

Rule of Law in Han Feizi's Thought

Maziyar Shokrani

Vice President at Law,
Justice and International Peace Institute

ABSTRACT

In this paper, the author will review the meaning of the rule of law and investigate the Chinese major political theorist of the pre-Qin period, Han Feizi, thoughts on legalism and examine whether his philosophy is in conformity with contemporary concept of the rule of law. The paper concludes that considering the knowledge and progress of Han's era, we may see his philosophy as one that promotes rule of law.

Keywords: Han Feizi, Legal Philosophy, Confucianism, Rule of Law.

INTRODUCTION

As the last major social and political theorist of the pre-Qin period, Han Feizi believed that each stage of development in human civilization comes with its own set of obstacles and the rulers of each age must be able to come up with new measures for dealing with them. [7-296] Therefore, the conditions and situation where Han Feizi wrote his theories, at least according to himself, must have been related to his period in the state of Han in China (c. 280-233 B.C.E.); however, his theories on "legalism" and "rule of law", as will be discussed in this paper, are likely to be workable today although the world's development and political situation is completely different from Han Feizi time. As a thinker who believed that moralities are by themselves insufficient to guarantee peace and prosperity, [7-296] his philosophy had tremendous influence on political theory and practice in China. [7-297] He designed a Way for rulers as a guiding thread of truth and falsity and source of the state affairs. [7-298] He simply advises the rulers not to do anything, but just leave the affairs to ministers to make the plans (name) and fulfill the plans (form) [7-299]. What the ruler must do is just observe secretly [7-299] and use the two handles of punishment and favor. [7-307] For the purpose of establishing order in the state and security of people, Han Feizi suggests the ruler to promote public law [7-302] and govern the state by what accords with the law and abandoning that which does not. [7-306] Chapter II will briefly introduce the concept of "rule of law" in different legal systems and Chapter III will examine the compatibility of "rule of law" with Han Feizi thoughts. Finally the concluding remarks brings about the final remarks and evaluations of Han Feizi philosophy and what it can say for today's concept of "rule of law".

WHAT IS "RULE OF LAW"?

The function of law, in modern thoughts is to maintain the "good or peaceful" social order [1-29] which results in harmony: "the common good is peaceful and civil society in which humans can, for the most part, live their lives in cooperative harmony" [7-29] and the children should learn that the community to which they are born is a "jural community". [7-32] Therefore, to achieve harmony and good by legal rules, they must be relevant to both officials and citizens attitudes [4-79] however, the courts and officials have the opportunity reinterpreting social relations in the light of modern ideas and adjusting positive law in accordance with them. [4-80] But the question is that should they interpret and exercise the law for the good of the State or for the common good? Neil describes the common good as which "requires the just

treatment of all persons within the state's jurisdiction, according to some stable idea of justice, and requires otherwise that government be conducted with a view to sustaining or enhancing the welfare of all" [8-173]. The 'stable idea of justice' and 'enhancing or sustaining welfare to all', in my idea, needs a substantial level of rule of law in the State since 'predictability' and 'equality' are the commonly understood features of the rule of law. [6-19] Only through stable idea of justice and sustaining welfare people can predict the society situation in order to plan their lives. Another feature is 'equality' before law which is debatable even in today's modern democracies claimed to exercise the rule of law. Rousseau believed that inequality before law never gives way to equality before the law: "No legal system treats all citizens equally". [6-22] Even today, which State can claim that it completely treat its people equally despite their Constitutions desires so? My answer is absolutely no State! Therefore, the idea of rule of law must be observed relatively instead of looking for absolute rule of law. In this context, States may enjoy different level of exercising rule of law; and even exercise their own understanding of the rule of law unless the 'equality' and 'predictability' factors are not ignored and the 'common good' is kept to achieve 'harmony'. Therefore, while reading Han Feizi philosophy, I will try to determine which ideas match the 'predictability' and 'equality' factors together with other characteristics of rule of law as defined by Maravall [9-261] and Dicey [2-10]: prospective, general, stable, clear, hierarchically ordered, open to all, independent and predominance to influence of discretionary arbitrary prerogative power in order to observe the level of rule of law in Han's philosophy.¹ I elaborate my observations in Chapter III.²

"RULE OF LAW" IN HAN FEIZI PHILOSOPHY

Han Feizi says that uniform standards must be applied to ministers: "When the assembled ministers keep to their duties, the hundred offices follow a uniform standard, and the ruler employs them based on their abilities..." [7-299] Uniformity of standards for ministers, indicates the rule of standards, or could be saying, rule of law, in governmental and administrative level. The ministers can 'predict' the consequences of their affairs; besides, they can enjoy 'equality' since the same standards are levied upon other ministers.

Han Feizi names five ways that a ruler could be blocked i.e. "When a minister usurps the power to issue commands... When a minister can plant his own men in positions of power..." [7-300] In today's modern systems of governing, issuing commands must be done in accordance to laws and regulations. Prohibition of issuing commands while usurping power is in conformity with rule of law. Prohibition of planting 'own people' by ministers is a very modern concept today; however, the peoples of the world suffer this issue in every country. These two concepts of corruption are violating rule of law. Han Feizi also prohibits the rulers from giving position to those incapable of those positions by using the metaphor of tiger with wings: "The power of position is something that can either facilitate order or benefit disorder. Thus, the Documents of Zhou19 say, 'Do not add wings to a tiger, or it will fly into the cities, snatching up people and devouring them.' To allow unworthy men to ride on the power of position is to add wings to a tiger".

Today, in some non-democratic or even democratic states, the rulers may reveal their desires when they want to interfere beyond their constitutional powers which we may call it 'rule of ruler'. Therefore, the ministers will interpret what the ruler wants; and perform tasks in order to satisfy ruler's desire. Han Feizi expressly prohibits this: "Being empty, he grasps the essence of phenomena; being still, he understands the correctness of movements. When a proposal is made, it itself serves to name the objectives. When an affair is carried out, it itself serves to

form the results. When form and name are matched and found to be identical, there is nothing for the ruler to do, and everything returns to what is essential. Thus it is said, a ruler should never reveal what he desires" [7-298]

Promoting public law is a significant tool in today's modern democracies in order to establish a good level of rule of law. Constitutional law (including human rights law) and administrative laws are major branches of public law which introduce the highest level of 'predictability' and 'equality' in a legal system. Han Feizi elaborates how public law leads the State and people to order and security: "Thus, at the present time, if a ruler can get rid of private crookedness and promote the public law, his people will become secure and his state will become well ordered. If he can expel private conduct and enforce the public law, his troops will grow strong while his enemies grow weak. Therefore, if when examining gains and losses there is a system of laws and standards that can be applied to the claims and actions of the assembled ministers, the ruler will not be deceived by trickery and falsehood" [7-302]

Han Feizi believes that distribution of rewards and handing out penalties must be in accordance to standards instead of reputation and slander respectively: "If a ruler distributes rewards based on reputation, and hands out penalties based on slander, those people who covet rewards and hate penalties will abandon the public law and carry out their private schemes, colluding with one another in order to advance their mutual interests." [7-302]

Selection of ministers, according to Han Feizi, must be according to law. So no ruler can misuse his power to select them by his own discretion and measurements which may endanger 'equality' and 'predictability'. "Thus, an enlightened ruler uses the law to select men and does not try to promote them himself; he uses the law to evaluate accomplishments and does not try to measure them himself". [7-303]

Enforcement of laws on ministers is instructed by Han Feizi as "an enlightened ruler makes sure that his assembled ministers do not let their intentions wander into areas outside the scope of the law, and does not grant favors in those areas within the scope of the law, so that no action negates the law". [7-306] Although the reason is that Han wants to support the ruler to keep power; however, this idea supports the rule of law at the same time.

Interpretation of laws is very important in a legal system as finally the courts decide what the law is in many cases. Han Feizi put an end to discretionary interpretations by rulers and introduces a way by which the ruler respects the precedent which highly supports the 'predictability': "The estimate of a skillful carpenter is as accurate as an ink-line, but a good carpenter will always begin by using the compass and square as his standard. The recommendations of the wisest men always strike at the heart of the matter, but a truly wise man will always use the laws of the former kings as a way of checking his conclusions." [7-306] Han Feizi leaves no way for ministers to misuse their power for rewarding and punishing people; therefore, 'abuse of power' is cancelled: "if the ruler of men does not make it so that the might and benefits that derive from rewards and penalties come only from him, and instead listens to his ministers when carrying out rewards and penalties, then the people of the state will all fear their ministers while dismissing their ruler, and turn to their ministers while departing from their ruler." [7-307]

In the system of Government instructed by Han Feizi, the law is both for commons and ministers: "if the ministers have no laws, there will be disorder below" [7-320] And Certitude of laws are guaranteed: "... when the certitude of punishments and penalties is understood in

the hearts of the people, when rewards are given to those who respect the law, and when penalties are imposed on those who violate the ruler's decrees". [7-320]

CONCLUSION

It is not easy to judge whether Han Feizi philosophy promote rule of law since the contemporary modern legal systems and democracy is a reflection of the well aware people who enjoy the electronic communications at the global village. However, considering the knowledge and progress of Han's era, we may see his philosophy as one that promotes rule of law: the 'ancient rule of law' and still I observed several modern concepts in his philosophy. Prospective, general, stable, clear, hierarchically ordered, open to all, independent and predominance to influence of discretionary arbitrary power, more or less, can be found in his philosophy.

References

- Barden, Garrett and Murphy, Tim, *Law and Justice in Community*, Oxford University Press (2011)
- Dicey, AV., 'Introduction to the Study of the Law of the Constitution' (1885), in Faragher, Colin, *Public Law*, Oxford University Press (2012)
- Faragher, Colin, *Public Law*, Oxford University Press (2012)
- Galligan, Denis, *Law in Modern Society*, Oxford University Press (2010)
- Wang, Guiguo and Yang, Fan, *The Rule of Law: A Comparative Perspective*, City University of Hong Kong Press (2013)
- Holmes, Stephen, 'Lineages of the Rule of Law, in Marvall, Jose Maria and Przeworski, Adam, (eds.), *Democracy and the Rule of Law*, Cambridge University Press (2003)
- Ivanhoe, Philip J, and Van Norden, Bryan W., *Readings in Chinese Classical Philosophy*, Seven Bridge Press (2001)
- MacCormick, Neil, *Institutions of Law: An Essay in Legal Theory*, Oxford University Press (2007)
- Marvall, Jose Maria, 'The Rule of Law as a Political Weapon', in in Marvall, Jose Maria and Przeworski, Adam, (eds.), *Democracy and the Rule of Law*, Cambridge University Press (2003)
- Marvall, Jose Maria and Przeworski, Adam, (eds.), *Democracy and the Rule of Law*, Cambridge University Press (2003)