

Concurrent Evidence and Polarization

some comments for Justice Mclellan's presentation
from a legal philosophical point of view

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Purpose

- ❑ Some comments from a legal philosophical point of view
- ❑ Not only the legal decision-making process in court, but also wider applicability in social contexts will be taken considered.
- ❑ In particular, I'd like to compare concurrent evidence with deliberation in collective decision-making.

On “Concurrent Evidence”

- ❑ Unlike adversary system, experts can discuss scientific or other highly technical issues.
- ❑ Their mutual examination is expected to raise quality of evidence, free from lawyers’ unproductive interference.
- ❑ It seems good in “scientific” sense .
- ❑ But I think it depends on types of issues. I’d like to classify the types, by referring to professor Stirling’s former discussion, too.

On a scientific issue – “uncertainty”

- ❑ On a scientific issue (“uncertainty”), concurrent evidence by number of experts will be very effective
- ❑ Because experts’ mutual examination of their evidence will correct careless mistakes.
- ❑ Their view will converge by degrees.
- ❑ In this process, there is not disagreement about values, or how to frame the issue.

Disagreement about values or framing – “ambiguity”

- ❑ If they disagree about values or framing, it is in state of “ambiguity” in Stirling’s classification.
- ❑ Convergence of their view will *not* be guaranteed.
- ❑ The conflicts will often become more serious, and divide into two extremely opposite and adversary sides.
- ❑ This phenomenon is called “polarization,” in political theory of deliberative democracy.

Polarization (1)

- ❑ On highly controversial problems connected to political values, as more people participate in discussion, this divergence often occurs.
- ❑ It is because people who have extreme opinions are liable to lead the discussion, and pull in other people who have middle opinions to their side with group pressure.

Polarization (2) examples

- ❑ Discussion of green-house effect and backlash to it is typical.
- ❑ In Japan, recent “Deliberative Poll” about nuclear plants or discussion of low level radiation effects may show the tendency.
- ❑ Though this depends on default framings, recent positivist political science studies show the general tendency in deliberation.

Institutional safe guards for the polarization problem

- ❑ In concurrent evidence, such polarization may be rare.
- ❑ The purpose of concurrent evidence is not argumentations, but, at first, to manifest each standpoint, and then to co-operate to find the truth with positivist attitude.
- ❑ This process should be evidence-based, and also should be adequately led by judge.
- ❑ Therefore, concurrent evidence has institutional safe guards for the polarization problem

Does possibility of polarization limit concurrent evidence ?

- ❑ But that does not mean “zero-risk”.
- ❑ In spite of all such efforts, serious value conflicts or polarization may occur.
- ❑ The risk is a limit of concurrent evidence, and at the same time, the most significant characteristics of it.
- ❑ Exceptions often “open up” the essence.

Is a decision “beyond science” “unscientific” ?

- In the case that polarization occurs and experts’ opinions seriously diverge, judge must make a decision beyond science, perhaps, existentially.
- But it does not mean just an unscientific or irrational determination.

visualization and differentiation

- ❑ In the process, visualizations and differentiations are made, such as scientific and unscientific, or certain and uncertain issues.
- ❑ Judges or other decision-makers no longer can pretend to make value-free, neutral, or scientific decisions.
- ❑ Polarization after adequate concurrent evidence process or deliberation indicates that there were conflicts of values, framing, or at least condition setting from the beginning.

Not in convergence, but in divergence

- ❑ Clear polarization and bare value conflicts are rare in concurrent evidence, but they can exist everywhere in subtler version.
- ❑ By being sensitive to it, we can refrain from both excessive relativism and scientism.
- ❑ Essence of concurrent evidence exists in divergence rather than convergence.