

QIKJS-Part.0.C

Qualitative Inquiry of Korean Judicial System

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As Exploratory for the Theories or Frameworks

The research on PAKJ seems timely that the judiciary or system change is hotly with the common passion about many concerned people. In this case, the judiciary includes the triad of community peers and their institutions. The prosecution offices and education or qualification of bar members came to fall within the scope of discussion beyond the judiciary in narrow sense. In dealing with the topic, my purpose is to enlighten the historical review and comparison with the framework of two doctrines as well as structural thought of modern constitutionalism. In the process, I would intend to phase out the elements of public administration involved with the judicial organization as well as the typology of Korean case on this area of public administration. The two doctrines I will utilize as the lens of analysis help to locate the status and dynamics to administer and reform the judicial organization, which I consider relevant with the theory of ideology and policy diffusion (Bell, 2006; Rogers, 2003). The discourse and public opinion about the judicial reform can be investigated when we informed of communitarianism. Often the study of laws are focused on the kind of key words, i.e., grievance, standing, concrete injury, legal remedies, and so on. It obviously comes in purview of individualism and liberty which may be seen in tension with the communitarianism. This implies that the notion on classic liberty and protection of vested rights typically had defined the role of judiciary that is not irrelevant even through the contemporary government. The communitarianism, however, should never be interchangeable with the communism, in which the lawless labor dictatorship is an ultimate ideal and the property or free contract is an evil or administered minimally to suit the central planning economy (Bell, 2003). The philosophy rather has a theoretical hold and focus on a person's social identity and personality as influenced by the community relationships. Hence it is humanity-based as adapted with the community concept while the communism may perhaps be on humanity, but as absolutely informed by the economic justice. The absolutism in this case turns down since the humanity is broad and influenced multifariously with the structure and typicality of specific community. Hence it perceives the person and community squarely on phenomena in general, in which the views or frames may arise as complete spanning from the anthropology, sociology, psychology and on. The theory, therefore, leaves the assumption of absolute materialism and denies the allegation of false consciousness as well as the acid accuse of capital exploitation. In other words, for example, the theorists in this camp perceive the anthropological influence as real and effective on humanity or

psychological element is true on humanity other than material conditions. Therefore, they think that the communism is radical and temporal idea although the impact, in terms of its methodological rigor and scientific presentation as well as the frame of thought, actually would be amazing and still effective to influence a scholarly circle of social science. The philosophy of communitarianism also now informs the law and judicial people although not extensive (2003). For example, the positive liberty and area of welfare laws or concept of entitlements may be notable. The advanced notion of this kind has been facilitated with the perspective although the realistic challenge is fairly dominant, such as financial burden of government. The voice on folk constitutionalism or scholarly highlight on the national legal culture also can be seen a part of influence relating with the idea of communitarianism. The philosophy can have much more potential to give the frame of thought concerning administrative issue of judicial organizations. PAKJ is the kind of political and social issue although it triggers the judicial organizations (Kim, Lee, Gatzhiro, Rhyu, Park, 2012). Hence the influence from the public and political arena actually leads the public discourse in this issue. The actors or players in the decision making process are ordinary lawyers or judicial elites and leadership that generally is conservative and law minded, which often contributed as a professional barrier or resilience. More importantly, the policy makers in the executive or Blue House are a prime source of judicial reform and associated with the ruling party and national assembly, in which the professionalism is operative and effective that they are generally lawyers. The voice of Supreme Court and bar association depends on the condition of national politics, in which they had been retracted through the time period of chilled political culture while the bar association can partially some facial role as a democracy watch force. Along the democratization through its settlement at the end of militaristic strong government, the autonomy of judicial branch and national bar association about their internal matters had sharply increased that even the policy makers of political branch defers to their opinion or suggestion (Lee, 2002). In some policy areas, they are, of course, constitutionally responsible to write the law, which is administrative in nature and cannot be derogated as a matter of constitution. As briefed later, the theory of policy diffusion can inform the kind of concepts so as to be dynamic and analyze the differences of time rate in different circumstances or locales, in which the actors and players are important as an adopter or social system. The factor of knowledge and persuasion as well as communication channels will be incorporated as a tool of analysis that assist with my dealings on the topic.

The Research Problem and Significance

The research problem involved with my topic is simple and straightforward. First, the kind of administrative issues are now abundant in the aspiration of better judiciary and legal professions. Second, while the many critiques or public opinions are raised, the debate often has been exchanged as fragmented or ad hoc that the systemic view is hindered with the lack of scholarly provision, such as applicable frame of policy diffusion within the PAKJ or essences of ideological and intellectual conflict involved therewith (Kim, 2009). The significance of my research also is simple and clear. By illuminating the trait of PAKJ adapted with the respective political or social circumstances, I can provide the audience with its broad picture that would be a tale of two doctrines and Korean experience. The element or trait disclosed within the story (i) guides more deep understanding of current controversy involved with PAKJ (ii) can be applied to the nations of same or similar political culture or

historic experience -- perhaps the nations of post-colonial independence around 1940 through 1960's (iii) contributed to the general theory of PAJ.

As Patton guides, the literature review would be the kind of thrust that locates the research piece as a part of intellectual heritage and helps to understand the genealogy of research within the field of interest (2002). It is an essential process to work as scholarly and the kind of rituals over every piece of work for the professional researcher. It even can be viewed as obligation that deals with the integrity, uniformity, as well as facilitation of professional communication. In other words, it has to be presumed and involved with a due professional care that allows the peer scholars to easily see the identification and points of creativity or contribution with a specific research piece. This does not mean that the research or topic should never be dealt with by other peers although the researchers often claim their merit in that way. It is sufficient to establish his pedigree of accomplishment with the existing structure of knowledge and intellectual awareness. The literature review, therefore, is required as a part of global system building for the knowledge and database, which is the kind of professional obligation or participatory process as a professional researcher (2015a,b,c,d,e).

A Library Search for the Authorities and Database

The topic I planned involves with the kind of themes, say, Korea, judiciary, public administration, which is mega scale of views. In the meso scale, we can resort with many other elements, to say, studies of historical public policy, culture, policy diffusion, ideology and community, developmental state, modern constitutionalism, and so on. The theme, of course, will be investigated with empirical data, in which I have to develop the research plan over the data collection and analysis (Lee, 2002). In dealing with the topic, the researchers are often called to establish the kind of level playing field with the scholarly community. In other words, the audience and peers expect that the deals and presentation are generally to be universal to share within the field of interest. Since I work on the particular conditions of Korea, it would be the first challenge with which I have to be responsive. Hence the theories and frameworks of western scholars inculcated with the literature review will be an important pathway in that regard. I also came with comfort that many internationally cited articles had been generated within the issues or research agenda of particular conditions. Provided if the global community is getting more familial and close with the advancement of communication technology, such as internet, the themes of particular condition, involved with the country and specific region, would arise more popularly. Although a considerable amount of source will be utilized with the Korean database, my first attempt has been focused on the frameworks that provide the lens of analysis and perspective of the research topic (Creswell, 2009). As commented, the SPP and US constitutionalism would be one most prevailing authority to govern structurally the discourse of PAKJ. In addition, I was concerned what the social scientists would have posited to inform the dynamics of issue in dimension. The first authority generally is classic, static and rigid in quality leading my interest through the clerical work or purely views of law as well as rule of *stare decisis* (Kim, 2009). This is an important divisive line between the legal research and that of public policy if the function of executive or ordinary public organization is dynamic, active, and progressive. I had a challenge with my search of literature, which is dubious with this rule of divisive line if some

articles fleshed out the ideological trait and evaluation of his works on Justice Brennan. The article is dynamic in logic and metaphor, and also includes an evaluation or suggestion for active judiciary or so. The kind of articles is even wrought by the scholars of public policy or political science other than law. Nevertheless, I discarded those articles since they principally were oriented to analyze and discuss the tendency of judgments that specific justice made over the professional lives in some philosophical favor. Hence the concern and dealings are case law oriented rather on the PAJ. Since Korea had imported the western constitutionalism upon its 1945 independence, my key word to seek the adequate frame of analysis came to hit firstly, say, policy diffusion or diffusion of innovation (Rogers, 2002). The theory seeks to explain how, why, and what rate new ideas and technology spread through cultures. There had been a mass of focus on the rural America or technology diffusion of agriculture, and the policy diffusion, in some cases, deals with that of fashion along the different regions and locales. The framework especially seems useful to investigate the functional aspect of constitutional import over the period from 1945 through 1948. For example, the five stages of adoption process are very powerful to explain the new policy suggestion of judicial reform, including the constitutional drafting in three years of turmoil, import of jury system and legal education or selection of attorneys through the contemporary debate. The five stages include knowledge, persuasion, decision, implementation, and confirmation, in which knowledge may be infused by leading scholars of law and public policy about the legal education or qualification of attorneys (2002). The social conflict about the ill effect of new law school system may pertain to the confirmation stage that now arouses an intense public forum on the national judicial exam. Especially relevant with the element of social system is it that affects the policy diffusion, in which the combination of external and internal influences, the kind of total influences, are exerted on the adopter. Besides the functional aspect of policy diffusion, one other would be sanguine to deal with the culture and ideological aspect of narrative that I realized it be pertinent to the discourse between the communitarianism and individualism. These two key words had been central and yielded derivatively ten key words listed at last. The key words would be useful to search the database relating my qualitative inquiry. Under the modern liberal constitutionalism and separation of powers principle, the queries would center on how ideology influenced the historical trajectory of PAKJ, and how the mechanism of policy adoption or resilience occurred within the PAKJ through the decades of constitutional rule in Korea (Kim, 2009; Kim et al, 2012). Google search had been conducted that I have identified two Wikipedia pages in purpose of general overview of two main theories. I also have noted important names to pioneer or develop those theories or frameworks, for example, *E. Rogers* or *C. Taylor*, *M. Walzer* and *A. Etzioni* and undergirded their main profile. Communitarianism is a philosophy that emphasizes the connection between the individual and community, in which the classic individualism is critiqued or reassessed by focusing the community relationships as an important factor to form a person's social identity and personality. Given the judiciary being placed on the tenet of classic liberty and individualism, the communitarianism would have a smaller standing to voice its influence in my case. That is because the judiciary is noble institution in common sense, and less on public administration that the judges and lawyers often rely on the logic of liberty or individual justice in carrying their role and responsibility, such as case briefing or creation of judge made law (Montesquieu, 1989; Kim, 2014). Nevertheless, it is equally true that they advance with the communitarian ethos or metaphor when they discuss the public policy issue of judiciary or judicial reform. For example, they argue on the maturation of public

conception when they urge to import common law jury system in 2005. The Korean public also had much misfortune between the ideological incongruence and dissention that led to the hate or struggle of the liberation period leadership. I mean that the Korean community around the independence years (1945-48) ailed in deep grave between liberalism and communism which affected the constitutional policy in the First Republic. The consequence had much impact on the quality of new constitution, but its impact on the judiciary in view of public administration seems less extensive. In other words, the communitarianism is less a factor to deal with PAKJ, if it widely informs a variety of social and public issues. Nevertheless, the influence had not retracted in the period of militaristic developmental paradigm that the Korean community immensely emerged into the national project of economic development, which had been uniform in pace and ethics. This means that the judiciary was officially and informally chilled in terms of due public administration, which threatened the value of judicial independence. In this period, the communitarianism may be on dual prongs at margin that one camp argued a toleration of complete liberalism until the national leap had become orbited while others disagreed that the liberal democracy is most foremost before the totalitarian scheme of national development planning (Bell, 2006). The communitarianism also lends an important frame on the reform of prosecution offices and the legal education or national judicial exams.

Some Current Turnout

In this way, the research can be a tale of two doctrines which will be combined with the SPP and Korean constitutionalism as well as empirical data. The key words allowed me to retrieve ten articles on the doctrines; (i) The other double standard: communitarianism, federalism and American constitutional law authored by Powell, K.J. and featured in the *Seton Hall Const.L.J.* in 1996 (ii) Communitarianism as the social and legal theory behind the German constitution authored by Brugger, W. and featured in the *international constitutional law journal* in 2003 (iii) For a European constitutional patriotism authored by Lacroix, J. and featured in the *Political Studies* in 2002 (iv) The communitarian critique of liberalism authored by Walzer, M. and featured in the *Political Theory* on 1990 (v) Communitarianism, social constitution, and autonomy authored by Cohen, A.J. and featured in the *Canadian Journal of Philosophy* in 1999 (vi) Liberalism and communitarianism authored by Kymlicka, W. and featured in *Canadian Journal of Philosophy* (vii) Accelerating the diffusion of innovations using opinion leaders authored by Valente, T. & Davis, R. and as featured in *Annals of AAPSS* in 1999 (viii) The social capital of opinion leaders authored by R. Burt and as featured in the *Annals of AAPSS* in 1999 (ix) Integrating models of diffusion of innovations: A conceptual framework authored by Wejnert, B. and as featured in the *Annual Review of Sociology* in 2002 (x) Transfer agents and global networks in the transnationalization of policy authored by Stone, D. and as featured in the *Journal of European Policy* in 2004. The books or articles of Korean source are plentiful that many databases or on-line books had been identified so far.

The key words relating with my studies are not clearly restrained since I am now under exploratory stage. Tentatively, I found these words are effective to retrieve relevant materials; (i) policy diffusion (ii) diffusion of innovation (iii) communitarianism (iv) judicial reform (v) organizational change (vi) separation of powers principle (vii) communication channels (viii) public administration (ix) judicial economy (x) spread of constitutionalism.

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