

QIKJS-Part.V.H

Qualitative Inquiry of Korean Judicial System

Kiyoung Kim

Professor of Law and Public Policy

Dept. of Law, Chosun University

Gawng-ju South Korea

Drafts of Documents

A discourse involved with the PPKJS would properly be viewed in the middle of state and political economy, and more prominently the kind of theories through the expert group or its consequence with the politics. I am also scratched into the thought of critical theory that deals with the actors or interest holders in view of the environment or influence. An extension might be deeper with their socio-cultural identity in face of sufferance and transformation over the age. Under this backdrop, one interesting query through the research is how the liberalism or neo-liberalism can shake hands with the communitarian thought. That is because the communitarian thought can give a compromise, and the feral phenomenology destined with the modern capitalism can be comingled with the particulars of state, philosophy, sociology and history. Scholars in this line of thought had held a focus on the new land and compete with the political liberalism or mounting of neo-liberal school since the late 1980's. They would think that the community of US can be identified and defined a distinct community, in which the ideals or values could be generated. Given the political liberalism had parlayed the civil society and modern democracy, communitarianism can provide a basis of philosophical critique to deal with the specific community. As Walzer deplored, the liberalism, or neo liberal discourse if not to be out of his scope, needs to be periodically revisited that some development may be rebuffed as to harm the value of nation, or if others could be incorporated.

The deals of academy in this concern would only be feasible, in my view, if the community has an aspect of sharing, tradition, or various common elements of society, such as gene or ethnicity of nationals, common public education, social mobility of various states within the nation, as well as affordable terms of national history to any tradition. Two implications can be relevant with my story. First, Korean history is not such long if the US has a treasure of constitutional history since its beginning of 1789, and even could be more projected into the colonial experience. Her history is richer and denser than Korea, if we are narrowed excluding the myth of feudality or monarchy in Korea. Nevertheless, the findings would support that the common sense or value system to deal with PPKJS can largely be laid out that proves the hypothesis of expedited implant and

cultural transformation in the area of judicial administration. Second, the struggle or fight with the challenge of value system can be similar with the western father culture, but with the important steer of post-colonial and importing nations given its non-economic nature -- quasi-political or institutional -- other than the matter of political branches, say, president or congress. The judiciary and judicial system are political as one of constitutional organs that the article III of US Constitution bears their status. In other sense, they are more institutional or In-Art concept of responsibility that delivers a distinct nature of public power and function (Kim, 2014a,b; 2015b,d). This hybrid sense can name them “quasi-political” as adequately.¹ The federal staffs are nominated and the state judges would be elected, which I consider impels to think as one of possibilities in the future KJS, for example. Second, the communitarianism can be a furnace to deal with the braches of philosophical thought that would be political, but with the particulars of state, as this theory is assumed. As we see, the state is any distinct object that had long been critiqued of its illusion, hypocrisy or its fatal fallacy to conspire with the capital. The Weberian ethics of public officer had been spawned amidst this conundrum, but rather focused on -- in the least toned with -- the bureaucracy, say, distinct expert group on the duty, and relationship concerned of public administration. The communitarianism can be more encompassing, in my thought, than the Weberian notion, which is pertinent to help understanding or critiquing the policy process of PPKJS. The theory may not be universal as focused on the US or possibly other specific nation, but has strength to assess the Korean experience and transformation.²

¹ Given the wholesales of staffing practice based on the nomination and appointment in Korea, it may not mirror the origin of US democracy or constitutionalism. The federal judges would be appointed by the President and approved by the Senate in US, but the state judges are elected in many states. In this aspect, Korea could be gone same with the federal practice in staffing the court, but the general preference of nationals on politics and election might incur a challenge to revise the current system of appointment method by the chief justice of KSC. Interestingly, staffing of judges by the appointment of president in the chilled period is one of carnage that had been struggled for securing the judicial independence, classic belief or the kind of sacred institution through the contemporary constitutionalism. The locale of appointment power has been argued as coupled with the budgetary independence of judiciary that shaped a vertebrate of critical discourse over the struggling period. It is no longer contended since the head of judiciary has been empowered of that prerogative with an express constitutional provision. A budgeting of courts also had been improved with new codes and practice that has seen much progress over the transformative age and 1989 constitution. Korea’s distinct path from the US model would underlie the difference of system on national administration between the federalism and singular form of government. Then this kind of software ingredient within the judiciary and judicial system may raise a stake, in my findings, whether Korea would be gone with the active or more political kind of federal judiciary, or French type of clerical judiciary, or symbolic judiciary of British type and if the intelligent division from the German system of highest court.

² Given the communitarian thought has the element of specific community and nation, its reception by the European states would largely be less sanguine although the inchoate ideas may be traced back to the western or European tradition. But the rapid compression with a speedy flow of information and public knowledge, for example, could infuse the German constitutional thoughts that would engraft the ideas of communitarianism with the German or prospective European constitution, for example.

The trajectory of reform or phenomenon within the KPO and judiciary, the two organizations of government within the triad of judicial system can be explained in terms of Korean tradition of short, but embezzled experience -- that brings the critical understanding on reflexivity and normativity feasible (Kim, 2014c; 2015a,c). The episodes to better the system generally mirror a conceivable path of post-colonial states, but in a speedier and conscientious aftermath once the politics turned highly transformative on the firm soils cemented around 1990's. Given the econo-political leap was orbited onto the verse of advanced states, political reform followed and the western institutions turned truly normative, not merely an ornament. A reform of KPO and compassion to restore the ontology of Supreme Court practice had been challenged that voiced on the ideals of classic virtue, the kind of Korean communitarianism mixed with the national particulars -- such as two Koreas -- and western terms of judicial role. One interesting typology is that the political neutrality of KPO and common law criminal proceedings were symbolized to dominate a discourse and public debate. They had ridden as a value and belief system incorporated into the judicial reform decades across several administrations. A frequency of media coverage and interview result simply corroborated the standing of typology that agendas of those sorts continued to be a focal point of interest holders, such as civil activist group and partisan politicians.

An implication would be that the political neutrality of KPO is a most important threshold issue to substantiate on the flourishing democracy for the politicians and activists. The KPO now stands at the center of national power institutions instead of past central intelligence agency, the kind of formidable arms of dictator. It naturally earned the name as a top power institution that attracted the public, and important responsibility to safeguard a renewable partisan politics and political freedom was attributed to the role of that institution. Their political role was splendid on the quest of civilian government that enforced a justice on illegal business leaders of *chaebol*, former presidents and rank officers as well as several occasions of criminally condemning the heads of national intelligence agency. The acts, interactions and processes would likely be some kind of taste as any disciplinary action against the power class with the cause of the rule of law concept. A number of unethical or corrupted congressmen also had been and continued to be a scapegoat that impressed the social justice as tangible for the public and conscientious politicians. The KPO would likely be the kind of public outlet from fury or dissatisfaction, and once rated as one of most credible public institutions in nation.

The import of jury system and common law institutions also had attained a public credence that was brought into a reality or continual attraction for the future reform. Public had been skeptical if the continental inquisitive system would be deemed a culprit of past evils for the fatal and wrongful justice. However, it should have been more proper, in my view, in terms of the political distortion or consequent disturbance of judicial independence than institutional flaws. Other implication from the import of jury system means the democratic nature of judicial operation had been preferred by the public. I could reflect that the state-led democracy and too centralized powerful leadership in the past hurt the Korean public much. It also demonstrates that the democracy generally would be most sublime ideal for the Korean citizens. The professionalism normally had

to give a way to the cause and arguments on the political democracy in Korea.³ As Turner implied, the politics of expert could well be lost between the right and left wing politics, but still must be traumatic for the experts themselves. Another typology is that the progress and epistemology of interest holders or policy actors tends to be instructed with the heroes or historic incidents memorable as the kind of lesson for the generations of lawyers. It brings several implications to understand the PPKJS (i) the legal history and its impact to develop the soil of communitarianism as we get with the significant historic cases, such as Dred Scott, Gibbons in US, or Dreffys in Europe, also would be elementary to shape the mentality and pattern of consciousness and learning, spelled from the whole nationals through the judicial actors themselves (ii) the constitution and organizing acts would be classic and typical that the structure itself normally should not be tainted, but such heroes or events could impulse to any permanent lesson that comprise, in my view, the varied form of CTD to deal with this area of public policy and learning (iii) the participatory democracy has had a great forge to intensify the democratic profile of institution within KJS, such as import of jury trial, activism of KBO and civil judicial monitor group (iv) reflexivity and normativity had practically been enforced with new turns and political support, not merely scholastic.

One interviewee commented,

“the past wrongs perpetrated by the Court had to be cleared to restore the face of Korean judiciary...A summary execution, the political use of capital punishment, self-pardon for his political parties, misappropriation to exclude the progressive or reform voices, justice for the haves than have-nots, and public misuse of judiciary against the professional value would be the kinds that have to be eliminated....The judicial terror to execute the innocent victims might be toned with the community at that time, but seriously biased by the oppressive government that must be restored if lately....The criminal liability of culpable judges may be conceivable or retrial had to be ensured with the sustained institution, such as special committee....”

As streamed with this comment, the government launched the special committee of past wrongs and new era (SCPWNE), in which the judicial section for past wrong justice had taken a place for investigation and compensation. A number of retrial proceedings were conducted in the KSC to restore their defamed dignity and to prove their innocence. It generally supports our hypothesis that the political reform would precede the judicial area of public interest. It also proves the tendency of post-colonial state to relate with

³ Normally the politicians and general public would not like to increase his personal image as anti-democratic. One interesting confession of leading congressman in Korea is to risk his political disaffection, if to say “Korea is now an excess of democracy.” He is an expert of economic science and had recently served many important public offices. While the economist may be courageous to speak to tame the democracy, it would be ironical that the lawyers would not say the Republic as too much democratic. As Plato preached, the democracy would be a worst form of administration behind the oligarchy and monarchy, when the tyranny is absent. It would be a unique form supportable only if the need to replace a tyranny would arise. Although we may even go forward to say the past regime as a tyranny, the transformation over years could largely allow us to be muted of the absolute power, but affluent with an attraction of democracy discourse. It is skeptical, however, if the policy process had been with the shoes of professionalism and “deliberative” democracy.

their imperial states. The special committee of treason (SCT) had been instituted in the Congress of first republic around mid of 1950's, the classic years of KJS in our theme. It was largely considered as faltered or failed by the influence of S.M. Lee. Its impact on the nation thereafter had fostered the soil of recurrence on the issue of Japanese clearance since the committee had not been exhaustive to settle the public minds of Korea. While the new deals for the pro-Japanese activists or their unjustifiable wealth around 1990's and new millennium, the inside issue of nation corrupted by the clerical judiciary had been churned with the initiative of policy minds. The pattern and story may be more replicable in view of French type of Republics, which shows a short term of public learning and swift change or transformation, which I suppose of typology for a considerable number of post-colonial states. Nevertheless, I believe it inextricable and lesson-some in reflexivity of Korean response over various sectors of community since its birth as one of post-colonial democracies in 1945. It not only suggests the chaos of Korean republic, but also informs the agility of system or public policy as well as the social or policy leadership and actors toward any ideals.

The production of charisma or symbols through the sacrifices and events would fuel the communitarianism in Korea, in which the actors or interest holders would regard it precious for lessons and as models of professional ethics. Most interviewees agree that several occasions for judges to act against the line authority of court administration had deeply inculcated to understand the KJS. In view of KPO, the statutory terms of KPO chief has deserved a top list of agendas embosoming on their professional orientation and understanding of their community. Another typology brought new frequencies of unethical conduct led to public pressure for the institution. The increasing informative society within the Korean community would allow a new pattern of public exchange that the policy makers or interest holders had to be attentive. At extreme, we can feel that Korean people can share instantly at *Daum* or *Naver* about important public occurrences that critically affect the past paradigm of public relationship. The concept of e-government or public disclosure laws may be similar to this aspect of concern and the public could know much more than the past and implications on PPKJS or symbolism could be elevated. This environmental change could maturate a communitarian experience in Korea beyond the global stories. The consequence has shifted the principled public exposure to the details of story and symbolism with significant figures or events.

“The four times of judicial strike can characterize the immanence of Korean judiciary and lawyers. The first strike was most organized and forged a dynamic impact. The trait was to struggle with outside enemy, say, political power of abuse and monopoly than separation to check and balance. The strike had a backdrop of judgments, declaring the unconstitutionality of state liability clause, one unique decision of constitutional adjudication in the Park's reign, and acquitting the college students of demos inside the opposition party building, who boycotted the congressional election...The administration had taken them as implausible and unacceptable given the budget constraint and scheme of partisan politics. Park, president in 1970's phoned directly chief justice to blame...The courage of judges was notable, but the consequence was serious with retaliation and suppression. Park declared the national emergency around the end of 1971, the congress decreed to dissolve, and his permanent constitutional status was plotted and actually institutionalized. The state tort liability now had no longer to be the law of statute, but placed constitutionally that structurally foreclosed any prospective attempt of judiciary. The flak of Park on the judiciary had peaked at that

time according to sources. While the chief justice had been reappointed, all nine justices signed on the blamed judgment failed to be reappointed. This point is distinguishable from the court packing plan of US around early of 20th century, the advent era from the classic years toward the administrative or welfare state. The lesson from the courage and legal conscience of justices should truly be the assets of judiciary and professionals at large....”

The other three judicial strikes involved impeaching the standing system also proved the importance of informal or inside networks and role of organizational members given the segmented nature of society or system. It also corroborated with our theme that the policy transformation or reform movement has relevance with the policy environment. The second judicial strike had occurred around the important period of political shift in the nation, which, therefore, relates with the removal of then chief justice, who was considered as some past symbol of authoritarian government. The second strike had been successful with the signs of junior judges in 1988. The third strike had exploded by the pleading of one judge imploring with the general comment of judicial reform. The response of KSC was insufficient or even mocking by pledging on policy reform of nugatory nature, such as curfew of attorneys for the office of judges, permit system of attorney office clerks to transmute into the court, and public regulation of golf meeting between the judges and attorneys. Despite the petition of noble and principled suggestions on judicial independence and penitence of past practice, such sluggish response can imply of the societal mood of principled civilian leadership and newly emancipated, but stiff judiciary to consider it the kind of chores. The fourth strike had been more sophisticated, which touched on the personnel management policies on seniority basis. It can be seen to explain some enhanced understanding of judicial administrative issues by then judges or attorneys. M.H. Noh, then president, had created the mood and social attitude that was fortified with the influence of their policy circles in same ethos for the nation of laws. As said, the reform package of KJS had been approved by the Congress during his reign that had long been resilient along the public debate and conferences. A bureau-tending system or institution and practice of judiciary had been subjected to reform. The activism of KBO and implementation of grading system to ensure a monitor and check for the practice of judges had been ideated in the same compassion around the second Noh’s administration. The strike, however, could not see any concrete result, or systemic feedback beyond the claim on resignation of Chief Justice. Two judges left the court, who were discriminated from the mainstream of judicial power. They now serve as a professor of law in local universities.

In my view, the judicial people over tradition can be typified in three tastes, bureau-liberal, bureaucracy, bureau-intelligible and bureau-institutional. The first taste can be friendly with the British tradition, while the second may be woven with France, the third with Germany and the last as paired with the US.⁴ The politics could have a niche to shape the

⁴ In this taste, I am assumed with the symbolism of historic figure and stigmatic conjuncture on social progress, such as John Locke and Millis, Rousseau and King’s court, or rather lack of history and radical idealism, as well as the new turn of US hegemony through two world wars. John Locke had envisioned the possibility of bureaucracy and civilian form of government, perhaps theoretical originator of modern form of government as

taste of national jurists or public officers. Given the world history of politics, the judges or public officers of past hegemony, such as Britain, could have dual dimension that they are philosophically more akin to the liberalism, but also have to be loyal with the public responsibility for their citizen or subjects. A circle of intelligence, such as scholars or social thinkers also tends to prefer enjoying on the political theory, such as anarchism or neo-liberalism and realism, or society than the state. One of most eminent title of scholarly journal originated from the UK, *Nature*, simply undergirds a taste in this attribution.

developed from the Hobbesian principle of social contract theory. His work on the limited government and civilian steering can bear significantly with the inchoate discourse of bureaucracy, most interchangeable with the notion of government. His idea could see his protégé on the international scale that J.S. Mills had proposed the paradigm of liberty and British international politics with the concern of its public agency. It would be a good point of comparison that Weber and Mills had churned to erect the model of bureaucracy and public or agency moral of imperialistic government around their times. In the median, Woodrow Wilson could stand to inform the bureaucracy of new land sometime later from his two influences. In this assumption, we can hypothesize the bureau-liberal, bureau-ethical or intelligible, and bureau-institutional. The tradition of continental state had been prone to the idealism and rationalism than experimentalism or pragmatism so that the operable form of bureaucracy or civilian government would rather be untouchable other than idealistic political discourse as Rousseau or Saint Simon. It would be recallable that King Henry proclaimed the National Church, which evidenced the realism or pragmatism and experimental culture of Island state rather than Catholicism, most idealism in human strand. The political power had largely been left within the might and influence of King in France if the King's court pertained as to describe then judiciary or power class, or merely symbolized with the three estates based on the economic and political relationships with the King and community. This symbolic approach of French tradition makes the judiciary powerful through the inside of monarchy on the favorable conditions, but persecuted to be made clerical for the hard times and even through the current. This mainstream of politics created a philosophical condition in the continental states that they would be ethical or intelligible as Marx did or contemporary critical theorists are doing. The dense trait of this kind could also be reinforced with their late comer status of Germany as an imperialist in terms of international politics in history. The bureau-institutional could be any final form to understand the bureaucracy properly, but could be conditioned if all the elements had deeply been contested over the tradition and history, and most importantly with the general condition that the politics are stabilized and resources are plentiful.

References

- Kim, Kiyong, Ethics, Law and Social Justice (April 10, 2015a). Available at SSRN: <https://ssrn.com/abstract=2592876> or <http://dx.doi.org/10.2139/ssrn.2592876>
- Kim, Kiyong, Human Rights: Are They Just a Tweak for the Policy Makers or Administrators? (March 3, 2015b). European Academic Research, Vol. II, Issue 6, September 2014. Available at SSRN: <https://ssrn.com/abstract=2572951>
- Kim, Kiyong, Public Policy and Governance: Some Thoughts on Its Elements (April 3, 2015c). Available at SSRN: <https://ssrn.com/abstract=2589526> or <http://dx.doi.org/10.2139/ssrn.2589526>
- Kim, Kiyong, The Constitution and Tripartite System of Government: From the Mutiny for the Limited Government Through the Interbranch Subtlety. (September 1, 2014b). International Journal of Advanced Research (2014a), Volume 2, Issue 9, 392-401. Available at SSRN: <https://ssrn.com/abstract=2574711>
- Kim, Kiyong, Theories and Tenets: An Impalpable Troll for the Policy Makers, Research Officers and Administrators? (March 4, 2015d). International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS), 2014, Vol 1, No. 8, 30-50.. Available at SSRN: <https://ssrn.com/abstract=2573526>
- Kim, Kiyong, The Relationship between the Law and Public Policy: Is it a Chi-Square or Normative Shape for the Policy Makers? (September 10, 2014c). Social Sciences. Vol. 3, No. 4, 2014, pp. 137-143. doi: 10.11648/j.ss.20140304.15. . Available at SSRN: <https://ssrn.com/abstract=2577832>
- Kim, Kiyong, The Separation of Powers Principle: Is it a Lynchpin or Pushpin for the Voyage of American Public? (August 1, 2014a). International Journal of Advanced Research (2014), Volume 2, Issue 8, 887-895. Available at SSRN: <https://ssrn.com/abstract=2573560>