National Council of Crime Prevention) for giving me some information about the situation regarding bribery in Sweden and for providing me with statistics. It was also a great honour to meet with Justice Rod Howie of the Supreme Court of New South Wales, Deputy Director of Public Prosecutions Commonwealth Jolliffe Jim and David Wong, an officer of the NSW Police Integrity Commission, receiving answers from each of them involving bribery criminal law and bribery practices of Australia. Thank you so much for these meaningful meetings.

I am also grateful to SIDA (the Swedish International Development Agency) and its “Strengthening Legal Education in Vietnam” project for financing my research. Especial thanks go to Associate Professor Bengt Lundell, Associate Professor Lars-Göran Malmberg, Professor Lê Hồng Hạnh, Professor Lê Minh Tâm and Professor Lê Thị Sơn for their support during my research. In addition, I am grateful to the competent people at the Faculty of Post-graduate and the Department of International Co-operation of Hanoi Law University and at the Faculty of Law of Lund University for helping me with procedures for going abroad, housing and other practical matters.

I would also like to deeply thank Hanoi Law University for providing me the facilities for doing research during over last four years. My gratitude also needs to be expressed to my colleagues at the Faculty of Criminal Law of Hanoi Law University for their encouragements and help during the time I was doing my thesis. I must thank so much people at Vietnamese legal agencies and institutions such as the People’s Supreme Court, the People’s Court of Hanoi, the National Institution of State and Law, etc., who provided me with relevant information, statistics, judgments and materials.

The persons to whom I am most grateful are naturally my supervisors, Professor Per Ole Traskmån of the Faculty of Law at Lund University and Professor Nguyễn Ngọc Hòa of Hanoi Law University. As supervisors, they not only gave me instructions and suggestions but also encouraged me to develop ideas myself. Professor Per Ole Traskmån

even helped me with checking a translation of the Swedish Penal Code and other Swedish legal documents concerning my research, additionally arranging meetings for me with experts and practitioners in the area of my study. They have provided me with insightful comments and have discussed essential issues of the thesis with me. I must say that I could not have completed my research without their help and encouragement.

Finally, my friends and my family have contributed the greatest and warmest support and encouragement. Thank you my fellow doctoral candidates and also my friends for help and chat, cheering me up when I felt sad or pessimistic and discussing idea with me when I was stuck. My special gratitude is given to my best friends (and also my colleagues) at the Faculty of Criminal Law of Hanoi Law University Dr. Nguyễn Tuyết Mai and Dr. Dương Tuyết Miên who not only encouraged me but also helped me both by assisting my research and sharing my difficulties. I would like to express from the bottom of my heart my greatest indebtedness to my mother, my sister, my parents in law and, above all, my husband and children who shared with me the difficulties and the happiness. I have the greatest sympathy for them on account of my spending so much time on doing research instead of taking care of them. This study is dedicated to you all.

It is necessarily to say in this Preface that I bear sole personal responsibility for the ideas and arguments presented in this thesis.

Hà Nội, 14 January 2011

Le Thu Dao

[Đào Lê Thu]

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## List of Abbreviations

CAER	Centre for Australian Ethical Research
COE	Council of Europe
CPI	Corruption Perceptions Index
CTH	Commonwealth
GRECO	Group of States against Corruption
EUR	Euro
EU	European Union
ICC	International Criminal Court
ICAC	Independent Commission Against Corruption
MCCOC	Model Criminal Code Officers Committee
NIS	National Integrity System
OECD	Organization for Economic Cooperation and Development
Para.	Paragraph

PMU	Project Management Unit
SEK	Swedish Crowns
SIDA	Swedish International Development Cooperation Agency
UK	United Kingdom
UN	United Nations
US	United States of America
U.S.C.	United States Code
VCCIA	The Central Committee of Internal Affairs of Vietnamese Communist Party
VCP	Vietnamese Communist Party
VCLEPG	Vietnamese Commission of Legal Education and Propaganda of Government
VND	Vietnam Dong

## INTRODUCTION

### **Background**

The protection of government and their public officials from corruption has recently been under consideration all over the world. Every state is aware that the stability and transparency of government are essential factors to secure State's development and citizens' lives and property, to ensure the rule of law and to get the public's trust in government. In order to maintain the security of society, public fairness and official responsibility before the law, public officials need first and foremost to be free from corruption. However, the world now has to confront with the seriousness of the problems and threats posed by corruption. Corruption is a high-profile issue of all countries, both developed and developing. Corruption-related activities have occurred with increasingly high frequency that is affecting the stability and security of societies, damaging the institutions and values of democracy, ethical values and justice and putting danger to sustainable development and the rule of law. Moreover, the links between corruption and other forms of crime - especially organized crime and economic crime - are found around the world. In addition, corruption has made many public officials become degenerate. As a result, they misuse of official powers that harm both individual and the public for improper benefit. Furthermore, corruption is now not only a national problem but also a trans-national phenomenon, making all societies worried.

Recently, there have been more and more cases of corruption. Corruption cases are seen as disasters "that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those State"<sup>1</sup>. Corruption is still rampant in 70 countries, says Corruption Perceptions Index (CPI) 2005.<sup>2</sup> Moreover, more than two-thirds of the 161 nations surveyed in Transparency International's 2006 CPI scored less than 5 out of a

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<sup>1</sup> Preamble of the United Nations Convention against Corruption.

<sup>2</sup> At: <http://www.transparency.org>. The CPI measures the perceived level of public-sector corruption in different countries and territories around the world. The CPI can be considered a survey of surveys because it is conducted based on different expert and business surveys. The higher the score that a country obtains, the cleaner the government is deemed.

clean score of 10, indicating serious levels of corruption in a majority of the countries surveyed. Despite progress on many fronts, including the imminent entry into force of the United Nations Convention against Corruption, 74 countries, nearly half of those included in the Index, scored less than 3 on the CPI, indicating a severe corruption problem. On this CPI, Vietnam is in the 111<sup>th</sup> position and scored 2.6.

At the moment, there is a notion that “the prevention and eradication of corruption is a responsibility of all States”.<sup>3</sup> This means that we should use various and effective measures and policies to prevent and control corruption, including the recourse to criminal law. An OECD official states, “Governments have understood that it deserves to be a criminal offence. This is a point worth underlining. Governments have recognized bribery as a crime for a good reason - because of the tremendous harm it causes” (Grurria 2006).

As many other countries, Vietnam has been engaging in activities that show a determination to combat and control corruption. For instance the Government signed the United Nations Convention against Corruption on 10<sup>th</sup> December 2003, joined the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific in June 2004, enacted the Act on the Prevention and the Fight against Corruption on 28<sup>th</sup> November 2005 and ratified the United Nations Convention on 19 August 2009.

However, Government anti-corruption efforts remain predominantly dependent on national affairs and discussions. The situation of corruption in Vietnam is alarming and bribery offences are worrying society. The situation regarding such offences is complicated and dangerous. A number of bribery offences involving high-ranking officials, including those in judiciary have recently been committed and people are losing their trust in public officials’ impartiality and fairness. Bribery has nowadays been spreading into many fields of society, such as trade, construction, finance, sport, education, the judiciary, medicine and so on. Some high-ranking officials in Vietnam have been convicted of committing bribery offences but many others, in spite of being discovered by the media or investigated, were not convicted and this for many reasons.

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<sup>3</sup> Preamble of the United Nations Convention against Corruption

Bribes hide behind many kinds of name such as gift, reciprocity, graft, payoff and kickback. This becomes one of the obstacles in the fight against bribery. It must be said that the Vietnamese people's perception of bribery is still unclear as well as negative. So far as Vietnamese legal practitioners are concerned, the criminal provisions concerning bribery are neither adequate nor clear too.

In order to make my own contribution to the fight against corruption, this research wishes to resolve some problems concerning bribery offences from criminal law point of view, which are, indeed, the subject of this study. The topic "*Bribery offences under Vietnamese criminal law in comparison with Swedish and Australian criminal law*" needs to be studied for the following reasons:

*First*, Vietnam as well as Sweden and Australia, despite many differences in politics, economic development and culture share the consideration of bribery problems. These countries are aware of the necessity of preventing and fighting bribery. They all consider that one of the essential instruments to prevent and control bribery is the criminal law. The approaches of these different countries on bribery should be analyzed and compared, because the result will help Vietnam reinforce and strengthen its penal system as it applies to bribery.

*Secondly*, bribery is subject to criminal law liability in Vietnam as well as in Sweden and Australia. Sweden and Australia have, to a considerable extent, succeeded in controlling bribery through criminal law. In other words, Swedish and Australian criminal laws have really acted as an effective instrument to prevent and limit bribery. Whereas Vietnam still has difficulties in applying criminal law to bribery offences and the enforcement of the law is inefficient and inadequate. Some of the reasons can be attributed to the lack of clarity in and shortcomings of the law on bribery. Therefore, our criminal law needs to be clarified and improved.

*Thirdly*, in Vietnam the fact that practices such as receiving bribe and giving bribe have been growing. These activities make people doubt the transparency of the government. However, in spite of the increase of bribery, few cases involving bribery are punished through the criminal law. We can therefore say that there is a big difference between the

quantity of bribery activities and the number of convictions for bribery offences. This fact requires us to find problems for it relating to criminal law and their solutions.

*Fourthly*, among different kinds of corruption, bribery can be considered as a very “traditional” and typical form. It is also a pervasive and complicated illegal act nowadays. Indeed, using criminal law to control bribery is not a new phenomenon in Vietnam, Sweden or Australia. However, little research has been performed on this topic. There are only a few historical and sociological books, commentaries and articles, regarding one or more issues regarding bribery. Most of these materials only mention current criminal laws in general. Finally, they mainly focused on the domestic bribery law.

The above-mentioned facts become reasons for studying and understanding bribery in the light of criminal law and through a comparative approach. The actuality of the subject reflects the needs of society and this in turn is based – internally – on the perception of bribery as a problem to be dealt with by criminal law and the state of the existing law; and – externally – whether there is a need of compliance with international commitments. Based on bribery issues seen from both internal and external aspects, the current situation in Vietnam very much warrants its being studied of bribery in a doctoral thesis.

*Why does the author choose Swedish and Australian criminal laws as other penal systems for this comparative research?* First, these laws belong to different legal families. The Vietnamese legal system is rooted in the civil law tradition. In contrast, Australian law is a type common law. The Swedish system belongs to the civil law family, but it shares some characteristics with a precedent-based system. This all attracts comparative law researchers. The way of dealing with complex matters in bribery cases by way of case law in addition to legislation is something Vietnam also needs to study. Secondly, although in different continents, Sweden and Australia are both good examples of controlling corruption and bribery. In the Transparency International’ Corruption Perceptions Index of 2006, Sweden scored 9.2 and ranks at 6<sup>th</sup>, Australia scored 8.7 and ranks at 9<sup>th</sup>. These very impressive results showed the effectiveness of the fight against bribery waged by the two countries. So comparative research on Vietnamese law with

Swedish and Australian laws on bribery and studying the way they apply their laws to prevent and combat bribery seems both necessary and meaningful for Vietnam.

### **Aims of the Research and Research Questions**

The main aim of this research is to examine and make comparative analyses of the laws of the three countries on bribery offences. The discussion, based on the theories relating to bribery offences and the current law of the three countries, is to find out why it is sometimes difficult to punish bribery by way of the criminal law. Next, aim is to give suitable suggestions for dealing with difficulties in interpreting and applying the criminal law on bribery. In addition, the research will also highlight a number of shortcomings of the law in question and make a number of recommendations for improving Vietnamese legislation. The comparative aspect of the research should locate and provide useful legislative experience from Sweden and Australia which Vietnam can apply when revising its criminal law on bribery.

In order to obtain all the purposes, the research will concentrate on solving some major questions. *First*, what is bribery from international and different national points of view? *Second*, what does bribery look like under present international and national criminal law? *Third*, what is the situation regarding bribery in Vietnam in comparison with what it is in Sweden and Australia? *Fourth*, what are the difficulties of applying Vietnamese criminal law on bribery and what are the experiences of Sweden and Australia in the matter? *Finally*, what are the solutions recommended for the shortcomings and obscurities in the Vietnamese penal law on bribery?

### **Delimitation**

The thesis presents a study on bribery offences from a criminal law perspective. As it belongs to the field of comparative criminal law, the thesis will go deeply into the three criminal law systems relating to bribery offences and then compare them.

There are many issues concerning bribery. However, in the scope of this thesis, the analysis will mainly focus on bribery-related offences in terms of the law on such offences. Some criminological issues will be addressed, such as the situation and causes



of bribery offences. The purpose of presenting such issues is to examine the role and effectiveness of criminal law in connection with the situation of bribery in the countries compared. This thesis will of course focus on theoretical and practical issues of bribery in respect of Vietnamese, Swedish, and Australian criminal law.

Some interesting but not immediate topics relating to the offences, such as the investigating techniques and public reaction will be left out. In other words, many aspects of criminology and procedure will not fall within the scope of the research.

The subjects of comparison in this thesis will be Vietnamese, Swedish and Australian bribery criminal law. Accordingly, the analysis will focus on such criminal law systems. Furthermore, because Vietnam, Sweden and Australia have signed or ratified certain International Conventions on bribery, these legal instruments will also be considered.

### **Literature review**

Bribery is a not new phenomenon. Bribery offences can be regarded as traditional crimes as they have long been provided in criminal law. Consequently, such offences should have been much studied by researchers. Moreover, bribery has become more complicated and more dangerous recently which also requires researchers to pay attention to the phenomenon. However, research concerning bribery in terms of criminal law seems to be lacking. Whereas quite an extensive literature exists on the question of corruption in general, the issues concerning bribery in particular have not received as much attention. It is therefore possible to make some real contribution to scholarship in this area.

In Vietnam there were very few criminal law researches concerning bribery offences. Moreover such offences were only viewed from the standpoint of Vietnamese criminal law only. In addition, these researches mainly considered corruption in general, not going deeply into bribery offences. Furthermore, most research on bribery offences in Vietnam took a criminological approach. Some notable research (books, text books, articles) can be referred to here. From the criminal law perspective, studies such as *Studying criminal liability for crimes relating to public positions*, by Võ Khánh Vinh, 1996; *Commentaries on the Penal Code of 1999*, by Legal science Institute - Ministry of Justice, 2004 and

*Textbook on Vietnamese Criminal Law of Hanoi Law University*, Book 2, 2005 mention bribery offences among other crimes relating to public positions. However these researches do not analyze cases (applications of the law) of bribery. From a criminological viewpoint, such researches as *Situation, Causes and Solutions to prevent and combat corruption crimes*, Doctoral Thesis by Trần Công Phàn, 2004 and *Modern Criminology and Prevention of Crime*, by Nguyễn Xuân Yêm, 2001 did present and analyze issues concerning corruption in general and bribery in particular. However, it seems that practical issues relating to bribery offences occurring in Vietnam received insufficiently concern and attention.

In regard to bribery in an international context, there are several books that consider corruption in general and bribery in particular, for instance “*Bribes*” by John T. Noonan, Macmillan Publishing Company, New York 1984; *Corruption: Its Nature, Causes and Functions* by S. H. Alatas, Avebury Gower Publishing Company Limited, 1990; “*Corruption and Government - Causes, consequences, and reform*” by Susan Rose-Ackerman, Cambridge University Press, 1999; *Explaining Corruption* by R. William ed., Edward Elgar Publishing Limited, 2000; “*Fighting corruption in Asia - Causes, Effects and Remedies*” by John Kidd and Frank-Jurgen Richter editors, World Scientific Publishing Co. Pte. Ltd, 2003 and “*Corruption and good Governance in Asia*” by Nicholas Tarling (ed), Routledge, 2005. However, these researches focus on such phenomena in the light of criminology and sociology. Materials looking at it in the light of criminal law are very few. Some studies at international level such as *The OECD Convention on Bribery – A Commentary* by M. Pieth, L. A. Low and P. J. Cullen, eds., Cambridge University Press 2007 focus on international instruments relating to bribery; some others mention national law, including Swedish and Australian law. A study concerning criminal law on corruption of Vietnam in comparison with German criminal law conducted by Trần Hữu Tráng in 2008 with the title “*Korruption im Bereich von Amtstätigkeit Ein strafrechtlich-kriminologischer Vergleich zwischen der Bundesrepublik Deutschland und der Sozialistischen Republik Vietnam*” also paid attention on the concept of corruption offence, elements of corruption offences under the two penal systems and some issues of criminology regarding corruption offences. But approaching bribery offences from the criminal law perspective can be said to be inadequately done.

Reviewing studies regarding bribery, one sees that doing research on bribery offences from a mainly criminal law approach, though coupled with some criminological issues in Vietnam, is still going to be useful. Comparative analyses in relation to international and foreign theories and law will make the research both globalized and objective.

### **Materials and Methods<sup>4</sup>**

As noted above, there has not been much previous consideration of this topic. The material is therefore limited. This is an analytical treatment of the limited amount of material contained in the foregoing studies, being a study focusing on legal instruments addressing the topic questions. The resources used will mainly encompass law (such as Penal Codes), Government Bills, and Reports on bribery, including relevant legal documents from the United Nations, the OECD and the Council of Europe. More literature was collected from Vietnamese, Swedish and Australian law journals and other periodicals will also be used.

The main aim of this thesis is to examine the law of the three relevant countries on bribery offences; the regulation-oriented approach is thus applied along the lines of traditional legal method. Accordingly, legal points of view, the current law on the phenomenon and their problems are studied mainly through the analytical method. Historical legal method is also used somewhere in order to show the relationship between current and earlier legislation. Additionally, the conclusion and some summaries or general evaluations of the laws on bribery offences are presented through the synthetic method.

Other methods are further used including the law and philosophy method, the law and politics method and the law and sociology method, all in order to analyze and explain the context in which bribery offences appear and develop, to justify the need of using criminal law for combating bribery and to explain why bribery has been regulated with certain requirements and in a certain manner. Moreover, empirical studies are referred to find out the main reasons for the difficulty in applying the criminal law on bribery. Some

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<sup>4</sup> For the description of the methods have been used in this thesis I mainly based myself on the study “Methods in legal research” by Lidgard, Hans Henrik et al. (2006) in the Document of Research Methodology for Joint Doctoral Program at Faculty of Law of Lund University in 2006.

practitioners and agencies (e.g. judges/courts) are consulted to assist in the matter of law application. The data were collected from empirical studies and reports of competent authorities. The collected data was then classified and processed to comprehend analysis of the situation of bribery offences and the question of applying criminal law to bribery.

Finally, because this research is a comparison between Vietnamese, Swedish and Australian laws, the similarities and differences between the three criminal law systems on the topic are reviewed by the comparative law method. This method becomes one of the main methods used in the thesis. This is obviously the case for the comparison between Vietnam and Australia and Sweden – this being a comparison between different national legal systems. As for the international conventions, that is, the United Nations Convention against Corruption, the European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States, the Council of Europe Criminal Law Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in the International Business Transactions are concerned, the degree of compliance of national law with these international instruments is also viewed through a comparative approach. By comparative method, the compliance of Vietnamese law with relevant conventions can be clearly seen. Moreover, the similarities and differences between Vietnamese law and other comparative legal systems are also pointed out and explained. Finally the results of comparative analyses are used in providing recommendations for Vietnamese law in dealing with bribery offences. The comparison of law made by comparative method shows the fact that there is not a perfect criminal law on bribery offences in every country in this study. Vietnamese criminal law on bribery has its reasonable and suitable provisions. Therefore using comparative method does not mean to support all similarities and to criticize all differences. Comparative analyses suggest Vietnam should not learn everything from other systems or copy bribery law of other countries.<sup>5</sup>

The foreign and international part of the thesis, as well as the theoretical part, is based mainly on material written in English. Most of the information on the law is obtained

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<sup>5</sup> I wrote an article discussing deeply on the topic of comparative criminal law. See Đào Lê Thu (2008), “The role of comparative law in legislating criminal law of Vietnam”, *Jurisprudence Journal* (1), pp. 54-58.

through legislative texts, conventions, preliminary and explanatory reports as well as some monographs and journal articles. I have included materials about Swedish law that are not available in English, including commentaries on the Penal Code and some of the case law. These are materials that I have access to through a translation by a Swedish law student and through a meeting with Professor Madelene Lejonhufvud who is the writer of the bribery offences part of the Commentaries on the Swedish Penal Code. Professor Per Ole Traskmån of the Faculty of Law at Lund University as my supervisor has confirmed and controlled the Swedish material. The reliability of what I have gained via such material is also confirmed by some official reports mentioned in the thesis.

As for the Vietnamese material, a large number of actual cases have been mentioned in Chapter 3 on factual issues relating to bribery in Vietnam. There is no doubt that there should have been a systematic search of all bribery cases in Vietnam but it was impossible to do this due to relative lack of public access and the sensibility of the issue. I have tried to collect as many cases as possible, especially ones occurring in big cities such as Hanoi and Ho Chi Minh because these are often high-profile ones. However that is not the most important criterion for selecting cases. The main criteria have been used for selecting such cases are their typicality for illustrating the situation of bribery and the successes as well as weaknesses of the application of the law. I have to admit that some cases came to my attention by chance. For the cited cases I have done research at different levels. For cases where I could obtain the indictment and the judgment, information came directly from these. For others that I had access to by internet sources, I had summaries of the cases and tried to cross-check the information. The internet sources that I used are all official sites in Vietnam. It should be noted the use made of the information presented in these internet web sites is permitted by the Vietnamese Government.

### **Overall Structure of the Study**

The structure of the thesis is presented in the logical form of background – problem and current law – practical experience – empirical facts and causes of deficiencies – recommendations for solutions.

An introduction to the thesis briefly presents the research. It focuses on problems of bribery offences from a criminal law point of view that need to be studied, the purposes of the study and the methods used in doing the research.

After the Introduction, Chapter 1 takes as its point of departure of both theoretical and practical issues relating to such offences. In the first chapter, I argue that the understanding of bribery offences in the light of criminal law is related to four main issues, namely the idea that the concept of bribery is perceived as a kind of corrupt offences, which should be understood in a modern and broad way to include bribery in the private sector, bribery of foreign public officials and some other types in regard to gift-giving; the idea that the criminalization of different types of bribery is dependent on social attitude towards the phenomenon, culture and the need to protect values concerning not only government system but also private interests; the idea that some elements of bribery offence such as the bribe and the bribe recipients need to be broadened to meet modern concepts of bribery; and lastly to this is the idea that the policy of punishing bribery offences needs to be flexible for ensuring both the sufficient severity to prevent and combat such offences and adequate lenient to encourage offenders to voluntarily report crimes, due to the fact that it is very difficult to find evidence in bribery cases. Chapter 1 also addresses issues of bribery as approached by international law to strengthen the theoretical issues and in addition to aforesaid issues to establish a framework for later analyses and comparison.

In Chapter 2, I examine the existing criminal law of Vietnam regarding bribery offences in comparison with that of Swedish and Australia. The chapter not only presents the law but also examines whether Vietnamese as well as Swedish and Australian law is compatible with theories and in conformity with international obligation. I have used the modern definition of bribery offence to analyze the present law and the interpretation of the law on bribery. In the second chapter, the scientific presuppositions laid down in Chapter 1 are demonstrated. In this part I also discuss perceptions of current law. Through reviewing Vietnamese, Swedish and Australian criminal laws on bribery offences, I find the confirmation of the theories mentioned in Chapter 1. Domestic laws on bribery indicate considerable consistency with relevant criminal law theories. In

addition, the criminal law of each of the three countries provides for elements of bribery offences that are very similar to international standards under the relevant Convention. There is no doubt that what is required by these Conventions e.g. the criminalizing of prevalent types of bribery, the elements of the offences, the nature and coverage of such concepts as ‘public official’, ‘bribe’ and so on, are fulfilled by each country’s law.

In the third chapter, the situation of bribery as a factual problem is investigated. The main causes of such offences are also discussed. It is argued that there is a link between public attitudes to bribery and the degree of its prevalence and this matches the situation of bribery in the three countries. Through empirical studies and a comparative approach it has been shown that Vietnam, Sweden and Australia share the situation of bribery that a low level of bribery activities leads to convictions in comparison with other areas of crimes. Reviewing the situation of bribery offences in these countries one sees that almost prevalent types of bribery occurred. The most frequent type which leads to convictions is bribery in the public sector. Bribery of a normal and petty nature was more likely to be convicted while political or high-profile cases were rarely proven guilty or came to light. The existence of hidden bribery offences could be the case in each of these countries. Accusations of bribery may be politically motivated. This situation proves what was presumed in the theoretical discussion. The three countries share similar problems in the enforcement of bribery criminal law which could lead to bribers and others discounting the risk of being punished. One more similarity shared between these countries is that the low level of convictions of bribery may be due to the ambiguity of the bribe or the definition of the bribe recipient. The situation of bribery offences in Vietnam, including the problems of hidden offences, is much worse than that in Sweden and Australia. Among the three countries, the Vietnamese model of bureaucratic administration and the dependence of lower authorities on higher ones can be taken as two of the key causes of bribery there. For Vietnam it is apparent that bribery is mainly caused by policies and institutional mechanisms that created a high level of official independence and greed. By contrast, Sweden and Australia are successful in fighting bribery by openness and transparency.

This chapter also addresses the issues of the application of the law. Because case law is not recognized in the Vietnamese legal system, I have to deal with cases of bribery as matters of the application of law. This means that this part presents the way law is interpreted and applied in fact. Examining the issues in question, there is no doubt that the application of the law on bribery offences in Vietnam, Sweden and Australia does obtain good results though to different extents. The three countries share some difficulties and weaknesses in their law enforcement and judicial functions. Factual presentations show both the efficiency and the inefficiency of the law as well as the functioning of legal practitioners. Having once considered the weaknesses of Vietnamese criminal law and law enforcement authorities in practice as well as the experiences learnt from Sweden and Australia, Vietnam may overcome these difficulties and improve its criminal law in the fight against bribery offences while also making its law enforcement more effective.

Based on the analyses in the previous chapters, Chapter 4 gives recommendations for the revision and application of Vietnamese criminal law. Before giving particular recommendations, I present some guiding principles as prerequisites for my recommendations. In this chapter I present systematic and overall recommendations for amendments to and the interpretation of the criminal law on bribery. Such proposals and solutions are made in the light of relevant theories and in compliance with the Conventions regarding bribery offences. In addition, my recommendations express the current need for revision and interpretation of the law. One sees that the recommendations given here are the obvious results of the arguments, analyses and comparisons made in the course of the research. Finally, a few remarks have been added as a final conclusion to the study as a whole.



## CHAPTER 1

### GENERAL ISSUES RELATING TO BRIBERY OFFENCES

#### **1.1. Theoretical Issues relating to Bribery Offences**

##### *1.1.1. The Concept of Bribery Offence*

The core concept of this research is, of course, the bribery offence. However, in order to carry out in-depth analyses of different theoretical approaches to the concept ‘bribery offence’, the phenomenon of bribery itself should be discussed as well. The concept of bribery as a phenomenon has been studied from various perspectives, including politics and sociology (Noonan 1984, Michell 1996, Rose-Ackerman 1999, Andersson 2002, Lennerfors 2007); economics (Arvis and Berenbeim 2003, Lambsdorff 2007); criminology (Van Duyne 1996, Reid 2000, Trần Công Phàn 2004, Green 2006); and criminal law (Lanham 1987, Võ Khánh Vinh 1996, Bogdan 2002, Leijonhufvud 2003). Bribery has been addressed in numerous legal instruments and academic publications over a long period, though it is usually approached by way of the broader concept “corruption”.

An issue needs to be resolved is the difference and the relationship between corruption and bribery. Studies indicate that bribery is the most typical and serious type of corruption. In some research projects the concept of corruption and the concept of bribery are understood as essentially the same. In other words, the term ‘bribery’ is considered as another name for corruption and vice versa (Van Duyne 1996, Rose-Ackerman 1999, Heidenheimer 1998). However, corruption is generally perceived as a broader concept. A traditional and common definition of corruption describes corruption as “behaviour which deviates from the normal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence” (Nye 1967: 419). Studies show that the core idea underlying most contemporary definitions is that corruption involves the use of public office for private gain (Nye 1967; Della Porta and Vannucci 1999; Trần Công Phàn 2004). In the legal sphere, corruption is often used as a name for

activities such as misuse of public office, embezzlement, bribery (Nye 1967: 966; the US Department of Justice). For example according to the Department of Justice of the United States, the abuse of public office (corruption) includes offences such as bribery, extortion and conflict of interest.<sup>6</sup> From this point of view, bribery is a type of corrupt practices. Other authors share the view that corruption encompasses more than bribery (Johnson and Sharma 2004) albeit bribery is one of clearest and most obvious types of corruption (Andersson 2002: 51).

In Vietnamese studies, the perceptions of corruption and bribery do not seem very different. Trần Công Phần (2004:8) in his dissertation on corruption considers that corruption can be seen from moral, economic and political aspects. He concludes that from the moral point of view, corruption is immoral action; from the economic view it is the public official's misuse of public authority in economic area, and from a political (state and law) approach, corruption is attributable to the misuse of state power for private gain. However, almost all Vietnamese authors consider corruption and bribery as separate concepts though they are thought to be related to each other. Corruption is understood as the abuse of public office activities committed by public officials, while bribery can be committed by both public and non-public officials (Võ Khánh Vinh 1996; Trần Công Phần 2004; Đinh Văn Quế 2006). Accordingly only active bribery (giving bribes) falls within the scope of the concept "corruption". The definition of corruption thus does not entirely cover the concept 'bribery'.

The nature of bribery can be seen from various aspects. From the social point of view, bribery is considered as a deviant form of reciprocity. "Bribes are species of reciprocity. Human life is full of reciprocities. The particular reciprocities regarded as bribes in particular cultures are distinguished by intentionality, form, and context" (Noonan 1984: xiii). Accordingly, bribery can be seen as a negative social phenomenon, perhaps a misuse of good traditions or customs from the past, such as gift-giving or gratitude tradition. The wrongfulness of bribery may not be perceived or may be perceived to a different extent, much depending on the culture and traditions of each society. The perception has its impact on the policy to bribery and affects the law on bribery. This

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<sup>6</sup> See: Sourcebook of criminal justice statistics, available at <http://www.albany.edu/sourcebook>.

should be taken into account when making law on bribery. Further, when talking about the moral wrongfulness of bribery, Green introduces his “disloyalty - based theory” on bribery which shows that the bribe recipient is disloyal to his constituents and to the ideals of his job, even in the case of accepting a bribe to do the right thing (Green 2006: 203-211). This theory seems similar to the former notion of other authors when they pointed out the betrayal of trust as a condemnable and critical feature of bribery (Noonan 1984; Alatas 1999). Bribery is therefore condemnable disloyalty from the moral point of view. The nature of bribery seen from the social view initially justifies for the necessity of combating it through legal means.

In regard to the political aspect, bribery has been seen as a tool used for the exchange between political power and property. “Bribery is one of the perquisites of power and a common coin of exchange between power and wealth” (Reisman 1979: 39). Bribes are considered improper gifts given by and for the political power. Via bribery, political power makes money; equally money can buy political power. Bribery also shows one of the negative effects of a political hierarchy. It becomes an instrument for getting and maintaining political power as well as leading to impartiality and inequality in society. Andersson (2002: 4) argues that it reduces trust in both politicians and the system. Bearing in mind the seriousness of bribery in political area, the need to fight it by the tool of criminal law is obvious.

From the public administration perspective, bribery is unanimously perceived as a form of corruption. In my opinion, bribery undermines the public administration, making governments of all levels become bureaucratic, slack and non-transparent. It also destroys the morality, integrity, honesty and responsibility of public officials. As a consequence, it destroys the public’s trust in government and public officials. The phenomenon and its consequences are seen in much research mentioned in this study. It is noted that “where there is a systematic bribery of a number of officials it is likely that the department is badly run and that morale of the executive staff is low” (Van Duyne 1996: 163). Bribery tends to occur where the government’s works lack transparency and a sense of morality. The nature of bribery viewed from this perspective explains why bribery offences are usually categorized as offences violating public administration or business offences.

Taking a legal approach, bribery is supposed – held all over the world – to constitute illegal acts of exchange of improper benefit. Such an exchange is carried out through a two-sided relationship. On the one hand, the briber gives an improper benefit in order to ask or require the bribe receiver to do or not do something. On the other hand, the receiver misuses his position or office to supply the giver's demand in exchange for benefit. The nature of such an exchange is of misuse of office for obtaining an improper advantage. Bribery is supposed to be illegal due to such wrongful nature.

In brief, bribery is in any perspective perceived as having an immoral, harmful and illegal nature, damaging to several values of society. It is a very serious type of corruption. Its wrongfulness easily justifies the necessity of resorting to criminal law and severe punishments in the fight against it. Bribery should be criminalized in ways that it ensures its wrongfulness can be clearly identified so that people do not misunderstand what is behind the concept.

Being the central concept in this chapter, the definition of bribery should logically be approached first. A clear and comprehensive definition of bribery is the essential starting point for all analyses. Since the phenomenon is the subject of various sciences, the concept has been defined differently, depending on the area in which bribery is being studied as well as the criteria upon which it is based to be defined. Reviewing the research concerning the topic, some typical definitions of bribery were discovered.

*The first model* for defining bribery characterizes it in a simple way, reflecting the nature of the subject. In my opinion, these may be called 'simple definitions'. Take the definition by Langseth as an example. He defines "[b]ribery is the bestowing of a benefit in order to unduly influence an action or decision. It can be initiated by a person who seeks or solicits bribes or by a person who offers and then pays bribes" (Langseth 2006:10). Similarly, another brief definition of bribery is given as "[b]ribery - tendering and accepting a private reward for defection from a manifest duty" (Reisman 1979: 2). The advantage of such definitions is that it describes both sides of bribery: giving and receiving of improper benefit. These two definitions can be considered general descriptions of bribery as a whole. Moreover, the concept does not limit bribery to any

area or sector of social life. However, the weakness of this model is that the definitions do not reflect the particular purpose of bribery which is that it is supposed to influence the official's exercise of duty so that the giver will be treated with favour. In addition, the feature of the bribe recipient is not expressed. Consequently, the definitions hide some important characteristics of the subject.

Bribery is, due to its complex and two-sided nature, not easy to define. Thus, the definition is sometimes given in an unusual form and this constitutes to *the second model* of defining the concept. Such a model results in 'special definitions' of bribery. For instance, Green (2006: 194) gives a "framework" which he calls a "working definition" of bribery: X (a bribee) is bribed by Y (a briber) if and only if: (1) X accepts, or agrees to accept, something of value from Y; (2) in exchange for X's acting, or agreeing to act, in furtherance of some interest of Y's; (3) by violating some duty of loyalty owed by X arising out of X's office, position, or involvement in some practice." This definition looks like a prescription of the procedure of bribery's occurrence with all its notable elements. This adequate and rather detailed prescription reflects the relationship between a bribe giver and a bribe recipient as well as what each wants to gain from this relationship. In addition, the key feature of the recipient's being an office holder or position holder is included in the definition. Such a definition also expresses both parties' activities in a bribery transaction. Moreover, the definition seems to cover bribery in both the public and the private sectors by having no limit regarding public officials and public duties. Establishing a similar definition, Senior (2006: 27) insists that,

The definition consists of five conditions that *must all be satisfied simultaneously*. Corruption occurs when a corruptor (1) *covertly* gives (2) *a favour* to a corruptee or to a nominee to influence (3) *action(s)* that (4) *benefit* the corruptor or a nominee, and for which the corruptee has (5) *authority*.

Although this kind of definition manifests many notable factors of bribery, it still reveals a shortcoming is that it based mainly on the action of giving payment. The action of receiving payment is not presented clearly. The distinguishing feature of this definition is that the compulsory requirement bears what the author called a "*covert*" condition. It requires the action be committed covertly if it is to constitute bribery. In an analysis later

in this thesis, I will show that several recent bribery practices have been committed publicly. The definition's requirement seems not practicable.

The second model of bribery definitions illustrates the point that it is difficult to build an adequate and comprehensive definition of bribery. These definitions contain weaknesses. However, they contain valuable suggestions for designing an acceptable definition as well as for understanding the nature of bribery.

Besides the mentioned models of bribery definitions, there are some different ways of defining the concept. Considering only active bribery, OECD defines bribery as “the offering, promising, or giving something in order to influence a public official in the execution of his/her official duties” (OECD Observer 2000). In addition, OECD establishes another definition which explains more about the nature of bribery. “Bribery is a specific form of corruption that can be defined as the voluntary giving of something of value to influence performance of official duty either by doing something improper or failing to do something they should do within the authority of their position” (OECD Bribery Awareness Handbook). Once again the definition limits bribery to public areas. It prescribes specifically the character of the recipient and the purpose of bribery and the bribe. However, the definition only approaches the supply-side and does not consider the demand-side of the bribery relation. By contrast, another definition tends to approach the concept of bribery only through the action of receiving payment “a public official is corrupt if he accepts money or money's worth for doing something that he is under a duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons” (McMullan 1961: 4).

The above definitions of bribery mainly consider the subject either in general or in the public administration area. These definitions, despite their differences of defining the subject, reflect the wrongfulness of bribery and share many common features. These will be the background for further studies on bribery offences. However, the legal aspect of the concept has yet not been considered.

Mitchell (1996: xiii) pointed out that, from the legal perspective “[b]ribery is viewed as a legal concept, with laws and regulations as interpreted by procurators and judges,

determining what constitute a criminal act.” In his opinion, the concept of bribery viewed from the legal aspect is equivalent to the concept of bribery offence. Accordingly, from the legal point of view, bribery is always a criminal offence. The ICAC of New South Wales of Australia shares Mitchell’s view by giving a formula in its website: bribery = crime.<sup>7</sup>

Taking Mitchell’s opinion as a suggestion, I go further and study the concept of bribery as criminal offence. I would like to find different definitions of the bribery offence as grounds on which to build my own definition. Reviewing studies on bribery regarding to criminal law, I found that the concept of bribery offence is often approached as falling within the offences of corruption (Nicholls et al. 2006; Trần Công Phàn 2004), offences relating to public position (Võ Khánh Vinh 1996; Đinh Văn Quế 2006), or business offences (Reid 2000). The definition, characteristics and elements of bribery offences are addressed and discussed to some extent but not always in detail. Studies provide some definitions of bribery offence that show its important features. An American scholar defines bribery as the action of offering money, goods, services, information, or anything else of value for the purpose of influencing public officials to act in a particular way (Reid 2000: 255). In this definition, the author just defines bribery from the supply-side (the briber’s activity). Therefore, that definition can be perceived as a definition of active bribery. Then the author adds “[t]he modern concept of bribery includes the voluntary gift or receipt of anything of value, in corrupt payment for an official act already done or to be done, or with the corrupt intent to influence the action of a public official or any person involved with the administration of public affairs” (Reid 2000: 255). With this addition, Reid considers also the ‘demand-site’ role of the bribe recipient. Moreover, the use of the adjective “corrupt” is important for the expression of the wrongness of bribery activities. In addition, the definition covers an element of “voluntariness” that becomes a key factor in the distinction between bribery and extortion. This has recently become a controversial matter in criminal law and in the application of criminal law throughout the world. Reid’s definition of bribery is understandable and comprehensive, showing clearly the nature of bribery actions, the character of the receiver and of the bribe. However, this

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<sup>7</sup> See at: <http://www.icac.nsw.gov.au>

definition has a limit as it only covers public bribery. There are some similar definitions in Australian law. At common law bribery is defined as “the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity” (Russell 1964: 381). The MCCOC in addition has “bribery is offering money or other benefits to public officials in order to influence them to depart from their public duty” (MCCOC 1995: 235). The ICAC of New South Wales explains that bribery includes offering or asking for, seeking or accepting money or gifts to or by government officials to obtain a benefit or favour, considering it a form of corruption.<sup>8</sup>

The above definitions of bribery concentrate on the misuse of public office for private gain as the traditional way of defining corruption. Such definitions are now receiving criticisms. The main weakness with this type of definitions is that they restrict bribery to the public sector while it is clear that bribery can occur in the private sector too (Senior 2006: 21). The second weakness of the traditional definitions is that they do not cover situation where the goal of the abuse is to benefit the official’s political party, ethnic group, etc, rather than the official or the official’s family (Gardiner 1993: 22). I agree with these scholars on the weaknesses of the above definitions. In my opinion, the bribery offence now needs to be defined in such a way that it takes into consideration of some of the new issues that have arisen in modern societies.

Looking at a range of legislation concerning bribery and commentaries to bribery provisions in the criminal law, I found that no definition of bribery is accepted equally in every nation. Different nations have different legal definition of bribery. I also recognized that there is no common definition of bribery but separate definitions of separate bribery offences in statutory law. In the light of the criminal law terminology, bribery is usually defined by way of two definitions of giving and receiving a bribe or the so-called “active bribery” and “passive bribery”. Briefly, ‘active bribery’ usually refers to the offering or paying of the bribe, while ‘passive bribery’ refers to the receiving of the bribe (Langseth 2006: 9). Similarly, Schwartz recognizes that bribe giving occurs when individuals seek

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<sup>8</sup> At <http://www.icac.nsw.gov.au>



to have officeholders use their official powers or perform their public functions so as illegally to advance the individuals' private goals. Bribe taking occurs when officeholders seek to use their official positions and powers so as to obtain illegal rewards from others (Schwartz 2004: 185). It seems impossible to establish a common definition for both sides of bribery in the criminal law area, since any definition is required to express the common features of the concept, while the concept 'bribery' consists of two sides, each with differing features.

In order to establish a definition of bribery offence that to a greatest extent fulfils the requirements of a comprehensive definition while overcoming the weaknesses of the definitions cited earlier, I see the need to go into the unique and typical features of the bribery offence in its connection with criminal law. Under criminal law, bribery can be recognized by some notable features. *First*, giving and receiving a bribe are two sides of one phenomenon - bribery. This means there are always two subjects who act in or affected by bribery, the briber and the bribed. Bribery cannot exist without the demand-supply relation between the persons in need and the power-holders. The bribe giver and the bribe recipient are required to appear in the bribery definition as prerequisites for a bribery offence to be constituted. *Secondly*, bribery can only be carried out through the use of improper advantages and the misuse of power for the obtaining of an improper benefit. Accordingly, the mutual support between the use of undue benefit and the misuse of office is characterized a feature of bribery which needs to be recognized in any definition of the bribery offence. *Thirdly*, the improper benefit or things of value to be exchanged for the misuse of office is in the common interest of both parties to the bribery affair. The so-called 'bribe' seems to be a required element of bribery offence, since it substantiates the impropriety of bribery activities. *Fourthly*, bribery can only be committed through intent. Intent to influence the recipient's duties or intent to be influenced by the bribe is a factor that makes bribery culpable. Intent should thus be a subjective requirement for the bribery offence. Intent exists even in case where the briber gives bribes due to the demand from the official or the official receives bribes due to pressured offer from the briber, since the briber or the bribed in question are both aware of the illegal nature of their activities and still decide to act. The existence of an 'influence' factor cannot deny the existence of an 'intent' factor. *Finally*, the illegality of

bribery must be established by the law. In other words, the bribery offence must be provided for in law and determined by the law, including case law. Bribery as a crime can only be punished by virtue of the principle of legality.

After recognizing the features of bribery from a criminal law perspective and considering other studies on bribery, I put forward my own definition of the bribery offence as: ‘bribery offence is intentionally and illegally offering or giving, receiving or asking, or aiding or inciting in giving or receiving things of value to or/and by position holders or authority holders or any recommended person, in order to influence the performance of the recipient’s duties.’ The definition has some advantages over the ones cited earlier. First, it extends bribery offence to activities in the private sector, because I do not limit my definition to the public sector. Second, the definition covers both active and passive bribery as well as acting as intermediaries in bribery. Further, requirements relating to such elements as the recipient, the bribe, activities, purpose of bribery and intent, are all included in the definition. The special feature of the recipient is manifested in the definition. The bribe is not limited to material things but can consist of intangible benefit. Finally, the requirement of the principle of legality is satisfied by my definition.

What I build here is of course a theoretical and general definition of the bribery offence as a whole. In later chapter concerning specific bribery offences under current law of comparative countries I will give specific and separate definitions in accordance with the respective national laws. The definition above will be regarded as the basis for theoretical analyses of the elements of the bribery offence. It will also be the theoretical framework for analyzing the law and the application of the law to bribery offences.

### ***1.1.2. Prevailing Types of Bribery***

Bribery is a complicated phenomenon that can occur in various areas of life in various forms. From the theoretical aspect, the identification of the prevailing types of bribery is helpful for understanding its dangerous nature and the necessity for the criminalization of certain types. From the practical aspect, analyses of the categories of bribery will help to see whether the law on bribery offences criminalizes a sufficient range of types of bribery, perhaps providing some further types of bribery for criminalization. In this part I

focus on analyzing the danger of each type of bribery, giving arguments for the criminalization of certain types. The practical uses of these analyses will be seen in later parts of the thesis.

Bribery can be classified according to different criteria. Van Duyne (1996: 161-169) points out six main types of corruption, based on the nature of the situations in which decisions are taken and the working environment of the persons involved. Accordingly, bribery can in my opinion also be classified in these six ways, including (1) public sector bribery between officials, (2) public sector/private sector bribery, (3) public sector/political bribery, (4) private sector bribery, (5) private sector/political bribery, and (6) bribery between politicians.

The *first type* of bribery only occurs in the public sector and commonly aims at maintaining or getting more powerful position, making more incomes, hiding illegal activities, and the like. Rose-Ackerman (1999: 82) also recognizes such a type of bribery, regarding it as indicating exchange relations between superior officials and lower officials. According to her, such a relation occurs with both “bottom-up” and “top-down” dimensions. From the bottom-up dimension, the lower officials receive bribes and then give part of them to their senior official as a sign of sharing and goodwill. At the beginning, such giving is intended to make the leaders silent with regard to their junior’s wrongful activities. Such practices are committed systematically, and then become a requirement for employment, good positions and the like. From the top-down dimension, senior officials also find it necessary to give benefits to those below them, to buy their silence. This type of bribery is considered of the highest seriousness because “the higher the proportion of corrupt officials, the easier it is to encounter a corrupt official, the lower the risk of offering a payoff, and the greater the number of individuals who expect to benefit from paying a bribe (Ibid: 124). I am of the opinion that such bribery is even graver because it creates systematic and interactive corrupt relations that are also helpful for concealing illegal activities or escaping from legal liability.

The *second type* refers to bribery exchanges between public officials or public agencies as receivers and individuals or private corporations as givers. In Van Duyne’s theory, a

legal entity is also recognized as a bribe receiver. “It is also conceivable that an entire public service unit has become corrupt by engaging in an improper exchange relationship with individuals or firm” (Van Duyne 1996: 164). Examples of this type include the case in which a company gives bribes to a state agency in forms of sponsors for entertainment activities or meals, in order to obtain favours from that agency. Such bribery has now become prevalent all over the world and may be one of the most common corrupt practices in every country. I will investigate these actual bribery transactions in the context of Vietnam, Sweden and Australia in Chapter 3 for the illumination of my hypothesis. I see the need of criminalizing this type of bribery due to its harmfulness to both state’s stability and public interest. It destroys the integrity and fairness of public officials, creating obstacles to the performance of public functions on the one hand, and harming the interests of the public as a whole on the other hand.

The *third type* of bribery occurs when public officials exchange bribes with the holders of political offices. They want to mutual support to make themselves more powerful and wealthier through bribery practices. The danger of this can be clearly seen because it is committed by powerful and prestigious actors who can even change the important institutions of the State. It seems however very difficult to detect and punish such bribery due to the strength of the power that creates and conceals these practices, especially in countries where a tradition of authoritarian political regimes still prevails. Criminalization should not consider such bribery as marginal but needs to focus on covering these types of actors in any definition of bribery offences.

Bribery in the private sector between individuals, private corporations, entrepreneurs, and the like, may be recognized as the *fourth type* of bribery. This type is also perceived as business or commercial bribery. It occurs in market economies and has been developing to be an implicit business rule in some economies. It is now accepted as a “normal” cost of doing business in several countries. Arguments for the criminalization of bribery in the private sector have been made from different points of view. From the administrative aspect although it is undeniably in the public interest that the role of public bodies is more important and the stability of the public administration should be protected to a greater degree, private bodies are also of importance. Further public sector actors have

been increasingly engaged in functions other than the exercise of public authority, i.e. tasks that are also carried out in the private sector. In addition, the terms of employment in the public and the private sector have become so similar that it is reasonable for all employees to act under similar essential liability. Reasons for the criminalization of private sector bribery can also be derived from the economic perspective. (Heine 2003: 610) analyzed the policy goals of criminalizing private bribery as being the strengthening of public awareness regarding the giving or accepting of illegal benefits in business matters; the sharpening of social consciousness to understand that corruption is not only ethically unacceptable but also counter-productive; guaranteeing the integrity of the relationship between employer and employee, avoiding distortions of competition. Private bribery has undermined the fair competitiveness of economies, leading to high prices and harming the consumers' interest. I agree that these arguments sufficiently justify the need for the criminalization of bribery in the private sector.

The *fifth type* is bribery between business actors and politicians. This includes improper exchanges of benefit between actors with economic and political power. Private companies can give bribes (in the forms of contributions, donations, and the like) to politicians or political parties for their campaigns, in order to get back “preferential treatment” from political power when doing business. Through this type of bribery money and political power can be exchanged as products in a black market. In my opinion such practices constitute bribery to gross degree of danger. The danger of such a bribery type also means legislators must make it an offence. However, this seems not to be easy in countries where politicians are not covered by the concept of ‘official’.

The *last type* in accordance with Van Duyne's classification is bribery among politicians of political parties, so it is also called political bribery. Sometimes politicians need support themselves when putting forward new policies or legislation. In this type of bribery, “[p]ayoffs are often made to obtain legislative or regulatory favors” (Rose-Ackerman 1999: 142). The danger of political bribery is hardly to be recognized, due to the complicated nature of the benefits exchanged. It moreover depends on the political regime of a country. In my opinion there is neither basis nor the capability for proving the existence of such bribery. The possibility of criminalizing such bribery seems low.

In addition, Heidenheimer (1989) classifies corruption into three categories: “black corruption”, “grey corruption” and “white corruption”, being based on the public attitudes towards corruption. Based on his theory, bribery can also be categorized into “black”, “grey” and “white”. “Black bribery” refers to bribery activities in which the wrongfulness can be clearly seen. In other words, it is definitely immoral and its nature can be easily perceived, giving rise to public condemnation. On the contrary, “white bribery” is accepted by the public and even tolerated by some of the population. It is perceived as a custom, a rule or even a cultural norm. “Grey bribery” is, as its name suggests, difficult to identify as immoral. It is situated in the middle between support and condemnation. Due to the difficulty of determining the wrongness of the two latter types it is not easy to condemn them. As a result, they are rarely criminalized. Similar to Heidenheimer’s approach, Reisman (1979) classifies bribery into transaction bribes, variance bribes and outright purchases. His classification is based on the “different impacts on the larger social system” in which bribery takes place and “different degrees of lawfulness”. In his theory, a transaction bribe is “payment routinely and usually impersonally made to a public official to secure or accelerate the performance of his prescribed function” (Ibid: 69). It is also commonly called facilitation payments or “grease money” or “speed money”. These are small payments made to speed up common administrative procedures (Arvis & Berenbeim 2003: 9). The public seems tolerant of this type of bribery or even sometimes encourages it. Facilitation payment is of course dangerous for the operation of the state machine but is not easily criminalized, due to the perception of its minor importance. Variance bribery seems more dangerous because it is paid to secure the suspension or non-application of a norm to a case where the application would otherwise be appropriate” (Reisman 1979: 75). In other words, this is payoff in order to make the giver perform his duty differently from what is required. Generally, the public does not support variance bribes, thus making them easier to condemn. The last type of bribery in Reisman’s model seems rather special among other bribes. Outright purchase is payment to buy a person who is working for an office or a company where he has the duty to be loyal, in order to make him act against his office. The payoff is buying an official who may work as an insider for a long time. In this affair, the giver acts as the purchaser and the giver sold himself (Ibid: 88-89). The conclusion seems to be that the

transaction bribe has the least affect on society while, outright purchase is the most serious type, because it destroys social systems by way of a secret infiltration. It should therefore be severely punished (Ibid: 93).

As a development of the idea, Della Porta and Vannucci (1999: 24) argue that the degree of tolerance for illegal activities among certain social groups or within public opinion may be a good opportunity for bribery. One can perceive from the mentioned models that the higher the tolerance of bribery, the less chance for bribery practices to be identified as wrongful actions and criminalized. Criminalization of bribery and the proper enforcement and the application of the law on bribery need to be supported by growing awareness of the true nature of bribery. I have no doubt that a high incidence of bribery is due to a high level of tolerance of this phenomenon. As has been observed in some cultures, the transaction bribe has even been regarded as general service available to the public (Reisman1979: 70-71). However, I suppose that people may even more be determined to get rid of bribery practices in countries where bribery occurs too often.

Recently, there have been some controversial bribery-related practices, namely gift-giving or payments for goodwill or for thing already done. Terms commonly expressing the given benefits are the so-called inducements and rewards without a prior bribery agreement. The discussions focus on the nature, the effect and the legality of these practices. As mentioned above, gift - giving has been rooted in a moral tradition, implicitly showing the giver's respect or love for the receiver. However, this tradition is misused for improper purposes nowadays.

In the first type, gifts may be given simply for setting up good relations with the receivers. Gift-giving accordingly becomes an investment for the future. The giver in question does not require the officials to do any favour for him at the time of giving the gift. But the value of gift and the frequency of giving gifts will affect the performance of the recipient's official duties. Preferential treatment for the giver will be unavoidable. "Even when a gift was not explicitly offered in exchange for favors, it was believed that there was a possibility that it might influence an official's judgment" (Park 1993: 65). The giver develops "goodwill" for the day when a favour is needed. Due to the danger of

such practices, they are now considered implicit bribery or pay-off. However, the danger of such gifts is invisible even if the gift itself can be perceived. The improper purpose and the influence of the giving in this regard are difficult to prove. Therefore, it is rarely criminalized as an offence.

The second type of gift-giving is giving rewards for something already done. There is no prior agreement between the giver and receiver about payments and things required to be done. As a result, it is thought that no influence is imposed on the performance of the duty. At first glance, it seems that nothing bad should be said about this type of gift-giving. However, it should be noted that the things already done were pursuant to the official's duties and by way of official power. But the gifts were given to show gratitude to the official personally. For the public, this is thus also cases where private benefit gained through public functions. In addition, such behaviours may result in the official's expecting to receive gifts while exercising official duties. In other words this creates bureaucratic habit for officials. If this type of gift-giving is maintained, it will be difficult to secure such values as equality and impartiality in public administration. Some Vietnamese authors argue that gift-giving for gratitude should be made an offence for two reasons: first, the position holder's performance of his public duties as an official may benefit people but they do not owe him anything and he has no right to receive gifts from the public; second, if receiving one gift leads to a continuous flow of gifts, the official is bound to be influenced and his integrity has been undermined (Trần Kiên Lý and Đặng Văn Doãn 1982: 29).

The arguments for the criminalization of these like-bribery activities are then very persuasively made. From the point of view of UK law reformers, a reward or inducement may or may not have a tendency to corrupt, depending on the circumstances. If it is made in the hope of a mutually profitable relationship in the future, it should be considered as corrupt activity as the act tends to encourage breaches of duty. This reasoning suggests that the distinction is not that between rewards and inducements, but that between conduct which does or does not tend to encourage breaches of duty. Reward may sometimes be relevant to inducement. Such payments would be potentially corruptive since the recollection of them is likely to influence the receiver in any future dealing with



the gift giver. The corrupting quality of reward or inducement would lie not only in its possible influence on the receiver's future conduct, but also in the possibility that other agents might be influenced in their dealings with the giver or with others from whom they might expect to receive similar rewards. Conduct should be regarded as corrupt if it would be corrupt for other to learn of it (UK Law Commission 1997: 75-77). From a Vietnamese point of view, receiving a gift of major value should be criminalized due to the obvious risk to the integrity of the public official (Trần Công Phần 2006). I agree with the view on the potential risks of such gift-giving. I am of the opinion that the law should set reasonable limits for gift giving, based on the value or type of benefit that can lawfully be received in order to avoid abusing the tradition of gift-giving. In addition, acts of giving and receiving the above payments should be criminalized subject certain requirements. I will discuss the issue again in Chapter 4 of the thesis.

Through the above analyses of the prevailing types of bribery, I draw as my own conclusion that all these types can harm the public interest and state stability and this requires the conduct to be criminalized. However, criminalization should also be based on other circumstances such as how widespread the act is, the requirement for fighting such acts and the probability of detection and conviction of the act. In addition, the requirement for international cooperation in the context of global integration and international recommendations on serious types of payments should be taken into account when considering what types will be criminalized. For some types of bribery that contain special features, e.g. bribery in the private sector or gift-giving as corrupt practices or bribery involving politician, the law should provide separate offences with specific descriptions. The difference in degrees of danger between the different types of bribery obviously needs to be considered when the law provides punishments thereupon.

### ***1.1.3. Theories concerning Bribery Offences***

As mentioned above, studies on bribery vary and the phenomenon can be approached in different ways. The theories referred to in this part mainly view bribery through the broader concept "corruption" and only relate specifically to bribery from the point of view of the criminal law aspect. Studies on bribery criminal law in an international

comparative context are scarce and the subject is mainly approached in domestic criminal law. My research mainly used the commentaries and textbooks explaining national laws. For the criminal law, the elements of bribery offences and the principles of punishing them (including penalties for such offences) are placed at the centre of the discussion.

The interests protected by bribery criminal law should be considered first. These would be factor reflecting the nature of bribery offences, deciding what kind of offences should be categorized as bribery. Scholars seem to agree with the opinion that bribery offences destroy the trust that citizens have and should have in persons who carry out public functions. The betrayal of trust is pointed out as the critical feature of bribery (Noonan 1984; Alatas 1999). Green develops that notion by building his disloyalty - based theory, attributing bribery to the disloyalty of the bribe recipient to his constituents and to the ideals of his job (Green 2006: 203-211). This theory seems to be illustrated by the fact that in the Constitution of the United States bribery is provided for alongside treason.<sup>9</sup> Accordingly, the first interest protected from the damage by bribery offences is the duty of loyalty owed by the bribed person to his employer (the State, his principal and the like) and to his constituents. In addition, at common law bribery is considered as offence that breaks “the known rules of honesty and integrity” (Russell 1964: 381). Wincler (1972: 210) also condemned bribery offences for striking at the honesty and integrity of public officials. So the honesty and integrity of officials are perceived as another protected interest that is undermined by bribery offences. In fact, the French Penal Code appears to confirm that view by classing bribery among other “breaches of the duty of honesty”.<sup>10</sup> Briefly, these ideas have a similar view on the interests protected by bribery criminal law. However, they seem to focus on the moral dignity of the officials. In other words theory on this matter does not seem to consider the interests of the State as interests undermined by bribery offences.

As mentioned above, bribery is commonly regarded as a type of corruption. The idea that bribery offences are among the offences of corruption seems not to have been argued for

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<sup>9</sup> Article II Section 4 of the US Constitution stipulates that “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery...”

<sup>10</sup> See Section III of Chapter II of Title III of Book IV of the French Penal Code.

from an international perspective. Meanwhile, in Vietnamese criminal law studies, most authors seem to stick to the idea that only the offence of receiving a bribe is a corrupt offence, arguing further that only this offence is required to be committed by public position holders (Institute of Legal Science 2004, Đinh Văn Quế 2006, Trần Công Phàn 2006, Hanoi Law University 2005). Unlike this notion, few researches introduce a different point of view, stating that also giving a bribe and acting as a bribery intermediary are offences of corruption, because these bribery practices are always linked to the offence of receiving a bribe and both activities seriously violate the stability of State agencies and organizations (Government Ombudsmen 2004:107; Trần Anh Tuấn 2006:26). Taking a neutral approach, another author regards giving a bribes and acting as bribery intermediary as offences that have a direct connection with offences of corruption (Nguyễn Văn Tuấn 2006: 79). According to a Governmental agency in Vietnam, only the activities of giving a bribe and acting as bribery intermediary committed by public position holders or public authority holders in order to develop the business of their agencies, organizations or local governments in a corrupt manner are considered corruption (VCLEPG 2006:15-16). I am of the opinion that the different types of bribery offences interact themselves, all violating the authorities of the State as well as influencing the performance of public duties for improper gains. These offences should thus all be considered corruption offences.

Issues in regard to *the bribe recipient* have received much attention in recent studies. According to the traditional perception of Vietnamese lawyers, only persons who are public position holders and public authority holders are able to be bribe recipients. No one seems to disagree with this idea; the question just arises who can be regarded as such persons. The public position holders and the public authority holders are commonly perceived as persons who are responsible for performing public duties in the State authorities or organizations and at the time of performing their duties have certain powers or abilities in relation to other persons (Trần Kiên Lý and Đặng Văn Doãn 1982:33, Đinh Văn Quế 2006:78). In this view, the bribe recipient is recognized by his or her public duties. Public duties or public functions thus become a requirement of the bribe recipient. Such duties or functions do make the holders powerful in relation to certain people in society. It seems a correct explanation that holding a position or having authority means

that the holders can make decisions - individually or within a group – that can considerably affect other people’s rights, making them strongly dependent on the decision makers (Trần Kiên Lý and Đặng Văn Doãn 1982:33-34). In addition to public duties, the bribe recipient is also required to have authority or hold a position at the time of the offence. This means that person can only commit receiving a bribes at the time of holding position or authority; and before obtaining the office or after leaving it a person cannot be regarded as being capable of being a bribe recipient. Because the bribe recipient is the person who uses his position or authority as a tool for obtaining improper benefits from the people in need, a person can only receive bribes when he is in office or at the time of performing his duty (Trần Kiên Lý and Đặng Văn Doãn 1982: 35, Đinh Văn Quế 2006: 29-30). Further, one author argues that being a bribe recipient also strongly depends on the nature and the scope of the duty and the function. As a result, persons responsible for purely technical works or scientific or educational functions, such as engineers or teachers and having no right to make decisions affecting others cannot be the bribe recipient (Mai Xuân Bình 1996:47-54). As a Vietnamese analyst, I find these arguments reasonable in the context of Vietnam. The political and administrative features of Vietnamese society have a great influence on such theory. I am of the opinion that a bribe recipient needs to be determined by three requirements: *first*, he or she holds a public position or carries out a public authority in an agency or an organization by appointment, by election, by assignation or under a contract; *second*, he or she has the authority to make or to exert influence on the making of decisions that may have effects on the rights or benefits of other people or entities; and *third*, he or she holds the position or authority at the time of the offence so the permanence becomes essential. From my point of view, payment and seniority are irrelevant factors in this regard. Of course my argument is reasonable in the Vietnamese context. To an observer, the third may seem not to be required because in many countries it is believed that a person may have authority before obtaining or after leaving his position. That is not the case in Vietnam.

Beside theories concerning who can be the recipient, studies on bribery also discuss the definition and scope of bribe recipients. The scope of people who may be bribed is perceived as quite broad. Scholars do discover special cases in which the actors may be different from the usual ones. It is supposed that “bribes may be paid to individuals who

can influence the decision-making process independently of their formal position within the public administration. This may be the case of a politician with the power to nominate and revoke his “representatives” within a certain body (Della Porta and Vannucci 1999: 40). Moreover, international views seems different from Vietnamese ones as some of the former argue that the class of bribed persons can include the former officials who no longer holds public office but can still influence the decision-making process (Ibid: 41). Developing the idea of broadening the scope of the bribe recipients, the OECD made its view clear by indicating that the law should be applied in exceptional cases to persons holding some form of public authority irrespective of the terms of his employment (Official Commentaries to OECD Convention). Further, it has been argued that the definition of public officials should also cover officials of political parties, candidates for political office and any person in anticipation of his or her becoming an official.<sup>11</sup> In the international context these views appear to be understandable because of the compatibility between such theories and the actual political and social conditions. The issue is well covered by Green’s research where he points out a trend for the class of people considered capable of being bribed persons has been broadening over time, and this for two reasons: first, the class of people who are considered “public officials” has grown; second, bribery has spread its reach to the private sector (Green 2006: 195). Based on the mentioned arguments I would expect that the bribe recipient would cover officials at all ranks and levels of government, including former and potential officials in the public and private sectors as well. One more thing which has recently been discussed is whether witnesses are capable of being bribed persons. Actually in some domestic criminal laws such people are provided as being a class capable of receiving a bribe. Green suggests “witnesses should qualify as potential bribees” (Green 2006: 196). It seems reasonable for bribery of witnesses to be criminalized because it is also a type of bribery that aims to influence the proceeding of justice by improper means. In addition, the definition of the recipient in bribery offences is considered to be extended to ‘foreign officials’ (Trần Anh Tuấn 2006, Trần Công Phàn 2006). The need for this extension is, in my opinion, called for by the increase in international relations and cooperation. The

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<sup>11</sup> Commentary 10 on the OECD Convention, Article 7(3) of the UN Convention, Legislative Guide for the Implementation of the UN Convention, Para.70 and 86.

concept of ‘foreign officials’ is also perceived in a broad manner with the view that “a foreign public official is anyone who carries out a public function for another country or for an international organisation” (Zerbes 2007: 59).

Reviewing these theories concerning the bribe recipient, I totally agree with the idea of broadening the concept of the recipient in bribery offences. This will be suggestion for the criminal law to cover all situations in which a person can misuse his authority for improper gains. The definition should also cover those who work in the private sector, certain candidates for important positions in the State administration and officials and employees of international and foreign agencies and organizations. In addition, those who are not responsible for directly resolving the briber’s problem but can use their power or position to influence another person to perform duties in favour of the briber should also be captured in the definition of the bribe recipient. It is clear that the traditional view of the bribed person will be changed. The law in this respect will be revised consequently. I discuss this more when analyzing bribery laws in practice and compare them directly with the theories about them.

Theories concerning *the bribe* vary, due to its complicated and ambiguous nature. The most significant issues are the nature of the bribe and the differences between bribes and the like, e.g. gifts, tips, bonuses, contributions and so on. Theoretically, it does not seem very difficult to determine what a bribe is, when the bribe is commonly regarded as a thing of value to be given to the bribed person to influence his official duties, to persuade him to act in the interest of the giver (Noonan 1984: xi, Carson 1985: 71, Green 2006: 198, Arvis & Berenbeim 2003: 9). The ‘core concept’ of the bribe, as defined by Noonan, is “an inducement improperly influencing the performance of a public function meant to be gratuitously exercised” (Noonan 1984: xi). Carson argues that “[a] bribe is a payment of money (or something of value) to another person in exchange for his giving one special consideration that is compatible with the duties of his office, position, or role” (Carson 1985: 71). Accordingly the bribe can be perceived as a favour or gift offered or given or asked for or received with the purpose of influencing the performance of the recipient’s official duties. Terms expressing the form of the bribe are numerous and

include benefit, things of value, advantages, payment, and reward. Generally, the adjectives for showing the wrongfulness of the bribe are “improper” or “undue”.

In addition, there is a concurrence of opinions that the bribe may be anything of value and it may exist in any form, including material and immaterial and tangible and intangible benefits. According to Van Duyne’s view (1996: 162) the bribe can be everything covered by the improper exchange relations, including different and complicated types of exchange in various areas of social life, for instance in case involving politicians, political support for some pieces of legislation or the case in which a place in a famous school is arranged for an inspector’s child in order that the inspector ignores some unsatisfied conditions of the school. The undue intangible benefits given in Van Duyne’s examples show the complicated nature and diversified forms of the bribe. According to his view, the concept needs to be understood in a broad way which may make its nature more difficult to be identified. Similar to Van Duyne’s notion, the bribe is stated to consist of a wide range of things of value, including sexual favours (Green 2006: 199). Even entertainment and treats are discussed about as what may be considered as bribe in particular circumstances (Nicholls et al. 2006:19).

Further, the bribe is considered to cover any benefit obtained from the relationship between the giver and the receiver. “The bribe also includes property sold to a public official for less than its true value and property sold by a public official for more than its true value” (Winckler 1972: 215). Similar opinions have been found in researches on bribery offences by Vietnamese authors (Trần Kiêm Lý and Đặng Văn Doãn 1982:12-13, Mai Xuân Bình 1996: 37-38). The idea has been developed that more kinds of benefit should be included in the concept. “The bribe can either be a direct payment in return for showing favour or payment of part of the proceeds of a contract granted as the result of the bribe, called a kickback” (Nicholls et al. 2006: 3). Further, scholars have broadened the concept ‘bribe’ to include intangible benefits. As an illustration of this idea,

[I]t is possible to give a monetary value to an immaterial benefit. For instance, every promotion, a larger office, more leisure time, and other forms of professional advancement can be measured in salary terms. The improvement of professional

opportunities can also be valued. If the bribe in question consists of new contacts, of a personal or also sexual nature, there is a market for these, enabling the price to be (approximately) calculated. (Zerbes 2007: 102).

This idea is not only prevalent in western societies but has also recently spread to Vietnam. It is a new idea in Vietnam when the bribe is argued to include immaterial benefit, due to the fact that the bribe is traditionally thought to cover only material benefits. The bribe has now been perceived to include advantages such as publication of the writings of the official, high appreciation of the official's role in the media, or sexual favours (Lê Mạnh Luân 1997: 87-88). This idea is supported by several authors in Vietnam as is the notion that even an intangible or immaterial benefit can be calculated,

Some intangible benefits may be calculated in material values such as the arrangement for children of the position holders or of the authority holders to go abroad or to study abroad or to get jobs in a certain agencies, or even some pure immaterial benefits e.g. praise of the position holders in the media, good comments where necessary, also being perceived as transfigured forms of bribes (Trần Công Phàn 2006: 25).

In an overall study on corruption in Vietnam, it is argued that both material and immaterial benefits can fulfil a person's demand and consequently being things that may influence the decisions made by the position holder (Government Ombudsmen 2004: 107). The argument is reasonable and significant in the context of Vietnamese law. In my opinion this is a good change of perception, especially when it comes to the revision of Vietnamese criminal law.

The above opinions indicate that the notion of what is covered in the concept 'bribe' is now much the same throughout the world. The notion is that everything that makes the recipient satisfied and might influence the performance of his duty should be considered valuable. Discussions focus more on how to estimate the value of the bribe. "The bribe need not be monetary as long as it is of sufficient value in the eyes of the person bribed to influence his official conduct" (Winckler 1972: 214). Accordingly, the value of the bribe lies in its meaning to the bribe recipient, regardless of its monetary worth. In my opinion, indeed, the value of a bribe does not necessarily lie in its material benefit but must be measured by the recipient's demand and enjoyment of it. If a type of benefit can



influence a recipient's official conduct, it is sufficient to be 'thing of value' and will constitute a bribe. In other words, the influence on the performance of an official duty reflects the value of a bribe.

By virtue of the above theories, the bribe can be identified as falling within various types and taking different forms and, based on these opinions the definition of the bribe should be broadened. However, the identification of the real nature of a bribe thus becomes difficult. On the one hand, the difficulty is due to some less-ordinary forms of the bribe, such as intangible advantages. On the other hand, an ambiguity appears as a bribe is sometimes hard to distinguish from other similar things, such as gifts and the like. Actually, the distinction between the bribe and the legitimate benefits is a matter that has recently received much attention and discussion. Such a distinction is easy to draw in theory but difficult to act on in practice. It seems that the old traditions of gift-giving, tolerant or even accepting attitudes toward bribery and customs in business area have blurred the line between legal gifts and bribes. Mitchell (1996: 147) observes "the old custom of gift giving made it difficult for authorities to distinguish between legal gifts and illegal bribes". The bribe is therefore easy to hide behind legal transactions. So, how to differentiate bribes from gifts and the like? Theoretically, bribes reflect a bilateral agreement between the parties while gifts, tips, rewards and campaign contribution are unilateral, because they are given without agreement. Green (2006: 198) points out a feature which makes bribes different, saying that "bribes involve an agreement to exchange something of value in return for influence, whereas gifts, tips, and campaign contributions involve no such agreement." Another author shares this opinion when arguing that the main difference between a gift and a bribe is that the bribe presupposes an agreement of certain kind. "That is, it must be understood by both parties that the payment in question is exchanged, or to be exchanged, for the relevant conduct. [...] Without it [this agreement] we cannot properly distinguish between bribes and gifts or rewards" (Philips 1984: 626). Similarly, it is noted that there is no agreement between the giver and the receiver and no misuse of office at all in cases of giving gifts (Trịnh Tiến Việt 2006: 46). One more suggestion for distinguishing bribes from other payments is given, based on the existence of an explicit quid pro quo. Gifts have no explicit quid pro quo, while bribes do and "many gifts are purely altruistic transfers with no expectation of

a material reward” (Rose-Ackerman 1999: 92-93). Obviously the bribe is to distort the judgment of the recipient. Accordingly, when the legislators make a law on bribery offences, the bribe should be described as comprising things to be exchanged for favours made through the performance of duties or functions, irrespective of its kind and size.

An issue concerning the distinction between bribes and gifts arises when it is found that gift can sometimes be implicitly meaningful, which will happen if it is of considerable value. “If individual gifts are large enough to have a marginal impact on the recipient’s behaviour, a quid pro quo is implicit” (Rose-Ackerman 1999: 93). In this regard it appears that the triviality of the gift is not a defence in its own right but a factor in determining whether it was given as a reward (Lanham 1987: 205). In addition, one also should look at payments made after the performance of an official duty in a context where payment is an implicit practice (custom) in the kind of business relationship concerned. In this light payment could be considered an offence if the amount is large (Zerbes 2007: 111). It means that the large value of gift can influence the receiver’s official duties without explicit agreement. The bribe’s size can therefore be a factor to be considered in determining whether a given thing is a bribe. The idea is more argued that “[a] payment to a government employee before a tender process has been concluded is a bribe as the recipient may consider the payment when deciding on awarding the contract.” (CAER 2006: 4). Another view of the difference between bribes and gifts can be based on the relationship between the actors in question. It is argued that the essential factor in distinguishing gifts from bribes is the past relationship between the giver and the receiver. If there has been a long relationship between them, which may have included gift-giving and if the gift in question was not too out of the ordinary in comparison with past gifts they have exchanged, the gift will not be considered to be a bribe (Befu 1975). Further some authors provide other criteria for a gift to be questionable: first, if the intention of the gift-giver is to obtain additional advantages; second, if there is an impact on the receiver; third, if other parties perceive the gift as a bribe (Crane & Matten 2004). I agree with this. I am of the opinion that the intention of the gift-giver or the impact on the recipient may implicitly be shown by the great value of a benefit or the unusual nature of a gift. Moreover, the situation in which gift is given also needs to have attention paid to it. In my opinion, in determining whether there is a bribe in cases where the nature of

the given benefit is not explicitly visible, it is necessary to consider the size of the benefit, the meaning and the impact of the benefit on the recipient, the relationship between the parties and the recipient's position or authority in connection with the giver's needs. A Swedish author seems to share my opinion on the need for consideration of the context of the relationship between the giver and the receiver (Lennerfors 2007: 225). Perhaps it now seems less difficult to determine the distinction between acceptable and unacceptable types of exchange.

The concept of the bribe is always affected by the concepts of morality, values and traditions. As a result, exchanges of benefits may be viewed incorrectly. Schwartz assumes that "one's society can wrongly legalize exchanges that should count as bribery or wrongly extend its legal prohibitions of bribery to exchanges that should not count as bribery" (Schwartz 2004: 187). In addition, there is an argument that "[t]he definition of bribes and gifts is a cultural matter, but "culture" is dynamic and constantly changing. If behaviour labelled "corrupt" by some observers is, nevertheless, viewed as acceptable gift giving or tipping within a country, it should simply be legalized and reported" (Rose-Ackerman 1999: 110). The author means that the outsiders' view is objective for determining whether a kind of gift should be treated as a bribe, since the insiders' view is often much affected by traditions and customs and may not be correct. In my opinion the legalization of things as being bribes should also be based on outsiders' view, especially on international law's recommendations and experiences learnt from other countries.

In brief, the mentioned theories show a consensus on the nature of the bribe even when one takes an international perspective. However, the differences between cultures, traditions and perceptions in the world make it difficult to establish common criteria for distinguishing bribes from legal payments. In addition, the important role of a bribe is affirmed. It is noted that the bribe should be regarded as an important factor in establishing a bribery offence. It shows the improper nature of bribery as well as indicating how bribery differs from acceptable exchanges of benefit. Considering the role of the bribe, it is clear that it needs to be required as an element of any bribery offence.

Who may benefit from a bribe? Of course a bribe is given or offered to influence the recipient's performance of his official duties so it seems that it should benefit the official. However, the bribe can also influence the official in the way that he feels satisfied with advantages to be enjoyed by those he recommended. I am of the opinion that the bribe is not necessarily required to benefit the official himself. In other words, the beneficiary may be a third party, such as members of the official's family, his organization or anyone else. It does not matter who the beneficiary is providing that the intent is to influence the official's performance of his duties. The requirement is simply 'the use of false motives for official action' (Zerbes 2007: 96). Any law on bribery offences should thus be flexible on the matter of third party beneficiaries.

The issue of the objective elements of bribery offences has not received much theoretically attention. Commonly, the *actus reus* of bribery offences is supposed to include only illegal acts. This means that the element of act performance is sufficient for a bribery offence to be constituted, regardless of its result. The definitions of bribery mentioned to in subtitle 1.1.1 of the thesis, for example the definition in the OECD Observer 2000, do prescribe the element of acts of bribery. For instance acts of active bribery are commonly described as offering or promising or giving improper benefit to officials. In my opinion, active bribery offence should indeed be constituted by such acts as offering, promising to provide as well as providing (or giving) things of value to officials. 'Offering' means that the briber shows his desire or voluntariness to give an undue advantage. An offer is considered as a declaration by the briber, on his own initiative, stating his readiness to pay the official in question. The offer is given actively by the briber, indicating his voluntariness. Offering does therefore not appear in cases where the recipient demands a bribe. 'Promising' is made in cases where the briber commits to give an undue advantage later or where an agreement is made between the briber and the bribed that an undue advantage will be given later. By promising, the briber makes a definitive commitment. The promise may be given either of his own motion – then it is given at the same time as an offer is made – or he agrees to make it with the official in case a bribe is recommended or solicited by the official. 'Giving' is the act of actually transferring the benefit of an advantage to the control of the bribe recipient. The manner of transferring depends on the nature of the advantage.

A physical object will obviously require the handing over of possession; funds will be electronically transferred to a bank account; a place in University or College will be guaranteed by enabling registration to take place. The transfer will finally be affected when the object of the bribe is in a position in which it can be controlled, i.e. by taking up possession, drawing on the bank account, or taking up the place at University, etc. (Zerbes 2007: 110).

It is noted that ‘giving’ is the actual transfer and is not required to be dependent on actual receipt by the official. “Whether the official ever actually takes control is not important: the act of giving does not depend on the act of receiving” (Zerbes 2007: 110).

It can be seen that these three actions are like different stages in the chain of active bribery offence. However, they are independent actions. “It could be that an agent or subsidiary undertaking made the first ‘contract to bribe’ or it may be that the bribe donor himself took that step. In either case, the preliminary acts can be distinguished from the quite independent offence of transferring the bribe” (Ibid.: 110). This means that an offence may be committed by the act of carrying out a bribery agreement entered into by someone other than the donor of the bribe. Bribe donors are however as guilty as those who may have entered into the previous agreement or given the promise. They are not excused from criminal liability because the bribe agreement was entered into by somebody else. Furthermore, whereas offering’ and ‘giving’ do not require an agreement between the briber and the public official for the acts to constitute an offence, ‘promising’ needs such an agreement. Therefore, offering or giving a bribe constitutes an offence even if the official does not accept or is even not aware of the offer or the advantage. For instance the offer or the benefit could be intercepted by the law authorities before it is delivered to the official. In the case of promising a bribe, the official must be aware of the existence of the briber’s promise.

Based on the description and the analyses of the acts of giving a bribe, it is clear that the offence has been completed when the briber has made an agreement with the official regarding the receipt of the bribe with the intent to influence the official’s performance of his duty; or when the bribe is actually provided to the official, regardless of whether he is aware of it or accepts it. The transmission of the offer of a bribe, the promise or the transfer of the bribe itself can be sent to the wrong address or cannot be sent at all for

various reasons. In these circumstances, the acts cannot be said to be completed though there might have been an attempt to bribe. The official's decision will here not be subject to a claim that it was influenced by the bribe. The act still constitutes an attempt of bribery since success is not necessary for the commission of this offence.

In regard to passive bribery, I am of the opinion that there are three kinds of act: 'accepting' a bribe offer, 'receiving' a bribe or 'soliciting' a bribe. 'Accepting' a bribe offer is the act of consenting to an offer of a bribe. The official gives his affirmative agreement to the bribe offeror. This means an agreement with the offeror is made when the official accepts the offer. 'Receiving' a bribe is the act of actually taking delivery of a benefit from the briber. 'Soliciting' a bribe is the act of asking someone giving a benefit if something will be done by the official in relation to the performance of his duty. A request for or the receipt of a bribe can be made by the bribed person himself or by another person on his behalf. With these acts, the offence will have been completed when the official in question actually receives the given benefit or when the agreement is made between the two parties.

Concerning the *actus reus* of bribery offences, there is an opinion that the definition of bribery requires 'covert' manner of the act (Senior 2006: 27). This means that acts of bribery offences would be committed covertly. Consequently, acts of publicly giving or receiving a benefit for the performance of the official's duty would not be made improperly and would not constitute bribery offences. I do not agree with this. Theoretically, the impropriety of bribery activity is not constituted by the manner in which the act is committed, but because of its nature including the nature of the benefit given and its purpose. I am of the opinion that the prescription of elements of bribery offences in the law need not to include the manner of the acts.

Studies on bribery share a consensus on the notion that there should be an agreement between the briber and the bribe recipient for the offence to be constituted (Võ Khánh Vinh 1996, Mai Xuân Bình 1996, Đinh Văn Quế 2006, Trịnh Tiến Việt 2006, Philips 1985, Green 2006). Of course this is not necessary in cases where the bribe is immediately given without an initial agreement. I support the idea of the need for an

existing agreement in cases of ‘promising’ a bribe or ‘accepting’ an offer, based on the rationale that it will be a factor in distinguishing bribery from gift-giving and the like. However, an agreement is only necessary for a bribery offence to be completed. If an offer of a bribe is not accepted by the official, the act still constitutes an attempt. An issue to be further discussed is what has to be covered by such an agreement. Authors commonly state that a bribery agreement should encompass agreement on the bribe and on the thing to be done or not be done for the briber in the official’s performance of his duty (Võ Khánh Vinh 1996, Mai Xuân Bình 1996, Đinh Văn Quế 2006). From my point of view, the ‘key’ aim of bribery activity is to reach an agreement between the briber and the bribed person whereby the bribed person accepts the offer of a bribe or the briber agrees with the demand for a bribe. Consequently, a bribery agreement should at least provide that the briber will give a bribe and the bribed person accepts this (agreement on what kind of benefit will be given, how much the benefit will be and how the benefit will be transferred are not so necessary) with a view to influencing the official performance of a duty or function in a way that benefit the briber or any other person.

One more issue concerning the agreement between two bribery parties is whether a bribery agreement should exist in a material form. I am of the opinion that the agreement needs not be recorded in a document or in any other explicit manner. If there is an implicit agreement between the two parties or if it is considered as customary, it will be not necessary to speak it out or write it down. My opinion seems to be commonly shared as we see that “[t]he offer and the promise can be made tacitly; they need not be explicit” (Zerbes 2007: 109). This is also some Vietnamese authors’ view (Trần Kiêm Lý, Đặng Văn Doãn 1982: 38; Mai Xuân Bình 1996: 42). It will be much easier for law enforcement authorities and the court to prove bribery offences if criminal law provides or is interpreted in such a way that an act will constitute a bribery offence regardless of whether the bribe is explicitly or implicitly offered in exchange for favour. The authorities will then only have to prove the regular exchange of benefits and the relationship between the giver and the receiver, taking into account the position of the receiver and the situation of the giver.

In regard to the acts of the bribed official, studies have paid attention *first* on the purpose of bribery. Some authors insist that bribery has to have a particular influence on the performance of the official's duty (Trần Kiên Lý, Đặng Văn Doãn 1982; Mai Xuân Bình 1996; Võ Khánh Vinh 1996, Đinh Văn Quế 2006). The point of bribery is to induce the official to act or omit to do a particular thing in the briber's favour. From my point of view, bribery must of course be linked to the performance of the official's duty, but need not necessarily leads to a specific and immediate act by the official. It should only be required by criminal law that bribery is intended to influence the official's act in relation to his duty. A briber may give benefits to the official in order to create or maintain a good relation with an official for an uncertain and future advantage or for a regular favour made by the official in regard to his duty. I am of the opinion that bribery is constituted if the offer is made or the gift is given with the intent that the offeree or the receiver acts favourably to the offeror or the giver when necessary and not any particular occasion specified at the start. No particular act needs to be intended by the offeror or the offeree. *The second* consideration concerns how the performance of the recipient's duty is changed by the bribe. Bribery aims to induce the bribe recipient to act or refrain from acting in relation to the performance of official duties. As a result, the prohibited acts of a bribed official may include acts of both commission and omission. It should be noted that bribed officials may act illegally or in breach of their duties but they may also perform acts that are not contrary to the law, including acts that they are required to perform within the scope of their duties. It should thus constitute a bribery offence also in cases where the bribed official's act is not illegal. My argument for this requirement is simply that the impropriety of a bribery activity is attributable to the fact that the official in question is influenced by a bribe. The integrity and honesty of officials are still negatively affected even in situations where the official does not act in breach of duty. The public's trust in officials can also be lost in these cases. In addition, bureaucratic habits of officials soliciting and demanding benefits for exercising public functions will arise if the acts in question are not criminalized.

Concerning the *mens rea* of bribery offences, it can be clearly seen that intent is a mental element. Bribery offences are not constituted without an intent element, since bribery



involves improper influence on the performance of public duties. Both active and passive bribery show knowledge of an act and intent to commit that act.

The question of whether bribery should be limited to the public sector or should also cover the private sector is a hotly debated theoretical issue. Take Australian criminal law as an example. Discussion focuses on whether the distinction between public and private sector bribery should be retained. According to MCCOC's report, bribery has traditionally been confined to public officials only. The argument for this traditional perception is that "because integrity in government is of such overwhelming importance to the overall functioning of society" (MCCOC 1995: 243). Moreover, it is argued that "the special duty and liability imposed on public officials should not be imposed on agents in the private sector. Agents in the private sector cannot be said to have a duty to the private sector in general" (Ibid: 245). Bribery should thus never be extended to the private sector. In contrast, the now prevailing opinion is to extend bribery's reach to the private sector. The arguments for this view vary. First, the distinction between the public and the private sectors is said to be unclear, especially nowadays "an increasing number of functions which have traditionally been performed by the public sector are being privatized" (Ibid: 245). Secondly, the integrity of the private sector is argued to be important as well, because the public needs to be able to have confidence in the integrity and the honesty of both the public and the private sector (Ibid: 245-247). The essential argument is that bribery in the private sector can also be considered to have a negative effect on society as a whole, since bribery in the private sector can harm the community as much as public sector bribery or sometimes it does even more damage (Ibid: 245-247). From a Swedish point of view, Lennerfors (2007: 37) calls for a reinterpretation of the concepts of public and private, saying that "corruption should not be seen as something limited to the public sector, but rather as a special relation between public and private roles. The public role is connected to office, which might both be that of a public servant and that of an employee in a private company". Some Vietnamese authors also share this idea, arguing that it fulfils the requirements of setting up a fair environment for business and for competition in the context of international cooperation (Nguyễn Văn Tuấn 2006: 79-80; Trần Anh Tuấn 2006: 21). Bribery for these authors seems to cover all payments

in exchange for the performance of duties, regardless of whether made to a public or a private employee.

I agree on the above justifications. In my opinion, one more important argument for bribery in the private sector to be criminalized is that as bribery in both the public and the private sector are presumed to violate principles of integrity and loyalty made with the principal, it is not fair if only public sector bribery is sanctioned under criminal law. There are of course differences between bribery in the public and in the private sector relating to the interests harmed, the roles and functions of the actors in these sectors and the degree of danger for society. I am of the view that bribery in the private sector needs to be regarded as less serious as the harm caused by public sector bribery is much greater. These differences should be considered when criminalizing bribery in the private sector, particularly with regard to penalties.

Beside issues relating to elements of bribery offences, theorists also consider the criminal law policy which should be adopted to deal with such offences. Ideas and opinions in this regard are not totally alike, due to the different perceptions of the danger of bribery. For some groups or people in a society, bribery can be an acceptable phenomenon or should even be viewed tolerantly. This is due to the fact that bribery is often considered as crimes with no visible victim (Della Porta and Vannucci 1999: 24). The second reason is that the real nature of bribery is usually masked or justified by customs, traditions, cultures or a misguided perception. The wrongfulness of bribery is often hard to recognize. As a result, the condemnation of bribery and the fight against bribery offences are not always supported all that strongly. That perception also leads to the fact that some criminal systems adopt inadequate punishments and measures when dealing with bribery offences. In contrast, most the world considers bribery a very dangerous phenomenon. Studies in respect of bribery indicate similar views on its seriousness. The danger of bribery is shown by much research. One of the emerging features of bribery offences is the attribution to it of a close relationship with organized crime (Duyne 1996, Rose-Ackerman 1999: 23-25, Đào Trí Úc 2000: 30, Korchagin and Ivanov 2003: 110-112). Bribery and organized crime may support each other to mutually develop. As a result, bribery in cooperation with organized crime may cause more dangerous effects for

society. From a macro point of view, Mauro (1995) argued that one of the most significant features of bribery is its corrosive effect on the respect of the public for the rule of law and on the structure and stability of society. Alatas (1990: 130) also recognizes that “[t]hrough corruption crime syndicates or individual criminals can bend the law, infiltrate the state organization, and acquire respectability.” The effect of bribery is further seen if it has a direct impact on the enforcement of law: it becomes a socially undesirable act in the standard model of enforcement because it dilutes deterrence (Polinsky and Shavell 1999: 4). As a result of these harmful features, bribery must be prevented and severely punished. One of the most effective means of preventing and combating bribery is precisely the use of criminal law and the criminalization of bribery activities.

Particular criminal law policies for the fight against bribery will now be discussed. Rose-Ackerman (1999: 52-53) designed a model which she called “the deterrent effect of anticorruption laws”. Her starting point is the paradox of law enforcement efforts torn between the requirement of the high level of punishment needed to deter corruption and the demand of promise leniency to informers which will give rise to a high probability of detection of corruption. On the one hand, Rose-Ackerman insists on the idea of maintaining high level of punishment for bribery, considering it necessary for the deterrence thereof (Ibid). She seems to be supported by the opinion that crimes of corruption should be severely punished for the purpose of general deterrence of criminal law (Nguyễn Văn Tuấn 2006: 40). The need for a severe policy is also due to the fact that the growth in the level of corruption is attributed to the lack of any real fear of punishment (Alatas 1990: 121). On the other hand, Rose-Ackerman finds out that evidence of corruption can be more easily obtained by the promises of low penalties. Accordingly, policies for combating bribery and the particular punishments for bribery offences need to be designed and provided with both purposes in mind - adequately severe for the deterrent aim and sufficiently tolerant to encourage bribers to give evidence of offences (Rose-Ackerman 1999:56). Rose-Ackerman’s view appears to be supported by the view that a criminal law policy that differentiates between the different roles of bribery perpetrators in relation to the different types and levels of penalties is meaningful in encouraging whistle-blowers to report bribery offences, thereby helping

responsible authorities to efficiently investigate and punish bribery activities (Trần Kiêm Lý, Đặng Văn Doãn 1982: 16-17). Moreover the interaction between active and passive bribery activities should be taken into account when formulating the policy for punishing bribery offences. It is clear that there will be a close connection between the consideration of the penalties for the offences of giving a bribe and acting as a bribery intermediary and the consideration of the penalties for the offence of receiving a bribe. The connection should be borne in mind when formulating criminal law policy on bribery offences in order to help the investigation and conviction thereof (Nguyễn Văn Tuấn 2006: 36, 81). I would like to develop this idea by indicating that it would help the investigation and conviction of the offences if the bribery law is made in consideration of establishing defences or mitigating factors for reducing criminal liability for those who report bribery practices or give evidence of the recipient's act. The comparison between the seriousness of active bribery and that of passive bribery also needs in my opinion to be paid attention to when considering the severity of the penalties to be provided. Receiving a bribe is generally regarded as a more serious offence than giving one. I note that the bribe recipient is a position or authority holder who is responsible for public duties. He has the authority and capacity to decide what should be done, thus he becomes the 'key' factor in the bribery contract and consequently should be punished more severely. The principle of proportionality does also need to be respected in connection with the imposition of penalties and other criminal measures on bribery in different sectors. I mean by this that the difference between levels of seriousness of bribery in the public sector and that in the private one needs to be taken into consideration when providing and imposing penalties.

Some authors go further and suggest specific penalties for bribery offences. Some people consider in regard to Vietnamese criminal law that the role of fines as a criminal sanction imposed on bribery offences should be increased, especially in cases where the offence is considered petty (Nguyễn Văn Tuấn 2006: 84-85). I am of the opinion that fines should be provided for and imposed on cases of bribery that contain mitigating circumstances. Even in cases where other penalties have already been imposed, fine can be added to indicate the corrupt nature of bribery offences. In addition, fixed-term imprisonment should be considered as penalty compatible relation with the danger of bribery offences.

This would be sufficient severity for such offences and effective deterrent for persons with intent to commit them. Criminal measures that may result in economic loss for the convicted persons are also suitable for bribery offences. In addition, Rose-Ackerman points out a punishment strategy with suggestion that penalties for the officials bribed should be tied to the size of the payoffs they receive and the probability of detection, and the penalties imposed on bribe payers should be tied to their gains (Rose-Ackerman 1999: 54-55). She means to highlight the correlation between the severity of the punishment and the value of the benefit obtained through bribery. Rose also notes that the punishments for the giver should not be based on the value of the bribe but on the value of the benefit he obtained from the official act of the receiver. I find this opinion reasonable because advantages or benefits that the briber gains from bribery affair are normally much greater than the value of the bribe. The advantage that the briber obtains or intends to obtain is a factor showing the seriousness of the offence. This idea should be considered by legislators when they design punishments for bribery offences.

*To conclude*, the theories concerning bribery offences have some common features. I would agree that: *first*, all bribery offences should be regarded as acts of corrupt nature, acts which undermine values such as the integrity and honesty of the persons responsible for public interests; *second*, the term 'bribe recipient' should be a broad concept that include employees working in the private sector; *third*, the bribe could consist either material or immaterial benefits, providing that they can influence the performance of the official duties; *fourth*, both the physical and the mental elements of bribery offences should be named specifically and defined when necessary; *fifth*, the beneficiary in bribery offences may be a third party; *sixth*, bribery offences can be committed through an intermediary and acting as a bribery intermediary might be provided for as a separate offence in order to signal its danger; *seventh*, bribery offences may only be committed to induce an official to performance his official duty as it is required; *finally*, the types and levels of penalties provided for bribery offences should be compatible with their corrupt nature and seriousness. A criminal law covering all the above criteria would play an important and effective tool in the fight against bribery offences. The role and effectiveness of criminal bribery law will be shown when we study its enforcement in the context of the situation of such offences. Certain loopholes will also be noted.

## 1.2. Bribery Offences as approached by International Criminal Law Standards

In this part I will analyze issues arising from criminal law standards relating to bribery offences which are set out in notable international conventions. I shall also give some examples from national laws. Hopefully they will confirm the theoretical issues addressed in former parts.

Many people throughout the world are concerned about bribery. Due to the recent serious growth in bribery with all its consequences, the international community has focused on how to prevent and combat this in an effective and efficient way. Thus a range of both international and regional conventions have been enacted against bribery-related offences although they do not cover all aspects of the problem. Here, bribery issues are discussed in connection with certain leading international treaties. The United Nations Convention against Corruption 2003, the European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States 1997, the Council of Europe Criminal Law Convention against Corruption 1999 and the OECD Convention on Combating Bribery of Foreign Public Officials in the International Business Transactions 1997 (hereafter the UN Convention, the EU Convention, the COE Convention and the OECD Convention) are typical conventions that should be referred to. These are also conventions which Vietnam, Sweden and Australia have signed or ratified. Moreover, the influence and the feasibility of international standards in criminal law being provided by these conventions will be analyzed in tandem with study of the laws of several countries. The similarities and differences between international standards and national laws express to some extent the practicability and rationality of the relevant conventions.

Despite the differences in scope, applicability and extent of detail, the above International Conventions all share common features. *First of all*, they all reflect the need to criminalize bribery in national criminal laws. For example the OECD Convention calls for effective measures to deter, prevent and combat the bribery of foreign public officials, and the prompt criminalization of such bribery is indeed included.<sup>12</sup> These Conventions

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<sup>12</sup> The Preamble of the Convention.

also share a concern about the impact of bribery on various aspects and the values of societies. A clear perception of the links between bribery and other forms of crime, especially organized crime and economic crime is manifest in most of the legislation discussed above. *Second*, all the Conventions set up guidelines as standards for the criminalization and punishment of bribery offences. They oblige the Parties to them to establish criminal offences covering a variety of types of bribery, i.e., active bribery, passive bribery, bribery of national public officials, bribery of foreign public officials and officials of public international organizations, bribery in the public sector and bribery in the private sector. This can be seen as a suggestion that States recognize the different types of bribery that are causing great harm to governments and societies alike. Of course, the Party States do not have to constitute a different bribery heading for each of these offences, and some countries have already covered all such bribery activities by way of a single offence with a broad, general description. However, the detailed descriptions of bribery activities can still be seen as necessary standards for legislation. A criminal law on bribery will be comprehensive and adequate if it covers the different specific bribery offences in any way. A more detailed and specific law may be a more useful instrument in countries where the knowledge of the existence of bribery is still at a low level. Third, all the Conventions share the perception that bribery of all types is a form of corruption, this being expressed in their Preambles. The UN Convention even specifically provides a range of types of corruption that includes embezzlement, trading in influence as well as bribery in all its kinds.

Reviewing the relevant provisions of the above Conventions and certain national laws of the State Parties<sup>13</sup>, international criminal law standards covering issues relating to bribery offences can be discerned as follows.

### ***Issues of setting up definitions of bribery offences***

The definition of a bribery offence is always an important issue in any of the Conventions. The recitals begin by giving a broad description of bribery offences. The Conventions however establish their standards on the criminalization of bribery by

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<sup>13</sup> Unless otherwise stated, these legislations have presented the current law until October 2010.

prescribing specific offences, rather than through a generic definition of the offence of bribery. The definitions are therefore quite clear, comprehensive and easy to apply. They are also universal definitions because all the Conventions use the same or similar definitions of active bribery, passive bribery, bribery of foreign public officials, and bribery in the private sector. Compare Article 15 of the UN Convention (Bribery of national public officials) with Article 2 (Active bribery of domestic public officials) and Article 3 (Passive bribery of domestic public officials) of the COE Convention. They can therefore be said to constitute internationally acceptable definitions of bribery offences. The State Parties should implement these definitions in their domestic criminal bribery law.

Like the definitions in the Conventions, the definitions of bribery offences under the criminal law of countries such as the United Kingdom (UK), France, or the United States of America (US) specifically prescribe different types of bribery offences.<sup>14</sup> These definitions all cover the important elements of bribery offences namely, the requirements of the bribe recipient, of the bribe, of the illegal acts, the third beneficiary, and so on. It seems that national criminal law prefers specific and clear definitions of bribery offences.

### *Issues concerning elements of bribery offences*

From the description of the above definitions of bribery offences, one sees that other issues appear such as the definition of domestic public official, of foreign public official, of bribe and different forms of bribe, of influence, etc. These are the fundamental elements of all bribery offences. Reviewing the definitions of different types of bribery in the above Conventions, the elements of a bribery offence are of two kinds: subjective and objective ones.

### *Objective elements of bribery offences*

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<sup>14</sup> For instance, the definitions of active and passive bribery under Article 432-11 and Article 433-1 of the Penal Code of France; or similar definitions under Title 18 Chapter 11 section 201 of the US Code, or under section 1(1) of the Prevention of Corruption Act 1906 of UK, are highly specific in comparison with international standards.



The Conventions all concentrate on the *offender* in relation to bribery offences. The offender is thus the first element to be analyzed. According to all conventions, there are two kinds of offender, *the briber* and *the bribee* (also called the bribe recipient). In addition, an accomplice can also be responsible for a bribery offence when his or her conduct meets the appropriate requirements.

*The bribee* must be a “public official” under these International Conventions. The terms ‘public official’, ‘foreign public official’ and ‘official of public international organizations’ as provided for in the Conventions express different kinds of bribees. The definition of ‘public official’ in the Conventions has to be flexible to fit the aim of creating a harmonized standard for identifying the bribee.

Both the EU Convention’s and the COE Convention consider both roles of the public official: as the subject (the offender) of passive bribery and as the object (the recipient) of active bribery. Meanwhile, the OECD Convention considers the concept “public official” as the object of the offence only. The two former Conventions refer back to the “victim country’ for the definition of public official. For example, the COE Convention defines “public official” as follows: ““public official” shall be understood by reference to the definition of “official”, “public official”, “mayor”, “minister” or “judge” in the national law of the State in which the person in question performs that function and as applied in its criminal law’ (Article 1(a)). The domestic criminal law definition of public officials is therefore given priority. The OECD Convention establishes an autonomous definition of public officials as persons holding a legislative, administrative or judicial office, whether appointed or elected or persons exercising a public function (Article 1(4)(a)). The UN Convention constructs specific, direct and broad definitions of concepts such as “public official”, “foreign public official” and “official of a public international organization” under Article 2 (a), (b), (c). The bribee, according to these Conventions, consists of national (domestic) public officials, foreign public officials and officials of a public international organization.

*“National public official”*, as defined in the Conventions, is a very broad and general concept. Basically, the concept should include any person who:

- holds a legislative, executive or administrative office, including heads of state, ministers and their staff;
- is a member of a domestic public assembly exercising legislative or administrative powers;
- holds a judicial office, including a prosecutor;
- performs a public function, including for a public agency.
- performs a public function for a public enterprise, e.g. executives, managers;
- performs any activity in the public interest delegated by a signatory;
- provides a public service as defined in the signatory's domestic law and as applied in the pertinent area of law of that signatory, e.g. teachers, doctors;
- meets the definition of a "public official" in the domestic law of the signatory, such as minister, mayor, law enforcement officer, and the military.<sup>15</sup>

In addition, it is noted by the Conventions that someone is considered a national public official regardless of whether that person is appointed or elected, paid or unpaid, permanent or temporary as of his level of seniority. Moreover, the concept of national public official should not be limited to the central level of government. The definition of public official should cover the relevant persons at all levels of government.<sup>16</sup>

Reviewing the list of persons to be regarded as 'national public official', one sees that this frames the concept as broadly as possible. Employees of all kinds and at all levels of national government and anyone exercising a public function for the national government are included in the concept of public official.

The concept of a national public official under criminal law of certain countries is defined in a similar way. For instance under Article 432-11 of the French Penal Code, a public official can be: first, persons holding public authority; second, persons holding a public electoral mandate, including Members of the National Assembly; or third, persons

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<sup>15</sup> See details in the Legislative Guide for the Implementation of the UN Convention, Para. 28 (a).

<sup>16</sup> Legislative Guide for the Implementation of the UN Convention, Para. 28 (b).

discharging a public service mission (those are not public authority holders but responsible for a certain public duty). Moreover, the French Penal Code also provides some other special public authority holders, e.g. judges, prosecutors, jurors, or any other member of court of law as who can be the bribee in bribery offences under Article 434-9 of Chapter IV “Perverting the Course of Justice”. The scope of who may be considered a national public official is thus quite broad, including persons temporarily carrying out public missions though they are perhaps not public officials as usually understood.

In the case of the UK law on bribery offences, the concept has likewise developed and extended into broader areas. The development of the case law on bribery has extended the concept of public official (from judicial officials only to begin with) to all persons acting in an official capacity or performing public functions. Through cases, bribery has extended to judicial and ministerial officers and some others, including military officers,<sup>17</sup> Member of Parliament,<sup>18</sup> and officials who are not paid by a public fund or appointed under any regulation.<sup>19</sup> But case law does not extend bribery offence to public officials performing private functions. In addition, the Prevention of Corruption Act 1906 extended the Public Bodies Corrupt Practices Act 1889 to cover also bribery in the private sector and the Prevention of Corruption Act 1916 extended the 1889 Act to include bribery in central government. Under Section 1 of the 1906 Act, the concept used is ‘agent’. The term ‘agent’ will encompass both public officials and private employees. The concept ‘agent’ covers persons employed by or acting for a principal, including the State.

One can see, through these analyses of the UK and French law on the concept of public official that the scope of the concept has been significantly broadened. This trend shows compliance with international standards as well as correspondence with the theories considering the bribee in bribery offences.

*“Foreign public official”* is another kind of bribee. The concept of foreign public official is understood under the above Conventions in similar ways. The COE Convention treats

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<sup>17</sup> R. v. Whitetaker [1914] 3 K.B. 1283.

<sup>18</sup> R. v. White [1875] 13 S.C.R. (N.S.W.) 322.

<sup>19</sup> Stewart v. R. [1960] 2 W.I.R. 450.

the concept along the same lines as that of national public official. The difference is that “foreign public official” refers to officials of foreign states. This Convention allows the definition of foreign public official to be determined by national law (Article 1). The concept is thus identified by similar criteria to those of a “national public official”, except that the official is of another state. The UN and the OECD Conventions both specifically define the term. Under these conventions, the scope of the definition of ‘foreign public official’ includes public officials of foreign countries and officials and agents of public international organisations. For instance both Article 2 of the UN Convention and Article 1 (4) of the OECD Convention define the concept to cover persons holding a legislative, administrative or judicial office or persons exercising a public function for another country or for an international organisation. Thus the ‘key word’ for determining the concept is ‘a public function’. According to the Official Commentary 12 to the OECD Convention, “‘Public function’ includes any activity in the public interest, delegated by a foreign country.’ This kind of function can be identified by two features: first, it is an activity delegated by a foreign country and, second, it relates to the public interest. Foreign states include any organized foreign area or entity. Article 1(4)(b) of the OECD Convention also stresses that “‘foreign country’ includes all levels and subdivisions of government, from national to local.’ Furthermore, the term “foreign public official” in these Conventions also covers officials, employees and representatives of international organizations. Such organizations consist of those established by states, governments or other public international or supranational organizations or bodies of which the state party is a member, regardless of their form and the scope of their competence. A “Public official” of a public international organization shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.<sup>20</sup> This class of officials is therefore very diverse. It can also include the members of parliamentary assemblies of international or supranational organizations (e.g. the European Parliament) and international courts (e.g. the International Criminal Court, the Court of Justice of the European Communities). Such a person can also include a “contracted employee”, within the meaning of the staff regulations, of any public

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<sup>20</sup> Article 2(c) of the UN Convention.

international organization (OECD 2007: 33). Once again the concept is defined in a very broad way and is very comprehensive.

Under domestic laws, the concept seems not very different, just adding an international flavour to the domestic notion. For example the Penal Code of France defines the term ‘foreign public official’ to include community civil servants or national civil servants of another member State of the European Union or members of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community; persons acting under the authority of other foreign states or other public international organizations; judges, prosecutors, jurors and other persons holding judicial office.<sup>21</sup> The term as expressed under the law is both clear and specific. Another example is the definition of foreign public official under US law. The Foreign Corrupt Practices Act (FCPA) sets up a definition of foreign official that includes any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>22</sup> Moreover, US case law has confirmed this covers of individuals whose official status may not be readily apparent. The definition would, for example, cover judges, even though they are not expressly included, and even though in a particular country the judiciary might be independent to a degree, which could call into question whether judges were foreign public officials.<sup>23</sup> The FCPA also specifically prohibits payments to “any candidate for foreign political office” and “any foreign political party or official thereof” to influence that party’s or individual’s decision-making or to induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business. In this regard the FCPA has a broader scope than the OECD Convention.<sup>24</sup>

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<sup>21</sup> See Articles from 435-1 to 435-4 of the French Penal Code.

<sup>22</sup> 15 U.S.C. § 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

<sup>23</sup> United States-Phase 1 Bis: Report on Implementation of the OECD Anti-Bribery Convention, p.5.

<sup>24</sup> *Ibid.*, p.6.

Leaving the issues regarding the bribe recipients, the briber should be considered. Under the Conventions, *the briber* can be any person, regardless of his capacity. For example he can be a public official, a private individual or a company. This means that the Conventions do not require “special features” of such an offender. The briber can be an individual as well as a legal entity. The Conventions clearly cover the liability of legal persons.<sup>25</sup> If the briber acts for the account of or on behalf of a legal person, corporate liability may also apply in respect of the legal person in question, providing that the briber involved has a management position in such entity. For instance, under the COE Convention, a legal person can be held liable for the criminal offence of active bribery that was committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person. Such a position is based on the power of representation given by the legal person or the authority to take decisions on behalf of the legal person or exercise control within the legal person. Moreover, Article 18 (2) of the COE Convention extends corporate liability to cases where the lack of supervision within a legal entity makes it possible for subordinate persons to commit active bribery. “Creating or allowing a climate of corruption to exist because of failure to supervise by management renders the legal person liable” (Huber 2003: 583). The legal person can also be responsible for active bribery offences in cases where there is an involvement of such a natural person as accessory to or instigator of a bribery offence. It should be noted that both the OECD Convention and the COE Convention provide for a legal person’s responsibility to be imposed only on active bribery offenders, whereas the UN Convention allows such liability for every offence established by the Convention. As with the usual criminal principle, the liability of a legal person does not in any manner exclude criminal proceedings against relevant natural persons. Therefore, the combination of corporate liability with individual liability is provided for in all these conventions. Consequently, the Conventions recommend corporate liability to be established under domestic criminal law.

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<sup>25</sup> See Article 2 of the OECD Convention, Article 18 of the COE Convention and Article 26 of the UN Convention.

It appears that the standards established by the Conventions for provisions on the briber match those in the domestic law of several countries. Take the relevant provisions in the French Penal Code as an example. The briber can, under Article 433-1, be any “private person”, including natural as well as legal persons. It means that a public entity cannot be held criminally liable for active bribery offence. Article 433-25 provides that legal persons may incur criminal liability for active bribery pursuant to the conditions set out under Article 121-2. Accordingly, legal persons shall be criminally liable for active bribery offence committed on their account by their organs or representatives. Article 121-2 also notes that the criminal liability of legal persons does not exclude that of any natural persons who are perpetrators of or accomplices to the same act. Looking at these provisions it can be seen that the principles of holding criminally liable as briber and the general grounds for corporate criminal liability under French law are almost the same as those under international conventions. One more example is the US bribery law. Under general legal principles, the United States holds legal persons criminally liable for active bribery, including bribery of a foreign public official. The U.S.C provides that “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>26</sup> The 1998 amendments expand the FCPA’s coverage to any legal person organized under the laws of a foreign country that takes any act in furtherance of an unlawful bribe within the territory of the United States. Under these provisions, state-owned and state-controlled companies are subject to criminal responsibility if they are organized as a corporate identity according to the laws of the state of incorporation and thus falls within the definition of a “domestic concern,” “issuer,” or “person” under the FCPA. The ground for liability is that, “[a] corporation is held accountable for the unlawful acts of its officers, employees and agents under a *respondeat superior* theory, when the employee acts (i) within the scope of his or her duties, and (ii) for the benefit of the corporation.”<sup>27</sup> UK law on the liability of the briber is similar with the principles of corporate liability established by the common law (Nicholls et al. 2006: 40-41). Some mentioned domestic laws are well illustrated international standards of establishing criminal liability for the briber.

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<sup>26</sup> 1 U.S.C. § 1.

<sup>27</sup> United States-Phase 1 Bis: Report on Implementation of the OECD Anti-Bribery Convention, p.10.

*Actus reus* is another element of bribery offences. This element expresses the acts of the offences. Under the Conventions,<sup>28</sup> the *briber's act* can be promising, offering or giving an advantage.

“Promising” may, for example, cover situations where the briber commits himself to give an undue advantage later...or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later. “Offering” may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, “giving” may cover situations where the briber transfers the undue advantage.<sup>29</sup>

It can be seen that the Conventions do not limit the offence of active bribery to the act of transferring the bribe alone. From these Conventions' point of view, “[p]rior agreements and other acts preparatory to the transfer must also be included by national legislation as criminal conduct. Conversely, an act of bribery committed on the spur of the moment, without prior agreement, must also be regarded as an offence” (Zerbes 2007: 110). Active bribery is completed as soon as the recipient has perceived the existence of an offer or promise of bribe or as soon as it is possible for him to obtain access to the bribe, irrespective of whether he accepts the offer or the bribe.

The bribee's act can be requesting, soliciting, receiving or accepting a bribe under the COE Convention and the UN Convention. Accordingly, passive bribery offences are divided into two broad categories: (1) acts of requesting or soliciting a bribe, (2) acts of accepting or receiving a bribe. ‘Requesting’ or ‘soliciting’ a bribe occurs when a public official lets another person know, explicitly or implicitly, that he will have to pay in order to make the official act or refrain from acting. It is thus the unilateral act of the official.<sup>30</sup> The requested person needs neither be aware of the existence of the request nor receive it. “Acceptance or receipt means the actual taking of the benefit.”<sup>31</sup> This act may be committed by someone on the official's behalf. The offence is complete when the request

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<sup>28</sup> Article 15 of the UN Convention; Articles 2,3 of the COE Convention; and Article 1.1 of the OECD Convention.

<sup>29</sup> Explanatory Report of The COE Convention, Para. 36.

<sup>30</sup> Explanatory Report of the COE Convention, Para. 41.

<sup>31</sup> *Ibid.*, Para. 42.



is made or when the bribee accepts the offer of the bribe or when he actually obtains the bribe, depending on what act is committed.

Under the Conventions, it is important to note that ‘offering’ or ‘giving’ or ‘requesting’ a bribe does not require an agreement between the briber and the bribee. From this viewpoint the international standard seems different from theories mentioned in subtitle 1.1.3 of the thesis.

Let me take some examples of domestic law and compare them with international standards in regard to illegal acts of bribery offences. The French Penal Code provides ‘proffering’ an offer or a promise or a benefit<sup>32</sup> as the act of active bribery. This is meant to encompass offering or promising or providing a benefit. Passive bribery covers such acts as ‘requesting’ a bribe or ‘accepting’ an offer or a bribe.<sup>33</sup> These acts can be committed “at any time”. Consequently, a prior agreement between bribery parties is not required. Under UK law, acts of active bribery are ‘offering’, ‘agreeing’ to give and ‘giving’ a bribe. Passive bribery includes ‘accepting’, ‘obtaining’ ‘agreeing’ to accept, ‘attempt’ to obtain.<sup>34</sup> It does not however cover ‘soliciting’ a bribe, though such conduct may be treated as an attempt to obtain a bribe. So UK law sees an offence of bribery not only in giving or receiving a bribe but also in offering or accepting one. It is noted that “offering and receiving a bribe are unilateral acts and do not depend on any state of mind on the part of the person offering the bribe or the person solicited” (Nicholls et al. 2006: 18). In addition, the law does not require a prior agreement between the two parties. “It is not necessary for a corrupt contract to be proven” (Sullivan 2003: 66). This is understandable because the conduct e.g. acceptance or obtaining of a gift or consideration fully meets the requirements of the offence. Similarly German law stipulates such illegal acts of bribery offences as ‘demanding’ or ‘allowing’ oneself to be promised or ‘accepting’ a benefit; or ‘offering’ or ‘promising’ or ‘granting’ a benefit.<sup>35</sup> Under US law the acts provided for are almost the same.<sup>36</sup> It appears that both international Conventions and domestic laws share a common view regarding illegal acts of bribery offences. This

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<sup>32</sup> Article 433-1 of the French Penal Code.

<sup>33</sup> Article 432-11 of the French Penal Code.

<sup>34</sup> Article 1(1) of the Prevention of Corruption Act 1906 of UK.

<sup>35</sup> Sections from 331 to 335 of the German Criminal Code.

<sup>36</sup> 18 U.S.C. § 201(b)(1)(2).

law practice is almost consistent with the theoretically relevant issues mentioned in subtitle 1.1.3, except for the issue of a prior bribery agreement.

*The bribe* is a very important element that should be referred to and carefully analyzed. According to the Conventions, the bribe must constitute an ‘undue’ advantage. Thus, not all advantages are prohibited. What does ‘undue’ mean? An advantage is only considered as undue when it is not foreseen by a legal norm. The determination of the lawful or unlawful nature of an advantage is based on the binding legal norm of the state Parties. For example, under the OECD Convention, there cannot be a bribery offence if the advantage is permitted or required by the written law or regulation of the country of the foreign public official, including case law.<sup>37</sup> Similarly, the COE Convention considers ‘undue’ benefit as something that the recipient is not lawfully entitled to accept or receive. It is also explained that “the adjective “undue” aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.”<sup>38</sup> In general, the spirit of the Conventions is to make the giving of an advantage an offence regardless of its result, the value of the advantage, the local customs, the local authorities’ tolerance to such payments and the alleged necessity of the payment. However, small facilitation payments can be accepted.<sup>39</sup> It is perceived that the criminalization of the giving of very small gifts is not a practical or effective way to combat bribery. By its provision on facilitation payments, the OECD Convention does set up a bottom line between legal and illegal advantages.

As stated in each of the above Conventions, the bribe can be any undue pecuniary or other advantage. It can also be defined as any tangible or intangible benefit. The bribe can be an advantage of any kind. The usual forms of bribe are bank transfers or the payment of cash and transfers of other assets. Bribes are not only of material (tangible) but also immaterial (intangible) benefits, e.g. obtaining a place at a famous school for the official’s child or better career prospects. The arrangement of all kinds of personal favours for the official, whether related to his career or his private life, is covered. The key point is that the offender or the third party is placed in a better condition than he was

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<sup>37</sup> Official Commentary 8 of the OECD Convention.

<sup>38</sup> Explanatory Report of the COE Convention, Para. 38.

<sup>39</sup> Official Commentary 9 of the OECD Convention.

before the commission of active bribery and that he is not clearly entitled to the advantage given to him. The requirements regarding the nature and form of the bribe set forth under the Conventions seem both flexible and justifiable view from the criminal law perspective.

The criminal law of several countries seems to match international views on the bribe. French law is an example. The Penal Code defines the bribe as offers, promises, donation, gifts, and advantages.<sup>40</sup> The bribe is thus a broad concept. Accordingly a bribe may take the form of cash or any other advantage, including services. The value of the given advantage is not important for action to constitute an offence. “An advantage, whatever its value, must be the cause of the employee’s performance” (Bonifassi 2003: 92). The bribe includes pecuniary as well as non-pecuniary advantages. At UK common law the bribe is defined as “undue reward”. Under statutory law, it is provided for to include “gift, loan, fee, reward, or advantage whatever”, all being considered as “an inducement to, or reward for” the act of doing or not doing something in respect of which the official is concerned.<sup>41</sup> “Although bribes usually take a tangible form such as money, they can also take the form of services, including sexual services” (Nicholls et al. 2006: 19). In US law, the simple but multiple meaning term for the bribe is “anything of value”.<sup>42</sup> US law regards “anything of value” as being equivalent to any advantage. “Anything of value” means anything that is of value to the recipient and encompasses anything that is given to an official to obtain an improper advantage.”<sup>43</sup> German law covers all material or non-material benefits to which public officials have no legal entitlement and that place them in a better position in economic, legal or even only personal terms.<sup>44</sup>

Some countries’ laws do not criminalize ‘minimum gifts of very small value’. For instance, at common law a reward that is so small as not to be considered as reward, cannot be regarded as “undue”.<sup>45</sup> Under French law, it is more difficult to prove that an

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<sup>40</sup> Article 433-1 of the French Penal Code.

<sup>41</sup> See in detail Section 1 of the 1906 Prevention of Corruption Act of UK

<sup>42</sup> 18 U.S.C. § 201(b)(1)(2).

<sup>43</sup> United States-Phase 1 Bis: Report on Implementation of the OECD Anti-Bribery Convention, p.4.

<sup>44</sup> Section 334 of the German Criminal Code

<sup>45</sup> Woodward v. Maltby [1959] VR 794.

advantage of little value was the cause of the performance than when there is an advantage of large value (Bonifassi 2003: 92).

Regarding facilitation payments, the Conventions allow domestic law to exclude such payments from criminalization.<sup>46</sup> UK law has never recognised facilitation payments as a distinct category of payment or reward (Nicholls et al. 2006: 19). However the Government has publicly stated that it is difficult to envisage circumstances in which the making of a small facilitation payment, extorted by a foreign official in a country where this is normal practices, would of itself give rise to a prosecution in the UK.<sup>47</sup> US law allows the exclusion of facilitation payments from criminalization.<sup>48</sup> In contrast, under German law it is said that there is no possibility of excluding small gifts.<sup>49</sup>

It appears that the issues relating to the bribe as set out under the Conventions as and provided for in some domestic laws are similar in manner and have almost the same content. This shows a common perception on the issue between international and national law. International standards are further said to be equivalent to theories on the bribe mentioned in previous parts.

*The third party beneficiary* can also be considered a requirement of bribery offences. The above Conventions all cover the issue of a third party who benefits from the bribery offences. The OECD Convention mentions “a third party”<sup>50</sup>, the COE Convention covers “anyone else”<sup>51</sup> and the UN Convention clearly includes “another person or entity”.<sup>52</sup> Therefore, the advantage given by the briber is not necessarily enjoyed by the public official himself. It can be for the benefit of a third party. The third party beneficiary, too, may be anyone regardless his or her relationship to the official. Giving advantages to his wife or his son or contributing to the political party to which the official may be affiliated or to the office for which he works can still constitute an illegitimate motive for exercise of that public official’s public powers. Such provisions on third party beneficiaries aim at

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<sup>46</sup> See for instance Official Commentary 9 of the OECD Convention.

<sup>47</sup> At <http://www.ukti.gov.uk>.

<sup>48</sup> 15 U.S.C. § 78dd-1(b) and (c).

<sup>49</sup> Germany-Phase 1 Bis: Report on Implementation of the OECD Anti-Bribery Convention, p.2.

<sup>50</sup> Article 1.1.

<sup>51</sup> Article 2.

<sup>52</sup> Article 15.

filling a loophole in domestic laws that restricts criminal liability to cases where the advantages are given to the official himself. The bribery offence provisions should also cover cases where advantages are transmitted directly to a third party albeit with the agreement or awareness of the public official. Note that this does mean that when an offer or promise is addressed to a third party, the official must have knowledge of it, at least to some extent. By addressing this issue, international law once again uses the same notion as does criminal law theory.

The issue of the third beneficiary is addressed in the State Parties' domestic laws. Under UK law, the bribe is stated to be given to an agent "for himself or for any other person".<sup>53</sup> German criminal law stipulates regarding the benefits given to the public official "for himself or for a third person".<sup>54</sup> US law covers advantages given "for any other person or entity".<sup>55</sup> Some other countries recognized the third party beneficiary of bribery offences in the interpretation of their laws although the law does not expressly cover the point. These facts show that domestic laws are compatible with international standards to a certain extent.

*The act of the concerned official* is the object of bribery offences. According to the Conventions, a bribe is given in order to make an official act or refrain from acting in the exercise of his official duty or function. In other words, it aims at influencing the official's public activities. The Conventions does require a link between the bribe and the official's action or omission. In other words, the bribe has to be given to induce the official to act or refrain from acting in the exercise of his or her duties. The key point is that the Conventions do not require that the official's action or omission as such must be illegal or in breach of duty. Let me take the OECD Convention as an example. The spirit of this Convention is that a bribery offence is constituted in, say, a tender situation, whether or not the winning, bribing company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.<sup>56</sup> Moreover, under the COE Convention, an official's act will be considered more harmful

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<sup>53</sup> Section 1(1) of the 1906 Prevention of Corruption Act of UK.

<sup>54</sup> Sections from 331 to 335 of the German Criminal Code.

<sup>55</sup> 18 U.S.C. § 201(b)(1)(2).

<sup>56</sup> The Official Commentaries of the OECD Convention, Para. 4.

if the official acts in a manner which is actually prohibited or arbitrary; he would become liable for a more serious offence.<sup>57</sup> The State Party should not provide that an illegal act of the official is a required element of the offence but it may establish it as an aggravating factor. The explanation is that the Conventions aim at safeguarding the confidence of citizens in the fairness of Public Administration and this would be severely undermined by the accepting of bribes, even if the official might have acted in the same way even without the bribe.<sup>58</sup> Moreover, the act of taking bribes will lead to an official's seeking private benefit whenever he performs his duty.

The domestic law of UK, US, France or Germany is in conformity with the Conventions in regard to the connection between the bribe and the bribee's performance of duty. Similar to standards established in the Conventions, these domestic laws provide that the bribe be given to the official as an inducement or reward "for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, ...",<sup>59</sup> "to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;...",<sup>60</sup> "for the discharge of an official duty".<sup>61</sup> The wording of the domestic law does not express any requirement that the nature of the official's act be illegal. Confirming this, it is stated in French law that "[a]n employee who is bribed to perform an act that he is otherwise required to perform is nevertheless liable for punishment when it can be proven that the bribe induced this particular instance of performance (Bonifassi 2003: 95); or it is also noted under UK law that "it would be no defence for an agent to demonstrate that, despite taking a bribe, he bargained effectively for his principal and obtain a good contract" (Sullivan 2003: 66). German law even considers the taking or giving of bribes as an incentive for violating the recipient's official duties as an aggravating offence to be more severely punished.<sup>62</sup>

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<sup>57</sup> The Explanatory Report of the COE Convention, Para. 39.

<sup>58</sup> Ibid.

<sup>59</sup> Section 1(1) of the 1906 Prevention of Corruption Act of UK.

<sup>60</sup> Article 432-11 of the French Penal Code.

<sup>61</sup> Section 331 of the German Criminal Code.

<sup>62</sup> Section 332 and Section 334 of the German Criminal Code.

A question that can be raised is whether the official's action or omission is linked to acts within his power (duty) or whether it needs just relate to his position or influence. The Conventions consider the matter in a broad light. For example, it is specified that to "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorized competence.<sup>63</sup> One consequence of this is that the briber may not even be aware of whether the official had the discretion to act or refrain as requested. The briber need only expect that the official has the authorized capacity.

Under French law, the notion seems very similar. It can be seen from the wording of the law that the performance of an act is required to be related to the bribee's office, duty or mandate or facilitated thereby.<sup>64</sup> The official's act is thus not only strictly within his duty. The FCPA of the US includes payments to induce a foreign public official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision, whether or not the award of specific business is within his authorized duties.<sup>65</sup>

The Conventions are also concerned with *bribery through an intermediary*. Under the Conventions there is a notion that bribery can also be committed through an intermediary. This is the so-called indirect form of bribery. The Conventions thus cover situations that occur when a briber offers, promises or gives a bribe through an intermediary or when an official accepts or receives a bribe through an intermediary. Unlike the requirement relating to the bribee, the intermediary can be anyone. He or she does not have to be a person who has any relation to the briber or the bribee. For instance, an intermediary can appear when a briber uses a customs agent, a financial institution, a consultant, a company or even a lawyer to transmit an offer, promise or gift to an official on his or her behalf. The matter of determining whether the intermediary should be liable as an accomplice to the active or passive bribery offence or as a perpetrator is left to the state parties. Domestic law can define a separate offence of acting as an intermediary in bribery, or the descriptions of active and passive bribery offences can also allow for the

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<sup>63</sup> Article 4(c) of the OECD Convention.

<sup>64</sup> Article 432-11 of the French Penal Code.

<sup>65</sup> 15 U.S.C. § 78dd-1(a); 78dd-2(a); 78dd-3(a).

action of the intermediary to be seen as that of an accomplice. This is not important from the perspective of the Conventions. Further, the Conventions do not require that the intermediary always have knowledge of or intent to commit the bribery offence. In other words the intermediary may in some cases not know the legal nature of his action and he is merely used by the briber or the bribee as their tool, for example to transmit the offer or the bribe. Of course the intermediary in such cases will not be criminally liable for his action. The Conventions do not further mention this issue. It can be said that the Conventions focus on the liability of the briber and the bribee, showing less interest in the intermediary, even in a case of bribery through intermediaries.

The State Parties' law varies in providing grounds for the intermediary to be held criminally liable. For instance, under French law there is no specific offence of acting as a bribery intermediary but the Penal Code stipulates that illegal acts can be committed directly or indirectly.<sup>66</sup> Accordingly for bribery to be constituted, the public official needs not be aware of the role of the intermediary. The present law of the UK criminalizes bribery through an intermediary via the principle of secondary liability. According to this, the intermediary is guilty of bribery of foreign public official as a principal offender. The briber is held liable as an accessory who assists or encourages the intermediary.<sup>67</sup> Most of the State Parties' laws treat bribery through intermediaries via relevant complicity provisions or case law. This would be considered a consistent implementation of the Conventions.

### *Subjective elements of bribery offences*

Under the above Conventions, bribery offences are all intentional offences. In other words, bribery offences can only be committed intentionally. For instance, Article 28 of the UN Convention defines “[k]nowledge, intent and purpose as elements of an offence”. Accordingly, the briber and bribee must be aware and have the intention that the bribed official act or refrain from acting in exercise of his or her duties. The Conventions neither prescribe the mental elements of bribery offences precisely nor interpret the meaning of intent. Theoretically, two elements are normally included in any definition of intent: the

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<sup>66</sup> Articles 435-2, 435-3 and 435-4.

<sup>67</sup> UK Law Commission Consultation Paper No.185, Paras. 7.24, 10.2 – 10.5, and 10.13.



element of knowledge and the element of will (volition). The commentary that follows gives a comprehensive explanation of these two elements:

To act *knowingly*, the offender must have been aware that he was committing bribery himself or through another person, as the case may be; he must at least have reckoned with it. To act *willingly*, the offender must have resolved to commit the crime, or have reckoned with the occurrence of corruption under his management (Zerbes 2007: 159).

The Conventions furthermore require that ‘intent’ has to relate to all objective elements of the offences, including the future result of the offence.<sup>68</sup> This means that the intent must also relate to the briber’s act that is regarded as a consecutive element. For example the briber does not only want to give the bribe, but also wants the bribed official to act or refrain from acting as required. However, ‘intent’ does not require that the actual action of the bribed official be as intended. In addition, under the Conventions the purpose of influencing the official’s performance of duty is also required as another mental element of bribery offences. It seems difficult to prove the *mens rea* of the bribery offences, due to these rather vague requirements. The UN Convention suggests the way to determine these elements “[k]nowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.”<sup>69</sup>

A review of some State Parties’ law shows similarities in the way that ‘intent’ is reflected in any statute which brings about criminalization. The domestic laws of UK, New Zealand, Australia, US, Germany and France all establish ‘intent’ as the required mental element of bribery offences. Those with a common law tradition often use such terms as ‘corruptly’, ‘improperly’ or ‘with intent’ to express the ‘intent’ element.<sup>70</sup> Those with a civil law tradition usually do not make any description of ‘intent’ in the definitions of bribery offences, but refer to provisions giving a definition of intent common to all offences.<sup>71</sup> The requirement of mental elements seems to be respected by domestic law.

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<sup>68</sup> Explanatory Report of the COE Convention, Para. 34.

<sup>69</sup> Article 28 of the UN Convention.

<sup>70</sup> See for example Article 1(1) of the 1906 Prevention of Corruption Act of UK, Title 18 U.S.C. § 201(b)(1)(2) or Section 70.2(1) of the Australian Criminal Code Act 1995.

<sup>71</sup> See for instance Article 121-3 of the French Penal Code or Section 15 of the German Criminal Code.

In addition to international standards, national approaches to the subjective elements of bribery offences revealed a consensus with the relevant theoretical viewpoints.

***Issues concerning the specific types of bribery which should be criminalized***

The first type approached is *bribery of foreign public officials*. The Conventions all address issues relating to this type of bribery, recommending State Parties to criminalize it under national law. The UN Convention in particular recommends that the acts of active and passive bribery of foreign public officials or officials of public international organizations be criminalized as offence of bribery.<sup>72</sup> The COE Convention requires State Parties to criminalize active and passive bribery of foreign public officials; of members of any public assembly exercising legislative or administrative powers in any other State; of members of parliamentary assemblies of international or supranational organisations of which the Party is a member; of the holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.<sup>73</sup> Unlike these Conventions, the OECD Convention only covers active bribery of foreign public official, although the coverage of the concept ‘foreign public official’ is the same as that covered under the UN Convention. The two former Conventions cover both active and passive bribery of foreign public officials for different purposes in different areas. However, under the OECD Convention, the aim of active bribery of foreign public official must be to obtain or retain a business transaction. As a result, not all bribery of foreign public officials falls under this Convention but only that involving international business transaction. The transactions concerned can be cross border or foreign trade or transactions with international organizations. Advantages which result from the bribery can be contracts obtained or other improper advantages like investment permits in international sales. Every benefit that is gained through bribery of a foreign public official shall be regarded as an improper advantage. There must be a link between the commission and the objective of the offence. However, the obtaining of the advantage is not required. “It is important to emphasize that it is always bribery under the Convention for a foreign public official to be paid in return for the granting of business, without

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<sup>72</sup> Article 16 of the UN Convention.

<sup>73</sup> Articles 5, 6, 10 and 11 of the COE Convention.

regard to the economic benefit which the transaction might bring to the foreign state concerned” (Zerbes 2007: 151). Hence, it can be said that the obtaining of an improper advantage and its value are not relevant issues in such a bribery offence.

It can be seen that almost all State Parties to these Conventions have criminalized bribery of foreign public official as a separate offence. For instance, French law provides for active bribery offences involving a foreign public official separately from bribery of domestic public officials.<sup>74</sup> Under these provisions, foreign bribery offence does not only cover bribery occurring in business transactions but also that involving different areas, including bribery of foreign judicial officials. Similarly, Part 12 of the Anti-Terrorism, Crime and Security Act 2001 extended the jurisdiction of English law over bribery offences to include bribery involving foreign public officials abroad. Further US law and German law set out separate provisions concerning bribery of foreign public officials.<sup>75</sup> The coverage of foreign bribery under these national laws is totally in conformity with international standards.

The above Conventions also extend criminal responsibility to *bribery in the private sector*. There are several reasons for the criminalization of bribery in the private sphere. First of all, it helps ensure the maintenance and development of fair social and economic relations. Second, it is necessary for maintaining fair competition. Finally, it protects the public from the damaging effects of bribery in business, especially the corruption of financial and other powers in this field of social life.<sup>76</sup>

There are three notable features of bribery in the private sector that can be identified. *First*, the scope of the fields where private bribery occurs is restricted to the business area. Under the COE Convention, it is limited to “business activity”.<sup>77</sup> The UN Convention provides three areas where private bribery can occur: economic, financial and commercial activities.<sup>78</sup> *Secondly*, the receivers must be employees in the private sector.

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<sup>74</sup> See Articles 435-1, 435-2, 435-3 and 435-4.

<sup>75</sup> See 15 U.S.C. §78dd-1, 78dd-2 and 78dd-3 and the Act of Combating Bribery of Foreign Public Official in International Business Transactions 1998 of Germany.

<sup>76</sup> See the detail explanation in Explanatory Report of the COE Convention, Para. 52.

<sup>77</sup> Article 7 and Article 8.

<sup>78</sup> Article 21.

The Conventions specifically provide that the passive actors in private bribery offences can be persons who direct or work, in any capacity, for private sector entities. This provision can be interpreted in a broad way. “It should cover not only employees but also the management from the top to the bottom, including members of the board. ...It would also include persons who do not have the status of employee or do not work permanently for the company...but can engage the responsibility of the company.”<sup>79</sup> The provision therefore covers a large number of people who can become offenders of bribery in the private sector. *Thirdly*, in contrast to the provisions on bribery in the public sector, the private bribery offence requires an element of breach of duty by the bribee. This requirement is explained in this way “[t]he employee, partner, or managing director who accepts a bribe to act or refrain from acting in a manner that is contrary to his principal’s interest betrays the trust and loyalty expected of him based upon the contract between them. The secrecy under which the undue benefit is agreed upon or accepted causes the offence to be a grave threat to the principal’s interests” (Huber 2003: 579). It appears that the loyalty-based relation between the employee and the principal becomes the key point justifying the impropriety of bribery in the private sector. From the international viewpoint, criminal law should only intervene in the private sector when the payment is to violate the bribee’s duties owed to his principal.

As State members of the Conventions, several countries such as the United Kingdom and France do respect these international requirements concerning private bribery. French law has criminalized bribery in the private sector since 1919. The relevant provisions were first established in the Penal Code (Article 177), then placed in the Labour Code (Article L.152-6), and are now once again included in the Penal Code (Articles 445-1 and 445-2). By virtue of the designation of the offences “passive and active corruption of persons not holding a public function”, the bribe recipient is not a public official but a person who is “holding or carrying on, in the context of a professional or social activity, any management position or any occupation for any person”.<sup>80</sup> Accordingly, the bribee may be a manager or an employee. Payment to a person can only constitute an offence when it is made to induce him to act “in violation of his legal, contractual and professional

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<sup>79</sup> Explanatory Report of the COE Convention, Para. 54.

<sup>80</sup> Article 445-2 of the French Penal Code.

obligations”.<sup>81</sup> These requirements of domestic law seem totally consistent with the Conventions. Under UK law, changes have been made to extend bribery to the private sector. Case law and the 1889 Public Bodies Corrupt Practices Act limited bribery to the public sector. The 1906 Act covers bribery in both the public and the private sectors in the same provisions.<sup>82</sup> Consequently private bribery is required the same elements and is treated in the same manner as bribery in the public sector. The expression of ‘agent’ in the private sector covers all persons employed by or acting for another (a principal). Moreover it is perceived that “there need be no breach of trust in the part of the employee other than the failure to reveal the taking of a bribe from a third party” (Sullivan 2003: 66). In this regard private bribery under UK law requires fewer conditions than that recommended by the international conventions concerned.

Some types of benefits such as *the gifts or rewards without an agreement* have not been approached in the Conventions, doubtless due to their controversial aspects. These Conventions require that the offer or request of the bribe must take place before the official’s action or omission. As a result it does not constitute an offence when a person gives or an official receives a benefit after the act has been performed by the official, without any prior offer, request or acceptance. In this case the official cannot be said to act under the influence of the payment. This requirement is to avoid punishing acts where benefits are unrelated to a specific earlier act in the exercise of the official’s duties.<sup>83</sup> This also suggests that “gifts” that are regularly given just for the sake of good relations with public officials should not be treated as bribery offences. The Conventions leaves it open to State Parties to consider whether the payment of late rewards for acts of public official should be criminalized.

Gift-giving and late payment are indeed criminalized in certain circumstances in a few countries. The case of US criminal law on illegal gratuity offence is a typical example.<sup>84</sup> Under criminal law, the illegal gratuity offence is closely related to the bribery offence. An illegal gratuity consists of inducements and rewards. The key difference between

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<sup>81</sup> Ibid.

<sup>82</sup> Article 1(1).

<sup>83</sup> Explanatory Report of the COE Convention, Para.43.

<sup>84</sup> 18 U.S.C. § 201(c)(1)(A)-(B).

bribery and illegal gratuity offence is that bribery requires a specific intent to influence an official act or to be influenced by an official; meanwhile illegal gratuity requires a lesser element of intent in that gratuity is given for or because of an official act only. Further, while bribery offences cover present and future officials, gratuity offence also applies to former officials. Another example is the UK law on bribery. The law is interpreted to hold that a “reward includes a gift for a past favour irrespective of whether there was any previous agreement to provide it. The offence lies in accepting the reward, not in the showing of the favour” (Nicholls et al. 2006: 30). Similarly, the French Penal Code criminalizes such payments as “unlawful taking interests”. French criminal law also provides a limit to the annual gifts that may be received.<sup>85</sup>

The above facts on the law of gifts and the like reflect not only the complexity of the issue but also the need for considering it from the criminal law perspective. This issue will be more discussed in later analyses.

### ***Issues of setting out penalties for bribery offences***

In addition to the criminalization requirement, the Conventions all mention the principle of punishing bribery offences. For example, the UN Convention provides that: “[e]ach State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.”<sup>86</sup> It is more specifically stated in the OECD Convention that “[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.”<sup>87</sup> Thus it can be perceived that the principle of proportionality, *inter alia*, should be borne in mind when the State establishes the range of penal sanctions for punishing bribery offences. Several factors may be referred to in determining whether the sanctions for bribery offences are effective, proportionate and dissuasive. The first factor is the comparability of the available sanctions for bribery offences to those for other offences of a similar nature, such as extortion, embezzlement or fraud. The second is whether the sanctions for the briber and the bribee are comparable. Another factor is

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<sup>85</sup> Articles 432-12, 432-13 and 432-14 of the French Penal Code.

<sup>86</sup> Article 30(1).

<sup>87</sup> Article 3(1).

whether the sanctions for bribery offences in different countries are comparable. The next factor is whether there is an appropriate differential in the level of sanctions for different levels of the committing of the offence, that is, for preparation, for attempt or for the completed offence. Furthermore, the issue of the actual enforcement of sanctions for bribery offences and their effectiveness should be considered.

The COE Convention also recommends penalties involving both deprivation of liberty and monetary sanctions.<sup>88</sup> The penalties for natural person who commits bribery offences are of definitely criminal nature, such as imprisonment, criminal fines. For legal persons, sanctions provided for are not purely criminal ones. The Conventions set forth several kinds of sanctions, e.g. confiscation (of the bribe, proceeds and instrumentalities of bribery), fines and confiscation of equivalent value. Due to the fact that not all criminal law systems impose criminal liability on legal persons, the Conventions do not oblige the parties to provide criminal sanctions but do suggest administrative or civil sanctions at least.

The criminal law of certain countries indicates they take a somewhat different view on the penalties for bribery offences. Countries like the US and France seem to regard the danger of such offences more seriously, by providing very severe penalties. Under US law, the offences may give rise to a fine maximum equal to three times the monetary equivalent of the bribe, or imprisonment of up to 15 years, or both penalties.<sup>89</sup> French law provides for bribery offences in the public sector with maximum penalties of ten years imprisonment and a fine of 150,000 Euros.<sup>90</sup> Taking a milder approach, UK law stipulates less severe penalties for the offences, that is, imprisonment for a term not exceeding 7 years or a fine, or both.<sup>91</sup> In the German criminal law, the penalties do not seem adequate to the gravity of bribery offences. The law provides for imprisonment not exceeding 3 years or a fine for normal cases; and imprisonment not exceeding 5 years for cases intending to violate the receiver's official duties.<sup>92</sup> These national laws all provide additional penalties that may be imposed on bribery offences, namely disqualifying from

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<sup>88</sup> Article 19(1).

<sup>89</sup> 18 U.S.C. § 201(b).

<sup>90</sup> Article 432-11 and Article 433-1 of the French Penal Code.

<sup>91</sup> Section 1(1)(b) of the 1906 Prevention of Corruption Act of UK.

<sup>92</sup> Sections 331-334 of the German Criminal Code.

holding office, confiscation of assets and some others. The conformity with international standards is to a certain extent ensured.

*In conclusion*, Conventions relating to bribery have been effective and useful tools in the combat against so immoral a phenomenon. These Conventions cover every kind of bribery activities which undermine public activity, guiding State Parties to criminalize these activities. All matters concerning bribery are prescribed in the Conventions, making the international legislation a universal standard for every country. Domestic laws give a range of examples illustrating the standards of criminal law set by the Conventions. All these international instruments seem to concentrate on the use of criminal law as the main tool. This shows that the role of criminal law is perceived as one of the most important pillars in the international combat against bribery. It is very important to note that all these Conventions only indicate standards for the Party States (individual countries) to help them set up effective measures and to promote their efforts in preventing and combating bribery. The provisions in these Conventions are not rigid but flexible. “The criminal law standards set forth in these Conventions become important guidelines for national law reform, creating grounds for the consensus on understanding and legislating bribery provisions all over the world” (Đào Lê Thu 2011: 42).

### **1.3. General Conclusions**

Reviewing the above analyses of issues concerning bribery offences from a theoretical viewpoint as well as from the criminal law standards set forth in relevant International Conventions, I summarize the content of this chapter as follows.

From the theoretical aspect, authors and scholars, to a varying extent, mention or do research on bribery offences. Their significant findings and valuable recommendations are given along with discussions and analyses. Bribery offences can be said to be an under-researched topic. The two-sided and complex nature of bribery makes it difficult to give a sufficient and accepted definition. Generally theoretical definitions of bribery express its nature, both as a phenomenon and as criminal offences, from different aspects. In addition, some definitions include the new features of bribery that have appeared recently. The undue nature and the gravity of these offences are clearly manifested in the



studies. The definitions, features and prevailing types of bribery, through analyses and mentioned theories, provide a real portrait for bribery to be identified and seriously condemned. Further, the studies on bribery offences provide notable ideas on the elements of the offences, e.g. on the bribe recipient, on the bribe, on the bribee's act, on the intent to influence official duties and so on. The criminal policy behind the punishment of bribery offences is also comprehensively covered. In spite of a few differences, the opinions and ideas expressed seem unanimous, showing that knowledge and perception of bribery offences have been now reached to universal standards.

From the practical perspective, issues in regard to bribery offences are also reflected in relevant Conventions and illustrated via some national law examples. The legal definitions of bribery offences under these Conventions, coupled with illustration from domestic legal systems show considerably common perception on the issue. Moreover the Conventions do manifest an international point of view on the different issues of bribery offences, e.g. the elements of active and passive bribery, bribery through an intermediary, the third party beneficiary. The Conventions provide international standards in criminal law which can be recommended not only to State Parties but also to others countries seeking criminalize the different bribery types. In other words, they help national criminal law prescribes bribery offences more specifically and adequately. Especially the Conventions also approach bribery related issues that have not been paid attention to by national law, such as bribery in the private sector, bribery of foreign public official and corporate liability for bribery offences. The Conventions have set up important standards and recommendations for national law to learn from and follow.

Comparing the theoretical definitions of bribery and the legal definitions in international instruments their compatibility and similarity can be seen. In other words, the definitions established under the Conventions meet the theoretical requirements of the subject that early mentioned. All the definitions describe bribery offences as activities involving the exchange of undue benefits to or by employees and officials of any agency or organization or entity in both the public and the private sector, with the intent of influencing them in the exercise of official duties.

The reasonableness and practicability of the theories on various issues of bribery offences are seen and confirmed by international standards set forth under the Conventions. There is a consensus between theory and law concerning such issues as the concept of ‘public official’, the concept of the bribe, illegal activities of the briber and the bribee, the ‘intent’ element, corporate liability in active bribery offence, bribery of foreign public officials, bribery in the private sector and the criminalization of gift-giving. For instance analysis concerning the bribee shows that both theory and international law do favour extending the scope of the concept. Most requirements for identifying a (domestic or foreign or international) public official are the same. The comparisons between theories and law standards do indicate a few differences regarding the issues of prior agreement between the briber and the bribee, the completion of bribery offences and the severity of penalties to be imposed on the offences.

Generally it can be seen that theories and international criminal law standards both considerably express common issues concerning bribery offences. Comparing all facts and ideas shows that the similarities are major and the differences minor. All this will serve as backgrounds for my later analyses on the laws of Vietnam, Sweden and Australia as well as on the interpretation and application of the law in each country in practice. The unanimity and reasonability regarding the issues may also give rise to ideas for recommendations for Vietnamese law presented in the last chapter of this study.

## CHAPTER 2

### BRIBERY OFFENCES UNDER THE CRIMINAL LAW OF VIETNAM COMPARED WITH THE POSITION IN SWEDISH AND AUSTRALIAN LAW

#### **2.1. Bribery Offences under the Vietnamese Penal Code**

Bribery offences are currently dealt with in the Vietnamese Penal Code 1999 which entered into force on 1 July 2000. The Code now contains the recent important amendments relating to bribery offences. The first change is the separation out of the offence of acting as an intermediary for bribery as an independent offence. The second change is the abolition of the death penalty from the range of punishments for giving a bribe and acting as an intermediary for bribery. The anti-bribery provisions of the Penal Code, found in Chapter XXI (Offences concerning Official Positions), criminalize three types of bribery, namely receiving a bribe (Article 279), giving a bribe (Article 289) and acting as an intermediary for bribery (Article 290). However, such offences are regulated in two different parts of Chapter XXI although they are all bribery activities. Specifically, taking a bribe is provided for in Part A (Corrupted Offences), whereas giving a bribe and acting as intermediary in bribery put in Part B (Other Offences concerning Official Position). This arrangement shows that in the criminal law context only passive bribery is considered corruption. The two latter offences are not classified as corrupted offences. The reason for such a distinction between bribery offences is attributed to the view of the definition of corruption. When enacting relevant provisions of the Penal Code, the legislators based themselves on the Ordinance on Preventing and Combating Corruption 1998, indicating that corruption must involve activities of misuse of office for private benefits by position holders and authority holders. As a result, corruption offences can only be committed by public officials or persons discharging public duties. Because the offences of giving a bribe and acting as an intermediary for bribery can be committed by anyone, they are not included in the group of corrupt offences. However, such offences are still categorized as “offences concerning official positions” for the reason that these activities are very closely linked to the performance of public duties of the high position

officials and they can both influence the stability, fairness and effectiveness of public authorities and organizations.

Similar to the Conventions concerning bribery, the Vietnamese Penal Code has no single and common definition of bribery. Bribery offences are prescribed independently in different provisions using different techniques. Among these, only receiving a bribe has its own definition. Giving a bribe and acting as an intermediary for bribery are not defined. The Code gives only designation to the latter offences and does not provide definitions. This legislative technique is explained by the fact that such offences are close and share similar features with taking a bribe so they can be easily understood based on the definition and elements of the latter (Mai Xuân Bình 1996: 55). In my opinion all offences in the Penal Code need to be defined with sufficient and clear prescription in order to avoid confusion and incorrect interpretation when studying and especially when applying the law. I discuss such definitions later in my thesis.

### **2.1.1. Elements of Bribery Offences**

Bribery offences are punishable in Vietnam by virtue of Articles 279, 289 and 290 of the Penal Code. Under Article 279 the offence of receiving a bribe can be defined as anyone who by abusing public position and/or authority received or will receive, directly or through an intermediary, money, property or other material benefits in any form, monetarily valued at at least two millions VND or in cases where the benefit is valued at less two millions VND, the act causes serious consequence or the offender has already been disciplined for the same act or the offender has already been convicted of one of the corruption offences but the criminal record has not been remitted, in order to act or refraining from acting in the exercise of his or her official duty or function for the giver's benefit or at the giver's request.

Articles 289 deals with "giving a bribe" by providing that anyone who gives a bribe calculated as having a monetary value of at least two millions VND or under that value where the act causes serious consequence or the act has been committed more than once. Further Article 290 establishes the offence of "acting as an intermediary for bribery" with the provision that limits acting as an intermediary for bribery to cases in which the bribe

calculated as having a monetary value of at least two millions VND or under that value but the act causes serious consequence or the act has been committed more than once.

Articles 289 and 290 in connection with Article 279 all establish particular elements of bribery offences as follows:

*First of all*, bribery offences require that the bribe recipient must be a position holder or an authority holder. Although this is not clearly indicated in Article 279, the phrase “by abusing position or authority” clearly suggests such requirement. According to Vietnamese criminal law theory, this involves the so-called “special offender”. Such an offender is the person that has not only the capability for criminal act but also one or more personal characters that enable him to commit a certain offence (Nguyễn Ngọc Hòa 2006: 60). To commit the offence of receiving a bribe, the offender is required to be a position holder or an authority holder in the public sector. Article 279 does not contain any explicit reference to the concept ‘a position or authority holder’ or any definition of the term. Instead, a definition can be found in Article 277 of the Penal Code. Particularly Article 277 defines them as persons who, through an appointment, an election, a contract or any other manner, paid or unpaid, are discharged to perform a certain public duty, having certain authority when performing such a duty. In addition to Article 277 of the Penal Code, Article 1(3) of the Law on Preventing and Combating Corruption makes the definition clearer by providing a list of persons included, namely: (a) Cadres, public officials, civil servants; (b) Professional soldiers, military employees, military officers in military offices or military force; high-ranking officers, non-commissioned officers either doing police tasks or doing technical tasks in police offices or police force; (c) Members of a directorate or of a management board of a state-owned enterprise; members of a directorate or of a management board who are representatives of the State’s capital in a company; (d) Persons who exercise an assignment designated by public authorities or who exercise a public duty, having authority when performing such assignment or duty.

It can be seen that the definition of the bribe recipient is defined in a criminal law provision but the scope of who should be considered as such is determined by a non-criminal instrument. According to the list of position or authority holders, the bribee may

perform any legislative, administrative or judicial duty. It is clear that under Vietnamese law Members of the National Assembly are regarded as those who may be subject to anti-bribery law. Further, a certain persons involve in public companies, in the military and the police forces are also included in the definition of the bribee. The key feature of all such persons in my observation is that they are discharging or performing ‘public duties’. As a result the concept is not limited to public officials or employees working in public agencies but broadened to include employees of public organizations, such as employees of political organs (e.g. members of organs of the Communist Party who are not public officials) and of social organs (viz. members of the Vietnamese Trade Union, of the Communist Youth Union), provided that they are responsible for carrying out the publicly-oriented duty of these public organizations and they have authority to make decisions that can affect the interests of other persons. In addition, certain persons who are not categorized as public officials or public employees but exercise an assignment designated by public authorities that allow them to decide on others’ interests are considered as a type of bribee, these including persons selected from the public to be supporters of the security forces in a community.

Based on the mentioned provisions, I recognize three features of the bribee under Vietnamese criminal law: (i) his or her position or authority can be established in different ways, such as through an appointment, an election or a contract; (ii) neither payment (or salary) for nor seniority are requirements for a person to be a public position holder; (iii) his or her duty is of public nature and his/her authority can only be enforced at the time of exercising the duty. In my opinion the most important factor for identifying a public position holder under Vietnamese law is the third feature. My argument for this is that the performance of public duties at the time being creates the official capacity for the receiver to do or refrain from doing something that meets the bribe-giver’s request. The public nature of the duty and the performance of that duty are thus required in order to determine the element of the bribe receiver. My opinion is supported by a statement that “the basic feature for determining whether a person is in a public position or a public authority holder is the nature of the public duty or function that he exercises and the authority that is vested in him by law” (Võ Khánh Vinh 1996: 37). Consequently, the provisions on bribery offences exclude payments made to candidates for public office

that have entered the electoral lists but have not yet been elected. Further the definition of the public position holder does not extend to a person who had been serving as a public office, but at the time of payment was no longer serving.

Under Vietnamese criminal law, the concept of a position holder or an authority holder is not limited to the central level of government. Such a concept covers the relevant persons at all levels of governments and authorities.

The above-mentioned persons are legally considered public position holders, but not all of them can become the offenders with respect to the offence of receiving a bribe. Under Article 279 the description of the offence contains a purposive element that “in order to act or refraining from acting in the exercise of his or her official duty for the giver’s interest or under the giver’s request”. As a result the offender must be a position holder who is officially able to act in the bribe-giver’s interests or at his requests. Such ability is the consequence of an official position and only occurs during the performance of a public duty. One practitioner indicates that the offender must be a person who is, at the time being, charged with resolving the bribe-giver’s case (Đinh Văn Quế 2006: 77). In other words, under Vietnamese criminal law, the briber-taker must be a person who holds a public position or has an official authority to directly act or refrain from acting for the bribe-giver’s advantage. This requirement seems to narrow the scope of the bribe recipient somewhat. It excludes two cases of taking improper benefits: (i) the public position or authority does not make the holder capable of directly acting or refraining from acting for the bribe-giver’s advantage; or (ii) the public duty had already been exercised, making the position holder unable to do so. An example is as follows: B is an investigator and was charged with the investigation of a case of petty injury by N. After finishing the investigation he found that the case should be excluded from criminal sanction. He thus made his report on the case with that recommendation. His chief agreed by signing the decision excluding any criminal sanction. B then met N, telling him that B is discharging N’s case and asks him for payment in order to give him favour in return. The act of soliciting payment in this case cannot constitute receiving a bribe under Vietnamese law because of the fact that B’s exercise of duty was over. He is no longer able to act on N’s case. His act constitutes fraud rather than bribery offence.

Under Vietnamese law some kinds of public employees like teachers, engineers or doctors, because of the nature of their purely educational or technical or scientific occupation, are not commonly considered as position holder within the meaning of the bribery offence. However they may commit a bribery offence if they perform public functions or duties that make them become decision makers, for example when they have the legal right to sign an education record, to assess and mark an entrance exam or to issue documents that affirm the technical standards of transportation means.

We need now to bring into focus the situation where a public official abuses his position to take a benefit but in fact has to influence another official to act for the giver's advantage, due to the fact that he is not able to do the act himself but he can use his position to influence other officials who have that capacity. The question is whether he will be convicted of receiving a bribe under Article 279. The answer is that his act will constitute another offence than the offence of receiving a bribe. The Penal Code makes this act the offence of "Abusing one's position or authority to influence other persons for personal benefit" under Article 283.

Unlike the recipient of the bribe, Vietnamese law does not require any special feature for the briber. The offender who gives bribe can be anyone who is capable of bearing criminal responsibility pursuant to Articles 12 and 13 of the Penal Code. Article 12(2) provides that an offender (when committing an intentional and very serious crime) must be of the age of fourteen years old or more. Article 13 implicitly requires that an offender must be in the normal state of mind that makes him/her aware of and able to control his/her act. Accordingly, under Vietnamese criminal law the briber must be persons aged at least fourteen years and is capable to understand the nature of his/her act and to control it in accordance with the common requirements of ordinary life. It is not necessary that the offender of giving a bribe is a position holder. That said, a position holder may commit the offence of giving a bribe, as in the case of Bùi Tiến Dũng, a former general director of PMU18 of the Ministry of Transportation who was convicted of preparation for giving a bribe to some law enforcement officials in order to escape from investigation and prosecution for a gambling offence. However it is clearly seen that in this situation the offender committed this offence as an ordinary person, not through a public role. The



Penal Code via these provisions provides criminal liability for individuals only. In other words, under the Code only natural persons are subject to prosecution for giving a bribe. Corporate liability for legal entities has not been criminally established.

The *second objective element* is actus reus or illegal acts of bribery offences. Firstly it is prescribed by Article 279 that passive bribery is the act of receiving money, property or other kinds of material benefit. The act must be committed by means of abusing a public position or authority. In other words, the abuse of a public position or authority is the manner for receiving a bribe. The abuse of public position or authority means under Vietnamese law the use of one's official duty or capacity for personal gains. By virtue of his or her position or authority, the offender can do or refrain from doing what the bribe-giver needs or requests in exchange for receiving a bribe. In other words, the act of receiving a bribe can only be committed in connection with the position or authority of the offender. It is perceived that "receiving money, property or other material benefits is in a close relation to the offender's public position or authority. A public position or an authority is a *facilitating factor* for the offender to take money, property or other material benefit from the bribe-giver" (Đình Văn Quế 2006: 84). This means that the offence may be easily committed via such factor. I am of a different opinion on this issue. The abuse of public position or authority should be considered a *decisive factor* (a requirement) rather than just a *facilitating factor* in receiving a bribe. The offence cannot be committed without this factor. For example H, S and T are public officials working for the Project Management Unit of a ministry. These officials used their power as members of the council charged with evaluating and deciding which company is the best qualified bidder in order to receive money given by a company' representative. They would be given money because they have the authority to decide the company giver should be the bidder. Thus their authority is the decisive factor in the receipt of the bribe.

Unlike the manner of classifying the varying acts in the relevant conventions, the prohibited act of receiving a bribe is not specified into different kinds. Under Article 279 the only prohibited act is receipt of a bribe. Receiving a bribe can be committed in two different situations: 'already received' an improper benefit or 'will receive' improper reward after acting or refraining from acting in respect of the giver's interest under a

prior agreement with the giver. Accordingly the actual receipt of the bribe may be made before or after the performance of public duties in the giver's interest. In both cases, there must be a prior agreement between the briber and the recipient on the specific things to be done in the briber's interest. In the latter case both parties also have to agree that a bribe will be given to the position holder, but the amount or value of the bribe is not necessary included in such an agreement. An agreement is made in two different cases: first, when the bribee accepts the briber's offer or promise; second, in case the bribee solicits a bribe, the agreement is made when the required person accepts such a solicitation. The requirement of a prior agreement is based on the logic that the commitment in such agreement reflects the influence exerted on the position holder's exercise of his duty. Without such a commitment the performance of his duty by the position holder cannot be perceived to be influenced by the benefit. Under Vietnamese law the act of receiving late payment without prior agreement cannot constitute the offence of receiving a bribe. Such an agreement can be made in various forms, such as verbally form, in a document or through implicit expression, as long as it expresses the briber's promise of giving a bribe and the acceptance of the bribee on the things will be done in the giver's interest. Concerning the agreement between the two parties under Vietnamese law, I agree with an author that this agreement commonly made with the satisfaction and consensus by both parties but it can also be made in cases of one's willingness, typically in cases where public officials ask or demand a bribe (Trần Hữu Tráng 2009: 68).

Receiving a bribe can be committed directly or through an intermediary. The latter is the so-called indirect form of bribery. Directly receiving a bribe happens when the public position holder takes a bribe from the briber directly, i.e., the bribee directly receives money from the briber when, say, the briber goes to the bribee's office. Directly receiving a bribe can also be the case of committing the offence through services for instance a bank transfers money or the post office transfers property. The Penal Code also includes indirect passive bribery which occurs when a bribee accepts or receives a bribe through an intermediary. It is worth noting that for a bribery offence to be committed, the bribee needs not be aware of the role of the intermediary. I will mention the intermediary's liability later.

Receiving a bribe can involve directly getting money or property in hand but can also be masked by contracts when, for example one can receive a bribe through a selling contract with higher price or a buying contract with lower price than usual. Receiving a bribe can further be committed through unpaid services. In addition, under Vietnamese law receiving (and giving) bribes can be made in secret or publicly. To conclude, the ways of receiving a bribe is irrelevant for the offence to be constituted. The prohibition of all ways of receiving payments by the Penal Code is significant in the current situation of bribery offences in Vietnam where these practices are becoming more complicated with invisible and serious ways of their commission.

The completion of the offence of receiving a bribe is variously perceived, partly due to the non-specific prescription of the conduct element. Some authors insist that the offence is completed only when the position holder actually obtains the bribe (Võ Khánh Vinh 1996: 100, Mai Xuân Bình 1996: 34). Meanwhile others argue that the completion will vary in accordance with the three cases of receiving a bribe. In particular, the offence will be completed when the receipt of the bribe is actually carried out, when the position holder solicits the bribe or when the position holder accepts the offer of a bribe (Trần Kiêm Lý, Đặng Văn Doãn 1982: 37-38). I see weaknesses in the second opinion because this is not really based on the general theory of the completion of an offence and the prescription of the offence of receiving a bribe. From my point of view, the completion of this offence should be based on the theory that “an offence is completed when it fulfils the prescription of the legal elements thereof” (Hanoi Law University 2010: 160). Since the offence of receiving a bribe is a conduct-offence, it requires only the act of receiving payments. Consequently the offence is in my opinion completed when the bribee actually takes a bribe or he does not refuse when the bribe is delivered into his possession. In this regard my notion is thus the same as the first opinion.

I now turn to analyzing the *actus reus* of giving a bribe under Article 289 of the Penal Code. Although Article 289 does not prescribe the briber’s act, the judicial authorities and experts in the criminal law field both agree that the act is giving money, property or

other material benefits to the public position holder.<sup>93</sup> In connection with the offence of receiving a bribe, giving a bribe can be conceived as being done either in advance or afterwards. This means that giving a bribe can be identified in two ways: actually providing a benefit to the position holder or giving the benefit after making an agreement with the position holder. From both theoretical and practical perspectives the latter can be perceived as giving a bribe under a promise or an acceptance that a bribe will be given to the position holder after he/she exercises a public duty in the giver's interest. In other words, it constitutes the offence of giving a bribe by any person who actually gives or will give an undue benefit to a position holder. The act still constitutes the offence of giving a bribe even if the official does not accept the promise. As with receiving a bribe, giving a bribe can be committed directly or through an intermediary.

When is the offence of giving a bribe completed? There is still discussion on the issue since the description of the act is not given in the law. Some authors assume an early completion by stating that the offence is completed when the briber offers a bribe to the position holder (regardless of whether the position holder accepts or not) or when the briber accepts the demand of a bribe from the position holder.<sup>94</sup> However, another researcher argues that it is only completed when the bribe is actually received by the bribee (Võ Khánh Vinh 1996: 110). The former view appears to fix the completion of the offence sooner than the law requires and refuses to allow for the completion of the offence when a benefit is immediately given without any discussion or agreement. The latter view seems to make the completion of this offence dependent on the act of receiving a bribe while these offences are independent and separate. These views both show incorrect perception to a certain extent. It is worth noting that under Vietnamese criminal law, the offence of giving a bribe is constituted even when the bribee neither accepts nor receives the bribe. In other words, the act of bribe-giving constitutes an offence regardless of the act of bribe-taking. The matter in question should be solved by

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<sup>93</sup> See for example Textbook on Vietnamese Criminal Law Part II of Hanoi Law University, 2005, p. 329; Textbook of Vietnamese Criminal Law (on specific offences) of The National University of Hanoi, 2003, p. 707; or Trinh Tien Viet 2008, p.6.

<sup>94</sup> This perception is very common in textbooks or other works on bribery offences. See for example Textbook of Vietnamese Criminal Law (On Specific Offences) of The National University of Hanoi, p. 707; Trần Kiên Lý, Đặng Văn Doãn 1982: 41; or Trịnh Tiến Việt 2005: 32, etc.

way of the theory of a completed offence as mentioned above. Accordingly the offence of giving a bribe is completed when the briber actually gives a bribe to the position holder.

I also disagree with the opinion that giving a bribe is also completed when the briber gives an advantage to a person who pretended to be a position holder. This should be considered as an attempt to give a bribe. In addition, it is again incorrect to state that the offence of giving a bribe is completed when the payment is valued at least 500 thousand VND [under the old provision] or the act caused serious consequence or has repeatedly been committed (Hanoi Law University 2005: 329). By this view, the determination of the completion of the offence is based on the line between criminal and non-criminal acts while this is an irrelevant factor.

In brief, offering or promising a bribe or accepting an offer of a bribe is not considered a completed offence under Vietnamese law. Vietnamese law seems not in conformity with theory and international standards in respect of the *actus reus* of bribery offences and their completion, yet the act is generally provided and requirements for the act make it completed later than what would be expected by virtue of theory or required by the Conventions.

As mentioned above, giving and receiving a bribe can be committed indirectly through an intermediary. Vietnamese law criminalizes the act of being an intermediary for bribery as a separate offence to giving and receiving a bribe. However the Penal Code does not establish any definition of such an offence. This is a weakness of Vietnamese law because it may lead to confusion on the elements of the offence and cause difficulties in the application of the law. In several pieces of research and in textbooks the offence has been defined in connection with the offences of receiving and giving a bribe. Take for example the definition that “acting as an intermediary for bribery is the act of being the intermediary between the briber and the bribee to make an agreement on the bribe as well as on acting or refraining from acting in the exercise of public duties under the briber’s request” (Hanoi Law University 2005: 329). Similar definitions can be found in several

articles and books.<sup>95</sup> More specific is the definition that “acting as an intermediary for bribery is acting as a middleman and aiding in the establishment of an agreement on acting or refraining from acting in the exercise of public duties in the briber’s interest, on the bribe, and then transporting the bribe to the position holder under the briber’s entrust” (Mai Xuân Bình 1996: 64).

The above-mentioned definitions appear unanimous to express the nature of the offence of acting as intermediary for bribery. The role of the intermediary can be seen as a middleman who connects the briber and the bribee in a bribery deal.

The *actus reus* of acting as an intermediary for bribery can be perceived as the act of connecting the briber and the bribee for the establishment (and maybe carrying out) of a bribery contract at either party’s or both parties’ request. The conduct is regarded as being a bridge between the two parties in order to make them aware of their supply and demand, their possibilities and then help make an agreement on giving and receiving the bribe as well as on the particular act or omission which will be done by the position holder in the giver’s interest. As a connected person, the conduct of the intermediary not only reflects his/her middleman role but also expresses his/her passive role. Acting as an intermediary can be committed in different manners. It may be the act of transferring the briber’s offer or the bribee’s request to other party, or the act of transferring the benefit to the bribee. It can also be the act of arranging for the meeting between the briber and the bribee. The intermediary can suggest the briber give a bribe or he can persuade the bribee to receive a bribe. Such acts are all done at the briber’s or bribee’s request, not on the intermediary’s own initiative. The intermediary takes part in the establishment of a bribery contract under each or both parties’ request. As can be seen, the act of the intermediary must be dependent on the briber’s or bribee’s demand. In other words, “the intermediary acts in accordance with the demand or the entrustment of the briber or the bribee, not according to his own initiative” (Võ Khánh Vinh 1996:121). The intermediary cannot therefore decide himself to make an agreement with the briber or the bribee about the bribe or the act or omission that the official should undertake for the briber. The

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<sup>95</sup> See for example the definitions given in Đinh Văn Quế 2006, p. 329 or in Trần Kiêm Lý, Đặng Văn Doãn 1982, p. 42.

nature of acting as an intermediary involves aiding or facilitating a bribery affair, not for or on the behalf of one only of briber and bribee. This means that there is a distinction between the intermediary and an accessory to receiving or giving a bribe under Vietnamese criminal law. The accessory to giving or receiving a bribe can actively participate in the affair, discussing matters with the opposite party. Such a person can even decide the value and form of the bribe. He or she always acts for or on behalf of the briber or the bribee only; whereas, the intermediary carries out his conduct passively under the request of the parties. That is the reason why an author states that “the intermediary just acts as a tool for the briber and the bribee to commit the act of giving or receiving a bribe” (Đình Văn Quế 2006: 330).

Acting as an intermediary in bribery is an offence independent of other bribery offences. The completion of the offence should thus be determined in connection with its own elements. It seems unreasonable the opinion that “the offence of acting as an intermediary for bribery is completed when the agreement between the briber and the bribee is made” (Hanoi Law University 2005: 332). It means that the completion of this crime is dependent on the establishment of an agreement between the briber and the bribee, while such agreement results from the acts of the two parties and is not the result of the intermediary’s act. As I pointed out above, under Vietnamese law the moment when such an agreement is made is not the completion of giving a bribe and receiving a bribe. Logically that moment cannot be the time of completion of acting as an intermediary in bribery, because this offence is considered less serious than the two former offences. Considering the act of an intermediary in bribery as aiding for the act of giving or/and receiving a bribe, it should be perceived that the intermediary’s assisting for the act of giving or receiving a bribe is sufficient for the completion of this offence.

*The bribe is another required objective element* of bribery offences. The essential requirement to be proved is therefore that there is a causal relation between the bribe and the act or omission of the relevant official. The bribe is prescribed in all provisions on bribery offences. Unfortunately, the definition of a bribe in Vietnamese Criminal Law is narrower than the corresponding element in the Conventions. Article 279 of the Penal Code defines bribe as “material advantages” which does not include non-pecuniary and

intangible benefits. In particular, the Code prohibits three categories of improper benefits: (i) money, (ii) property and (iii) other material advantages. There will thus be no bribery offence if a person gives or receives something other than material advantages. According to the related provisions, the usual bribe is money or property; other kinds of benefit are all things that can be calculated (in money). By “other material benefit” is meant that the bribe can be hidden in different forms for the purpose of concealing its illegal nature. For example the bribe can be tickets for travelling, services without payment, dearer payment for a cheaper property sold by the official. As a result, an act can constitute a bribery offence even if the bribe is hidden within forms that seem to be legal, as long as the bribe has material value and relates to a particular act of exercising of public duty. The coverage of the concept “bribe” in this regard appears to be broad. However, the requirement of a material nature for the bribe narrows its scope. In Vietnam there is now a common perception of the nature of the bribe that “the bribe must be material or have economic value, things that have purely intangible values cannot thus be bribes” (Institute of Legal Science 2004: 44). Due to this requirement, benefits such as praise in an article in a well-known journal, membership in a favourite club or sexual favours, are not regarded as bribes. Vietnamese criminal law does not consider “immaterial benefits” as bribes because the law is based on the idea that only material benefits can affect the exercise of public duties. Moreover, immaterial things generally are usually said to be intangible, thus making it hard to calculate and demonstrate their value. This often makes the investigation and the prosecution of bribery nearly impossible. I do not agree with these arguments. In my opinion both material and immaterial things can influence the position holder’s performance of his duties, providing that they are of benefit to the recipient. My argument is supported by the theories and the provisions of international law mentioned in Chapter 1 of the thesis. In regard to the bribe, Vietnamese criminal law is unnecessarily different from both the theories and the standards of the relevant Conventions.

The Code also describes the limit to the value of benefit that makes an act to be a bribery offence. According to Articles 279, 289 and 290, in normal circumstances an action can constitute a bribery crime only if the bribe is worth at least two millions VND (equals to



one hundred USD).<sup>96</sup> It seems that Vietnamese criminal law on the value of the bribe is in compliance with the related Conventions, since these Conventions all indicate that the penalization of bribery actions involving a bribe of very little value is neither necessary nor practical. However it is worth noting that although the payment of less than that amount does not constitute a criminal offence, it is still a violation of the Law on Preventing and Combating Corruption 2005 (or should be considered as an administrative offence or a breach of administrative duty). Vietnamese criminal law expressly excludes “small facilitation payments” by requiring the minimum value of the bribe.

The Penal Code does not mention to the legal nature of the bribe. In other words, the related provisions in the Code do not indicate that the bribe must be “undue” or “improper”. The bribe is however said to be of “undue” nature in connection with its purpose that is to induce the position holder to commit or omit a particular act in the giver’s interest or in accordance with the giver’s request. In addition Article 40 of the Law on Preventing and Combating Corruption provides principles of giving and receiving gifts to make the line between allowable and non-allowable gifts clear. Accordingly bribes are considered “undue” because these are benefits that the officials are not allowed to receive.

As regards the bribe, another issue has also recently arisen. The Code does not consider whether bribes can consist of illegal things. There is no clear-cut guideline for the interpretation of the law here. In fact, there is still discussion on the situations where the giver gives illegal benefits to the officials, such as narcotics, forbidden goods or stolen property for instance in order to escape from the arrest or investigation. Some find these within the concept of the bribe; others do not agree (Nguyễn Thị Minh Huyền 2001). From my point of view, in considering whether acts in such situations constitute bribery offences, arguments should be based on two grounds: first, whether such things can benefit the position holder in his or her eyes; second, whether these special things can influence the position holder so that his or her exercise of duties would be wrongly affected thereby. As a matter of fact, these two requirements seem to be fulfilled in the

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<sup>96</sup> In other circumstances where the bribe is less than two millions VND, the action can only constitute a crime if it causes serious consequence or it is repeated several times.

above discussed situations. Therefore, I am of the opinion that things like illegal goods or property can be considered as bribes, provided that they do influence the exercise of public duties. Acts of giving and receiving such illegal items should be treated as bribery offences.

The bribe needs not to benefit the position holder himself. In principle it can also benefit other persons. However the Penal Code does not expressly cover the third party who may be benefited in bribery deals. Although the requirement of a third party beneficiary is neither prescribed directly in the Code nor covered in any regulation, it is argued in commentaries on the Code and generally accepted in practice that a bribe can be enjoyed or made use of by persons other than the position holders.<sup>97</sup> In other words, the bribe can benefit a third party, providing that it aims to influence the exercise of public functions. Improper benefits will thus constitute bribes regardless of who is the beneficiary. The third beneficiary can be any natural or legal persons. For example the third beneficiary can be among the position holder's family members, the office that he or she works for and the organization that the official establishes or of which he or she is the member. Even in cases where the position holder requests advantages to be used for charitable activities, such as gifts given to the disabled or homeless children, his act still constitutes a bribery offence under Vietnamese law as long as he agrees to act in the giver's interest. The failure to describe the third party beneficiary and interpret who may be such a person in a guided document may constitute a shortcoming of Vietnamese law in the fight against bribery offences.

The next element reflects *the protected interests* that may be harmed by bribery offences. As commonly perceived, these offences aim to destroy the stability, fairness and effectiveness of public authorities and organizations. Like other position-related offences, under Article 277 of the Penal Code bribery offences are activities “that infringe upon the legitimate activities of the public authorities and organizations”. It is added that such offences “seriously affect the effectiveness of the public activity and harm the citizen's confidence entrusted to the public officials” (National University of Hanoi 2003: 664).

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<sup>97</sup> See for example Textbook of Vietnamese Criminal Law (On Specific Offences) of The National University of Hanoi 2003; Textbook on Vietnamese Criminal Law, Book II of Hanoi Law University 2005; or Đinh Văn Quế 2006.

Bribery offences also undermine the integrity and impartiality of position or authority holders. The public's confidence or trust in the exercise of public duties is considerably distorted by such offences. Such values as the stability, fairness and effectiveness of state agencies and organizations and, the integrity and impartiality of public position holder need to be protected by, among other instruments, criminal law. These values can only be ensured when the exercise of public duties is shielded from bribery offences. In what way can bribery offences undermine these values? Under Vietnamese law bribery offences aim to change the normality of a certain object and any change in this object will lead to effects on the stability and effectiveness of the state authorities. So what is the object affected by bribery offences? It is perceived by some authors that the object is the money or property or other material benefits to be given to the position holder (Đình Văn Quế 2006: 83; National University of Hanoi 2003: 675). I see that perception as totally wrong, because these benefits are the bribes rather than the object of the offences. The object of the offences should be determined via their theory. Vietnamese criminal law considers "an object of a crime is a part of a relation [value] protected by criminal law upon which the crime makes its bad impact in order to damage that protected relation" (Hanoi Law University 2010: 94). Under Vietnamese law, the object of an offence may be a person, material things or the normal activity of a person (Ibid: 95-97). In my opinion, the exercise or performance of public duties by the position or authority holders is the element that expresses the fairness and integrity of state bodies as well as ensuring their effectiveness and stability. Therefore bribery offences can only undermine the above values by distorting such exercise or performance. These offences create "obstacles for the normal activities of a person by way of changing one's own or another person's behaviour" (Nguyễn Ngọc Hòa 2006: 108). Through bribe-giving or acting as an intermediary for bribery, the giver or the intermediary negatively influences the public position holder's behaviour and through bribe-receiving the recipient negatively influences his own behaviour. In other words, the briber aims at the bribee's act in order to change his performance of public duties so as to align them with the briber's request or interest; and in his turn the position holder himself changes his performance of duties in favour of the briber's interest in a benefit exchange. For instance a briber does not want his smuggle goods to be found so he gives a bribe to a custom official in order that this

official does not check his goods. The exercise or performance of public duties is clearly the object of bribery offences. We now see the way in which bribery offences destroy certain values of the state.

We now pay more attention to the act of the position holder as an objective element of bribery offences. Bribery is to induce the position holder to *act or refrain from acting in the exercise of public duties* for the briber's interest. Vietnamese criminal law does not require that this action or omission be of an illegal nature. An act can still constitute a bribery offence even when the advantage is given and/or received for a commission or an omission that is legal or even has to be carried out by the position holder, e.g. receiving money for sealing a document that fulfils all legal necessary requirements or giving gifts for the appointment of a person who meets all requirements and is also the best candidate for the job.

Payments made for actions or omissions that are neither in breach of duty nor illegal are still considered improper because these tend to create bad and bureaucratic habits in the performance of public duties, such as solicitation for benefit, authoritativeness and partiality, thus undermining the position holder's integrity and accountability. As a consequence, the operation of public authorities is badly affected. According to Vietnamese law, if the action or omission meets the requirements for constituting another offence, the bribee will also be responsible for that. For example in cases where a prosecutor receives money from a suspect in order not to make a decision for prosecuting that person, although he finds there is enough evidence for a prosecution, he will be responsible both for receiving a bribe and for failing to prosecute an offender according to Article 279 and Article 294 of the Penal Code.

It is noted that the act to be done by the position holder may be in the briber's interest or in the interest of other recommended persons, as long as that act is specifically required and accepted by both parties in the prior agreement. Furthermore commission or omission in the giver's interest or at the giver's request is, in connection to the bribee, limited to the position holder's official capacity of. This means that acts done for the

briber's benefit must be within the recipient's official capacity. This requirement seems to be narrower than what appears in the relevant Conventions.

Beside the above objective elements, bribery offences are also characterized by a *subjective element*. It seems to be a loophole that the Penal Code lacks provision on fault element in bribery offences. Despite the fact that the requirement of intent is not expressly indicated in the wording of the relevant provisions, the general principle of guilt under Vietnamese criminal law implicitly conditions bribery offences to intentional activities. It means that these offences all require "intent" as a mental element. Further 'intent' in bribery offences is regarded as 'direct intent'.<sup>98</sup> 'Direct intent' means in general that the offender is aware of the wrongful nature of his conduct but he or she is still willing to engage in it. In other words the offender commits bribery offences knowingly and willingly. Accordingly the attitude of the offender must be such that he or she is aware of and desires all statutory elements of the offence. It is worth noting that bribery offences are "conduct-crimes" under Vietnamese law so the requirements of intent do not cover the results of the offences (Hanoi Law University 2010: 141).

The requirements of direct intent, encompassing knowledge and volition requirements, can be interpreted specifically in separate bribery offence.

For the offence of receiving a bribe, the recipient has the *knowledge* of the nature of his or her act. Firstly he or she must be aware of the *actual nature* of the act. This means that he/she is aware that the act involves receiving an improper advantage. This requirement is to differentiate the offence for cases where the recipient thought that his/her act constituted receiving allowable gifts. Further, it must be proved that the official receives a bribe with the knowledge that it is given in order to influence him to do or not do something in the course of the exercise of public duties that may or may not be contrary to his duty as a position holder. This means that he/she must be aware of the *illegal nature* of receiving a bribe. The recipient also has volition in receiving improper benefit, which means that he/she voluntarily receives the bribe. Even in situations where the briber initially offers a bribe and the position holder is considered as passively accepting

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<sup>98</sup> See for example Textbook of Hanoi Law University 2005 or Đinh Văn Quế 2006.

or receiving it, the recipient is regarded as doing so voluntarily. It would be unacceptable the argument that he/she has in such circumstances no intent to do this or intent should be considered as less serious. I argue that position holders are, due to their knowledge of the requirements or rules of their office as well as their more powerful position in comparison with the bribe giver's situation, always totally free to consider the offer of a bribe. They have the freedom and ability to decide to accept or refuse the bribe offer. They cannot be said to receive bribes by coercion or without volition.

The requirements of knowledge and volition also apply to the briber. First the briber must have knowledge that the recipient has an official capacity and can exercise duties in the briber's interest.<sup>99</sup> In addition, it must be proved that he or she is aware that influencing the performance of public duty through giving an advantage is wrong and illegal. This means that the giver is aware that the position holder has no right to receive undue advantages because it is contrary to the rules of the public administration. For the requirement of volition, the briber voluntarily gives bribes to induce the position holder to do or not do something in his or her favour. In cases where a person gave bribe on the request of the position holder, intent is still proved if such person was aware that he/she was engaged in bribery conduct and voluntarily gave an undue benefit. However, intent is considered in these cases as less serious than in normal cases.

In some instances, viz. an advantage given to induce an official to misuse his official position, 'intent' is apparent from the purpose for which that advantage is provided. In other situations, however, it is not apparent that the official acts in breach of duty. Indeed, the argument may be that the official did no more than he or she would have done without payment.

Intent in the offence of acting as an intermediary for bribery means that the offender is aware that he/she is engaged in a bribery affair. In particular, the offender is aware of the fact that he/she is making a connection between the parties in order to improperly influence the exercise of public duties. Further the offender voluntarily acts as an

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<sup>99</sup> This knowledge includes an incorrect awareness of the official capacity of the recipient. This means that the briber may wrongfully perceive that the recipient is the position holder who is capable of exercising duties in his interest but such a person is actually not a position holder.

intermediary. His or her purpose may vary, for instance it may involve private gains or developing personal relations, but this aspect is not required by law. Therefore his or her act constitutes the offence even when the offender acts for purely emotional reason and not for private gain.

The above elements seem adequate for recognizing bribery offences. However such acts will only constitute bribery offences if these fall into one of the cases prescribed under the Penal Code. Article 279 provides two conditions for the bribe-receiving offence to be established: (1) the bribe is valued at two millions VND or more; (2) the bribe is less than two millions VND but the act causes a serious consequence or the offender had previously been punished by disciplinary rules because of previous act of receiving a bribe or the offender had previously been convicted of one of the corruption offences and that conviction has not been remitted from his criminal record. The case in which an act causes a serious consequence is the subject of discussion because it is not clearly provided for or interpreted. Further there has not been an official explanatory document about the issue. This is a weakness that makes the interpretation of law rather difficult. From the practical perspective, a practitioner indicates that “a serious consequence caused by the act of receiving a bribe can be harmfulness to human life or health, serious loss of property or other immaterial detriments to society” (Đình Văn Quế 2006: 97). He gives some types of consequences for illustrating his view, such as death, serious damage to the health of at least one person, loss of property accounting to at least fifty millions VND, or serious immaterial impairment e.g. negative effects on the performance of the Communist Party’s or the State’s policies. These are mentioned in some guidelines by law enforcement authorities as consequences of offences that are considered as being as grave as bribery offences.<sup>100</sup> This opinion appears reasonable to some extent. However, I find it hard to see how bribery offences could cause death or illness for another person though it is possible to determine the consequences of property loss and perhaps of immaterial detriment, such as the loss of public confidence in the state authorities and the instability of the relevant public agencies. Further, it is noted that ‘serious consequence’

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<sup>100</sup> See for example the interpretation of “causing a serious consequence” in the Inter-Circular No. 02/2001 on 25<sup>th</sup> December 2001 by the People’s Supreme Court, People’s Supreme Procuracy, the Ministry of Police and the Ministry of Justice guiding the application of some provisions in Chapter XIV “Offences against property ownership” of the Penal Code 1999.

should be a consequence caused directly by the bribery act and not merely claimed to be imaginative or deductive consequences. Some authors argue that the consequences of bribery offences include all detriments caused by such offences to the political, economical and social spheres. These are evaluated through factors such as the harm done by the act of the position holder under the giver's request or the high-ranking position of the recipient (Trần Kiên Lý, Đặng Văn Doãn 1982: 55). I find this argument reasonable. I am of the opinion that a "serious consequence" should be determined by the evaluation of all relevant factors especially the actual effects on the stability of relevant public authorities and the loss of confidence in the position holder. The most important factors are, from my point of view, the wrongful or illegal nature of the act or the refraining from acting by the position holder in the giver's interest, the high rank of the bribee or his/her role in the relevant agencies or organizations.

Similar to the offence of receiving a bribe, giving a bribe and acting as an intermediary for bribery are established in cases provided under Articles 289 and 290. These are again cases where the bribe is less than two millions VND but the act causes serious consequences or is committed several times.

### ***2.1.2. Preparation, Attempt and Complicity regarding Bribery Offences***

Vietnamese criminal law does not only punish the completed offences of bribery but also covers cases of preparation and attempt. By the way it sets out common legal grounds for the prosecution of preparation and attempt, the Penal Code implies that preparation for and attempt to committing bribery offences do not escape criminal responsibility and punishment. Specifically, the preparation for bribery offences will be punished in accordance with Article 17 of the Code. The act of preparation is intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so. Article 18 of the Code deals with attempt. Attempt also appears in cases where the briber gives an undue advantage to a person who, in the briber's view, is the position holder capable of doing the things he needs but actually is not.

Vietnamese law also criminalizes complicity in bribery offences, including inciting, aiding and organizing an act of bribery. The Penal Code has general provisions for this



kind of participation in a criminal offence.<sup>101</sup> In particular, joint perpetrators, abettors, aiders and organizers are all accessories in accordance with Article 20(2). These provisions are applied to bribery offences in the same way as to other offences.

### ***2.1.3. Criminal Sanctions and Measures for Bribery Offences***

The criminal law policy on bribery offences is a combination of severe and lenient treatments. Such policy is clearly manifested via the relevant criminal law provisions. To begin with, Vietnamese criminal law considers bribery offences seriously and is determined to punish them very strictly, since they have such a major impact on society and the public authorities. As a consequence, the Penal Code provides very severe penalties to be imposed on bribery offences. In cases of receiving a bribe the severest punishment is the death penalty, for giving a bribe that is life-imprisonment and for acting as an intermediary for bribery, twenty years of imprisonment.<sup>102</sup> The principle of proportionality is thus respected by the establishment of four different frames of penalties for bribery offences. The provisions on punishments fulfil the requirement of proportionality principle because they are made in consideration of the proportion between the gravity of offences and the severity of the penalties provided. In other words, the punishments in these provisions are compatible with the reprehensibility of the offences. The key factors for the establishment of different frames of penalties are the size or value of the bribe and the consequences caused by the offences. The most popular punishment provided for bribery offences is imprisonment for a long period, for example according to Article 289 imprisonment imposed on the offence of giving a bribe is at least one year and at most twenty years. A fine of between one and five times the monetary equivalent of the bribe or confiscation of property is provided as an optional additional penalty for bribery offences. Further the confiscation of objects and money directly related to offences under Article 41 of the Penal Code, as a criminal measure, must be imposed in bribery cases. The seizure or confiscation of bribe proceeds is always applied in bribery cases. These provisions are meant to show recognition of the profitable

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<sup>101</sup> Article 20(1),(2) and (3) of the Penal Code

<sup>102</sup> This is the maximum length of imprisonment for a crime according to Vietnamese criminal law (Article 33 of the Penal Code).

nature of bribery offences and the need to deal with these via economic treatments as well.

The offence of receiving a bribe with the mentioned elements is of such gravity that it needs to be punished the most strictly of the bribery offences. As a result the punishments provided for this offence are quite severe. Beside the most popular penalty of fixed-term imprisonment for at most twenty years, the death penalty and life-imprisonment are also provided as alternatives though they only applied in the most dangerous cases. The principle of proportionality is focused on when considering whether it is necessary to impose such penalties. In order to fulfil the requirements of the principle, some official guidelines by the Supreme Court have been issued and applied. According to these guidelines, in common cases where there is no aggravating or mitigating circumstance or both circumstances exist and are considered equivalent, the death penalty will be applied if the bribe is valued at two billions VND or more; in cases where there are several mitigating circumstances but no or fewer aggravating circumstances and if after evaluating all these factors it is clear that the mitigating circumstances are of much greater weight, the death penalty will not be applied and life-imprisonment will be applied if the bribe is valued at two billions VND or more; in cases where there are several aggravating circumstances but no or fewer mitigating and if after evaluating both circumstances it is clear that the aggravating circumstances are of much greater weight, the death penalty will be applied if the bribe is valued at least eight hundreds millions VND.<sup>103</sup> It is thus said that when assessing the penal value of a bribery offences for deciding the punishment, mitigating and aggravating circumstances must be taken into account. This guided document, which is given great weight in the Vietnamese legal system, makes decisions of penalties rather straightforward. Moreover there are three additional penalties for the recipient of a bribe including the prohibition of holding a public position that must be applied in all cases. Accordingly the offender is always forbidden to hold a position for performing a public duty after being released from prison. This is to avoid the risk that he/she will abuse the position to commit the offence

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<sup>103</sup> See Resolution 01/2001/NQ-HĐTP issued on 15<sup>th</sup> March 2001 by the Council of Judges of the People's Supreme Court on guiding the application of Articles 139, 193, 194, 278, 279 and 289 of the Penal Code.

again. The compulsory imposition of such a penalty is highly significant for the prevention purposes of criminal law.

Under Vietnamese criminal law the principle of leniency also exists in form of several more lenient measures. The Penal Code provides measures, found in Articles 289(6) and 290(6), concerning excluding and exempting criminal liability for the offences of giving a bribe and acting as an intermediary for bribery in certain special cases.

To ensure the principle of leniency for the giver who was solicited, Article 289 excludes criminal liability in cases where the giver was forced to give a bribe but actively reports the competent authority before the action is discovered. For such defence, the giver will not be considered guilty if he fulfils the following requirements: *first*, the briber did not volunteer to give a bribe. He was forced to give an advantage by the demand or solicitation of the position holder. By the act of “demanding a bribe”<sup>104</sup> the position holder did actually make the demanded person afraid that it would badly result in his case if he did not give a benefit to the position holder. The giver in question cannot avoid that threat so he feels he has to give a benefit to the soliciting position holder. Therefore, the giver cannot be considered willing to commit the action in regard to the requirement of intent. *Secondly*, the giver actively reported his act and the bribee’s act to the competent authorities. He must do this by himself and not be influenced by anyone else. The giver must report matters to the authorities before his act is discovered. It means that the authorities have not known the case until the giver informs. It is the combination of factors of “not voluntarily giving” and “actively reporting the case before it is discovered” which makes the danger of the act disappears, leading to its being regarded as not guilty.

In addition to this first type of leniency, the Penal Code set forth another lenient measure with respect to giving a bribe and acting as an intermediary for bribery. This measure allows exemption from criminal liability in certain cases where the giver voluntarily gives a bribe or the intermediary acts for bribery voluntarily. It means that their acts would constitute bribery offences. However, they voluntarily and actively report the case

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<sup>104</sup> These tricks are thus prescribed as aggravating circumstances for the offence of receiving a bribe under Article 279 of the Penal Code.

to the competent authorities before it is discovered. It is worth noting that these offenders might be exempted from criminal responsibility. The Code provides exemption from criminal responsibility for the briber and the intermediary only as an option for the judicial authorities: this exemption does thus not have to be granted in every case. It is argued that the causes that lead to the offender's report of his/her offence should be taken into account when granting this exemption. Specifically this should happen where the offenders showed their regret for the offence or testified truthfully or actively helped the investigation (Trình Tiến Việt 2005: 34-36). In my opinion, the present provision of law should be interpreted in a flexible way that ultimately profits the defendants in question. The help given by reporting crime to the competent authorities could even be sufficient for applying this measure, regardless of whether the offender regrets committing it. Vietnamese criminal law does not ignore cases where the offender in question is not allowed to be exempted from criminal responsibility: he/she will still be applied the general mitigating factor "actively report the offence before being discovered" under Article 46 of the Penal Code for a penalty reduced.

In comparison with the theories relating to criminal law policy to bribery offences mentioned in Chapter 1, we can see compliance of Vietnamese criminal law therewith. By recognizing these lenient measures, Vietnamese shows another policy to these offences besides using severe penalties. In connection with the detecting strategy in the fight against bribery by means of criminal law, these measures appear meaningful, especially for the detection and prosecution of receiving a bribe.

*In conclusion*, Vietnamese criminal law covers most types of bribery, including giving a bribe, receiving a bribe and acting as an intermediary for bribery. The Code prescribes elements of each offence to a certain extent. However the prescription seems rather general. The penalties provided express the criminal law policy of strict treatment of such offences, reflecting the determination of Vietnam in the struggle against bribery. Apart from the seriousness of the penalties, lenient treatment for deserving offenders is permitted via provisions on exclusion of and exemption from criminal responsibility. One can say that Vietnamese criminal law covers notable types of bribery but not all the kinds which are prevalent. Bribery of foreign officials and officials of international

organizations is neither expressly covered in bribery provisions nor separately provided for. In principle the action will be criminally punished under the same provisions as is domestic bribery along with the general provisions on the applicability of Vietnamese criminal law. Bribery in the private sector has not been criminalized. Such matters as ‘gift-giving for making future good relation’ and ‘gift-giving for showing gratitude’ have been theoretically discussed and have not been covered by criminal law. Despite some differences, the Vietnamese law on bribery is basically in accordance with the theories and the relevant Conventions mentioned in Chapter 1.

## **2.2. Bribery Offences under Swedish Criminal Law**

Since 1941 bribery has been outlawed as offences under the Penal Act (Chapter 25 section 5). Originally bribery was limited to the public sector. Since 1977 the philosophy underlying Swedish criminal law on bribery is that the same rules of criminal responsibility should apply to employees in both the public and the private sector (Cars 1996: 154). Both typical types of bribery (active and passive) are covered in the Swedish Penal Code 1962. The criminal law on bribery has been amended several times. The changes made to the relevant penal provisions have been explained in preparatory works such as the Report (SOU) 1974: 37 by the Committee of Bribery Responsibility, the Ministry of Justice Report (Ds) 1998: 29, Government Bill (Prop.) 1998/99: 32 and Report by the Committee of Justice (Bet.) 1998/99: JuU16, Ds 1999: 62, Ds 2002: 67, Prop. 2003/04: 70 and Bet. 2003/04: JuU21, etc. The Swedish Parliament passed the most recent important amendments to the Penal Code on bribery in Law 1999: 197, Law 2004: 404 and Law 2004: 785. The 1999 amendments add new categories relating to foreign public officials and create sanctions for “gross” (aggravated) bribe-taking. The 2004 amendments slightly restructure the bribery offences provisions and expand the coverage of foreign actors with some changes (mentioned later). The key purposes of these changes can be said to be to ensure the compliance of Swedish law with the requirements of international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, the EU Corruption Convention 1997, and the COE Criminal Law Convention on Bribery mentioned above.

The main changes have been focused on broadening the scope of persons to whom the law applies and the expansion of what are counted as criminal acts.

In spite of the close relation between active and passive bribery, the two types of bribery are placed in two different chapters of the Penal Code. There are two main provisions in the Swedish Penal Code dealing with bribery offences. Bribe-giving (the so-called bribery) is regulated in Chapter 17 Section 7, while bribe-taking is found in Chapter 20 Section 2. This arrangement suggests the different natures of these two offences. Under Chapter 17, active bribery is considered a crime against public activity. Such a crime can be committed by anyone. On the other hand, passive bribery is categorized as a crime of misuse of office and it can only be committed by employees. The Penal Code covers different types of bribery, namely bribery, taking a bribe, bribery in election and includes bribery both in the public and in the private sector. Bribery of foreign public officials is also included. In addition to the legislation, case law on bribery offences also exists. This resource has been developing to help the interpretation and application of the bribery statutes.

The interests to be protected from bribery offences shall be considered first. Regarding the public interest, the essential purpose of the penal provisions on bribery offences is to protect the loyalty and the proper exercise of public duties from undue influences, to ensure the stability of and the confidence in administrative authorities and democratic institutions, and to maintain the integrity and honesty of officials. In this regard, not only are the state's interests worth protecting but the public interest as a third party also needs to be protected from the harmful impact of bribery (Holmqvist, Leijonhufvud, Träskman and Wennberg 2009).<sup>105</sup> Moreover, from protected economic perspective the criminal provisions in question aim at preventing acts that can harm the fair business environment and competition. Finally, the Penal Code takes into account the economic interests of consumers when punishing bribery offences, because "corruption in economic life is contrary to the general interest of the consumer to the extent that it leads to unfair

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<sup>105</sup> This is the Commentaries to the Swedish Penal Code and commentaries on bribery provisions by M. Leijonhufvud so hereinafter the book will be referred to by Leijonhufvud et al. 2009.

competition and to more expensive or inferior goods or services or to goods or services being marketed without correct information” (Cars 1996: 154).

Under the Penal Code bribery offences are provided for through a descriptive technique. In other words these offences are defined through specific descriptions. Such descriptions help to show the elements of the offences. The legislative technique seems very helpful for the application of law on bribery offences, since bribery offences are considered as difficult to identify in practice.

### ***2.2.1. Elements of Bribery Offences***

Under Swedish criminal law, bribery offences are found in two different places of the Penal Code as mentioned above. Particularly Chapter 17 covers the offence of (active) bribery in Section 7 and the offence of accepting an improper reward for voting in Section 8. Along the same lines, Chapter 20 Section 2 deals with the offence of taking a bribe.

*Active bribery* is defined in Chapter 17, Section 7 of the Penal Code as follows:

A person who gives, promises or offers a bribe or other improper reward to an employee or other person defined in Chapter 20, section 2, for that person or for anyone else, for the exercise of official duties, shall be sentenced for *bribery* to a fine or imprisonment for at most two years.

If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

*Passive bribery* is dealt with in Chapter 20, Section 2 with the following wording:

An employee who, whether for himself or any person, receives, accepts a promise of or demands a bribe or other reward for the performance of his duties, shall be sentenced for *taking a bribe* to a fine or imprisonment for at most two years. The same shall apply if the employee committed the act before obtaining the post or after leaving it. If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

Based on these provisions, bribery offences can be identified by their elements as follows:

*The offenders* of bribery offences shall be considered first. I will analyze the requirements for the bribe giver and the bribe taker. Chapter 17 Section 7 applies to the bribe giver as “a person”. Under Swedish law, only natural persons are subject to criminal liabilities. It is assumed under criminal law that “a person” in question means any natural person. (Active) bribery offence can be committed by any natural person, providing that the offender has attained the age of 15 as required in Chapter 1 Section 6 of the Penal Code. However, it does not mean that criminal sanction cannot be imposed on legal persons for bribery. The Penal Code (Chapter 36, sections 7-10) makes it possible to impose criminal sanctions upon legal persons e.g. a legal entity or a limited liability company. From the relevant provisions, these will be cases where a bribery offence is committed in the exercise of business activities by a natural person working in the company, even if that person does not hold a leading position. The conditions set forth in Chapter 36 Section 7 are that the crime entailed gross disregard of the special obligations which are connected to the business activities or is otherwise of a serious nature, and that the entrepreneur has not taken reasonable measures for the prevention of the crime. The latter also covers lack of supervision or control by a natural person who has a leading position within the legal entity. Sweden amended its provisions on corporate fines in the Penal Code on 1 July 2006. The amendment abolishes the requirement of a gross disregard or a serious nature. The maximum corporate fine is also increased. The liability of legal persons under Swedish law is thus not fully criminal. “This “quasi-criminal” liability can be imposed on any natural or legal person that professionally runs a business of an economic nature, including state-owned companies” (Bogdan 2002: 6). How can the court impose criminal liabilities on the different kinds of actors concerning legal persons? An interpretation has been suggested as follows,

If the illicit payments are made by an independent agent on behalf of the company, the agent will be punished for complicity. Are the illicit payments made by order of the company or with its knowledge - for instance if the commissions of the agents are so big that it must be assumed that a substantial part is designed to be used as illicit payments - the responsible representative of the company will be punished as the perpetrator (Cars 1996: 155).



In short, only natural persons can commit bribery crimes under Swedish criminal law. However, Swedish law at least provides a corresponding model for the issue of the liability of legal persons in respect of such crimes.

We now turn to studying the bribe taker as the key element of taking a bribe. Under the Penal Code the important question is who falls within the concept of “an employee”. At first, the recipients encompass employees in the public as well as in the private sectors. The Penal Code sets forth a list (definition) of persons who are regarded as employees as follows:

1. a member of a directorate, administration, board, committee or other such agency belonging to the State, a municipality, county council, association of local authorities,
2. a person who exercises an assignment regulated by statute,
3. a member of the armed forces under the Act on Disciplinary Offences by Members of the Armed Forces, etc (1986: 644), or other person performing an official duty prescribed by Law,
4. a person who, without holding an employment or assignment as aforesaid, exercises public authority,
5. a person who, in case other than stated in 1-4, by reason of a position of trust has been given the task of
  - a) managing another’s legal or financial affairs,
  - b) conduct a scientific investigation,
  - c) independently handling an assignment requiring qualified technical knowledge or
  - d) exercising supervision over the management of such affairs or assignments referred to in a, b or c,
6. a minister of a foreign state, member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in 1.
7. a person who without holding an employment or assignment as aforesaid, exercises public authority in a foreign state or a foreign assignment as arbitrator,
8. a member of supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is a member, and
9. a judge or official of an international court whose jurisdiction is accepted by Sweden.

The list covers a variety of persons, encompassing employees, certain domestic officials, Armed Forces personnel, certain persons in positions of trust, and certain types of public officials of foreign states and certain international organizations, entirely regardless of whether these persons work in the public or the private sector. The term “employee” means employees at all levels, working for central or local governments, from the top to the lowest positions, full-time or part-time (Cars 1996: 155).

The actors regulated in points 1-4 are public officials and persons performing public functions and services within the Swedish government at all levels, including judges and prosecutors. They can be elected, appointed or contracted for. They can hold positions or employment in public administration or in public services. The common character of their employment is the exercise of public functions or authority or assignment. In respect of the public sector, the term “employee” in bribery provisions broadly covers all types of domestic public officials and the like. Other public officials mentioned in Article 1 of the COE Convention who cannot be perceived as “employees” under Swedish law are covered by the categories found in Chapter 20 Section 2. Some special categories of officials e.g. municipal commissioner – “kommunalråd” or “borgarråd” (in Stockholm) – local politicians employed to represent the municipality and the board of a municipality, ministers and other elected representatives, are covered in respect of “a person who exercises an assignment regulated by statute” (OECD Report 2009, Para.9). In addition, “politicians performing public functions and services within Swedish central or local governments - also members of political assemblies as the Parliament - but legally not classified as employed under the Labour law, are also considered as recipients” (Cars 1996: 155). However bribery of a member of a political party who is not a public official and cannot influence government action in the interest of the giver is not covered at all. Political party members do not fall within the list if they act as ordinary members, since they have no official duty to perform or no public authority to exercise as the Code requires. In this regard members having leading positions may be considered employees within the meaning of relevant provisions, due to the fact that they can make decisions affecting other persons’ interest.

As regards the public sector, it seems that the concept “employee” may in exceptional cases cover persons holding some forms of public authority irrespective of the terms of their employment. This is regardless of whether or not they are formally public officials, provided they *de facto* perform a public function.

The persons who fall within point 5 of the section are employees working in the private sector. The last group of recipients comprises foreign public officials and officials of several international organizations who are provided in points 6, 7, 8, 9 of the section. Those falling under points 5-9 will be discussed in subtitle 2.2.2 of the thesis.

Through the detailed description given by the Penal Code, a range of recipients comprising employees in public and private sectors, national or foreign and international officials is covered by criminal law. These categories are not only applied to passive bribery but also applicable in regard to active bribery under Chapter 17 Section 7. It can be said to give rise to a very wide coverage, making Swedish law comply with international criminal law standards.

In the Swedish anti-bribery provisions, criminal liability may be imposed before the professional position is assumed and may be held after the employee left the position. In other words, bribery liability applies even when the bribery transaction has been undertaken before the taker entered the office or the employment, or after the taker left the post. The arguments for these provisions may be that candidates may have the potential capability to act as a holder of the position while former employees can still influence decision-making after leaving the post. For the former a prerequisite should be that the candidate indeed gets the position or employment later. For the latter, the implication is that the transaction is intended to induce future undue performance of duty (Leijonhufvud et al. 2009). According to the Commentaries to the Code, a subsequent reward has no such purpose due to the fact that no promise or request was made in advance. It cannot therefore be punished under criminal law (Ibid). Nevertheless, it is noted that a general exemption from criminal liability for subsequent rewards would leave the way open for a systematic influence in the form of rewards given afterwards (Government Bill 1975/76: 176).

The following element is *the actus reus* of the offences. For (active) bribery offence, the act consists of giving, promising or offering a bribe. It is thus not necessary for only an actual giving of a bribe constitutes active bribery as promising or offering a bribe also establishes the offence. An offer of a bribe is itself sufficient to constitute the offence of bribery. “The Swedish case law clearly confirms that an offer needs not have to be accepted to constitute the full bribery offence” (OECD Report 2005: Para.168). The promise to give a bribe is made in cases where the employee in question demands a bribe and the person asked promises that the demand will be fulfilled. In other words, the briber and the bribee have agreed that an undue benefit will be paid. “In this context it is unimportant whether any of the parties at the time of the agreement or at a later point in time becomes unwilling to fulfil the agreement” (Leijonhufvud 2003: 416). For cases of promising or offering a bribe, the crime will be completed when these actions have been done, irrespective of whether the actual giving of the bribe is carried out or not. The promise or the offer can be sent by internet, telecommunication or other media.

Taking a bribe is an offence in which the recipient receives or accepts a promise of or demands a bribe or other undue reward in exchange for some favoured actions in connection with his or her professional occupation. The *actus reus* under the law encompasses receipt of a bribe, acceptance of a bribe promise and the more active demand for a bribe. What is deemed “receipt”? According to the Commentary to the Code, it is insufficient for the receipt of a benefit to be constituted when the benefit comes into the employee’s possession, such as by courier, with his/her knowledge thereof. A fundamental requirement for liability is that the recipient must also be aware that the benefit is in his possession and he/she has expressed his/her desire to keep it or otherwise has the disposal of it (Leijonhufvud et al.2009). In case NJA 1958 B 6 a bureau director was acquitted of responsibility for taking a bribe for the fact that he had a carpet delivered to his home as a gift, it had been lying there for some time but he then showed his refusal by restoring it to the donor.

The acceptance of a promise or the demand for a bribe itself constitutes the offence without the actual receipt of a bribe. By acceptance of a bribery promise is meant that the bribe giver and the bribe taker mutually agree that a bribe will be paid. An illegal

agreement between the bribe giver and taker is required in this regard. However, in this context it is irrelevant whether or not one of the parties, during the agreement or later, is indeed not willing to pursue the undue performance of duty required in the agreement (Leijonhufvud et al. 2009). For a demand for a bribe to be constituted, it is required that the employee must unambiguously make his request clear to the briber. The condition of the offender's declaration of intent is seriously meant (Government Bill 1975/76: 176). It is worth noting that demanding a bribe is not a defence excluding criminal liability on the part of the bribe giver. "The World Bank case confirms that the offence of active bribery is committed regardless of if the bribe has been solicited" (OECD Report 2005: Para.170).

For bribery offences to be completed under Swedish law, everything depends on the types of act committed. In regard to active bribery, it is sufficient that the delivering of the bribe makes the employee able to take it into his/her possession (in case of giving a bribe), or the promise or offer is made (in case of promising or offering a bribe) even if the employee rejects the promise or offer. In respect of taking a bribe, the receipt of a bribe is deemed to be fully committed when the employee does not refuse the given advantage although he/she was aware of its nature. The demand itself makes the offence complete when it is clearly made to the person requested, even if that person refuses it. In case of accepting a promise, the offence is completed when both parties have come to an agreement. It can be said that the criminal acts prescribed by the Penal Code are fully in compliance with the requirements regarding illegal acts in the Conventions to which Sweden is a State Party.

Besides the above elements, description of both bribery offences includes an important element namely "*the bribe*". Under bribery provisions the bribe is reflected through such terms as "bribe" and "other improper reward". The definition of a "bribe" or "improper reward" has not been established under Swedish law. Further, the wording of the provisions does not indicate explicitly what kinds of benefit the bribe consists of. However, the bribe is generally said to be interpreted in its widest sense to cover benefits of different kinds, including benefits of an intangible or immaterial nature such as access to membership in an exclusive golf club or grant of a decoration (Cars 1996: 154;

Bogdan 2002: 4; Leijonhufvud et al. 2009). The preparatory works to the Penal Code (SOU 1974: 37, p.141) gave examples of tangible benefits of economic nature such as gifts, discounts, transfers of right of use, commissions, credits of goods/commodities, loans, undertakings of guarantee, or strongly reduced debits, concessions of interests and amortizations, inexplicably high consultants fee, commodities supplied at cost price, services and other similar advantage; and pointed out recommendations or other patronage as benefits of an intangible nature. According to this report, within the criminal area, every benefit that has any kind of value can be considered as tools of bribery. A special kind of bribe was discussed in the case NJA 1985 (p.477) where a will made by an elderly man that would benefit the service manager of the apartment where he lived was regarded a bribe. The Supreme Court held that it was made with the intent to influence the performance of the manager's duty and the way of accepting this testament cannot be interpreted in any other way than that the employee accepted a promise of a gift (Leijonhufvud et al. 2009).

Concerning the bribe one should also be aware of the distinction (made in the law) between a "bribe" and other improper "reward". The term "bribe" refers to illicit payments given in advance whereas improper "reward" refers to subsequent rewards that given afterwards (Cars 1996: 155). According to the Commentaries to the Penal Code a bribe is different from an undue reward by virtue of the former's purpose of making the recipient perform against his duties (Leijonhufvud et al. 2009). The Committee of Justice however used the term "bribe" in a way that includes any other improper reward (Report 1976/77: JuU17 p.6). It appears that the notion of the differences between the two concepts cannot be determined either from the law text or from the preparatory works.

The only point of agreement is that both a bribe and other improper reward are given for the performance of the employee's duties. The connection between the improper benefit and the performance of official duties is required. According to the preparatory works to the Penal Code, this does not mean that there needs to be a specific connection between the improper benefit and a certain act within the employee's duties. The given benefit should in principle just be aimed at functions relating to the employee's service or position (Government Bill 1975/76: 176). However the examination of such a connection

is not simple because there are also other connections between the parties that may overlap the connection of duty. It is noted that even if a connection related to the duty existed between the giver and the taker, the transaction would not always have to be judged as a bribery transaction (Leijonhufvud et al. 2009). If an employee is permitted by the authority to which he/she belongs or by his/her principal to have a certain mission as a side task and he/she has been in contact with the giver within his employment, a benefit taken from this connection will be excluded from criminal liability (Government Bill 1975/76: 176). This argument is illuminated by several cases heard by the Supreme Court. In the case NJA 1985 B 6, a gift card valued at SEK 500 received by a director was considered not to be an unreasonably high payment for some tasks he had performed for the gift givers, because these tasks could not be proven to be a part of his performance of his duties. In contrast, in the case NJA 1953 C 710 a road manager received SEK 1800 from a gravel company and the givers were convicted of taking and giving a bribe, due to the fact that the bigger part of the amount was considered as undue commission for his duty.

The above cases dealt with the notion of the “impropriety” of the benefit in question. The issue of the implication of the word “improper” has been raised. Under the Penal Code, the use of the adjective “improper” describes the nature of the bribe, indicating that only a benefit considered “improper” is forbidden to be given to the employees and such benefit constitutes a “bribe” or “reward” in the description of bribery offences. Accordingly the prerequisite of the bribe is the impropriety of the given benefit. It is a matter of fact that the law text does not directly indicate the criminal area required in respect of the bribe because it has no definition of “impropriety”. This is explained on the basis that the impropriety depends on social custom and usage and the view prevalent at the time so it can hardly be specified in the law text, and more detailed guidelines for the interpretation of the law text are to be provided in case law (Decision 2009: 15).<sup>106</sup> In principle “impropriety” means that the benefit is not permitted by any statute or case law currently in force. It is perceived that “not every gift or other reward is illegal, not even if it is connected with the exercise of a person’s duties” (Bogdan 2002: 4).

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<sup>106</sup> This is a Decision given at the Swedish Government Meeting on 19 March 2009.

The interpretation of “impropriety” derives from the preparatory works to the bribery provisions (SOU 1974: 37, Prop. 1975/76: 176, Bet.1976/77: JuU17) as well as from recent case law (NJA 1981 p.477; NJA 1985 p.477; NJA 1993 p.539; RH 1993: 74, RH 1997: 33 or Supreme Court Judgment of 11 June 2008 in case B 1866-07). In the light of the preparatory works, it is logically required that the meaning of the “impropriety” of the bribe should be decided on the basis of an overall assessment of all relevant circumstances. It is argued that “impropriety” should be determined from the social attitudes, custom or tradition at the given time (Cars 1996: 154, Bogdan 2002: 4). Moreover, a benefit can only be considered “improper” if it means to have an impact on the taker’s exercise of his duty. The principal requirement is that a benefit or reward should be considered improper if it is deemed to influence the exercise of the employee’s duties (Government Bill 1975/76: 176 p.36f). However, it is still not easy to determine what is deemed to influence the performance of the employee’s duties, because this assessment strongly depends on the circumstances in question. According to that Government Bill, if the recipient has a purpose to act or had actually acted in breach of his/her duties in the giver’s interest, the impropriety of the given benefit is obvious. The transaction is also improper if it is manifest from the nature of the matter that the purpose of the benefit cannot be other than making the recipient carry out a certain act against his/her duties. The assessment becomes more difficult when the affair in question does not clearly show a specific focus on procuring a breach of official duties. It is now simply required that it has the purpose of influencing the recipient’s performance of duties in general. The assessment turns to be strongly dependent on the economic value of the benefit (Leijonhufvud et al. 2009). The value of the benefit is thus of importance to the issue of whether a given advantage should be regarded as a bribe. From a social perspective, things like money or other items having economic value should always be considered “improper”, since these benefits usually make the taker feels that he owes the giver and he will find a way to do a favour for the giver through his performance of duties. Nevertheless, benefits of very small value, such as a souvenir or a cinema ticket should not be seen as “improper”, normally being accepted as gifts, not bribes. Such benefits may be regarded as the expression of the giver’s gratitude or respect to the recipient. The relevant case law brings into focus the fact that besides paying attention to



the issues of whether there are objective and good reasons for receiving advantages, such as a trip abroad from a friend or a will leaving property to a non-relative, a considerable attention is also paid to the value of the advantage received or given. However there is no specific limit to the bribe's value under Swedish law. The notion is that the introduction of such a limit into the law would easily lead to what could be perceived as officially received payments. In addition, Swedish law in principle does not exclude facilitation payments from criminal liability. The wording of the relevant provisions seems to be that the offence is committed regardless of the amount of the payment and there is no exception for facilitation payments to be excluded from criminal law imposition. However the matter of whether such payments are "improper" will be considered on a case-by-case basis.

It is worth noting that the value of the benefit is a factor among other relevant circumstances to examine the impropriety of the benefit. A Government Bill indicates that there should also be a special assessment of the nature of the position or the assignment that the employee holds or carries out. Certainly employees exercising public duties or other essential public business will be treated as in exceptional positions (Government Bill 1975/76: 176). In addition the protected interests of bribery provisions must be considered. In this regard the interests of the public sector are traditionally given strong protection and the concept of impropriety takes a broader meaning within this sector. Within the private sector the employer's interest is of fundamental importance together with the interest of free competition and fair trade and business transactions. Payments that are objectively likely to harm these interests should be considered improper (Report 1976/77: JuU 17 p.10). Further, it is argued that if the benefit has an immediate connection with, and is a natural and useful part in, the employee's duties, it should be regarded as proper. Examples are given such as working lunches and field trips. However, a general condition for a benefit of such kind to be deemed as proper is that the purpose of the benefit is entirely legitimate. In this regard stricter requirements may be imposed when it comes to public activity (Government Bill 1975/76: 176).<sup>107</sup>

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<sup>107</sup> Several cases illustrating these matters of the impropriety such as NJA 1981 p.1174, NJA 1993 p.539, RH 1993:74 or RH 1997: 33, etc, will be discussed in Chapter 3 for the purpose of comparing them with the interpretation and application of Vietnamese law.

In my opinion, Swedish law covers all material and non-material benefits to which the employees aforesaid have no legal entitlement and that may influence them in the exercise of their duties. The notion of the law is understandable but it still does not fully satisfy the requirements of the related Conventions especially in regard to the element of other improper reward.

In addition to other objective elements, “*the third beneficiary party*” in bribery offences is prescribed directly in the Penal Code. Sweden extends the offence of bribery to benefits conferred on ‘anyone else’. In relevant provisions, the wording of law says “whether for himself or for anyone else”. This expression matches exactly the wording of the COE Convention. It is commented that responsibility for bribery nowadays covers also situation where the benefit goes to – or where the intention is that it will go to – someone other than the one whose duties are likely to be affected (Leijonhufvud et al. 2009). Bribes in other words deemed to include favours to individuals other than whose duties the favour is intended to influence. The interpretation made in a Government Bill refers to situations involving criminal responsibility for taking bribes for another person where either the employee knows that the benefit has come into the third party’s position and he expresses his approval of it; or he/she has in any other way been actively involved in the receipt of the benefit; or he/she has remained completely passive in respect of the benefit, provided he can be considered to have a real influence on the receipt; or the employee let himself be promised or has requested a benefit for someone else (Government Bill1998/99: 32, p.94). The purpose of the provision is of course not to punish an employee for a benefit coming to someone else without his/her knowledge.

The third party can be anyone regardless of the relationship with the given employee. Such a party may be a natural person or a legal person, e.g. a member of the bribed person’s family or his political party. The bribe can thus benefit those other than the bribee as long as it is given with a view to influence the exercise of the bribee’s powers. In the above-mentioned Government Bill, the issue of the third party beneficiary is subject to some more complex perspectives. It is stated that a contribution offered to a political party is a bribe or improper reward if it is made in order to influence the performance of the duties of a cabinet member representing the party, but it is not a bribe

or other improper reward if its aim is to influence the party's general political programme, even if the ultimate purpose may benefit the donor (Government Bill 1998/99:32 p.93). It is stressed that even a donation to an employee's favourite charity can constitute a bribe or other improper reward, irrespective of how charitable and respectable the charity is, providing that it is given for the exercise of the employee's duties (Government Bill 1998/99: 32 p.92). As a result, a contribution not made on particular conditions or reservations but deemed to be given to support the program of the party and even if it should result in favouring the interest of certain party officials is not regarded as a bribe. In this regard the notion of Swedish law appears to be compliant with global standards.

Essentially, the third beneficiary gains benefits from bribe-taking by the employee in question, not from his/her own action. The third party will therefore not be held liable for a bribery offence. However, responsibility for complicity can arise for a third party who has knowingly received a bribe. This means that if the third party induced another to commit a bribe-taking crime and he knew that what he received or enjoyed is a bribe, the Penal Code provisions found in Chapter 23 Section 4 which state that he would be punished for instigating or otherwise for aiding the taking of a bribe would apply.

Examining the objective elements of the offences, *the exercise of official duties* by the bribed person is also required as an element of both bribe-taking and bribe-giving. The provisions on bribery offences stipulate that the bribe is made "for the exercise of official duties" and "for the performance of his duties". The object of bribery offences is accordingly the exercise of the official duties of the bribe taker. Although bribery provisions do not expressly include omission, case law shows that "the exercise of official duties" covers both actions and omissions. "Several court decisions presented by the Ministry of Justice confirm this interpretation by covering offers of bribes to induce policemen to abstain from reporting traffic offences" (OECD Report 2005, Para.180). Further it is obviously irrelevant whether the act of the recipient is in breach of duties or illegal or not. "It must be stressed that bribery is punishable even if its aim is to persuade the bribed person to exercise his duties in accordance with his obligations, i.e., to do something that he is obliged to do anyway" (Bogdan 2002: 5). This means that criminal

liability can be imposed even if the bribe-taker does nothing more than what corresponds to his/her duty towards the bribe-giver. In addition, it is noted that the law just requires the expected connection between the bribe and the bribee's performance of duties but does not require the bribee's actual performance, "because the danger of undue influence alone justifies criminal sanctions" (Bogdan 2002: 5). In other words, the actual performance of the official duty does not have to be affected by the advantage because the mere risk of influence is the basis for the establishment of the offence. The action of the bribee required by the briber may or may not be performed.

A matter to be discussed is what is meant by "for the performance of his duties". This implies a risk of an influence upon the employee, whose decision or service on which the giver is dependent, by virtue of his/her receiving a bribe. To constitute a bribery offence, the improper benefit needs not be linked to a specific act by the employee in question but must of course be linked to the duties performed by him/her. In short, a causal relation between the gift (or the promise of gift) and the commission or omission by the taker has to be proved. In this relation, it should be noted that the performance of the duties need not be within the employee's formal authority. "In a 1994 Appeal Court decision, the Court pointed out that responsibility for the current offence does not presuppose that the public official has to have a formal authority to make any decision. It is enough that the public official, through his responsibility for evaluations and presentations, has a direct influence on the decisions of the County Council on security issues" (OECD Report 2005, Para.181). Nevertheless, the commentary to the Code refers to preparatory works in which a clear line concerning what is considered as performance of a duty is drawn, indicating that the act of the employee on which the bribe focuses must lie within his/her main activity (Leijonhufvud et al. 2009). Case law thus broadened the meaning of bribery offence in this respect and this extension does support the related theories mentioned in Chapter 1. Moreover it seems that the exercise of official duty does not need to depend on the bribed employee's authority. It is said to be sufficient that the bribe taker in his service or position may influence the performance of the duty and thus indirectly promote the bribe giver's interest. Accordingly an employee who writes drafts for a decision maker or all those involved in preparing decisions can be found guilty of bribery (Ibid).

As regards the exercise of the employee's duties, the interpretation of Swedish law shows that this domestic law allows for a broader meaning than that implied in the relevant Conventions.

Concerning *the mens rea* of the offences, the Penal Code does not directly prescribed the subjective requirements for bribery offences. While the law does not make any reference to intention in its definitions of bribery offences, the act must always be intentional insofar as Chapter 1 Section 2 of the Penal Code specifies that an act is to be regarded as a crime only if it is committed intentionally, unless otherwise stated in a particular provision of an offence. Consequently bribery offences should be interpreted as including a subjective element of intent. "The requirement of intent means that at least *dolus eventualis* must exist. No malicious intent or other special intent is required" (Leijonhufvud 2003: 417). The offender's intent with regard to all objective elements of the offence is necessary for criminal liability. The offenders in question know that they are engaged in bribery activities. They must be aware of the nature of their actions at the time of committing the criminal act. Specifically the offender knows that what he/she gives or receives is an improper advantage and thereby he/she is aware that he/she would influence or be influenced in the performance of official duties. For instance in the World Bank case, the defendants argued that they had no intention to bribe the World Bank officials, and thought that the money was linked to actual business events. The District Court considered that "they must have realised that there was no other reason for the World Bank employees to want to have contact with them than that they would derive financial gain from the relationship" (OECD Report 2005, Para.167). In brief, relevant statutory provision and case law confirm the requirement of intent as a mental element of bribery offences under Swedish law.

*Finally*, regarding the standards set forth in the relevant Conventions the issue of bribery committed through *intermediaries* should be examined under Swedish law. The Penal Code does not explicitly cover the issue. However this would not be an obstacle for the prosecution of bribery offences because an intermediary as such would be covered by the general rules on complicity, provided for in the Penal Code. According to Chapter 23 Section 4, criminal liability is to be imposed not only on the person who committed the

act but also on anyone who furthered it by advice or deed and such a person may also be considered the perpetrator of the offence. Moreover, a person may, if s/he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime. In brief an intermediary may be held liable for complicity in bribery offence if he/she knowingly takes part therein. A case in the Court of Appeal mentioned in the OECD Report 2005 (Para.176) illustrates bribery through an intermediary. In a 1994 Court of Appeal decision, a sales manager agreed to pay the travel costs of a public official on a regional manager's proposal. The regional manager then delivered the ticket to the official. The two managers were convicted of active bribery. The sales manager was considered to commit active bribery through the intermediation of the regional manager.

The Swedish authorities state, in a report, that it would be obvious to anyone with knowledge of the Swedish penal system that bribes given or received through intermediaries are covered. The use of intermediaries does not differ from the use of instrumentalities. An intermediary can therefore be regarded as a kind of human instrumentality through which the perpetrator commits bribery offence (OECD Report 2000:4). An intermediary can be an innocent person who is used as an instrument for the principal perpetrator's aim of committing bribery offences, thus being free of criminal responsibility. Unlike the third-party recipient, an intermediary does not have equal status to the other parties in the corrupt transaction, and the criminality of the intermediary's role is adequately reflected by liability for aiding and abetting. In accordance with the requirement of the above Conventions on the issue of intermediaries, there is at least a ground under Swedish law for the prosecution of the intermediary in bribery offences.

### ***2.2.2. Some Special Criminalized Types of Bribery***

#### *Bribery in the private sector*

Although bribery in the private sector is not provided for as separate offence in the Penal Code, the relevant provisions show that private bribery is criminalized and punished as a type of bribery offences. Under Swedish law the primary interest to be protected from private bribery is the correct and loyal discharge of duties and assignments. The other

interests vary from the “integrity of services or assignments”, the “proper functioning of market economy” to the “undisturbed relations between the principal and the employee or person working on assignment” and “well-functioning competition” (Leijonhufvud 2003: 410). The reasons for extending criminal liability to private bribery are several, for example the public administration has become increasingly involved in some tasks and functions that are also performed in the private sector and activities in the private sector are now more similar to those conducted by the public authorities (Ibid: 411). It seems that the purposes of criminalization of bribery in the private sector of Swedish law are the same as they are presumed in the theories and suggested by international law.

Bribery in the private sector means illegal transaction in which the giver and the receiver are both working in the private sector. Areas where private bribery occurs are usually industry and commerce, such as in banking or insurance area. The recipients of private bribery are listed in Chapter 20 section 2 second paragraph, point 5, encompassing persons who by reason of a position of trust have been given the task, on another person’s behalf of managing a legal or financial matter, carrying out a scientific or similar investigation, independently handling an assignment requiring qualified technical knowledge or exercising supervision over the management of one of the above three tasks. As an interpretation of the law, it is stated that in the private sector bribery recipients can be any person acting as a fiduciary in legal, economic or technical matters, including directors of companies, associations and foundations, accountants, brokers, commercial agents, commission agents, auditors, real-estate managers, government-appointed estate administrators, trustees in bankruptcy, advocates and other legal consultants (Cars 1996: 155, Bogdan 2002: 4).

The commentaries on the Penal Code refers to the preparatory works, arguing that when it comes to the private sector, there is no need to punish practices which can be seen as a natural part of accepted forms of interaction within the trade and industry or within any particular business thereof. Within this sector, benefits of the nature of advertising and presenting new products and services often exist whose purposes may be considered legitimate and these should be accepted in general. Such benefits should, as a rule, not be considered as improper unless they are aimed at influencing the performance in breach of

duty by the employee or the contractor (Leijonhufvud et al. 2009). Accordingly, the law considers an act as bribery in the private sector if it aims to induce the receiver to act in breach of his/her duty. The requirements of private bribery offence are thus less strict than that of the public sector one.

According to the Penal Code, there is an essential difference in the prosecution of bribery offences between the public and the private sector: public prosecutors may always prosecute in cases of bribery offences within the public sector, whereas in cases of bribery in the private sector public prosecutors may only prosecute if the employer or principal of the person engaged in the bribery reports the crime for prosecution or if prosecution is called for in the public interest (Chapter 17 section 17, Chapter 20 section 5). This provision shows the notion of the private bribery is considered less serious than the public one.

#### *Bribery offences having international features*

The most important factor of foreign bribery offences is the international feature on the part of the recipients. The bribed actors in these cases appear directly from the wording of the Penal Code found in Chapter 20, Section 2 points 6, 7, 8, 9. These provisions are results of the 1999 and the 2004 amendments to the Code. Prior to the 1999 amendments, the Swedish provisions on bribery already covered (although not expressly) any foreign public official who would be considered an “employee”. Looking at the 1999 amendments, the legislation did not provide a definition of foreign official or official of an international organization as standard terms as in the international Conventions. The relevant provisions established the recipient by a common term “employee”, not setting out any difference between Swedish and foreign employees. The explanation for this may lie in the fact that it adapted to the Convention simply by applying pre-existing national definitions of the bribery offence to the commission of the offence in an international context. Following this line, the definition of foreign public official was approached via the traditional interpretation of the domestic official. This means that foreign public officials are afforded equal treatment with Swedish public officials. However, the interpretation of Swedish employees is not easy to apply to international situations



(Bogdan 2002: 9). In addition, the foreign actors were prescribed in provisions on both active and passive bribery offences. These provisions became complicated due to the cross-referencing technique of making law.

One of the reasons for the 2004 amendments is given in the Government Bill 2003/04: 70 that the older provision (Chapter 20 Section 2) covered members of the European Union Parliament only but did not include members of other assemblies of international organizations to which Sweden is a member. The 2004 amendments created new structures for provisions on both bribery and taking a bribe by moving persons having international feature previously mentioned in Chapter 17, section 1 to Chapter 20, section 2 while adding further kinds of such persons in Chapter 20, section 2 (6) and (7). Foreign and international actors are now covered by Chapter 20, section 2. Chapter 17, section 7 just makes a reference to this. The term “employee” should be interpreted in a very broad manner, irrespective of whether they are employed in Sweden or abroad. In addition to persons whose title or position is directly prescribed in Chapter 20 section 2(6), such as ministers of a foreign state, the Code also refers to persons who are members of foreign bodies corresponding to such Swedish bodies as are set forth in Chapter 20 section 2(1), e.g. a member of a foreign committee, of a foreign county council. Further, a foreign person who without holding an employment or assignment as aforesaid but “exercises public authority in a foreign state” is classified as a recipient of bribery offences.

For these provisions, the Swedish authorities explain that the term “foreign state” includes “all levels and subdivisions of government, from national to local” and the term “public authority” corresponds in meaning to the term “public function” in the OECD Convention (OECD Report 2000: 5). Beside the foreign actors mentioned, officials and agents of international organisations are classified as persons who are members of a supervisory body, a governing body or a parliamentary assembly of a public international or supranational organisation (Chapter 20, section 2(8), e.g. a member of the European Commission. Bribery of such persons is a criminal offence. Swedish law, however, falls short of the requirements of the Convention by restricting the application of its bribery law to international organisations of which Sweden itself is a member. The last persons with an international feature are judges or officials of international courts whose

jurisdiction is accepted by Sweden, such as a judge of the European Court of Justice. It seems that the more specific the list of foreign public officials is, the narrower the definition of employee. There is a concern that since the provisions on bribery expressly cover specific categories of foreign public officials, the question will arise whether the broad category in respect of an “employee” is intended to cover those who are not explicitly mentioned (OECD Report 2005: Para.178).

In addition to active bribery of foreign public officials, it is noted that passive bribery of foreign public official is also covered by the Swedish bribery provisions. The preparatory works to the Government Bill 1998/99: 38 indicated it is punishable for a foreign employee to take bribes, as bribing such an employee. Moreover, transnational active and passive bribery in the private sector is implicitly included in the Swedish Penal Code. In these respects the Swedish law on bribery goes beyond the requirements of the relevant Conventions.

Unlike the requirement under the OECD Convention, Swedish law does not require that foreign bribery be to obtain or retain business or other improper advantage in the conduct of international business. In this regard Swedish law has a broader scope than that of the Convention.

The application of Swedish criminal law by Swedish courts does not mean that the provisions on bribery offences in situations having international factors must necessarily be interpreted and applied in the same manner as domestic cases. “The international background of a particular case can be taken into consideration when interpreting the law, for example when deciding whether a particular reward is improper or whether a person is an employee” (Bogdan 2002: 11). Further, Sweden appears to respect international relationships when deciding on the prosecution of foreign bribery as it is noted that bribery of officials of foreign States tolerating bribery should not lead to prosecution in Sweden, unless Swedish public interest is concerned (Ibid.:12). The court shall take all relevant circumstances into consideration, including the law and custom of the foreign public official’s country. It seems that the prosecution of bribery of foreign public official abroad also depends on the other country’s law in the area.

After analysing the Swedish law on foreign bribery, some issues may arise, such as whether giving an improper advantage to a foreign public official in countries where the payment is not criminalized should still constitute active bribery under Swedish law or whether it is a defence in cases where it is necessary to bribe a foreign public official to be able to ensure the legal right of a Swedish citizen abroad which could not be ensured via the usual channels. In my opinion these would be bribery cases under Swedish law only if the prosecutions are required for the “public interest” in accordance with Chapter 17 Section 17 of the Penal Code.

### *Bribery of voters in elections*

In order to protect the integrity and fairness of elections, Swedish criminal law provides a special type of bribery which is dealt with in Chapter 17, section 8 of the Penal Code. There are active and passive bribery of voters in elections. For active bribery in elections, it follows the law that a person who, in an election to public office or in connection with some other exercise of suffrage in public matters, attempts to “improperly influence the vote”, shall be sentenced to a fine or imprisonment of at most six months or, if the crime is gross, at most four years. It is stated that “offering rewards to voters in exchange for their votes will normally not constitute a gross offence, unless the offer involves misuse by the offered person of his official position” (Bogdan 2002: 6).

The person, who receives, accepts a promise of or demands an improper favour for voting in a certain manner or for abstaining from voting on a public matter, shall be sentenced to a fine or imprisonment of at most six months. The acts of this offence are the same as those of taking a bribe offence. It seems the essential difference between taking a bribe and passive bribery in elections is that the latter is restricted to acts of voting to public offices or in public matters. Therefore, if the act relates to the employees mentioned in Chapter 20 section 2, it will constitute the more serious crime of passive bribery and that provision shall be applied instead.

### ***2.2.3. Uncompleted Offences and Complicity***

Beside the elements of the crime, the matters of uncompleted bribery offences are also of concern. Under Swedish criminal law a preparation for or an attempt to committing a crime can only be punished “in cases where specific provisions exist for the purpose” (Chapter 23 Sections 1 and 2). There is however no such provision in respect of bribery offences. The criminal provisions concerning bribery just prescribe the completed offences. Consequently only completed bribery offences are punished under the Penal Code. However it should be stressed that because the bribery offence applies to acts of promising and offering, or accepting a promise and demanding a bribe, criminal responsibility does in effect include acts that would on general principles be considered attempts to bribe. Since the acts of offering and promising a bribe or accepting a promise and demanding a bribe constitute completed offences, they are more severely punishable than they would have been if Swedish law had been able to capture these acts as attempts. Conspiracy is in the same situation as in the case of attempt. Complicity in bribery offences is dealt with by the same provisions and principles as are mentioned in the analyses of the liability of the intermediary.

#### ***2.2.4. Criminal Sanctions and Measures***

In Swedish criminal law, bribery offences are considered as normal offences by comparison with other crimes. The graver the crime is, the severer the sanction will be. As a result, the punishments provided for such offences are not too severe. For (active) bribery a fine or imprisonment of at most two years shall be imposed. The same punishments apply to taking a bribe. Both active and passive bribery can involve cases of gross (aggravated) offences that shall be imposed imprisonment for at least six months and at most six years. By providing different severe levels of penalties for “normal” and “gross” bribery, Swedish penal law shows respect for the principle of proportionality to a certain extent. In addition, Chapter 29 of the Penal Code contains guidelines for assisting the court in the determination of an appropriate sanction. Section 1 provides the general principle that a sentence shall be determined according to the “penal value” of the crime. The criminal sanctions for bribery offences seem comparable with the punishments imposed on other similar serious offences under Swedish law. In spite of that

comparability, the penalties appear to be less severe than those in many other countries. In a commentary on the punishments provided for bribery offences, the author states,

The maximum punishment of two years for “normal” bribery may seem very lenient in international comparison, especially if one considers that the maximum punishment is almost never imposed and that prisoners are in Sweden routinely released on probation after having served about two thirds of their sentence (Bogdan 2002: 7).

Alternatives to imprisonment, e.g. conditional sentence and probation, are also applicable to bribery and bribe taking and may be combined with a fine under Chapter 27, section 2 and Chapter 28, section 2 of the Penal Code. Moreover, passive bribery committed by a domestic public official may lead to sanctions of a non-criminal nature, such as dismissal from official position.

The aggravated form of bribery offences was introduced in connection with the ratification process of the COE Convention, indicating the compliance with international requirements. According to these bribery provisions, even in the most serious cases, the severest punishment in the criminal sanction system would not be imposed.<sup>108</sup> What does “gross” mean in the context of bribery offences? The relevant provisions do not define or indicate the elements or circumstances to take into account when deciding whether a specific case can be qualified as “gross” bribery offence. But the notion of “gross” or aggravated offence has been traditionally addressed in the Penal Code as it has been already used in the context of many other offences. Obviously the determination of a “gross” bribery offence always depends on the specific circumstances of a case. A few cases on the issue, e.g. RH 1996: 30 regarding the high position of the offender; or *Svea hovrätt*, DB 56/1994 relating to the large amount of the bribe, show how the law is interpreted in practice.

The Penal Code makes it possible to deal with corporations involve in bribery offences. According to the 2006 amendment to the Penal Code, corporate fines of from SEK ten thousands to ten million (approximately from EUR 1.1 thousand to EUR 1.1 million) may be imposed. From the international point of view the sufficiency of the new

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<sup>108</sup> In the criminal sanction system of Swedish penal law, the most severe punishment is life imprisonment, the following one is fix-termed imprisonment of ten years.

maximum fine should be assessed in conjunction with the use of confiscation against legal persons (OECD Report 2007: Para.12). Further if active bribery is committed in the course of someone's business activities, the perpetrator (a natural person) may be prohibited from running the business or from acting in a managerial position in a legal person ( the so-called business prohibition) for certain period of time (from 3 to 10 years). Rules governing this sanction, which can only be imposed by a court, are provided in the Trading Prohibition Act (1986: 436).

In principle, bribery offences in the private sector are dealt with under the same rules as those applied to the public sector, since the activities are provided together in the same provisions. The penalties prescribed are the same. However, the rules and penalties are not necessarily interpreted and applied in the same manner for both kinds of bribery offences. According to the preparatory works, taking a bribe in the private sector will normally be punished less severely than doing so in the public sector. Therefore, a bribery offence by private employees can only with difficulty ever be considered "gross" as the wording of the Code for aggravating circumstances (Government Bill 1975/76: 176 p. 38). Swedish criminal law is thus considered as imposing appropriate punishments for bribery in both the public and the private sectors.

*In conclusion*, by amendments to the provisions on bribery offences in the Penal Code, Sweden has actually implemented and to a great extent fulfilled the requirements of the Conventions concerning corruption. All types of bribery, ranging from bribery in the public sector and the private sector, from bribery of domestic and of foreign employees to bribery of officials working for international organizations, and also bribery of voters in elections, are covered and prescribed in the Penal Code as offences. For over ten years, Sweden has worked with Swedish legislation in connection with proposals from those international organisations of which Sweden is a member. Legislative works within the EU, the OECD and the UN always lead to changes to Swedish penal law on bribery. Despite these efforts, the law on bribery has still received criticisms. The Greco Report 2009 (Para.81) refers to criticism put forward by the Anti-Corruption Institute <sup>109</sup> that "a

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<sup>109</sup> The Anti-Corruption Institute (Institutet Mot Mutor) is a non-profit organization established by the Stockholm Chamber of Commerce, the Federation of Swedish Industries and the Swedish Retail

number of perceived weaknesses in the wording of current legislation, such as the definition of what constitutes a bribe, the interpretation of the “employee requirements” as well as an alleged lack of precision of the list of persons covered by the offence, the very general wording of the impropriety requirement, the uncertainty of what constitutes an aggravating offence and the lack of distinction between bribery in the public and the private sector.” The legislation, due to its above shortcomings, has had a negative impact on the effectiveness of the law enforcement, leaving a wide margin of discretion to the courts when developing the case law. Nevertheless, the penal provisions relating to bribery offences have been playing an important role in the fight against corruption in Sweden. In comparison with the International Conventions, the Swedish criminal law on bribery offences is considered almost in compliance. Along with the implementation of the standards by these international legal tools, Swedish law has become quite stringent in the fight against bribery.

### **2.3. Bribery Offences under Australian Criminal Law**

#### ***2.3.1. Australian law on bribery offences in general***

Australia has a two-level structure with the Commonwealth and eight states and territories beneath it. The Commonwealth has the power to enact criminal law which covers criminal matters in the whole country while the states also have power to enact their own criminal laws dealing with offences in their territory. At all levels of criminal law, bribery offences are provided for. Bearing in mind the scope of this study, the Commonwealth criminal law on bribery will be in focus, though the penal law of several States in this respect will be introduced to some extent. In addition, case law on bribery offences will be mentioned since Australia is a typical common law system.

At the level of the Commonwealth, bribery offences are stipulated in the Commonwealth Criminal Code 1995 (hereinafter the CTH Code). Particularly, Chapter 7 Part 7.6 of the CTH Code deals with bribery and related offences. Both active and passive bribery offences are covered in Chapter 7 under the title “The proper administration of

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Federation. The aim of this Institute is, *inter alia*, to spread knowledge about the legal provisions against bribery and corruption; to make public legal cases in this field; to provide the public with advice on the interpretation and usage of relevant legislation and to combat the system of illicit payments.

Government”. As a result, the proper administration of Government is the object that may be put in danger by bribery offences. Bribery offences including giving and receiving a bribe are both found in section 141.1 of the CTH Code. Here, the legislative technique of establishing two offences in one division implicitly expresses the two-sided nature of bribery and also indicates the common object of these two separate offences. In addition, as bribery-related offences, ‘corrupting benefits given to, or received by, a Commonwealth public official’ are covered by the CTH Code in section 142.1. According to section 142.3 of the CTH Code, the provisions relating to bribery offences will be applied within the most extended geographical jurisdiction and to most officials working for or on behalf of the Commonwealth. It directly follows from the law that category D of the extended geographical jurisdiction will be applied to these offences.<sup>110</sup> Further, the CTH Code also includes Subsection 268J (Offences against administration of the justice of the International Criminal Court) in which the offence of corrupting witnesses or interpreters is provided for. At common law, it seems that bribery is not a single general offence which may be committed in different ways but one which is treated as distinct offences.

Unlike many other members of the OECD Convention, Australia’s law still maintains the distinction between bribery in the public and in the private sector. Bribery which is confined to public officials, originated in the common law; whereas, private sector bribery offences are entirely statutory. In fact, only bribery offences in public sector are provided for in the CTH Code. The so-called secret commissions offences which are described by the MCCOC as “essentially an attempt to create a bribery offence for corruption in the private sector” (MCCOC 1995: 241) are dealt with in the State and Territory legislation. Legislation on secret commission offences is considered the result of the controversial discussion on the extension of criminalization to the private sector bribery during the twentieth century in Australia. At last the offences were established but the distinction between bribery in private sector and that of public officials still remains.

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<sup>110</sup> The Code provides two kinds the so-called “Standard geographical jurisdiction” and “Extended geographical jurisdiction”. Extended geographical jurisdiction is then divided into four categories: A, B, C, D in which category D is applied in the widest jurisdiction.



As a member of the OECD Convention, Australia implemented the Convention at the Commonwealth level and enacted the Criminal Code Amendment Act 1999 on Bribery of Foreign Public Officials. Accordingly, the offence of bribery of foreign public officials is now regulated under Article 70 of the CTH Code. The enactment of the legislation on this kind of bribery signifies the Federal Government's clear determination to fight international bribery of foreign officials. The objectives of the legislation are to prohibit undue benefit provided or offered with the intention of influencing a foreign public official in the exercise of his duties in order to obtain or retain an undue business advantage, to apply the prohibition to conducts within and outside Australia and to ensure that Australia complies with the key features of the OECD Convention (JSCT Report 1998: 21).

At state level, the law on bribery offences is not of the same style. In New South Wales (NSW) and Victoria (VIC), bribery remains common law offences. In States where there have been criminal codes and in the Australia Capital Territory (ACT), bribery is of statutory offence, being dealt with by virtue of quite similar provisions. Those provisions are all specific and comprehensive. All the Codes provide a glossary of definitions of the relevant terms. Especially, some States' Criminal Codes specify very specific cases of bribery, for instance the WA Criminal Code 1913 stipulates such offences as Bribery of Member of Parliament in section 61, Bribery of public officer in section 82, Bribery (at elections) in section 96, Judicial Corruption in section 121 and Corruption of Witnesses in section 130. The States and Territories of Australia have similar legislation on bribery offences in the private sector. Such offences are often dealt with by virtue of legislation on secret commissions. Typically, the Criminal Code of Western Australia (WA) 1913 devotes Chapter LV with the title "Corruption of agents, trustees, and others in whom confidence is reposed" to dealing with bribery offences in the private sector; whereas some others States, NSW for instance, prescribe private bribery in the same way as they do the public sector form.<sup>111</sup>

In short, under Australian law bribery is of both common law and statutory offence. Bribery generally consists of three main kinds: (1) corrupting benefits given to, or

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<sup>111</sup> Section 249B of the NSW Crimes Act 1900 covers bribery and secret commissions.

received by, a public official; (2) bribery of foreign public officials; and (3) secret commissions as bribery in the private sector.

Under Australian criminal law, there are a number of similar definitions of bribery. At common law, it is difficult to find a satisfactory definition of bribery, due to its complex nature. Bribery is often described in terms of several separate offences rather than as a single offence. “Bribery is the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity” (Russell 1964: 381). Essentially, bribery under the CTH Code can be perceived as dishonestly offering, providing or asking or receiving benefit of any kind to or by a Commonwealth public official for himself or another person with the intention that the exercise of the official’s duties as a Commonwealth public official will be influenced (section 141.1). Under the legislation of Australian Capital Territory (ACT), South Australia (SA), Western Australia (WA), the Northern Territory (NT), Queensland (QLD) and Tasmania (TAS), it constitutes an offence for public officers to seek or accept bribes, and for other people to give or offer bribes to public officers.<sup>112</sup> In SA it is an offence for a person to seek a benefit, to which he or she is not actually entitled, on the ground that it is owed by virtue of the person’s being the holder of a public office.<sup>113</sup> In the NT, QLD and TAS it is also an offence for public servants to accept any reward from a person in exchange for their performance of public duties.<sup>114</sup> Bribery is a common law misdemeanor in NSW and is punishable as such in VIC.<sup>115</sup> In NSW offences of bribery are covered by provisions for the receiving and soliciting of corrupt commissions or rewards by agents who are defined to include persons serving under the Crown, police officers and local government councilors.<sup>116</sup> Bribery as a statutory offence aims to influence the public administration

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<sup>112</sup> See ACT Criminal Code 2002 section 353 on the definition of ‘agent’, section 356 on bribery; SA Criminal Law Consolidation Act 1935 section 249; WA Criminal Code 1913 sections 82 (Bribery of public officer) and 121 (Judicial Corruption); NT Criminal Code section 77; QLD Criminal Code 1995 sections 87 (other public officers) and 120 (officers whose duties touch the administration of justice); TAS Criminal Code 1924 section 83 (other public officers), section 90 (judicial officers) and section 91 (public officers employed in relation to offences).

<sup>113</sup> SA Criminal Law Consolidation Act 1935 section 252.

<sup>114</sup> NT Criminal Code section 78; QLD Criminal Code sections 88; TAS Criminal Code section 84.

<sup>115</sup> See for example *R. V. White* (1875) 13 SCR (NSW) 322, SC (NSW) Full Court.

<sup>116</sup> NSW Crimes Act 1990 sections 249A and 249B.

by using undue benefits. Through case law, bribery provisions are argued to be used to prevent agents and public servants from being put in positions where they might be tempted to betray their duties.<sup>117</sup>

### ***2.3.2. Elements of Bribery of a Commonwealth Public Official***

The offence is to be found in section 141.1 of the CTH Code, including giving and receiving a bribe. Both active and passive bribery are provided for in the same place to imply and respect their close relationship.

The provisions on *giving a bribe*, found in section 141.1(1), are made as follows:

A person is guilty of an offence if:

- (a) the person dishonestly:
  - (i) provides a benefit to another person; or
  - (ii) causes a benefit to be provided to another person; or
  - (iii) offers to provide; or promises to provide, a benefit to another person; or
  - (iv) cause an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and
- (c) the public official is a Commonwealth public official; and
- (d) the duties are duties as a Commonwealth public official.

*Receiving a bribe* is dealt with in subsection 141.1(3) which is formulated as follows:

A Commonwealth public official is guilty of an offence if:

- (a) the official dishonestly:

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<sup>117</sup> See for example *R. v. Wellburn* (1979) 69 Cr App Rep 254 at 265; *R. v. Dillon & Riach* [1982] VR 434 at 436; or *Singh V. R.* [2006] 1 WLR 146 at 13.

- (i) asks for a benefit for himself, herself or another person; or
  - (ii) receives or obtains a benefit for himself, herself or another person; or
  - (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
- (b) the official does so with the intention:
- (i) the the exercise of the official’s duties as a Commonwealth public official will be influenced; or
  - (ii) of inducing, fostering or sustaining a belief that the exercise of the official’s duties as a Commonwealth public official will be influenced.

Through the descriptions of law, the offence can be seen to consist of the following elements:

*The bribe givers* may be individuals or legal entities. The coverage of Australian law is applied to all persons natural or legal. Specifically the CTH Code requires that an individual will be criminally responsible for an offence if he or she is aged 10 years or more and at the time of carrying out the conduct constituting the offence that person was not suffering from a mental impairment that led to such effect as (1) the person did not know the nature and quality of the conduct; or (2) the person did not know that the conduct was wrong; or (3) the person was unable to control the conduct (Division 7). For cases involving bribery offences committed by legal persons, corporate criminal responsibility will be imposed. In principle, the CTH Code applies to bodies corporate in the same way as it applies to individuals and a body corporate may be found guilty of any offence, including one punishable by imprisonment (section 12.1). It directly follows from the wordings of the CTH Code that there are two kinds of elements that need to be proved when imposing criminal corporate liability on bribery offenders: the physical and fault elements. In terms of objective requirements, it is provided that “if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate (section 12.2). In the light of the subjective requirement, intention is attributed to a body corporate on the ground that it expressly, tacitly or impliedly authorized or

permitted the commission of the bribery offence. Such an authorization or permission may include the following circumstances: (1) the body corporate's board of directors intentionally carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of bribery offence; or (2) a high managerial agent of the body corporate intentionally engage in the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of bribery offence; or (3) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or (4) the body corporate failed to create or maintain a corporate culture that required compliance with the relevant provision (section 12.3). In short, the Criminal Code does provide the essential grounds for imposing criminal responsibility on individuals and legal persons. It is worth noting that these two kinds of responsibility do not exclude each other.

The core physical element of the bribery offence is *the bribe recipient*. The recipient can only be a Commonwealth public official. The concept of a Commonwealth public official is neither defined nor given a reference thereof in the CTH Code. The Crimes Act 1914 subsection 3(1) fills this gap by providing a definition of *Commonwealth official* which means a person holding office under, or employed by, the Commonwealth, including:

- (1) a person appointed or engaged under the *Public Service Act 1999*;
- (2) a person permanently or temporarily employed in the Public Service of a Territory or in, or in connection with, the Defence Force, or in the Service of a public authority under the Commonwealth;
- (3) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police;
- (4) a person who, although not holding office under, or employed by, the Commonwealth, a Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth.

The definition of public official encompasses different groups of people who share the same sector - public services work, under or by or for the Commonwealth. These people carry out public duties in three areas: Public Services, Defence Force and Federal Police. The last group do not seem to be public officials in principle but are still considered as

public officials when they are performing services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth. Consequently, the key requirement is the public service nature for which the Commonwealth official works, disregarding their seniority and salary. According to the Parliamentary Debates, the issue of who is included within the definition of “Commonwealth public official” is fundamental and should be clarified. These debates criticized the definition of Commonwealth public official in the Crimes Act 1914 because it does not indicate clearly whether ministers are covered. The debates further recommended that any new definition should include all federal members of Parliament, ministers and judges.<sup>118</sup> The preparatory works to the Government Bill 1999 also considered this definition unsatisfactory.<sup>119</sup> It is required that all people performing duties and functions for the Commonwealth be covered in the definition. It also includes ‘Commonwealth service providers’ who provide services by contract rather than as office holders or employees. These people often have responsibilities that are indistinguishable from departmental officers.<sup>120</sup> The Explanatory Memorandum in addition notes that “[i]t is important that there should be no doubt about the coverage and that the protection afforded to the administration of government should be extended to judicial officers.”<sup>121</sup> With the most extended coverage, the term ‘Commonwealth public official’ is defined to include a broad group of people including Commonwealth employees and officers, Members of Parliament, judges, police, contractors, military personnel and those employed by the Commonwealth authorities.<sup>122</sup>

At common law, it is not a requirement of the offence that the relevant public officer be under a duty to act judicially.<sup>123</sup> Members of Parliament are regarded as public

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<sup>118</sup> Official Hansard in the 39<sup>th</sup> Parliament First Session - Fourth Period of House of Representatives (Commonwealth of Australia) on Wednesday, 24 November 1999.

<sup>119</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.363.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid., Para.362.

<sup>122</sup> Ibid., Para.44.

<sup>123</sup> *R v White* (1875) 13 SCR (NSW) 322, SC (NSW) Full Court.

officers.<sup>124</sup>The definition extends to persons intending to become or purporting to be a Commonwealth official, but does not include former agents.<sup>125</sup>

As regards the *physical elements* of bribery offences, the acts of giving a bribe vary according to the CTH Code. The conduct of giving a bribe is not limited to providing a benefit but extended to some others, such as causing a benefit to be provided, offering to provide or promising to provide a benefit. As a result, an action can constitute a crime even if the benefit has not actually been transferred. Notably, the conduct can even include causing an offer or a promise of the provision of a benefit to be made to another person. These special types of conduct are similar to acts of preparing for the offence in other systems. For a proper understanding of such conducts, we need a definition or interpretation. “While there is no definition of “causes”, the word carries with it potentially broad consequences’, assuming that it would include any form of direction or inducement for an action to be taken” (Wilder and Ahrens 2001). The conducts named “causes” set forth under subsection 141.1(1)(a)(ii) and (iv) appear to be significant as regards the issue of committing bribery through *intermediaries*. “It seems clear that the term “causes” addresses the situation where a person causes a benefit to be provided, offered or promised through an intermediary” (OECD Report 1999). Australian law does have, in respect of the *actus reus* of bribery, wide application. It foresees various acts that may occur in bribery practices and makes it possible to capture them all.

As various as are the conducts of giving a bribe, acts of receiving a bribe consist of three kinds: asking for a benefit, receiving or obtaining a benefit, and agreeing to receive or obtain a benefit. ‘Asking for a benefit’ seems not to be passive but active action. The conduct is committed actively and clearly shows the intention of the offender. The demand for a bribe is not required to be accepted by the demanded party. ‘Receiving a benefit’ requires the actual receipt of a bribe. It means that the benefit is already controlled or enjoyed by the recipient. ‘Obtaining a benefit’ is understood similarly. By ‘agreeing to receive or obtain a benefit’, the benefit does not have to be actually received

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<sup>124</sup> *R v White* (1875) 13 SCR (NSW) 322, SC (NSW) Full Court.

<sup>125</sup> *R v Brewer* (1942) 66 CLR 535; [1942] ALR 353 BC4200007.

by the receiver. The essential requirement is that the official already made an agreement with the offeror under which he will receive or obtain the benefit later.

Next, the key element that all bribery offences share is *the bribe*. As it is in the criminal law of many other countries, the bribe is placed in the centre of the Australian criminal law on bribery offences. The bribe is defined in law at both the Commonwealth and States levels. Section 140.1 of the CTH Code provides that “benefit” includes any advantage and is not limited to property. “Bribe can be paid by many different means”.<sup>126</sup> The definition appears to meet the requirements of theory concerning the nature of the bribe. It is commonly perceived that a bribe is defined as a favour or gift offered or given with the intention of influencing the behaviour or opinions of the recipient (CEAR 2006: 4). The bribe is in this definition regarded as a benefit of any kind paid to the public official in respect of an act done in relation to his or her duties. Similarly the NSW Crimes Act 1900 defines the bribe as “benefits” that includes “money and any contingent benefit” (section 249A). There is no limitation either in kind or size regarding what may constitute a benefit. At common law bribery is approached broadly to cover both monetary and non-monetary payments and can even include sexual favours.<sup>127</sup> The above definitions of the term cover the broad scope of advantages that are considered as bribes, including those of an intangible nature. The bribe is under statutes often represented by the term “benefit” and that is also a wide concept itself. Benefit is in its turn defined broadly in section 140.1 to include any advantage. ‘Advantage’ is another broad term. One hardly finds a broader term than ‘advantage’ for the coverage of the bribe. Clearly, the sorts of advantage that can be conferred in a bribe vary and anything that can be regarded to constituting a benefit should be covered in the scope of the bribe. In regard to the amount of the bribe, MCCOC comments that “benefit could extend to small things like gratuities but the requirement that the transaction be dishonest would preclude tips and the like being treated as bribes” (MCCOC 1995: 269). Actually convictions have been made for the provision of benefits valued at as little as \$ 200.<sup>128</sup> However the smaller the benefit the less likely it is that it will satisfy the other elements of the bribery

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<sup>126</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.227.

<sup>127</sup> *McDonald v State* 329 So. 2d 583, 587-88 (1975).

<sup>128</sup> *R v Giovannone* (2002) 140 A Crim R 1; [2002] NSWCCA 323; BC200204619.



offence. In circumstances where the benefit is of such small value that could hardly cause any influence on the official's performance of his duties, it should not be regarded as a bribe. At common law, things of small value, such as food, drink, may not constitute a bribe.<sup>129</sup> Further, section 249H of the NSW Crimes Act enables a court to dismiss a case where "it appears... that the offence is of a trivial or merely technical nature". It is moreover suggested that factors such as the nature of the bribe, the political and financial position of the receiver, the relation between the giver and the receiver, become necessary conditions for identifying what benefit constitutes a bribe (Lanham 1987: 31).

Relating to the bribe, Section 249J of the NSW Crimes Act also provides that "it is not a defence that the receiving, soliciting, giving or offering of any benefit is customary in any trade, business, profession or calling". The prohibition of the law appears to be more stringent.

Obviously the bribe may benefit a third party. *The third party beneficiary* is also covered in the statutory provisions. Section 141.1 of the CTH Code indicate that the benefit may be provided or offered to *another person* with the intention of influencing a public official (who may be the other person) and the benefit is asked or received by the official for himself, herself or *another person*. Following the wording of the law, the bribe may benefit another person, not necessarily being enjoyed by the official, as long as it is made in order to influence the official's performance of his duty. In other words, the person who is bribed may be other than the public official, providing that the bribe is made to influence the public official's performance of his duties. This may be the situation in which a bribe is given to person who is a family member of the public official or the political party in government where the official is a member, provided this affects the official's behaviour. However the actual relationship between the official and the third party beneficiary is irrelevant as it is not required by the law.

Besides the physical elements, bribery of a Commonwealth public official requires *mental elements*. Specifically, the fault elements of the offence are "*dishonestly*" and

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<sup>129</sup> *Woodward v Maltby* [1959] VR 794.

“*intent*”. “Dishonestly”<sup>130</sup> is required to show clearly the wrongfulness of the bribery offence for the reason that the essence of the offence is not mere payment but actual disloyalty or dishonesty.<sup>131</sup> It has been argued that several kinds of payment such as the official’s salary would constitute bribery because it is a benefit given in order to influence the official’s duty and the fault element of ‘dishonesty’ therefore provides an important safety-valve.<sup>132</sup> Essentially, such an element is necessary for an ultimate assessment of the legitimacy of the benefit to be satisfied with bribery offence. In other words, a “dishonesty” element is meaningful for distinguishing bribes from legitimate benefits. The core element of bribery is thus the dishonesty of the conducts in respect of the performance of a duty owed by the public official. However the CTH Code does not define “dishonestly” in regard to bribery offences. Regarding the “dishonest” fault element, MCCOC refers to the common law notion of “corruptly”, which is based on behaviour that is “contrary to the known rules of honesty and integrity” (MCCOC 1995: 255). MCCOC indicates that the term “dishonestly” is somewhat broader in scope than “corruptly”, thus preferring “dishonesty” as the fault element for bribery with the argument that it is more flexible. “The flexibility of the dishonesty concept in allowing an assessment of the dealing against the standards of ordinary people is the best and most workable way of capturing the essence of bribery and other corrupt payments (Ibid.: 261). In short, the element “dishonestly” would help a jury to assess whether the act of the defendant committed against the standards of ordinary people.

Notably, the element of intent is prescribed directly in the statutory expression of the offences. Pursuant to section 5.2 of the CTH Code, a person has intention with respect to bribery conduct if he or she means to engage in that conduct while he or she knows the nature and the quality of the conduct. In the context of bribery offences, the Code requires intent to cover two conditions (1) intention to give/receive a benefit to/by the public official and (2) intention that the benefit will influence the duty of that official, or that the exercise of the official’s duties will be influenced. On the part of the recipient,

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<sup>130</sup> In South Australia, Tasmania or Northern Territory, the statutory provisions use the term “improperly” to capture the meaning of this fault element.

<sup>131</sup> New South Wales Cabinet Office and Attorney-General’s Department (1992), *Reform of the Criminal Law relating to Bribery and Corruption: Discuss Paper and Exposure Bill*.

<sup>132</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.232.

intent may be attributed to circumstances in which the official acts with the intention of influencing, fostering or sustaining a belief (in the part of the giver) that the exercise of the official's duties as a Commonwealth public official will be influenced (subsection 141.1(3)(b)(ii)). It seems that in these circumstances the bribee does not want his/her exercise of duties to be actually influenced. The element of intent only requires that the recipient indicates that he has the intention of being influenced by the bribe. Therefore, the exercise of the official's duties is not necessarily carried out in fact. It is irrelevant whether it may be done or not be done in fact or even the official then does not want to do. Intent to be influenced is sufficient to constitute the offence. For the offence of giving a bribe, subsection 141.1(2) does not require proof that the defendant knew: (1) that the official was a Commonwealth public official; or (2) that the duties were duties as what a Commonwealth public official has. This means that the action of for example providing a benefit to another person may constitute bribery offence even if the giver has the wrong knowledge about the receiver's position or duties. "In some cases it should only be necessary that the defendant knew that he or she was dealing with a public official, not necessary a 'Commonwealth public official'." <sup>133</sup>

*The official's exercise of duty* can be regarded as the object of bribery, being required as an element of bribery offences. Section 141.1 of the CTH Code provides that the giver 'does so with the intention of influencing a public official ...in the exercise of the official's duties as a public official'; along the same lines, the receiver 'does so with the intention: that the exercise of the official's duties as a Commonwealth public official will be influenced'. Bribery thus aims to induce the official to do something in his/her official capacity as a public official. The law does not require that the official's exercise of duty be actually carried out or fully consummated or succeed in producing the desired outcome.

The *first question* arising is whether the exercise of the official's duties comprises acts of both commission and omission. The relevant provision in the CTH Code does not expressly refer to omission in the exercise of a public official's duties but that form of act

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<sup>133</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.372.

is indeed covered. Take the case *R. v. Tange* [1993] QCA 501 by the Supreme Court of Queensland Court of Appeal to support the statute. In this case the defendant allegedly bribed a detective sergeant with AUS 5 000 to take no action against him or deal with drug charges summarily rather than on indictment. The judgment of the Full Court in *Tange* held that providing a benefit to obtain an omission can amount to a bribe. The *second issue* relates to the legal nature of the official's act. Since the CTH Code does not explicitly indicate that the official's act is necessary wrong or illegal, an act may constitute a bribery offence even if the official is influenced to do things that his/her duty requires. "It clearly envisaged that accepting payments for things within the scope of duty could be caught by bribery offences" (MCCOC 1995: 269).

Regarding the exercise of the official's duties, attention should be paid to the key term 'duty'. This is the first term to be defined under Chapter 7 of the CTH Code. Section 131.1 defines 'duty' in regard to the Commonwealth public official and the public official.<sup>134</sup> Duty as defined refers to authority, duty, function or power. It means various types of exercise of the official capacity of a public official. The definition is set forth to ensure it has the widest possible meaning and appropriately covers duties that the 'Commonwealth public official' may not technically have but he/she is able to hold himself or herself out as having. The broad coverage of the definition is significant because the community cannot be expected to know what exact duties an official has. The definition would not be unreasonable if one might expect some dishonest officials try to seek favours by promises to do things that have nothing to do with their duties.<sup>135</sup> The CTH Code also provides a similar definition in relation to 'public officials'. This is necessary in the context of bribery of Commonwealth public officials, because the offence only requires the prosecution to prove that the bribed person is a 'public official',

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<sup>134</sup> Section 131.1 of the CTH Code defines 'duty' as follows:

**duty:**

- (a) in relation to a person who is a Commonwealth public official – means any authority, duty, function or power that:
  - (i) is conferred on the person as a Commonwealth public official; or
  - (ii) the person holds himself or herself out as having as a Commonwealth public official; and
- (b) in relation to a person who is a public official – means any authority, duty, function or power that:
  - (i) is conferred on the person as a public official; or
  - (ii) the person holds himself or herself out as having as a public official.

<sup>135</sup> See: Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.42.

not that he/she is a 'Commonwealth public official'. "Many in the community are not precisely aware of what public officials are State public officials, as opposed to Commonwealth public officials."<sup>136</sup>

The next question in respect of 'exercise of official duties' is whether it is required to be within the official's duties. The favoured perception is that "[a]n agent who received payments outside the course of regular remuneration would be likely to be found dishonest" (MCCOC 1995: 269). Case law actually shows situations where the official received a payment for doing what is not part of his or her duty, but he or she was capable of doing it because he or she is an official. This means that a wider view of the relationship between bribery and exercise of duty has developed on a case by case basis. The first example is the case of *Attorney-General of Hong Kong v. Ip Chiu* (1980) AC 663, where a police officer took a payment from a suspect who paid the money to avoid being beaten up or having evidence planted. The Privy Council held that this act did not fall within the duty of the police office and that the notion of duty could not be limited to things that the official was legally obliged to do. This view was supported by the wider approach in *R v. Patel* (1944) AD 511. In the case of *R v. Herscu* (1991) 103 ALR 1, the High Court held that duty was not restricted to matters the official was legally obliged to do but included functions which were the official's functions to perform. The Court in this case seemed to prefer the broader view that bribery offence should apply to things done in an official capacity. Questions arising from the issue of "duty" have been still discussed in the courts. While the common law offence requires that the bribe must be in relation to the public officer's exercise of a legal power obtained by virtue of the office, a judgment of a conspiracy to bribe a member of parliament was established when the aim of the bribe was to persuade the parliament member to put pressure on a minister to carry out a particular transaction involving the expenditure of public money. The fact that the pressure could be exerted by virtue of the member's role was sufficient to make the act a public mischief and a criminal conspiracy.<sup>137</sup>

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<sup>136</sup> Ibid., Para.43.

<sup>137</sup> See *R v Boston* (1923) 33 CLR 386; 30 ALR 185; BC2300011.

To put an end to issues relating to bribery of a Commonwealth public official, it should be noted that although giving a bribe and receiving a bribe are provided for together and share some common elements, this does not mean that these offences depend on each other. They are separate offences. An action can constitute the offence of giving a bribe without involving receiving a bribe and vice versa.

### ***2.3.3. Other Bribery Offences***

#### *Bribery in the Private Sector*

Bribery in the private sector in Australian law, as mentioned above, is expressed in terms of secret commissions. At common law, a secret commission or also called a bribe, or a secret profit, is defined by Rebecca King (1993) to be a benefit, or profit, received by an agent, from a third party with whom the agent is dealing on the principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the time of creation of the agency. The main reason for establishing secret commissions as private bribery offences is that under general principles of law, an agent is not allowed to make a secret profit out of the exercise of his/her duties as agent. The agent must act in good faith and loyalty to his/her principal's interest. There is a duty to account for all profit he/she obtains by virtue of acting as an agent of his/her principal, because of the contract between the principal and the agent.

At the Commonwealth level is it unclear whether private bribery is recognized as a criminal offence under statutory law. The Commonwealth Secret Commissions Act 1905, instead of covering corruption in the private sector as traditionally understood, was only used to combat Commonwealth public sector corruption and secret commission offences under this Act were replaced by offences in Division 142 of the CTH Code.<sup>138</sup> The Commonwealth legislation seems to leave the issue to State law and case law to deal with. Legislation in each State and Territory of Australia on secret commissions is considered roughly equivalent but not identical.<sup>139</sup> Take the NSW law on secret

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<sup>138</sup> See details in Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, paras.237-238.

<sup>139</sup> See the NSW Crimes Act 1900 (Part 4A, section 249B), the VIC Crimes Act 1958 (section 176), the SA Secret Commission Prohibitions Act 1920, the QLD Criminal Code 1995 (Chapter XL11A), the WA

commissions as an example of providing bribery in the private sector. Under Section 249B of the NSW Crimes Act (the NSW Act), offences are defined as receiving or soliciting or agreeing to receive or solicit, or giving or offering to give any benefit by or to an agent for the agent or for anyone else (a) as an inducement or reward for or on account of the agent's doing or not doing something, or having done or not having done something, or showing or not showing (or having shown or not having shown) favour or disfavour to any person, in relation to the affairs or business of the agent's principal; or (b) the receipt or any expectation of which that would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person, in relation to the affairs or business of the agent's principal. The term 'agent' is defined in a wide sense to include employees in the public and private sectors. The purpose of secret commissions, unlike that of public bribery, is to 'tend to influence' the agent's act in relation to the affairs or business of his/her principal. In the private sector, the principal can be regarded as the victim of a secret commission. Some similar elements may be shared with bribery offences in the public sector. These offences however contain different features, such as the areas in which the offences occur, the nature of the duties of the private agent and so on. Private bribery thus does not relate to the misuse of public office. Under Australian law, there are two essential differences between bribery in the public sector and secret commissions in the private sector: first, bribery covers only public officials as recipients, while secret commissions extend to bribery of non-officials prescribed as agents; second, in bribery the offer of or at least the agreement on the bribe must be made before the conduct as an inducement, whereas in secret commissions an inducement or reward is made for acts previously done without the need for an offer or agreement before the performance of the act (MCCOC 1995: 243).

### *Bribery of foreign public officials*

The offence is set out in Division 70 of the CTH Code. As the offence is placed in Chapter 4, it is one of the offences that undermine the integrity and security of the international community and foreign governments. The provisions on bribery of foreign

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Criminal Code 1913 (Chapter LV, section 530), the TAS Criminal Code 1924 (section 266), and the ACT Agents Ordinance (section 72).

public officials are comprehensive and detailed. First, a glossary of definitions of relevant terms is set out, including “foreign enterprise”. After that the description of the offence is formulated as follows:

(1) A person is guilty of an offence if:

(a) the person:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to other person; and

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official’s duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

The provisions set forth the *elements of the offence* many of which are equivalent to those in the bribery of domestic official offence, including the elements of conduct, intent, the bribe, the third party beneficiary, the exercise of the official’s duty (including the definition of duty) and bribery through intermediaries. However there are some distinctive elements relating to the transnational features of the offence.

The bribe giver can be a natural person or a legal person. In principle, the offender must be an Australian citizen. However, residents of Australia will also be subject to the legislation. These include executives and employees of foreign corporations working in Australia on residency visas. In addition, bodies corporate incorporated by or under a law of the Commonwealth or of a State or Territory, are also covered. This will include



Australian companies operating domestically and abroad. Further, foreign bribery provisions apply to foreign corporations operating in Australia, but only to those foreign subsidiaries incorporated in Australia. It is noted that even when a representative of an Australian incorporated company is not an Australian citizen or resident, that company will still be responsible for the offence of bribing a foreign public official (Wilder and Ahrens 2001).

The bribe recipient of the offence constitutes the core element that makes the offence different from other bribery offences. The CTH Code requires the recipient to be a foreign public official. The concept of a foreign public official is defined broadly and specifically in the Code. Under section 70.1, recipients may be classified into three main categories: (i) persons who work for a foreign government body; (ii) persons who work for a public international organization; and (iii) a person who is (or holds himself or herself out to be) an authorised intermediary of a foreign public official.

The *first category* of foreign public officials covers employees or officials of a foreign government body or individuals working for a foreign government body under a contract. It also includes the well-known political actors, the members of the legislature, executive, judiciary or magistracy of a foreign country. Under the CTH Code “foreign country” covers the full range of countries and territories that are outside Australia.<sup>140</sup> In respect of the foreign bribery offence, *foreign government body* means the government of a foreign country or of part of a foreign country; an authority of the government of a foreign country; an authority of the government of part of a foreign country; a foreign local government body or foreign regional government body; or a foreign public enterprise (section 70.1). The legislation does provide a broad definition of “foreign government body”. This definition comprises not only every “authority of the government” but also “a part of the government” and this in turn embraces public agencies and public enterprises. It is thus not restricted to government entities but covers all levels and subdivisions of the foreign country. Every person performing duties by virtue of an appointment, office or position in those bodies, whether via a contractual, statutory, or

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<sup>140</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.369.

customary establishment, is regarded as a foreign public official (section 70.1). The definition of foreign public official under Australian law is not made in the light of performing a public function. It is instead tied to the duties or tasks being performed by the person in question. Notably, the definition extends to persons who perform works or duties for a foreign public enterprise. Australian law addresses the subject of public enterprises with a considerable degree of specification. The CTH Code indicates the circumstances under which an enterprise will be regarded as subject to state control. This may be the case where the foreign government holds over 50 % of the capital or of the votes attached to the share capital of the company, appoints more than half of the body's board of directors, or where, formally or informally, the board carries out the government's instructions. The foreign country may also hold a position of dominance by other means such as 'trusts, agreements, arrangements, understandings, and practices' (section 70.1), regardless whether there is a legal basis for such control or there are legal means for enforcing such influence. Furthermore, the control may be established on the ground that the company enjoys special legal preferment by the government, i.e. benefits in terms of 'special legal rights or a special legal status special benefits or privileges' (section 70.1). The Code does not cover persons purporting to hold a public office. It can be seen too that there is no criminal punishment for bribery of candidates of a foreign government body. In addition, political parties and party officials of foreign states do not fall within the scope of the CTH Code.

The *second category* of recipients encompasses employees of a public international organisation and individuals who perform work for a public international organisation under a contract, etc. The "covered persons" are set out in the same manner as the first category is established. By virtue of section 70.1, the definition of "public international organisation" includes three kinds, namely an organisation (or an organ thereof) of which 2 or more countries, or the government of 2 or more countries, are members; an organisation established by organisations of which 2 or more countries, or the government of 2 or more countries, are members, etc.

In addition to the above two main groups, the recipient of transnational bribery can also be *the authorised intermediary* of a foreign public official. This person acts as a conduit

to that public official (Wilder and Ahrens 2001). Furthermore, “the chain of rewards, favours and influence may be far broader, an offer or promise can be made to any person and paid in any form, including into offshore accounts” (Ibid). The definition is more potent by the way that it indicates the existence of foreign bribery committed through intermediaries.

The next important element is *the bribe*. According to the CTH Code, the bribe is a benefit that exists in any direct or indirect form. It can be any kind of advantage, as long as it is considered ‘not legitimately due’. Proving that an advantage is not legitimately due is not a simple burden. For the sake of making it easier, subsection 70.2(2) provides that the examination of whether a benefit is ‘not legitimately due’ will disregard whether the benefit may be, or be perceived to be, customary, necessary or required in the situation. Moreover, the value of the benefit or any official tolerance of it should not be regarded. Further the International Trade Integrity Act 2007 amended the Commonwealth Criminal Code, confirming that the results of the alleged conduct are also irrelevant in this regard. Due to the fact that this requirement is not provided for in domestic bribery, there is no judicial guidance on its interpretation. It is supposed that the legitimacy of the benefit will be determined by a statutory test of “not legitimately due” (Wilder and Ahrens 2001).

As the offence requires only “intentionally” as a mental element, the element of “dishonesty” is not covered as it is in the domestic bribery offence.

The object of bribing a foreign public official is to obtain or retain business or a business advantage that is not legitimately due. Business advantage means an advantage in the conduct of business. Under the wording of the legislation, the business that the briber is willing to obtain or retain “is not qualified by the notion of legitimacy”. The aim of obtaining or retaining business will itself be sufficient for constituting an element of the offence. The business advantage however will need to be examined as to whether it is not legitimately due. For determining if a business advantage is not legitimately due, one can disregard whether the business advantage is customary or perceived to be customary in

the situation, or regardless of the value of that advantage or the official tolerance thereof (subsection 70.2(3)).

According to section 70(5) the offence covers the conduct of bribing a foreign public official regardless whether it occurs wholly or partly in Australian territory or it occurs outside Australia. “The willingness of the Australian Government to extend its jurisdiction beyond Australia’s territorial boundaries demonstrates the Government’s seriousness in tackling the bribery of foreign officials” (Wilder and Ahrens 2001).

Although the legislation on bribing a foreign public official is severe, it still embraces tolerant zones. The CTH Code provides two special defences (in addition to general defences applying to all offences) for excluding criminal responsibility for bribery of a foreign public official (1) the conduct is lawful in the foreign public official’s country, (2) the benefits are of facilitation payments (subsection 70.3(1) and (2)). Regarding the first defence, the CTH Code specifies eleven cases (along with eleven types of foreign public officials covered in section 70.1) in which the conduct is considered lawful. The purpose of this detailed specification is to prevent the briber from escaping responsibility by locating himself in some specific jurisdictions with the intention of taking advantage of the defence. For instance, in case that the briber is an employee or official of a foreign government body, the defence of lawful conduct is only determined under the written law currently in force in the place where the central administration of the body is located. The second defence is relevant to the nature of the given benefit. The law requires four conditions that must be fulfilled for taking the defence: (1) the value of the benefit was of a minor nature; (2) the person’s conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, for instance the action of granting a permit or licence that qualified a person to do business in a foreign country is considered as a routine government action of a minor nature if it is ordinarily and commonly performed by a foreign public official; (3) as soon as practicable after the conduct occurred, the person made a record of the conduct that sets out the value of the benefit concerned, the date on which the conduct occurred, the person’s signature or some other means of verifying the person’s identity and includes some other facts; (4) the person has retained that record at all relevant times or a

prosecution for the offence is instituted more than 7 years after the conduct occurred (subsection 70.4(1), (2) & (3)). Such a defence creates a distinction between bribes and facilitation payments. In principle these two kinds of practices should be seen as different both by their nature and in degree. Accordingly, by its nature “[a] payment is a facilitation payment, and not a bribe, where it is paid to government employees to speed up an administrative process where the outcome is already pre-determined” (CEAR 2006: 4), and in degree a facilitation payment is of a minor value. However, the provision of this defence is criticized for its ambiguity. Instead of providing for the *minor value* of such payments as required by the OECD Convention, it recognizes facilitation payments as of ‘*a minor nature*’. Moreover the CTH Code does not define the word “minor”. This means that the size of facilitation payment is not set out clearly and this defence thus remains problematic. It is believed that the inconsistent and vague way in which Australian law treats facilitation payments is a loophole in the system for administering anti-corruption legislation (CEAR 2006: 4).

#### *Bribery relating to the operation of the International Criminal Court*

In order to protect the administration of the justice of the International Criminal Court (ICC), Australian criminal law prohibits some bribery practices concerning the operation of this Court. “Corrupting witnesses and interpreters” and “Receipt of a corrupting benefit by an office of the International Criminal Court” are provided as offences that may distort the justice of the Court under sections 268.106 and 268.113 of the CTH Code. The wording of the law is very detailed and comprehensive. The offences found in section 268.106 cover (i) active and passive bribery of a witness, and (ii) active bribery of an interpreter. Almost all the elements of the offences are the same as those of other bribery offences. The key difference is that the bribe recipient is a witness or an interpreter at a proceeding of the ICC. Bribery in this regard is to influence these persons’ activities as witnesses or interpreters. The offender has the intention that the recipient will not attend or give false evidence (or withhold true evidence) or give false (or misleading) interpretation as a witness or an interpreter at the proceeding before the ICC. By setting out these offences, Australian law indicates the existence of bribery of witnesses and the necessity of its criminalization, which I have mentioned in the theoretical part of the

thesis. The law in addition stipulates the offences of passive bribery by an ICC official. The offence requires almost the same elements as the offence of receiving a bribe by a domestic official. The core difference is the role and duties of the offender as an official of the ICC.

By criminalizing certain bribery activities perverting the administration of the justice of the ICC, Australian law has affirmed globalized standards in the fight against corruption.

#### ***2.3.4. Attempt, Conspiracy and Complicity***

An attempt to commit a bribery offence gives rise to the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed in pursuance with section 11.1 of the CTH Code. Under subsection 11.1(2), the condition for an attempt to commit a bribery offence to be charged is that the person's conduct must be more than merely preparatory to the commission of the offence. Attempt requires intention and knowledge as fault elements in relation to each physical element of the offence attempted (subsection 11.1(3)). In addition to attempt, complicity, including conspiracy to commit bribery offences may be punishable. Subsection 11.2(1) provides that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. Pursuant to the relevant provisions, a person will be punishable for complicity in a bribery offence if (1) the person's conduct is actually aiding, abetting, counselling or procuring the commission of a bribery offence, (2) that offence has been committed by the other person, and (3) the person has intended to do so. By the provision on complicity, it can be supposed that acting as an intermediary in bribery offences may be regarded as acting as a kind of accomplice. Accordingly, a person who is an intermediary may be charged with complicity to commit bribery offence. Provisions on specific bribery offences do not expressly cover the act of an intermediary and the responsibility for that person. The general provisions can be applied to the cases in question.

#### ***2.3.5. Criminal Sanctions***

Prior to the CTH Code Amendment 1999 (Theft, Fraud, Bribery and related Offences), the penalties provided for bribery offences were very low (maximum 2 years imprisonment). Along with the need for more comprehensive obligations and propriety on the Commonwealth public officials, the Government required significantly increased penalties for bribery.<sup>141</sup> Under the current law, the punishments for bribery offences seem appropriate for the seriousness of the offences. The maximum penalty for bribery offences is imprisonment for 10 years. In comparison with the penalties provided for felony offences, such as treason or murder (usually imprisonment for 25 years or life-imprisonment), the penalty imposed on bribery offences is sufficiently severe. It seems to fulfil the principle of proportionality required by the relevant Conventions. Giving a bribe is considered as being as dangerous as receiving a bribe since the penalties provided for both offences are the same. Although the provisions on bribery offences only provide for imprisonment, a fine may also be imposed in accordance with the principles of criminal law. For instance section 70.2 of the CTH Code notes that under Section 4B of the Crimes Act 1914, a court may impose a fine instead of or in addition to imprisonment. The Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 which was passed in February 2010, increases the financial penalties for bribery offences. The new penalty is a fine of up to 10 000 penalty units (AUD 1.1 million) for an individual; and a fine of up to 100 000 penalty units or three times the value of benefits obtained by the act of bribery, whichever is greater for a legal entity (a body corporate). If the value of the benefits obtained from bribery cannot be ascertained, the penalty is a fine up to 100 000 penalty units or 10% of the annual turnover of the company, whichever is greater. The penalties were increased due to the criminal nature of bribery and the detrimental effects it gives rise to (OECD Report 2010). In short, the penalties imposed on bribery offences may be imprisonment for 10 years or a fine or both. These penalties can be said to be proportionate to the danger and the nature of the offences.

### ***2.3.6. The offence of corrupting benefits given to, or received by, a Commonwealth public official***

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<sup>141</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, in General Outline.

In addition to criminalizing bribery, the CTH Code also provides for the lesser offences of giving and receiving corrupting benefits as offences relating to bribery by virtue of section 142.1. The criminal conducts involved in these offences are the same as prescribed in the bribery ones. The corrupting benefits offences, unlike bribery offence, do not require the intention of influencing the exercise of the official's duties. They instead require proving a tendency to influence the official. Benefit in the nature of a reward is also covered in the offences. The reason for covering reward in the ambit of the law is that "[a] large reward in one instance can have a tendency to influence a particular official and others in relation to dealings with the person making the payment."<sup>142</sup> Due to the lesser serious of the offences in comparison with bribery, the maximum penalty provided for is thus much lower (5 years of imprisonment).

*To conclude*, Australian criminal law does cover all types of bribery that are dealt with in the relevant Conventions, e.g. public bribery, private bribery and bribery of a foreign public official. In addition, some special types such as bribery of a Member of Parliament, bribery at elections and judicial bribery are also provided for in the Commonwealth Criminal Code or State/Territory legislation. Further, the case law on bribery is another source for the prosecution of bribery offences. General speaking, Australia has a strong legislative regime criminalizing bribery practices. The legislation has been made as virtually identical to and as stringent as that of other countries and the relevant Conventions. It can be said to be a comprehensive body of enforceable law. Criminal law can thus act as an effective tool for preventing and combating corruption in Australia.

#### **2.4. Comparative Analysis**

As members of significant International Conventions concerning corruption, Vietnam, Sweden and Australia are aware of the negative effects of bribery on various areas of society. The countries have thus all implemented the relevant Conventions and criminalized bribery practices. The three domestic law systems regarding bribery offences seem to fulfil the international requirements and standards set forth under the

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<sup>142</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, Para.244.



Conventions. The laws governing bribery offences of the three countries share several similarities but also contain certain differences. The differences may be said unavoidable, due to dissimilarities of criminal law policies, legal cultures and social-economical basis.

*The similarities* should be mentioned first. Vietnam, Sweden and Australia have criminalized bribery behaviours that are prevalent everywhere, such as active and passive bribery. Despite the difference in structures or arrangements, the elements of bribery offences are basically similar. The similarities vary, ranging from the physical to the mental elements. For example commonly prescribed actions are promising, giving or asking or receiving an undue benefit. Further, one more feature of bribery offences shared in the three sets of criminal law is that these all are ‘conduct offences’. This means that the full effect of the offences is not required as part of the legal description. In addition, intent is commonly recognized as a fault element of bribery offences and the requirements of intent element are again almost the same. The bribe itself is required as an element of bribery offences in all legal systems. Moreover the offender as well as the object of the offences is prescribed similarly. The notion of who may be the bribed person is also similar. The three countries’ laws require special positions, functions or works with respect to which an employee or an official can commit passive bribery. The coverage of persons who can be the bribe recipients is as broad as the relevant theories suggest and the related Conventions recommend, and even broader to some extent. As the object of bribery offences, the performance of official duties is a common required element. The aim of bribery offences, again shared in the three countries’ law, is to influence the exercise of the bribed person’s duties. Further, the issue of third party beneficiaries is addressed or acknowledged in the bribery law of three countries to a different extent. Another similarity is to be found in the way of expressing the undue (corrupt) nature of bribery offences. For the sake of clearly showing such nature, the misuse of public position or the impropriety or dishonesty of the offences is required under all three laws. It is particularly a requirement under Vietnamese law that receiving a bribe must be committed by misuse of public position or authority. Swedish law prohibits an ‘improper’ benefit being given to or received by an employee and under Australian law ‘dishonesty’ is required as another mental element beside intent. Generally speaking, the condemnation of bribery under the laws of all these countries is

based on a 'corruptly' requirement. In addition Vietnamese and Swedish law both provide circumstances that make the offence aggravated, for instance the 'gross' offence under Swedish law and the 'serious consequence' in Vietnamese law. As regards criminal sanctions, a consensus on the types of penalties for bribery offences exists between the criminal law of the three countries which each establishes imprisonment and fines as popular penalties. Seizure and confiscation of bribery proceeds are also provided for. The similarities of the elements of and the penalties for bribery offences indicate that the perception of these three countries on these offences from a criminal law perspective is now almost identical. In comparison with the provisions and recommendations of the relevant International Conventions, the three criminal law systems do meet basic standards. Vietnam, Sweden and Australia may therefore be acknowledged as fulfilling their responsibilities under the Conventions.

Besides the similarities, the three countries' criminal laws on bribery offences still contain several *differences*:

*First of all*, the legal sources establishing bribery offences in the three countries are not the same. Vietnam only provides for such offences in the Penal Code, making the Code the only source for criminally treating bribery. Meanwhile, under the Australian system, bribery offences are dealt with by different sources of law, e.g. the Commonwealth Criminal Code, the Secret Commissions Act and the Crimes Act. Moreover, case law plays a very important role, sometimes even becoming the main tool in the conviction of bribery offences. Although Sweden has only covered bribery in the Penal Code, case law may be seen as another source for the interpretation and application of the bribery provisions. It can be seen that the Australian and the Swedish laws on bribery offences are more diversified than Vietnamese law.

*The following differences* can also be found in the arrangements and structures relating to the offences. To begin with, the offences are placed and structured differently. The Commonwealth Criminal Code of Australia places both active and passive bribery in the same section, expressing the close relationship between them. The legislative technique makes the law comprehensive and easy for the application. Whereas Vietnamese Swedish

law arranges the offences in different sections or even different parts of their Penal Codes, meaning that the offences undermine different kinds of protected interests. The fact that the bribery provisions of Vietnam and Sweden use the technique of cross-reference between active and passive bribery to understand what is meant by the law. The arrangement of bribery offences under Vietnamese and Swedish law thus seems less logical and practical for applying cross-reference technique, making the law is less convenient than the Australian one.

In addition, while Vietnamese and Swedish law covers different types of bribery (domestic and international) in the same provisions, Australian law establishes them separately with different designations. It places bribery offences in the public sector and in the private sector in different laws, retaining the distinction between them. Swedish law by contrast has no such distinction. Australian law also devotes separate provisions to some specific types of bribery. I prefer the technique of classifying bribery in Australian law because it makes the offences clearly distinguished from each other. It shows the differences in the nature of and the legal attitudes towards different types of bribery.

Further, differences can be seen in the techniques of prescribing and structuring elements of the offences under criminal statutes of Vietnam, Sweden and Australia. Vietnamese law only defines passive bribery - with rather unclear wording - and just gives names to the other bribery offences without any description. More helpfully, Swedish legislation prescribes the offences more clearly, with a description of each bribery offence. In comparison with Vietnamese and Swedish law, Australian law seems the best in this respect. It uses very detailed and clear wording to describe the offences. The wording of law is always sufficiently descriptive and comprehensive for the understandings and the subsequent application. The structure of the offences shows the requirement of each element in a clear and logical order, from the objective to the subjective elements. In addition to the specific prescription of the offences, Australian legislation also defines all relevant concepts and terms, for instance only Australian law defines the bribe, the foreign public official, the duty of the official and so on. This technique appears to be helpful for the application of the law.

*The third difference* is the scope of bribery practices covered by the laws. According to Vietnamese criminal law, only bribery in the public sector is considered as crimes; whereas Swedish and Australian law criminalize bribery both in the public and in the private sectors. Moreover, Vietnamese criminal law has not directly covered bribery of foreign public officials while the Swedish and the Australian ones have. Indeed, Australian criminal law establishes a division in the CTH Code dealing with such bribery. The explanation regarding this difference is that Vietnamese criminal law has its long tradition of only considering the harmful effects of public sector bribery on the public administration. In Vietnam it is indeed a very common notion that bribery can only occur in the public sector. In addition, free markets have only operated in Vietnam for a short time, thus making business and commercial life less developed. As a result, Vietnam has not paid sufficient attention to the negative side of economic development, including bribery in the private sector. The prevalence of private bribery in Vietnam has not been formally confirmed so the necessity of criminalization is less obvious from a practical view. Besides this explanation for the lack of any law on private bribery, it is worth explaining the non-existence of any specific provision on foreign bribery in Vietnam. While Australia and Sweden are members of the OECD Convention, required to fulfil their responsibilities by criminalizing bribery of foreign public officials, Vietnam is not party to that Convention and as a result has no duty to enact domestic law in compliance. However, it should be noted that bribery of foreign officials is regarded as a crime under Vietnamese law. Although there is a lack of any such specific offence, general principles on the applicability of the Penal Code in connection with the specific provisions on giving and receiving a bribe will also cover foreign bribery. Therefore both active and passive foreign bribery may be subject to criminal law so long as the act meets the requirements of the offence to be constituted. In this regard, the main difference lies in the manner of specification of the law.

*Fourthly*, in spite of the common notion that all bribery offences are to be condemned for distorting of the stability and effectiveness of the government mechanism and destroying the integrity and morality of officials, Vietnamese criminal law still maintains the perception that only the offence of receiving a bribe is of corrupt nature. Consequently Vietnamese criminal law only regards passive bribery as a kind of corruption. Active

bribery is not legally considered corruption at all. The reason for Vietnamese law in this regard is that only passive bribery is committed by the position or authority holders. As a result, the misuse of office is only manifest in respect of passive bribery. Meanwhile, Australia and Sweden consider all types of bribery to be corruption. These countries keep the argument that both active and passive bribery can influence the exercise of official duties so both offences are committed corruptly or properly. In the light of theoretical views as well as international standards on the issue, Vietnamese law seems neither justifiable nor compliant.

*The fifth difference* can be found in the provisions concerning the offenders in bribery offences. As mentioned above, Vietnamese and Swedish criminal laws only have criminal responsibility for natural persons. It means that under these systems only individuals may be criminally responsible for committing bribery offences. As a small distinction, Swedish law imposed corporate fines as a kind of the so-called ‘quasi-criminal’ penalty for legal persons engaging in bribery practices. Australian criminal law provides full criminal responsibility for corporate bodies. As a result, a company may be criminally responsible for committing passive bribery.

Regarding the bribe recipient, there are also some differences. The terms used in law are different, such as the term “position holder” in Vietnamese law, “employee” in Sweden or “official” in Australia. But that is only a formal difference. Due to the differences in political regime and the structure of the state organization, including the administrative system and the roles of the different actors in the government, the bribe recipients are not identical under the law of the three countries. Vietnamese criminal law requires the official to be currently in his position. Swedish law by contrast extends to circumstances in which the employee is no longer in office at the time of receipt of the bribe or has not yet to obtain the office. Australian law similarly covers persons purporting to be or intending to become a public official, but not former officials, in its definition of the recipient. Moreover, Vietnamese criminal law requires that the bribe recipient must be those who are capable of directly doing or not doing something in favour of the giver’s interest. This means that the bribe recipient must himself take that action or omission. By

contrast, Swedish and Australian laws cover also cases in which the bribe taker may by virtue of his employment or position influence another's act for the briber's interest.

*Sixthly*, although the bribe is required and provided for as an element of bribery offences in all three criminal law systems, the requirements of that element are not the same. Vietnamese criminal law only considers the bribe as benefits of material and tangible nature. Swedish and Australian laws whereas provide that the bribe can be of any kind, including immaterial and intangible advantages, as long as giving the benefit can influence the official's exercise of duties. Furthermore, according to Vietnamese law, material benefit can only constitute a bribe when it valued at certain amount of money or more. Consequently, small payments may not constitute bribes. Unlike Vietnamese law, Swedish and Australia laws do not fix the value limit of the bribe and small payments may not be excluded from criminal liability. However a given benefit may be excluded if it is of very small value.

*Seventhly*, illegal conduct, as a physical element of the offences, is to a certain extent prescribed differently under the three countries' laws. Vietnamese law only sets forth bribery offences by the conduct 'giving' or 'receiving'. For example 'receiving' a bribe is all there is under Vietnamese law and it simply includes 'already received' or 'will receive'. Meanwhile, Australian and Swedish laws describe several kinds of act, such as offering, promising or providing a bribe; or asking, accepting or receiving a bribe. Especially, Australia also considers causing a benefit to be provided or causing an offer (a promise) of the provision of a benefit to be provided as kinds of bribery activity. The descriptive, specific and separate acts as provided under Swedish and Australian law are obviously significant for the interpretation and application of the law. This diversity of acts also makes the completion of bribery offences different from that in Vietnamese law. It is noted that under Swedish and Australian laws 'asking for a bribe' is described as a normal offence, but it is seen as an aggravating offence in Vietnamese law. This means that the act is same in kind but different in degree of gravity under these different systems. Vietnamese legislators want to treat this act more severely on the basis that it is more dangerous than the act of receiving. In my opinion this difference need not exist, because the act of receiving is the actual receipt of a bribe while the act of asking for a

bribe can constitute the offence even if nothing has been received yet. Moreover, in the light of legislative technique, the description of asking a bribe as an aggravated circumstance which seems separate to the normal cases of the offence, found in Article 279(2)(d) of the Penal Code, may lead to its not being considered as a bribery offence.

*Eighthly*, if the third party beneficiary is recognized in all three criminal law systems, it is provided for in different ways. Swedish and Australian laws provide for the issue directly and clearly. All relevant provisions in Swedish law indicate that the bribe may be given (or received) for the official himself or for anyone else. In Australian law, the third party beneficiary appears clearly in the provisions on receiving a bribe. It is stated that the official receives a benefit for himself, herself or another person. Meanwhile, Vietnamese law does not expressly address the issue. Formally, the third party beneficiary has not been covered by the Penal Code. However, the issue has been recognized in criminal law theory as well as in the perception of practitioners.

*Ninthly*, according to the law of the three countries, the purpose of bribery offences is to influence the exercise of an official's duty. However, 'duty' is not understood in the same way under the three laws. For instance Vietnamese criminal law limits such duty to the function for which the relevant official is legally responsible, while Australian law extends the scope of that duty. It is not restricted to matters the official was legally obliged to do, but includes functions which were the official's general functions to perform. Moreover Vietnamese law requires a specific act or omission to be exercised by the official in exchange for the receipt of a benefit though it need only be agreed by both parties, not actually done. Sweden and Australia whereas require only a mere risk of influence. The burden of proof in this regard seems heavier for Vietnamese prosecutors than that imposed on Swedish or Australian ones.

*The tenth difference* relates to the responsibility of the intermediary for bribery. The so-called indirect bribery or bribery through an intermediary is recognized by the criminal law of the three countries, but not in the same manner. Both Swedish and Australian criminal laws do not explicitly cover the issue in question which does not mean the intermediary for bribery may not be punished under these laws. According to the

principle of complicity, if an intermediary acts as a kind of accomplice, he or she will be criminally responsible for complicity in a bribery offence. Unlike the Swedish and the Australian law, Vietnamese criminal law sets out a separate offence of acting as an intermediary for bribery, further differentiating two cases of intermediaries: acting as an accomplice on behalf of the giver or of the receiver or acting as an intermediary on his own. The responsibility of the intermediary provided in all three domestic laws seems to fulfil the standards set forth in the relevant Conventions.

*The following difference* is about formulating the element of fault. Although intent is required as a fault element of bribery offences in Vietnamese, Swedish and Australian criminal law, it is recognized differently in the law of the three countries. Vietnamese and Swedish laws do not expressly provide intent as an element of bribery offences. Under these legal systems the general principles of fault confirm the existence of intent as a necessary element. Moreover, the application of law traditionally admits that intent is required to constitute bribery offences. In contrast, Australian law specifically defines intent as the fault element of bribery offences. The legislative technique of Australian law is once again clearer by comparison with the other two.

*Moreover*, differing here from Vietnamese and Swedish law, Australian law in addition to criminalizing bribery offences prohibits other corrupt benefits to be given to or received by a public official. It thus establishes other offences relating to bribery. The benefits may be inducements or rewards that tend to influence the exercise of the official's duties. Further Swedish and Australian law criminalizes some more kinds of bribery such as bribery in the elections, bribery of witnesses or interpreters in some International Courts, etc. This criminalization confirms the broader coverage of bribery practices in Australian and Swedish law by comparison with Vietnamese law. It is also an illustration for the theories on prevailing types of bribery mentioned in Chapter 1 of the thesis.

*The last and biggest difference* that can be noted relates to penalties provided for bribery offences. Comparison between the three criminal law systems indicates that the sanctions provided for persons engaging in bribery under Vietnamese law are much more severe



than those under Australian and Swedish ones. Considering such offences very dangerous to society, Vietnamese criminal law provides severe penalties. The death penalty can be imposed for the offence of receiving a bribe in the most serious cases. Similarly, giving a bribe may lead to life-imprisonment and acting as an intermediary may receive 20 years of imprisonment. The most common penalty to be applied is fixed-term imprisonment. Fine may be imposed as an additional penalty. Conversely, the penalties for bribery offences are lenient under Swedish criminal law. Fines and fixed-term imprisonment are the most frequent penalties. Short-term of imprisonment is more likely for such offences. In normal cases two years of imprisonment is commonly applied and even in 'gross' cases the longest term of imprisonment is only six years. In comparison with Vietnamese and Swedish criminal laws, Australian law can be placed in the middle, because of the neutral levels of penalties. The law allows imposing at most ten-years of imprisonment on bribery offences. The differences in the severity of penalties can be explained by differences in the perception of the gravity of bribery offences and the criminal policies regarding combating bribery offences in these countries. In this regard, Vietnamese law seems too severe while Swedish law appears to be too lenient.

## **Conclusions**

1. Reviewing Vietnamese, Swedish and Australian criminal laws on bribery offences, one can see the confirmation of theories mentioned in Chapter 1. Once again the reasonableness and significance of these theories are illustrated. Domestic laws on bribery show considerable consistency with relevant criminal law theories. In addition, the criminal law of the three countries provides elements of bribery offences that are very similar to the international standards under the relevant Conventions. It is no doubt that what required by these Conventions namely, the criminalizing of the prevalent types of bribery, the elements of the offences, the nature and coverage of such concepts as 'public official' and 'bribe', are fulfilled by these laws. The domestic law on bribery offences in each country reflects the levels of implementation of the related Conventions.

2. Vietnam, Sweden and Australia have paid attention to criminal laws dealing with bribery offences. Almost all bribery activities, including active bribery, passive bribery,

acting as an intermediary for bribery and bribery of foreign public official are provided for with proportionate and deterrent penalties. In general, the elements of bribery offences are provided for similarly. This means that the legal perception of such offences meets globalized standards. However, several differences still exist between Vietnamese law and the two other systems, such as differences on the criminal liability of legal entities, of the kind and value of the bribe, of the types of bribery to be criminalized (e.g. bribery in the private sector, bribery of foreign public official and corrupting benefits given as an inducement or reward to the official), and especially on the penalties to be imposed on bribery both in kind and in degree. These differences may derive from dissimilarities in legislative point of views and criminal policies and also from the situation regarding bribery offences in the three countries. Some existing shortcomings in these laws are potential obstacles that may cause difficulties for the interpretation of law and negatively impact the effectiveness of the fight against bribery offences. I will continue to consider both the practicability and the weaknesses of the law on bribery in connection with its enforcement and application in the next chapter.

## CHAPTER 3

### PRACTICAL ISSUES CONCERNING BRIBERY OFFENCES IN VIETNAM – COMPARING WITH SWEDEN AND AUSTRALIA

#### **3.1. Current Situation of Bribery Offences in Vietnam - Compared with the situation in Sweden and Australia**

By investigating the recent situation regarding bribery offences in Vietnam and comparing it with that in Sweden and Australia, I do not have the ambition of carrying out a comprehensive criminological research, but merely wish to present a genuine picture of such offences in connection with the role and also the deficiencies of criminal bribery law. One may see that criminological standards are not really satisfied because of limits I impose due to the purposes of the thesis as a whole.

##### *3.1.1. Current situation regarding bribery offences in Vietnam*

The situation of bribery offences is first manifested in the number of offences actually found out. The statistics given below seem to show that an acceptable number of bribery practices have come to light in Vietnam.

*Table 3.1* Number of cases and defendants adjudicated for bribery offences in first instance courts in Vietnam (2000 - 2009)

Year	Receiving a bribe		Giving a bribe		Acting as Intermediary	
	Cases	Defendants	Cases	Defendants	Cases	Defendants
2000	13	32	5	9	1	2
2001	16	116	11	13	4	6

2002	24	78	11	23	0	0
2003	1	9	1	1	1	2
2004	30	118	28	36	1	4
2005	17	38	33	44	3	9
2006	34	85	47	78	4	10
2007	42	124	35	50	0	0
2008	39	123	36	71	2	7
2009	19	37	23	41	2	6
Total	235	760	230	366	18	46

*Source:* Bureau of Summarized Statistics of Vietnamese People's Supreme Court

The current situation regarding clear bribery offences in Vietnam does not appear to be serious. *Table 3.1* illustrates the limited number of bribery cases and defendants found guilty by the first instance courts for 10 years by comparison with that of traditional crimes. According to statistics from the Supreme Court, the number of bribery cases and defendants is small percentage in compared with the total number of cases and defendants charged with offences relating to public position (Annual statistics by the Bureau of Summarized Statistics of Vietnamese People's Supreme Court). In particular, between 2000 and 2009, of the 3192 cases and 6816 defendants charged with offences relating to public position, only 483 cases related bribery (amounting to 15%) and 1172

defendants were accused of bribery (accounted for 17%). In addition, statistics of prosecution show that the prosecuting authorities prosecuted 143 cases and 529 persons for bribery offences during 2000 and 2005 (The People's Supreme Procuracy: Appendix of Statistics 2004-2005). At the same time, the courts adjudicated 101 cases and 391 defendants of bribery at the first instance level. By comparison with the cases and persons prosecuted, the percentage of cases adjudicated is over 70% and that of defendants adjudicated is nearly 74%. These statistics not only present the facts about clear bribery offences but also indicate that it is not easy to find adequate evidence allowing one to bring all bribery cases to court although such cases were already prosecuted by prosecuting authorities.

According to the statistics of both the prosecution and judiciary authorities, although the number of persons investigated, prosecuted and judged for receiving a bribe in the last ten years is low, it still accounts for a large percentage in comparison with that of other corrupt offences and is just lower than that for embezzlement. For example between 2000 and 2009, the defendants charged with receiving a bribe numbered 760, accounting for over 12% of the total defendants charged with corrupt offences (6092) and this ranks second place, - embezzlement ranks number one with 3820 defendants and accounting for over 62% of the total; and the rest (including five other offences) accounting for just 25%. In other words, the rate of persons convicted for receiving a bribe is more than that of other corrupt offences, except that of embezzlement. These statistics indicate that after embezzlement bribery offences pose a growing risk for the stability of the public authorities. The danger of bribery offences to Vietnamese society cannot be said to be of minor importance.

In addition, *Table 3.1* demonstrates that the number of bribery cases and defendants has risen in some years, especially 2006, 2007 and 2008. It is observed that more bribery cases are handled in the courts. Prosecutions of corrupt public servants are nearly always successful and the only issues may exist concerning exact penalties (NIS Report - Vietnam 2006: 25). Theoretically, the increase in the number of convicted persons may show a more serious situation of offences or reflect the greater effectiveness of the fight

against such offences. In case of bribery, both hypotheses seem possible though the former may be more significant.

How is the actual situation regarding bribery in Vietnam? Studies both theoretical and empirical agree that bribery is widespread as well as serious. In late 2005, the Central Committee of Internal Affairs of Vietnamese Communist Party (hereinafter VCCIA), supported by the Swedish International Development Cooperation Agency (SIDA), published a draft report on the findings of its diagnostic study of corruption in Vietnam. The purpose of the study was to identify the types and causes of corruption and the reasons for the limited effectiveness of anti-corruption efforts to date. The study was carried out through quantitative and qualitative surveys in seven provinces and cities (Son La, Dong Thap, Hai Duong, Nghe An, Thua Thien-Hue, Hanoi and Ho Chi Minh City) and three ministries (Industry, Construction, and Transportation and Communications). The quantitative survey was distributed to 20 districts/corporations, 42 communes and 33 companies and then survey for qualitative data was conducted through 113 in-depth interviews and 7 group discussions. The study collected the opinions of 5,407 public officials and civil servants, managers of enterprises and citizens in these sample localities and agencies. A significant number of the persons questioned estimated that bribery offences occurred very often. Nearly two-third of respondents ranked corruption as the most significant socio-economical problem facing Vietnam (Table 2.14). It was surprising to be informed that 47% of the public officials and civil servants questioned responded that they would accept bribes or hesitate to refuse. Over 50% of the public officials and civil servants surveyed stated that higher-level officials are involved in corrupt activities. As regards the major consequences of corruption, the study found loss of state assets, reduction in business opportunities and competitiveness due to increased production costs, reduced foreign investor's confidence, underutilization and loss of competent civil servants and officials, increased social inequality and degradation. Theories in respect of the interests damaged by bribery offences are actually supported by these factual consequences. The seriousness of such offences as supposed in theory is lively proved. These findings also offer valuable insights into the attitudes of representative groups of people in Vietnam toward corruption, especially bribery practices.

The VCCIA study also listed areas where corruption and bribery were most prevalent. Among ten organizations considered the most corrupt, cadastral and housing agencies were number one in the list; followed by the customs/import-export management agencies at second place, traffic police at the third; following by public finance and the tax agency, management/entities in the construction industry, construction permit-granting agencies, health care entities, planning and investment agencies, management/entities in transport industry and finally the economic police (VCCIA Report 2005: Table 2.12). These findings are also confirmed by information that authorities that most frequently interact with foreign businesses, namely the tax and custom departments, land administration and the construction permit and import/export license agencies were cited by the World Bank in 2006 as the most corrupt public institutions.<sup>143</sup>

Recently bribe giving and receiving have occurred in almost areas of society, from economic sectors such as construction, land, housing management, finance and banking, to areas of life requiring more integrity and ethicalness such as education, medical service and social welfare and policies. Bribery practices have received much attention by media coverage.<sup>144</sup>

Bribery in construction is now considered one of the most common corrupt practices. It is stated by an author who is also an official in the police force that almost all suspects or defendants, when investigated, prosecuted or judged for corruption in the construction area, gave testimony or recordings of using money or other material benefits as gifts to a total value of several billions VND to offer high-ranking officials or persons having the official duty of examining and approving business plan, issuing permits of construction, giving bidding approval, inspecting the process of construction and approving financial

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<sup>143</sup> The information provided by Business Anti-Corruption portal (BAC) in “Vietnam Country Profile” in 2008, found at <http://www.business-anti-corruption.com/normal.asp?pageid=666>. Hereinafter this will be cited as BAC 2008.

<sup>144</sup> See for example sources at <http://www.baolaocai.vn/banin.asp?NewsId=17384> (results of conviction of 8 high-profile cases of corruption in 2008, information provided by the Internal Affairs of Vietnamese Communist Party; <http://vietnamnet.vn/chinhtri/2009/06/855054/>; <http://www.laodong.com.vn/Home>; or <http://www.infoplease.com/ipa/A0781359.html>

matters (Bùi Thanh Minh 2006: 40). It seems there has been an explosion of the so-called “purchasing in public procurement” if one wants to become a winner of contracts for the construction of public infrastructure. The development of construction has a negative impact on the raise in bribery practices.

The widespread nature of corruption, including bribery offences, is also confirmed by the following statement as an overall description of the situation:

Corruption recently not only occurs in sensitive areas such as construction of infrastructure, land management, management of public finance, taxation, customs, ... but also reaches into areas in which morality is traditionally respected namely education, medical service, performance of policies of humanity, social welfare. Corruption has even spread over several law enforcement authorities and judiciary agencies traditionally considered as representatives of justice and equality. Corruption has occurred at all levels, from central to local governments and practices of embezzlement, bribery, extortion or other corrupt benefits have become more and more common (Government Ombudsmen 2004:18).

Bribery in Vietnam, as a well-known type of corruption, has even occurred where morality and integrity is highly considered. Bribery in medical services can be given as an example. Practices of taking bribes by doctors for making prescription of high-priced medicine or of too many kinds of medicine for their patients; for sooner medical examination (due to the situation of having too many patients in a medical service); for making false medical records, etc., have recently been recognized. The bribery case occurring in the Department of Labour, War Invalid and Social Affairs of Hà Tĩnh province from 2001 to 2005 (Judgment No.50/2006/HSST and Judgment No.1270/2006/HSPT) was a typical case. The defendants used to be doctors who performed duties of determining the seriousness of injuries caused by the war to former soldiers in order to allow them to apply suitably social welfare. They received bribes for incorrect determination or for producing false documents in order to get money from the State.

Cases of bribery in law enforcement agencies and judicial authorities also occur. Bribery committed by policemen, by investigators, by prosecutors and by judges has been found out and given rise to convictions. Bribery practices in this regard are often to avoid



arresting suspects or accusing criminals, to change investigated results, to prosecute or adjudicate criminal cases in favour of the briber or someone else, to resolve civil cases in favour of the briber. The so-called 'judicial purchasing' appears to be an emerging phenomenon in recent years. From the objective point of view, bribery within the judiciary is not regarded as so significant a problem as is that in law enforcement. Bribery more frequently occurs during the inspection and investigation process prior to trial (NIS Report - Vietnam 2006). A number of cases have recently come to light in which officials in the Government Ombudsmen and People's Procuracy allegedly received bribes in order to prevent cases from going forward, as seen in the conviction of Phạm Sĩ C - former Vice Director of the People's Supreme Procuracy of Vietnam in 2003 for receiving a bribe to help Trương Văn C - the leader of a crime organization for early release from prison, the conviction of Lương Cao K, former Vice Leader of the Department for handling claims and denunciations relating to public enterprises and some other senior officials of Governmental Ombudsmen for receiving a bribe in 2007. The prosecuting and investigative agencies are frequent targets of corruption, with a view to preventing cases from going to court. Typically in 2006 a range of legal enforcement and judicial persons were convicted of bribery, as in the case of Trần Ngọc H, a high-ranking police officer (the former Commissioner of an investigating commission of Hanoi police) who received money so that he would not not arrest a suspect in a criminal case concerning drug-related crime, sentenced to 20 years of imprisonment; the case of Nguyễn Thành M, a former judge of the People's Court of Châu Thành district of Bến Tre province who was arrested at hand when receiving a bribe from the defendant and received a sentence of 4 years in prison; the case of Nguyễn Thị Vân A, a former clerk of a district court of Bến Tre province, who was sentenced for acting as an intermediary in bribery to 18 months of imprisonment; the case of Trần Trường S, former judge of a district court of Bắc Giang province who was convicted of taking a bribe and sentenced to 2 years imprisonment. Cases in 2009 include the case of Lê Minh H, former leading judge of Tam Nông court of Đồng Tháp province who was sentenced to 5 years imprisonment or the case of Vũ Văn L, former judge of Hoàn Kiếm court of Hà Nội, sentenced to 15 years in prison. In 2010 there have been several charges of bribery against certain prosecutors of the Supreme Procuracy responsible for monitoring the

investigation of a case of smuggling and some policemen charging with temporary detention of criminal suspects in Dong Nai province.<sup>145</sup> This fact warns about the seriousness of bribery in this respect. The above cases have demonstrated a tendency of using benefit to influence legal officials' performance of duties, showing the gravity and widespread nature of bribery in the legal enforcement and judiciary sectors in Vietnam.

The situation of bribery can also be determined from the attitude and reaction toward such practices of different groups in society, including public officials, businessmen and the public. The 2005 survey provided the information that taking a bribe is now one of the most popular corrupt practices, being identified factually by a considerable fraction (one-third) of public employees questioned (VCCIA Report 2005, Table 2.2). In addition, a survey conducted by Ernst&Young Corporation and Vietnamese Chamber of Commerce and Industry in 2007 and 2008 may shock us by the result that 60% of corporations doing business in Vietnam was asked for bribes by public employees.<sup>146</sup> Along the same line with the increase in taking and asking for bribe, practices of giving a bribe have been found everywhere. Due to difficulties caused by public employees in administrative procedures, citizens and businessmen tend to give bribes to have their businesses managed quickly. Particularly, the VCCIA survey found that 46.3% of businessmen questioned chose the solution of giving a bribe to employees who directly handle their matters when difficulty arises and 23.5% decided to give bribes before their businesses was done (VCCIA Report 2005: Table 2.6). In addition, nearly a half of these respondents considered voluntarily giving a bribe as the quickest and easiest way to have their works done and the similar percentage decided to bribe because of thinking of its low cost and high interest (Ibid: Table 2.7). According to the World Bank and IFC survey in 2005, 67% of the companies surveyed reported having to make informal payments in order to "get things done" (BAC 2008). Similarly, citizens accept bribery as a necessary payment for their works to be done. According to the VCCIA survey, a large percentage (accounted for 57%) of citizens accept to pay money so as not to be punished for traffic violations they committed and 50 % accept to give bribe to have their matters done by the courts or the prosecution bodies (VCCIA Report 2005: 35). This survey also provided

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<sup>145</sup> Official news obtained at <http://tuoitre.vn/Chinh-tri-xa-hoi/Phap-luat/...>

<sup>146</sup> Information accessed at <http://vietnamnet.vn/chinhtri/2009/06/855054/>

that an average of about two-third of people questioned share the statement that “giving a bribes in the process of solving issues has become a habit for people” (Ibid: Table 2.16).

The above-mentioned facts allow us to recognize the situation of bribery practices to a considerable extent. The situation may now be identified by two criteria ‘widespread’ and ‘commonly acceptable’. The large extent of ‘widespread’ and ‘acceptable’ of bribery activities make these practices to be recognized as a “culture” or “rule” of several groups of society, including public servants and citizens as well. “In some areas of public businesses or agencies and for some groups of public officials, embezzlement and bribery are even considered necessary practices and ‘unwritten law’” (Government Ombudsmen 2004: 18). The situation seems to illustrate the opinions on the occurrence of systematic corruption held by Reisman (1979), Heidenheimer (1989), Rose-Ackerman (1999) and Della Porta and Vannucci (1999). As indicated in theory, the tolerance and acceptance of bribery existence has contributed to the high prevalence of such practices in Vietnam.

Looking at the picture of bribery offences in Vietnam, one may see a various and ambiguous types of the bribe. Corrupt benefits are further demarcated in such a picture. A criminological study on corruption crimes in Vietnam has found that the bribes are often disguised as legal benefits such as gifts and rewards (Trần Công Phần 2004: 80). This empirical study also notes that public employees and officials commonly makes use of rewards and prizes to give and receive bribes (Trần Công Phần 2004: 79-80). Rewards and gifts can be seen as safe forms by which bribes can be hidden in context of a market economy of Vietnam. An improper advantage is also given by way of commissions and kickbacks from economic entities. For instance commissions were recognized as bribes in the case of bribery of Vietnamese officials committed between 1999 and 2005 by the manager and some of his accomplices at the US Nexus Technologies Incorporation.<sup>147</sup> Actually the bribes are also covered up by giving legal advantages such as travelling inside the country or abroad and paying for study courses abroad for the children of position holders. For example the 2005 survey indicated that 28.5% of the public employees questioned recognized activities of inviting authoritative people on tours and meals for self-interest (VCCIA Report 2005: Table 2.2). However, the official findings

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<sup>147</sup> Information accessed at [http://bbc.co.uk/vietnamese/vietnam/2009/07/090701\\_nexus\\_admission.shtml](http://bbc.co.uk/vietnamese/vietnam/2009/07/090701_nexus_admission.shtml)

by investigating or judiciary authorities tend not to show these types of bribes. The bribes were all found in form of money and property that were obviously improper benefits. The ways of hiding the illegal nature of benefits have increasingly been diversified and this makes discovering and proving bribery cases more difficult and even impossible. For example the 2005 survey showed the answer from about 21% of the questioned people that the position holders usually agrees with the partner to increase the contract (concerning public financial) value to receive kickbacks from the partner and 16% of these respondents recognized the behaviours of buying land and asset at low prices or receiving other services (Ibid). In some cases when found guilty of bribery the defendants argued that money was lent for some private reasons by way of a civil agreement.<sup>148</sup> These findings illuminate theories regarding bribes and the difficulties in differentiating improper benefits from legal advantages.

More sophisticated tricks have also been used to commit bribery, showing the gravity of bribery situation. The aforementioned empirical studies show the fact that soliciting for bribes becomes common by trick of creating reasons for individuals and lower officials to give gifts. For instance the 2005 survey provides finding of more than 40% of responded employees working in the Ministries of Transport and Industry answered that they see authoritative people intentionally cause difficulties to others so that the latter have to give them money or presents. There were several convicted cases of bribery in which the givers said to be asked by the position holders, especially cases involving police officials investigating criminal cases and judicial officials discharging with civil cases (asking parties to give bribe to have their cases solved in their favour). For instance out of 14 bribery cases adjudicated at the first instance by the People's Court of Hanoi city from 2000 to 2008, 5 cases illustrate this feature of bribery. In addition, the trick of implicitly demanding for bribe has existed in bureaucratic mechanism namely causing difficulties for the needs. The 2005 survey presented a large percentage (around 50%) of respondents found that state administrative officials often use such tricks as intentionally delaying

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<sup>148</sup> For instance in the case of Nguyen Thi H who used to be a Judge of People's Court of Ho Chi Minh city, being convicted of receiving a bribe in 2004, the defendant argued that she borrowed money from the giver to visited her mother in Hanoi due to her mother's illness; or in the case of giving a bribes by some high officials of PMU18 of the Ministry of Transportation (Judgment 253/2007/HSST), the key defendants Bùi Tiến D and Nguyễn Mậu T both agreed that money was lent to help T finish his construction, not for attempt of giving a bribe.

matters, giving no clear guidance, finding faults that made commonly due to ambiguous regulations concerned, to put pressure on needed businesses so that they have to give grease or speed payments (VCCIA Report 2005: Table 2.3). The situation in this respect shows prevalence of routine or facilitation payments in Vietnam. In addition to the aforesaid information, it makes theoretical suppositions regarding such type of bribery proven.

Bribery offences in Vietnam are now developing not only by the quantity but also by the quality. It means that the nature of offences is becoming more complicated and serious. Many of these related to public employees in different levels of government, different regions and sectors. From time to time, such high-profile bribery cases come to light and convicted in the courts. The first case can be considered is the case Tân Trường Sanh that was convicted in 1999, concerning bribery of a range of customs officials. In this case the representatives of Tân Trường Sanh Company engaged in illegal trafficking of many kinds of products from Cambodia and Thailand and they gave bribes to several high-ranking officials of customs offices of Ho Chi Minh City and of some other provinces. The defendants of receiving a bribes varied, such as Trần Đ (former Leader of the Department of investigating trafficking of the Customs Agency of Ho Chi Minh city), Nguyễn Ngọc Thắng L (former Director of the Customs Agency of Thừa Thiên - Huế province) Văn Ngọc T (former Director of the Customs Agency of Cần Thơ province). The value of the bribes in this case was up to hundreds thousands USD. The next very big case is the case involving Trương Văn C and the accomplices who were considered professional criminals, convicted in 2003. Bribery in this case was even in connection with organized crime. In the case several public officials (including some of very high-ranking) of police force, prosecution body and public media agencies at both local and central governments from both the North and the South of Vietnam were convicted of receiving a bribes from the so-called “godfather” and his accomplices and using their official positions to help him released from prison early and hide his illegal organized activities.<sup>149</sup> The so-called Project Management Unit (PMU) 18 corruption case, which

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<sup>149</sup> This case was received much attention by media and people due to the relevance between high-ranking officials and organized crimes. Judicial documents on the case could not be reached but information

came to light in 2006, related to several high-ranking officials in the Ministry of Justice and the Ministry of Police. PMU 18 of the Ministry of Transportation was alleged to have embezzled millions of dollars of public funds, notably by awarding public works contracts to private firms owned by family and friends and bribery involving escape from criminal liability. The Transport Minister resigned over the case and some high officials have been convicted for bribery and misuse of office in trials during 2007.

Moreover, some cases of bribery were committed internationally – sometimes in several countries. Take the case of Trần Thế H in Tiền Giang province convicted in 2006 as an example. The defendants (representatives of Thành Phát Company of Tiền Giang) in this case committed petrol trafficking through the borders between Singapore, Vietnam and Cambodia in the manner of temporary import and re-export. The bribes in this cases were even a villa or a boat valued billions VND. Recently, the case of bribery of some Vietnamese public officials in the management board of the project of construction (PMU) of East-West Avenue of Ho Chi Minh city committed by representatives of Japanese PCI company with the considerable value of the bribes (millions USD) has warned about the trend of transnational bribery. The defendant of receiving a bribe in this case was the director of this PMU and he has just convicted in October 2010, being sentenced to life-imprisonment, the most severe conviction in ten recent years.

Furthermore, bribery cases committed by way of complicity have also been increasing. Several cases of bribery with a number of relevant persons and accomplices, committing in sophisticated and hidden manners in connection with some other kinds of crimes illustrate the seriousness of situation of bribery. For instance in the case involving TAMEXCO (a state-owned company), the defendants committed several crimes, including active bribery of several state banking (high) officials for illegal lending money to do businesses, embezzlement, violating of land management provisions, etc., resulted in much damage for the state property. Another similar case is the case relating to land management in Gò Vấp district of Ho Chi Minh city with the key defendant Trần Kim L - former District Chief of the People Committee of Gò Vấp district. The defendants of

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concerning investigation, prosecution and conviction was available in all kinds of media at that time. What I obtained mainly from <http://www.vnexpress.net/GL/Phap-luat/2003...>

public position holders were found guilty of crimes of embezzlement, giving a bribe and abusing positions to influence other public official for a corrupt benefit. In addition, the case of drug-related crimes and bribery of police officers in Thanh Nhân ward of Hà Nội, convicted in 2007 (Judgment No.53/2007/HSST), can be considered a scandal of police force when several policemen and security agents received money from drug-dealers and protect their illegal activities. The bribed policemen contributed to drug dealings in several years, causing much danger for the security of this area and making this area become haven for crimes of selling and using drug. The mutual relationship between these corrupt police officers and a criminal group of drug trafficking in this case showed new challenge for the fight against bribery and drug-related crimes.

The next factor expressing the situation of bribery offences in Vietnam is the features of the offenders. In fact the bribe recipients were mainly public officials and employees exercising public functions, varying from different aspects of public sector, including officials of law enforcement and judiciary authorities. Statistics by the Supreme Court (of all bribery cases adjudicated by all courts of Vietnam) from 2000 to 2009 indicate that the largest number of defendants convicted of receiving a bribe are junior public officials and public employees (222 persons), accounting for 30% of the total of 760 defendants. By comparison a low percentage of high-ranking officials were convicted (approximately 0.3% of the total) cases with the defendants of junior public officials evidently prevail. It means that bribery of normal and small scale has characterized the situation. Some of the bribe recipients were of very high-ranking, such as the former Vice Minister of the Ministry of Commerce Mai Văn D involved in a bribery case concerning purchasing quotas for exporting garment products to the United States in 2007; the former Vice Leader of the Department for handling claims and denounce relating to public enterprises Lương Cao K and some other senior officials of Government Ombudsmen in bribery case convicted in 2007; the former District Chief of the People Committee of Gò Vấp - Ho Chi Minh city convicted in 2007 trial, etc. Moreover, because of their high qualified and experienced features, some defendants have significant legal and managerial knowledge. Defendant Phạm Sĩ C - former Director of the People's Supreme Procuracy of Vietnam in the case of Trương Văn C in 2003 is a typical example as such. Recently, in the case of bribery the PMU of the East-West Avenue project of Ho Chi Minh City, the defendant

(Huỳnh Ngọc S) of receiving a bribe was the director of this PMU and he was convicted in October 2010. Furthermore some persons were not public employees but being convicted of receiving a bribe as the accomplices.

In addition to the diversity of the bribe recipients, the bribers have recently varied too, including public officials purchasing higher positions, businessmen purchasing big contracts with public authorities, especially law violators, suspects or defendants in criminal cases and litigants in civil cases.

The previous researches on bribery offences from criminological perspective indicated a notable feature of such offences that bribery was often committed to create good conditions for conducting another crime or to escape from criminal responsibility or to conceal an illegal conduct or a crime. Crimes relevant to bribery were usually embezzlement, intentionally violating state's rules on economic management causing serious consequence, trafficking, tax avoidance (Trần Công Phàn, Nguyễn Xuân Yêm, People's Supreme Procuracy).

Such feature is still clearly manifested in the situation of bribery offences recently. Bribery offences are now committed to conduct illegal activities, e.g. to commit smuggling of goods (the bribery case concerning most of customs officials exercising duties at the Border Pass of Tân Thanh - Lạng Sơn in 2004), to transport illegal goods (the bribery case in which the former Vice Leader of the Department of Market Management of Quảng Ninh province received money to ignore transporting goods that were smuggled from China to Vietnam without imported tax in 2003-2004), to commit drug-related crimes (the high-profile bribery and drug selling case in Thanh Nhàn of Hai Bà Trưng district of Hà Nội in 2007), to escape from criminal responsibility for another crime (the bribery case concerning PMU 18 of the Ministry of Transportation in 2007), to escape from arrest by policemen (the case concerning theft of foreign property and giving a bribe to the commissioner of active policemen of Hanoi by Nguyễn Bá D in 2006), to ask for reducing penalties (accounted for 30 per cent of bribery cases convicted by the People Court of Hanoi). Recently it has made the public worried the fact that some groups in society show their ignorance of law by intentionally violating law and then



using money or other benefits to bribe law enforcement officials to escape responsibility. A typical case in this respect is the case committed by a very wealthy, young billionaire Nguyễn Quốc C in which the defendants and some others organized and drove in an illegal car race in Ho Chi Minh city in 2003; the race occurred in the city centre and seriously violated the public safety and traffic rules, making policemen hardly pursued and arrested; the defendant publicly used his money to bribe competent policemen.

Notably, the number of bribery cases concerning drug-related crimes is considerably rising. Considering bribery cases adjudicated at the first instance by the People's Court of Hanoi from 2000 to 2008, it was easily found a large percentage of cases involving drug-related crimes. Specifically a half of total (14) cases are of such kind. I see two main reasons for that fact. First, the number of drug-related crimes has been dramatically increasing in some recent years. Second, punishments provided for such crimes are of the most severe criminal sanctions. The fact of a mutual assistance between the bribed recipients and the criminals in drug-related deals has been putting society in danger. Vietnam has been facing two serious evils that are in concern all over the world – bribery and crimes relating to drug.

Bribery offences are traditionally committed in secret, often being covered up by sophisticated tricks. However, active and passive bribery in Vietnam have recently become more publicly and cynically. These practices have sometimes been identified in public areas or in offices. For example in the case of Cao Thị L and her accomplices selling drug in 2007 at Thanh Nhàn area of Hanoi, L and some others stated that they several times gave money to Nguyễn Hữu T, police officer responsible for this area, at the so-called “drug market” in front of many people who were selling and buying drug. Furthermore, a survey conducted in 2005 provided the fact that public officials sometimes receive bribes even from persons having close relations with them. Only 37.9% of questioned people and 30% of businesses answered that the givers and receivers are totally unknown to each other, a large percentage of respondents recognized the position holders received bribes from their acquaintance (VCCIA Report 2005: Table 2.10). Such openness of bribery practices is also confirmed by some other researches by state agencies on corruption (Government Ombudsmen 2004; ĐTDL. 2005). This fact

indicates that the bribed person was not ashamed of his act or did not afraid of being seen or reported to competent agencies. The cynical way of committing bribery offences also demonstrated that some groups of public officials become disregard of law and of the public's condemnation. This tendency can be explained by such reasons as (i) some high-ranking officials consider their position as a strong protection thereof, expecting that nobody can affect their position; (ii) these officials were protected by more powerful people who may be bribed thereby; and (iii) bribery offences were punished insufficiently and inadequately, not making these officials afraid of being severely punished.

The increased number of bribery offences in some recent years has in the other hand manifested the more effectiveness of the fight against corruption in Vietnam. Law enforcement authorities such as the People's Supreme Procuracy and the Ministry of Police in cooperation with the People's Supreme Court have focused on a range of high-profile corrupt cases, encouraging and ensuring procedures of these cases. Such authorities have shown their considerable efforts in dealing with bribery cases.

However the situation is worth worrying due to the fact that efforts have only resulted in few cases of conviction. The formal information has only reflected the surface of bribery offences situation. A considerable extent of bribery offences has still been hidden safely. The official statistics based on police or judicial sources include only the visible part of the phenomenon. The number of convicted crimes is now estimated much lower than the level of bribery committed in fact. From criminological aspect, an author supposes that "corrupted offences are of secret nature with the largest percentage of hidden activities" (Đào Trí Úc 2000: 25). According to results from some researches and surveys made by an author who is also a prosecutor, the percentage of bribery offences that have been found guilty and convicted is only accounted for 5% to 10% (Trần Phần 2004: 60). In comparison with the number of thousands of cases containing corrupt elements (including bribery) found out every year by the Governmental Ombudsmen, the number of convicted bribery cases is too low. These numbers clearly indicate that relying on prosecution and conviction rates as estimates of the extent of bribery offences at best uncovers the tip of the iceberg. Actually a range of cases had been charged with bribery offences at the beginning but could not be found guilty when the court adjudicated over

the cases or the convicted one turned out to be another crime. For instance the corrupt case concerning land management in Đồ Sơn of Hải Phòng province in 2007, cases involving a range of coaches and players giving and receiving money to unfairly play in some football matches of Vietnamese League in some last years, the case involving the former Director of PJICO insurance helping a company to fraud of insurance money in 2007, the case of the former Director of the Department of Education and Training of Thái Bình province in 2007, etc., all were considered containing bribery elements at the beginning of the investigating process but finally defendants were only convicted of misuse of office. As a court's official stated "some bribery cases had been discovered and publicised by some reliable media agencies but have not been investigated or even did not be paid any attention by the investigating, prosecuting or adjudicating authorities or were been convicted but the public was not satisfied with the results (Từ Văn Nhữ 1997: 239). In addition, most of cases that have been found guilty are cases in which the commission of crime was arrested at hand or was reported by the bribers. These cases were often found through entrapment. According to an empirical study, the rate of convictions of receiving a bribe (till 2004) was approximately from 5% to 10% of the total practices as such (Trần Phần 2004: 60). The fact of bribery offences convictions as well as empirical studies in this respect demonstrates that law enforcement and judiciary authorities actually discovered and criminally punished small cases that committed by junior officials or focused on punishing active bribery. Only few high-profile cases involving high-ranking officials found proven. Many acts of bribery remain secret.

Đào Trí Úc (2000: 25) attributes reasons for hidden bribery offences in Vietnam to some features of such offences for instance bribery offences are usually committed through complicity and sometimes become organized crimes; the bribed persons are public officials and some of high-ranking position and the manners of committing crime are sophisticated. The reasons are added from an objective observation, including a general reluctance to use complaint mechanisms for fear of the potential repercussions for the people who complain and a non-guaranteed anonymity or protection for whistleblowers (NIS Report - Vietnam 2006: 34). Vietnamese authors, including practitioners, seem agree with those explanations. A prosecution official recognized that bribery offences are almost impossible to be found out due to the mutual relation between the briber and the

bribee (Vũ Danh Hồng 2006: 7). Similarly, it was found that “bribery transactions are usually agreed by both parties to be kept in secret and if it could be discovered it would be hidden behind legal activities such as giving gifts, showing gratitude, act. It would be very difficult to catch in the act these exchanges and also difficult to prove the illegality of such practices” (Trần Gia Hiền 1997:140). Actually the briber and the bribee are often the sole persons who know about their transaction. When they concur on keeping their affair in secret, no one will be witness to provide evidence. Moreover, some bribers, despite of losing money for bribery deals, may believe that they gain more from bribery, thus bribery may not be reported as a problem. It is supposed that both parties of bribery transactions expect to get benefit thereby. Moreover, under Vietnamese criminal law, active bribery may even be subjected to criminal responsibility in case where the briber actively reports the case to responsible authorities before the case is discovered. Being afraid of criminal responsibility may be obstacle to parties in bribery transaction to report the case, thus bribery is kept in secret. Criminal law in this regard becomes a weakness that makes the fight against bribery inefficient. In addition, the fact that some bribers who had to bribe the demanded official but even tried to conceal the official’s activity, due to their scariness of being revenged. This is due to the strong power of several bribed persons. Such power in its turn is a key factor for bribery to be hidden. “Most of persons committed bribery were high-ranking officials, having wide and good relations in the society and getting much money because of corrupt transactions, thus they used their relation and money to bribe legal officials in judiciary authorities when they were investigated or adjudicated” (Nguyễn Ngọc Điệp 2006: 42). It is stated that the politically powerful corrupted people are able to escape investigation and prosecution (NIS Report - Vietnam 2006: 34). Further, the bribes have been legally hidden in sophisticated forms, such as gifts, bonuses, rewards, commissions. Money in cash is now hardly used in bribery transaction. Intangible benefits are recently preferred to make the real nature of bribery difficult to be found. In addition, relevant parties often express implicitly their demand and supply, neither telling clearly nor making any written agreement. This becomes one more difficulty for proving the case while it is, as aforementioned, a requirement of the law that there must be an agreement on what will be done by the position holder in his exercise of public duties in exchange for given benefit.

Such law requirement gives bribery one more chance to escape from criminal liability. The above factors illuminated for the situation of hidden bribery. Such situation also forms a complicated part of the whole picture of bribery offences in Vietnam.

After studying situation of bribery offences in Vietnam, one sees that such offences are of hidden and complicated nature, often being committed in a secret and mutual relationship between parties. The investigation, prosecution and conviction of such offences are therefore difficult and sometimes impossible. It could be understandable for a limited number of bribery cases that have actually been found recently.

In addition to the situation, it is worth learning some main causes resulting in bribery offences in Vietnam.

*The first group of causes relate to weaknesses of the state's policy in economic management and the apparatuses or the bureaucratic mechanisms*

In spite that Vietnam has moved from a planned economy towards a market economy over the last twenty years, the State has very strong impact on the economy. The State still controls the economy by its administrative-economic policies, e.g. protecting and supporting state-owned enterprises, controlling prices of products, limiting areas to be done business, etc. Such impact sometimes makes economic entities dependent and uncompetitive. When they stuck in businesses due to the State's intervention in economic management, they have recourse to some illegal instruments including bribery. The so-called "policy purchasing" has arisen in Vietnam. This seems to meet a statement that "market economy and the State's strong intervention therein is objective important cause leading to the development of corruption (Government Ombudsmen 2004:13).

Moreover the State's policy of economic development has shown its negative site. "Rapid economic growth is accompanied by increased demand for administrative functions such as the need for more government permissions to engage in economic activities via license, approvals, consents and the like; this in turn increases opportunities for administrative or petty corruption" (Anti-Corruption Resource Centre 2008). One says proudly that Vietnam has undergone comprehensive economic reform in order to

facilitate economic growth. However the reform of decentralization in Vietnam has given greater authority over businesses to local governments and investment zones. Local governments have further been given authority of controlling over local expenses, especially in infrastructure, and of approving foreign investment projects. “These decentralization efforts have led to the uneven implementation of laws and variations in requirements and have given local officials considerable discretion to demand bribes for issuing licenses and permits” (Gainsborough 2003). In addition, the policy of privatization of a variety of State-owned enterprises gives opportunities for public officials to demand kickbacks. Fast-growing transitional economy seems create some causes of and also opportunities for bribery to develop in Vietnam. Vietnam has been in transition from command and free market economy. In my observation economic rise of Vietnam is accompanied by rampant and rising bribery. The situation provides more evidence that bribery is most prevalent in countries of developing world.

With regards administrative aspects, the State’s institutions of Vietnam are assessed to be organized in too complicated mechanism, overlapping levels with various inconvenient procedures (Vũ Danh Hồng 2006:9; Government Ombudsmen 2004:62; Trần Công Phàn 2004:108). Such mechanism and procedures in their turn have created bureaucratic habits for administrative officials, such as authoritative attitudes to the public, asking for benefits or even extortion. Although Vietnam has reformed administrative procedures, there has been a growth of state bureaucracy. I am of the opinion that this is another cause leading to bribery practices in Vietnam.

For Vietnam it is stated that the most important cause of bribery is the demand-supply mechanism within State’s body (Government Ombudsmen 2004; Trần Công Phàn 2004; ĐTDL.2005). Authorities and officials responsible for supplying state’s funds and other necessary benefits for the whole public sector are of very strong authority. The mechanism causes the dependence of lower authorities on the higher ones. In terms of causes of corruption, the 2005 survey provides that the rate of respondents including public officials and civil servants, enterprise managers and of citizens cited the ‘ask-give mechanism’ as a major cause of corruption is between 70% and 90% (VCCIA Report 2005: 63). As a result, the lower ones and the needs have to find the good ways to get

what they should have been supplied and the best way, in their thinking, is bribing responsible officials. Practices of kickbacks, illegal commissions, and patronages have been seen everywhere.

The above factors can be considered the first and the foremost causes of bribery offences in Vietnam. These may be called institutional and policy-related causes.

*The second group of causes consists of factors concerning personnel management*

Bribery offences have also been caused by a mechanism of loose personnel management and insufficient law thereupon. Law on employees and public officials has been enacted since 2008 and time for its genuine enforcement is still short. In addition law says little about role and function of public officials. There are no specific rules on gifts, conflicts of interest and post-employment restrictions for members of the judiciary, other than those in force for public servants and members of VCP as a whole. “Codes of conduct, where they exist, are poorly enforced. This is especially the case where they deal with conflicts of interest” (NIS Report - Vietnam 2006: 34). The 2005 Report shows a large percentage of respondents’ consensus on main causes of corruption such as loose regulations on rights and accountabilities of civil servants, the lack of monitoring and inspection of people in power contributed to corruption, weak personnel management. These causes were deeply analyzed and strongly supported by surveys and interviews (VCCIA Report 2005: 58-67).

*Thirdly ethical degeneration, wrong perceptions of how to solve matters involving public authorities and the social environment have also resulted in bribery offences*

In addition to aforesaid objective causes, some subjective causes of bribery in Vietnam relating to moral attitudes and ethical rules of people engaged in bribery practices should be addressed somewhat. In my opinion, the degeneration of morals including undermined integrity of public officials and corrupt culture in which any difficulty thought to be solve by benefits have led to bribery offences in Vietnam recently. The so-called “envelope culture” implicitly indicating prevalence of giving and receiving improper money in envelopes has existed as corrupt perception in Vietnam so far. Some empirical studies

discuss about these causes of bribery. A study at state level demonstrates that individualism, life-style of advantageous consideration and enjoyment of material benefits are psychological causes of corruption, including bribery (ĐTĐL.2005:10). Furthermore some bureaucratic attitudes of a large group of public employees and officials in contrast to ethical rules of integrity and accountability such as authoritarian, like of causing difficulties and soliciting for benefit whenever performing public duties have resulted in bribery affairs (Nguyễn Xuân Yêm 2001: 554-555). The 2005 study by anti-corruption committee of VCP carried out survey in this respect and a large percentage of interviewed people (69.6% of civil servants and 56.7% of citizens) considered depravation of morality as a cause of bribery (VCCIA Report 2005:65-66).

The above-mentioned immoral attitudes in connection with weaknesses of state policy and law, non-transparency of state organization and operation, and low awareness of law of citizens in their turn lead to thoughts of depending on help or support by public officials and of using benefits to exchange for things done by them. Such thoughts or perception are widespread among citizens, becoming a cause of giving a bribe. Moreover, it is argued that Vietnamese citizens have not been used to recourse to legal services to solve their matters. They are further afraid of engaging in fighting corrupt habits of public position holders due to thinking of being victims and hesitating to bring case to courts, accepting giving benefit instead. This perception also causes bribery activities (Nguyễn Minh Đoan 2004:37).

Social environment attributes a factor to causes or support bribery practices. As aforesaid several cases of bribery have shown situation of systematic bribery or prevalent-corrupt environment where defendants worked for and lived in. As a learning experience from each other, engaged-bribery people observe and copy bribery activities among them. They see obtainable advantages from bribery by others and little risk of being detected. Consequently they do as the way others do to get benefits from bribery. Systematic bribery cases of Tân Thanh border-control, of PMU 18 of the Ministry of Transportation, of related-drug case in Thanh Nhàn ward of Hanoi with a range of defendants give us examples of bribery cause regarding social environment.



*Fourthly the quality of Vietnamese criminal law on bribery, as analyzed in Chapter 2 of the thesis, is weak in several respects. It contains loopholes that create opportunities for bribery*

Law was made with indeterminate legislative language. This rendered bribery law complex and confusing. Some elements of the offences are provided in a narrow sense or not expressly covered in the prescription thereof, while some existing requirements seem not necessary to be appeared in the definition of bribery offences, e.g. abuse of public position/authority, material benefit, bribery agreement of things will be done by the official, etc. Such requirements have made the proof of bribery difficulty and sometimes impossible, consequently leading to few cases of bribery to be properly punished. Law is too general, leaving too much discretion to lower-level regulations, causing difficulties in application. Meanwhile, responsible authorities such as the Standing Committee of the National Assembly and the court have not issued any legislative explanatory regulation for the application of criminal law on bribery. Consequently a certain confusion of the law has caused enforcement delays and uncertainties.

Vietnamese criminal law further only deals with the most traditional and blatant bribery. Other types of bribery recently occurring and being serious, such as bribery in the private sector, giving and receiving inappropriate gifts, cannot be punished. Bribery of foreign public officials has not been expressly covered in law, leading to the lack of legal framework for fighting bribery at transnational and international level. In brief, law cannot provide sufficient basis for punishing all types of bribery.

The above-mentioned shortcomings of bribery criminal law can be considered gaps that position holders and the needs make use to commit bribery. Especially people having good legal knowledge can find easier and safe way to exchange undue benefits. Criminal law cannot act as preventive tool of combating bribery since it has not made potential people scared of punishment. When someone escapes from criminal liability once, he (and maybe other people who know about the case) may dare to commit bribery again.

*Fifthly, the weaknesses and inefficiencies of law enforcement can be considered as a very important cause of bribery offences*

It is worth noting that if illegal acts cannot be found out or if found out but inadequately punished further same acts will be committed. Cause for bribery to be repeatedly and commonly committed may arise due to weak law enforcement on such offences. It is true in the context of Vietnam in some recent years. One may see that there are several obstacles to the law enforcement and implementation on bribery offences in Vietnam. The lack of comprehensive bribery law is also regarded a cause of poor law enforcement. No special units exist for prosecuting and adjudicating corruption. These make the investigation of suspect bribery transactions more complicated and prosecutors reluctant to pursue bribery cases, especially when they lack sufficient professional and financial resources to do so. In addition, the investigation, prosecution and adjudication have been intervened by several factors. For instance higher officials involving the cases or the defendant's agency impact on solving cases by no cooperation, put pressure on competent officials, using power and money to influence judiciary, etc. In fact prosecutors somewhere are not really aware of the necessity of punishing bribery offences, leading to ignorance of reports thereof and omission of prosecuting such offences.

It is also found by a surveyed study that over 64% of questioned public officials and civil servants, 58% of enterprise managers and 59% of citizens regarded the lack of specific government 'action plans' as a key factor limiting the effectiveness of anti-corruption efforts; formalistic participation by officials in anti-corruption campaigns was also cited as a common problem; over 71% of public officials and civil servants, 64% of enterprise managers and 62% of citizens blamed the absence of a specialized anti-corruption agency as a significant limitation on the impact of anti-corruption (VCCIA Report 2005).

Some other factors relating to law enforcement and application may also obstruct anti-bribery activities, contributing cause and opportunity for bribery practices to be incurred and developed. I share with an author's findings of obstacles for instance legal procedures to solve bribery cases, including administrative ones, are several and complicated, having impact on independence of legal authorities; legal knowledge, awareness of genuine danger of bribery and capacity of legal practitioners is insufficient for requirements of the investigation, prosecution and adjudication of bribery cases (Vũ

Danh Hồng 2006:10). Another author further found that there have been connections between bribery offenders and legal officials somewhere and protection of such offenders in dealing with bribery cases has been seen (Trần Công Phần 2004: 61). He also mentioned to problems of unfair treating between different kinds of offenders, e.g. more severe punishments for lower officials and bribe givers, lenient treatments for high officials; of insufficient sanctions imposing on bribery defendants (Ibid: 120).

Observing objectively Vietnamese situation, an author found shortcomings that hinder current efforts in developing the legal and judicial system to combat corruption such as the lack of a clear law development strategy; an inadequate institutional framework for effective implementation and enforcement of the law, especially in regard to the quality and independence of trials; and the lack of a coordination strategy and action plan (Wescott 2003: 264). Confirming that statement, it is argued that efforts to fight bribery in Vietnam are plagued by a plethora of problems such as gaps in implementation, lack of coordination between anti-corruption agencies and lack of independent oversight and monitoring (Anti-Corruption Resource Centre 2008).

I totally agree with aforementioned findings, seeing causes for bribery to be more committed due to such weaknesses of law enforcement and judiciary. In my opinion no punishment or insufficient one causes repetition and potential commission of bribery. Due to the incomprehensive law and its ineffective enforcement, Vietnamese people tend to bring their cases to the courts with giving a bribe in order to be sure that they win. Over 56% of public officials and civil servants, 62% of enterprise managers and 48% of citizens reported that low detection levels contributed to the incidence of corruption (VCCIA Report 2005). This seems to meet the notion that “if the law on the books does not mean much and the judicial system operates poorly, people will avoid bringing disputes before the courts unless they are certain to be the high bribers” (Rose-Ackerman 1999: 153).

The fourth and fifth groups of causes are really in my concern because these are of criminal law aspects. By seeing these causes it means that we can work out solutions to situation of bribery offences in Vietnam by means of criminal law.

### *3.1.2. The recent situation concerning bribery offences in Sweden and Australia*

Sweden and Australia are considered two of the most successful countries in preventing and combating bribery offences. These countries are highly appreciated of environment that almost free from corruption. This appreciation can be illustrated by the fact of low level of bribery offences accused and convicted therein.

For a long time, Sweden has been always ranked at one of some first positions in the list of transparent and clean countries of some international organizations against corruption. For instance in the Corruption Perceptions Index (CPI) 2009 by IT, Sweden scored 9.2 points and ranked at the third position. Sweden is actually perceived one of the least corrupt countries all over the world. One can say that Sweden is an almost bribery-free country and bribery is therefore not considered a major concern for Swedish society. However, Sweden's ranking at top does not mean that bribery is totally precluded from this country. Bribery offences occur but not of serious problem. As bribery is not considered a major problem in Sweden and is not targeted as such, no statistics are kept as how many cases of bribery were investigated and how many of those led to prosecutions. In this research, information regarding to bribery offences in Sweden was collected from different reports and it seems not really adequate to draw a specific picture of the situation of bribery in Sweden. However, different sources of information at least commonly indicate the low level of bribery therein. The number of bribery cases and persons committed bribery reported is quite low. For instance according to Report 2006 of the National Anti-Corruption Unit of Sweden (a prosecution authority), from 2003 to August 2006 just 147 cases of bribery were reported. In addition, a study carried out by the National Committee of Crime Prevention indicating that the number of suspected bribery offences during the period 2003-2005 was 248 (excluding an unknown number of offences still under investigation). Amongst these suspended offences, the number of those led to prosecution was 31 (GRECO Report 2009). The GRECO Evaluation Team (GET) was further informed by the National Anti-Corruption Unit that between 15<sup>th</sup> July 2003 and 15<sup>th</sup> January 2009 there had been about 280 pre-investigations leading to 82 prosecutions and involving more than 270 persons (Ibid). A month later, at the time of adoption of the GRECO Report 2009, investigations and prosecutions resulted in

approximately 90 convictions. A recent study of criminology also provides some information regarding corruption in general, for instance there are 147 cases of corruption reported to the National Anti-Corruption Unit between 2003 and 2005; 248 suspected offences and 202 persons identified as guilty by the person reporting the offence; 74 persons registered as suspects by the prosecutions, leading to 21 persons convicted (Karlsson 2008). More specifically, the number of suspected offences is then divided into different kinds of offence. Giving of bribes contributes 63 offences, accounted for 25 per cent of the total corrupted offences; while the number of taking of bribes is 80, accounted for 32 per cent thereof (Ibid). The percentage seems not small in comparison with that of other corrupted offences. Moreover, the fact shows a considerable increase in the investigations, the prosecutions and the convictions of bribery offences. Actually the National Anti-Corruption Unit, since its establishment in 2003, has dealt with an increasing number of bribery cases. Consequently, number of those adjudicated and convicted by the court has been expanded and cases were adjudicating in the various courts, including the Supreme Court.

*Table 3.2* Number of persons found guilty of bribery offences in Sweden (1998 - 2007)

Year	Bribery	Taking a bribe
1998	12	3
1999	7	2
2000	5	6
2001	0	0
2002	9	5

2003	5	4
2004	9	7
2005	8	24
2006	14	40
2007	13	33
Total	68	124

*Source:* The National Council of Crime Prevention

The statistics provided by the OECD seem different from the ones cited above. It is reported that 24 persons were sanctioned for active and passive bribery in 2000 and 15 persons were fined for these offences in 2001 (OECD Report 2005: Para.22). It can be clearly seen that the number of persons convicted of bribery offences during ten years is quite low. This is the cleared number of such offences, mainly manifesting the situation of bribery in Sweden in the last ten years. Once again, that number indicates the low level of bribery in comparison with the total convicted crimes in Sweden. The situation of bribery seems not serious at all and this is a common perception of public officials and representatives from other areas of society those were interviewed to give opinions to three Evaluation Reports on Sweden by GRECO which covered a fairly long period too (GRECO Reports 2001, 2005 and 2009).

The context of the suspected bribery offences was analysed in Karlsson's study (2008), indicating that of the total persons committed corrupt activities (135), 83 persons were involved in illegal influence on sales or purchases (accounted for 61%), 13 persons did it in a legal process (accounted for 9.6%), 9 persons put illegal influence on inspections and

permits (accounted for 7%), while 4 persons exerted an illegal influence on service and treatment and the final 4 persons did it for the purpose of getting or manipulating secret information (accounting for 8%). In her interesting presentation at the QOG Lunch Seminar on 25 March 2008, Karlsson also talked about twelve typical cases of corruption in Sweden in some recent years, including bribery occurs in pharmaceutical industry, influencing on flawless inspections and renewed permits, international corruption with billion dollar bribes, street-level prosecution corruption, the home-help service gets rewards, the Mamma Mia case. She further mentioned to the fact that Swedish legal authorities just detected corruption between private companies and State-owned companies or State authorities, between individuals and the State; that they have not found any case among private companies or between individuals and private companies or among State authorities or in law enforcement. The working environment in State authorities seems almost free from bribery.

According to Evaluations Reports by GRECO in 2001 and in 2009, it seems that there has been no case of bribery involving judges, the only case reported to GET is an attempt by a citizen to bribe a judge. These reports in addition provide more notable information that bribery within police authorities is an almost unknown phenomenon in Sweden and organized crimes is also an unknown phenomenon in Sweden and there seems to be no indication of any links between detected bribery cases and organized criminal groups. Some types of bribery often seen in the Western world such as political bribery, international bribery but have never recorded in Sweden. The OECD Report 2005 in respect of the implementation of OECD Convention by Sweden informed that there was only one case of bribery of foreign officials of the World Bank that adjudicated by Huddinge District Court in 2004. By the court judgement, a Swedish consultant and his accountant were convicted for paying kickbacks to two officials of the World Bank in 1998 in exchange of being awarded three contracts for projects in Africa. Some other cases of bribery involving foreign officials were still under investigations at the time of preparing the report but then did not be convicted due to the lack of sufficient evidence (OECD Report 2005: Annex 3). It seems that even petty bribery was received attention and there have been several convictions of bribery of morally ambiguous or trivial in Sweden (Jacobsson 2006, Lennerfors 2007).

The situation of bribery in Sweden seems quite optimistic with the information from the Economic Crimes Bureau (ECB) of the fact that ECB has been investigating few cases of bribery and the ECB's representatives believe that corruption is not a serious threat in Sweden (GRECO Report 2001: Para.52). Moreover, during the time of preparing its report, representatives of the Swedish Anti-Corruption Institute informed the Greco Evaluation Team that major corruption cases were rare in Sweden, but they thought that some sectors seemed more vulnerable to corruption than others, such as the building industry. They also pointed out some risks inherent to large organizations, where decision-making powers are delegated to lower levels, thereby increasing the risk of small-scale bribery (GRECO Report 2001: Para.76).

The question may be raised that why bribery in Sweden is of very low level in spite of the fact that there is no national program or special strategy for fighting corruption. Reasons may vary. First of all, transparency mechanisms, e.g. independent and public scrutiny, systems for declaring or reporting potential conflicting interests or corrupt activity, play a very important role. Sweden is considered a country that has a longstanding tradition of very solid public administration with a high degree of integrity and transparency and of independence and decentralization (GRECO Report 2005). The second important factor is the respect of the far-reaching principle of the right of public access to official document (OECD Survey 1999, GRECO Reports 2001, 2009). According to GRECO's evaluation, the most important weapon against corruption is probably openness and the public's access to information. These provide the public and the media with the means to control public sector activities. Supervision by the public and the press is then reinforced by some institutions namely the Chancellor of Justice and the Parliamentary Ombudsmen who can investigate any complaint about the executive, and also the National Audit Office that controls all Government-funded agencies and State-owned companies (GRECO Report 2001: Para.112). Moreover, "another important element as regards as means of fighting corruption is the unique Swedish system of protection of informants to the media. Public officials may, according to rules regulating this in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, submit information, with the intent of it being published or spread in other ways to a broad public to representatives of the media. The official has the right to remain anonymous and it may



amount to a criminal offence for a representative of an authority to enquire into the name of the source or for a journalist to reveal it. The right to inform includes, but not all, of the information that is considered secret” (OECD Survey 1999).

In addition, even there is no special program for the protection of witnesses in Sweden but witnesses in bribery cases can be protected by all the measures included in a “Catalogue of witness protection and security measures”, edited in 1997 by the Office of the Prosecutor-General and spread to thousands of police officers and prosecutors. This catalogue contains all measures that should be taken at the various stage of a crime investigation in cases involving injured persons and witnesses at risk. Besides legal guidelines on bribery were enacted in order to show public officials and citizens what should do and what should not to avoid the activities constituting bribery. For instance there is a law governing local authorities and a code of conduct specifying what gifts may be received. As an organization in respect of fighting corruption, the Swedish Anti-Corruption Institute drew up a Code on “The Use of Benefits to Promote Business Contacts and Relationships” what designed to promote high standards of integrity in business transactions, whether in the private or public sector. Such a code draws a clear line between ethically acceptable practices and those are corrupt activities.

The brightness of bribery situation in Sweden is also contributed by some agencies and organization specialized in anti-corruption, including National Council for Crime Prevention, National Anti-Corruption Unit working as a prosecution agency and Institute against Corruption. Moreover, meadia plays an active and important role in the fight against corruption. Actually some bribery cases were under legal procedure because of information by meadia. Notable example was the case concerns a Conservative Party member of parliament that came to public light in 1993 when Sundsvalls Tidning, a local newspaper, published an article on his activites which could be regarded as corrupt from 1991 (Andersson 2002:77-78). Co-operation between competent authorities in finding corrupt-suspected cases is further a factor for effectiveness of anti-corruption activities. It is assessed that there seems to be a high-level of co-operation between tax inspectors and prosecutors in Sweden. The Economic Crime Bureau indicated that the tax administration is its most common source of information, and the tax administration assembled a team

of 200 tax investigators in 2000 who have specially trained to assist prosecutors in their investigations on tax and economic crimes (OECD Report 2005: Para.92).

Although the number of identified bribery offences in Sweden is of low level, it is admitted that some bribery activities remain secret. Lennerfors (2007:110-111) quoted from Cars (2001:166) to show a studying result that 12% of the decision-makers in general and 27% in the construction industry had been offered bribes. Some Swedish authors mentioned to the grey bribery which could neither be discovered nor found guilty (Andersson 2002, Lennerfors 2007, and Karlsson 2008). Some participants at the on-site visit by OECD moreover provided a slightly different picture from optimistic statistics aforesaid. A representative of the business community stated that Swedish companies are “somewhat naïve” and unprepared to deal with the issue of foreign bribery. One official gave opinion that Swedish businesses had been solicited for bribes in certain high-risk countries. Another participant suggested that smaller companies are particularly vulnerable to paying bribes because of their competitive disadvantage; in his view, some probably do pay (OECD Report 2005: Para.65). The actual number appears to be different from the cleared number to some extent.

The explanations for hidden bribery offences in Sweden may be the low level of bribery awareness and the absence of specific guidelines or training on corruption issues among officials in certain key areas. These may hamper the reporting of suspicions of corruption, leaving complex and sophisticated corrupt practices undetected, particular those used the context of certain international business transactions (GRECO Report 2001: Para.118). Actually the high confidence that Swedish community placed in the behaviours of public officials and authorities could result in low awareness of the danger of bribery, reducing the number of reports related to suspected activities of bribery. This situation also prevents the law enforcement authorities and supervising bodies from actively seeking traces of corrupt practices. Besides, report of an offence can hardly come from the victim because on the one hand there is often no individually identifiable victim or because those having specifically suffered damage are likely to ignore the existence of underlying bribery. On the other hand, none of the persons engaged in bribery practices have the slightest interest in revealing it as they would be in danger of prosecution and

punishment (Ibid: Para.117). In addition, it is found that the inappropriate supervision in public procurement procedures could have resulted in leaving undetected some concrete corrupt practices (Ibid: Para.123). Moreover, as both sides of corrupt transactions share an interest in concealment, many cases are likely to remain undetected (Ibid: Para.129). The difficulty to detect bribery offences appears to be caused by the very secret and silent nature of bribery transactions.

Although the number of convicted bribery cases and defendants in Sweden is low, statistics by Table 3.2 indicates a considerable growth thereof. Specifically during three years from 2005 to 2007 there were 132 persons convicted of bribery, accounted for 68.7% of the total convicted persons in this respect (192 persons) in 10 years. In addition, in spite that statistical number is low in comparison with that of many other countries, it is still accounted for a large percentage in the total number of regarded corrupt offences in Sweden. In Karlsson's study, the rate of cases of convicted bribery between 2003 and 2005 was the highest in which taking bribe is 32% and (active) bribery is 25% of the total corrupt cases (Karlsson 2008:7).

Notable causes of bribery offences may be seen in context of Sweden. The first cause may paradoxically result from the perception of a society free from corruption. Bribery has not been deemed as a dangerous phenomenon in Sweden. The measures against bribery have therefore not been given priority on the political agenda in Sweden (OECD Survey 1999). The common view is that bribery is not major problem for the society and the fight against bribery is therefore not considered as a priority in Sweden. As a result, the Swedish authorities have not prepared or adopted any special national program or strategy against corruption, including bribery. Even the law enforcement authorities in Sweden tend to disregard or low appreciate the danger that such offences put on the society. For example the Economic Crimes Bureau's representatives reported to GRECO that they believe that corruption is not a serious threat in Sweden (GRECO Report 2001: Para.52).

Moreover, Andersson (2002: 51-56) based on Heidenheimer's model, what I already mentioned to in Chapter 1, investigates attitudes toward bribes in some European

countries including Sweden, finding the result that attitudes against bribes have sharpened over time in almost these countries except in Sweden. In his interpretation of the findings, it may be that the perception of bribes in Sweden has changed in the way that people can imagine situations where bribes are justified or there may be a slight tendency towards increased acceptance of bribery. One sees that this perception may cause opportunity for bribery offences to be committed. It is also observed that the Swedish public does not see foreign bribery as a pressing concern, that foreign bribery does not appear to be a major issue and Swedes rarely hear about it in Sweden, and that the media has not play a sufficient role in raising the awareness of foreign bribery (OECD Report 2005: paras.64,67).

Recently, study has found that transparency somewhere declines. “It was speculated that this was especially a factor because level of transparency had been lower and scrutiny less tight” (Andersson 2002: 98). As transparency is key factor in the fight against bribery, its lower level becomes a cause of bribery.

Difficulties in interpretation of law have also been arising, causing the ineffectiveness of the enforcement of law on bribery (GRECO Report 2009: Para.81). This has made several suspected cases cannot be proven. In addition, the situation in which several important cases that made the headlines but then no charge was brought due to the lack of sufficient evidence showed deficiency in law enforcement. The ineffectiveness of law enforcement on bribery cases may result in continuous engaging in bribery and non-preventive role of law. This facilitates the existence of bribery.

There is a potential for certain cases of foreign bribery to escape prosecution pursuant to Chapter 17, section 17 of the Penal Code in circumstances where prosecution is warranted, due to two main reasons: first, prosecutors are not required to automatically notify the Prosecutor-General of cases of bribing a foreign public official. This means that the Prosecutor-General will not necessarily have the opportunity to ensure that Chapter 17, section 17 is not misused. Second, the general instructions for prosecutors on the application of the public interest were abrogated in 1997-98 and are therefore no longer in force. The gaps are the insufficiency of the information in the Commentary on

the meaning of “public interest” in the Code of Judicial Procedure, the abrogation of the “General Instructions” to prosecutors on the “public interest” and the absence of a requirement of automatic notification of the Office of the Prosecutor-General of cases of foreign bribery. These gaps may result in the detection and the prosecution of foreign bribery cases.

Leaving the situation of bribery in Sweden, Australian facts will be considered. It appears difficult for me to carry out a study on the situation of bribery offences in Australia because of the federal structure of the country. In my capacity I could only collect little statistics and information concerned at the federal level and some more information on facts of bribery in NSW State.

The situation of bribery in Australia seems similar to the Swedish one. In TI’s Corruption Perception Index 2009, Australia scores 8.7 and ranks eighth. According to a report made by TI in respect of the National Integrity System 2004 on Australia, the matter of bribery is not a major problem. TI Report 2004 also informs that the statistical information from the Australian Federal Police and the Director of Public Prosecutions indicates low level of corruption being detected and prosecuted at the federal level. The specific number of bribery cases being investigated and convicted per year at the federal criminal justice system could not be caught, due to the fact that such an offence is not put in the list of principle offences those are subjected to official statistics. However a total number of 60 convictions of domestic bribery cases for the period of 1984 to 2005 were reported (OECD Report 2006: 158). No foreign bribery prosecutions has made till 2008. The number of prosecutions has been specified in the Annual Reports made by prosecution agency.

*Table 3.3* Cases prosecuted by the Director of Public Prosecutions at Commonwealth level (1998-2007)

Year	Number of cases
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1998 - 1999	3
1999 - 2000	5
2000 - 2001	1
2001 - 2002	2
2002 - 2003	1
2003 - 2004	15
2004 - 2005	12
2005 - 2006	0
2006 - 2007	9
Total	48

*Source:* the Office of the Director of Public Prosecution

From the fact of very few cases prosecuted, it can be expected that the number of bribery cases convicted before the federal courts is similar. The statistics indicates the extraordinarily low numbers for the commission of bribing a Commonwealth official. In addition, the role of the Australian Federal Police as the investigator is said to be limited to a relatively small proportion of the bribery cases that are going through the prosecution process (NIS Report – Australia 2004). The fact clearly demonstrates that the overcoming issue is the lack of evidence that is a significant bribery offence problem.

The situation seems similar in eight states and territories of Australia. Take the State of NSW as a good and typical example. This state's population is largest in Australia but during ten years (1998 - 2007) there are only 250 charges of bribery offences, leading to 101 persons found guilty in the local courts; 99 charges and 38 persons found guilty in the Higher courts of NSW (including the district courts and the Supreme Court of NSW). Some high-profile cases can be referred to for example the case of Andrew Theophanous and the case of Nick Petroulias. In May 2002, Andrew Theophanous, the former Labor member for Calwell in the federal House of Representatives, was convicted of four charges of bribery and defrauding the Commonwealth. He was sentenced to six years of imprisonment, but then served only 20 months. He was accused of seeking or obtaining thousands of dollars to help Chinese nationals with visa applications and other immigration matters. A notable charge among these is bribery in the form of sexual favour. Theophanous was alleged of the act that in one case he sought sexual favours from a woman (NIS Report – Australia 2004: 12). The case of Nick Petroulias was adjudicated during 2006 and 2008. In this case the defendant, the former first assistant tax commissioner, regarded as position within the highest ranks of the Australian Taxation Office, was convicted of three counts in an indictment, including receiving a bribe under Section 73 of the Commonwealth Crimes Act 1914 for using his authority to issue private binding rulings to assist in marketing with someone else and gain private financial.

Some strengths of the law enforcement can be explained for the successfulness of Australian authorities in the fight against bribery. These are said to be the independent and highly- regarded investigation, prosecution and judiciary processes; the active and independent monitoring by the Ombudsman and the Auditor-General; the statutory accountability arrangements are backed up by review by the upper house of Parliament, using its powers, and where the government does not have a majority (NIS Report - Australia 2004: 38). Moreover high awareness of bribery offences is an important factor. Australia has undertaken a number of awareness raising activities on such offences. Report indicates that officials of the Australian Government and agencies interviewed had good general awareness that bribery of foreign public officials constitutes an offence under Australian law (OECD Report 2006: Para.30). It should be noted that out of two investigations of foreign bribery had been carried out till 2006, one allegation was

triggered by a complaint from an employee (Ibid: Para.26). The Australian authorities have conducted training and information sessions of providing general knowledge of foreign bribery for CTH law enforcement authorities and members of the prosecution body undergo continual education sessions on newly implemented Criminal Code provisions (OECD Report 2006: Para.31). The National Witness Protection Program administrated by the Australian Federal Police can be considered as an essential mechanism for the effective investigation. Openness and transparency, seeing in all public administrative aspects, moreover limits misuse of office as well as dependence of public services. This has made bribery hardly find opportunity to incur and develop. High income for public officials, especially for law enforcement and judicial officials, further encourage them to contribute loyalty and to keep integrity to public duties. Officials' greed is limited at least, causing little chance for bribery.

However, official statistics received interest in the "quite extraordinarily low numbers" for the incidence of bribing a CTH official or paying corrupting benefits (NIS Report – Australia 2004: 10). It is may be explained by an Australian author's opinion that the measurement of corruption is not straightforward. Reasons for that vary, including the hidden nature of corruption, the fear of reprisal for reporting corruption, lack of awareness of responsibility to report such practices, lack of consensus on definition of what constitutes corruption, etc (Gorta 2006: 204). In addition, differences in the manner and criteria of making statistics among federal and state levels resulted in inaccurate numbers of bribery cases.

Further, to date no individual or company has been charged with bribery of foreign public officials since the enactment of new relevant provisions of the CTH Criminal Code. Some investigations conducted but these failed to find basis for prosecution. These may because of some reasons for example Australia does not have a specialized office for the investigation or prosecution of the offence of bribing a foreign public official, The AFP's Case Categorisation and Prioritisation Model (CCPM) assesses the impact of a matter as either "very high", "high", "medium" or "low" for the purpose of determining the priority of incidents for investigation services. On its face, the CCPM does not seem to place the bribery of foreign public officials in the "very high impact" or "high impact" categories



(OECD Report 2006: Para.51). OECD was also concerned about the position of Australian Federal Police that it would only open investigations of foreign bribery on the basis of formal allegations, because this would have meant that other important sources of information could have been overlooked (OECD Report 2006: Para.55). The case of the Australia Wheat Board (AWB) that received much attention in international sphere and in Australia as well may be given as example for the failure of proving foreign bribery.<sup>150</sup> The AWB had been investigated for allegation of bribery of Iraq's former ruling Baath Party in the UN-supervised "oil-for-food" program. It was the single largest company involved in these international corrupt practices with the allegation of payment of USD 222 million in kickbacks, contributing 14% of the total (Kelly 2005). However, findings in the Cole Inquiry Report on this case do not indicate that the AWB case constituted bribery under Australian laws.<sup>151</sup>

The real fact appears to be a little different. From the fact in Queensland and Victoria, a leading corruption fighter of Australia Fitzgerald said "[a]ccess can now be purchased, patronage is dispensed, mates and supporters are appointed and retired politicians exploit their connections to obtain "success fees" for deals between business and government" (Austin 2009). In addition, the Lawyers Weekly that well-known in Australia warned the Australians about the high risk of bribery by saying that the fight against bribery of foreign officials in Australia is in "the slack" with a little enforcement of its commitment to the Anti-Bribery Convention. The anti-bribery measures were said to have "some significant short fallings". The situation is said to be dangerous. It appears that Australia considers foreign bribery as a marginalized matter. Bribery of foreign officials is said to be not of importance.<sup>152</sup>

In respect of bribery in Australia, causes seem similar to that of bribery in Sweden. According to NIS 2004, every official interviewed in the course of this study expressed the view that corruption in Commonwealth administration is not a serious problem. The

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<sup>150</sup> See for example reports on Australia by OECD in 2006 and 2008, and information and discussion provided and raised by Australian media e.g. at <http://www.wsws.org/articles/2005/nov2005/awb-n14.shtml>, <http://www.abc.net.au/7.30/content/2006/s1549627.htm>, or <http://www.heraldsun.com.au/news/national/australian-wheat-board-boss-andrew-lind...>, etc.

<sup>151</sup> The Cole Inquiry Findings are attached to the OECD Report 2008 on Australia.

<sup>152</sup> At [http://www.lawyersweekly.com.au/blogs/top\\_stories/achive/2009/08/18/bribery-fight...](http://www.lawyersweekly.com.au/blogs/top_stories/achive/2009/08/18/bribery-fight...)

government generally and Australian officials appear to be so complacent of the result of the fight against bribery that can lead to the unconsciousness or the disregard of the situation thereof.

Fitzgerald had a message for political leaders generally that “[d]espite their protestations of high standards of probity, which personally might well be correct, and irrespective of what they intend, political leaders who gloss over corruption risk being perceived by their colleagues and the electorates as regarding it of little importance” and “that is a disastrous perception” (Austin 2009). He also indicates another cause for bribery that the combination of greed, power and opportunity provides an almost irresistible temptation for many activities of corruption. This seems very complex and dangerous cause. In addition, insufficient penalties imposed on bribery seem not make people fear of being criminal punished and get rid of bribery practices. Fitzgerald urges “the near-certainty of exposure and severe punishment” as the only counter to the temptation of engaging in corrupt behaviour, because the establishment of a broad-ranging, anti-corruption commission has been refused in Victoria (Ibid). Moreover, exclusive functions in economic area still exist and the government somewhere is not as open and transparent as it should be (Ibid). These may be causes for bribery in Australia.

The weaknesses of the law enforcement may attribute to the badness of the situation. Firstly, reporting mechanisms make it difficult to ascertain the exact level of corruption. This has policy implications for the government in that were systemic corruption problems arise; they may not be recognized early enough. Secondly, whistle blowing arrangements are not convincing. Thirdly, the emphasis upon encouraging agencies to manage their own governance arrangements means that whole-of-government consistency is compromised. Finally, the problems of accountability of Ministers and Ministerial staff are still existed (NIS Report – Australia 2004: 38).

### **3.1.3. Comparative Analysis**

The situation of bribery in Vietnam and in Sweden as well as in Australia share the most clear feature of low level of bribery activities being convicted in comparison with other

areas of crimes. The existence of hidden bribery offences could be found in any of these countries. Accusations of bribery may be politically motivated.

It seems that the statements mentioned in Chapter 1 by Reisman (1979), Heidenheimer (1989) and Della Porta and Vannucci (1999) on the balance between public attitudes to bribery and degree of its prevalence match the situation of bribery of three countries.

These three countries share similar problems with the enforcement of bribery criminal law that could lead to the disregard of risk of being punished. The opportunity for committing bribery seems apparently obvious.

One more similarity shared between these countries is that the low level of cases of bribery convicted by the courts may be due to the ambiguity of the bribe or the definition of the bribe recipient. The requirements of the bribe both in legal nature and in kind caused difficulties in determining it among the like. The unclear definition of the position holder in Vietnamese law and along the same line the overlapping and still vague definition under Swedish law both resulted in low level of convictions of bribery offences. This is further affirmed issues that expected in theoretical chapter of the thesis.

Reviewing situation of bribery offences in these countries one can see that almost prevalent types of bribery occurred therein. The most frequent type being convicted is bribery in the public sector. Bribery of normal and petty nature was more convicted while political or high-profile cases were rarely proven guilty or came to the court. This situation proves what presumed in theoretical discussion.

For Vietnam bribery most prevalently committed in such areas as construction, housing and land management between position holders and representatives of both public and private companies. However the lack of criminal liability of legal person under penal law, which suggested by theory in Chapter 1, led to no legal basis for prosecution and conviction of corporate bodies in Vietnam.

Vietnam has more problems with bribery in law enforcement and judiciary than that of bribery in Sweden or Australia. In this respect bribery is almost non-existent in the latter countries.

The situation of bribery offences in Vietnam, including problems of hidden offences, is much worse than that in Sweden and Australia. Among three countries, the unique model of bureaucratic administration and the dependence of lower authorities on the higher ones in Vietnam make the key cause of bribery herein different from that of the other two countries.

The severity of the punishments provided and sentenced for bribery offences in Sweden and Australia seems lenient in comparison with the seriousness of crime. For Vietnam although penalties available under law are severe, the fact indicates that imposition of penalties on bribery cases are often not adequately severe in compatible with the gravity of what committed. This may be a factor explaining the situation of bribery in these three countries, as Alatas attributes the growth of bribery to “the lack of fear of punishment” (Alatas 1999: 121).

For Vietnam it is apparent that bribery is mainly caused by policies and institutional mechanisms that created independence and greed. In contrast, Sweden and Australia are successful in fighting corruption by openness and transparency. These countries however have problems with too confidence of freedom from corruption and ignorance of the existence of bribery somewhere.

What role has criminal law played in the fight against bribery offences? A tool for combating rather than that for preventing such offences is of course what it has acted. Even as a kind of severe treatment it has contained several deficiencies that contributed to causes of the situation. What I expected on the impact of the effectiveness and weaknesses of criminal law on the situation of bribery in Chapter 1 turns out to be true.

Studying situation of bribery offences in a comparative perspective confirms relevant theories mentioned in Chapter 1. Causes of bribery offences in these countries may also be created by the deficiencies of law interpretation and application. That is reason why I will discuss such matters below.

### **3.2. The Application of the Vietnamese Criminal Law on Bribery Offences – Compared with that of Sweden and Australia**

### ***3.2.1. The Application of the Vietnamese Criminal Law on Bribery Offences***

The provisions of Vietnamese Penal Code do indicate the legislative view and the strict criminal policy of Vietnam regarding to bribery offences. The application of these provisions in fact in the other hand expresses the effectiveness and applicability of the law. It also impacts on the overall situation regarding bribery. How has the law been applied recently?

In order to find the answers for such a multiple-answer question, the author studied the application of Vietnamese criminal law from 2000 (after the entering into force of the new Penal Code) to 2009 through the law enforcement of the prosecution and (mainly) the court systems. The fact the author could observe is that the application of law on bribery offences is in general good and legally. In spite of many difficulties, the law enforcement authorities perform adequately and rightly their functions and duties of investigation, prosecution and conviction of bribery offences, securing the legal rights of citizens under the criminal procedures. The convictions could in general be said justifiable and proper.

The activities of the courts in dealing with bribery cases most clearly show the effectiveness of the application of criminal law on bribery offences. The people's court system (with the support and cooperation of other authorities) did try its effort in order to convict rightly, to keep justice and to give proportionate sentence to the criminals in bribery cases. To ensure the value of the evidence collected and to find the true guilty persons as well as to prove the right crime, the courts several times return the case to the prosecution authorities to demand the additional investigation or the Court of Appeal in some cases hold to dismiss the judgments of the lower courts, then give the cases back to the prosecution authorities to carry out additional investigation. In some more complicated cases with very little evidence or the low-value evidence, the courts had even to organize many different trials and hearings, several times demanding the prosecution authorities to investigate additionally. The case of Lương Đức Tuấn and Lê

Hồng Giang in Thái Bình province is such a very typical case.<sup>153</sup> This case was at first solved by the People Court of Thái Bình province (Judgment No.23/2007/HSST). The judgment was appealed by the defendants to the People Supreme Court. The Court of Appeal (in Judgment No.396/2007/HSPT) hold that the evidence is not adequate to prove the defendants guilty and decided the judgment be dismissed, then giving the case to the Procuracy of Thái Bình province to start investigation from the beginning according to the general criminal procedure. The case was after that to be appealed by the Procuracy of Thái Bình province to the Supreme Court and then being solved by the Court of Appeal (Judgment No.252/2008/HSPT). Three trials with several hearings and some investigating processes, some appeals both by the defendants and the prosecution authorities show the complication of the case and the efforts of the courts as well. Another case can be referred to is the bribery case occurred in the Ministry of Commerce in 2004. The case was discovered and accused in 2004 but it could only be prosecuted and convicted until 2007, after three years of investigating. Such a fact reflects the difficulties and the complicatedness of the law enforcement activities, expressing the accountability and the high respect of law of the law enforcement authorities. Processes of collecting evidence and proving the case appear to be carried out very prudently, carefully and thoroughly, because of the secret nature of bribery offences and the relation to high-ranking officials of government. Furthermore, the investigation, prosecution and conviction of bribery offences must also ensure the prestige and the stability of the Communist Party's organizations and Government's authorities. The application of criminal law in resolving bribery cases is actually justifiable and convincing. The judgments seem to ensure the suitability of the facts with the elements of crimes. The above facts appear to show a considerable progress of Vietnamese law enforcement authorities and judiciary agencies in investigating, prosecuting and convicting bribery cases. Law officials seemed more knowledgeable and responsible.

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<sup>153</sup> This is the case in which the defendants gave money to request competent policemen of the Police Commission of Investigating related-public position and economic crimes to omit investigating activity of illegal gambling by Lương Đức Tuấn's wife. The complications of the case were due to different and even contrast statements and testimonies given by relevant people. The defendants were arrested at hand but they argued that they had not prepared for giving a bribe and just wanted to give little money for request lenient measures for Tuấn's wife, and stated that policemen entrapped them and actively took all money they have in possession as evidence of bribe. The court of first instance did not carry out cross-examination between defendants and witnesses.

The success and the effectiveness of the law enforcement authorities have recently been seen through the fact that most of cases were resolved completely, entirely, seriously and persuasively. Especially, some recent strict convictions of several cases those are publicized and complicated, relating to organized crime activities clearly indicate the successfulness of the application of criminal law to punish bribery offences. These convictions are to a certain extent useful for the general prevention of such offences. Specifically series of big and high-profile bribery cases have recently been solved, namely the case of Tân Trường Sanh in 1999, the case of Năm Cam in 2003, the case of customs officials in area of border control of Tân Thanh - Lạng Sơn in 2004, the case concerning purchasing quotas to export garment products to the United States in the Ministry of Commerce in 2007, the case of PMU 18 of the Ministry of Transportation in 2007, etc.

The cases of bribery offences were in general sentenced seriously and applied penalties properly thereupon. The type and the level of penalties were to a certain extent applied proportionally and suitably in comparison with the nature and the seriousness of offences.

The table below expresses the fact of punishing bribery offences by Vietnamese courts and the severity of penalties applied thereupon in some recent years.

*Table 3.4* Number of persons sentenced to fixed-term imprisonment for bribery offences during 2000 – 2008 in Vietnam

Year	sentenced to imprisonment up to 7 years	sentenced to imprisonment over 7 years to 15 years	sentenced to imprisonment over 15 years to 20 years
2000	13	4	0
2001	61	11	0

2002	40	20	2
2003	3	3	0
2004	75	19	4
2005	58	9	0
2006	88	12	0
2007	98	10	2
2008	110	19	2
Total	546	107	10

*Source:* Bureau of Summarized Statistics of Vietnamese People's Supreme Court

The statistics from the Supreme Court also give the number of 1088 persons convicted of bribery offences between 2000 and 2008. Of all these persons, Table 3.4 shows that 663 persons were sentenced to fixed-term imprisonment, rated to 60.9 %. The proportion of imposing imprisonment was thus quite high. Imprisonment can therefore be said the principle penalty used for punishing bribery offences. Imprisonment rates varied from few years to several years and even to 20 years. Through the provisions in the Penal Code allow the court to apply different kinds of sanctions namely probation and suspended sentence in mitigating circumstances, the use of imprisonment prevails substantially. The first factor attributes to this trend of sentencing is the policy of Vietnam in the fight against bribery. The Penal Code's relevant provisions could be considered the second factor for the domination of imprisonment in the area of bribery offences. Articles 278,



279 and 289 (dealing with bribery offences) all provide imprisonment as the main (and the least severe) punishment for such offences. Accordingly, the courts rigidly apply these provisions despite the existence of other relevant provisions providing non-imprisonment sanctions to be imposed. Table 3.4 illustrates the rigid and strict view of Vietnamese courts on bribery offences. The longer term of imprisonment was often imposed on the cases in which the convicted persons were in high-ranking position or the bribes were of very valuable benefit or advantages. For example in the case of giving and taking bribes to get quotas for exporting garment products to the United States in 2007, the defendants were sentenced to long-termed imprisonment, particularly Mai Văn D, Ex-Deputy Minister of the Ministry of Commerce, was sentenced to 12 years of imprisonment; Lê Văn T, former Vice Director of the Export-Import Department of the Ministry of Commerce, was sentenced to 17 years of imprisonment. In another case concerning giving and taking bribes to escape from being arrested and prosecuted for drug trafficking, Trần Ngọc H, ex-commissioner of the Investigating Commission of Police in Hai Bà Trưng district of Hanoi, was imposed the longest term of imprisonment with 20 years (Judgment No.552/2007/HSST of the Court of Hanoi and Judgment No.794/2006/HSPT of the Court of Appeal of the Supreme Court). One more case that illustrates the prevailing trend of imposing imprisonment is the case of Phan Xuân T, ex-senior official of the Department of Investment of Khánh Hòa province. The defendant received 71,000 USD for the approval of a foreign investment plan in 2006. Due to the high value of the bribe, he was sentenced to 20 years of imprisonment. In addition, some other cases containing aggravating circumstances were also applied severe sanctions. The most recent case is the case of Huỳnh Ngọc Sĩ - former director of PMU of East-West Avenue in Ho Chi Minh City who received much money as kickbacks from a Japanese Company doing business in Vietnam. He deserved to get the sentence of life-imprisonment made by the People Court of Ho Chi Minh City in October 2010 and this is the most severe penalties imposed in bribery cases for over 10 past years. The severity of these sentences shows determination of fighting bribery by means of criminal law, strengthening preventive purpose of Vietnamese criminal law.

In order to improve the severity of criminal sanctions imposed, fine was used in addition to imprisonment to as an additional penalty. Fine is traditionally regarded as a suitable

sanction for economic crimes including bribery. The courts often applied fines in cases that the bribe was of high value. For instance in the case of Bùi Tiến D, former General Director of PMU 18 of the Ministry of Transportation , the defendant was convicted of preparing for offering bribery to some senior police officers in order to avoid being prosecuted for illegal gambling. He was imposed a fine of 1,168,657,000 VND, the same value of the bribe that he prepared to offer (Judgment No.253/2007/HSST). Moreover, some criminal measures were also applied by the prosecutor or the judge, e.g. confiscation of the bribe, of the proceeds of bribery offences, of the tools that the criminal used to communicate to each other (namely mobile phone) or of the means of transportation to be used in bribery transactions, etc. Actually the courts, according to Article 41 of the Penal Code, did impose these measures on most of bribery cases.

The application of provisions concerning the determination of non-criminal responsibility or exemption from criminal responsibility was carried out seriously in accordance with the law. All cases in which the bribe-givers were forced to give bribes and actively report themselves their activity to responsible authorities before the bribery dealings discovered were regarded inadequate to constitute bribery offences. The suspects as a result were held not to be guilty, being not responsible for their activities. Further, these bribe-givers could get back their benefit that used to give the bribe-takers. For example in the bribery case dealt with in the Judgment No. 844/HSST/2003 by the People's Court of Hanoi, Nguyễn Việt Đ and Phạm Thị H gave involuntarily money to some tax officials following the demand of these officials. The bribe-givers then felt angry with the officials' activity and decided to go to the police office to report the case at the time this case was still in secret. This helped the investigation succeeded. Consequently, the givers were held to be free from criminal responsibility. In addition to cases of non-criminal responsibility, in several other cases the bribe-givers were decided to get exemption from criminal responsibility, because of the fact that they (although voluntarily gave the bribes) did actively report the bribery transaction before it was discovered. However, not all cases as such could be exempted from criminal responsibility. The fact clearly showed that the cases, in which the defendants report their commission honestly and adequately, contributing to the successful investigation and prosecution of the bribe-receivers, usually got the leniency of the court and the defendants were exempted from criminal

responsibility. The givers in some cases even became the witnesses before the trials, reserving to be treated leniently. For instance in case of committing drug-related crimes in Thanh Nhân area of Hai Bà Trưng district of Hà Nội (dealt with by Judgment No.53/2007/HSST of the People's Court of Hanoi), defendant Cao Thị L and some other accomplice had given money and provided material services to some police officers for a long time in order to get help and support thereof. However, L and her accomplice were exempted from criminal responsibility for bribery because they actually reported the bribery activities and persons involved to the investigation authority so the investigation, prosecution and conviction completed successfully, discovering and punishing a range of corrupt and degenerated police officers.

Sentencing and imposing penalties upon bribery offences were in accordance with the relevant provisions in the Penal Code. The legal grounds for sentencing were applied rather suitably for each case. In general the courts in discussing and imposing penalties did observe the law in the one hand and consider relevant circumstances in the other hand. In the court's judgment, it can be seen that the analyses for deciding penalties were significantly careful, clear and convinced. Take the Judgment No.53/2007/HSST of the People's Court of Hanoi on Cao Thị L case as an example illustrating my statement. This is a judgment dealing with a bribery transaction within a big case of illegal drug selling activities. For imposing penalties on the defendants who committed the offence of taking a bribe by misuse of their official positions, the court holds that:

Dương Trọng H and Vũ Hoàng N were both vice-commissioners of the police office of the area in question, being persons who directly guide and give orders to other police officers of lower level in the fight against drug-related crimes in the most complicated area of the capital of Vietnam, but they themselves destroyed the integrity of police officers due to the greed of benefit obtaining from illegal drug dealings. Due to the fact that they were in higher position than other defendants in this case, using their position for taking bribes in exchange of allowing and tolerating activities of drug selling, loosing the public trust on police officers and making the public angry, they could not be sentenced with much reduced penalties in spite of mitigating circumstances they possessed for instance they did report their activities honestly, they submitted money that they illegally obtained, they got some considerable achievements in their office time, etc. They should be punished severely to make the public believe in justice and to eliminate corrupt police officers from the police force.

Other defendants TH, T1, D and T2, despite of their different functions and duties, share the same object of fighting crimes, especially drug-related crimes. They should have kept their integrity in exercising their duties, however have taken bribes in different forms for a long time. D, considering the position of a commissioner of a criminal police commission, directly received money from drug sellers and shared with T2 so his action should be regarded more dangerous than the others, in spite of the fact that he then submitted the bribe. Although TH and T1 testified that they received the smaller amount of money than the amount defined in the indictment but they admitted their activities and submitted the bribed money. Their honest admit can be considered as a mitigating factor to sufficiently reduce penalties for them.

Such a judgment did demonstrate the severity and the impartiality as well as the leniency of Vietnamese criminal law. The application of criminal law in such bribery cases could therefore considered successful works of the judiciary agencies.

However, the succeeds of the law enforcement and judiciary authorities in applying criminal law to dissolve bribery cases above could not hide their factual shortcomings. The statistics on the result of the trials of appealed cases partly show the defects of these authorities' activities. The first-instance court, due to its shortage of experienced and high-qualified judges, sometimes made mistaken judgments. The difficulties and the complicatedness of bribery cases appear to be more obstacles for the lower courts.

*Table 3.5 Results of Appealed Trials on the offence of taking a bribe by the Court of Appeal of the People's Supreme Court in Hanoi*

Year	Number of defendants	Uphold of the first instance sentence	Change of the first-instance sentence			The first instance sentence dismissed	Appeal withdrawn
			Increasing penalty	Reducing penalty	Changing into suspended sentence		

2000	15	6	0	9	0	0	0
2001	0	0	0	0	0	0	0
2002	10	7	1	0	1	0	1
2003	7	2	0	2	3	0	0
2004	35	28	0	3	0	0	4
2005	13	5	0	4	0	0	4
2006	12	9	0	1	1	0	1
2007	4	2	0	0	0	2	0
2008	12	1	0	7	4	0	0
Total	108	60	1	26	9	2	10

*Source:* the Court of Appeal of the People's Supreme Court in Hanoi

Table 3.5 indicates that the rate of judgments that considered incorrect or insufficient is still high with over 35 per cent was changed and dismissed. Among the changed judgments, the ones changed into less severe sentences were the most. Particularly 24 per cent of these sentences were changed into reduced penalty sentences and 8.3 per cent changed into suspended sentences. In some few cases the judgments were dismissed because the higher court found that the judgments by the first-instance courts were based on insufficient or non-valuable evidence.

Through studying the application of criminal law on bribery offences, it can be said that there are still some shortcomings that appear to weaken the law application. The shortcomings could be found in different processes of applying law as follows,

*The first shortcoming involves the wrongful determination of criminal responsibility.* This wrongfulness happens in two different ways. In some cases the determination of criminal responsibility was wrong by the improper and unconvinced prosecution of the suspect. Particularly, the evidence collected did not prove that the facts of the case in question were suitable for the elements of bribery offences. In other words, the facts that had found and showed before the trial did not totally match with the elements of the specific crime. Lawyers for the defendants in these cases did prove that the activity did not constitute a bribery offence, but their arguments did not be approved by the court. For instance in case of Trương Văn C and the accomplice adjudicated by the People's Court of HCM city in 2003, defendant Trần Sỹ C was convicted of taking bribes from the crime organization by defendant Cam. However C's lawyer argued that Trần Sỹ C could not commit such a crime because of two reasons: first, Trần Sỹ C was not the public official who had the position as well as the power to decide whether Trương Văn C could be released before his imprisonment time finished, making Trần Sỹ C could not be the subject of the crime according to the description of the Penal Code; second, Trần Sỹ C just signed on the Recommendation 1333 to release Trương Văn C from the prison in accordance with his duty and that document was just a recommendation, not a decision. In other words, he did not use his position to make the decision to release Trương Văn C from the prison. His activity was not misuse of his office to get improper benefit, thus not constituting a offence of bribery. Factually the public and the media believed that Trần Sỹ C was guilty but the prosecution and conviction were not based on the adequate evidence and the judgment seemed not convinced.

In contrast, in some cases the activities did match the elements of crime and the requirements of law seemed to be fulfilled but the prosecution was finally not done. For example in the case happened in the Ministry of Commerce in 2007, some representatives of relevant garment companies who did give money to the responsible officials of the Ministry to get quotas for the exportation but were remitted from whom demanded for the

prosecution by the investigating authority for the reason that these companies actually needed this kind of quota and the representatives committed giving money action for the proper needs of their companies, not for purchasing and selling quotas to make improper benefit. The arguments seemed understandable but according to the Penal Code these actions did constitute the offence of giving a bribe. The decision for not prosecuting in this case appeared conflict with the law. The case of Trần Thế H concerning illegal petrol trafficking in the West-South frontier-pass in 2006 gave us another example as such. The defendants in this case discussed to offer 340 million VND to some customs officials and other responsible officials in order these officials omit their illegal activities of trafficking petrol. However the Procuracy withdrawn the prosecution of the offence of giving a bribes right in the trial for the reason that they just discussed but not yet decided particularly who to be given and how much for each. I am of the opinion that the action in question was sufficient to constitute the preparation for giving a bribes and relevant persons should have been prosecuted. In addition there were some cases in which the prosecution and conviction were done for some defendants but the others concerned were omitted to be prosecuted, being regarded unfair trials. The typical example could be the case occurring in the Cái Khế Commercial Centre of Cần Thơ province in 2004. Two defendants Nguyễn Văn T (former leader of the management unit of Cần Thơ Markets) and Ngô Ngọc L (former vice leader of the management unit of Cần Thơ markets) were prosecuted and convicted of committing the offence of taking a bribe. In the trial the testimony clearly indicated that Phan Tấn Đ (director of a housing company) was the person who gave money to the two defendants above. However, Phan Tấn Đ was not prosecuted of the offence of giving a bribe.

*The wrongful determination of bribery offences among some other different offences can be considered the second shortcoming of the application of the criminal law on bribery*

The duty of designating bribery offences and of differentiating such offences among similar nature offences is not easy in fact. This work must be carried out based on the description of elements of crime in law. Factually, in order to correctly designate what is bribery offence prosecutor and judges have to prove that the facts match with the elements of crime under the relevant provisions in the Penal Code. However, judiciary

authorities sometimes recognize and evaluate factual events and factors differently. As a result, in some cases the procuracy prosecuted for bribery offences but the court was aware of other offences and vice versa. The different views of prosecutors and judges in these cases led to the fact that the court several times returned the case to the procuracy and demand the supplement investigation. The case of Trần Nghĩa V (ex-General Director of PJICO, a State Insurance Company) in 2006 can be illustrated for this situation. Defendant V and some other senior officials of PJICO agreed with the director of Việt Thái Phong Company to help this company to get money through an illegal insurance contract with the condition that these insurance officials can be shared a half of the amount of money. The case was aware differently by the procuracy and the court. The Procuracy of Hanoi prosecuted Trần Nghĩa V for the offence of taking a bribe, while the Court of Hanoi held that the defendant's activity contains elements of embezzlement. The difference in designating V's offence led to the situation that the procedure of this case lasted during 2006 and 2007 with several trials and several times of transferring the case between the procuracy and the court.

The wrongful differentiating between bribery offences and other offences (that have similar elements) was still found in the fact of the courts. In some cases, the activity contained factors that suit the requirements of elements of bribery offences but was prosecuted for committing other offences. Let us take some examples for illustrating this fact. *The first case* I would like to refer to is the case of Trần Thế H in Tiền Giang province in 2006. H was a director of a state-owned company of petrol and some other officials co-operate with Savimex company of Cambodia to commit illegal petrol trafficking. H and the accomplice received money from the Cambodian company, then giving some of that money to some customs officials to get the permission, helping the Cambodian company to avoid import tax. They were at the beginning accused of receiving a bribe. However the prosecutor at the trial withdrew such an accusation and change to accuse them of making false State documents according to Article 268 of the Penal Code, by the reason that the defendants just helped the Cambodian company to making the false documents to commit petrol trafficking from Vietnam to Cambodia and participated in this case as a middle site between the Cambodian company and some Vietnamese customs officials and got the kickback for that. In my opinion, if the



arguments of the prosecutor were right the defendants should have been accused of acting as intermediaries in bribery offence, not the offence that the prosecutor accused.

*The second case* was concerned with the very big case of Trương Văn C in 2003. In this case Hoàng Linh, a journalist of Tuổi Trẻ Journal did use his position to receive money from some people and corporations to omit to report their illegal activities, i.e. receiving from Ms. Đoàn Thị Minh Hương (fifteen millions VND), from Ms. Huỳnh Liên Thuận (twelve millions VND), from the Board of directors of Tamexco company (forty millions VND and 100 USD), from Mr. Phạm Ngọc Lâm (eleven millions VND), and Mr. Phan Trú Phiêu (twenty six millions VND), etc.<sup>154</sup> From my point of view, Linh's activity was totally suitable for the elements of the offence of taking bribes and his commission actually constituted such a offence. However, Linh in fact was just accused and convicted of "abuse of public position" under Article 281 of the Penal Code - a much lesser serious offence.

The most usual weakness of the court was the confusion between bribery and extortion. Particularly the different courts hold different views for the action of using official position or power to ask or demand or threaten other people to get money from them. This court may consider the action as an aggravating circumstance of the offence of taking a bribe under Article 279 section 2 point đ, but the others may regard it to constitute the offence of extortion by misuse of office. For example in the first case the defendant named Phan Xuân T (ex-senior official of the Department of Investment of Khánh Hòa province) threaten and asked a Korean investor for money in order to approve his investment plan into the tourist area of Cam Ranh Island in 2006. T was convicted of committing the offence of taking a bribe. However in the second case containing very similar facts the defendant was convicted of extortion. That is the case of Nguyễn Quốc Đ, ex-prosecutor of the People's Procuracy of Cẩm Giàng district of Hải Dương province. During the time of exercising his duty to prosecute Nguyễn Văn Ba for the action of intentionally committing injury, the defendant several times threatens and asks Ba for thirty millions VND to escape from prosecution. After some discussion Ba agreed to give Đ eighteen millions VND. Đ was then convicted of committing extortion by using

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<sup>154</sup> <http://www.vnexpress.net/GL/Phap-luat/2003/02/3B9C51CD/>

his official position. The fact of different interpretation of law is due to similarities in the description of elements of offence in the Penal Code. The principle requirement of bribery is the action of asking or demanding a bribe, while that of extortion is asking or demanding a benefit by threatening. The difference is very small and very difficult to recognize in fact. The difference in designating bribery and extortion led to a terrible result that the givers in these cases were treated differently. In case that the receiver was convicted of taking a bribe the giver may be convicted of giving a bribe (except the case in which the giver report the receiver's activity to responsible authority before the case was discovered). Meanwhile, the giver would have been free from criminal responsibility if the receiver had been convicted of extortion.

The above weaknesses indicate the fact that Vietnamese law enforcement and judiciary authorities have still not exactly understood criminal law on bribery or they have been aware of it differently. The different understanding or the vague notion of law on bribery is first and almost due to the shortcomings and loopholes of law. Such shortcomings render the law complex and confusing. The situation of having no legislative guides for interpreting and applying law is attributed to the above weaknesses as another important reason.

*The third shortcoming is the omission of or the wrong determination of the stages of committing bribery offence*

Factually there were some cases in which the offence was not committed completely but the court did not consider that matter, making the sentence and deciding penalty similar to cases in which the offence was completed. As a result, penalties were imposed on these cases seemed too severe, being disproportionate in comparison with the gravity of the activity. For instance in the case of fraud and giving a bribe dealt with in Judgment No.423/2001/HSST in 2001 by the People's Court of Hanoi, defendants T and K thought that defendant L had a duty that could help T and K to solve their problems so they gave a bribe of money to L. However L was in fact not possible to do that due to his different duty. T and K gave therefore the bribe to the wrong person who could not be the bribe-taker under Article 279 of the Penal Code. According to Vietnamese criminal law, in the

one hand K's activity constituted fraud, not a bribery offence. In the other hand, the commission of giving a bribe was not completed due to the action of giving a bribe to the wrong subject. Particularly the offence was just an attempt of bribery. Being based on the value of the bribe the court decided to apply section 3 of Article 289 of the Penal Code and made sentencing for the offence without considering that it was just an attempt. The decision of penalties seemed as severe as it was for normal case in which the offence completed. T was sentenced to 14 years of imprisonment and for K's case it was 13 years. It can be said in this case that the omission of evaluating the process and the extent of committing offence led to the wrong sentence for the defendant. In addition, in some other cases the determination of stages of committing bribery offence was not proper. The case of Bùi Tiến D and some other accomplice committing the offence of giving a bribe (Judgment No.253/2007/HSST) can be given as a typical example. In this case the Prosecution Authority accused the defendants of attempting to commit giving a bribe but the Court held that the defendants was just preparing money and looking for responsible police officials who could help. They had not met any of those to offer or to give so the crime just stopped at preparation for giving a bribe. The cases given above reflect the fact that judiciary authorities has not really focused on the determination of preparation for and attempt to bribery offences. Although such cases were a few, these did affect the efficiency and quality of the judiciary's application of law.

*The fourth weakness is the incorrect determination of the frame of penalties and the imposition of inappropriate sentences for the gravity of the offences*

First of all the situation of incorrect applying the frame of penalties should be considered and analyzed. According to the Penal Code, there are four different severe penalty frames that were provided to be applied for different cases of bribery offences, in proportion with different extents of the offence's seriousness. The first frame is designed to be applied for the normal cases and the rest for cases with aggravating circumstances. The main aggravating factor is the higher value of the bribe in comparison with that is in normal cases. Factually the wrong determination of the frame of penalties originated from the wrong evaluation of the value of the bribe. For example several cases of bribery solved by the lower courts were appealed to the Court of Appeal for the reason that the

value of the bribe was not counted correctly, leading to the severe penalties imposed on the defendants. Through a range of Appealed Judgments by the Court of Appeal of the People's Supreme Court in Hanoi e.g. Judgment No.377/2006/HSPT, Judgment No.376/2008/HSPT or Judgment No.681/2008/HSPT, etc., the Court did check and re-evaluated the value of the bribe, then deciding to apply the less severe frame of punishments for the defendants in question.

Further, the prosecution authority and the court have sometimes not had the consensus on the matter of which frame of punishments should be applied. For instance in the case of bribery in the Ministry of Commerce in 2007, the Prosecution Authority based on the value of the bribe demanded to prosecute Mai Văn D under section 2 of Article 279 (with the second frame of penalties). Meanwhile the Court kept the view that the gravity of D's activity should be evaluated in relation with some very serious consequences that it resulted therein, such as the considerable bad effects on the area of exporting garment products of Vietnam, the terrible unfair competition of commercial transaction, the stability of the state authorities in the field, etc., so holding that the defendant should be applied the most severe frame of penalties in section 4 of Article 279. The disagreement in the matter of the penalty frame between the two authorities led to the situation that the case had returned to be investigated additionally for three times. This situation indicated the notion of the different responsible authorities on the law against bribery was still vague as well as non-consensus.

Secondly, the specific punishment chosen to be imposed on the convicted of bribery offence seemed not really suitable for the offence committed. In other words, the penalties imposed were not in proportion with the seriousness of the crime. There were two trends of sentencing unsuitable penalty namely the too lenient sentence and the too severe sentence in comparison with the danger of the crime committed. For the first trend, the court rigidly apply the law and did not consider the principle of leniency of criminal law or the court too carefully applied the provisions on the mitigating circumstances, being afraid of applying these circumstances for reducing the penalty. The court did in addition not dare to apply Article 47 of the Penal Code concerning the very much reduce of penalty in special cases, due to the scare of being responsible for wrong

application of such a provision. Consequently, the sentence was too severe for the criminals. For example the case of Ngô Quang K in 2008 dealt with by the People's Court of Haiphong city in Judgment No.60/2008/HSST was then appealed to the People's Supreme Court for the reason of too severe punishment. The Court of Appeal (in Judgment No.602/2008/HSPT) held that the first-instance court omitted to consider some mitigating circumstances of the case that are provided in Article 46 section 1 of the Penal Code, making it not to apply Article 47 of the Penal Code to (much) reduce the penalties for the defendants in case.

In contrast to the first trend, the court following the second trend tends to sentence too leniently for the convicted. This trend of sentencing has been seen clearly in some recent years. The statistics of the People's Supreme Court evidently demonstrate that the sentences that the court have made recently are still lenient in comparison with the severity of the offence as well as in relation with the State policy of fighting bribery offences. Particularly from 2000 to 2008 of 708 persons who were convicted of committing the offence of receiving a bribe, a number of 250 persons were imposed a suspended sentence thereupon, rating to 35%; 8 persons were sentenced to probation; 359 defendants were sentenced to imprisonment up to 7 years, 83 were sentenced to imprisonment over 7 years to 15 years and 8 were imposed imprisonment over 15 years to 20 years; none of them was sentenced to death penalty. The application of suspended sentence for the offence of taking a bribe has recently been popular and it seems neither sufficient solution to the situation of such an offence, nor suitable sentence for the grave nature thereof. The most popular cause of the situation of too lenient sentencing is the inadequate awareness of the necessity of fighting bribery and the insufficient evaluation of the crime's seriousness in fact. The fact that the court sometimes omits to apply aggravating factors those provided in relevant provisions to make the crime be gross namely "crime committed repeatedly", "organized crime", "causing serious consequence". Take the case of bribery in V-league 2004 as an example. The case involves several football coaches and referees who committed giving a bribe, receiving a bribe and acting as an intermediary for bribery. Such defendants' activities made the public and people interested in football very angry and caused serious effect on the sport of Vietnam. However, the penalties imposed upon the convicted seem lenient. Most of

them were sentenced to 3 or 4 years in prison, four of them were applied suspended sentence. All defendants were applied mitigating circumstances for reducing penalties but none of them were considered to get aggravating factors in spite of the fact that the crime was organized and committed in cooperation between the defendants, causing serious consequence, and some defendants even committed crime repeatedly (Judgment No.215/2007/HSST). Another example is the case of Lương Đức Tuấn và Lê Hồng Giang. The Court of Appeal of the Supreme Court in Hanoi held in Judgment No.252/2008/HSPT that the first instance court did not assess accurately the seriousness of the case, resulting in wrongly applying penalty frame and deciding too lenient penalty. The first instance judgment does therefore not fulfill requirement of the prevention and combating bribery crime. In addition, the unreliable or careless application of provisions concerning mitigating factors and reducing penalties has still been seen. According to a study by a high judicial official, some mitigating factors are often abused to reduce penalty for bribery defendants or used differently for different defendants. These are mainly factors for instance the case was of petty nature; defendants used to obtain considerable achievements in the army force, in working or in studying (Tư Vấn Nhũ1997:270-272).

*The fifth weakness is that the court limited to impose supplementary sanctions such as fines and the so-called “forbidding to hold certain official position” upon those convicted in bribery cases*

According to section 5 Article 279 of the Penal Code, the person who commits the offence of taking a bribe will be imposed the compulsory sanction of forbidding to hold certain official position after the enforcement of the principle penalty from 1 to 5 years. However the fact shows that the court rarely applied such a sanction on the defendants in case. There were just few cases in which that sanction were imposed, for instance in the case of Nguyễn Thị H, ex-judge of the People’s Court of Ho Chi Minh City, who committed the offence of taking a bribe, the defendant was imposed the sanction of forbidding to hold an official position as a public official in 3 years after the enforcement of imprisonment. The omission of the court to apply this compulsory sanction in the one hand reflects the court’s unrespectable enforcement of criminal law and makes the

provision on this sanction unmeaning in the other hand. Similarly fine was occasionally imposed upon cases of bribery through the aim of this penalty is to deprive of money that the criminals used to commit bribery offences or they obtained from bribery deals. Fine was applied with small amount in some cases. The amount of money decided to be deprived just equals to the value of the bribe in spite that the law allows the court to sentenced to a fine of at most five times of the value of the bribe. For example in case of Bùi Tiến D of PMU 18 of the Ministry of Transportation the defendants were sentenced to a fine of that the amount of money is equal to the value of the bribe (Judgment No.253/2007/HSST of the People's Court of Hanoi).

The above shortcomings of the application of criminal law on bribery cases could be explained by some reasons as follows:

*First of all, some objective factors contributed to the weaknesses*

The complicated and secret nature of bribery offences can be regarded as the first obstacle that makes the investigation, prosecution and conviction difficult. These crimes relate to high-ranking officials so the procedure for dealing with cases and the application of law are sometimes intervened by the powerful people. The intervention sometimes affects much the decision and the sentence, making the application of law improper or insufficient. Some defendants were powerful persons, using their power to scare or using money and advantages to suborn the witnesses or other defendants to give testimony in favour of them. This also made the exercises and judgments of the law enforcement authorities become wrongful. Especially the report or testimony of the value of the bribe was almost impossible to check due to the fact that the parties in bribery transaction usually gave together incorrect information in order to avoid being punished more severe. Therefore the judiciary agencies sometimes evaluate incorrectly the value of the bribe, leading to the wrong application of the penalty frame.

In addition, the vague wording of relevant provisions concerning bribery offences is one of the most obstacles for the interpretation and application of law. It sometimes makes the interpretation of law narrower or broader than what the law really calls for. The interpretation and application of the provision concerning who can be the bribed person

can be a good example illustrating this weakness. The determination of the bribed person under Article 279 is factually complicated, due to the fact that such an article only provides generally the concept of the bribed person. In several cases the prosecutor and the judges found it embarrassed and unconfident to prosecute and convict the suspect for the reason that the suspect seemed not totally match the requirement of law. For example in the case of Trần Ngọc H, ex-commissioner of the Investigating Commission of Police in Hai Bà Trưng district of Hanoi. H used his position to scare Hùng Vang who had committed illegal drug dealings, making him to give H money for escaping from being arrested. H was convicted of taking a bribe and sentenced to 20 years of imprisonment by Judgment No.552/2006/HSST of the Court of Hanoi. Then H appealed the case to the Court of Appeal of the Supreme Court with the argument that at the time of committing crime he was impossible to decide whether Hùng Vang should have been arrested or not because it was not within his official capacity and the warrant for arresting Hùng Vang was actually released by the police agency. H proved that what he committed is fraud, not bribery. His argument seemed logical and acceptable but he was in fact convicted of taking a bribe.

The law created difficulty for the court in this case due to its vague prescription of the bribed person's requirement. This weakness of law can be seen a factor causes difficulty in differentiating between receiving a bribe and some other offences namely fraud by using public position, extortion by using public position, misuse of office, etc. Criminal law on bribery offences has therefore not appeared to be a really practicable tool for the application of law in the fight against bribery. In addition, the shortage of legislative guides is another difficulty for the enforcement and application of bribery criminal law. There has been no legal document of guidelines for the application of Chapter XXI of the Penal Code 1999 since the entering into force of the Code in 2000. The interpretation and application of the relevant provisions have been mainly based on the traditional view and usage of the court and other law enforcement authorities. Case law is not legally recognized in practice, despite its helpfulness and flexibility.

Moreover, the intervention of and the extensive interest from the public and the media put pressure on the authorities' enforcement of law on bribery. Besides, although the



Constitution of Vietnam grants the judiciary independence, it is in practice the judiciary is relatively weak and not really independent. Currently, the judiciary in Vietnam is weak and is not a key pillar of the NIS (NIS Report - Vietnam 2006: 22). The Law on the Organization of People's Courts 2002 is intended to protect judges from the influence of government bodies, but the ability of judges to decide genuine independent verdicts is severely limited.

In addition to the objective factors, some subjective (inside) factors also negatively affected the enforcement of bribery criminal law. The first factor is the low level of knowledge of bribery criminal law of several investigators, prosecutors and judges. These practitioners have a limited understanding of relevant criminal law and they have not much opportunity to improve it. "Corruption cases are increasingly handled through the court system, although judges have no specific training to handle such cases" (NIS Report - Vietnam 2006: 22). This is the reason why their capacity of interpreting and applying law is still weak. It seems not only my opinion but also a practitioner's point of view when he pointed out the weakness of legal officials in solving bribery cases (Đào Văn 2006:19).

In addition the prosecutors' and judges' awareness of the necessity of the fight against bribery is still at low level. For Vietnamese legal officials the requirement of recognizing and combating bribery is higher than other groups in society. However there are still several investigators, prosecutors and judges whose attitude to such a requirement is insufficient or even neutral. In other words their view on the severity of bribery offences is improper or vague or inconsistent. They have thus not got the determinedness of fighting bribery though using criminal law. Some of them were even worried about or afraid of properly punishing high-ranking officials or powerful people who committed bribery offences. These factors led to the insufficient evaluation of bribery cases so the decisions and judgments were sometimes improper.

*To conclude*, the enforcement and application of bribery criminal law of Vietnamese courts and some other authorities in some recent years were carried out sufficiently to some extent. This proved the useful and important role of criminal law in the fight against

bribery. The success of the correct and proper judgments on bribery cases contributed to the prevention of such crimes. The wrongfulness and weaknesses of the enforcement of law were however found in some ways, clearly showing the shortcomings of the law itself and the legal practitioners. Some other obstacles also existed in the application of law on bribery, making us to think of the ways to abolish or at least to overcome.

### **3.2.2. Experiences of the Application and Interpretation of Criminal Law in Sweden and Australia**

In both Sweden and Australia, the enforcement of criminal law on bribery offences could be stated rather efficient and successful, playing an important role in the combat against such offences. Most discovered bribery cases were prosecuted and convicted sufficiently and in accordance with criminal law. Considerable results of Sweden and Australia in terms of using criminal law to fight bribery in fact were highly appreciated and recognized in several evaluation reports by or to international organizations against corruption such as GRECO and TI.<sup>155</sup> The exercises of investigating, prosecuting and judging bribery cases in Australia and Sweden seemed less difficult than these were in Vietnam. Reasons for that vary but some significant reasons could be recognized. First, the use of banking services is very popular in these countries and even it requires for some areas and employments, making the law enforcement authorities enable to check financial activities and to soon discover signals of illegal transactions or conducts. Finding evidence of bribery offences through financial checking is therefore more possible. Second, because of the development of information technique and the popular use of computer as well as the habit of saving important information in computer and some other technical tools, evidence of bribery transactions could be found easier and is more practically valuable for the enforcement of law.

#### *3.2.2.1. The Swedish experiences*

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<sup>155</sup> For instance the Evaluation Report on Sweden 2009 by GRECO, the Country Study Report on Australia 2004 by TI, the Report on the application of the OECD Convention on Sweden 2005, on Australia 2006, etc., all appreciate the efforts and results of these two countries in the application of criminal law to combat bribery offences.

Similar to the activities of Vietnamese judiciary authorities, Swedish prosecution body and court have recently accused, prosecuted and convicted successfully some high-profile cases of bribery that captivated the public and the Swedish media. The investigations, accusations and convictions of the bribery cases occurring at Systembolaget (the Swedish Alcohol Retail Monopoly) relating to nearly hundred store managers accused of taking bribes can be considered as very successful commission of the Swedish law enforcement agencies, since these cases were very systematic and relating to a range of people. Another factual example was the case occurred in 2006 at Bilprovninggen (the Swedish Motor-Vehicle Inspection) in Hedemora in which several employees were accused of taking bribes in forms of spirits, beer and chocolate from different customers (Lennerfors 2007:20-21). Cases concerning the pharmaceutical companies with much improper payment by for medical conferences and studies in exchange of the excessive introduction and prescription of their medicine were also under law enforcement exercises. For instance the case of a doctor accused of taking bribes in Halmstad in 2006 for his action of prescribing the medicine Reptiva for psoriasis to a significantly greater extent than other doctors (Ibid). The accusations and convictions of the abovementioned cases demonstrated the efficiency and the capacity of the law enforcement authorities of Sweden in using criminal law to deal with bribery offences. The role of criminal law and the application thereof in these cases was also acknowledged.

Because of the fact that there has been few bribery offences occurring in Sweden in some recent years, the law enforcement authorities have not solved these much. The number of bribery cases adjudicated by the courts is small in Sweden. For instance during 2000 to 2004 only over 10 cases of both active and passive bribery convicted per year, in 2006 (the year with the most cases of bribery recently) fourteen convictions for active bribery in both the public and the private sectors were decided by the courts and for passive bribery the prosecution led to 40 convictions (no acquittal was pronounced). In addition the cases that convicted successfully and completely were almost small-scale and less serious bribery, involving mainly low-level officials. However this does not mean that responsible authorities have not faced complicated and sensitive matters with bribery cases and scandals. The Swedish Supreme Court has acquired much experience in dealing with cases that were solved through several instances. The experience was

recorded in a report made by the Committee of Bribery Responsibility that contains detailed historical review of bribery responsibilities and presents a number of cases (Lejonhufvud et al. 2009). Cases adjudicated by the Supreme Court, which have neither been reviewed nor settled in lower instance, will be discussed below.

*Firstly*, concerning the interpretation of the acts of offering and promising of a bribe, the Swedish case law expressly indicates that an offer itself is sufficient to constitute bribery offence. The Courts of Appeal pronounced several convictions of persons having offered bribes to policemen or maritime inspectors who declined the offer and reported it (OECD Report 2005, Para.169). The World Bank case further confirms that the offence of giving a bribe is committed regardless of whether the bribe has been solicited (Ibid: Para.170).

*Secondly*, the nature of the bribe has also been regarded a factual matter through case law. Bribery provisions in the Penal Code prescribe the bribe as “a bribe or other improper reward” and the term “reward” is interpreted by the courts as anything that can be defined as a benefit, including an intangible benefit. A 1999 Court of Appeal decision confirms this interpretation when the bribe appeared in the form of sexual favours. In addition, case law indicates that bribes also covered goods other than money. For instance in a 1996 District Court judgment, the bribes offered were liquor and cigarettes to public officials; in a 1994 Court of Appeal decision, the bribe consisted of an airline ticket (OECD Report 2005, Para.171). However, a decision of a Court of Appeal in 1996 put limit on the definition of bribes, considering that the offer made by the accused was not “a promise of an economic value”. In this case a lawyer stated to a policeman: “I might be able to help you some day. One day you might need a damn good lawyer and then you have a good lawyer. We do not always lose on helping each other.” The court found that the statement was couched in general term and that the lawyer said nothing about doing anything for free or for a reduced fee. What was offered therefore was not sufficiently specific to constitute an improper reward. However, the OECD working group is in its report concerned that bribes are often informal and sometimes do not involve tangible benefits (OECD Report 2005, Para.172). The limit put in this case seems not really meet standards by the OECD Convention as well as relevant theories discussed in Chapter 1.

The next matter solved by the court was how much the bribe should be to constitute a bribery offence. Though related-bribery provisions in the Penal Code do not set any limit on the value of the advantage, the court flexibly interpreted and applied law in the matter. “Case law shows that sanctions have already been imposed in connection with small bribes (around USD 100)” (OECD Report 2005). The fact is that the courts usually hold the cases in which the benefit was of minor or spirit nature not guilty. For example in the case NJA 1981 s.477 handled by the Supreme Court, the Court held that Christmas gifts from an entrepreneur to county officials of about 100 SEK (EUR 9) annually did not constitute bribery offence. The gifts were considered small value and were given to not only a specific official. Further gift-giving in this case was done publicly. Thus gifts here were not regarded improper.

The case mentioned above also involved in the matter of “improperness” that falls under the prescription of bribery offences. Such a matter has been considered the most important in bribery cases. The current requirement of impropriety provides inadequate guidance for differentiating between bribes and acceptable benefits that promote better contacts and relation. In addition, the preparatory documents to the legislation do not contain sufficient instructions in this respect.

How have Swedish courts determined the benefit given improper or not? There were several cases express the view of the courts concerning the determination of “improperness”. In the case NJA 1981 s.1174 the Supreme Court found that a trip paid by a building company for county officials (from the south of Sweden) to go to Stockholm for an information visit that included staying the night, lunch and dinner was not improper. In spite of the evaluation that the trip was recognized more extensive than the purpose of the trip that could motivate and that certain elements of the trip were of higher standard than reasonable, the Court considered in an overall assessment that the objections directed against certain features of the trip did not weigh heavily enough and the grounds for granting the prosecution for offence of taking and giving a bribe existed but were not sufficient. Another case contains similar circumstances but the judgment was different. In the case RH 1993:74, a foreign travelling provided for local governors paying by a company was considered to be bribery. The purpose of the trip was to discuss

an establishment of a business in the municipality and any objective reason to locate the meeting in Budapest had not existed under the Court of Appeal's evaluation. The trip as a whole was considered as improper. These two cases indicated that the court did consider deeply all circumstances concerned and evaluate the cases as a whole in order to establish proper judgments. Although these two cases include some similar circumstances, the key factors were different in nature. In the case NJA 1981 s.1174, it appeared that the trip was to be formally helpful for both the company's and the municipality's business and it just occurred inside Sweden. In contrast, the second case concerning the trip provided only, at first glance, for the municipality's business. The trip in the case RH 1993:74 seemed more luxury and expensive when it took place abroad. Overall, the judgments of the Court in such cases could be regarded reasonable and convinced.

The issue of "improperness" was also discussed in some other cases. In the case of NJA 1985 s.477, there was a testamentary appointment, made by an older man, which benefited the manager of the service apartments for elderly people where he lived. The question is how such testamentary appointment was regarded as improper benefit that has been included in the criminal provision when it was not directly a concern in the preparatory work of the legislation of bribery offences. The Supreme Court pointed out that the establishment of a testament to the benefit of an employee should be regarded, as much as a gift would be, as something intended to influence on the performance of the duty. The possibility that the testament appointment would be retrieved could be a special reason for the manager of the service apartments to behave in favour of the testator's staying. If the manager as an employee had acknowledged that a certain pensioner or patient aims at leaving his or her assets by will to the employee, the Supreme Court cites, it would have been her duty to not only omit to take part in establishing such a testamentary appointment, but also make it clear for the testator that the manager is, because of her duty, not allowed to receive such an appointment. The manager should whatsoever have refrained from any kind of action that the testator could understand as consent to the testamentary appointment. If, in contrast with what has now been stated, the manager somehow contributed to the testament to take place, there is no reason to interpret the act in any other way than that she accepted a promise of a gift for herself. Through such participation in the establishment of the will, a fully accomplished bribery

offence may have been taken place. An employee's obligation to refrain from this property can, which also was pointed out by the defendants side, come into conflict with the general principal in Swedish legislation that a testator's last wishes shall be respected even when it has not been well considered. Considering the risk of that the testament give rise to suspicions concerning the integrity of the employee, disregard she took part in the setting up of the testament or not, it should not, even in this situation, be accepted that the manager should have received a property of more than an insignificant value. The investigation revealed that the accused, despite her knowledge of the man's plan, made it easier for him to get his testament done by contacting two people to help him with establishment thereof. She therefore was accused of having accepted a promise of a testamentary benefit. She was furthermore considered as having received the benefit as a reward for performing her duties. Although her act was not considered as a performance against her duties, the reward was regarded as improper by its mere risk of leading to the distrust of the public and of those living in the service-house about the service house activities and the integrity of the manager. Similarly, in the case of RH 1988:13 and the case RH 1998:100, persons employed at service-houses respectively retirement facilities were convicted of taking bribe by receiving property that left by testament from people under their care. In contrast to the above cases, in the case of NJA 1987 s. 604 with some similar factors, the Supreme Court found bribery offence not proven. In this case an elderly man left his house to a nurse who had helped him at home. The Court held that the property left by testament – an estate with belonging assets - was not considered as a reward (for the nurse's earlier performance of duties as home help service at the testator's home) in the bribery provision sense, since the testator had a desire to ensure that the farm was in a trusted person's hands. Comparing with the above-cases concerning the receipt of property left by testament, this was not considered an improper reward.

In a Supreme Court judgment of 10 July 2008 (case B 5248-06) the Court found a vehicle inspector of the State Motor Vehicle Inspection guilty of passive bribery. The inspector had accepted gifts in the form of alcoholic beverages or had been offered the chance to buy such beverages at heavily discounted prices. Those providing the benefits were representatives of local car dealers, who regularly came to the station to have vehicles

inspected. The representatives of the dealerships were sentenced for active bribery. In this case the Supreme Court interprets the notion of “improper reward” in the following way:

A reward given with the specific intent that the recipient is to grant the briber a privilege is always to be considered improper. In other cases the question of impropriety is dependent on custom and public opinion at a given time and is to be assessed taking all relevant circumstances into consideration. According to the preparatory works any transaction that on objective grounds is likely to influence the recipient’s professional basis is to be considered improper. This assessment is in turn dependent on the nature and the value of the reward in relation to the position of the bribe taker. The concept of impropriety has a wider meaning if the bribe taker is exercising public authority compared to when this is not the case. The strong demand for protection of integrity of persons that exercise public authority can in certain cases lead to the assessment that a reward is considered improper even if it is not likely - on objective grounds - to influence the recipient.

Accordingly the more detailed determination of the concept of impropriety is dependent on custom and public opinion and cannot be specified in the legal text. What is to be considered improper can change from time to time and be different in different sectors of society.

Concerning the impropriety of the advantages, in a Court of Appeal decision of 1994, a sales manager and a regional manager of a company decided to invite a Swedish public official to a trade fair abroad in which technical innovations for security systems were presented. They stated that it was in line with a general agreement according to which the company was obliged to keep the County Council informed of technical development in this field. The District Court however found no such obligation in the agreement. The Court further referred to the administrative rules governing travel for public officials, determining that if the trip had been made in the course of carrying out the official’s duties, it would have been proper. However, the goal of the trip was in this case not to promote the company in relation to the County Council and the Council was even not aware of the trip. In addition to that case, the World Bank case of bribery of foreign official is another. In this case the District Court noted that “the employees of the World Bank are not permitted to have any private interest in the projects link to the World Bank. In the OECD working group’s view, it is not clear whether the courts required a breach of the administrative rules for a bribery offence to be constituted or just considered the rules



as additional evidence for determining if the defendant's conduct was improper (OECD Report 2005: Para.173).

In fact the courts of Sweden have much experience in adjudicating cases in which a separation between the public and the private roles of the accused had to be made clearly. In the case of NJA 1958 B 6, a gift card of the value of 500 crowns that a director of a bureau received was considered to be not unreasonable high payment for some tasks he had already performed for the gift-givers. These tasks could not be considered as a part of the performance of his official duty. He was therefore not convicted of acceptance of an improper reward. On the contrary, giving and receiving a gift as a birthday present of 1000 crowns from the National Railway were assessed in the case of RH 1981:13 as bribe-giving respectively taking of a bribe. The bribe-giver was a builder and the bribe-taker was the president of the municipal employee committee and the construction committee in the city where the builder was active. They had known each other for a long time, but not been socializing. Their private relationship was thus not a justification for the acts of giving and receiving gift as a sign of the friendship.

In spite of the existence of the guidance of determining the element of "improperness" by the Supreme Court, the Swedish courts seem to face difficulties and confusion in making sentences for bribery cases. Difficulties in distinguishing everyday bribes and pure gifts led to some criticized and controversial judgements (Jacobsson 2006). The interpretation and application of law appear to be either different or insufficient to some extent. Some cases below may illustrate the situation. In the case NJA 1993 s.539 a company that sold office supplies offered employees in the public and private sectors a portable stereo "Walkman" if they ordered products from the company exceeding a certain amount. This was considered an undue advantage even though the offer was made openly and was not unusual at the time. The values that came into question were about 450 crowns and the benefit of these values was considered by the court as not insignificant, creating a considerable risk that the purpose of the offer was achieved. The fact that hundreds of the employees had used the offer also showed that it was not meaningless. Thus, the reward that was offered had to be considered as improper, even these kind of offers are not unusual and despite the fact that the offers were made fully transparent. Two

representatives of the company were convicted of bribery to pay fines proportional to their daily income. Two Justices of the Supreme Court were dissenting and found that the case, despite that it was improper from a marketing law point of view, could not be considered improper within the meaning of the offence of bribe-giving. In another case of controversial convictions what is called Mamma Mia case, TeliaSonera Company in Sweden gave invitations to loyal customers to a presentation of new products and services while providing information with the Mamma Mia musical performance. In 2006 TeliaSonera was accused of offering bribe on the ground that the event of Mamma Mia music just focused on entertainment and not on works concerning product information. The case received much interest and opposite opinions thereupon. There were some favourable arguments for the Mamma Mia case that it was a way of maintaining customer relations and was related-business activities such as customer care and PR action. The cases mentioned above were considered common in the business world. Lennerfors referred to the Mamma Mia case with implication that the accusation in the case was strongly manifested the ambiguity of the impropriety of the bribes and “much could be a bribe. To be nice is dangerous; to show gratitude is risky; to express appreciation or accept appreciation could lead to the end of your career” (Lennerfors 2007: 22-26). The grey area of bribery transactions appeared to make the accusation and conviction inconvenient and confused. It is found that “in Sweden law, there is no difference as to how to judge cases of corruption in public and private sectors. Notwithstanding this similarity in letter, private and public sectors are dissimilar. In practice, stricter rules apply to public sector officials” (Lennerfors 2007: 31).

The unclear distinction between the roles of a person as an official and as an individual in society became obstacle in dealing with some cases of bribery. It is noted that these cases often related to high-ranking officials, making the public and the media be interested therein. In the specific case the issue was campaign funding and the types of outside activities ethically acceptable for politicians. The district court found the MP guilty but the Court of Appeal rendered a judgment of not guilty. The case in question occurred during the 1991 election campaign. A Conservative Party Member of Parliament had been carrying out activities which could be regarded as corrupt. He had sent to some twenty companies a letter offering two-day consultations regarding company decisions

and economic policy measures in exchange for a payment of 8,000 SEK per day. In 1994, the district court convicted the Member of Parliament of taking bribe. The court considered that his activities were carried out within the exercise of his duties as a member of parliament and the remuneration was therefore considered bribe-taking. Unlike the district court, the Court of Appeal did however not find the advantages improper based on the argument that the activities were not part of the member parliamentary work (RH 1995: 99). The verdict of the Court of Appeal seemed to be the subject to the condemnation of the media and the public as well as politicians in Sweden (Andersson 2002: 77-78). Moreover, in 2006, the court found it not proven a case involved the head of the municipal executive committee in Malmö. The head was accused of taking bribe in form of a trip to South Africa. The District Court in the city Malmö considered the argument of the accused that what he received was a private gift from his friend. The person who offered the trip and the accused were good friends so the court found this relationship made the trip to be acceptable. From sociological perspective, an author addressed the question if invitations between friends were really considered to be legitimate (Lennerfors 2007: 26). This author also found that the public and private dichotomy will be of greatest importance since it will be seen to constitute the core of the definitions of corruption (Ibid,; 26-27). I am of the opinion that it is also of importance for the practitioners to ascertain the nature of impropriety in the same cases.

Another case of being acquitted of bribery charge is the case relating to a County Governor. In a Supreme Court judgment of 11 June 2008 (case B 1866-07) the Court held that the participation of a County Governor in a free moose hunting trip offered to her by a major forest company did not constitute passive bribery. Moose hunting is of considerable importance for the area of Sweden that the County Governor represented. Her participation was considered as a natural part of her work. The reward was therefore not considered improper. However, the acquittal seemed to be a subject to the public concerns. The fact that the County Governor was the person responsible for making decisions on how many animals would have been hunted and how much the forest could be used for making products. The hunting trip here seemed to offer for entertainment

other than for exercising an official duty. The judgment has so far been received much controversial.

In regards fault element of bribery offences, some cases may be referred to as interpretation of intent element. A fundamental prerequisite for liability is that the recipient must know that the benefit is in his possession, and it is also required that the recipient has expressed his desire to maintain the benefit for good or otherwise have the disposal over it. In the case of NJA 1958 B 6, a bureau director had received a carpet and had it lying in his home for some time before restoring it to the donor. He was acquitted from responsibility for taking a bribe, but were considered to be lacking of judgement and therefore judged of committing malpractice by not clearly marked his refusal to accept the carpet and by not immediately restoring it to the donor. In a 1986 Court of Appeal decision, the defendant argued that his offer “was only an idea that came to his mind” and proved that he did not at that time have in his possession funds offered. The court did not accept his argument since the offer has been provided to the policeman who had perceived the offer as genuine. In addition to that case, in the World Bank case the defendants argued that they had no intention to bribe the World Bank officials and thought that payments were linked to actual business events. The District Court held that “they must have realized that there was no other reason for the World Bank employees to want to have contact with them than that they would derive financial gain from the relationship”. Moreover the Court in consideration of a number of facts “regards it as beyond reasonable doubt that the defendants were well aware of what the companies and the accounts were to be used for” (OECD Report 2005: paras.167-168). Further the Commentaries to the Penal Code confirm that circumstantial evidence would be the guiding factor in determining fault element of bribery offences (Lejonhufvud et al. 2009).

Regarding the exercise of official duties, the interpretation of law did develop statute concerned to a broader meaning. As mentioned to in Chapter 2, such exercise needs not to be limited to formal authority of the employee in question. It seems adequate for the act to constitute bribery offence if the employee has a direct influence on the decisions made on the given issue. Take the World Bank case a more illustration for the law interpretation. The District Court noted that “task managers and co-financing officers at

the World Bank can exercise influence over which consultants are awarded projects assignments and what funds the projects may use” (OECD Report 2005: 181).

The next matter involves in the determination of aggravating factors of bribery offences. The provisions on bribery offences do not clarify the circumstances that make the offence gross and to be aggravated. A great deal of law interpretation is given to the courts. According to the preparatory work to the bribery legislation, an aggravated offence may be at hand for instance if the bribe taker holds a post that calls for special protection of its integrity or if that person has carried out or intended to carry out an act that is contrary to his/her duties or if he/she has caused considerable damage (SOU 1974: 37, p. 145). Further, the circumstances to be taken into account would be similar for active and passive bribery, including the amount of the bribe, the systematic recourse to bribery, the size of the advantage received, etc (OECD Report 2005, Para.157). Being based on this guidance, the court solved several cases in which the matter arose. Two published Court of Appeal judgments dealing with the question of the border between “normal” and “gross” offences can be referred thereto. In RH 1996: 30, the Court held that a person who negotiated rental agreements on behalf of an authority had committed an aggravating offence when he received 195,000 SEK (EUR 17 600) from a real estate owner. In RH 1997: 43 a reward (in form of construction services) amounting to 187,000 SEK from a building company to a technical manager did not however constitute an aggravating offence. The Court came to this conclusion after having established that the technical manager had very little influence over the decision making of interest to the briber. It should be noted that this case was adjudicated by the district court in the first instance. Accordingly the technical manager held a very responsible position concerning housing and construction. In spite that he had no formal decision right about projects of more than three basic amounts, he was regarded in this case as a key figure in deciding what company would get the contract on the old people’s home. Because of his heavy responsibility in the case the district court considered the offence as gross.<sup>156</sup> The Supreme Court’s decision seems to be contrary to the local court’s judgment in evaluating the seriousness of the offence in question.

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<sup>156</sup> Facts concerning this case under provided in Andersson 2002: 85-86.

The fact of sentencing for bribery offences by the Swedish courts has now been in concerns of not only Swedes but also some international organizations involving fighting corruption.<sup>157</sup> Penalties imposed on the defendants appeared to be still lenient, expressing a neutral view on the gravity of bribery offences. Despite the provisions in the Penal Code allow the courts to impose fix-termed imprisonment to persons convicted of committing bribery offences, the number of defendants who were applied imprisonment was very few, even in cases that contain aggravating circumstances. For instance in the case of a technical manager in Dorotea municipality received a reward (in form of construction services) amounting to 187,000 SEK from the building company Skanska, the district court held that his act constituted an aggravating offence. “The court considered the crime of such seriousness as to entail a prison sentence, but took into account that the conviction had resulted in the technical manager losing his job and he had undergone already considerable suffering. The judgment was therefore conditional sentence and day-fines (Andersson 2002: 86). One more example is the World Bank case. The Court of Appeal (in its judgement on 1 December 2005) in addition to confirming the judgement of the District Court convicted the persons involved of two additional cases of bribery. The Court considered that the committed bribery offences were very serious; the sentences were even though confirmed to 1 year and one year and a half of imprisonment respectively.<sup>158</sup> In determining the sentence the court took into account the circumstances such as the large sums of money involved (bribes of SEK 1 million), which had their origin in funds intended to assist in the construction of infrastructure in developing countries; the risk of exclusion of other consultants in the procurement; and that the criminal activity would likely have continued had the improprieties not been discovered. The Court therefore considered that the sentence should be imprisonment for not less than one year, and that the defendant who had the more active role should be given a longer sentence.

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<sup>157</sup> For instance in the GRECO Report 2009, the Evaluation Team seemed to be concerned with the fact that a large majority of the cases convicted persons had been sentenced to day-fines or a suspended sentence combined with a day fine and none of bribery offences referred to in the report led to imprisonment (paragraph 28).

<sup>158</sup> Information obtained through OECD Report 2007.

The statistics manifested in the table below illustrate the fact of imposing penalties on bribery offences.

*Table 3.6* Persons convicted of bribery offences to be imposed penalties (1998-2007) in Sweden

Year	Persons sentenced to imprisonment	Persons received conditional sentences	Persons sentenced to fines	Persons sentenced to other penalties or free/exempted from sanction
1998	2	4	9	0
1999	0	0	7	2
2000	1	2	8	0
2001	0	0	0	0
2002	2	3	8	1
2003	3	2	4	0
2004	3	2	10	1
2005	0	6	26	0
2006	0	5	49	0

2007	0	10	34	2
Total	11	34	155	6

*Source:* the National Council of Crime Prevention

According to Table 3.3 the Swedish courts have recently sentenced bribery offences to be imposed almost fines. Specifically from 1998 to 2007, of the total 206 defendants were convicted of giving and taking bribes, 155 defendants were sentenced to fines (amounting to 75 per cent of the total of persons convicted). At the same period of time, conditional sentences were decided to be applied to 34 convicted persons (rating to over 16 per cent) and only 11 defendants were punished by fix-termed imprisonment (just a little over 5 per cent).

In spite of the existence of criminal provisions on forfeiture (Chapter 36 sections 1 and 4 of the Penal Code), no cases have been imposed this measure thereon. The practical interpretation of these provisions has not been demonstrated. Along the same line, confiscation has never been applied to the briber (OECD Report 2005: paras.197-198).

*In conclusion*, the fact of the application, including the interpretation of penal provisions on bribery offences by the Swedish courts in some recent years has shown the role of criminal law in the fight against bribery. Beside the successfulness, there are still difficulties and weaknesses that negatively affected the application of law. The matters to be obstacles are mainly the scope of the definition of the bribed persons, the nature of the bribe, the impropriety of the advantage, the amount of the bribe and its impropriety, the intent, etc. Some factors can be considered as the causes of the situation. According to a report by GRECO, the legislation as a result of its general character leaves a wide margin of appreciation to the courts for developing case law but the fact that existing case law is rather limited due to the relatively low number of known cases (GRECO Report 2009: Para.81). In addition, Sweden has no specialized anti-corruption judge who has experience in adjudicating bribery cases.



### 3.2.2.2. *The Australian experiences*

Australia, as a nation with federal and state systems of law enforcement authorities and judiciary agencies, is less easy to approach. Due to the fact that I did not have sufficient time and adequate information to allow me to do research in the whole Australia, the thesis will just consider the activities of interpreting and applying the law of the High Court of Australia and the courts of the state of New South Wales. The main focus will be on experiences and issues arising during the prosecution of bribery cases and the subsequent sentencing.

As with Sweden, Australia is known as a nation with a very low level of corruption, including bribery offences. As a result, the investigating, prosecuting and adjudicating authorities have handled relatively few cases of bribery. Take the case of New South Wales, the state with the largest population among eight states and territories, as a good example. During ten recent years (from 1998 to 2007), there were only 250 charges of bribery, leading to 101 persons being found guilty by the local courts. Similarly, the number dealt with by the higher courts was 99 charges with 38 persons found guilty of bribery offences between 1998 and 2006. It appears that Australian courts do not get involve with many bribery cases. However the courts faced a certain difficulties and did have some experience of dealing with bribery offences through criminal law, including case law. Consequently a range of typical cases have been established as precedents.

The investigations, accusations and convictions of high-profile bribery cases involving politicians, high-ranking officials and police officers, for instance the systemic cases of bribery by police officers of New South Wales (Larry Churchill case, Trevor Haken case, etc.) in some years around 1986 at Kings Cross<sup>159</sup> or the case of Petroulias in the

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<sup>159</sup> See Royal Wood Report corruption NSW Police at [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME1.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME1.PDF); [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME2.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME2.PDF); [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME3.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME3.PDF); [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME4.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME4.PDF); [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME5.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME5.PDF); [http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF\\_files/VOLUME6.PDF](http://pandora.nla.gov.au/pan/56191/20060214-0000/www.pic.nsw.gov.au/PDF_files/VOLUME6.PDF)

Australian Taxation Office from 1997 to 1999, manifested the principle of legality in Australian criminal law. These cases of bribery were punished sufficiently and sentenced proportionally under the federal law or the state law.

The law enforcement and the judiciary authorities seem high-qualified and well-done in dealing with cases of bribery, in spite that the courts have no judges specialized in such crimes. Through their activities, prosecutors and judges have manifested their deep understandings of the relevant legislation as well as case law and their sufficient knowledge of legal theories concerning bribery offences. The analyses and arguments given in the judgments can be said to be profound and efficacious. The interpretation of and references to legislation and case law in bribery cases were proper, reasonable and convinced. For complicated cases, the courts in co-operation with the police and the prosecuting agencies deeply studies and considers all relevant circumstances as well as carefully finds out suitable case law for the case in question. Especially in determining some controversial and vague elements of bribery offence such as the definition and the scope of Commonwealth officials, the nature of the bribe, the element of intent, etc., the courts did analyze and evaluate the case deeply and carefully with references of several precedents as well as opinions that commonly acknowledged. The other matters relating to determination of the defendant's criminal responsibility, such as preparation, attempt, conspiracy and complicity, were also considered and used in sentencing.

The prudence and carefulness of the prosecution agencies and the courts were also manifested in the appeal and the revision of some bribery cases that contain complicated issues. The fact shows some bribery cases that were appealed several times and adjudicated by several courts through several instances. The case of Petroulias can be given as a typical example. This case was adjudicated through eight trials with many hearings and appeals during 2006 and 2008 (not including the time of investigating before).<sup>160</sup> In this case of bribery, the defendant - the former first assistant tax commissioner, considering to be promoted to the highest ranks of the Australian Taxation

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<sup>160</sup> The judgments made in dealing with this cases consist of R (Cth) v. Petroulias (No. 1) [2006] NSWSC 788; R (Cth) v. Petroulias (No. 30) [2007] 214 FLR 311; [2007] NSWSC1119; R (Cth) v. Petroulias (No. 34) [2007] NSWSC 1462; Petroulias v. R [2007] NSWCCA 134; R (Cth) v. Petroulias (No. 16) [2007] NSWSC 506; R (Cth) v. Petroulias (No. 29) [2007] NSWSC 1005; R (Cth) v. Petroulias (No. 36) [2008] NSWSC 626.

Office, was accused and then convicted of three counts in an indictment, including receiving a bribe under Section 73 of the Commonwealth Crimes Act 1914. The District Court and then the Supreme Court of the State of New South Wales faced many difficulties in adjudicating the case due to the fact that the defendant was a brilliant tax lawyer, getting high level of legal education (Master of Law) and being considered very knowledgeable. The defendant was in addition an expert in his field and committed bribery activities in a very secret and wise way. That was why he appealed his case several times. All these factors created difficulties for the courts in dealing with the case. In order to make a justifiable and convinced judgment, the Supreme Court of New South Wales did study carefully the personality of the defendant, much considering his activities at work, focusing on his relationship with other accomplices and clearly showing the relevance of his illegal activities concerning his work and the activity of receiving a bribes for several times.

The facts of applying criminal law on bribery offences were lively manifested through cases in which difficulties and problematic matters arose and solved by the courts. Experiences were also obtained through the activities of the courts in these cases.

First of all, the definition of Commonwealth official was considered a multi-faced practical issue that most commonly arose in cases of bribery. The courts have so far interpreted this concept in broader manner. Case by case the concept has been extended to new subjects. The concept of Commonwealth official has recently covered all kinds of public officials.

While originally bribery was considered to be the taking of rewards by judicial officers, it has long been regarded by the courts as extending to both judicial and ministerial officers. As a suggestion for the current law, it should also be an offence at common law to bribe a Member of Parliament, although he is neither a judicial nor a ministerial officer. For example in *R v. White*<sup>161</sup>, the defendant offered a member of the Legislative Assembly money for a vote in favour of a claim of compensation for damage caused by gold miners to land and cattle. The New South Wales Court of Appeal rejected the

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<sup>161</sup> [1875] 13 S.C.R. (N.S.W.) 322.

argument that bribery was limited to judicial officers and supported the wider statement of the offence that extended the scope of the bribe recipient to Members of Parliament. The conviction of the defendant was affirmed.

In *R v. Whitaker*<sup>162</sup> the colonel of a regiment accepted money from a firm of caterers to induce him to accept their representative as tenant of the regimental canteen. His counsel conceded that bribery extended to ministerial officers but argued that he was not a ministerial officer. The Court of Criminal Appeal held that every public officer who was not a judicial officer was a ministerial officer, thus dismissing the colonel's appeal. In this case, it was confirmed that a public officer is an officer who discharges any duty in the discharge of which the public are interested, irrespective of whether his area of work is judicial, ministerial or otherwise. The concept could also be extended to cover a military officer.

In further cases, the scope of the concept was broadened not only in terms of the function of the bribed person but also from the payment perspective. In *R v. Whitaker*,<sup>163</sup> a public officer was defined as one "who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public". This suggests that payment is an important but not a necessary factor determining who is a public officer. A West Indian case illustrated the issue directly. In *Stewart v. R*<sup>164</sup>, the defendant was an unpaid liaison officer whose duty it was to recommend to the Minister of Labour the names of agricultural workers for farm work in the United States. He received £ 7 for showing favour to an applicant. The Jamaican Court of Appeal held that he was guilty of bribery and that it made no difference that he was not a paid official or that he was not appointed under any regulation.

In addition, a number of cases in a variety of jurisdictions dealing with the issue that the recipient of the bribe was a public officer held there was no requirement that the recipient should hold any kind of continuing position. This means the court acknowledged that the bribe recipient can be a person who discharges a temporary official duty or position. In *R*

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<sup>162</sup> [1914] 3 KB 1283; 10 Cr App R 245, CCA.

<sup>163</sup> [1914] 3 KB 1296.

<sup>164</sup> (1960) 2 WIR 450.

*v. Pitt and Mead*,<sup>165</sup> an English case, the bribe recipient was held to include electors when the defendants were charged with bribing electors at a parliamentary election. Lord Mansfield held that such conduct was an offence at common law and rejected an argument that it was a matter solely for the House of Commons. Similarly in *R v. Lancaster and Warrall*,<sup>166</sup> the court held that it was an offence at common law to bribe local government electors at a local government election. The above cases present the view of the court that the bribe recipient should be considered as one who is exercising an official duty or performing a public authority rather than as a public official in a narrow sense.

Furthermore the courts have in some cases extended the meaning of a public officer to a person who is just going to hold an official position. According to the court, it is not necessary that, at the time of the receipt of the bribe, the recipient be in a position to exercise an official function. For instance in *HM Advocate v. Dick*,<sup>167</sup> Lord Young recognised that a person might be guilty of taking a bribe in anticipation of his appointment as a magistrate for services to be performed after the appointment. A similar extension was made in *R v. Brewer*.<sup>168</sup> However, this rule does not apply to former officers. This means that the court will not recognize them as bribe recipients. Furthermore it is an offence to bribe the jurors at a specific trial. This is regarded as a species of bribery, supporting the view that no continuing office is necessary for the bribery offences to be committed.

Under case law it seems that the law also covers cases where the bribed person is purporting to exercise public powers. In *Ex parte Winters* case,<sup>169</sup> the defendant held himself out as a police officer and took a bribe. His defence was that he was not in fact a public officer. The court held against him and observed that because he was officer enough to accept a bribe, he was officer enough to go to the penitentiary for so doing. This case is recognised a precedent in Australian court practice.

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<sup>165</sup> (1762) 3 Burr 1335.

<sup>166</sup> (1890) 16 Cox CC 737.

<sup>167</sup> (1901) 3 F (Ct of Sess) 59.

<sup>168</sup> (1942) 66 CLR 535; (1942) ALR 353.

<sup>169</sup> 140 P. 164 (1914) by the Criminal Court of Appeals of Oklahoma.

The second issue that the court is also concerned with is the element of undue benefit in bribery dealings. At common law, benefits could appear in tangible forms, namely money, car or house, or intangible forms such as services, promises and sexual favour.<sup>170</sup> The courts have held that benefits can be things of any form so long as they are undue. Gifts in the form of entertainment and meals could be considered “undue”. The limit of the given benefit’s value is also of concern because it will be a factor in determining whether a benefit is undue or not. In *Woodward v. Maltby*,<sup>171</sup> a gift of a book of matches containing an exhortation to vote for a candidate was held to be neither treating (because it was not meat, drink, entertainment or provisions) nor bribery because the value was so small that it could not be inferred that it was given in order, as a gift, to influence the recipient voter. It seems that entertainment and treats, which are things of small value, are not prohibited because they can hardly be regarded as having been strong enough to influence the official in question or to incline him to act in breach of duties. From the view of the courts, convictions could have been obtained for bribery of benefits valued at as little as \$200. The case *R v. Giovannone*<sup>172</sup> was an example as such.

The next noticeable matter is how the court determines the mental element of bribery. To constitute bribery offences, conduct should be committed with intent and dishonesty. It requires a corrupt purpose or a corrupt intent. In most cases of bribery, intent is found when a benefit is given or received to induce the recipient to act in breach of duty, for example, to exercise his discretion in a way the recipient would not otherwise have exercised it. More difficult is the case where the reward is offered or received as an inducement to the recipient to perform her or his duty for example to exercise discretion in the right direction. Case law has long led the court to take a wider approach. In *Williams v. R*,<sup>173</sup> a charge of attempted bribery was brought under the Commonwealth Crimes Act 1914, section 73. Blackburn J. took the view that the requirement of corruption at common law implied an intention to procure a breach of duty on the part of the official bribed but that no such limitation applied to the statutory offence. This is a

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<sup>170</sup> *Scott v State* 141 NE 19 (1923) (Supreme Court of Ohio).

<sup>171</sup> [1959] VR 794.

<sup>172</sup> (2002) 140 A Crim R 1; (2002) NSWCCA 323.

<sup>173</sup> (1979) 23 ALR 369.

narrow view of the common law. In *R v. Boston*,<sup>174</sup> the High Court of Australia recognized that it was no defence to a charge of conspiracy to bribe a Member of Parliament to show that the act requested was in the public interest. In *R v. Gurney*,<sup>175</sup> the defendant was charged with attempting to bribe a justice of the peace. The Common Serjeant told the jury that if the defendant sent the money with the intention to produce any effect on the justice's decision, his act was an attempt to corrupt. There was no requirement that the intent must be to induce the justice of the peace to come to the wrong decision. The mental element in these cases was thus required to include the intention to have any influence on the exercise of official duties.

The broader view on the issue of intent has continued to develop. In *R v. Patel*<sup>176</sup> the defendant offered money to a detective to use his influence to get a charge against a third party withdrawn. He was acquitted of bribery by the Magistrate Court on the ground that the prosecution had not proved that the gift was offered to influence the official to do something in conflict with duty in the sense of something wrong. The Appellate Division rejected this view. Feetham J.A. pointed out that, if an official has a discretion what the law requires of the official is that he exercises that discretion with sole regard to the public interest: once he exercises that discretion with regard to private interests he is acting in conflict with his duty.<sup>177</sup> In this kind of case it can either be said that there is no requirement that the gift is intended to cause a breach of duty or that taking the gift into consideration is itself a breach of duty. Whichever way the law is stated it is not necessary to show that the discretion would have been properly exercised differently in the absence of the gift (Lanham 1987: 206).

Another problem concerning the determination of intent is whether a connection must exist between the bribe and the official function of the recipient. Two different views have been taken by the courts on the point. The narrow view requires a close connection, as seen in cases such as *R v. David*.<sup>178</sup> In this case David gave a constable a travelling rug to destroy evidence found on David's premises. The court held that David was not guilty

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<sup>174</sup> (1923) 33 CLR 386.

<sup>175</sup> (1867) 10 Cox CC 550.

<sup>176</sup> 1944 AD 511.

<sup>177</sup> 1944 AD 522.

<sup>178</sup> [1931] 2 QWN 2.

of corruption under section 87 of the Queensland Code because it was no part of the constable's duty to destroy evidence. The wider view in contrast considers such connection unnecessary. Take the case *R v. Patel* (already referred to in the paragraph above) as illustrating this view. One of the grounds on which the Magistrate's Court found the detective not guilty of bribery was that it was no part of a detective's duty to decide whether a prosecution should proceed or not, this being the function of a public prosecutor. However, the Appellate Division held that a detective when discussing evidence with a public prosecutor might properly indicate his view on the value of such evidence and that his position gave him a legitimate opportunity for exercising an influence on the prosecutor. It was thus not necessary to show that the detective was discharging any duty specifically imposed by law.

One more question arising in finding 'intent' is whether the recipient cannot be found guilty on facts showing that he or she had no intention of being influenced by the bribe. Such cases as *R v. Dillon and Riach*,<sup>179</sup> *R v Mills*,<sup>180</sup> etc, contained such facts and the court held that if the recipient takes money from the giver which are intended by the giver as a consideration for furthering the giver's interest but with no intention of doing anything for the giver, the recipient would still be guilty of bribery. The court's statement seems right because bribery offences only require that the recipient receives the benefit while being aware of the giver's purpose of influencing him or her.

Sentencing is also a key court's function in dealing with bribery cases. The facts of sentencing and deciding penalties of Australian courts indicate that the principle of proportionality is really respected. The court much considered circumstances that made the crime more or less grave, choosing suitable and proportionate penalties for the defendants. Penalties imposed were considered to be corresponding with the severity of crime and suitable for the situation and the personality of the criminals. It can be seen that the courts flexibly imposed non-imprisonment punishments such as home detention, periodic detention, suspended sentence with or without supervision, community service order, fines, etc., in bribery cases, implying that imposing these penalties is to give

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<sup>179</sup> [1982] VR 434.

<sup>180</sup> [1978] 68 Cr App R 154.



opportunities for the convicted to be rehabilitated and educated with help from society. The facts of sentencing for persons convicted of bribery offences are partly manifested in statistics of penalties for such offences. Due to the fact that the High Court of Australia has not put statistics of bribery offences as a separate item, the statistics could not be reached from federal level. However the facts can be illustrated to some extent from the statistics of penalty for principle offence dealt with by the Courts of New South Wales.

**Table 3.7** Penalties for bribery offences imposed by New South Wales Local Courts (1998 - 2007)

Year	Imprisonment	Home detention	Periodic detention	Suspended sentence	Community service order	Fine	Other penalties
1998	1	0	0	1	1	9	5
1999	0	1	2	3	0	6	2
2000	1	0	0	0	1	7	9
2001	1	0	0	0	1	3	4
2002	2	1	0	0	1	5	6
2003	4	0	1	1	1	1	2
2004	0	0	2	2	2	0	1
2005	0	1	1	0	0	0	2

2006	0	0	0	0	1	0	1
2007	0	0	1	0	2	1	1
Total	9	3	7	7	10	32	33

*Source:* NSW Bureau of Crime Statistics and Research

The above statistics show that imprisonment was *inter alia* a sanction that occasionally imposed on convicted persons in bribery cases. During ten years of sentencing (from 1998 to 2007) the local courts of NSW convicted 101 persons of committing bribery offences but only nine defendants were imposed imprisonment upon (accounted for nearly 9 per cent of the total persons sentenced). Among different sanctions provided for bribery offences, fine was the sanction that imposed most popular. Particularly, by the local courts of NSW fine was imposed on 32 convicted persons (accounted for nearly 32 per cent).

According to the OECD Report 2006 on Australia, between 1984 and 2005, there were 60 cases where convictions for bribery offences of CTH public officials were obtained. Out of the 60 convictions, 33 were sentenced to terms of imprisonment, eight sentences of community service, nine imposed fines and the rest treated by different penalties. Among sentences of imprisonment, the longest term was 39 months, the shortest was seven days and the average was approximately 18.5 months. The sentences of fines ranged from AUD 500 to AUD 5 000, with an average of approximately AUD 2 066. Neither a fine nor a confiscation was ordered in any of active bribery cases under Divisions 141 of the CTH Criminal Code.

Some matters regarding sentencing by Australian Courts are still of concern. Firstly, it appears that bribery offences are still considered by the courts to be of lesser gravity and the penalties imposed were rather lenient. I am of the opinion that the courts still take a neutral view on the gravity of bribery offences. In spite that penalties provided in law for

such offences include terms of imprisonment; the courts seem unlikely to decide this penalty to be imposed upon the convicted persons. Therefore, imprisonment was only applied in few cases that were considered very serious. Even in such cases the length of imprisonment is often a short period of time. The case *R (Cth) v. Petroulias* (No. 36) [2008] NSWSC 626 can be referred as very good example. The court considered in this case such circumstances as the value of the bribe was quite big; the offence involves a very high order of objective gravity as well as gross impropriety on the part of the offender in the performance of his duties over an extended period and the offence was well-planned. Further the defendant concealed facts and directed other accomplices to do the same; as this was very close to the worst cases seen, the court decided to sentence the defendant to imprisonment but still for a term of one year and eight months only. It is noted that “the terms of imprisonment imposed in the domestic bribery cases are much lower than the available maximum penalty of imprisonment for those offences” (OECD Report 2006: Para.159). Moreover, the confiscation of the proceeds of bribery, which is regulated under the Commonwealth Proceeds of Crime Act, has rarely been imposed in bribery cases.

*To conclusion*, because of the low level of bribery, the courts and other law enforcement authorities of Australia has not many cases of bribery to deal with. However the difficulties in applying criminal law on such cases are not small and the courts have handled bribery cases with much effort. The proceeding of bribery cases took quite a long time, establishing much experience as well as various and valuable case law for the courts. The matters arising in cases of bribery offences during the proceeding and the court’s judgments then become suggestions for the interpretation of the law, the revision of the current law or the enactment of new law.

### **3.2.3. Comparative Conclusions**

By way of this review of facts and experiences of law interpretation and application for punishing of bribery offences in Vietnam, Sweden and Australia, some comparatives conclusions can be drawn

#### *Similarities*

*First*, the law enforcement and judiciary authorities of three countries all made efforts in handling bribery cases. Criminal law is resorted to as an important tool for the courts to deal with bribery offences. The law enforcement and application activities efficiently resulted in investigating, prosecuting and adjudicating high-profile and complicated bribery cases; in properly interpreting law and establishing case law; in showing the loopholes and shortcomings of the current law. The activities of the courts of three countries not only present the respect of law but also manifest the ability of flexibility of interpreting and applying law. The efficiency of the law enforcement in combating bribery offences has been acknowledged in fact.

*Secondly*, the courts and other enforcement authorities of Vietnam as well as Sweden and Australia did deal with several difficulties and overcome obstacles in interpreting and applying law on bribery offences. The shortcomings of the current law become the first obstacle for the law application, for instance the legislative technique of general description of elements of crime leads to vague understandings or some unsuitable requirements of law make it inconvenient to be applied, etc. Furthermore, the prosecutors and judges of Vietnam, Sweden and Australia all found it difficult to find proper evidence, to determine some elements of crime such as the scope of the bribed persons, the nature of the bribe or the issue of impropriety. The hidden and sensitive nature of bribery offences and relevant problems can also be attributed to difficulties for the law enforcement. In addition, the shortage of specialized and experienced practitioners in the proceeding of bribery cases is considered one more weakness in the application of law.

### *Differences*

The first difference concerns with the interpretation of law of three countries. For Vietnam the application of law seem more difficult due to two reasons: first, there is no official legislative guide for the courts and relevant authorities in practice; second, case law has not been recognized in Vietnam as an official source of law. Meanwhile Sweden and Australia authorities are supported by several preparatory works e.g. bills. Moreover these two countries, especially Australia have a system of precedents that can be a very important source for the interpretation of law.

The second difference is that the common limitation of Vietnamese prosecutors and judges is the confusion of the key elements of bribery offence, leading to the wrong prosecution or conviction of the offence constituted; while that of the Swedish and Australian courts is the determination of the act guilty or not. The activities of the courts of Sweden and Australia showed the fact that the judgments for several bribery cases had been dismissed by the higher courts for the reason that the defendant was not found guilty while he/she had been found guilty before or vice versa.

The next difference is that Vietnamese Courts seem not to have as many experiences as the Swedish and the Australian ones have in proving the element of the “bribe”, because of the limit of its definition and nature according to the law. Under Swedish and Australian laws, not only can material benefits constitute the bribe but also immaterial things can fall within that concept. Unlike these countries’ laws, Vietnamese law provide a narrower scope of the definition, making only material things enable to be the bribe. Moreover, Vietnamese law does not require the characteristic of the bribe of “improper” as Swedish and Australian laws do. In this regard, it seems less difficult for Vietnamese court in dealing with bribery cases.

One more difference relates to the focus of the courts on some basic elements of bribery offences. While Vietnamese courts seemed to pay attention on determining only the conduct of the crime and almost forgot to analyze mental element (or just analyzed other factors to imply the element of intent); the Swedish and especially the Australian courts did not only concern with the act but also concentrate on mental element.

The difference of the tendency of sentencing for bribery offences can be identified the most important difference between the three countries’ application of law. Unlike Sweden and Australia, Vietnam is experiencing significant growth in the use of imprisonment upon bribery offences. Vietnamese courts have imposed imprisonment on every cases of bribery and made suspended sentences for a few of convicted persons; while Swedish and Australian courts share the same tendency of imposing mainly fines and other non-imprisonment sanctions. There are some factors explaining this difference, such as the difference of provisions on punishments for bribery offences and the

difference of the policy of fighting bribery and the notion of the severity of such offences. For the case of Vietnam, the Penal Code provides severe sanctions e.g. fix-termed imprisonment, life-imprisonment, death penalty (imprisonment is the main among them) for imposing on bribery offences. Swedish and Australian criminal laws in contrast stipulate much less severe punishments (fix-termed imprisonment, fine, suspended sentence, etc.) In addition, it seems that the notion of the courts of Vietnam and the other two countries on the severity of bribery offences is different. This led to the difference in considering circumstances of bribery cases for sentencing and then resulted in the sentences. The facts of law enforcement of the three countries have presented the efficiency of fine and some other non-imprisonment sanctions in the fight against bribery offences.

The differences may also be found in the factors affected the effectiveness and the efficiency of the law enforcement. Firstly, the level of knowledge and the capacity of legal practitioners seem different between Vietnamese and Swedish and Australian law enforcement and judiciary authorities. For Swedish and Australian investigator, prosecutors and judges the training activities are carried out continuously, systematically and professionally. The legal practitioners of these two countries maintain a considerable concern with researching activities in law schools and even being lecturers at some universities. This could be considered a very good way to improve the capacity of dealing with legal matters in fact. In comparison with that fact of Sweden and Australia, Vietnam seems to stand at the lower level. In spite of certain efforts, Vietnamese law enforcement authorities have still undergone poor training policy and training programme for practitioners. Several prosecutors and judges do not have enough capacity for practising their works and some of them even do not like to participate in activities of improving knowledge.

In addition, the ability of independence in law enforcement activities could be regarded as another difference. It can be said that the law enforcement and judiciary authorities of Vietnam have not been really independent from other influences in their activities. According to a research of a Vietnamese author on the independence of Vietnamese courts, some factors negatively affected the independence of the courts have still been

maintained such as the so-called “Duyệt án” practice meaning approving how to judge the case in advance by judges of higher rank; or the so-called “Thỉnh án” practice and the dependence of the lower court (Van-Hoa To 2006: 425-440). These practices show “top-down” and “bottom-up” procedures those intervene in the court’s activities. Differently, the law enforcement and judiciary authorities of Sweden and Australia seem totally independent. According to GRECO Report 2001, the Swedish judges and prosecutors are independent in performing their functions and no other judge and prosecutor can influence their exercises. Similarly, the Country Report by TI in 2004 confirms the independent and highly regarded investigation, prosecution and judiciary processes of Australian authorities. Evidently this difference affected in different directions on the law enforcement and application of the three countries.

*A general conclusion* which can be given is that the application of the law on bribery offences in Vietnam, Sweden and Australia does obtain good results albeit to different extents. The three countries share and maintain some difficulties and weaknesses in performing law enforcement and judiciary functions. Factual activities present both the efficiency and inefficiency of the law as well as the legal practitioners’ functioning. Being considered the weaknesses of Vietnamese criminal law in practice and of Vietnamese law enforcement authorities as well as learning experiences from Sweden and Australia, Vietnam may overcome the difficulties and improve its capacity in the fight against bribery offences, getting good lessons for the effectiveness of the law enforcement.

## CHAPTER 4

### RECOMMENDATIONS FOR THE VIETNAMESE CRIMINAL LAW ON BRIBERY OFFENCES AND ITS APPLICATION

#### **4.1. Guiding Principles for Recommendations**

Through reviewing current criminal legislation one can conclude that the Vietnamese criminal law on bribery offences is in an unsatisfactory condition. There are still several weaknesses and loopholes that have caused problems in the application of the law. Vietnamese criminal law only deals with the most traditional and blatant kinds of bribery. Other serious types of bribery appearing more recently have not been established to be criminal offences. Some elements of the offences are provided in a narrow sense or not expressly covered in the prescription of the law, while some existing requirements seem unnecessary to be appeared in the meaning of bribery offences. In addition, indeterminate legislative language weakens the application of law. This renders the law complex and confusing. It can lead to interpreting the law on bribery in a broader or a narrower sense. In addition, responsible authorities such as the Standing Committee of the National Assembly and the court have not issued any explanatory regulation or guidance for the application of the law on crimes relating to public positions in general and bribery in particular. At the moment, there are no clear-cut guidelines for the interpretation of the bribery provisions. Consequently some confusion of the law exists as already indicated in chapters 2 and 3 of the thesis. With regard to shortcomings of the law identified, one must obviously first argues that the Vietnamese criminal law relating to bribery should be a matter of concern. Next, the provisions in the Penal Code dealing with bribery offences need to be revised and guidelines should be issued by the relevant authorities. For now, the most important duty of my research is how to design adequate and practical proposals for improving the Vietnamese criminal law on bribery.

In order to contribute comprehensive proposals allowing Vietnamese criminal law to efficiently combat bribery offences, some principles which can serve as guidance in making recommendations should be given first. These principles will be presented in terms of the requirements regarding the scope of the issues should be paid attention to,



the aim of the recommendations, the bases or grounds for the recommendations and the conditions for applying the proposals or solutions recommended.

*Firstly*, I would like to mention the requirements regarding the range of bribery issues which need amendment or formal interpretation. As indicated in previous parts of the thesis, the issues concerning bribery offences in respect of criminal law seem diverse. Several problematic issues existing among these should be resolved, varying from the shortcomings of the penal provisions directly dealing with the offences and the weaknesses of relevant provisions, to issues of criminal strategy and institutions for combating bribery offences. As a result, recommendations for Vietnam criminal law in regard to bribery offences might vary too. However, bearing in mind the ambit of my thesis, it is sufficient to concentrate on issues relating to the penal provisions on bribery offences. I am of the opinion that recommendations should cover both revisions of and supplements to the law. These should improve both the law itself and the relevant legislative techniques. New proposals should cover elements of the offences as well as criminal sanctions and related measures. Recommendations are crucial for ensuring that weaknesses and loopholes in the provisions are covered adequately. Further recommendations might cover matters arising in the interpretation and application of these provisions. This means that not only the law itself is put into focus but its practical issues are also reviewed. This extensive concern may be justified by the role of the interpretation and application of law. These activities are to show the practicability and effectiveness as well as the weaknesses of the law. Improving law cannot be sufficient without impacting on these activities. In addition, the efficiency of these activities will have a direct result in the fight against bribery offences. Attention will be paid to all the above issues. For the issues set forth to be subject to recommendations, I may design a concrete proposal or just give suggestions, depending on the importance and complication of the issue. Others loopholes of criminal law, such as the lack of providing liability for legal persons, the vagueness relating to several provisions on crimes containing similar elements to bribery such as extortion or misuse of office, stand outside my purview, because these do not seem to be serious problems from the point of view of my thesis's approach while some have already been addressed in other research.

*Secondly* the aim of my recommendations is also essentially link to proposals to be given. The first aim of my recommendations is to assert and confirm the outcomes of my research. These recommendations are more significant for the overall aim of improving Vietnamese criminal law as well as the application of the law in the fight against bribery. In other words, the recommendations should not only improve the law itself but also make its application more practicable. For these purposes, the recommendations should make the criminal law on bribery overcome its symbolic nature and become a truly practical tool for combating bribery. Proposals will be made with the aim of achieving a more modern, globally standardized, efficient and easily accessible set of bribery provisions with clear criteria for criminal liability. These finally make the bribery provisions truly effective.

*Thirdly*, recommendations for Vietnam in respect of the criminal law on bribery have to be based on both theoretical and practical issues concerning the offences. The theoretical bases comprise definitions and various theories concerning bribery offences as mentioned in Chapter 1 of the thesis. The bases also include international criminal law standards set out in the relevant Conventions. Recommendations for the amendments and application of the law should not be made without consideration of the theoretical arguments mentioned in Chapter 1 of the thesis. These are commonly recognized and affirmed all over the world. The definitions of bribery, of a bribe, arguments on the elements of bribery offences, theories on the prevalent types of bribery that have undermined such values as integrity and the stability of state organization, opinions on the criminal law's treatment of bribery, are all worthy of being considered when making proposals on the law and guidance for its interpretation. The practical aspects encompass issues of the law itself and issues arising in its application and interpretation. The practical bases will cover issues concerning the law on bribery of the countries subjected to comparative study.

*Fourthly*, the principles are also seen in the requirements and conditions for the application of proposals and solutions recommended. First of all, recommendations should take into account social conditions of Vietnam. These conditions include cultural, traditional and customary factors and social attitudes toward bribery determining what types of bribery are commonly regarded as serious acts for society and to what extent

serious bribery is condemned. These are preconditions for deciding which practices should be subject to criminalization and for establishing the penalties and criminal measures to be imposed on bribery offences. For instance in Vietnamese traditional thinking, a person purporting to be an official or leaving an official position cannot influence the performance of public duties as an official, any recommendation extending the definition of the bribe recipient to cover these persons thus not be accepted. Moreover we also need to pay attention to economic development as it gives rise to or may cause new types of bribery to appear that need to be criminalized. The growth of international commercial and business transactions between Vietnam and other countries is also to be taken into consideration when making proposals for Vietnamese law on bribery. All these factors create the need for criminalizing certain new types of bribery, such as bribery in the private sector and bribery of foreign public officials. In brief, the proposals and measures should be practical and necessary in connection with social and economical conditions of Vietnam.

More requirements need being recognized when making recommendations for revision and interpretation of the law on bribery. The existence of relevant law should be taken into account, this including the Law on prevention and combating corruption 2005 and the Law on employees and public officials 2008. Other penal provisions should also be considered such as the general provisions on criminal liability and exemptions from such liability, on the severity and applicability of different kinds of penalties, and specific provisions on other offences having similar elements to those included in bribery.

In addition, the requirements of state criminal policy towards combating bribery offences will play a very important role in the thinking on my recommendations. This policy decides what activity should be criminalized and how severe the penalty for that offence should be. The Vietnamese Government has over time made greater and greater efforts in the fight against corruption and bribery. The need for more effective tools to combat bribery is now a priority and the criminal law on bribery must contribute to the combat. In order to satisfy the needs of state policy, my recommendations will aim to make the criminal law on bribery practicable. Elements of the offences will be made easy to

recognize and prove. Further proposals for penalties and criminal measures will be given to support the prevention of and fight against bribery as required by the policy.

Moreover, Vietnamese commitments to international conventions relating to bribery offences should be taken into consideration. The implementation and enforcement of international commitments needs to be observed and constantly monitored. Currently, Vietnam is a state member of the UN Convention on corruption. Recommendations and requirements set forth under this Convention should therefore be respected. Vietnamese criminal law should be seen as an example of the fulfilment of the Convention's commitments. To ensure the implementation of the Convention, Vietnamese law needs to be reviewed with respect to such aspects as the scope of bribery practices that are currently criminalized, the elements of the offences, the penalties and measures provided for bribery offences both in kind and in degree of severity. Moreover, lessons learnt from the domestic laws of the countries reviewed as well as experiences of law interpretation and application need to be considered in connection with Vietnamese conditions. These may be lessons regarding legislative techniques, such as the technique of structuring the elements of an offence in a logical and comprehensive manner or the descriptive technique. Lessons may also be derived from substantive aspects of the offences, such as the definitions of the bribe recipient, of the bribe or of the third party beneficiary; or the use of penalties other than imprisonment for bribery offences in normal cases. In this regard, it is worth noting that considering international standards and other legal systems on bribery offences will allow us to assess the conformity of Vietnamese law, noting the differences and the reasons for them, and then allowing us to determine what is suitable for Vietnamese law. Learning does not mean imitating or copying but reasonably selecting useful notions which Vietnamese law in its current situation can work with.

The practicability of the recommended models or solutions needs to be a priority. This suggests that recommendations regarding revision and interpretation of the law should be made in connection with the situation of bribery offences and the needs of the interpretation of the law. The analyses in Chapter 3 of the thesis indicate that one of the most problematic factors causing the seriousness of the situation concerning both clear and hidden bribery in Vietnam is the weaknesses and deficiencies of present law on

bribery offences such as the fact, for instance, that elements of the offences are too complicated to be proven and the lack of sufficient legal grounds for punishing certain types of corrupting benefits. Chapter 3 in addition shows that one of the causes of the shortcomings in the application of the law on bribery cases is the vague wording of the law and the lack of interpreting regulations or guidelines.

Apart from the above-mentioned requirements, I would like to set out an exceptional principle regarding some recommendations, which is that, proposals may not be made which are based on the practical problems of the overall situation relating to bribery or the needs of the application of the law in Vietnam. Proposals in this regard may only be based on the theories and the recommendations of international conventions mentioned in Chapter 1 and the domestic law of the other countries studied in Chapter 2. I could not find the necessary information regarding the prevalence of bribery in the private sector or bribery of foreign public officials in Vietnam, due to the fact that no formal information has been published and the matters seem not to be of any concern. Some recommendations may thus not be justified by the facts. In my opinion, the need for new amendments to the Penal Code may also come from theoretical arguments that are commonly accepted. Moreover matters should receive attention when they come from the requirements of international law as well as the need for globalization and integration. Further the law of other countries on these issues may illustrate and support the need for law reform, especially as Vietnam now has political and economical relationships with these countries.

The next requirement relates to the techniques of writing the law on bribery. Traditional legislative techniques that are familiar to Vietnamese people will be respected when I design a new structure for the offences and prescribe its elements. I am however of the opinion that proposals for amendments should bravely leave traditional but deficient techniques, due to the fact that these have made the current law vague and inefficient. These techniques include designating the offences of giving a bribe and acting as an intermediary for bribery without any prescription of the elements of the offence because of a wish to avoid any repetition of the elements of the similar offence of receiving a bribe, of providing an offence without a clear definition, or of defining an offence

without any fault element as this is not seen as necessary. I take the view in this respect that all requirements of what constitute a bribery offence should be captured in fully descriptive terms. As I mentioned in Chapter 1 in respect of the relevant Conventions, detailed descriptions of bribery activities can be seen as necessary standards for domestic legislation. A criminal law on bribery will be comprehensive and adequate if it defines specific bribery offences in a way that make them easily recognized. Detailed and specific penal provisions will be an even more useful tool in Vietnam where knowledge of bribery is still at a low level. From my point of view, clearness and detailed specifications are among the priorities when revising the law on bribery. These are also needed to avoid the uncertainties in the law that violate the principle of legal certainty.

The current provisions on the offence of giving a bribe (Article 289) and the offence of acting as an intermediary for bribery (Article 290) in the Penal Code are very simple and uninformative in this regard. These provisions show the weaknesses arising from the lack of good prescription of the elements of offences. For the sake of making more comprehensive provisions, definitions of such offences need to be set forth in the Penal Code. Consider further the fact that the law on bribery offences still make prosecution difficult or even impossible when some elements of certain offences are provided with too specific requirements including, for example, the requirement that the bribe recipient must engage in *abuse of office* when he receives a bribe, or that the bribe is to make the position holder do or not do a *particular thing* in the briber's interest the exercise of his duty. The law on bribery needs to be amended in ways that make elements of the offences easier to prove. Bribery activities should be provided via descriptive technique albeit in combination with cross-references. This will make the line between criminal and innocent conducts clearer. In addition, the incomplete forms and completion of a bribery offence will also be determined easily. Moreover the prescription of the offences should cover the necessary elements only and unnecessary requirements should be removed. In the current law some elements are not part of the essential nature of bribery offences but are mere conditions, like the requirement that the offender has already been disciplined for the same act or has already been convicted of one of the offences of corruption and his criminal record has not been remitted. The technique of providing such requirements

as alternatives to a requirement regarding the value of a bribe when that requirement unfulfilled seems illogical. I will mention this again and give a specific recommendation.

In addition, the knowledge and capacity of judicial officials in Vietnam will be taken into account when I make proposals for revision and interpretation of the law, because law should not just be a piece of paper but should be usable by knowledgeable and capable enforcers.

Now I turn to requirements for proposals regarding criminal sanctions and measures to be imposed on bribery offences. As indicated in Chapter 1 of the thesis, both the theories and the international Conventions agree on the need for suitable and sufficiently severe penalties for such offences. The Conventions recommend a penalty system that should be effective, proportionate and dissuasive in dealing with bribery. In Chapter 2 I analyzed and commented on the penalties and other criminal measures under the current criminal law of three countries, focusing on Vietnamese law. Chapter 3 shows the weaknesses of these penalties and measures under Vietnamese law as well as details regarding their imposition. Considering their deficiencies, these penalties and measures seem not really fit the theoretical base or the recommendations of the relevant Conventions. They are also different from the systems of the other countries. The Vietnamese penalties should be amended and their imposition needs to be formally guided. My proposals for new penalties and measures will be made consideration taking into account the standards mentioned in Chapter 1 and the deficiencies indicated in Chapter 2 and illustrated in Chapter 3. In my opinion, proposals in this regard have to be sure that any new penalties will be appropriate to the nature of bribery offences. Such offences are of a corrupt nature and their aim is to obtain benefits through improper influence on the performance of official duties. Accordingly benefits are the tool and the end of bribery practices. The key point is thus designing a penalty system that definitely treats such offences in a way that make convicted persons lose all their benefits. Others who want to commit bribery should foresee (when reading the law) economic loss if they break the law and this should have a deterrent effect. Penalties will imply dissuasive purpose in this light. This is also recommended in the relevant Conventions and illustrated in the criminal law of the other countries.

Recommendations are further made in consideration of the current over-providing of imprisonment for bribery offences in Vietnamese law. I prefer the trend of making the imposition of imprisonment less frequent and strengthening the use of other penalties. Finally, the most important requirement for any proposal of new penalties is the respect of the principle of proportionality. The principle requires a proportion between the gravity of a bribery offence and the severity of the penalties it receives. It also requires compatibility between the penalties for the various bribery offences and comparability with penalties for other offences of a similar penal nature. In the light of the principle of proportionality, the available penalties for bribery offences under the current law of Vietnam seem somewhat too severe. I am of the opinion that such offences are serious and should be dealt with by sufficiently severe penalties. However they should be considered less serious than crimes against the life of persons or against the nation and the state. I will therefore recommend abolishing some overly severe penalties from the bribery provisions and adding some less severe ones. Other countries' system such as those of UK, the US, France, Australia or Sweden show that penalties for such offences are often comparable to those for such offences as theft, fraud, extortion. I share the view of these law systems. Further, from my point of view the penalties established for each offence should not be the same, because I consider that receiving a bribe is more serious than the other bribery offences.

In addition to proposals for penalties, recommendations for other criminal measures will be given. Lenient measures that encourage criminals to report their bribery practices and support law enforcement authorities in the investigation and prosecution of bribery seem required to be strengthened.

Finally it is worth noting that recommendations for revision and interpretation of the law will only be useful if they are considered simultaneously, taking into account relevant measures and changes, e.g. changes of the other related laws and law enforcement mechanism, because the proposals are systematic. It is more practical for Vietnam to rectify all of its legislative deficiencies at the same time so as to enhance the law's consistency and efficiency.



## **4.2. Particular Recommendations**

### *4.2.1. Recommendations for the Revision of Bribery Provisions in the Penal Code*

#### *4.2.1.1. Recommendations concerning the offences*

*Concerning the elements of bribery offences in the current law, I make the following recommendations:*

*First of all*, due to the fact that the key definition of the bribe recipient has not been expressly covered in the provision on receiving a bribe, the nature of the offender does not clearly appear. To fill in this loophole, Article 279 of the Penal Code should be amended by using the phrase “Any position holder or authority holder” instead of phrase “Those who abuse their positions and/or authority” as prescribed in the present law. The requirements concerning and the clear list of these persons is needed in order to help identify the bribe recipient in practice and differentiate the offence of receiving a bribe from other crimes containing similar elements, thereby avoiding incorrect or controversial decisions in respect of the bribe recipient as indicated in Chapter 3 of the thesis. Following the relevant Conventions and the criminal law of Sweden, Australia and some other countries, all possible categories of public officials and employees should be covered in the definition of the bribed person in order to avoid, as much as possible, loopholes in appear criminalization of public sector bribery. The ‘key feature’ of these persons is the exercise of a public function or duty. The law should be extended to include payments to induce an official to use his influence, whether or not the award of specific business is within his authorised duties.<sup>181</sup>

I take the above notion to make the next recommendation concerning the bribe recipient. Article 279 should include the act of abusing a position or authority to influence other person for a corrupt benefit, currently a separate offence found in Article 284 of the Penal Code, considering it as a kind of receipt of a bribe. Such activity is basically the conduct of a higher ranking official in influencing a lower official’s performance of duty for his

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<sup>181</sup> See for example the interpretation of Australian law in Chapter 2 and the UK and the US law on bribery offences in Chapter 1 of the thesis.

or her private gain. The argument for this inclusion is that this offence is also committed by a position or authority holder and the act is the same as receiving a bribe. The only difference is that under Article 284 the offender abuses his position to influence another position holder to exercise a public duty in the giver's interest. The similarities between these offences cause difficulties in understanding the law. The greatest difficulty is the determination of criminal responsibility for the giver in the case where he/she gives benefit to persons under Article 284. This person is in principle considered the accomplice of the position holder and is found guilty under Article 284, not being the briber under Article 289. However it is more difficult when he gives a benefit to a person but that person is neither a public official nor a person who may influence another position holder as desired. The receiver is of course found guilty of fraud but what responsibility can be imposed on the giver? Theoretically the giver's act is regarded as conspiracy to commit the offence under Article 284. But Vietnamese criminal law only provided for attempt, not conspiracy. The question then arising, too, is with whom he commits the offence. The separation of the offence found in Article 284 results in difficulties determining the role and responsibility of the giver. Moreover, statistics by the Supreme Court shows that cases heard under Article 284 are very few in number. Between 2000 and 2009 only 14 cases were adjudicated by the court and no cases were resolved in 2002, 2004, 2005, and 2008, although much more prosecuted cases brought into the court.<sup>182</sup> This partly shows the difficulties in determining the offence. Considering these matters, the definition of the bribe recipient should be extended to include the position or authority holders under Article 284. This inclusion will also avoid any misunderstanding of the difference between the activity in question and the activity of receiving bribes, which often happens in practice.

Regarding the definition of public position and authority holders within the meaning of bribery offences, a proposal for a new provision giving a clear and detailed list of these persons, in the way Swedish law does, would not be suitable in the context of the Penal Code of Vietnam. In other words this is not the traditional technique of Vietnamese penal law and the new provision would be isolated. Moreover a more general definition of

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<sup>182</sup> Source: Bureau of Summarized Statistics of Vietnamese People's Supreme Court.

these persons covering all offences relating to public positions does exist under Chapter XXI of the Penal Code. The better way to deal with the issues would be the enactment of an explanatory regulation by the Standing Committee of the National Assembly or guidance by the Supreme Court: a specific definition could be provided. The definition of public official should depend on the status of the official rather than the scope of his duty. In respect of the definition of the bribe recipient, I again identify such a person via three requirements mentioned in Chapter 1 of the thesis: (i) he or she holds a public position or carries out a public authority in an agency or an organization by appointment, by election, by assignation or under a contract; (ii) he or she has authority to make or to have influence on the making of decisions that may have an effect on the rights or benefits of other people; and (iii) he or she holds the position or authority at the time of the offence.

The concept should also be interpreted in connection with Article 277 of the Penal Code, Article 1 of the Law on prevention and combating corruption and Article 4 of the Law on employees and public officials. The definition should, in my opinion, include position holders in the Vietnamese Communist Party, the Vietnam Fatherland Front, components of the media and other unions, organizations and agencies. This would also include the more standard list of public employees at the central, provincial, district and commune levels; ministerial employees at all levels; the State Audit of Vietnam; in State-Owned Enterprises; in the People's Procuracy and the Government Ombudsmen. The definition should cover the five basic branches of public employees: elected officials; employees of political and socio-political organisations; administrative and non-business agency staff; judges of People's Courts and prosecutors of the People's Procuracy; and supporting personnel in the military and police forces. The interpretation of definition and features of the bribe recipient will be very helpful for the investigation, prosecution and conviction of bribery offences in Vietnam.

*Secondly*, the *actus reus* of bribery offences in the Penal Code of Vietnam needs to be specified. As I have mentioned in previous parts, the act element is one of the major weaknesses of the current law on bribery even though the role of such element is very important in establishing the offence. In my opinion the more specific and clear the act is,

the easier to prove the offence. I thus recommend that different and specific acts should be provided as the *actus reus* of bribery offences as follows:

Receiving a bribe will include receiving a benefit or accepting an offer of a benefit or asking for (soliciting) a benefit.

Giving a bribe will include giving a benefit or offering a benefit to a public position or authority holder or accepting a solicitation for a benefit by a public position or authority holder.

Acting as intermediary for bribery involves the act of being a contact person between the briber and the bribed person helping them establish a bribery contract and/or carry out such contract under the parties' demands or conditions.

The above activities entirely match the activities set forth in the relevant Conventions as well as those provided in the domestic law of many other countries, including Australia and Sweden. The analyses of these acts in Chapters 1 and 2 may be used for their interpretation.

*Thirdly*, the culpability of persons who are engaged in bribery should be clearly expressed in the bribery provisions. In other words, the fault element of bribery offences should be expressly covered in the definitions. Such coverage needs to appear in an amendment to the bribery law due to the fact that the prosecutor and the court often omit to address the fault element in their indictment and judgment. A clear showing of the intent element in the bribery provisions will be useful in the context of Vietnam where awareness of the fault element and of its significance is still at a low level.

*Fourthly*, the definition of the bribe should be extended to immaterial things such as votes, aid, consent and sexual favour. Under present law the bribe only includes material benefits. In contrast several Vietnamese authors, as mentioned in Chapter 1, argue that bribes may be intangible and immaterial things, as long as these meet the need of the recipient and can influence the performance of public functions or duties. The Vietnamese Government takes the view that the current narrow definition is a major deficiency of the law, now corrupt practices are committed in very complicated ways and

the benefits that are of a corrupt nature vary. They are often immaterial and sometimes it is very difficult to determine whether the benefit is material or immaterial (VCLEPG 2006: 14). This is a correct statement in connection with the situation of bribery in Vietnam drawn in Chapter 3. Moreover, by virtue of Article 2(5) of the Law on prevention and combating corruption, “corrupt benefits” are defined as “material and immaterial benefits that the position/authority holders obtain or may obtain through corrupt practices”. In addition, international criminal law standards and the domestic law of other countries such as Sweden and Australia support the idea of such broader coverage. I agree with the idea of extending the definition of the bribe to cover immaterial things. The extension will broaden the criminalization of bribery and make the fight against it more effective. Under an amendment of this kind, the bribe should be interpreted to include advantages of any kind that are not permitted or required by any statute currently in force and that place the position holder in a better position in any economic, legal or personal respect. The interpretation of the bribe should also make it extend to illegal things like drugs or illicit goods, as these objects are actually given in practice and can clearly benefit the official. Further, the bribe needs to be provided for in the way to make the line between criminal and non-criminal acts clearer. “Laws often fail to provide a clear distinction between gift-giving and bribery” (Ching-hsin Yu and I-chou Liu 2005:68). This is the situation of Vietnamese criminal law at this time. Moreover, the law will be comprehensive if the nature of the bribe is defined. The bribe should be thus provided with an “improper” nature as recommended by relevant Conventions and provided for under Swedish law. As regards the bribe I finally recommend that any revision of the law will describe the bribe by way of the phrase “improper benefit of any kind”.

*Fifthly*, the situation where the public position or authority holders obtain or attempt to obtain a benefit for a third party should be clearly expressed in the Penal Code. The fact is that Vietnamese agencies have not issued any guideline for the interpretation of this issue, despite the fact that the law does not specifically provide for it. For a long time, understanding of the issue was viewed through the traditional perception expressed in the commentaries on the Penal Code. A real legal basis has not been given. This does not meet the requirement of the principle of certainty of criminal law. The bribery provisions

in the Penal Code should be amended to cover the situation where the bribe is received for or given to the third beneficiary. The model for covering this issue can be taken from relevant Conventions or from Swedish or Australian criminal law. My proposal is that the amendment should be effected by adding an expression like “for himself or for any one else”. In addition to the revision of law, interpretation should make clear that the bribe may be received or enjoyed by any other person the position holder is aware of or allows to receive it.

*Sixthly*, in the current bribery provisions some requirements do not express the nature of bribery offences, including the requirement that the offender has already been disciplined for the same act or that the offender has already been convicted of one of offences of corruption but his criminal record has not been remitted under Article 279 or the requirement that the offender has repeated the act of bribery more than once under Articles 289 and 290. Such requirements relate to the personality (bad character) of the offender. The technique of providing these requirements as alternatives to the requirement of the bribe’s value when this requirement is unfulfilled (the bribe being valued at under two million VND) seems unusual. I have never seen the like in any system known to me. Further these requirements make the constitution of the offence based on the past and personality of a person which seems unfair to that person. In my opinion the offence should only constitute based on its own nature. The above requirements may be regarded as aggravating factors but not as elements of the offences. I therefore recommend removing them as elements of bribery offences. I totally support a more general view of a Vietnamese scholar that the Penal Code as a whole should be amended in such a way that all requirements allowing the bad characters of an offender to be part of an offence should be removed (Nguyễn Ngọc Hòa 2006: 188-190).

Based on the above recommendations on the elements of bribery offences, I shall now give some proposals for amending the law, structuring them so they also serve as definitions of offences. My proposals are formulated as follows:

#### *Receiving a bribe*

“1. Any position or authority holder who intentionally, directly or through an intermediary, receives or accepts an offer of or solicits an improper benefit of any kind, for himself or for anyone else, in order to do or not do something for the briber’s interest or at the briber’s request, in one of the following circumstances:

- a) The benefit is valued at between 2 million and under 10 million VND; or
- b) The benefit is valued at less than 2 million VND but the act causes serious consequences;  
will be sentenced to...”

*Giving a bribe*

“1. Whosoever intentionally, directly or through an intermediary, gives or offers or accepts a solicitation for an improper benefit of any kind to/from a position or authority holder, for himself or for anyone else, in order that the position or authority holder do or not do something for his interest or at his request, in one of the following circumstances:

- a) The benefit is valued at between 2 million and under 10 million VND; or
- b) The benefit is valued at less than 2 million VND but the act causes serious consequences;  
will be sentenced to...”

*Acting as intermediary for bribery*

“1. Whosoever intentionally acts as an intermediary in establishing and/or carrying out an agreement on giving and receiving an improper benefit of any kind, for a position or authority holder or for anyone else, in order that the position or authority holder do or not do something for the briber’s interest or at the briber’s request, in one of the following circumstances:

- a) The benefit valued at between 2 million and under 10 million VND; or
- b) The benefit is valued at less than 2 million VND but the act causes serious consequences;  
will be sentenced to...”

*In addition to proposals concerning the elements of bribery offences in the current law, I also make recommendations for criminalization of some special types of bribery*

*Firstly, private bribery should be criminalized in conformity with international commitments and trends.*

Under current law bribery offences are limited to the public sector. The bribe recipient can only be a position/authority holder in the public sector and bribery is to influence the exercise of public duties. The current law contains major gaps or loopholes in this regard for several reasons. Clearly private bribery can be committed by actors in the private sector and this type of bribery is becoming more common worldwide. Considering economic development in Vietnam and the concomitant bad effects, I suspect that bribery in private sector has been occurring in Vietnam for some time. The opinions given in Chapter 1 of the thesis seem unanimous on the existence and danger of private bribery. Arguments were also made in the same chapter in favour of the criminalization of such bribery. Recommendations for criminalizing private bribery have been set out in various Conventions. The criminal law of several countries also illustrates the point. As a member of the UN Convention, Vietnam is required to fulfil its commitments by implementing provisions on private bribery. There are two models for criminalizing such bribery. Some countries such as Sweden and the UK combine public and private bribery and make no distinction between these types, while others such as Australia and France formulate private bribery as separate offences from public bribery. Which would be suitable for Vietnam? I prefer the latter for two reasons: first, private bribery has its own features that should be expressed specifically in separate provisions; second, the latter would make it easier to establish less severe penalties for private bribery for the reason that such bribery needs to be regarded less serious than the public type. For the sake of these advantages, I propose the provision of private bribery as a separate offence under the Penal Code.

As the concept private bribery is not familiar with Vietnamese criminal law, I do not give a concrete definition of the offence in this thesis. I only draw some characters of the concept as backgrounds for establishing bribery offences in the private sector in the



future. *First*, it is necessary to criminalize both active and passive bribery in the private sector. *Second*, private bribery offences should only be limited to economic, financial and commercial activities in the private sector. *Third*, the receivers must be employees in the private sector. The passive actors in private bribery offences can be persons who direct or work, in any capacity, for private sector entities and having the principal's trust in doing an assignment or a duty. *Fourth*, the *actus reus* of bribery offences in the private sector should be designed in the same way as that of the offences in the public sector. *Fifth*, the private bribery offence should require an element of breach of duty by the bribee. In other words, the bribe recipient accepts a bribe to act or refrain from acting in a manner that is contrary to his principal's interest betrays the trust and loyalty expected of him based upon the contract between them. The act can only be dangerous in such situation. *Sixth*, the fault element of private bribery is also intent. *Final*, in consideration of the situation of bribery in Vietnam, private bribery offences should be considered less grave than the public ones.

*Secondly*, considering that bribery of foreign public official is a matter of concern all over the world, this should be specified as a separate offence in the Penal Code.

This type of bribery has in principle been covered in the penal provisions dealing with bribery offences. The general provisions on the applicability of the Penal Code allow the bribery provisions to be applied to activities that fulfil the elements of bribery offences and these include the giving a bribe to foreign public officials by Vietnamese citizens inside or outside Vietnam and receiving a bribe by a foreign public official in Vietnam.<sup>183</sup> However, it seems that the legal grounds for criminal liability in cases of foreign bribery are not expressly covered in these provisions. Article 289 dealing with giving a bribe has no indication regarding the person to whom the bribe may be given. Article 279 covers public position/authority holders and these concepts seem to include only Vietnamese public officials and employees within Vietnamese agencies and authorities. Moreover, there are no guidelines for the interpretation of criminal law in case of foreign bribery. This may result in confusion about the legal nature of such bribery and foreign

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<sup>183</sup> Provisions on the applicability of Vietnamese Penal Code found in Articles 5, 6 Chapter 2 of the Penal Code.

bribery has often been wrongly regarded as non-criminal. This fact, in connection with the requirements that I formulated above encourage me to propose that bribery of foreign public official be specifically provided for in the Penal Code. The specification of a provision on foreign bribery in the Penal Code will be meaningful in different regards. This first confirms the existence of the offence of bribery of foreign officials. The establishment of such an offence is also meaningful in regard to the tendency of making criminal law on foreign bribery all over the world and to the implementation of the UN Convention. It is more significant that this will establish legal ground for international cooperation in the fight against bribery. The way a foreign bribery offence is established is also important. As suggested by the OECD, “countries might introduce a completely new offence, whether in its penal code or in other criminal legislation, or introduce a stand-alone statute for this purpose. These techniques might be simpler in the long run and might give more prominence to the new offence(s)” (OECD Glossary 2007:15). Taking this suggestion into consideration in connection with the requirements set forth in previous part of this chapter and after reviewing the Swedish and Australian law, I prefer the Australian model. Accordingly bribery of foreign public officials should be dealt with in a specific provision of the Penal Code. The model is suitable for the specification of the distinguished elements of such type of bribery. It will also be meaningful in the way that the offence covers all the relevant definitions and defences. It is noted that the definition of foreign public officials should be established in a broad way so as to include officials of public international organizations.

For a concrete proposal of the issue, I thought of whether both giving and receiving bribery to/by foreign public officials or only active bribery of that kind should be criminalized. Considering the law of Sweden and Australia, I find both models, each has its reason. In my opinion, criminalization of foreign bribery needs to ensure a fair and equal treatment to everyone. Foreign bribery is dangerous for society not only because of the giver’s act but also due to the acceptance of receiving or asking benefit by foreign officials. Therefore it is necessary to criminalize both giving and receiving bribery of foreign public officials. This ensures the principle of equality in Vietnamese criminal law.

Bribery of foreign public officials in Vietnamese law needs to contain some special elements, for instance the bribe giver must be Vietnamese citizen and the recipient must be public officials of a foreign country or an international public organization. Other elements of the offence should be the same as they are in domestic bribery offences. Foreign bribery offence should be perceived as serious as the offences having domestic features in the current law.

Considering the above criteria I made a proposal for foreign bribery offence as follows:

*Bribery of foreign public officials or officials of international public organizations*

“1. Whosoever intentionally, directly or through an intermediary, gives or offers or accepts a solicitation for an improper benefit of any kind to/from a foreign public official or an official of any international public organization, for himself or for anyone else, in order that official do or not do something for his interest or at his request, in one of the following circumstances:

- a. The benefit is valued at at least 2 million VND; or
- b. The benefit is valued at less than 2 million VND but the act causes serious consequences;

will be sentenced to...”

2. Any foreign public official or official of any international public organization who intentionally, directly or through an intermediary, receives or accepts an offer of or solicits an improper benefit of any kind, for himself or for anyone else, in order to do or not do something for the briber’s interest or at the briber’s request, in one of the following circumstances:

- a. The benefit is valued at at least 2 million VND; or
- b. The benefit is valued at less than 2 million VND but the act causes serious consequences;

will be sentenced to...”

Furthermore, one should think of providing certain defences concerning foreign bribery that are in compliance with international customs as this offence have international features. From my point of view, some defences commonly accepted in criminal law throughout the world may be set forth in Vietnamese law, for example (1) the conduct is lawful in the foreign public official’s country, and (2) the conduct is to ensure legal and essential rights of a person, such as to ensure the right of life or health protection.

*Thirdly*, amendments of bribery law should be made in consideration of gift-giving as a corrupt practice. The potential risk of such practices having an influence on the operation of public functions evidently exists. I have already mentioned this risk in Chapter 1 of the thesis. I would like to once again conclude that by gift-giving it means a potential threat of undue influence. Gifts of a certain value may influence the exercise of official duties and bribery activities may be hidden behind the tradition of gift-giving. The Vietnamese situation of hidden bribery as analyzed in Chapter 3 illustrates the threat. How can the law prevent it? It is suggested that “[o]ne possible solution to the problem is to impose strict limits on the value of the individual gifts and the frequency or total value of gifts that an official may receive per year (OECD Glossary 2007: 38). As I mentioned in Chapter 1, the French Penal Code adopts this solution. I appreciate the idea of setting reasonable limits to the gifts that may be received by Vietnamese position/authority holders, often based on the value or amount or each type of benefit. In addition to this solution, criminalization of gift-giving of major value should be considered. Such limited criminalization may protect the genuine gift-giving tradition and remove a possible front for concealed bribery. It further protects against and combats bureaucracy in the exercise official duties and the environment in which bribery can flourish will be destroyed. The way to establish such an offence may be gleaned from other countries’ laws. Some countries like the US, the UK, France, and Australia have criminalized such corrupt practices. In the criminal law of Australia, the US and the UK, “other corrupt benefits” are less serious offences which could be committed where a benefit is provided as an inducement or reward that tends to influence the performance of official duties. Chapter 2 indicates that Australian law formulates corrupting benefits offences in a very clear and

comprehensive manner, considering these as offences relating to bribery. To some extent Swedish law covers this in its provisions on bribery offences, as it only requires a mere influence on the exercise of official duties. The French model of criminalizing the unlawful taking of interest of a certain value, mentioned in Chapter 1, also seems significant and worth studying. I recommend that the Penal Code of Vietnam should include a provision dealing with gifts of major value, considering such gifts as “other corrupt benefits” or “unlawful interest”. The Code should provide that it would be an offence to give or receive other corrupt benefits, provided that the act has a substantial tendency to influence the exercise of public duties by the public position/authority holder in question or others in comparable positions. A certain limit amount for such benefits should be established under the Penal Code and this amount would be fixed pursuant to certain administrative rules. In order to support this proposal, a code of conduct that regulates the gifts and the value of such gifts that may be received should be issued.

#### *4.2.1.2. Recommendations concerning penalties and other criminal measures*

*Concerning the penalties and other criminal measures for bribery offences, I have the following proposals:*

*First*, considering giving a bribe and acting as intermediary for bribery are less serious offences than receiving a bribe, I recommend providing less severe penalties for such offences. The facts and analyses in Chapter 3 show that imprisonment is sometimes unnecessarily applied or suspended sentence is overused. Both these deficiencies are consequences of a lack of less severe penalties provided for in bribery provisions. The court has few options when deciding on the penalties in bribery cases. A variety of penalties will make criminal law more effective in the fight against bribery. I am of the opinion that giving a bribe and acting as intermediary for bribery may occur in the situations where there is certain mitigating factors, making the offence less serious than usual, such as giving bribe in case of being demanded or in case of small payment. In such situations it is not necessary to apply imprisonment.

My recommendation is that principal penalties for bribery offences should be extended to include fines, which ought to be imposed in minor cases of bribery. These are cases in

which the value of the bribe is small or the cases have some mitigating circumstances. The fine should also be provided as an additional penalty that must be imposed in cases where another penalty has already been imposed as the principal penalty. It is because that fine cannot be imposed both as principal and additional penalty on one offence under Vietnamese law. Regarding fines, my proposals are as follows: (i) the fine should be regarded as one of the principal penalties for bribery cases formulated under articles 289(1) and 290(1) of the Penal Code and the offenders will be subject to a fine of between one and five times the value of the bribe or of at least 10 million VND in cases where the bribe is of a non-pecuniary nature; and (ii) the fine should be regarded as an additional penalty that *will be* (not “may be” as provided in current law) imposed on any bribery case and the fine imposed will be the same as provided under articles 279(5), 289(5) and 290(5) of the Penal Code.

Furthermore, to have more choices available to be imposed in bribery cases, I recommend probation be added to the list of the principal penalties for giving a bribe and acting as intermediary for bribery under articles 289(1) and 290(1). Such a penalty is in my view a good, neutral solution to situations where imprisonment seems too severe and a suspended sentence appears inadequate. Providing fines and probation as principal penalties would be significant change in current trends on the imposition of penalties in bribery cases in Vietnam which has been analyzed in Chapter 3. These penalties will be wonderful alternatives for an unnecessary use of imprisonment and insufficient imposition of suspended sentence. Combining the proposals for fines and probation, I finally recommend that penalties under articles 289(1) and 290(1) should consist of “a fine of between one and five times the value of the bribe or of at least 10 million VND in cases where the bribe is of a non-pecuniary nature, or probation for a period of between 1 to 3 years or fixed-term imprisonment...”

*Secondly*, in comparison with the severity of penalties for public bribery, I recommend less severe penalties should be provided for bribery offences in the private sector. In my opinion imprisonment, probation and fines should be different choices for the court to apply. Different from the model of designing four frames of penalties for bribery offences in the public sector, there should be only two frames of penalties for private bribery ones

and the maximum penalty is not over 7 years of imprisonment (the highest level for a serious crime under Vietnamese law). It should be more noted that penalties for receiving a bribe need to be provided for at severer levels than giving a bribe.

*Thirdly*, considering foreign bribery offences being as dangerous as the domestic offences, penalties provided for these offences should be similar to those for domestic bribery. This is also the model of providing penalties for both foreign and domestic bribery offences in many countries.

*Fourthly*, regarding the penal sanctions for offences of giving and receiving other corrupt benefits, I recommend less severe penalties than those for bribery offences. There should be only one frame of penalties for such offences. The penalties will reflect the gravity of the offences as less serious crimes. My proposal is that the specific penalties may be a fine between one and five times the value of the corrupt benefit, probation for a period of between 6 months to 3 years or fixed-term imprisonment of between 3 months to 3 years.

*Fifthly*, in contrast to proposals for more lenient penalties, I note some aggravating circumstances in bribery offences which need to be treated more severely as follows:

For giving a bribe, the offence should be considered gross or aggravated when the benefits that the giver obtains or expected to obtain are of major value or significant advantage. As I mentioned in Chapter 1, this is perceived as a more serious case in comparison with the normal offence. I consider that this circumstance contains more influence on the exercise of public duties and heavier duty in the part of the recipient and consequently gives rise to greater distortions of public function. If this cannot be regarded as an aggravating circumstance in the law, it should at least be used as a factor in the interpretation of the element “causing serious consequence” under the Penal Code. This could also be used in guidelines on deciding penalties.

In addition, bribery law should be amended to include the aggravating circumstances of giving and receiving a bribes for a breach of duty or an illegal act or a crime to be committed or for a concealment of a crime already committed, in order to treat these

cases of bribery more severely. Bribery committed in these circumstances need to be regarded as considerably more serious than that in normal cases since such offences are not about the “normal” influence on the exercise of public duties but clearly harm public interests by getting public official to engage in more dangerously illegal practices. Moreover, the situation of bribery offences in Vietnam mentioned in Chapter 3 shows there is a close relationship between such offences and other dangerous crimes such as trafficking in illegal goods, drug-related crimes and embezzlement. Bribery practices relating to law enforcement and the judicial sector have become more serious. This may be seen through the prevalence of using benefits to buy officials to escape from investigation, prosecution and conviction of a crime or to commit other crimes. This relation between bribery and other violations or crimes should be destroyed by any means, here including more severe criminal punishments. The coverage of the above aggravating circumstances under Vietnamese Penal Code indicates that the law follows an appropriate strategy fitting the requirements of the fight against bribery.

*The last* recommendation in respect of criminal measures against bribery offences is to make use of the principle of leniency under Vietnamese criminal law. My opinion in this regard has already been indicated in previous parts of the thesis. Here I develop my idea and give a more specific proposal. In connection with the requirements of the fight against bribery, the law is expected to encourage people who know of bribery practices to provide evidence against bribery offenders that is otherwise very difficult to collect. Chapter 3 indicates these difficulties in complicated situations involving hidden bribery offences. I am of the opinion that encouraging whistle-blowers and witnesses, including the bribe givers and intermediaries, to report bribery offences or any fact relating to bribery should be regarded as a priority in the strategy for combating these practices. The persons giving such evidence need to feel safe as they will be treated leniently when they volunteer to give information on the case. In the light of criminal law, defences and mitigating circumstances should be established as lenient criminal measures to support the strategy. Such a strategy will also serve to prevent position holders from receiving or asking for a bribe because of the high risk of being revealed or denounced. The cases reviewed in Chapter 3 show the effectiveness of such reports on bribery for law enforcement activities. However the current law on bribery only allows that these



circumstances may give rise to an exemption from criminal liability. It is thus not a real encouragement for people engaged in bribery to report their practices. In the light of the above arguments and facts, I recommend that exemption from criminal liability be provided for all cases where the offenders report the cases to responsible authorities before the disclosure of such cases. The exemption should be definitely laid down in the law instead of allowing the court to decide which cases may be exempted. Specifically articles 289(6) and 290(6) should be amended as “will be exempted from criminal liability” instead of “may be exempted from criminal liability”.

#### *4.2.2. Recommendations for the Interpretation and Application of the Criminal Law on Bribery*

*First*, as a general support for the interpretation and application of the criminal law on bribery, a legislative guidance should be immediately be issued by responsible authority. This explanatory document of the law should set forth guidelines for interpreting all offences relating to public positions under Chapter XXI of the Penal Code, also covering bribery offences. The guidelines will deal with such offences in a system because of relevance between offences.

With regards making this recommendation, I have reviewed the factual issues on bribery offences raised in Chapter 3 and questioned whether these facts are illustrated for the relevant theories mentioned in Chapter 1 and the current law presented in Chapter 2. Chapter 3 indicated and analyzed some weaknesses and difficulties of current practical activities. Here I would like to sum up the deficiencies before giving reasonable solutions. Incorrect prosecutions and convictions of bribery offenders often arise due to mistakes and difficulties in identifying the bribe recipient, the nature and value of the bribe, the elements of acting as an intermediary for bribery and the element of causing serious consequence all coupled with disregard of the distinction of preparation, attempt and completion of the offences; inadequate decisions on penalties and criminal measures for convicted persons, including exemption from criminal liability; and confusion between bribery and other offences sharing similar elements due to there being no clear-cut distinction between such offences as between receiving a bribe by way of a demand and extortion by abusing a public position. As indicated in Chapter 3 of the thesis, one of

the main reasons for these mistakes and difficulties is the gaps in the current law and the lack of guidelines for its interpretation. I therefore urge enactment of such guidelines. In my opinion, such guidance would be of significance at the time being for several reasons. First, the penal provisions on offences relating to a public position have been in the Penal Code since 1999 and it seems unlikely they will be amended soon. Anh there are many problematic issues which need to be dealt with. The need of such guidance also comes from the requirements of the policy regarding combating corruption. The guidelines thus need to cover all the problematic issues mentioned above. The arguments and explanations that I have put forward as my recommendations for revisions of law and that were analyzed in Chapter 2 and Chapter 3 of the thesis should be useful when composing such guidelines. As such explanations have already given in detail, it is not necessary to repeat them here.

*Secondly*, regarding the application of the law I would like to make some notes that can be considered as my recommendations. One can see that weaknesses in the interpretation and application of the law derive from incorrect perceptions and a low level of knowledge of the law on bribery. The mistakes shown in Chapter 3 in defining the offence and deciding the penalties illustrated this. For an accurate and fair application of the law, practitioners' knowledge and view on bribery should be increased. They include at least adequate knowledge of bribery law and relevant law. Awareness of the seriousness and complexity of bribery offences in the Vietnamese context also needs to be strengthened. I further suggest that a full proof of all elements of bribery offences is always needed as I have observed that some elements tend to be ignored, especially the fault element. All provisions concerning bribery offences should be respected in applying law, including provisions on additional penalties. As noted in Chapter 3 fines are rarely applied and the prohibition on holding certain positions as a compulsory additional penalty is not always imposed. The latter provision, found in Article 279(5) of the Penal Code, needs to be applied in all cases of receiving bribes.

*Thirdly*, due to difficulties in the enforcement and application of bribery law, there should be expert investigators, prosecutors and judges who could specialize in handling such cases. The law enforcement and judicial authorities should choose practitioners with good experience, a sufficient knowledge of bribery law and strong determination to solve

bribery cases. These practitioners should be trained and specialize in the criminal law on corruption. A principle in the enforcement of this are of the law is that without bodies or persons equipped with sufficient knowledge, training and expertise, there can be no efficient protection against this dangerous and hidden form of crime (GRECO Report 2001: Para.122). Moreover, an honest and well-respected judiciary has a special role to play in the application of the law on bribery. These specialized investigators, prosecutors and judges should be carefully selected and their awareness of bribery law needs to be continuously refreshed. In addition their salaries should be raised to a proper extent to ensure that the exercise of their duties cannot be influenced by improper benefits. These are lessons to be learned from countries which have succeeded in fighting corruption, such as Sweden and Australia.

*Fourthly*, the independence of law enforcement and judicial authorities should be respected and ensured. These authorities, including the court, have also faced problems due to the complicated administrative procedures in corruption cases. In addition to such procedures, the improper interventions mentioned in Chapter 3 also impact on the independence of law enforcement and application activities. I am of the opinion that ensuring the independence of the law enforcement and judicial authorities should be one of the most important priorities in the more effective use of criminal law in the fight against bribery.

*To make an end to this chapter*, I should say I have tried to make systematic and comprehensive recommendations for amendments to and interpretation of the criminal law on bribery. Such proposals and solutions are made in the light of the relevant theories and are in conformity with the international Conventions concerning bribery offences. In addition, my recommendations express the current needs of the revision and interpretation of the law. They would provide a more concrete background for further amendments and subsequent application. One sees that the recommendations given here are supported by the arguments, analyses and comparisons made in the course of this research. Such recommendations combined with the efforts of society as a whole raise the hope that bribery offences in Vietnam will be treated sufficiently and can be effectively combated by way of criminal law.

## **Final Conclusion**

Generally speaking, in Vietnam the theories on bribery offences have not received sufficient attention. Studying such theories in an international context and through a comparative manner plays an important role in raising awareness of bribery offences here. Chapter 1 of the thesis indicate that the theories concerned and international criminal law standards both considerably express common issues concerning bribery offences. Comparing all facts and ideas shows that the similarities are major and the differences are minor. It can be seen that the issues mentioned in this chapter, including controversial matters do serve as backgrounds for later analyses on the laws of Vietnam, Sweden and Australia as well as on the interpretation and application of the law in each country.

Vietnam, Sweden and Australia have paid attention to criminal laws in regard to bribery offences. Almost all bribery practices, including active bribery, passive bribery, acting as an intermediary for bribery and bribery of foreign public official are provided for with proportionate and deterrent penalties. In general, the elements of bribery offences are provided for similarly. However, several differences still exist between Vietnamese law and the two other systems, such as differences in certain elements of the offences and especially in the penalties to be imposed on bribery both in kind and in degree. These differences exist for certain reasons but the most important explanation may derive from dissimilarities in legislative point of views and criminal policies as well as from the situation regarding bribery offences in the three countries.

Practical issues addressed in the thesis show that some existing shortcomings in the laws of the three countries become obstacles for the interpretation of law and negatively impact the effectiveness of the fight against bribery offences. Where the law does not match the related theories, deficiencies and weaknesses arise in its enforcement and application. The reasonability of the theories on bribery is really confirmed by the law and the law in its turn shows its practicality through its enforcement and application. Practical issues also indicate that a number of recent problems can be observed across nearly all the systems, most dangerously with what occur in law enforcement, and that

the law enforcement and judiciary of Vietnam do not really work well. The mechanisms to tackle bribery are not systematic and poorly enforced and the role of bribery law has not been clearly seen here. Experiences from Sweden and Australia in the fight against bribery and in the application of the criminal law should be reasonably learned in the context of Vietnam.

Via both the theoretical and practical issues concerning bribery offences, one sees that the unanimity and reasonability regarding the subject may also give rise to ideas for recommendations to Vietnamese law. By making proposals and solutions in the light of the relevant theories and are in conformity with the international Conventions concerning bribery offences, the current needs of the revision and interpretation of the law is really considered. Hopefully the recommendations would provide a concrete background for further amendments to and subsequent application of the law.

Finally, one should say that bribery is ultimately an attack on decision-making processes in society and has negative consequences in all its forms. It is worth noting that bribery is a problem that cannot be prevented and combated in isolation. Anti-bribery law should only provide a background for more important structural reforms. Specifically, criminal law is necessary but not sufficient for controlling bribery. In addition to revision of the bribery criminal law, other measures should be taken simultaneously. A suggestion seems to fit the fight against bribery in Vietnam that in order to prevent and combat bribery offences, anti-corruption efforts should be coordinated with another international campaign - the fight against organized crime, particularly money laundering and international criminal enterprise in general. Anti-bribery efforts should involve all sectors of society (Rose-Ackerman 1999: 190).

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