

Judicial Review and Market Institutions

: Case of Korea¹

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Introduction

What is market economy in institutional context ? It is legal institutions by which to rule the competition order.[Hayek(1973)] If legal institutions of the market are constituted with the legal elements which fit well to address market attributes, market activities tend to prosper. Unfortunately, this requirement is not easy to be met by any system.[Barro(1997), Carlson, et al(2001)] The difficulty of institutional building precedes the difficulty of economic growth.[Tullock(1967c), Mahony(2001), Acemoglu, Johnson and Robinson(2001a, 2001b, 2002), Rhee(1995), Rodrick(2002), Rubin(2003)]

Recently, the recognition has grown on the importance of the rule of law as an important pillar upon which economic system is built[Buchanan & Tullock(1962), Buchanan & Congleton(1998), Congleton(2003), Barro(1991, 1997), Hall and Jones(1999), Friedman(1962, 2002)]. However, what do you mean by rule of law ?[Dicey(1914)]

There are a variety of different legal systems in the world. Some fit well to address market attributes, but some do not. Hayek(1960, 1973) considers common law as law of liberty, ideal model to create spontaneous order. Recent studies reveal that common law system is better fit to the provision of such legal system as is required in market economy.[Rubin(2003)]

Although studies on performance comparison of common law system with civil law system look intriguing, it doesn't seem to bear much of practical value. Switching from civil law system to common law system is practically impossible. Is common law system flawless ?[Rowley(1993)] Does the civil law system doom to fail ?[World Bank Group(1993)]

Such questions seem to underline the need to find new approach in this line of study, which should bear pragmatic use value.

Most fundamental question is what is the relation between legal system and market institutions. How are they related ? What changes in legal system affect what attributes of market institutions ? To what extent ?

These questions underscore the need to find elements of market attributes of legal institutions. That is, decomposition of institutional attributes of market system.

In this research, two-way decomposition is attempted. One is legal attributes of market institutions. The other is market attributes of market institutions.

This model is applied to 85 judicial review(JR) decisions in Korea and

attempted to answer the question, namely, if JR system operates well to remedy the market institutions, which were eroded by the infringements from bureaucratic, political predation, anti-competition sentiments and institutional inconsistency.

Legal Attributes of Market Institutions

The stability of possession is one of three fundamental laws of nature on whose strict observance the peace and security of human society depends. The other crucial laws are the transference of property by consent and the performance of promises(contract). The instability of property rights over foods, along with their scarcity, is a major impediment to social wealth.[Hume(1739-40), recited from Furubotn and Richter(1997)]

Property right is most important legal attribute of market institution. Even contract is established upon property right.

Contract is the second important attribute of market institution.

To reflect the reality of high transaction cost in some of contract activities, tort is distinguished from contract.[Cooter and Ulen(2004)]

Finally, some policy effects, which will bear influence on the value of property, are recognized separately and appended to property right. Inflation policy or frequently changing differential tax rate policy, e.g. against speculative activities in Korea, which create instability in property right and uncertainty in economic activities, is the example.

Market Attributes of Market Institutions

On the other hand, market attribute indicates institutional elements featured to establish the stability of exchange-activities. Incomprehensiveness of property right distinction, information asymmetry and uncertainty are the sources to harm the stability of exchange activities. By the introduction of appropriate market attribute distinction, the possibility for the rise of opportunism and uncertainty can be categorically captured.

Prime market attribute, which functions to ensure the stability of exchange activity, is accountability. By accountability, it indicates the principle of own responsibility, i.e., appropriability of right as well as obligation, which are associated with a specific economic activity. It, in turn, means suppression of

opportunism or moral hazard.

Predictability is the second market attribute, which addresses the issue of imperfect foresight or uncertainty. No doubt that a long horizon of predictability is indispensable element of activated market operation. Distinctiveness of property right boundary or sharpness of contract or tort liability broadens the horizon of predictability. An institutional change, which is to enhance the predictability of market action, will definitely activate the operation of the market.

Possibly, there are conceptual overlaps between accountability and predictability. Improvement in accountability enhances the predictability of market operation. The overlapping area is considered belonging to the domain of accountability because accountability is presumed to precede predictability in an order of gravity weighing on efficient operation of market.²

The third market attribute, which sustains the stability of market operation, is transparency. Transparency is clearly an institutional attribute, which is distinguished from accountability or predictability, though it reinforces the power of the other two previous attributes.

In this research, two aspects of transparency are all extended by this concept. One is informational transparency. The other is procedural transparency. Informational transparency indicates the disclosure of information, which precludes fraud conducts and reduces the possibility of agency problem and moral hazard, stemming from information asymmetry.

Procedural transparency indicates mostly juridical effectiveness of legal right enforcement, which is supported by the absence of complication, confusion or inconsistency in legal procedures or juridical system. Complicated juridical system and grey areas in legal procedures tend to foster junky hazardous lawsuits, which blur the procedural transparency.³

The fourth market attribute of the market is fairness, which describes fairness of the rule governing competitive order in the market. Since the main layer of market structure is competitive order, the fairness of competitive order

² The adoption of this order should eventually be supported by empirical validity. That is, to the extent that market attributes of JR decisions are well captured, empirical validity is considered gaining support.

³ These sorts of legal hazing cause high transaction costs to market activities in the countries where juridical districts are separated in each of different states and legal procedure follows common law system, e.g. the U.S. than in countries where legal procedure as well as juridical system is unified into a single system such as Korea.

indicates one of essential elements of market institution.

These four are considered essential attributes of market institution.

The following six are supplementary attributes of market institution.

Institutional efficiency indicates functional efficiency of market institutions. Often, institutions are overlapping and conflicting in the statutes or functional operation steps. Institutions are often inconsistent each other. There are institutions, which are outdated and do not correctly reflect the reality. Corrective actions on such contortions either by legislation or judicial decisions improve functional efficiency of the market.

Competitive environment describes another operational feature of market institution. Institutional structure could draw its operational energy from adopting hierarchical system or from the operation of competitive system. Improvement in competitive environment draws closer toward the rule of law.

Private/public composition is the third supplementary attribute of market institution. Increase in public composition attenuates the environment of market institution.

Squeezing discretion toward legalism describes the improvement in competitive environment of the market and facilitation in establishing the rule of law.

Liberty level describes development stage of individualism and liberty level.

Lawlessness indicates the situation where law enforcement is blocked due to ineffective legal system.⁴

Institutional Structure Spanned by Legal and Market Attributes

These two tenets of institutional attributes, when combined together, provide a useful analytical tool. Table 1 displays institutional structure of the market each pair of the combination of two tenets of attributes creates in combination. For the brevity of illustration, the grid extended by four legal attributes and four essential market attributes are explained.

Property

⁴ Most frequent cases of lawlessness in Korea are unlawful conducts in sites of labor union strikes.

Table 1: Institutional Structure Spanned by Legal and Market Attributes

Legal/market attributes	<i>Property</i>	<i>Property(indirect effect)</i>	<i>Contract</i>	<i>Tort</i>
Accountability	appropriability of ownership right and legal obligation; policy measures directly stipulating on property relations; corporate governance; public ownership	policy measures indirectly affecting property right relations; inflation; differential taxation; inconsistent-unpredictable change of policy	pre or post contractual asymmetric information; pre or post contractual opportunism	negligence-liability appropriation
Predictability	institutions directly affecting the predictability of future value	institutions indirectly affecting the predictability of future value	predictability of the effectiveness of contract relations	predictability of the effectiveness of negligence-liability relations
Transparency	Informational and procedural (i&p) transparency, which directly affecting on property relations	institutions indirectly affecting on i&p transparency in property relations	i&p transparency of contract relations	i&p transparency of negligence-liability relations
Fairness	fairness of rules on property relations in competitive environment	fairness of competitive rules on property relations, which were affected by other policies	fairness of contract relations	fairness of negligence-liability relations

Property/accountability cell includes institutions related to the accountability issues which may arise while claiming and operating property rights. Included are institutions stipulating on ownership right and responsibility obligation. Examples are statutes on property relations, e.g. statutes and regulations on private ownership, inheritance, corporate governance, public ownership, etc.

Since all economic activities are essentially built upon property rights, any looseness in property right relation leads to the eruption of problem in market activity. Included are generic principal–agency problems to each different type of private corporations, moral hazard in public enterprises, etc.

Any judicial review(JR) decisions, which will improve the accountability of property right, is considered to invigorate market activities.

Entry into property/predictability cell includes institutions affecting future values of properties. Government administrative branch's influence on specific financial loan allocation decisions of financial institutions may be one of such examples.

JR decisions, which declare the unconstitutionality of such public authority's influence, will improve the predictability of the property right. With reduced uncertainty of property right, market vitality tends to promote.

Entry into property/transparency cell includes informational and procedural transparency which will directly affect on property right relations. Introduction of global standard in accounting and auditing rules may be an example of informational transparency. Introduction of federal judicature as integrating system to separated multi-facet state juridical system may be considered an example of procedural transparency.

Property/fairness cell includes institutions which will affect the fairness of rules on property right relations in competitive environment. A shift from lottery drawing to competitive bidding system in property right allocation will be considered to improve fairness and vitalize market activities

The column property(indirect effect) includes policy measures or statutes, which themselves are not property-related institutions but have indirect impacts on property value. Regulation policy measures, taxation policy(differential taxation on speculative activity) or frequent and inconsistent changes of regulation policy are some of such examples.

Property(indirect effect)/accountability cell includes changes of institutions, policies or statutes, which will bear indirect-effects on the accountability relations of property right. Likewise, property(indirect effect)/predictability,

transparency, fairness are defined.

Contract and Tort

Asymmetric information and imperfect foresight are two major sources, which tend to create impediments to contract-related market activities. Adverse selection (pre-contractual asymmetric information) is the outcome of pre-contractual opportunism. Moral hazard (post-contractual asymmetric information) is that of post-contractual opportunism.

Imperfect foresight has the effect of making it impossible to enumerate and contract upon all conceivable contingencies that the future will bring. [Furubotn and Richter(1997) ch.5]

These problems in contract or tort-related market activity are decomposed into the institutional structure spanned by four essential market attributes, i.e. accountability, predictability, transparency, and fairness of contracts (and six supplementary attributes) or of torts.

Market Institutions in Korea

New-institutional economics' path dependence hypotheses [Matzavinos, North, Shariq(2003)] precisely describe how Confucian culture and bureaucratic authoritarian historical backdrop as well affected the making of current institutional structure in Korea.

From the outset, market institutions in Korea followed different path from those expected in the society of common law tradition. Under the tradition of civil law system, legal system has to be established and changed only through law making procedures of the legislature.

What distinguishes Korean case is the dominating role of the executive administration in law making process as well as in law enforcement. Compared to the executive, the legislature is intellectually incompetent and politically vulnerable. Legislative bills are mostly drafted by bureaucratic branches of the executive administration. The role of the legislature has been virtually no more than gavel-tapping in law making process.

The outcome of such political system is bureaucratic authoritarian (BA in short) system. The building of BA system has been supported by the cultural

heritage of Confucianism. People have been familiar with the communitarian approach, where communitarian management follows the leadership provided by intellectually elite bureaucracy.

Such system is not well compatible with market system because BA system tends to interfere with spontaneous order. Once tamed to the privileges of authority power, the bureaucracy likely refuses to give way to competitive order, which will replace organizational system being under the control of the bureaucracy. Such BA system well combines with the interests of the politicians.

Upshot is that three sources, namely, bureaucratic infringement, political infringement and communitarian behavior have operated to make current feature of Korean market institutions (BA market institutions in short).⁵⁶

One important thing is that even the effective political representation system doesn't look effective to remedy the problems of BA market institutions. That is, despite public inconvenience and economic inefficiency, the problems in BA system tend to persist. Where should we rely on for the hope for bridling bureaucratic authoritarianism and revitalizing market system? Natural answer is the rule of law. However, in civil law system, the law does not necessarily mean liberty. It often means bureaucratic authority.

This is backdrop for why we turn attention to judicial review(JR) system.

Judicial Reviews in Korea Since 1988

Judicial review, which adjudicates on the constitutionality of statutes, passed by the legislature, or administrative ordinances and regulations, implemented by the executive branches, if their constitutionality becomes influence factor of the

⁵ Confucian communitarian behavior is noteworthy due to its peculiar character applying to the Confucian cultural heritage of Korean society. Confucianism is not merely ethical principles but also state-governing rules, which governs state by the polity of virtue and respect for managerial order under the bureaucratic leadership of Confucian scholars. Tamed to this culture, people tend to demand bureaucratic administration to deal with economic problems, and tend to shun competitive mechanism of the market. In cases of bureaucratic and political infringement, market erosion is compelled or supplied by bureaucrats and politicians against the interest of the people. However, in this case of market erosion due to Confucian communitarian behavior, it is demanded by the people themselves. It is anti-competition or anti-market sentiment of Confucian cultural heritage.

⁶ If current analytical model is applied to cases of judicial decisions in the U.S., judicial infringements, which will capture the cases of confusion in the judicature, which likely arise due to possible political influence, may be added.

court trial, had been originally established in the U.S.

German system is the copy of the U.S. system. Since civil law tradition is common in Korea and Germany, Korea could easily copy its judicial review system from the Germany.

In Korea, the Constitutional Commission was introduced from the establishment of the First Constitution 1948. However, JR system remained ineffective until current system appeared at the Revision of the Constitution in 1988. The Constitutional Court of Korea was newly formed in 1988. Nine justices were appointed.

Since 1988, 9558 cases of constitutional complaint were filed in the Constitutional Court(CC), out of which 8978 cases were settled. Out of 8978 settled cases, 5270 cases were settled by full bench decision, among which 971 cases were dismissed and in 2947 cases unconstitutionality complaints were rejected. Details of case statistics are attached to the appendix.

The CC selected 123 cases among cases, which had been filed since 1988, considering the political and social significance attached to them and disclosed precedent records of court decisions of these 123 cases. Since this research intends to investigate how judicial reviews affect on market institutions, 85 cases, which have bearing impacts on market institutions, were selected out of 123 cases.

Methodology

Each decision record of 85 cases was read. Two classifications were conducted at each of cases. Firstly, each case was classified according to causation types of market erosion, i. e. bureaucratic infringement, political infringement, communitarian behavior. For instance, bureaucratic infringement indicates the case requesting CC adjudication to determine the unconstitutionality of a bureaucratic infringement measure in the Executive administration or statutes stipulating on the authority of bureaucratic infringement. Erosion of market institutions may come from political infringement or Confucian communitarian behavior.

Two other parallel classifications, juxtaposed to cases of market erosion, are institutional inconsistency and competence dispute cases among government branches.

In civil law system, often times, some statutes of outdated law still hold

effective and create unreasonable or inconsistent effects either due to the complicatedness of statutes structure or due to incompetence of the Executive administration or political schedule of the legislature. It is labeled institutional inconsistency.

CC adjudication on competence disputes on jurisdictional authority between different branches of the state are labeled judicial leadership.

Each of these five causational types of CC adjudication request draws respective table of JR effects on market institutions. Each of 85 cases was classified into one of the five tables according to its affiliation to causational types.

Each of 85 cases was weighted from one to four according to the significance of institutional gravity weighing on the operation of the market.⁷ Weight indicates number of entry in the table. That is, if weight is three, the same case makes entry three times.

Another salience in this weight counting is distinction between positive and negative number. If CC decision is seen to extend(contract) the domain of market function, i.e., market conforming(conflicting), the entry is marked positive(negative) number. The entries of mixed sign, though rarely, are allowed, for instance, institutional efficiency(+) could be combined with suppression on legalism(-) for a specific case, if CC decision seeks improved(situational) efficiency of institution by encouraging bureaucratic discretion and suppressing legalism.

Classification of Constitutional Court Decisions by Causational Type

Total number of weight points assigned to 85 cases is 205 in aggregate.

Comparison of cases or weights among five causational types of CC decision reveals that bureaucratic infringement, with 37 cases and 102 weight points, is the largest source of CC adjudication. It indicates bureaucratic infringement is the most frequent source of market erosion in important CC adjudications.

The weight attached to individual cases in bureaucratic infringement is largest with average weight point of 2.75, which indicates discretionary measures, designed and implemented by the bureaucracy of the executive

⁷ If institutional gravity weighing on the economy is of ordinary level, 2 was given as weight. If weightily ordinary, 3 was given. Meager, isolated impacts on the economy, cases were given 1. Immense impact cases gravitating on the economy is given 4.

administration, weighs heaviest gravitation in its impact on the erosion of functional institutions in the market.

CC decisions, 72 positive points and 30 negative points, are quite intriguing. It is noteworthy that negative point indicates CC decision's endorsement of bureaucratic authoritarian policy. Although it reflects on the degree of conservatism in the judiciary, the negativity doesn't indicate setbacks to the direction of market erosion. It's because judicial decision can only endorse market erosion policy of the administration. But it cannot introduce new market erosion measure.

Appropriate assessment should be that an immense level of progress has been attained to redress functional erosion in market institutions, which was caused by bureaucratic infringement, and to contribute to the establishment of rule of law in the market.⁸

Compared to cases of bureaucratic infringement, political infringement, with 7 cases and 18 weight points, is considerably weak as source of institutional erosion of the market. However, the gravity weight impacting on market institutional erosion is not weak with 2.57 average points.

With 12 positive and 6 negative points, CC decisions have been quite correcting the erosion of market function which was incurred by political infringement.

Table 2: Classification of Constitutional Court Decisions by Causational Type

	<i>Bureaucra tic Infringem ent</i>	<i>Political Infringem ent</i>	<i>Communit arian Behavior</i>	<i>Institution al Inconsiste ncy</i>	<i>Judicial Leadershi p</i>	<i>Total</i>
# Cases	37	7	14	18	9	85
Weight Points	102	18	37	33	15	205
Positive	72	12	30	33	6	153
Negative	30	6	7		9	52
Average Pts.	2.75	2.57	2.64	1.83	1.66	2.41

⁸ If positive weight points are zero, it indicates no progress in the function of market institutions. Seventy two positive points with thirty negative points indicates overwhelming progress.

With 14 cases and 37 weight points, cultural factor, i.e. Confucian communitarian behavior, is not an insignificant source of erosion on functional institutions in the market. Impact on the market institution is strong with average weight point of 2.64.

The legal institutions of civil law system often do not match reality. Sometimes, there are inconsistencies, conflicts or even lacuna among operating statutes. Frequency of CC adjudication, with 18 cases and 33 weight points, is a natural consequence. Cases are not necessarily those directly related to functional institutions of the market, average weight point being low value 1.83.

However, all decisions of 18 cases were market conforming(positive points). The CC was not hesitant to correct defects of communitarian behavior and take market conforming steps to the improvement of institutional functioning of the market.

Some of CC adjudications, 9 cases, which were classified to judicial leadership type, are not directly related to market institution(average weight point of 1.66). Particularly, competence disputes among public institutions are the examples. Despite the decisions' remoteness from market functioning, these CC decisions contributed to the establishment of CC leadership, which is desirable outcome in transition path leading to the rule of law system.

Erosion of Market Institutions by Bureaucratic Infringement

In Table 3, the gravity of CC adjudication concentrates on essential attributes of the market. In the grid block spanned by essential attributes of the market(accountability, predictability, transparency, fairness) and legal attributes[property, property(indirect effect), contract, tort], subtotal 45 weight points(25, -20) are mounted out of total 102 weight points(72, -30).

Specifically, property right is the central legal attribute, on which most of CC adjudication cases concentrate. Property and property(indirect effect) combined together, 38 weight points(12,-12 and 10,-4) out of block subtotal 45 weight points centers on property right cells.

Within essential attributes category, accountability and predictability are central attributes. Particularly, accountability gains 18 weight points(10,-8) out of 45 weight points of essential attributes. Predictability gains 13 weight points(8,-5).

Table 3: Erosion of Market Institutions by Bureaucratic Infringement

	<i>property</i>	<i>property</i> <i>(indirect</i> <i>effect)</i>	<i>contract</i>	<i>Tort</i>	<i>Subtotal</i>	<i>human</i> <i>right</i>	<i>total</i>
accountability(also , firmness of value)	6, -5	3	-2	1,-1	10, -8	6	16, -8
predictability	4,-3	3,-2		1	8, -5	4	12, -5
transparency	-1	2,-1	1		3, -2	1	4, -2
fairness	2,-3	2,-1		-1	4, -5	5, -1	9, -6
subtotal:essential	12, -12	10, -4	1, -2	2, -2	25, -20	16, -1	41, -21
institutional efficiency		1, -1	-2	1	2, -3	1	3, -3
comp environment	1, -1	1			2, -1	1	3, -1
private/public composition	1				1		1
squeezing discretion toward legalism	5, -2	5		3, -2	13, -4	7, -1	20, -5
subtotal:suppleme nt	7, -3	8, -1	-2	4, -2	19, -8	9, -1	28, -9
liberty level less lawlessness		1			1	2	3
total	19, -15	19, -5	1, -4	6, -4	45, -28	27, -2	72, -30

If weight points counting is extended to include supplementary market attributes, 58 weight points(19,-15 and 19,-5) out of subtotal 73 weight points(45,-28) belong to property right related CC adjudication.

In nutshell, property right is the central category of market institutional issues, on which most important CC adjudication decisions concentrated during last 25 years. Particularly, accountability and predictability of property right turns out to be central market attributes.

At first look, the market conformity of CC decisions in essential attributes block, with 25 positives and 20 negatives, doesn't appear very impressive. However, still this much weight points and sign ratio should be considered big steps toward market conformity.

If some important BA statute is declared unconstitutional, replacement legislation as well as sweeping system changes should follow to fill the administrative vacuum, which, in many cases, is technically and politically unrealistic. This ratio(25,-20) is less market conforming compared to market conformity of total ratio(72,-30), which merely indicates greater difficulty of the reform in market institution than in human right reform.

Human right cases are not directly connected to functional attributes of market institutions. However, market activities prosper only upon the protection of human right. In this regard, the effect of changes in human right condition upon institutional attributes of the market is counted.

Considerable gravity of CC adjudication centers on human right related issues, e.g. 29 weight points out of total 102 points. It is remarkable that most of CC human right related adjudication decisions were market conforming. 27 weight points out of 29 points are positive.

It is not surprising that 'squeezing discretion toward legalism', with 17 weight points(13, -4), gathers heavy weight among supplementary attributes. Decisions of the CC seem to reveal their preference to suppress bureaucratic discretion and favor legalism in adjudication on bureaucratic infringement cases.

Erosion of Market Institutions by Political Infringement

As in the case of bureaucratic infringement, CC decisions concentrate on essential legal and market attributes in cases of political infringement. Out of total eighteen cases(12,-6), 9 cases(5,-4) belong to this essential market attributes block.

The gravity of property right cases is less evident in political infringement block. Only four weight points, out of nine points, belong to property right related decisions. They are all negative numbers, not very market conforming. On the other hand, market conforming decisions in contracts and torts cases, with all 5 positive numbers, are comparable.

Table 4: Erosion of Market Institutions by Political Infringement

	<i>Property</i>	<i>property</i> <i>(indirect</i> <i>effect)</i>	<i>Contract</i>	<i>tort</i>	<i>Subtotal</i>	<i>human</i> <i>right</i>	<i>total</i>
accountability(also, firmness of value)	-2		1	1	2, -2	2	4, -2
Predictability			1		1	1	2
Transparency							
Fairness	-2		1	1	2, -2	1	3, -2
Subtotal:essential	-4		3	2	5, -4	4	9, -4
Institutional efficiency							
comp environment			1		1	1	2
private/public	-2				-2		-2
composition							
Squeezing discretion toward legalism							
subtotal:supplement	-2		1		1, -2	1	2, -2
liberty level							
less lawlessness				1	1		1
Total	-6		4	3	7, -6	5	12, -6

In this essential attributes sub-block, market conformity of decisions, with 5 positives and 4 negatives, is still considerable, though the ratio is below the average of the total, 12 positives and 6 negatives. In political infringement cases, market conformity in essential market attributes(5,-4) and legal attributes(7,-6) are more difficult to achieve than in human right related attributes, where 5 weight points are all positive.

Erosion of Market Institutions by Confucian Communitarian Behavior

In societies with Confucian cultural heritage, often, the communitarian approach, which relies on administrative discretion, is adopted rather than

relying on competitive procedure combined with strict application of rule of law.⁹ However, due to lack of objective standard to determine ‘properness’, the concept of which to be applied to administrative discretion, such communitarian approach often encounters disputes between conflicting interest parties.

Essential market-legal attributes block is again most active in Table 5, with sixteen weight points out of total thirty seven points. Two features are distinguishing in this case of market erosion by Confucian communitarian behavior.

One is apparent increase in relative weights of contract and tort cases compared to property cases. Seven weight points out of subtotal 16 points(13, - 3) are contracts(2) and torts(5).

Since this categorical type is the replacement of market institutions by communitarian administration, the cases seem more frequently related to contract or tort problems than to property related problems.¹⁰

The other distinctive feature is market conformity of CC’s affirmative decisions. Out of all sixteen weight points, 13 points were positive. CC Decisions do not tend to endorse Confucian status quo position.

This trend seems to reveal undoubted philosophy of the CC, which tends to return to the rule of law system if communitarian approach drifts due to the deadlock after encountering the conflict of interests.

Not surprisingly, human right cases are legion in this categorical type with 12 weight points out of subtotal 28 points. Decision patterns are similar. Out of total 37 weight points in this category, 30 weight points are positive and only 7 points are negative. In case of disputes, the CC is prepared to turn the institutions toward the direction of rule of law system.

⁹ This is distinctive elements of fundamental difference from the society with individualistic cultural tradition.

¹⁰ One example is labor-management disputes. In the communitarian administration approach, the mediation role of government or of third party is called for and considered appropriate. The interruption into otherwise private firm’s problem is justified as such.

Table 5: Erosion of Market Institutions by Confucian Communitarian Behavior

	<i>property</i>	<i>property(indirect effect)</i>	<i>contract</i>	<i>Tort</i>	<i>subtotal</i>	<i>human right</i>	<i>total</i>
accountability(also, firmness of value)	1, -1	2	-1	2	5, -2	3	8, -2
predictability	1	2		2	5	4, -2	9, -2
transparency							
fairness	1	1	-1	1	3, -1	2, -1	5, -2
subtotal:essential	3, -1	5	-2	5	13, -3	9, -3	22, -6
institutional efficiency	1				1	1	2
comp environment						1	1
private/public composition							
squeezing discretion toward legalism		2		1	3	-1	3, -1
subtotal:supplement	1	2		1	4	2, -1	6, -1
liberty level							
less lawlessness		1			1	1	2
total	4, -1	8	-2	6	18, -3	12, -4	30, -7

Institutional Inconsistency

Most of unreasonable(inconsistent, conflicting, outdated) institutions or institutional lacuna exist in human right cases. There are only a small number of property right cases. Because unreasonable institutions cannot remain unaltered for long time in areas where economic interests conflict acutely.

Table 6: Institutional Inconsistency

	<i>property</i>	<i>property(in direct effect)</i>	<i>contract</i>	<i>tort</i>	<i>subtotal</i>	<i>human right</i>	<i>total</i>
accountability(also, firmness of value)	1				1	4	5
predictability	1				1	2	3
transparency	1				1		1
Fairness	2				2	13	15
Subtotal:essential	5				5	19	24
institutional efficiency	2			1	3	3	6
comp environment private/public composition squeezing discretion toward legalism						1	1
Subtotal:supplement	2			1	3	4	7
liberty level less lawlessness						2	2
Total	7			1	8	25	33

Again, it is reaffirmed that property related institutions are most weighty field where more accountable, predictable, transparent, and fair institutional improvement is required. All five weight points of essential attributes block belong to property right cells in Table 6.

Human right cases occupy most of inconsistent institution type of category. Out of total 33 weight points, 25 points belong to human right cases.

Prominent feature in this type of classification is the market conformity of CC decisions. All the cases, all 33 weight points are positive. In all of cases, CC decisions invigorates rule of law approach and competitive system. The results are quite convincing because in case of unreasonable institution, CC decisions

merely corrects institutional defects since there does not exist any pressure to protect status quo.

Judicial Leadership

Most of cases belonging to this type group are adjudication on competence disputes on jurisdictional authority between government branches. Even internal competence disputes in the legislature were brought to the CC for the adjudication decision.

The response of the CC in such decisions seems quite cautious. Because of the principle of separation of power, the CC's decisions on competence disputes among different branches of the government, particularly, between the legislature and the judiciary and between the executive and the judiciary, seem to shun off from outright decisions, which is why negative numbers are overwhelming. In total, 9 minus weight points are compared to 6 positive points.

Despite this cautious step of actions, the judiciary seems to have secured the foundation to establish leadership over the legislature and the executive in navigating the democracy of the state by adding the function of constitutional review to the jurisdiction of the judiciary.

Table 7: Judicial Leadership

	<i>human right</i>	<i>judicial leadership</i>	<i>total</i>
Essential attributes		-2	-2
Supplementary attributes		-2	-2
liberty level	-1	1	1, -1
less lawlessness	-1	-1	-2
Subtotal 1	-2	1, -5	1, -7
over executive		2, -1	2, -1
over legislature		2, -1	2, -1
sovereignty		1	1
Subtotal 2		5, -2	5, -2
total	-2	6, -7	6, -9

Concluding Remarks

In this research, a decomposition of market institutions is undertaken into 5 legal attributes and 4 essential market attributes and 6 supplementary attributes. Application of this model to 85 cases of CC decisions in Korea since 1988 enabled the investigation on the impacts of the operation of JR system on market institutions.

This research approach opened way to provide empirical evidence when to determine if any institutional change contributes to the improvement of market institution. The research results reveal that the legal order supporting competitive system has been improved in Korea due to the operation of JR system.

The practical value of this research approach is remarkable because neoclassical measurement approach to prove the need for institutional change has only limited use value.¹¹

The implication of research results is considerably enlightening.

Traditionally, a prejudice is that the bench is defensive of existing institutions so that expecting market-conforming institutional reform from the bench is presumed far from realistic. However, the investigation on JR records reveals the falsity of this presupposition.¹²

It is also noteworthy that changes in legal order according to CC decisions very often attain Paretian improvement rather than conflict of interests on the contract curve.

¹¹ If market economy is considered legal order to operate competitive system, institutional change has to follow the logic of legal order. Often, it is not possible to make partial or isolated institutional replacement. Sometimes, such institutional change has to be restrained by the condition of path dependence. Sometime, it is subject to historical, political, cultural condition. The approach to prove operational efficiency of legal order is more useful than approach to measure and compare the efficiency of a partial institutional change.

¹² What happened ? One possible explanation is that not much room of rent-seeking exists in this procedure of judicial review, which seems to put justices in relative neutral position. [D. Mueller(2003), Tullock(1967c)]

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Case Statistics of the Constitutional Court of Korea

As of Dec 31, 2003

Type	Total	Constitu- tionality of Law ¹⁾	Im- peach- ment	Dissolu- tion of a Political Party	Compe- tence Dispute
Filed	9558	472			20
Settled	8978	434			16
Dismissed by Small Benches	3335				
Decided by Full Bench	Unconstitutional ²⁾	249	83		
	Unconformable to Constitution ³⁾	74	25		
	Unconstitutional, in certain context ⁴⁾	44	15		
	Constitutional, in certain context ⁵⁾	28	7		
	Constitutional	755	186		
	Annulled ⁶⁾	198			2
	Rejected	2947			6
	Dismissed	971	19		6
	Miscellaneous	4			
Withdrawn	373	99			2
Pending	580	38			4

1. This type of "Constitutionality of Law" case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the CC.

2. "Unconstitutional" :

Used in Constitutionality of Laws cases.

3. "Unconformable to Constitution" :

This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.

4. "Unconstitutional, in certain context" :

In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.

5. "Constitutional, in certain context" :

This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".

6. "Annulled" :

This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

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