

The Theory of State Intervention under the Modern — Liberal Constitution

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1 Introduction

In modern liberal states based on the concept of the night watchman state, the role of the state was generally restricted in terms of guaranteeing human rights. In such societies, activities of citizens were thought to be ensured by private autonomy. Therefore, the states stood back from the daily activities of society and were not permitted to intervene in the free activities of citizens. Since the very role that was allotted to states was to evict those who disturbed the peace and order of a state, a primary function of the state was to maintain the public order and to defend the land. The legal relationship between state and society resulted in the rights of freedom which were guaranteed in civil constitutions and democratic governments based on the principle of autonomy by the people.

In spite of such legal relationship, states were concerned with the protection of human rights. In particular, when human rights were infringed, the judiciary worked organizationally in order to obtain justice. However, in most cases the judiciary was able to start its work only after human rights had been infringed, and had to deal with each case separately and individually. Even when remedies such as prevention or injunctions would be given in advance, such remedies were only applied in situations where it was difficult to reinstate the injured party to its original position, once infringement of rights had occurred, and such cases were extremely rare. Therefore, commitment by the judiciary to the protection of human rights was rather passive as a whole.

However, in the case of the contemporary democratic state, it

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has become increasingly necessary for a state to commit to the protection of human rights. Good examples of this tendency are the restrictions on economic freedom and the provisions of social rights in the contemporary democratic constitutions in the 20th century. The aim of such restrictions is, as seen in the prohibition of private monopoly, to maintain sound capitalistic economic order and ensuring free competition by restricting the freedom of those who have strong economic powers. The provisions of social rights are designated to resolve harms inherent to capitalism, and its components include social security benefits and social welfare which are intended to improve the quality of life of the poor who need support. For effective enforcement of these institutions, a positive intervention by state is essential and indispensable. Such enforcement has developed against a historical background of civil states in which a night watchman state, whose role had been restricted to a passive function, has turned into a social state which will make a positive contribution to the protection of the social life of the people.

2 Change of Liberalism

The transformation of civil states is made on the basis of the change in the basic concept of liberalism, which is the principle of civil states. Generally speaking, individualism on which liberalism is based is founded on the atomic view of society. In this view, a state or society is considered to be a group of individuals, and there is no existence recognized which is above the individuals. In individualism, therefore, the supreme value will be found in each individual, and at the same time, an individual person is detached from society and regarded abstractedly as an atomic existence and also as an absolutely equal existence. By giving freedom to such an individual in individualism, ideologically the guarantee of freedom would extend to the maximum point. This form of liberalism was the classical liberalism which was a fundamental principle in the modern civil constitutions. Legal subjects under this theory were citizens who had a general and abstract characteristic, and to which Radbruch referred as “Person”.

However, the situation changed. When the evils of capitalism

brought about an increase in the number of poor people, states had to intervene in the free activities of citizens in order to protect the poor. A justification for the intervention in free activities of citizens by the state was the recognition that such individuals, as part of the social existence, were in extreme poverty because of social factors. In this situation, a new legal subject is recognized in the field of law. That is, like the poor and the unemployed, a social existence developed which has characteristics of real human beings, and to which Radbruch referred as "Mensch". In this theory, an individual is thought to have some relation with a society, and a certain change is made in the theory of individualism which regards an individual as the only unit of existence. At the same time, a collectivism idea is introduced. Therefore, while it is recognized that activities based on free will of individuals are regarded as supreme, high value is also placed on societies or states which look in that direction. In this new theory, societies as well as individuals are considered to have high value, and it is thought to be natural and necessary for a state to intervene in order to remedy social harms. In the end, there develops a welfare state in which positive interventions by a state are justified for their social nature.

3 Development of a Theory of Positive Liberty

A new theory on liberty developed under which the change in liberalism was digested into the theory on rights. The theory was proposed by a 19th century English philosopher, T.H. Green. In addition to the negative liberty of conventional classical liberty, he advocated positive liberty. In modern liberalism, because it was thought that there was no room shared between individual freedom and positive functions of the state, and because both freedom and functions were in conflict with each other, freedom was negatively regarded as what there was without external coercion. But in the late 19th century, there appeared in England industrial and social problems such as unemployment. These problems made it clear that natural harmony by free activities of individuals was an illusion. It was realized that harmony should be made artificially in order to secure peaceful order and to gain fundamental conditions for con-

ducting free activities. For this reason, the idea of liberty was reconstructed in harmony with the positive function of state. In his concept of positive liberty, “the self” would be realized while looking for the common good. Construing liberty in such a way, Green pointed out that “it becomes liberty guaranteed by positive functions of the state which is not contradictory to positive functions of the state for promoting common good”. Thus, positive liberty is “one which requires the state to positively secure conditions for realizing personification of individuals”.

In terms of constitutional law, social rights can be within the category of positive liberty. However, not all the social rights, but those rights which are directly related to protection of the right of liberty, fall into this category. Those rights whose aim is to secure a precondition for full enjoyment of the right of liberty, and which are only related indirectly with protection of the right of liberty, like provision of materials, are not within this category of positive liberty. Examples of positive liberty are guarantees of adequate employment conditions and working conditions, the right of organization, the right of collective bargaining and the right to strike. For, although those guarantees and rights place restrictions on freedom of contract for employers, the life of poor people and workers would be harmed without those restrictions, and therefore it is necessary for the state to remedy harms positively.

4 Meaning of Contradiction of Positive Liberty

How can we reconcile the fact that positive interventions by the state, which is the center point of positive liberty, may contradict the concept of liberty? With regard to anti-trust law, for example, there are opposing opinions as to whether the law is a law which promotes liberty or a law which restricts liberty. It is true that state interventions which restrict or prohibit private monopoly formally also entail restriction on economic freedom from the state. However, such economic freedom is freedom for enterprises which may hamper fair and free economic competition by private monopoly. Furthermore, the aim of restriction by anti-trust law is to recover real economic liberty by removing obstacles to the free competition. For these rea-

sons, anti-trust law can be said to a law which substantially promotes liberty. This positive intervention by the state is formally in contradiction with liberalism, but substantially in harmony with liberalism.

5 Guarantee of Liberty and Positive Intervention of State

Taking into consideration the historical background of establishing modern constitutions and the inclination of state power to injure rights, it cannot be denied that the basic relationship between individuals and state power appears to be in opposition. But, as shown in the examples of social rights, both individuals and state power do not fully stand in opposition, and there is some room for compromise. In modern liberal states democracy is the fundamental principle which demands realization of liberty and rights of the individuals. For these reasons, state power and liberty are part of the same principle. There is room for the state to do positive activities for the substantial protection of liberty of the individuals.

Given such relationship, to what extent and degree are state power and liberty related to each other? It is apparent from looking at the changes from the guarantees of human rights under modern-liberal constitutions to those under contemporary constitutions where positive liberty is now founded on negative liberty. For this reason, state power, as a principle, cannot be allowed to intervene in autonomous matters which are objects of rights of liberty. Therefore, when state power is intended to create the protection of rights of liberty for a purpose of securing conditions for the realization of individual ability and personality, state power can provide a framework for realizing rights of liberty, that is, to provide external conditions for those rights. I shall describe that claim by which conditions for those rights can be demanded of the state, detracting from the concept of positive liberty, as the right of positive liberty.

6 Social Factors in the Right of Positive Liberty

The first factor is the advent of a highly informational society. In this society, because of the rapid development of the media which has the means of transmitting valuable information, and because of the dominant monopoly of information by a small number of large

enterprises, there appears a risk that a few may intentionally manipulate the view of value in a society. For the purpose of removing obstacles which hamper free flow of information and securing free market of thought, the right to know and the right to access have come to be claimed. These are the rights of positive liberty. Whatever political and economic system it may be, one characteristic of the present state is technocracy, which gives priority to ideas characteristic to highly developed science and technology, and by which society can be controlled. Shortcomings of technocracy are the use of scientific and technological thinking at the expense of dignity of human beings, the dehumanization which is brought about by giving priority to the scientific and technological efficiency, and the risk of bringing about a non-humanistic society. In order to overcome these shortcomings, secure liberty of individuals, and recover humanity, there is no way other than extending the right of positive liberty.

In addition, present societies often tend to be managed societies. Managed societies are said to be societies in which “the relationship between the managers and the managed is generalized as a new form of domination and suppression”. Among other things, suppressive management in the middle world of the society tends to expand.

In order to reduce such suppression, it is necessary for the strong power of the state to destroy the suppressive function of the social intermediary apparatus, and to make more room for liberty, and secure humanity.

7 Power Element in the Right of Positive Liberty

Because the right of positive liberty may, whether it may be a provision of external conditions, result in positive intervention by the state for the realization of rights of liberty, the risk of injuring liberty by its power element is much higher than any other type of positive liberty. Since the provision of conditions by power is substantially closely related to “realization of personality” or “free development of human abilities” which can be made by such conditions, there is a huge fear of exceeding the provision of such conditions and injuring the substance of liberty. Another problem that may be brought about by the right of positive liberty is the harm to liberal-

ism which is inflicted by expansion of power through using power itself. We can find a classic example for responding to power in the United States where a variety of interest groups are established and sound liberalism is achieved by the system of balance of powers.

8 Democratization of State

It is necessary to democratize a state before overcoming the negative effects of liberalism or preventing them from arising. As an ideological condition, it is necessary to democratize consciousness of civil servants as bearers of power. As executors of formation and realization of wills of power, civil servants must be holders of individualism, liberalism, and democracy. Then, as an institutional condition, there must be a system of democratic government by which the formation and realization of state will fully reflect the will of the people of the state. Therefore, parliamentary democracy, the principle of democratic liability of administration, and the principle of local government must be not only declared expressly in constitutional documents, but also realized in real institutions and the ordinary administration of power. Regarding the expansion of power which is brought about by ensuring the right of positive liberty, first, constitutional autonomy must be guaranteed through direct participation by the citizens of the states in the formation of state will, and secondly, democratic basis must be added to the power intervention by allowing citizens to take part in the power intervention, and thus by maintaining the balance between power and citizens, we must ensure liberalism.

Good examples of constitutional autonomy will be found in legislation such as the National Industrial Recovery Act and the Agricultural Adjustment Act which were driving forces in the age of the New Deal. In regard to the NIRA, a huge self-governing power was vested to the industrial bodies in making regulations for fair competition, which served the role of preventing the President, who held a large variety of powers, from inflicting harms to liberty. Therefore, constitutional autonomy was guaranteed in response to the situation that powers were concentrated with the President and Federal Government in order to improve the economic order, to secure so-

cial stability and overcome economic depression by the positive intervention by the state in the social and economic process. In response to sharp restrictions on rights, constitutional autonomy aims to minimize the negative effects of such relations by securing liberalism in the process.

It is also necessary to secure political freedom as a right of positive liberty. It is freedom of participation in the political process and has positive nature. For this reason, it is a freedom which directly secures realization and embodiment of the sovereignty of the people. The more it secures, the more political will of the people is reflected in the process of forming state will. This may make it possible to secure the similarity between state will and the will of the people. Generally, it is pointed out that, because of its power element, securing positive liberty brings about expansion of power and raises the fear of turning society into a totalitarian society. To make a state democratized is of significance, because it secures participation of the people in the political process, and thereby the state will reflects the will of the people. Democratization of a state is a strong driving force for liberalism and a brake to totalitariazation.