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Qualitative Inquiry of Korean Judicial System

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Synthesis of Literature Review

The growing scholarly concern evidences the new partnership of law and public administration. While both disciplines and schools of thought commonly provide the version and narrative to the government and the public offices, they differ in frame of thought while the function of constitutional power and responsibility has a distinctive element. For example, the judicial branch or court interprets the statute and create a judge made law as applicable to the case or controversy, while the executive or legislative create the public policy and law of general nature that is amenable to interpretation and enforcement. If we consider the law in view of civil law tradition, the judges or court are to recognize what law is and apply their findings to a specific dispute as their sheer responsibility, while the executive administers or enforces the law and the legislative makes the law, of course, of general nature (Montesquieu, Cohler, Miller, Stone, 1989). This assumption and practice constitutes the idea of separation of powers principle which stems from the civil law tradition and was embedded in the US constitutionalism. Two variants can be extraverted for clarification; (i) The common law tradition conceives of law as their case law that is created by judge, which is guaranteed as a matter of principle by the stare decisis rule (ii) therefore, we generally do not say that the judges perform a legislative function, but is considered as a creator of law. (iii) The judges, in some context, exert an ultimate authority over other branches by undertaking a constitutional interpretation. The phenomenological separation is obvious to make a distinction within the responsible scope of studies by both disciplines. The conceptual subtlety in both legal traditions and variants even bring to reinforce the tripartite scheme of government with any more salient distinction, which means, in our purpose, a due cause of differentiation between two disciplines (Antons, 2013; Haley, 2013). In other words, their role and responsibility are distinct principally because the judiciary is passive and neutral as well as based on the case or controversy restraint. That is empirically true even if we can see some dual roles or career path as a judge and secretary in case of John Marshall, and judge and legislator in the House of Lord. This study – Public Administration of the Korean Judicial System (PAKJS) -- deals with the "policy arena of judicial system" from the "perspective of public administration" that has a distinct element and historical trait and that can provide a useful view or lesson theoretically and practically (Kim, 2013). The phenomenology is distinct with the national particulars of Korean democracy. However, I believe that it can be learned usefully across the countries.

In terms of PAKJS, the constitutional reform in 1987 is any most significant event that divides the time period in any meaningful understanding. Evidence shows that the most of liberal practice in various societal and governmental sectors had been truly made possible with the new constitution (Han, 2014). Normatively speaking, the reform is simple with the shortened presidential term, removal of emergency powers vested with the presidency, establishment of the constitutional court in different hierarchy from the normal court system, and reinforcement of bill or rights with the addition of several individual rights. Nevertheless, the impact had been significant principally because it was achieved with the public demonstration and the kind of civil rebellion against the tenor of then strong president and partly because the role of constitutional court became more powerful with the rule of milder militaristic leadership. In our purpose, the political morality of true liberalism absolutely could begin with the enactment of 1987 constitution. Therefore, the communitarian understanding of Korean society would more properly be tailored with the shift of political culture and constitutionalism other than race or ethnicity and other socially distinctive elements, often attributed as an important variant on the part of US communitarianism. The trait of historical experience in Korea, therefore, incurs the characteristic interplay with both philosophies (Gibson, 2015). In the pre-1987 constitution, the contest or disagreement had been fueled more structurally and as politically more sharp that the political liberalism was virtually dead (for the militaristic period) or dormant (for the classic years) while the pre-government era upon liberation in 1945 and before the Republic may be chaotic, but ironically very liberal under the umbrella of rule of US liberation force – at least in terms of new constitutional drafting -- more on alterative and diverse visions. In this period, the framework of communitarianism and liberalism to analyze the PAKJS must be differentiated: (i) the communitarianism based on the liberal constitutionalism or modern democracy is far limited to the select of modern intellectuals, and vast of people are just a spectator or absolute followers for the opinion leaders (ii) true interchange with critiquing, complementing and agreeing would be less plausible that liberal proponents and strong leadership just came in simple dichotomy with liberalism and communism– meaning that the kind of pluralistic community with historic lessons or periodic corrections as Walzer suggest and as the kind of basin to maturate true debate on both philosophies could hardly be assumed to term the Korean reality and political culture (Kymlicka, 1988; Glass & Rud, 2012). The characteristic of environmental context before the pre-1987 constitution allows important discrepancies: (i) the agenda or issues of PAKJS would hardly be processed (ii) the formal institution was not apparently wrong, but the informal nature of practice or atmosphere involved with the judicial system was fairly subjective to the powerful administrator (iii) the reform voice or action rather is not systemized, but raised in a distorted way with the strike and demonstration of judges (iv) the organizational objective is chilled and poorly performed – even questioned if the judiciary is truly a bulwark of civil rights -- which is a most popular point of criticism (Kim, 2009; Han, 2014).

The era of post-1987 constitution brought a significant change in terms of philosophies, political culture and social biology of Korean community. The paradigm of debate and distribution of new public policy on the judicial system also began with flourishing ideas within the market and public policy making arena, which mainly was due to the change of political culture and atmosphere, informally though. It truly was seen as a new turn of political liberalism although the constitution had long been with that literary ornament within the provisions. Empirical evidence corroborates starkly, for example, a rapid increase of judicial reform agendas, and concerned articles or books as well as the government reports and

documents on the policy package of judicial system (Hwang, 2012; Kim, 2019). This progress, perhaps more properly viewed as revolutionary in fashion and effect, offers the attitude and way of approach for the policy makers and opinion leaders as more advanced, in which the version can be shared with the peers of western democracies. This does not mean the communitarian and liberalism tools of analysis are inadequate to the pre-1987 period. They can, on the other hand, be more persuasive to give an account of status and policy diffusion on PAKJS. I just mean, however, that the version in such earlier years is more extraordinary that can be variegated from the western reality and history – at least if such short time (1945-1987) on radical and fundamental disagreement (Lee, 2011; Lee 2013). Now in face of new rise on political liberalism, the western cultures experienced through the past days and new invented system or institution had been explored at the more common level with the Korean public. Although the characteristic of innovations or innovators are largely political and governmental, as well as gone with the public value and utility, the environmental system had been crucial and turned in favor of civil initiative, diversity, and based on the freedom of expression. The preliminary studies led me to identify the substantial extent of public forum and intellectual debate over a number of important public initiative dealing with the public policy of creating or reforming the judicial system, such as instituting new legal education, and statutory or legislative reform for the political neutrality of prosecution office, as well as jury trial of criminal procedure (Han, 2014; Yang, 2013). The institutions were implemented and placed in order with success, but still contended if it needs to be reconsidered or improve. At the center of debate can we see the important theme of how we view the public value and moral conditions from the Korean communitarianism. For example, we can question if the Korean public and community would be sustainable without the national judicial exam as a subsidiary method of attorney qualification and despite the socioeconomic disparity or allegedly unequal treatment of law against the deprived class of attorney hopefuls (Shinichi, 2013; 2014). Given eight times of intermittent resignation in roll, we have to explore how the historic reality of conflict between the strong attorney general and one of wickedness or racketeering could be explicated in terms of the liberalism or conservatism bureaucracy and communitarian concept of justice or justice department (Gibson, 2015). The issue had surfaced as one of most contentious political agendas in Korea except for the key economic issues, so that Korea had once earned "republic of investigation authority" as a nickname. The episode with the serial focus on *chaebol,* a Korean conglomerate, in exercising their authority, and success to jail the top managers, often superrich as most aspired by the people, made the institution heroic, and actually situated the office a key political or retributive center of this small republic. The kind of communitarian experience had been effective that needs to be taken into account between the original liberty and "ritual vent on public anger." In terms of liberalism or conservatism, it can be a due narrative to deal with the kind of inquiry why the superrich or former presidents should be a scapegoat for the new administration or Korean public. That might be on Korean tradition concurrent with political liberalism or morality as we argue on the basis of communitarianism (Sage, 2012; Wilson, 2015; Nicholson-Croty & Carley, 2015).

As we consider the conceptual framework of diffusion theory, Wejnert proposed three characteristics and 12 variables within each three that affect the diffusion of innovation or policy (Sabatier & Weible, 2014; Wejnert, 2002). The framework is convenient to delineate the more scientific way of explication in viewing the pending reform or experienced judicial system in terms of public policy and administration. I had illustrated an expensive tuition of law schools with the opportunity of social promotion which pertains with the socio-economic

characteristics. Substantial evidence shows that the growing disagreement from the law educators and concerned public ascends to justify the supplementary role of national judicial exam for a small part of share, in which the people at large can earn a qualification as an attorney with the independent study and without schooling (Yang, 2013). According to the framework, the geographical settings affect adoption by influence and applicability of the innovation to the ecological infrastructure of the potential adopter and by exerting spatial effects of geographical proximity. In this characteristic, the geopolitical settings can be a ramification of classification, especially useful to deal with the public or governmental innovations (Shipan & Volden, 2012). For example, the national anti-communism act, called anti-sedition act, had been a hyperbole with the volatile north and south relations in Korean peninsular, which is like a chameleon and with the face of Janus. The liberalism proponents would be stiffer and resilient to emancipate such biding law that may dismantle a due watch and alertness against the northern enemy while empirical evidence on the communitarianism corroborates with the substantial progress for the cooperation and peaceful reunion of both regimes. The preliminary studies, nevertheless, generally disprove the intensity of variables when we fall within the administrative issue of KJS (Korean judicial system). The issue of sedition act is either political or on the criminal justice, the issues of PAKJS would be administrative and thus neutral leading that the discourse would be affected by the legal professionalism or concept of efficacy other than the legal ideals or political reality. This pattern of policy approach and attitude of policy makers or opinion leaders differentiate the effect of variables even though both agendas are public or governmental (Makse & Volden, 2011; Ward & John, 2013). The neutrality and efficacy of public administration as a foundation of discipline and as classic in nature are translated as a more powerful theme to cover the topic in this contrast. The context nears to us as similarly when we explore the three years of national liberation period. While the political conditions had been governing to draft the major constitutional issues, such as socialistic or liberal provisions, the administrative area of judicial system had been treated fairly neutrally and modestly that the focus of drafters had been held to ensure the independent judiciary, a universal principle of modern constitutionalism and legal professionalism. In this sense, the neutrality of public administration is more stable with the state power and political support while political ideology could possibly disfigure or destabilize the legal justice, one popular thesis to view less developed democracies or nations of suppressed judicial practice. In other words, the countries, including the pre-1987 constitution of Korea, would have an experience that the neutrality of judiciary can only mean within the clerical sphere of justice issue, which may be the point of struggle hundreds years ago and with a span of time period if with the advanced peers. Nevertheless, the learning and level of policy makers are truly not only relevant, but also consequential through the history indiscriminately and in general, and especially critical upon the new political culture of post-1987 constitutionalism where we must address several important queries within the our thesis purpose (Kim, 2014;2015a,b). Overall, the two philosophies and diffusion theory of innovation or policy provide two important frameworks to clip the PAKJS in terms of its ideological heritage and political morality as well as scientific understanding of adoption or resilience.

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