The Conditions of Deference to Law Makers and Law Appliers

論　説

The Conditions of Deference to Law Makers and Law Appliers*

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For a long while, in the dominant current of legal theories and political theories, legal obligation and political obligation have 'divorced.' Theories of law that explain the nature of legal obligation and political theories that justifies political obligation are separated. On legal theories, under the overwhelming influences of (descriptive) legal positivism which separates strictly the descriptive, and value-neutral theory which explains empirically the nature of 'law as it is' (mainly, the general conditions of existence of law, and the normative character of law) and the evaluative (critical) assessment of the merit (right or wrong) of content of law from 'law as it ought to be' (namely, justice), the problem of obligation to obey the law has been treated as the problem of evaluation of law. Legal philosophers tend to ignore the significance of justification of legal obligation, that is, whether or not an obligation to obey even unjust laws is justified on the basis of the value which 'law as it is' (hereafter 'value of law', simply) has.

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On political theories, the focus has been exclusively put on what political relationship grounds political obligation, and political philosophers have often taken little notice to the value of law which grounds legal obligation. Needless to say, no theory of political obligation can be established without noticing functions of law, for almost all rulers govern by laws. However, political philosophers are solely interested in whether actual laws and legal practices are useful for governance, and they are often satisfied with a confirmation of usefulness of some aspects of laws and legal practices. They are interested in the art of government, and they have a concern about laws so long as laws facilitate the governance.

The value of law which justifies legal obligation is disregarded both from descriptive positivistic legal theories and from political theories. However, recently the circumstance of arguments of legal obligation and political obligation has been changing, and legal philosophers have become acknowledged the significance of inquiry of the value of law. Especially the debate between Ronald Dworkin and 'normative (ethical) positivists' the leading figures of whom are Jeremy Waldron and Tom Campbell which mainly discuss the desirable separation of powers between legislature and court (and the role and scope of judicial review) vitalizes within legal theories the inquiry about the normative value of rule of law and the value of law which backs it up. My project of reintegration of legal obligation and political obligation basically swims with the tide of vitalization of normative inquiry about the value of law.

To reintegrate legal obligation and political obligation, I will argue the following points.

(1) Legal obligation is not an obligation to conform to (or obey meekly) law but to respect it and to share burdens to reform unjust laws.

(2) Legal obligation is justified from the value (or ethics) of deference to law makers and law appliers who claim their justice in good faith under (sometimes) deep controversies of political moralities.

(3) To be accepted as a claim of justice in good faith, law makers and law appliers should satisfy the conditions of legitimacy of law. As for domestic affairs, I (still) support a normative positivistic theory that demands distribution to each member of a political society an equal political right to express her opinion and to have it reflected in democratic processes.

1 Legal Obligation as Obligation to Respect Law and to Share Burdens to Reform Unjust Laws

1. 1 Socrates in Apology and Crito

The basis of justification of legal obligation and political obligation was inquired systematically for the first time by Socrates in Plato's early dialogue Crito. In Crito, Socrates gave us three arguments, namely, the argument from gratitude, the consent theory, and the argument from destructive consequences of disobedience. Whether these arguments succeed is a very important and controversial issue even today, but my main interest is elsewhere: Why did not Socrates escape? Firstly, as is generally known, at that time, for Socrates to flee from Athens was much easier than for us to fleeing from Japan or other western states. Secondly, he could demand himself expulsion from Athens at the trial. Lastly, death-row convicts of Athens usually fled from their country and seek asylum in other states (polis). In fact, the accusers of Socrates (Anytos, Meletos, Lykon) and most of citizens of Athens seemed to expect him to flee. But contrary to the generally ac-

cepted practice and the general expectation, Socrates did not escape and accepted the death penalty (drank hemlock).

In Crito, Socrates confessed his love to Athens, and showed the reasons of accepting the death penalty, i.e. obedience to the Athens law is, and I do not doubt his sincerity. He really believed the truth of his argument. However, (at least for me) there is still something not easy to understand in Socrates' attitude. In Apology, he claimed his innocence and declaimed against his accusers somewhat provocative, but in Crito, he was uncannily calm. Can we understand his attitude in Apology and Crito coherently? Moreover, I doubt that he really had (or believed to have) a chance to be found not guilty under the political circumstance of Athens at that time. If he did not, wasn't his sincere apology ultimately futile?

In order to understand his attitude in Apology and Crito coherently and rationally, I think we have to change the understanding of the nature of legal obligation and also the understanding of the relation between legal obligation and civil disobedience. Legal obligation is not an obligation to conform to the law, that is, to acknowledge a peremptory force of law and do submissively what laws of our country command, but an obligation to respect the law and make better unjust laws to come closer to justice. Socrates in Apology did not simply follow his belief and conscience, and in Crito he did not surrender his judgment of the merit or demerit of the law.

1. 2　Civil Disobedience as a Fulfillment of Legal Obligation

Socrates attitude in Apology and Crito teaches us also about the relation between legal obligation and civil disobedience. As Joseph Raz explained (Raz 2009: ch.14), we should distinguish civil disobedience from conscien-

tious objection on one hand, and from revolutionary action on the other hand. civil disobedience is (1) to disobey openly laws that we judge are unjust (2) for an objection against them which attempt to revise and make better the laws, (3) by bringing the unjust laws to the attention of our fellow citizens and evoking their sense of justice. And (4) civil disobedients are generally aware of and accept the sanctions of laws which punish their illegal acts, for they do not lose their hope to revise the unjust law through ordinary legislation and judicial process. Conscientious objection is (usually) only follow our consciousness and does not have attention to the conflict between other citizens' moral convictions and laws and the revision of laws, so it perhaps shares (4) of the features of civil disobedience, but does not have (1) (official disobedience), (2) and (3). Revolutionary action, on the other hand, shares (1), (3), and perhaps (2). but not (4).

In my view, civil disobedience does not conflict with legal obligation (and political obligation). Civil disobedience is rather a fulfillment of legal obligation. For civil disobedients do not ignore and violate laws with a concern for not being detected by the authorities but disobey laws openly and accept the sanction in order to make the laws better. They defer the legal procedure and have strong attention to the improvement of laws. Compared with unreflecting conformity to law, we can see more respect for law in civil disobedience.

1. 3 Legal Obligation as Obligation to Reform Unjust Laws

Traditionally there is a strong tendency to treat the problem of legal obligation as follows: Laws are somehow given and what we must answer is only whether and for what reason we should obey them or not. How-

ever, as we saw above, legal obligation (fidelity to law or respect for law) does not simply require conformity to law, but it sometimes requires (civil) disobedience to law. What we really have to answer is when we should obey and when we should (or are permitted to) disobey. To answer this question, we must make sure who/what and to what extent has rights and responsibilities or burden to build and maintain the legal order and also to fulfill the requirement of justice. Are none but officials responsible to build and maintain a just order, or do citizens also have to bear some burden? For example, if the politicians and bureaucrats make little progress to form the policy to cope with the sufferers of a big earthquake and subsequent accidents of nuclear plants, should we only criticize the resourcelessness of politicians and bureaucrats and follow their decisions (or indecision, or nondecision), or should we disobey them? The successful theory of legal obligation explicates the appropriate distribution of burden of building a just order.

2 The Value of Deference to Law Makers and Law Appliers

2. 1 Difficulties and Significance of Argument from Fairness

2. 1. 1 Formulation of Argument from Fairness

For answering the question of just distribution of burdens, it is very instructive to have a glance at difficulties of the justification of political obligation from fairness. The standard formulation of arguments from fairness (hereafter AF) is as follows: Political society is a social cooperation to supply its members with collective goods such as the national defense and the police and a protection of members' lives and bodies and properties, roads, railroads, waterworks, a minimal livelihood protection etc.. Collective

goods have a spill-over effect, so it is rational for each member to take the benefits of social cooperation and to refuse to bear fair burdens of the social cooperation if other members bear enough burdens to maintain it and to supply the collective goods. In a word, it is rational to be a free-rider. The task of AF is to show the moral reasons for members of a political society not to be a free-rider, even if when a certain number of members free-ride, social cooperation would not collapse, and even if when these free-riders get more gains than they bear the burdens, the welfare of the political society as a whole would improve.

2. 1. 2　Criticism and Vindication of Argument from Fairness

When AF will succeed to justify political obligation? John Simmons's answer is as follows: AF would succeed and the political obligation would be justified only when all the members of a state (political society) not merely 'receive' (take unintentionally and without deliberation) the benefits, but 'accept' them, because accepting them means having an intention to pay for them that is assuming political obligation. If some members only receive the benefits of collective goods (because of spill-over effect), but other members or government require to pay for them, these collective goods are sold aggressively. However, nearly all members do not accept the benefits of social cooperation, but merely receive them. Hence AF does fail (Simmons 1979: ch.5, Simmons 2001: ch.1).

One of most powerful vindication of AF was presented by George Klosko. The core of his argument consists of two part (Klosko 1991).

(1)　The indispensability of collective goods: Some collective goods that states provide, such as the national defense, the police, maintaining a minimal social order, are indispensable for us to live peacefully. Klosko calls

these collective goods ‘presumptive beneficial public goods.’ Even if we merely receive the benefits of these collective goods, we would accept them if we were asked to take them or not. Actually, we have no other alternative than anarchism which endorses privatization of the collective-goods-supplying services. If we do not support anarchism, we should admit the existence of our political obligation.

⑵ Controversy of necessity of collective goods and the value of solution through fair collective decision-making process: However, the scope of indispensable collective goods which justifies political obligation is limited. Most collective goods are necessary for some members, but not necessary for other members (for example, the SMRT new line, Thomson-East Coast Line?). Klosko calls these collective goods ‘discretionary public goods.’ For success of justification of political obligation of our welfare state, receipt of discretionary goods must be the basis of political obligation. However, the extent of necessity of discretionary goods is highly controversial. Klosko’s answer is as follows: Whether or not receipt of these collective goods (‘discretionary public goods) justifies the political obligation (of welfare state), depends on whether we have a fair decision-making process which arbitrates controversy of the necessity of discretionary goods.

However, is the existence of fair decision-making process enough to justify bearing the costs to supply discretionary public goods even if we do not accept benefits of them? I think not enough. Let us imagine about a socially marginal people (for example, ethnic minorities, or religious minorities) whose interests are seldom reflected and protected in the democratic process. Should they obey laws that seems to be unjust for them? Let us assume they are pacifists and that laws order all citizens to serve in the

society's army. Laws can claim that the compulsory service is necessary for the national security, that is, the basic public goods every political society should provide. However, pacifists of marginal groups can argue that the most morally desirable and the most effective way to protect every political society is unarmed neutrality. Thus, there can be (deep) controversies about the necessity of armies (especially, compulsory services). If there may be a democratic decision to establish armies under a fair decision-making process, should pacifists obey the decision though they do not believe to accept or receive indispensable or discretionary goods? If we argue that even pacifists are receiving public goods to justify political obligation, we would be blamed as aggressive peddlers who force to receive benefits of armies to pacifists.

2. 1. 3 Fair Burdens of Reforming Unjust Laws?

As argued above, legal obligation is to respect to law and to share burdens of reform unjust laws. We have an obligation not to neglect or violate secretly unjust laws, but to make them better in ordinary legislative processes or through civil disobediences. How can we explain this legal obligation from AF?

We may treat law as a joint enterprise which can be realized by supports of members of every jurisdiction and also which has a spillover effect. Especially under democratic regimes each member has (at least) a voting right. As far as she does, she has chances to elect other candidates to reform current law. Members of political societies are not only victims of unjust laws but subjects who can share burdens of reform unjust laws with law makers and law appliers.

AF can argue that so long as every law system provides necessary benefits to members of the jurisdiction, members should bear the costs for

establishing and maintaining this law system and that the costs includes obligation to make laws better. Is AF which tries to justify obligation to reform unjust laws? I think it is not. Above all, even if every law system provides enough benefits to justify bearing costs for establishing and maintaining it, we should still argue why obligation to make laws better consists of the costs. We pay taxes and (in some cases) do our national services. Are not they enough?

To sum, AF is not a successful argument to justify obligation to obey the law because of controversies what public goods are. AF is neither successful to justify obligation to reform unjust laws as a fulfillment of obligation to obey the law.

2. 2　Deference Based on Counterfactual Reversibility Thinking

Philip Soper's argument seems to be more hopeful as justification of obligation to obey the law. Soper argues as follows (Soper 2002).

(1)　Law in general is indispensable for us to implement justice, so someone of us should make and apply laws.

(2)　However, there are (sometimes deep) controversies between us about the conceptions of justice (for example, utilitarianism, libertarianism, liberalism to support welfare states, communitarianism, feminism, multiculturalism), therefore whether or not some law is just is quite often controversial. Under this circumstance, even if some people believe a law is unjust, they should respect that law so long as law makers or law appliers claim their justice in good faith as a fulfillment of obligation to defer to two of them.

(3)　Obligation to defer to law makers and law appliers is based on a coun-

terfactual reversibility thinking as follows. As I said in (1), Law is indispensable and some of us make and apply laws. Suppose we the members of a jurisdiction were law makers or law appliers and made decisions in law making or law application. We know whether our decisions are just or unjust is controversial but we still believe our decisions were sincere, in Soper's terminology claiming justice in good faith. Suppose that some members now opposed our law making or law application because our decisions are against their conception of justice. If they neglect or violate secretly our decisions, what would we think about their attitude? It is not surprising if we would blame them, but what is the moral basis of our moral sentiment?

The basis of our blame to member's neglect or violation is a kind of mutual respect. Under the controversies about justification of collective decisions, especially about conceptions of justice, not a few of the decisions inevitably face dissents. All of us are short of making absolutely right or unanimous decisions. If dissents would freely neglect or violate the decisions, our political order will collapse. Then, dissents should defer to the decision makers because dissents would wish to be deferred if they were decision makers.

3 Guarantee of 'Claiming Justice in Good Faith'

What are the conditions we should admit that law makers and law appliers "claim justice in good faith"? If the condition is merely that they believe their decisions are just, even seriously evil decisions can claim justice in good faith. If we try to make good use of Soper's argument, we have to find the proper conditions of guaranteeing 'claiming justice in good faith.'

I will answer this question from a normative positivistic account of rule of law.

3. 1　*Circumstances of Politics*

As I said, there are various conceptions of justice, and we inevitably face political conflicts between them while, at the same time, we need some collective decision-making procedures for arbitration. As Jeremy Waldron says, we cannot escape from the *circumstances of politics*. What is *circumstances of politics*? Waldron argues as follows.

"The circumstances under which people make judgments about issues like affirmative action, the legalization of abortion, the limits of free speech, the limit of the market, the proper extent of welfare provision, and the role of personal desert in economic justice are exactly (the) circumstances in which we would expect, …that reasonable people would differ. As in case of more comprehensive disagreements we do not need to involve bad faith, ignorance, or self-interest as an explanation. The difficulty of the issues – and the multiplicity of intelligences and diversity of perspectives brought to bear on them – are sufficient to explain why reasonable people disagree." (Waldron 1999: 112-113). And we feel the need "for a common framework or decision or course of action on some matter, even in face of disagreement about that framework, decision, and action should be" (ibid. 102).

3. 2　Rule of Law: Process or Best Justification of Settled Laws?

3. 2. 1　Process related conception of Rule of Law

Under the circumstances of politics, what are the conditions of politi-

cal legitimacy and political obligation? The core of many legal and political philosophers' answer exists in what the ideal of rule of law is. The problem of the ideal of rule of law is elusive, so for this presentation, I will argue the dispute between Ronald Dworkin and so-called normative positivists, especially Jeremy Waldron (and Tom Campbell).

Dworkin's ideal of rule of law is what he calls the 'right-conception' (Dworkin 1986a: Ch.1). Law ought not merely to be a set of rules that are made public and can be known by everyone, but to be an enterprise for governance based on the just understanding of individual rights. Of course, there is a deep controversy in what is the just conception of individual rights, but we can argue the conditions of the just arbitrations of controversy. The point of the conditions can be named 'an inquiry for the best justification (interpretation) of settled laws'. We have to show our understanding of individual rights as a (part of a appealing) answer and contribution to the inquiry. Dworkin argues the best justification is guided by the idea of 'integrity' (Dworkin 1986b: Ch.6): firstly, it have to be consistent with settled laws (the condition of 'fit'), and secondly, it have to be more adapted to the principles of justice (the condition of morality). When we follow the idea of 'integrity', our society becomes the 'community of principle'. In the 'community of principle', (1) we regard the legal obligation (i.e. our obligation to obey the law) as special, that is, holding distinctly within us; (2) we treat and have an concern about each member of our society as a compatriot; (3) we have an obligation to have an equal concern for all member's well-being. The idea of 'integrity' which is the condition of the 'community of principle' is the Dworkin's answer for the problem of political legitimacy.

A crucial problem for my presentation (and normative positivists) is what the court should do in order to realize the 'community of principle',

especially whether the courts should have the power of judicial review, that is, the power to invalidate statutes which are not adapted to the courts' interpretations of constitutional provisions of human rights. In my reading, Dworkin's answer to the latter question is yes. He supports the following view of judicial review.

Our legal culture insists that judges...and finally the justices of the Supreme Court...have the last word about the proper interpretation of the Constitution. Since the great clauses command simply that government show equal concern and respect for the basic liberties...without specifying in further detail what that means and requires...it falls to judges to declare what equal concern really does require and what the basic liberties are. But that means that judges must answer intractable controversial, and profound questions of political morality that philosophers, statesman, and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices, ...(Dworkin 1996: 74)

Certainly, his argument of chapter 2 of Freedom's Law targets US Constitution, so if he thought about other constitutions, for example, British Constitution, he might present another proposal. But I think Dworkin prizes judicial review based on the following argument. Legislature, administrative, and judiciary should allocate the responsibility to make the just interpretation and implementation of Constitution according to the proper institutional division of labor. If legislators decides and makes statutes by majority, and does not and cannot adequately care for minorities' interpretations as resources for revising and making better a majority's interpreta-

tion, judicial review has a merit of making legislators reconsider their views and reexamine the basis of them.

I disagree with this Dworkin's conception of rule of law. We should places legislature as a branch that has an authority of final say in arbitrations of moral disagreements about rights, and judiciary mainly as a guard for protecting democratic legislating process. Jeremy Waldron, one of the prominent normative positivists, advances an argument for supporting my view that can be named 'process-related conception of rule of law. (Normative positivism (NP) is a normative theory of law which says that we have normative (or ethical) reasons to support the rigid separation of law and morals, that is, the source thesis, according to which the existence and content of law can always be determined by reference to its sources without recourse to moral argument, even if laws actually are and may be determined according to moral criteria in some cases. The main reason of NP is provided from NP's conception of rule of law.)

Waldron's process-related conception of rule of law can be explained as follows (Waldron 2005). A Process-related reason is a reason that stands independently of considerations about the appropriate outcome, for insisting that some person make, or participate in making, a given decision. These reasons are the basis of an obligation to obey it even if the person disagrees with the decision, that is, the basis of political legitimacy. Of course, we have outcome-related reasons of an obligation to obey, for example, that the decision implements some human rights. However, as I pointed out, there are deep controversies about what human rights are and which rights should be guaranteed by the government. Hence we should give a process-related reason in order to answer the problem of political legitimacy. Wal-

dron sees democratic legislative procedures following the principle of majority decision as a fair treatment of citizens because they respect equally every citizen's opinion about rights and justice, therefore we should respect the output of legislative process as politically legitimate.

3. 3　Democracy and 'Claiming Justice in Good Faith'

Now we can show you the conditions of 'claiming justice in good faith.' If law makers and law appliers make decisions and treat them claiming justice in good faith, they should be accountable about their decisions to members of the jurisdiction. Especially they can answer dissents with presumptively stronger reasons to support their decisions. Deference from members of a jurisdiction to law makers and law appliers is respect to the latter for their sincere attempts to justify their decisions and answer to dissents with reasons under the circumstances of politics.

In other words, deference based on respect to law makers and law appliers is the basis of legitimacy of law makings and law applications under circumstances of politics. Normative positivists' answer for conditions of legitimacy, that is, deference is making collective decisions under pure democratic processes which give each member of the jurisdiction an equal right to express her opinion and to be reflected in collective decision making processes, because under circumstances of politics we cannot treat any opinions closer to a right answer.

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