

A Comparative Study of the Formal Rule of Law and the Substantive Rule of Law

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Abstract

The formal rule of law and the substantive rule of law are two basic classifications of the model of rule of law. The former pays more attention to compliance of rules, but it can easily lead to mechanical rigidity. The latter pays more attention to consideration of situational factors, but it is likely to cause arrogation of rules, and even has the danger of disintegrating the rule of law. From the perspective of legal interpretation and legal paradigm, their differences are investigated more clearly. Different modes of rule of law also have different influences on judicial adjudication, and although these influences have caused difficulties in judicial adjudication, they have also promoted the question of legality, thereby arousing scholars' re-concern about the rule of law in the new context.

Key words: The formal rule of law; The substantive rule of law; Legal interpretation; Legal paradigm; Judicial adjudication

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INTRODUCTION

It should be said that the discussion on the dichotomy of the relevant “form/substance” in academic circles is very mature, and the reason of re-mention the topic, on the one hand, is that their opposition today has given more

epochal significance than the traditional opposition, and the recalling of the controversial history will be conducive to answering many contemporary legal problems, and on the other hand, based on the theme purpose of this paper, it is necessary to discuss the profound influence of “form/substance” which is the most important and universal method of division on the administrative law.

1. DIVISION OF THE FORMAL RULE OF LAW AND THE SUBSTANTIVE RULE OF LAW

Although because of the different appellations of the model of rule of law, for example, Professor Chen Xinmin, a Taiwan scholar in China, distinguished the two types of rule of law with various understanding of the concept of the rule of law in Anglo-American legal system and continental law system, which corresponds to the two types of rule of law of form and substance respectively in essence (Chen, 2010). Some scholars in Mainland China called this way of classification as “the model of rule of law or the ideal of rule of law”, so they distinguished the four models of the natural ideal of rule of law, the legal model of the rule of law, the formalistic model of rule of law and the comprehensive justice model of the rule of law, where the distinction between the two latter models was corresponding to the formal / substantive dichotomy (Zhang, 2006). Though different concepts are expressed differently, their substances are roughly the same, and in view of this, the author discusses the concept of “form / substance” which is generally accepted.

Firstly, as the formalistic model of rule of law, it pays more attention to emphasize the formality and instrumentality of the rule of law, and the universality and stability of the law. When a country makes laws through the legislature according to the statutory procedures to restrain citizens, this process has been

strictly implemented, and in other words, this process is regarded as the implementation of the rule of law, and there is no need to judge whether the law is good or bad in the level of value, and whether it has an “actual effect”. In general, it has the following characteristics: firstly, it emphasizes the rule by law in the instrumentality sense. This instrumentality means that the law or the rule of law is regarded as a means to reach a goal, and the implied premise is the recognition and consolidation of real social relations and the law or the rule of law becomes a functional existence, which played a positive role in the historical process of early reliance on the law against autocracy. Secondly, it emphasizes the role of order in society. The legal order under the rule of law is a legal order in accordance with the law, which runs through the law, thereby contributing to the formation of order. What this order implies is the recognition of the universality of the law and the pursuit of the certainty and stability of the law. The formation of order requires the conversion of a single order into the generally abstract and binding rules, which is a special process where individuality and particularity are abandoned, and the reduction of the degree of specialization means the improvement of the degree of universality, which also means that the order which is shaped by the rules is more firm. This stable order requires more prominent characteristics of certainty and stability of the law and it also requires that the frequency and extent of the amendment of the law should be reduced as much as possible, so as to ensure social stability. Thirdly, it pays attention to the equality of efficiency and form. Due to the establishment of a set of orders, the degree of prediction for people’s behaviors will be greatly improved, and the blindness and irrationality which affect behavioral efficiency will be reduced, which also reduces the transaction costs of people in the society to a certain extent, so as to speed up the social process. Besides, the realization of efficiency also pays more attention to highlight the formal equality which is first emphasized by the concept of rule of law, and this process rather than the equality of results is expressed in Rawls’s two principles of justice.

Secondly, the substantive model of rule of law was firstly reflected in the concept of “the just law” put forward by Aristotle, an ancient Greek philosopher, in *Politics* when discussing the rule of law. The substantive rule of law emphasized the substance of the law and the domination of the just law. Therefore, the substantive rule of law in principle cannot tolerate the treatment of the bad law. This view was expressed in the three principles which were put forward for the theoretical development of rule of law in *“The Declaration of Rule of Law in the Free Society”* (*“Delhi Declaration”*) published by the “International Congress of Jurists” in Delhi in India in 1959. In general, the main characteristics of the substantive rule of law are as follows: The first

characteristic is to emphasize the rule by law with the purposeful value. Unlike the instrumentality of law which is emphasized in the formal rule of law, the substantive rule of law pays more attention to emphasize the purpose and regards the law as an important goal pursued by human development. The existence of the purposeful value urges the value connotation behind the law to be fully excavated, and a complete set of legal rules are essentially transformed into a set of hierarchical value systems, which shows that as the best way of governance in the modern society, the law achieves the common belief values of human beings, such as freedom, equality and human rights. The second characteristic is that the substantive rule of law pays more attention to restrain the national power to ensure the protection of human rights. This characteristic is manifested in the different attitudes of the two models of rule of law in dealing with the issue of “freedom”, which comes from the two division ways of the classical “positive freedom” and “negative freedom” put forward by Isaiah Berlin, a British political philosopher. The formal rule of law is more manifested by the model of rule of law based on “negative freedom”, while the substantive rule of law is based on “positive freedom”. Therefore, the substantive rule of law will not meet a fair and well-functioning program design, and it is more concerned with the actual inequality caused by process justice and equality of opportunity and under the desire and possible initiative of citizens to actively achieve freedom, there is a hope that the various impulses of this inequality will be completely eliminated. Therefore, the substantive rule of law puts forward more stringent requirements for the use of national power with a more stringent supervision, and human rights and social justice achieve the substantial guarantee.

Finally, from the perspective of the relationship between the two models of rule of law, the dialectical unity of the two models is embodied in that the substantive rule of law determines the content and operation of the formal rule of law, and the formal rule of law restrains the implementation method of the substantive rule of law. From another point of view, there is a progressive relationship between the two models. The formal rule of law should be achieved first in the basic level, while the substantive rule of law is a requirement for a higher level of rule of law under the social background that the formal rule of law is basically established, and the difference between the two models is only in the time period of realization. However, what needs to be explained is that this progressive relationship is not absolute, and the projection of time in the social process in the real world is complex and profound, which is often shown that the formalistic model of rule of law has not been established yet and the requirement of the substantive rule of law is already very urgent; therefore, it is very difficult to find the time point of the transformation from the formal rule

of law to the substantive rule of law, and what we can see is the complex situation of the common development of the formal rule of law and the substantive rule of law. Therefore, what kind of perspective in which we should view the relationship between the two models can be basically determined after social economy, history humanities and other many factors are integrated.

2. MANIFESTATION OF THE FORMAL RULE OF LAW AND THE SUBSTANTIVE RULE OF LAW IN DIFFERENT PERSPECTIVES

2.1 The Perspective of Legal Interpretation

When the law science scholars face the problems caused by the judicial review, the first consideration is the knowledge resources of legal interpretation. As the oldest and the most basic knowledge system, legal hermeneutics, especially the legal interpretation of specialization and departmental normalization, is always able to give a sufficient theoretical support to the judges in the first-line practice, and the judicial activity formed by the judges' review of cases through the theory of hermeneutics has also become the main proposition that the legal scholars have studied repeatedly. Although there are many theories in the field of legal interpretation, we can still comb out two different hermeneutic standpoints which are established in the two different models of the formal rule of law and the substantive rule of law: the normative standpoint and the pragmatism standpoint.

The normative standpoint mainly refers to the realization of justice within the law according to a "regular" way of thinking. This is an "arbitrariness of denial of negotiation and consensus", which is also very similar to the "interpretation of the judge's innermost monologue" that Dworkin advocated. Under the normative standpoint, the judicial interpretation of law is often subject to rigid legal rules, while is stricter with the existing precedents and verdicts, and does not attach importance to the uncertainty in the law or to the inadaptability of the law produced by the change of the times; however, it is more difficult to identify this kind of behavior doctrine of separation of powers arrogation of "judge-made law" at the political level. The hermeneutic standpoint which is called the legal foundationalism is mainly manifested in three aspects: first of all, wherever possible, the judge will use various methods to look for the original intention of the lawmaker for the articles of law, and the situation of this text interpretation what we call is relatively common (although this method has gone through the process from the originally simple "historical explanation" to the latter "new textualism explanation" which pays more attention to the words, semantics and syntactic criteria in the articles of law). Secondly, in

the absence of the original intention of the legislator, the judges will often follow certain habits, and in other words, they will follow the precedents that usually have an explanatory meaning, and have been accumulated by the long-term practice within the legal community, and even if there is no direct precedent, it is possible to find the closest meaning from a similar precedent. In addition, when the aforementioned methods are invalid, the judges are asked to use the value sequence within the legal system to give an explanation for the purpose of the case, in order to ensure that the basis that this situation is still in the normative standpoint is that these so-called value sequences can only come from the legal system rather than referring to the environment outside the legal system.

The pragmatism thinking standpoint is contrary to the normative standpoint, whose basis is more trust in the judicial power rather than the dependence on the rational legislation of the legislator. In order to make the relative stable articles of law form a relationship with the diverse world, the functionalist attitude which is taken regards the law as an adjustment mechanism for the society, aiming at promoting the overall goals and interests of the society. The manifestation of the pragmatism thinking standpoint in the context of administrative law is that judges have the relatively strong policy thinking, and they pay much attention to the consideration of specific public policies and social purposes in cases and the social effects formed by the cases at last. Specifically, the manifestation is in the following aspects: Firstly, the pragmatism thinking standpoint supports the judge's intention of legislation and carries out a re-construction combined with the external environment when cases are heard (including the policy-political environment and even the part of the public opinion environment), and it not only maintains the respect for the legislature, but also has certain flexibility; secondly, this thinking standpoint fully expresses respect for the interpretations of administrative organs. Because in this case, the judge's interpretation for cases starts from judging whether the interpretation of administrative organs for cases is right, this respect has gained the trust of the administrative organs and has exchanged more administrative efficiencies and spaces to a great extent; Finally, in the administrative environment of our country, the judges are required to "pay attention to social effects" during their trials, and the process of legal interpretation is not only regarded as the realization of legislation, but also considered as an important means to solve social controversial issues, resolve social disputes, maintain social stability and promote social harmony. In the expectation of the overall environment, the pragmatism thinking standpoint plays a more important role.

2.2 The Perspective of Legal Paradigm

From the perspective of legal paradigm, different scholars put forward different divisions of paradigm. The most influential divisions are the three paradigms: "Repressive

Law, Autonomous Law, and Responsive Law”, which put forward by Philippe Nonet and Selznick (Nonet & Selznick, 1994); the two paradigms of “Formal Law in the period of laissez-faire capitalism and Welfare Law in the period of developed capitalism” put forward by Habermas (Habermas, 2011); and “Customary Law, Bureaucratic Law, Order Law and Community Law” put forward by Unger, an American scholar (Unger, 2008). Although the three types of division methods are different, they all belong to the division of the legal paradigm according to the social form and the corresponding legal form; therefore, the author will discuss them together.

Philippe Nonet and Selznick, American scholars, tried to combine formal justice with substantive justice in a standardized way in their work “*The Law and Society in Transformation: Towards the Responsive Law*” (1994). On the basis of combing the legal tradition, the book put forward three different kinds of laws of the repressive law, the autonomous law and the responsive law. The book believed that with the change of forms of social organization, the law form would turn from the repressive law to the autonomous law, while the autonomous law finally formed the responsive law that conformed to the characteristics of the modern post-bureaucratic society. The so-called repressive law put forward by Philippe Nonet and Selznick mainly aimed to solve the problem of political order, and met this requirement through the obedience to power and authority by law. This kind of legal form will make the governance pressure inside the organization more and more serious, and the tension between the internal and external of the legal system is also becoming more and more difficult to bridge, and then it will gradually go to the era of autonomous law. Similarly, the evolution of the autonomous law has changed the way of legal reasoning and legal participation and has gradually broken the formal ideal state. Under the pressure of institutional change, it has been gradually replaced by the responsive law. Throughout this historical process, the author finds that the repressive law belongs to the pre-modern legal paradigm, while the autonomous law and the responsive law belong to the modern legal paradigm. In terms of the autonomous law, its characteristics are mainly based on the separation of law and politics, and it makes use of the formalistic legal model for social adjustment, and in this process, we pay more attention to the formal justice brought by the procedure. However, its shortcomings are also very obvious, and the most important one is that people mechanically think that the purity of law system forces the separation of legal provisions from social facts, resulting in the intensification of tension between formal justice and substantive justice. As the responsive law of the alternative solutions put forward by the author, its characteristic is that many elements abandoned in the period of autonomous law have been emphasized, for

example, the authority of purpose, and the integration of politics and law on the participation issue have loosened the shackles of the once strict “law centralism”; and compared with the autonomous law, the responsive law emphasizes the ability of the legal institution to realize its responsibility, and the substantive justice has become the desired and attainable goal. When we come back to see “the transformation theory of law” put forward by Philippe Nonet and Selznick again, we can clear see that the author focuses on analyzing the different types of law, which means the expression of the two models of rule of law of the formal rule of law and the substantive rule of law in the context of law paradigms, and these in the context of law paradigms are not only in accordance with the characteristics of the two models of rule of law of the formal and the substantive rule of law, but also concretely translate these characteristics into the institutional model with time imprint.

In addition, on the issue of the formal rule of law and the substantive rule of law, the careful analysis and the constructed theory of Habermas, have also produced a huge impact. In his book “*Between Facts and Norms - Discussion on the Theory of Law and the Democratic and Legitimate State*”, Habermas used one chapter to discuss the issue (2011). Before Habermas put forward the procedure paradigm, he put forward two kinds of legality of legality and legitimacy just like Max Weber and other law and sociologists, and put forward two kinds of law paradigms based on this: the first law paradigm was the formal law in the period of laissez-faire capitalism; the second law paradigm was the welfare law in the period of capitalism with developed organizations (the period of monopoly capitalism). The characteristics of the formal law in the period of laissez-faire capitalism met the social environment at the time of competition, and based on individualism and from the presupposition of “rational man” in classical economics, we respected the individual’s independent choice and molded the ethical values of individualism, and the law gave the individual the absolute right of property and the right of contracting freedom to contain the content which the right of individuals included through the formulation of rules. At this time, the country and the civil society were antagonistic to each other, and the country played only the role of a passive night watchman, while the civil society (private sphere played an independent role, providing a larger space for self-help at both the economic level and the political level (Gao & Ma, 2006). However, the defects such as the isolated individual as the starting point and the substantive inequality under the formal equality were also very obvious; therefore, with the development of society, the call for a new legal paradigm that could overcome the defects of the formal law was more and more intense. With the rise of the welfare state, the legal paradigm changed: (a) Firstly because of the development

of science and technology, the economic globalization, the increasingly complex society, the social risk people face and the uncertainty were far beyond the range they could bear, which required the country to carry out an overall planning and arrangement to reduce the risk of citizens, and the process was that the government used the legal system to actively intervene in the economy and life of society; (b) secondly, due to the formulation of a large number of labor law, social security law and economic type law, the originally autonomous private law system was broken, and the emergence of social law made the public law “invade” the private law in a large scale, and although the law mixing the public law and the private law was mainly aimed at maintaining social equity and adjusting interest relations, it was undeniable that the emergence and development of this phenomenon changed the original structure type of “small country and big society”; (c) the positive protection for vulnerable groups urged the law to pay more attention to emphasize the freedom and equality in fact rather than paying attention to the formal freedom and equality just like the past from the beginning of formulation; (d) the age of the welfare law appeared as “the tendency of the substantive private law” Habermas called; (e) the activities of judicial organs were more active and played a more active role (Ibid.). Although with many of these changes in the welfare law, we hoped to overcome the defect of the formal law to achieve transcendence, but unfortunately, the welfare law would also face many problems, such as the constant expansion of administrative power, the atrophy of legislative and judicial power brought by the self-legislation of self-administrative judgment, the occupied self-space of citizens and the separation of powers and the destruction of democratic principles. However, it was undeniable that the way of division of the formal law and the welfare law mentioned by Habermas basically belonged to the product of the two models of rule of law of the formal rule of law and the substantive rule of law, and the detailed analysis of the two legal paradigms had a great significance for studying the two models of rule of law.

Similar to the above three scholars, Unger, an American jurist, also put forward his division method of legal paradigm in his work “*Law in Modern Society*” (2008), and the different point was that Unger observed and studied legal issues in the overall perspective of society, while legal issues and changes in social form were only the theoretical background, which were studied by Philippe Nonet and Selznick or Habermas. The four legal formations (paradigms) of “Customary Law-Bureaucratic Law-Order Law-Community Law” put forward by Unger had a hidden connection with “Formal Law and Welfare Law” in “*Between Facts and Norms*”, and the three laws of “Repressive Law-Autonomous Law-Responsive Law” in “*The Law and Society in Transformation: Towards*

the Responsive Law”. The difference was that Unger thought that the most important thing for understanding the modern social law but not the so-called time division of “pre-modern-modern-post-modern” was the diverse understanding of “liberalism”, so Unger’s discussion on the modern social form was also concentrated in the two categories of liberal society and post-liberal society, while Unger’s understanding of liberalism was carried out in the form of his deep criticism. In his early work “*Knowledge and Politics*”, Unger took the lead in raising the critical banner. He thought liberalism was both a social order and an ideology, and the ideological liberalism has been deeply embedded in the whole social organization and culture structure, which was called “the deep structure of Western society” by Unger. This structure made people in a dilemma in the two aspects of morality and politics to promote the fragile relationship between people, and the cooperation activities aimed at altruism were replaced by the cooperative activities aimed at self-interest, so that the relationship between people was connected mainly by money and power. In the icy world of fact and technology, the world of human feelings was mercilessly isolated, which was also similar to the evil of capitalism mentioned by Marx and Engels in “*The Communist Manifesto*”: “the amorous veil covered on family relations was tore off to change this relation to the purely monetary relation”. After a deep critique of liberalism, Unger combed the social form of liberalism, which meant to build a liberal society and post-liberal society, and because the characteristics of the law under the two kinds of social formation summed up by the author were very similar to the conclusions summed up by Philippe Nonet, Selznick and Habermas, the author will not give unnecessary details here (Unger, 2008). Eventually, we can see that the division of law paradigms can show the profound meaning of two models of rule of law of the formal rule of law and the substantive rule of law, which also shows that from other aspect, it’s not as optimistic as some scholars are - we have surpassed this opposition, and in fact, this opposition will be more tense.

3. THE INFLUENCE OF THE FORMAL RULE OF LAW AND THE SUBSTANTIVE RULE OF LAW ON JUDICIAL ADJUDICATION

After a brief introduction of the two models of the formal rule of law and the substantive rule of law, we need to investigate the influence of the two models of rule of law on judicial adjudication respectively. Judgment activities should be the executive activities under the concept of rule of law, and the concept of rule of law not only affects the value orientation of judicial judgment, but also restricts the basic way of legal interpretation and legal reasoning

in judicial judgment to a large extent. Therefore, the influence of the division of the two models of rule of law which is reflected to the field of judicial judgment will seem very important.

3.1 Judicial Adjudication in the Perspective of the Formal Rule of Law

To put it simply, the theoretical resources behind the judicial judgment in the perspective of formal rule of law include two aspects: the natural law theory's understanding of rationality and the analytical jurisprudence's understanding of the existence of law. Although the two theories have irreconcilable contradictions for a long time, the modern natural law and analytical jurisprudence have not the relationship of either this or that through many scholars' theoretical harmonization. The reason why the school of natural law thinks that the law is universal is largely based on that the true law is the right sense of reason, and the universal and stable rationality of human beings leads the law to be abstract, pure and logical. For analytical jurisprudence, the existence of law is quite different from the necessity of law, and the existence of law is reasonable and legitimate, which requires that a complete, detailed, clear and stable legal system must exist. In order to prevent the fluctuation of the above characteristics due to the ambiguity of interpretation, the judge is required to maintain the priority of the existing legal order in dealing with general cases, which is the basic guarantee for the scientization of the law.

The judicial adjudication in the perspective of formalistic rule of law directly invokes the relevant legal provisions and carries out reasoning according to the existing legal system structure in the main process of the application of the law, thereby coming to the verdict and judgment of specific cases, and the process is essentially a process of deductive reasoning, and according to the requirements of the formal rule of law, if the facts found in two cases are the same, under this circumstance that the law does not have changes, the same legal provisions should be used for reasoning, and the same articles of law should be invoked for reasoning to obtain the basically same verdict and judgment results, thereby reaching the formal rationality of the law. Therefore, we can see that the judicial adjudication of the formalistic rule of law should have the following characteristics: firstly, under the judicial adjudication of the formalistic rule of law, the influence of non-legal factors in the judgment should be eliminated as much as possible. In the real judicial activities, the judge will be affected by a variety of non-legal factors, such as emotion, public opinion and moral or personal interests, and these factors cannot be avoided to a certain extent based on the diversity of real life and legal value; however, if there is no corresponding rule restriction, these factors will have a profound influence on judicial adjudication. In the process of deductive reasoning, the judicial adjudication of the formalistic

rule of law draws a conclusion strictly on the basis of the construction of the big premise and the small premise, and this process is bound to effectively eliminate the influence of non-legal factors in most of the judgments. Secondly, it safeguards the realization of the equal value of the law. The equality of the law is an indispensable part of many legal values, and it is also recognized as an important judicial principle in the judicial field. The pursuit of the equal value of law reflected in the field of administration of justice is the legal doctrine that all people are equal before the law, while in the running process of judicial adjudication of the formalistic rule of law, the same big premise should be applied to the same small premise (specific case facts), and at last, the same adjudication conclusion will be drawn. Therefore, the judicial adjudication of the formalistic rule of law is also the most effective tool for the realization of legal equality. Thirdly, the judicial adjudication of the formalistic rule of law is also of great significance for citizens to comb and maintain the legal belief. When discussing the rule of law, Aristotle emphasized that the rule of law should enable people to maintain faith in law, and faith was rooted in something that was clear and stable, and for the judicial adjudication under the formalistic rule of law, the most prominent feature is that in the dynamic process of law enforcement, the stability, clarity and predictability of the law can still be maintained, which of course, was also an inevitable result of deductive reasoning. With the true determination of big and small premises and proper application, reasoning conclusions are bound to be contained in it. Compared with judicial adjudication, the result of judicial judgment is inevitably included in the legal norms and the case facts of the case rather than others, thereby being beneficial to maintain the stability, clarity and foresight of the law and fundamentally setting up and maintaining citizens' belief in and respect for the whole legal system.

From the specific adjudication link, in the process of cognizance of the legal facts, it is necessary to restore or reproduce the case facts that have already occurred in the real life through the procedure of litigation. The process of restoring or reproducing facts is actually a reconfirmation of case facts. Though this is the prosecutor or judge's analysis and judgment on the case material as a judicial body, this conclusion is not imaginary, and its subjectivity is bound to be bound by objective rules, such as evidence to make a reliable basis and reason for cases. Truthful and reliable fact bases and reasons are the basis for constructing the medium and small premises of legal reasoning and are also the logical starting point of thinking in the deductive reasoning of law; therefore, it is of great significance to correctly judge and confirm the truth and validity of factual basis of cases. Secondly, in the process of legal subsumtion, the confirmed case facts do not automatically generate

a small premise for legal reasoning and cannot be connected to the big premise of legal reasoning, which must be an activity similar to law classification, and the special facts about the forthcoming cases belong to the activities within the specific scope of application. In essence, this subsumption process is the legal evaluation of the preceding case facts, and it abstractly generalizes and divides the contents with legal meaning to make it interact with the legal norms at a certain level and finally achieve the connection between big and small premises. As a matter of fact, we can see that this process has a greater subjectivity, and because the judicial personnel have various understanding of legal norms and the identification of case facts and the subsequent legal evaluations also have differences, the condition of common case of different judgments we usually say may occur; therefore, only when the big and small premises are constructed in the process of interacting and corresponding with each other, can case facts be confirmed by the law.

3.2 Judicial Adjudication in the Perspective of the Substantive Rule of Law

According to Posner, an American jurist, “form refers to what is inside the law and substance of the law refers to the world outside the law.” (Posner, 1994) The so-called “things within the law” refer to the content stipulated by the legal norms and the basis for formal legal reasoning. The so-called world outside the law refers to the content that does not belong to the legal norms, but the various grounds and reasons other than the legal norms (Yong, Jin, & Yao, 2002). In the circumstances of “certain situation”, the judicial adjudication in the perspective of the substantive rule of law is a process of legal reasoning based on certain values or reasons. However, Bodenheimer, an American jurist, had an accurate description in his book “Jurisprudence: Legal philosophy and legal methods” on the problem that a substantial way of reasoning is needed in which particular occasion, and in other words, “the situation that the judge needs to apply dialectical reasoning can be divided into 3 categories: (a) the situation that the law never stipulates a simple principle of judgment; (b) the situation that the solution to a problem can apply two or more conflicting premises but must make a real choice between them; (c) the situation that although there are rules or precedents that can adjust the accepted cases, but when the court is exercising the power that is granted, the application is refused in view of the fact that the rules or precedents have no sufficient basis in the background of the dispute reality (Bodenheimer, 1999). The author also basically agrees with the division of the situation, and thinks under the special circumstances of the big premises (such as loopholes in legal norms, unclear legal norms, conflicting legal norms and just legal forms and unjust substance), the special circumstances of the small

premises (mainly refers to the situation of suspicion of case facts) and the special conditions of the combination of big and small premises (for example, the situation that the two are similar in form while are conflicting with each other in value judgment or in form and consistent with each other in value judgment), the substantive rationality of judicial adjudication is pursued by actively applying the way of judicial adjudication in the perspective of substantive rule of law.

Judicial adjudication in the perspective of the substantive rule of law usually is not involved or is less involved in the law, but mainly conducts value judgment on the substance of the fact; therefore, there is no need to apply the deductive reasoning model in reasoning and carry out judicial judgment activities under the substantive rule of law like the judicial judgment in the perspective of the formal rule of law, and it has its own method. Specifically, there are mainly several ways: the first way is to explain the spirit of law and the original intention of legal provisions, so as to find out the conformity between social development and legislators’ intentions, which is legal interpretation conforming to the purpose what we call in jurisprudence. The second way refers to the standard which is similar to the case law system of Anglo-American legal system and uses the typical precedent issued by the high court as guidance to the relevant judgment to limit the judge’s power of discretion, which is the way of “case guidance system” which has been discussed by academic circles in recent years in; the third way is to make a verdict on a case by using these informal sources of law, such as habits, legal principles, principles or values in a particular case.

CONCLUSION

Through the comparative study of the formal rule of law and the substantive rule of law, we can see that in whatever model of the rule of law, we are always asking about the legitimacy of the law. This legitimacy is not equal to the “legal law”, but more close to the “justification”. This kind of legitimacy is people’s trust in and obedience to rule under the rule of the political system, and in other words, it is sincerely convinced rather than the fear based on authority and punishment. From the perspective of history, the legitimacy had different bases, and may be rooted in the people’s life habit and may also be rooted in some leaders’ charisma; however, in the modern “disenchantment” society, the original solid basis begins to shake. The formalistic model of rule of law relieves this uncertainty to a certain extent and sets the whole rule base on a stable, neutral and autonomous political system, and many evaluation criteria of the people on the original rule also have been reduced to the single standard whether conforms to the legality, and the “shackles” which are called by the people stabilize the operation of the whole

system to a great extent. However, this apparent stability has not completely solved the fundamental problem of legitimacy, and people's recognition of rule has been changed to the compliance of rules, which means that people have changed the way of asking questions, but they have changed the "shackle" that the people feel in fact. In order to break through the cold "rational cage", people are looking for and building a variety of standards with the substantive significance as the guideline for action again. The rise of the substantive rule of law in a fundamental sense is not counted as a waiver of freedom rather than fighting for freedom, and only because of the era of welfare state, people are more dependent on the organized body, and policy choices with specific value tendencies can bring more union between people than the neutral political system, and in other words, under this expectation for union and getting rid of loneliness, legitimacy has found the foundation again.

However, this is not the end of the story or the "end of history" which is said by Fukuyama. Traditional and modern problems are intertwined and represented with a new look. As a matter of fact, at present, we are unable to grasp this "mobile society", and are more unable to build a complete set of scenarios to cope with future scenarios, and even the situation in which we are in has lost our ability to put forward a more profound question about legitimacy. Therefore, the study on the two models of rule of law in this paper only arouses our attention to the understanding of the background of the problem of modern public law, perspective and legitimacy and the concern of the legitimacy crisis to provide the "planning"

in a sense for further studying these new problems and even more importantly, hope to arouse the noble sense of mission and sense of responsibility in the mind of the scholars engaged in the study.

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