

韩非法

思想研究



刘慧 著



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序

“法家”是一种广义的国家治理学说,其主要特点是打破周王朝“封邦建国”体制下的“亲亲”、“尊尊”传统,采取新的政治、经济、军事、社会组织等政策,实现社会的转型,在列国争霸中制胜。“废井田、开阡陌”是经济变革;郡县制废除了世禄世卿制,是政治体制变革和官职制度变革;分家制度、里甲制度是社会基层组织的变革。法家在秦、楚、齐等国家得到推行,成效十分显著,这些国家在春秋时期逐渐成为强国。成语“朝秦暮楚”说明了当时小国在外交方面的无奈;六国统一最终也是由变法比较彻底的秦国完成的。

法家实行变革的核心是“法”。但“法”首先不仅是刑法,也包括一定意义上的民法、程序法;其次,也不限于统治者隐藏于内心之秘的治人的办法,也是公开颁布的成文法。这就在一定程度上保障了法律的客观性和公正性;最后,根本地说,“法”也是广义的国家政策、方略。这些都是我们今天了解“法家”所必须留意的。由于法家要打破旧制,进行变革,就不能不在一定程度上推行法律面前人人平等,“王子犯法与庶民同罪”的司法理念,因而在历史上常常遭到“严而少恩”的批评,如“法家不别亲疏,不疏贵贱,一断于法,则亲亲尊尊之恩绝矣。可以行一时之计,而不可长用也,故曰‘严而少恩’”。秦始皇统一天下,很快又灭亡;这被认为是“仁义不施”、刻薄寡恩的结果。应该说,这些批评都是有道理的,所以在历史上法家的地位一直不高。不过,悖论的是,法家的思想和一些做

法并未在历史上绝迹。郡县制一直保持下来了。并且,从西欧和日本的历史来看,从诸侯割据的“封建制”(“封建”的本义)过渡到现代社会,郡县制是一个重要环节。就治术本身来说,阳儒阴法一直是中国历史的现实。汉宣帝就曾教训过他的太子元帝说:“汉家自有制度,本以霸王道杂之,奈何纯任德教,用周政乎?”所以,《论六家要旨》表彰法家说:“然其正君臣上下之分,不可改矣。”这样法家思想似乎又成为了君主驾驭臣民的利器。站在我们今天的立场上来看,历史上对于法家的批评既不准确,表彰更是错的放矢,言而未中。仁义当然是有亲、爱的意思,但不是徇私情;亲亲只是私德而不适用于公共领域。在这方面,我们今天应当重视法家思想中包含的把法律普遍化因而具有现实意义的地方;同时,抛弃那些把“法”视为隐秘的治术甚至权诈之谋的不健康的想法。依法治国,就法本身来说,要强调其公正性、公开性和程序性,使之能够明确、准确、合理地厘定群己权界,成为全社会的客观标准;就司法过程来说,则是让法律对社会生活起引导作用,发挥法律的主体性作用,而不是一个人拿着法来治理别人。这些应该是我们今天研究包括韩非在内的法家思想的着眼点。

刘慧研究韩非是从以上角度入手的。她深入地辨析了韩非的“法”的概念的多重含义以及构成韩非的思想框架的法、术、势三个概念的关系,较为全面地展示了韩非法思想的体系。对于秦朝灭亡与韩非思想的关系,也做了客观的说明,指出不宜简单地以功过论之。关于韩非思想的现实意义,她认为,韩非以法治国的思想是我国当代法治建设的“辅助性的历史资源”;从具体法治实践而言,韩非法思想有利于我国当代的法治建设。对于韩非法治思想中缺乏维护大众基本权利的方面,则给予了批评。她的研究,对于我们深入理解法家思想,全面推进依法治国,都有一定的帮助意义。她还在前人研究的基础上较为详细的介绍《韩非子》的编者及成书过程、版本和篇目,辨

别了其中一些篇目的真伪。这些都是值得肯定的。希望本书的出版,在推进对于法家思想深入理解的同时,为我们的法治建设起到增砖添瓦的作用;也希望刘慧借着这本书,继续对法家思想进行研究,取得更大的成绩。

乔清举

摘 要

韩非是先秦诸子的殿军,法家的最后一位代表人物,其以法治国的思想是构成我国法律文化不可忽略的重要组成部分。作为法家学派的集大成者,韩非在我国古代思想史上的学术地位是非常重要的,对我国历史发展的影响也是巨大和深远的。在建设社会主义法治国家的现今时代,对其以法治国思想进行梳理和反思性研究,对于我国法治建设实践具有重要的借鉴意义。

韩非思想是一个包罗宏富、体大思精的学说体系,涉及哲学思想、政治思想、法思想、经济思想、军事思想、管理思想、教育思想、史学思想、文学艺术等诸多领域。本书研究的是韩非的法思想。本书围绕韩非法思想这一主题,从韩非法思想的载体、韩非法思想产生的背景、韩非法思想的理论来源、韩非法思想的范畴、命题及其定位、韩非法思想的历史影响与当代意义五个方面进行了探究。

《韩非子》一书承载了韩非全部的以法治国主张,因此,研究韩非法思想应以《韩非子》为基本依据。本书对《韩非子》的编定者及成书过程、版本和篇目进行了较为详细的介绍。关于《韩非子》一书的编定者及成书过程,该书在前人研究的基础上指出,韩非在世时其著作已经传播,不过是以单篇的形式流传的。韩非“后学”的整理工作是《韩非子》编集与成书过程的第一个阶段,西汉末年刘向对先秦古籍的校录,是《韩非子》编集与成书过程的完成阶段。韩非著作自刘向校订为 55 篇以后,其面貌即基本定型。关于《韩非子》版本源流问题,本书概括介绍了学界对这一问题的研究概况,较为详细地介绍了

《韩非子》一书的重要流传版本——《乾道》本、《道藏》本、《韩子迂评》本、明代赵用贤本、20 世纪通行的《韩非子》整理本和注译本。关于《韩非子》篇目的真伪问题,笔者深切地体会到这一问题的复杂性。笔者在前人研究的基础上指出,《韩非子》一书中只有《存韩》后半篇是李斯的言论,其余除《初见秦》篇争论较大尚须谨慎对待外,一般的篇章,即使个别词句有问题,也不宜一律否定其为韩非所做。关于《韩非子》一书的内容,笔者将《韩非子》一书 55 篇按照其与韩非以法治国主张关联度的强弱分为两类,对关联度较高的 31 篇进行了较为详细的介绍,对关联度较弱的 24 篇作了概括的介绍。

研究韩非法思想,应当首先明确其学派渊源及其分类。在此基础上,进一步探究其思想产生的背景。本书在对法家学派的由来、“法家”概念的分歧和法家代表人物及分类探究的基础上指出,自从“法家”一词出现以后,不论学者对法家如何分类,韩非都在法家之列。韩非属于法家,其思想应为法家思想。本书根据韩非的生卒年,大体确定了韩非所处的时代,在此基础上,又从韩国的历史、韩非与韩王的关系、韩非出生前后对韩非有影响的事件三个方面,阐述了韩非法思想产生的时代背景。根据社会存在决定社会意识的原理,对韩非所处时代的经济、政治和思想文化状况对韩非法思想体系形成的影响进行了较全面的阐述。

韩非法思想的渊源相当复杂,并非完全出于韩非本人的创造。其中既有对以前法家人物的实践或理论成就的综合吸收,也有对其他诸子思想中有益于其以法治国主张的利用。其源于前期法家如管子、申不害、商鞅、慎到者有之,源于其师荀子者有之,源于墨、道者又有之。只承认韩非法思想的法家来源,不承认其亦有法家之外的诸子来源的观点是不准确的。

韩非的以法治国思想是通过一定的范畴、命题来体现的。本书通过对韩非法思想的基本范畴如道、德、理的探究,揭示了韩非对老

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子形而上“道”的思想以及其他诸子关于“道”的见解的吸纳,强调了韩非通过“理”将“道”引向现实层面对其法思想形成的哲学意义。对于构成韩非以法治国思想大厦的三个基本概念法、术、势,笔者也进行了详细的阐述。对《韩非子》中“法”的用语进行了梳理,将其归为宪令、公法、法和律、法令、法度、法禁、刑法、权衡和度量、规矩和绳墨九类,以便从语汇的角度理解韩非的以法治国思想。对于韩非法思想中的“术”,书中重点介绍了其内容和种类,指出韩非所主张的“术”是保证法的实行而不得不用方法,他希望君主通过对不可知的无为术、因任授官的参验术和循名责实的督责术的依法交合运用,实现禁奸于未萌的无为而治。对于韩非法思想中的“势”范畴,笔者重点探究了韩非的“人设之势”主张,指出韩非“人设之势”是为多数中材之主设想,而不拘泥于少数极端之例,同时也客观地呈现了韩非对君主用势时不能离开客观法则的希冀。关于韩非法思想的基本命题,笔者归纳出七个:“因道全法”、“凡治天下,必因人情”、“上古竞于道德,中世逐于智谋,当今争于气力”、“编著之图籍与赏罚必于民心”、“陆行之有犀车良马,水行之有轻舟便楫”、“立可为之赏与设可避之罚”、“守法责成、奉法行事与遵法立功”,对于每一个命题的出处、含义和主旨均进行了全面的阐述。“因道全法”反映韩非以法治国思想的道论基础;“凡治天下,必因人情”反映了韩非以法治国思想的人性论基础;“上古竞于道德,中世逐于智谋,当今争于气力”反映了韩非关于法律起源的主张;“编著之图籍与赏罚必于民心”反映了韩非对于法的内涵和特征的认识;“陆行之有犀车良马,水行之有轻舟便楫”表明了韩非关于法的效用的主张;“立可为之赏与设可避之罚”反映了韩非对立法原则的认识;“守法责成、奉法行事与遵法立功”反映了韩非坚持以法治国而非以私治国的治国主张。

对于韩非法思想的基本定位,笔者梳理了学界在这一问题上的分歧,通过对《韩非子》文本本身的分析指出,韩非的法思想是一个完

整的体系。其中,国家的富强是目标,法、术、势三者的统合运用是手段,法是主轴和中心。关于韩非以法治国思想的实质,本人认为韩非以法治国的思想从与儒家治国思想比较意义上来说是“法治”,其特色主要表现为任法而治、君臣民守法和刑赏依法三个方面。

韩非的法思想不仅对我国古代的历史发展有巨大的影响,而且对我国当代的法治建设实践也具有重要的借鉴意义。前者表现为其对秦和秦之后的封建社会及其主要政治家、思想家的影响。韩非法思想对秦的影响,学界有韩非亡秦论、秦兴于韩也败于韩论、不能简单地把秦的灭亡归咎于以韩非为代表的法家思想三种代表性观点。笔者从韩非法思想提出的目的、韩非法思想对始皇政策的影响、韩非法思想与秦灭亡的关系三个方面阐明了韩非法思想对秦的影响,提出韩非法思想形成以后,其社会化过程因实践者对它的认识、理解和运用受实践者本人的理解能力、主观动机和政治实践等因素的影响,故呈现出多面性和复杂性。不具体分析这种多面性与复杂性,简单地将其实践的效果归结于这一思想本身的属性是有失客观、公允的。所以,韩非的法思想对于秦的历史发展的影响是十分复杂的,不宜简单地归结为功、过两方面。

秦以后的中国古代社会,实行的都是中央集权的政治体制,所以在汉代及其以后的中国古代社会,国家机器的运转都难以摆脱韩非法思想的实际影响。但鉴于秦亡的教训,汉朝及其以后的治国者对韩非法思想进行了改造,使其披上了儒家的外衣,具有了“阳儒阴法”的特色。汉代以后的“阳儒阴法”,在显性模式上确立了儒家思想的主导地位,而在隐性模式上确立了以韩非为代表的法家思想的实际地位。所以,韩非以法治国的思想对秦、汉以后的中国政治和学术思想的深远影响是隐藏在儒家仁义道德后面的。韩非的以法治国思想对我国当代的法治建设实践具有重要的借鉴意义,主要表现在观念层面和具体法治实践方面。从观念层面来看,韩非以法治国思想是

我国当代法治建设的一种“辅助性的历史资源”；从具体法治实践而言，韩非法思想有利于我国当代的法治建设。当然，法律在当代社会的一项重要职能是维护大众的基本权利。这方面的内容在韩非那里基本上是付之阙如的。这是韩非的历史局限性所在，是需要明确指出的。

Abstract

Han Fei, the last greatest thinker and the last legalist in pre-Qin era of China, not only synthesizes the legal school but also proposes the idea of ruling by law (RBL), which is an indispensable part for our legal culture. It is believed that Han Fei has played a very important role in our history of thought, and has brought strong influence to bear on the development in our long history. So it occupies a status of vital importance to reflect upon his idea of RBL when our country is in the process of establishing its socialist nomocracy.

Han Fei Thought is an in-depth, comprehensive and sophisticated system of ideas covering many fields, including philosophy, politics, law, economics, military, management, education, history and arts etc. This academic work is mainly concerned about Han Fei's legal thought, and it tries to explore and analyze this topic in terms of its carrier, its background, its theoretical underpinning, its paradigm, preposition and position, and its historical influence and current implication.

The book, *Han FeiZi*, carries all of Han Fei's idea of RBL, so it is necessary to base the study of Han Fei's legal thought on it. This academic writing provides a detailed analysis of the book, introducing not only its editors and edition process, but also its different editions and contents. As for its editors and edition process, the book, on the

basis of the previous studies, argues that Han Fei's works have already come out while he is still alive, whereas most of them are published in single booklets. The compilation and completion of the book can be divided into two phases, the first phase of compilation is done by Han Fei's students and followers, while the second phase of edition and completion is carried out by Liu Xiang, a scholar in Han Dynasty, and it lasts for almost 50 years, from the early years of Han Dynasty to the ruling years of Emperor Xiao Wu (Liu Che). After Liu Xiang's edition, Han Fei's writing that contains 55 articles comes into its being.

Speaking of the different editions of *Han Fei Zi*, this writing, after a brief introduction of the research background, presents a detailed analysis of some important editions, including *Qian Dao* edition, *Dao Cang* edition, *Han Zi Yu Ping* edition, *Zhao Yongxian* edition in Ming Dynasty, and the widely-used edition and its annotation edition in the 20th century. The book also explores the trueness and contents of the book's different sections. Obviously, it is a necessary but complex issue to detect the trueness. In view of the previous studies, the works suggests that it should not be denied that most of the writings in *Han Fei Zi* are written by Han Fei himself, and only that there are some discrepancies about some single words or sentences, and that the final section of *Cun Han* (*Maintaining Han*) is written by Li Si, a famous scholar in Qin Dynasty, and that there are some disagreements about the section of *Chu Jian Qin* (*First Impression of Qin Dynasty*). Based on their relevance to the idea of RBL, it is suggested that the sections and contents of *Han Fei Zi* should be divided into the strong part and the weak part, with the former referring to 31 strongly related chapters and being discussed in detail, while the latter containing 24 less strongly

related sections and only being briefly introduced.

It should be the first step to clarify that which school Han Fei belongs to and where his thought comes from before studying his legal thought, and then to further explore the background on the basis of it. After a discussion of the origin of the legalist school, the discrepancy about “legalist”, and its representative figures, it is suggested that that, ever since the appearance of the legalist school, Han Fei has kept being a legalist, so his thought should belong to the legalist school no matter how do the scholars categorize the school. On account of Han Fei’s birth day and death day, the book firstly defines that Han Fei lives in Han, a state at that time, in the later part of the Warring States period, and then discusses the influence of the time on Han Fei with regard to Han’s history and territory, the relationship between Han Fei and King of Han, and the living conditions before and after Han Fei is born, aiming to understand the influence of that time and that space on the conception of RBL. After this, a detailed discussion is made to talk about the political, economical and cultural conditions at that time on account of the principle that social being determines social consciousness. Han Fei’s legal thought, complex as it appears, can not be created by Han Fei himself, but by the integration of the previous achievements, in theory and in practice, made by the famous people in the legalist school, such as Shen Buhai, Shang Yang, Shen Dao, and by the assimilation of the beneficial ideas from other schools that favors RBL, for example Mo school, Taosim, Confucianism.

After an in-depth exploration, the writer proposes that it is inaccurate to think that Han Fei’s legal thought comes only from the legalist school; rather it is formed in a complex way, drawing from

many resources. Han Fei's idea of RBL is realized by a set of paradigms and propositions. The analysis of the basic paradigms of Tao, moral and reason reveals that Han Fei's legal thought assimilates the metaphysical thought of "Tao" proposed by Lao Zi and the understanding of "Tao" by other scholars. The analysis also shows that Han Fei puts "Tao" into practice by means of "reason", which is of philosophical significance for the formation his legal thought.

Detailed analysis is also made with regard to the three basic concepts for the RBL idea, "law", "technique" and "power". As for "law", the book proposes nine categories, that is, constitution, public law, law and decree, order, moral standard, ban, criminal law, power standard and measurement, and rule and regulation. The division and analysis aims to facilitate the understanding the ideal of RBL. Great emphasis is put on the contents and categories of "technique", and the analysis indicates that it is a necessary method to ensure the implementation of law. Han Fei hopes that the monarch can, by rule of law, cross-use the unknown inaction method, the counseling method of appointing officials, and the surveillance method by real name, thus achieving the aim of ruling by inaction and eradicating the wicked behavior at its burgeoning point. As for "power", the writing probes deep into the power that is set by people, and reveals that it is conceived for most of the wise leaders, and not is confined to the extreme minority, expressing Han Fei's hope that the monarch can use their power but not deviate from the objective law.

The basic propositions in Han Fei's thought of law can be summed up in seven categories, that is, "law and Tao", the Taoist foundation of RBL; "rule by social relationship", the humanistic foundation of

RBL; “competing for moral in ancient times, wisdom in middle age, and strength nowadays”, the origin of law; “compiling books on law” and “praising and punishing according to morale”, the connotation and characteristic of law; “riding rhino and horse on roads, driving boat and ship in waters”, the practicability of law; “setting rule for award rather than for punishment”, the principle of legislation; “keeping the law, following the law and executing the law”, the claim to rule by law instead of ruling by person.

A systematic review of the rudimental position of the legal thought tells us that it is a comprehensive system, in which the national strength is the purpose, “law”, ‘technique’ and “power” the method, and law the center. On the difference between “rule by law” and “rule by person”, which is concerned about the essence of RBL, the works argues that Han Fei’s RBL thought, in comparison with Confucianism, belongs to the former one, with the characteristic of ruling by any existent law, awarding and punishing by law, and obeying the law by the monarch, the official and the ordinary people.

Han Fei’s legal thought not only bears great influence in ancient times, mainly indicated by its influence on Qin Dynasty and the feudal society after Qin as well as their main politicians, but also bears strong referential meaning for the building-up of nomocracy nowadays in China. Regarding the effect of Han Fei’s legal thought on Qin Dynasty, there are three different views, that Han Fei destroys Qin, Han Fei brings prosperity and also destruction for Qin, and Qin’s destruction should not be simply attributed to the legalist thought represented by Han Fei. The writing tries to explain the effect of Han Fei’s legal thought on Qin in the aspect of its purpose, its effect on the