《論　　説》

Collective Freedom: From an Individualist Point of View[1)]

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1. la volonté générale

If I can be said to have free-will I must have full control of my body; i.e. my limbs should obey the commands of my mind. Instead, if parts of my body, especially my tongue, have their freedom in how to act, I cannot be said to be free myself. In general, in order for an entity to be free its constituents should be obedient to the entity's will and cannot be free themselves. I think that should be the definition of 'will'. In short, existence of will presupposes obedience, i.e. non-freedom, of the constituents.

When Rousseau talks about the general will（la volonté générale）we can apply the same logic described above and expect that under the general will its constituents, i.e. individuals in the polity, are not free and obeying the decisions of the general will, i.e. the will of the polity as a whole. In this sense Rousseau was doubtlessly a totalitarian. But his theory of social contract offers many means to make individuals in the polity feel themselves identical with their polity. If the will of one individual and that of the polity as a whole are identical, or nearly so, there is no reason not to say he is free in Rousseauan world. But that means the will of each individual, hypothetically equated

1）　The following essay was first read in the special workshop, 'Collective Decision Making in a Theory of Justice' in IVR（Internationale Vereinigugng für Rechts-und Sozialphilosophie）2019 World Congress at Luzern.

with that of the whole society, must be the same with one another. And the conditions set by Rousseau for this purpose were practically impossible to achieve in our contemporary world; direct democracy run by a comparatively small number of people with rich occasions of communication among themselves whose main livelihood consists in agriculture.

So in modern society, where those conditions seem to be nothing but an unattainable dream, 'general will', even according to Rousseau, appears as the most dangerous oppressor for individual freedom.

But it is obvious that we cannot do away with collective decisions all together. So, the only thing we theoretically do is to classify the cases of collective decisions and try to apply suitable limitations on the competence of the general will.

2. least problematic case: modifying private law

Private law makes it possible for any actor to decide things within his sphere as he likes. In a sense his decision, thanks to private law, becomes final as a social decision. The most important point here is that others do not interfere with him because they believe it is his matter to decide.

There exists in people's minds an imaginary network of rights and duties the content of which are changing according to the concerning actor's expressed will, or most of the cases by various contracts made. The stronger the belief of the society in the existence of this imaginary system that makes each individual's decision social the freer the individuals in it are in positive sense. In this context private law, or firm belief in its existence, is inevitable for a society in which each individual can be socially free. So far as I believe, the essence of "the rule of law", i.e. the rule of law modeled after private law as its paradigm, resides here.

Roman law was basically private law and that feature was maintained by Western legal tradition after the Renaissance when the tradition started the process of succeeding Roman law. The lawyers and legal scholars sometimes called the study of

law originating from this tradition ‘natural study of law’. And I believe the social contract theories of various kinds, especially that of John Locke, are utilizing this trend of thought in describing ‘the state of nature’ from which the story of social contract leads to establishment of the state by people’s contract. But so called the state of nature, as described here, looks very Western if seen, say, from the Far East.

Anyway after codification of civil law, e.g. by Napoleon, it has become possible for legislation through democratic process to modify the content of private law. And in late 19th century when socialism became influential among legal theorists, scholars started discussing the possibility of abolishing the private law all together. Marx and Engels called private law as the means of class-oppression justifying economic exploitation of workers by capitalists. Such zeal for radical social revolution getting rid of private law seams fading after around 1990 when the Cold War ended with the fall of socialist block under USSR’s influence.

At present what is expected as the role of legislation in this field is to make transactions of individuals as smooth as possible. It may be useful to compare private law to traffic rules. Traffic rules stipulate many details of how cars must be driven. But they never tell drivers when and where to go. Instead, it is because the suitable traffic rules are set by the legislator and kept by individuals that each driver can plan his trip freely with some certainty. In a chaotic traffic no one can be free to choose timing and destination of his trip.

But in the case of traffic rules road maps as a whole constitute a static two dimensional world and all possibilities of where to go are given at start like in a game with perfect information. But the whole network of legal relations that innumerable private transactions constitute are dynamic and changing at any moment. New destinations are created by some and discovered by others. Competitions are functioning everywhere as discovery processes. As a hindsight it looks just obvious why free economy superseded centrally planned economy which basically prohibited individual initiatives.

If it were not for transaction cost we could have expected this mechanism of

behavioral order[2] made possible by private law to achieve the maximal efficiency. But in our world with various transaction costs we need new rules always to cope with the development of technology, social changes and the like. But anyway the most important point here is that the purpose of legislation in this field is to make the involved individuals as free as possible.

3. less problematic case: providing public goods

We have to deal, in this context of collective freedom, with the roll of the government, or public sector, to provide so called public goods. But since at present I have not much to say on this subject beyond text books of Economics, I like to be brief.

Public goods are defined as non-excludable and non-rivalrous goods. Examples for it could be defense, information（including official statistics）, scientific discoveries, environmental goods, etc. But they are ‘goods’ because individuals, either directly or indirectly, demand them. There are genuine demands for such goods but market cannot provide them because the lack of excludability prohibits the potential providers to earn by offering them only to the buyers. Therefore public sector should be providing them. In short the logic here to justify the collective provision of public goods is fundamentally individualistic.

But there are some difficulty in applying this theoretical concept to the real world. For example Ronald Coase’s research showed that light-houses, one of the most popular class-room examples of public goods, were as a matter of fact built and maintained by non-governmental bodies[3]. The expense for a lighthouse can be collected by including it in the fee for ships to use a near-by harbor. Though some ships, skipping the harbor, can utilize the information given by the lighthouse as free

2） cf. F. A. von Hayek, Rechtsordnung und Handelnsordnung, in *Freiburger Studien; Gesammelte Aufsätze,* J. C. B. Mohrr（Paul Siebeck）Tübingen, 1969

3） Ronald H. Coase, *The Firm, the Market and the Law,* University of Chicago Press, 1988

riders, the income gathered from the ships coming into the harbor may be enough to cover the expense. Anyway, it might be thoughtless to jump to the conclusion that only government can coup with the problem of public goods.

4. most problematic case: decision making of the sovereign

As was discussed at the beginning, collective entity of people and each individual who constitutes it are two different things to be distinguished clearly. Sovereignty resides in the former. And there may be some issues for sovereignty to decide and the latter to obey. What could be those issues. There must be many but I will discuss here only on the problem of religion and politics.

Seen from Western common sense, there must be separation of government and religion. Japanese Constitution also has an article for such separation similar to American one. But what if some people, as a free entity, has settled with a sort of theocratic regime and a great majority of individuals constituting it like to live under that regime? Some Western scholar would answer to this question and argue that the principle of human rights, especially freedom of religion, prohibits the majority to force their religion to minorities. As a lawyer I would agree with them. I even wish if such interpretation of human rights would have universal validity in the present world.

But theocracy is sometimes the very content and core of some religion. And if one believes in such a religion he or she automatically believes in authenticity of theocracy too. Chandran Kukathus seems to offer a different solution to such situation[4]. In his 'archipelago', a sort of federal state, each community, or island, is allowed to apply different conception of justice while the value of individual autonomy is not required as a necessary condition for one's well-being but no more than one of the values. So, a life lived in total submission to the given divine fate without any autonomous choice

4) cf. *Liberal Archipelago : A Theory of Diversity and Freedom,* Oxford UP, 2003. But what follows is nothing but my application of his idea and he is not responsible for it.

between potential alternatives could be, if it is lived in peace and satisfaction, as good a life as that with full choices and achievements. Though it is not articulately written if Kukathus is ready to go this far, one community, I presume, has and another may not have the separation of government and religion in the archipelago.

The relation between communities with different conceptions of justice are described like international relation between sovereign states. We could imagine as well that each community has its own constitution. So, in a liberal type of community people have secular government and individuals have religious freedom, while in a theocratic community situation is the opposite. Maybe in the latter a law prohibiting blasphemy is felt to be unavoidable in order to protect people's religious piety and anti-blasphemy law will be made by its collective will. But such law would be hated by the people in a liberal community and be understood as unconstitutional. The relation between the two communities are treated like that of sovereign states. So in the territory of theocratic community blasphemy is a crime and punished. But in the region of liberal community criminalization of blasphemy, executed either by public or private agents, is prohibited and people have freedom of expression and can criticize any religion in any way. The choice depends on the sovereign will of community; it is communities to choose but not each individual.

In other words, liberalism itself is put on the same level with religions or comprehensive doctrines and is treated as such. Liberalism applies not because it has universal value but because the sovereign will of community chooses it as its value system. Actually there is one advantage in this system. In the archipelago liberal regimes do not have to try or pretend to be universal and they can free themselves from futile mission of covering up and include alien systems of theocracy by compromising its own core values; secular government, individual autonomy, freedom of expression, gender equality, open society and the like.

But Kukathus's treatment of apostasy is different from that of blasphemy[5]. He

5) cf. Paul Marshall and Nina Shea, *Silenced; How Apostasy and Blasphemy Codes are Choking*

demands ‘free exit’ from any community. Usually one’s attachment and wealth etc. are tightly connected to the community one belongs. So the cost of exit must be considerably high. But if one is ready to bear the cost and decides to leave it, exit from the community must be permitted. When an individual chooses to be an agent of free decision, one must be treated as such. But Kukathus does not answer the question what can be done if free exit is prohibited by the theocratic community. Probably not much can be done in the theocratic territory. But at least in theocratic enclaves within the liberal community, those must receive legal support who want to exercise the right of free exit. Individual decisions are respected to that extent. In other cases too, liberal communities which commit to individual freedom should do whatever they can to defend those who wish to be individuals with free will[6].

Freedom Worldwide, Oxford UP, 2011

6） By the way at the end of my essay I would like to remind the audience of one thing. Most Japanese are polytheists. And I am enjoying myself being one in dealing with the most serious problem caused by monotheists of different kinds.