

POSITIVE LAW AND NATURAL LAW: HAN FEIZI, HOBBS, AND HABERMAS

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Abstract: This essay is devoted to a comparative study of three philosophers' views on the relationship between positive law and natural law. It intends to ask whether obligations which positive laws impose, rights which positive laws define, and justice which positive laws are supposed to realize have a natural basis, and whether our reflection and judgment of good positive laws have some cognitive and normative constraints.

The subject-matter of the relationship between positive law and natural law is important for us to understand the nature, basis, source of legitimacy, and function of positive laws. Today, its stock value rises as the debates about the legitimacy, authority, and rationality of global justice get heated. The dual appeals to natural justice and to international laws, and the statutes in those debates, return us to the subject-matter. That the norm of human rights is an operating norm of the spirit of our epoch, rekindles the issue of a normative justification of the norm. To a great extent, the subject-matter of the relationship between positive law and natural law to philosophy of law is akin to air to us. It may not always be in the center of our attention or debate, but we cannot slight or marginalize it.

Notwithstanding, the subject-matter is pregnant with some dispositional, perennial questions on the philosophy of law: How best to distinguish between good and bad positive law? How best for us to distinguish between rational, reasonable positive laws and irrational, unreasonable ones? Are such distinctions subject to some cognitive and normative constraints, or are they merely choices of human will? If they should be subject to certain cognitive and normative constraints, what are those constraints? When we claim that human rights are inherent, inalienable rights, and the norm of human rights and the law of

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humanity are of global justice, does our claim express our reflection and judgment of some objective truths, or does it merely express our sentiment in time? What is the relationship between the validity and rationality of positive law, the authority and rationality of positive laws, and the legitimacy and rationality of positive law? Positive laws are particular beings and as such, do they need to have a universal basis? While historical narrative and political narrative are among the common forms of legal argumentation for positive law, is meta-narrative needed to justify or undermine positive law?

Robert Post indicates that “contemporary law cannot easily appeal to the authority of God, nature, divine rulers, or universal ethics; it must instead appeal to the authority of democratic self-determination.” (Post 2006, 2). Appropriately, few of us argue against the concept that legitimate positive law must appeal to the authority of democratic self-determination. That said, democratic self-determination may be better off by recovering a concept of natural justice, thereby drawing a distinction between good, reasonable, and rational positive laws and bad, unreasonable, and irrational ones. This is not to say that meta-narrative is necessary for a plausible concept of positive law and justification of positive law. It says only that the concept of natural law may be illuminating to the sluggish, labored democratic self-determination today. Admittedly, positive law is a human artifact. Still, positive law ought to be a work of rational determination of human reason, not merely the free choice of human will. Positive law must be sovereign, no question of that. However, the sustainability of sovereign positive law depends heavily on its rationality and reasonableness or the fact that it is good law. Finally, justice should be the first virtue of positive law today as it was yesterday. It is not unreasonable for one to argue there is such a thing called natural justice just as there is such a thing called an apple.

Therefore, in this essay, three philosophers’ views on the subject-matter of positive law and natural law are explored and brought into a dialogue. Correspondingly, the ramifications of each view are explored with great care. I do not pretend to claim something original in the essay. My objective is to rekindle the discussion of the subject-matter or in the Chinese idiom, to “throw the stone to draw the jade”. For conceptual clarity, I shall clarify at the outset that in the essay, I use the terms “natural law” and “the law of nature” interchangeably. Both connote objective laws of existence which are part of the course of nature.

I.

The most ambitious and doubtlessly the most influential enterprise in ancient China to elaborate the nature, function and scope of positive laws is Han Feizi's philosophy of law. Han's philosophy was also the philosophy that guided China to be a united country in 221 BC. Needless to say, this philosophy epitomizes traditional Chinese legalism, and has an enduring influence on China's legal thinking even in China today. No constructive thought of positive laws can afford not to start from Han Feizi in the philosophical discourse of positive laws in China today. Its profundity is yet to be fully explored and still has a lot to offer for our deep understanding of positive law today.

A key tenet in Han's philosophy is his concept of the relationship between positive law and the law of nature or natural law. Contrasted to how it is often labeled by some scholars, Han's legalism is not a strong form of legal positivism. It may be an overstatement that the Archimedean point of Han's philosophy of law is the concept of the universal *Dao*—the law of nature. Still, a salient feature of his legalism is that positive law necessarily reflects the natural principle of things that must be commensurable to the universal *Dao*. Admittedly, Han Feizi advocated that positive laws were as they were publically published in book or other forms and were conventional in nature; their public publication not only announced their authority and validity, but also defined the totality of their existence. Moreover, for him, positive law expresses a sovereign ruler's will, not the will of a sovereign people. Indeed, as an ancient thinker, Han Feizi had no concept of people's sovereignty. That said, Han Feizi also insisted that good positive laws must be rational and reasonable; the rationality and reasonableness of positive laws come from their embodying the natural principles of things; and their being commensurable to the universal *Dao*. Indeed, for him, embodying the natural principles of things and being commensurable to the universal *Dao* is a necessary condition for positive laws to be good. Equally crucial, "*Dao*" here is understood as the totality of natural laws. Natural principles are understood as some particular precepts of natural law and of which moral principles are not part, at least not necessarily part. In other words, good positive law is necessarily commensurable with natural law, not necessarily to moral law. This view and insistence makes legalism compatible with Daoism. In Daoism, "Man models himself after Earth; Earth models itself after Heaven; Heaven models itself after *Dao*." (Lao Zi 1996, Ch.25). Positive laws are of particular states of affairs or

practices and what they directly reflect are the natural principles of particular states of affairs or practices. In the Daoist concept, the Dao has no precepts of humanity, righteousness or other moral norms.

Of positive laws, Han Feizi claimed, “By [civic] law is meant statutes and commands publically published by the government, which people know to be backed by the threat of punishments, following them will be rewarded and violation of them will be punished.” (Han 1996, 289/ch43). This is not only the skeleton of Han’s concept of what is civic law, but also the flesh tinkered with the bones. It summarizes Han’s conceptual understanding of positive laws. In his concept, civic law is the aggregation of publically published statutes and commands by the government or ruler. The law of a country is a set of statutes and commands which sets up the scope and limit of what is jurisprudence and legal. It is fair to say Han Feizi’s definition of civic law here has legal positivist color, which can be seen better if we consider it in relation to John Austin’s famous definition of civic law: “A law, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down by an intelligent being having authority over him.” (Austin 2000, 117). For Austin, “the legal rules of a community are general commands its sovereign has deployed.” (Dworkin 2000, 162). Thus, conceptually, Han Feizi’s concept of what is positive law and its scope and function is at home with Austin’s here, though the two also differ in some aspects.

By the same token above, for Han Feizi, positive laws have two salient features: (1) they are written, and publically published norms and codes, not unwritten, publically unpublished norms and codes; and (2) they are backed by institutional force and threat of punishment. Positive laws are published commands, backed by institutional force, which bind a person or persons, and they thus differ from moral laws or codes that are unwritten and without any public publication. Positive laws explicitly and specifically define the boundary of what is juridical and beyond which one should not refer. Therefore, positive laws should be the only means to govern society. Han Feizi argues, “A good society should bring about order by positive laws and tactics ... A good society should not make reference beyond positive laws, while not failing to make reference to what is in laws.” (Ibid, 158-159/ch.29). A good society is understood as a well-ordered society, to borrow a term of John Rawls. Only positive laws can bring about such a well-ordered society. Han Feizi did not call for the rule of law as the principal rule, with the rule of morality as the auxiliary, as some legalist

thinkers did before and after him. He called for a monopoly of the rule of law. In connection with all these, for Han Feizi, the function of law was to prohibit and enjoin conduct and practices under penalty. Therefore, they are backed by institutional force and did not need to be humane. Han Feizi made no bone about the fact where there is the rule of law, there is the use of institutional force, repression, and oppression.

Notwithstanding, Han Feizi insisted that positive laws should not be arbitrary, but should be rational and in no a small measure, reasonable. Indeed, the insistence that rationality and reasonableness should be definite qualities of positive laws demarcates him from some other Chinese legalist philosophers such as Lord Shang Yang. It also distances Han Feizi from traditional legal positivist philosophers in the West. This should not be a surprise. Han Feizi was a student of the Confucian master Xun Zi whose philosophy is characterized by its emphasis on the laws of nature. *Ren Ji Yi*, the Chinese scholar of the history of Chinese philosophy, claims that in his legal philosophy, Han Feizi inherits Xun Zi's materialistic naturalism (Ren 1979, pp.247-250). *Ren Ji Yi* has a point, though materialistic naturalism is an ill-defined concept. For Feizi, positive laws have an objective dimension.

A key tenet here is Han's distinction between good civic laws and bad ones. In his distinction, good positive laws reflect and embody the principles of things and are commensurable with the *Dao*—that is to say, they are rational in line with the *Dao* and thus reasonable. “The *Dao* is that by which all things become what they are. It is that which all principles are commensurable with.”(Han Feizi 1996, ch.20). And “a principle is that which distinguishes the square from the round, the short from the long, the coarse from the refined, and the hard from the brittle.”(Ibid). In other words, the *Dao* is the universal natural law, while principles are particular natural principles of particular things. By this token, the *Dao* is embodied in principles; principles embody the *Dao*: “Only after principles become definite can the *Dao* be realized.”(Ibid). Positive laws that reflect and embody principles reflect and embody the *Dao*.

For Han Feizi, good positive laws reflect those natural principles of things, while bad positive laws are the opposite. Here, in Han Feizi, both the concept of *Dao* and the concept of principles are concepts of natural laws. Meanwhile, positive laws are specific and particular and good positive laws must reflect principles of things. Given principles of things are precepts of natural laws, good positive laws must reflect natural laws. Good positive laws thus must be

commensurable with the *Dao*, not merely consistent with and compatible with the *Dao*. By associating positive laws with natural principles of things and the *Dao*—in short, the laws of nature, Han Feizi intended one stone for two birds. First, he intended to ground the distinction between good positive laws and bad positive laws in the laws of nature and in some objective basis. As a student of Xun Zi, Han Feizi recognized the existence of the laws of nature. Secondly, he intended to emphasize not only that positive laws are superior to moral laws in governing society, but also that only positive laws are really fit to govern society. The second objective may seem to be odd to those who conceive moral laws to be a kind of natural law, but nothing unusual to thinkers such as Han Feizi who do not associate these two with each other. Indeed, an underlying claim of Han Feizi's claim is that moral laws are not part of the laws of nature, and in many cases, incompatible with the laws of nature.

Singling civic law out as the only institution fit to govern society, Han Feizi claimed: "It (the rule of civic law) turns chaos into order, punishes the wrong and rewards the right as merited, giving due to what is important and what is not with measurement. It is consistent with the principles of nature and does not damage human dispositions and nature ... It holds to tested principles and ground in nature."(Ibid. ch.29) That is to say, the good and just rule of civic law does not violate the principles of nature, is consistent with human nature, and is grounded itself in [the laws of] nature. Good positive laws reflect the principle of justice and the rule of reason. Noteworthy here, claiming that the rule of good positive laws does not damage human nature, Han Feizi had to brush against his teacher Xun Zi who claimed that human nature is evil, and therefore sages established rules and rites to transform it and cultivate goodness in human nature. To claim that human nature is evil and therefore sages established rules and rites to transform it and cultivate goodness in human nature is not to claim that moral cultivation is to damage human nature. To claim that the rule of positive laws does not damage human dispositions or human nature is not to claim that human nature is originally good. It is not to claim that the basis for the rule of positive laws is the fact that human nature is originally good. In a nutshell, Han Feizi's concept of good positive laws is the concept that positive laws are rational, reasonable, and therefore effective.

Needless to say, the problems of civic law which Han Feizi addressed were of municipal laws, and did not include problems of international laws or global laws such as the laws of humanity, or crimes against humanity, which we also

confront today. But the questions which he attempted to answer are still relevant to us today. That is, do good, valid positive laws have a natural basis? When we say that certain positive laws, be they municipal laws or international and global laws, are good, valid, reasonable, and rational, what do we mean? Do our concepts of goodness, validity, reasonableness, and rationality of law express merely the fact that they are accepted by peoples or do they express a kind of acceptability by human reason? With regard to international and global laws, noteworthy, ever since Kant, we cannot talk about world laws without mentioning human rights as natural rights that are juridical. And to talk about human rights as natural rights that are juridical is to talk about global justice as natural justice and world laws as natural laws.

A clarification is in order. Han Feizi claimed that positive law must be grounded in natural laws and not that positive laws must be grounded in moral laws. Fair to say, to insist that good positive law must be just or to talk about good positive law is to talk about that positive law as having an ethical-moral dimension. But in Han Feizi, neither the concept of *Dao* nor the concept of principle is a moral concept or necessarily connotes anything ethical-moral. On the contrary, for him, the rule of law is intended to be the opposite of the rule of morality which for him is the rule of man. Noteworthy, Han Feizi explicitly emphasized that in good positive law, one should be rewarded and punished in accordance with laws, not in terms of moral merits; a deed that was moral but not following positive laws must also be punished; there should be consistency and persistence in interpreting and implementing laws (Ibid. ch.7). Evidently, Han's emphasis that one should not use morality to overridden positive law is also an emphasis that positive laws are not subordinate to moral law or simple mouthpieces of morality. Admittedly, Han Feizi insisted that there should be procedural justice in administrating laws wherein interpretation and implementation of laws must have integrity and be consistent. Still, to emphasize that justice in administrating laws is not to emphasize that positive law must be subordinate to morality.

Another clarification is this. While Han's emphasis on the relationship between good positive laws and natural laws is evident, it is not so clear whether natural laws constitute also a source of the validity of positive laws. Validity here refers to the acceptability of positive laws. At issue is also the question of the relationship between the validity and rationality of positive laws. Does the former depend upon the latter? To this question, Han's answer is ambivalent. One

possible answer is that Han Feizi did not draw a distinction between acceptability and acceptance, and for him, what is accepted is acceptable. By this token, the validity of positive laws has little to do with their rationality, but has everything to do with their authority which is affirmed by their publication. Another possible answer is that the concept of good laws presupposes the concept of valid laws; accordingly, the concept that good laws are associated with rational laws is also the concept that valid laws are associated with rational laws; therefore, the validity of positive laws presupposes the rationality of positive laws. That said, for the purpose of this paper, suffice it to say that Han Feizi emphasized that good positive laws and rational positive laws are the same—that is to say, what can be counted as good positive laws must be rational in terms of reflecting natural principles of things and being commensurable with the *Dao*; good positive laws are commensurable with natural laws; equally crucial, good positive laws must be valid laws. By this token, we can assume that in Han Feizi, valid laws and rational positive laws are united in the concept of good positive laws.

Notwithstanding, for Han Feizi, good positive laws must be accessible to common people. As Han Feizi saw it, positive laws are instruments of social management and thus its accessibility is a necessary quality of its reasonableness. This could be understood as follows. Positive laws must be accessible to ordinary people because they must be actionable. “If governmental commands neglect ordinary affairs [the particulars] of people and if simple folk cannot understand these commands ... then these commands would not be the way of orderly government.” (*Ibid*, ch.49) By “governmental commands” Han Feizi meant positive laws here. Fair to say, to be accessible to ordinary people is one thing, and to be just in the eyes of ordinary people is quite another. Also, to be comprehensible and knowable is one thing and to be reasonable is another. To be accessible to ordinary people is one thing and to be acceptable to them is quite another. Still, Han Feizi insisted, accessibility is a necessary condition for reasonableness of positive laws, and reasonableness of positive laws is a necessary component of rationality of positive laws. As Han Feizi saw it, laws could be imposed on common people. But if what are imposed on common people are not accessible to their common reason and feeling, then they would have little, if any, real effects on them. For this reason, Han Feizi insisted, “positive laws serve as the teaching.” (*Ibid*). Positive laws serve as teachings in the sense that they are, as Habermas would claim, a system of both knowledge and action. As a system of knowledge and standards for action, they must be accessible to those who are obliged to obey

them.

Noteworthy here is the debate between Confucianism and legalism on whether society should be governed by positive laws or by morality. This constitutes one of the most important philosophical debates in the history of Chinese thought. The debate is not only about whether morality or positive laws should be the principal institution to govern society, but also about whether morality or civic law is in itself sufficient to govern society. This intellectual, ethical-moral effervescence reveals two features of legalism that are exhibited most conspicuously in Han's philosophy of law. First, in legalism, positive laws and morality are not two mutually complementary institutions; they are actually two antithetical, incompatible institutions. Second, in the legalist concept of the universal *Dao*, moral principles are not precepts of the universal *Dao*. Both legalist views as described above are epitomized in Han's philosophy of law. For example, Han Feizi insisted that morality and positive laws emphasize different and incompatible values and concepts, and "what are mutually incompatible should not exist together." (Ibid, ch.49/323). He accused Confucianism of messing up positive laws by its teaching of moral doctrine (以文乱法 *yi wen luan fa*) (Ibid.). He insisted that an enlightened ruler use positive laws alone, not morality, to put a society in order (Ibid, ch.49.324).

Not surprisingly, for Confucian thinkers, the Achilles' heel of Han's philosophy of law is its total exclusion of the voice of morality in positive laws; in particular, the voice of humanness and humanity in civic law. In Han's philosophy, the masses, like anything else, are merely objects of regulation. In his view, law should put the common people in order the same as it should put any other things in the world in order. For Han Feizi, law could be justified to be cruel and oppressive for the purpose of effective social management. The concept of humanity had no place in Han's legal thinking. In his thought, law can be reasonable without giving due to the voice of humanness. Noteworthy, the legal system of the Qin dynasty, which was *de facto* guided by Han's legal thought, was one of the cruelest systems of law in China's history. Confucian thinkers might be wrong in claiming that Han's philosophy of law does not emphasize reason. The problem is that Han's concepts of reason and normativity are too instrumental and utilitarian. All the same, Han Feizi's unconstrained, one-sided emphasis on heavy law (重典 *zhong dian*) and legal punishment could open the door to cruelty, abuse, and inhumanity.

In summation, in Han Feizi's philosophy of law, in spite of the fact that

positive laws are publically published and backed by institutional force, good positive laws must be rational and commensurable with the laws of nature. In essence, Han's concept of natural laws is Daoist although he was a student of the Confucian Master Xun Zi. His concept of the universal *Dao* has nothing to do with such moral concepts as humanity, righteousness, and propriety which are considered to be universal moral principles and norms of the human way in Confucianism. Thus, his emphasis on the inseparability of positive laws and natural laws has, ironically, traded on his emphasis that moral laws are not the natural principles of things; some of them are not even compatible with the natural principles of things. All the same, although they leave much to be desired, Feizi's insights into the relationship between positive laws and natural laws are still illuminating today.

II.

The Archimedean point of Hobbes' philosophy of law is the concept of natural law. A key tenet of his philosophy is that natural law is not only necessary for good positive law, but identical to the latter in content. For him, positive law and natural law are not two distinctive families of law, but they are two parts of the same family of laws that are equal in content and differ only in form. "Hobbes is content to interpret a law as an authoritative command, whether human or divine. But each command must be justified, and justification of statute law consists in showing that it is merely an application of natural laws." (Schneider 1958, xi).

According to Hobbes, "the law of nature and the civic law contain each other and are of equal content." (Hobbes 1958, 212). Civic law, for Hobbes, is positive law. And to claim the law of nature and the civic law contain each other and are of equal content is to claim that they are necessarily associated with one another. In other words, while each is not a sufficient condition for the other, each is the necessary condition for the other. Equally crucial, Hobbes' concept of natural law is the concept of natural justice wherein universal rights and values are grounded in human nature and recognized by human reason. Therefore, Hobbes' claim that positive law and natural law are equal in content is the claim that civic justice and natural justice are equal in content wherein universal rights and values are grounded in human nature and recognized by human reason.

For Hobbes, the law of nature is the foundation and source of positive law. In turn, positive laws actualize the law of nature in a commonwealth, and natural

justice is the foundation of civic justice which, in turn, actualizes natural justice. “For the law of nature—which consist in equity, justice, gratitude, and other moral virtues...are not properly laws ...When a commonwealth is once settled, then are they actually laws and not before, as being then the commands of the commonwealth and therefore also civic laws; for it is the sovereign power that obliges men to obey them.”(Ibid.). Natural law is not proper law until it is actualized as positive law. And positive law cannot be as it is without natural law as its source and content. Natural law and natural justice are necessary prerequisites for positive law and civic justice, and positive law and civic justice are the necessary development of natural laws and natural justice. Good positive laws come from natural laws while natural laws remain to be developed into positive laws. On the one hand, positive laws can be good and rational because they have their source in natural laws and are equal in content with natural laws. Fair to say, in positive laws, the members of a commonwealth must submit to the commands of the sovereign. But the sovereign can dictate good positive laws if and only if the sovereign does so by consulting and reflecting natural laws. On the other hand, natural laws need to be developed into positive laws of a commonwealth to realize that they are laws. Natural laws are good and rational, but they only have their sovereignty and authority through being developed into positive laws of a commonwealth.

Not surprisingly, Hobbes shared four views with Han Feizi despite their differences. The first three are conceptual in nature while the third is about the normativity of positive law.

First, for Hobbes, positive law must be written. “Civic and natural law are not different kinds but different parts of law, whereof one part, being written, is called civic, the other unwritten, natural.”(Ibid.) Hobbes and Han Feizi are in total agreement that positive laws must be written although Hobbes contrasted positive laws with natural laws while Han Feizi contrasted positive laws with moral laws. That is to say, for both Hobbes and Han Feizi, conceptually, the first salient feature of positive laws is that they are written; written codification is the necessary property of any legitimate positive laws; where there are legitimate positive laws, there is a written codification of them. By this token, positive laws differ from both regular conventions and moral laws.

Second, for Hobbes, positive law must be published by a sovereign with legitimate authority. “The law of nature excepted, it belongs to the essence of all other laws to be made known to every man that shall be obliged to obey them,

either by word, or writing, or some other act known to proceed from sovereign authority.”(Ibid, 216) “There is therefore not only a declaration of the law, but also sufficient signs of the author and authority.”(Ibid.)

For Hobbes, as it is for Han Feizi, “The law is a command, and a command consists in declaration or manifestation of the will of him that commands, by voice, writing, or some other sufficient argument of the same—we may understand that the command of the commonwealth is law only to those that have means to take notice of it.”(Ibid, 214-215). Positive laws must be published or written by a sovereign that has proper authority, but the law of nature need not. “The law of nature... need not any publishing or proclamation.”(Ibid, 215). To this point, Hobbes and Han Feizi are also in total agreement, though in Hobbes, the sovereign is the people or the ruler while in Han the sovereign is the emperor. That is to say, for both Hobbes and Han Feizi, public publication is another necessary property of legitimate positive laws. Where is legitimate civic law, there is its public publication.

Third, for Hobbes, positive laws must be sovereign and authoritative. Positive laws express the will of a sovereign that has the proper authority to impose laws. Needless to say, Hobbes and Han Feizi each has a different concept of the sovereign’s will that is expressed in positive laws. But they both insisted that sovereignty and authority are two necessary properties of legitimate positive laws. For both of them, where there is positive law, there is the sovereignty and authority which articulates it.

Fourth, good positive laws must not be inconsistent with reason. “Law can never be against reason.”(Ibid, 214) When civic law is against reason, it is bad. There is a distinction between good positive laws and bad positive laws, and an important criterion for such a distinction is whether a piece of law is in line with reason or against reason. On this point, Hobbes and Han Feizi are in general agreement, although Han emphasized that human reason itself must operate in accordance with natural principles. All the same, for both Hobbes and Han Feizi, legitimate positive laws must be consistent with human reason, and where there is legitimate civic law, it too must be consistent with human reason.

The foregoing discussion suggests that Han Feizi is not the kind of strict legal positivist as he is generally understood to be in the West and mainland China. It also suggests that Hobbes also includes elements of legal positivism in his view. By and large, it is not unreasonable for us to associate Hobbes’ philosophy of law with a form of legal realism.

Hobbes also differs from Han Feizi in several important areas. Again, some of these differences are conceptual, and others are normative. That is to say, some differences are about the nature, scope, and limit of positive laws. Others are about the justification of positive laws.

First, for Hobbes, the content of positive laws and natural laws is the same and differ only in form, e.g., positive laws are written and published while natural laws are not. In comparison, for Han Feizi, positive laws reflect and ought to be compatible with natural laws and reflect natural laws, but they are not equal in content or form. Thus, while for Hobbes, positive laws and natural laws are not different kinds of law, they are different parts of law; for Han Feizi, positive laws and natural laws are different kinds of law.

Second, Han Feizi had no concept of natural rights in his concept of positive laws, while in Hobbes, the concept of natural rights is foundational. For Han Feizi, positive laws are not means to protect basic human rights. For Hobbes, positive laws are geared to protect persons' basic human rights and legitimate interests. For Han Feizi, positive laws are the means for a ruler to govern a kingdom, while for Hobbes, positive laws are the means for a commonwealth to govern itself. For Hobbes, positive laws stipulate both rights and obligations because rights and obligations are not separable. For Han Feizi, positive laws stipulate obligations, not necessarily rights. For Hobbes, the concepts of laws, rights, and obligations are inseparable while the concept of rights is generally absent from Han Feizi's concept of positive laws.

Third, for Hobbes, positive law is necessary for a society because it is necessary for justice, while for Han Feizi, the function of positive law is to bring about order to a society. Wing-Tsit Chan indicates that legalist thinkers such as Han Feizi "were primarily interested in the accumulation of power, the subjugation of the individual to the state, uniformity of thought, and the use of force." (Chan 1963, 251). Chan's observation may do some injustice to Han Feizi and other legalist thinkers. But it does point to the Achilles's heel of Han's concept of law: his concept of law is not geared to protect popular rights and interests. For Hobbes, justice depends on "the coordinated conduct of large numbers of people, which cannot be achieved without law backed up by monopoly force." (Nagel 2005, 115). Also, in Hobbes, the concept of rights is part of the concept of natural justice. But for Han Feizi, the concept of rights is not part of the concept of the universal *Dao* and there is no such thing called justice in terms of "natural rights."

Fourth, for Hobbes, natural laws and moral laws are more or less identical. As for the rule of law and the rule of morality, their content is the same but they differ in form. In comparison, for Han Feizi, natural laws and moral laws are not identical, and the rule of law and the rule of morality differ in nature, content, and form. Hobbes' laws of nature are more or less theorems of reason and laws that spell out natural justice and universal truths of nature and humanity. Thus, all of Hobbes' eighteen natural laws can be said to be moral laws whereas Han's particular principles of things or the *Dao* are not moral concepts, although some principles such as the principle of justice have an ethical-moral content or dimension. Han's laws of nature are precepts of the universal *Dao*. While in Hobbes, everything that conforms to morality also conforms to natural laws, but for Han Feizi, acts that have moral merit but violate positive laws or codes should still be punished.

As Thomas Nagel indicates, "Hobbes construed the principle of justices, and more broadly the moral law, as a set of rules and practices that would serve everyone's interests if everyone conformed to them."(Ibid) Thus, for Hobbes, justice is natural in the sense that it is a principle of reason. In comparison, Han Feizi emphasized what we would call "procedural justice" in administrating positive laws, but not what we would call "substantive justice of positive laws." For him, substantive justice as righteousness, like humanity, is a principle and practice that is taught by morality. In other words, while Hobbes emphasized substantive justice, Han Feizi emphasized procedural justice. The difference is not merely on focus. It is a conceptual difference about what positive laws ought to be.

Speaking of Hobbes' concept of positive laws, it may be useful to mention Kant. Both Hobbes and Kant conceived moral law to be law of a higher order. For both of them, the concept of positive law and the concept of rights entail one another. But Kant explicitly emphasized that positive law must be subordinate to moral law. Hobbes evidently conceptualized positive law to be written, codified, and publically published moral law. Thus, Hobbes' view intersects with Kant's in some important aspects amid their differences. But Kant's concept of positive laws is deontological, while Hobbes' is teleological.

In sum, for Hobbes, natural law and positive law are twin brothers in content and differ only in form. Thus, Hobbes' philosophy of law differs importantly from Han's. Hobbes advocated for positive law as the necessary actualization of natural law in a commonwealth, while Han Feizi advocated for positive law as the

alternative means of social management to morality. The difference between Hobbes and Han is due importantly to the fact that they have different concepts of natural law. In Hobbes' view, natural laws are laws of human reason of which moral laws are a crucial part. For Han, natural laws are precepts of the universal Dao with which moral laws that are artifacts of culture may not be compatible.

III.

The Archimedean point of Habermas' philosophy of law is not the concept of natural law. His approach to positive law differs from both Han's and Hobbes'. For him, positive laws are democratically established human artifacts. In the democratic procedure for legislatures to make laws, even if there may be arguments appealing to the concept of natural law, democratically established positive laws are not duplications of natural laws. Instead, they differ from natural laws both in content and form. The legitimacy and validity of positive laws come exclusively from the democratic process in which laws are established and published. By the same token, the rationality of positive laws comes exclusively from a democratic legislature based upon rational communication under the guidance of the communicative rationality. In social management, morality is complementary to positive law. But positive law is not subordinate to morality. Instead, the two are parallel institutions.

Habermas shares with Han and Hobbes the view that positive laws have two salient features. First, they are written and publically published. Second, they are backed by those who have a monopoly on force. The second feature of positive laws is dubbed by Habermas as the "facticity" of law. The facticity or social reality of positive laws is that they are compulsory and backed by sanctions. As Habermas puts it, "Such laws appear as the will of a lawgiver with the power to punish those who do not comply; to the extent that they are actually enforced and followed, they have an existence somewhat akin to social facts." (Ibid, xi). Also, for Habermas, as it is for Han and Hobbes, positive law differs from natural law in the sense that positive law is a social institution, a human artifact, not a natural institution. Positive law comes into existence by a historical and public action—that is, the democratically legislation of it and its being publically published.

Moreover, for Habermas, positive laws have their independent claims of validity. They differ from natural laws both in content and form. For Habermas,

in content, “law is two things at the same time: a system of knowledge and a system of action.” (Habermas 1998a, 114). That is, so far as their contents are concerned, positive laws have two substantial properties. First, they are a system of specific knowledge of what is acceptable, what is not, and what is sanctionable. Second, they are also norms and standards of action. They impose obligations. Positive laws consist of a set of codes that not only codify behaviors, but also claim to be valid standards or norms of conduct. The validity of positive laws refers to their claims to reason: that is to say, “compulsory laws are not simply commands backed by threats but embody a claim to legitimacy.” (Ibid).

The facticity of positive laws demarcates them from natural laws. First, it indicates the institutional and institutionalized feature of positive law. They are part of human artifact called “social institution.” Second, it indicates the scope and limit of positive law that differs from that of natural law. Meanwhile, the validity of positive law leads us to see its democratic genesis. It indicates that positive laws are not given in nature or given by some divine power. Instead, they are established by a human community and are rationally acceptable to the members of that community in which they have validity.

Habermas agrees with Hobbes and Han Feizi that good positive laws must be rational. As Habermas sees it, “legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law: it must remain possible for everyone to obey legal norms on the basis of insight.”(Ibid, 121). But for Habermas, the concept of rationality pertaining to positive laws does not derive positive laws from natural laws, but demarcates them. As he says, “Legal institutions differ from naturally emergent institutional order in virtue of their comparatively high degree of rationality; they give firm shape to a system of knowledge that has been doctrinally refined and coupled with a principled morality.” (Ibid, 114).

For Habermas, “in the legal mode of validity, the facticity of the enforcement of law is intertwined with the legitimacy of a genesis of law that claims to be rational because it guarantees liberty.”(Ibid, 28). In other words, legal validity is internally associated with the democratic genesis of positive laws. Accordingly, the rationality of positive laws has two concerns. The first concern is about the source of a rational procedure in which positive laws are established. Only a procedure that allows the free, informed democratic execution of will can be counted as rational. The second is about the content of positive laws. Only those positive laws, which could be rationally accepted by all those whom they will

affect, can be claimed to be rational. Therefore, the concept of rationality does not derive positive laws from natural laws, but it associates the concept of legitimate positive laws with rational communication and the rational democratic process of establishing positive laws.

Thus, Habermas claims, “The positivity of law is bound up with the promise that democratic processes of lawmaking justify the presumption that enacted norms are rationally acceptable.”(Ibid, 33). “Law borrows its binding force, rather, from the alliance that the facticity of law forms with the claim to legitimacy.”(Ibid, 38-39). By this token, Habermas’ discursive concept of civic law steers between the twin pitfalls of legal positivism and natural law. Habermas asks us to consider that the legitimacy of positive law is conceived as procedural rationality and ultimately traced to an appropriate communicative arrangement for the lawgiver’s rational political will-formation (as well as for the application of law). If so, then the inviolable moment of legal validity need not disappear in a blind decision nor be preserved from the vortex of temporality by a moral containment (Ibid. 453). Additionally Habermas’ view differs from Han Feizi’s concept of the rationality of positive laws as mirroring natural laws as well as from Hobbes’ concept of the rationality of positive laws as duplicating natural laws.

With regard to positive laws, the conceptual difference between Habermas on the one side and Han Feizi and Hobbes on other can also be understood as a difference between a deontological concept and a teleological concept of positive law. To a great extent, Habermas’ concept of positive law is deontological, while Han’s and Hobbes’ concepts of positive laws are teleological. In the deontological concept of positive laws there are norms and standards of conduct organized to justify practices focusing on the normativity of positive laws. Habermas conceives positive laws to be a system of norms, or valid norms, acceptable to all who are affected by them, such as all who will subscribe them. In comparison, the teleological concept provides that positive laws are a set of rules and practices which embody social values. Such a concept of positive laws focuses on the instrumentality of positive laws, and this concept is what Habermas rejects.

The distinction between the deontological and the teleological concept can be summarized as follows. First, the difference is on focus and emphasis. The deontological concept focuses on rightness and the normative justifiability of positive law, especially rightness in terms of a person’s basic rights. In the teleological concept, positive law is a system of norms. Good or bad laws are

evaluated in terms of whether they are right or wrong in reference to their ability to address claims of rights and obligations. In comparison, the teleological concept focuses on how well positive laws can bring good to a society as well as to individuals. In this concept, positive law is a system of rules and practices which are evaluated as good or bad in terms of what good they produce. The second difference is about validity. In the deontological concept, the validity of positive law is universal acceptance. In the teleological concept, the validity of positive laws is communal and therefore particular. The third difference deals with requirement. For example, in the deontological concept, there is a requirement of internal coherence of various positive laws. In comparison, in a teleological concept of positive laws, there is no such requirement of internal coherence among positive laws.

Noteworthy, normally, a deontological concept of positive law often has much to do with the concept of natural and moral law. Also, in Western philosophy, natural laws are generally understood as laws postulated by human reason. Habermas' case is a bit different. His deontological concept of positive laws leads him to emphasize that the democratic procedure must be rational to guarantee the rational acceptability of positive laws that are established in the procedure and to conceive positive law and moral law to be mutually parallel and complementary, but not necessarily connected. On this point, Habermas differs even from Kant to whom he is greatly indebted.

Habermas shares Han's view that civic and moral laws differ from one another in both form and content. But their difference is also conspicuous and significant. Habermas conceives positive law and morality to be mutually parallel, complementary institutions. According to Habermas, "Moral norms regulate interpersonal relationships and conflicts between natural persons who cognize each other both as members of a concrete community and as irreplaceable individuals . . . By contrast, legal norms regulate interpersonal relationships and conflicts between actors who recognize one another as consociates in an abstract community first produced by legal norms themselves." (Ibid.112). In comparison, for Han Feizi positive law and moral law are two antithetical, incompatible institutions.

For Habermas, morality constrains persons in enjoying freedom in the private realm while positive laws constrain persons in enjoying freedom in the public; morality constrains persons cognitively, motivationally, and organizationally by inviting persons to conform to the general, universal—that is, by acting out of a

sense of duty. Positive laws constrain persons cognitively, motivationally, and organizationally by inviting persons to conform to the particular—that is, by acting out of a sense of obligation. For Han Feizi, positive law and morality teach different things that are not compatible, and “what are mutually incompatible should not exist together.” (Han 1996, ch.49/321-323). Fair to say, Habermas and Han Feizi each conceptualizes morality in his own way and thus they conceptualize the relationship between law and morality differently.

In his 2001 visit to China, Habermas argued that “without basic liberty, equality, rights of political participation, and social justice, there can be no modern system of law.” (Cao, 2004, 79). Habermas’ remark then was intended as a criticism of China’s current positive laws. They should place more emphasis on liberty, equality, basic rights of political participation, and social justice. That said, his criticism can also be understood here to delineate a crucial difference between his concept of good positive law and Han’s. Habermas emphasizes that good positive laws must redeem the claims of basic liberty, equality, rights of political participation, and social justice, while Han’s concept of positive law does not emphasize such.

Another point is this. In strict terms, in Habermas’ philosophy, basic liberty, rights of political participation, and social justice are not precepts of natural law. They are principles that human reason necessarily postulates under the rule of law and institutionally established. For example, Habermas insists, “Human rights in the modern sense can be traced back to the Virginia Bill of Rights and the American Declaration of Independence of 1776 and to the Declaration des droits de l’homme et du citoyen.” (Habermas 1998b, 189). He further insists,

The concept of human rights does not have its origin in morality ... Human rights are juridical by their very nature. What lends them the appearance of moral rights is not their content, and most especially not their structure, but rather their mode of validity, which points beyond the legal orders of nation-state (190).

In the passage above, Habermas draws a distinction between human rights and moral rights as natural rights, indicating that the concept of human rights is a product of the rule of law and human rights are developed by humankind under the idea of the rule of law.

An interesting asymmetry here is that Habermas dissociates positive law and

natural law on the one hand and conceives positive law and moral law to be mutually complementary on the other hand; in comparison, Han Feizi associated positive laws and natural laws but dissociated positive law and morality. Antoni Abat Ninet indicates that Habermas in effect makes use of the concept of natural laws. Ninet's reasoning goes as follows: in Habermas' philosophy of law, justification of the legitimacy of positive laws includes moral justification; moral justification necessarily appeal to moral laws, which in turn appeals to natural laws (Ninet 2013, 68-70). Ninet's view is flawed. Admittedly, in Habermas' philosophy of law, the justification of positive law includes moral justification. Above all, moral questions constitute one of three questions which positive law must address. Still, in Habermas' view, moral justification need not appeal to natural law. Also, Habermas' philosophy of law moral laws and natural laws are not identical. For example, human rights and natural rights (or moral rights) are identical, and cosmopolitan laws and natural laws are not identical. As a matter of fact, Habermas does not appeal to the concept of natural laws to argue for the rationality, validity, and legitimacy of positive laws. Conversely the concepts of rationality, legitimacy, and the validity of positive laws are central to Habermas' positive laws. We should also bear in mind that Habermas explicitly claims his discursive concept of civic law belongs neither to legal positivism nor to natural law theory.

Habermas aligns with Hobbes' view that positive law and moral law are associated. For him, positive law must address three types of questions: the pragmatic, the ethical-political, and the moral. First, "Pragmatic questions pose themselves from the perspective of an actor seeking suitable means for realizing goals and preferences that are already given."(Ibid, 159). Second, "the ethical-political questions pose themselves from the perspective of members who, in the face of important life issues, want to gain clarity about their common life."(Ibid, 160). Third, "in moral questions, the teleological point of view from which we handle problems through goal-oriented cooperation gives way entirely to the normative point of view from which we examine how we can regulate our common life in the equal interest of all."(Ibid, 161) Needless to say, if positive law must address moral questions, moral law cannot be irrelevant or insignificant for them. If the normativity of positive law is defined partially by its answering moral questions, moral law cannot be irrelevant or insignificant to positive law.

That said, Habermas would reject the Hobbesian concept that positive law and moral law are of equal content. For Habermas, positive law and moral law

differ cognitively, motivationally, and organizationally in content and form, which is exhibited in the differences between legal norms and moral norms. First, positive laws are always specific and determinate in cognitive content. For example, in the law that one is legally obliged to pay his or her share of federal tax in America each year, the cognitive content of the law is specific and determinate. In comparison, moral norms or laws are indeterminate in cognitive content. For example, in the moral norm that one has a duty as a citizen to pay federal tax in America, the cognitive content of the norm is indeterminate. Here, one's share of taxes or how much tax one should pay in order to fulfill one's duty is indeterminate. When one should pay one's share of tax is also indeterminate. One has a cognitive burden to determine what one's duty in content is. Second, for Habermas, positive laws are sanctionable and backed by force, while moral laws are not. Therefore, in Habermas' view, the content of positive laws necessarily remains within the boundary of organizational resources. But the contents of moral laws are without such restriction by organizational resource. In other words, the content of positive law must correspond to institutional resources which are the enacting conditions of positive law. The content of moral laws is not subject to such a corresponding constraint.

In sum, Habermas' discursive concept of positive law differs from both Han's and Hobbes' concept of civic law, in particular with regard to the relationship between positive laws and natural laws. Habermas is a true democrat, which both Han Feizi and Hobbes are not. The discursive concept of positive laws emphasizes the relationship between the democratic process in which laws are established and positive laws. It sets aside the concept of natural laws. This need not suggest that Habermas rejects the concept of natural law. It simply indicates that Habermas does not appeal to natural laws to argue the legitimacy, validity, and rationality of positive laws.

In conclusion, at the end of the day, the question which we should ask is whether the concept of the laws of nature or natural laws is necessary for a reasonable, rational concept of good, legitimate, and valid positive laws. To claim that natural laws are a necessary part of a concept of a reasonable, rationally, good, legitimate, and valid positive laws is to claim that where there are good, legitimate, and valid positive laws and there are natural laws; where there is no natural law, there is no good, legitimate, and valid civic law. The answers which Han Feizi, Hobbes, and Habermas have given as described above mirror the diverse answers which we have today. In general, Han's and Hobbes' answers are

affirmative, while Habermas' is negative. Today, various philosophers' answers to these questions are still divided between the affirmative and the negative. This in turn confirms that the question is in effect complicated when it may initially have appeared to be a simple one. But the question is important for us to fully understand the nature, scope, and limit of positive law.

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