Lee, Woosung 9809021

GSIS International Cooperation

till*@Aliq*A-i

Legitimacy and Legality

The words 'legitimacy' and 'legality' do not sustain a clearly differentiated ineaiiiiio **in** current legal language and thought. Legitimate and legal are used indifferently to characterize the path in which State activity complies to the particular rules of tile legal system or with tile general mandates that the Constitution lays down. 'Legitimacy' is reflected as a convenient method of expression for portraying in general terms the criteria for the 'validity' of power, its 'title' for issuing orders and insisting on obedience from those who in turn embrace themselves under obligation to obey. So, in this fashion, legitimacy asSLii-nes legality, the existence of a legal system and of a power issuing orders according to its rules. However, it also procures the Justification of legality, by bestowing on power the significant basis of authority: It is additionally 'plus' sign added to the force which the State utilizes in the name of the law.

In traditional political theory the problem of the relationship between legitimacy and legality was long held as one of the basic problei-ns pertaining to the State. During tile sixteenth and seventeenth centuries the medieval writers differed in their perspectives of the way in which 'legitimation' of power could take place. Some school of writers persisted that it could consist only in a formal investiture; other school of writers advocated the regular exercise of power according to admissible rules of law. The quest for the legitimation of power has never refrained to be one of the prime interests of political theory, even though the word 'legitimacy' may sound rather obsolete nowadays.

Max Weber's opinion on the matter of legitimacy and legality is enlightening and critical: 'today', Weber expressed, 'the i-nost usual basis of legitimacy is the belief in le(,ality, the readiness to confori-n with rules which are formally correct and have been imposed by accepted procedures.' Max Weber had recognized that most i-nodern societies, and more especially the State, are 'legal' societies where command are given in tile name of all impersonal nori-n rather than in the name of a personal authority; and in turn providiii" of a command constitutes obedience to a norm rather than an arbitrary decision. Hence, Weber concluded that 'rational legitimacy', which he classified with legality, was the only type of legitimacy to prevail in the modern world. In it every single conveyor of power of command

is legitimated by the system of rational norms, and their power is legitimate so far as it corresponds with the norms. Obedience is thus given to the norms rather than to the person.

These observations of Weber have shed a significant deal of light on the problem that 'deration. They surely clarify why legality plays such a prominent role today, not is in consi I only in legal theorybut also in current views of the State. There are exceptional and con reasons for this fact. The principle of legality is closely tied with the modern ideation of the State. The precisenotion of the constitutional system was derived from the struggle agains tyrannical rule and from the need to restrict the action of the State within distinct legal Iiiy)its. The old idea of the Rule of Law was converted into an institutional practice. Special tools were created or gradually developed for the purpose of safeguarding legality against abuse, not only by executive power but by the legislative as well. The conception that legality is tile foundation of the State was the influential factor of such as Government under Law, which are generally acknowledged today as the best description of what the i-noderii State is or claims to be, and of the reason why its commands are received as legitimate. Dean Pound once displayed in humorous vein, modern man's notion of the State may be expressed with a paraphrase of the Psalm: 'Because of thy law am I content with thee, 0 State.' Legality seems to have become the modern version of legitimacy as Weber pinpointed.

For legality to provide legitimacy as well, it must necessarily refer not only to the formal structure of power but to its intrinsic nature. In other words, what is required is clearly to indicate what kind of legality we have in mind when we praise the State for guaranteeing it.

Principle of Legality - Due Process

1. Concept of Due Process

A course of legal proceedings according to rules and principles that have been established in a system of jurisprudence for enforcement and protection of individual rights.

2. Origin of Due Process

Due process derives from early English common law and constitutional history, The first concrete expression of the due process idea embraced by Anglo-American law appeared in the 39' article of Magna Carta(1215) in the royal promise that "No freeman shall be taken or(aild) imprisoned or disseised or exiled or in any way destroyed .... Except by the legal judgement of his peers or(and) by the law of the land." In subsequent English statutes, the references to "the legal judgement of his peers" and "laws of the land" are treated as substantially synonymous with due process of law

Drafters of the U.S. federal Constitution adopted the due process phraseology in the Fifth Amendment, ratified in 1791, which provides that "No person shall .... be deprived of life, liberty, or property, without **due** process of law." Because this amendment was held inapplicable to state actions that might violate an individual's constitutional rights, it was not until the ratification of the Fourteenth Amendment in 1868 that the several states became subject to a federally enforceable due process restraint on their legislative and procedural activities.

3. Due Process relating to substantive enactments and procedural legislation,

Today, if a law may reasonably be deemed to promote the public welfare and the means selected bear a reasonable relationship to the legitimate public interest, then the law has met the due process standard,

In determining the procedural safeguards that should be obligatory upon the states under the due process clause of Fourteenth Amendment, the Supreme Court has exercised considerable supervision over the administration of criminal justice in state courts, as well as occasional influence upon state civil and administrative proceedings. Its decision have been criticized, on the one hand, for unduly meddling with state judicial administration and, on the other hand, for not treating all of the specific procedural guarantees of the first IO amendments as equally applicable to state and to federal proceedings.

Some justices have adhered to the propositioii that the framers of the Fourteenth Amendment intended the entire Bill of Rights to be binding on the states. Other justices, however, have contended that states should be allowed considerable latitude in conducting their affairs, so long as they comply with a fundamental fairness standard. Ultimately the latter position substantially prevailed, and due process was recognized as embracing only those principles of justice that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."