

Customary Law in Constitutional Review in Korea

Byun Hae-Cheol

University of Hankuk

Corresponding author. Email: byunhch@hufs.ac.kr

ABSTRACT

Customary law is defined as a law formed in social life, not by legislators. Customary laws, based on rituals and customs, have occupied an essential part of legal life. However, in the 19th century, through the codification era, customary law was replaced by written law, not only in written law countries but also in unwritten law countries. The French Civil Code in 1804 (called Code Napoleon in 1087) has played an essential role in codification in Europe. Customary law being considered supplementary; the effect of customary law is inferior to that of written laws. However, the effect of customary law differs according to its nature and form of existence. According to the Introduction, this paper consisted of 1 question: Could a Customary Law object to Constitutional Law? This paper concludes that customary laws in the constitutional review have been a new field of constitutional discussion in Korea; customary laws as an object of adjudication on the constitutionality and formation of customary constitutional law by the Constitutional Court. However, it faced a new and continuous political challenge by the political powers, actually in the majority, which tried but failed to relocate the Capital of Seoul according to the KCC's decision. It could result in other constitutional cases in the future.

Keywords: *Customary Law, Constitutional Review.*

1. INTRODUCTION

In general, *customary law* is defined as a law formed in social life, not by legislators. Customary laws, based on rituals and customs, have occupied an essential part of legal life. However, in the 19th century, through the codification era, customary law was replaced by written law, not only in written law countries but also in unwritten law countries. The French Civil Code in 1804 (called Code Napoleon in 1087) has played an essential role in codification in Europe.

In Korea, customary law is recently being re-evaluated along with the diversification and/or decentralization of socio-economic structure, which has changed the reality of legal life.^[1] Besides, it is reinterpreted not only in general judicial but also in constitutional review.

Traditionally, the ordinary courts have recognized customary law and normative control over it, especially the Supreme Court. However, the establishment of KCC brought out new changes in normative control over customary laws.

As the control of constitutionality of laws has been activated since the constitutional revision in 1987, a new question was raised if a customary law could be an object of control of constitutionality of laws. In other words, it

was a question of customary law could have a normative effect like a law stipulated by the legislator.

A normative effect of customary law, like a law, is sometimes recognized by the legislator itself. According to the Commercial Act, the customary commercial law shall apply in priority to the Civil Act for a particular commercial matter: "Where this Act does not provide for a particular commercial matter, the customary commercial law shall apply; and if no such law exists, the Civil Act shall apply." (Art.1)

However, the effect of customary law differs according to its nature and form of existence. As the status of customary law is not stated explicitly in Korean Constitution, it is stipulated in the Civil Act: "If no provisions applicable to certain civil affairs exist in Acts, customary law shall apply, and if no applicable customary law exists, sound reasoning shall apply." (Art.1) And, it is also stipulated in the Commercial Act: "Where this Act does not provide for a particular commercial matter, the customary commercial law shall apply; and if no such law exists, the Civil Act shall apply." (Art.1)

Besides, even if a statutory stipulation does not notify it, customary laws have been recognized in Korea in diverse fields, such as customary constitutional law,

customary laws as a law, customary administrative law, etcetera.

As the constitutional review on the customary administrative law is limited in competence dispute, especially between local governments, it is appropriate to focus on the customary constitutional law and customary laws as a law.

2. RESULT AND DISCUSSION

According to the Civil Act and the Commercial Act, civil and commercial customary laws would have a legal effect, like a law made by the legislator, people's representatives. In this case, it is expected that, even if a customary law could be recognized by ordinary courts, especially by the Supreme Court, they should also be controlled their constitutionality of laws by the Constitutional Court.

Primarily, customary laws which have based on Japanese research of customs during the Japanese occupation period should be controlled their constitutionality of laws. [2]

However, there is also opinion that inappropriate to make the customary law the object of adjudication. [3]. The ordinary courts confirmed several times that a customer on the right to claim for division of property has been formed and existed as customary law in Korean society, and applied it to the cases on the inheritance (for examples, SC November 25, 1969, 67Me25; SC June 12, 1973, 70Da2575, etcetera.).

Korean Supreme Court itself decided a customary law by which the right to claim for restoration of inheritance would be extinguished after 20 years since the beginning date of inheritance was against the overall legal order with the constitution as the peak norm. So, eventually nonvalid as customary law.

"In order to say that a social life norm created through repeated practices of society has come to be recognized as a legal norm, the social life norm must be recognized as having legitimacy and reasonableness as it does not go against the overall legal order with the constitution as the supreme norm. Otherwise, social life norms cannot be recognized as effective as customary law by using them as legal norms, even if they are created through repeated practices of society."

(SC July 24, 2003, 2001Da48781)

The Court also decided a customary law denying to female as member qualification of a family conflicted with the constitutional order on which the customary law in question was based and lost its normative certitude and validity.

(SC July 21, 2005, 2002Da1178)

A motion made by a party to request a review on the constitutionality of a customary law that denied the right of succession and right to claim for division of property

to females if the head of the family was dead was denied by the Supreme Court.

The Court rejected that customary law is not an object of adjudication of constitutionality by the Constitutional Court because it is under the jurisdiction of the Court itself.

(SC May 28, 2009, 2007KaGi134)

After that, based on the article 68 ph.2 of the Constitutional Court Act, the party asking the customary law in question is constitutional or even not filed a constitutional complaint with the Constitutional Court. The Constitutional Court has to decide if the customary law can object to adjudication on the constitutionality by itself. The KCC applied the same reasoning to the case, on which it allowed an adjudication on the constitutionality of treaties that have the same legal effects as laws in the formal sense.

According to the KCC, as treaties that have the same typical effects are considered as the object of adjudication on the constitutionality of statutes, it contributes not only to the unity of legal order and legal stability but also to the protection of people's fundamental rights by allowing adjudication based on the laws consistent with the constitution.

"In this case, even if the customary law at issue is not a law in the formal sense, it has a normative effect substantially as a law in the absence of laws regulating inheritance before the enforcement of Civil Act. Therefore, it could be an object of adjudication of the constitutionality of laws."

(25-1 KCCR 18, 2009Hun-Ba129, February 28, 2013) The existence of customary constitutional law.

The concept of customary constitutional law is discussed theoretically by law scholars. Some constitutional norms which are not included in a written constitution could exist in the form of customary constitutional law and law-like parliamentary law, election law, etcetera. [4]

However, customary of constitutional law is considered as the part of constitutional law (constitutional sources) by Korean Constitutional Court. It was in Relocation of the Capital City Case (16-2(B) KCCR 1, 2004Hun-Ma554, October 21, 2004) in which KCC considered the Special Act on the Formation of the New Administrative Capital was unconstitutional since it was inconsistent with the constitutional custom of which Seoul has been the capital of the nation.

The program to resettle the administrative function of the capital was the election pledges of candidate Roh Moo-Hyun at the presidential election in 2002. It was for the reason of curbing the concentration and overpopulation at the capital Seoul and balancing local development. After he was elected as President, the Act at issue was enacted for implementing the pledge in 2004.

The constitutional complaint was filed since the Act was unconstitutional. It was an attempt to resettle the nation's capital without the act of revising the constitution and violating the right to vote on the referendum of constitutional revision. (Art. 130, Ph. 2 of Korean Constitution)

1. Reasoning of Korean Constitutional Court

'Seoul is the capital of the Republic of Korea', some questions could be raised in this case.

- 1) The matter of capital is truly constitutional matter?
- 2) Constitutional customs exist?
- 3) If it exists, it owns the same effect as the written constitution?
- 4) The Constitutional Court can confirm or even form the customs of constitutional?

1) About the first question;

"The establishment or relocation of the capital is the geographical placement of the basis of the nation's organization and structure through the determination of the location of the highest constitutional institutions such as the National Assembly and the President, and is thus a fundamental decision by the citizens concerning the nation, and, at the same time, a core constitutional matter that forms the basis for the establishment of a nation."

2) About the second question;

"That Seoul is the capital of our nation is a continuing practice concerning the life in the national realm of our nation for over six-hundred years since the Chosun Dynasty period. Such practice should be deemed a fundamental matter in the nation that has achieved national consensus from its uninterrupted continuance over a long period. Therefore, Seoul is the capital, is a constitutional custom that has traditionally existed since even before establishing our written constitution. It is a clear norm in itself and a premise upon which the constitution is based, although not stated in an express provision in our constitution. As such, it is part of the unwritten constitution established in the form of a constitutional custom."

However, based on the opinion of one justice, "in a legal system under a written constitution, customary constitutional law may not be established or maintained apart from the written constitution, and, instead, is always given no more than supplementary effect as it may be established and maintained only when harmonized with various principles of the written constitution.

Also, constitutional revision is a concept that pertains to the constitution in the formal sense, i.e., the written constitution. Therefore, the change of the customary constitutional law does not belong to constitutional revision and may occur through the enactment of the revision of the statute that is the procedure for representative democracy established by the constitution. In the case of a change in constitutional custom such as

the transfer of the capital, as there is no particular constitutional provision that prohibits this, it may be done by enacting the statute by the National Assembly. Therefore, there is no possibility that the Act at issue, in this case, violates the right to vote on a referendum under Article 130, Section 2, of the Constitution."

3) About third question;

"Constitutional custom is also part of the constitution and is endowed with the same effect as the written constitution. Thus, such legal norms may be revised only through constitutional revision according to Article 130 of the Constitution. That Seoul is our nation's capital is an unwritten constitutional custom and, therefore, retains its effect as constitutional law unless invalidated by the establishment of a new constitutional provision ordaining a new capital through the constitutional revision procedure. On the other hand, other than through formal constitutional revision, a constitutional custom may lose its legal effect by losing the national consensus that supports it. However, in this case, such circumstance is not found."

"According to Article 130 of the Constitution, a national referendum is mandatory for the constitutional revision. Therefore, the citizenry has the right to express its opinion concerning the constitutional revision through a binary pro-and-con vote. Here, in this case, the Act at issue realizes the transfer of the capital, which is a matter to be undertaken by the constitutional revision, merely in the form of a simple statute without following the constitutional revision procedure. Thus, the Act violates the constitution as it excludes the exercise of the right to vote on the referendum, thereby violating such right, which is a fundamental right to participate in politics retained by the people at the constitutional revision according to Article 130 of the Constitution."

As the Act at issue was declared unconstitutional, it changed, 'Act on the construction of an Administrative-Function Hub City' in 2005, which relocated administrative institutions of the central government with certain exceptions. It was not including the highest constitutional institutions like the National Assembly and the President.

4) About the last question;

KCC implemented the general requirements of customary law traditionally adopted by the ordinary courts, especially the Supreme Court;

- Constitutional custom is as part of the constitution and given with the same effect as the written constitution. Thus, legal norms may be revised through constitutional revision according to Article 130 of the Constitution.
- Seoul is the capital as unwritten constitutional custom and, therefore, retains its effect as the constitutional law unless invalidated by determining new constitutional provision

ordaining new capital through the constitutional revision procedure.

- Other than through formal constitutional revision, a constitutional custom may lose its legal effect by losing the national consensus that supports it.

2. New challenges against the KCC's decision at issue

However, there have been some continuous attempts to relocate the capital. At first, as the KCC required that at least "the highest constitutional institutions such as the National Assembly and the President" have to be in the actual Capital, Seoul, President Roh and the political party in the majority, which tried to relocate the capital by a particular law carried forward it indirectly. They replaced the law declared unconstitutional with a new law moving the Executive (except the President) to the Sejong City, newly being constructed. Of course, the new law being by the constitutional requirements was declared constitutional. In this case, it could be supposed that the KCC understood the concept of the President as the highest constitutional institution in a narrow sense. In Korean Constitution, the President is the Executive itself, including the ministers who assist only the President. (Art.87 Ph.2) Therefore, it is not easy to imagine the ministers separated from the President. It could be an unconstitutional phenomenon.

Recently, President Moon and the political party in the majority, which succeeded the former government, have tried again to avoid the standard constitutional requirements recognized by Constitutional Court. Instead of moving the National Assembly to the City concerned, they are trying to establish a second parliamentary building for the permanent Commissions in Sejong City. It would also raise now and in the future some political and constitutional questions, which could be concluded as unconstitutional.

3. CONCLUSION

Questions on customary laws in the constitutional review have been a new field of constitutional discussion in Korea; customary laws as an object of adjudication on the constitutionality and formation of customary constitutional law by the Constitutional Court.

At first, the KCC respected the ordinary courts' judgment on the customary law, conditions of establishment of customary laws, its extinction, etcetera. However, the KCC itself confirmed its jurisdiction on the control of the constitutionality of customary laws.

The KCC's competence in constitutional interpretation, especially on customary constitutional laws, confirmed its power to allow the constitutional effect to a custom. It was through the Relocation of the Capital City Case.

However, it faced a new and continuous political challenge by the political powers, actually in the majority, which tried but failed to relocate the Capital of

Seoul according to the KCC's decision. It could result in other constitutional cases in the future.

In this case, it is essential to confirm the People's will to maintain a customary constitutional law, especially by a referendum.

REFERENCES

- [1] Chang Young-Soo, "Judicial Review on Customary Law", *Public Law*, Vol.40, No.2, Dec. 2011, pp.339-360.
- [2] Choe Byoung-Jo, "Customs and customary Law in Classical Roman Law", *Seoul Law Journal*, Vol. XLVII, No.2, pp.1-50.
- [3] Chung Tae-Ho, "Adjudication on the constitutionality of a customary law having same legal effects as a law in the formal sense", *Kyung Hee Law Journal*, Vol.46, No.4, 2011, pp.343-376.
- [4] Han Tae-Yeon, *New Constitutional Law*, Bobmun Sa, 1961.
- [5] Michel Troper, "Du fondement de la coutume à la coutume comme fondment", *Droits, Revue Française de Théorie Juridique*, No 3, pp.11-24.
- [6] Sung Nak-In, *Constitutional Law*, Bobmun Sa, 26th Ed., 2020.
- [7] Oh Se-Hyuk, "Modern Views of Customary Law", *Korean Journal of Legal Philosophy*, Vol.9 No.2, 2006, pp.145-176.
- [8] Yun Soo-Jeong, "The object of judicial review on customary law", *Constitutional Law*, Vol.XXI, No.2, 2015, pp.195-227.
- [9] Korea Legislation Research Institute, *Preliminary Research of Korean Customary Law*, Vol.1, 1992.