

國立清華大學 102 學年度碩士班考試入學試題

系所班組別：科技法律研究所碩士班 甲組(科技專業組)

考試科目 (代碼)：文獻評析(含中文文獻及英文文獻)(4102)

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一、請閱讀文章後，以中文回答下列問題：(50%)

有遵從法律的義務嗎？

有遵從法律的義務(有人稱為「遵法義務」)，意思是說，既然國家以法律之名作出規範，那麼被規範的對象本就應該有遵從法律的道德義務。當然，有時候依照各別法律的內容，也會出現照著做似乎不太正確，或者沒道理遵守這種法律的情況。但即使如此，只要法律有規定，人們即有遵守的義務——這就是遵法義務。

這麼一來，我們必然會直覺反應，不可能對於漫無邊際的要求均有服從的義務。大部分的法哲學家也這麼認為。有些國家就是會規定出一些怪法，像是歧視少數民族或女性未獲得丈夫或父親的許可不得外出等。但若要問，是否因為制定了法律就得一律遵守？相信一般都會認為並非如此，至少對於明顯荒唐且毫無道理的法律，便沒有遵從的理由——探討是否有遵法義務，首先應該從這個結論出發。

(中間略)

除了一看就知道毫無道理的法律無需遵從外，其他的情形又如何呢？看起來很有道理遵守的法律，通常都是尊重憲政主義或法治理念，大致上能符合正義的國家所制定，這時候就應該遵守法律。

當然，綜合各方面的考量，結論或許仍然可能覺得自己沒有遵從該法律的理由。舉例而言，為了防止流行病蔓延，法律賦予零歲嬰兒都必須接種某種疫苗之義務。可是，有的父母知道自己的孩子是特殊體質，接種該疫苗後會留下嚴重的後遺症，但因立法不夠完備，並未規定這種情形不須接種疫苗。這時候，縱使有法律規定，制度本身的目的也夠正當，也不能迫使自己的孩子接種疫苗吧。

不過法律命令大家接種，「原則上」是有理由的。但因為存在一個足以推翻該命令的相對理由——孩子若接種將引起重大的後遺症，因此不應接種——而且由於此理由更為有力，所以結論而言，便是不應接種。若是大致上符合正義的國家，遵從法律都會有個「原則上」的理由——雖然就結論而言，否定該理由是可能的。但這能認為是妥當的看法嗎？

法哲學家拉茲認為，在這種情形，不能以一般常識作出結論，必須往更具體層面進行檢討。他首先指出，像是不可殺人、不可性侵害等當然應遵從的道德觀制定於法律中的情形，就無需另行論述是否有遵從法律的義務。

遵法義務之所以引起爭議，並非在於法律所命令的內容如何，而是依此法律行動是否有理由。不可殺人、不可性侵害等，一開始就有理由服從。因此同樣的內容制定於法律中，確實也就有「服從和法律規定內容相同事物的理由」，但卻不能說有「遵從法律之理由」。因此談遵法義務，其實是多餘的。換種方式說明，

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法律當然會主張應該遵從自己，因為自己是權威。為什麼是權威呢，因為比起讓每個人自行判斷，還不如遵從法之命令，更能讓人們的行為正確。但不可殺人、不可性侵害等，原本就是自己該採取的正確行為，無須法律規定。因此是否有遵從法律的義務，就不需特別討論。

或許有人會提出異議，認為話雖如此，這世上並非都是能辨別是非的人，當中也有殺人犯或性侵犯，所以有必要區別遵法義務和道德。確實，原本即應處罰這些不辨是非的人。若不如此，會如同霍布斯所指出的，如果放任壞人自私自利無所不至，那還有誰願意遵從道德當個好人呢。

不過，這種情形下的法律，以及國家提供的服務，仍然不是作為權威的法律或服務。我再說一遍，原本每個人就應採取某種行動的理由，不會因為法律的出現產生變化。因此遵從法律，也不會讓人們的行為變得更正確。哲學家諾齊克

（Robert Nozick）於其所著《無政府、國家與烏托邦》一書中描述了一個假設：取締違反（法律出現之前的）道德的人，亦即道德上的殺人犯或性侵犯，並科以刑罰，理論上是可以透過契約交由民間團體去執行的。不只是郵政或鐵路交通業務，就算是監獄的經營及警政服務民營化——且不問是否真的比較有效率——其實都是可能的。

法律的權威無法適用於殺人犯或性侵犯，正因為他們無法理性判斷如何正確行事才會「犯罪」。對於這種人，就有必要給予「刑罰」，讓他們知道無視道德的利己行為，只會對自己不利。法律施加強制力，並非給予人們行為的理由，而是為了改變其動機。

道德能給予人們普遍性的實踐理由，但法律不同。「僅因法律的命令便該照做」是否合理呢？答案應該是否定的。

可是，由國家提供的警政、刑事裁判或監獄經營等服務，真的完全不會使得人們的行為理由發生任何變化嗎？倒也不全然如此。這些服務，在多數社會都是由政府依法辦理，如此才能提供公正且有效率的服務。……若確實如此，國民便有新的理由協助具有協調能力的政府活動，而這個理由與前面提到的實踐理由，層次並不相同。當政府尚未介入協調人們的活動以前，人們只認為，如果他人也負擔一部分的成本，我也願意負擔我自己的部分（如果他人不負擔，我也不負擔）；但是當政府開始經營一種制度，強制眾人必須分攤成本，而且對違反者科處罰則（不用成為壞人的犧牲品），此時國民便有遵從規定的理由。因為這樣才能讓警政、司法或科刑等服務公正且有效率。

同樣的情形也能廣泛適用到解決協調問題的法制度。不過，這仍然不能簡單地歸結為，政府只要主張「我們是為了解決協調問題」，就一定成為人們必須遵從該法制度的理由（即便是原則上的理由亦然）。畢竟，政府所提出的解決架構，也不見得總是成效卓著。

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所以，仍有必要依據個別法律及個案情形考量是否有遵從的理由。道路交通規則是解決協調問題的典型例子。但在視線良好的直線道路，在視界所見範圍內都看不到任何車子靠近的時候，縱使眼前的路口為紅燈，是否仍有理由堅持不穿越馬路呢？我個人認為沒有。

另外，政府權威的另一個泉源，便是當政府較一般人民具有更卓越的知識的時候。例如，發射電波的機器如何使用、核電廠發生事故，或海嘯來襲時，該如何採取行動等等，政府一般都會聽取專家意見後作成決定。因此政府較一般市民具有更正確且有效知識的情形確實不少。

儘管如此，「政府的知識較民眾卓越」仍然不是自明之理。……既然政府的權威、法律權威來自於完備的知識，那麼就有必要依個別法律、個案情形判斷政府的知識是否正確。而且，縱使有適切的知識為後盾，但由於法律是一般性規定，所以在具體個案中，法律適用仍可能有削足適履的情況發生。這是我們必須留意的。

（中間略）

縱使一兩個人不願遵從政府的決定，也不會立刻導致政府的崩解。就像剛才舉的例子一樣，在完全沒有人經過的路上闖紅燈，難道就會導致政府的威信瓦解嗎？明顯言過其實。一個人小小的「反抗」，是否便會使民眾對正當政府的全面不信任，以及政府功能的崩壞，導致「不公平」？這仍然只能視個案而定。……如果依據實證法規定解決眼前的問題，卻導致不合理且極度怪異的結論，我們就應回歸法律背後的實踐性理由，探究適切的解決方案。憲法的基本人權條款，正是排除實定法之適用，回歸實踐性理由的窗口。法官既然也是人，不可能與道德毫無關連地生活，一般公民當然也是如此。

長谷部恭男著，郭怡青譯，法律是什麼？

商周出版，2012 年，215-225 頁

（因出題所需調整部分文字與段落）

問題：

（一）本文作者對於「人民是否有遵法義務」的看法為何？請作成五百字以內篇幅之摘要。(15%)

（二）有論者主張，既然已將法治之要求訴諸明文，人民便應尊重法權威，遵法義務如果不能以普遍形式成立，那麼法律的權威將變得非常不穩定，因此縱使法令無法符合個人的真正需求，人民也不應該反抗法律的規定，否則就會造成政府功能乃至於法秩序的破壞。試問：如果你是本文作者，會如何反駁上述主張？請附理由說明之。(20%)

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(三) 你是否贊同本文作者的想法？若是，其理由為何？若否，其理由為何？
(15%)

二、請閱讀以下文章，並以中文回答問題: (20%)

(The Economist, November 10th, 2012, with certain modification)

Translating and the law

Legal language

Services specialising in language and culture are in demand

IN A high-heeled argument last year, Christian Louboutin, a shoemaker, sued Yves Saint-Laurent, a fashion house. Louboutin was irked that YSL made footwear that had a red sole, a distinctive feature of Louboutin shoes. The case was tried in America, but both companies are French. This presented a few problems.

Louboutin's lawyer, Harley Lewin, describes four layers of difficulty in international litigation when [it] comes to "discovery"—the right to demand documents relevant to the case from the other party. The first, and most obvious, is language. The second is culture: how frank people are in e-mails varies widely from country to country. The third is local law. France, with little tradition of discovery, has strict privacy laws. These can, for example, prevent low-level employees' names from appearing in documents in discovery. Finally, there is the sheer volume: electronic communication has made discovery a huge undertaking. Mr Lewin says the vast majority of those e-mails say nothing more than "yup", "OK" and "sure" (in whatever language), but lawyers have to go through them all anyway.

American courts give litigants an expansive right to discovery. It is a process so long and expensive that it is commonly used to impoverish and exhaust legal opponents into settling cases. Many lawyers abuse it. And the cost and complexity are magnified in international cases, such as a recent patent-infringement trial in America involving Apple and South Korea's Samsung, where language and culture have to be taken into account.

It is too much for one lawyer, or even a small firm. So specialists are filling the void. Mr Lewin hired TransPerfect, a language-services firm. It helped to arrange a "silo" system for protecting certain communications, to meet France's privacy laws while obeying the American court's discovery orders. TransPerfect also translated

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huge numbers of documents from French, Italian and Spanish. These documents, Mr Lewin said, were critical for Louboutin's partial court victory over YSL: red soles could constitute a protectable trademark, but an all-red shoe with a red sole would not.

Common Sense Advisory, a research firm, estimates that the worldwide language-services business is worth \$34 billion and it is growing fast, at about 12% a year. No firm is big enough to dominate and most are privately held. The biggest, Mission Essential Personnel, boasted revenues of \$725m in 2011; TransPerfect raked in \$300m. Fees from legal work can be juicy.

TransPerfect worked for both sides in the case involving Apple and Samsung. When Panasonic, a struggling Japanese electronics-maker . . . , bought Sanyo, another one, in 2009, America's antitrust authorities required so much documentation before approving the merger that TransPerfect hauled in \$25m in fees for translating around 100m words.

Specialised "e-discovery" software helps lawyers cull the masses of electronic data. But in international deals and lawsuits, such software must be run by cultural and linguistic experts to make sure the correct search terms are used and the right information is ferreted out. Translation is still something that computers do badly much of the time, especially when the topic (a drug patent, say) is a difficult one full of technical details.

The many law students wondering if the rotten legal job market will ever improve should take note. The twin forces of globalisation and technology may put many mediocre lawyers out of business. But those who master languages and computers may find themselves in demand.

- 1.請依據本文，以 100 字以內之篇幅說明外國公司在美國可能面臨的難題。(10%)
- 2.請依據本文，以 200 字以內之篇幅說明前題 1 所示之類似難題，對法律人未來的啟示。(10%)

三、請閱讀以下文章並以英文回答問題：(30%)

GOING FOR BROKE (Article adapted from FORBES, October 8, 2012)

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Chuck Feeney has earned \$7.5 billion, but he's not on The Forbes 400. Instead, the Duty Free Shoppers founder has secretly given it away as fast as he's made it. All he personally has left is \$2 million--and credit for inspiring the modern philanthropy movement. Chuck Feeney is the James Bond of philanthropy. Over the last 30 years he's crisscrossed the globe conducting a clandestine operation to give away a \$7.5 billion fortune derived from hawking cognac, perfume and cigarettes in his empire of duty-free shops. His foundation, the Atlantic Philanthropies, has funneled \$6.2 billion into education, science, health care, aging and civil rights in the U.S., Australia, Vietnam, Bermuda, South Africa and Ireland. Few living people have given away more, and no one at his wealth level has ever given their fortune away so completely during their lifetime. While the business world's titans obsess over piling up as many riches as possible, Feeney is working double time to die broke.

Feeney embarked on this mission in 1984, in the middle of a decade marked by wealth creation--and conspicuous consumption--when he slyly transferred his entire 38.75% ownership stake in Duty Free Shoppers to what became the Atlantic Philanthropies. "I concluded that if you hung on to a piece of the action for yourself you'd always be worrying about that piece," says Feeney, who estimates his current net worth at \$2 million (with an "m"). "People used to ask me how I got my jollies, and I guess I'm happy when what I'm doing is helping people and unhappy when what I'm doing isn't helping people."

What Feeney does is give big money to big problems--whether bringing peace to Northern Ireland, modernizing Vietnam's health care system or seeding \$350 million to turn New York's long-neglected Roosevelt Island into a technology hub. He's not waiting to grant gifts after he's gone nor to set up a legacy fund that annually tosses pennies at a \$10 problem. He hunts for causes where he can have dramatic impact and goes all-in. "Chuck Feeney is a remarkable role model," Bill Gates tells FORBES, "and the ultimate example of giving while living."

For the first 15 years of this mission Feeney obsessively hid the type of donations that other tycoons employ publicists to plaster across newspapers. Many charities had no idea where the piles of money were coming from. Those that did were sworn to secrecy. Now that his quest to give until nearly broke is coming to its conclusion, he's opening

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up a bit. What emerges is one of strangest, most impactful lives of all time.

Feeney grew up in an Irish-American neighborhood in the blue-collar town of Elizabeth, New Jersey, coming of age in the Great Depression. He served in the Air Force during the Korean War. In 1956 he traveled to France and got involved in the business of following the U.S. Navy's Atlantic fleet, selling tax-free booze to sailors. Competition was intense, but he got ahead by using his military experience to talk his way directly onto ships and gathering intelligence on the fleet's next destination by chatting up local prostitutes.

It was a nice little business, but soon the Japanese economic boom would transform the scrappy operation into one of the most profitable retailers in history. In 1964, Japan lifted foreign travel restrictions, allowing citizens to vacation abroad. Japanese tourists, along with their massive store of pent-up savings, surged across the globe. Hawaii and Hong Kong were top destinations. Feeney, who had picked up some Japanese language and customs while in the Air Force, hired smart, pretty Japanese girls to work the stores and filled his shelves with cognac, cigarettes and leather bags that gift-crazy Japanese snatched up for co-workers and friends. Soon Feeney and company had tour guides on the payroll who herded tourists to DFS stores before they had even checked into the hotel so they couldn't spend money anywhere else first. The Japanese were such lucrative customers that Feeney hired analysts to predict which cities they'd flock to next. DFS shops sprung up in Anchorage, San Francisco and Guam. Another target was Saipan, a tiny tropical island just a short flight from Japan that he predicted could become a hot beach spot for Tokyo residents. There was a catch: The island lacked an airport. So in 1976 DFS invested \$5 million to have one built.

The tourism rate dropped after the Gulf War and Feeney tried to sell their company to the French luxury powerhouse LVMH, owned by billionaire Bernard Arnault. Feeney got owner Alan Parker on his side early. Pilaro and Miller would prove harder to convince. For two years the four owners battled with themselves and Arnault over prices and deal terms. Each player brought their own attorneys into the scrum. "Every time I'd see a new lawyer I'd say, 'Holy Christ, how much are we paying this guy?'" Feeney laughs.

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During the sale to LVMH, Feeney reluctantly gave up his anonymity but in the process gained a better tool for good: a powerful following. Two of the world's richest men, Bill Gates and Warren Buffett, credit Feeney as a major inspiration for both the \$30 billion-strong Bill & Melinda Gates Foundation and the Giving Pledge, which has enlisted more than 90 of the world's richest to (eventually) grant half their wealth to charity. "Chuck is fond of saying that none of us has all the answers," says Gates, "but I know that Melinda and I have learned a great deal from him in the time we've spent together."

He forces charities to compete for his cash, requesting detailed business plans with clear milestones and full transparency. If a project runs off course, Feeney cuts funding. He chooses programs that promise exponential returns that will allow people to lift themselves up. He pumps billions into university research in places like Ireland and Australia because he believes it creates a skilled workforce and attracts top talent, setting the table for high-tech industry and foreign direct investment.

Casual observers categorize Feeney as frugal, but that's a simplistic diagnosis. On the spending side Feeney obsesses over value, and on the cost side he loathes waste. For Feeney, he flew millions of miles in coach because first class didn't get him to his destination any faster. He wears a rubber Casio watch because it keeps time like a Rolex. Even Feeney's taxes underscore how he thinks: He has aggressively tried to avoid taxes at every stage in his career, despite gaining no personal advantage in his later years. Eventually, less taxes meant that he could give away more.

That's a lesson he wants to teach the new class of philanthropists: Don't wait to give your money away when you're old or, even worse, dead. Instead, make substantial donations while you still have the energy, connections and influence to make waves. "People who have money have an obligation," says Feeney. "I wouldn't say I'm entitled to tell them what to do with it but to use it wisely."

- (1) How is Feeney different from other philanthropists? (15%)
- (2) How did Feeney succeed in the duty free business? Please use the events described in the article to help explain your points. (15%)