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Understanding of the criminal policy of "Both bribery and graft will be punished together" and governance strategy:According to the Amendment of Article 390 of the Criminal Law

Ziyi Zhao
Beijing Normal University, Beijing, China
Corresponding author, E-mail: 202322040175@mail.bnu.edu.cn

Abstract
The criminal policy of "Both bribery and graft will be punished together" has problems of understanding and application in judicial practice. The criminal policy of "Both bribery and graft will be punished together" is not equal to "both bribery-takers and bribery-givers are heavily punished", and the judicial practice should focus on the investigation and punishment of active bribery rather than the punishment. The results of empirical analyses reveal the contradiction between judicial practice and criminal legislation, and the implementation of policies should pay attention to the dilemmas existing in judicial practice. China wants to effectively punish bribery offenses, that is, we should correctly understand the criminal policy of "Both bribery and graft will be punished together", and we should adhere to the governance idea of "strict but not stern" for crime of offering bribes, and adopt the governance strategy of strictly investigating bribery and severely punishing those who accept bribes should be adopted in judicial practice.

Keywords
Both bribery and graft will be punished together; strict but not stern; Investigate and punish bribery seriously; Amendment (XII) to the Criminal Law

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1 Introduction

Power corruption is a serious social problem in current China. With the continuous deepening of anti-corruption efforts in our country, our criminal policies have been constantly adjusted, and criminal legislation and criminal justice have also continuously intensified the punishment for bribery crimes. Compared with the Criminal Law of 1997, the Criminal Law Amendment (IX) prominently highlights the stricter punishment for bribery. First, it has set the conditions for the application of lenient punishment for special self-surrender in the crime of bribery. Generally, if a briber voluntarily discloses the act of bribery before being prosecuted, they can only be given a lighter or mitigated punishment. However, for those with relatively minor criminal circumstances, only if they have made significant meritorious contributions or played a key role in solving the case will they be granted a reduced or mitigated punishment. Second, fines have been added to all types of bribery crimes, which reflects the orientation of the criminal policy of "giving equal weight to punishing bribery and accepting bribes" in criminal legislation.

Nevertheless, the phenomenon of bribery offenses has not been effectively curbed, and the Party and the State have proposed to increase the punishment of active bribery offenses in order to form a high-pressure situation of investigating and dealing with active bribery.[1] In 2021, the Central Commission for Discipline Inspection and the State Supervisory Commission, in conjunction with a number of units, issued the Opinions on Further Promoting the Investigation of Active and Accepted Bribery Together, which emphasised that it was necessary to "iImprove and perfect the institutional norms for punishing bribery, and resolutely investigate and deal with bribery";[2] in 2022, General Secretary Xi Jinping further emphasised at the sixth meeting of the 19th Central Discipline and Supervision Commission of the Communist Party of China (CPC) that it was necessary to "adhere to the principle of heavy deterrence, high pressure, and long-term deterrence, and adhere to the principle of investigating active bribery and acceptance of bribery together"; [3]In the same year, the Supreme Prosecutor issued the "Guiding Opinions on Strengthening the Handling of Active Bribery offenses", which requires that "the opinion requires that procuratorial institutes should adhere to the main tone of "investigating both bribery and corruption together" and intensify the punishment of bribery crimes.". [4]Recently, the National People's Congress passed the Amendment (XII) to the Criminal Law, in which an important content is to further increase the punishment of active bribery offenses. However, some scholars have proposed that increasing the punishment of active bribery offenses may not necessarily be able to effectively curb bribery offenses,[5]and the revision of the penalty configuration of active bribery offenses cannot be simply "just punish it strictly", but the crime of bribery should be incorporated into the overall criminal law configuration structure of bribery crimes for systematic improvement, [6]so as to achieve a comprehensive and optimized effect in crime governance. The author agrees that the statutory penalties for the crime of bribery should not be blindly increased. This is because "investigating both bribery and

1 Long, Z. Z., Xie, X. G., "Governance of Active Bribery offenses in the Threshold of Criminal Integration", in Journal of Law, No. 2, 2024, p. 141.

2 Website of the Central Commission for Discipline Inspection and National Supervision: "The Central Commission for Discipline Inspection and National Supervision, together with relevant units, jointly issued <Opinions on Further Promoting the Investigation of Active and Accepted Bribery Together>", accessed on 9 May 2024 at https://www.ccdi.gov.cn/toutiao/202109/t20210908_249687. html.

3 Xi, J. P., "Comprehensive Strict Governance of the Party Explored a Successful Path to Jumping Out of the Historical Cyclical Rate by Relying on the Party's Self-Revolution", accessed in Seeking Knowledge, Issue 2, 2023, p. 6.

4 Online Publishing Office of the Supreme People's Procuratorate: "Guiding Opinions on Strengthening the Handling of Cases of Bribery Crimes", accessed on 9 May 2024 at https://www.spp.gov.cn/spp/xwfbh/wsfbt/202212/t20221209_595081.shtml.

5 He, R.G., "The Logical Paradox of the Rule of Law of 'Parallel Punishment for Active and Passive Bribery'", in Jurisprudence, Issue 10, 2015; Fan， J.M., "Review of "Strictly Punishing Active Bribery to Curb Bribery Crimes", in Journal of Zhengzhou University (Philosophy and Social Science Edition), Issue 6, 2017; Zhao, J., "Quantitative Research on the Governance Strategy of Bribery Crimes", in Legal Studies, Issue 6, 2022; Liu, Y.H., "Rational Reflection on the Pan-Penalisation and Heavy Penalisation of Criminal Legislation in the Age of Misdemeanours", in Law Review, Issue 2, 2024;

6 Qiu, S.P., "Systematic Improvement of Criminal Law Configuration of Bribery offenses - Expanded by the <Criminal Law Amendment (XII)>", in Comparative Law Research, Issue 1, 2024, p. 36.

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accepting bribes" does not necessarily equate to "punishing both bribery and accepting bribes severely". Adopting a conviction standard and sentencing scale that are commensurate in severity and leniency for bribery and accepting bribes may not necessarily lead to a reduction in the occurrence of bribery crimes. On the basis of insisting on placing bribery and accepting bribes on an equal footing in punishing bribery crimes, and taking the current situation of crimes and their governance as the basis, an effective governance model should be formed.

In conclusion, this article intends to, based on the criminal policy of "investigating bribery and accepting bribes together", analyze the penalties imposed by judicial authorities in China on bribery and accepting bribes crimes since 2022, and in combination with the amendments to the Criminal Law Amendment (XII) to the crime of bribery, explore the scientificity and rationality of the criminal policy of "investigating bribery and accepting bribes together" compared with the principle of "punishing both bribery and accepting bribes equally", and how to understand this policy in order to effectively curb bribery crimes.

2 The active and passive bribery judicial governance of the current situation of empirical analysis

Many researchers in China's theoretical and practical circles have explored the setting of statutory penalties for the offence of active bribery. The viewpoints that support the strict punishment of active bribery believe that active bribery is the source of corruption, and bribery and accepting bribes are in a relationship of cause and effect, [1]so the guidelines of combating passive bribery and active bribery should be established, and corruption should be eradicated from the source;[2] Some people also hold the view that bribery has serious social harm, and intensifying the crackdown on the crime of bribery is an inevitable requirement for curbing corruption at its source. After the criminal policy of "equal punishment for bribery and accepting bribes" was introduced, especially with the further strengthening of the punishment for the crime of bribery in the "Amendment (IX) to the Criminal Law", the concurrent fine was added, and the conditions for lenient punishment of the crime of bribery were strictly limited. [3]After the criminal policy of "investigating bribery and accepting bribes together" was proposed, it was even more emphasized that bribery crimes should be severely cracked down on. However, whether the severe punishment for the crime of bribery has achieved good governance results remains a question that should be considered. At present, the academic circle in China has conducted fruitful theoretical analyses on the governance methods and paths of the crime of bribery under the criminal policy of "investigating bribery and accepting bribes together". However, few scholars have paid attention to the judicial practice of handling the crimes of bribery and accepting bribes from the perspective of empirical analysis, as well as the practical feasibility of the theory of the crime of bribery they advocate. Therefore, through the empirical research method, the author took PKULafa as the search platform, set the case causes as the keywords of "bribery" and "accepting bribes" respectively, and found 101 cases of bribery crimes and 180 cases of accepting bribes crimes. Given that bribery and accepting bribes involve a large number of charges, in order to avoid analytical errors, the author takes the two main crimes of bribery, namely the crime of bribery and the crime of accepting bribes, as the research objects.

1 Miao, Y.S., "Why advocate punish active bribery and punish passive bribery at the same time", in People's Court Daily, 8 May 2015, p. 6.

2 Zhang, Z.H., "Study on the Legislative Problems of the Offence of Passive Bribery", in Legal Studies, No. 5, 2009, p. 170.

3 Xie, W.Y., "Increasing the Punishment of Active Bribery offenses from the Legislative and Judicial Levels", in People's Procuratorate, No. 12, 2012, p. 22.

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After deleting the charges such as "bribery of influential people", "bribery by units", "bribery by taking advantage of influence", and "bribery by units", 64 cases of "bribery" are selected. Taking 118 cases of the crime of accepting bribes as samples for comparison, it was found that the judicial governance characteristics of the crime of offering bribes and the crime of accepting bribes are as follows:

2.1 The overall sentence for bribery offenses is light, and the judicial misdemeanour rate is high

This paper, referring to the standards for defining minor crimes by scholars such as Guo Lirong and Gao Yong, considers crimes with a term of imprisonment of less than 36 months in judicial practice as minor crimes. [1]Based on the statistics of the sample data in this article, it can be seen that among the 64 cases of bribery crimes, 56 cases were sentenced to less than 36 months in prison, with a minor crime rate of 87.5%, which is far lower than the setting of the maximum legal sentence of 60 months for the first paragraph of bribery crimes. Among the 118 cases of bribery crimes, 75 cases were sentenced to less than 36 months in prison, with a minor crime rate of 63.56%, which is lower than the 36-month maximum statutory sentence set in the first paragraph of the bribery crime. The rate of minor crimes for both the crime of bribery and the crime of accepting bribes is over 50%. From the above analysis, it can be seen that the degree of leniency in sentencing for both the crime of bribery and the crime of accepting bribes is relatively high, and the overall sentencing is relatively lenient (see Figure 1).

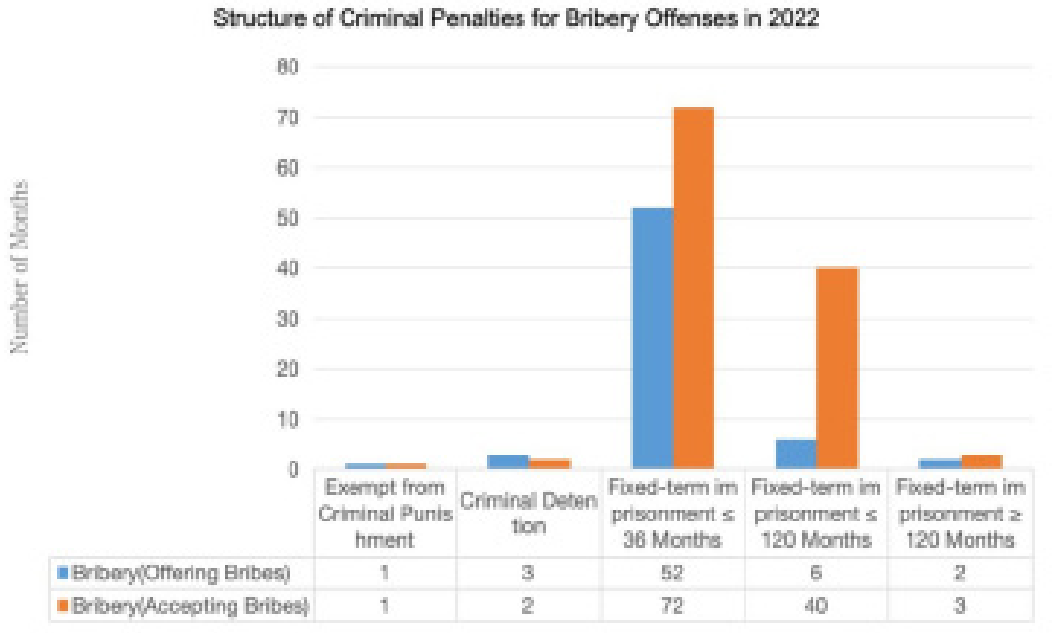


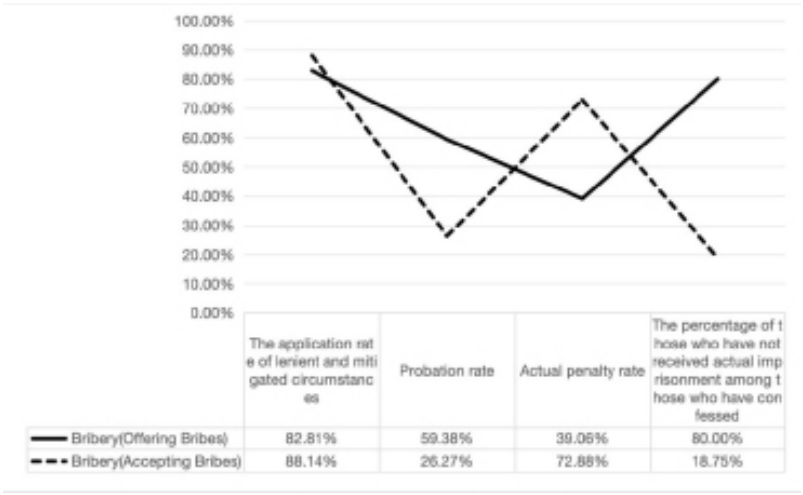
Figure 1. Structure of penalties for bribery offenses in 2022

1 Guo, L.R., Research on Criminal Policy of Misdemeanours, China Legal Press, 2023 edition, pp. 76-82; Gao, Y., The Construction of China's Misdemeanour Legal System, Law Press, 2019 edition, p. 131. It should be noted that: i. "misdemeanour" in this article refers to judicial misdemeanour, i.e. a sentence of less than 36 months' imprisonment as determined by a judicial officer in accordance with the law; ii. the application of probation is based on the defendant being sentenced to a custodial or fixed-term imprisonment, and only the length of the sentence is counted here, without regard to whether it is a probationary sentence; iii. the length of the sentence is in months; iv. The prison term is measured in months; iv. For sentences with multiple offenses, only the prison term for the offence of active bribery is counted.

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2.2 The crime of bribery and the crime of accepting bribes generally have mitigating or lenient circumstances, among which the actual sentence rate of the crime of bribery is relatively low

Through the analysis of the above sample data, among the 64 bribery cases, the courts adopted the sentencing suggestions of leniency or mitigation proposed by the procuratorates in 53 cases. The application rate of leniency and mitigation circumstances was 82.81%, among which 38 cases were granted probation, and the actual sentence rate was only 39.06%, with a clear trend of leniency. Among the 118 cases of accepting bribes, the courts adopted the sentencing suggestions of leniency or mitigation proposed by the procuratorates in 104 cases. The application rate of leniency and mitigation circumstances was 88.14%, among which 31 cases were sentenced to probation, and the actual sentence rate was 72.88%, almost twice that of the crime of accepting bribes. The difference in the actual sentence rate between the crime of bribery and the crime of accepting bribes lies in that in bribery crimes, there are a large number of defendants or criminal suspects who confess and plead guilty and accept punishment. However, in the crime of bribery, the percentage of those who have not been sentenced to actual punishment and have confessed and accepted punishment is 80%, that is, a large number of bribers are given lenient treatment due to confession and are granted probation without being deprived of their personal freedom. In the crime of accepting bribes, the percentage of those who have not been sentenced to actual imprisonment and have the circumstances of confession and acceptance of punishment is 18.75%. That is to say, even if a large number of bribery crimes have the circumstances of confession and acceptance of punishment for leniency, they cannot be granted probation. Overall, the sentencing structure for the crimes of bribery and accepting bribes is to some extent imbalanced, which is consistent with the conclusion drawn by Zhang Yong in his 2017 research on the actual sentence rates of the crimes of bribery and accepting bribes.[1] Furthermore, there are also cases where the crime of accepting bribes is not punished, is given a lighter or mitigated punishment, is exempted from punishment, or is granted probation. This indicates that through the general leniency rule of the General Provisions of the Criminal Law, a large number of crimes of accepting bribes have been mitigated or even given probation. (Figure 2).



	The application rate of lenient and mitigated circumstances	Probation rate	Actual penalty rate	The percentage of those who have not received actual imprisonment among those who have confessed
Bribery(Offering Bribes)	82.81%	59.38%	39.06%	80.00%
Bribery(Accepting Bribes)	88.14%	26.27%	72.88%	18.75%

Figure 2. The application rate of lenient punishment for the crimes of bribery and accepting bribes

1 Zhang, Y., "The Basis and Mode of the Criminal Policy of Parallel Punishment of Active and Passive Bribery", in Jurisprudence, No. 12, 2017, p. 54.

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2.3 The recovery rate for active bribery offenses is low overall

To further understand the judicial practice handling of bribery crimes and accepting bribes in recent years, this article searches for relevant judgments on bribery crimes in "Peking University Legal Treasure", respectively setting the case causes as the key words of "bribery" and "accepting bribes". The charges for inquiry include bribery, bribery by units, bribery to influential individuals, bribery to units, accepting bribes, accepting bribes by units, and accepting bribes by taking advantage of influence. Collect the first-instance judgments from 2015 to 2022. [1]Among them, the number of judgments involving cases of active bribery offence is 2105, 3081, 3463, 2270, 1529, 886, 330 and 88 respectively; the number of judgments involving cases of passive bribery offence is 3944, 8411, 6856, 4633, 4052, 3130, 1136 and 153 respectively.[2] In terms of the number of collected judgments, since the criminal policy of "equal punishment for bribery and accepting bribes" and even "investigating bribery and accepting bribes together" was proposed, the annual ratio of the number of bribery crime cases to the number of accepting bribes cases (that is, the prosecution rate of bribery cases compared to accepting bribes cases) has been 53%, 37%, 51%, 49%, 38%, 28%, 29%, and 58% respectively. The above data indicates that the number of cases where bribers have been investigated and dealt with is far lower than the number of bribers sentenced to criminal penalties. The prosecution rate of the crime of bribery only remained at around 50% at the beginning of the criminal policy of "equal punishment for bribery and accepting bribes", and has since shown a decreasing trend year by year. This indirectly indicates that a considerable number of bribers have not been held criminally responsible in judicial practice. (Figure 3).

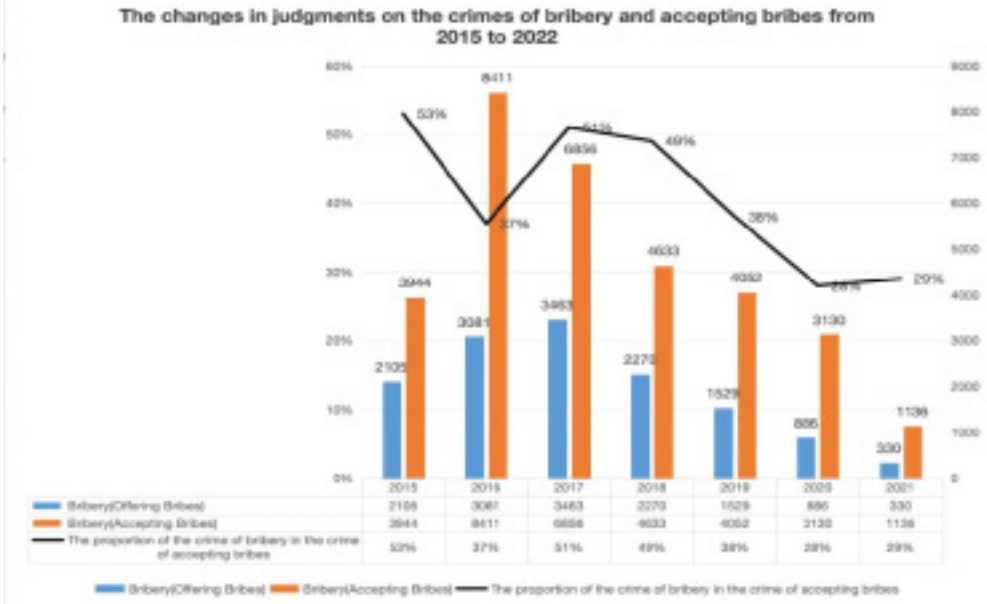


Figure 3. Changes in judgments on the crimes of bribery and accepting bribes from 2015 to 2022

1 The reason for starting the statistics from 2015 is that the criminal policy of "equal punishment for active and passive bribery" was formally proposed in 2015.

2 The decline in the number of judgments in 2021 and 2022 is due to a sharp drop in the number of judgements made public by the judiciary on its own initiative on case retrieval platforms such as the Judicial Instruments Network, rather than a significant drop in the number of bribery offenses.

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The above text, through the review and analysis of some judgments on bribery and accepting bribes during 2022, aims to illustrate the current situation of judicial governance of bribery crimes in China and thereby conduct in-depth thinking on the current judicial activities against bribery crimes in our country. From the above perspective, through the analysis of the various data in the previous text, it can be found that there are problems existing in the current judicial governance of bribery crimes in our country, such as the relatively high rates of judicial minor crimes for both the crime of bribery and the crime of accepting bribes, the relatively high application rate of suspended sentences for the crime of bribery, the extensive application of lenient and mitigating circumstances resulting in abnormally lenient sentences for the crime of bribery, and the overall low prosecution rate for the crime of bribery. Overall, the penalties for the crime of bribery and the crime of accepting bribes vary significantly, with the punishment for the crime of bribery being more lenient. This indicates that under the criminal policy of "investigating bribery and corruption together", more attention should be paid to the judicial governance activities of judicial organs. It is not enough to merely focus on the "correction" at the criminal legislative level. Therefore, the author will explore the reasons for the above situation and explain the criminal policy of "investigating bribery and corruption together" based on these reasons.

3 Reasons for the ineffective implementation of the "active and passive bribery are investigated together" in terms of severe punishment of active bribery

As mentioned earlier, under the criminal policy of "investigating bribery and accepting bribes together", the judicial penalty measures for the crime of bribery show the characteristics of lenient criminal penalties. Among the judicial judgments sorted out in this article, a large number of procuratorial suggestions applying lenient, mitigated penalties and suspended sentences have been adopted by the courts. More than half of the bribers have not received criminal sanctions. Even those who have been criminally pursued have mostly been sentenced to lenient or mitigated penalties. This reflects the "weakness" of criminal law in regulating bribery crimes in China's judicial activities.[1] Some scholars hold that it is not so much the judicial enforcement of bribery crimes that has led to the "failure" of criminal policies on bribery crimes as it is that the traditional criminal policy orientation of "valuing bribery over bribery" is still implicitly contained in the criminal policy of "investigating both bribery and bribery together", which makes judicial authorities still tend to focus on cracking down on bribery crimes when combating bribery crimes. When dealing with the crime of bribery, a "lenient" policy is adopted, which makes the crime of bribery present the characteristics of lenient punishment and high exemption rate. This is obviously contrary to the principle of fairness of the law. [2]

However, the ineffective enforcement should not only be attributed to the impact of criminal policies, but also take into account the criminal composition of the bribery crime itself and the practice of the procuratorial organs in investigating and handling bribery crimes. From the perspective of the criminal composition of bribery crime itself, bribery and accepting bribes are a kind of concurrent crime. The legal interests in-

1 Gao, C.G., "The Effectiveness of "Bribery from a Lighter Perspective" from the Perspective of Empirical Research", in Politics and Law, No. 5, 2016, p. 48.

2 Yang, Y.H., "Empirical Analysis and Reflection on Judicial Control Strategies of Active Bribery offenses - Taking 106 Criminal Judicial Documents as Research Samples", in Social Scientist, Vol. 7, No. 7, 2020, p. 123.

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fringed upon by both are the non-buyability of the official acts of state functionaries. However, the statutory penalties stipulated in the criminal laws of various countries for the crime of bribery are generally lower than those for the corresponding crime of accepting bribes.[1] From a legislative perspective, since the subject of the crime of accepting bribes is a state functionary, their act of accepting bribes plays a greater role in infringing upon the irreplaceability of official duties. Therefore, it is reasonable to appropriately reduce the statutory penalty for the crime of accepting bribes. China's criminal Law has not yet formed symmetrical provisions on the elements of the two crimes and the conditions for punishment. From the perspective of constitutive elements, the crime of bribery requires "seeking improper benefits", while the crime of accepting bribes does not have such a requirement. This makes it possible for the briber to be convicted in a bribery crime for the purpose of seeking proper benefits.

Bribery and accepting bribes are crimes without victims, characterized by high concealment. Both parties involved in the bribery often have the awareness of anti-investigation and have taken preventive measures. Both the briber and the briber-giving are beneficiaries of the act of bribery.[2] They form a community of interests under the act of bribery, and their behavioral choices are often driven by certain incentive motives, [3]If the briber is not given certain benefits and the punishment for bribery crimes is blindly increased, it will lead to the formation of an offensive and defensive alliance between the briber and the bribery-giving, thereby increasing the difficulty of investigating and handling bribery crimes.[4]When the punishment suffered by the active briber is increased, it may be based on the wrong concept of self-protection and the bribed person to reach an alliance of attack and acceptance, which undoubtedly gives the judicial organs of the detection of the work caused by the difficulties. Therefore, in judicial practice, the investigating authorities often need to first declare the leniency policy to the bribe giver in order to obtain his statement, so as to get the key breakthrough on the bribery offence. After the statement of the bribe giver has been effectively verified, the inspection authority shall fulfil the degree of leniency, even if it is transferred to the examination and prosecution, the proposed leniency or application of probation recommendations of the trial authority will mostly be adopted, so many bribe givers are often dealt with in a lenient manner.

The judicial staff on the front line of the case also recognized the above view. China's detection of bribery offenses still rely on the confession of both parties to the bribe, the lack of one side of the verbal evidence, the facts of the bribery offence is very difficult to identify, [5]so from one side to open a breakthrough in order to obtain a confession is crucial. Investigative work is a very confrontational work, the briber who can confess with a positive attitude is a very necessary strategy with practical significance. If the return to the case can truthfully confess to account for the facts of active bribery with the bribe-taker and severely punished, sentenced to relatively heavy penalties, will be firm resistance to active bribery, the difficulty of detecting bribery cases will be greatly increased. Therefore, the judicial practice in the treatment of active bribery is generally light on the issue of active bribery is severely punished "poor implementation" of an important reason.

1 Zhang, M.K., "Principles and Techniques of Criminal Law Amendments--Annotation on the Improvement of the <Criminal Law Amendment (XII) (Draft)>", in Chinese Journal of Criminal Law, No. 5, 2023, p. 18.

2 Fan, J.M., "Review of Strictly Punishing Active Bribery to Curb Bribery Offenses", in Journal of Zhengzhou University (Philosophy and Science Edition), No. 6, 2017, p. 37.

3 He, R.G., "The Logical Paradox of the Rule of Law of Parallel Punishment for Active and Passive Bribery", in Jurisprudence, No. 10, 2015, p. 158.

4 Liu, Y.H., "Rational Reflection on Pan-Penalisation and Heavy Penalisation of Criminal Legislation in the Era of Misdemeanours - Taking <Criminal Law Amendments (XII) > as a Perspective", in LLR 2024, No. 2, p. 17.

5 Miao, Y, "From "Declaring War on Bribery" to the Distance between Theory and Practice", in Legal Daily, 30 September 2007, p. 002, p. 1.

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4 Understanding and application of the criminal policy of "active and passive bribery are investigated together"

The criminal policy of "investigating bribery and accepting bribes together" seems to still revolve around the concept of "severely punishing bribery and increasing the severity of punishment for bribery". Some scholars have thus pointed out that the origin of accepting bribes lies in the act of bribery, and bribery and accepting bribes are like "poisonous flowers blooming on the same vine". In addition to the act of soliciting bribes, there is no act of bribery without the act of active bribery, and the crime of passive bribery often originates in the lure of the act of active bribery.[1] Therefore, the sentencing mechanism for bribery crimes should be improved, and the threshold for criminalizing the crime of bribery should be lowered. However, considering the judicial practice problems existing in the above text, raising the statutory penalty for the crime of bribery and expanding the criminal circle of the crime of bribery may lead to the predicament of the inversion of the effectiveness of the prosecution for bribery and accepting bribes,[2]and further result in a tendency of excessive criminalization in the punishment of bribery crimes. This article holds that the idea of "severely punishing bribery" in the criminal policy of "investigating bribery and accepting bribes together" does not merely emphasize severe penalties for the crime of bribery, but should be equivalent to the idea of "strict but not stern" punishment. That is, [3]on the one hand, by means such as tightening the legal net, the conditions for the establishment of the crime of bribery should be improved, and the prosecution rate of the crime of bribery should be increased, so as to intensify the crackdown on the crime of bribery. On the other hand, the punishment for the crime of bribery should be mitigated.

4.1 Construct a "strict but not stern" bribery offence punishment system

China's past years on the punishment of active bribery offenses with "strict but not stern" characteristics, [4]in the criminal legislation, first of all, the threshold of active bribery offenses is lower than that of passive bribery offenses, and its entry standard is "guilty of the offence of active bribery", there is no amount or circumstance, while the entry standard of passive bribery offenses is "a larger amount or a more serious amount, or a lesser amount, or a lesser amount". is "a larger amount or other heavier circumstances"; secondly, the first statutory penalty under article 390, paragraph 1, is "fixed-term imprisonment of less than five years", and the second provides for "fixed-term imprisonment of more than five years and less than ten years", both of which are higher than the same level of imprisonment. These are higher than the statutory penalties for the same offence of passive bribery. The configuration of statutory penalties stems from the judgement of social harm, when the legislator believes that the social harm of the active bribery offence is greater than that of the passive bribery offence, the legal interests infringed by the active bribery offence are higher than that of the passive bribery offence, and its culpability is heavier than that of the passive bribery offence, i.e., the active bribery offence is subject to heavier statutory penalties. However, the offence of passive bribery is more harmful to the interests of the law, and its social harm is also stronger. The innate abusive motivation of power suggests that many active bribery behaviours are shaped by the abusive nature of public power, which suggests that the state should place the prevention and punishment of passive brib-

1 Wang, J.M., "The Criminal Legislative Dilemma of China's Bribery Offence and Its Improvement", in Contemporary Law, No. 1, 2019, p. 116.

2 Mei, C.Q., "Imbalance in the Statutory Penalty for the Offence of Active Bribery: Doctrinal Reflection and System Improvement", in Criminal Law Series, vol. 1, 2020, p. 361.

3 Liu, Y.H.: "Equalisation of the Crime Circle and Mitigation of Penalties: The Development Direction of China's Criminal Legislation in the Era of Misdemeanours", in Chinese Journal of Criminal Law, Vol. 1, 2024, p. 17.

4 Wen, D.F., "The Offence of Active Bribery in the Perspective of Criminal Policy", in Chinese Journal of Criminal Law, No. 4, 2004, p. 52.

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ery at the centre of criminal policy. In addition, as passive bribery is committed by public officials who hold public power, who are able to decide on their own whether to accept a bribe from another person, and who have more important social responsibilities than ordinary citizens, their acceptance of a bribe is more egregious than the commission of an act of active bribery, and their criminal liability should clearly be heavier than that of the bribe-taker.

Severe punishment of active bribery can certainly prevent and reduce the occurrence of bribery offenses to a certain extent, but this approach is not likely to achieve a good effect of the rule of law because it deviates from the centre of the problem. Specifically on criminal legislation and justice, on the one hand, the State should place the focus of governance on passive bribery, rather than setting heavier legal penalties for the offence of active bribery; on the other hand, in the judicial activities should not be sentenced to overly harsh penalties for active bribery. Therefore, the policy of "Bribery and accepting bribes will be investigated together" should be implemented in the governance idea of "strict but not stern", and the offence of active bribery should be treated "strictly", and law enforcement and judicial investigation of active bribery should be strictly adhered to. Increase the investigation and punishment of the offence of active bribery;[1] but also from the "leniency", through the mitigation of the penalty punishment to disintegrate the offensive and defensive alliance between the bribe giver and the bribe taker, in order to prevent the bribe giver from refusing to make a confession in order to cause the consequences of the bribe object is difficult to investigate and deal with.

4.2 Reasonableness of the change to article 390 in the Amendments to the Criminal Law (XII)

The Criminal Law amended Article 390 "Penalty Provisions for the Offence of Active Bribery" by amending the first level of the offence of active bribery from "Anyone who commits the offence of active bribery shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention" to "Three years' imprisonment or criminal detention of not more than three years". The first level of the offence of active bribery was amended from "for those who commit the offence of active bribery, they shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention" to "fixed-term imprisonment of not more than three years or criminal detention"; the second level of the offence of active bribery was amended from "for those who commit the offence of active bribery, they shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention" to "fixed-term imprisonment of not less than three years or more than ten years"; and Specific aggravating circumstances have been stipulated, limiting the many aggravating circumstances in previous judicial practice to seven. The provision of aggravating circumstances for the offence of active bribery is aimed at implementing the principle of balancing leniency and severity, i.e., restricting the State's right to impose penalties, so that only the aggravating circumstances explicitly stipulated in the law can lead to heavier penalties. The above statutory penalty adjustment reflects the legislator's attention to the sentencing of the offence of active bribery in judicial practice, and this amendment has changed the inappropriate setting of excessive statutory penalties for the offence of active bribery on the one hand, and on the other hand, it is also conducive to the better realization of the crime and responsibility of the punishment is appropriate.

1 Zhao, J., "Quantitative Research on the Governance Strategy of Bribery offenses", in Legal Studies, No. 6, 2022, p. 168.

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Since active and passive bribery are complementary offenses, the governance of active bribery needs to be considered together with the governance of passive bribery. The punishment of bribery is not a positive correlation between the "lips are dead and teeth are cold",[1] and the punishment of active bribery should pay more attention to the choice of its governance strategy. For the governance strategy of the offence of active bribery, there are two modes of punishment: symmetric mode and asymmetric mode. Scholars holding the "concurrent theory" support the symmetric mode, stressing that coordination and consistency must be taken into account in the criminal penalties of active and passive bribery, and that active and passive bribery offenses should be corresponding to each other in terms of subjective purpose, amount, circumstances and the setting of legal penalties, and even that the offence of active bribery should be abolished. Even the element of "seeking an undue advantage" should be abolished in the offence of active bribery, so that active bribery for the purpose of obtaining a legitimate advantage is also treated as an offence.[2] However, as mentioned above, the opposite direction does not mean that one party constitutes an offence when the other party necessarily constitutes an offence, and therefore the punishment for the offence of active bribery cannot be mechanically increased based on the high punishment intensity of the offence of passive bribery, and active and passive bribery will be punished in parallel.

This paper considers that the asymmetric model is more appropriate as a governance strategy for both the active and passive bribery offenses, which is consistent with the legislative model of the existing criminal law in China on the allocation of penalties for bribery offenses. Amendment (XII) to the Criminal Law incorporates the modification of the penalty allocation for the offence of active bribery into the overall criminal law allocation structure for bribery offenses, making the allocation of penalties for the offence of active bribery more reasonable. The essence of "active and passive bribery are investigated together" is to hope that by cracking down on active bribery and then punishing passive bribery "by following the vine", so as to cut off the overall chain of interests in bribery offenses, so that the leniency of the legal penalty for the offence of active bribery is conducive to breaking down the barriers of interests of the two sides of the bribery.

4.3 Adhere to the governance strategy of strict investigation of bribery and punishment of bribery

Active and passive bribery are interdependent, the same direction of profit and loss, for the two sides of the bribery offence, and therefore should adhere to the two "together to investigate". As the public power controller in the bribery offence occupies a structural dominant position, as well as the offence of passive bribery in the social harm or the legal interests of the infringement of the offence are heavier than the offence of active bribery, in the judicial activities should be insisted on the strict investigation of bribery, strict punishment of passive bribery of the governance strategy. The strict investigation of active bribery is oriented towards exposing bribery offenses, and the imposition of lighter penalties on bribe-takers or probation for those who meet the conditions is conducive to the disintegration of the relationship of trust between the bribe-taker and the bribe-taker, so as to provide prior deterrence to the bribe-taker, so that the bribe-taker "cannot, dare not, and do not want to rot". The current amendment to the Criminal Law has increased the

1 Ye, L.F., "Game Analysis and Practical Test of the Punishment Mode of Active and Accepted Bribery--Another Comment on Articles 44 and 45 of the <Criminal Law Amendment (IX)>", in LLR, Issue 1, 2016, p. 108.

2 Peng, X.L., "Suggestions for Improvement of Criminal Law Legislation on Corruption offenses in China", in Journal of Law, No. 3, 2021, p. 72; Wang Junming, "The Dilemma of Criminal Legislation on the Offence of Active Bribery in China and Its Improvement", in Contemporary Law, No. 1, 2019, p. 119.

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investigation and punishment of the offence of active bribery through the modification of the special surrender system for active bribery. The Amendment (XII) to the Criminal Law added the expression "investigative breakthrough", adapted to the changes in the reform of the supervision system, and recognised the active explanation of bribery by the bribe-giver before being prosecuted as a key role in the investigative breakthrough of the disciplinary, inspection and procuratorial authorities as a special surrender, which provided a greater convenience for the investigation and clarification of the facts of the bribery offence. However, this amendment does not explain the "before being prosecuted". The author tends to understand "before being prosecuted" as "before the public prosecution is initiated". This not only benefits the briber in confessing and returning the ill-gotten gains after entering the case procedure, but also facilitates the "breakthrough in investigation" of the corresponding bribery cases, and can also balance the relationship between the special provisions of the crime of bribery and the self-surrender system in the general provisions of the Criminal Law. In such circumstances, if the briber can truthfully confess his crime after being passively arrested, it can also be treated as a voluntary surrender, which will greatly increase the probability of the briber voluntarily confessing after being arrested.

For the person accepting bribes, it should be ensured that they receive "substantive criminal punishment". Based on the results of the judgment in the previous text, judicial authorities rarely apply probation to the recipients of bribes. Even if most recipients of bribes have circumstances such as self-surrender, confession, guilty plea and acceptance of punishment, and active return of ill-gotten gains that may lead to leniency or mitigation of punishment, they still receive substantive criminal penalties. In most bribery crimes, the recipients of bribes often have the situation of accepting bribes multiple times or even soliciting bribes. If the recipients of bribes are sentenced to overly lenient penalties or are sentenced to substantive penalties, it will be difficult to effectively compensate for the losses they have caused. Therefore, recipients of bribes with huge social harm should be severely punished, and the application of probation circumstances should be even more cautious.

5 Conclusion

"Investigating bribery and accepting bribes together" does not mean "punishing both bribery and accepting bribes severely". The focus lies in strengthening the investigation and handling of bribery crimes, thereby achieving effective governance of bribery crimes. This policy of "investigating together" but not treating the two equally should be balanced and implemented in practice. According to the data extracted from the judicial documents, at present, the penalties for the crime of bribery in China are showing a trend of leniency, while the penalties for the crime of accepting bribes are relatively severe. The tendency of judicial practice to differ from criminal legislation indicates that legislators should pay more attention to the judicial control activities of judicial organs and should not merely regulate them by adjusting the allocation of legal penalties. The implementation of criminal policies should be in line with reality. It should not only conform to the criminal elements of the crime itself, but also pay attention to the difficulties faced by judicial organs in handling cases. It is not advisable to blindly emphasize the severe punishment of bribery. The adjustment of the statutory penalty configuration for the crime of bribery, the setting of aggravated punishment circumstances, and the lowering of the threshold for the special self-surrender system in the Criminal Law Amendment (XII) all reflect that the policymakers have considered that the focus should be placed on combating

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bribery crimes by increasing the investigation rate of bribery crimes. Therefore, during the implementation of the criminal policy of "investigating both bribery and accepting bribes together", In dealing with the crime of bribery, the governance ideology of "strict but not stern" should be adhered to. Overall, the governance strategy of strictly investigating bribery and severely punishing the acceptance of bribes should be maintained.

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