

自然法与人为法之间：韩非子“薄版本”的法治思想

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摘要

法家经常被描述为专制（人治）的鼓吹者。但法家明显讲“法”，虽然法家之法比西方之法意义更加广泛。就狭义的法而言，法家的批评者认为，法家讲的最多是法制，而非法治。这种判断大多出自对法哲学相关概念的混淆。本文会澄清相关的法哲学术语（人治、法制、法律实证主义、法治、自然法，等等）同时展示它们的分别与关联，并为最低限度的法治观念（薄版本的法治）提供辩护。那些批评韩非子以及法家的人往往采取了对法治的一种“厚”的理解，将法治理解为“良法之治”或者某种自然法，而薄版本的法治则更具有概念的清晰性、普世性、以及包括最低限度的善。通过考察从人治到自然法的连续性转变，特别是通过获取某些特征，法制向法治的转变，我们会看到，法治以八条原则为其根本特征，而这些特征为不同的法哲学传统所共同认可。基于法治的八原则，我们会展示韩非子的法律思想与法治是符合的。同时我们会展示，韩非子给出的是最底线的、彻底的、一致的法治思想。作为一种最薄版本的法治理论，它与西方主流法学理论又有一些微妙的差别，而对这些差异的研究可以在理论上丰富我们对法哲学乃至政治的理解。并且，这种最薄版本的法治对处理当代所谓失败国家的问题，也有其现实意义。

关键词

韩非子 法制 法律实证主义 法治 自然法

Between Natural Law and Positive Law:
On Han Fei Zi's "Thin Version" of the Rule of Law

Abstract

The Chinese Legalists are often condemned as defenders of despotism. But obviously, this school has the term "fa" in its name, although "fa" has a broader scope than law in the Western tradition. On the narrow sense of this term, which means "law," the critics claim that Legalism embraces "rule by law" at best, and not "rule of law," but such a claim is often the result of confusions about the meanings of relevant terms in legal philosophy. One thing I wish to achieve in this paper is to clarify these terms: "rule by man," "rule by law," "positive law" (or "legal positivism"), "rule of law," and "natural law," showing the distinctions and the connections among them, and defend a "thin" or minimum version of the rule of law. Those who are critical of Legalists such as Han Fei Zi often take a very "thick" reading of the rule of law, making it the rule of the good law or a form of natural law, and a "thin" version of the rule of law has the merits of conceptual clarity and universalizability, while preserving some minimum goodness. Through looking into the continuous spectrum from rule by man to natural law, especially how rule by law can be transformed into the rule of law through acquiring certain features, the rule of law can be characterized by eight principles, which legal theorists from different schools may agree. Based on these principles, we can show that Han Fei Zi's understanding of the law is firmly in the camp of the rule of law. Meanwhile, we will show that what Han Fei Zi offers is the minimalist, thorough, and coherent version of the rule of law. As a "thinnest" theory of the rule of law, it has some subtle differences from Western legal theories, and the study of them may then contribute to the enrichment of our understanding of law and politics. Moreover, this thinnest version of the rule of law may be instrumental to address the practical issue of how to save failed states.

Key words

Han Fei Zi, Rule by Law, Legal Positivism, Rule of Law, Natural Law