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The Rule of Law vs. Rule by Law: A Comparative Analysis of Thomas Hobbes' *Leviathan* and Han Feizi's Chinese Legalism

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ABSTRACT: The purpose of this paper is to compare and contrast the legal and political philosophies of two thinkers from civilizations separated by nearly two millennia and both of whose philosophies have been developed in very different cultural traditions, Thomas Hobbes (1588-1679) and Han Feizi (c. 280-233 BCE), who both believe that human conflict can be resolved through the absolute rule of the sovereign. They agree on the establishment of a system of government based upon unchallengeable state power but differ in their understanding of the nature, source and purpose of law. According to Hobbes, positive law is the actualization of natural law (moral rules which can be known by reason) in a commonwealth (civil society) formed by a social contract. Han Feizi's conception of law (Fa) is not one of moral reasoning but of the cosmic Way (Dao) and he views law as an alternative to rather than a representation of morality. This paper holds that Hobbes is a true theorist of rule of law based on natural rights and contractual reciprocity while Han Feizi is a more advanced thinker of rule by law (law as an administrative measure of the sovereign) without natural rights and without popular accountability. The two paradigms of legal absolutism, and their continued significance in the present discussion of law, sovereignty, and political legitimacy, come to light.

Key Words: Hobbes, Han Feizi, rule of law, legalism, natural law, positive law, sovereignty, comparative political theory

INTRODUCTION

One of the most oldest and enduring questions in political philosophy is how to create political order amidst human conflict. Two thinkers, from very different historical and cultural backgrounds, have thought about this question with great seriousness: Thomas Hobbes, the seventeenth-century English philosopher, who saw the wreckage of civil war in his own country; Han Feizi, the third-century BCE Chinese Legalist, who experienced the chaos of the Warring States period. Both saw human selfishness was the basic problem for peace and both found that moral exhortation alone was not enough to control human behavior; they both came to the conclusion that only absolute sovereignty can bring peace. However, there is a deep difference, one that lies in their understanding of law and how it is related to morality, natural order, and sovereign accountability. Since then, Hobbes has been increasingly compared to Han Feizi. Both of them are frequently described as political realists who put aside morality for the sake of survival of the state. But comparisons can only tell so much. The main thesis of this paper is that Hobbes and Han Feizi have quite different philosophies regarding the nature of law, its connection with moral standards, and the responsibility of the

sovereign. Hobbes makes an argument for a thick understanding of the rule of law: positive law contains natural moral precepts and is still linked to individual rights. In contrast, Han Feizi states a thin rule by law, which is law as an impersonal and publicly declared norm of conduct that is used by the administration of the sovereign for its own purposes, without regard for natural rights or moral content.

This paper is in five parts. Firstly, it sets the methodology of comparison for such cross-cultural studies. Secondly, it discusses Hobbes's legal theory including the interplay between natural law and positive law. Third, it examines Han Feizi's Legalist philosophy, focusing on Fa (law), Shu (technique), and Shi (positional power). Fourthly, it engages in a systematic comparison along three lines: human nature, the nature of law, and sovereign accountability. Lastly, it reflects on the significance of this comparison for an understanding of the different forms of legal absolutism, and their modern-day relevance.

METHODOLOGICAL CONSIDERATIONS IN COMPARATIVE POLITICAL THOUGHT

Comparative political thought poses specific methodological problems. There is always the potential for anachronism, in the sense of imposing Western conceptual categories on other traditions. Comparing two traditions requires sensitivity to the conceptual languages and philosophies of each tradition, as Dallmayr and other comparative thinkers have stressed.

The method used in this paper is problem centering comparative. It does not equate Hobbes and Han Feizi as thinkers who just happen to be from different cultures, but rather the political problem of how to create and sustain political order in the presence of human selfishness, and how each thinker's philosophical premises lead to different solutions. This way one can make some sort of comparison without diminishing the particularity of each tradition.

Another methodological issue is whether Han Feizi's philosophy is a true "rule of law" or "rule by law. Those who oppose the Chinese Legalism have always believed that it is only the latter: law as a weapon in the hands of a ruler who is above the law. But recent scholarship has begun to cast doubt on this binary. Those who reject the idea of Legalism as "rule by law" tend to read the rule of law quite "thick," as Tongdong Bai puts it, equating it with the rule of good law or natural law. A "thin" conception of the rule of law (one that highlights its features, including publicity, generality, prospectivity, and clarity) might better reflect the rule of law as Han Feizi would have it. This paper examines this issue and preserves the difference between Hobbes's morally based rule of law and Han Feizi's instrumentally-based rule by law.

HOBBES'S LEGAL THEORY: NATURAL LAW ACTUALIZED

The State of Nature and the Social Contract.

It is impossible to have a complete grasp of Hobbes's legal philosophy without his discussion of the state of nature. But without a common fear of death, men would be in a perpetual state of war, "a warre of every man against every man" (Hobbes, 1651/1991). This is a disease of three main causes of quarrel, namely, competition, diffidence, and glory. Human beings, in general, are mentally and physically alike, and there is no justification for relying on the trust of one man in another. Such a life is a "solitary, poore, nasty, brutish, and short" life (Hobbes, 1651/1991).

The rational precepts that allow to get out of this situation are the laws of nature. Hobbes says that the law of nature is "a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life" (Hobbes, 1651/1991). These laws (nineteen in *Leviathan*) are basically theorems of reason which prescribe the conditions of peaceful co-existence. The first and fundamental law of nature is to seek peace and keep it; the second law is to renounce all right to everything in favor of others in order to have as much liberty as they give up for themselves. This mutual abandonment of rights is called the social contract, in which individuals delegate to a sovereign the right to act on their behalf and to enforce a peaceful agreement to live together.

Natural Law and Positive Law

Hobbes's legal theory focuses on the relationship between natural law and positive law. Hobbes said that natural law and civil law "contain each other and are of equal extent" (Hobbes, 1651/1991, ch. 26). This has been a subject of much scholarship. In one sense Hobbes is a legal positivist who believes that the law is nothing more than the will of the sovereign. On another, he is still in the natural law tradition, in which validity is conferred on positive law by its adherence to natural moral law.

But there's a more subtle stance in *Leviathan*. Hobbes does not distinguish between natural law and civil law in terms of content, but in terms of form. The natural laws are "dictates of Reason" which obliges conscience, but do not have force. Civil law is the same rules "made Law by the Sovereign Power" (Hobbes, 1651/1991). Hobbes states that, "the Law of Nature, and the Civill Law, contain each other, and are of equall extent" (Hobbes 1651/1991 ch. 26). The sovereign cannot make new moral obligations out of nothing; he must give expression to the precepts of natural law in positive law that is made and enforced in the public sphere.

For Hobbes, natural and moral laws are, as Chen (2016) notes, "more or less identical" and "the rule of law and the rule of morality, their content is the same, but they differ in form" (p. 24). The laws of nature are "theorems of reason and laws which describe natural justice and universal truths of nature and humanity" (Chen, 2016, p. 24). Therefore, all of Hobbes' natural laws "can be described as moral laws" (Chen, 2016, p. 24).

This is why Hobbes can claim that the 'Sentence of the Judge constituted by the Sovereign Authority' is the interpretation of the law of nature (Hobbes, 1651/1991). It is not true that the sovereign has the right to define morality as he sees fit. Instead, it implies that in the event of any contestation, the decision of the sovereign shall be final, not because the sovereign is infallible, but because otherwise there could be a continuing state of disagreement and the state of nature would return.

Most importantly, the sovereign is subject to natural law, albeit God. The sovereign's purpose is to rule for the "safety of the people": not just to keep them alive but "all other contentments of life" (Hobbes, 1651/1991). This teleological focus also sets Hobbes's theory apart from legal positivism, for it is not an *a priori* theory of the sovereign's power, but rather one that bases its legitimacy on the fulfillment of the natural law condition of peace and security. As Chen (2016) writes: "Hobbes called positive law the actualization of natural law in a commonwealth" (p. 36).

The sovereign and rule of law

The Hobbesian sovereign has been described as an unconstrained tyrant, an "uncommanded commander unconstrained by law." This reading, however, fails to take into account the important qualification that the sovereign rules by law. According to Dyzenhaus (2012), Hobbes's sovereign "is by definition one who governs by law," and can have its laws "recognised as law. Hobbes's concept of the rule of law exhibits a number of characteristics. First of all, laws need to be written and publicized. Second, the law should be general and prospective, and not retrospective or *ad hominem*. Thirdly, the sovereign must exercise his authority through legal rather than arbitrary means. But Hobbes's rule of law serves the sovereign's ends, after all. The sovereign is not subject to positive law; it cannot be, because the source of positive law is the sovereign. But, in the case of the sovereign, he is subject to natural law, which imposes the obligation to serve the welfare of the people. This is a unique form of legal absolutism, which is absolute in its power over subjects but limited in its scope by the natural law obligation to keep people free from war and the inalienable right of subjects to preserve themselves.

HAN FEIZI'S LEGALISM: LAW AS ADMINISTRATIVE INSTRUMENT

Historical and Philosophical Context

Han Feizi lived in the Warring States period (475–221 BCE), characterized by a lot of warfare between states, which eventually led to the unification of China by the Qin dynasty. He was a student of the Confucian philosopher Xunzi, but taught that it was important to focus on moral cultivation, rather than on a comprehensive theory of state administration, as practiced by his teacher. Han Feizi was a synthesis of the three Legalist thinkers, Shang Yang's theory of Fa (law), Shu (administrative techniques) of Shen Buhai, and

Shi (positional power) of Shen Dao. This synthesis is one of the most systematic and ruthless in the history of political thought of state power.

Human nature and the denial of morality

Han Feizi starts his chapter from a pessimistic view of human nature, as does Hobbes. Han Feizi, c. 230 BCE/1939, is a text that depicts individuals as self-interested, and calculating. Unlike Hobbes, however, Han Feizi does not assume an "ab initio" "state of nature" out of which people cede powers. Instead, he refers to the Confucian Xunzi who said that human nature is bad, must be changed, stripping away the Confucian belief that moral education can do such a thing. Han Feizi comes to a clear conclusion: rulers cannot depend on the good-will of the ministers, or on the moral sentiments of the subjects since everyone is interested only in his own interests. Confucian "rule by virtue" (De) is not only ineffective, it is also harmful as virtuous rulers can be duped by the hypocritical ministers who pretend to be virtuous to serve their own interests. The ruler should put aside his personal feelings and emotions to serve as a guideline for ruling.

The Triad: *Fa*, *Shu*, and *Shi*

***Fa*:** Standard or law. The law code should be clearly drafted and published. It is based on the principle of neutrality, "The law does not favour the nobility. The law treats everyone equally, from the highest to the lowest, everybody is equal. *Fa* sets clear standards and holds people accountable, they are consistent and fair. The law is based on right and wrong, it is made by the king, but it is meant to establish the rule of law not the rulership of the king.

***Shu*:** Administrative skills or tactics. These are the hidden ways in which the ruler rules ministers, gets them to carry out their assigned roles and prevents them from gaining too much authority. *Shu* is hidden (public) while *Fa* is never hidden (private) the ruler will never reveal his strategic thinking.

***Shi*:** power or authority that is derived from position. The ruler's power is not based on his personal attributes, but on that of his kingdom. The legitimacy is the "shi" which allows the ruler to implement laws and techniques efficiently. Even the most wise ruler cannot rule without *Shi* – even the most mediocre ruler can rule with *Shi*.

These three are all key to the relationship. *Fa* is the public standard; *Shu* is the way of enforcing and controlling; *Shi* is the power which makes both possible. They form a complete government system which is independent of the ruler's personality.

The Cosmic Ground of Law.

One of the Han Feizi's unique contributions to the philosophy is that he bases law on the cosmic Way (Dao). Han Feizi sees *Fa* as not being made by man, but as a representation of the Dao, the natural order of the universe. This is not, however, the "moralized Dao" of the Confucians or Daoists. Instead, it is a vision of a natural regularity and predictability: the Dao is expressed in the regularities of reward and punishment, cause and effect, found in all phenomena.

Han Feizi, as Chen (2016) says, views natural laws as distinct from moral laws, and the rule of law as different to the rule of morality (p. 24). Han Feizi's laws of nature "are precepts of universal Dao that moral laws are artifacts of culture may not be compatible with" (Chen, 2016, p. 41). Furthermore, "acts that have moral merit but violate positive laws or codes should still be punished" (Chen, 2016, p. 14) is the view of Han Feizi. The law is based on its adherence to the regular patterns of the cosmos, and not on its moral rightness.

Rule by Law Rule of Law?

It is controversial whether Han Feizi is a proponent of the rule of law or rule by law. The traditional interpretation of Han Feizi's law is that it is only instrumental: "an amoral and an instrument in the hands of a central ruler who uses law to consolidate and maintain power" (Winston, 2005, p. 1). In this perspective, the ruler is always above the law, and "law, in the end, is what pleases the ruler" (Winston, 2005).

Some of the study has thrown this picture into dismay, however. If we take a "thin" definition of law, which relies on publicity, generality, prospectivity and clarity, Tongdong Bai (2026) contends that Han Feizi's conception of law is "firmly in the camp of the rule of law. Han Feizi's law code should be "clearly written and made public", it should apply to everyone and it should be prospective, not retrospective. These are, says

Bai, a real, if limited, rule of law. Finally, Bai emphasizes that Han Feizi's "thin version of the rule of law" may be among the 'thinnest' and could prove to be a key in solving the real-world question of 'how to save failed states'.

But even this "thin" rule of law is different from Hobbes's notion. Hobbes says that the legitimacy of law comes from the content, conformity with natural moral principles. Han Feizi's understanding of the legitimacy of law is rooted in its form, which is clarity, publicity and impartiality, as well as in its cosmic warrant. The difference between Hobbes's law and Han Feizi is that Hobbes's is substantive, Han Feizi's is procedural. As written by Chen (2016), Hobbes was a proponent of substantive justice, while Han Feizi was a proponent of procedural justice, and the difference was not only in focus but also a conceptual difference on what positive laws should be (p. 22-24).

COMPARATIVE ANALYSIS

Human Nature: Shared Pessimism, Divergent Implications

Hobbes and Han Feizi start off in a pessimistic manner. Both view humans as self-important, competitive and untrustworthy. Both agree that there has to be something other than moral exhortation to regulate human behavior.

However, the conclusions that they reach are vastly different. Based on Hobbes's pessimism, the social contract is formed: people realize that they need peace in order to pursue their own interests and give up their rights to a sovereign who will enforce their rules. The government is established by the consent of the people.

There is no such contract in the philosophy of Han Feizi. The ruler's power is not based on consent, but is bestowed by birth and held by *Shi*, that is, positional power. You are not going to make people obey, they don't want to, they don't choose to obey, they obey because the consequences of disobeying are known to them and they're harsh. There's no consent, no rational calculation of mutual benefit, no transfer of rights. There's only power, and people will act out of selfishness to get prize or reward for their doings and actions or fear of getting punished.

This difference is of great significance in the nature of law. Hobbes's law is contractual, that is, it is a creation of an agreement between equals who realize that they share a common interest in peace. Han Feizi's law is enforced which means that it is an enforcement of power and of rules that is applied to a population without its consent.

The Nature of Law: Natural Law Actualized vs. Cosmic Instrument

The first and most basic difference between Hobbes and Han Feizi is with respect to the relationship between law and morality. Hobbes' view of natural laws and moral laws is that they are "more or less identical" (Chen, 2016, p. 24). The content of the rule of law and the rule of morality is exactly the same but they are different in form (Chen 2016, p. 24). According to Chen (2016) Hobbes's laws of nature are "theorems of reason and laws that spell out natural justice and universal truths of nature and humanity" (p. 24). In a commonwealth positive law is the actualization of these natural moral precepts that is necessary. The substance of the law is moral; its form (public, enforceable, codified) is positive.

Han Feizi, on the other hand, believed that "natural laws and moral laws are not the same, and the rule of law and the rule of morality are not the same in nature, content and form" (Chen, 2016, p. 24). Han Feizi's laws are "precepts of the universal Dao" (Chen, 2016 p. 41), but the Dao is not a moral principle. Moral acts that are not in accordance with positive laws or codes should be punished as well (Chen, 2016, p. 14). The law and morals are not only different, but even conflicting.

This difference is reflected in their notions of justice. Hobbes stressed "substantive justice" justice as principle of reason, what laws should be. Han Feizi stressed procedural justice, which is the fair application of the existing law. Hobbes's concept of justice is natural in the sense that it is a principle of reason (Chen, 2016, p. 17-18). Han Feizi's concept of justice is that it is whatever the law specifies it to be, if the law is applied fairly.

Sovereign Accountability: *Fiduciary* vs. *Automaton*

Hobbes's sovereign is a trustee, or *fiduciary*, who has power in the name of the commonwealth. The sovereign is established through the social contract, and is responsible for the safety of the people. The sovereign can be no more accountable to the subjects but towards natural law and to God. The key to the sovereignty's legitimacy is that it must uphold the natural law need for peace and security.

Han Feizi's sovereign is an *automaton*: a figure who has to downplay his personal feeling and only take actions based on the impersonal logic of *Fa*, *Shu*, and *Shi*. The sovereign is not answerable to anybody or anything other than the survival of the state. The sovereign has no responsibility to any natural law, there are no rights of subjects, there is no contract that can be called off. The only obligation of the sovereign is to keep machinery of state going.

Their treatment of the right to resist is perhaps most clearly the difference between them. Hobbes also grants the subjects the right to defend themselves against the sovereign's violence: If the sovereign threatens to kill the subject himself, the subject may resist without breaking the covenant. This is because the social contract was entered into for the purpose of self-preservation: if this purpose is not met, the contract is null and void. Han Feizi doesn't give any such right. The right to resist, no longer exists, nor does there exist a right to life that is above the laws of the sovereign. The only thing the subject has to decide is obey or punishment.

The Role of Virtue

Hobbes restates the definition of virtue: obedience to the rules of the community and rational prudence. It is not necessary that the sovereign be a good man in the classical sense, but he must be competent. Subjects are good to the extent that they abide by civil law. But there is a place for virtue: The natural laws are "moral virtues," and observance of the laws is "called for by rational self-preservation."

Han Feizi's virtue is dangerous. If a ruler develops his own charisma or benevolence, he will be a prey of flatterers and faction-builders. True "virtue" of a ruler is his negative capacity of not acting on his own preferences – he depends only on the impartial reward-punishment mechanism of *Fa*. Private morality plays no part, and is indeed harmful, in the government.

There is a difference in both of their philosophy. This is because of the vastly different anthropologies of these two. Although Hobbes's theory is exclusively based on consent and natural rights, he does leave a room for the individual conscience and moral judgment. Han Feizi eliminates completely the private moral sphere, making the law "the whole of state survival."

CONCLUSION

The comparison of Hobbes and Han Feizi shows that there are two paradigms of legal absolutism. Under extreme circumstances of political unrest, Hobbes forms a system of absolute sovereign power in England, and Han Feizi does the same in China. They both have a negative anthropology, with selfishness being the basic barrier to peace. Both are against the idea that moral exhortation is sufficient to control human behaviour.

But there is a gulf beneath these apparent likenesses. The natural rights, social contract, and realization of natural moral precepts in positive law, are all part of Hobbes's rule of law. The Hobbesian sovereign is a fiduciary with a rule of law, who is accountable at least to God and to nature for the safety of the people. Han Feizi's rule by law is based on the regularity of the cosmos, the administrative skills, and the impersonality of rewards and punishments. The Han Feizian sovereign is an automaton in which all personal feeling are suppressed and he rules by means of the *Fa*, *Shu* and *Shi*.

There's a significant difference between these two paradigms that carries on with them. For all the absolutism in his system, Hobbes has the elements of liberal constitutionalism: inalienable rights to life, political authority based on contract, and the need for law to be public and prospective. Even with all the procedural complexity of Han Feizi's system, there is nothing like a seed of rights, consent, accountability or individual conscience. The law is a tool of the state's power.

These two paradigms have continued to be the subject of contemporary debate on the rule of law, both in China and elsewhere. Is law a moral business, that limits power, for the sake of justice and rights? But is law an administrative technology that's used for the purpose of the state, which can be any purpose? There are two strong, and conflicting, answers to these questions: Hobbes and Han Feizi. As they compare, they remind us that the rule of law is not a single ideal from one point in history to another, but rather a tradition that is contested and widely debated, with many competing interpretations.

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