

Reasonability of Policies and Laws -- From the Negative Freedom Perspective

HAO Chuan^{[a],*}

^[a]Associate Professor, College of Law, Southwest University, Chongqing, China; Doctoral Candidate, Southwest University of Political Science and Law, Chongqing, China.

*Corresponding author.

Supported by the Youth Research Funds for the Humanity and Social Science of the Department of Education. This paper is a phase result of the project "Study on Chinese Sentencing Guidelines" (11YJC820033).

Received 20 March 2012; accepted 14 August 2012

Abstract

Government implements public administration mainly by policies and laws which the citizen must abide by. Policies and laws which can be called as legal system are ensured by public power of the government. From perspective of Hayek's negative freedom that the conception of freedom is avoiding arbitrary compulsory from other individuals and organizations even the public government in the modern society. Security of freedom which is realized by setting delimit for behaviors which could prevent arbitrary coercion so that state and government should abandon positive stylized design and should also set reasonable limit for government's power to avoid arbitrary enforcement from public power and guarantee the rights of individuals.

Key words: Negative freedom; Policies and laws; Public power

HAO Chuan (2012). Reasonability of Policies and Laws -- From the Negative Freedom Perspective. *Canadian Social Science*, 8(4), 140-143. Available from <http://www.cscanada.net/index.php/css/article/view/j.css.1923669720120804.1379>
DOI: <http://dx.doi.org/10.3968/j.css.1923669720120804.1379>.

Government implements public administration mainly by policies and laws which could be called as the legal system of a state. A series of new policies and laws are promulgated which we should abide by so that everyone is under the network of policies and laws. Comparing

with the enactment of laws which must go through a strict procedure, policies are more flexible and more convenient in solving the emergencies and easier to be understood by the public. Government always formulates new policies when needed in some certain circumstances. It is true that policies and laws are the norms which make the social relationships in good order and to a certain extent they can ensure citizen's freedoms and rights, but on the other hand can these so many policies and laws help us in realizing our social members' freedom and protection for the rights of citizens? Especially policies focus more in a special field but not universal to all the circumstances, are they kept with public interests and social justice and do they violate personal freedom? These undoubtedly should be considered by the policy makers and the national legislative bodies.

1. POLICIES AND LAWS ARE SEEN AS UNIVERSAL KEYS IN SOLVING SOCIAL PROBLEMS

The principle has been always stressed by sociologists and jurists that in the modern society the legal system could guarantee citizen's safety, rights and can safeguard social fairness and justice. As role of laws the policies' role also comes from public power granted by the Constitution and laws. The legal system including laws and policies which are rules for all the behavior that individuals must obey otherwise they will have to bear legal liabilities. It is an admitted fact that these rules can handle various social contradictions effectively so that we seem to solve problems relying on polices and laws more and more. For example regulation of school buses was announced after accidents took place. Purchase limit was set while prices of real estate ~~are going~~ went upwards continuously. Motor vehicles driving restrictions was operated while the traffic congestion increasing. Almost a series of new laws come

into force every year. It is an indisputable fact that many kinds of polices and laws seem to be prescriptions or universal keys to social problems when they are needed. People obey rules in modern legal society which is indeed the salient characteristic in conformity with the principle of ruling by law.

Although the principle of ruling by law is so far the best social arrangement in human society according with human nature, the legal system is not almighty. First, rules in the legal system can't reply the complicated social problems on a flexible way. The legal system is designed to coordinate contradiction and partnership relations by all the social members. As achievement of social development, the rule system is summarized from human behaviors so that it is not all timely or all-inclusive to the social reality especially polices in some given fields regulated by governments at all levels. Second and which is the more important that our lives are hedged around with many regulations and we can't enjoy many sound freedoms. For example, the policy of purchase limit in real estate makes some reasonable rights of wage-earning class can not-improve their dwelling conditions. Many behavior rules can make the society in order but too many rules also could become obstacles for individual freedoms so that the world can't be really in harmony. In fact, more rules could mean more public powers could interfere people's freedom in decision making. How far we should go to explore the rules and the legal system to ensure our citizen's freedom?

2. HOW LAWS AND POLICIES TO ACT, SET BOUNDARY OR SET OBSTACLE? --FROM THE NEGATIVE FREEDOM PERSPECTIVE

2.1 What is Negative Freedom

In our Chinese traditional culture, liberty only seemed like the symbol in shrine and subtle in the secular society thereby we had not found a best way to carry out this noble value for a long time. Liberty will lose its significance if it is separated from the practice although it is the mental creation of our human beings. Inner relationship between liberty and rule has been interpreted long before by liberalists and jurists including Hayek whose explanation for liberty was very practical in field of the science of law and politics. Liberty is always the ethical value we try our best to aspire after and it is the base of political principles in the west which give guidance while people are organized and administrated. Liberty not only has been defined in several ways, for example, as a kind of ability related to skills, powers and property, but it also is classified from different angles including political freedom, economical freedom, idea freedom and so on. Friedrich von Hayek, author of "The

Constitution of Liberty" (Hayek, 1960), defined liberty at its fundamental level that, the meaning of liberty should point in the situation among people in which there had the least arbitrary coercion. This definition is very similar to the concept of negative freedom (Berlin, 1958) which is that one has freedom to do what he can do or what he will do while there is not interfering from others. On the other hand, the concept of positive freedom is that one has some kinds of freedom such as enjoying happiness, right to vote and so on. Although most of us believe in freedom and try our best to seek for it, we do need to understand this great disagreement of negative freedom about its meaning. One major task is to understand that negative freedom means "Freedom from not doing something" or "freedom to do something", which is indeed the most important difference between negative freedom and positive freedom.

We often believe we enjoy some freedom of selection when in fact we are constrained while facing the set choices in the reality. We can draw such a conclusion that the very opposite of the liberty should be interfering or coercion. As for the idea that liberty has tight mutuality with capability, power and property, it only means how far the people's activities can go. For example, for the sake of subservice the king, a courtier who can enjoy luxurious living or a general officer who can command massive armies perhaps has less liberty than a poor farmer or a hard working craftsman because he has not more possibilities to live on his own willingness. The courtier or the general perhaps has more coercion and has not more freedom. Less coercion perhaps is the real meaning of liberty from the negative prospective. As for the positive freedom, it seems to preset some free options so that there are no other freedoms except the preset options. We are obviously more limited and have to accept these free options against our willingness in this situation. This negative concept of freedom has been more easily understood and accepted than positive prospective. In fact, many concepts are expressed from their negative meanings. For example, we can understand peace as no unsafe and instable factors. Some legal rules are statements as behavior bans or inaction.

Do laws and policies always restrict the freedom of the people who obey them? Laws and policies are thought to be coercive worse than interfering. The characteristic of this coercion involves in threatening to impose penalties which means that the subject of laws and policies will suffer a loss of freedom to certain degree. For theorists and philosophers, the proposition is that affirmative, coercive laws and polices do always reduce people's freedom. But as we know, in the society, interfering even coercion is inevitable and anyone cannot do anything as he pleases. The society should have some order. As the social members are protesting the interfering and coercion, the public power granted by citizens tries to prevent the arbitrary coercion among individuals and organizations. Negative freedom means more choice space apart from

prohibition. Therefore, prohibition should not be arbitrary and excessive or it will become coercion. It is just like the expression of Wu Zhongmin, a Chinese sociologist, “Do not arrange the citizen’s social lives of details by inflexible moral or political standard. It should not be prohibitive if the manners of life style which members of the society chose do not disturb the normal works and live of others or damage reasonable interests of others (WU, 2011).”

2.2 Laws and Policies Should Act as Boundary of Freedom Free from Arbitrary Coercion

Our exploration of liberty is valuable because we constantly endeavor to found the best rule system to adjust our behavior for the sake of protecting individual’s legal rights and interest. It is just the nature of human beings to pursue one’s own advantage but the selfishness is not the very opposite of liberty. On the other hand, being selfish is reasonable because of the limited social resource such as property, power and so on. Due to this limitation, we should set boundaries to distinguish what we can do and what we cannot do for the sake of liberty. Those boundaries are the behavior rule system accepted by all the members of the society. It is just like what David Hume said in his “A Treatise of Human Nature” and his political works that if human behavior is not bounded by certain principle it will emerge inexhaustible confusion in the human society and the greedy and selfishness will immediately plunge the world into a state of disorder. Facing the reality of finite resource we could not free our behavior from any restrain and coercion to do anything we want to especially in modern society. Modern society is managed by legal system with characteristic of coercion which is universally accepted through legal procedure. From the perspective of negative freedom do those behavior rules including laws and policies protect freedom or restrain freedom then?

In Hayek’s view, liberty is the situation of the least arbitrary coercion through setting boundary free from arbitrary coercion in legal society. Everyone can enjoy his freedom choices within this boundary. The most important thing is that this boundary should be negative rather than positive according to negative freedom. Definite content is indicated by prohibitive limits instead of concrete positive scope. For example, laws provide a certain standard of property right judgment so that we can buy freely all kinds of merchandise which has clear property right. The standard should be definite and stable by which we can make our decision freely in the definite space otherwise we perhaps can only buy some regulated things. It is not what we wish in modern society obviously. Regulations of constant changes or of many limits will lead to confusion. Purpose of legal system is to ensure more freedoms without damaging freedoms of others. We will have not enough space if there is an

omnipresent guidance regulation network which has many positive contents but we will feel helpless without these positive contents. We all know that the real world is ever changing all the way while rules keep summarized and induced from many past situations. So these rules could not all-inclusively face the changeable reality. We don’t want to be overcautious in front of this omnipresent network. We also don’t want the difficulty of moving even a step in an emergency due to the lack of corresponding regulation. This society will not be harmonious and we will be overcautious if the government intentionally leads us to be surrounded in this positive network. In modern society many freedoms are followed by economic interests and some positive content perhaps damages other interests so that it should be prudent to design the positive choices especially the private property rights. Obviously, it is more reasonable to set up boundary than to regulate contents.

2.3 Laws and Police Should Set Boundary to Reduce the Coercion from Public Power

The liberalists do not deny the existence of coercion but emphasis on the least coercion through legal system free from arbitrary coercion. The fact is that legal system which is guaranteed by the government just implicates the existence of coercion from public power. In the modern society government has legal public power but it is inevitable to damage individual freedom once the power is abused to some extent. For example, we have to give up our own plan to improve the housing conditions when buying limit in real estate market runs to suppress high housing price. We have to choose bus instead of convenient private cars due to the passage limit of motor vehicles to relieve the traffic jam. Those choices are definitely not from our willingness but we must do that otherwise we will be punished by some public departments. Although these polices do have good effects for public, they are not proper in the long run because of more expedience and less universality. When there is more public power, there is less private domain. Liberty preinstalls certain private domain guaranteed by law which cannot be interfered by others even by the public power (Hayek, 1960). After all, public power is the power to avoid coercion upon individuals rather than the power against the citizens. Social members are positioned under the protection of public power but not under the coercion, therefore, the scope and the degree of participation in social management should be regulated in the legal system. Public power should not be used as instrument of acquiring interests by some individuals and organizations. Legal society should set up boundary of public power to ensure the least coercion from state and government and the reasonable space of private freedom.

3. SOME ENLIGHTENMENTS ABOUT LEGAL SYSTEM CONSTRUCTION IN NEGATIVE FREEDOM PERSPECTIVE

30 years gone from China's reform and opening up to the outside world, with economy development, the life quality of Chinese people has been greatly improved. We can choose more satisfactory occupations and enjoy better living conditions than before. At the same time we always connect more freedoms by ability, property and power and aspire to them along with economy development. A series of rules are issued by government to regulate competitions for the possession and use of the limited natural and social resources. We are not only positioned in the conflicts of rights and interests followed by limited resources but also feel more severely all kinds of restraints by the political and economic rules in social lives, so it is very helpful to examine and understand the laws and policies tightly related to us in negative freedom prospective.

First, individuals in modern society should have more rational consciousness for rights and interests and should understand freedom in negative meaning which can help us not to be controlled by material benefits. From this point the social members should also avoid interfering with other people's freedom as boundary of freedom is clear.

Second, the government should be as prudent as possible in legislation construction and avoiding making individuals to be confined in the omnipresent rule networks. The government should also give up the idea that laws and policies are all-powerful. The social order and harmony is not simply and positively related to the

amount of laws and policies. Early in the 18th century David Hume expressed his political philosophy, "If the overall plan or system is necessary to maintain the civil society in general, if the good is more than evil in general, that is enough." (Hume, 1734) Obviously this necessary plan and system design will be focused on boundary of rights but not the complicated contents.

Finally, rationally clarifying the function government and preventing public power from being abused. Government which has public power is the executor but not the user of laws and policies and should do something effectively in keeping the boundary of public power and position of itself. The available way to the least coercion from public power in the civil society is that all the public management activities should be restricted by the definitive legal system in advance. Public power should be exercised within the prelimited range meanwhile this range boundary is clear to ensure society members to adjust their behaviors. In this sense the government plays its role properly. The character of limited government fits the legal society better.

REFERENCES

- Hayek, F. A. (1960). *The Constitution of Liberty* (pp. 3). Beijing, China: Sanlian Press.
- Hume, David (1734). *A Treatise of Human Nature* (pp. 157). Beijing, China: Commercial Press.
- WU, Zhongmin (2011). Development and Problem of Liberty and Peace for 30 Years from Reform and Opening up to the World. *Journal of Qinghua University Philosophy and Social Science Edition*, (2), 25-42.