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# New Administrative Capital (English).pdf

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The Problems relating to the Decision of  
Unconstitutionality on the Special Act for Constructing  
the New Administrative Capital Rendered by the  
Constitutional Court

**November 11, 2004**

**Sung-Soo Han**

After the unconstitutional decision on the Special Act for the New Administrative Capital Construction, public opinions have scattered among the Korean people.

Though relevant issues should be thoroughly analyzed and legally interpreted based on related laws, confusion is more and more growing since people are not familiar with this kind of approach.

Currently, the methods for approaching the related issues are various; there are political, philosophical, and historical approaches, etc.

Contract details in written form<sup>1</sup> are the most important when parties enter into a contract. Thus, it is needless to say that the most important thing when interpreting law is the code itself.

At the time of national referendum, the people confirm the written content of the constitution, not the unwritten norm.

The Republic of Korea established and promulgated the first Constitution on July 17, 1948 and then amended the Constitution 8 times subsequently. The current Constitution was amended and promulgated on October 29, 1987 through a national referendum following the resolution by the National Assembly.

It is clear that at the time of resolving the current Constitution, the National Assembly discussed and passed the written form of the constitution bill, not the unwritten customary constitution.

If Seoul's status as the national capital comes under the constitutional norm, the National Assembly should have discussed, passed and submitted the issue to a national referendum.

Our Constitution has been amended eight times. This implies that, after establishing the first Constitution, the people's recognition of democracy matured which led to the necessity to more democratically amend the Constitution focusing on strengthening the people's fundamental rights in line with such development.

Through the amendment to the Constitution based on national consensus, the Korean government has endeavored to reinforce the protection of the people's bodies and lives by reinforcing the right to request the court to review the legality of arrest or detain, extending the system of compensation for criminal detention and establishing national aids for criminal victims, etc., and to guarantee substantially three basic labor rights and appropriate distribution of income, balanced development of regional economy, and enforcement of protection of small and medium enterprises, farmers and fishermen.

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<sup>1</sup> Parole evidence rule: Evidence of prior or contemporaneous negotiations and agreements that contradict, modify, or vary contractual terms is inadmissible if the written contract is intended as a complete and final expression of the parties.

The constitution, as the fundamental law of a nation, is the supreme law which determines the ruling organization and the ruling principles and protects the people's fundamental rights. As stated by Loewenstein, the modern constitution is the means for controlling the authority of a man of power in order to prevent the abuse of authority in the process of exercising it.

Accordingly, the constitution codifies 1) the principle of power distribution, 2) the principle of check and balance, 3) the principle of national sovereignty, 4) the principle of protecting fundamental rights and 5) the reasonableness of methods to amend the constitution<sup>2</sup>.

The Constitution of the Republic of Korea also consists of the following contents following the general principles.

Chapter I. General Provisions  
Chapter II. Rights and Duties of Citizens  
Chapter III. The National Assembly  
Chapter IV. The Executive  
Chapter V. The Courts  
Chapter VI. The Constitution Court  
Chapter VII. Election Management  
Chapter VIII. Local Autonomy  
Chapter IX. The Economy  
Chapter X. Amendments to the Constitution

Accordingly, the issue on whether the capital should be located in Seoul and KyonGi Region or in ChungChong Region is not relevant to the ruling organization and ruling principle, and 1) the principle of power distribution, 2) the principle of check and balance, 3) the principle of national sovereignty, 4) the principle of protecting fundamental rights and 5) the reasonableness of methods to amend the constitution.

Article 40 of the Constitution prescribes that “the legislative power shall be vested in the National Assembly”, and Article 52 of the Constitution prescribes that “Bills may be introduced by members of the National Assembly or by the Executive”.

This implies that through national consensus, the legislative power<sup>3</sup> for all the laws required for the national operation which cannot be provided in the Constitution has been vested in the National Assembly. Accordingly, since what is not provided in the Constitution should be decided by the National Assembly by enacting laws, the matter as to whether the capital should be relocated to the ChungChong Region should be entirely decided by the National Assembly.

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<sup>2</sup> Kim, Chul Soo, The Outline of Constitution, 7<sup>th</sup> edition, 12 page

<sup>3</sup> Section 8, Article 1 of the US constitution: The Congress shall have power to exercise **exclusive legislation** in all cases whatsoever / The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution...

Article 1 (Purpose) of the Act for the Special Administration of the Seoul Special Metropolitan City (Act No.05000) provides that “This Act is based on Article 161 of the Local Autonomy Act and regulates the special treatment of the Seoul Special Metropolitan City with respect to its status, organization and operation”. And Article 2 (Status) stipulates that the “Seoul Special Metropolitan City shall be under the direct jurisdiction of the government and hold the special status of the capital within the limits as prescribed by this Act.”

Article 1 (Purpose) of the Act for the Establishment of the Daegu and Incheon Metropolitan Cities provides “The purpose of this Act is to promote the balanced development of the nation, and improve the benefit of citizens and the administrative efficiency by establishing the Daegu and Incheon metropolitan cities.

Thus, it is clear that the legislative power of the National Assembly decides what area should become the special metropolitan city (capital), and what area should become the metropolitan cities. That is, the Acts make clear that Seoul is the Special Metropolitan City (capital), and Daegu and Incheon are metropolitan cities.

In the sentence saying that the “Seoul Special Metropolitan City shall be under the direct jurisdiction of the government and hold the special status of the capital within the limits as prescribed by this Act”, the subject of the sentence is the “Seoul Special Metropolitan City”, and the wording “hold the special status of the capital within the limits as prescribed by this Act” means that the Seoul Special Metropolitan City holds the special status of the Korean capital according to the Act which was established by the National Assembly, not being the Korean capital of itself.

Nevertheless, the Constitutional Court insists, based on the facts existing since 600 years ago, that the people can directly establish constitutional norms in the form of customs when necessary.

The current electorates are not people from the Chosun Dynasty or people who lived under the Japanese colonial rule. That is, they are not accustomed to the past customs, and the young generations who are supposed to get voting rights will dream of a far more advanced and democratized society as our generation did. Nevertheless, the Constitutional Court is trying to retreat our history by depending on old customs.

If we accept the logic of the Constitutional Court as it is, there is a high possibility that many obsolete thoughts such as “householder system” or the “predominance of men over women ideology” which can be obstacles for the social development will resurrect in the form of customary constitution because of illogical and illegal decisions made by the Constitutional Court.

If the Constitutional Court continues to make such unreasonable decisions, the young generations who will lead the Republic of Korea and the global community in the future will not be able to dream of a new world as they are bound to wrongful decisions.

If the Constitutional Court's decision was wrong, this should be revealed in a proper way for the sake of the development of democracy, because such a matter must not happen again.

In order to give the people who are not familiar with the law a better understanding, I explained why the Constitutional Court's decision is in violation of the Constitution and relevant laws, based on the Constitution and relevant laws

At the time of President Roh's impeachment, I have also sent a written opinion concerning the inappropriateness of the impeachment bill to the relevant persons including the 9 judges of the Constitutional Court on March 16, 2004.

However, this time I present my opinion on the unreasonableness of the Court's decision regarding this matter after the unconstitutional decision was confirmed.

I believe this paper can serve as important materials for comparing the two cases that relate to the unreasonableness of the National Assembly's impeachment resolution and to the unreasonableness of the Constitutional Court's unconstitutional decision, respectively. I enclose, therefore, the two relevant opinion papers with this letter.

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# I. Summary of the Decision of Unconstitutionality Rendered by the Constitutional Court

## 1. Constitutional Court's Judgment on Legal Issues

### **- Have Fundamental Rights been infringed? -**

If it is confirmed that Seoul is the capital of Korea from the standpoint of customary constitution, it is acknowledged that the matter which must be regulated through an amendment to the constitution has been regulated merely in the form of law and the national referendum which is essentially required for an amendment to the constitution has been excluded. Accordingly, the citizen's right to national referendum may be infringed.

If that is the case, since there exists possibility that the Act relating to this case may infringe petitioners' right for a national referendum, which is the fundamental right to participate in government, in relation to an amendment to the constitution, the probability for an infringement of the relevant right is recognized.

### **- Is the infringement of fundamental rights self-related, direct and existent? -**

The fundamental right that is considered to have been infringed in the pending case is the right to a national referendum for an amendment to the constitution which is one of the rights to participate in government. That is, since this right is a fundamental right which each individual of petitioners as a Korean citizen has, it is obvious that petitioners have a self-relation to the infringement of right by the Act in issue.

Also, since the Act relating to this case contains the details to expedite the capital relocation in a concrete way on the premise that the capital relocation is a matter of course, any procedure or decision regarding 'capital relocation' itself is no longer required. Therefore, as the citizens' right to a national referendum concerning the amendment to the constitutions is directly infringed, the directness of infringement is acknowledged.

In addition, the capital relocation is decided legally through the promulgation and enforcement of the Act relating to this case and the petitioners' right to a national referendum is already infringed. Accordingly, since the infringement of the right actually took place and is in progress, the existence of infringement is acknowledged.

Thus, petitioners have a self-relation to the Act which regulates the capital relocation and its detailed procedure, and directness and existence of right infringement also are acknowledged.

### **- Observance of Petition Period -**

This constitutional petition was submitted on July 15, 2004, within 90 days from the day (April 17, 2004) when the Act relating to this case was enforced. Accordingly, the constitutional petition was made within the petition period and is valid from every point of view.

### **- Whether it can be subject to judicial review in spite of the highly political act -**

The president or congress often make highly political decisions such as the invokement of national emergency orders and overseas dispatch of national armed forces, etc. and it is

recognized that there exist national decisions which cannot be subject to a judicial review under the request that such decisions should be respected as much as possible from a constitutional perspective.

However, the president, congress and any other governmental power should be subject to the law according to the principle of legalism, the basic principle of our constitution. Also, since all of the national actions are the means to achieve the value of the citizens' fundamental rights, their limitation must be observed.

The Constitutional Court is the national institution to execute its mission for protection of the constitution and citizens' fundamental rights. Accordingly, although national action is performed as a result of highly political decisions, in case the action is directly related to the infringement of citizens' fundamental rights, the action can be subject to the review of the Constitutional Court. (Please refer to hyenjae 1996. 2. 29, 93 hyenma 186, Case book 8-1, 111, 115-116)

Even though it is recognized that the construction of the new administrative capital or capital relocation is characteristic of politics, it cannot be said that the issue cannot be subject to judicial review since it needs a highly political decision.

Moreover, what should be decided in this case is the unconstitutionality of the Act relating to this case, not constitutionality of the action taken by the president. Accordingly, in case the constitutionality of law is subject to review of the Constitutional Court, it cannot be said that the law is not subject to judicial review only for the reason that the law includes political issues.

However, as the first consideration for judging unconstitutionality of the Act relating to this case, where presidential decision on whether the capital relocation and the new administrative capital construction should be submitted to national referendum is subject to judicial review, it is desirable that the judicial review should be restrained because the decision requires highly political decisions. Accordingly, it is desirable that judicial review of the Act based on faults related to the decision should be also restrained.

However, in case the presidential decision is directly related to the infringement of citizens' fundamental rights, the decision can be subject to the judicial review of the Constitutional court. Accordingly, laws relating to the decision can be subject to the review of the Constitutional Court.

...Accordingly, as the first consideration for judging unconstitutionality of the Act relating to this case, even in case of judging unconstitutionality of presidential decision on national referendum, the Act relating to this case can be subject to judicial review of the Constitutional Court within the limit of judgment on whether petitioners' right to national referendum was infringed.

Therefore, a constitutional petition for this case is possible. As reviewed above, the constitutional petition for this case is valid since the petition satisfies all of the legal requirements on the issues raised and has no legal faults.

## 2. Judgment on this case of the Constitutional Court

### 2.1 Constitutional meaning of the Capital

The capital of a nation generally means the place where national institutions are intensively located and perform key functions such as politics and administration and which symbolizes the nation internationally.

## **2.2 Whether the Act relating to this case includes the decision-making of capital relocation**

The Act itself relating to this case includes the decision-making that main national institutions performing key function of politics and administration are transferred to the new administrative capital which will be constructed in the ChungChong Province.

## **2.3 Whether the status of Seoul as the capital comes under the Korean customary constitution**

### **2.3.1 The meaning of customary constitution under the system of written constitution**

Since Korea adopts a written constitution, constitutional code is the source of constitution. However, it is impossible that even a written constitution contains thoroughly and completely all of the constitutional rules. Also, since the constitution, as a national basic law, prefers the consciousness and implication, constitutional norms which are not recorded in the written constitution code may be recognized as unwritten constitution or customary constitution.

Especially, obvious or prerequisite norms at that time of establishment of constitution and universal constitutional principles are not always regulated in the written constitutional code.

Even if it is the case, all of the customs or traditional practices are not always customary constitutions. Strict conditions should be met in order to be recognized as the constitution having legal effect, and only the customs that meet such conditions have the same legal effect as a written constitution.

Paragraph 2, Article 1 of the Korean Constitution stipulates that “the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from people.” Thus, since the people are a sovereign of the Republic of Korea and have supreme authority for constitution establishment, the people participate not only in establishment and amendment of the written constitution but also can directly build up constitutional norms in the form of customs which are not included in the written constitution when necessary.

If it is the case, customary constitution is the constitutional decision of the people who are a sovereign like written constitution and has the same effect as the written constitution. With respect to this, the establishment of constitutional norms derived from customs is deemed to exercise the people’s sovereignty.

The principle of people’s sovereignty or democracy requires the people’s participation in establishing all of the valid laws regardless of written law or custom, and customary constitution established by the people binds legislators and has the effect as constitution.

In order for customary constitution to be established, first of all, norms on which customs are based must have constitutional character and the norms should be constitutionally important basic rules to have the priority over law.

Substantial constitutional norm generally means rules on national organization or composition of authority of national institution or the status of individual against national authority. However, customary constitution means the rule which comes under the basic and core rule of a nation that cannot be provided in laws among general constitutional norms

Which one of the general constitutional norms comes under the basic and core constitutional rule cannot be determined by a general and abstract standard but should be decided by a concrete standard such as constitutional importance and constitutional principle.

Next, general establishment requirements should be met for establishment of customary constitution.

The requirements are as follows:

First, there should exist some customs or usual practice in relation to basic constitutional norms.

Second, the customs should be repeated or continued during a certain period so that the people may recognize the existence and realize the customs will not lapse (repetition and continuousness).

Third, since the customs hold durability, customs contrary to existing customs should not be established (homeostasis).

Fourth, the customs should not be so ambiguous that it can be interpreted in various ways but should be clear (clearness).

Fifth, the customs should acquire the people's approval, firm belief and broad consensus as constitutional customs and thus the people should believe that those customs are mandatory (people's consensus).

Accordingly, in order to recognize the establishment of customary constitution, all of those requirements should be met.

### **2.3.2 The capital as basic constitutional norm**

It is one of the substantial constitutional norms representing nation's identity to decide where the constitutional institutions, especially the president and congress playing a critical role in the democratic government should be located.

National identification, the source of national mental unification, means national characteristic built up through the integrated expression of national history, experience, culture, politics, economics, power structure and mental symbol, etc. Besides establishment of capital, the following can become basic constitutional norms for national identification; decision of the name of a nation, selection of the Korean language as a national language, choice of the Korean alphabet as the national alphabet, demarcation of territory and clarifying who holds national sovereignty.

Establishment or relocation of the capital means deciding where supreme constitutional institution such as congress or the president is located and to arrange the foundation of the national organization in a certain place. Therefore, the establishment or relocation is the

people's fundamental decision and comes under the core constitutional norms forming the basis for the composition of a nation.

Accordingly, the decision on where the capital should be established or relocated comes under the constitutional norms, and since it is a critical and basic constitutional norm for national identification and basic organization and should be decided by the people themselves, such decision should not be made by the president, government or subordinate government institutions.

### **2.3.3 Whether Seoul's status as the capital is a part of the customary constitution**

In the Korean constitution code, there does not exist a specific article stating that 'Seoul is the Korean capital'. However, Seoul means the 'capital' as a dictionary meaning. ... It is clear that customary constitution regarding the capital itself does exist in light of Korea's historic, traditional and cultural circumstances.

It is an obvious and preconditioned fact that Seoul is the capital, firmly formed from the long tradition and customs. Accordingly, all of the Korean people recognize this fact as compulsory legal norm regarding national formation.

#### **- Establishment of Chosun and relocation of the capital to Seoul -**

Upon foundation of the Chosun Dynasty<sup>4</sup>, the necessity of capital transfer was discussed. Taejo Sungkye Lee who became a king on July 17, 1392 ordered Dopyungwysasa<sup>5</sup> to relocate the capital to Hanyang, the old name for Seoul.

... The status of Hansung (Hanyang) as the capital was reflected in Kyungkookdaejon which was the Chosun's constitution completed for the period of King Sungjong... The contents of the Kyungkookdaejon was kept without amendment for the period of the Chosun Dynasty.

#### **- Seoul's status as the capital under Japanese colonial rule -**

Japan began to occupy Korea by force after the Japanese annexation of Korea on August 1910. After that, however, Kyungsongpu, Seoul, continued to play the role of the Korean administrative center and also was the place where the independence of Korea was declared by Korean representatives on 1 March, 1919 under the condition of deprivation of national sovereignty.

The Provisional Government was operating the Yentong system which was the secret Korean administrative organization and set up its general management place in Seoul. Accordingly, even if the national organization collapsed due to the occupation of the Korean territory by Japan, Seoul, as the Korean capital, held an international symbol. Moreover, since the Provisional Government organized an anti-Japanese movement by considering naturally Seoul as the Korean capital and as the people continued to recognize Seoul as the Korean capital, it is reasonable to say that the recognition that Seoul is the Korean capital did not change even during that period.

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<sup>4</sup> Chosun Dynasty was the name of Korea for 14 to 19 centuries.

<sup>5</sup> Dopyungwysasa was the Korean supreme political institution.

### **- Seoul recognized as the capital from liberation to now -**

Even though the Korean constitution had been enacted at the time of national foundation after the liberation, the article relating to the capital was not included in the constitution. However, there historically existed various laws which were regulated under the premise that Seoul is the capital.

First, on September 18, 1946, Article 2 of the Decree for the establishment of the Seoul Metropolitan City of the Act No. 106 for the US Military Government clarified that Seoul City shall be the Metropolitan City as 'the Capital of Chosun' and shall obtain the same function and authority as other Provinces.

It was in the Interim Legislative Assembly of South Chosun belonged to the US military government [founded by the Act No. 108 for the US Military Government (the Establishment of the Interim Legislative Assembly of South Chosun) on August 24, 1946] that the status of Seoul was at first discussed by the Korean people's representatives.

Paragraph 2, Article 52 of 'the Draft Bill for the Interim Administrative Organization of South Chosun' submitted to the above assembly on February 27, 1947 gave only Seoul special treatment clarifying that 'Seoul is made the Special Metropolitan City and is under the direct jurisdiction of the central administrative government'.

Also, the Bill for Organizing Local Governments, which was discussed on July 30, 1947, followed the main details of the Act No. 106 for the US Military Government and provided that 'Seoul city is Chosun's capital and is made the Special Metropolitan City, and has the same functions and authority as other Provinces'.

It was after the Local Autonomy Act (the Act No. 32 enacted on 4 July, 1949) was enacted that Seoul City obtained the status of the Special Metropolitan City. Article 2 of the Act stipulated provinces and the 'Seoul Metropolitan City' as the local government under the direct jurisdiction of the Central Government.

The chief member of Domestic Affairs of State, Yong-Kyun Na, explained that 'each region of Korea was classified into Pu or Koon for the period under the rule of the Japanese government. ... During the period under the Interim Government, only Seoul was named as the Seoul Metropolitan city and other regions were called as Pu. ... There were cases where regions were called 'Do' like Tokyo in Japan considering the population or the relation to the capital. Considering all of those aspects, Seoul was named the 'Special Metropolitan City'. Thus, it supports that the reason for naming Seoul as the Special Metropolitan City was that the status of Seoul as the capital was considered.

Let's observe current laws. The Local Autonomy Act was amended in the form of the Act No. 404 on April 6, 1988, and the provision (Article 161) was made that 'special treatment can be given with respect to the status, organization and operation of the Seoul Metropolitan City taking into consideration its special nature as the capital under the conditions as prescribed by the Acts'.

Accordingly, the Act for the special treatment of administration of the Seoul Metropolitan City was enacted in the form of the Act No. 4371 on May 31, 1991. Under this Act, the Seoul Metropolitan City comes under the direct jurisdiction of the Central Government and obtains the special status of the capital (Article 2).

Where the Minister of the Home Affairs intends to approve the issuance of municipal bonds of the Seoul Metropolitan City or to conduct an audit on local affairs, he/she should be subject to the arbitration of the Prime Minister (Paragraphs 1 and 2 of Article 4). Also, the Mayor of the Seoul Metropolitan City has the special authority over the appointment of its officers and conferment (the Paragraphs 5 and 7 of Article 4).

Also, with respect to roads, traffic and environment relating to the Seoul Metropolitan City in the National Capital Region, where there exists discrepancy in opinions between the head of the central administrative agency and the Mayor of the Seoul Metropolitan City, the arbitration should be obtained from the Prime Minister (Article 5).

Considering the legislations stated above, there have continuously existed the laws stipulating that Seoul is the Capital. However, those laws adopted it as the existing normative premise that Seoul was traditionally the Korean capital and were merely enacted in order to legally establish the special status of Seoul in the form of law. Therefore, those laws were not intended to decide that Seoul is the capital from the legal point of view.

Through the background that those laws were enacted, the Korean people's traditional legal assurance that Seoul is the Capital can be confirmed.

As examined above, even though there did not exist the article of the Constitution that Seoul is the Capital, it was included in the *Kyungkookdaejon* after the establishment of the Chosun Dynasty and had legal effect as the national basic norm for a long time.

Also, since the legal assurance that Seoul is the capital was formed by the people through long the history and customs before the establishment of the constitution and the fact that Seoul is the capital was a part of the basic norm that was self-evident and premised under the Korean constitutional system after the Korean Constitution was first established, it should be regarded as unwritten constitutional norm.

In light of requirements of customary constitution stated above, Seoul's status as the capital has been a normative fact of national life for 600 years since the Chosun Dynasty. Therefore, since 1) Seoul's status as the capital can be evaluated as the continuous custom traditionally formed as national life (continuousness), 2) the custom has been lasted effectively for a long time and was not broken off (homeostasis), 3) Seoul's status as the capital acquired the definite common consents on which Korean people make no difference (clearness) 4) the custom already acquired the people's approval and broad consensus for a long time (people's consensus), Seoul as the capital is the basis of national life which the people believe has efficacy and enforcement.

Accordingly, Seoul's status as the capital is the constitutional custom which existed traditionally before our present constitution was enacted first, and the norm premised in the constitution though it is not clarified in the article of the Constitution. Therefore, it can come under unwritten constitution established in the form of customary constitution.

That is, since Seoul's status as the capital meets the conditions stated above, it is not a factual proposition but is an unwritten constitutional norm which has constitutional effect. Also, the justifiable proposition was not deduced from the factual proposition. Rather, the norm was underlying behind the factual proposition through normative forces lasting without dispute.

**- Constitutional process for abolition of customary constitution of 'Seoul as the capital' -**

If some legal norm is recognized as customary constitution, there inevitably exists the possibility of amendment. Since the customary constitution, as a part of constitution, has the same effect as written constitution, the legal norm can be amended only through the process of amendment to the constitution according to Article 130 of the Constitution.

... Besides such formal amendment to the constitution, the customary constitution may lose its legal effect by losing national consensus supporting it. The customary constitution can last only as long as the people recognize the customary constitution as an effective constitutional norm. If national consensus which is one of the existing requirements of customary law disappears, legal effect of customary constitution lapses. The requirements of a customary constitution are not only those of establishment but also are those of the effect.

Norms of customary constitution recognized under written constitution like Korea cannot be amended by the law which is an inferior norm to the constitution.

... In Korea, the process of amendment to the constitution is different from that of the amendment to laws and is strictly controlled by the constitution. Accordingly, if customary constitution can be amended by law, customary constitution can not be recognized as constitution any longer but is recognized as customary 'law'. Therefore, this results in denying the existence of the customary constitution. Since such result is logically contradictory to the major premise which acknowledges customary constitution even under the system of written constitution, it can not be accepted under the system of Korean constitution.

...For example, if the article of the constitution is enacted that certain region of ChungChong Province is the Korean capital, the customary constitution that Seoul is the capital may be abolished.

However, where even the custom accepted as constitutional norm is infringed with the lapse of time and due to the change in constitutional conditions and moreover, national consensus concerning its legal effect disappears due to the recognition of the infringement as natural, customary constitution naturally becomes extinguished.

In order to recognize the extinguishment, the method which can be trusted by everyone such as national referendum for the purpose of confirming the overall intention of the people can be taken into consideration. However, in this case, the condition of the extinguishment is not confirmed.

Therefore, as explained above, since Seoul's status as the capital is a norm recognized as customary constitution and there exists no change in circumstances, the amendment to the constitution is certainly required in order to abolish that.

... However, the Act relating to this case has realized the relocation of capital only in the form of law without any procedure of amendment to the constitution. Accordingly, exercise of a national referendum, the people's fundamental right to participate in government, was excluded and the Act is infringing the fundamental right.

If it is the case, regardless of other issues raised by petitioners, it is clear that the Act which regulates relocation of the capital and the procedure of relocation has changed the unwritten customary constitution that Seoul is the Korean capital without the procedure of the amendment to the constitution. Accordingly, the Act infringed the people (including petitions)'s right to national referendum to amend the constitution and thus it is against the constitution.



## **II. Problems of the Unconstitutionality Decision rendered by the Constitutional Court**

### **1. Concerning the judgment of Legal Condition**

#### **1.1 Public official's constitutional and legal duties**

Paragraph 1 of Article 65 of the Constitution prescribes that “in case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, judges of the Constitutional Court, judges, members of the Central Election Management Committee, members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of their official duties, the National Assembly may pass motions for their impeachment”.

Article 56 of the State Public Official Acts (Duty of Fidelity) stipulates that “all public officials shall observe Acts and subordinate statutes, and perform faithfully their duties” and Article 63(Duty to Maintain Dignity) provides that “no public official shall do any act detrimental to his dignity, regardless of whether it is for his duties”.

In addition, Article 4 (Independence of Justices) of the Constitutional Court Act prescribes that “justices shall adjudicate independently according to their conscience and in conformity with the Constitution and laws”.

#### **1.2 Summary of the judgment on legal condition by the Constitutional Court**

Summaries of the Constitutional Court's opinion on legal condition of the constitutional petition against administrative capital relocation are as follows.

Under the customary constitution, Seoul's status as the capital is acknowledged. Accordingly, in order to relocate the capital to other regions, the Constitution should be amended. And in order to do that, a national referendum is required.

By promulgating and enforcing the Act related to this case, the capital relocation was legally confirmed. Accordingly, since petitioners' right to a national referendum was already excluded and the infringement of this right is in progress, the presentness of the infringement was acknowledged.

As the first consideration for judging unconstitutionality of the Act relating to this case, where presidential decision on whether the capital relocation and the new administrative capital construction should be submitted to a national referendum is subject to judicial review, it is desirable that the judicial review should be restrained because the decision requires highly political decisions. Accordingly, it is desirable that judicial review of the Act based on faults related to the decision should be also restrained.

However, in case the presidential decision is directly related to the infringement of citizens' fundamental rights, the decision can be subject to the judicial review of the Constitutional Court. Accordingly, laws relating to the decision can be subject to the review of the Constitutional

Court.

The constitutional petition for this case is valid since the petition satisfies all of the legal requirements on the issues raised and has no legal faults.

### **1.3 Problems of the judgment on legal conditions by the Constitutional Court**

Article 72 of the Constitution of the Republic of Korea prescribes that the “President may execute national referendum, if the subjects are regarded as important policies of diplomacy, national defense, unification and other matters relating to the national destiny”.

This Article is a discretionary rule (“may”), not a mandatory rule (“should”). Thus, the execution of national referendum is wholly at the discretion of the President.

Moreover, considering that the Constitutional Court also stated “Where presidential decision on whether the capital relocation and the new administrative capital construction should be submitted to a national referendum is subject to judicial review, it is desirable that the judicial review should be restrained because the decision requires highly political decisions”, it is judged that those statements of the Constitutional Court were based on the consideration that the Article is a discretionary rule, not a mandatory rule.

However, it will lead to very unreasonable results if the Constitutional Court states that in case Presidential discretionary acts are directly related to the infringement of the people’s fundamental rights, those acts may be subject to the judicial review of the Constitutional Court.

The Constitution is documented under national consensus. The current Constitution was established through a national referendum. That is, the people had awarded the discretionary power to execute the national referendum to the President under a clearly written article at the time of confirming the Constitution through a national referendum.

Nevertheless, if the Constitutional Court reviews the unconstitutionality of the constitutional discretionary power endowed by the people through a clearly written article, it is not in accordance with Article 4 of the Constitutional Court Act stipulating that “the Justices shall adjudicate independently based on the Constitution and laws, guided by their consciences”.

The Constitutional Court stated that “Moreover, what should be decided in this case is the unconstitutionality of the Act relating to this case, not constitutionality of the action taken by the president. Accordingly, in case the constitutionality of law is subject to review of the Constitutional Court, it cannot be said that the law is not subject to judicial review only for the reason that the law includes political issues”, whereas it decided that “In case where Presidential discretionary acts are directly related to the infringement of the people’s fundamental rights, those acts may be subject to the judicial review of the Constitutional Court.”

As the Constitutional Court stated, if what should be decided in this case is the unconstitutionality of the Act relating to this case, the Constitutional Court should have decided the appropriateness of the constitutional petition as to whether the Act can be subject to the constitutional petition.

However, the Constitutional Court stated that national referendum is necessary for amendment to the Constitution and the constitutional petition is valid since the Presidential act without

national referendum infringed the people's fundamental right. That is, notwithstanding its own opinion that the presidential act is not subject to judicial review of the Constitutional Court, the Constitutional Court made a conflicting decision of judging the unconstitutionality of the presidential act.

President's exercise of the discretionary power to execute the national referendum is his own right endowed by the national consensus. Where "Special Act for the New Administrative Capital Construction" is established through legislation by the Congress based on legitimate procedure, there is no reason for the president to submit the case to a national referendum.

Accordingly, the Constitutional Court's judgment that, on the ground that the President did not submit the matter in issue to the national referendum, he infringed the people's right to a national referendum is not reasonable.

Article 24 of the Constitution (Chapter 2: citizens' right and duty) prescribes that "all citizens shall have the right to elect public officers under the conditions as prescribed by laws". However, the authority to execute the national referendum is not prescribed under the Chapter 2 (citizens' right and duty) since it is under wholly President's discretion.

That is, since the right to elect public officers and the right to the national referendum are totally different in their meanings, even though the President did not execute the national referendum, it does not mean that citizens' fundamental right is infringed.

The Constitutional Court did decide that the Presidential act is unconstitutional without the decision of the unconstitutionality of the Special Act. However, since there was no infringement on fundamental right insisted by the petitioners, the Constitutional Court's decision does not have legal grounds.

If the Constitutional Court's assertion is accepted, constitutional petitions based on abstract concepts (i.e. diplomacy, national defense, unification, national security policies and etc.) will be lined up, the president should execute national referendum whenever he/she makes crucial political decisions and the people will waste tremendous time on national referendum.

Since most of the national policies have direct significant effects on the citizens' fundamental rights, parliamentary democracy which the Korean constitution adopted based on national consensus will be destroyed if those important policies are to be decided through a national referendum in a direct democratic way.

## **2. Concerning the Judgment of Main Issues**

### **2.1 Public officials' constitutional and legal duties**

**- Refer to "Concerning the Judgment of Legal Condition"-**

### **2.2 Summary of the judgment of main issues by the Constitutional Court**

Summaries of the judgment of main issues by the Constitutional Court are as follows:

It is impossible that all of the constitutional norms are prescribed without omission even in a written constitution. Also, the constitution seeks for the consciousness and implication as the national basic law. Accordingly, there is room that norms which are not prescribed in the formal constitutional code may be recognized as unwritten constitution or customary constitution.

The customary constitution deals with the norms which are especially basic and core for a nation among general constitutional norms, that are not proper to be regulated in the form of law.

Seoul's status as the capital has been a normative fact of national life for 600 years since the Chosun Dynasty. Therefore, since 1) Seoul's status as the capital can be evaluated as a continuous custom traditionally formed as national life (continuousness), 2) the custom has been lasted effectively for a long time and was not broken off (homeostasis), 3) Seoul's status as the capital acquired the definite common consents on which Korean people make no difference (clearness) 4) the custom already acquired the people's approval and broad consensus for a long time (people's consensus), Seoul as the capital is the basis of national life which the people believe has efficacy and enforcement.

However, where even the custom accepted as constitutional norm is infringed with the lapse of time and due to the change in constitutional condition and moreover national consensus concerning its legal effect disappears due to the recognition of the infringement as natural, customary constitution naturally become extinguished.

In order to recognize the extinguishment, the method which can be trusted by everyone such as national referendum for the purpose of confirming the overall intention of the people can be taken into consideration. However, in this case, the condition of the extinguishment is not confirmed.

... However, the Act relating to this case has realized the relocation of capital only in the form of law without any procedure of amendment to the constitution. Accordingly, the exercise of a national referendum, the people's fundamental right to participate in government, was excluded and the Act is infringing the fundamental right.

If it is the case, regardless of other issues raised by petitioners, it is clear that the Act which regulates relocation of the capital and the procedure of relocation has changed the unwritten customary constitution that Seoul is the Korean capital without the procedure of the amendment to constitution. Accordingly, the Act infringed the people (including petitions)'s right to national referendum to amend the constitution and thus it is against the constitution.

### **2.3 Problems of the judgment of main issues by the Constitutional Court**

The Constitutional Court states that "Since Korea adopts a written constitution, the constitutional code is the source of constitution. However, it is impossible that even a written constitution contains thoroughly and completely all of the constitutional rules. Also, since the constitution, as a national basic law, prefers the consciousness and implication, constitutional norms which are not recorded in the written constitution code may be recognized as unwritten constitution or customary constitution", and held that "Strict conditions should be met in order to be recognized as the constitution having legal effect, and only the customs that meet such conditions have the same legal effect as a written constitution".

Also, it states that "Paragraph 2, Article 1 of the Korean Constitution stipulates that the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from people. Thus, since the people are a sovereign of the Republic of Korea and have

supreme authority for constitution establishment, the people participate not only in establishment and amendment of the written constitution but also can directly build up constitutional norms in the form of customs which are not included in the written constitution when necessary”.

### **- Necessity of Codification -**

The written details of a contract<sup>6</sup> confirmed in the form of documents when concerned parties enter into the contract are most important. Likewise, it is needless to say that the most important thing in interpreting statutes is a written code itself. At the national referendum, people confirm the written contents of the constitution, not the unwritten contents.

The Republic of Korea established and promulgated the first Constitution on July 7, 1948 and then, amended the Constitution 8 times subsequently. The current Constitution was amended and promulgated on October 29, 1987 through a national referendum following the resolution by the National Assembly.

When deciding on the current Constitution, the National Assembly discussed and resolved the written constitution, not the unwritten customary constitution.

If Seoul’s status as the capital of Korea is a constitutional norm, it is natural that the norm should have been discussed and resolved by the National Assembly and submitted to a national referendum at that time

### **- Transition of the Constitution of the Republic of Korea -**

Our Constitution has been amended eight times. This implies that , after establishing the first Constitution, the people’s recognition on democracy matured and it was necessary to more democratically amend the constitution focusing on strengthening the people’s fundamental rights in line with such a development.

Through the amendment to the Constitution based on national consensus, the Korean government has endeavored to reinforce the protection of the people’s bodies and lives by reinforcing the right to request the court to review the legality of the arrest or detain and extending the system of compensation for criminal detention and establishing national aids for criminal victims, etc., and to guarantee substantially three basic labor rights and appropriate distribution of income, balanced development of regional economy, and enforcement of protection for small and medium enterprises, farmers and fishermen.

### **- Purpose and Contents of the Constitution -**

Constitution, as fundamental law of a nation, is the supreme law which determines the ruling organization and the ruling principle and protects the people’s fundamental rights. As stated by Loewenstein, the modern constitution is the means for controlling the authority of a man of power in order to prevent the abuse of authority in the process of exercising it.

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<sup>6</sup> Parole evidence rule: Evidence of prior or contemporaneous negotiations and agreements that contradict, modify, or vary contractual terms is inadmissible if the written contract is intended as a complete and final expression of the parties.

Accordingly, the constitution codifies 1) the principle of power distribution, 2) the principle of check and balance, 3) the principle of national sovereignty, 4) the principle of protecting fundamental rights and 5) the reasonableness of methods to amend the constitution<sup>7</sup>.

The constitution of the Republic of Korea also consists of the following contents following the general principle.

Chapter I. General Provisions  
Chapter II. Rights and Duties of Citizens  
Chapter III. The National Assembly  
Chapter IV. The Executive  
Chapter V. The Courts  
Chapter VI. The Constitutional Court  
Chapter VII. Election Management  
Chapter VIII. Local Autonomy  
Chapter IX. The Economy  
Chapter X. Amendments to the Constitution

Accordingly, the issue on whether the capital should be located in Seoul and Kyongi Region or in ChungChong Region is not relevant to the ruling organization and ruling principles, and 1) the principle of power distribution, 2) the principle of check and balance, 3) the principle of national sovereignty, 4) the principle of protecting fundamental rights and 5) the reasonableness of methods to amend constitution.

#### **- The legislative power of the National Assembly -**

Article 40 of the Constitution prescribes that “the legislative power shall be vested in the National Assembly”, and Article 52 of the Constitution prescribes that “Bills may be introduced by members of the National Assembly or by the Executive”.

That means that, through national consensus, the legislative power<sup>8</sup> for all the laws required for the national operation which cannot be provided in the Constitution has been vested in the National Assembly. Accordingly, since what is not provided in the Constitution should be decided by the National Assembly by enacting laws, the matter as to whether the capital should be relocated to ChungChong Region should be entirely decided by the National Assembly.

#### **- Legal instability incurred by recognition of the customary constitution -**

The Constitutional Court asserts that “It is impossible that even a written constitution contains thoroughly and completely all of the constitutional rules. Also, since the constitution, as a national basic law, prefers the consciousness and implication, constitutional norms which are not recorded in the written constitution code may be recognized as unwritten constitution or customary constitution”.

If it is the case, even custom which does not come under the ruling organization or ruling principles should be recognized as the constitution. Accordingly, the National Assembly exercising legislative power should always anticipate the existence of potential customary constitution and its legislative power will become unstable. Also, the Constitutional Court

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<sup>7</sup> Kim, Chul Soo, The Outline of Constitution, 7<sup>th</sup> edition, 12 page

<sup>8</sup> Section 8, Article 1 of the US constitution: The Congress shall have power to exercise **exclusive legislation** in all cases whatsoever / The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution...

should review unconstitutionality of all the legislations that the National Assembly establishes whenever constitutional petition is filed. This sounds very unreasonable.

**- The Constitutional Court's unreasonable decision and historical recession -**

The Constitutional Court states that "Paragraph 2, Article 1 of the Korean Constitution stipulates that the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from people. Thus, since the people are a sovereign of the Republic of Korea and have supreme authority for the constitution establishment, the people participate not only in the establishment and amendment of the written constitution but also can directly build up constitutional norms in the form of customs which are not included in the written constitution when necessary".

As set forth above, the Constitution of the Republic of Korea has been amended eight times since 1948. Amendment to the Constitution requires the consensus of the people who are alive and hold the right to national referendum at the time of the amendment.

The fact that our Constitution has been amended eight times since the establishment of the first Constitution means that the people's recognition upon democracy has matured by experiencing democracy which they have never experienced before the first Constitution, and the development of democracy has been accelerated with the new generations being endowed the right to national referendum.

It is thought that, among people who have the right to national referendum, those who were born before the Japanese annexation of Korea (the year 1910) take up an extremely small percentage of total eligible voters.

However, the Constitutional Court draws out the logic that not only the people can directly participate in the establishment or amendment of written constitution people but also can directly build up constitutional norms in the form of customs when necessary, and it also states that "Seoul's status as the capital had been acknowledged since 1394, the period of the Chosun Dynasty. Also, the fact was reflected in the KyungKookDaejon, the basic constitution of Chosun Dynasty, and Seoul maintained its status as the capital of Korea even under the Japanese colonial rule as well as until now after the liberation".

It was not until July 17, 1948 that the Republic of Korea started to own its Constitution as being a democratic republic. Before that, the democratic constitution didn't exist. Unlike the hereditary Chosun Dynasty, the Republic of Korea introduced democratic systems and established ruling organizations as well as ruling principles. And all the legislative power necessary for national operation has been vested in the National Assembly.

Nevertheless, the Constitutional Court insists, based on the facts existed since 600 years ago, that the people can directly establish constitutional norms in the form of customs when necessary.

The current electorates are not people from the Chosun Dynasty or those who lived under the Japanese colonial rule. That is, they are not accustomed to the past customs, and the young generations who are supposed to get voting rights will dream of a far more advanced and democratized society as our generation did. Nevertheless, the Constitutional Court is trying to retreat our history by depending on old customs.

If we accept the logic of the Constitutional Court as it is, there is a high possibility that many obsolete thoughts such as "householder system" or "predominance of men over women

ideology” which can be the obstacles of the social development will resurrect as the form of customary constitution because of the illogical and illegal decisions made by the Constitutional Court.

If the Constitutional Court continues to make such an unreasonable decision, the young generations who will lead the Republic of Korea and the global community in the future would not be able to dream of a new world with being bound to wrongful decisions.

#### **- Problems of the customary constitution criteria made by the Constitutional Court -**

The Constitutional Court states that “Seoul’s status as the capital has been the normative fact of national life for 600 years since the Chosun Dynasty. Therefore, since 1) Seoul’s status as the capital can be evaluated as a continuous custom traditionally formed as national life (continuousness), 2) the custom has been lasted effectively for a long time and was not broken off (homeostasis), 3) Seoul’s status as the capital acquired the definite common consents on which Korean people make no difference (clearness) 4) the custom already acquired the people’s approval and broad consensus for a long time (people’s consensus), Seoul as the capital is the basis of national life which the people believe has efficacy and enforcement”.

Let us observe the “householder system” or “predominance of men over women ideology”. Those customs have been existed for a long time, and some senior citizens still agree with the customs. It means that almost all people did agree with such customs for 550 years, from the Chosun Dynasty to 1947 when the Republic of Korea initially adopted democratism.

Based on this fact, the Constitutional Court drew out the conclusion that the pending issue satisfied 1) continuousness, 2) homeostasis, 3) clearness and 4) people’s consensus. Accordingly, if we accept the conclusion of the Constitutional Court as it is, it would result in ignoring the current and expected electorate’s democratic ideologies.

The Constitutional Court states that “Seoul’s status as the capital acquired the definite consensus on which the Korean people show no difference (consciousness)”. However, it is not the factual background that the Constitutional Court should judge right now.

Rather, as mentioned earlier, the Constitutional Court should judge whether the Special Act for the New Administrative Capital Construction violated the Constitution, and also should determine whether the Special Act is not in accordance with the Constitution which regulates the ruling organization and ruling principles in its review.

However, without a review on it, the Constitutional Court ignored the purport of the Constitution established based on national consensus and created the criteria which are not proper and reasonable in order that the old customs and obsolete thoughts may rule our society.

Article 10 of the Constitution prescribes that “all citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals”.

Paragraph 1 of Article 11 of the Constitution provides that “all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status”.



In addition, Article 34 of the Constitution prescribes that “all citizens shall be entitled to a life worthy of human beings and the State shall have the duty to endeavor to promote social security and welfare”.

Article 35 of the Constitution prescribes that “all citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment, and the State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like”.

Lastly, Article 123 of the Constitution prescribes that the State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries. And the State shall have the duty to foster regional economies to ensure the balanced development of all regions.

If the arbitrary criteria made by the Constitutional Court are accepted, thoughts such as “householder system” or “predominance of men over women ideology” will be maintained as Korean customary constitution, and it would result in trampling down all the democratic ideologies including equality right that the constitution is seeking for.

Article 1 (Source of Law) of the Civil Act prescribes that “if there is no provision in the Act applicable to certain civil affairs, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply”.

The precedent (Supreme Court 1983.6.14, 80Da 3231) held that “As customary law has the same effect as law, it is legally effective within the limit as prescribed in the Act... Accordingly, even though there is no assertion or evidence of concerned parties, the court should determine it... Since the factual custom is legally ineffective, it is limited to complementing concerned party’s opinions. The concerned parties, therefore, should prove that the factual custom does exist.

Thus, the Civil Act makes clear that customary law can be complementarily applied within the limit as prescribed in the Act only where there is no related provision in the Act.

However, notwithstanding that the Constitution does not acknowledge the application of customary law, the Constitutional Court judged that customary constitution does really exist. What is more, the Constitutional Court definitely disregarded the written constitution beyond its limit, not within the limit which does not conflict with the Constitution.

**- Right to live in a healthy and agreeable environment & the balanced development of all regions -**

It is the government’s duty to ensure the citizens’ rights to live in a healthy and agreeable environment as prescribed by the Constitution and to endeavor for inspiring their pride as citizens of a democratic nation through promoting the balanced development of all regions.

Paragraph 2 of Article 66 of the Constitution stipulates that “The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.”

The Special Act for the New Administrative Capital Construction was enforced through the resolution of the National Assembly for securing the fundamental rights of the people as prescribed by the Constitution.

The Act came into effect through the legitimate resolution of the National Assembly for the purpose of reconciling the imbalanced development between the capital regions and local regions and solving various conditions which are infringing upon citizens' fundamental rights such as the deterioration of citizens' living standard due to the congestion of the capital regions.

However, the Constitutional Court stated that Seoul's status as the capital is a part of customary constitution by setting up an arbitrary standard which runs counter to the purport of the Constitution, and suspended the legal effect of the Special Act for the New Administrative Capital Construction which shows no legal flaws. As a result, the Act which was legitimately enacted by the National Assembly in accordance with the ideal of the Constitution has been tramped down by the Constitutional Court.

#### **- Differences between customary civil law and customary constitution -**

Among existing Korean Acts, only the Civil Act and the Business Act acknowledge the application of customary law. It means that other laws do not recognize the application of customary law.

If other laws also recognized the necessity of customary law, the Criminal Act and the Act for Criminal Procedures etc. would have included the clause saying that "if there is no provision applicable to certain criminal affairs in the Act, customary law shall apply, and if there is no applicable customary law, sound reasoning shall be applied".

Since the Republic of Korea adopts the written law system, it is absolutely required that every law should be documented in written form so that all of the citizens can secure foreseeability relating to their social activities.

Exceptionally, in case of civil affairs, there are cases where concerned parties' legal interest has been entangled each other (e.g. the right to a tomb on someone else's land which existed since the Chosun Dynasty and the Japanese colonial rule) from long time before the enforcement of the Civil Act. As it is necessary to stably maintain the legal relationship between concerned persons, there exists a reasonable reason for recognizing the application of customary law.

However, unlike the Civil Act, the Criminal Act which strictly follows the principle of legality<sup>9</sup> will not allow the application of customary criminal law. This is because Korea, with its change to a democratic nation, has adopted new democratic criminal laws that conform to the new democratic system. If someone asserts that customary criminal law should be applied to this democratic Criminal Act, that doesn't stand to reason at all.

With the adoption of the modernized democratic system, the prior deteriorated hereditary system from the old Chosun Dynasty and the system from the Japanese colonial rule which were not reflected in the first Korean Constitution completely disappeared at the time of establishing and promulgating the first Korean Constitution.

As for civil affairs, since there are cases where concerned parties' legal interest has been entangled each other from the past such as the right to a tomb on someone else's land, to protect such right is necessary.

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<sup>9</sup> The principle of "nulla poena [nullum crimen] sine lege"

Despite the transition to a democratic nation from the earlier Japanese colonial rule, the social and economic activities between persons have not changed. Therefore, taking into account that written laws cannot regulate all social and economic affairs, there was the need to stabilize legal relations between persons that cannot be regulated by written laws.

However, in the case of the constitution which stipulates the ruling organization and the ruling principle, legal interests between concerned parties as in the case of Civil Law do not exist.

The beginning of the modernized democracy through the establishment of the first Constitution means that a new system has been adopted which is completely different from the past. Therefore, unlike civil laws which deal with interest relationship between concerned parties, there does not exist legal interests between the government ruling system under Japanese colonial rule and the government ruling system under the first Constitution. Accordingly, there is no logical basis to acknowledge the customary constitution.

Article 1 of the Civil Act (Source of Law) prescribes that if there is no provision in the Act applicable to certain civil affairs, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply.

The precedent (Supreme Court 1983.6.14, 80Da 3231) also held that “As customary law has the same effect as law, it is legally effective within the limit as prescribed in the Act... Accordingly, even though there is no assertion or evidence of concerned parties, the court should determine it... Since the factual custom is legally ineffective, it is limited to complementing concerned party’s opinions. The concerned parties, therefore, should prove that the factual custom does exist.

Thus, the Civil Act stipulates that only in case where there is no related provision in the Act, the customary law can be complementarily applied within the limit as prescribed in the Act.

However, notwithstanding that it is clear that the Constitution does not acknowledge the application of customary law, the Constitutional Court made an unreasonable decision that customary constitution exists.

#### **- Laws and regulations relating to the capital -**

The Constitutional Court acknowledges the following:

- 1) The Decree for establishment of the Seoul Metropolitan City of the Act No. 106 for the US Military Government
- 2) Paragraph 2, Article 52 of ‘the Draft Bill for the Interim Administrative Organization of South Chosun’ submitted to the above assembly on February 27, 1947 gave only Seoul special treatment clarifying that ‘Seoul is made the Special Metropolitan City and is under the direct jurisdiction of the central administrative government’.
- 3) It was after the Local Autonomy Act (the Act No. 32 enacted on 4 July, 1949) was enacted that Seoul City obtained the status of the Special Metropolitan City.
- 4) The Local Autonomy Act was amended in the form of the Act No. 404 on April 6, 1988, and the provision (Article 161) was made that ‘special treatment can be given with respect to the status, organization and operation of Seoul Metropolitan City taking into consideration its special nature as the capital under the conditions as prescribed by the Acts’. Accordingly, the Act for the special treatment of administration of Seoul Metropolitan City was enacted in the form of the Act No. 4371 on May 31, 1991.

5) Under this Act, Seoul Metropolitan City comes under direct jurisdiction of the Central Government and obtains the special status as the capital (Article 2).

6) Where the Minister of the Home Affairs intends to approve the issuance of municipal bond of Seoul Metropolitan City or to conduct an audit on local affairs, he/she should be subject to the arbitration of the Prime Minister (Paragraphs 1 and 2 of Article 4). Also, the Mayor of the Seoul Metropolitan City has special authority over the appointment of its officers and conferment (the Paragraphs 5 and 7 of Article 4).

7) Also, with respect to roads, traffic and environment relating to the Seoul Metropolitan City in the National Capital Region, where there exists discrepancy in opinions between the head of the central administrative agency and the Mayor of the Seoul Metropolitan City, the arbitration should be obtained from the Prime Minister (Article 5).

However, the Constitutional Court states that “Those laws adopted it as an existing normative premise that Seoul was traditionally the Korean capital and were merely enacted in order to legally establish the special status of Seoul in the form of law. Therefore, those laws were not intended to decide that Seoul is the capital from the legal point of view. Through the background that those laws were enacted, Korean people’s traditional legal assurance that Seoul is the Capital can be confirmed”. This is a very unreasonable legal construction which goes beyond common sense.

As explained earlier, constitution forms the fundamental law of a nation and determines the ruling organization and the ruling principles. As it is the most important law that guarantees the fundamental rights of the people, the constitution codifies 1) the principle of power distribution, 2) the principle of check and balance, 3) the principle of national sovereignty, 4) the principle of protecting fundamental rights and 5) the reasonableness of methods to amend the constitution, etc.

Following such principles, Article 117 of the Constitution provides that “Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of laws and regulations. The types of local governments shall be determined by this Act.”

Article 2 of the Local Autonomy Act (types of local governments) categorizes local governments into 1) Special Metropolitan City, Metropolitan Cities, and Do; and 2) Shi, Kun, and Ku.

Article 117 of the Constitution clarifies only the general principles of the local government which is a part of the ruling organization, and delegated the rest to the legislature. Being authorized by the Constitution, the National Assembly established the Local Autonomy Act. That is, the National Assembly has an exclusive authority to enact laws and regulations concerning the operation of the local government by the constitution.

According to the Local Autonomy Act, the local governments are categorized into the Special Metropolitan City, Metropolitan Cities, Do, Shi, Kun and Ku. Each Law is authorized to determine what area will be classified as a Special Metropolitan City or a Metropolitan City.

Article 1 (Purpose) of the Act for the Special Administration of the Seoul Special Metropolitan City (Act No.05000) provides that “This Act is based on Article 161 of the Local Autonomy Act and regulates the special treatment of the Seoul Special Metropolitan City with respect to its status, organization and operation”. And Article 2 (Status) stipulates that the “**Seoul Special Metropolitan City** shall be under the direct jurisdiction of the government and **hold the special status of the capital** within the limits as prescribed by this Act.”

Article 1 (Purpose) of the Act for the Establishment of the Daegu and the Incheon Metropolitan Cities provides “The purpose of this Act is to promote the balanced development of the nation, and improve the benefit of citizens and the administrative efficiency by establishing the Daegu and Incheon metropolitan cities.

Thus, it is clear that the legislative power of the National Assembly decides what area should become the Special Metropolitan City (capital), and what area should become the metropolitan cities. That is, the Acts make clear that Seoul is the Special Metropolitan City (capital), and Daegu and Incheon are metropolitan cities.

In the sentence saying that the “Seoul Special Metropolitan City shall be under the direct jurisdiction of the government and hold the special status of the capital within the limits as prescribed by this Act”, the subject of the sentence is the “Seoul Special Metropolitan City”, and the wording “hold the special status of the capital within the limits as prescribed by this Act” means that the Seoul Special Metropolitan City holds the special status of the Korean capital according to the Act which was established by the National Assembly, not being the Korean capital of itself.

However, the Constitutional Court states that “Related laws adopted it as an existing normative premise that Seoul was traditionally the Korean capital and were merely enacted in order to legally establish the special status of Seoul in the form of law. Therefore, those laws were not intended to decide that Seoul is the capital from the legal point of view”.

The Constitutional Court which must interpret laws based on the clear context brought about a very unreasonable result through the biased interpretation of clearly outlined related laws.

In the past, Seoul was classified as a special metropolitan city, and Busan as a metropolitan city. However, with the growing population in Daegu and Incheon, the National Assembly has promoted the balanced development of territory and the benefit and welfare of the people as well as the administrative efficiency by elevating the status of those areas to a metropolitan city

Accordingly, it is possible to make Daegu a special metropolitan city and locate the Korean capital in Daegu, if it is necessary for promoting the balanced development of territory and the benefit and welfare of the people as well as the administrative efficiency.

In such a case, the National Assembly may make the provision that the **Daegu Special Metropolitan City** shall be under the direct jurisdiction of the government and shall **hold the special status of the capital** within the limits as prescribed under the underlying Act.

As the Constitution has delegated the establishment of laws concerning the operation of the local governments to the National Assembly, there is no legal flaw.

If Daejeon is elevated to a special metropolitan city, the National Assembly may make the provision that Daejeon shall be under the direct jurisdiction of the government and shall hold the special status of the capital within the limits as prescribed under the underlying Act.

Hence, there is no room for disputes with regard to the interpretation of laws. In conclusion, the Constitutional Court’s decision is baseless that “It is clear that the Act which regulates the relocation of the capital and the procedure of relocation has changed the unwritten customary constitution that Seoul is the Korean capital without the procedure of amendment to the

constitution. Accordingly, the Act infringed the people (including petitions)'s right to national referendum to amend the constitution and thus it is against the constitution".

Subparagraph 2, Paragraph 2, Article 23 of the Constitutional Court Act makes possible "the modification of a previous opinion on interpretation and application of the Constitution or laws made by the Constitutional Court". Thus, the Constitutional Court itself should correct its inappropriate judgment to prevent the further violation of the people' fundamental rights.