

Constitutional Law

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# **G U A R A N T E E D**

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## I. INTRODUCTION

There are many things that we take for granted. We do many things that we would not, if we knew that the end of the world was nearing. But what makes us feel secure about savings in bank accounts? How do we know that our right to healthcare will still be there tomorrow? To answer these questions, we need to look at the concept of freedom and the government.

## II. LEGITIMACY OF GOVERNMENT

### 1. ORDER, AUTHORITY AND THE LEGITIMACY OF GOVERNMENT

Governing is a matter of organizing people and resources to achieve certain goals – providing a better life for those being governed and insuring that those who govern retain their power and control. For this to take place effectively, governing requires some form of legitimated power, or authority, and a structure, the state, through which the power to govern can be exercised. As history shows, authority has always been a part of human relationships, and the state has existed in some form as long as humans have lived in groups.

The state is the structure within which the business of governing takes place. According to S. E. Finer there are five characteristics of states. First, they have geographic borders within which the population accepts a common government. Second, that government is served by specialized personnel, civil to carry out its daily business and military to protect it from internal and external threats. Third, the government and population that constitute a state are recognized by other such entities as independent and sovereign within its borders. The fourth and fifth combined are that the population feels a sense of common nationality and community.<sup>1</sup>

For a state to function, it must be able to impose order on its population. Order brings to mind a harmony of social and personal interests. It may connote a body of people living together under agreed upon regulations, conformity to established authority, a customary mode of life, or authoritative direction to social life. Sometimes it implies merely the absence of disturbance, riot, or general unruliness. Such order is crucial because human beings are anything but harmonious in their relations with each other.

Social and economic order is a benefit to society because it grants people with the ability to live their lives and conduct business with an expectation of regularity and continuity. Today, the ability to establish economic and social order lies in the hands of the nation state and most modern democratic states have been successful in developing

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<sup>1</sup> Finer, Samuel F., *The History of Government From the Earliest Times*, 3 vols.; (Oxford: Oxford University Press, 1997) 2-3

and maintaining environments, in which citizens live and work in compatible association. The success of such states lies in the fact that they have become an accepted source of authority in matters of social and economic well being.

Authority is thought of as a part of the political process. Through the evolution of the meaning of authority and its location in the visible structure of the state there has been a shift from imposition of order from above to imposition of order by common consent. For the state to exercise the power necessary to impose and maintain order, it must be based on some form of authority because authority conveys legitimacy.

For the western world, the Greeks served as a major source of ideas about government and legitimate authority. The ultimate political legacy of Ancient Greece to the West includes the concept of loyalty to the state above all other loyalties, the concept of the state as the mediator of culture, and the concept of the primacy of the individual in all affairs.

The western system rests on reason, impersonal law, and individual rights. One other aspect of the western concept of authority is the idea and practice of freedom. According to O. Patterson, there are three kinds of freedom. Personal freedom which gives an individual some control over his life, sovereign freedom in which a person has the power to restrict the freedom of others or to empower others and civic freedom in which the adult members of a community participate in its life and governance.<sup>2</sup>

Furthermore, the western world was also highly influenced by the social contract theories proposed by Thomas Hobbes, John Locke, and Jean-Jacques Rousseau.

According to Hobbes, there are only the sovereign and the individual. The sovereign's authority was derived from a covenant with the people. However, this covenant was irrevocable. The sovereign, or the state, was all-powerful in the life of the individual. Law arrived at and applied rationally would enable each individual to pursue his own interests and convince him that his own interests would be best served through the authority of the state.

Locke also envisioned a society in which people submitted themselves to a supreme authority that was expressed in rational law. However, this supreme authority is limited and divided into legislative and executive. Furthermore, Locke argued that the people should have the right to dissolve their contract with the supreme authority. By implication Locke foresaw a society in which supreme authority was vested in the state, but in which other institutions could also flourish.

In order to remedy the situation in the French society of his time, Rousseau

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<sup>2</sup> Orlando Patterson, *Freedom in the Making of Western Culture*, (New York: Basic Books, 1991) 1-5

proposed a social contract among the members of the body politic who collectively formed the sovereign authority. This sovereign authority was expressed as the General Will whose purpose was to secure the general good. To obtain the benefit of this general good, individuals must subordinate themselves completely to the General Will, the execution of which is left to the state. However, the Supreme Authority remains vested in the community of individuals. The social contract is among the people with the state simply serving as its temporary agent.

## **2. FUNCTIONS OR DUTIES OF THE GOVERNMENT – GUARANTEE OF PEACE & ORDER, PROTECTION AGAINST OUTSIDE ENEMY AND PROMOTION OF WELFARE**

In the modern times, a state only carried out its minimum duties such as the maintenance of the public order, national defense and protection of individuals' fundamental rights. Scholars like Adam Smith, Lassalle Ferdinand and Jeremy Bentham asserted that public works should be minimized and other things should be left to one's freedom.

As things in every social area became more complicated, many social problems such as the Great Depression in 1930 arose and people felt a necessity to change the existing policy. In this post-modern period, many countries came to perform many roles in various areas. There has been much focus on a state's active roles. A state's sphere of activity got broadened so that every individual can lead a decent life.

John Locke thought the purpose of instituting a state is to provide its people peace and security i.e. the social order. He believed that as a part of its functions and roles, a nation should exert its force in order to maintain the peace of the community based on people's agreement. This is called the theory of social contract. In addition to Locke, Hobbes also believed that the state provides its people peace and security. The compelling force of a state is a necessary element for guaranteeing the community peaceful life. They both saw the relationship between the existence of a state and securing peace and order inseparable.

The Constitutional Law of Korea reflects Locke and Hobbs theory well. The article 37 paragraph 2 states: The freedom and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

We believe that maintaining peace and order is very important for the continuation of a state. In order to secure peace and order, a state has some external and internal obligations. Externally, it has to protect its people from outside enemies

therefore, national defense is the fundamental duty that a nation should focus on. Internally, it has to provide its people with peaceful life. A country should well-maintain the public order. In order to do that, it protects individuals' fundamental rights such as the right to property. It also provides its people especially the oppressed with welfare benefits. It has to offer at least the minimum standard of living to the oppressed otherwise they are going to raise upheaval. In this respect, we believe that there is a close relationship between the existence of a country and securing peace and order; moreover, guaranteeing peace and order, national defense and welfare are correlated to one another.

One of the nation's basic roles is to maintain public order. Human beings are social animals and therefore people need to live together. When people live together, conflict occurs. A state was first formed in order to solve conflict and maintain social order. A state controls the society through the legal system. For example, it applies the commercial law to maintain the order among companies, the civil law to solve the conflict between individuals and the criminal law to maintain the general public order.

As mentioned earlier, the state's role and influence are very extensive ranging from economy to individuals' lives. The state can intervene in people's lives for maintenance of public order and interest of the public. There are three policies that a nation intervenes in civilians' lives. It can either restrict or facilitate one's freedom and work for the social welfare. For example, it restricts an individual's freedom if it harms the whole society like limiting the circulation of the illegal drugs, birth control and environment conservation. It also protects and supports people, for example, reduction in taxes and offering subsidies. A good nation tries hard to improve the social welfare such as the basic standard of living system and medical insurance benefits.

There are many kinds of efforts that a nation makes in order to maintain peace and order and to minimize conflict. First many countries focus on national defense. Korea has concentrated much on military defense due to the North Korea issues. It has concluded mutual defense treaties and involved in international organizations such as the United Nations. Secondly, it tries hard to promote a sense of unification among its people. The international sports games, national anthem and flags are good examples. Third, through social welfare and subsidy system, it provides its people with stability and peace.

In concluding summarizing the national services, we would like to finish this section by quoting some of the 'right to peace' defined by Asian Human Rights Commission.

*"All persons have the right to live in peace so that they can fully develop all the*

*capabilities, physical, intellectual, moral and spiritual, without being the target of any kind of violence. Wars and civil conflicts which have caused many deaths, mutilation of bodies, external or internal displacement of persons, break up of families and in general, the denial of any prospects of a civilized or peaceful existence. The right to live in peace requires that political, economic or social activities of the state, the corporate sector and the civil society should respect the security of all people, especially of vulnerable groups. People must be ensured security in relation to the natural environment they live in, the political, economic and social conditions.”*

### III. FREEDOM

Freedom enables human beings to relish the happiness to the fullest. In other words, freedom can be guaranteed especially when government interferes the least. Although nowadays people take freedom for granted, this didn't come without price. Freedom starts its journey in order to secure individuals' freedom from restraint. More specifically, individuals should not be restrained without due process.

#### 1. FREEDOM FROM RESTRAINT

Freedom from restraint is on the basis upon natural rights or God-given rights. The typical one is 'Personal Freedom', which means human body is under each individual's determination or its freedom should not be invaded. Currently, this is found in Article 12 from Korean Constitution. Article 12 clearly stipulates that 'Every national has personal freedom. No national is subject to arrest, confinement, seizure, search without due process of law or torture, no national is susceptible to punishment, security-measure or forced labor.' As we are all aware, freedom does come with a lot of sacrifices and efforts.

Historical Background of Freedom from Restraint:

##### From Magna Carta to Mercantilism, Industrial Revolution

Originally, Magna Carta focused on aristocrats' rights. In the 17th century, however, Magna Carta provided good fundamentals to justify Parliament against King. Accordingly, taxation levied by King without approval of Parliament should not be accepted. What's more, Article 39 stipulating that 'No one should be arrested or confined without trials or laws was also of great assistance.

Mercantilism and Industrial Revolution made a great contribution in shaping Bourgeois, who later on helped to guarantee freedom from restraint. People could never

be free under Absolute Monarchy.

Mass production was conducive to rendering each European country realize the necessity of new markets and of wealth. Hence, the Wealth of Nations resulted into the necessity of colonies. During the process, merchants came to understand the need of freedom from restraint, especially from severe taxation.

### Bourgeois Revolution

Bourgeois Revolution broke out not only because Bourgeois wanted freedom from restraint from Royal Authorities, but also because severe taxes were levied on Bourgeois. Since merchants possessed financial powers and didn't want to be manipulated at the expense of their freedom by Royal Authorities, Bourgeois Revolution arose. Consequently, Revolution helped secure freedom from restraint.

### Night Watchman Government

'A wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned – this is the sum of good government.' Thomas Jefferson.

During Night Watchman Government era, finally, freedom from restraint as well as freedom to do anything was enjoyed by people.

The inherent problem with Night Watchman style of government was conflicts among common people. Eventually, freedom from restraint was achieved, but excessive maximization of an individual's freedom to do anything transformed into a huge stumbling block. Thus, according to Korean Constitution as well, Article 37. 2 stipulates that 'Every freedom and right of nationals can be limited only for national security, order maintenance or public welfare through laws.

## **2. FREEDOM TO DO ANYTHING**

The instinctual desire of most every person is the fulfill wishes, to experience pleasure and to feel free. But what happens when one takes the personal allowance of liberty to harness freedom itself?

Freedom, or liberty, is the concept of exercising unrestricted authority over one's life and also the extensions of one's life that can be regarded as property. Because every being must occupy space and consume external sources of energy to continue existence, the property question goes to the very essence of life itself. Therefore individual freedom, or liberty, and private ownership of property can be considered as

synonymous concepts.

Property ownership can be defined in terms of control; whoever makes decisions about an item of property is the real owner. Based on this definition, the owner may do as he pleases with his property, without any restrictions or limitations. If the owner may not do so, he is not the real owner, but the restricting party is. One may want to amend this statement with a condition – as long as it does not interfere with the right of others. However there is no need for this precondition, because property principle precludes a person from trespassing upon the life or property interest of another. In this sense, victimizing crimes for example, cannot be regarded as an exercise of freedom. Murder, rape, robbery are actions that all violate the property interests of the victim.

In the case of practices that maybe distasteful but involves no property trespass the same principle can be applied. Take a men's club that chooses not to accept women as members. A woman is refused and may feel that her freedom to join the club has been ignored. Here the woman's right to join the club and the club's choice to not to receive female members seem to be in conflict. The property principle, however, allows unrestricted freedom to decide with whom to share, or exclude from the property. In other words, the woman has no rights to join the club but the club has the right to deny her.

It is important to acknowledge the right of others to act freely concerning their property, although it may be offensive to others. Voltaire's words, "I may disagree with what you say, but I will defend to the death your right to say it", is well expressed and suitable to describe the right to have 'freedom to do anything' on one's own property.

### **3. FREEDOM GUARANTEED BY GOVERNMENT**

#### *1) Freedom*

Freedom is a mental condition – a condition of the spirit. Therefore all of us are free, if we choose to acknowledge it. To borrow from Rose Wilder Lane, freedom is control of the self. The essence of the "self" is one's mind, soul, and spirit. Everyone is always free to change the inner part of each of us – our thoughts, knowledge and understanding, attitudes and beliefs.

It seems no doubt that people have "freedom" in this democratic society. But is it true that we have freedom to do anything? Since we live as a member of society, it is not possible for an individual to have unlimited freedom. As we all know, we have "responsibility" as well as "freedom". However even in this point of view, it is obvious that we have freedom naturally, which is not made or manipulated but should be guaranteed by the government.



## *2) Guaranty*

What is the meaning of "Guaranty" or "Guarantee"? In understanding the concept of rights, knowing the meaning of these words is an essential precondition. According to the dictionary, "Guaranty" means a contract that some particular thing shall be done exactly as it is agreed to be done, whether it should be done by one person or another, and whether or not there be a primary or principle contractor.

Also, legally the word means a collateral agreement for performance of another's undertaking. An undertaking or promise that is collateral to a primary or principal obligation and that binds guarantor to promise.

"Guarantee" is a promise made on the grounds that it will be fulfilled and maintained by the party or parties who generate it.

## *3) Freedom Guaranteed by Government*

As mentioned above, we have freedom. It is the government that rules and controls various social affairs, conflicts etc. that occurs in the society. Then should the government guarantee freedom for its citizens? For the following two reasons, the government should guarantee our freedom:

### Social Contract

Social contract means that each individual concerned has consented and so removed himself from the "status of nature" and helped set in motion a regime of government under laws, of impartially administered justice, and of civic morality.

According to the social contract, individuals had natural rights in their nature. But to protect and secure himself, he gives up certain parts of his natural rights. This is the reason why people do not have unlimited freedom in a society. Even though people give up certain parts of their freedom, the government or ruler should guarantee the essential parts of one's freedom, which should not be given up. In this way, the government can protect people more efficiently. Moreover, this is the government's reason of being.

### Freedom by Government Legitimized by Consent

The persuasive definition of freedom is used to express the norm that the government ought to be based on the consent of the governed (people). This usually means representative government and majority rule. Under such a system, men are free because their freedom is limited only by measures of enactment in which they are free to

participate. "Freedom" stands no longer as the government's duty to be responsive to the will of the citizens, but as the citizens' duty to lead the governmental enactment and obey such enactment through self-restriction. According to Rousseau, the citizen is always free whether he fulfills this obligation freely or he has been "compelled to be free".

#### IV. CONCLUSION

Freedom is a delicate fruit of a mature civilization. This hard earned 'freedom to do anything' on owned property does exist and should be respected. But again, freedom is a delicate and vulnerable fruit.

Imagine a board game with one obligation, to exercise the freedom to do anything on one's own property. This may sound like an ideal setting where everyone can enjoy personal freedom without restraint. However, few minutes into the game the players will start to feel frustrated, instead of the pleasure from having individual freedom. There are two reasons for this. First, there are no rules and so there is no goal. The purpose of the game is non-existent. Each player may have an idea as to what they would like to achieve from the game, but of course they cannot exert this on other players. The second reason is the fear of losing their freedom. Although the one obligation stands, which if said backwards is do not intrude on others' property, one cannot exclude the possibility that the opposition may violate it. Sooner or later, players will realize the need for a set of instructions and rules for this game to work properly, and ways to deal with rule breakers. Freedom alone will not be sufficient to actually exercise it.

The world, and the way it works is not much different from this board game. We need instructions or laws in order to fully enjoy given freedom. There has to be a system, namely a government that will see to the fairness of the game. Therefore, as we have discussed within the presentation, the people have given and accepted the authority of the government. The question of what the government should do and should not do is a controversial issue. Also, the role of the government has changed with the course of history. But the job of the government has altered, according to the wish of the people, although it did cost sacrifices. Whatever we feel is appropriate in order to guarantee our freedom and rights will eventually become the present role of the government.

Right to peace is a necessary condition for exercising true freedom. We know that freedom cannot exist alone. There has to be a system that will guarantee that the order of things today will not suddenly disappear tomorrow.