

SOME ISSUES OF IMPROVING REGULATIONS ON POWER-RELATED CRIMES IN THE 2015 PENAL CODE

BUI THI HANH*

Abstract: The regulations of the Vietnamese Penal Code regarding power-related crimes have been significantly improved, creating a solid legal basis for the fight against corruption. However, to strengthen the fight against power-related crimes and comply with international standards, regulations on this group of crimes need to be further studied and improved. This article analyses existing problems and shortcomings and proposes perspectives and solutions to strengthen Vietnamese criminal law on power-related crimes further, thereby enhancing the effectiveness of combating this type of crime in practice.

Keywords: Corruption; power-related crimes; private sector

MỘT SỐ VẤN ĐỀ HOÀN THIÊN QUY ĐỊNH VỀ TỘI PHẠM CHỨC VỤ TRONG BỘ LUẬT HÌNH SỰ NĂM 2015

Tóm tắt: Quy định của Bộ luật Hình sự Việt Nam về các tội phạm chức vụ đến nay đã có sự hoàn thiện đáng kể, tạo cơ sở pháp lý vững chắc cho công tác đấu tranh phòng, chống tham nhũng. Tuy nhiên, để tăng cường đấu tranh chống tội phạm chức vụ và phù hợp với chuẩn mực quốc tế, quy định về nhóm tội phạm này đòi hỏi phải tiếp tục được nghiên cứu hoàn thiện. Bài viết phân tích một số điểm còn vướng mắc, bất cập đồng thời đề xuất một số quan điểm và giải pháp tiếp tục hoàn thiện pháp luật hình sự Việt Nam về các tội phạm chức vụ nhằm tăng cường hiệu quả đấu tranh phòng chống tội phạm này trên thực tiễn.

Từ khóa: Tham nhũng; tội phạm chức vụ; khu vực tư

Introduction

Power-related crimes are regulated by Articles 352 to 366 of the 2015 Penal Code, as amended and supplemented in 2017. These crimes violate the proper and regular operations and compliance with the law of agencies and organisations. The agencies and organisations referred to here may include state agencies, political organisations, socio-political organisations, people's armed forces units, public non-business units, state-owned enterprises and other organisations and units established by the State, provided with facilities, allocated full or partial operating costs, directly managed or partly administered by the State, as well as organisations in the non-state sector¹. Power-related crimes are a group of crimes characterised by the fact that the subject must be a person holding an official position and authority within a state agency, organisation, or non-state organisation. Most of these crimes show

intentional faults and motives for personal gain or other purposes. The act of abusing position or authority is the core element of the objective aspect of these offences, causing damage to state property, public interests, or the legitimate rights of individuals and organisations. In the Penal Code, power-related crimes are divided into two groups: corruption-related crimes and other power-related crimes. Corruption is defined as conduct by a person in a position of authority that abuses that position for personal gain². Corruption-related crimes are a specific group of crimes in the field of positions and authorities, characterized by the following main features: The subject of the crime is a person holding a position or authority; The act of the crime is associated with the abuse of positions and authorities (the offender takes advantage of the assigned position

* Email: Hanhbui76@gmail.com

Assoc. Prof., PhD, Vice-Rector, Vietnam Procuratorate University

² Clause 1, Article 3 of the Law on Anti-Corruption 2018.

¹ Hanoi Procuratorate University, *Penal Law Textbook, Crimes*, Vol. 2/2020, p. 355.

or authority to commit corrupt acts), with common forms including accepting bribes, embezzling property, abusing positions to appropriate property, taking advantage of positions for personal gain; The purpose of personal gain or interest group (corruption always aims to appropriate property or for personal gain (such as power, money, property) or to serve a specific interest group) is the characteristic that distinguishes corruption-related crimes from other power-related crimes; The consequences of the crime cause severe damage to public interests (corruption causes direct or indirect damage to state property, reputation of agencies, organizations, and social trust).

Other power-related crimes are criminal acts committed by people in positions of authority while performing their official duties or assigned tasks. These crimes are not included in the group of corruption-related crimes, yet they remain directly connected to the abuse of position or authority. Some basic characteristics of this group of crimes include: The subject of the crime is a person holding a position or authority (typically a cadre, civil servant, or an individual assigned managerial duties within state or private agencies or organizations); The act of the crime is associated with a position or authority (illegal acts arising in the process of performing assigned duties and tasks), with manifestations such as abuse of power, lack of responsibility, or violation of regulations on public service; The consequences of the crime cause damage to public interests or organizations (these acts often result in economic damage, loss of prestige of agencies, organizations, or erosion of public trust in the state apparatus). These crimes are not “commercial” in nature like corruption-related crimes but rather involve violations of principles and regulations in state management or assigned work. The purpose of the crime is not for personal gain, nor is the motive to misappropriate property or obtain personal benefits; rather, it typically

stems from a lack of responsibility or failure to comply with regulations. This is the feature that distinguishes other power-related crimes from corruption-related crimes.

1. Practical application of criminal law on power-related crimes

The practical application of regulations in the Vietnamese Penal Code on power-related crimes in performing the rights of prosecution and investigation supervision is raising many difficulties and inadequacies related to the signs of crime and criminal sentencing framework determination, specifically as follows:

First, the subject of corruption-related crime is a person holding a position or authority. The scope of the term “position,” as interpreted in current relevant legal documents, does not fully encompass all individuals who could be subjects of corruption-related crimes. The Penal Code provisions on these subjects often focus on individuals holding positions in state agencies, specifically those with official positions/duties and powers directly arising from those positions/duties. It overlooks those who hold important roles but do not have official positions or duties, such as advisors or consultants to state agencies, as well as people who exert informal influence within an organisation. At the same time, people holding positions or authority in the private sector, such as private enterprises or state-owned enterprises, also need to be regulated more specifically.

For example, a person who runs an enterprise as a major shareholder yet does not hold an official position on the Board of Directors may be the one making critical decisions; however, such a person may not meet the criteria for holding a position of authority in a private enterprise. On the other hand, there is a need for specific guidelines for some instances involving individuals considered to hold positions of authority. According to point d, Clause 2, Article 3 of the Anti-Corruption Law, persons holding positions of authority also include “other persons assigned to perform duties

and public duty and who have authority while performing those duties and public duty". The resolution of criminal cases in practice shows that the subject's status as "a person assigned to the performance of official duties and vested with authority while performing such duties" is difficult to determine in certain corruption cases. For example, in instances where village heads or deputy village heads carry out acts such as allocating land, selling land, or leasing land beyond their authority, procedural authorities in certain localities have initiated criminal proceedings, conducted investigations, brought prosecutions, and adjudicated these cases for the offence of abuse of position or authority while performing official duties. Some argue that these individuals do not meet the criteria for being subjects of corruption-related crimes because they do not hold positions or authorities³. In contrast, others say that they do hold positions of power because they are assigned specific duties⁴. In essence, the difficulty in determining the appropriate offence in this case depends on how one perceives what is "assigned to perform a task or official duty" is such a task or duty determined based on the position or title assigned to the individual or on the content of the specific document or decision? In particular, expanding the scope of the crime of embezzlement to include the "private sector" has sometimes led to a mechanical application in practice, overlooking the need to identify and clarify the specific characteristics of the offender as a special subject of the crime. This has led to confusion about the distinction between embezzlement and the abuse of trust

to appropriate property⁵. This is evidenced by the recent cases of shippers misappropriating money or goods entrusted to them for delivery. The Procuracy prosecuted them for abuse of trust and misappropriation of property, but the court instead convicted them of embezzlement⁶. This indicates that special signs for subjects in certain power-related crimes need to be explained and clarified to ensure consistent application.

Second, some circumstances that have already served as indicators of criminalisation or aggravating sentence brackets in power-related crimes have not been consistently applied or interpreted, leading to differing interpretations and applications in practice. Specifically, the element of "self-seeking" in the elemental composition of many power-related crimes; the circumstance of "causing other damage upon state interests, lawful rights and interests of another organization or individual" stipulated in Clause 1, Article 356 of the Penal Code (Abuse of power or position in performance of official duties); the elements of "his/her own influence" and "to promote" in the circumstances of crime determination stipulated in Article 358 of the Penal Code (Abuse of power or position to influence another person for personal gain), Article 366 of the Penal Code (Abuse of influence over an office holder for personal gain); and the circumstance of "beyond his/her authority" stipulated in Article 357 of the Penal Code (Acting beyond authority in performance of official duties) and the established levels of damage in some criminal composition are no longer appropriate to the current situation.

Third, there are difficulties in the regulations regarding the cumulative value of assets or damages when determining crimes. According to Clause 1, Article 8 of Resolution

³ Quang Dai (2022), *Can village heads "abuse their position and authority when performing official duties?"*, <https://laodong.vn/ban-doc/truong-thon-co-the-loi-dung-chuc-vu-quyen-han-khi-thi-hanh-cong-vu-1000778.lido>.

³ Tuyen Phan (2024), *Former village head protest innocence of corruption crimes: "The sentence is too harsh"*, <https://thanhnien.vn/cuu-truong-thon-keu-oan-toi-tham-nhung-ban-an-qua-nghiet-nga-185240417071217655.htm>.

⁵ Bui Thi Hanh, "About the special signs in the subject of the crime of embezzlement", *Journal of Procuratorate Studies*, No. 6(68)/2023.

⁶ Dan Thuan (2023), *A shipper is sentenced to 3 years in prison for embezzlement of property*, <https://tuoitre.vn/mot-shipper-bi-tuyen-3-nam-tu-toi-tham-o-tai-san-20230419130336495.htm>.

No. 03/2020 of the Supreme People's Court guiding the application of specific provisions of the Penal Code in the trial of corruption and other power-related crimes, in a case where a person has committed the same offense prescribed in the Chapter on power-related crimes multiple times, though the value of misappropriated property, bribe, or property damage each time is below the minimum level liable to criminal prosecution, the offence is not liable to criminal prosecution in any other cases, no administrative penalties have been imposed while the time limit for imposition of administrative penalties has not expired, if the total value of misappropriated property, bribe, or property damage is equal to or more than the minimum level liable to criminal prosecution as prescribed in the Penal Code, the person who commits the act will be liable to criminal prosecution. In practice, this provision applies only to crimes involving misappropriation or "bribes" (such as taking bribes or embezzlement). In these cases, the offender committed intentional offences, so the resulting loss is justified and necessary. Under the Penal Code, the accumulation of damages for criminal prosecution of multiple acts, each of which individually falls below the minimum threshold for criminal liability, may apply to certain types of crimes (such as theft of property). A common characteristic of these offences is that they are committed with the intent to cause harm. However, because offenders in "property damage" crimes within the power-related crime category are unintentionally at fault, the cumulative value of the damaged property used to determine criminal liability is not entirely appropriate. On the other hand, the cumulative nature of the offences does not require that the acts be committed repeatedly and continuously, which is inconsistent with the approach adopted for offences against rights of property⁷.

⁷ Official Letter No. 64/TANDTC-PC dated April 3, 2019, from the Supreme People's Court regarding the announcement of the results of online answers to a number of questions about criminal, civil and administrative proceedings.

2. Perspective on improving Vietnamese criminal law, particularly on power-related crimes, to meet the requirements of the fight against corruption

To meet the requirements of combating and preventing corruption, the provisions on power-related crimes in the Penal Code need to be further improved. Such improvements should ensure the following guiding principles:

First, ensuring transparency and clarity in the law's provisions. Regulations in criminal law concerning power-related crimes must be clearly defined to avoid contradictions or difficulties in application. These crimes often manifest as a series of intertwined actions, proving that the composition of a crime requires that the legal indicators of determinations of crimes or sentence brackets (such as objective behaviour, motive, purpose, and subject of the crime) must be prescribed, interpreted, and guided in a comprehensive, clear, and practical manner. This is essential to enhancing transparency and accountability in the handling of power-related crimes.

Second, further expanding the scope of application of power-related crimes to cover the "private sector". It is necessary to specify further a broader range of acts that should be regarded as corruption in the private sector, particularly in public service areas such as healthcare, education, and construction, including bribery, abuse or misuse of power, and negligence that results in serious consequences. This will strengthen the protection of administrative order, the performance of duties, and the provision of public services in economic sectors, and safeguard the legitimate interests of citizens. However, extending the application of corruption-related and power-related crimes to the "private sector" still requires ensuring that the subject of the crime fully satisfies the "special" signs, as is the case with these crimes in general. This requires that the special signs in the subject of corruption-related and power-related crimes be interpreted and guided uniformly, especially when applied to the "private sector".

Third, ensuring human rights, guaranteeing effective asset recovery, and maintaining stability for economic development in the fight against corruption. The refinement of the Penal Code's provisions on power-related crimes should emphasise the protection of human rights and expand the scope of circumstances in which the death penalty is not applicable, to ensure the recovery of assets for the State. On the other hand, it is also necessary to maintain economic stability, foster a healthy environment for fair competition and development across economic sectors, and expand the use of non-custodial penalties to ensure differentiation and enhance the effectiveness of remediation for damages.

Fourth, harmonising with international standards. There is a need to consider strengthening the domestication of international commitments (such as the United Nations Convention against Corruption) and actively learning from the legislative experiences of other countries in handling and preventing corruption-related and power-related crimes in the completion process of the Vietnamese Penal Code's provisions on power-related crimes to harmonise with international standards.

3. Solutions to improve the Vietnamese criminal law, particularly on power-related crimes, to meet the requirements of the fight against corruption in the future

Based on the practical application and the above viewpoints on improving the law, to meet the requirements of combating and preventing corruption in the coming period, the provisions of Vietnamese criminal law on power-related crimes need to be improved in the following direction:

First, the subjects of corruption crimes who hold positions or powers should be expanded to include those who hold important roles but do not have official positions or responsibilities, such as advisors and consultants to state agencies, as well as those with unofficial influence over organisations. Therefore, the guidelines

on persons holding positions or authority should include "persons holding positions in an agency or organisation and having a role that influences the decision-making of persons holding positions or authority in that agency or organisation." This criterion is also appropriate when applied to individuals with similar roles in private sector businesses. On the other hand, regarding "other individuals assigned to perform **tasks and duties** and **possessing authority** while performing those tasks and duties," it is necessary to provide guidance that these tasks and duties are determined following the specific documents and decisions issued by the competent authority when defining the position, title, and work undertaken by that individual. This will clearly explain the limits, scope of authority, responsibilities, and powers allowed to individuals. Such misuse or abuse of authority constitutes corruption. If this element is not satisfied, their harmful conduct should be classified as constituting a different criminal offence, as it infringes upon a different legally protected interest. Moreover, the individual who commits a corruption crime performs assigned "tasks and duties" as a representative of the agency or organisation. Such representation reflects a close connection between the individuals and their organisation. Only when this element is satisfied does the individual's criminal conduct distort the organisation's normal course of conduct, infringe upon its proper and lawful operation and reputation, and thereby fully meet the requirement of social dangerousness inherent in corruption crimes⁸.

Second, it is necessary to strengthen guidance and interpretation of the law with respect to particular circumstances that constitute indicators of determinations of crimes or aggravating sentence brackets in power-related crimes, specifically: The circumstance of "*adversely affecting the living conditions of cadres, civil servants, public employees, and workers in agencies or organizations*" in the

⁸ Bui Thi Hanh, *ibid*.

crime of embezzlement; and the behavioral indicators of “*using his/her own influence*” and “*to promote*” in the crime of abusing power or position to influence another person for personal gain. Besides, it is necessary to amend the threshold levels of damage so that criminal prosecution in certain corruption-related, economic, and power-related crimes is commensurate with the current situation. *For example:* Article 360 of the Penal Code on the crime of negligence that results in serious consequences stipulates the level of property damage of from 100 million VND; the crime of abusing power or position in performance of official duties under Article 356 stipulates the level of property damage of from 10 million VND, etc. These damage quantifications are no longer relevant to current realities.

Third, amend the regulations regarding the cumulative value of property or damage when determining criminal liability for power-related crimes. Clause 1 of Article 8 of Resolution No. 03/2020 of the Supreme People’s Court should be amended in a restrictive manner, so that it does not apply to power-related crimes that merely “cause property damage”. In this case, the offender acted negligently concerning the consequences (the damage that occurred); therefore, consideration should be given to not aggregating the damage results, to ensure proper differentiation and appropriateness to the nature and degree of danger of the criminal act. On the other hand, the accumulation of damage should be considered only where the crimes of appropriation of property, taking bribes, and similar crimes are committed continuously and successively over time, to ensure consistency in legislative technique in its application to offences against the rights of property.

Fourth, it is necessary to study and improve the provisions of the Penal Code on corruption-related crimes based on the legal experiences of other countries, with a view to strengthening international

integration. First and foremost, research and supplement provisions to address certain new forms of corruption with “non-traditional” characteristics, such as policy manipulation. Policy manipulation is a form of corruption or abuse of power in which an individual or organisation intentionally influences or affects the formulation, enactment, or implementation of public policy to serve personal interests, interest groups, or businesses rather than the common interests of the community. This is a complex form of misconduct that is often carried out in a sophisticated manner, causing serious harm to the transparency and fairness of the policy system. Individuals holding positions of power within state agencies may use their influence to alter or shape policies in a manner favourable to a particular group, through economic benefits such as money, gifts, or other incentives to “bribe” those holding authority to influence policy. As a result, policies are enacted that favour specific interest groups, while causing harm or injustice to other groups within society. Forms of policy manipulation can include manipulation during the policy-making phase or manipulation during policy implementation.

The scope of criminal liability for commercial legal entities should be expanded when they commit acts of corruption. Experience in combating and preventing corruption shows that there have been numerous practical instances in which representatives of companies or enterprises, seeking to gain advantages in production, business, or bidding for their companies, have engaged in acts such as taking or giving bribes to people in positions of power. However, at present, even if a commercial legal entity commits acts of corruption, in general, and acts related to bribery in particular, that satisfy the conditions for criminal prosecution under Article 75 of the 2015 Penal Code, it is not considered a crime. This affects the effectiveness of deterrence and corruption prevention in general.

Along with practical assessments of the fight against corruption in Vietnam today, based on research into the provisions of international treaties to which Vietnam is a party on corruption prevention and control, such as the United Nations Convention Against Corruption (UNCAC) and the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP), it can be seen that these international treaties all recommend that member states, including Vietnam, should adopt specific measures providing for the criminal liability of legal entities for bribery-related acts. They require each party to ensure that legal entities are subject to criminal or non-criminal sanctions to prevent such acts. Therefore, stemming from practical requirements and commitments under international treaties, Vietnamese criminal law should expand the scope of criminal liability for commercial legal entities that engage in acts of corruption, specifically bribery, to ensure fairness and strict enforcement.

In addition, it is necessary to supplement the basic penalty frameworks (in Clause 1) for corruption-related crimes with fines and non-custodial penalties. In Vietnam, the judicial reform strategy also indicates that “reducing prison sentences” is a key orientation of criminal policy, along with the requirement to “expand the application of fines and non-custodial reform penalties for certain types of crimes”⁹. Currently, in the provisions of the 2015 Penal Code regarding corruption crimes, only the crime of Abuse of power or position in performance of official duties (Article 356) stipulates non-custodial reform penalties as the principal penalty, which is less severe than imprisonment.

A review of legislative experience in other countries regarding corruption-related crimes shows that most jurisdictions provide additional penalties that are less severe than imprisonment. For example, the Russian Federal Penal Code does not prescribe the

death penalty or life imprisonment for corruption crimes. Fines are usually the preferred form of punishment imposed by the courts, followed by other types of penalties. Russian lawmakers believe that monetary penalties are more effective than other forms of punishment for corruption crimes. In the Penal Code of the Federal Republic of Germany, corruption offences are regulated from Article 331 to Article 357, in which these offences all prescribe fines as both principal and supplementary punishments. Similarly, under the criminal codes of some Southeast Asian countries, such as Thailand, fines are prescribed as a principal penalty, applied concurrently with imprisonment. Meanwhile, the Vietnamese Penal Code only provides for fines as an additional penalty for this group of crimes, and their application is discretionary. Therefore, based on a selective review of legislative experiences from various countries worldwide, the author proposes supplementing fines and non-custodial reform penalties into the principal sentencing frameworks (as stipulated in Clause 1) of corruption-related crimes under the 2015 Penal Code.

Conclusion

Vietnamese criminal law on power-related crimes has made significant progress, providing a solid legal basis for combating corruption. However, these regulations need further research and improvement to ensure consistent and practical application./.

LIST OF REFERENCES

1. Bui Thi Hanh, “About the special signs in the subject of the crime of embezzlement”, *Journal of Procuratorate Studies*, No. 6(68)/2023;
2. Dan Thuan (2023), *A shipper is sentenced to 3 years in prison for embezzlement of property*, <https://tuoitre.vn/mot-shipper-bi-tuyen-3-nam-tu-toi-tham-o-tai-san-20230419130336495.htm>;
3. Hanoi Procuratorate University, *Textbook on Penal Law (Part of criminal offences)*, Vol. 2, 2020;
4. The 2018 Anti-Corruption Law;
5. The 2015 Penal Procedure Code;
6. The Supreme People’s Procuracy, *Document summarising lessons learned from the practice of prosecuting and supervising the resolution of corruption-related and other power-related crimes*, 2023.

⁹ Trinh Tien Viet (Editor), *Vietnamese Penal Policy Facing the Challenges of the 4.0 Industrial Revolution*, Justice Publishing House, Hanoi, 2020.