大法官講堂: 中華民國憲法及政府(一)

第二十一講 人身自由

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人身自由

湯德宗

憲法有聲書

目 次

壹、自由權總說

- 一、自由的意涵
 - Freedom
 - ➤ The state of being free; liberty; self-determination; absence of restraint; the opposite of slavery. (消極自由 ≠奴役)
 - ➤ The power of acting, in the character of a moral personality, according to the dictates of one's will, without other check, hindrance, or prohibition than such as may be imposed by just and necessary laws and the duties of social life. BLACK'S LAW DICTIONARY 664 (6th ed., 1990) (積極自由=從心所欲而為的能力) [1]

• Liberty

➤ The "liberty" guaranteed and protected by constitutional provisions denotes not only freedom from unauthorized physical restraint, but embraces also the freedom of an individual to use and enjoy his faculties in all lawful



ways, acquire useful knowledge, marry, establish a home, and bring up children, worship God according to the dictates of his own conscience, live and work where he chooses, engage in any of the common and lawful occupations of life, enter into all contracts which may be proper and essential to carrying out successfully the foregoing purposes, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free people.

BLACK'S LAW DICTIONARY 918 (6th ed., 1990)

- Personal liberty (人身自由=免於逮捕拘禁的行動自由)
 - ➤ The "personal liberty" guaranteed by Thirteenth Amend.,U.S. Const., consists in the power of locomotion without imprisonment or restraint unless by due course of law, except those restraints imposed to prevent commission of threatened crime or in punishment of crime committed, those in punishment of contempt of courts or legislative bodies or to render their jurisdiction effectual, and those necessary to enforce the duty citizens owe in defense of the state to protect community against acts of those who by reason of mental infirmity are incapable of self-control. Ex parte Hudge, 86 W. Va. 526, 103 S.E. 327, 329.

BLACK'S LAW DICTIONARY 918 (6th ed., 1990).

The right or power of locomotion; of changing situation,



or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 42, 27 L. Ed. 835.

BLACK'S LAW DICTIONARY 919 (6th ed., 1990).



Q 人身自由、行動自由與一般行為自由?

釋字 699 湯德宗大法官部分協同暨部分不同意見 書〉: 人身自由(§8)→居住遷徙(行動)自由(§10) →一般行為自由(§22)(參◆<u>30</u>講解釋要旨)

二、自由的分類

- 1. 消極自由與積極自由
 - 1.1 消極自由 (negative freedom) = 免於干涉之自由 (freedom from intrusion/ interference)
 - 自由的客體/內容=作為或不作為之選擇 (choice of action or inaction) \rightarrow
 - 1.1.1 Robert Alexy: x is free (or not free) from y, to do (or not to do) z
 - x is the liberty holder (x 為自由權之主體)
 - *y* is the obstacle to liberty (*y* 為自由的障礙)
 - z is the object of liberty (z 為自由權的客體/內容)
 - Ex. To travel abroad (or not) 旅行(與否)之自由
 - 1.1.2 法律所稱之自由(legal liberty)概指「消極自由」 只要國家不干涉(a negative act, or omission, 例如: 不拒發護照、不禁止出境),x 便有法律上的旅行 自由(消極地免於國家干涉的(遷徙)自由)
 - 1.2 積極自由 (positive freedom) = 依其所欲而行為之自

- 曲 (Freedom to act or to pursue in the way he/she wishes)
- 自由的客體(內容)
 - =作為 (simply an act, a single act) \rightarrow

X might not be able to afford \rightarrow economic liberty

If economic liberty is a matter of liberty at all, then it is positive liberty. \rightarrow

X must be given a suitable entitlement as against the state, that is, a right to a positive act on the part of the state, such as state subsidy. (物質受益請求權)

- 1.3 有「消極自由」,未必有「積極自由」
 - ℚ 國家對基本權之保護義務,於此二者有別否?
- 1.4 「消極自由」為實現「積極自由」之手段 吾人所以 渴望「免於干涉之自由」(隱私),乃因其 提供吾人 自由行動(積極自由≒自主)之可能性。
- 2. 身體自由與精神自由
 - 2.1 身體自由

人身自由(§§ 8,9)

居住遷徙自由(§10=行動自由)

2.2 精神自由

表現自由(§11)

秘密通訊自由(§12)

宗教信仰自由(§13)

集會結社自由(§14)



貳、人身自由概說

- 一、人身自由的概念
 - 1. 最廣義的人身自由
 - 1.1 UK WC
 - § 2 (right to life) 生命權
 - 2.1 Everyone's right to life shall be protected by law.
 - 2.2 No one shall be deprived of life intentionally.
 - 2.3 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary--
 - .1 in defence of any person from unlawful violence; or
 - .2 in action lawfully taken for the purpose of quelling a riot or insurrection.
 - 2.4 No one shall be condemned to death or executed.
 - §3 (freedom from torture) 免於虐待之自由 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
 - §4(freedom from slavery and forced labor) 免於奴役及強制勞動之自由
 - 4.1 No one shall be held in slavery or servitude.
 - 4.2 No one shall be required to perform forced or compulsory labour.
 - 4.3 For the purpose of this Article, the expression 'forced or compulsory labour' does not include-
 - .1 any work required to be done in the ordinary course of detention according to Article 5 or during conditional release from such detention;
 - .2 any service of a military character or, in case of



conscientious objectors, service exacted instead of compulsory military service;

兵役或良心替代役

- .3 any service exacted in case of an emergency or calamity threatening the life or well being of the community;
- .4 any work or service which forms part of normal civic obligations.
- §5 (right to liberty and security) 人身自由與人身安全 參後述
- 1.2 Checklist/ III. Fundamental Rights
 - D. Physical integrity of the person
 - Life
 - Liberty
 - Dignity
 - Privacy
 - Security
- 2. 狹義的人身自由 = 身體自由及安全
 - 2.1 UK_WC §5 (right to liberty and security)
 - 2.2 Checklist/ D 2 & 5 (liberty & security)
- 二、比較憲法例(「人身自由」權利保護範圍之比較)
 - 1. UK_WC §5 (right to liberty and security) 人身自由與人身安全

5.1

- 5.1.1 Everyone has the right to liberty and security of person. (權利宣示)
- 5.1.2 No one shall be deprived of their liberty except, on reasonable grounds and in accordance with fair



procedures established by law, in the following cases-得為限制之例外情形:

5.1.2.1 the *lawful* detention of a person after conviction by a competent court; 經管轄法院判決有罪後之合法拘禁;

5.1.2.2 the *lawful* arrest or detention of a person for noncompliance with the *lawful* order of a court or in order to secure the fulfillment of any obligation prescribed by law;

因違反法院之合法命令,或為確保法定義務之履 行,所為之合法逮捕或拘禁;

5.1.2.3 the *lawful* arrest or detention of a person effected for the purpose of bringing them before the competent legal authority *on reasonable suspicion* of having committed an offence **or** when it is reasonably considered necessary to prevent their committing an offence **or** fleeing after having done so;

因合理懷疑其曾經犯罪,或為防止其犯罪或犯罪後脫逃所必要,為使解送有管轄權之司法機關,所為之合法逮捕或拘禁;

5.1.2.4 the *lawful* detention of persons for the prevention of the spreading of infectious diseases constituting a serious threat to public health, or of persons suffering from mental disorder where necessary for the prevention of harm to themselves or others;

為防止傳播嚴重威脅公共健康之傳染病,或為防止精神失常者傷害自己或他人所必要,而為之合



《對話憲法・憲法對話》2016 法逮捕或拘禁;

- 5.1.2.5 the *lawful* arrest or detention of a person to prevent their effecting an unauthorized entry into the United Kingdom or of a person against whom action is being taken with a view to deportation or extradition. (*Cf.* 釋字 708 & 710) 為防止非法入境,或為驅逐出境,而為之合法逮捕或拘禁。
- 5.2 Anyone who is arrested shall, at the time of arrest, be informed in a language which they understand of the reasons for their arrest and shall be promptly informed of any charges against them.

逮捕時應告知理由,並應迅速告知所受指控。

5.3

- 5.3.1 It shall not be the general rule that persons awaiting trial shall be detained in custody. 羈押候審應屬例外
- 5.3.2 Anyone arrested or detained on a criminal charge shall be brought *promptly* before a judge or other officer authorized by law to exercise judicial power and is entitled to trial *within a reasonable time* or to release pending trial.

因刑事指控(犯罪嫌疑)而遭逮捕或拘禁者,應迅速(即)移送法院,並於合理期間內接受審訊或予開釋。

- 5.3.3 Release may be subject to guarantees to appear for trial or at any other stage of the judicial proceedings. 得以擔保出庭應訊為條件,而予開釋
- 5.4 Anyone who is derived of liberty by arrest or



detention is entitled to *take proceedings before a court* in order that the court may *decide without delay* on the lawfulness of the detention and may order their release if the detention is not lawful.

因逮捕或拘禁而喪失身體自由者,得向法院起訴,俾 法院得判斷其拘禁是否合法,或命予開釋(=提審)

- 5.5 Anyone who has been the victim of unlawful arrest or detention has an *enforceable right to compensation*.
 遭受非法逮捕或拘禁者,得訴請賠償
- 5.6 All persons deprived of their liberty shall be treated with humanity and with respect for *the inherent dignity* of the human person.

因逮捕或拘禁而喪失身體自由者,應受到人性之對 待,並尊重其人格尊嚴

- 5.7 Accused persons in detention shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as people who have not been convicted. 非有例外情形,因指控而遭受拘禁者(犯罪嫌疑人),應與罪犯隔離收容,並應受到與其他嫌疑人相當之對待
- 5.8
 - 5.8.1 Accused juvenile persons in detention shall be separated from adults and brought as speedily as possible for adjudication.

因受指控而遭拘禁之未成年人,應與成年人隔離收容,並應儘速受審

5.8.2 Juvenile convicted persons shall be separated from adults and accorded treatment appropriate to



their age and legal status.

定罪之未成年人應與成年人隔離收容,並應受到與其 年齡與法律地位相當之對待

5.9 No one shall be imprisoned *merely* on the ground of inability to fulfill a contractual obligation.

不得僅因契約不履行,而予拘禁(羈押、收容等)



- 2. UDHR § 9
- 3. ICCPR § 9 (Right to liberty and security of persons)
 - & General Comment No. 08 (1982/06/30)
- 三、人身自由的憲法地位
 - 1. 人身自由為其他自由權之基礎
 - 釋字 384 解釋理由書 [1]:

「人民身體自由享有充分保障,乃行使其憲法上所保障其他自由權利之前提,為重要之基本人權。故憲法第八條對人民身體自由之保障,特詳加規定」

- 釋字 588:
 - 「人身自由乃人民行使其憲法上各項自由權利所不可 或缺之前提」
- 釋字 588〈許宗力大法官等協同及部分不同意見書〉: 「管收涉及人身自由之限制,而人身自由又可謂其他 自由權之基礎,政府欲採取限制人身自由作為達成一 定目的之手段,應慎重為之」
- 2. 憲法第八條為我國憲法上「正當程序保障」(Due Process Guarantee) 之依據 (釋字 384)
 - 2.1 程序上正當程序(procedural due process) = 「程序正當」
 - Q 限制(含剝奪)人民身體自由時,應經如何程序



方屬正當?

- Ω 我憲法上「正當程序保障」所保障之「法益」,原 僅限於「人身自由」(憲法 §8),嗣經大法官解釋 逐步擴及其他自由及權利
 - 釋字 488(接管銀行之正當程序,參◆<u>27</u>講解釋要旨)
 - •釋字 462(大學教師升等之正當程序,參◆27講解釋要旨)
 - •釋字 491(公務員考績免職之正當程序,參◆<u>28</u> 講解釋要旨)
 - 釋字 499 (國民大會修憲之正當程序,參◆<u>01</u>講解釋要旨)
 - 2.1.1 憲法要求之正當程序(憲法上的正當程序):
 - 正當修憲程序(釋字 499,參◆01 講解釋要旨)
 - 正當立法程序
 - 正當行政程序(釋字709,739,參◆27 講解釋要旨)
 - 正當司法程序(亦「訴訟權」之內容)
 - 2.1.2 法律要求之正當程序(法律上的正當程序): 行政程序法(88/02/03 制定公布,90/01/01 施 行)
 - □ 湯德宗,〈論正當行政程序〉,收於氏著《行政程序法論》1~50, P. 49(2005年,增訂二版)。 訴願法(89/06/14制定公布,90/01/01施行)
 - □ 湯德宗,〈論訴願的正當程序〉,收於氏著 《行政程序法論》403~445(2005年,增訂二版)。 監察法(37/07/17)

立法院職權行使法(88/01/25)

- 2.2 實質上正當程序 (substantive due process)=「實質正當」 旨在確保法律規定之內容之「公平」(fairness),避免 實質上不正義之法律。核其功能,殆與憲法第二十三條 大體相當,例如:
 - 法律須為達成合法目的之合理手段
 - City of New Orleans v. Dukes, 427 U.S. 297 (1976) (僅當政府青睞之管制手段「全然恣意」(wholly arbitrary) 時,法院始予推翻)
 - Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (學校以成績為由,命學生退學之處分,如其內容尚非「重大悖離學術規範」 (a substantial departure from academic norms),即屬符合實質上正當程序之要求)
 - Price v. Hecker, 733 F.2d 699 (9th Cir. 1984) (繫爭法律與達成合法之政府目的間具有「合理關連」 (rational relationship),即應認合憲)
 - ・法律之內容,無論其為「誡命」(Gebot)或「禁令」 (Verbot),須明確,俾人民知所措手足 ≒法律明確性原則
 - Bell v. Arlington County, Va., 673 F. Supp. 767 (1987) (地方立法規定模糊,即執法官員亦難分辨「按摩技師」(massage technician)與「按摩治療師」(massage therapist)之不同。該法僅許後者為異性施行按摩。系爭規定爰「過於含糊而違憲」(unconstitutionally vague)

2.3 「程序正當」與「實質正當」之區別 釋字709〈湯德宗大法官 協同暨部分不同意見書〉 (參◆27講 解釋要旨)

綜上,美國憲法上「法律正當程序」(Due Process of law) 乃在確保國家公平、合理地行使公權力(含立法、司法 與行政),避免「恣意」。

參、憲法第八條釋義

一、第一項(原則揭示)

「非現行犯」之逮捕、拘禁、審問、處罰,屬「憲法保留」

- 1. 非現行犯之逮捕、拘禁
 - 1.1 「司法或警察機關」

司法機關:指含檢察官在內之「廣義司法機關」 (釋字 392 解釋文[1])

警察機關:含行政執行處(釋字 588 解釋文[4])

1.2 「法定程序」

釋字 384 (法律所規定之內容更須「實質正當」) 釋字 271 〈吳庚大法官不同意見書〉

1.3 「逮捕」

相當於刑事訴訟法所稱「拘提」與「逮捕」 (釋字 392 理由書 [11])

1.4 「拘禁」

相當於刑事訴訟法所稱「羈押」(釋字392 理由書[11])

- 2. 人身之審問、處罰
- 2.1 「法院」

釋字 392 解釋文 [2] & 理由書 [6]

釋字 251

2.2 「法定程序」

釋字 384

2.3 「審問」

指法院審理之訊問,無審判權者自不得為之(釋字 392)

- 2.4 「處罰」
 - 2.4.1 釋字 392 理由書 [11]

「就剝奪人身之自由言,拘提與逮捕無殊,羈押與 拘禁無異;且拘提與羈押亦僅目的、方法、時間之 久暫有所不同而已,其他所謂「拘留」「收容」「留 置」「管收」等亦無礙於其為「拘禁」之一種,當 應就其實際剝奪人身[按:行動]自由之如何予以觀 察,未可以辭害意」

- 2.4.2 二十四小時以上之「拘禁」=「處罰」
 - (舊) 違警罰法「拘留」(4小時~7日)、「罰役」(2~8小時)(釋字 166)
 - Q「罰役」概在24小時以下,居留亦未必逾24小時,釋字166解釋太苛?
 - 行政執行法「拘提管收」(釋字 588, 參◆22 講解釋要旨)
 - 破產法「破產人羈押」(釋字 300)
 - 檢肅流氓條例「留置」(釋字 523,參◆22 講解 釋要旨)
- 2.4.3 二十四小時以上之「拘禁、勞動」=「處罰」
 - 槍砲彈藥刀械管制條例「強制工作」(釋字 471,

參◆22 講解釋要旨)

- 檢肅流氓條例「感訓」(釋字 636,參◆22 講解 釋要旨)
- 組織犯罪條例「強制工作」(釋字 528,參◆22 講解釋要旨)
- 2.4.4 二十四小時以上之「拘禁 & 改造」=「處罰」
 - 違警罰法「矯正處分」(釋字 251)
 - 戡亂時期預防匪諜再犯管教辦法「交付管訓」 (釋字 567,參◆22講 解釋要旨)
 - 少年事件處理法「收容」、「感化教育」 (釋字 664,參◆22講解釋要旨)
- 3. 「現行犯」之逮捕→ 「法律保留」事項
 - 3.1 「現行犯」(釋字 90)
 - 3.2 法律另定:刑訴 §§88,88之1,92
 - ② 為何區分「現行犯」(法律保留)與「非現行犯」(憲法保留),而異其程序保障?
- 二、第二項(逮捕、拘禁「犯罪嫌疑人」之正當程序)
 - 1. 書面告知
 - 2. 載明事由(逮捕、拘禁原因)
 - 3. 告知對象(本人及其本人指定之親友)
 - 4. 逮捕、拘禁機關之作為義務
 - 4.1 主動移送(法院審問)
 - 4.2 限時(二十四小時內)移送法院審問
 - 4.2.1 二十四小時之計算

釋字 130 (不含事實上不能用以偵查之時間)

4.2.2 提審期間不計入(逮捕機關之拘禁期間)

釋字 392 解釋文 [4] & 理由書 [13]

- 5. 法院延長羈押之裁定,不適用本項規定(釋字 233)
- 三、提審制度(§8-II & III;釋字 392)
 - 1. 聲請主體

本人或他人(§8-II)

(提審法(103/01/08) §1-I)

2. 聲請事由

凡人民被法院以外之任何機關逮捕、拘禁時,即得聲請 提審,不以因「犯罪嫌疑」而遭逮捕、拘禁者為限

- 3. 法院之提審義務(§8-III)
- 3.1 法院對提審之聲請不得拒絕
- 3.2 法院不得先令(逮捕拘禁機關)查覆
- 3.3 法院應限時(二十四小時內)提審(§8-II)
- 4. 逮捕、拘禁機關之義務(不得拒絕或遲延)(§8-III後句)
- 四、依法追究(非法逮捕、拘禁)責任(§8-IV)
 - 1. 聲請主體:本人或他人
 - 2. 法院有受理之義務(不得拒絕)
 - 3. 法院應限時(24 小時內)追究
 - 4. 責任之種類
 - 4.1 行政責任
 - 4.2 刑事責任(刑法 §§125,127)
 - 4.3 民事責任
 - 4.3.1 侵權責任(民法 §186→ 國賠法 §2)
 - 4.3.2 國家賠償(§§8-IV, 24) 國家賠償法(69/07/02) §13
 - 釋字 228



4.3.3 冤獄賠償

冤獄賠償法(48/06/11) §1 → 刑事補償法(100/07/06) §1

- 釋字 477 (冤獄賠償法)
- 釋字 487 (冤獄賠償法 §2-(2))
- 釋字 670 (冤獄賠償法 §2-(3))

【學思策問】

大法官經由解釋,引進美國憲法上「正當程序」保障,對
於我國憲法之發展有何意義?

② 大法官在「正當(法律)程序」之解釋上,遭遇到什麼樣的困難(瓶頸)?

【進階閱讀】

湯德宗,〈論憲法上的正當程序保障〉,收於氏著《行政程序法論 論正當行政程序》,頁 195~204(2005年)

Sherry Colb, Freedom from Incarceration: Why Is This Right Different from All Other Rights?, 69 N.Y.U. L. REV. 781 (1994).

【課後習作】

憲法第八條規定之「程序上正當程序」為何?



版權聲明

頁碼	作品	版權 標示	作者/來源
217	The state of being free; liberty; self-determination; absence of restraint; the opposite of slaveryneces sary laws and the duties of social life.		The Law Dictionary, 《The Constitution of the United Kingdom》 (http://thelawdictionary. org/freedom/) 瀏覽日期: 2016/11/2,本作品依 據著作權法第 46、 52、65 條合理使用。
217 - 219	The "liberty" guaranteed and protected by constitutional provisions denotes not only freedom fromwithout imprisonment or restraint, unless by due course of law.		H.C. Black《Black's Law Dictionary – Sixth Edition》 P918, 919 本作品依據著作權法 第 46、52、65 條合理 使用。
221	2.1 Everyone's right to life shall be protected by law. 2.2 No one shall be deprived of life intentionally. 2.3 Deprivation of		The Institute for Public Policy Research, 《The Constitution of the United Kingdom》 P47, 48



	life shall not be regarded as inflicted in contravention of this Article when it results§5 (right to liberty and security)	21〈人身自由〉講綱 (http://www.ippr.org/file s/images/media/files/pu blication/2014/01/the-constitution-of-the-united-kingdom_1991-2014_1420.pdf?noredir ect=1) 瀏覽日期 2016/10/6,本作品依據著作權法第 46、52、65 條合理使用。 Albert P. Blaustein,
222	Rights D. Physical integrity of the person 'Life 'Liberty 'Dignity 'Privacy 'Security	《Framing the Modern Constitution: A Checklist》 本作品依據著作權法 第 46、52、65 條合理 使用。
222 - 226	5.1 .1 Everyone has the right to liberty and security of person2 Everyone has the right to liberty and security of person5.9 No one shall be imprisoned	The Institute for Public Policy Research, 《The Constitution of the United Kingdom》 P48, 49 (http://www.ippr.org/file s/images/media/files/pu blication/2014/01/the-



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united-kingdom_1991-

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	inability to fulfil a		2014_1420.pdf?noredir		
	contractual		ect=1)		
	obligation.		瀏覽日期 2016/10/6,		
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