

## **Han Fei and Justice**\*

---

Henrique SCHNEIDER

Universit ä Graz, Austria

### **Abstract:**

Justice in an abstract sense (or, establishing just outcomes) is one of the most important goals of any legal system. For Han Fei, on the other hand, justice did not seem worthy of a meaningful consideration within framework, which focused on the effectiveness and efficiency of the state aiming at increasing the power and/or stability of the state (and its ruler). However, this paper claims that there is a proposition to be made: Although Han Fei was not concerned with justice, establishing just outcomes was equally fundamental for the functioning of the system proposed by him as its inherent stability.

**Key Words:** Philosophy, Political System, Qin, Justice, Dao

---

\* The author gratefully acknowledges the insightful comments given by Al Martinich, Yang Xiao, and Hui-chieh Loy.

*Fundamenta justitiæ sunt, ut ne cui noceatur, deinde ut communi utilitatiserviat.*  
(The foundations of justice are that no one shall suffer wrong; then, that the public good be promoted.)

Cicero, *De Officiis*, I. 10.

It's a very heterogenic group; it even seems too disparate to be brought together: legal philosophy, justice, Han Fei, and (some) comparative philosophy. Yet, there is an intuition of justice that merits some thought within legal philosophy. Would this entail that Han Fei

<sup>1</sup>, as a philosopher thinking about legality, had justice in mind, as well?

This paper aims to establish what justice means in the philosophy of Han Fei. In order to do so, the concept of justice will have to be examined. In a more ethical sense, justice can be understood as righteousness; but in a more procedural meaning, justice takes the form of effectiveness, efficiency, and procedural equality.<sup>2</sup> It will be shown that Han Fei rejects, of course, the first concept of justice but accepts the second, and indeed, the second is fundamental for his philosophy.

In order to make this point, the paper will start by giving definitions as an extended introduction to this topic and will then continue on to the role of justice in Han Fei, and, lastly, to some conclusions.

## 1. DEFINITIONS

This paper's title already warrants more than one explanation. Through the definition of certain key terms, the scope of this analysis should be made clearer. In this section, three conceptual relations will be defined. First, the idea of "justice", then, its relation towards legal philosophy in general and if this relation also can be applied to Chinese philosophy.

### 1.1 Justice

Justice and injustice are notions that can be applied to a society, its processes, and its structures. At a basic level, the Merriam-Webster dictionary (2013) defines justice as: (1) the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments; (2) a: the quality of being just, impartial, or fair, and b: the principle or ideal of just dealing or right action (righteousness), and c: the quality of conforming to law; (3): conformity to truth, fact, or reason (correctness).

---

<sup>1</sup> Following Goldin's prescription: Han Fei 韓非 was the name of a prolific Chinese philosopher who (according to the scant records available to us) was executed on trumped up charges in 233 B.C.E. Han Feizi 韓非子, meaning Master Han Fei, is the name of the book purported to contain his writings." (Goldin 2013, 1).

<sup>2</sup> Whether in the sense of fulfilling these individually or composedly is a discussion for another forum.

---

While (2) has an almost ethical implication – being fair or righteous – (1) and (3) take on a more procedural meaning of justice. It may seem odd to state (3) as a procedural matter, but jurisprudence is about the construction of a narrative structure that puts facts in order. Truth means stating or narrating the true facts in a true way. This is a process grounded in language and makes language part of the juridical process. Therefore, truth meaning the correct construction of a narrative is, from the juridical point of view, a procedural matter (in-depth discussion in Gibbons et al 2004). So, (1), and at least concerning some aspects also (3) seem to refer to justice as the quality of applying correctly and impartially the rules, or laws, of a society. A fundamental distinction instantly comes to light in this rather simple definition of justice; the distinction between the ethical and the legal (*stricto sensu*) meaning. Of course, they are not contradictory, but they are not synonymous either.

At a philosophical level, four distinct theories of justice can roughly be discerned. First, utilitarianism is a form of consequentialism and considers law, especially punishment, prospectively. What has the best consequences for society (usually, the total average welfare caused by a measure) is just in the sense that its implementation produces most (societal) goods. Justified by the ability to achieve future social benefits resulting in the reduction of deviation from the law, the moral worth of an action for implementing the law is determined by its outcome. Hume (1751) and Mill (1863) explain the mistaken belief that justice is overwhelmingly important by arguing that it derives from two natural human tendencies: the desire to retaliate against those who hurt, and the ability to put oneself imaginatively in another's place. Therefore, when humans see someone harmed, they project themselves into the victim's situation and feel a desire to retaliate. This instinct, however, does not logically guarantee that justice will be established in the end, nor that society as a whole will be better off. The utilitarian's idea is to increase the overall average welfare of society. Punishment, for example, is an instrument to achieve this, even if punishment in itself is negative: Trough deterrence (the credible threat of punishment may lead people to make different choices; well-designed threats may lead people to make choices that maximize welfare), rehabilitation (punishment may make bad people better.) and security/incapacitation (limiting the opportunities of wrongdoers for causing harm), punishment maximizes the overall good in the long term. For the utilitarian, the reason for punishment is the maximization of welfare, and punishment should be imposed on whomever and in whatever form and severity are needed to meet that goal. Critics of this approach have pointed out that this logic may justify punishing the innocent or inflicting disproportionately severe punishments, when this promises to have the best consequences overall; for example executing a few suspected shoplifters live on television would be an effective deterrent for shoplifting (Ten 1993).

The second form of understanding justice is the retributive argument that regulates proportionate response to crime proven by lawful evidence, so that punishment is justly imposed and considered as morally correct and fully deserved. The law of retaliation (*lex talionis*) is an example of an outcome of the theory of retributive justice, when it says that reciprocity should be equal to the

wrong suffered. Systems of customary law often recur to this concept; Albanian law, for example, codifies traditional law Kanun or the Books of Moses in postulating the principles "life for life, wound for wound, stripe for stripe (Shemot / 2nd Book of Moses / Exodus 21, 23-25)." The philosopher Kant also endorsed a strict system of retributive justice (1773). Restorative justice, as a third, is not so much concerned with retribution and punishment as with re-establishing the victim and reintegrating the offender into society. The UN has conducted experiments in using this theory of justice (UN 2002).

Lastly, distributive justice is directed at the proper allocation of things – wealth, power, reward, respect – among different people. In "A Theory of Justice", John Rawls (1993) used a social contract argument to show that justice, and especially distributive justice, is a form of fairness: an impartial distribution of goods. Rawls makes the famous argument of the veil of ignorance that denies the agent all knowledge of personality, social status, moral character, wealth, talent and life plan, and then asks what theory of justice the agent would choose to govern society when the veil is lifted, should the agent want to do the best possible. The agent does not know the specific individual, and therefore cannot bias the decision in his or her or the agent's own favor. So, the decision in ignorance models fairness, because it excludes selfish bias. Rawls argues that the individual would reject the utilitarian theory of justice, because of the risk that the subject will turn out to be someone whose own good is sacrificed for the greater benefit of others. Instead, agents would endorse Rawls's two principles of justice: (1) "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.", (2) "Social and economic inequalities are to be arranged so that they are both to the greatest benefit of the least advantaged, consistent with the just savings principle, and attached to offices and positions open to all under conditions of fair equality of opportunity."

Among these different understandings of the concept of justice, it is difficult to single out one commonly shared denominator. At a substantial level, even the lack of a common commitment to what justice is seems to be missing – in the direct comparison of the structures of the arguments, however, there may be a similarity. These roughly differentiated four lines of thinking are all concerned not only with producing the right outcome – which can differ – but also with doing so in the most efficient way. Establishing the right thing (be it justice, restoration, retaliation, distribution, or the allocation of rights) has to be achieved by designed processes in which not only the constancy and consistency of rules have to be guaranteed, but also the stability in treatment of those in the process. All four strings of thought considerably weigh the relationship between the individual and the legal process, especially conditions like equality and impartiality. To give two examples: Utilitarianism can be supposed to make a case of severely punishing even unimportant crimes in order to establish deterrence. For doing so, utilitarianism would still need a rule committing a legal system to do so, and this rule would apply to all people found guilty of a crime, disregarding personal affiliations, relationships, and conditions. In Utilitarianism, it is the fact that every member of society has an equal weight that allows the argument to be based on the average social welfare. Should some realms of society weigh differently, there is no

possibility of calculating the changes in average welfare. The same applies for retaliatory justice: It is not the will of vengeance that drives the argument, but the idea of restoring a balanced state of affairs. It is part of the conception of this goal that in order to do so, not many transactional costs can be incurred. An efficiently and effectively working system of justice is one of the better means of securing the minimization of transactional costs. Effectiveness and efficiency seem to be principles that apply to all four theories of justice mentioned above.

This, however, is not enough. HLA Hart makes a strong point when he claims that “justice is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as ‘Treat like cases alike’; though we need to add to the latter ‘and treat different cases differently’ (Hart 1961, 155).” Hart continues to explain that this concept is still an empty vessel, because it lacks a guide to conduct. According to him, it is important to establish what “alike” and “different” mean, i.e., the criteria for the differentiation is necessary. Yang Xiao calls Hart’s a concept of justice, opposed to a conception of justice, whereby conception entails some type of content (Xiao 1997).

This difference can be illustrated as follows: Human everyday intuition associates not only procedural principles (concepts) with justice, but also very specific institutions, and these have not been named once, so far. For example, “universal human rights” (conception) in form of a list are missing, as the idea of fairness as an ethical construct is missing. Certainly, in most propositions named above, there is the conception of equal rights all as well as the procedural commitment to judging states of affairs impartially, which is equal to fairly. But there is no indication as to what being just fundamentally means. Again, one could claim that the ethical discourse of justice has to be separated from legal philosophy. But (some) philosophers (of law) thought differently about this. Cicero as well as Confucius were concerned about identifying the application of law with justice. “Summum jus, summa injuria. (Extreme justice (or: law) is extreme injustice)”, Cicero declared (I 10). And Confucius: “The Master said, if the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame.” (Analects 2, 3).

In today’s legal philosophy, however, the differentiation between the legal treatment of justice as a procedural facet and the ethical meaning seem clearly entrenched, and since this paper is an investigation of the legal philosophy of Han Fei, it seems adequate to leave the ethical question open, which does not mean endorsing the strict separation of both usages of the term.

## 1.2. “East”, “West” and Comparison

By quoting Cicero and Confucius in the same sentence above, another task of definition has been brought up: What is “Western” philosophy? Or even: can a seemingly “Western” concept like justice be used to cover a Chinese philosopher? As described elsewhere (Schneider 2013), the claim that there is something unifying to “Western” or “Eastern” philosophy is too bold to hold. If it is understood as an ontic claim, it entails an entity that makes western philosophy “Western” and eastern philosophy “Eastern”. Showing the existence of this entity might prove to be

impossible. Similarly, if the claim is epistemic, a rule for recognizing something as a token of one of the two types has to be specified. It is doubtful whether such a (philosophically substantive) rule, which identifies Plato and Adam Smith as “Western” and at the same time the Vedas and Han Fei as “Eastern”, can exist.

At a practical level, however, philosophies can be referred to one of the groups, if there is enough awareness that this is done for matters of simplification alone and does not entail any philosophical presupposition regarding a) whether such a group exists in a philosophical sense, b) whether the philosophy referred to is representative for the group, and c) whether the conjunction, disjunction, or overlapping of a possibly uncountable number of other groups is formed for a practical purpose only.

It is in this sense that this paper refers to Western legal philosophy as a non-necessary group of legal doctrines that per se only share the background of having been developed in Europe and North America as well as being applied primarily by philosophers and practitioners in these regions. Independent of which other groups could be analytically discerned or which other doctrines there are, the above theories of justice will be contrasted with Han Fei’s philosophy. Here again, Han Fei is not taken to be a “typical” “Chinese” philosopher – it is the content of his book that is of interest. In the end, this paper is about Han Fei and his concept – and possibly conception – of justice. “Western” legal philosophy is just a departure point to clarify the concept of justice being used here. This brings up yet another question: Can justice be used in a “Chinese context”? Here enters comparative philosophy.

“Comparative philosophy – sometimes called “cross-cultural philosophy” – is a subfield of philosophy in which philosophers work on problems by intentionally setting sources from across cultural, linguistic, and philosophical streams into dialogue. The ambition and challenge of comparative philosophy is to include all the philosophies of global humanity in its vision of what is constituted by philosophy (Internet Encyclopedia of Philosophy 2013).” David Wong (1989) has offered a view of the ways in which philosophical traditions may be incommensurable: “One kind of incommensurability involves the inability to translate some concepts in one tradition into meaning and reference in some other tradition.”

The definition as well as Wong’s argument seem valid. Both are the reasons for this paper to take a non-comparative approach. The aim here is to analyze the Han Fei; however, since an inquiry always takes the perspective from which it is initiated, the perspective being taken is the legal-philosophic idea of “justice”, and since the author of this paper operates from within the European tradition of Legal Positivism, it seems justified to use those analytical instruments which are open to him. Instead of now asking whether Han Fei had any idea of justice that corresponds to the idea mentioned above, we will ask how he treated justice. The answer will be given by utilizing the above mentioned separation of concept (as an abstract) and conception (as content). This paper shares the claim of Yang Xiao that “although the modern conception of justice in terms of equal rights does not apply to societies of the past, the concept of justice seems to be a non-relatively shared one (1997, 529).”

The primary Chinese term being discussed is 義 (*Yi*), which can be translated as morality righteousness (similar to the second meaning given above as a quote from the dictionary Merriam-Webster), but also as justice. The next chapter will examine how *Yi* is treated in the Han Fei.

## 2. HAN FEI, *YI*, AND JUSTICE

The subject of Han Fei and justice meets more obstacles than just that intuition, according to which it seems risky to even think that Han Fei ever thought of justice. To be clear: Han Fei uses the word *Yi*, righteousness or justice, in different ways. Sometimes it has a negative connotation, at times, it is a vestige of an old system, and at times he even uses it positively. Han Fei is not fond of the idea of *Yi* as an overall moral principle, particularly because it still carries the weight of Ruism. For Confucians, *Yi* is a “basic morality” (Cheng 1991) or the moral disposition to do ethical good, and through this constitutes a necessary condition for *Ren* 仁 (being a gentleman). In other words, the Confucian *Yi* is a (moral) obligation which includes an obligation towards other people. In this case, it is also reciprocal. Here enters Han Fei’s skepticism: If *Yi* is a reciprocal obligation between individuals, what if it subverts the rule of the state? If *Yi* is an obligation that arises from ethical considerations, then it cannot be controlled by the state, because the ruler controls (through) laws and standards. In this case, it does not do good, but wrong, and can therefore be neither justified nor tolerated.

Han Fei always (better: mostly) puts the interests of the state or of the monarch in the center of his attention, whereby he assumes that they fully correspond with each other. His goal is to make the ruler strong and through this make the state stable. As “philosopher of political power”, Han Fei is interested in maintaining and strengthening power. His main instruments for this are the “two handles”, a system of reward and punishment, and the “*xingming*” (names and forms, 形名), a system which assigns exact duties to the ministers and exactly measures their performance. This section may even make an argument similar to that of Harris (2013), but it takes another perspective: While Harris examines the relationship between Han Fei and morality, this section focuses on justice and what Han Fei’s philosophy entails with regard to justice at a pragmatic level.

As to the above stated, does it mean that Han Fei denies the existence of justice? This section analyzes how Han Fei denies the moral conception of *Yi* advocated by the Ruists, but at the same time advances a legal and pragmatic concept of justice.

### 2.1 What is wrong with *Yi*?

In the Analects, there is a discourse in 13.18:

子路：葉公語孔子曰：「吾黨有直躬者，其父攘羊，而子證之。孔子曰：「吾黨之直者異於是。父為子隱，子為父隱，直在其中矣。」

Zi Lu says: The Duke of She informed Confucius, saying, "Among us here there are those who may be styled upright in their conduct. If their father has stolen a sheep, they will bear witness to the fact." Confucius said, "Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this."

Famously, the Han Fei inverts the story in chapter<sup>3</sup> 49 "The Five Vermin":

故行仁義者非所譽，譽之則害功；文學者非所用，用之則亂法。楚之有直躬，其父竊羊而謁之吏，令尹曰：「殺之，」以為直於君而曲於父，報而罪之。以是觀之，夫君之直臣，父之暴子也。

Those who practice humaneness and rightness should not be praised, for to praise them is to cast aspersion on military achievements; men of literary accomplishment should not be employed in the government, for to employ them is to bring confusion to the law. In the state of Chu there was a man named Honest Gong. When his father stole a sheep, he reported the theft to the authorities. But the local magistrate, considering that the man was honest in the service of his sovereign, but a villain to his own father, replied, "Put him to death!", and the man was accordingly sentenced and executed. Thus we see that a man who is an honest subject of his sovereign may be an infamous son to his father.<sup>4</sup>

For Han Fei, it is simply wrong to accept that someone can break the law just because of obligation towards other people, including filial obligation. The law, here the punishment for stealing a sheep, is not changeable depending on the function of the person, of the relationships between involved people, or even depending on the function of higher, ethical concerns. For the Legalist, whatever the rule is, it has to be enforced. He is not immune, however, to the ethical perception of the reader of his time – a reader used to Confucian ethics – and wittingly rearranges the story, giving a bitter end to the honest subject. By doing so, he appeals to two sentiments: First, to the concept of justice, which – for him – states that all people are to be treated equally by the two handles of the state, i.e., that law applies impartially and equally to all. Second, by reshaping the story, he is also making a case of the conception of justice, namely that it is unjust to punish the innocent man who merely reported a crime. Han Fei gives the impression that Honest Gong (mind the name!) is treated unjustifiably by the local magistrate, a person who even himself considers Gong to be of good service. Han Fei is not only saying that the case goes against a procedural sense of justice, he claims that considering the rules in terms of personal obligation is also unethical. The personal understanding of *Yi* therefore leads to juridically wrong and morally bad outcomes

---

<sup>3</sup> Treating the *Han Feizi* always warrants a decision on whether calling its parts "book" or "chapter". In this article a conscious decision for "chapter" is made.

<sup>4</sup> Translations by WK Liao with some modifications by the author.

The extent to which Han Fei objects the personal, reciprocal understanding of *Yi* is made clear in chapter 5 “The Way of the Ruler”:

主道：是故人主有五壅：臣閉其主曰壅，臣制財利曰壅，臣擅行令曰壅，臣得行義曰壅，臣得樹人曰壅。臣閉其主則主失位，臣制財利則主失德，臣擅行令則主失制，臣得行義則主失明，臣得樹人則主失黨。此人主之所以獨擅也，非人臣之所以得操也。

For these reasons, the lord of men always has to face five kinds of delusion: delusion by ministers impeding the sovereign, delusion by ministers controlling public resources and revenues, delusion by ministers issuing decrees at random, delusion by ministers distributing personal favors, and delusion by ministers feeding dependents. When ministers impede the sovereign, the sovereign loses his viewpoint. When they control public resources and revenues, he loses his advantages. When they issue decrees at random, he loses his ruling authority. When they distribute personal favors, he loses his name. When they feed their dependents, he loses his supporters. All their doings as such should be based on the initiative of the lord of men and should not be started by the ministers at their pleasure.

Here, Han Fei goes so far as to name *Yi* as one of the five ways ministers can act against the ruler’s welfare (implying thus, against the welfare of the whole society). If ministers have personal *Yi* (favors or obligations) towards anyone other than the ruler himself, Han Fei sees a disruption in the order of things. Instead of serving the state or the ruler, ministers would have to act within their obligation of *Yi*, this, in turn, would make them lose their impartiality. This is important in a twofold way: First, if justice is understood as a mode of procedure, any corruption of this mode, including the *Yi*, diminishes the effectiveness of the state apparatus and the efficiency of the process; furthermore, failing to proceed according to a standardized mode would introduce a wrong differentiation into the question of what has to be treated alike and which differences have to be observed. Han Fei is able to accept differentiations according to cases, as will be shown below, but not such basing on persons or relationships between persons. The conception of *Yi* he criticizes here leads to an erroneous differentiation, because it does not conform to a stable standard –on the contrary, it would have to evaluate the relationships between officials and subjects for every new interaction anew. A main idea of Han Fei is that the model of government applies to all in equal manner: The state is a carefully oiled machinery that works on its own – with causal precision. Any other interactions would disrupt the system. Therefore, ministers cannot be allowed to work on their own motivation, but are supposed to follow the prescriptions of “performance and title” (rather: “job description”, 形名, *xing-ming*) to the letter. The story about the keepers of the hat and the robe (in chapter 5 of the Han Fei) explains this point drastically: As a Marquis got drunk and fell asleep, the keeper of the hat laid a robe over the ruler, as he saw the ruler was getting cold. As the Marquis awoke, he was pleased but nonetheless inquired about who had lain the robe over him. In the end, he punished the keeper of the robe for failing to do his duty, and the keeper of the hat for overstepping his office. They

were punished, because they did not perform their assigned tasks or performed those of the other, respectively. Note that neither the worthiness of the task nor its actual content is being measured here, but only the question whether the right task has been performed or not. This is a judgment of a procedural matter.

Han Fei recognizes that everyone, including ministers, have their reasons for acting. He, however, wants the monarch to be the only cause of any action occurring within the state, for the reasons others may have do not coincide with the public good. This theory of action is in itself interesting. As claimed above, Han Fei advocates the model of the state as a machine that works in pre-determined processes, its laws or standards. People working for the state must learn not to act on their own reasons/causes, but only as an agent of the state, i.e. become a nexus in the causal chain. But what does guarantee the stability of the state machinery? The monarch himself! Han Fei knows that no ruler can personally and constantly run the state. And he even advises against it, for the monarch could himself succumb to his own reasons for acting. In setting up a framework of laws or standards that implement the two handles, the ruler creates the causal model, and once this causal machine is created, he has to submit to it. The ruler finally becomes a part of the causal system that ensures efficiency, effectiveness, and a constant standard for treating singular cases.

There is a second case that Han Fei makes here: Independent from the concept of law being infringed by acting on one's personal *Yi*, the conception is wrong as well! When ministers act in the ways described by Han Fei, not only does the state apparatus lose efficiency, but people themselves are injured. The question of the monarch "losing his supporters" does not only mean that people could turn against the ruler, but also implies that they will turn against him because they feel treated unfairly and taken advantage of. This is not a procedural question anymore, but an ethical one: When ministers are allowed to follow their *Yi*, they will treat some people better at the expense of others, and this infringes the general rules of welfare. Han Fei makes a point against the conception of *Yi*, namely that if everyone followed their own *Yi*, in sum, the majority would be worse off. This not only applies to subjects and ministers, but even to the monarch. In chapters 36 and 37, the question of the righteousness of Duke Huang is treated. Han Fei claims that even if the ruler has the moral inclination to act on *Yi*, he should not do so, because it disrupts the causal system the state machinery has to work with, and therefore his own power, and, as a consequence, the welfare of society. Does this mean that *Yi* has no place in Han Fei's system?

## 2.2 Public and Private, Mencius and Laozi

Not necessarily. In chapter 19, Han Fei makes a case for public *Yi*:

禁主之道，必明於公私之分，明法制，去私恩。夫令必行，禁必止，人主之公義也；必行其私，信於朋友，不可為賞勸，不可為罰沮，人臣之私義也。私義行則亂，公義行則治，故公私有分。人臣有私心，有公義。修身潔白而行公行正，居官無私，人臣之公義也。汙行從欲，安身利家，人臣之私心也。明主在上則人臣去私心行公義，亂主在上則人臣去公義行私心，故君臣異心。君以計畜臣，臣以計事君，君臣之交，計也。害身而利國，臣弗為也；富國

而利臣，君不行也。臣之情，害身無利；君之情，害國無親。君臣也者，以計合者也。至夫臨難必死，盡智竭力，為法為之。故先王明賞以勸之，嚴刑以威之。賞刑明則民盡死，民盡死則兵強主尊。刑賞不察則民無功而求得，有罪而幸免，則兵弱主卑。故先王賢佐盡力竭智。故曰：公私不可不明，法禁不可不審，先王知之矣。

It is the duty of the sovereign to make clear the distinction between public and private interests, enact laws and statutes openly, and forbid private favors. Indeed, to enforce whatever is ordered and stop whatever is prohibited, is the public justice of the lord of men. To practice personal faith to friends, and not to be encouraged by any reward nor to be discouraged by any punishment, is the private righteousness of ministers. Wherever private righteousness prevails, there is disorder; wherever public justice is obtained, there is order. Hence the necessity of distinction between public and private interests. Every minister cherishes both selfish motive and public justice. To refine his personality, improve his integrity, practice public creeds, and behave unselfish in office, is the public justice of the minister. To corrupt his conduct, follow his desires, secure his personal interests, and benefit his own family is the selfish motive of the minister. If the intelligent sovereign is on the throne, every minister will discard his selfish motive and practice public justice. If the violent sovereign is on the throne, every minister will cast public justice aside and act on his selfish motive. Thus, ruler and minister have different frames of mind.

One might now ask wherein the differentiation of public and private lies. The word for public, *gong* 公, denotes the interests of the state, or better, those of the ruler. It is not to be forgotten that in the Han Fei's best case, the interests of the state and those of the ruler are the same. The private sphere, *si* 私, is dictated by the self-interested actions of all people, especially ministers. This is not an absolute differentiation about what is public or private, but just one made in order to separate the realm of public action from the ministers' hidden agendas. Here, again, Han Fei cautions the ruler against the selfishness of his entourage, but he acknowledges that there are public duties.<sup>5</sup> There is a sort of *Yi* that creates an obligation to the public good. The argument would be as follows: Ministers have an obligation towards the ruler, and the ruler has an obligation towards himself, or better, towards the *Dao* of his position. Since he as such is the guarantor of power, public safety, and stability, these obligations towards his person are also obligations towards public welfare. In this sense, Han Fei accepts public *Yi*. This type of obligation, however, concerns the concept of *Yi*, which is left empty of content, i.e. without conception. The text is explicit about executing whatever has to be executed, not specifying any further criteria to the orders, but making it clear that the process of order giving and order taking is what is meant by public *Yi*.

---

<sup>5</sup> Perhaps, Hanfei also cautions the ruler against the benevolence of his entourage, for example in the story about the servant serving wine to Duke Li of Jin insisting in good faith his master to drink. As the Duke got drunk, he was executed (*Hanfeizi* chapter 10).

This may be an argument directed against Mencius, who would not find a break of *Yi* acceptable under any circumstances and who heavily relies on individual *Yi*. Mencius openly claims that ministers have an obligation towards morality, even in going against the ruler. Famously, he writes: “One who despoils humaneness is called a thief; one who despoils rightness is called a robber. Someone who is a robber and a thief is called a mere fellow. I have heard of the punishment of the fellow Zhou but never of the slaying of a ruler.” (1B8) Of course, Han Fei could just refute this argument, but he seems to be more interested in the very foundation of Mencius’ *Yi*, his insistence on *Yi* in oneself (4B11 and 7A1) (Makeham 2001). Again, Han Fei accepts that there is some sort of justice to follow, but not an individual or particular justice, because these would only entail aiming at the self-interested goals of each person. These goals may even appear to be dressed in an ethical robe, but they are not; they are nothing more than individual calculations of utility. The public *Yi* of the ruler, however, is the calculation of utility by the state and therefore follows a different logic: It is not about self-interest, but about common-interest. Overemphasizing this point (against Mencius), it can be stated that whereas individual *Yi* is self-interest disguised in morality, public *Yi* is a concept of justice as the common interest of the state.

The question is now, whether this public *Yi* entails more than just procedural justice. Harris (2013) proposes to read the public *Yi* of the ruler as a “standard of right”. While this reading solves the interpretative problem, there is another possibility, not suggested by Harris, but following his reading of Han Fei: Instead of asking what *Yi* is, one can inquire as to what purpose it serves. This means, like the whole philosophy of Han Fei, that *Yi* also has to be seen in the instrumental light, as a tool of statecraft. While the private *Yi* serves the self-interest of individuals, the ruler’s public *Yi* aligns and synchronizes the standards of action of all state subjects with the ruler’s. One of the advantages of this instrumental reading of *Yi* is that it allows Han Fei to remain amoral, outside morality. This is a rather pragmatic reading of this concept, but it saves the development of a theory on how Han Fei deals with the Way (*dao*, 道) or any natural minimum content of statecraft. In this reading, public *Yi* is nothing more than an instrument, a procedure; but one that, in as far as it is valid for all, equalizes the state subjects before the ruler and the law and thus provides for justice in its procedural meaning.

All his skepticism towards *Yi* notwithstanding, in chapter 20 “Commentaries on Laozi”, Han Fei makes a quite complicated case that needs some explaining – and again the explanation is possible with an instrumental concept of *Yi*:

義者，君臣上下之事，父子貴賤之差也，知交朋友之接也，親疎內外之分也。臣事君宜，下懷上〔宜〕，子事父宜，（眾）〔賤〕敬貴宜，知交友朋之相助也宜，親者內而疎者外宜。義者，謂其宜也，宜而為之。故曰：「上義為之而有以為也。」禮者，所以貌情也，群義之文章也，君臣父子之交也，貴賤賢不肖之所以別也。中心懷而不諭，故疾趨卑拜而明之。實心愛而不知，故好言繁辭以信之。禮者，外節之所以諭內也。故曰：「禮以貌情也。」凡人之為外物動也，不知其為身之禮也。眾人之為禮也，以尊他人也，故時勸時衰。君

子之為禮，以為其身，以為其身，故神之為上禮，上禮神而眾人貳，故不能相應，不能相應，故曰：「上禮為之而莫之應。」眾人雖貳，聖人之復恭敬盡手足之禮也不衰，故曰：「攘臂而仍之。」道有積而德有功，德者道之功。功有實而實有光，仁者德之光。光有澤而澤有事，義者仁之事也。事有禮而禮有文，禮者義之文也。故曰：「失道而後失德，失德而後失仁，失仁而後失義，失義而後失禮。」

"Righteousness" covers the manners of ruler and minister, superior and inferior, the distinction between father and son, high and low, the contact between intimate acquaintances, between friends, and the difference between the close and the distant, the internal and the external. The minister ought to serve the ruler aright; the inferior ought to comfort the superior aright. The son ought to serve the father aright; the low ought to respect the high aright. Intimate acquaintances and good friends ought to help each other aright. The close ought to be taken in while the distant ought to be kept off. In short, "righteousness" implies whatever is done aright. Anything right ought to be done aright. Hence the saying: "Superior righteousness acts and makes pretensions." "Ritual" refers to the mode in which one's feelings are expressed. It is concerned with the cultural embellishments of all righteous acts, such as the mutual relations of ruler and minister, father and son. It is the way whereby high and low, worthy and unworthy, are differentiated. For instance, when one pines after someone else but cannot make himself understood, he runs fast towards the person and bows low in front of him so as to express his attachment to that person. Similarly, when one loves someone from one's innermost heart and cannot make himself known, he uses pleasing words and beautiful phrases to convince the person loved. Thus, ritual is the outer embellishment whereby the inner heart is understood. Hence "ritual" refers to the mode in which one's feelings are expressed. Dao accumulates; accumulation accomplishes an achievement; and De is the achievement of Dao. Achievement solidifies; solidity shines; and Ren is the shining of De. Shine has gloss; gloss has function; and Yi is the function of Ren. Function has propriety; propriety has embellishment; and Li is the embellishment of Yi. Hence the saying: "One leaves Dao and then De appears. One leaves Virtue and then Benevolence appears. One leaves Benevolence and then Righteousness appears. One leaves Righteousness and then Propriety appears."<sup>6</sup>

In this passage, Han Fei seems to take a deviant position toward himself. Here, he emphasizes a system of reciprocal obligations that culminates in "doing things right". This, however, is not about the conception of righteousness, but about its concept: In speaking on how a society is built and that everyone has to accept his or her place in this building, he is not substantially claiming anything about the nature of the building, but just stating the obvious "whatever is right is aright".

<sup>6</sup> *Daodejing* chapt. 38: 故失道而後德，失德而後仁，失仁而後義，失義而後禮。夫禮者，忠信之薄，而亂之首。Therefore when Tao is lost, there is goodness. When goodness is lost, there is kindness. When kindness is lost, there is justice. When justice is lost, there is ritual. Now ritual is the husk of faith and loyalty, the beginning of confusion.

This is inherent to his system of the carefully oiled state machinery in which everyone has a place and should not aspire to change it. Indeed, Han Fei points out that *Yi* does not have any conception but is a procedural concept of how to perpetuate the legal system. This is why *Yi* is compared to ritual as a more substantial term. While *Yi*, the neutral concept, just states what the right order is, ritual gives the process a personal meaning. It is not that Han Fei objects to ritual as a whole, he just does not deem it as important as the public commitment toward the state. If the one is established and solidified among ruler, ministers, and subjects, Han Fei does not object to the rites, as long as they occur within the place the state reserved for them and they do not counter the state machinery. Han Fei objects to assigning the rites a higher value than public *Yi*, as specified above. The rites complement public *Yi*, but have no public function of their own. Again, overemphasizing this point: Following public *Yi* means letting the *Dao* unfold itself; following individual *Yi* (in its plurality) creates the potential to disrupt the *Dao* and the state.

In the passage above, Han Fei is interpreting a Daoist text on a society following the *Dao*. The main idea is that without being in *Dao*, there is chaos, and the *Dao* cannot be substituted by *De*, *Ren*, or *Li*. Han Fei's remarks point toward the same mechanisms with the additional distinction between the realms to which principles are assigned. While *Yi* is a public good, the rites seem to belong to the private realm, one in which meanings are assigned to actions. This does not mean that they are separated; it only means that the first realm has a privilege over the second. It is the public *Yi* that gives the rites space in which to develop. There still is public *Yi* without rites, but without public *Yi*, the rites are hollow at best and wrong at worst.

This section of the paper has discussed Han Fei's treatment of *Yi* and shown that although the Legalist denies the conception of *Yi* advanced by Confucius or Mencius, he sees a positive role of having an obligation to the public interest. And he also has a concept of justice as a procedural mode that ensures the causality of the workings in the state system. This concept of justice bases on ideas like efficiency, effectiveness, rules of recognition, impartiality, and equality.

### 2.3 The measurable standard

Han Fei advocates for a number of formal standards that guarantee that the same processes take place again and again. The most famous standard is the law, 法 *fa*, or in other translations: model or standard. Here, two groups of laws must be mentioned: Han Fei comes up with the two handles, reward and punishment. For him, there is a list of actions that deserve to be punished and a list of actions that have to be rewarded. The first list foresees very heavy punishments: The Legalist is not merely advocating heavy penalties for major offenses; he is advocating heavy penalties for even minor infractions, since he relies on the deterrence unfolded by a system of harsh laws. In the "Two Handles", Han Fei is very precise and says: "To inflict mutilation and death on men is called punishment." This runs counter to "Western" theories of justice, which typically require that punishments be proportionate to the crime. For Han Fei, however, the most effective way to benefit the people is for the ruler to enable them to avoid punishment altogether, and this by severely punishing even minor crimes. Although he attributes his theory of punishment

ultimately to Shang Yang, Han Fei also appears to be influenced by the Daoist idea of tackling a problem at its root.

Then, there is the second sense of *fa*, namely a type of meta-law, an instrument for recognizing cases that have to be treated similarly and such that have to be differentiated. Surprisingly, a similar rule can also be discerned in the Confucian texts. Xiao Yang states that “To be *Yi* is to treat cases that belong to the same kind (*lei*) alike and cases that belong to different kinds differently (Xiao 1997, 534).” In chapter 13 “The Story of Bian He”, Han Fei narrates a story on why cases have to be carefully compared: If a case is not self-evident, meaning that if it does not precisely fit under a standard of punishment, its features have to be carefully compared to other cases in order to find out with which type the given case corresponds. Han Fei is very careful in saying that the procedure of comparison itself must be determined by a standard. The idea that all state procedures are rule or standard-based entails that they themselves as well as their outcomes are measurable. This makes the whole state apparatus objective. And objectivity is an immunization from corruption and perversion (an idea discussed in Han Fei’s chapter 6).

In Han Fei’s scheme, the ruler cannot use the law, even non-arbitrarily, for personal gain, because he is fundamentally constrained by a commitment to the state and its welfare. He cannot justify his laws by the mere fact that they are his laws; he must justify them in terms of whether they benefit the people. In chapter 50 “Eminence in Learning,” for example, Han Fei labors to justify his harsh measures: “Therefore, the intelligent sovereign makes the law select men and makes no arbitrary promotion himself. He makes the law measure merits and makes no arbitrary regulation himself. In consequence, able men cannot be obscured, bad characters cannot be disguised; falsely praised fellows cannot be advanced, wrongly defamed people cannot be degraded.”

It is in the chapter 7 “The two Handles” that Han Fei also explains the principle of “performance and titles”, just before the story about the keepers of the robe and the hat:

人主將欲禁姦，則審合刑名；〔刑名〕者，言（異）〔與〕事也。為人臣者陳而言，君以其言授之事，專以其事責其功。功當其事，事當其言則賞；功不當其事，事不當其言則罰。故群臣其言大而功小者則罰，非罰小功也，罰功不當名也。群臣其言小而功大者亦罰，非不說於大功也，以為不當名（也）〔之〕害甚於有大功，故罰。

The lord of men, whenever he wants to suppress culprits, must see norm accords with name and word never differs from task. Whenever a minister utters a word, the ruler should in accordance with his word assign him a task to accomplish, and in accordance with the task call the work to account. If the work corresponds with the task, and the task corresponds with the word, he should be rewarded. On the contrary, if the work is not equivalent to the task, and the task not equivalent to the word, he should be punished. Accordingly, any minister whose word is big but whose work is small should be punished. Not that the work is small, but that the work is not equivalent to the name. Again, any minister whose word is small but whose work is big should also

be punished. Not that big work is not desirable, but that the discrepancy between the work and the name is worse than the accomplishment of the big work. Hence the minister should be punished.

In the end, this system itself is a standard for differentiating what is to be treated alike and what differently. The ministers have their duties and report their performance; it is now up to the ruler to find out whether the performance corresponds with the duties, whether they are more alike than they are different from what has been ordered. Han Fei gives the monarch an instrument for establishing the standards. In his chapter 19, Han Fei constructs a parallelism between the skillful carpenter's developing the standards of his craft and the ruler's exercising his power through the two handles. In chapter 6 "on having standards" he even directly compares the practicability, usability and specificity of the carpenters' standards and the rulers'. It is towards the end of that chapter that he discusses standards at-large, the rulers in history setting up markers to recognize the south and the carpenters'. The claim here is that the ruler's standards – especially rewards and punishments – must be very specific and practical.

Once the system of reward and punishment has become ingrained in habitual behavior, once the methods of defining the proper relations of "names and performances" in government are in place and all the devices for controlling bureaucratic behavior are operative, once the acceptance of the authority of the ruler has been internalized in the attitudes of people, the processes of society, of the state, will be aligned with the *Dao* – at least, this seems to be Han Fei's plan.

The question remains how *Yi* and standards interrelate. It may prove useful to go back to the Mencian idea of *Yi*: "Yi plays a similar role in deciding when it is appropriate to observe a particular *Li* activity and when it is appropriate to depart from its observance (Makeham 2001, 27)." If the Mencian *Yi* is now substituted by Han Fei's public *Yi*, and the idea of rites (*Li*, 禮) is replaced by standards, as Han Fei suggests in his interpretation of Laozi, then it is through the public *Yi* that specific standards are developed. In the interest of the state, laws can be discerned, and by applying them equally to all, justice is achieved.

In order to summarize: Han Fei disliked the conception of *Yi* as an ethical obligation between two or more people, but he saw elements of a concept of justice in a procedural sense as important for the functioning of his state model. He even saw a place for *Yi*, the public sphere, in which an obligation to the ruler, the state, and the overall welfare seemed advisable.

### 3. CONCLUDING REMARKS

This article explores the relationship of justice and Han Fei. The Legalist is not primarily concerned with justice in a moral sense and therefore dismisses the value of any individual *Yi*. However, he seems to acknowledge that there is an overall interest of the state and that a public *Yi* can instrumentally be used in order to align the interests of the people – primarily the ministers – with those of the state. Similarly instrumental, using this public *Yi*, specific standards of statecraft, especially laws, can be developed. *Yi*, understood as justice, has a procedural status in

Han Fei's thinking and as such has some resemblance to at least one string of theories in contemporary (or: "Western") legal philosophy. It may even be claimed that in applying the standards equally to all, justice in Han Fei's sense also leads to an increase in general welfare.<sup>7</sup>

## REFERENCES

- [1] Cheng, C. Y. (1991). *New Dimensions of Confucian and Neo-Confucian Philosophy*. Albany: State University of New York Press.
- [2] Cicero (edition by Parker 1855). *De officiis*; The Society for Ancient Languages; Oxford: Oxford University Press.
- [3] Confucius (translation by Huang, C. 1997). *Lun Yu*. Oxford: Oxford University Press.
- [4] Gibbons, J., et al. (Eds.). (2004). *Language in the Law*. Hyderabad: Orient Blackswan.
- [5] Goldin, P. (2013). Introduction: Han Fei and the Han Feizi. In Goldin, P. (Ed.), *Dao Companion to the Philosophy of Han Fei*, (pp 1-21). New York: Springer.
- [6] Han Fei, Han Feizi. translation by WK Liao, from (2013, February 22)<http://www2.iath.virginia.edu/saxon/servlet/SaxonServlet?source=xwomen/texts/hanfei.xml&style=xwomen/xsl/dynaxml.xml&chunk.id=tpage&doc.view=tocc&doc.lang=bilingual>
- [7] Harris, E. (2013). Han Fei on the Role of Morality in Political Philosophy. In Goldin, P. (Ed.), *Dao Companion to the Philosophy of Han Fei*, (pp 107-131). New York: Springer.
- [8] Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Oxford University Press.
- [9] Hume, D. (1751 [1975]). *An Enquiry Concerning the Principle of Morals*, (edited by L.A. SelbyBigge, 3rd ed.). Oxford: Clarendon Press.
- [10] Internet Encyclopedia of Philosophy (2014, January 13): <http://www.iep.utm.edu/comparat/>.
- [11] Kant, I. (1797 [1870]). *Grundlegung zur metaphysik der sitten*. Bonn: L. Heimann.
- [12] Laotse (Lau, D.C., ed.) (1963). *Dao de jing*. London: Penguin.
- [13] Makeham, J. (2001). Interpreting Mencius. *New Zealand Journal of Asian Studies*, 3, 20-33.
- [14] Mencius (Lau, D.C., ed.) (1979). *Mencius*. London: Penguin.
- [15] Merriam-Webster Inc. (2004). *Merriam-Webster's collegiate dictionary*. New York: Merriam-Webster.
- [16] Mill, J.S. (1863 [1991]), *Utilitarianism*. In Gray, J. (Ed.). *On Liberty and Other Essays* (ed.). Oxford: Oxford University Press, 1991).
- [17] Rawls, J. (1999). *A Theory of Justice*. Oxford: Oxford University Press, 1999.
- [18] Schneider, H. (2013). 'Han Fei, De, Welfare'. *Asian Philosophy*, 23(3), 260-274.

---

<sup>7</sup> In "western" legal philosophy, justice goes along with human dignity, for Han Fei however, it only means treating individuals differently.

- [19] Ten, C.L. (1993). *Crime and Punishment* In Singer, P.(Ed.). *A Companion to Ethics* (366-372). Oxford: Blackwell Publishing.
- [20] United Nations Economic and Social Council (2002). ECOSOC Resolution 2002/12: "Basic principles on the use of restorative justice programmes in criminal matters", in: <http://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf> (2013, January 23).
- [21] Xiao, Y (1997). Trying to Do Justice to the Concept of Justice in Confucian Ethics. *Journal of Chinese Philosophy*, 24, 521-559.