

Lecture Notes - "Legal Obligation and the Duty of Fair Play" - John Rawls

- In this article, Rawls wants to argue *that* the moral obligation to obey the law is a special case of the prima facie duty of fair play.
 - He's going to assume that, in a society like ours, citizens do have such an obligation and that such an obligation must rest on some general moral principles. His concern is to show which principles those are.
 - Still, he does provide us with a kind of argument for the claim that there is a moral obligation to obey the law; and that's going to be our focus.
- Here's how he sets up the question.
 - Assume you live in a society that has a legal system. That legal system satisfies the *rule of law* (rules are public, similar cases are treated similarly, etc. [You should think of Fuller's "Eight Ways" here.]). The legal order of the society is a constitutional democracy that establishes equal citizenship and political equality (suffrage) and secures freedom of the person, thought, and conscience. In such a legal system, we accept that sometimes we will be in the majority on a particular issue of law and sometimes in the minority. When we are in the minority, we may find (perhaps correctly) that the law that is adopted is patently unjust. On what grounds do we have an obligation to obey such a law?
 - Let's clarify:
 - A voting procedure *does not* settle what the best policy is; it settles only the question of which policy *will be enacted*.
 - If you accept the voting procedure as fair, then you seem to be committed to accepting the outcome as legally obligating you, but not to believing that it is the best policy.
 - So, you can think that it is not the best policy (perhaps it is unjust) yet still find yourself obligated to obey it.
- How can this be? How do you become obligated to obey an unjust law?
 - Rawls's answer is that you become so obligated by accepting as binding on you a just constitution that includes as a fundamental rule:
 - Given a majority vote in behalf of a statute, it is to be enacted and properly implemented.
 - Ok, but how does accepting such a constitution obligate you to obey unjust laws?
 - It binds you as a result of the *duty of fair play*.
 - Assuming that the constitution sets up a scheme of social cooperation that is mutually beneficial (better than the state of nature) and just, and that the advantages can be obtained only if everyone (or at least nearly everyone)

cooperates, it follows that each individual has a duty to cooperate so long as they are enjoying the benefits.

- Why?
- Cooperation requires that each sacrifice something (if only some part of their liberty). The benefits of cooperation, however, are, up to a certain point, free, i.e., one could not contribute yet still reap the benefits (be a free-rider). Why should one not do this?
- “The reason one must abstain from this attempt is that the existence of the benefit is the result of everyone’s effort, and prior to some understanding as to how it is to be shared, if it can be shared at all, it belongs in fairness to no one.” (122)
- The idea is that in breaking the unjust law, you make an exception for yourself and accrue some benefit as a result (the benefit may only be an increase in your liberty that you fellows do not get), but why should you be allowed to reap this benefit? You shouldn’t...it’s unfair to the others...EVEN if it doesn’t harm them or your cooperation doesn’t benefit them.
 - The key is to see that failing to follow the law is a kind of free-riding. You’re accepting the benefits of cooperation and intend to continue excepting them, but not paying your due. More precisely, you’re taking a particular benefit for yourself – the extra bit of freedom that is made available by nearly everyone else doing their part – prior to some agreement as to whom this benefit belongs.
 - You couldn’t achieve your ends (getting from A to B quickly) by speeding if everyone was doing this because it would cause more accidents, more traffic jams, etc. The ability for you to use this means to achieve your end is a product of everyone else following the speed laws. But, then, why should you get to take this benefit that is created by everyone’s effort prior to our coming to an agreement regarding its distribution?
 - Prior to this agreement, it belongs to everyone or no one. If it’s something shareable, then we need to come to an equitable way of distributing it...perhaps we pass the permission to break the speed limit around to different people on different days so it is fairly distributed. If it isn’t something that could be distributed in this way – as the distribution would be

too costly or cumbersome or simply impossible – then it belongs to no one at all.

- As long as you benefit from the cooperative endeavor and intend to continue benefiting, you are obligated by the duty of fair play to obey the laws.
- If you accept the constitution as binding, you have to obey the laws.
- It seems, then, that our question is really this: why would you accept a constitution that you know (for all practical purposes) will lead to the adoption of at least some laws that you will consider unjust?
 - To see why, we need to consider Rawls's theory of justice.
 - Two principles:
 - Everyone has an equal right to the most extensive liberty compatible with a like liberty for all. (Liberty Principle)
 - Inequalities in opportunity or benefits are only acceptable if it is reasonable to expect that they will work out for everyone's advantage (Difference Principle) and provided that the positions and offices to which they attach or from which they may be gained are open to all (Fair Equality of Opportunity)
 - Why accept these principles: the argument from the original position (Veil of Ignorance)
 - Parties do not know:
 - The race, ethnicity, gender, age, income, wealth, natural endowments, comprehensive doctrine, etc. of any of the citizens in society, or to which generation in the history of the society these citizens belong.
 - The political system of the society, its class structure, economic system, or level of economic development.
 - Parties do know:
 - That citizens in the society have different comprehensive doctrines and plans of life; that all citizens have interests in more primary goods.
 - That the society is under conditions of moderate scarcity: there is enough to go around, but not enough for everyone to get what they want;
 - General facts and common sense about human social life; general conclusions of science (including economics and psychology) that are uncontroversial.
 - Rawls thinks that rational people would choose these principles above any others.

- Given these principles it would be unjust to adopt any voting procedure that makes you a dictator, that is, that ensures that only statutes you deem just are adopted.
 - Why?
 - It would restrict the liberty of others...it is not possible that everyone has this authority.