

## How the Rule of Law Connects and Protects Human Rights?

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**Abstract.** The rule of law has become an important fundamental framework for government governance; it helps promote justice, fairness, and individual freedom, which are some rights that are included within the scope of human rights. Nowadays, the rule of law has been regarded as the most effective way to protect human rights, therefore, how the rule of law connects and protects human rights is a discussible issue. This essay will focus on the principles given by Professor Evan Fox-Decent, discuss the connection between the rule of law and human rights protection, and discuss how the rule of law can protect human rights.

**Keywords:** the rule of law, human rights protection.

### 1. Introduction

The rule of law is a principle outlined by Ancient Greek philosopher Aristotle, which states that all people and organizations within a country, state or community should be regulated under the same set of laws, no one is above the law, the rule applies equally to everyone in the society, including individuals, corporations, and government.<sup>1</sup> Since then, many philosophers have published their own ideas of the rule of law; those principles constitute the content of the rule of law. Nowadays, many countries claim that they govern the country under the principle of the rule of law, and the rule of law has become the fundamental principle that underpins the governance of democratic countries. As the rule of law limits the powers of governments, corporations and individuals, it protects people from unlawful exercise of power, provides people with a predictable and ordered as promotes justice, fairness and individual freedom.<sup>2</sup> Hence, the relationship between the rule of law and human rights protection is an issue that worth discussing. Human rights is one of the key issues in international affairs, the promotion and protection of fundamental human rights is one of the main purposes of the UN.<sup>3</sup> In 1948, the UN enacted the Universal Declaration of Human Rights (UDHR), the UDHR consists of 30 articles of individual's basic rights

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<sup>1</sup> National Geographic, *Rule of Law*, <<https://education.nationalgeographic.org/resource/rule-law>>.

<sup>2</sup> Australian Constitution Centre, *Principle 2: The Rule of Law*, <<http://www.australianconstitutioncentre.org.au/the-rule-of-law.html>>.

<sup>3</sup> United Nations, *Protect Human Rights*, <<https://www.un.org/en/our-work/protect-human-rights>>.

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and fundamental freedoms, recognized that all humans are born free and equal in dignity and rights.<sup>4</sup> The Preamble of the UDHR states that, “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.<sup>5</sup> In addition, during a UN High Level Debate on ‘Human Rights at the Centre of the Global Agenda’, IDLO’s Director General, Irene Khan said, “Human rights and rule of law have to go hand in hand. Without rule of law, human rights are paper promises and without human rights, rule of law becomes rule by law and a system for repression.”<sup>6</sup> It seems that there are some connections between the rule of law and human rights, the further development of human rights protection should be supported by the rule of law. The UN states, the rule of law and human rights are two sides of the same principle, the freedom to live in dignity, so there is an indivisible and intrinsic relationship between the rule of law and human rights.<sup>7</sup> As the rule of law requires the exercise of power must follow particular rules, it guarantees the protection of human rights.<sup>8</sup> This essay will discuss the connection between the rule of law and human rights base on Fox-Decent’s discussion, and how the rule of law protects human rights by safeguarding individual liberty and judicial independence.

### 2. Connection between the rule of law and human rights

Professor Evan Fox-Decent discusses the connection between the rule of law and human rights in his essay *Is the Rule of Law Really Indifferent to Human Rights?*[1] On one hand, according to Joseph Raz, who was a famous Israeli legal philosopher, he stated that the rule of law is just one of the virtues of a legal system, it is not to “be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.” He called the view “no-rights thesis”, raised that the rule of law is indifferent to human rights, gross violations of human rights can compatible with the rule of law.[2] Also, Murphy agreed Raz’s idea that she states the function of the rule of law is to guide behavior, respecting rights is not required for guiding behavior.[3] Her idea is the law can also guide the behavior of slavery when guiding the conduct of a free person. However, Fox-Decent against Raz and Murphy’s idea, he states that the “no-rights thesis” is false, human rights are justifiable in accordance with human dignity, the rule of law affirms human dignity, therefore is an affirmation of human rights. In his essay, Fox-Decent discusses the connection between the rule of law and human rights according to Lon L. Fuller’s principles. Fuller was an American legal philosopher who developed the principle of the internal morality of law, his principle has been recognized by most of legal philosophers as the significant component of the content of the rule of law. Fox-Decent discusses Fuller’s concept in two main aspects, the first aspect is the fiduciary relationship of reciprocity between the states and its people, the second aspect is the recognition of human dignity in the internal morality of law. [1]

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<sup>4</sup> Ibid.

<sup>5</sup> *Universal Declaration of Human Rights*, <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

<sup>6</sup> IDLO, *Without Rule of Law, Human Rights are Paper Promise*,

<<https://www.idlo.int/fr/news/highlights/without-rule-law-human-rights-are-paper-promises>>.

<sup>7</sup> United Nations and the Rule of Law, *Rule of Law and Human Rights*, <<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>>.

<sup>8</sup> Ibid.

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Firstly, Fox-Decent discusses the fiduciary relationship of reciprocity between the states and its people. According to Fuller, the internal morality of law sets limitations and establish a framework for legislation to observe, build a structure that provides a measure of moral authority for law makers, which restricts the legislative power to avoid the law becomes merely a set of rules enforced compulsory by government's power. [1] Thus, the principle of the internal morality of law give rise to legal obligations based on an existence of legal relationship. Fox-Decent states there is fiduciary relationships between the state and each person subject to its powers, the relationship supplies the content of the rule of law that constitutes and constrains the state's authority to enact and enforce law, and the basis of the state's authority is lies on the trust from public as free and self-determining people. As the state exercise the authority when it exercises the power in the way that respect the fiduciary relationship, the state's affirmation of the rule of law and its fiduciary obligation gives the public a reason to fulfil legal obligations.[4] Also, as a fiduciary of its people, the state can only acts with legal authority if it respects the fiduciary obligations of the rule of law. Therefore, the institutional role of public authorities to individual freedom is by a sense of trusteeship, the state owes an obligation to comply with the rule of law, also owes public fiduciary obligations to its people.[1] According to this fiduciary relationship, the state can only exercise its legal authority that respect the rule of law.

Then, the second aspect is the recognition of human dignity in the principle of internal morality of law. In the book *The Morality of Law*, Fuller identifies eight conditions for legal rules to meet in order to be recognized as true laws. The eight requirements are: (1) generality, a legal system must be sufficiently general to achieve general rules; (2) promulgation, the law must be publicly accessible; (3) prospectivity, the law must be prospective generally; (4) clarity, the law must be understandable by people clearly; (5) compatibility, the law must be compatible with other laws; (6) possibility, the law should not ask the impossible; (7) constancy, the law should not be changed frequently, it must be constant; and (8) congruence, there should be congruence between what written statute declare and how it actually administered. These principles constitute Fuller's principle of internal morality of law. Fuller states that the commitment to the internal morality of law entails a commitment to the idea that the law recognizes people as free, self-determining and responsible agents that own the inherent human dignity because of their autonomy.[5,6] For example, in a contract case, the court must decide whether the party has the intention to be bound by the contract terms, if there is an intention, the party is responsible for the breach of contract terms. So, in this case, people are free to choose whether to enter the agreement or not, and be held responsible for their breach, people are free and responsible under the legal system, the human dignity and autonomy is protected by the rules that the court cannot punish the party if the party does not intend to be bound by the contract terms. Similarly, in a tort case, the issue is whether there is an actual injury caused by the defendant to the plaintiff, if there is a damage, the defendant should take responsibility for his or her fault. Thus, in this case, people are free to choose between lawful and unlawful conduct and be held responsible for the unlawful conduct, the human dignity and autonomy is also be protected as they will only be punished for their wrongdoing.[1] Therefore, for Fuller, both the coherence and the moral authority of law are based on the idea that the person is the free and responsible center of action, this concept is required for achieve justice, law of freedom and dignity is the main distinguish of law from other rules. The term "self-determined" reflects a liberal conception of autonomy, which states that

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individuals should have freedom of choice in a congenial environment of rules and decisions structured by the internal morality of law.[7] The environment means the opportunity to participate in decision-making processes, the internal morality of law guarantees the opportunity for people to participate in the decision-making processes of a public institution. Thus, the rule of law recognized the dignity of humans by respecting people as free, self-determining and responsible agents, as well as struct the a congenial environment for decision-making. Law can guide people's behavior because people have cognitive and volitional capacities that permit them to understand and follow the rules [1].

To sum up, there is a fiduciary relationship between the states and individuals, in which the states have obligations to follow the rule of law when exercising its legal authority. As the principle of internal morality of law ensures respect for the free and self-determination nature of people, Fuller's idea is consistent with the fundamental human rights of freedom and the right of self-determination in international human rights law. Therefore, there is a connection between the rule of law and human rights, the human dignity and human rights recognized in the principle of internal morality of law overlaps the freedom and rights affirmed in international human rights law.

### **3. How the rule of law protects human rights**

#### **3.1 The rule of law protects human rights by safeguarding individual liberty**

The content of human rights has been defined in many international human rights treaties, the Article 1 of the UDHR states, "all human beings are born free and equal in dignity and rights",<sup>9</sup> which identifies freedom and equality as two fundamental human rights. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states, "everyone has the right to liberty and security of person",<sup>10</sup> which also identifies the right to individual liberty. The importance of the rule of law for protecting human rights was always mentioned in international human rights law, such as the Preamble of the UDHR and other declarations made by the UN Human Rights Office, the main idea is the rule of law can help prevent violations of human rights and protect human rights.<sup>11</sup> According to Fox-Decent's view based on Fuller's principle of the internal morality of law and the idea of Hayek, the rule of law can protect human rights as a safeguard of personal liberty.

According to Fuller's eight conditions of internal morality of law, a true law must be general, promulgated, prospective, clear, non-contradictory, possible, constant and congruence.[3] Fox-Decent defines freedom as a mere cognitive and volitional capacity, people can engage in purposive action, including a possibility of act in accordance with the law. However, to achieve the purposive action, people must have some knowledge of the law, otherwise the action of obedience of the law may not be the result of the original purpose to follow the rule but an accident. As people is recognized as free and responsible agents under the rule of law, the law must be public and accessible, so that the person is freely to choose the actions with the knowledge of the result of his or her actions, as well

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<sup>9</sup> *Universal Declaration of Human Rights*, <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

<sup>10</sup> *International Covenant on Civil and Political Rights*, <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

<sup>11</sup> *Strengthening the rule of law and accountability for human rights violations*, <<https://www.ohchr.org/en/about-us/what-we-do/our-roadmap/strengthening-rule-law-and-accountability-human-rights-violations>>

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as taking the responsibilities of these actions. The capacity of people to engage purposive actions means that the person can choose to obey or disobey the law, but the capacity only establish when the person has the knowledge of a law that is public and knowable to he or her. If the law does not meet the requirement of publicity, the law violates human dignity as a free and self-determining person because it deprives the person's ability to make the choice. In addition, the principle of nonretroactivity, clarity, consistency, possibility and constancy all respect the right of self-determination of people, that the law can only impose obligations on the person within the scope of the person's capacity of self-determine the purposive action.[1] To sum up, in Fox-Decent's idea, the principle of internal morality of law affirms people's capacity to self-determine the purposive action, which protects the human right of self-determination.

Furthermore, in F.A. Hayek's book *Constitution of Liberty*, he states that the rule of law can be the safeguard of individual liberty, which I think, is a form of protection of human rights of freedom. Hayek defines freedom as an absence of coercion. The violations of human rights always occur when the government abuse power to coerce people, under the coercion, people are forced to act under the government's order but not act on his or her own will, so, there is an absence of freedom of choice under the coercion. When the rule of law restricts the government's abuse of power, people have freedom of choice for their own conducts. Firstly, under the rule of law, the law must be known and certain, the result of breaking the rules is foreseeable, so people can predict the outcome of their conducts based on their knowledges, as well as determine the responsibilities, which provides a space for people to plan their actions under the current law freely. Then, the principle of generality requires the law under the rule of law must be a general rule that recognized by the society, the law must be a general rule that applies universal to anyone equally but not targeted to specific group of people. In this stage, the government cannot abuse its power because of the requirement of generality of the rules, government can only exercise its power when there is reasonable and appropriate to exercise the power under the general rules. According to these conditions, all the rules or laws based on the principle of rule of law can be regarded as a rule to promote the social order rather than an abuse of power, these rules protect people's freedom of choice for their own conducts, as well as protect human rights by preventing the abuse of government power. Moreover, equality is one of the fundamental human rights, under the rule of law, all rules or regulations apply equally to everyone, including individuals, corporations and governments, in this stage, people are treated equally regardless of identities, which ensures the human rights of equality. Hayek states, the individual liberty is a freedom under the law, people have the freedom of choice for their own conducts at the same time as following the rules, the law is a general rule applies to anyone in the society universally and equally, the main purpose of the rule is to maintain the social order but not as a tool for government to abuse power. The rule of law helps establish a society that free from coercion, so people can act under their own wills, which achieve the freedom of choice for their own conducts. In addition, Hayek also states that the rule of law safeguards fundamental human rights and civil liberties, he states that the freedom of expression, freedom of religion, freedom of association and assembly, as well as the right to private property is essential rights for people and cannot remain effective without the rule of law.[8][9] In words, according to Hayek's idea, the rule of law protects human rights by limits government's power and secures the personal liberty.

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To sum up, Fox-Decent states that the rule of law ensures people's freedom to self-determine their purposive action, which is a protection of human rights of self-determination. Hayek states that the rule of law can guarantee the individual liberty by limiting the government's power, and the fundamental human rights must be protected by the rule of law. Both concepts affirm the value of rule of law in protecting human rights, people's freedom and fundamental rights can be protected effectively under the rule of law.

### 3.2. The rule of law protects human rights by judicial independence

The UDHR Article 10 states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."<sup>12</sup> Moreover, the right of access to justice is defined in Article 14 of the ICCPR, which states that all person shall have the right to a fair trial.<sup>13</sup> According to the 2021 World Justice Project Rule of Law Index, which the scores are determined through the elements of constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice, it could be found that a country adherence to the rule of law set more constraints on government powers than a country that less adherence to the rule of law.<sup>14</sup> Alexander Hamilton was one of the founding fathers of the United States, he developed the idea of judicial independence that the independence of the courts of justice is essential to protect people's rights and privileges stated in the Constitution, as well as prevent the executive and legislative to violate those rights, it is the foundation of the rule of law and democracy.[10] Under the independent judicial system, the judiciary can safeguard people's rights and freedoms through ensuring the equal protection for all people.[11] The rule of law limits the powers of the government under the principle of the separation of powers, a state's government has been divided into three branches, the legislature, the executive and the judiciary.<sup>15</sup> An independent and impartial judiciary can ensure the judicial decisions are made impartially without the influence of other branches, as well as establish the public confidence of access to justice.<sup>16</sup> Hayek states that, according to the separation of powers, the system of making law and the system of exercise law are operate separately.[8] For the legislature branch, when making laws, the parliament only consider whether the law is general and appropriate for maintaining social order under the current situation, legislators cannot predict the result of breaking the rules as the legislators do not have the authority to make judicial decisions. So, the law is not made for fulfil the political requirements of the government, but for a better social order. For the judiciary branch, the court make impartial decisions case by case only based on the existing law but not the government policy, decisions will be made by merely consider the meaning of the law and the current fact that the person breach the rules. In this stage,

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<sup>12</sup> *Universal Declaration of Human Rights*, <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

<sup>13</sup> *International Covenant on Civil and Political Rights*, <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

<sup>14</sup> World Justice Project, *WJP Rule of Law Index 2021*, <<https://worldjusticeproject.org/rule-of-law-index/global/2021/>>.

<sup>15</sup> Parliamentary Education Office, *Rule of Law*, <<https://peo.gov.au/understand-our-parliament/how-parliament-works/system-of-government/rule-of-law/>>.

<sup>16</sup> Rule of law education center, *Open, Independent and Impartial Judiciary*, <<https://www.ruleoflaw.org.au/principles/independent-judiciary/>>.

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defendant can get independent and impartial judicial decision as the decision is made according to the interpretation of the statute, but not the hidden policy consideration of the legislators. Therefore, the separation of powers prevents the abuse of power by governments, make the exercise of power accountable, people can also challenge the other two branches by bring the action to the court, which ensures people's right of access to justice as possible as it can.

To sum up, the rule of law protects the human rights of access to justice by judicial independency under the principle of separation of powers.

#### 4. Conclusion

In conclusion, the core of the rule of law is to put restrictions on government's exercise of power, protect individual human rights, and prevent human rights from being violated by the state and others. According to Fox-Decent's discussion, the rule of law and human rights are closely connected, human dignity and human rights are recognized in the principle of the rule of law. The protection of human rights are the basic value and fundamental goal of the rule of law, and the rule of law is the fundamental guarantee of human rights, it plays a vital role in protecting and respecting of those freedom and rights. It could be concluded that, without fundamental human rights, there is no true rule of law, without the rule of law, the ideal concept of human rights cannot become reality, only through the confirmation of the law, the human rights can be transformed from obligatory rights to legal rights, and then become real rights that citizens can truly enjoy under the rule of law. The law has great authority under the system of the rule of law, no individual, government or any organization is allowed to have the privilege beyond the law, so, without the rule of law, fundamental human rights such as self-determination, freedom, democracy and equality cannot be fully respected and guaranteed. According to Fox-Decent and Hayek's view, the rule of law protects human rights by safeguard the right of self-determination and individual liberty. According to the principle of separation of powers, the rule of law protects human rights of access to justice by judicial independency. To sum up, the rule of law is closely connected to the human rights and help protects human rights in many ways.

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