QIKJS-Part.III.J

Qualitative Inquiry of Korean Judicial System

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A Journal Article and Critique

A Background for this Journal Article Critique

One article for the purpose of this assignment excited me much since it made a critique reflexive around the days. The practice of critiquing is an important attribute of scholar and may well segment the academic world from the secular society. We may punish or insult in neighborly lives, but generally keep away from critiquing the occurrences or events we experience. It is, however, a prime engine that (i) scholarly knowledge will be constructed (ii) new discoveries or findings will be made motivated and feasible (iii) eventually a better understanding can be formulated.[1] Depending on the method and attribute of articles in particular, the general tip of advice for best practice of critique may vary, but it is generally a good standard to comply with the rubric along four traditional sections including the literature review, method and research design, results, and discussion (Pyrczak, 2009; Writing a Support Services, 2015). One article under my review deals with the constitutional history of independence years in Korea, and one of noted scholars in this field similar to L.M. Friedman in the US context. His scholarship is, nonetheless, critical for that of the mainstream of legal discourse in Korea, even if in view of his specific field often considered more critical than the general attitude of legal scholars (Kim, 2014a,b; 2015a,b). Given the author is critical and very appealing to my feel of perfection, it would be somewhat odd to add a critique of mine, but was chosen if we know the work of critiquing. I would rather proceed to review or critique because; (i) it has relevance with my doctoral research and (ii) I may possibly suggest

[1] As the critique guide elicited, the importance to develop good skills in scholarly critique arises from many standpoint of views (i) use in the peer review process prior to publication (ii) use in the tenure system common in traditional colleges and universities (iii) no perfect research per se (iv) critical literature review leading greater exposure of audience to understand the current state of knowledge (v) use to make research himself to become a better reviewer of his own drafts (vi) use in the dissertation purpose (vii) a fit to make a scholar-practitioner critical consumers of literature as a decision maker in the field (viii) relationship to the doctoral level scholarship.

improvement, especially in view of the interdisciplinary perspective as a policy researcher.[2] When we come to the mind of critique, we perhaps normally imagine between the kind of "rags to riches" entrepreneurs and homeless people. Besides these broad-strokes minds, my topic is interesting that will be striated into a distinct domain of interest, such as Korea, legal system and policy or interested players, which is not exactly same with the general minds. The author pointed out the ostentatious circle of legal authors as text enslaved and blind adherent for common myths, who would be fallible from the objective veneer into which they usually slip into. However, he is one of most accepted scholar in the legal academia of Korea, paradoxically more than revered despite his strong impression as an acid legal critique in his field. The structure of general minds between the haves and have-nots, and sensibility of critique to lean on have-nots are less quite fitting in the world of academia. This is partly evidencing the importance of critiquing for the researchers and professors to make his career successful. Also corroborating is that there are separate journals to allow the study circles and groups of legal scholars to play on his tone and metaphor and even in terms of his scholarly beliefs.[3] This understanding needs to be presumed on my dissertation purpose since the legal scholars are fairly an influential authority to affect the policy side approach of PAKJS in terms of system design and constructive criticism.

On the Author's Dealing

The article, as inducted, relies on the hermeneutics of texts and articles that the author critically interprets and analyzes to construct his theme and suggestion (Lee, 2014). The author cited a large number of scholarly works that the citations seem to be appropriate to his topic. The literature primarily needs to be drawn upon the current sources unless the works cited are foundational for the research design and in terms of theory. The author has not breached this general standard, and the author particularly seemed to do a best practice that chose citations judiciously beyond its quantity. The chapters had been structured passing without the methodology section, but prior researches were extensively surveyed to support his problem

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[2] As the Walden guide tells, we need to rethink that it must be a good study if a study has already been published in a peer-reviewed journal. It is instructive to recall, "there is no such thing as a perfect study….not guarantee that it is necessarily sound in all aspects." In my case, it is a good lesson, "studies may be good, but all studies have areas for improvement."

[3] This does not reject that there are a mainstream of the legal phenomenon, for example, hierarchical supreme court with a clipped prose style to rule within the common law countries and politically generated statutes to impose a corresponding responsibility of judiciary to compel the respect of public wills. The follow-ups of academicians to interpret, analyze and criticize them to write their journal articles would probably build up the main theme of jurisprudence in both legal traditions. I would like to pinpoint two points relevant with my topic. This characteristic of law people are fairly biblical and text based, whose approach is to search the briefs of counsels or court record in case of judges and text based in case of law professors. The work to reach his mental saturation in terms of epistemology is heuristic or somewhat hermeneutics within their intellectual minds and attitudes. This supports the selection of my method as essentially related with the legal professionalism besides the policy aspect of discourse. In a second point, the argument of author is resounding about the general fallacy of legal scholarship that simply reinforces the unconsciously masked discourse of professional terms based on a sort of legal texts, documents and materials.

statement. He raised his skepticism in chapter II that the current understanding of Jin-oh Yu, often considered a major figure to draft the 1945 constitution laying the first republic on the land, is not perfectly correct. It is his problem that has to be addressed with more than the evidence-based research (2014). He argued that it could be merely a parable if to allege him to be comparable with American way of "founding fathers." In other words, he perceived it skeptical that we may properly ascribe him as a Korean founding father[4] of national constitution, which is sensational and repugnant to the prevailing notion of Korean public. This common perception was initially challenged by the administrative research team around 1948, whose members worked together with Yu because they had been seen as tainted or disqualifiable for their previous career under the Japanese rule. This means that they were an important working group, while Yoo's principal use was just on the nomenclature purpose of borrowing his clean name. However, this argument was later rejected that a fair extent of draft was filled up with the ideas and proposals of Yu (2014). A critical scholarship to counter the role of Yoo was refueled by K.J. Lee, who degraded the qualification and contribution of Yu in establishing the national system of constitutionalism. A repercussion from his radical depreciation of Yu against the prevailing view, however, was not great. The debate of KFF (Korean founding fathers), however, had escalated centering on the dualism between the "creationist theory" and that of "historical continuity" as well as American type of understanding based on the terms, say, KFF. A thought to integrate the controversy something like the American's began to hold a new highlight for the politicians of independence period other than some kinds of earlier professionalism.[5] The believers in this line of recognition, notably Y.I. Yu, argued that S.M. Lee, the first president of nation, should truly be a KFF (2014). H.K. Seo and M.L. Park, in their collaborative work, asserted that S.A., Cho, S.M. Lee, I.H. Shin, and J.O. Yu, mostly politicians except Yu, should truly be four founding fathers of modern Republic of Korea, in which S.A. Cho is viewed as the father of Korean constitution in lieu of Yu. This radical and deep research to reconstruct the Korean constitutionalism has brought, the author viewed, a countering response that the Korean constitution was not created artificially by several leaders, but must be viewed on the continuum of history and evolutionary civilization.[6]

The author critiqued a prior research based on the stringent dualism from his middle way standpoints (2014; Pomeroy, 1955). First, he argued that such epoch of creating the

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[4] This fallacy was created by T.Y. Han in 1970's based on the official title of constitutional draft for the approval of KNA (Korean National Assembly). This understanding had been reinstated by many prominent authorities of constitutional law circle, such as H.J. Kim, K.S. Kim, H.Y. Kye, and Y.S., Chang, through the present.

[55] Lee and Korean scholars approach the issue of KFF between the politicians and expertise of drafters. This contrast would be plausible to describe the Korean controversies, but can be unfit within the American history provided that most of founding fathers in US are not only politicians, but also lawyers.

[66] W.C. Shin and S.Y. Kim proposed a new understanding that the concept of man-created constitution should be converted as the evolution of constitutional science. In this viewpoint, the temporal government in Shanghai through the period of Japanese rule can be incorporated as a prototype of constitution and tradition.

modern form of national constitution should not be blurred by alleging merely a Darwinian evolutionism of science concept. In other words, it is the kind of significant occurrence that is better received in terms of national will or determinism other than the notion of evolutionism or progressives' notion. Second, he also questioned on the limitations of dualism in that the approach is formalistic losing an insight and empirical or objective assessment that should have dealt with the extent of role exercised by Yu, which is any most critical query in this field of scholarly interest. Based on his critical review of prior research, he evaluated Yu's role and influence for founding the first constitution in Korea. He illustrated a plenty of artifacts and historic documentation, which have much implications in terms of policy process and professional knowledge as an important attribute in this area of policy formulation. The remaining chapters had been devoted to two subject matters of independence constitution in terms of continuity and creation theories. His focus was made on the constitutional structure of government and the national economy that was debated most intensely in a drafting work and subsequent approval of KNA (Korean National Assembly). In due course, the author provided his points of critical analysis given his prelude that was stated to be formalistic. Within the structure of dualism, he argued, based on his critical reading and analysis, to propose a better understanding of the constitutional history around the independence years (2014).

A Critique: Insights and Implications for My Dissertation Project

The work provided a number of insights and implications to influence my dissertation process. First, it thrusts the important differences from other policy areas that involved the thesis of constitutionalism and roles of founding drafters. The judicial system of nation generally depends on the language of constitution, which is significant to shape the basic paradigm of national judiciary and subsidiaries. The event has a trait that coincides with the PET (punctuated equilibrium theory), in which the agenda setting is newly revolutionized from the previous pattern of incrementalism. The political will and environmental context relating with the policy making or adoption will be the most important factor that will interact or process a policy agenda. Around the years of author's interest, the national politics were revolutionized by altering the Japanese rule and interrupted from the previous feudal or Korean imperialism (Chatterjee, 1993). Ne exposure to or discipline from the long history of western democracy had been available for the Korean public, but only new hope with the modern democratic constitutionalism can be made feasible by the liberation army and charisma of independence political figures (Pomeroy, 1955). This kind of desperation can be remedied, in my appreciation, by leaning on the "knowledge and learning" more than the experienced and normalized period of public administration. A heroic figure of Yu was also made feasible which is considered to characterize this kind of predicament. For example, the alleged pirate, Drake, could save a country by destroying the Invincible for the British hegemony thereafter. Yu might be made a puppet, as argued by the tainted members of administrative team, to soothe the conflict of different ideologies and intersected pressure from powers. An imperial state of Manchuria and East Indian companies to exploit the colonial lands would be the kind of mask to hide the real intent and process of powers (Geschiere, 1998).

This hypothesis suggests that the Japanese heritage, their officers of Korean national, and learned intelligenza still had been pejorative with the implied power and hindsight of their superiority over the inexperienced and less cultivated neighbors. Yu actually would not be a prominent scholar of constitution, but with merely some years of legal study. Despite this

psychological guess, Yu's role seems very stark to impact profoundly by structuring the basic aims and directions of national constitution.[7] In my thesis purpose, it is resounding that the policy actors with the background of law, such as lawyers and law professors including a legal student like Yu, tend to make a decisive role, unless (i) the political interest involves unusually with a mightier political figure, often dictators or national charisma, such as S.M. Lee[8] and (ii) especially for the moment in which such PET occurs to interrupt the existing policy paradigm into any new agenda setting, and (iii) on the characteristic that the environmental system is a point of crucial contention and also important source of impact – international politics around the imperialism and emerging threat of cold war terms, political enmity of power contenders for the presidency or national chair, and military rule of occupying force and bureaucratic traditions or system on the continuum of Japanese rule (Pomeroy, 1955). The author's account also corroborates the traditional policy process theory that the role of congress is virtually decisive to terminate the policy contention and disagreement. However, it is equally true that the professional sagacity and proposals on the legal knowledge are neither neglected nor easily repudiated by the congress, which, I consider, a little distinct as a collegiate body from one man office. In the process, Yu's role was active and prominent that the congress frequently called to audit his opinion and views on the desired constitutionalism. His enthusiasm, as the author argued, affected the voting preferences of national assemblymen, and many points of his opinion were accepted by a great margin of votes.[9] One other insight is that the distinctness of policy process, i.e., critically relying on the professional suggestion and ideas, would closely match up with the PET theory meaning that the judicial system is conservative and more virtuous of less frequent change unless the extraordinary and compelling change need of policy environment occurs.

This trait brought no significant policy change involved with the KJS thereafter, but only with subsidiary revamp incidental to the revision of national constitution motivated by more overwhelming need of charisma or militaristic government. The transformation toward the truly liberal and democratic form of government around 1980's and early of 1990's cast the convincing evidence that the environmental system or PET theory is important to affect the policy process or diffusion of innovation (Geschiere, 1998). A globalization and liberalization of market for the level playing field with the western countries alarmed the administration that pushed forward the reform of KJS. Despite many points of policy side exploration as above, they generally had been unattended because of the author's specific aims and focus. The article

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[7] As the author expounded, the scholarship of Yu and his status as an authority of constitutional law had decisively influenced the policy process of adopting the first national constitution. He was assigned to make a keynote speech in the orientation session of KNA that explained the purpose and content of draft.

[8] For example, the author considered an important revision made by the drafting committee as significant to assess the role of power and professional servitude, which changed the initial provisions of parliamentary system of government into the presidential one. p. 62.

[9] J.H. Lee, the national assemblyman of first congress, recalled, "the peer members had been ignorant of the basic terms of modern constitutionalism and corresponding Korean needs. They just faithfully listened to the presentation of Yu."

is viewed as a model for the qualitative investigators on the text interpretation and manner of documentary examinations. Very impressively, he singled out the importance of historical eyes to on the public cognition of norms within the interpretive or comparative work of biblical studies or texts. It can serve an author's purpose to bridge the past with current that enables to construct a precise understanding of constitutional history. Equally, his emphasis on the historical appreciation is methodologically insightful for the projected researchers, who investigate the essence of historical stages for the commonality and interconnectedness. For example, through the article and especially if concerned of the presidentialism of US model, we can imply of the political influence of US politics and culture as well as educational system, and part of Japanese mixture to create the national judicial system – for example, most of basic statutes from the European origin via Japan. This replicated in the 1990's legal reform that Japan may be a direct textbook to copy the import of US law school system[10] and that the kind of cultural imperialism from the US influenced as a backdrop that Korean public admired. Nevertheless, we cannot say that it is facially inadequate or biased, because (i) the system itself can be competitive or productive (ii) it could be an evidence of national pride for the nation's rising economy and civilization (iii) it could be a safe strategy to compete in the international arena and one way to consolidate with the first and regional partnership countries.

[10] Japan had reformed the paradigm of legal education a little earlier than Korea, which could possibly be benchmarked for the Korean policy makers and provided a learning source.

References

Chatterjee, P. (1993). *The nation and its fragments: Colonial and postcolonial histories* (Vol. 11). Princeton, NJ: Princeton University Press.

Geschiere, P. (1998). Globalization and the power of indeterminate meaning: witchcraft and spirit cults in Africa and East Asia. *Development and Change, 29*(4), 811-837.

Kim, Kiyoung, Human Rights: Are They Just a Tweak for the Policy Makers or Administrators? (March 3, 2015a). European Academic Research, Vol. II, Issue 6, September 2014. Available at SSRN: https://ssrn.com/abstract=2572951

Kim, Kiyoung, The Constitution and Tripartite System of Government: From the Mutiny for the Limited Government Through the Interbranch Subtlety. (September 1, 2014). International Journal of Advanced Research (2014a), Volume 2, Issue 9, 392-401. Available at SSRN: https://ssrn.com/abstract=2574711

Kim, Kiyoung, Theories and Tenets: An Impalpable Troll for the Policy Makers, Research Officers and Administrators? (March 4, 2015b). International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS), 2014, Vol 1, No. 8, 30-50.. Available at SSRN: https://ssrn.com/abstract=2573526

Kim, Kiyoung, The Separation of Powers Principle: Is it a Lynchpin or Pushpin for the Voyage of American Public? (August 1, 2014b). International Journal of Advanced Research (2014), Volume 2, Issue 8, 887-895. Available at SSRN: https://ssrn.com/abstract=2573560

Lee, Y. (2014). Between "Yoo Jin-Oh invention theory" and "Historical continuity theory" of the Korea Constitution of 1948 – with special reference to the power structure and economic clauses. *Ajou Law Research,* 8(2), pp 55-85.

Pyrczak, F. (2009). *Evaluating research in academic journals: A practical guide to realistic evaluation (4th ed.).* Los Angeles, CA: Pyrczak.

Pomeroy, E. (1955). Toward a Reorientation of Western History: Continuity and Environment. *The Mississippi Valley Historical Review*, 40(4). pp. 579-600

Writing a Support Services (University of Calgary). Writing a critique or review of a research article, Retrieved Dec. 11, 2015 from ucalgary.ca/ssc/writing-support.