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## Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor

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# NOTES

## Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor

### ABSTRACT

*On August 26, 1996, the criminal bribery convictions of two former South Korean Presidents sent shockwaves throughout the nation of South Korea. The court found former Presidents Chun Doo Hwan and Roh Tae Woo guilty of amassing hundreds of millions of dollars in bribes during their respective presidential terms. The court also found corporate executives of major Korean conglomerates guilty of bribing the former Presidents in exchange for government contracts or political favors. Such events invite a look into South Korea's difficult past, revealing a history of remarkable industrial progress tarnished by pervasive government corruption. This Note first explores South Korea's sociocultural and political history in order to assess the modern practice of bribery among public officials. The Note then analyzes the Korean antibribery laws and evaluates the legal machinery against corruption. The author determines that the poor enforcement of the antibribery laws allowed bribery to spread among public officials. Next, the author describes a theoretical model for optimal law enforcement, premised on efficiency, and applies its principles to the present context. In the process, the author proposes solutions to resolve the current problem of government corruption, emphasizing the need for optimal enforcement of the Korean antibribery laws. Although meaningful reform will be difficult to achieve, the author concludes that the laws against bribery can ultimately provide a government of integrity for South Korea.*

TABLE OF CONTENTS

I. INTRODUCTION..... 1072

II. HISTORICAL BACKGROUND..... 1077

    A. *Sociocultural Roots from the Yi Dynasty*..... 1077

    B. *Politics Under Military Regimes After the Korean War—A Tale of Greed and Corruption* 1078

    C. *The Nature of the Bribe—A Cultural Ritual? ..* 1083

III. POLICING THE PRACTICE OF BRIBERY..... 1085

    A. *The Antibribery Laws—Statute and Case Law* ..... 1085

        1. Public Official..... 1088

        2. Bribe ..... 1089

        3. Duty ..... 1091

        4. Intent ..... 1094

    B. *The Poor Enforcement of the Antibribery Laws*..... 1097

IV. A MODEL FOR EFFICIENT ENFORCEMENT OF THE ANTIBRIBERY LAWS: THE OPTIMAL ENFORCEMENT THEORY..... 1099

V. PROPOSALS FOR CHANGE..... 1104

    A. *Optimal Enforcement of the Antibribery Laws* 1104

    B. *Constitutional Amendment—Taking Optimal Enforcement All the Way* ..... 1109

    C. *Higher Salaries for Low-Level Public Employees—A Necessary Corollary to Optimal Enforcement*..... 1113

VI. CONCLUSION ..... 1115

I. INTRODUCTION

For great is truth, and shall prevail.<sup>1</sup>

Blinding flashes of light flooded the courtroom as cameras focused upon two former Presidents inside a district court in Seoul, South Korea (hereinafter “Korea”).<sup>2</sup> Once at the pinnacle of political power, the two former Korean Presidents found themselves defendants, humbly dressed in sky-blue prison

1. JOHN BARTLETT, FAMILIAR QUOTATIONS 30 n.3 (Justin Kaplan ed., 16th ed., Little Brown 1992) (1855) (quoting Thomas Brooks (1608-1680)).

2. See Sheryl Wu Dunn, *Death Sentence for Ex-President Chun a Landmark for Korea*, N.Y. TIMES, Aug. 27, 1996, at A4.

uniforms, awaiting the court's verdicts. On August 26, 1996, following a lengthy and highly publicized trial, the court found former Presidents Chun Doo Hwan and Roh Tae Woo guilty of accepting hundreds of millions of dollars in bribes during their respective presidential terms.<sup>3</sup> As a result of these convictions and others for their role in a 1979 military coup, Chun was sentenced to death, and Roh was sentenced to twenty-two years and six months in prison.<sup>4</sup> These events have riveted the attention of the Korean population both domestically and abroad. Although the sentences will not likely be carried out,<sup>5</sup> assuming they are upheld on appeal,<sup>6</sup> the convictions hopefully mark the beginning of meaningful efforts to resolve the problem of government corruption in Korea.

From being a war-torn country in the early 1950s, Korea has now become a major contender in the global market. Through tremendous export-oriented growth, Korea has achieved exponential industrial development since its establishment as an independent nation.<sup>7</sup> As a sign of its economic status, Korea is presently among the top ten trading partners of the United States.<sup>8</sup> However, along with Korea's impressive industrial development, there is a dark side to its success. Corruption among public officials, in the form of bribery, has long plagued Korea's political history.<sup>9</sup>

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3. *Id.* See also *infra* notes 50-64 and accompanying text.

4. Wu Dunn, *supra* note 2, at A4. Chun was found guilty of mutiny, insurrection, and bribery. *Id.* Roh was found guilty on similar charges. *Id.* The two were also found guilty of manslaughter. See *Ex-Leaders Appeal S. Korea Sentences: Chun, Roh Fight Mutiny Convictions*, BOSTON GLOBE, Sept. 1, 1996, at A27, available in 1996 WL 6876090 [hereinafter *Ex-Leaders Appeal*].

5. Many insiders believe that Chun will eventually be granted a presidential pardon and that Roh's sentence will be reduced. See Wu Dunn, *supra* note 2, at A4.

6. Both Chun and Roh have appealed their respective convictions and sentences. See *Ex-Leaders Appeal*, *supra* note 4, at A27. Appellate proceedings may extend until April of 1997. See *infra* note 98.

7. See IL SAKONG, KOREA IN THE WORLD ECONOMY 8 (Washington, D.C.: Institute for International Economics, 1993). In 1962, Korea's per capita gross national product (GNP) was \$87. *Id.* Since then, Korea has experienced rapid industrial growth. In 1988, the year of the Seoul Olympics, the per capita GNP figure reached \$4,127. *Id.* In 1994, Korea's per capita GNP totaled \$8,665. See INT'L MONETARY FUND, INT'L FIN. STAT. 354-57 (Aug. 1996).

8. In 1995, Korea surpassed Germany to become the fifth-largest trading partner to the United States. See Michael Schuman et al., *Convictions in Korea Highlight Anxieties Over Economy, Politics*, WALL ST. J., Aug. 27, 1996, at A1. Korea is presently the world's 11th-largest economy. *Id.*

9. The problem of bribery among public officials exists in many countries worldwide. See generally Jay M. Vogelson, *Corrupt Practices in the Conduct of International Business*, 30 INT'L LAW 193, 196-98 (1996) (reviewing recent efforts within the United Nations and the Organization for Economic Cooperation and

For example, a bribery paradigm reportedly exists within the Korean construction industry that has played a primary role in numerous disasters.<sup>10</sup> Generally, when contractors allocate funds for a construction project, they use a significant amount of the funds to extend kickbacks to local public officials to acquire permits or to bypass violations of safety standards.<sup>11</sup> After distributing these bribes, the amount of funds remaining within the construction budget is usually insufficient to cover the costs of the necessary building materials as well as the requisite labor. Thus the practice of bribery contributes to poor construction.

Poor construction, largely arising from the bribery paradigm, has led to many fatal accidents. On June 29, 1995, a posh five-story shopping mall in southern Seoul suddenly collapsed, killing 458 persons and leaving 132 missing.<sup>12</sup> The shopping mall incident was the worst peacetime disaster in Korean history. The five-story building spontaneously caved in because of poor construction. Prosecutors arrested numerous city officials on charges that the officials had received bribes from mall executives to overlook construction safety violations in authorizing the mall's opening in 1989.<sup>13</sup> The incident was the culmination of a long series of similar disasters in which public officials had received payoffs.<sup>14</sup>

Development to address the problem of bribery in international business transactions); Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 216-29 (1994) (arguing that the Foreign Corrupt Practices Act (FCPA), which prohibits U.S. corporations from bribing foreign officials, should be amended to allow a private right of action in order to improve both enforcement and clarification of the FCPA). One commentator proposes a treaty to regulate international corrupt payments made by business representatives to foreign public officials. See Stephen Muller, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act Is Not the Answer*, 1 ILSA J. INT'L & COMP. L. 3, 27-39 (1995). Despite the attractiveness of such a proposal, however, such an international treaty would be difficult to enforce. As discussed *infra*, an international body of law in this area would only be effective to the extent of each nation's willingness to deal with the problem of bribery within its own borders. See *infra* notes 172-244 and accompanying text.

10. See John Burton, *S. Korea Blames Lax Inspection*, FIN. TIMES, July 4, 1995, at 6, available in 1995 WL 9139251. See also Teresa Watanabe, *Bullders: A Double Standard in S. Korea*, L.A. TIMES, July 1, 1995, at A1. "One construction company official told a news service reporter that payoffs drive up costs, leading bullders to cut more corners[:] 'Bribery is inevitable to do business here and then we have to cut costs to make up the loss[:]'" *Id.*

11. See Burton, *supra* note 10, at 6.

12. See 3 *More Seoul Officials Arrested for Bribery*, AUSTIN AM.-STATESMAN, July 25, 1995, at A4, available in 1995 WL 6098119.

13. *Id.*

14. See Steve Glain, *Korea's Rush to Build Invites Tragedy—Store Collapse Is Latest Example of Shoddy Construction*, WALL ST. J., July 6, 1995, at A5.

On July 31, 1992, ten piers of the Shin Haengju Grand Bridge, under construction in western Seoul, collapsed.<sup>15</sup> On January 7, 1993, the four-story Uam shopping and apartment building in the city of Chongju collapsed, killing twenty-eight persons.<sup>16</sup> On October 21, 1994, the Songsu Grand Bridge collapsed in the middle of rush hour, killing thirty-two persons.<sup>17</sup> On December 7, 1994, a gas reservoir in western Seoul exploded, killing twelve persons.<sup>18</sup> On April 28, 1995, an underground gas explosion at a subway construction site in the city of Taegu killed ninety-eight persons and injured many others.<sup>19</sup>

Apart from the construction industry, bribery has also been a long-standing practice between central government officials and representatives of major corporations.<sup>20</sup> Since the early 1960s, the government has heavily regulated the economy.<sup>21</sup> Under a powerful centralist government, the drive for industrial development created an environment in which major corporations bribed high-level public officials in exchange for favorable treatment.<sup>22</sup> Such favorable treatment included low-interest government loans, beneficial tax regulation, and tariff protection against foreign competition.<sup>23</sup> Bribery has become quite pervasive, spreading across local government bodies, administrative agencies, and other bureaucratic organizations.<sup>24</sup> For instance, a driver wishing to avoid a traffic citation may give money to a police officer.<sup>25</sup> A local civic servant may receive

15. *Id.*

16. *Id.*

17. *Id.* See also Steve Glain, *Broken Bridge May Hasten Industry Reform in Korea*, ASIAN WALL ST. J., Nov. 7, 1994, at A3, available in LEXIS, News Library, Curnws File.

18. Glain, *supra* note 14, at A5. See also *Numerous City Officials Arrested in Ahyun Gas Explosion*, DONG-AH DAILY, Dec. 10, 1994, at 1 (Korean language only, translated by author).

19. Glain, *supra* note 14, at A5. See also *Taegu Gas Explosion Kills 98, Injures 143*, DONG-AH DAILY, Apr. 29, 1995, at 1 (Korean language only, translated by author).

20. See *infra* notes 44-64 and accompanying text.

21. See WALDEN BELLO & STEPHANIE ROSENFELD, *DRAGONS IN DISTRESS* 50-51 (1990).

22. See *infra* notes 44-64 and accompanying text.

23. See *infra* notes 44-46 and accompanying text.

24. See *South Korea's Leader Boasts Own Style—Apart from Military*, LAS VEGAS REV. J., Mar. 5, 1993, at 12A, available in 1993 WL 4485643 [hereinafter *Korea's Leader Boasts Own Style*] (stating, "Millions of dollars are spent to grease the palms of bureaucrats for permits, bank loans and even to get children into elite primary schools.").

25. See Paul Shin, *S. Korea Reformers Face Bribery as Way of Life*, CHI. SUN-TIMES, Mar. 14, 1993, at 30, available in 1993 WL 6520303.

money from a resident seeking approval for the construction of a new home.<sup>26</sup>

The prevalence of bribery among public officials does not suggest that the Korean people lack a sense of morality. The Korean people share the same moral and ethical standards regarding bribery as people in Western cultures.<sup>27</sup> The practice of bribery, however, persists in Korea despite the existence of antibribery laws specifically aimed at public officials.<sup>28</sup> The problem stems from cultural and political origins, dating back to early Korean history. One must examine Korea's sociocultural and political background in order to understand the present problem of bribery. When one superimposes the practice of bribery against such a backdrop, one can identify meaningful solutions to the present problem.

Part II of this Note discusses the sociocultural and political history of Korea in order to examine the modern practice of bribery in its proper context. Part III analyzes the antibribery laws and evaluates the legal machinery against bribery. Part IV describes the optimal enforcement theory as a model for efficient enforcement of the antibribery laws. Finally, Part V applies the principles of the optimal enforcement theory to the present situation, in light of Korea's national policy objectives, in an attempt to propose viable solutions to the problem of government corruption. Solutions to the present problem require optimal enforcement of the antibribery laws, an amendment to the Korean Constitution subjecting the President to immediate criminal sanctions for bribery committed while in office, and increases in salaries for low-level public employees. Although efforts to

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26. *Id.* Bribery has almost become a norm in terms of having an administrative function performed. When a Seoul resident needed water in her new building, it cost her approximately \$5,000 in bribes to have city officials ignore a government that would have prohibited the construction. She also had to give bribes to acquire permits, have utilities installed, and to ensure that the work was completed. *Id.* In another instance, a hair salon owner was charged with organizing and controlling a bribery scheme. See Merrill Goozner, *Revelations of Far-Reaching Corruption Stun Koreans—Prosecutors Even Allege Bribery in Miss Korea Contests*, S.F. EXAMINER, July 3, 1993, at A3, available in 1993 WL 8579303. Through the assistance of the hair salon owner, the mothers of three prior Miss Koreas each allegedly bribed the director of the pageant to increase their daughters' chances of winning. *Id.*

27. See Suk Jo Kim, *A Theory of Pseudo-Community: The Formal Law in Korea*, in INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 68, 71 (Sang Hyun Song ed., 1983). "A majority of Koreans are aware of the historic principle of *nullum crimen sine lege*. (Only law can define an act as a crime.) They do not accept the notion of sovereign immunity for governmental wrongdoing." *Id.* The Korean antibribery laws also reflect the Korean culture's moral condemnation of bribery. See *infra* note 91.

28. See *infra* notes 91-162 and accompanying text.

decrease the incidence of bribery will be difficult to achieve, this Note concludes that the laws against bribery can ultimately provide a government of integrity for Korea.

## II. HISTORICAL BACKGROUND

### A. Sociocultural Roots from the Yi Dynasty

Korea's early cultural influence was China.<sup>29</sup> In assuming its own identity, the Korean culture maintained Confucianist ideology, conformist views oriented towards the collective group, and a pyramid-structured hierarchical social system—all of which were derived from the Chinese culture.<sup>30</sup> However, the Korean culture adopted its own unique characteristics, especially the development of its own language.<sup>31</sup> The political structure consisted of a centralized form of monarchy, premised on Confucianism, during the Yi Dynasty (1392—1910).<sup>32</sup>

The social structure mirrored the political structure and a clear division existed between the upper and lower classes.<sup>33</sup> One showed respect for authority in terms of social status, according to occupation or age, and such respect contributed to social order.<sup>34</sup> The highly orthodox culture conformed to tradition and prevented any deviations from the norm.<sup>35</sup> Cultural norms promoted group solidarity and disfavored individualism.<sup>36</sup> In particular, the legal system achieved social harmony through the imposition of strict penal provisions.<sup>37</sup> The law, however, was not enforced consistently. Those of the ruling elite and upper social class remained above the law, and law enforcement was largely

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29. See PYONG-CHOON HAHM, *THE KOREAN POLITICAL TRADITION AND LAW* 7 (1967).

30. See *id.* at 9.

31. *Id.* at 11. See also BYUNG-NAK SONG, *THE RISE OF THE KOREAN ECONOMY* 46 (1990). King Sejong invented the Korean language in 1443. *Id.*

32. HAHM, *supra* note 29, at 8-9.

33. *Id.* at 36-37.

34. See DONALD S. MACDONALD, *THE KOREANS: CONTEMPORARY POLITICS AND SOCIETY* 80 (1988). Respect for authority remains a cornerstone of the Korean culture. For example, one bows to a senior person at the workplace, or to an elderly person in social contexts. *Id.* It is also considered offensive to cross one's legs in front of a person with higher social status. *Id.*

35. HAHM, *supra* note 29, at 10.

36. *Id.*

37. *Id.* at 20-21.

restricted to the common people.<sup>38</sup> Such a practice would later manifest itself within the political arena in the modern day era.<sup>39</sup>

B. *Politics Under Military Regimes After the Korean War*  
—A Tale of Greed and Corruption

In 1961, Park Chung Hee took control of the government through a military coup.<sup>40</sup> Under the Third Republic, the following eighteen years of rule under Park's regime largely set the political and industrial foundation for Korea. After Park acquired control, he implemented an ambitious economic agenda that centered upon export-oriented growth.<sup>41</sup> The government heavily regulated the economy and instituted a series of five-year plans focused on building the economy.<sup>42</sup> Over the course of such five-year plans, the government remained closely involved with large corporations, requesting dedicated support towards national industrial development.<sup>43</sup>

Amidst the drive for industrial growth, however, something existed that could only taint Korea's economic success and

38. *Id.* at 42. Hahm observes that the early Korean legal system adopted the Chinese tradition that law and punishment were to be applied only to the masses and not against the ruling elite. *Id.* The law primarily disciplined the lower class, while the upper class remained unaffected by the legal system. "The powerful and the privileged had little cause to be restrained by legal rules and administrative regulations. No one, including law-enforcement officials, dared to raise any objections when they ignored them." *Id.* at 68.

39. *See infra* notes 48-68 and accompanying text. During numerous royal successions over the course of the Yi Dynasty, many wars were fought with the Japanese. *See* MARK L. CLIFFORD, *TROUBLED TIGER* 26 (1994). In 1910, the Korean peninsula ultimately fell to the Japanese and became subject to colonial rule. *Id.* The Korean peninsula remained a colony until the end of World War II in 1945. *Id.* at 28. The independence of Korea, however, was determined by foreign influences. *Id.* Korea was divided at the 38 degree parallel, with the Soviet Union occupying the North, and the United States occupying the South. Relations between the North and South deteriorated because of political differences. *Id.* In 1948, both sides respectively declared independence, with the North as the Democratic People's Republic of Korea, and the South as the Republic of Korea. *Id.* at 29. After the Soviet Union and the United States withdrew their military forces from the North and the South respectively, the North invaded the South to spark the Korean War in 1950. *Id.* Following the 1953 armistice, after the mass destruction of war, South Korea was left with the difficult task of rebuilding itself as a nation. *Id.* at 30.

40. *Id.* at 36-37.

41. *See* SUNG MOON PAE, *KOREA LEADING DEVELOPING NATIONS* 78-80 (1992). Prior to the Third Republic, the Korean economy was largely import-oriented due to a manufacturing industry which lacked the capacity to generate assembled products. *Id.*

42. *Id.* at 73.

43. *See id.*

national pride. Park's regime created an atmosphere ripe for corruption through the exercise of coercive power over large corporations. In pursuing its economic agenda, the government controlled major conglomerates, known as *chaebols*, through the use of various regulatory incentives and sanctions.<sup>44</sup> In exchange for cooperation by large corporations, the government provided preferential access to low-interest loans, tariff protection against foreign competition, tax benefits, and controls on foreign investment.<sup>45</sup>

The government-*chaebol* network gradually led to a concentration of wealth among the top business conglomerates and created an oligopolistic system.<sup>46</sup> Controversy surrounded the alliance between the government and the selective group of conglomerates, and the people began to express ambivalence towards the system of governmental favoritism.<sup>47</sup> Societal belief that the government was corrupt steadily grew, as the public perception of the government-*chaebol* relationship worsened under the leadership of Chun Doo Hwan,<sup>48</sup> who succeeded Park Chung Hee.<sup>49</sup>

Corruption within the government-*chaebol* alliance reportedly consisted of a ritualistic practice of bribery among the political and industrial elite.<sup>50</sup> In return for regulatory incentives, large

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44. See BELLO & ROSENFELD, *supra* note 21, at 51-52. The Korean *chaebols* are comparable to their Japanese counterpart known as the *keiretsu*, which refers to the collaborative system of major Japanese corporations. See also CLYDE V. PRESTOWITZ, JR., TRADING PLACES 43, 294-302 (1988). Receiving favorable support from the government, large corporations of the *keiretsu* maintain a cooperative network of fiscal policy which act as a barrier to foreign competition. *Id.*

45. BELLO & ROSENFELD, *supra* note 21, at 51-55.

46. *Id.* at 63-64. In 1988, the combined revenues for the top four *chaebols*—Samsung, Hyundai, Lucky-Goldstar, and Daewoo, in descending order—totaled over \$80 billion, or about 60% of Korea's GNP of \$135 billion. *Id.* at 63 (citing *The Rise of Korea in the Electronics Market*, EXECUTIVE SUMMARY 1 (Toronto: Domicity, 1989)).

47. *Id.* at 73-74.

48. *Id.* at 71.

49. See Sung-Joo Han, *South Korean Politics and Its Impact on Foreign Relations*, in *ASIA AND THE MAJOR POWERS* 161, 162 (Robert A. Scalapino et al. eds., 1988). In 1979, Park was assassinated by his chief intelligence aide. *Id.* at 161. The assassination was purportedly committed to prevent an attempt to overthrow the government that would cost many lives, in light of growing protests against the coercive Park regime. *Id.* Park's assassination provided an opportunity for the democratization of Korea. *Id.* at 162. However, in 1980, General Chun Doo Hwan usurped political power and authoritarian military rule would continue. *Id.* Martial law was imposed to suppress demonstrations, resulting in many civilian deaths, especially in the city of Kwangju. *Id.* at 163. Chun Doo Hwan and Roh Tae Woo were later convicted for their roles in the Kwangju incident. See *infra* note 61.

50. CLIFFORD, *supra* note 39, at 123.

corporations extended bribes to high-level government officials. Such bribes were disguised as "donations" or "contributions" for various charitable causes and political campaigns.<sup>51</sup> During Chun's term of leadership, an organization known as the Ilhae Foundation served as a vehicle for collecting illicit payments.<sup>52</sup>

One commentator notes:

Ilhae was only the largest of dozens of official foundations and government projects that relied on donations from businesses. These contributions were, in many cases, just a half-step up from outright extortion. They were the price of doing business in a country where the government could destroy companies or, as was commonly the case, rescue them from their own mistakes. Because most of this fund-raising was secret, it is difficult to know with any certainty the total amount of business contributions.<sup>53</sup>

The practice of receiving large corporate contributions through various political foundations, or slush funds, occurred throughout Chun's term and continued during the following presidential term under Roh Tae Woo. Both Chun and Roh would later regret having solicited such corporate contributions.

In December of 1995, Chun and Roh were indicted for allegedly accepting bribes during their respective presidential terms.<sup>54</sup> Chun allegedly received \$275 million in bribes as part of a \$900 million political slush fund amassed during his 1980-88 term.<sup>55</sup> Roh allegedly accepted bribes, in exchange for large government contracts, through a massive political slush fund as well during his 1988-93 term.<sup>56</sup> Roh's scandal erupted on October 19, 1995, when a legislator of an opposition party publicly disclosed one of Roh's secret bank accounts, which held a large amount of funds.<sup>57</sup> Facing public pressure, Roh appeared

51. *Id.*

52. *Id.* at 208.

53. *Id.* at 208. Hyundai's chairman, Chung Ju-Yung, was designated to act as "bag man" for the Ilhae Foundation, with the task of collecting \$40 million from other corporations within three years. See BELLO & ROSENFELD, *supra* note 21, at 72. In one instance, the Kukje-ICC conglomerate, according to its former chairman, was dismantled for refusing to make donations to the Ilhae Foundation. *Id.* at 73. When Kukje was liquidated, its steel subsidiary was given to Dongkuk Steel, and a large portion of its stock was sold below market value to Hanil Synthetics. Both Dongkuk and Hanil were major contributors to the Ilhae Foundation. *Id.*

54. See *Korea's Chun, Roh Indicted For Their Roles in '79 Coup*, ASIAN WALL ST. J., Dec. 22, 1995, at 8, available in 1995 WL-WSJA 10231704 [hereinafter *Korea's Chun, Roh Indicted*].

55. See Namju Cho, *Roh Repudiates Bribery Charge in Testimony*, ASIAN WALL ST. J., Jan. 16, 1996, at 1, available in 1996 WL-WSJA 3324835.

56. *Korea's Chun, Roh Indicted*, *supra* note 54, at 8.

57. See Paul Shin, *South Koreans Grill Roh on Slush Fund; Arrest Expected*, COM. APPEAL, Nov. 16, 1995, at 2A, available in 1995 WL 10965135.

on live national television and with tears admitted to collecting \$650 million during his term, and leaving \$230 million in secret bank accounts.<sup>58</sup> Roh claimed that his slush fund was merely a continuation of a long-standing informal political practice, followed by all of his military predecessors.<sup>59</sup>

On August 26, 1996, Chun and Roh were both found guilty of bribery.<sup>60</sup> Apart from the imposition of multiple prison terms, Chun and Roh were fined \$270 million and \$350 million respectively.<sup>61</sup> Nine other former government officials were found guilty of assisting either Chun or Roh in accepting bribes.<sup>62</sup> In addition, nine major corporate executives were convicted and heavily fined for bribing Roh during his presidential term.<sup>63</sup> Four

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58. See *Korea's Chun, Roh Indicted*, *supra* note 54, at 8. See also Jim Doyle, *2 Koreans Hid Money in Bay Banks—\$200,000 Penalty for Kin of South Korea's President*, S.F. CHRON., Jan. 28, 1993, at A13. The daughter and son-in-law of Roh pleaded guilty to money laundering charges in a federal district court in San Jose, California. *Id.* The couple agreed to forfeit \$192,577 in deposits and pay \$30,000 in fines. *Id.* Both acknowledged violating U.S. currency laws by attempting to conceal an undisclosed amount of money in 11 Bay Area banks. *Id.*

59. *Korea's Chun, Roh Indicted*, *supra* note 54, at 8.

60. See Wu Dunn, *supra* note 2, at A4. See also Sandra Sugawara, *Seoul Court Convicts Top Industrialists*, WASH. POST, Aug. 27, 1996, at A1. The convictions of Chun and Roh were influenced by political factors. When Kim Young Sam assumed the Presidency in 1993, Kim initially left the fate of Chun and Roh to be "judged by history." See *Korea's Chun, Roh Indicted*, *supra* note 54, at 8. Kim had reason for such action since he had received political support from Roh prior to winning the presidential election. However, after the loss of popular support during the latter half of his presidential term, Kim ordered the indictments of Chun and Roh for their involvement in the 1979 military coup as well as for bribery. The indictments followed the passage of special legislation that waived the statute of limitations by discounting Chun and Roh's time in office. Opponents argued that such action was unconstitutional because it was retroactive. *Id.* Apart from this controversy, President Kim's vast reform measures, implemented soon after he took office, are not to be understated. See *infra* notes 66-76 and accompanying text.

61. See Sugawara, *supra* note 60, at A1. Under the Korean antibribery laws, the punishment for bribery involving a sum over \$64,000 includes imprisonment for at least 10 years. See *infra* note 93 and accompanying text. The punishment available under the antibribery statutes were included in the respective sentences imposed upon Chun and Roh, in light of other prison terms imposed for their convictions for mutiny and treason. See *supra* note 4 and accompanying text. Chun and Roh were convicted for mutiny and treason for their involvement in the 1979 Kwangju incident when Chun usurped power through a military coup. See *supra* note 49.

62. Sugawara, *supra* note 60, at A1.

63. *Id.* Four corporate executives were given prison terms. Among this group of four, the founder and chairman of one of the largest *chaebols*, Daewoo, was sentenced to a two-year prison term. Financial analysts predict that the four corporate executives will eventually receive suspended sentences, or brief prison terms, since their imprisonment would hurt the economy. The remaining five

of the nine corporate executives were each found to have bribed Roh between \$13 million to \$20 million during his 1988-93 term.<sup>64</sup>

Chun and Roh are the first former Presidents in Korean history to be prosecuted and convicted for bribery.<sup>65</sup> Such legal action has largely been possible through vast reform efforts under the new leadership of President Kim Young Sam. In 1993, through a direct popular vote, the Korean people elected Kim as the first civilian-President after thirty-two years of authoritarian rule under military regimes.<sup>66</sup> Upon his inauguration, Kim publicly declared, "I shall not accept political donations from anyone."<sup>67</sup> Kim referred to past government corruption as being part of the "Korean disease," which had spread from the top and pervaded down to all lower levels of the government.<sup>68</sup>

After Kim took office, sweeping reforms soon followed.<sup>69</sup> Kim appointed reform-minded persons to key positions within the administration, and publicly disclosed his personal assets, reaffirming that he would refuse to accept any illicit payments during his term.<sup>70</sup> The National Assembly passed amendments to the Ethics in Public Service Act that require all public officials falling within its broad provisions to register their personal assets.<sup>71</sup> The disclosure of assets revealed the ownership of large

corporate executives received suspended sentences. Lee Kun Hee, the chairman of Korea's largest conglomerate, Samsung, was among the latter group. *Id.*

64. *S. Korean Industrialists Jailed and Fined for Bribing President*, DEUTSCHE PRESSE-AGENTUR, Aug. 26, 1996, available in LEXIS, News Library, Curnws File.

65. Schuman et al., *supra* note 8, at A1.

66. See Deog Ryong Kim, *Reform and National Development*, 17 KOREA AND WORLD AFFAIRS 405, 405-06 (1993). See also *Korea's Leader Boasts Own Style*, *supra* note 24, at 12A. Kim was inaugurated on February 25, 1993, to a five-year term. *Id.*

67. Kim, *supra* note 66, at 411.

68. *Id.* at 406.

69. See Soon-Hoom Kil, *Political Reforms of the Kim Young Sam Government*, 17 KOREA AND WORLD AFFAIRS 419, 421-26 (1993).

70. *Id.* at 422.

71. CURRENT LAWS OF THE REPUBLIC OF KOREA 295-97 (Government Legislative Administration Agency of the Republic of Korea ed., 1984) [hereinafter KOREAN LAWS]. The Ethics in Public Service Act, Law No. 3520 (Dec. 31, 1981), primarily requires the registration of enumerated assets. Article 15 requires a public official to report the receipt of any gift from a foreign government official or foreigner. *Id.* at 297-10. Reported gifts revert back to the national treasury under Article 16. *Id.* Failure to register assets in accordance with the applicable provisions may result in dismissal (by the public official ethics committee) or criminal sanctions under Article 2. *Id.* at 297-12-297-14. Criminal sanctions can be imposed for the following: (1) taking advantage of any secret learned in the course of official duties; (2) refusal to register property; (3) submitting false materials regarding registration; (4) failure to attend a public official ethics

amounts of personal and real property among many officials, supporting public suspicion of the illegal accumulation of wealth within the government.<sup>72</sup> Many officials resigned because of criticism by the press and public censure.<sup>73</sup>

President Kim also mandated the use of "real names" in all financial transactions through a presidential decree.<sup>74</sup> Previously, one could maintain a bank account under a fictitious name. Under the "real name" system, a bank account may be held only under one's legal name. This measure exposed large sums of "black money"—under-the-table political contributions—and has made it difficult for officials to maintain illicit funds in multiple bank accounts under fictitious names.<sup>75</sup> Additionally, the National Assembly passed amendments to the laws governing political campaigns. The amendments place statutory limits on campaign contributions in order to discourage illicit payments to political candidates.<sup>76</sup> The foregoing regulatory changes supplement the antibribery laws by making it difficult to conceal accepted bribes. Such reform measures alone will not, however, solve the problem of government corruption. These measures merely begin the long and arduous process of addressing the effects of over thirty years of prior government corruption.

### C. *The Nature of the Bribe—A Cultural Ritual?*

Before discussing the legal background regarding bribery, as well as possible solutions to the problem, one must understand the nature of the act itself. Obviously, bribery is not only illegal, but also immoral in that it contradicts fundamental principles of fairness and loyalty. However, before one condemns an act as a bribe, one must clearly identify operative elements of the act itself.<sup>77</sup> One scholar observes, "The core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised. . . . The concrete constituent elements—what counts as 'an inducement,' what counts as 'improperly influencing,' what counts as 'a public

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committee hearing; (5) inspection and reproduction of property registration without permission; (6) disclosure of matters related to property registration that is non-public; and (7) employment in a profit-making private enterprise. *Id.*

72. *Kil, supra* note 69, at 422.

73. *Id.*

74. *Id.* at 423.

75. *Id.* at 423-24.

76. *See* KOREAN LAWS, *supra* note 71, at 65-75.

77. *See* JOHN T. NOONAN, JR., BRIBES xi (1984).

function,' what functions are 'meant to be gratuitously exercised'—*change with the culture*."<sup>78</sup>

Cultural factors influence the concept of a bribe. As noted above, in contrast to the individualistic and egalitarian characteristics of the Western culture, the Korean culture focuses upon the collective group and abides by a pyramid-structured social status hierarchy.<sup>79</sup> Similar to the political context of the Yi Dynasty, the modern political leaders of successive military regimes assumed tight control over economic affairs and largely remained above the law.<sup>80</sup> Consistent with the cultural norm of being deferential towards authority, nobody forcefully challenged the actions of the political leadership.<sup>81</sup> Government leaders were thus prone to engage in corruption through the abuse of their power. Hence, cultural factors partly contributed to the practice of bribery within the political realm.

Cultural norms have favored the practice of bribery in another manner. The Korean culture stresses reciprocation as the foundation to interpersonal relationships.<sup>82</sup> Bestowing a gift or favor to someone constitutes a symbolic expression of one's loyalty to another, and serves as a primary means of maintaining a social relationship.<sup>83</sup> Given the predominance of such reciprocation, does the Korean culture make it more difficult to distinguish between a gift and a bribe, thus making bribery an accepted practice?

If the offering of money in exchange for a public function were an accepted cultural practice, no further discussion of the current topic would be necessary. The only remaining task would be to explain the aspects of the Korean culture that would provide an understanding of such a practice from a sociocultural perspective. However, from a sociocultural standpoint, the answer to the foregoing question is in the negative. As stated earlier, the Korean people share the same moral standards as the Western culture regarding bribery. They are equally capable of

78. *Id.* (emphasis added).

79. *See supra* notes 29-36 and accompanying text.

80. *See supra* notes 37-38 and accompanying text.

81. Although minority opposition continued throughout the periods of military rule, in the form of student protests, the majority of the population conformed with the status quo and did not stage any organized revolutionary movements. *See, e.g.,* John Burgess, *Korean Demonstrators Renew Protests In Streets*, WASH. POST, June 27, 1987, at A1; *Korean Students Jailed*, L.A. TIMES, Aug. 20, 1985, § 1, at 8.

82. MACDONALD, *supra* note 34, at 78-80.

83. *Id.* at 80.

distinguishing between what is intended to be gratuitous and what is intended to wrongfully influence another person.<sup>84</sup>

Cultural norms have contributed to the practice of bribery only in the sense of permitting it to become pervasive. In light of the Korean culture, there will simply be a higher tendency for one to attempt to mask a bribe as a gift, thus increasing one's susceptibility to engage in bribery.<sup>85</sup> However, cultural norms do not affect the concept of bribery by making the practice less condemnable relative to Western standards. In the past, the Korean people generally chose not to outwardly challenge the government, conforming to the traditional norms of being obedient toward authority for the sake of national harmony.<sup>86</sup> Yet the public remained inwardly critical of government corruption.<sup>87</sup> Indeed, amidst recent reforms, some Koreans have broken with traditional culture and a public backlash against the former corrupt political regimes has developed.<sup>88</sup> Thus, bribery has become a cultural ritual only in the sense that it is a prevalent practice, but not in the sense that it is a morally accepted practice.

### III. POLICING THE PRACTICE OF BRIBERY

#### A. *The Antibribery Laws—Statute and Case Law*

Formulating a legal definition for bribery seems simple at first glance. But when one attempts to articulate a standard, which intelligibly distinguishes between lawful and unlawful exchanges, the difficulty of such a task soon emerges. For instance, is a corporate political contribution of one million dollars legal or suspect? This question reveals that effective antibribery laws must sensibly distinguish between a gift, a political contribution, and a bribe. One must identify elements that determine when the two former types of exchanges, both legally acceptable, cross the line and change in character to become an illegal bribe. An analysis of the Korean antibribery statutes and case law will show how the Korean law draws the line between legal and illegal exchanges.

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84. See, e.g., *Memorial Turns into Melee*, SAN DIEGO UNION & TRIB., July 30, 1995, at A25, available in 1995 WL 5730732. See also *supra* note 27.

85. MACDONALD, *supra* note 34, at 80.

86. See *supra* notes 35-36, 81 and accompanying text.

87. *Id.* See also *supra* notes 47-48 and accompanying text.

88. See *Those Deferential Asians*, ECONOMIST, Dec. 9, 1995, at 12.

Korean law comprises general and special statutes.<sup>89</sup> With respect to the offense of bribery, the general statutes contain the provisions regarding the elements of the offense and punishment. The special statutes derive from the general statutes and impose more severe punishment in those specific situations stipulated to by the applicable statute. When both a general and special statute apply, only the special statute governs.<sup>90</sup> According to Article 129, Subsection (1), of the Korean Criminal Code, "A public official . . . who receives, demands or promises to accept a bribe in connection with his duties . . ." is guilty of the bribery offense.<sup>91</sup> Conversely, under Article 133, Subsection (1), of the Korean Criminal Code, "A person who promises, delivers or manifests a will to deliver a bribe . . ." is also in violation of the

89. See *infra* notes 91, 93 and accompanying text.

90. JAE-SANG LEE, CRIMINAL PROCEDURE 25 (1988) (Korean language only, translated by author).

91. KOREAN LAWS, *supra* note 71, at 779. The general statutes related to the bribery offense involving public officials are enumerated in Articles 129 through 134, under the heading, "Crimes Concerning the Duties of Public Officials." Relevant provisions within this Section are:

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.

(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 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-five thousand Hwan.

(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.

*Id.* at 779-80. The statute of limitations period for the bribery offense under Article 129, Subsection (1), is five years. *Id.* at 815.

antibribery provisions.<sup>92</sup> Apart from the foregoing general statutes, special statutes impose heavier punishment if the sum of the bribe that a public official receives, demands, or promises to accept, exceeds the statutory amount.<sup>93</sup> In order to prove an offense under Article 129, the government must show the following: (1) a public official; (2) received, demanded, or promised to accept a bribe; (3) in connection with his duties; (4) with criminal intent.<sup>94</sup> The case law further refines these elements, which are discussed below in their respective order.

92. *Id.* at 780.

93. Special statutes related to the bribery offense are enumerated in Articles 2 through 4, under the heading, "Special Statutes Providing for Heavier Punishment for Criminal Offenses." Relevant provisions within this Section are:

Article 2 (Heavier Punishment for Acceptance of Bribe)

Any person who commits the offense as specified in Articles 129, 130, or 132 of the Criminal Code, shall be punished according to the following (if the amount of the bribe which a public official receives, demands or promises to accept exceeds the amount stated in the following subdivisions):

(1) When the amount of the bribe exceeds 50 million won [\$64,000], the punishment shall be life imprisonment or penal servitude for not less than ten years.

(2) When the amount of the bribe exceeds 10 million won [\$13,000], but less than 50 million won, the punishment shall be penal servitude for not less than five years.

Article 4 (Extension of the Application of the Antibribery Provisions)

(1) In the application of Articles 129 through 132 of the Criminal Code, management-level employees of government-owned corporations shall be deemed public officials.

(2) The range of management-level employees of government-owned corporations referred to in subdivision (1) shall be determined according to Presidential Decree.

HYUN-AM, COLLECTION OF STATUTES 1667 (Sung-Won Cho ed., 1996) (Korean language only, translated by author). The statute of limitations period is 10 years under Article 2, Subsection (1), of the special statutes. *Id.* at 815.

94. The government has the burden of proving each element of the offense beyond a reasonable doubt. LEE, *supra* note 90, at 458. A defendant or suspect is presumed innocent until proven guilty. *Id.* at 466. All criminal cases are bench-tried and there is no jury system. *Id.* Although lower courts are not bound by precedent, higher court decisions are persuasive. *Id.*

The legal analysis primarily focuses on antibribery statutes governing public officials under Article 129 of the Korean Criminal Code. See *infra* notes 95-171 and accompanying text. Although both the donor and the donee involved in an illegal exchange are culpable, the legal analysis focuses on the public official's perspective, as the official has the higher duty not to abuse a position of public trust. For example, under Chapter VII of the National Civil Service Act, Article 59 imposes a duty upon the public official to work "impartially as servant of all citizens." KOREAN LAWS, *supra* note 71, at 293-19-293-20. In addition, Article 61 states, "No public official may give or receive directly or indirectly any reward, donation or entertainment in connection with his duties." *Id.* As administrative

## 1. Public Official

The term "public official" is largely defined according to statute, with relatively few cases interpreting this term. Public officials obviously include all of those holding positions within the legislative, judicial, and executive branches of the government.<sup>95</sup> Chapter III of the Korean Constitution vests legislative power in the National Assembly, which must consist of at least 200 members.<sup>96</sup> As for the judicial branch, Chapter V establishes the Supreme Court as the highest court of the State.<sup>97</sup> The Court Organization Act outlines more specific guidelines regarding the structure of the judicial system.<sup>98</sup>

Chapter IV of the Constitution designates the President as the Head of State, as well as the Commander-in-Chief of the armed forces.<sup>99</sup> The Government Organization Act provides overall guidelines for the establishment, organization, and the scope of function of national administrative agencies.<sup>100</sup> Presidential decrees designate the types and fixed number of public officials within each administrative agency.<sup>101</sup> As for employees of government-owned corporations, those that

law, the National Civil Service Act designates disciplinary committees within agencies to decide upon disciplinary action if a public official violates any of its provisions. *Id.* at 293-29. Categories of discipline include removal, dismissal, suspension from office, reduction of pay, and reprimand. *Id.* at 293-28.

95. Korea is a nation-state and thus operates under one system of government.

96. KOREAN LAWS, *supra* note 71, at 8. Members of the National Assembly serve four-year terms and are elected by "universal, equal, direct and secret ballot by the citizens." *Id.*

97. *Id.* at 17.

98. *Id.* at 301. The courts are divided into four categories, consisting of the Supreme Court, high courts (appellate courts), district courts, and family courts. *Id.* District courts and family courts are further divided into branch courts, juvenile branch courts, circuit courts, and registry offices. *Id.* The Supreme Court, consisting of 15 justices, decides cases of final appeal and cases of reappeal against a decision or decree made by a high court or district court. *Id.* at 303-04. Under the Constitution, the Supreme Court has the power of judicial review over administrative decrees, regulations, and administrative actions. *Id.* at 18.

The Supreme Court also has final appellate jurisdiction over military appeals courts (which decide cases appealed from military courts). *Id.* at 19. However, Chapter VI establishes a separate Constitutional Court, consisting of nine justices, to decide on the constitutionality of laws, the dissolution of a political party, impeachment, jurisdictional disputes within the executive branch, and petitions relating to the Constitution as prescribed by law. *Id.* Thus, if the constitutionality of law is at issue, the Supreme Court must request a decision of the Constitutional Court. *Id.* at 18.

99. *Id.* at 12-13.

100. *Id.* at 251.

101. *Id.*

maintain a position above a statutory occupational level are considered public officials and fall within the provisions of the antibribery statutes.<sup>102</sup> In sum, the number and types of public positions are generally determined by statute or by presidential decrees.

The few cases falling close to the line that divides public and non-public positions usually involve an employee within an administrative agency. In *State v. Lee*,<sup>103</sup> the defendant was an employee of the Cultural Properties Management Bureau, an administrative agency.<sup>104</sup> The defendant was responsible for the collection of payments related to contracts involving the purchase and sale of land parcels. The Korean Supreme Court found that the defendant's responsibilities were more than "simplistically mechanical or physical in nature."<sup>105</sup> The defendant was thus held to be a "public official" under Article 129.<sup>106</sup>

The Court's definition of the term "public official" leaves open a degree of uncertainty for those positions that may fall close to the line separating public and non-public positions. In borderline cases, it may be difficult to determine whether a bureaucratic function, performed by a local civic servant, is "simplistically mechanical or physical in nature." However, for present purposes, it is sufficient that the term "public official" clearly includes high-level officials such as members of the National Assembly, as well as all executive ministry officials. As long as Article 129 applies to such officials, the antibribery provisions potentially have sufficient jurisdiction to police high-level government corruption.<sup>107</sup>

## 2. Bribe

A public official violates Article 129 if he receives, demands, or promises to accept a "bribe."<sup>108</sup> As for what constitutes a "bribe," the Korean Supreme Court broadly construed the term to

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102. See *supra* note 93.

103. Judgment of Apr. 25, 1978, Daebubwon [Supreme Court], 77 do 3709 (Korea) (Korean language only, translated by author).

104. *Id.*

105. *Id.*

106. *Id.* See also Judgment of Oct. 19, 1971 (*State v. Ahn*), Daebubwon [Supreme Court], 71 do 1113 Daepahn 43 (Korea) (holding that the antibribery provisions also apply to those who are "temporarily employed" in public positions) (Korean language only, translated by author).

107. Only a constitutional amendment is necessary to broaden the jurisdictional reach of the antibribery laws to allow criminal sanctions against the President for bribery committed during the presidential term. See *infra* notes 216-33 and accompanying text.

108. KOREAN LAWS, *supra* note 71, at 779.

include "any monetary, property, or other material interest, as well as any tangible or intangible benefit, which may satisfy a human demand or desire."<sup>109</sup> A "bribe" also includes "any opportunity to participate in a business venture."<sup>110</sup> In *State v. Chung*,<sup>111</sup> an executive officer of a private construction company gave 200 shares of the company's stock to a public official at face value, which was below the market price of the shares, in exchange for political favors.<sup>112</sup> The defendant-official contended that the market price for the shares subsequently dropped below face value and argued that the shares did not constitute a bribe. The Court, however, held that the actual market price of the shares was irrelevant in determining whether the shares constituted a bribe.<sup>113</sup> The defendant-official's mere "expectation" that the shares had value was sufficient to deem the shares a "bribe."<sup>114</sup> The Court held that if the defendant-official personally believed that the shares had value, the stock constituted a bribe regardless of whether he accurately assessed the value of the shares.<sup>115</sup>

In *State v. Song*,<sup>116</sup> the director of a residential association granted membership to numerous persons, at the request of a public official, without charging them the required premium fees.<sup>117</sup> Each member of the association acquired the right to purchase one residential unit within a newly constructed apartment complex. In return for the extension of membership to those selected by the official, the official promised to approve the construction of the apartment complex upon its completion. Although the official did not receive any monetary benefit himself, the Court held that the monetary benefit received by those selected by the official constituted an "intangible benefit" for the official.<sup>118</sup> This "intangible benefit," deriving from the fact that

109. Judgment of Oct. 10, 1979 (*State v. Chung*), Daebubwon [Supreme Court], 78 do 1793 Daepahn 16 (Korea) (Korean language only, translated by author).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 17.

114. *Id.* at 18.

115. *Id.* See also Judgment of Sept. 5, 1995 (*State v. Ahn*), Daebubwon [Supreme Court], 95 do 1269 Daepahn 105 (Korea) (an option to buy a parcel of land was held to constitute a "bribe," despite consideration tendered for the option by the defendant-official, due to the "expectation" of a rise in the option's market value) (Korean language only, translated by author).

116. Judgment of Dec. 22, 1992, Daebubwon [Supreme Court], 92 do 1762 Daepahn 46 (Korea) (Korean language only, translated by author).

117. *Id.* at 47.

118. *Id.* at 47-48.

fees were not charged to the selected members, was held to constitute a "bribe" under Article 129.<sup>119</sup>

Under Article 2 of the special statutes against bribery, the Supreme Court held that a series of payments made to an official may be combined if the payments are part of the "same scheme."<sup>120</sup> In *State v. Lee*,<sup>121</sup> an official received a total of seventeen payments by a corporate representative over the course of eighteen months.<sup>122</sup> The Court held that the payments were part of the "same scheme," and were not to be considered individually.<sup>123</sup> Hence, the combined sum of the payments, which exceeded \$64,000, brought it within the provisions of the special statutes.<sup>124</sup>

As for what constitutes a bribe, anything that confers a physical or psychological benefit to an official, in exchange for a public function, may fulfill this element under Article 129. The content of a bribe may take almost any shape, size, or form, as long as it confers some type of benefit. As in *Chung*, the mere expectation that the value of a company's shares could rise was sufficient to render the shares a bribe. Among the elements of the bribery offense under Article 129, this element is the broadest in scope.

### 3. Duty

If an act is a public duty, it will fall within the purview of the antibribery statutes. A large body of Korean case law defines the scope of the phrase "public duty." A public official violates Article 129 if he receives, demands, or promises to accept a bribe "in connection with his duties."<sup>125</sup> The Korean Supreme Court has broadly interpreted the range of a public official's "duties." In *State v. Koh*,<sup>126</sup> the Court held that an act is within the scope of public duty if it is "influential," apart from duties expressly prescribed by statute, even if the public official lacks the "authority to deliver the act."<sup>127</sup>

119. *Id.* at 48.

120. Judgment of Sept. 25, 1990 (*State v. Lee*), Daebubwon [Supreme Court], 90 do 1588 Daepahn 261 (Korea) (Korean language only, translated by author).

121. *Id.*

122. *Id.* at 262.

123. *Id.*

124. *Id.*

125. KOREAN LAWS, *supra* note 71, at 779.

126. Judgment of Dec. 28, 1956, Daebubwon [Supreme Court], 4289 hyungsang 235 (Korea) (Korean language only, translated by author).

127. *Id.*

In *Koh*, the defendant was a police officer in charge of screening applications for exemptions from the military draft and sending them to the mayor.<sup>128</sup> The mayor made the sole decision as to which applicants would qualify for exemption. An applicant sought to secure exemption from the draft and gave money to the defendant along with the application. The defendant was found to lack the authority to make the final decision concerning exemption from the military draft.<sup>129</sup> The Court, however, found that the defendant possessed the capacity to "influence" the decision by virtue of his ability to screen the applications.<sup>130</sup> The Court held that such influential capacity brought the defendant's act within the scope of public duty regarding the antibribery provisions.<sup>131</sup>

In a later decision, the Court held that the scope of duty under Article 129 includes acts that are "closely related" to express statutory duties.<sup>132</sup> For example, in *State v. Choi*,<sup>133</sup> a low-level public official, employed by a local construction bureau, received a payment from a private construction company representative.<sup>134</sup> As an employee of the bureau, the public official's responsibilities included surveying government-owned land parcels for zoning purposes. The local construction bureau collected all offers made concerning government-owned land parcels and sent them to an appraiser. The appraiser would later select and accept the offer that was closest to the assessed market price of the parcel.

The construction company representative made the payment to the official in exchange for an estimate on the assessed market price of the parcel. The representative sought to make an offer in accordance with the official's estimate in order to increase the chances that the offer would be accepted. On these facts, the Court found that the official's estimation of the parcel's value was not "closely related" to his prescribed duties.<sup>135</sup> The official's estimate was found to be based on his own personal knowledge and experience, apart from his duty to survey land parcels.<sup>136</sup>

128. *Id.*

129. *Id.* at 236.

130. *Id.* at 236-37.

131. *Id.* at 238.

132. Judgment of Oct. 12, 1961, Daebubwon [Supreme Court], 4294 hyungsang 292 (Korea) (Korean language only, translated by author).

133. Judgment of Mar. 22, 1983, Daebubwon [Supreme Court], 82 do 1922 Daepahn 76 (Korea) (Korean language only, translated by author).

134. *Id.* at 77.

135. *Id.* at 78.

136. *Id.*

Thus, the official's acceptance of the payment was held not to be "in connection with his duties."<sup>137</sup>

The Court also held that public duties embody acts that are established through "actual practice."<sup>138</sup> In *State v. Koh*,<sup>139</sup> the Court elaborated upon this rule and held that public duties include acts that are performed under a public official's *de facto* authority.<sup>140</sup> In *Koh*, the defendant was a colonel in the army who received a series of small payments from a subordinate-captain in exchange for favorable assignments.<sup>141</sup> The Court found that the subordinate-captain had made his request in light of the defendant's position of authority.<sup>142</sup> Apart from *de jure* authority, expressed by statute, the Court held that the defendant's *de facto* authority was sufficient to bring his action within the range of public duty, especially in light of the power of his rank within the military.<sup>143</sup>

In *State v. Shin*,<sup>144</sup> the Court held that public duties also encompass acts that are "governed by a statutory requirement of the administrative agency under whose authority the official is acting."<sup>145</sup> In *Shin*, the defendant was employed by a local rural development bureau, an agency responsible for approving government landfill projects.<sup>146</sup> The defendant received a payment from a representative of a private construction company, the latter seeking to obtain approval for a project completed by the construction company. The defendant contended that the payment was not accepted "in connection with his duties," since he was employed within the agricultural creation division, and not the agricultural development division which directly oversaw all landfill projects. The Court held that although the defendant had an indirect role in the approval of such projects, his decisions were nevertheless "governed by the statutory guidelines of the local rural development bureau, under whose authority the

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137. *Id.*

138. Judgment of Nov. 22, 1966, Daebubwon [Supreme Court], 66 do 1378 (Korea) (Korean language only, translated by author).

139. Judgment of June 7, 1977, Daebubwon [Supreme Court], 76 do 3662 Daepahn 35, 38 (Korea) (Korean language only, translated by author).

140. *Id.* at 38.

141. *Id.* at 36-37.

142. *Id.* at 38.

143. *Id.*

144. Judgment of Sept. 25, 1984, Daebubwon [Supreme Court], 84 do 1568 Daepahn 191 (Korea) (Korean language only, translated by author).

145. *Id.* at 193.

146. *Id.*

defendant was acting."<sup>147</sup> Thus, the defendant was held to accept the payment "in connection with his duties."<sup>148</sup>

The Korean Supreme Court has broadly interpreted the scope of a public official's duties under Article 129. Apart from duties prescribed by statute, public duty may be implied when an act is influential, even if the public official has no authority to deliver the act. In addition, the scope of public duty includes acts that are closely related to express statutory duties, established through actual practice, performed under *de facto* authority, or governed by statute of an administrative agency under whose authority a public official is acting. Any one of these factors may be dispositive of the issue as to whether an act falls within the broad scope of public duty outlined by the Korean Supreme Court.

#### 4. Intent

Under Article 129, specific criminal intent must be established in order to sustain a conviction. In *State v. Gwok*,<sup>149</sup> the Korean Supreme Court held that a public official is in violation of the antibribery statutes if the official "knowingly" receives, demands, or promises to accept a bribe with the "intent to perform an official action in exchange for the bribe."<sup>150</sup> The bribe must be offered in exchange for specific official action, or *quid pro quo*.<sup>151</sup> The requisite intent may be proven by circumstantial evidence in light of all of the facts and circumstances of each case.<sup>152</sup>

In *Gwok*, a construction company representative was in charge of the administration of a random lottery selection process, which granted each selected participant a unit within a newly constructed condominium complex.<sup>153</sup> The representative was a personal friend of a local government official and arranged for the official to be selected for the acquisition of a condominium

147. *Id.*

148. *Id.* at 194.

149. Judgment of Apr. 28, 1981, Daebubwon [Supreme Court], 80 do 3323 Daepahn 337, 342 (Korea) (Korean language only, translated by author).

150. *Id.*

151. *Id.*

152. *Id.* See also Judgment of Mar. 4, 1955 (*State v. Yoo*), Daebubwon [Supreme Court], 4285 hyungsang 114 (Korea) (the monetary amount of a bribe was held to be a factor in determining whether the defendant-official had the intent to participate in an illicit exchange) (Korean language only, translated by author).

153. Judgment of Apr. 28, 1981, 80 do 3323 Daepahn at 339.

unit.<sup>154</sup> The Court held that the public official was not in violation of Article 129 because the unit was not received in exchange for any specific official action.<sup>155</sup> In the absence of a specific *quid pro quo* arrangement, the Court held that the intent requirement was not satisfied.<sup>156</sup>

When a public official "receives" a bribe, the official must have "knowledge or awareness" of the bribe's existence. For example, a public official was unaware that someone had left an envelope filled with money in his office.<sup>157</sup> The official immediately returned the money to the donor after discovering the payment.<sup>158</sup> The Court held that the official did not "receive" a bribe, since he was not "aware" of the payment when it was offered by the donor.<sup>159</sup> Thus, the official lacked the requisite state of mind under Article 129.<sup>160</sup> In another case, as a public official was leaving in a limousine, the donor threw a package of money through the open window of the moving vehicle.<sup>161</sup> Under these facts, the Court held that the official did not "knowingly receive" a bribe, thus negating the element of intent.<sup>162</sup>

The element of intent is of particular significance in the sense that it is reflected through a *quid pro quo* arrangement. Judge John Noonan distinguishes between a gift, a campaign contribution, and a bribe from the moral perspective. His views offer guidance in the present context since moral parameters shape the legal parameters concerning bribery.<sup>163</sup> Noonan observes:

A gift . . . is meant as an expression of personal affection, of some degree of love. . . . No obligation is imposed which the donee must fulfill. . . . That the gift should operate coercively is indeed repugnant and painful to the donor, destructive of the liberality that is intended. Freely given, the gift leaves the donee free. . . . Campaign contributions are imperfect gifts because they are

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154. *Id.*

155. *Id.* at 342.

156. *Id.*

157. Judgment of Jan. 31, 1978, Daebubwon [Supreme Court], 77 do 3755 Chongnam Hyungbup 129-64 (Korea) (Korean language only, translated by author).

158. *Id.*

159. *Id.*

160. *Id.* See also Judgment of Nov. 25, 1986, Daebubwon [Supreme Court], 86 do 1433 Daepahn 69 (Korea) (when a public official "receives" a bribe, the official need not independently demand or promise to accept a bribe for the element of intent to be established) (Korean language only, translated by author).

161. Judgment of July 10, 1979, Daebubwon [Supreme Court], 79 do 1124 Chongnam Hyungbup 129-73 (Korea) (Korean language only, translated by author).

162. *Id.*

163. See *supra* note 78 and accompanying text.

usually not set in a context of personal relations; they are intended to express a limited love—an identification with a cause. . . . They do not express or create overriding obligations, that is, there is no absolute obligation on the part of the contributor to recognize past work by the candidate; and there is no absolute obligation on the part of the candidate to do the work the contributor expects. Absence of absolute obligation creates one difference between contributions and bribes. Size is thus a relevant characteristic. A large contribution can create an overriding obligation; its proper name becomes a bribe.<sup>164</sup>

A gift or a campaign contribution is thus lawful when it does not create an obligation on the part of the public official to reciprocate to the donor. The donor gives, and the donee receives, without the expectation that the latter will specifically perform a public function on behalf of the former. There is no exchange.

However, when a specific *quid pro quo* arrangement can be implied, the contribution constitutes a bribe. The size of a contribution is a factor to be considered in determining whether there is an illicit exchange. For example, in the hypothetical case of the corporate political contribution for one million dollars posed earlier, the public official receiving such a large sum may have an overriding obligation to reciprocate through official action. Given the large amount of the contribution, one is more likely to infer that a bribe exists than if the amount of the contribution was relatively small. The size of a contribution, or the timely performance of a specific public function by an official, are factors that may establish the requisite intent.

The determination of the predominant motive, or intent, is ultimately decisive as to whether a contribution was meant to manipulate a public official.<sup>165</sup> Noonan elaborates, "Motives may be mixed when the President makes an appointment or when a private corporation hires a former government employee. Double effect can often be found—choice of a responsible appointee, reciprocation of an official favor. As in countless other situations of double effect, a moral judgment is required to determine the predominant motive and consequences."<sup>166</sup> Hence, an official's intent to reciprocate a specific public function, in exchange for a benefit, lies at the heart of the bribery offense.

164. NOONAN, *supra* note 77, at 695-97. Apart from size, Noonan notes that the public disclosure of contributions is another way contributions differ from bribes. *Id.* at 697. Contributions are given openly, recorded, and reported. Such disclosure preserves political accountability. *Id.* However, the characteristic of non-secrecy loses some significance in the current context, since many political contributions were made openly to former Korean Presidents through political slush funds. See *supra* notes 51-64 and accompanying text.

165. NOONAN, *supra* note 77, at 698.

166. *Id.*

As noted above, the Korean case law construing the element of intent focuses on the existence of a *quid pro quo* arrangement.<sup>167</sup> The size of a suspected bribe and the performance of a public function are among numerous factors that may establish the requisite element of intent. Whether such factors exist are questions of fact to be tried by the court.<sup>168</sup> If the evidence establishes a *quid pro quo* arrangement beyond a reasonable doubt, the mental state requirement is satisfied.<sup>169</sup> In this regard, the Korean antibribery statutes and case law seem to provide a satisfactory and workable legal framework in terms of defining the parameters of the bribery offense.

An overall evaluation of the laws against bribery reveals that they are broad in scope, with the element of intent being significant in distinguishing between lawful and unlawful exchanges. In a 1984 decision, the Korean Supreme Court stated, "In order to maintain public confidence in the government, the purpose of the antibribery laws is to preserve fairness in the execution of public service and to protect the principle that public service cannot be bought."<sup>170</sup> The broad judicial construction of Article 129 reflects the Court's pursuit of such policy goals to maintain the integrity of public office.

Given that the Korean laws against bribery are sufficiently broad in scope, one may question why bribery remains pervasive among public officials. The problem does not arise from the laws themselves. As noted above, the substantive content of the antibribery laws seems satisfactory and a revision of the laws is largely unnecessary.<sup>171</sup> Instead, the practice of bribery has continued largely as a result of the inconsistent enforcement of the antibribery laws.

### B. *The Poor Enforcement of the Antibribery Laws*

The enforcement of the antibribery laws has largely been limited to low-level public officials within both the central and local sectors of the government. High-level officials within the central government include, but are not limited to, the following:

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167. See *supra* notes 149-162 and accompanying text.

168. See *supra* note 94.

169. Determinations as to whether the requisite intent exists can only be made on a case-by-case basis in light of all relevant facts and circumstances.

170. Judgment of Sept. 25, 1984 (State v. Shin), Daebutwon [Supreme Court], 84 do 1568 Daepahn 191, 193 (Korea) (Korean language only, translated by author).

171. The only revision necessary is an amendment to the Korean Constitution which is discussed in greater detail below. See *infra* notes 216-233 and accompanying text.

the President, the Prime Minister, ministry officials above the level of the Assistant Minister, and members of the ruling party of the National Assembly.<sup>172</sup> High-level officials within the local government include governors, vice-governors, mayors, and vice-mayors.<sup>173</sup> The majority of cases have not implicated such high-level officials and the antibribery laws have been primarily enforced against officials at lower levels within the political hierarchy.<sup>174</sup>

As a result of an overpowering executive branch, which exercised broad discretion during the successive military regimes, a strong disparity exists between legal theory and reality.<sup>175</sup> Although the Korean Constitution provides for fairness and equal application of the laws,<sup>176</sup> in reality the antibribery laws have not been enforced against high-level officials. Possessed as they were of tremendous political authority, high-level officials, especially within the central government, engaged in bribery without fear of legal action.<sup>177</sup> Despite the capacity to pursue legal action, public prosecutors largely chose not to prosecute high-level officials

172. See KOREAN LAWS, *supra* note 71, at 255-56.

173. *Id.* at 251-53.

174. Apart from journalistic sources, this observation is based on a review of all Supreme Court and high court decisions involving the bribery offense concerning public officials, under both the general and special statutes, rendered between 1953 and 1995. The vast majority of these decisions involve only low-level public officials. Of course, such an observation does not presume that those high-level officials suspected of bribery are guilty of the offense in the absence of any legal conviction. Under Korean law, all suspects are presumed innocent until proven guilty in a court of law. See *supra* note 94.

175. As for the separation of powers among the three branches of government, one scholar observes that the executive branch exercised broad discretionary power. See Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 404 (1995). In the past, the legislative and judicial branches of government assumed passive roles amidst an overpowering executive branch. *Id.* At times when the President sought an additional presidential term, the National Assembly provided support. *Id.* The judiciary remained largely passive throughout the entire period, with the power of judicial review shifting between the Supreme Court, the Constitutional Committee, and the Constitutional Court over the course of several decades. *Id.* at 406-10. Yoon states:

In Korea, the long period of authoritarian governance inevitably distorted the will of the public and the law to fit the political purposes of the moment. Administrative expediency and efficiency were unduly emphasized while fairness and procedure were neglected. . . . What aggravated the situation in Korea was the fact that nominally countervailing institutions, such as the legislature and judiciary, were too weak to curb the vast discretionary power enjoyed by the executive.

*Id.* at 410-11.

176. See KOREAN LAWS, *supra* note 71, at 4-5.

177. See *supra* notes 46-64 and accompanying text.

through the exercise of prosecutorial discretion. In particular, prosecutors remained reluctant to challenge the power of the chief executive while the military-backed authoritarian regimes maintained control of the government. Such inconsistent enforcement of the antibribery laws greatly weakened the efforts in policing government corruption and allowed bribery to spread among many public officials.

The cases involving low-level officials reflect only a small portion of the overall problem of bribery among officials in general. Even with the transition to a legitimate democracy under the current leadership, allowing for the prosecution of two former Presidents, the pervasive corruption among officials has left prosecutors with insufficient resources to pursue all cases of bribery. Therefore, one should not take the antibribery laws at face value. In placing the antibribery laws in proper perspective, one can identify solutions to address their ineffective enforcement.

#### IV. A MODEL FOR EFFICIENT ENFORCEMENT OF THE ANTIBRIBERY LAWS: THE OPTIMAL ENFORCEMENT THEORY

Although President Kim's efforts have set the stage for future reforms, the question remains as to how to redress the persisting problem of government corruption. Scholars adopting an economic approach to criminal law have provided insight regarding efficient means of criminal law enforcement through what is referred to as the optimal enforcement theory. The optimal enforcement theory seeks to ascertain economically efficient, or optimal, levels of criminal law enforcement efforts in order to minimize the overall costs of crime and punishment to society.<sup>178</sup> Through an analysis of the optimal enforcement theory, principles of the theory can be applied to the present context. In the process, one can develop proposals as to how to enforce the Korean antibribery laws efficiently in order to decrease the incidence of bribery among public officials.

Gary Becker championed the classic model of optimal law enforcement.<sup>179</sup> The analysis begins with the individual offender,

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178. See *infra* notes 179-201 and accompanying text.

179. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker's work subsequently generated many other works discussing different aspects of the optimal enforcement theory. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205-31 (1985) (offering an economic perspective, focused on promoting efficiency, regarding the substantive doctrines of criminal law); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 223-31 (4th ed. 1992) (discussing optimal

who either chooses to obey or to violate the law. The offender will commit an offense if the social value of the gain to the offender (denoted by variable  $G$ ) exceeds the cost of the expected penalty, which relates to the probability of conviction (denoted by variable  $p$ ) and the level of punishment (denoted by variable  $f$ ).<sup>180</sup> Thus, in symbolic terms, the offender commits the crime when  $G > pf$ .<sup>181</sup>

An increase in either  $p$  or  $f$  would decrease the expected utility from an offense and would reduce the number of offenses, since either the probability of being convicted or the level of punishment itself would increase.<sup>182</sup> The variable  $H$  refers to the external harm caused by the offense to other members of society.<sup>183</sup> The net cost or damage to society, denoted by the variable  $D$ , equals the difference between  $H$  and  $G$ .<sup>184</sup> The variable  $O$  is also introduced in order to determine the aggregate effects of the total number of offenses, and thus:  $D(O) = H(O) - G(O)$ .<sup>185</sup>

Under the optimal enforcement theory, one must also take into account the costs of law enforcement which come in two forms. First, the cost of apprehension and conviction exists in terms of expenditures spent on police, court personnel, and other specialized equipment used for law enforcement (such as wire-

criminal sanctions); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 24-37 (providing an economic analysis of criminal law as shaping the preferences of offenders and the population at large); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1395-98 (1987) (discussing optimal punitive liability in the civil tort law context and arguing that efficiency can be achieved by: (1) raising the burden of proof from negligence by a preponderance of the evidence to gross negligence by clear and convincing evidence; (2) lowering the standard of care to require less than reasonable care; and (3) assessing punitive damages).

180. Becker, *supra* note 179, at 173, 176-77.

181. See Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 749-50 (1993).

182. Becker, *supra* note 179, at 177.

183. *Id.* at 173.

184. *Id.* The net cost or damage to society includes costs caused by the entire range of criminal offenses, which give rise to estimates of direct costs of various crimes. *Id.* at 170. Costs are incurred in terms of crimes against persons, crimes against property, illegal consumption of goods, and white-collar crimes. *Id.* at 171. There are also the costs of public expenditures in enforcing the law, as well as private expenditures spent on precautions taken against crime. *Id.*

185. *Id.* at 173, 177. The notations within the equation are read "D as a function of O," and so forth for the other variables, signifying that the value of D in the aggregate depends on the value of O, the number of offenses. See Parker, *supra* note 181, at 750 n.22.

tapping, computer monitoring, and fingerprinting).<sup>186</sup> Such expenditures are denoted by the variable  $C$ , which is a function of both the "supply" of offenses  $O$ , and the probability of conviction  $p$ , and is labeled as  $C(p, O)$ .<sup>187</sup> An increase in either the probability of apprehension and conviction, or the number of offenses, would thus increase the total cost.<sup>188</sup> Second, punishments are costly to offenders in terms of foregone earnings, the value of the restrictions in consumption and freedom, and fines paid.<sup>189</sup> There is also the cost of punishments to other members of society such as expenditures spent on prison guards, supervisory personnel, buildings, and food.<sup>190</sup> The total social cost of punishments is the cost to offenders plus the cost or minus the gain to others.<sup>191</sup>

Some punishments also create a "deadweight" loss to society, denoted as the factor  $b$ , to the degree that the punishment imposed on the offender cannot be transferred to socially productive use.<sup>192</sup> The total social loss from punishments can thus be expressed as  $bpfO$ , since  $bf$  represents the loss per offense punished, and  $pO$  is the number of offenses punished.<sup>193</sup> As with an increase in the probability of conviction, an increase in punishments also raises the total level of social cost.

Putting all of the foregoing variables together, Becker's model defines the total social loss function according to the following equation:  $L = D(O) + C(p, O) + bpfO$ .<sup>194</sup> Under this equation, the total social loss (denoted by variable  $L$ ) from crime and punishment equals the sum of the net cost to society, the cost of apprehension and conviction, and the cost of punishments. The important task consists of selecting values for the variables that are directly subject to social control in order to minimize the total social loss. Becker designates  $p$  and  $f$ , which refer to the probability of conviction and the level of punishment respectively, as the social decision variables.<sup>195</sup> By adjusting these decision variables and observing how they affect the level of total social

186. Becker, *supra* note 179, at 174.

187. *Id.* at 174-77.

188. *Id.* at 175.

189. *Id.* at 179.

190. *Id.* at 180.

191. *Id.* Costs to offenders regarding fines paid produce a gain to others that equal the cost to offenders, apart from collection costs, and thus the social cost of fines is close to zero. *Id.* The payment of a fine is essentially a transfer payment. *Id.*

192. Parker, *supra* note 181, at 750.

193. Becker, *supra* note 179, at 181.

194. *Id.*

195. *Id.*

loss, one can ascertain optimality conditions for  $p$  and  $f$ . Optimal enforcement is achieved at the point where the marginal benefit and the marginal cost are equal, and the total social loss is minimized.<sup>196</sup>

Optimality is compromised in conditions of either underdeterrence or overdeterrence.<sup>197</sup> In order to achieve optimal deterrence, the external harm must equal the expected penalty from a societal perspective.<sup>198</sup> Underdeterrence occurs if the external harm exceeds the expected penalty, which would cause society to lose from both the commission of the offense and the ensuing need to punish the offender.<sup>199</sup> If the expected penalty exceeds the external harm, overdeterrence occurs when a welfare-increasing act is deterred.<sup>200</sup> In this situation, preventive measures may deter acts whose benefits outweigh their social costs, resulting in overcompliance among those who refrain from productive behavior.<sup>201</sup>

196. *Id.* at 181-85. Becker notes that if the goals of social policy were simply deterrence, the probability of conviction  $p$  could be raised close to one, and punishments  $f$  could be imposed to exceed the gain, thereby allowing for a reduction in the number of offenses  $O$  essentially at will. *Id.* at 180. However, an increase in  $p$  increases the social cost of offenses in raising expenditures in fighting crime  $C$ , as does an increase in  $f$  (if  $b > 0$ ) due to the cost of punishments  $bf$ . *Id.* At modest levels of  $p$  and  $f$ , such effects may outweigh the social gain from increased deterrence. Likewise, if social policy simply were to make punishment to proportionately fit the crime,  $p$  could be set close to one, and  $f$  could be equated to the harm incurred by the rest of society. *Id.* at 180-81. Such a policy, however, also neglects the social cost of increases in  $p$  and  $f$ . *Id.* at 181.

As for the dynamics between  $p$  and  $f$ , Becker observes that an increase in  $p$  would reduce the expected utility, and thus the number of offenses, more than an equal percentage increase in  $f$  if the offender has preference for risk; an increase in  $f$  would have the greater effect if the offender has aversion to risk; and  $p$  and  $f$  would have the same effect if the offender is risk-neutral. *Id.* at 178.

197. Parker, *supra* note 181, at 757-58. Under Parker's analysis,  $p$  is held constant and  $f$  is assumed to be the sole decision variable. *Id.* at 751-53.

198. Becker, *supra* note 179, at 183.

199. Parker, *supra* note 181, at 757-58.

200. *Id.* at 757.

201. *Id.* at 772. Jeffrey Parker rounds out Becker's model and incorporates the doctrine of *mens rea* into the optimal enforcement theory. *Id.* at 769-77. Parker first acknowledges both descriptive and normative criticisms of the optimal enforcement theory. From a descriptive perspective, the theory is criticized for being impractical in terms of its application. There are inherent difficulties in measuring variables such as the social harm of an offense, the probability of detection, and the responsiveness of potential offenders to punishment. *Id.* at 743. Normatively speaking, critics argue that the optimal enforcement theory fails to account for the moral dimension of criminal law, as exemplified by the theory of retribution and its emphasis on moral blameworthiness. *Id.* at 743-44. By incorporating the doctrine of *mens rea* into the optimal enforcement theory, however, Parker responds to both of the foregoing criticisms.

In applying the tenets of the optimal enforcement theory to the present context, one can derive prescriptions for policy to address the problem of government corruption. Various solutions can be proposed to decrease the incidence of bribery among public officials through efficient enforcement of the Korean antibribery laws.

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Parker refers to *mens rea* as a requirement of self-awareness, or the possession of "self-characterizing" information, denoted by the variable  $I$ . *Id.* at 744-45. In economic terms, whether the actor is aware of the nature of the committed act refers to the actor's information costs at the margin. *Id.* at 745. If the actor did not know the relevant circumstances, then it would have been costly for the actor to acquire that information ( $I > 0$ ). *Id.* If the actor did know, it would have been costless to obtain the necessary information ( $I = 0$ ). *Id.* In other words, if the environment has provided the actor with the necessary information *ex ante*, then the actor did not have to invest in self-characterization, in which case  $I$  is zero and *mens rea* exists. *Id.* at 779. Apart from the cost of acquiring such information, one may also incur the private cost of overinvesting in information in order to comply with the law whenever punitive penalties exist. *Id.* at 773-75.

As Parker argues, the *mens rea* doctrine serves the economic function of minimizing the cost of self-characterization. *Id.* at 745-46. Parker initially simplifies Becker's model by holding  $p$  constant and designating  $f$  as the sole decision variable. *Id.* at 751-53. In the situation where it is difficult to precisely measure the external cost of criminal behavior, causing penalties to be set at punitive levels above the optimal range, *mens rea* serves to reduce expected punishment costs to zero whenever self-characterization is costly (when  $I > 0$ , and the actor does not have the requisite mental state). *Id.* at 776. Parker provides his own equation reflecting this proposition and outlines conditions under which the equation will be socially optimal. *Id.* In the process, Parker addresses both descriptive and normative criticisms of the optimal enforcement theory. In instances when it is difficult to accurately measure the variables of the theory, Parker's model allows the public authority to raise punishment levels slightly above the optimal level, while still avoiding the negative consequences associated with overdeterrence. Also, by incorporating the *mens rea* doctrine into the optimal enforcement theory, Parker accounts for the moral element in criminal law. *Id.* at 778-79.

One may justify the punishment of offenders based on moral grounds alone according to the principles of retribution. However, the optimal enforcement theory, premised on utilitarian principles, provides an analytical framework from which one can derive policy solutions regarding criminal law enforcement. See *infra* notes 202-244 and accompanying text. Inherent difficulties in measuring variables (such as the social harm from an offense) do not detract from the practical value of the optimal enforcement theory, as the practice of law itself is an inexact science.

## V. PROPOSALS FOR CHANGE

A. *Optimal Enforcement of the Antibribery Laws*

If national policy objectives seek to attain a sound democratic form of government, one must address the problem of bribery among public officials. Public officials must act accountably on behalf of the people. A bribe taken for an official's personal gain directly undermines the democratic process and sacrifices the loyalty owed to the citizenry at the expense of the public welfare. Reforms must achieve a government of integrity if Korea seeks to continue its national development. One readily identifiable solution calls for optimal enforcement of the antibribery laws.

At the outset, it is safe to assume that the external harm to Korean society presently exceeds the cost of preventive measures because of widespread corruption among public officials. As a result of this underdeterrence, the cost to society has been incurred through a myriad of factors. Such factors include the loss of many lives from the collapse of poorly constructed infrastructures and a feeling of distrust towards the government by the people.<sup>202</sup> In examining the two variables  $p$  and  $f$  (the probability of conviction and the level of punishment), one must approximate optimal values for these respective measures to achieve efficient enforcement of the antibribery laws.

Under Article 129, Subsection (1), of the general statutes, the punishment for bribery includes imprisonment for up to five years.<sup>203</sup> Under Article 2, Subsection (1), of the special statutes, the punishment for bribery (involving a sum exceeding \$64,000) is imprisonment from ten years to life.<sup>204</sup> Initially, one must evaluate whether the levels of punishment for the bribery offense

202. See *supra* notes 10-26, 47-48 and accompanying text. One commentator notes that it is incorrect to assume that corruption creates costs and market inefficiencies without any counterbalancing economic benefits. John Hogarth, *Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 559 (1995). For instance, the underground economy can stimulate economic growth by responding to market demand for products or services not legally available. *Id.* at 559. The underground economy may also provide a source of venture capital, employ otherwise unemployable persons, and bring business expertise to high-risk ventures. *Id.* Despite such short-term economic benefits, however, corruption among officials ultimately creates long-term economic and social costs that outweigh the short-term benefits. *Id.* Such costs include increases in the cost of government arising from noncompetitive bidding on government contracts, nonproductive use of money for bribes, loss of tax revenues, and the erosion of the free market. *Id.*

203. See *supra* note 91.

204. See *supra* note 93.

are presently sufficient under the general and special statutes. When the probability of conviction is below the optimal level, the level of punishment can be increased to compensate for the lower  $p$  to induce the optimal number of offenses.<sup>205</sup> However, if the probability of conviction is too low, it may become impossible to deter the offense of bribery despite imposing punitive levels of punishment such as life imprisonment or even the death penalty.<sup>206</sup> In such a situation, raising the level of punishment becomes ineffective. Instead, the probability of conviction must be increased in order to approach optimal deterrence.

Here, it appears that the punishment available under the special statutes would potentially allow one to impose an optimal level of punishment, which can be set at the court's discretion. A sentence ranging from imprisonment for ten years to imprisonment for life would intuitively constitute sufficient punishment for bribery. Life imprisonment is clearly the highest level of punishment possible (apart from the death penalty), and any sentence approaching this extreme would be punitive. It appears that the wide range of sentencing options currently available under the special statutes is not the source of the present problem of underdeterrence. As for the general statutes, it will be assumed that the available penalty of up to five years in prison would allow the court to set the degree of punishment at the optimal level for smaller cases of bribery. In brief, the levels

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205. Becker, *supra* note 179, at 183.

206. See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1241-44 (1985). Shavell notes that an offender could not possibly be deterred from committing an act if his expected private gain exceeds the disutility of the highest conceivable expected punishment, the death penalty, discounted by the probability of its imposition. *Id.* at 1241. As an example, Shavell describes a situation where the benefit an offender would derive from committing an act is 200, the disutility of the maximum punishment is 1000, and the probability of the imposition of punishment is 10%. *Id.* at 1241 n.37. In this situation, the offender could not possibly be deterred since the maximum expected punishment would be  $10\% \times 1000$ , or 100, which is below 200. The foregoing situation relies on the formal assumption that the disutility of punishments is bounded and not infinite. *Id.*

In addition, if the levels of punishment are raised very high in order to achieve adequate deterrence, amidst a very low probability of conviction, the punishments for acts of differing severity would be similar and thus compromise marginal deterrence. *Id.* at 1246. Shavell describes that if the probability of apprehension and conviction were very low, the punishments for both robbery and murder might have to be near life imprisonment to create sufficient deterrence. *Id.* at 1246 n.52. Under such circumstances, only a small difference in the punishments for the two crimes would exist and robbers would have little reason not to murder their victims. *Id.*

of punishment presently available under the general and special statutes do not warrant any changes.<sup>207</sup>

The probability of apprehension and conviction (expressed as  $p$ ) emerges as the critical variable that must be manipulated to achieve efficiency. As stated earlier, the antibribery laws have been primarily enforced against low-level officials, pointing to only a small segment of the overall problem of government corruption. Even without empirical data, one may deduce that the value of  $p$  in the present context is close to zero, particularly among high-level officials, and below the optimal level. The present task is to raise the probability of conviction of public officials that commit bribery in order to enforce the antibribery laws optimally. A higher probability of conviction would decrease the expected gain from resorting to bribery, for the official contemplating the act, and would reduce the aggregate number of bribery offenses among officials. In turn, the lower incidence of bribery would decrease the level of external harm to society and would diminish the total social loss.

In order to raise the likelihood of apprehension and conviction of public officials who commit bribery, the burden will be on public prosecutors and law enforcement officials to enforce the antibribery laws vigorously. However, one must keep in mind that an increase in the probability of apprehension and conviction raises the social cost of offenses by raising the expenditures related to law enforcement.<sup>208</sup> It would be inefficient to prosecute every instance of suspected bribery, especially in light of its pervasiveness, to the point whereby the cost of law enforcement exceeds the external harm to society. The cost of preventive measures should thus be minimized by pursuing relatively larger cases of bribery under the special statutes, involving sums over

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207. The only concern points to the possibility of the level of imposed punishment being reduced by a presidential pardon or commutation. Under the Korean Constitution, the President has the power to grant "amnesty, commutation, and restoration of rights." KOREAN LAWS, *supra* note 71, at 14. For instance, a reduction in Roh's sentence, which may occur in the future according to some legal experts, could compromise optimal deterrence. See *supra* note 5. In addition, monetary sanctions, in the form of fines, may be preferable to imprisonment in deterring white-collar crime (such as corruption of public officials) since they are less costly. See *supra* note 191; Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410-18 (1980) (arguing that fines are a more efficient form of punishment than imprisonment with respect to white-collar criminals). However, as Posner acknowledges, such a proposition only holds true to the extent that the white-collar criminal is able to pay an imposed fine. See *id.* at 417. See also Shavell, *supra* note 206, at 1237. "[I]t is impossible to deter a person with no assets by the threat of monetary sanctions." *Id.*

208. See *supra* notes 186-93 and accompanying text.

the statutory amount, in order to attain optimal enforcement. Such action would allow the public authorities to use their budgets and resources efficiently.

Optimal enforcement can be achieved by pursuing relatively larger cases of bribery among high-level officials, particularly in light of the social characteristics of the Korean culture. As noted above, the Korean culture emphasizes the concept of one's reputation and honor.<sup>209</sup> According to one's position within the pyramid-structured social hierarchy, a higher level of deference is given to those with higher status. In a society that focuses on authority and status, the criminal punishment of prominent political figures would have a greater deterrent effect, relative to the punishment of low-level officials, because of the larger social stigma associated with such punishment.<sup>210</sup> The conviction and punishment of high-level officials would thus have a deterrent effect comparable to punishing a larger number of low-level officials. Since a relatively lesser number of officials would need to be apprehended and punished to achieve the same deterrent effect, one can efficiently minimize the cost of preventive measures.

In addition, scholars observe that the effects of deterrence vary among different social subgroups of the general population.<sup>211</sup> For instance, the process of socialization has been identified as a variable related to criminal behavior.<sup>212</sup> A strongly socialized person is more likely to comply with the threat of punishment due to a greater sensitivity to the negative aspects of punishment than the less socialized counterpart.<sup>213</sup> Since public

209. See *supra* notes 33-36 and accompanying text.

210. See Posner, *supra* note 179, at 1205.

211. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE* 249-53 (1973).

212. *Id.* at 119.

213. The optimal enforcement theory assumes that criminal acts are based upon rational, cost-benefit analyses by wrongdoers. Although such an assumption may not hold true for those who are insane, mentally incompetent, or uneducated, its predictive power comes into play when dealing with socialized subgroups of the population. See *id.* at 75 (citing Jeremy Bentham, *Principles of Penal Law*, 1 WORKS 392, 399 (1843)).

Zimring and Hawkins observe:

[One reason for] law-abiding behavior [includes the factor that] the strongly socialized individual will obey commands out of a desire to do right, quite independent of the specific consequences of wrongdoing. Further, a strongly socialized individual is more likely to comply with threats because he is more sensitive to the negative aspects of threatened consequences than his less socialized neighbor. Social disapproval, which is an important part of most threatened consequences, will be carefully avoided by the strongly socialized individual. Because the [two factors] will commonly occur together, it is extremely difficult to estimate how

officials can be generally characterized as strongly socialized individuals,<sup>214</sup> officials presumably share a greater sensitivity to threatened consequences. As a result of this greater sensitivity, the threat of punishment is likely to have a larger deterrent effect among officials with respect to bribery, compared to the effects of punishment among less socialized individuals regarding other crimes. Such a larger deterrent effect would also promote efficient enforcement of the antibribery laws through less costly means of law enforcement.

Lastly, in raising the probability of conviction, one must acknowledge the concern of overdeterrence. Apart from the cost of higher expenditures on law enforcement, overdeterrence may also chill socially productive behavior. As stated earlier, the exchange of gifts is an integral aspect of the Korean culture in terms of maintaining social relationships.<sup>215</sup> Imposing preventive measures above the optimal level may cause people to refrain from making such legal exchanges. Such overdeterrence may

much of an observed difference between strongly and weakly socialized individuals is attributable to the greater sensitivity of the former to the negative aspects of threatened consequences. Perhaps the crucial test of such an effect would come in an area covered by a legal threat where the chances of apprehension were known to be nil. . . . [or] extremely low.

*Id.* at 120.

These observations apply to the present context. One may initially assume that public officials can be generally characterized as "strongly socialized," since most officials are literate and educated. See INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 248 (Sang Hyun Song ed., 1983). All public officials who are to serve in administrative agencies, above the level of Grade five, are required to pass an examination. The examination consists of written, oral, and performance tests which are designed to gauge the applicant's educational background. *Id.*

According to Zimring and Hawkins, the absence of bribery among strongly socialized persons, such as public officials, could be attributed either to their sense of morality or to their greater sensitivity to the negative aspects of threatened consequences, compared to less socialized persons. If public officials were to refrain from engaging in bribery, committed despite a low risk of apprehension, then the officials presumably did not commit the criminal act because of their sense of morality, as opposed to any deterrent effect of punishment. Conversely, if public officials were to engage in bribery, amidst a low chance of apprehension, one could eliminate the element of the "desire to do the right thing" as a factor regarding compliant behavior.

The recent convictions of former Presidents Chun and Roh as well as other former officials for bribery, committed during periods when the risk of apprehension was extremely low, detract from the naive notion that public officials would obey the laws against bribery through a commitment to moral values, apart from the deterrent effects of punishment. Therefore, public officials are more likely to comply with the threat of punishment, relative to less socialized persons, due to a greater sensitivity to the negative aspects of threatened consequences.

214. See *supra* note 213.

215. See *supra* notes 82-83 and accompanying text.

impede the process of reciprocation and hinder interpersonal relationships. Hence, in achieving optimal enforcement of the antibribery laws, an increase in the probability of conviction of public officials must be tempered by the potentially negative aspects of overdeterrence.

B. *Constitutional Amendment—Taking Optimal Enforcement  
All the Way*

If the foregoing observations are to have any practical significance, they must apply to the highest of all public officials—namely, the President. The pyramid-structured political hierarchy places the President in a highly influential position in light of cultural norms that stress social status, conformity, and group harmony. The President controls the members of the State Council which include the Prime Minister, ministers, and other high-level officials.<sup>216</sup> The President also directs and supervises the heads of all central administrative agencies.<sup>217</sup>

One former public official's comments reveal that meaningful change must occur from the top of the political hierarchy. In some instances, bribery schemes operate within an entire government agency.<sup>218</sup> When an official receives a bribe, it is often distributed among a network of supervisors and fellow employees.<sup>219</sup> In such a situation, an ethical official who refuses to accept a bribe risks being terminated.<sup>220</sup> Those at lower levels of the bureaucratic hierarchy are sometimes almost forced to accept bribes in order to maintain job security. Under these circumstances, the only possible solution is to rectify the situation from the top of the political structure. Meaningful reform cannot occur unless officials in high positions, beginning with the President, can provide an atmosphere for other officials to act lawfully without the fear of reprisal. The Korean Constitution should be amended to this end.

Article 84 of the Korean Constitution provides, "The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason."<sup>221</sup> Although the

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216. See KOREAN LAWS, *supra* note 71, at 15.

217. *Id.* at 255.

218. Young-Juhn Kahm, *Confessions of a Former Tax Collector*, CHOSUN MONTHLY, Sept. 1990, at 208, 210-11 (Korean language only, translated by author).

219. *Id.* at 210.

220. *Id.* at 211.

221. KOREAN LAWS, *supra* note 71, at 14-15. The statute of limitations for applicable offenses, apart from insurrection or treason, begins to toll upon

President can be impeached for misdeeds committed while in office,<sup>222</sup> the President cannot be criminally prosecuted for bribery during the presidential term. This grant of immunity poses a problem since a motion for impeachment of the President is unlikely to occur due to political reasons.<sup>223</sup> Even if the antibribery laws are enforced against high-level officials of the central government, the force of the laws may remain insufficient if the President can engage in bribery without the threat of impeachment or any criminal sanctions during the five-year presidential term.

If efficient deterrence is to be a means for reform, the Korean Constitution must be amended to include bribery within the exception to the presidential immunity from criminal prosecution. Although the procedural requirements may make a constitutional amendment appear difficult to achieve,<sup>224</sup> many amendments have been made in the past.<sup>225</sup> If subject to criminal prosecution for bribery, the President will likely refrain from accepting illicit payments during the presidential term. In turn, such changes can permit the laws against bribery to be optimally enforced.

completion of the presidential term. See YOUNG-SUNG KWON, PRINCIPLES OF THE CONSTITUTION 802, 802 n.2 (1988) (Korean language only, translated by author).

222. The President can be impeached for a violation of the Constitution or "other laws in the performance of official duties" which include the antibribery laws. KOREAN LAWS, *supra* note 71, at 12.

223. See *infra* notes 226-30 and accompanying text.

224. The procedures for a constitutional amendment are outlined in Chapter X of the Korean Constitution. See KOREAN LAWS, *supra* note 71, at 22. A proposal to amend the Constitution can be introduced either by a majority of the total members of the National Assembly or by the President. If passage by the National Assembly by a two-thirds vote or more is obtained, the proposed amendment is submitted to a national referendum within 30 days. More than one-half of all votes cast in favor of the proposed amendment, by more than one-half of all eligible voters, renders the amendment "finalized." *Id.* A proposed amendment, subjecting the President to criminal prosecution for bribery committed while in office, is likely to be finalized in a national referendum. Reports of the widespread positive reaction to the convictions of Chun and Roh suggest that the majority of the Korean population would support such an amendment. See Wu Dunn, *supra* note 2, at A4.

225. See Yoon, *supra* note 175, at 400. Yoon notes, "Since the establishment of the first constitution in 1948, Korea has changed its Constitution nine times, an average of almost once every five years. This alone demonstrates the instability of Korea's political process. Moreover, until recently, every change of regime has entailed a change in the Constitution." *Id.* For the first time, the 1987 revision of the Constitution was a result of a collaborative effort between the government and the opposition party. *Id.* at 402. The 1987 revision reinstated the direct popular vote as the process for presidential elections and limited the presidential term to one five-year term. *Id.* at 402-03. See also Dae-Kyu Yoon, *Constitutional Change in Korea: Retrospect and Prospects*, XXV ASIAN AFFAIRS 178-86 (June 1994).

One may argue that the process of impeachment is sufficient in terms of sanctioning the President for bribery.<sup>226</sup> Given the impeachment process, it would be unnecessary to subject the President to criminal prosecution to prevent the misuse of office. An impeachment of the President that is highly publicized may adequately deter other officials from bribery due to the social stigma associated with the removal from office. Impeachment is also less costly since it does not require expenditures related to criminal conviction and punishment. However, the National Assembly is not likely to sustain a motion for impeachment of the President. The procedural requirements for a motion to impeach the President are more stringent than those applicable to other public officials and pose a serious barrier to removing the President for abuse of office.<sup>227</sup> In particular, the ruling party has traditionally held majority control of the National Assembly.<sup>228</sup> Moreover, the President serves as the head of the ruling party.<sup>229</sup> Under these circumstances, the ruling party is unlikely to support a motion for impeachment of the President due to partisan solidarity. As long as the ruling party maintains majority control, it can effectively block a motion for impeachment of the President. Therefore, the process of impeachment is an ineffective mechanism in terms of sanctioning the President for bribery.<sup>230</sup> Thus, the criminal process provides an essential alternative to impeachment in disciplining the President for engaging in bribery while in office.

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226. See *supra* note 222.

227. KOREAN LAWS, *supra* note 71, at 12. A motion to impeach the President initially requires a proposal by a majority vote of the National Assembly, and concurrent approval by two-thirds of its total members. *Id.* As for other public officials, a motion for impeachment can be proposed by one-third or more of the total members of the National Assembly, and requires a concurrent vote of a majority of the total members of the National Assembly. *Id.* If a motion is approved, the Constitutional Court adjudicates the impeachment decision. *Id.* at 19. Impeachment of a public official does not extend further than removal from public office and does not exempt the impeached official from civil or criminal liability. *Id.* at 12.

228. Yoon, *supra* note 175, at 404-05. Yoon observes,

Apart from exceptionally brief periods in the early 1950s and at the end of the 1980s, the ruling party has enjoyed majority control of the legislature. Most Assemblymen of the ruling party are fully under the control of the President, who is also the head of the party. . . . Often, in the past, a ruling-party-controlled Assembly demonstrated extreme loyalty to the President.

*Id.*

229. *Id.*

230. No President has been impeached throughout Korea's political history.

One may nevertheless question whether a constitutional amendment is still necessary to address the problem of government corruption. Under the current laws, the prosecution of the President for bribery upon completion of the term may sufficiently deter other public officials from engaging in bribery. For instance, the recent convictions of former Presidents Chun and Roh may sufficiently deter other public officials from corruption. Indeed, the convictions of Chun and Roh are likely to have a significant deterrent effect upon other officials. If the President engages in bribery while in office, however, the long delay of criminal prosecution until after the term is completed would compromise optimal deterrence. Delayed prosecution in such a situation simply fails to prevent the harmful consequences of bribery throughout the presidential term. Unless the President is swiftly punished for bribery committed while in office, it may be too late to redress the damaging effects resulting from years of prior government bribery. After completion of the presidential term, any deterrent effect that punishment may have is also lessened by the former President's loss of political power and prestige. Hence, the Korean Constitution must be amended to allow immediate action against the President for a betrayal of the public trust.

On the other hand, subjecting the President to criminal prosecution for bribery could dangerously interfere with the President's performance of executive duties. The independence of the President preserves political stability. Political turmoil increases the susceptibility of falling prey to a North Korean invasion. Such an argument is quite plausible. The independence of the chief executive is necessary to preserve political stability and order. Criminal prosecution would obviously interfere with the performance of the President's duties. However, the mere potential of being subject to criminal prosecution for bribery would not intrude upon the independence of the President. Engaging in bribery is simply not one of the President's proper executive duties. A President who accepts bribes should no longer be in office. In such an event, the procedure for replacing the President comprises nothing more than an ordinary presidential election.<sup>231</sup> Therefore, criminally proscribing bribery would not interfere with the lawful exercise of the President's responsibilities.

Perhaps the only remaining concern is that the President could be prosecuted, despite insufficient evidence, solely as a

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231. KOREAN LAWS, *supra* note 71, at 13. If a vacancy occurs in the office of the President, a presidential election is to be held within 60 days. *Id.* The Prime Minister temporarily fills the vacancy until a new President is elected. *Id.*

means of making a political attack upon the President. For instance, a motion for impeachment requires approval by a two-thirds vote of the National Assembly. In contrast, an individual prosecutor could conduct an investigation and initiate criminal proceedings solely to harass the President. Such an abuse of the criminal process for political ends is unlikely, however, since public prosecutors are employees of the executive branch and are appointed by the President.<sup>232</sup> Instead, the question is whether a public prosecutor could prosecute the President without a conflict of interest, or outside political pressure, that would impede upon the prosecutor's independence.

If the President is subject to criminal sanctions while in office, the public prosecutor would be able to pursue legal action against the President with sufficient independence. Although the President is involved in hiring public prosecutors, the President lacks the power to terminate them. Under Article 37 of the Public Prosecutor's Act, a public prosecutor can be dismissed or suspended if the prosecutor is impeached, sustains a criminal conviction resulting in imprisonment, or is subject to disciplinary action.<sup>233</sup> A public prosecutor's job security is threatened only if the prosecutor commits a wrongful act, which does not include the pursuit of lawful criminal prosecution. Thus, Article 37 would allow the public prosecutor to investigate and prosecute the President for bribery with sufficient independence. It is unnecessary to adopt measures that would arrange for an outside independent counsel to prosecute suspected criminal violations implicating the President.

### C. *Higher Salaries for Low-Level Public Employees* —*A Necessary Corollary to Optimal Enforcement*

Another aspect of reducing government corruption entails raising the salaries for low-level public positions. One often-cited explanation for bribery among local government officials points to the low incomes of low-level public employees. The positions with low income levels are generally within administrative agencies and bureaucratic organizations.<sup>234</sup> Salaries for local civic servants are reportedly very low and insufficient to support the average household.<sup>235</sup> Such low salaries create the need for

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232. *Id.* at 323-26.

233. *Id.* at 323-27.

234. See Tae-Hyun Yoo, A Research Study on the Problem of Tax Evasion in Korea 71 (1989) (unpublished M. Econ. Thesis, Korea University) (Korean language only, translated by author).

235. *Id.* at 71-72.

public employees to supplement their income through the acceptance of bribes.<sup>236</sup> Here, the solution is simply to raise the income levels for low-level public employees who receive insufficient salaries. If salaries for public positions that warrant a raise are sufficiently increased, such changes would reduce the need among low-level public employees to resort to bribery out of dire financial necessity.

One obstacle to increasing government salaries consists of the difficulty in raising taxes in light of the anticipated opposition from the people. There is also the opportunity cost of raising income levels for many public positions, which must be justified by the social gain of reducing the incidence of bribery among public employees whose salaries are increased. Initially, there is no need to raise taxes in order to subsidize higher government salaries. Given the preexisting problem of tax evasion,<sup>237</sup> raising taxes would not generate significant tax revenues, as tax evaders simply would not comply with higher rates. Significant tax revenues can only be generated by addressing the problem of tax evasion.

Apart from bribery, tax evasion is also a serious problem in Korea. Individuals employ various methods to evade taxes such as failing to report capital gains from the transfer of property, undervaluing reported assets, and extending private loans to others at interest rates above the usury rate.<sup>238</sup> At the corporate level, companies evade taxes by fraudulently under-reporting income and maintaining funds unaccounted for on the books of record.<sup>239</sup> Such practices give rise to a large underground economy that is wholly unreported.

In the case of private loans, over \$3 billion worth of these loans are estimated to circulate each year.<sup>240</sup> The interest income earned from such loans is not reported. Countless employees of small and medium-sized businesses are not compensated through a formal payroll system, resulting in a large amount of untaxed

236. *Id.* See also NOONAN, *supra* note 77, at 638-39.

237. See *infra* notes 238-42 and accompanying text.

238. Yoo, *supra* note 234, at 77. See Jae-Kwon Jung, *Importer of Foreign Wines Fined for Tax Evasion*, CHOSUN DAILY, Sept. 16, 1995, at 4 (Korean language only, translated by author). An importer of foreign wines was fined for using false invoices and receipts in order to under-report the amount of goods imported and distributed. *Id.* See also Sung-Uhng Moon, *Theater Owner Investigated for Tax Evasion*, CHOSUN DAILY, Mar. 14, 1996, at 6 (Korean language only, translated by author). A theater owner was fined for reusing movie tickets, without destroying them after each purchase, in order to conceal under-reported income. *Id.* Under Section (1) of the Restrictions on Interest Rates Act, the usury rate is presently 25%, as determined by presidential decree. HYUN-AM, *supra* note 93, at 1068.

239. Yoo, *supra* note 234, at 79.

240. *Id.* at 76.

income.<sup>241</sup> Annual losses in tax revenues arising from the large underground economy range in the billions of dollars.<sup>242</sup> Under these conditions, the tax collection and audit systems must be improved in order to generate significant tax revenues to support the necessary increases in government salaries for low-level public employees. Such changes require institutional tax reform.<sup>243</sup>

The optimal enforcement theory is applicable here as well in terms of increasing government salaries in a cost-effective manner. A rise in income in legal activities, which reduces the incentive to commit a crime, serves to reduce the aggregate number of offenses.<sup>244</sup> In the present context, a higher salary would decrease the utility of accepting a bribe for the public employee contemplating the act. A higher income would thus reduce the incentive to resort to bribery and would lower the total number of bribery offenses. The critical question is as to the extent that government salaries should be increased. Here, salaries should be raised only to the level whereby the social cost of raising salaries for low-level public employees does not outweigh the social gain from the decreased incidence of bribery among such employees.

## VI. CONCLUSION

To be sure, the present problem of government corruption will not cause the demise of Korea. Korea has already shown the world that it can overcome obstacles through its remarkable industrial progress. In grand fashion, Korea prosecuted and convicted two former Presidents for their prior misdeeds committed while in office. However, apart from the prospects for reunification, the persisting problem of bribery must be resolved if Korea seeks to realize its full potential as a nation. Reforms must restore the honor traditionally associated with public office. The government must regain its credibility with the people in order to establish the proper foundation for further national advancement.

Efforts to resolve the problem of corruption among government officials require the following measures. First, the

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241. *Id.* at 78.

242. *Id.* at 81. In 1992, some observers estimated the underground economy to total nearly \$40 billion, comprising nearly 14% of the GNP. See KOREA: BUSINESS 7 (World Trade Press 1994).

243. A discussion as to how such tax reform may be accomplished is beyond the scope of this Note and is an interesting topic for another endeavor.

244. Becker, *supra* note 179, at 177.

antibribery laws must be optimally enforced. The levels of punishment for bribery presently available under the general and special statutes do not warrant any changes. But the probability of apprehension and conviction regarding corrupt officials must be increased to achieve optimality. Optimality can be reached by pursuing relatively larger cases of bribery under the special statutes, which would permit the efficient use of law enforcement resources. Efficient law enforcement would be supported by the Korean culture's emphasis on social status as well as the greater sensitivity to threatened consequences shared by public officials. Second, the Korean Constitution must be amended to allow immediate criminal sanctions against the President for bribery committed during the presidential term. Such an amendment would ensure optimal enforcement of the antibribery laws because the President is unlikely to be impeached, and the delay of criminal prosecution until the end of the term would compromise optimal deterrence. Finally, salaries must be raised for public positions with low levels of income. Higher salaries will decrease the financial necessity among low-level public employees to engage in bribery. The necessary increases in government salaries point to the need to improve the tax collection and audit systems. Improved tax collection will generate the significant tax revenues needed to subsidize the higher salaries.

It will take time to redress the effects of over three decades of prior government corruption. Reducing the incidence of bribery will demand a fundamental change in the Korean way of thinking. Although meaningful reform will be difficult to achieve, Korea can attain an ethical government in order to continue its national development and prosper well into the twenty-first century. If recent reform efforts are to be long-lived and extend beyond the current presidential term, the antibribery laws need to become the primary means for reform. The laws against bribery must assume the role of educating government officials that if they are to truly have honor, they must preserve the integrity of their office. The laws must ultimately convey that being ethical is not square. Being ethical is *in*.

Daniel Y. Jun