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**ON INTERNATIONAL EXPERIENCE
ON INTRODUCING CONSTITUTIONAL
AMENDMENTS
AND ON CONSTITUTIONAL REVISION**

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REPORT

**“CONSTITUTIONAL AMENDMENT
IN THE REPUBLIC OF KOREA”**

by

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I. Introduction

1. The constitution establishes the fundamental principles and institutions of a nation. To keep a society permanent, a nation must have a stable constitution. However, to adapt to rapidly changing circumstances, the constitution can be changed properly and timely. Maintaining a proper balance between stability and flexibility is an essential element in constitutional amendments.

2. In modern democratic society sovereign power resides with the people and the people establish a written constitution of their own country. Once the constitutional law is adopted, an amendment procedure which is set up in the constitution should be followed to change the constitution. In many countries the constitutional amendment process is much harder than the revision process of an ordinary law.

3. Korea gained independence from Japan in 1945 and established the founding constitution on July 17, 1948. Korean people suffered the Korean War from 1950 to 1953. After the War, Korea was one of the poorest countries in the world. Since then Koreans have experienced a rapid social change and economic growth. Now, Korea is a member of the Organization for Economic Cooperation and Development and the G-20 major economies.

4. As society changed dramatically, Korea has adopted 9 constitutional amendments since the founding constitution was established. With these amendments, Koreans experienced presidential and parliamentary system. Also, Korea has adopted various kinds of constitutional adjudication system. These experiences are valuable asset to Koreans and may be a reference for the constitutional reform in other countries.

II. History of Constitutional Amendment

1. In 1919, the Provisional Government of Republic of Korea promulgated the Constitution of Korea in Shanghai. But it was not effective in the Korean Peninsula. After World War II the United States Military Government ruled South Korea for 3 years. During that period a communist state was established under the Soviet auspices in the northern part of the Korean Peninsula. The founding Constitution of Korea adopted a presidential system in which president was elected indirectly.

2. Under the government of the first president Dr. Rhee, the Constitution was amended 2 times in 1952 and 1954. President Rhee pushed through constitutional amendments with an aim of long term seizure of power. At that time Korean society was in chaos because of the Korean War. So the Constitution was amended without fully following the constitutional amendment procedure. It weakened the legitimacy of President Rhee's government.

3. After the April Revolution, the Constitution was amended completely with a full public support in June, 1960. The revised Constitution adopted a parliamentary system. This was the first and the only instance Korea turned to a parliamentary cabinet system instead of a presidential system. In November 1960, the Constitution was amended again to make a ground for a special law which aimed to punish retroactively former officials who took part in the anti-democratic activities under President Rhee's government. Although the government had been established with support of the people, it had failed to implement effective reforms. Endless social unrest and political turmoil brought about military revolution in May 1961.

4. After the May 16 Revolution, the National Assembly was dissolved and military officers replaced the civil officials. The military government proposed the revision of the Constitution. A draft prepared by the Supreme Council for National Reconstruction submitted to a national

referendum and became effective in December 1962. This amendment procedure was not based on the Constitution but on the Emergency Decree on National Reconstruction promulgated by the military government. So some legal scholars argue that this is not the 5th amendment of the Constitution but the enactment of a new Constitution. After 2 year military rule, General Park was elected as a new president and Korea returned to a presidential system in 1963.

5. According to the Constitution of 1962 the presidency was limited to two terms. In 1969 the 6th constitutional amendment was forced through the National Assembly to allow President Park to seek a third term. President Park was re-elected in the 1971 presidential election. But the ruling party was defeated in the parliamentary elections and the opposition party had a power to pass constitutional amendments. President Park declared a state of national emergency in December of that year. The National Assembly was dissolved and the Constitution was suspended. A draft prepared by the Emergency State Council submitted to a national referendum again and the Constitution was amended in December 1972.

6. The 7th amended Constitution gave the president effective control over the parliament and the judiciary. The president would be elected through indirect election by an elected body, and the term of presidency extended to 6 years with no restrictions on reappointment. The economy continued to flourish under the authoritarian rule by the president. However students and activists for democracy continued demonstrations and protests for the abolition of the new Constitution. In the midst of political turmoil, President Park was assassinated in 1979.

7. After the assassination of President Park, General Chun took a power and declared martial law in May 1980. In September of that year, Chun was elected president by indirect election. The amendments to the Constitution were established by national referendum in October 1980. The new Constitution maintained the presidential system but limiting it to a single 7 year term and strengthened the authority of the National Assembly. President Chun succeeded in economic and foreign policies. However, because of lack of legitimacy, the public trust in the government was low.

8. In June 1987, more than a million students and citizens participated in the nation-wide anti-government protests. As a result both ruling party and the opposition announced their own drafts for a new Constitution. For the first time in Korean history, a proposal for constitutional revision was prepared through negotiations and cooperation between the government and the opposition parties. After passing the National Assembly, the proposal was put to a national referendum. The proposal was consented and promulgated in October 1987.

9. This marked the 9th time that the Korean Constitution was amended. However, it was the first time that the revision took place as a result of the people's demand for a system in which they could freely choose their own government. It was the first time that a national desire for strengthening the protection of fundamental rights was the motivating factor in the revision process. Under this current Constitution democracy in Korea has been fully realized.

III. Constitutional Adjudication in Korea

1. Throughout the constitutional history, there have been periods when the constitutionality guaranteed basic rights of the people went unprotected and institutions designed to prevent the arbitrary and unlawful exercise of state power failed to operate. A demand was created for securing the normative power of the Constitution as the highest law of the nation by subjecting all state power under its binding authority, and safeguarding the fundamental

rights of the people through it. Constitutional adjudication was introduced and developed as a response to this historic demand.

2. While the founding Constitution was being drafted, there was a debate over whether the power to review the constitutionality of statutes should belong to the ordinary courts or given to a separate independent agency. At that time the courts in Korea enjoyed neither the authority nor the trust necessary to restrain the power of the legislature. On the contrary, many judges had come under fire for collaborating with the Japanese as they had served in their posts since the days of the colonial occupation. The founding Constitution thus came to adopt the centralized model of constitutional adjudication by establishing the Constitutional Committee. The chairman of the Constitutional Committee was the Vice President. 5 justices of the Supreme Court and 5 members of the National Assembly served as members of the Committee. From 1948 to April 1961, when a new Constitutional Court replaced this Committee, there were 6 cases referred to the Constitutional Committee for review. The Committee rendered a decision of unconstitutionality in 2 of these 6 cases.

3. After the April Revolution in 1960, the 4th amended Constitution established the Constitutional Court instead of the Constitutional Committee. The Constitutional Court should be composed of 9 judges. The President, the Supreme Court and the House of Councilors should designate 3 judges respectively. However, after the May 16 Revolution in 1961, the constitutional provisions on the Constitutional Court were suspended by the military government. Thus the Constitutional Court was terminated before it could ever get off the ground.

4. The 6th amended Constitution stated that the Supreme Court should have the power to decide with finality the constitutionality of a law when its constitutionality was prerequisite to a trial. The Supreme Court made some attempts to activate this judicial review power and declared a few statutes unconstitutional. But these efforts were thwarted by frequent incidents of unlawful interference by political power and the executive branch in the operation of the courts.

5. In 1972, President Park reintroduced the Constitutional Committee. This was a decision made in reaction to the experience during 1960s when some members of the judiciary had rendered decisions finding statutes unconstitutional in opposition to the will of the executive. Reintroduction of the Constitutional Committee was designed to reduce the adjudication of constitutional issues to a nominal agency, and thereby hollow out the power of constitutional justice. The Constitutional Committee was comprised of 9 judges appointed by the President, 3 of whom were nominated by the National Assembly, and another 3 designated by the Chief Justice of the Supreme Court. No review of the constitutionality of a statute has been made in this Committee.

6. The current Constitution was made through a democratic procedure. During the revision process, different political factions expressed different views on how to structure the system of constitutional adjudication. As negotiations progressed, the ruling party and the opposition eventually agreed to establish an independent Constitutional Court. The Constitutional Court is composed of 9 justices appointed by the President. Among the justices, 3 shall be appointed from persons selected by the National Assembly and 3 appointed from persons nominated by the Chief Justice of the Supreme Court. The Constitutional Court has jurisdiction over (1) the constitutionality of a law upon the request of the ordinary courts, (2) impeachment, (3) dissolution of a political party, (4) competence disputes between State agencies, between State agencies and local governments, and between local governments, (5) constitutional complaint.

7. According to the Constitution and the Constitutional Court Act, any person may file a constitutional complaint when any of his or her fundamental rights has been violated by an

action or omission from the public power. A constitutional complaint was unfamiliar to Koreans and the people expected the new Constitutional Court to be a relatively quiescent institution. However, the Court has become the embodiment of the new democratic constitutional order of Korea. The Constitutional Court is routinely called on to resolve major political conflicts and issues of social policy. Since its establishment in 1988, the Court has rendered about 26,000 decisions among them more than 95% of cases were constitutional complaints. The Constitutional Court is consistently rated one of the most trusted and influential institutions in Korea by public.

IV. Constitutional Amendment Procedure

1. According to the current Constitution, amendments to the Constitution can be initiated by the President or a majority of the National Assembly. Proposed amendments to the Constitution shall be put before the public by the President for 20 days or more. The National Assembly shall decide upon the proposed amendments within 60 days of the public announcement. The bill can be passed with the concurrent vote of two thirds or more of the total members of the National Assembly. Then the proposed amendments shall be submitted to a national referendum not later than 30 days after passage by the National Assembly.

2. Many Korean scholars assert that the power of amending the Constitution is inferior to the power of establishing the Constitution, so the core of the constitution, such as the protection of human dignity and fundamental rights and the principles of freedom and democracy, cannot be revised through the amending procedure. Theoretically this argument is correct. However, the sovereignty of a nation resides in the people, and to amend the constitution, it is necessary to obtain approval from the people through referendum. Therefore, at least in Korea, the procedure for the establishment of the constitution is not different from that for the amendment. Moreover, it is not plausible to weaken the protection of human dignity and fundamental rights and the principle of freedom and democracy by constitutional amendments in Korea.

3. There is a special clause in the Constitution which restricts the effect of the constitutional amendment. According to article 70 of the constitution, the term of office of the President shall be 5 years and the President shall not be reelected. Amendment of this clause shall not be effective for the President in office at the time of the proposal for such amendments by the article 128 of the constitution.

V. Suggestions

1. The Korean Constitution was amended 9 times. All important amendments were made through a referendum. However, only the last amendment which was prepared through negotiations and collaboration between all political parties found to be successful. It is critical to achieve a national consensus on the substance of the constitutional amendments.

2. Korea experienced 3 kinds of constitutional adjudication system, the Constitutional Committee, judicial review by the Supreme Court and the Constitutional Court. Among them only the Constitutional Court is proved to be effective in protecting fundamental rights of the people and maintaining the principles of freedom and democracy. Many important political disputes have been dissolved peacefully and finally by the Constitutional Court. As a result the Constitutional Court is receiving the highest ratings of any government body in terms of public influence and trust in a public poll. The independent court which has an exclusive jurisdiction on constitutional matters is a prerequisite for a democratic society.