

# The Dimensions of Morality of Modern Rule of Law

Qianqian Zhu

Law School, China University of Political Science and Law, Beijing, China, 100088, China

zhuqianqian1001@163.com

## Abstract

**The rule of law is a civilized order, and the concept of the rule of law has been widely accepted by people. The relationship between the rule of law and morality has always been a difficult issue in the theory of rule of law. This article combs the historical origins of modern rule of law, summarizes the main contents of modern rule of law, and analyzes the moral dimension of modern rule of law. In the construction of the rule of law in China, we should be particularly vigilant about the risks of the separation of the rule of law from morality.**

## Keywords

formal rule of law, essential rule of law, morality.

## 1. Introduction

The rule of law is not a closed concept. With the continuous evolution of human civilization, the connotation of the rule of law is constantly expanding. From a macro perspective, the development of the rule of law can be divided into the rule of law in the classical era, the rule of law in the Middle Ages, the modern rule of law and the modern rule of law. Many concepts and viewpoints of modern rule of law are rooted in the tradition of rule of law.

Since mankind entered the modern society, profound changes have taken place in the social structure, social relations, and social values. The modern rule of law was created to adapt to this social background. Modern rule of law not only draws a lot of resources from the tradition of rule of law, but also constantly adapts to the needs of modern society in its development. The development of modern rule of law has gone through two stages, namely the formal rule of law and the substance rule of law.

The moral foundation of law has not only been deeply discussed in theory, but also widely used in the practice of rule of law. The German "Basic Law" mentioned above is the first article directly listing moral propositions. The first article of the United Nations Declaration of Human Rights states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should be treated in the spirit of brotherhood." This expression has a strong moral meaning.

## 2. The Historical Origins of the Modern Rule of Law

### 2.1. The Rule of Law in the Classical Era

The academic world generally believes that the rule of law originated in classical Greek thought. Plato and Aristotle's works have a lot of discussion about the rule of law. Plato pointed out, "If the law of a country is in a secondary and weak position, it will not be far from the day of the fall; and in a country where the law is the master of the official, I have seen salvation and God is beyond its protection." [1] Aristotle further deepened his understanding of the law from the perspective of human nature. Aristotle believes that "Human emotions are like beasts, and even the most holy sages can lead strong emotions astray. Only the law has reason to exempt

passion." [2] He also defined the rule of law as "the established laws are generally obeyed, and the laws that everyone obey should be good laws themselves." [3]

Ancient Greece is in a special position in the history of human civilization. In addition to the classic works of Plato and Aristotle, the wisdom and rationality of humankind are also shining in the ancient Greek literature and art. Sophocles raised such a core issue of the rule of law in the Athens tragedy *Antigone*: As long as the laws promulgated by the state meet the formal requirements, must people obey? To what extent can it betray people's moral standards? Does the supreme transcendental standard exist? In a nutshell, if human laws are to be effective, must they match certain values? To this day, this problem still haunts us.

Ancient Greece not only had rich ideas of rule of law, but also put these ideas of rule of law into practice. During the prosperous period of the rule of law in Athens, citizens enjoyed legal equality. The law was drafted in general terms and was not targeted at any individual. The council, magistrates, and legislative assemblies were all bound by the law; citizens were prohibited by the law You can move freely as you like.

From the 4th to the 3rd century BC, Rome's strength changed from weak to strong, and eventually became a strong force on the Italian peninsula. Ancient Rome had both positive and negative contributions to the rule of law tradition, and the negative side had greater consequences. The positive aspect mainly refers to Cicero's natural law thought. He pointed out that officials are subject to law, so society is ruled by law rather than officials. Cicero believed that the supremacy of law depends on their agreement with natural law. He believed that natural law is the law of reason. According to the law of reason, law should benefit the community, it should be just, and the happiness and safety of its citizens should be maintained. Rome's negative effect on the rule of law is mainly reflected in some of the expositions in the "Throne Law" and "Civil Law Encyclopedia". The "Throne Law" states that "In order to protect the country, the Roman people clearly granted the emperor absolute ruling power." The Justinian Code has two statements: "Every emperor is willing to have legal force"; "The emperor does not Subject to law". Urbian quoted the "Throne Law" in support of two statements, which were later absorbed into the "Code". According to the theory of the time, the emperor created the law, so the emperor was not bound by the law. This view is clearly opposed to the idea of the rule of law. In addition, these expositions became a powerful argument for the absolute dictatorship of the emperor in the Middle Ages and later historical periods.

## 2.2. The Rule of Law in the Middle Ages

The Middle Ages is a loose expression. This article refers to the period from the end of the Eastern and Western Roman Empire in the 5th century AD to the rise of modern Europe marked by the Renaissance, geographical discoveries, and religious reforms, which lasted about a thousand years. The first few centuries of the Middle Ages were known as the "Dark Age". With the constant wars and changes in society, the rule of law in the classical era has been obliterated or lost during this period. Therefore, to be more precise, the modern rule of law is starting in this period. The rule of law thought in the classical era is just the authoritative text supporting the rule of law thought in this period.

There is no single starting point for the medieval rule of law tradition. The struggle between the king and the church for supremacy, Germanic customary law, and the promulgation of the "Great Charter" provided the initial impetus and conditions for the development of the rule of law theory. The church occupies an important position in medieval Europe and has become the two dominant institutions competing with the secular regime. The church has also developed its own legal system-church law. The theologian Aquinas divided the law into eternal law, divine law, human law, and divine law, both of which are higher than human law. The medieval emperor held a coronation ceremony when he ascended the throne, and he took an oath to the pope in the ceremony. This coronation ceremony symbolizes the monarch's obedience to a

higher authority and his commitment to act within the limits of the law. Through repeated oath confirmation, the monarch's concept under the law has been continuously strengthened, which has also laid the foundation for the development of the rule of law to a certain extent.

In German customary law, "the monarch is under the law" is an ancient proposition, which is also regarded as an important source of the rule of law in the Middle Ages. This concept formed a kind of restriction and balance to the concept of the supremacy of monarchy in the Roman era, which had a great influence in Europe. Later, "the medieval view of the supremacy of law and the concept of Roman jurists whose law is the will of the sovereign, was reconciled through the realization that the monarch absorbed the law into his will." In addition, in Germanic customary law contains a very well-known right—the right to resist, that is, any monarch who violates the law must be abandoned by the people. These Germanic views of customary law have become an important part of the rule of law tradition.

The "Great Charter" is an important milestone in the history of human civilization. It is also a classic text that talks about the rule of law. The background of its signing was the power struggle between the nobility and the king. Finally, under the pressure of the nobility, the king signed a document that restricted the power of the king and guaranteed the rights of the people, namely the famous "Great Charter". The Great Charter has had a profound influence in the history of the rule of law. It created a model for the nobles to use the form of law to restrict the power of the king and protect the rights of the people.

### 2.3. Modern Rule of Law

The academic world also has different opinions on the definition of modern Western. The modern in this article refers to the historical period from the middle of the fifteenth century to the beginning of the nineteenth century. During this period, Western society experienced ideological emancipation movements such as the Renaissance and Enlightenment movements in modern times, and human beings' understanding of themselves and the world continued to deepen. In the process of opposing feudal autocracy and pursuing a good political system, many ideological giants have emerged, and the ideas and concepts of the rule of law have been demonstrated. Among them, Hobbes, Locke, Montesquieu, and Hamilton have the most representative ideas of the rule of law.

Hobbes has almost gone through the entire process of the British Revolution. He published "Leviathan" and other political and legal works, advocating natural law and social contract theory, and proposed and discussed the "monarchy and private grant" theory, which has produced modern Western rule of law. Had a profound impact. Among them, the theory of natural law began with Hobbes and a fundamental change took place. "Starting with Hobbes, the philosophy of natural law has basically become a theory of the natural state. Before him, the term "natural state" was more owned by Christian theology than political philosophy." [4]

Locke is known as the "ancestor" of bourgeois liberalism. It actively advocated the rule of law and published a series of political and legal works such as "The Government". Locke emphasized that the state must be governed by formal laws, not arbitrary, and that this law must be officially promulgated and generally accepted. Locke emphasized that the laws that have been promulgated must be implemented, otherwise, the laws would amount to nothing. He also emphasized that everyone is equal before the law, and no one can escape the sanctions of the law because of his power and status. In addition, Locke affirmed the existence of natural law. He summarized the basic content and requirements of natural law into that people should protect themselves and humans as much as possible.

Montesquieu was the pioneer of the French Revolution, and the founders of European and American countries, especially the American political system, and one of the main representatives of classical natural law. His famous book "Spirit on Law" was called by Voltaire "the law of rational freedom". Many points made by Montesquieu have become the core

elements of modern rule of law. Montesquieu defines freedom as "a person can do what he should do without being forced to do what he should not do." In the construction of political systems, Montesquieu proposed the separation of power and power the theory of checks and balances has had a profound impact on the political system of the West, especially the United States. Montesquieu also connected law with human reason, which laid the foundation for the birth of near-agent natural law.

Hamilton is the main drafter of the US Constitution, and his main rule of law ideas are embodied in the book "The Federalist Collection" co-authored by others. Hamilton inherited Montesquieu's theory of decentralization and suggested that the three powers of legislative power, executive power and judicial power should be separated from each other and exercised by different people. Under the premise of separation of powers, he also proposed to establish a judicial review system.

In addition to the contributions of the above-mentioned thinkers to the rule of law, the development of the rule of law in modern times is also reflected in the following aspects. First, the discipline of law with law as the research object is gradually formed, and human beings' understanding of law is continuously deepened. Secondly, various schools of law continue to emerge, and a large group of jurists have written books that promote their views and enrich human understanding of the rule of law; again, many countries attach great importance to legislative work, the US Constitution, and the French Civil Code "Both were born here, setting a good example for the legislation of later-coming countries. Finally, the legal profession has grown and provided a guarantee for the development of the rule of law.

### 3. The Basic Connotation of Modern Rule of Law

Since mankind entered the modern society, profound changes have taken place in the social structure, social relations, and social values. The modern rule of law was created to adapt to this social background. Modern rule of law not only draws a lot of resources from the tradition of rule of law, but also constantly adapts to the needs of modern society in its development. The development of modern rule of law has gone through two stages, namely the formal rule of law and the substance rule of law. In his book "On the Rule of Law-History, Politics, and Theory", Brian Z. Tamanaha made a careful distinction between the types of rule of law theory [5] (See table below).

<b>ALTERNATIVE RULE OF LAW FORMULATIONS</b>		
Thinner -----> to -----> Thicker		
<b>FORMAL VERSIONS:</b>	<b>1. Rule-by-Law</b> – law as instrument of government action	<b>2. Formal Legality</b> – general, prospective, clear, certain
		<b>3. Democracy+ Legality</b> – consent determines content of law
<b>SUBSTANTIVE VERSIONS:</b>	<b>4. Individual Rights</b> – property, contract, privacy, autonomy	<b>5. Right of Dignity and /or Justice</b>
		<b>6. Social Welfare</b> – substantive equality, welfare, preservation of community

**Fig 1.** Alternative rule of law formulations

#### 3.1. Formal Rule of Law

The formal rule of law is the first stage of the development of modern rule of law. It emphasizes that the rule of law must meet certain formal requirements. The form of rule of law also has different types according to the different requirements. The simplest form of rule of law can be summarized as "rule by law", that is, no matter what the government does, it must comply with the law. However, this view of the rule of law only uses the law as a tool for rulers. The rule of

law is actually the rule of government, and the power of the government is not subject to any restrictions. On the other hand, this type of rule of law does not contain any value choices or moral judgments, and evil laws can also be applied by the ruled on legitimate grounds. As Raz said: "The law can establish slavery without violating the rule of law." [6]

In order to solve the dilemma of the above-mentioned formal rule of law, Fuller proposed a new set of formal theory of rule of law. Fuller believes that "the relationship between law and morality is not the external relationship between the law and some external similar rules, but the internal requirements of the legal rules themselves." Fuller emphasized that the law itself must meet certain standards, that is, he the inner morality mentioned in "The Morality of Law [7]". He identified the moral requirements for the eight aspects of the rule of law, namely: the generality of the law, the publication of the law, applicable to the future rather than retrospective, the clarity of the law, to avoid contradictions in the law, the law should not require impossible things, the stability of the law, the consistency of official actions and the law. On the one hand, Fuller's theory of the rule of law avoids the rule of law from becoming a tool for rulers, on the one hand, on the other hand, he also pays attention to the value orientation of law. However, his formal theory of the rule of law is concerned with the good within the law, and he wants to use the law itself to get rid of the evil identified by the legislator. Fuller's theory of the rule of law wants to restrict the emergence of evil laws from the law itself, but legislation is done by people after all. On how to deal with the subject of legislation, formal rule of law has taken another step forward, that is, adding democracy to formal rule of law. As a decision-making process, democracy determines how the law is made. Due to the loss of faith in natural law and the reality of contemporary people's moral pluralism, democratic decision-making mechanisms have become the only way to obtain legal legitimacy. However, introducing democracy into legislation does not necessarily guarantee that good laws will be enacted.

At present, the concept of the rule of law is still declining, and the reasons are many. First, the rapid development of human society makes it more and more difficult for the law to adapt to social changes. Secondly, social changes have led to the diversification of people's interests, and it is difficult for the law to meet different value needs. Third, the premise of the rule of law is based on a stable social structure. The formal rule of law emphasizes the protection of individual rights and freedoms while ignoring the public interest. These defects of the formal rule of law have caused people to turn their attention to the essential rule of law.

### 3.2. Substantial Rule of Law

All substantive theories of the rule of law are formed based on criticizing and inheriting the formal legal concept. It retains the formal elements of the formal rule of law, while adding some provisions on legal content. Tamanaha believes that the most common substantive version is the inclusion of individual rights in the rule of law. The representative of this theory is Dworkin. Dworkin's view of the rule of law on rights holds that individual rights are not endowed by the state, but that everyone is born with them. The state has defects in protecting the rights of citizens. This defect is mainly due to the failure to grant citizens the rights they deserve in time, while at the same time weakening the existing rights of citizens for other reasons. Therefore, individuals can use their rights as a reason to oppose the utilitarian legislation of the country and improve their rights protection functions through other means. Similarly, rights do not come from legal norms, but from morality. In addition, Dworkin also pointed out that the law includes principles in addition to rules. When the rights of citizens are violated, and the exhaustion of existing laws and regulations cannot provide relief, the court can apply principles to protect the rights of citizens.

According to Tamanaha's distinction, a stronger version of the substantive rule of law means that the substantive rule of law should include the moral requirement to protect human dignity.

After the Second World War, Germany's ideological and legal circles began to reflect on Nazi law. The Nazi regime committed atrocities with the help of law, which caused serious doubts about legal positivism or the theory of the rule of law. If the state can arbitrarily stipulate the content of the law and the rights of individuals, this in fact recognizes that the power of the state is unlimited. In order to be alert to this danger of the rule of law, Article 1(1) of the German Basic Law after the war stated: "Human dignity is inviolable. Respecting and protecting human dignity is an obligation of all state powers." Article 1, paragraph 2, states that "The German people recognize the inviolable and inalienable human rights as the foundation of all human society and world peace and justice." Article 79 of the Basic Law provides that Article 1 cannot be changed. Through the mandatory provisions of the Basic Law, Germany "uplifts the rights above the law-creators and the people", thereby resisting the possibility of evil laws and ensuring the realization of the substantive rule of law.

The strongest version of the substantive rule of law is to add the requirement of "the right to social welfare" on the premise of adhering to formal legitimacy, individual rights and democracy. The main point of this substantive rule of law theory is that in the process of implementing the rule of law, the country must not only protect individual freedom and basic rights, but also undertake an obligation to improve the living conditions of the people. In other words, the purpose of the rule of law is not to passively prevent government tyranny and evil laws, but also encourage the government to actively seek welfare for the people.

#### 4. Moral Dimension of Modern Rule of Law

Through the above analysis of the origin and content of modern rule of law, we can see that the development of the rule of law has always been intertwined with morality, and morality has always been the cornerstone of the building of the rule of law.

In the classical era and the Middle Ages, "the supremacy endowed with the rule of law is associated with the belief that the content of the law is morally justified and guided by the goodness of the community. In these pre-modern times, people believed that the law was the moral content is infused. The rule of law is also morally good without this support. This idea seems strange to them, and they will reject it." The rule of law is not a tool here, but a natural law or divine. It shows that the law is not only convinced by people, but also believed by people. Since the fall of modern times, after the baptism of the Renaissance and the Enlightenment, the whole society has experienced the process of "disenchantment". The theory of classical natural law broke during this period, and Hobbes "tried to maintain the concept of natural law, but to make it separate from the concept of human completeness; only when natural law can be controlled from the actual situation of people's life. It can only be effective or of practical value when it is promoted by the most powerful force of all people or most people." [8] Natural law has since got rid of divinity and human reason and become a natural state. Objective laws in the rule of law gradually got rid of people's rationality and moral rules, and became a tool for governing the country.

Influenced by modern natural science and analytical philosophy, "In legal theory, individualism, rationalism, and nationalism have risen, and most scholars have abandoned natural law theory. This theory regards law as the product of human reason and conscience. The interpretation and application of laws must be based on their moral goals." From Austin to Hart and Raz, they all advocate the proposition of separating law from morality.

After the Second World War, after reflecting on the shortcomings of positivist law, the natural law closely related to morality began to revive, and people began to pay attention to the integration of law and morality. Fuller first guaranteed good law and good governance from the internal moral theory of law through the "morality of aspiration". "Fuller's contribution is that he completely deviated from the natural law tradition's requirements for the specific moral

content of the law, and raised the moral issues of the law itself; that is, the relationship between law and morality is not the law and its external Some kind of external relationship between rules, but the internal requirements of the legal rules themselves." Fuller once again established the foundation of legal morality based on human reason. "To develop a business that makes people's actions subject to the rule of rules, it is necessary to believe in the concept that a person is or can become a responsible and rational agent, be able to understand and follow the rules, and be able to fault his own Responsible." Therefore, "every event that deviates from the inherent moral principles of the law is an offense to the dignity of the person who is the subject of responsible rational action." [9]

Fuller explored the morality of the rule of law from the form of law, and Dworkin further emphasized the moral basis of law from the content of the law. Dworkin pointed out that "modern law is based on rights, rights are based on morals, and individual rights are not only superior to collective goals, but can resist laws that contradict them." Dworkin criticized the law in his own work *Autonomy and legal skopos theory* clearly put forward the law based on morality, and the laws of rules and policies must be regarded as the principles of morality. At the same time, he also emphasized that morality is not static, but changes constantly with the development of society, the change in morality does not affect his fundamentals. The ancient Greek poet once said, "The fox knows many things, the hedgehog only knows one big thing." Later generations used this to refer to the pluralism of value and monism. Dworkin explained his moral monism in his book *Justice for Hedgehogs*. "Dworkin's reconstruction of the moral foundation of the law not only defends the foundation of modern law in theory, but also has great practical value for preventing evil law and tyranny."

The moral foundation of law has not only been deeply discussed in theory, but also widely used in the practice of rule of law. The German "Basic Law" mentioned above is the first article directly listing moral propositions. The first article of the United Nations Declaration of Human Rights states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should be treated in the spirit of brotherhood." This expression has a strong moral meaning.

## 5. Conclusion

Modern rule of law does not naturally exclude morality, and morality is an important dimension of modern rule of law. If the independence of the rule of law is overemphasized and the pursuit of the moral goal of the rule of law is abandoned, the law will easily be reduced to a tool for tyranny, and it will be impossible to lead the progress of society. This issue needs to be especially careful in China. Traditional Chinese society is a moral and civilized order, and many scholars blame this moral rule for China's backwardness in modern times.

Mr. Huang Renyu even wrote in the preface of "1587, A Year of No Significance: The Ming Dynasty in Decline": "China has replaced the legal system with morality for two thousand years, and this is the crux of all problems." Therefore, in the construction of the modern rule of law, many people have an instinctive rejection of the concept of morality. This kind of psychology needs to be vigilant and overcome.

The construction of modern Chinese rule of law still needs the support of the moral theory foundation, and the Chinese traditional culture has rich theories to learn from in this respect. Since modern times, Neo-Confucian scholars such as He Lin, Zhang Junmai, Liang Shuming have provided many inspiring insights into the transformation of the rule of law in China. For example, He Lin divided the rule of law into three types: the rule of law based on utilitarianism, the rule of law based on morality, and the rule of law based on academics; Liang Shuming put forward the theory of replacing religion with morality in ancient China. In the construction of the rule of law, these are valuable resources that we should pay attention to.

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