

Guaranteed

The Roles of the government in ensuring individual rights

韓國 社會와 法 制道



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Guaranteed -Legitimacy of Gov't Guarantee Peace and Order

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<Peace>

▶ Negative Peace : Peace means "no wars." Oppose to the war or violence is the peace and peace comes automatically if there's no war or violence.

▶ Positive Peace : Peace means not only absence of the war but also filling up basic human needs, economic welfare, equality, justice and development of an embodiment and preservation of nature and human's value.

▶ Why there are no wars between democracies?

Leaders in democracies have no incentive to wage wars against another democracy. In the case of a war against another democracy, the people do not regard such war as foreign policy by other means but as the failure of foreign policy itself. Political leaders in democratic states have to take into account the people's fear of losing their lives and properties in wars. In order to explain the reason more, we can look into the characteristics of norms-culture and structure-institution of democracies. The prevailing norms in democracies include peaceful competition, persuasion and compromise. In the decision making process, checks and balances, separation of powers, and public support delay the process itself and reduce the possibility of reaching decisions to wage war.

<Order>

If there could be order in a society, there should be any kind of rules to regulate the people and in a modern society the law is a typical rule. Max Weber understood the law is a type of legitimate order.

The legitimate of order is guaranteed by pure 'inner state' in other words emotion, value-rationalization or religion. Besides it is guaranteed by 'outer state'; expectation of one peculiar outer result. The law belongs to the latter and Weber said law is understood as a right type of order when rational legal government appears in modern western society.

There are four types of laws.

→ Formal-irrational law : It is proceed by strict procedure, however the result of the judgment is unpredictable and its method is not controlled by intellect.

→ Informal-irrational law : It doesn't obey a generalized procedure, it is depended upon a judge's personal ethics and emotional and political elements. And the judicial decision doesn't come from generalizes rules but a concrete element of an individual case.

→ Informal-rational : It is judged by external principles like ethics, common-interest-goal-oriented rules and political postulate(Maxim), not by inner principles of the law. However it has unified rules or established principles.

→ Formal-rational : It is judges , by generalized inner principles of the law not by external principle of the law. It uses generalized rules and has logical meaning-explain standards which are controlled by intellect and high degree systems.

Because only formal-rational laws have predictability, they assure the freedom of citizen's economic activities, and made modern capitalism. They also influenced the appearance of the principle of legality(nullun crimen sine lege, nulla poena sine lege, 죄형법정주의).

[To Guarantee Protection against Outside Enemy]

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1. The Spirit of International Peace

1) After World War II, the human race desired the global peace. That led each country, domestically to proclaim the spirit of peace in their constitutional laws, and externally to conclude the treaties that deny an aggressive war.

2) The Articles of the Korean Constitutional Law

- article 4: The Republic of Korea intends to peaceful unification of Korean peninsula.

- article 5: The Republic of Korea shall try to keep international peace and deny an aggressive war.

2. Acceptance of Self-preserving War

1) A self-preserving war is generally accepted though an aggressive war is denied.

- aggressive war: the war for a national purpose such as territorial expansion

- self-preserving war: the war to guarantee the national safety and to defend the country against the invasion of enemy.

2) The Article of the Korean Constitutional Law

- article 5: The duty of national army forces is to guarantee the national safety and to defend the country.

cf. In Japanese constitutional law, not only any kinds of war but also any military expenditures are totally denied.

3. The Governmental Actions in the time of war

1) publishing the 'Martial Law'

- When the enemy invades the country, the president shall publish the martial law to carry out military administration because it is impossible in the time of war to carry out normal administration.

2) the Military Governmental Actions

a. calling out soldiers:

- In the time of war, the government can call out soldiers on off-duty and civilians who are in the first reserve. The government shall enforce them to enter barracks and serve the army.

b. labor mobilization

- In the time of war, the government can mobilize the people to accomplish the war successfully or to restore the war disaster.

c. forage of the property

- In the time of war, the government can make individuals to offer their personal property for military use when the economic demand of the army cannot be satisfied in normal way.

d. In the time of war, the government can restrict individual activities for the military purpose and military rules are applied even to civilians.

Guarantee the Welfare

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I. Introduction

When we define "rights" it's no use unless it's guaranteed. When we say rights of speech, privacy and assembly are "guaranteed", it's not really guaranteed unless you have the very basic needs like food, shelter and cloths satisfied. This is where the welfare comes in as to actually guarantee the rights we have looked at previously. In our part of the presentation, we are going to look at the meaning of welfare, its principles or origins, its characteristics, specific contents and the changes in the welfare policy (especially of the US for the last two parts).

II. Definition

Welfare is the governmental benefits distributed to impoverished persons to enable them to maintain a minimum standard of well-being.

III. Principles (Origins)

The major principle behind the welfare is to guarantee the very minimum standard of well-being for no others rights can really be guaranteed unless one can physically maintain living as a human being. But since when and why has the welfare become a concern of the government?

Before the industrialization, it was a custom for family, relatives and neighbors to help and share with the poor and the disabled. However, as the society became more complex, welfare of the individual became too important to be left to the custom and private understandings and therefore became a concern of government. Moreover, with the industrialization, where the supply of labor nearly always exceeds the demand and opportunity, poverty and dependence were no longer considered as evidence of personal failure.

As the wealth created by modern industry increased it was contended that there was enough to assure everyone of adequate support without unfairly penalizing or impairing the initiative of the talented and enterprising. An income large enough to provide the basic necessities of life in adequate measure was regarded as the right of every member of society. If anyone's income fell short, it should be supplemented not as an act of charity but as an act of social justice.

IV. Characteristics

Is welfare a right that the recipients can base upon asking for help? Or is it just a governmental policy?

Some scholars used to claim that it's only a governmental policy. So unless it's regulated through legislation, recipients don't have the right to ask for it. However, today everyone agrees that welfare right is one of the fundamental rights. The conflict is whether a recipient can directly ask the government for help based upon the constitutional law or it has to be stipulated in the law book for a recipient to base upon asking. Even today there hasn't been a consensus on the matter.

V. Contents (US)

1. Federal Social Security Programs

The Federal Government finances the major welfare programs in the country, such as Supplemental Security Income, Aid to Families with Dependent Children, and Medicaid benefits. These Programs are in addition to the benefits available to the aged, disabled, and unemployed workers and their dependants. Unlike the benefits based on the employment record of a worker, welfare benefits are distributed to people who demonstrate eligibility by establishing financial need.

-Supplemental Security Income : Indigent aged, blind, and disabled persons receive monthly checks to provide them with a minimum standard of living.

-Aid to families with Dependent Children : Relates a custodial relative with the basic necessities within the framework of the family relationship.

-Medicaid : Designed to make private medical care available to impoverished persons.

2. Food and food stamps

The Secretary of Agriculture has the authority to distribute to needy families, Indian Tribes such basic agricultural commodities as wheat, cotton, rice, cattle, sugar cane, tobacco and so on.

-Nutrition Programs : Grants money and food to nonprofit elementary and secondary schools and to child-care institutions so that they can serve milk and well-balanced meals.

-Food Stamps : Exchanged like money for food at authorized stores.

3. Public housing

To provide a decent home and a suitable living environment for every American family, various programs exist to facilitate private involvement in construction and management, site selection, rehabilitation and use of existing housing, and even home ownership for the poor.

4. Other governmental benefits

The primary purpose of public assistance is to relieve need, but eligibility to receive aid does not have to depend on need. There are many kinds of cash benefit programs in the United States that do not require applicants to pass a means test to prove their poverty.

VI. Changes in the governmental policy

In recent years, there has been a change in the principle behind the welfare. In the following we are going to look at the example of the US welfare reform of 1996.

The US welfare reform created a fundamentally new framework for running welfare. The welfare system, for its first 50 years, had the principal and almost sole goal of providing income maintenance for people in poverty but now the goal is promoting work and self-sufficiency and ending dependence.

This shift fits into a historical pattern of movement between two opposing philosophies. At one extreme is the notion that the poor are morally deficient and a welfare system should be designed as a "program of social control or social rectitude". At the other extreme is the belief that the poor are no different than other Americans, they simply lack money. The latter was the attitude governed the nation's welfare programs during the 1960s and '70s. But today the government has changed its policy since it felt it needed more social control in the welfare system.

Freedom Guaranteed by Government

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I. Introduction

The democratic state we live in is required to protect our 기본권 and our happiness with law.

II. The obligation of state

The people have a right to be acknowledged of their rights as human beings by the government. They have the right to be treated equally and fairly, the right to not be arrested without the correct procedures, freedom to choose where you live, and guarantee of privacy. Freedom of conscience, religion, education, and art are all mental freedoms related to 기본권. The people also have a freedom of press, and assembly. The freedom to participate in political matters is another important freedom, because it gives the people a chance to participate in the making of the laws that they must abide by.

Recently the right of labor, education, and the right to live in a safe and secure environment have become increasingly important due to the increased concern about the welfare of the people.

The state has an obligation to protect and uphold these rights for the people. The state has made many systems to observe their obligations.

For example, to arrest a person on criminal charges, the procedure written in law must be followed. And in order to restrict the 기본권 of the people provided by the Constitution, there must be a special order passed in congress.

III. Conclusion

The nation has an obligation to protect the 기본권 of its citizens through law systems and procedures.

“Guaranteed”- Freedom to do anything

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AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

1. Free Exercise of Religion

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any

restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." It bars "governmental regulation of religious beliefs as such," prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." Freedom of conscience is the basis of the free exercise clause, and government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs. Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute "conduct" rather than pure "belief." When it comes to protecting conduct as free exercise, the Court has been inconsistent. It has long been held that the Free Exercise Clause does not necessarily prevent government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question. What has changed over the years is the Court's willingness to hold that some religiously motivated conduct is protected from generally applicable prohibitions.

2. Freedom of Expression: The Philosophical Basis

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guarantee of freedom of expression--the free speech and free press clauses. The argument has been fought out among the commentators. Some of the commentators argue in behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression. Others would limit the basis of the First Amendment to one only among a constellation of possible values and would therefore limit coverage or degree of protection of the speech and press clauses. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth. A broader-grounded view is variously expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment, such as the concept that when speech is freely chosen by the speaker to persuade others it defines and expresses the "self," promotes his liberty, or the concept of "self-realization," the belief that free speech enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny. The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, probably in large part because they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

3. Right to Peaceably Assemble

The right to peacefully gather and parade or demonstrate to make one's views known or to support or oppose a public policy is based upon the twin guarantees of the freedom of speech and the right to peaceably assemble.

The right of peaceable assembly protects the right to picket which has been used in labor disputes and civil rights and anti-war demonstrations. In general, picketing is protected when it is for a lawful purpose, conducted in an orderly manner, and publicizes a grievance of some kind.

Generally, parades or demonstrations can be controlled by local time, place, manner regulations as long as they are applied in a nondiscriminatory fashion and do not block such protected expression.

4. Freedom of Association

The First Amendment does not specifically mention the right of association. The concept can be understood to have grown out of the First Amendment's guarantee of a right to peaceably assemble and petition the government. To petition the government effectively one might join others who have the same grievances. This liberty, then, was conceived to protect an association of people to achieve some lawful

political end.

The necessity of this fundamental right can be best understood in the context of our early history with England: In the 1600s, the English crown curtailed the press by licensing schemes and in the mid-1700s used libel laws to do so. Political associations were then created which began to assert great influence on public opinion and thereby on parliament and the crown. By 1765, parliament had begun to suppress political associations of all kinds. And by 1799, most were declared unlawful. The United States Bill of Rights was adopted in 1791.

5. Right to Petition the Government for a redress of grievances

Those who petition may aim their requests to Congress, state governments and legislatures, and the courts at any level.

Under the right of petition, individuals and groups of citizens and corporations may lobby for laws and policies that favor them.

Freedom from Restraint

MinKyung Kim

1. In the senate of the United States: A BILL

- To amend titles XVIII and XIX of the Social Security Act to ensure that individuals enjoy the right to be free from restraint and for other purposes:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2. Freedom from Restraint Act of 1999:

Section 1. Short Title

This act may be cited as the Freedom from Restraint Act of 1999;

The Freedom from Restraint Act extends current restraint protections for nursing home residents to all mental health patients in facilities receiving Medicaid and Medicare funds, and requires that deaths and serious injuries to mental health patients be reported. The legislation builds on successful laws that have reduced the use of restraints in nursing homes by one-third since 1991 and which patients, physicians, and providers have found workable. The protections can be implemented quickly and broadly due to their foundation in existing laws and policies, but bring important new rights to mental health patients.

Section 2. Individual' right to Freedom from Restraint and reporting of sentinel events under medicare

1) Right to be Free from Restraints:

Mental health patients will be protected by restrictions on the use of restraints.

2) Required Reporting of Deaths and Sentinel Injuries:

Unexpected deaths, serious injuries, known as sentinel events, and the steps taken to prevent their reoccurrence will be reported.

Death of a mental health patient triggers the broadest reporting. Upon a death, the facility is required to file a report with the police, the state licensing agency, the protection and advocacy system, any relevant national accrediting body and the Department of Health and Human Services. Upon receipt of a report, either HHS or the national accrediting body will ensure that the provider investigates the injury,

determines its cause, and takes action to correct the problem and reduce the likelihood of its repetition. Finally, the report of the death and corrective steps will be entered into a database available to the public through the Internet including the name and address of the provider in the case of a death related to restraints or seclusion.

Serious, unexpected injuries to a mental health patient that fall short of death will be reported to HHS or to the facility of national accrediting body in the case of an accredited facility. This requirement builds upon existing "sentinel event" reporting practices and definitions of the Joint Committee on Accreditation of Healthcare Organizations to minimize duplication and is intended to bolster those efforts. The reports of the injury and the steps to prevent its reoccurrence will be added to the publicly available database.

Finally, whenever a pattern of poor performance emerges for a facility, the name and address for that facility will be included in the publicly available database along with the records of all injuries or deaths that occurred at the facility.

3. Protection of Right to be Free from Restraints:

A provider of services eligible to be paid under this title for providing services to an individual entitled to benefits under part A or enrolled under part B (including an individual provided with a Medicare+Choice plan offered by a Medicare+Choice organization)

(1) protect and promote the right of each such individual to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience;

The bill does not prohibit the use of restraints, but establishes procedural safeguards to protect patients from their overuse. Under the legislation, a restraint may only be imposed "to ensure the physical safety of the patient or other patients" with a physician's "written order" specifying the "duration and circumstances" under which the restraints are to be used. Under emergency circumstances, specified by the Secretary of Health and Human Services, restraints may be used until a written order can be obtained.

Rather than create an entirely new standard, the bill simply broadens legislation that has successfully protected nursing home residents to include the mental health population. In nursing homes, the restraint standard has proven workable and is credited for the dramatic reduction in the use of restraints by nursing homes of over one-third in the last eight years alone, according to the Health Care Finance Administration.

(2) impose restraints:

A. only to ensure the physical safety of the individual or other individuals in the care or custody of the provider

B. only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained)

The Conclusion

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From the conclusions gathered from the preceding arguments, we would gather that "guaranteeing" the rights as defined by Marx Weber would be:

- Protecting the individuals from external enemies.

- As stated in the Constitution

article 5: The duty of national army forces is to guarantee the national safety and to defend the country.

- Imposing order through rational legal means by the government.

- As we have seen, the formal-rational means where generalized rules and logical meaning-explain standards which are controlled by intellect and highly systems are utilized.

- Not only protecting but also providing "Bok-ji", or welfare to it's members.

- The objective would be to guarantee the very minimum standard of well-being.

The rationale being that no other rights can really be guaranteed unless the members can live at least "like a human being" and not an animal. Thus the government guarantees that individual human dignity will be maintained and be upheld.

Max Weber has stressed that the legal form of government must guarantee the rights of an individual. The rights by themselves, would be meaningless if there was no powers in-being to enforce them. A state of human relationships without order imposed by a higher authority would no doubt degenerate into chaos due to the inherent instability of the social and psychological fabric of humans.

Therefore the legitimate government would attempt to create order within society and provide the safety net - the welfare system - in order for the members of the society to enjoy their rights rationally and freely.

On the other hand, a illegitimate form of forced order (i.e a dictatorship) would freeze, or even hamper the progress of many forms of economic, cultural developments.