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INDEPENDENCE AND CORRUPTION IN KOREA

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I. INTRODUCTION

In the summer of 2001, after years of opposition, the Korean National Assembly passed and President D.J. Kim signed a new Anti-Corruption Act ("ACA").[1] Apart from whistle-blower protections, however, the ACA in its present form contains little of substance, its independent counsel provisions having been stripped away by the ruling party. Given that Korean law has long outlawed bribery, we are skeptical about the potential benefits of the ACA, which in part exhorts the nation to prevent corruption. It seems unlikely that telling people to be virtuous will make them so. Corruption has been a crime since 1953, and there has been a series of anti-corruption programs and laws since 1993, when the popularly elected civilian President Y.S. Kim took office. The prior reforms either worked or they didn't. If they did work, why was the ACA necessary? If the earlier efforts failed, why did that happen? This article discusses private sector and official corruption in Korea, recounts the reform efforts including the ACA, and concludes that the reforms are unlikely to be effective without the establishment of an independent prosecutor.

The system that produced Korea's economic development eroded its own base. Corruption was an inescapable feature of the relationship among Korea's government, banks and *chaebol* during the decades of development from the early 1960s to the mid 1990s, and it was also at the root of the 1997 crisis. It may now threaten the success of the post-1997 corporate governance reforms, which assume independent decision makers on boards of directors, in audit firms and in the regulatory bodies. There have been several high profile cases in 2000 and 2001; the business community complains about it but does little to effect remedy; and at least one analyst concluded that the educated middle class are so demoralized by persistent corruption that they are leaving Korea. This is something more than inevitable and universal criminality. Were this garden-variety stuff, newspapers wouldn't be editorializing, NGOs wouldn't be campaigning, and the government wouldn't be announcing new programs.

From the early 1960s to the mid 1990s, the Korean government closely controlled the economy through a strict Foreign Exchange Control Law and an Economic Planning Board. Civilian democratically elected

[1] Act No. 6494, July 24, 2001. A translation of the ACA is included as an appendix to this article (see p. 50).

government has been in place since 1993, and much of the economy was deregulated in 1998. Corruption that arose from government control of finance and entry should have diminished, and perhaps it has. A Code of Conduct has regulated petty official corruption in the form of entertainment and small gifts since 1999, and it is probably the case that government officials are less willing to be seen in expensive restaurants. Yet, corruption has a long history and persists in some form.

Why is that? There are varieties of corruption, with different causes and cures. Not all involve an outright bribe. A conflict of interest that impairs professional independence, as demonstrated by the recent string of audit failures in the United States, might be considered a species of corruption, since the professional's independent judgment is impaired by the prospect of financial gain. Take it one more step: in Korea particularly, money was often given after the fact as a token of gratitude for a job well done. As a practicing lawyer in Seoul, one of the writers handled the purchase of a Korean business on behalf of a Swiss client. The deal went smoothly and after it closed the Korean seller gave him a white envelope with 300,000 won, then worth about $400. Money was also given before the fact, to establish or firm up friendly relations with a counterpart. Indeed, the payment might be expected. Instead of money, one might be entertained or given a gift; Korea is not the only place on Earth where businesspeople wine and dine their counterparts. However, the entertainment of a government official, which had been common in Korea, violates U.S. federal ethics rules (small sums might be paid to expedite customs clearance and the like, and we exclude this as harmless). Some think that corruption is based on aspects of the culture, and that what a Westerner sees as corruption a Korean may regard as an appropriate expression of friendship or gratitude or loyalty. But perhaps some business relationships must be adversarial. Ought one expect friendship and loyalty from an outside director, banker, external auditor or government regulator, or should these people be and remain independent, to be able to ask tough questions and press for correction when there is need? The current wisdom is that proper governance requires independence,[2] though it may be difficult to transform a culture

[2] Independence is at minimum the absence of observable conflicts of interest, and this is the way that many professional codes define it. E.g., AICPA Plain English Guide to Independence (Nov. 30, 2001), *at* http://www.aicpa.org/members/div/ethics/plaineng.htm (explaining the relevant sections of the AICPA Code of Professional Conduct, including financial and business relationships between auditor and client that impair independence). It is more than this, though. Independence includes the sense of duty to give honest and unbiased advice even when that may be unpopular. It is an "internal fortitude ... that will lead to an evaluation and judgment unaffected by any irrelevant or inappropriate considerations." William T. Allen, *Remarks Before the Blue Ribbon Committee on Audit Committee Practices*, Dec. 9, 1998, *at* http://www.stern.nyu.edu/clb/Blue Ribbon.pdf. It is "an

by means of legislation. (We do not want to overstate this point. Many Koreans are unhappy with corruption. The largest and most egregious cases cannot be excused as appropriate to the culture.)

Another sort of corruption involves the payment of substantial sums to government officials for permission to engage in a certain line of business, or to obtain bank financing. This is different from the above examples in two ways. The sums involved are usually greater, and there is no sense of friendship, gratitude or loyalty. Such cases are based on collusion. The Hanbo case, discussed below, is a prime example. A similarity with the above examples is that it involves the conduct of legitimate business; an easier legal solution, however, is simply to deregulate.

There are also the demands of politicians who need funds to run election campaigns. Although one in every four incumbent Korean lawmakers (or at least one member of their immediate family) was standing trial in criminal courts in mid 2001,[3] political slush funds are beyond the scope of this paper, as campaign finance and election law present specialized problems. We are interested in the reasons for the 1997 crisis in Korea and the subsequent efforts to eliminate collusion and instill a sense of independence in the boards of directors, auditors, bankers and executive branch regulators who are appointed to office.

Finally, there are the outright fraudsters and gangsters who purchase immunity from prosecution. This too may have little to do with the way that legitimate business is conducted, but to the extent that prosecutors are compromised, then a key piece of the independence machinery is missing. Who will police the regulators? This may also be related to the friendship and loyalty cases. The basic pattern has been established; the criminal deals with a family member or classmate of the prosecutor. Think of this in terms of game theory. Two actors would like to collude corruptly but neither knows if the other will report him to the prosecutor. What if they could trust the other to be complicit in the transaction? The social networks characteristic of Korean society, based on family, hometown and school connections, may enable corruption. Law cannot change a culture, and we doubt the efficacy of the whistle-blower provisions of the ACA; will one report a loyal friend? There is a second problem here which law can solve. Assume the social network didn't function for some reason. Neither actor knows if the other will

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attitude of mind characterized by integrity and an objective approach to professional work." Hong Kong Society of Accountants, Members' Handbook, vol. 1, Professional Ethics, statement 1.203, "Integrity, Objectivity and Independence," *available at* http://www.hksa.org.hk/professional/technical/ethics/index/php.

[3] *Lawmakers Become Lawbreakers*, KOREA HERALD, July 7, 2001.

report him to the prosecutor. But what if the prosecutor himself is corrupt? This is precisely what happened in 2000 and 2001. It suggests the need for a tenured independent counsel or other independent investigative body. This has been a major failure of the Korean scheme and the ACA does not address it.

This article considers how corruption threatens Korea's economic development and the governance reforms that followed the 1997 crisis. It next asks whether corruption is still a significant problem in Korea, and concludes that it probably is. Turning to possible solutions, we ask whether market forces are likely to prove more effective than legal forces in the fight against bribery. If not, then law must be considered. The West has in recent years condemned bribery, so we ask whether legal reforms are an inappropriate imposition of Western values upon a non-Western culture, and then consider the history of Korea's anti-corruption efforts including so-called "publicity and prevention" measures, as well as enforcement measures which have the potential to raise the cost of misbehavior and serve as a deterrent. The administration of the Criminal Code has been inconsistent and often weak, sometimes targeting political opponents yet resulting in minimal sentences, so in our concluding analysis of the ACA, we ask whether it contains anything that is likely to make enforcement of the anti-bribery provisions of the Criminal Code a genuine deterrent to corruption. The answer is no. The ACA does not create an independent prosecutor, and it does not curtail the power of the President to grant special amnesty. It indicates the determination of the National Assembly to allow corruption to continue and the desire of the President to achieve something merely to show local NGOs and external capitalists.

II. HOW CORRUPTION THREATENS ECONOMIC DEVELOPMENT

Korea's economic development was predicated upon the education of its people; human capital being one of the nation's few resources. The country now has a substantial middle class. The nation also has material wealth and social institutions; it is a member of the OECD; its stock markets attract foreign investors, and its largest companies, the *chaebol*, are known around the globe. Korea is widely regarded as a success story, and so the CIA predicts that it will remain an "economic center" into the foreseeable future and will continue to "get richer."[4] We assume that Korea's successful economic development

[4] The CIA in the New World Order, http://www.cia.gov/cia/public_affairs/speeches/archives/2000/

required a legal framework.[5] Corruption may signal a problem with the law or legal system and that may in turn signal a problem for continued economic development.

Without law there cannot be a free market, and it is at least arguable that without a free market, the economy fails.[6] One cannot trade goods or services unless one is the owner, so there must be property law. One will not make a bargain to be performed in the future unless there is contract law to protect expectations induced by promise. Since a market depends on accurate information and voluntary transactions, there must be laws against fraud and force.[7] Law without enforcement has little value, though, so there must also be courts and marshals. But even that cannot be enough. Someone in business must be able to rely on his counterpart's voluntary compliance with the terms of the deal. If all business had to be litigated, business would cease. One complies voluntarily if one assumes that the laws will be enforced consistently.

The usual formulation of "the rule of law" requires that laws are written and published so they are predicable and not arbitrary, that an impartial and independent judiciary has the power to review acts of the executive, and that the laws apply to the government officials who enforce them. Cast this way, the rule of law requires that the government follow the law; it is a remedy for official corruption and the arbitrary exercise of power. The independence of the judiciary and prosecutors is a key aspect of the rule of law. An independent prosecutor will charge in cases of official corruption, just as an independent judiciary will convict and punish. If the prosecutor himself is arbitrary or corrupt, then the rule of law ceases to exist. One will not assume that the laws are enforced. In a benign form known as "grease," corruption may make business easier; but, when loans and construction permits are awarded for bribes and not on the merits, corruption produces wasted capital and collapsing buildings and hardly furthers the cause of economic development. Korea has some

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dci_speech_020200smithson.html; Global Trends 2015, http://www.fas.org/irp/cia/product/globaltrends2015/.

[5] "Basic elements of a modern market economy such as property rights and contract are founded on the law and require competent third party enforcement." Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS 1998. Reprinted at http://www.ceip.org/files/Publications/rulelaw.asp?from=pubauthor%20. The relationship between the rule of law and a market economy is the subject of an extensive section within the website of the World Bank called Legal Institutions of the Market Economy, with home page at http://www1.worldbank.org/publicsector/legal.

[6] "(I)n order that competition should work beneficially, a carefully thought-out legal framework is required...." F.A. Hayek, THE ROAD TO SERFDOM, 41 (1944).

[7] Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD, chs. 3, 4, and 5 (1995). *See also* Richard A. Posner, *Creating a Legal Framework for Economic Development*, The World Bank Research Observer, vol. 13, no. 1, 1-11 (Feb. 1998) (the vigor of markets may depend on the establishment and enforcement of property and contract rights).

of the trappings of the rule of law: a civil law jurisprudence, a developed legal code, judges and prosecutors, law schools and lawyers.[8] Korean law protects private property, and it enforces contracts. Tort law is straightforward and comprehensive: the Civil Code incorporates much of the Criminal Code. By protecting property and contract and punishing fraud, the law is supposed to inspire the confidence among investors, bankers, trade counterparts and consumers that is necessary for a market to work, just as happened during the course of Korea's economic development.

Yet Korea's educated middle class now seem to have lost confidence that the rule of law exists in Korea. Even the administrations of reformist Presidents Y.S. Kim (1993-1997) and D.J. Kim (1998-2002), the civilians who succeeded the former Generals Park (1961-1979), Chun (1980-1988) and Roh (1988-1992), became mired in scandal. Y.S. Kim's son, Kim Hyun-chul, was sentenced to two years in prison for receiving a bribe from Hanbo to obtain government contracts, but served only six months and was eventually pardoned. Most recently, two of D.J. Kim's sons were arrested during the summer of 2002 on corruption charges.

It is not enough to have laws on the books. Laws must be enforced, and they must be observed. In the year 2000, many Koreans had become so discouraged about entrenched corruption that they had emigrated or were strongly considering leaving. The discouragement was especially prevalent among middle class white-collar workers, the educated class upon whom the nation's economic development plans depended. Many of them preferred selling pizza or operating a grocery store in Canada to their professional lives in Korea. Emigration among professionals increased 60% in 2000 as compared to 1999. Emigration in January and February 2001 showed a 25% increase over the same period in 2000.[9]

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[8] Whether or not this panoply of institutions amounts to the rule of law being established in Korea is discussed, and doubted, in Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT'L LAW. 267 (2000); Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y J. 1 (2000).

[9] Paul F. Chamberlin, *Korea 2010*, 149, CSIS (2001). Emigration may well be for others reasons and the inference of a causal connection to corruption may be mistaken. The Korean government asserts that its anti-corruption efforts have been successful, that the number of public servants "disciplined for irregularities is on the wane" and that the public believes corruption to be decreasing. "Korea's Second Phase Fighting against Corruption in the New Millennium," Korean Information Service, http://www.korea.net/learnaboutkorea/library/corruption.html. But the government publicizes its efforts in order to lower Korea's cost of capital. There are other surveys and measures that indicate that the level of corruption has not dropped appreciably in the last few years. *See* "Is Corruption Still a Significant Problem in Korea?," *infra*, and the discussion of the Board of Audit and Inspection, *infra*. This may mean only that people feel free to complain.

This wasn't the first sign that something was wrong. There was an abrupt exodus of foreign lenders and investors in late 1997 that is attributed partly to persistent collusion and corruption among Korea's *chaebol*, banks and government officials, resulting in massive corporate indebtedness - not all of which was disclosed in the financial statements - and bank failure.

"Korea especially suffered the same easy-credit syndrome. A number of major manufacturing enterprises had been rolling over debt, borrowing the while, but now the finance companies found their own money sources drying up. Panic turned into recession; major industries contracted and closed, leaving the usual jobless debris.

"(T)he Asians, it is said ... prefer to work, help and lend (borrow) through a network of personal and political friends and allies. Credit worthiness is not the point. It is connections that count."[10]

Much money had been borrowed for many fruitless projects because the directors, auditors, bankers and regulators looked the other way.[11] Hanbo, the first *chaebol* to go broke in 1997, had bribed the government for permission to build a steel mill, then bribed legislators to pressure bankers and for good measure bribed bankers too.[12] This happened during the administration of President Y.S. Kim, who pursued

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[10] David S. Landes, THE WEALTH AND POVERTY OF NATIONS, 528, 531 (1999). Here is the perspective of the Korean government: "The concentration of economic power in conglomerates called *chaebol*, the fragile financial structure heavily dependent on borrowings and financial institutions saddled with excessively large amount of non-performing loans made Korea's economy structurally vulnerable. In 1998, some large companies were nearing bankruptcy and sparked widespread uncertainty about the object economy of Korea. As the financial crisis hit Southeast Asia then, foreign investors in Korea began to look at the Korean economy with deeply worrisome eyes.

At that time, the Korean government failed to swiftly take proper measures to clean up non-performing loans plaguing financial institutions, restructure the financial industry and operate flexibly the exchange rate policy, thereby rendering the credit ratings of the Korean economy plummeting in international financial markets and prompting foreign investors to abruptly withdraw their loans. In particular, Korea experienced a serious foreign currency liquidity problem because of the high ratio of short-term borrowings in the aggregate foreign currency loans. In this way, the financial crisis was viewed as the most serious economic crisis in Korea since its founding. In the end, the Korean government turned to the IMF for financial support in late November 1997 to resolve the issue of the illiquidity of foreign currency." *Economic Laws on Foreign Investment in Korea*, Ministry of Legislation, Korea Legislation Research Institute (2000) at 6.

[11] Phrased less delicately, "the 1997 liquidity crisis was due to a structured system of corruption that prevailed in our society at the time." *Combatting Corruption in Korea*, May 18, 2001, Office of the Prime Minister, Republic of Korea, *available at* http://www.korea.net/kwnews/pub_focus/content.asp?cate=06&serial_no=752. Or, phrased more politely, "Korea lacked an effective corporate governance system to guide investment decisions by the *chaebols*, as well as independent financial institutions to ensure that capital was allocated efficiently." "Structural reform in Korea after the 1997 economic crisis the agenda and the implementation," Ignazio Visco Chief Economist, OECD, http://www1.oecd.org/media/release/viscoseouldec99.htm.

[12] TI Working Paper: Report on Recent Bribery Scandals 1996-2000, http://www.transparency.org/working_papers/country/s_korea_paper.html.

an anti-corruption reform policy. The 1997 crisis could happen because the bankers and auditors were not independent of their clients, and neither were the regulators and the prosecutors. Corruption permeated all levels of the system, and so the *chaebol* grew large, inefficient and massively indebted.

There have been several subsequent legal reforms, including measures intended to make *chaebol* finances transparent and *chaebol* directors and external auditors independent. The efforts to bring a measure of independence to the boards include the requirement that a stated percentage of the board consist of outside directors who meet a detailed definition of independence.[13] The efforts to bring independence to the external auditors include the establishment of an audit committee on the board of directors, an increase in the punishments for false financial statements, new conflict of interest rules, a rotation of the members of the audit team after three years and a requirement that publicly traded firms use the same audit company for at least three consecutive years.[14] Corruption is the utter negation of independence, so

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[13] The problems of the *chaebol* and the consequent board reforms and other corporate governance reforms are discussed in *U.S. Style Corporate Governance Reform in Korea's Largest Companies*, 18 UCLA PAC. BASIN L. J. 1, (2000); *Independence Within Hyundai?*, 22 J. OF INT'L ECON. L. 709 (Winter 2001); Hwa Jin Kim, *Toward the 'Best Practice' Model in a Globalizing Market*, YEARBOOK LAW AND LEGAL PRACTICE IN EAST ASIA, vol. 5, Street & Maxwell, London, 2002.

[14] For a summary of reforms from 1998 to 2000, including the audit committee requirements, see *Corporate Governance Reform*, *supra* note 13, at 44-51. Some of the 2001 reforms are noted in *Independence within Hyundai?*, *supra* note 13, at 732-33, 736-37. Amendments to the Act on External Audit of Stock Companies (Act No. 3297, Dec. 31, 1980) in March 2001 were intended to enhance the independence of the external auditor and punish the publication of false financial statements. For example, an auditor for a publicly traded company shall have a term of three consecutive fiscal years. That had been the rule for KSE listed companies since 1998, and became the rule for KOSDAQ registered ones too. Art 4-2(1). A dismissed auditor is entitled to go before the auditor selection committee of the client's board and his statement must be reported to the Securities and Futures Commission. Art. 4-5. The director of an audit team shall be replaced after three years if the client is publicly traded (the old limit was five years), and two thirds of the audit team must be reconstituted after three consecutive years. Arts. 3(4), 3(5).

Stricter conflict of interest rules took effect in mid 2001. A CPA shall not perform the services on audit or attestation regarding financial statements (including the consolidated financial statements), which fall under any of the following subparagraphs:

1. Financial statements of a person (including the company) for whom a CPA or his spouse is a director or officer, is in a similar position (including a responsible person for financial affairs), or was in such a position within the past one year;
2. Financial statements of a person of whom the CPA is an employee or was an employee within the past one year; and
3. Financial statements of a person in whom the CPA has such conspicuous interests, other than those as referred to in subparagraphs 1 and 2, that it is considered difficult for him to perform his services fairly and who is designated by the Presidential Decree. (Certified Public Accountant Act, Act No. 5255, Jan. 13, 1997, art. 21)

any remedy for the lack of independence must take account of corruption. The efforts to bring independence to the office of the public prosecutor failed. The Anti-Corruption Act does not include a provision for the creation of an independent prosecutor. The National Assembly passed

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Article 14 of the old Enforcement Decree of CPA Act prescribed that the term, "person who designated by the Presidential Decree" used in subparagraph 3 of Article 21 of the Act means a person who has any of the following relations with the CPA or his spouse:
1. Person whose stocks or contribution quota exceeding 1/100 of total issued stocks or contribution quota are owned by the CPA or his spouse;
2. Person who has an obligation relation exceeding one hundred million won with the CPA or his spouse except those who have any obligation relation related to affairs of the CPA;
3. Person who offers to CPA an office gratuitously or at the price remarkably lower than the ordinary market price; and
4. Person who pays to the CPA any continuous remuneration or offers other special economic benefits due to affairs other than those of the CPA.

This Enforcement Decree art. 14 was amended on June 18, 2001 as follows:
1. Person whose stocks or contribution quota are owned by the CPA or his spouse [in any amount];
2. Person who has an obligation relation exceeding thirty million won with the CPA or his spouse except those who have any obligation relation related to affairs of the CPA;
3. (not amended)
4. (not amended)
5. Person who offered or promised to offer to CPA its stocks, bonds with warrant, convertible bonds or stock options as the price for performing of his service under the Act art. 2.

This new Enforcement Decree took effect on June 18, 2001 except art.14 subparagraph 1, which became effective on Jan. 1, 2002.

A substantial civil penalty was introduced as a sanction for false auditing by an accounting firm and a CPA. (CPA Act, arts. 52-2 ~52-6, effective Apr. 2001). The Minister of Finance and Economy may impose civil penalties of up to five hundred million won to an accounting firm, and of up to one hundred million won to a CPA in place of the suspension of its business or his service. (CPA Act art.52-2(1)) This is massive and has the potential to be a strong deterrent, *if it is administered consistently, according to the rule of law.* Under 1998 amendments to the External Audit Act, an auditor who takes a bribe shall be punished by a fine not exceeding 30 million won or up to five times the value of the bribe, whichever is greater, or imprisonment for not more than three years. Art 19(1). An auditor who prepares or publishes false financial statements is subject to a fine of up to 30 million won and a term of imprisonment for not more than three years. Art. 20(1). A client who provides false information to the auditor shall be punished b imprisonment for not more than two years or by a fine not exceeding 20 million won. Art. 20(2).

The Securities and Exchange Act, (Act No. 2920, Dec. 22, 1976) was amended on March 28, 2001 to reinforce the penalties for false disclosures. Article 206-11 increased the limit of civil penalties from five hundred million won to two billion won. For example, the Financial Supervisory Commission may impose civil penalties up to 3/100 of the subscription or sales value on a statement of securities (up to two billion won where the price exceeds two billion won) against a registrant, directors of the corporation, CPA, etc. for a false entry or indication or failure to enter or indicate important matters in any registration statement, prospectus, or other documents to be submitted under Article 8, 11 or 12 of the SEA (SEA art. 206-11(1)).

The March 28 amendment also increased the imprisonment or criminal fine for false disclosures. A person who falsely enters important matters in the registration statement, tender offer statement, the periodic reports, etc., shall be punished by imprisonment for not more than 5 years (increased from one year) or by a fine not exceeding thirty million won (up from five million won) (SEA art. 207-3).

two other related laws in 2001, the Act relating to Regulation and Punishment of Criminal Proceeds Concealment and the Act relating to Offer and Use of Information on Financial Transaction, which regulate money laundering and punish the concealment of criminal proceeds. All three laws will be discussed below.

III. IS CORRUPTION STILL A SIGNIFICANT PROBLEM IN KOREA?

The government thinks so. The Prime Minister campaigns against it on his web site, describing Korea's anti-corruption programs and their reason for being.[15] A prosecutor in the Ministry of Justice believes that "as our economy came to recover from the financial crisis in 1999, corruption began to show signs of recurrence."[16] After languishing in the National Assembly for years, the Anti-Corruption Act became law in the summer of 2001.

Transparency International has ranked Korea in the middle of the pack for the last several years. In 2001, Korea placed 42 out of 91 nations on TI's corruption perceptions index. It ranked 48/90 in 2000 and 50/99 in 1999. Korea did not fare as well on another TI index, the briber payers index, which ranks the perception that nationals pay bribes abroad. Korea ranked 18 out of 19 exporting nations in 2000.[17]

The accounting firm PricewaterhouseCoopers has also ranked nations according to its own opacity index, based on subsidiary rankings for corruption, opacity in laws, government economic policies, accounting standards and government regulations.[18] Overall, Korea ranked 31 out of 35 nations in 2001; for corruption, it ranked 16th, again in the middle of the group. Korea's corruption score was a 48, the same as Colombia and Pakistan. Singapore received a score of 13, the United States a 25, Indonesia 70 and Russia 78.

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[15] http://www.opm.go.kr/home/english/sub_main04.htm.

[16] Keebong Paek, Ministry of Justice, *Combatting Corruption: The Role of the Ministry of Justice and the Prosecutor's Office in Korea*, paper presented at the ADB/OECD Conference on Combatting Corruption in the Asia-Pacific region, Seoul, Dec. 11-13, 2000, *available at* http://www1.oecd.org/daf/Asiacom/pdf/Paek_paper.pdf. For Conference papers generally, see http://www.adb.org/Documents/Conference/Fight_Corruption/default.asp and http://www1.oecd.org/daf/ASIAcom/countries/Korea.htm.

[17] *Head of Transparency International*, KOREA TIMES, Aug. 31, 2001; *Transparency Int'l gives good marks, Credits Korea's Anti-corruption Efforts*, KOREA HERALD, Aug. 31, 2001; *ACKN at Vanguard of Fight for Transparency*, KOREA TIMES, Sept. 25, 2000; *Korea's Corruption Index 2000*, KOREA HERALD, Sept. 23, 2000; *Corruption in Business Community*, KOREA HERALD, Oct. 30, 1999.

[18] *See* http://www.opacityindex.com/.

A 1999 survey found that 73% of multinational executives had been asked to pay bribes in Korea and 50% did so.[19] In a more recent survey of foreign business executives, 60% of the respondents said that corruption impeded their business activities in Korea.[20] In a survey of Korean firms, 73% of the respondents cited officials' demands for bribes as a major obstacle to the growth of their firm.[21] A survey in late 2001 found that 91% of secondary school students thought Korean society was corrupt.[22] It is the perception and probably the reality that "[c]ronyism and graft have traditionally been rampant in politics and business."[23] In the 18th century, "willful corruption was an ever-present problem in Korean local government."[24] One needn't go back nearly that far. Consider the following cases from late 1999, 2000 and 2001[25]:

Furgate, 1999

The chairman of the Shindongah Group was being investigated for embezzling $165 million and illegally sending the sum overseas. His wife claimed that she and her husband bought expensive clothes for the wives of several senior government officials in exchange for favors with the investigation. One of the wives was married to the Prosecutor General. He was arrested in December 1999, charged with improperly obtaining and then leaking a secret investigation document concerning his wife and altering the papers.[26]

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[19] Jong Bum Kim, *Korean Implementation of OECD Bribery Convention: Implications for Globals Efforts to Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 253 (Fall 1999/Spring 2000).
[20] *Kim Orders 'Extraordinary' Steps on Corruption*, KOREA HERALD, Jan. 10, 2001.
[21] *Businesses See Assembly as Most Corrupt*, KOREA HERALD, Feb. 17, 2001.
[22] *Setback to South Korea's Anti-graft Drive*, FIN. TIMES, Jan. 8, 2002.
[23] John Larkin, *Graft Busters Hit the Streets*, FAR E. ECON. REV., Oct. 4, 2001.
[24] Byoung-ho Park, *Traditional Korean Society and Law*, reprinted in INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA (1983) at 137.
[25] We go back only to late 1999 and exclude scandals that do not directly touch on auditing, banking financial regulators or public prosecutors, e.g., "Yoon-gate" (businessman bribed several government officials including the presidential press secretary, who resigned in January 2002), the resignation of the Minister of Construction and Transportation in fall 2001 amidst allegations of corruption, the public contract lobbying scandals that broke in spring 2000 (the Linda Kim and TGV cases), and the resignation of the Prime Minister in May 2000 amidst allegations of tax evasion and violations of the real name laws.
For earlier events, including the scandals involving former Presidents Chun (1980-1988) and Roh (1988-1992), see, e.g., Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071 (1996); Joongi Kim et al., *Cultural Differences in the Crusade Against International Bribery: Rice Cake Expenses in Korea and the Foreign Corrupt Practices ACt*, 6 PAC. RIM L. & POL'Y J. 549 (1997).
[26] *Kim Tae-joung's Arrest*, DIGITAL KOREA HERALD, Dec. 7, 1999. Kim served a prison term.

Lee Yong-ho Gate

Lee, described as a "corporate raider," is alleged to have bribed some 20 senior prosecutors and politicians. He was first arrested in May 2000 on charges of embezzlement of public funds and stock manipulation but was released the next day for unclear reasons, and was again arrested in September 2001. He appears to have engaged in a wide pattern of frauds and bribery, only one aspect being of interest here: The brother of Prosecutor General S.N. Shin received 66 million won ($52,000) from Lee, and Shin resigned amidst suspicion of having deterred the investigation of his brother. A prosecution special investigation team concluded that three senior prosecutors "wielded unwarranted influence" to drop the initial charges and they were charged with abuse of power.[27] An independent counsel was appointed in late November 2001. (The ex-Prosecutor General's brother is also being investigated for other acts of influence peddling and bribery. See, e.g., "Siblings of Ex-Prosecutor General Likely to Be Charged With Bribery," Korea Times, February 1, 2002.)

Deputy Minister of Justice

Deputy Minister of Justice Shin Kwang-ok allegedly received 100 million won ($78,000) from a convicted stock manipulator named Jin Seung-hyun. At the time, Shin was a senior presidential secretary. Shin resigned in mid December 2001 and was arrested on December 22 on charges of accepting 18 million won in bribes from Jin in 2000.[28] The amount charged is far less than the amount originally alleged. This may be because of evidentiary shortcomings or because the prosecutor has exercised discretion to avoid charges that carry a longer term in prison.

Financial Supervisory Commission

Chung Hyun-joon was the major shareholder in three finance companies, Chungwoo Mutual Savings and Finance, Dongbang Mutual Savings and Finance, and Daeshin Mutual Savings and Finance. He was alleged to have paid some 359 million won (a bit less than $300,000) in

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[27] *South Korea Begins an Anti-Corruption Effort as Scandals Swell*, N.Y. TIMES, Jan. 17, 2002; *3 Senior Prosecutors Found to Be Involved in Lee Yong-ho Scandal*, KOREA HERALD, Oct. 13, 2001; *Leading Prosecutor Faces Scrutiny*, KOREA TIMES, Sept. 24, 2001.

[28] *Prosecution Questions Key Figure in Jin Scandal*, DIGITAL CHOSUNILBO, Dec. 13, 2001; *Former Vice Justice Minister Arrested on Bribery Charges*, KOREA HERALD, Dec. 24, 2001; *Aide to President's Eldest Son Summoned in Corruption Case*, KOREA HERALD, Dec. 31, 2001.

bribes to Chang Rae-chan, a former top official with the Financial Supervisory Commission, the supreme financial regulator.[29] In exchange, Chang kept quiet about illegal loans that Chung took from the three companies. A warrant for Chang's arrest was issued and he committed suicide.[30]

Kim Young-jae, an assistant governor of the Financial Supervisory Service, was charged in November 2000 with taking 49.5 million won ($45,000) from the Asia Banking Corp.[31] He is also suspected of having taken money from Lee Yong-ho to suppress an FSS investigation.[32]

The FSC was established in April 1998 upon the passage of legislation consolidating the existing supervisory authorities in banking, insurance, non-banking[33] and securities. The mission of the FSC was to restore confidence by overseeing the restructuring of debt-laden banks and *chaebol*. The FSS was created in January 1999. It oversees and supervises participants in the financial markets under the general direction of the FSC and the Securities and Futures Commission. The SFC is also under the guidance of the FSC.[34]

Daewoo

The Daewoo Group collapsed in August 1999 under $80 billion of debt. In July 2001, nineteen executives were convicted of accounting fraud by concealing debts and exaggerating assets. Daewoo's auditor, the Sandong accounting firm, the local office of KPMG, was suspended from practice for 12 months. One CPA was convicted of violating the External Audit Act, having taken 470 million won in bribes.[35] In April 2001, he was sentenced to imprisonment and the bribe was confiscated pursuant to Article 19 of the External Audit Act. On appeal to the Seoul High Court, he was sentenced to one year and 6 months in prison with a stay of execution for three years on August 30, 2001.

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[29] *See* http://www.fsc.go.kr/english/about/index.html.

[30] *Financial Watchdog Suspected of Attempting to Cover Up Loan Scandal*, KOREA HERALD, Oct. 25, 2000; *Financial Corruption Scandals Rock Korean Society*, KOREA HERALD, Dec. 26, 2000.

[31] *FSS Official Arrested on Bribery Charges*, KOREA HERALD, Nov. 13, 2000.

[32] *Ex-Financial Regulator Questioned Over Role in Lee Yong-ho Scandal*, KOREA HERALD, Mar. 15, 2002.

[33] The term "non-banking" in this context refers to financial services such as trade finance and loan companies.

[34] *See* http://www.fsc.go.kr/english/about/index.html.

[35] *Charges Filed Against Daewoo Founder*, KOREA HERALD, Sept. 16, 2000; *Kim Woo Chong & Ponzi*, KOREA TIMES, Feb. 8, 2001; *Ex-Daewoo Telecom President Given 4 Year Jail Term*, KOREA TIMES, Apr. 13, 2001.

Outside director

Education Minister Song Ja resigned in August 2000 following allegations of corruption. He had been an outside director on the board of Samsung Electronics in 1998 when he received an interest free loan of $1.4 million from the company to purchase its shares at a discount price.[36]

Hanvit Bank

Park Jie Won resigned as Culture and Tourism Minister in September 2000 over a bank loan scandal. He was accused of pressuring Hanvit Bank to make an illegal loan to a former aide who also appears to have been a relative. An investigation found no evidence of improper influence, but an illegal loan was made and the press and public believed that there was a cover up.[37]

Telecom license

The former information-communication minister Lee Suk-chae was indicted in April 2001 for abuse of power in connection with the granting of a mobile service license to LG Telecom. He admitted changing the criteria for selecting bidders but denied receiving a 30 million won bribe.[38] The amount of the alleged bribe seems low in relation to the value of the telecom license, which suggests a lack of evidence or prosecutorial leniency.

The good news is that these cases are being publicized and prosecuted. That they persist suggests that the reforms have lacked a necessary element. Daewoo was a massive fraud, so it may not be fair to characterize this as typical, although there have been many lesser scandals involving auditors.[39] While audit penalties have been increased substantially to deter cases of blatant fraud,[40] it may be more difficult to instill a positive sense of independence. So too, the Samsung case raises the question of independence. If this is a friendship and loyalty case, then the pattern may be established in the culture. The Hanvit and telecom cases look like the Hanbo type, relics of the old days, and should diminish

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[36] *Bribery Scandal Deepens Investor Distrust of Samsung Electronics*, KOREA HERALD, Aug. 26, 2000.

[37] *Opposition Lays Siege on Min. Park Over Loan Scandal*, KOREA TIMES, Sept. 2, 2000; *Denies Influence Peddling - Prosecution Set to End Probe of Scandal*, KOREA TIMES, Sept. 5, 2000; *Whitewash on a Loan Scandal*, KOREA HERALD, Sept. 9, 2000.

[38] *Ex-Minister Indicted Over PCS License*, KOREA TIMES, Apr. 21, 2001.

[39] *See* note 50, *infra*.

[40] *See* note 14, *supra*.

as deregulation proceeds. (Though, as discussed above, another such case is now coming to the surface. A relative of President D.J. Kim is accused of pressuring banks to provide funds to Lee Yong-ho.) The prosecutor and FSC cases are troubling. They are not friendship and loyalty cases or Hanbo-type cases. They involve blatant criminality. Still, all the cases present the same question: how to change behavior from corruption to independence?

IV. INCENTIVES TO CHANGE BEHAVIOR, LESSONS FROM GOVERNANCE REFORMS

The Korean corporate governance reforms were modeled on U.S. law. A percentage of the board of directors of publicly traded companies must now be independent. Saying it shall be so and making it so are different things. Might Korea's deeply Confucian culture make it difficult for a member of a board to openly question or challenge or dissent? [41] Change might be more difficult still since the old system worked. Business opportunities and funds were divvied up quickly. The government told the *chaebols* what to do and told the banks to finance the ventures. Korea developed rapidly and the nation prospered. The *chaebol* prevailed for decades with opaque practices. The international capital markets were aware of the collusion inherent in the system, and still funded Korea. The collusion among government, banks and *chaebols* yielded substantial benefits, until it unraveled in 1997. At the time there were some who believed that the liquidity crisis was induced by foreign banks to discipline Korea for failing to open its financial services markets to foreign direct investment. From the point of view of the *chaebol*, what would they gain by abandoning the friendship and loyalty model and moving towards the rule of law and independence? Capital.

If a healthy stock market requires laws against fraud and self-dealing[42], institutional investors have the reciprocal power to set economic rules by choosing where to put their funds.[43] "[E]conomic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that institutional investors demand."[44] There is evidence that institutional

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[41] *U.S. Style Corporate Governance Reform in Korea's Largest Companies*, *supra* note 13, at 60-61.
[42] E.g., Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 783 (2001) (rules requiring disclosure and prohibiting self dealing).
[43] Jessica T. Mathews, *Power Shift*, FOREIGN AFFAIRS, Jan/Feb 1997.
[44] Carothers, *supra* note 5. For example, consider the CalPERS divestiture from Indonesia, Malaysia, Thailand, Philippines, announced in February 2002, for reasons of political instability and labor practices.

investors pay more for shares in a company with good governance practices, discount for opaque accounting and governance practices and disfavor corrupt nations.[45] The Korean stock market fell despite a growing economy; shares of Korean companies were undervalued in 2001 by 30% to 50%, depending on the company and the analyst, partly because of accounting problems and weak governance.[46] The McKinsey Investor Opinion Survey found that investors in 1999 were willing to pay an average premium of 24% for shares in a Korean company with good board governance practices. Korea needs foreign capital, and the governance reforms following the 1997 crisis were designed to assure minority shareholders that they would not be exploited, for example by diverting their investment to subsidize a weak group affiliate. Merely having law on the books does not compel change or overcome the inertia of culture, but the capital market might be able to encourage professional independence.

Several of the constituent companies of the Hyundai Group recently began to behave independently of the wishes of their sister companies. This seemed to be a break from the past, when the group acted as a coordinated whole under the direction of the group chairman. It may have happened because the directors of these companies understood that the banks were no longer under de facto government control and that therefore they needed to attract foreign capital to stay afloat.[47] But in April 2001, Hyundai Heavy Industries agreed to purchase $1.2 billion of semiconductor wafers produced by a distressed affiliate, Hynix Semiconductor's U.S. subsidiary, if Hynix itself couldn't find a buyer.[48] The independence model seemed to have vanished, and the stock market reacted predictably. HHI's stock price plunged. HHI surely must have known how the market would react, yet this did not deter its action. Maybe this is because old ways die hard and whatever the power of institutional investors may be, the *chaebols* are still willing to pay the price of disobedience. Or, perhaps the price of disobedience was cheap.

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[45] McKinsey & Company's Investor Opinion Survey 2000; Pricewaterhouse Coopers Opacity Index, http://www.opacityindex.com/; Philip Segal, *Before Investing in Asia, Consider the Cost of Corruption*, ASIAN WALL ST. J., July 24, 2000. For research finding a correlation between the valuation of a firm and the protection afforded minority shareholders, see La Porta, et al., *Investor protection and corporate valuation*, Harvard Institute for Economic Research, May 2001, available at http://post.economics.harvard.edu/faculty/laporta/papers.html.

[46] *Transparency Revolution*, KOREA TIMES, Jan. 4, 2001; *Korea Discount*, KOREA TIMES, Mar. 1, 2001; *Is Korea Discount a Western Conspiracy?*, KOREA TIMES, June 21, 2001; *Clear as Mud*, KOREA TIMES, Aug. 24, 2001; *Korea Discount Linked to Transparency Is Retarding Prices of Corporate Shares*, ENGLISH JOONG ANG ILBO, Nov. 22, 2001; *Chaebol Stocks Undervalued by Poor Governance*, KOREA HERALD, Dec. 15, 2001.

[47] *Independence Within Hyundai?*, *supra* note 13, at 726-27.

[48] *Hyundai Heavy in Trouble Due to Guarantees to Hynix*, KOREA HERALD, Apr. 13, 2001.

Korea made rapid progress in its recovery from the 1997 crisis, repaying its IMF debts early.[49] This relieved the pressure to make changes.

Maybe the market is not a sufficient enforcer. Collusion was a fact of life in pre-crisis Korea, and the Western and Japanese bankers certainly knew it. Korea's accounting was and is known to be often unreliable.[50] Any investor or banker who cared to know could have asked a Korean CPA and been told that there was a "tendency to accept white lies as a normal business practice."[51] Since 1997 every third company in Korea violated accounting rules and manipulated books to conceal debt, according to the Financial Supervisory Service[52], and that is the reason for the audit reforms described at note 14, above. Still the markets tolerate a degree of opacity so foreign investors and bankers put money there, although maybe not as much money or on such favorable terms as they might if *chaebol* finances were transparent and if disclosures were complete. This should hurt borrowers and issuers and should be an incentive for more scrupulous accounting and auditing, yet scandal still follows scandal and the Korea discount persists. But Korea's factories produce real goods. Companies earn cash and repay loans and bonds. So, capital comes to Korea and is not a strong force for change. Recent U.S. experience also suggests that the market may not be an effective enforcer of professional independence. If the market were good at rewarding independence, the recent string of U.S. audit scandals should not have happened.[53] Accounting firms compete for clients, and those

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[49] *Seoul Repays Final Part of Loan from IMF*, FIN. TIMES, Aug. 24, 2001, p 3.

[50] We do not mean to compare the quality of a Korean audit to a U.S. audit. Whether Korean audit failures are the result of client power (the problem in the U.S.), "friendly relations" or more elemental corruption (which seems to be the problem in Korea), the judgment is bought - either by an outright bribe or by a fee to the firm.

[51] Ehrlich and Mann, *Taking Account in Korea*, East Asian Executive Reports, vol. 20, no. 8, at 17, Aug. 15, 1998.

[52] *Corporate Governance, Cockeyed Optimism*, ENGLISH JOONG ANG ILBO, Nov. 12, 2001; *Creative Accounting Rampant Among KOSDAQ Companies*, AUSTL. FIN. REV., Mar. 30, 2001; *Cleaning Up Bad Accounting Practices*, Korea Herald, Feb. 21, 2001. The Securities and Futures Commission announced on March 14, 2002 sanctions against 13 companies, 7 accounting firms and 26 CPAs for fraudulent accounting and negligent audits. Financial Supervisory Commission, Weekly Newsletter, Mar. 23, 2002, at 7.

[53] "We have had far too many financial and accounting failures," said SEC Chairman Harvey Pitt in mid January 2002, noting a "pattern of growing restatements, audit failures, corporate failures and investor losses." Online NewsHour Update, http://www.pbs.org/newshour/updates/january02/enron_1-17.html. While the auditor is supposed to assume a public responsibility that demands independence from the client, United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984), there has been a series of scandals in which the Big Five firms have failed to detect or disclose irregularities and fraud in the accounts of their publicly traded clients. Enron is only the most recent and massive. The publicized cases involve Waste Management Inc and Arthur Andersen, Micro Strategy and PwC, Cendant and Ernst & Young, Sunbeam and Andersen, Rite Aid and KPMG, Phar-Mor and Coopers & Lybrand, Enron and Andersen, WR Grace and Price Waterhouse, Xerox and KPMG, and more recently Adelphia, Global Crossing and WorldCom. Driven by these cases,

clients want statements that are perceived to be reliable. This requires an auditor with a clean reputation, so an independent auditor should have a bigger book of business.[54] But, the reality is that clients also want good earnings to push their stock prices high, and perhaps to engage in financial cosmetics. During a bubble, investors reward aggressive accounting by bidding stocks up. The market rewards dishonesty. The power of the client has become great because of large audit fees and consulting fees, so in a judgment call the auditor succumbs to the wishes of the client. If the public loses confidence in the quality of the audits, the stock market will almost certainly suffer and so will the auditors. It is not difficult to imagine a "U.S. discount" if the current pattern continues, so the lack of audit conservatism by the Big Five is irrational - but it seems to be the reality. While markets may be good for providing the goods and services we want in the right quantities and at the lowest cost, they do not seem to be a force for making good on the rule of law or reinforcing independence. In the U.S., the cost of collusion has diminished as the legal risk to auditors has gone down, while the benefits of acquiescing to management have increased.[55] If this is right, then the risk and cost of liability must increase. Cases must be brought into court and punishment must be substantial so that auditors have cause to fear that bad practices will be punished.

We do not know whether the *chaebol* have stopped paying bribes to government officials, commercial counterparts, auditors, bankers and politicians. The available evidence suggests that the practice continues to

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by a perception that accounting firms may have compromised their independence by being more interested in large consulting fees than in asking tough audit questions of clients, and by a sense that clients are increasingly interested in playing a numbers game to "manage" earnings reports, there have been a number of recent reforms in the U.S. *Accounting Irregularities and Financial Fraud: What's an Audit Committee to Do?*, METROPOLITAN CORPORATE COUNSEL, Dec. 2001 (explaining how an audit committee should evaluate auditor independence); *Audit Committees in an Era of Increased Scrutiny*, CPA JOURNAL, June 2000, http://www.nysscpa.org/cpajournal/2000/0600/00-0601Feature/f62600a.htm. (discussing 1999 regulations which govern audit committees); *A Conceptual Framework for Independence*, CPA JOURNAL, Mar. 1998, http://www.nysscpa.org/cpajournal/1998/0398/Features/F160398.htm. (discussing the mission of the Independence Standards Board, created in May 1997, to establish independence standards for auditors of public companies); *SEC Policy Statement Concerning the Establishment of the Independence Standards Board*, Feb. 18, 1998, http://www.sec.gov/rules/policy/33-7507.htm; *Final Rule: Revision of the Commission's Auditor Independence Rules*, Nov. 21, 2000, http://www.sec.gov/rules/final/33-7919.htm (which partly incorporate the work of the ISB); William R. McLucas and Paul R. Eckert, *The Securities and Exchange Commission's Revised Auditor Independence Rules*, 56 BUS. LAW. 877 (2001).

[54] This is the point of view expressed by Rick Antle, a professor of accounting at the Yale School of Management, during a discussion on the PBS NewsHour on January 17, 2002. For a transcript, see http://www.pbs.org/newshour/bb/business/jan-june02/sec_1-17.html

[55] *See* "The Enron Debacle and Gatekeeper Liability," testimony by John C. Coffee, Jr., before the Senate Committee on Commerce, Science and Transportation, Dec. 18, 2001 (analyzing the diminished legal threat).

some extent. The governance and corruption reforms are undertaken with an eye towards the international community, including the international capital markets, which is one reason why the government undertakes and publicizes them. Country risk is a factor in determining the cost of capital, and a more transparent environment should bring a better credit rating and cheaper access to the international capital markets. Korea is trying to manage external perceptions. But why should any one company take responsibility for the total country risk, putting itself and only itself at competitive disadvantage by refraining from "friendship & loyalty" or Hanbo type acts? As long as they have governance mechanisms in their articles of incorporation and bylaws and clean audit letters, what more do they gain from the capital markets by refusing to pay an insistent official (e.g., telecom licenses) or a counterpart? Yet they complain about it.

Why does Korea still have a corruption problem? The usual answers are that the government was authoritarian, with close control of the economy, that the ministries operated according to vague or unwritten rules with judicial review unavailable as a practical matter (the product not only of having former generals as presidents but also of a Confucian culture, which combined gave rise to the Hanbo type corruption), that there are close family, regional and school ties[56] and because of the common practice of giving *chonji*, money as a token of appreciation, and cash gifts at weddings, funerals, graduations and the like[57] (which explains the "friendship and loyalty" cases, another aspect of Confucian culture). But there must be at least one more reason. The system must have worked on some level for it to persist. True, corruption gave Korea collapsing bridges and wasted capital but if the system were a total failure it should not have endured. Something about it worked, perhaps that it often produced a quick and certain outcome, coordinated action, reliable relationships. For a nation in a hurry to build itself, that is a virtue. Otherwise, the *chaebol* would have organized self-regulatory codes of conduct as soon as civilian government came into office. There are no multilateral undertakings to ban the practice. Maybe there are too many companies for such a pact to work. One participant might be tempted to break ranks and be the first mover. But there hasn't even been an attempt

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[56] *How Big Is This Scandal?*, DIGITAL CHOSUNILBO, Sept. 23, 2001. The government cites "blood-ties, hometown-ties (and) school-ties." *Combatting Corruption in Korea*, *supra* note 11.

[57] Young Jong Kim, *Corruption in North and South Korea*, http://www.transparency.org/iacc/8th_iacc/papers/yjkim.html (citing authoritarian governments and close economic control); *Cultural Differences*, *supra* note 25, at 561 (discussing "ttokkap" or rice cake expenses, and other traditional gifts); *Korea's Anti-Corruption Programs*, Office of the Prime Minister, *available at* http://www.opm.go.kr/home/english/html/4_03.html (citing excessive and unclear regulations, practice of giving cash gifts to express gratitude and prevalence of nepotism, regionalism and academic cliques).

to create such a pact, although there is a nascent effort to encourage individual firms to adopt a code on a unilateral basis. The Federation of Korean Industry distributed a Manual for Business Practice in June 2000 in order to encourage the voluntary practice of ethics. The Manual suggests that a corporate code of business ethics should prohibit bribery, tax evasion, giving of illegal political funds and money laundering.

V. WESTERN VALUES?

The government commissioned a Task Force in 1999 to recommend improvements to Korea's corporate governance structure. Of its four members, three were U.S. trained lawyers. Among other things, they studied the problem of director independence and believed that Korea's problems will respond to remedies proven elsewhere, because "even Confucian managers respond to incentives."[58] The idea that we repeat actions beneficial to us, and do not repeat responses that elicit a negative consequence, is called operant conditioning. It was the life's work of the psychologist B.F. Skinner; yet, it is not clear that social engineering is quite that simple. One cannot entice or bomb a member of al Qaeda into admitting the benefits of Western modernity. People don't always respond to incentives in a simple predictable way. The value of these incentives depends on how they are perceived. Western institutions cannot be transplanted to other places and cultures if the locals perceive it as the dictate of a foreign power.[59] Might that be a problem with corruption reforms?

Corruption and transparency reforms are on the agenda of the international development bodies, e.g., the World Bank and the Asian

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[58] Bernard Black, et al, *Corporate Governance in Korea at the Millennium*, May 15, 2000, at 7. Paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=222491.

[59] The idea of the rule of law originated in the West. *See, e.g.*, Zhenmin Whang, *The Developing Rule of Law in China*, HARV. ASIA Q., Autumn 2000, http://www.fas.harvard.edu/~asiactr/haq/200004/0004a007.htm. Indeed it is one of the distinctive features of Western culture. E.g., Samuel P. Huntington, *The West Unique, Not Universal*, FOREIGN AFFAIRS, vol. 75, no. 6, Nov/Dec 1996. While scholars debate whether the things that make the West Western must or will or can spread to other cultures, or whether other places will stick to their own value systems, let's merely ask whether a nation can adopt foreign law as its own. *See* Posner, *supra* note 7, "Such grafts do not always take." The imported laws must be adapted to the local culture and that is "a task for local not foreign lawyers." There is empirical support for the argument that "a well-designed strategy for institution building should take into account local knowledge, and should not over-emphasize best practice blueprints observed in developed countries at the expense of local participation and experimentation." Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *Economic Development, Legality and the Transplant Effect*, Apr. 2001, at 2, available at http://www1.worldbank.org/publicsector/legal/pistor-transplants.pdf. *See also, e.g., Law and Development Movement*, http://www1.worldbank.org/publicsector/legal/ldmovement.htm (summarizing the apparent failure of the law and development movement as being due in part to excessive participation by foreign legal consultants and too little participation by local lawyers).

Development Bank, as well as the OECD and Transparency International. While there is domestic grass roots support for these efforts, e.g., the Peoples Solidarity for Participatory Democracy, a citizens group which campaigned for years for an anti-corruption law,[60] others see the reforms as part of an international effort to weaken Korea,[61] or at best as inappropriate for Korean conditions. Some Koreans see entrenched and ancient patterns of corruption as the Western misperception of a Confucian society based not on law but on human relations.[62] An explanation based on culture is unacceptable to some. Culture is hard to quantify and measure, yet Korea is indisputably a Confucian culture and Koreans so perceive themselves. What does the concept embrace? It "emphasizes human interrelatedness and reflects upon what is required to relate properly to others and a keen awareness of what others do for one and what one should do in return."[63] One is tempted to say that this "coziness" may be relevant to board or audit practices but that culture has nothing to do with the bribery of a high prosecutor by an accused stock manipulator. The culture may, however, create the environment in which contact can be made, so culture cannot be wholly dismissed as an explanation for the persistence of corruption.

There is at least one more reason for skepticism about the new anti-corruption laws. One must appreciate the important role that status symbols play in Korea. Luxury cars, country club memberships, expensive watches, use of exclusive hotels, etc. are basic requirements for economic success. There is a substantial segment of the population that have an intense desire for public indicia of wealth, and this feeds the inclination to grand corruption. This is far more than the petty corruption of low-level bureaucrats. It is the staggering corruption of ex-Presidents Chun and Roh, who amassed slush funds of hundreds of millions of dollars. Though corruption is not unique to Korea, the sheer scale must be appreciated, and measures that are designed to deter petty corruption are not likely to be effective against the grander variety.

The report of the Task Force makes no mention of corruption, but the problem of independence cannot be understood except by reference to it. Since the middle class of Korea evidently does not share the confidence of the Task Force, it seems fair to ask: Will the ACA and other reforms likely succeed or do the emigrating professionals have it

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[60] For an account of the campaign by civic organizations for an anti-corruption law, see the PSPD website at http://www.pspd.org/pspd/activities/anti.html (anti-corruption law) and http://www.pspd.org/pspd/action/transparent.html (transparent society campaign).

[61] *See, e.g., Is Korea Discount Western Conspiracy?*, KOREA TIMES, June 21, 2001.

[62] *Culture and Corruption*, DIGITAL CHOSUNILBO, Jan. 22, 2001.

[63] Michael C. Kalton, *Korean Ideals and Values*, reprinted in INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA, 24 (Sang Hyun Song, ed., 1983).

right? The weight of past practice is heavy, some may see the reforms as foreign dictate, and as will be discussed below, Korea still lacks an independent prosecutor and an independent investigative body. No act of government can make its citizens virtuous but to the extent that law can suppress corruption, are the Korean laws appropriate and sufficient? If compliance with law is simply a question of incentives, and if the market does not provide sufficient rewards for transparent independent conduct, does the Korean scheme provide sufficient costs for misbehavior?

VI. HISTORY OF ANTI-CORRUPTION EFFORTS

The three new laws were not written on a clean slate, and there was not a legal vacuum in 2000 and 2001. To get a quick sense of the laws and programs that were in place at the time of the above scandals, consider the following list, which is illustrative and not comprehensive. Each of these will be discussed below.

- Criminal Code anti-bribery provisions, Articles 129 et seq. and 357, enacted in 1953;

- Public Servants Ethics Act, enacted 1981, amended 1993;

- Act relating to Information Disclosure of Public Authorities, enacted 1996;

- Real Name Accounting System, in financial transactions 1993, in real estate 1995;

- Act on the Special Cases concerning Confiscation of Public Officials Crimes, enacted January 5, 1995;

- Peoples Solidarity for Participatory Democracy first proposed anti-corruption law, 1996;

- Summer 1998 nationwide anti-corruption campaign;

- Anti-corruption law first proposed by government, 1998;

- Deregulation - the Basic Act on Administrative Regulations, the Administrative Procedures Act and the Regulatory Reform Committee, 1998;

• Korea signed the OECD Convention on Combating Bribery of Public Officials in International Business Transactions, December 1998;

• Government selected 10 major areas for anti-corruption measures, including tax and law enforcement, December 1998;

• The Corporate Tax Act was amended in December 1998 to disallow the deductibility of undocumented confidential business.

• Seoul metropolitan government began "online procedure" OPEN system, April 1999;

• Korea's Comprehensive Anti-Corruption Programs announced, June 1999;

• "First phase measures," August 1999;

• Government promulgated new 10-point code of ethics for public officials, June 1999;

• Presidential special committee on anti-corruption established, September 1999;

• "Second phase measures," 2000.

VII. PUBLICITY AND PREVENTION

The USAID Handbook for Fighting Corruption, 1998,[64] and the TI Source Book 2000[65] distinguish among public awareness measures, preventative measures and legal enforcement measures. The public sector publicity and prevention measures will be considered first, then the enforcement measures that existed in 2000 and 2001, and finally the three newest laws, which are additional enforcement measures.

A free press with investigative journalists and active non-governmental organizations can boost public awareness of corruption. So too, campaigns, workshops and other vehicles for publicity and education. These things are happening in Korea, as the websites of the Office of the Prime Minister,[66] the Korea Independent Commission Against

[64] *Available at* http://www.info.usaid.gov/democracy/anticorruption.
[65] *Available at* http://www.transparency.org/sourcebook/.
[66] *See* http://www.opm.go.kr/home/english/sub_main04.htm for a description of Korea's anti-corruption programs.

Corruption[67] and the Peoples Solidarity for Participatory Democracy[68] attest. Our sources for the major scandals of 2000 and 2001 are the local newspapers, once the voice of the government but far less so after the democratic reforms of the late 1980s.

Paying a living wage to civil servants is an obvious way to prevent petty corruption, but the recent scandals involved grand corruption of high-ranking officials. (Do government officials really earn less than in the private sector? The average monthly wage for all sectors in October 2001 was 1.7 million won, according to the Ministry of Labor, Monthly Labor Statistics Board. The basic sixteenth-class salary of the seventh-category in the regular government service is 1.13 million won at present.) There have been periodic campaigns and inspections of civil servants since the early 1990s, such as one in summer 1998 when thousands of civil servants were reprimanded and hundreds fired.[69] Financial management IT systems can help to prevent embezzlement of state funds, and Korea has a Board of Audit and Inspection[70] which is authorized to audit the accounts of the State to detect embezzlement, and the job performance of public officials. However, BAI staff themselves have engaged in corrupt acts.[71] This episode, like the Financial Supervisory Commission/ Financial Supervisory Service cases, illustrates the dependence of any regulatory scheme upon the existence of a prosecutor who is himself untainted by corruption.

In August 1993, President Y.S. Kim announced the government's decision to prohibit the use of false names in all financial transactions. The Presidential Financial and Economy Emergency Order on Real Name Financial Transactions and Guarantee of Secrecy, commonly known as the Real Names Law, was made pursuant the economic power given to the President under the Korean Constitution.[72] Previously, financial transactions, including savings and checking accounts, CDs, stocks and

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[67] *See* http://www.kicac.go.kr/. The KICAC is discussed below.

[68] An NGO that has campaigned for a comprehensive anti-corruption law, see note 18, *supra*. See too the work of the Anti-Corruption Network in Korea, another NGO, *Religious Groups' Anti-Corruption Initiatives, at* http://usinfo.state.gov/topical/econ/bribes/korean.htm.

[69] *Over 10,000 Civil Servants Reprimanded in Corruption Raid*, Dow Jones Newswires, Sept. 23, 1998; *300 Corrupt Civil Servants Face Dismissal, Criminal Punishment*, KOREA TIMES, Oct. 15, 1998; "Korea's Second Phase," *supra* note 9 (7,420 public officials disciplined in 1998).

[70] *See* http://www.bai.go.kr/english/p_e_about01_sub.html. The authority of the BAI is based upon Articles 97-100 of the Korean Constitution and the Board of Audit and Inspection Act (Act. No. 1495, Dec. 13, 1963). *See, e.g., Ranking Officials' Corruption Increased Sharply Last Year*, KOREA HERALD, Mar. 5, 2001 (describing BAI disciplinary action against corrupt officials); *Auditors Reprimand 142 Civil Servants*, KOREA TIMES, Aug. 19, 1998 (describing the BAI's role in the summer 1998 campaign).

[71] *300 Corrupt Civil Servants*, *supra* note 69 (two state auditors dismissed for receiving bribes).

[72] The order was replaced by the Act on Real Name Financial Transactions and Guarantee of Secrecy (Act No. 5493, Dec. 31, 1997).

bonds, were allowed under aliases or borrowed names. Assets of public officials and their family members must be registered and disclosed under the Public Servants Ethics Act. The Committee for the Public Servants Ethics, established pursuant to the Act, has authority to obtain account information from financial institutions. The Committee may demand that the head of any financial institution present materials on the details of financial transactions necessary to confirm the details of any financial transaction for the examination of property registration.[73]

In March 1995, the National Assembly enacted the True Ownership of Real Estate Registration Act.[74] It requires registration of the ownership and other property rights in real estate in the name of the true owner and accomplishes this by outlawing real estate trust arrangements. The purpose of the Act was to quell speculation in the real estate market and tax evasion. While not strictly an anti--corruption measure, it has that effect. The Prime Minister Park Tae-joon resigned in May 2000 after a court ruled that he had hidden real estate assets worth more than $5 million. An earlier investigation by tax authorities found that he had received more than $3 million in bribes while working at POSCO, then a state owned steel company.[75]

A code of ethics is another suggested prevention technique, regulating the gifts that a public official may receive and requiring disclosure of them. This may help to stem petty corruption or to guide the conduct of an honest civil servant but it hardy seems likely to have effect in cases of grand corruption. Will one really be deterred from taking a bribe that is already illegal under the Criminal Code because a code of ethics also forbids it? Still, the Prime Minister promulgated a 10-point code of ethics on June 14, 1999.[76] The Governmental Public

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[73] *See* Public Servants Ethics Act, 3520 art. 8(5) (1981, 1993). The 1993 amendment enlarged the range of public servants who are subject to property registration and the property that must be registered, and reinforced examination procedures and sanctions.

[74] Act No. 4944, Mar. 30, 1995.

[75] *Prime Minister Park's Resignation*, KOREA TIMES, May 20, 2000.

[76] 1. A public official should not receive the entertainment, the golf game, etc. from any person related to his duties.

2. A public official should not inform the bodies or businesses related to his duties of his personal congratulatory or condolence event and receive congratulatory or condolence money.

A public official should not invite anyone to his personal congratulatory or condolence event other than relatives and close friend.

A public official should not receive congratulatory or condolence money which exceeds more than 30,000 won (US$25). (Official on the level of grade 1 or higher is prohibited from receiving any money for congratulatory or condolence purpose.)

3. A public official is prohibited from receiving a wreath or flowerpot at the ceremony of leaving or assuming his office.

4. A public official is prohibited from giving and taking money as an appreciation or farewell gift from other public officials as well as from private citizens.

Officials Act[77] also states various duties of an official. No public official may receive "any reward, donation or entertainment in connection with his duties."[78] The "in connection with" requirement seems sensible; can it be wrong to be treated to dinner by an old friend? Yet this creates a loophole that also exists in the Criminal Code anti-bribery provisions, and the possibility of avoiding punishment because there isn't proof of a quid pro quo. Particularly if the bagman is a friend of the official, it may be difficult to prove the connection, yet it is difficult to imagine a legitimate reason to give more than the amount allowed in the ten-point code. This point is discussed below.

Another prevention measure is regulatory reform, to reduce the discretionary power of government officials. A Regulatory Reform Committee was formed in April 1998 to review and eliminate unneeded economic, social and administrative regulations.[79] Of the 11,000 regulations on the books, the Committee cut half.[80] The aim is to move from a model of economic development based on government planning and control to a market oriented and open model. The results are uneven. While foreign trade, foreign exchange and foreign investment have been deregulated, the government still plays a part in managing the domestic economy. In 1998, for example, the government mandated maximum debt equity ratios for the largest *chaebol* and arranged a number of restructuring deals amongst the largest *chaebol*, in order to limit their growth and concentration and to force them to trim their heavy debt load. These are merely two aspects of a broad ranging government effort to trim the power and inefficiency of the *chaebol*.[81] The government still regulates the largest *chaebol*, those 17 with assets in excess of five trillion won ($4 billion) each, by restricting investment of more than 25% of their assets in other companies.[82] And although some 30% of Korean

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5. A public official should not receive a gift whose value exceeds more than 50,000 won (US$40). (He should not receive a gift that is related to his duty.)
6. A public official's relatives or family should not use an official vehicle.
7. A public official should not have a wedding ceremony at a luxurious hotel or facilities.
8. A public official should not visit a luxurious entertainment establishment or a boutique.
9. A meeting of ranked officials' wives should be dissolved.
10. A public official should neither join nor give financial support to the political parties and supporters' association for the members of the National Assembly

[77] Act No. 1325, Apr. 17, 1963.

[78] GPOA art. 61.

[79] *See generally* Organisation for Economic Co-operation and Development, *Regulatory Reform in Korea* 139 (2000) [hereinafter *Regulatory Reform*] (discussing the establishment of the Committee), *available at* http://www1.oecd.org/subject/regreform/Products/oecd_reviews.htm#Korea.

[80] *Id.* at 27-33, 49-51.

[81] *Id.* at 26, 36, 43-44; *Independence Within Hyundai?*, *supra* note 13, at 714, 717.

[82] Don Kirk, *South Korea Slips Away From Changes Imposed in Bailout*, N.Y. TIMES, Dec. 17, 2001, at C14; Park Sang-soo, *New Regulatory Framework Due for Conglomerates*, KOREA

manufacturers do not make enough money to service their debt, the banks continue to extend credit at the direction of the government.[83] Hynix Semiconductor, the product of a government-arranged merger between LG Semicon and Hyundai Electronics, is insolvent but if it goes out of business it will drag down large bank creditors, so the government owned Korea Development Bank buys its bonds.[84]

In the past, Ministry decisions were often informal "administrative guidance" and were not reduced to a final formal writing. Only a fool would have dared challenge the government, and Seoul had many business consultants in the 1980s who served as conduits for the delivery of bribes to Ministry officials on behalf of foreign investors.

The Basic Act on Administrative Regulation[85] now requires that all regulations must be founded upon laws legislated by National Assembly. The Administrative Procedures Act[86] requires government agencies to inform individuals in advance of any administrative measure concerning them. There must be an informal hearing to allow citizens to express their opinions and the final decision must be explained clearly, with all legal and factual details. But, to the extent that laws still allow room for Ministry officials to exercise discretion, which must be the case, there should be clear written guidelines to guide the exercise of that discretion, and the availability of judicial review of final decisions. The Administrative Procedures Act requires that the contents of the administrative functions performed by the administrative agencies shall be concrete and clear. The disposition standards shall be stated as concretely as possible in view of the nature of the dispositions concerned and they shall be determined and publicly announced by administrative agencies. When rendering dispositions, administrative agencies shall set forth to parties the basis and reasons for dispositions with the exception of certain cases. When administrative agencies render dispositions, the disposition shall be made in writing except for cases otherwise stipulated by other Acts and subordinate statutes.[87] Chapter 6 of the Administrative Procedures Act regulates but does not ban the use of administrative guidance, requires that its use be the minimum necessary for the attainment of the purpose thereof, and shall not be unjustly exercised

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HERALD, Nov. 16, 2001; Kim Ki-tae, *Gov't Softens Restrictions on Chaebol Investment*, KOREA TIMES, Nov. 16, 2001.

[83] Moon Ihlwan, *Why Seoul Can't Let Go of Its Banks*, BUS. WK., Jan. 28, 2002, at 35.

[84] Alexandra Harney, *Fears of Debt Collapse Prompt Difficult Choices*, FIN. TIMES (LONDON), Oct. 24, 2001; Don Kirk, *South Korea Picks Out 49 Concerns to Liquidate*, N.Y. TIMES, Aug. 15, 2001, at W1.

[85] Act No. 5368, Aug. 22, 1997.

[86] Act No. 5241, Dec. 31, 1996.

[87] Administrative Procedures Act, 5241 arts. 5, 20(1), 23(1), 24(1) (1996).

against the will of the counter party of administrative guidance. When administrative guidance is rendered by oral statement, the person imposing administrative guidance concerned shall, when requested by the other party, provide in writing the matters about both his own identity and the purpose and content of the administrative guidance concerned, so long as no extraordinary administrative inconvenience arises thereby.[88]

Ministry decisions are subject to the review of administrative appeals commissions or courts. An administrative appeal commission deliberates and decides an appeal for adjudication pursuant to the Administrative Appeals Act.[89] Administrative courts can review the administrative action or the adjudication of the administrative appeal pursuant to the Administrative Litigation Act.[90] Administrative appeals are used more often today than twenty years ago.

Another mechanism for reducing the possibility of arbitrary government action is a Freedom of Information Act type of law. The Act relating to Information Disclosure of Public Authorities[91] provides in Article 6(1) that all citizens have a right to demand the public disclosure of information. Under Article 2, the public disclosure of information includes the inspection of information and the delivery of a copy.

The Corporate Tax Act[92] was amended on Dec. 28, 1998 to repeal the corporate tax deductibility of undocumented confidential business expenses which had, under Article 25(4), been allowed but limited to the extent of 1% of net worth plus 0.035% of gross revenue. This had been used to deduct "ttokkap" expenses.

Government in the sunshine is probably less susceptible to corruption than that which takes place in a smoke-filled room. In 1999, the city of Seoul instituted an online procedure for civil applications. The program, known as OPEN, is a web-based system that allows citizens to monitor the status of transactions that were prone to corruption, such as an application for a building permit.[93] So-called "First Phase Measures" in 1999 simplified procedures in tax administration, police work, housing and construction.[94] For example, construction-related licensing and permits procedures are made public on the Internet on a real-time basis. "Second Phase Measures" undertaken in 2000, included transparent

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[88] *Id.* arts. 48(1), 49(2); *Regulatory Reform*, *supra* note 79, at 56, 141-43.
[89] Act No. 3755, Dec. 15, 1984, arts. 5, 6.
[90] Act No. 3754, Dec. 15, 1984; arts. 3(1), 9.
[91] Act No. 5242, Dec. 31, 1996.
[92] Act No. 5581, as amended by Act No. 6558.
[93] Online Procedures Enhancement for civil applications, *at* http://www.metro.seoul.kr/eng/smg/corruption/online.html.
[94] See *Korea's Second Phase*, *supra* note 9, and *Combatting Corruption in Korea*, *supra* note 11, for a description of the First Phase Comprehensive Anti-Corruption Programs.

procurement procedures. For example, the Public Procurement Service, a central government organization responsible for procuring commodities and arranging contracts for construction projects involving government facilities now publicizes specific tender information on the Internet.[95]

VIII. ENFORCEMENT, THE CRIMINAL CODE.

Unlike publicity and prevention, legal enforcement has the potential to increase the cost of corruption. It also applies to the private sector. Notwithstanding the Confucian way of government, which stresses moral examples and persuasion rather than the use of physical force, the purpose of the Criminal Code is to prevent crimes and to maintain sound social order by providing punishment for crimes. That is consistent with the Western view that an appropriate punishment will deter the commission of the crime. We do not know what the appropriate punishment ought to be in Korea and do not undertake that economic analysis, nor do we take up the question whether deterrence works, though we assume that it can. We suggest only that whatever the level of punishment ought to be, current enforcement plainly falls below it. This may have something to do with corruption within the prosecutor's office. It may be because the defendant is seen to have suffered enough; the humiliation of being prosecuted at all is sufficient.

There are other problems with enforcement. It has been based on periodic campaigns. A bad actor need merely hunker down until the campaign has run its course. It would be better if limited prosecutorial resources were spent on unpredictable highly publicized efforts, rather than easily second guessed patterns. This suggests that the prosecutor ought to be independent of the government, so that he can operate according to his own timetable. Prosecution is also perceived as targeting political enemies of the President. There may or may not be such a pattern, but many people believe it to be the case. This too suggests the need for an independent prosecutor.

In the Criminal Code,[96] Articles 129-133[97] and 357[98] criminalize the payment and receipt of a bribe. The former sections deal with public

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[95] Byungtae Kang, Director General, Public Procurement Service, *Anti-Corruption Measures in the Public Procurement Service Sector in Korea*, paper presented at the ADB/OECD Conference on Combatting Corruption in the Asia-Pacific Region, Seoul, Dec. 11-13, 2000, *at* http://www1.oecd.org/daf/ASIAcom/pdf/Kang_paper.pdf.

[96] Act No. 293, Sept. 18, 1953.

[97] Article 129 (Acceptance of Bribe and Advance Acceptance)

(1) A public official ... who receives, demands or promises to accept a bribe in connection with his duties, shall be punished by penal servitude for not more than five years or suspension of qualifications for not more than ten years.

officials; the latter section deals with private sector corruption. The punishments are enhanced by the Act on the Aggravated Punishment, etc. of Specific Crimes[99] and the Act on the Aggravated Punishment, etc. of

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(2) If a person who is to become a public official ... receives, demands or promises to accept a bribe in response to a solicitation, in connection with the duty which he is to perform and he actually becomes a public official ..., penal servitude for not more than three years or suspension of qualifications for not more than seven years shall be imposed.

Article 130 (Bribe to Third Person)
A public official ... who causes, demands or promises a bribe to be given to a third party on acceptance of an unjust solicitation in connection with his duties shall be punished by penal servitude for not more than five years or suspension of qualifications for not more than ten years.

Article 131 (Improper Action after Acceptance of Bribe and Subsequent Bribery)
(1) If a public official or an arbitrator takes an improper action after committing the offenses under the preceding two Articles, imprisonment for a limited term of not less than one year shall be imposed.
(2) If a public official or an arbitrator receives, demands or promises to receive a bribe, or causes, demands or promises a bribe to be given to a third party, after taking an improper action in the course of performing his duties, the punishment specified in the preceding paragraph shall be imposed.
(3) If a person who was a public official or an arbitrator receives a bribe or demands or agrees to receive a bribe after taking an improper action in the course of performing his duties on acceptance of a solicitation made during his incumbency, imprisonment for not more than five years or suspension of qualifications for not more than ten years shall be imposed.
(4) In the case of the preceding three paragraphs, suspension of qualifications for not more than ten years may concurrently be imposed.

Article 132 (Acceptance of Bribe through Good Offices)
A public official who, by taking advantage of his post, receives, demands or agrees to receive a bribe concerning the use of the good offices in connection with the affairs which belong to the functions of another public official, shall be punished by imprisonment for not more than three years or suspension of qualifications for not more than seven years.

Article 133 (Delivery of Bribe)
(1) A person who promises, delivers or manifests a will to deliver a bribe as stated in Articles 129 through the preceding Article shall be punished by penal servitude for not more than five years or by a fine not exceeding twenty million won.
(2) The preceding Paragraph shall apply to a person who, for the purpose of committing the crime specified in the preceding Paragraph, delivers money or goods to a third party, or receives such delivery with the knowledge of its nature.

[98] See below.
[99] Act No. 1744, Feb. 23, 1966:
Article 2 (Aggravated Punishment for Bribery)
(1) Any person who commits the crime specified in Article 129, 130 or 132 of the Criminal Act, shall be punished aggravatingly depending on the amount of the bribery which the person receives, demands or promises (hereinafter referred to as the "amount of the accepted bribery" in this Article), as follows: <Amended by Act No. 3280, Dec. 18, 1980; Act No.4291, Dec. 31, 1990>
1.Where the amount of the accepted bribery is not less than fifty million won, the person shall be punished by imprisonment for life or imprisonment for not less than ten years; and
2.Where the amount of the accepted bribery is equal to or more than ten million won and less than fifty million won, the person shall be punished by imprisonment for not less than five years.
(2) Deleted. <by Act No. 4291, Dec. 31, 1990>

Specific Economic Crimes.[100] There is also an extradition treaty with the United States and while not specifically an anti-corruption measure it can be helpful in bringing defendants to justice.

Public sector corruption

The elements of the crime of official bribery have been well described by other writers.[101] The punishment is clearly stated in Article 2 of the Act on the Aggravated Punishment, etc., of Specific Crimes and Article 129 of the Criminal Code: ten years to life imprisonment if the amount of the bribe is at least 50 million won, at least five years if the amount of the bribe is more than 10 million won, and not more than five years for a lesser amount. However, the Korean Supreme Court has held that specific criminal intent must be established and that the bribe must be offered in exchange for specific official action. The proof may consist of circumstantial evidence but there must be a quid pro quo. This is what distinguishes a gift from a bribe.[102] The purpose of criminalizing bribery is to maintain the fairness of official decisions and society's trust in these decisions. The central concern is the incorruptibility of official action. In determining the payment's relation to the official's duties, the duties need not be those specifically stipulated by law but may include the entire scope of official duties that one is responsible for according to one's rank.

A payment or gift offered as a social courtesy is not a crime;[103] the amount of the payment is a factor in determining intent.[104] Determining whether a payment or gift is a social courtesy or an illegal bribe has become a delicate balancing act. The primary emphasis appears to be whether the payment was sufficiently in consideration for action within an official's duties. The courts will also consider whether the monetary payment or favor provided exceeds socially acceptable levels. The Supreme Court appears to believe that while the size of the payment will be considered, the primary factor remains whether the payment was

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[100] Act no. 3693, Dec. 31, 1983; see below.

[101] *See Bribery Among the Korean Elite*, *supra* note 25, at 1094; *Rice Cake Expenses*, *supra* note 25, at 563-570.

[102] Supreme Court Judgment of Apr. 28, 1981, 80 Do 3323; Judgment of Sept. 25, 1984, 84 Do 1568.

[103] Supreme Court, Judgment of June 7, 1955, 4288 Hyungsang 129 (entertainments or gifts offered as mere social courtesies were viewed as not being given in consideration for an official's acts, and therefore did not amount to an impermissible bribe); Judgment of July 11, 1955, 4288 Hyungsang 97; Judgment of Apr. 15, 1961, 4290 Hyungsang 201; Judgment of Apr. 10, 1984, 83 Do 1499 (Ministry of Labor official is guilty for being treated to a 70,000 won [approximately U.S. $88 at the time] dinner by a company director); Judgment of June 14, 1996, 96 Do 865.

[104] Supreme Court, Judgment of Mar. 4, 1955, 4285 Hyungsang 114 (lavish entertainment does not fall under the scope of the social courtesy); Judgment of May 22, 1979, 79 Do 303.

in consideration for an official's actions.[105] Neither the Criminal Code nor the Supreme Court suggests the standard that may distinguish between a social courtesy and a bribe. Even if the value were meager, this alone would not allow entertainment to qualify as a social courtesy. Conversely, a very large payment is not a bribe without some proof of quid pro quo. The ten-point code of ethics might serve as a useful basis for drawing a line between a gift and a bribe. It prohibits a public official from receiving a gift in excess of 50,000 won. The courts might have adopted a presumption that greater sum is a bribe, but no Korean court has adopted this view and the Anti-Corruption Act does not either.

Private sector corruption, e.g., the bribing of bankers and auditors

Article 357 of the Criminal Code defines the crime of private sector corruption.[106] The maximum period of imprisonment for the recipient is five years, and two years for the person who pays the bribe. The fine may not exceed ten million won and five million won respectively, and the amount of the bribe may be confiscated. Auditors are now subject to other stricter penalties, however.[107] Bankers are subject to stricter punishment under Article 5 of the Act on the Aggravated Punishment, etc., of Specific Economic Crimes (prison not more than five years but if the bribe is 10 million won or more, the term shall be five or more years, and if the bribe is 50 million won or more, the term shall be ten years to life).[108]

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[105] *See Rice Cake Expenses*, *supra* note 25, at 561-70.

[106] Art. 357 (Receiving or Giving Bribe by Breach of Trust) Act No. 293, Sep. 18, 1953.
(1) A person who, administering another's business, receives property or obtains pecuniary advantage from a third person in response to an illegal solicitation concerning his duty, shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won. <Amended by Act No. 5057, Dec. 29, 1995>
(2) A person who gives the property or pecuniary advantage as specified in paragraph (1), shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won. <Amended by Act No. 5057, Dec. 29, 1995>
(3) The property mentioned in paragraph (1) which has been obtained by the offender shall be confiscated. When confiscation is impossible or pecuniary advantage has been obtained, the equivalent price thereof shall be collected.

[107] *See* note 14, *supra*.

[108] Art. 5 (Crime of Acceptance of Property) Act No. 3693, Dec. 31, 1983.
(1) If any officer or employee of a financial institution accepts, demands or promises any money or other benefit, in connection with his duties, he shall be punished by imprisonment for not more than five years, or a suspension of qualification for not more than ten years.
(2) If any officer or employee of a financial institution receives any unlawful solicitation in connection with his duties, and makes any money or other benefits given to a third person, or demands or promises to be done so, he shall be punished by the penalty as referred to in paragraph (1).
(3) If any officer or employee of a financial institution accepts, demands or promises any money or

Insufficient punishment, selective prosecution

The Criminal Code and Aggravated Punishment Acts provide substantial terms of imprisonment yet sentencing has been weak. Public officials prosecuted for accepting a bribe in connection with their duties tend to be sentenced for a term of only two to three years in prison and usually with a stay of execution. The short term and the stay go hand in hand. Article 62 of the Criminal Code[109] allows a stay of execution if the sentence of imprisonment is "for not more than three years." Courts justified leniency by suggesting that the prosecuted public official had lost his honor and that he had performed his public service faithfully for a long time. In passing sentence, courts also considered that when a public official is sentenced to prison, he is subject to an ipso facto retirement and is unable to commit future corrupt acts.[110]

It is difficult to evaluate rigorously the enforcement of the Criminal Code because basic data are lacking. Corrupt acts are not ordinarily published, though we have no reason to disagree with the general sense that corruption is rife in Korea. There are surveys but they are subjective and imprecise. We would like to be able to know how many persons are accused, arrested, indicted and convicted, and for the last group what their sentences are. We would also like to know about the frequency of suspended sentences and pardons, and how long a convicted defendant actually spends in prison.

The following data from the Ministry of Justice[111] are incomplete because they do not indicate the conviction rate or the punishment given

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other benefits in connection with a mediation of matters belonging to the duties of an officer or employee of a subordinate financial institution or other financial institution, taking advantage of his status, he shall be punished by the penalty as referred to in paragraph (1). (4) In the case as referred to in paragraphs (1) through (3), if the value of the money or other profit accepted, demanded or promised (hereinafter referred to as an "accepted amount"), is ten million won or more, the punishment shall be aggravated as follows: 1. If the accepted amount is not less than fifty million won, he shall be punished by imprisonment for life or not less than ten years; and 2. If the accepted amount is not less than ten less than fifty million won, he shall be punished by imprisonment for a definite term of five or more years.

[109] Art. 62 (Requisites for Suspension of Execution of Sentence)

(1) If, in cases where a sentence of imprisonment or imprisonment without prison labor for not more than three years is to be imposed and there are extenuating circumstances in the application of the provision of Article 51, the execution of a sentence may be suspended for a period of not less than one year nor more than five years: Provided, that this shall apply in case where five years have elapsed since a sentence to imprisonment without prison labor or more severe punishment was completed or remitted.

(2) When punishments are to be imposed concurrently, execution of a part of the punishment may be suspended separately. Article 51 states the general principles for determination of punishment, including the offender's age, character, intelligence, conduct and motive, etc.

[110] Governmental Public Officials Act, 1325 arts. 33, 69. *See* Ministry of Court Administration (Korea), Practice for Determination of Punishment (in Korean) 354 (1999) (sentencing guidelines).

[111] Paek, *Combatting Corruption*, *supra* note 16.

by the court. They do however indicate a declining trend in the ratio of persons arrested to those "exposed" or accused by petition seeking criminal punishment, averaging 45% in 1996-1998 and dropping to 34% on average in 1999 and 2000. The data also demonstrate that private sector corruption is a problem and that public sector prevention methods are insufficient.

Number of People Accused and Arrested for Corruption
Figures in parentheses indicate the number of public officials.

Year Accused Arrested	Persons exposed	Persons arrested
1996	3,728 (688)	1,734 (482)
1997	2,892 (576)	1,417 (329)
1998	5,206 (1,035)	2,487 (613)
1999	5,099 (775)	1,893 (447)
Jan-Sept. 2000	3,764 (335)	1,209 (204)

At least through the end of 1995, "the enforcement of the anti-bribery laws has largely been limited to low level public officials."[112] As of mid-1999, the indictment rate for bribed officials was about 40%, below the general criminal indictment rate of 60%. Of those prosecuted, about 25% were sentenced to a term in prison without stay of execution.[113] The percentage of suspended sentences in case of bribery amounts to 60.3%, relatively high as compared with theft, fraud and burglary.[114] In case of the crimes of public officials related to their official duties, the decision not to institute a public prosecution amounts to 62%.[115] This is very high as compared with the rate of acquittal in the trial court being 0.09%.[116]

The use of law for political purposes is illustrated by the use of amnesty and pardons to effect political reconciliation. Many corrupt politicians and officials have received a stay of execution or were pardoned a short while later. In a famous case, the heads of nine *chaebol* were convicted of paying bribes to ex-Presidents Chun and Roh in the 1980s, e.g., $24 million from Daewoo to Roh for a submarine depot construction contract, $25 million from Samsung to Roh for permission to

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[112] *Bribery Among the Korean Elite*, *supra* note 25, at 1097.
[113] Young Jong Kim, *The Role of the National Assembly in Controlling Corruption: The Case of Korea*, Oct. 1999, *at* http://magnet.undp.org/docs/efa/GIT2000Beyond/present young jon kim.htm.
[114] Kang Seong Nam, *The Reformative Alternatives of Apparatus for Corruption Control in Korea* (in Korean), 1 Korean Corruption Studies Review 149, 155 (1997), *available at* http://www.ii2.net/corruption/kanheng9.htm.
[115] Report of the Supreme Public Prosecutors' Office presented to the National Assembly for the parliamentary inspection of the administration in 1995.
[116] Kang Seong Nam, *supra* note 114, at 155-56.

enter the automobile business. Roh amassed a $650 million slush fund during his term in office, of which some $300 million was unaccounted for and probably held in personal accounts. Daewoo's chairman, Kim Woo-choong, was given a two and a half year sentence in August 1996, subsequently suspended. Lee Kun-hee of Samsung was given a two year suspended sentence.[117] Maybe there was a legitimate reason for leniency; the importance of the chairmen to the economy, or that they had no real choice in the matter, corruption being an integral part of the way the system worked - but leniency is not a deterrent.

The Supreme Court sentenced ex-presidents Chun and Roh to death and 17 years in prison respectively in 1997. They were granted a special amnesty and restored to their rights by Y.S. Kim on December 22, 1997. Even D.J. Kim pardoned corruption convicts in August 1999 and August 2000, including former government officials and legislators.[118] The case of Kim Hyun-chul was noted above. Kim was arrested in mid-1997 on charges of accepting 6.6 billion won from six businessmen seeking government favors between 1993 and 1996, while his father was in office. The district and appeals courts sentenced him to two years in prison but he was freed in November 1997, after six months in jail. He received a "partial amnesty" in 1999 without restoration of civil rights and then received a full amnesty in August 2000. A former lawmaker, Hwang Byung-tae, and a former minister, Kim Woo-suk, were granted a special amnesty and restored to their rights on Aug. 15, 1999 by D.J. Kim. They were associates of Y.S. Kim and had been involved in the Hanbo scandal. Kwon Roh-kap, a member of the National Assembly and close confidant of D.J. Kim, was sentenced to imprisonment for five years on a charge of bribery in 1997 during Y.S. Kim's time in office. He took 250 million won from the bankrupt Hanbo Group. He was disqualified from membership in the National Assembly on December 1997, but President D.J. Kim granted a special amnesty and restored his rights on August 15, 1998, and today he exerts strong influence on the ruling party.

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[117] Sheryl WuDunn, *Death Sentence for Ex President Chun a Landmark for Korea*, N.Y. TIMES, Aug. 27, 1996, at A4; Sandra Sugawara, *Seoul Court Convicts Top Industrialists*, WASH. POST, Aug. 26, 1996, at AA01.

[118] *Presidential Amnesty to Pardon 30,647 Convicts for Reconciliation*, KOREA HERALD, Aug. 15, 2000 (full pardon of Kim Hyun-chul, pardon of former presidential secretary Hong In-gil and former president of Korean Broadcasting System Hong Doo-pyo); *30,647 Criminals Pardoned Today*, KOREA TIMES, Aug. 15, 2000 (pardon of Lee Won-jo, who orchestrated Roh's slush fund, and six former legislators); *Ex-president's son pays 1.57 bil. won fine after 'partial' amnesty*, KOREA HERALD, Aug. 17, 1999 (partial pardon of Kim Hyun-chul); Chon Shi-yong, *Presidential Amnesty to Benefit 2,864*, KOREA HERALD, Aug. 13, 1999 (former legislators pardoned); Teresa Watanabe, *S Korea Still Fighting Its Moral Malady*, L.A. TIMES, Dec. 2, 1996, at A10 (describing use of selective prosecution, suspended sentences and pardons).

President D.J. Kim refrained from granting amnesty in 2001, though, in deference to public criticism of the practice.

Suspended sentences and special amnesty are sometimes justified on grounds that the prosecution of corruption cases is vindictive and unfair, targeted at the political enemies of the ruling party.[119] One problem compounds another: because the case is ill conceived, the punishment is light. Yet the Kim Hyun-chul case can also be taken as evidence that prosecution is not improperly selective. Hyun-chul was prosecuted during his father's term in office, as was Y.S. Kim's defense minister. Some of D.J. Kim's colleagues recently have been forced to resign and face prosecution. Whether selective prosecution is common or not, there is a need for a permanent independent prosecutor if prosecution is perceived as being unjust political retribution. Selective prosecution of political opponents and granting de facto immunity to one's cronies is the antithesis of the rule of law, which requires the equality of both subjects and rulers before the law.

Lenient sentences are sometimes justified on grounds that "face" is extremely important and the stigma of a prosecution itself may be a significant deterrent. In the 2000 Parliamentary elections, a coalition of citizen NGOs published a list of candidates that it believed should not be

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[119] Consider two examples reported in THE ECONOMIST: "Mr [DJ] Kim has also launched an anti-corruption campaign. A member of his party has been arrested for allegedly taking bribes, and nearly a dozen opposition members are under investigation. On September 18th the public prosecutor's office said that the [opposition] Grand National Party had used the country's tax collectors to gather at least 8.4 billion won ($ 6m) from several dozen business conglomerates, including Hyundai, Daewoo and Samsung, to finance its election campaign last year.
Mr Kim wants the Grand National Party to apologize for its 'tax theft'. Lee Hoi Chang, a former Supreme Court judge who ran against Mr Kim as the party's presidential candidate, refuses to do so. Mr Lee says Mr Kim should reveal the source of his own campaign funds. He claims the investigation is unfair because it is mostly directed at opposition politicians....
Many in South Korea believe Mr Kim is trying to dismember the opposition in order to extend his party's power-base from the Cholla region in the south-west into the Grand National Party's stronghold in the more prosperous south-east. Mr Kim denies this, and refutes allegations that he has launched the corruption probe simply to get revenge on his old opponents." *South Korea. Nem con?*, THE ECONOMIST, U.S. Ed., Sep. 26, 1998.

"It is said that in 1996 some $80m of government money was funnelled to Mr Kim Young Sam's party, which distributed it to nearly 200 candidates campaigning in a parliamentary election. As well as being South Korea's president, Mr Kim was the chairman of the party. Mr Kim has denied knowing of the misuse of any money. At the same time he has accused President Kim Dae Jung of seeking "political revenge." He has not specified what he means by revenge but Koreans are aware that the old comrades did fall out. In opposition they formed rival political parties. There were rumours of corruption during Mr Kim Young Sam's presidency, although only now has the state's prosecution agency come out with some detail. But Koreans also sigh that this may be another example of a president turning on his predecessor. During Mr Kim Young Sam's presidency, two former presidents, Chun Doo Hwan and Roh Tae Woo, were jailed for treason, insurrection and taking bribes. The two men were freed in December 1997, just before Mr Kim's term of office ended." *A Question of Revenge*, THE ECONOMIST, U.S. Ed., Jan. 27, 2001, at 40.

elected. Many on the list were sufficiently stigmatized to lose their elections.[120] But some convicted politicians who were granted amnesty by Y.S. Kim ran for the National Assembly in 1996 after their records were wiped clean. Park Chul-un, who was a member of the National Assembly and relative and former associate of ex-president Roh, was sentenced to imprisonment on a charge of bribery in 1993. He asserted that it was political retaliation by ex-president Y.S. Kim. He was restored to his rights on Liberation Day, August 15, 1995. He was elected to the National Assembly in 1996. He ran again in 2000, but failed. Lee Geon-gae, a ranking prosecutor, was convicted of bribery in a slot machine scandal together with Park Chul-un. He was granted special amnesty and restored to his rights on August 15, 1995. He too was elected to the National Assembly in 1996. He ran again in 2000 again, but failed. Um Sam-tak, a ranking public official of the Agency for National Security Planning, was implicated in the same slot machine scandal and sentenced to imprisonment. He was granted special amnesty on Aug. 15, 1995 and restored to his rights on Aug. 15, 1996. In 1998, he ran for a National Assembly election to fill up vacancies, but failed.

So, the stigma effect is mixed. Even if stigma is a sufficient punishment for a politician, auditors and bankers do not run for office.

The new Anti-Corruption Act does nothing to change this pattern of leniency, although Article 31 provides that the Anti-Corruption Commission may seek judicial review of certain decisions by the prosecutor not to proceed against public officials. Recently, though, the prosecutor and the courts have tended to request and order stricter punishment. This may or may not be a durable change.

Extradition

The U.S. was and may still be the most common destination for criminal suspects who flee Korea to avoid prosecution, especially those who have amassed wealth illegally. The U.S.-Korea Extradition Treaty was signed on June 9, 1998 and went into force on December 20, 1999.[121] It defines an extraditable offense as one punishable under the laws of both Contracting States by deprivation of liberty for a period of more than one year. Bribery is an extraditable offense. The punishment under Korean

[120] Lee Joon-seung, *Only the People Can Effect Voter Revolution*, KOREA HERALD, Feb. 24, 2000; Sah Dong-seok, *Nascent Civic Movement Facing Crisis After String of Scandals*, KOREA TIMES, June 1, 2000.

[121] Treaty Doc. 106-2, 1998 UST Lexis 168.

law is discussed above. The punishment under U.S. law can also include imprisonment for more than one year.[122]

To conclude, the enforcement measures were largely sufficient as written. The chief defect lay in the administration of the Criminal Code.

IX. THE THREE NEWEST LAWS

The three laws are the Anti-Corruption Act, the Act relating to Offer and Use of Information on Financial Transaction[123] and the Act relating to Regulation and Punishment of Criminal Proceeds Concealment.[124] Another enforcement law, the Act of Preventing Bribery of Foreign Government Officials in International Business Transactions,[125] was enacted to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, but the purpose of that law is plainly not relevant to domestic corruption within Korea.

What the Anti-Corruption Act is not

Five years after it was proposed by the PSPD and three years after it was first introduced by the government, an anti-corruption act was enacted by the National Assembly on June 28, 2001, effective as of January 25, 2002. The law does not outlaw corruption. Bribery in the public and private sectors has long been a criminal offense. The Act does not concern private sector corruption, such as the bribery of a banker or an auditor.[126] While the Act does provide a reinforced criminal punishment against corrupt government officials, the penal provisions do not directly concern the acts of giving or receiving a bribe and instead concern a whistle-blower who complains falsely,[127] a public official who exploits or leaks office secrets,[128] violates employment restrictions if he

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[122] 18 USC § 210 (not more than 15 years), 18 USC §§ 1341, 1343 and 1346 (not more than five years).

[123] Act No. 6516, Sept. 27, 2001.

[124] Act No. 6517, Sept. 27, 2001.

[125] Act No. 5588, Dec. 28, 1998.

[126] "The term act of corruption means the act falling under any of the following items: a) the act of any public official's abusing his position or authority or violating Acts and subordinate statutes in connection with his duties to seek gains for himself or any third party; and b) the act of causing damages to the property of any public institution in violation of Acts and subordinate statutes, in the process of executing the budget of the relevant public institution, acquiring, managing, or disposing of the property of the relevant public institution, or entering into and executing a contract to which the relevant public institution is a party." Anti-Corruption Act, Act No. 6494 art. 2 subpar. 3 (2001).

[127] *Id.* art. 49.

[128] *Id.* arts. 50, 51. There have been suspected cases of insider trading by public officials. *Minister Lee Says Officials Should Refrain from Investing in Stocks*, KOREA HERALD, Mar. 3, 2000; *Stock*

has been dismissed for corruption[129] or retaliates against a whistleblower.[130]

The Act has fifty-three Articles (see full text, below). The following is a brief overview:

Articles 3-8 are hortatory and meaningless, declaring the responsibility of public institutions, political parties, private enterprises and citizens to strive to prevent corruption, to be "clean handed" and to abide by a code of conduct for public officials that will be prescribed by Presidential Decree.

Article 9 requires the State and local governments to "labor" to guarantee the livelihood of public officials. However, the cases described above did not involve petty corruption of low-level bureaucrats.

Articles 10-24 concern the establishment and operation of the Anti-Corruption Commission (which calls itself the Korea Independent Commission Against Corruption). Among its functions are to formulate and recommend policies to prevent corruption, to implement educational and publicity efforts and to receive the reports from whistle-blowers.[131] The President will appoint its members and they are guaranteed a term of three years, plus one possible reappointment.[132]

Articles 25-39 concern whistle-blowers. Any person who becomes aware of an act of corruption may report it to the ACC.[133] A public official who learns of such an act must report it.[134] If it is necessary to investigate a report, the ACC shall refer it to the Board of Audit and Investigation. If the accused is a high-ranking public official, the ACC shall refer the matter to the public prosecutor.[135] The ACC may seek judicial review of the prosecutor's decision not to proceed.[136] Whistle-blowers are protected against retaliation by their employers, and the Commission may recommend that they receive a reward.[137]

Any citizen may request an audit from the BAI.[138]

Profits of Officials, Editorial, KOREA HERALD, Mar. 2, 2000. The offense of exploiting office secrets under the Anti-Corruption Act does not directly aim to prohibit a public official from making a sale and purchase or other transaction of securities, as does Article 188(2) of the Securities and Exchange Act. An official who trades the securities on the material nonpublic information known in the course of performing his duties will be punishable under both Acts.

[129] Anti-Corruption Act, *supra* note 126, art. 52.

[130] *Id.* art. 53.

[131] *Id.* art. 11.

[132] *Id.* arts. 12, 15.

[133] *Id.* art. 25.

[134] Anti-Corruption Act, *supra* note 126, art. 26.

[135] *Id.* art. 29.

[136] *Id.* art. 31.

[137] *Id.* arts. 32, 36.

[138] *Id.* arts. 40-44.

A public official who resigns, is removed or is dismissed for committing an act of corruption shall be prohibited from working in any public institution or a private company with close ties to the official's former post for five years.[139]

Articles 49-53 are the penal provisions.

The mission of the anti-corruption commission

The ACA creates a nine-member anti-corruption commission,[140] though that is not a wholly new thing. President D.J. Kim by executive order created such a commission in September 1999. The Special Committee for Anti-Corruption was based on the Regulation on the Special Committee for Anti-Corruption, promulgated on Sept. 1, 1999. The Anti-Corruption Commission replaced the Special Committee for Anti-Corruption as of Jan. 25, 2002.[141] While the new Anti-Corruption Commission has a statutory foundation, its mission is to receive reports of corruption, which it then passes along to an appropriate investigative agency or to the court if the prosecution fails to act. It will also coordinate the government's policies and programs—something the old commission had done. Even Y.S. Kim had his own committee for the prevention of corruption.[142]

The role of the old Special Committee for Anti-Corruption was to provide advice and suggestions as requested to the President about the reform of unreasonable systems causing corruption, the promotion of public awareness against corruption, etc.[143] It was a non-permanent, consultative committee. Its function was to deliberate on the matters below:

- the reform of systems for anti-corruption
- the education programs and publicity campaigns for anti-corruption
- the support for anti-corruption movements led by civil associations and citizen groups
- the international cooperation in combating corruption
- the matters that the President deems deliberation by the Committee to be necessary.[144]

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[139] *Id.* art. 45.
[140] *Id.* art. 10.
[141] The Presidential Decree on the Office Regulations of the Anti-Corruption Commission was promulgated on Jan. 19, 2002, and went in effect on Jan. 25, 2002.
[142] *Rice Cake Expenses*, *supra* note 25, at 571.
[143] Anti-Corruption Act, *supra* note 126, art. 1.
[144] *Id.* art. 2.

The Committee was able to evaluate the government's anti-corruption policies and programs,[145] and request the explanation or the submission of materials, documents, etc.[146]

The Anti-Corruption Commission was established to revamp Acts and subordinate statutes, institutions, etc. and to formulate and implement policies, which are necessary to prevent corruption.[147] In addition to performing tasks similar to functions 1-5 above, the Commission shall receive complaints from whistle-blowers, and protect and recompense whistle-blowers.[148] The Commission may also urge the heads of public authorities to make institutional improvement for the prevention of corruption,[149] and may file an application for adjudication with the High Court.[150] But while the Commission does more than the Special Committee, it has neither investigative nor prosecutorial powers.

The ethics code

The Anti-Corruption Act provides that a public official shall abide by Acts and subordinate statutes, perform his duties fairly and hospitably, and refrain from committing any act of corrupting himself or losing his dignity.[151] The code of conduct that public officials shall have to observe in accordance with Article 7 of the Act shall be prescribed by the Presidential Decree, the National Assembly Regulations, the Supreme Court Regulations, the Constitutional Court Regulations, or the National Election Commission Regulations.[152] The code of conduct shall prescribe matters concerning the prohibition and limitation of any public official's receiving entertainment, money, goods, etc. from any person related to his duties, matters necessary to prevent corruption and maintain the clean-handedness and dignity of the public officials when they perform their duties, and so on.[153] It seems likely that the pre-existing ten-point code of ethics that was promulgated in 1999 will be incorporated in the code of conduct for public officials, so this part of the ACA adds nothing. The ACA does not make the code of ethics a basis for distinguishing a bribe from a social courtesy.

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[145] *Id.* art. 8.
[146] *Id.* art. 11.
[147] Anti-Corruption Act, *supra* note 126, art. 10.
[148] *Id.* art. 12.
[149] *Id.* art. 20(1).
[150] *Id.* art. 31.
[151] *Id.* art. 7.
[152] *Id.* art. 8(1).
[153] *Id.* art. 8(2).

Whistle-blowers

The Act enables any citizen to file a complaint with the commission[154], obligates a public official to do so,[155] protects whistle-blowers by protecting their identity and job security, provides monetary rewards to persons who inform the government of corrupt behavior and provides for punishment of a person who knowingly makes a false accusation.[156] We have two doubts about the likely effect of these rules. To the extent that people are willing to accuse, they already do so. Witness the scandals that have become public in the last two years alone. On the other hand, to the extent that people in a Confucian culture are not willing to betray a friend, one wonders whether these protections, standard equipment in the anti-corruption arsenal, add much.

Independent prosecutor

The Prosecutor General heads the Supreme Prosecutor's Office. In 1988 opposition parties secured a two-year tenure for the Prosecutor General, without reappointment.[157] He controls and supervises prosecution nationally, and is subject to the direction of the Minister of Justice. The Constitution and the Code of Criminal Procedure confer authority upon public prosecutors to initiate and conclude criminal investigations; they have sole authority and responsibility for doing so.

The ACA does not provide for an independent prosecutor. The opposition Grand National Party called for it and the ruling Millennium Democratic Party opposed it, so the bill enacted by the National Assembly does not contain it.[158] There are other measures designed to serve as a substitute, but they are insufficient. In September 1999 the Supreme Prosecutor's Office created its own special investigation unit to handle sensitive cases involving politicians and high government officials, following the creation of D.J. Kim's Special Committee for Anti-Corruption.[159] Since the President appoints the Prosecutor General, he is not free from political power and influence. Also, a two-year term is too short a time to mount a serious law enforcement effort. The investigation and prosecution of a case can take longer than this. With

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[154] *Id.* art. 25.
[155] *Id.* art. 26.
[156] *Id.* arts. 32, 33, 36, 49.
[157] Prosecutor's Office Act, 3882 art 12 (1986).
[158] Sohn Suk-joo, *GNP to Have Special Prosecutor Included in Anti-Corruption Law*, KOREA TIMES, Sep. 29, 2001.
[159] Paek, *Combatting Corruption*, *supra* note 15; Kang Seok-jae, *Prosecution Declares War on Graft*, KOREA HERALD, Sep.18, 1999.

only two years in office, the Prosecutor General must begin thinking about his next job from the moment he assumes his post. The director of the U.S. FBI serves a ten-year term that does not coincide with administrations.

At a New Year's news conference in January 2002, following the resignation of Prosecutor General Shin Seung-nam, the President promised to create a "prosecutor's office for special investigations" to handle cases involving senior officials,[160] and the Ministry of Justice is to draft appropriate amendments to the Public Prosecutor's Office Act. The office will be independent of the Prosecutor General's direction regarding the investigation of an offense, and the personnel management and budget will be independent also. The Chief Public Prosecutor of the Office shall be appointed from among senior chief public prosecutors, and his term shall be two years. But the opposition parties believe the Prosecutor General will in fact control the special investigation unit, which will be under the influence of the Supreme Public Prosecutor's Office.

The Government also plans to amend Article 7(1) of the Public Prosecutor's Office Act as follows: The public prosecutor shall obey any order of his superiors with respect to prosecutorial affairs: **Provided, that he may raise an objection to the unjustified order.** (Bold type will be newly inserted)

As of this writing in the Spring of 2002, there has not been further progress in the establishment of the new Office and the amendment of the Public Prosecutor's Office Act.

Korea has an ad hoc independent counsel system. Independent counsel have been appointed in three recent high profile corruption cases, including "Furgate" and "Lee Yong-ho gate,"[161] but the independent counsel is limited in time and authority. The National Assembly must pass a bill to appoint an independent counsel for a defined corruption case. The bill always prescribes the object of investigation, the range of functions and the period of investigation.

Thus, Korea has no permanent independent investigative body and no dedicated independent prosecutor who is not controlled by the Prosecutor General and indirectly by the President.

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[160] *Kim's Crucial Last Year*, Editorial, Korea Herald, Jan. 16, 2002. Jan. 15, 2002 Ministry of Justice press release, *at* http://www.moj.go.kr/index_.php?num=341 (Korean).

[161] In late November 2001, the National Assembly passed a bill appointing a special prosecutor to investigate Lee Yong ho. He was appointed on Dec. 1 of last year, and the prosecutor started the investigation on Dec. 11. The investigation continued for 105 days. The National Assembly failed to amend the act to extend the period of investigation and so on March 25, 2002, the special prosecutor terminated the investigation procedures by the expiration of the period of investigation.

Korea might have modeled the ACC on Hong Kong's Independent Commission Against Corruption[162] or Singapore's Corrupt Practices Investigation Bureau.[163] Both have achieved notable success in the investigation and prevention of corruption. Both have the power to receive and investigate complaints alleging corruption, though neither is a prosecuting body. For example, in Hong Kong, the ICAC's findings are presented to the Secretary of Justice, who decides whether to commence a prosecution in each case. As with Korea's anti-corruption commission, the Hong Kong and Singaporean bodies have statutory basis. A Commissioner who reports only to the Governor heads the ICAC, and he "shall not be subject to the direction or control of any person other than the Governor." Independent Commission Against Corruption Ordinance, section 5(2).

The ACC has an educational mission, in common with the ICAC, and it has a statutory basis, just as the ICAC and the CPIB. This confers legitimacy; it is more than the President's creation for oppressing political opponents. But the ACC is relatively weak. It has no investigative powers, and merely transmits complaints to other bodies. And while Hong Kong and Singapore could make do without an independent prosecutor, Korea cannot. The Hong Kong ICAC was formed in response to police corruption. Korea's public prosecutor has endured its own corruption scandals.

Money laundering laws[164]

These laws have a broader purpose than attacking corruption: they can also be used to attack terrorist financing.[165] The Act relating to Offer and Use of Information on Financial Transaction was enacted in September 2001 and became effective on November 28, 2001. It establishes the Financial Intelligence Unit under the control of the Minister of Finance and Economy. The FIU will receive reports of "suspicious financial transactions" from financial institutions (in excess of 50 million won if won denominated or US$10,000 if denominated in another currency) and analyze the data. The transaction is reportable if there are reasonable grounds to suspect that the funds are the proceeds of

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[162] http://www.icac.org.hk/

[163] http://www.gov.sg/pmo/cpib

[164] Anti money laundering legislation in Korea, Korea Financial Intelligence Unit (Korean), *at* http://www.kfiu.go.kr/Main.html; Park Yoon-bae, *Ant- Money Laundering Unit Set to Commence on Nov. 28*, KOREA TIMES, Nov. 20, 2001.

[165] *See* Financial Action Task Force on money laundering, an inter-governmental body which develops and coordinates policies to combat money laundering and which includes terrorist financing in its brief, *available at* http://www1.oecd.org/fatf/index.htm.

a "serious crime" as defined in the Act relating to Regulation and Punishment of Criminal Proceeds Concealment or if the person conducting the transaction is dividing the money for the purpose of evading disclosure. The FIU is not a prosecuting or investigative entity,[166] though it may transmit information to the prosecutor, the tax authorities, the customs service, the FSC, the police, and the National Election Commission. This seems unexceptional and similar to the role of Hong Kong's Joint Financial Intelligence Unit.[167] As with the whistle-blower provisions of the ACA, this Act may be a source of additional information for prosecutors, though a lack of information has not been cited in the literature as a reason for the prevalence of corruption in Korea. Also, the Committee for the Public Servants' Ethics already has the power to obtain account information from financial institutions. Under Article 8(5) of Public Servants' Ethics Act, the Committee may demand that the head of any financial institution present materials on the details of financial transactions necessary to confirm the details of any financial transaction for the examination of registered matters.

The Act relating to Regulation and Punishment of Criminal Proceeds Concealment, which became effective on November 28, 2001, criminalizes acts of money laundering through concealment, disguise or receipt of criminal proceeds. Serious crimes, which serve as a predicate offense, are defined to include embezzlement, fraud, bribery and organized crime. The legislation authorizes the confiscation of illegal proceeds and provides for punishment by imprisonment for up to five years and a fine of 30 million won ($25,000) or less. The prosecutor has had the power to confiscate the proceeds of corruption from public officials since 1995 under the Act on Special Cases concerning Confiscation of Public Officials Crimes.[168]

X. CONCLUSIONS, EVALUATING ENFORCEMENT

The easy issues

To the extent that the reforms are an attempt to impose Western values on a Confucian culture, the laws are unlikely to be effective. It may be hard to decree an end to the friendship and loyalty cases. The whistle-blower provisions can deter the clumsier attempts but are unlikely

[166] The FIU does have the power to demand the head of a financial institution to present information or materials relating to foreign exchange transactions and other foreign transaction (Act Relating to Offer and Use of Information on Financial Transaction, art. 10(3)).
[167] *See, e.g.*, http://www.info.gov.hk/police/jfiu/english/index.htm.
[168] Act No. 4934, Jan. 5, 1995.

to be effective against the deep Korean social networks that enable corruption.

To the extent that the reforms are an attempt to tell the "old guard" that they must change their ways, this too is likely to be an uphill battle. Some segments of the population may welcome change; others may resist it and try to wait out the storm. The generation that came to maturity after Park Chung-hee is leading the criticism of national character. It is not clear that the Federation of Korean Industries, the generation who built the nation, have an appetite for self-criticism. Law alone won't change behavior. Unpredictable enforcement coupled with discipline from the external capital markets might work. So might the passage of time.

To the extent that corruption arose from discretionary government control of the economy, deregulation should work.

The social courtesy exception could and should have been defined with bright lines, and the ACA failed to do so.

The tough questions

The prevention and public awareness measures were largely in place before 2000 and while a code of conduct and deregulation may be effective in reducing "wining and dining" and Hanbo type cases, they didn't deter the scandals of that year and the next one. The same can be said about the Criminal Code, but it has not been aggressively enforced. It could have expressed the sense of the National Assembly that the President should use special amnesty sparingly. However, that body is not known for its probity, and we do not expect it to restrict a power that may someday used to the advantage of its members.[169]

The government's stated emphasis is on prevention rather than punishment, with the suggestion that punishment is not as effective as prevention.[170] That may or may not be true but since the punishment has tended to be minimal, one cannot draw that conclusion.

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[169] The President may grant amnesty under the conditions as prescribed by legislative Act pursuant to Article 79 of the Korean Constitution, as amended in October 1987:
(1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by law.
(2) The President needs the consent of the National Assembly in granting a general amnesty.
(3) Matters pertaining to amnesty, commutation and restoration of rights are determined by law.

[170] Paek, *Combatting Corruption*, *supra* note 15; Key Chong Park, Office of the Prime Minister, Promoting Regional Co-operation in Corruption Prevention, paper presented at the ADB/OECD Conference on Combatting Corruption in the Asia-Pacific region, Seoul, Dec. 11-13, 2000, *available at* http://www1.oecd.org/daf/ASIAcom/pdf/Park_paper.pdf.

To the extent that corruption persists because punishment is too lenient, the reforms will fail because they do not address this problem. There is one possible exception: the penalties for false audits have been increased substantially, but it remains to be seen whether these new laws will be enforced aggressively for a sustained period.

To the extent that enforcement has failed because prosecution is perceived as selective and vindictive, the reforms will fail because they did not establish an independent prosecutor.

To the extent that corruption flourished because the prosecutor himself was corrupt or otherwise lacked the means or ability to prosecute cases unpredictably and fearsomely, the reforms will fail because they do not assure the independence of the prosecutor.

Some believe that the lack of a single, unified, comprehensive anti-corruption law is part of the reason for the prevalence of corruption, and that the Anti-Corruption Act cures this defect. However, corruption has been a crime since the early days of the Republic of Korea and the range of statutory penalties is severe. The gap has not been in the law. It has been in the political will of the prosecutor to investigate and charge and in the willingness of the courts to punish. If the point of the ACA is to demonstrate the political will of the government to crack down on corruption, that may make for good copy in the international press but it does not necessarily make the prosecutors and courts independent. No one doubted that Presidents Y.S. Kim and D.J. Kim were reformers. Their reputations and their campaigns in the end accomplished little (with the important exception of deregulation), and even their own family members became tarnished in corruption scandals. Until we see a pattern of prosecution brought without regard to political affiliation and resulting in lengthy prison terms, without suspended sentences and special amnesty, we will be skeptical of anti-corruption reforms in Korea.

ANTI-CORRUPTION ACT

Act No. 6494, Jul. 24, 2001

CHAPTER 1: GENERAL PROVISIONS

Article 1 (Purpose)

The purpose of this Act is to serve to create the clean climate of the civil service and society by preventing and regulating the acts of corruption efficiently.

Article 2 (Definitions)

The terms used in this Act are defined as follows:

1. The term "public institutions" means institutions and organizations falling under any of the following items:

(a) The administrative agencies of various levels under the Government Organization Act and the executive organs and local councils of local governments under the Local Autonomy Act;

(b) The Superintendents of the Offices of Education, the district offices of education, and the boards of education under the Local Education Autonomy Act;

(c) The National Assembly under the National Assembly Act, the courts of various levels under the Court Organization Act, the Constitutional Court under the Constitutional Court Act, the election commissions of various levels under the National Election Commission Act, and the Board of Audit and Inspection under the Board of Audit and Inspection Act; and

(d) Organizations related to the public service under Article 3(1) 10 of the Public Service Ethics Act;

2. The term "public officials" means the persons falling under any of the following items:

(a) The public officials under the State Public Officials Act and the Local Public Officials Act, and other persons who are recognized by other Acts as public officials in terms of qualifications, appointments, education and training, services, remunerations, status guarantee, etc; and

(b) The heads of organizations related to the civil service provided for in subparagraph 1(d) above and the employees of such organizations; and

3. The term "act of corruption" means the act falling under any of the following items:

(a) The act of any public official's abusing his position or authority or violating Acts and subordinate statutes in connection with his duties to seek gains for himself or any third party; and

(b) The act of causing damages to the property of any public institution in violation of Acts and subordinate statutes, in the process of executing the budget of the relevant public institution, acquiring, managing, or disposing of the property of the relevant public institution, or entering into and executing a contract to which the relevant public institution is a party.

Article 3 (Responsibilities of Public Institutions)

(1) Every public institution shall assume the responsibility to strive for the prevention of corruption to create the sound ethics of society.

(2) In the event that any public institution deems it necessary to eliminate legal, institutional, or administrative inconsistencies or to improve other matters for the prevention of corruption, it shall promptly improve or rectify the foregoing.

(3) Based on such reasonable means as education and publicity, every public institution shall make strenuous efforts to raise the consciousness of its employees and citizens to stamp out corruption.

(4) Every public institution shall aggressively work to promote international exchanges and cooperation for the prevention of corruption.

Article 4 (Responsibilities of Political Parties)

(1) Political parties that are registered in accordance with the Political Parties Act and members affiliated with such political parties shall endeavor to create a clean and transparent culture of politics.

(2) Political parties and members affiliated with such political parties shall have a proper culture of election take root and shall operate themselves and raise and spend political funds in a transparent manner.

Article 5 (Duties of Private Enterprises)

Private enterprises shall establish a sound order of trade as well as business ethics and take steps necessary to prevent every corruption.

Article 6 (Duties of Citizens)

Every citizen shall fully cooperate with public institutions in policy steps taken by them to prevent corruption.

Article 7 (Obligation of Public Officials to be Clean-Handed)

Every public official shall abide by Acts and subordinate statutes, perform his duties fairly and hospitably, and refrain from committing any act of corrupting himself or losing his dignity.

Article 8 (Code of Conduct for Public Officials)

(1) The code of conduct that the public officials have to observe in accordance with Article 7 shall be prescribed by the Presidential Decree, the National Assembly Regulations, the Supreme Court Regulations, the Constitutional Court Regulations, or the National Election Commission Regulations.

(2) The code of conduct for the public officials referred to in paragraph (1) above shall prescribe matters falling under each of the following subparagraphs:

1. Matters concerning the prohibition and limitation of the act of any public official's receiving entertainment, money, goods, etc. from any person related to his duties;

2. Matters concerning the prohibition and limitation of the act of any public official's intervening in personnel affairs or concessions or using his good offices or soliciting another person for his good offices, taking advantage of his position;

3. Matters to be observed by the public officials to create a sound climate of the civil service, including fair personnel administration; and

4. Other matters necessary to prevent corruption and maintain the clean-handedness and dignity of the public officials when they perform their duties.

(3) If any public official violates the code of conduct for the public officials referred to in paragraph (1) above, a disciplinary measure may be taken against him.

(4) Kinds of, procedures for, effect, etc. of the disciplinary measure referred to in paragraph (3) above shall be governed by Acts and subordinate statutes that prescribe matters concerning the disciplinary measures of administrative agencies to which the relevant public officials belong.

Article 9 (Guarantee of Livelihood for Public Officials)

The State and local governments shall labor to guarantee the livelihood of the public officials in order for them to devote themselves to the civil service and shall take necessary steps to improve their remunerations and treatments.

CHAPTER 2: ANTI-CORRUPTION COMMISSION

Article 10 (Establishment)

An Anti-Corruption Commission (hereinafter referred to as the "Commission") shall be set up under the President to revamp Acts and

subordinate statutes, institutions, etc. and to formulate and implement policies -- all necessary to prevent corruption.

Article 11 (Functions)

The Commission shall perform the work falling under each of the following subparagraphs:

1. The work of formulating and recommending policies and institutional improvement measures to prevent corruption in the public institutions;

2. The work of surveying the actual state and evaluating the progress of the policy steps taken to prevent corruption in the public institutions;

3. The work of working out and implementing the education and publicity schedule for the prevention of corruption;

4. The work of supporting activities carried out by nonprofit civic organizations to prevent corruption;

5. The work of promoting international cooperation for the prevention of corruption;

6. The work of receiving whistle-blowings, etc. with respect to an act of corruption;

7. The work of protecting and recompensing whistle-blowers; and

8. The work of addressing matters that the President puts on the agenda of the Commission to prevent corruption.

Article 12 (Composition of Commission)

(1) The Commission shall consist of 9 members, including 1 chairman and 2 standing members.

(2) The chairman and members shall be the persons of profound learning and experience in the corruption question and shall be appointed or commissioned according to the qualification standards set by the Presidential Decree.

(3) The chairman and standing members shall be appointed by the President and the non-standing members shall be appointed or commissioned by the President. In this case, 3 members shall be appointed or commissioned on the recommendation of the National Assembly and 3 members, on the recommendation of the Chief Justice of the Supreme Court, respectively.

(4) The chairman and standing members shall each come from officials of political service.

(5) If any member becomes vacant, a new member shall be appointed or commissioned without any delay.

Article 13 (Chairman)

(1) The chairman shall represent the Commission.

(2) When the chairman is unable to discharge his duties as such for unavoidable reasons, a standing member designated by the chairman shall act on behalf of the chairman in discharging his duties.

Article 14 (Disqualification of Members)

(1) A person falling under any of the following subparagraphs shall not be qualified as a member:

1. A person who is not a citizen of the Republic of Korea;

2. A person who falls under each subparagraph of Article 33 of the State Public Officials Act;

3. A person who is affiliated with a political party as a member; and

4. A person who registers himself as a candidate to run in an election held in accordance with the Act on the Election of Public Officials and the Prevention of Election Malpractices.

(2) Any member shall, when he falls under any subparagraph of paragraph (1) above, rightly resign his seat.

Article 15 (Independence of Work and Guarantee of Positions)

(1) The Commission shall independently perform the work belonging to its authority.

(2) The terms of office for the chairman and members shall each be 3 years and they may be reappointed or recommissioned only once.

(3) No member shall be dismissed or decommissioned against his will except for the case falling under any of the following subparagraphs:

1. Where he falls under any subparagraph of Article 14(1); and

2. Where he has much difficulty in performing his duties on the grounds of mental or physical trouble.

(4) In case of a member falling under paragraph (3)2 above, the President shall dismiss or decommission him on the recommendation of the chairman after going through a resolution thereof with the consent of not less than two thirds of the total members.

Article 16 (Resolution of Commission)

The meeting of the Commission shall be held by the attendance of a majority of its registered members and resolve with the concurrent vote of a majority of those present.

Article 17 (Subcommittees)

Subcommittees may be established by specific fields in the Commission to efficiently perform its work.

Article 18 (Expert Members)

(1) The chairman may appoint experts in the academia and social organizations and other experts on the related field as expert members of the Commission, as reasonably deemed necessary, to efficiently support the Commission's work and conduct specialized studies.

(2) The chairman shall appoint or commission expert members after going through a resolution of the Commission.

Article 19 (Establishment of Secretariat)

(1) The Commission shall establish a secretariat to deal with administrative affairs of the Commission.

(2) The secretariat shall have its head and other necessary staff.

(3) A standing member designated by the chairman shall concurrently serve as the head of the secretariat who takes charge of dealing with administrative affairs of the Commission and instructing and supervising the staff under the chairman's direction.

Article 20 (Advice for Institutional Improvements)

(1) The Commission may, if necessary, urge the heads of public institutions to make institutional improvements for the prevention of corruption.

(2) The head of any public institution shall, upon receipt of the advice on the institutional improvements under paragraph (1) above, reflect such advice in its effort for the institutional improvements and inform the Commission of the result of steps taken according to the advice. (3) In the event that the head of any public institution who has been advised to make institutional improvements under paragraph (1) above finds it difficult to take steps as advised by the Commission, he shall inform the Commission thereof.

Article 21 (Hearing of Opinions, etc.)

(1) In performing the functions provided for in Article 11, the Commission may take steps falling under each of the following subparagraphs, as necessary:

1. A request to any public institution for explanation or the submission of materials, documents, etc., and a survey of the actual condition thereof; and

2. A request to any interested person, any reference person, or any public official involved for his presence and his statement of opinion.

(2) The Commission shall be prohibited from taking steps provided for in paragraph (1) above with respect to the matters falling under each of the following subparagraphs:

1. Matters concerning the confidential information of the State;

2. Matters concerning the appropriateness of an investigation, trial, and execution of sentence (including any security measure, any security surveillance measure, any protective detention measure, any probation measure, any protective internment measure, any custodial treatment measure, and any community service order), or matters on which an audit and inspection have been launched by the Board of Audit and Inspection;

3. Matters brought for an administrative adjudication or litigation, an adjudication of the Constitutional Court, a constitutional petition, an examination request filed with the Board of Audit and Inspection, and other procedures for protest and remedy that are in process under other Acts;

4. Matters concerning procedures for mediating interests among parties concerned, including reconciliation, good offices, mediation, and arbitration, that are in process under Acts and subordinate statutes; and

5. Matters made definite by a judgment, decision, adjudication, reconciliation, mediation, arbitration, etc. or other matters on which the Audit and Inspection Commission has resolved in accordance with the Board of Audit and Inspection Act.

(3) The steps of each subparagraph of paragraph (1) above shall be limited to the scope necessary for the Commission to perform its work provided for in each subparagraph of Article 11 and attention shall be paid not to hamper the performance of duties by any public institution.

(4) The head of any public institution shall sincerely comply with the request for the submission of materials and cooperate in surveying the actual condition under paragraph (1) above.

(5) The head of any public institution may get his officials or relevant experts to be present at the Commission to state their opinions or to submit relevant materials in connection with institutional improvements, etc.

Article 22 (Confidentiality)

The incumbent or former members, expert members, and staff of the Commission and any other person who is or has been seconded to the Commission or commissioned by the Commission to perform the work of the Commission shall be prohibited from divulging any confidential information that they have acquired while performing the work of the Commission.

Article 23 (Legal Fiction as Public Officials in Application of Penal Provisions)

Members and expert members of the Commission who are not public officials shall be deemed public officials in the application of the Criminal Act and the penal provisions of other Acts in connection with any malfeasance regarding the work of the Commission.

Article 24 (Organization and Operation)

Necessary matters concerning the organization and operation of the Commission except for matters provided for in this Act shall be prescribed by the Presidential Decree.

CHAPTER 3: WHISTLE-BLOWING OF ACT OF CORRUPTION AND PROTECTION OF WHISTLE-BLOWERS

Article 25 (Whistle-Blowing of Act of Corruption)

Any person who becomes aware of an act of corruption may whistle-blow such act of corruption to the Commission.

Article 26 (Obligation of Public Officials to Whistle-Blow Act of Corruption)

A public official shall, in the event that he learns an act of corruption committed by another public official or he is forced or proposed by another pubic official to commit an act of corruption, whistle-blow without any delay such fact to any investigative agency, the Board of Audit and Inspection, or the Commission.

Article 27 (Obligation of Whistle-Blowing in Good Faith)

In the event that any person whistle-blows an act of corruption in spite of the fact that he knew or should have known the contents of his whistle-blowing were false, he shall not be entitled to the protection of this Act.

Article 28 (Method of Whistle-Blowing)

Any person who intends to whistle-blow an act of corruption shall make such whistle-blowing in a document stating matters concerning his name, address, occupation, etc., the purport of his whistle-blowing, and reasons therefor, and present the object of his whistle-blowing and evidence attesting the act of corruption along with such document.

Article 29 (Handling of Whistle-Blowings)

(1) The Commission may, upon receipt of a whistle-blowing, confirm the matters falling under each of the following subparagraphs from the whistle-blower:

1. Matters necessary to specify the contents of the whistle-blowing, such as the name, address, occupation, etc. of the whistle-blower and the details and purport of his whistle-blowing; and

2. Matters concerning whether the contents of whistle-blowing fall under any subparagraph of Article 21(2).

(2) The Commission may ask any whistle-blower to submit necessary materials within the scope of ascertaining the truth of the matters specified in paragraph (1) above.

(3) If it is necessary to conduct an investigation into a received whistle-blowing, the Commission shall refer such case to a competent organization (hereinafter referred to as an "investigative agency") among the Board of Audit and Investigation, an investigative agency, or an agency in charge of supervising the relevant public institution (referring to the relevant public institution in case that such agency is nonexistent).

(4) In the event that a person suspected of committing the act of corruption on which the Commission has received a whistle-blowing is a high-ranking public official falling under each of the following subparagraphs and contents of his suspected act of corruption require an investigation for criminal punishment and an institution of public prosecution, the Commission shall file an accusation with the prosecution against him in its name:

1. A public official with the rank of Vice Minister or higher;

2. The Special Metropolitan City Mayor, Metropolitan City Mayor, or Do governor;

3. A police officer with the rank of superintendent general or higher;

4. A judge or a public prosecutor;

5. A military officer with the rank of general; and

6. A member of the National Assembly.

(5) The prosecution shall, upon receipt of an accusation filed under paragraph (4) above, notify the Commission of the findings of its investigation. The same shall also apply to a case where the case on which the Commission has filed an accusation is already under investigation or related with another case under investigation.

Article 30 (Handling of Findings of Investigation)

(1) The investigative agency shall conclude its audit, investigation, or examination of a case within 60 days from the date on

which it is referred with a whistle-blowing thereon: Provided, That if there are justifiable grounds, the period of 60 days may be extended and the investigative agency shall notify the Commission of the grounds of such extension.

(2) The investigative agency to which a whistle-blowing is referred under Article 29 shall notify the Commission of the findings of audit, investigation, or examination thereof within 10 days from the date on which it concludes such audit, investigation, or examination. In this case, the Commission shall, upon receipt of such report, immediately inform the relevant whistle-blower of a summary of the findings of the audit, investigation, or examination.

(3) The Commission may, if necessary, ask the investigative agency to explain the findings on which the agency has made notification under paragraph (2) above.

(4) When the audit, investigation, or examination conducted by the investigative agency is deemed inadequate, the Commission may ask the investigative agency to launch again the audit, investigation, or examination by presenting reasonable grounds, such as the submission of new evidential materials, within 14 days from the date on which it is notified of the findings thereof. Any whistle-blower who is informed of a summary of the findings of the audit, investigation, or examination under the later part of paragraph (2) above may file an objection with the Commission regarding the findings of the audit, investigation, or examination.

(5) The investigative agency that is requested to launch again the audit, investigation, or examination shall notify the Commission of the findings of such further audit, investigation, or examination within 7 days from the date on which it concludes the audit, investigation, and examination. In this case, the Commission shall, upon receipt of the findings of such audit, investigation, or examination, immediately inform the whistle-blower of a summary of the findings of such audit, investigation, or examination that has been launched again.

Article 31 (Application for Adjudication)

(1) In the event that a person suspected of committing the act of corruption under Article 29(4) and (5) falls under Articles 129 through 133 and 355 through 357 of the Criminal Act (including the case of aggravated punishment under other Acts) and that the Commission directly files an accusation with the prosecution against him, if the same case as the one for which the accusation is filed is already under investigation or is related to another case under investigation and a public prosecutor concerned serves a notice on the Commission that he does not

institute a public prosecution against either of the two cases, the Commission may file an application for an adjudication on the right or wrong thereof with the High Court corresponding to the High Public Prosecutor's Office to which the public prosecutor belongs within 10 days from the date the Commission receives such notice.

(2) Articles 260(2), 261, 262 and 263 through 265 of the Criminal Procedure Act shall apply mutatis mutandis to the application for the adjudication referred to in paragraph (1) above.

(3) When the District Public Prosecutor's Office or the District Public Prosecutor's Branch Office to which the public prosecutor belongs under Article 260(2) of the Criminal Procedure Act receives the application for the adjudication of paragraph (1) above, the statute of limitation for prosecution thereof shall be suspended during the period from receipt of such application to ruling under Article 262(1) of the Criminal Procedure Act.

(4) With respect to the application for the adjudication referred to in paragraph (1) above, if the public prosecutor has not instituted a public prosecution by ten days prior to the date on which the statute of limitation for prosecution thereof expires, it shall be deemed that the public prosecutor has served a notice on the Commission that he does not institute such public prosecution at that time; and with respect to an accusation which the Commission filed with the prosecution under Article 29(4), if the public prosecutor has not instituted such public prosecution by three months after the date on which the Commission filed such accusation, it shall be deemed that the public prosecutor has served such a notice on the Commission at the time that the three months lapsed, respectively.

Article 32 (Guarantee of Non-Reprisal)

(1) No person shall be subject to any detriment in his position or any discrimination in his working conditions, including disciplinary measure etc., which is imposed by an institution, organization, or company, etc. to which he belongs, on the grounds of his whistle-blowing under this Act or his statement or his submission of materials, etc. related thereto.

(2) In the event that any person has suffered a disadvantageous disposition in his position on the grounds of his whistle-blowing, he may request the Commission to take steps to guarantee his position, including, but not limited to, restoring his disadventurous position to the original state thereof and transferring him to another post (hereinafter referred to as "steps for guaranteeing position").

(3) The Commission shall, upon receipt of the request referred to in paragraph (2) above, launch an investigation thereof.

(4) The Commission may conduct the investigation requested under paragraph (3) above in the manner falling under each of the following subparagraphs:

1. A request to the relevant requester or reference persons for presenting themselves before the Commission to state their opinions or for submitting their written statements;

2. A request to the relevant requester, reference persons, or related institutions, etc. for submitting materials, etc. that are deemed to be related to the investigation; and

3. An inquiry about facts or information that is deemed to be related to the investigation of the relevant requester, reference persons, or related institutions.

(5) Any person who is subject to the request, inquiry, or steps under each subparagraph of paragraph (4) above shall sincerely comply with them.

(6) When a request made by any public official for the guarantee of position is deemed reasonable based on investigation results, the Commission may ask the head of a public institution to which he belongs to take proper steps to guarantee his position. In this case, the head of such public institution shall comply with the request from the Commission unless the justifiable grounds exist that make it impossible for him to do so.

(7) When a request for the guarantee of position from a person who is not a public official is deemed reasonable based on investigation results, the Commission may recommend the head of an organization or a company, etc. to which he belongs to take proper steps to guarantee his position.

(8) When a whistle-blower who is a public official requests the Commission to transfer his post and such request is deemed reasonable, the Commission may ask the Minister of Government Administration and Home Affairs or the head of the relevant public institution to execute such transfer of post. In this case, the Minister of Government Administration and Home Affairs or the head of the relevant public institution shall, upon receipt of the request from the Commission, give preferential consideration to such request.

(9) The Commission may ask a relevant disciplinary officer to take disciplinary action against a person who has violated paragraph (1) above.

Article 33 (Protection of Whistle-Blowers)

(1) The Commission and any employee of the investigative agency to which the matters of any whistle-blowing are referred in accordance with Article 29(3) shall be prohibited from disclosing or suggesting the identity of a whistle-blower without his consent.

(2) A whistle-blower may request the Commission to take reasonable protective steps in case his whistle-blowing becomes a source of a feeling of insecurity to himself, his relatives, or his cohabitants. In this case, the Commission may, if necessary, ask the head of the competent police station to take relevant protective steps.

(3) The head of the competent police station shall, upon receipt of the request made under paragraph (2) above, immediately take steps to protect them under the conditions as prescribed by the Presidential Decree.

Article 34 (Protection of Cooperators)

The provisions of Articles 32 and 33 shall apply mutatis mutandis to the guarantee of position and physical protection of any person, other than a whistle-blower, who has cooperated in the audit, investigation, or examination of a whistle-blowing by stating his opinion and submitting materials, etc. in connection with such whistle-blowing made under this Act.

Article 35 (Mitigation of Culpability)

(1) If any whistle-blowing pursuant to this Act leads to detection of a crime perpetrated by the whistle-blower, the punishment of such whistle-blower may be mitigated or remitted.

(2) The provisions of paragraph (1) above shall apply mutatis mutandis to any disciplinary measure taken by any public institution.

Article 36 (Reward and Compensation)

(1) If any whistle-blowing made under this Act serves materially to bring interests to the property of public institutions, to prevent damages to such property, or to enhance the public interest, the Commission may recommend that the relevant whistle-blower be granted a reward in accordance with the Awards and Decorations Act, etc.

(2) If a whistle-blowing of an act of corruption under this Act has resulted directly in recovering or increasing revenues or cutting down costs of a public institution, the relevant whistle-blower may apply to the Commission for payment of compensation therefor.

(3) If an application for the payment of compensation is filed as provided in paragraph (2) above, the Commission shall pay the applicant

such compensation after going through a deliberation and resolution of the Compensation Deliberative Board set up in accordance with Article 37 under the conditions as prescribed by the Presidential Decree: Provided, That with respect to any whistle-blowing made by any public official in connection with his duties, such compensation may be reduced or not be paid.

(4) The application for the payment of compensation under paragraph (2) above shall be filed within 2 years from the date on which the recovery or increase of revenues or the retrenchment of costs of the public institution is known.

Article 37 (Compensation Deliberative Board)

(1) The Commission shall set up a Compensation Deliberative Board to deliberate and resolve matters concerning applications for compensation.

(2) The Compensation Deliberative Board shall deliberate and resolve matters falling under each of the following subparagraphs:

1. Matters concerning requirements for the payment of compensation;

2. Matters concerning the amount of compensation to be paid; and

3. Other matters concerning the payment of compensation.

(3) Matters necessary concerning the composition and operation of the Compensation Deliberative Board shall be prescribed by the Presidential Decree.

Article 38 (Decision on Payment of Compensation, etc.)

(1) The Commission shall, upon receipt of an application for compensation filed under Article 36, determine whether to pay such compensation and the amount of the compensation, if any, to be paid, within 90 days from the date of the application therefor unless there exists any reason to the contrary.

(2) If the Commission determines to pay the compensation under paragraph (1) above, it shall immediately inform the applicant thereof.

Article 39 (Relation to Other Acts and Subordinate Statutes)

(1) Any person who is to be paid compensation under Article 36 shall not be prohibited from applying for compensation in accordance with other Acts.

(2) In the event that any person who is to receive compensation under this Act has received compensation for the same reason according to the provisions of other Acts and subordinate statutes, if the amount of

such compensation obtained is the same as or exceeds the amount of a compensation to be received under this Act, any compensation under this Act shall not be given to such person, and if the amount of such compensation obtained is less than the amount of a compensation to be received under this Act, the compensation under this Act shall be the difference in the two amounts.

(3) If anyone, who is to receive compensation under the provisions of other Acts, in fact gains another compensation for the same reason pursuant to this Act, the amount of compensation to be provided under the provisions of other Acts shall be determined with the amount of compensation under this Act deducted.

CHAPTER 4: CITIZENS' REQUEST FOR AUDIT AND INSPECTION

Article 40 (Right to Request Audit and Inspection)

(1) In the event that execution of administrative affairs by a public institution seriously harms public interest due to the violation of Acts and subordinate statutes or the involvement in an act of corruption, any citizen aged 20 or over may request an audit and inspection from the Board of Audit and Inspection by presenting a petition signed by not less than a certain number of citizens as prescribed by the Presidential Decree: Provided, That with respect to the administrative affairs executed by the National Assembly, courts, the Constitutional Court, Election Commissions, or the Board of Audit and Inspection, such request shall be made to the Speaker of the National Assembly, the Chief Justice of the Supreme Court, the President of the Constitutional Court, the Chairman of the National Election Commission, or the Chairman of the Board of Audit and Inspection (hereinafter referred to as the "head of a relevant public institution").

(2) Notwithstanding the provisions of paragraph (1) above, the matters falling under any of the following subparagraphs shall be excluded from the subject of a request for an audit and inspection:

1. Matters pertaining to confidential information and security of the State;

2. Matters pertaining to the appropriateness of an investigation, trial, and execution of penalty (including any security measure, any security surveillance measure, any protective detention measure, any probation measure, any protective internment measure, any custodial treatment measure, and any community service order);

3. Matters pertaining to private right relationship or individual privacy;

4. Matters that have been or are under audit and inspection by other public institutions: Provided, That an exception shall be made in case there are new findings or material omissions regarding such audit and inspection already conducted; and

5. Other matters regarding which audit and inspection is reasonably deemed inappropriate as prescribed by the Presidential Decree.

(3) Notwithstanding the provisions of paragraph (1) above, any audit and inspection request pertaining to the execution of the administrative affairs that belong to the rights of local governments and their heads shall be governed by the provisions of Article 13-4 of the Local Autonomy Act.

Article 41 (Method of Requesting Audit and Inspection)

Any person who intends to request an audit and inspection shall make such request in the form of a signed document stating his name, address, occupation, etc. and the purport of and reasons for requesting such audit and inspection under the conditions as prescribed by the Presidential Decree.

Article 42 (Decision on Conducting Audit and Inspection)

(1) With respect to an audit and inspection request made in accordance with the main sentence of Article 40(1), the National Audit and Inspection Request Deliberation Commission prescribed by the Regulations of the Board of Audit and Inspection shall determine whether to conduct such audit and inspection.

(2) If the head of a relevant public institution receives an audit and inspection request under the proviso of Article 40(1), he shall determine, within 30 days, whether to conduct such audit and inspection in accordance with the National Assembly Regulations, the Supreme Court Regulations, the Constitutional Court Regulations, the National Election Commission Regulations, or the Regulations of the Board of Audit and Inspection.

(3) If the Board of Audit and Inspection or the head of a relevant public institution deems that an audit and inspection request is groundless, such board or head shall turn down the request and serve a notice thereon on the requester within 10 days from the date of the decision to turn down it.

Article 43 (Audit and Inspection on Request)

(1) The Board of Audit and Inspection or the head of a relevant public institution shall conclude an audit and inspection within 60 days

from the date of the determination to conduct such audit and inspection: Provided, That the period of 60 days may be extended where there exists any justifiable reason therefor.

(2) The Board of Audit and Inspection or the head of a relevant public institution shall notify a requester for an audit and inspection of the findings of such audit and inspection within 10 days from the date on which such audit and inspection is concluded.

Article 44 (Operation)

Necessary matters concerning citizens request for audit and inspection, except as otherwise provided for in this Act, shall be governed by the National Assembly Regulations, the Supreme Court Regulations, the Constitutional Court Regulations, the National Election Commission Regulations, or the Regulations of the Board of Audit and Inspection.

CHAPTER 5: SUPPLEMENTARY PROVISIONS

Article 45 (Employment Restrictions on Public Officials Dismissed for Corruption)

(1) Any public official who rightly resigns or is removed or dismissed from office for committing an act of corruption in connection with his duties while working for a public institution shall be prohibited from landing a job in any public institution, any private company incorporated for the purpose of making the profit of not less than a certain scale, which has maintained close ties with the post to which he has belonged for 3 years before he resigns (hereinafter referred to as a "profit-making company"), or any corporation or organization (hereinafter referred to as an "association") which has been established for the purpose of seeking a common interest and mutual cooperation with a profit-making company, for 5 years from the date on which he resigns.

(2) The provisions of Article 17(2) of the Public Service Ethics Act shall apply mutatis mutandis to the scope of the relationship of close ties between the post to which the public official has belonged prior to his resignation and the profit-making company, the scale of the profit-making company, and the scope of the association under paragraph (1) above.

Article 46 (Demand for Dismissal of Employed Persons)

(1) In the event that a person is employed in a public institution in violation of the provisions of Article 45, the Commission shall demand that the head of the public institution concerned dismiss him, and the head of the pubic institution concerned shall comply with the demand unless the justifiable grounds exist that make it impossible for him to do so.

(2) In the event that a person is employed in a profit-making company or an association in violation of the provisions of Article 45, the Commission shall demand that the head of the public institution concerned take steps to cancel his employment in such profit-making company or such association and the head of the public institution concerned shall, upon receipt of the demand, request the head of such profit-making company or the head of such association to dismiss him. In this case, the head of the profit-making company or the head of the association shall promptly comply with the request unless the justifiable grounds exist that make it impossible for him to do so.

Article 47 (Special Case for National Assembly, etc.)

The National Assembly, courts, the Constitutional Court, the National Election Commission, or the Board of Audit and Inspection shall independently perform sincerely the work provided for in each of subparagraphs 1 through 4 of Article 11 to prevent internal corruption.

Article 48 (Delegation Provisions)

Necessary matters concerning the enforcement of this Act, with the exception of matters prescribed by this Act, shall be prescribed by the Presidential Decree, the National Assembly Regulations, the Supreme Court Regulations, the Constitutional Court Regulations, the National Election Commission Regulations, or the Regulations of the Board of Audit and Inspection.

CHAPTER 6: PENAL PROVISIONS

Article 49 (Offense of Violating Good Faith Obligation by Whistle-Blowers)

If any person makes a whistle-blowing with knowledge that the contents of his whistle-blowing are false as provided in Article 27, he shall be punishable by imprisonment for not less than one year to not more than 10 years.

Article 50 (Offense of Exploiting Office Secrets)

(1) If any public official has acquired any goods or property interest by exploiting secrets that he has learned while performing his duties or has gotten a third party to acquire such goods or such property interest by exploiting such secrets, he shall be punishable by imprisonment for not more than 7 years or by a fine not exceeding 50 million won.

(2) In the case of paragraph (1) above, the imprisonment and fine may be imposed cumulatively.

(3) The goods or property interest acquired by a person committing the offense of paragraph (1) above or knowingly acquired by a third party by way of such offense shall be confiscated or collected by the corresponding value to be confiscated.

Article 51 (Offense of Leaking Office Secrets)

Any person who has divulged confidential information that he learned while performing his duties in violation of Article 22 shall be punishable by imprisonment for not more than 5 years or by the fine not exceeding 30 million won.

Article 52 (Offense of Violating Employment Restrictions on Public Officials Dismissed for Corruption)

If any public official who has been dismissed for committing an act of corruption is employed in any public institution, any profit-making company, or any association in violation of Article 45(1), he shall be punishable by imprisonment for not more than 2 years or by the fine not exceeding 20 million won.

Article 53 (Fine for Negligence)

(1) Any person who has imposed any detriment in position or any discrimination in working conditions under Article 32(1) shall be punishable by a fine for negligence not exceeding 10 million won.

(2) The fine for negligence of paragraph (1) above shall be imposed by the Commission and, if a person subject to a disposition taken to impose the fine for negligence fails to pay such fine for negligence by the due date, the Commission shall entrust the head of the jurisdictional district tax office with the collection of such fine for negligence.

(3) When the Commission imposes a fine for negligence in accordance with paragraph (1) above, it shall investigate and confirm the act of violation and then notify a person subject to a disposition taken to impose such fine for negligence that he should pay the fine for negligence by specifying the fact of violation, the method of raising an objection thereto, the period during which such objection is raised, the amount of the fine for negligence, etc.

(4) Necessary matters concerning standards, etc. for imposing a fine for negligence for violating Article 32(1) shall be prescribed separately.

ADDENDA

(1) (Enforcement Date) This Act shall enter into force 6 months after the date of its promulgation.

(2) Omitted.