

Aleksandra Dzięgielewska

University of Warsaw

Max Planck Institute for Social Law and Social Policy, Munich

e-mail: awdzięgielewska@gmail.com

ORCID: 0000-0002-2438-9466

REDEFINING THE RULE OF LAW: IN SEARCH OF A UNIVERSAL SOCIAL DIMENSION

Abstract

Bearing in mind that there exists no universally accepted definition of the rule of law, this paper sets out to identify its commonly agreed core, and to expand it by adding substantive elements. While the core is not controversial, the second part of the rule of law framework, comprising social welfare rights, essentially aims to revisit classical accounts of the rule of law. The analysis involves the frequently ignored social dimension of the rule of law, defending the necessity of its translation into a substantive element of the definition. Some general arguments are offered explaining why social rights protection should be included in the definition of the rule of law.

KEYWORDS

rule of law, rule of law definition, social rights, social welfare

SŁOWA KLUCZOWE

praworządność, państwo prawa, prawa socjalne, prawa społeczno-ekonomiczne, welfare

1. INTRODUCTION

It has become commonly accepted that the rule of law constitutes a central value of modern constitutional democracy¹. Its upholding counts among the main objectives of liberal governments worldwide². Despite a large consensus as to the rule of law's leading role in modern constitutional design, there exists no universally accepted definition thereof³. Regardless of numerous scholarly efforts to explain the phenomenon of the rule of law, its content remains highly disputed. The rule of law carries different meanings, depending on the social, legal, and cultural contexts. It is addressed as a value, guiding principle, standard, objective, or political ideal. Some scholars assert that there are so many viewpoints as to what the rule of law entails, that it has become a political slogan rather than a common standard⁴. According to Martin Krygier, leading scholar of the rule of law phenomenon, the notion now means so many different things to so many different people, and is so essentially contested, that it is hard to say what it implies⁵.

The idea behind this paper assumes – on the contrary – that the complexity of the rule of law constitutes its strength, not a shortcoming, and the clue to grasping the rule of law's objective lays in acknowledging this intricacy. What follows is that only isolating the rule of law's various – both well-established and newly emerging – features will enable to grasp it and determine the stage of its advancement in any given state. The rule of law's multidimensionality also contributes to its endurance as a central constitutional objective. For even if we agree that most of the democratic states worldwide meet the formal requirements of the thinnest rule of law conceptions, the evolving nature of the phenomenon repeatedly supplements it with new content, elongating the process of arriving at a satisfactory level of advancement. The process leading towards the rule of law is thus neither about reaching some ultimate rule of law-related goal, nor about an external assessment of the stage of its implementation. At the heart of the rule of law ideal there is rather the struggle for constant moving forward along the rule of law continuum and the awareness that the aspects requiring improvement will prevail.

¹ M. Rosenfeld, *The rule of law and legitimacy of constitutional democracy*, Cardozo Law School Working Paper 2001, No. 36, p. 2.

² F.K. Upham, *The illusory promise of the rule of law*, (in:) A. Sajó (ed.), *Human rights with modesty: The problem of universalism*, Leiden, Boston 2004, p. 282.

³ A. Bedner, *The promise of a thick view*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018, p. 34.

⁴ D.M. Beatty, *Law's golden rule*, (in:) G. Palombella, N. Walker (eds.), *Relocating the rule of law*, 2009, p. 99.

⁵ M. Krygier, A. Winchester, *Arbitrary power and the ideal of the rule of law*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 75; R. Fallon, *The rule of law as a concept in constitutional discourse*, "Columbia Law Review" 2007, No. 1, p. 6.

Following the idea of delineating the features of the modern rule of law, the main objective of this paper is to identify its consensual core. Further on, the latter will be expanded by substantive elements into a thick definition of the rule of law⁶. While the introduction of the core of the rule of law does not seem to be controversial, the second part of the rule of law framework, which in this paper comprises social welfare rights, essentially aims to revisit classical accounts of the rule of law and substitute the most common substantive requirements with a request for social rights protection⁷. Such expansion of the notion shall uncover its modern meaning by emphasizing an aspiration towards a more socially aware and inclusive state.

As far as the structure of the paper is concerned, the main argument is divided in two parts – firstly, the core of the rule of law will be identified, and further on, two substantive elements will be added to the definition. The elements belonging to the core will be individually commented on, although the main focus of the paper lays elsewhere. The emphasis will be placed on the transformative elements surrounding the core. The second part of the argument will assert not only that modern liberal democracies⁸ should advocate the substantive rule of law accounts by increasing human rights protection, but also that a considerable shift in states' responsibility to resolve social issues is discernible and calls for the recognition of a basic social protection as part of the rule of law⁹. It should be underlined here that the paper does not comment on the precise design of such social welfare schemes, but rather focuses on delineating why they are needed.

To understand why the present analysis refers to both the rule of law's core and its substantive parts, it is crucial to note that all the well-established rule of law definitions are only seemingly opposing each other. They are all fluid in nature – a clear demarcation line cannot be drawn between the thin and thick rule of law accounts. These viewpoints are not contradictory, as they often overlap with one another, for instance because every thick conception needs the foundations from a thin definition¹⁰. The same applies to formal, substantive, procedural,

⁶ The formulation of the formal versus substantive classification dates back to the 19th century and is also referred to as the “thin” and “thick” rule of law. K.-P. Sommermann, *Staatsziele und Staatszielbestimmungen*, Tübingen 1997, p. 223; B. Tamanaha, *On the rule of law: History, politics, theory*, Cambridge 2004, p. 91; G. Napolitano, *The rule of law* (in: P. Cane *et al.* (eds.), *The Oxford handbook of comparative administrative law*, Oxford 2020, p. 422.

⁷ A. Bedner, *An elementary approach to the rule of law*, “Hague Journal on the Rule of Law” 2010, No. 2, p. 65.

⁸ Mindful of the fact, that the rule of law does not require any particular form of government, and especially its thin accounts can be adopted in nondemocratic regimes, definition presented in this paper leaves such cases aside, and contributes to the scholarly debate on how to enhance the rule of law in liberal democracies.

⁹ N.W. Barber, *Must legalistic conceptions of the rule of law have a social dimension?*, “Ratio Juris” 2004, Vol. 17, No. 4, p. 483.

¹⁰ B. Tamanaha, *A concise guide to the rule of law*, (in: N. Walker, G. Palombella (eds.), *Florence Workshop on the Rule of Law*, 2007, p. 15.

and institutional accounts – they put emphasis on different aspects of national frameworks as constituting the main focus of rule of law. They cannot, however, be considered mutually exclusive. While the accents can be spread out differently in each of these accounts, some core elements need to be recognized in all of them. This is also discernible in the rule of law understanding elaborated in this paper. As the definition is divided into two separate chunks – the core and the substantive features – it allows to perceive the core as a self-sufficient thin definition, while the surrounding afforded by substantive elements makes up a thick rule of law account.

As much as the argument suggested in this paper strives to deliver a universal contribution to the study of the rule of law as a worldwide phenomenon, it cannot ignore the significant differences between local meanings of the notion. For instance, the American rule of law ideal is by no means to be confused with the German *Rechtsstaat* serving as a yardstick for most of the European rule of law understandings. Mindful of these divergent legal, cultural, and social capacities, the author is aware that the presented substantive account referring to social rights protection will prove most suitable for the European liberal democratic frameworks, traditionally devoted to providing social welfare schemes to their populations. Nevertheless, the definition developed in this paper was sketched out with an attempt to operate above the local differences of the rule of law meaning.

Finally, mindful that the proposed formal requirements do not add much controversy to the scholarly rule of law debate, an analytical advantage of the paper should be discerned in drawing attention to the social aspect. With that in mind, the provided analysis does not comment in detail on the content of individual rule of law requirements which vary substantially from country to country. Instead, it focuses on looking into the frequently ignored social dimension of the rule of law, with an aim to maintain the necessity of its translation into substantive elements of the rule of law definition. The emphasis is placed on the process of getting to the substantive notion as a go-to rule of law conception, one that is universally intelligible, regardless of where it was applied.

2. THE CORE OF THE RULE OF LAW

Similarly to the well-embedded, thin rule of law definitions, the core offered in this paper will focus on legal forms rather than substantive content¹¹. Its main elements were selected and termed in such a manner, as to firstly – reach the high-

¹¹ M. Krygier, *Four puzzles about the rule of law: Why, what, where? And who cares?*, (in:) J.E. Fleming (ed.), *Getting to the rule of law*, New York 2011, p. 67; B. Tamanaha, *A Concise guide...*, p. 13.

est possible degree of general consensus, and secondly – be universally understandable, without need for additional clarifications. The sequence of the rule of law's core features reflects the already mentioned metaphorical process of moving along the rule of law continuum – from the thinnest to the more substantive rule of law. More demanding elements will be added on top of the most basic ones creating the core, whereas the core itself will be of sufficient substance to establish a thin rule of law notion.

Even though the selection of the essentials of the rule of law is not unequivocal – there is no straightforward, commonly accepted line leading from the formal to substantive accounts – there seems to be a tentative consensus as to what constitutes the foundations of the rule of law¹². Drawing on the various, well-established notions of the rule of law, the universally accepted core of the concept can suggest to contain the following elements:

1. Principle of legality,
2. Legal certainty,
3. Prevention of abuse of power,
4. Access to justice

at the heart of the rule of law ideal. Turning straight to the content of the individual features, the principle of legality, as understood in this paper, requires firstly that public authorities act on the basis of and in accordance with the law. In that sense, legality constitutes the most fundamental constraint on the state power. It further means that state bodies need to have an authorization to act and that they will act within the limits of the powers that have been conferred upon them¹³. The second part of the principle of legality refers to the quality of the law-making procedures, which need to achieve a certain standard. It is asserted that the rule of law-conform lawmaking should be clear, accountable, inclusive, and democratic¹⁴. The draft laws should thus be publicly debated, and the legislature should engage in the social dialogue with various actors prior to adopting the laws. The expedited law-making procedures should in principle be prohibited (except for the state of emergency), to ensure sufficient time for deliberation and to avoid the adoption of erroneous laws which serve the interests of particular groups within the society.

The second element of the core – legal certainty – in general terms requires that the law must provide those subject to it with the ability to regulate their conduct¹⁵. It firstly implies the qualities concerning the form of law, which should be accessible (published before entering into force), foreseeable in terms of its effects (intelligible), stable (not often changed, and if so, the citizens ought to know in

¹² A. Bedner, *The promise of...*, p. 36; A. Bedner, *An elementary approach...*, p. 50.

¹³ Venice Commission of the Council of Europe, *The rule of law checklist*, 2016, p. 11.

¹⁴ G. Napolitano, *op. cit.*, p. 431.

¹⁵ C. May, *The centrality of predictability to the rule of law*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 99.

advance that the laws will be amended) and consistent (both internally and as a part of the larger field of law)¹⁶. Another aspect of the legal certainty is the protection of legitimate expectations. It requires that undertakings or promises held out by the state to individuals concerning their procedural or substantive interests should in general be honored¹⁷. The prohibition of retroactivity of the laws is also an element of legal certainty, although retroactive action improving the situation of an individual can be allowed under certain circumstances¹⁸. The American scholarship offers an alternative denomination for these requirements – all elements of legal certainty belonging to the core of the rule of law, as understood in this paper, constitute what Lon Fuller referred to as the inner morality of law¹⁹.

The third element making up the core of the rule of law definition as presented in this paper, is the prohibition of the abuse of power. It contains two further requirements, with respect to discretionary and arbitrary power. It should be noted at this point that the prohibition of arbitrariness has been constituting the central idea of the rule of law discourse from its beginnings and as such should also be considered of primary relevance to the understanding of the core offered in this paper²⁰. While the exercise of discretionary power is by itself admissible, there need to be clear provisions guiding its application, as well as the mechanisms to prevent, correct, and sanction the abuse of such power. A clear demarcation line between an admissible discretion and prohibited abuse must be set out by law²¹. Public authorities are required to give adequate reasons for their decisions, especially those directly affecting individuals, to exclude that they were taken in an arbitrary manner²².

The last feature of the core is the access to justice²³. The term encapsulates a wide range of legal provisions regarding institutional and procedural aspects, that can be merely enumerated here. Firstly, it should be noted that the contemporary rule of law requires not only a simple access to any justice, but rather to quality justice, referring mostly to the qualities of judicial independence and impartiality, as well as the effectiveness of access²⁴. Another important aspect is the right to fair trial with a public hearing and, when necessary, free legal and financial aid. As part of it, access to court must be effective and not merely

¹⁶ J. Møller, *The advantages of a thin view*, (in:) C. May, A. Winchester (eds.), *op. cit.*, pp. 28, 37.

¹⁷ A. Magen, L. Pech, *The rule of law and the European Union*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 240.

¹⁸ B. Tamanaha, *On the rule of law...*, p. 93.

¹⁹ L. Fuller, *The morality of law*, New Haven 1969; T. Ginsburg, *Difficulties with measuring the rule of law*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 50; C. Walker, *The rule of law and terrorism*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 456.

²⁰ B. Tamanaha, *On the rule of law...*, p. 97; M. Krygier, A. Winchester, *op. cit.*, p. 67.

²¹ European Commission for Democracy Through Law, Report on the Rule of Law, 2011, p. 9.

²² G. Napolitano, *op. cit.*, p. 432.

²³ J. Raz, *The authority of law: Essays on law and morality*, Oxford 1979, p. 217.

²⁴ T. Ginsburg, *op. cit.*, p. 50.

illusory – there needs to be an easy and approachable way of initiating legal procedures by individuals and the formal requirements, as well as court fees, must remain reasonable. Overall, it can be stated that the principle of effectiveness constitutes an overarching ideal for access to justice, consolidating various aspects of right to judicial protection – access, legal and financial aid, right to appeal, and execution of judicial decision²⁵.

It should be noted that the above mixed nature of various aspects of the rule of law is evident when looking at the core suggested in this paper. It is possible to maintain that the described core has a two-fold formal and institutional nature, where principle of legality, legal certainty, and prevention of the abuse of power would constitute the formal aspect, while the access to justice rather constitutes a guarantee of institutional character. Already at first glimpse, however, some features can be observed making this classification rather vague (e.g. access to justice and requirements for the lawmaking attract many procedural requirements). Nevertheless, the suggested core in its entirety remains mainly formal, making use of the classic, thin rule of law visions. Lastly, it is worth pointing out that many states observe far more formal and institutional requirements than those indicated above. With an aim, however, to bring up only the most essential elements of the rule of law, able to satisfy the requirement of universality, a strict reductionist vision was employed, that allowed for the core to only include four basic features.

3. SUBSTANTIVE FEATURES OF THE RULE OF LAW: TOWARDS A SOCIALLY ORIENTED STATE

Having identified the foundation able to meet the minimum requirements of the formal rule of law conception, we can now move on to the substantive elements reflecting the universal social dimension of the rule of law²⁶. Constant development of modern liberal democracies obliges the states to reach out beyond the thin rule of law and shift towards the morally ambitious, thick rule of law accounts. The essential role of the substantive features making up the present rule of law definition is to enclose the previously established core within an “enabling environment”²⁷, that would allow for an unrestrained advancement of both its constitutive and supplementary elements. Such rule of law design fosters the process of moving along the above-mentioned proverbial rule of law continuum. Mind-

²⁵ A. Cassatella, *Effektivität und Effizienz des Rechtsschutzes*, (in:) A. von Bogdandy, P.M. Huber, L. Marcusson (eds.), *Handbuch Ius Publicum Europaeum IX*, 2021, p. 543.

²⁶ N.W. Barber, *Must legalistic...*, p. 483.

²⁷ Venice Commission, *op. cit.*, p. 9.

ful of the fundamental differences between national governmental frameworks and their institutional capacities, and with an aim to prevent the overloading of the definition, the present rule of law conception includes only two substantive requirements:

1. Principle of equality and non-discrimination,
2. Protection of human rights, including basic social rights.

It was noted before, that the analysis will not engage with the content of the substantive rule of law features but will focus on the process of getting to the thick notion as the go-to rule of law conception. Thus, before an overview of the meaning of both requirements will be offered, their inclusion in the definition of the rule of law deserves an in-depth explanation. Against the backdrop of the main argument advanced in this paper, the reasons behind the incorporation of substantive features are equally important as their content. This background is reflective of why the various social circumstances should inform the substance of the rule of law. It is also needed to note that the rule of law has capacity, or even natural susceptibility, allowing its scope to expand, without obscuring its core. The main objectives of this introductory remarks are, firstly to show that the substantive rule of law accounts, inclusive of human rights protection, should become the notions of choice for modern states²⁸. Secondly, to assert that the gravity of the worldwide social dilemmas has grown to such an extent that facing them by making social rights enforcement part of the broader human rights protection, has made it to the substantive rule of law accounts²⁹.

The content of the rule of law as a constantly evolving legal phenomenon is not indifferent to development of liberal democracy's various dimensions. The socio-economic and cultural dynamics have forced the contemporary liberal democracies to take on more responsibilities. Since 2015, Europe has been confronted with massive migration. The issue has been further escalating since the Russian attack on Ukraine forced the European states to help the Ukrainian refugees. These problems, having implications for the global economy, translate into individual social hardships – rising inequalities, disparities between the rich and the poor, access to quality healthcare, and right to housing call for rearrangements in the states' social responsibility³⁰.

The regulatory gap in social realm and insufficient protection of the social minima have been noticed by the populist governments in Central and East-

²⁸ Although no precise social welfare scheme is asserted, the consensual catalogue of social rights to become part of the present rule of law definition could correspond to this included in the Universal Declaration of Human Rights, Articles 22–26. They stipulate the right to social security, right to work, right to an adequate standard of living, and right to education.

²⁹ C. May, *The rule of law: What is it and why is it 'constantly on people's lips'*, "Political Studies Review" 2010, Vol. 9, No. 3; A. Bedner, *An elementary approach...*, p. 63.

³⁰ A. Loretoni, *The rule of law and feminism: The dilemma of differences*, (in:) C. May, A. Winchester (eds.), *op. cit.*, p. 339; M. Krygier, A. Winchester, *op. cit.*, p. 83.

ern Europe (the most prominent examples would be Poland and Hungary) and allowed them to entrench their rule by providing robust social spending, while deteriorating the rule of law³¹. The current reality seems to confirm the concerns formulated by scholars in the context of the Polish transition period, that without an adequate safety net, or simply because of growing economic inequality, increasing social discontent may permit populist or totalitarian groups to win the day³². Perhaps this mechanism was noticed in other countries, as a minor trend towards social welfare legislation is discernible even in the United States – the country which is known for its self-restraint towards social welfare³³. Such issues as the adoption of the paid maternity leave³⁴, as well as the currently debated partial cancellation of the student debts³⁵, have been dividing the society. Perhaps shifting the emphasis from legislating social rights to acknowledging social needs and thus perceiving rights as one of the frameworks to tackle social issues, seems a more suitable approach for countries like the United States³⁶.

The inclusion of these substantive elements as part of the rule of law definition rests on a premise that, firstly, moral dimension is inherent to the concept of the rule of law, and secondly, that there should be some element of aspiration included in the rule of law notion. If we confined ourselves to advocating a mere thin vision of the rule of law, with no inherent moral values, requiring only some level of formal legality and procedural strictness, the rule of law could be instrumentally abused³⁷. We could as well conclude that it suffices to for the country to be democratic to fulfil these requirements³⁸. From such perspective, further advocacy for the rule of law seems pointless. This is precisely why, to enable the rule of law ideal to endure, its evolving nature and complexity should be perceived as an advantage incentivizing redefinition of its substantive aspects.

Thus, demands regarding social rights protection should be considered against the backdrop of the prevailing circumstances – and the rule of as a liv-

³¹ A. Magen, L. Pech, *op. cit.*, p. 245.

³² A. Sajó, *Socialist welfare schemes and Constitutional Adjudication in Hungary*, (in:) J. Přibáň, J. Young (eds.), *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the postcommunist countries*, Aldershot 1999, p. 162.

³³ W. Osiatyński, *Human rights and their limits*, Cambridge 2009, p. 113.

³⁴ C.C. Miller, *The world 'Has found a way to do this': The U.S. lags on paid leave*, "The New York Times" 25 October 2021, <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html> (accessed 14.03.2023).

³⁵ The White House, *Fact sheet: President Biden announces student loan relief for borrowers who need it most*, 24 August 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/> (accessed 14.03.2023).

³⁶ W. Osiatyński, *Human rights...*, p. 113.

³⁷ M. McIlwaine, *Denying human rights, upholding the rule of law: A critique of Joseph Raz's approach to the rule of law*, "The Western Australian Jurist" 2016, Vol. 7, p. 402.

³⁸ M. Krygier, *Rule of law (and Rechtsstaat)*, (in:) *International Encyclopedia of the Social & Behavioral Sciences*, 2015, p. 783.

ing instrument, which requires adjustments. Scholars assert that underlying such view is the argument of the imaginative social contract underpinning the creation of liberal communities. It is a “continuing conception” which develops with time to embrace the needs of the people³⁹. With that in mind, the mere fact that some rights or entitlements were not considered indispensable in the past, does not mean that their protection is not required nowadays. What follows is that including the protection of basic welfare rights as part of the rule of law does not “burden” the scope of the rule of law⁴⁰, but rather adds a component that has over time become indispensable due to the changing social and economic circumstances. Scholarship has noted that a more diffused and operational rule of law definition is needed⁴¹. That is where the social component comes to light adding substance to the demands put forward towards the rule of law. And it must be remembered that social rights are considered part of the most elaborate, substantive rule of law accounts, even if such views have not yet made it to the center of the rule of law debate⁴².

Another aspect worth noting is that the incorporation of social rights in the rule of law definition could also be a means of the latter’s rooting and internalization⁴³. Individuals need to be able to get tangible feedback as to why the rule of law is worth upholding⁴⁴. Its outcomes should thus be discernible on the level closest to individuals. This aspect of social engagement is an inextricable element of the rule of law’s development and the Venice Commission’s Rule of Law Checklist referred to it as an “enabling environment”⁴⁵, that is a surrounding in which every member of the society is engaged in the rule of law’s rooting and advancement. It is an environment necessary for the rule of law to flourish⁴⁶. It is interesting to note that from an individual’s perspective the rule of law may demonstrate its coercive side by subjecting citizens to laws with which they oftentimes disagree or which they find oppressive (e.g., tax law)⁴⁷. Protection of social welfare carries

³⁹ L. Henkin, *Economic-social rights as “rights”: A United States perspective*, “Human Rights Law Journal” 1981, Vol. 23, p. 230; W. Osiatyński, *Human rights...*, p. 113.

⁴⁰ D.M. Beatty, *op. cit.*, p. 99.

⁴¹ K. Nicolaidis, R. Kleinfeld, *Rethinking Europe’s “rule of law” and enlargement agenda: The fundamental dilemma*, Sigma Paper 2012, No. 49, p. 15.

⁴² N.W. Barber, *The principles of constitutionalism*, Oxford 2018, p. 116; B.Z. Tamanaha, *On the rule of law...*, p. 91; A. Bedner, *An elementary approach...*, p. 63; N.W. Barber, *Must legalistic...*, p. 474.

⁴³ A. Magen, L. Pech, *op. cit.*, p. 254; A. Sajó, *The new legalism: Law as an instrument of social transformation*, Working Paper for the American Council of Learned Societies Congress on Constitutionalism and the Transition to Democracy in Eastern Europe, 1990, p. 7.

⁴⁴ A. Bedner, *An elementary approach...*, p. 66.

⁴⁵ Venice Commission, *op. cit.*, p. 14.

⁴⁶ P. Blokker, *EU democratic oversight and domestic deviation from the rule of law: Sociological reflections*, (in:) C. Closa, D. Kochenov (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge 2016, p. 250.

⁴⁷ M. Rosenfeld, *op. cit.*, p. 10.

potential to engage with individuals because it affects the sphere of individual rights and obligations. An argument can arise claiming that while it is agreeable that certain basic social welfare rights constitute an important element of liberal democracy, they do not need to explicitly belong to the rule of law concept. While it is generally true, we can counter that without acknowledging social rights as part of the rule of law and recognizing their indispensability, the rule of law will never gain such social authority to elevate the struggle for its maintenance to a matter of joint effort⁴⁸.

Moving on to the content of the two above-mentioned substantive features – the prohibition of discrimination requires that no one is discriminated against on any ground⁴⁹. Any unjustified unequal treatment should be prohibited under the law and there should be an effective protection against discrimination. Next, the requirement of equality referring to law is that the laws should be applied equally to everyone (equality before the law) and that everyone should be subject to the same laws, without creating privileges for certain individuals or groups (equality in law)⁵⁰. Equality in law refers to the lawmaking process and constrains the legislative to adopt law which satisfies the obligation of equal treatment of similar factual situations and subjects. It provides for a rule maintaining that in its content, the law must not be privileging nor discriminating against any groups of citizens⁵¹. Equality before the law concerns equal treatment of equal individuals in the process of application of law⁵².

Protection of human rights is part of many substantive rule of law accounts, which renders their inclusion in the present definition rather uncontroversial⁵³. The opposite is true regarding the incorporation of fundamental social rights. Only the most substantive and elaborate definitions call for the protection of basic human welfare⁵⁴. It is a classic distinction within the human rights scholarship to note that while the individual rights and liberties are primarily marked by their negative dimension providing for a prohibition of interference on behalf of the state, quite opposite is true regarding social human rights⁵⁵. As social welfare is

⁴⁸ A. Bedner, *An elementary approach...*, p. 66.

⁴⁹ S. Baer, *Equality*, (in:) M. Rosenfeld, A. Sajó (eds.), *Oxford handbook of comparative constitutional law*, Oxford 2012, p. 986.

⁵⁰ W. Sadurski, *Giving desert its due: Social justice and legal theory*, Dodrecht, Boston 1985, p. 78.

⁵¹ M. Masternak-Kubiak, *Prawo do równego traktowania*, (in:) B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 121.

⁵² W. Sadurski, *Equality and legitimacy*, Oxford 2008, p. 96; J. Clifford, *Equality*, (in:) D. Shelton (ed.), *The Oxford handbook of international human rights law*, Oxford 2013, p. 427; G. Marshall, *Notes on the rule of equal law*, (in:) J.R. Pennock, J.W. Chapman (eds.), *Equality*, New York 1967, p. 263.

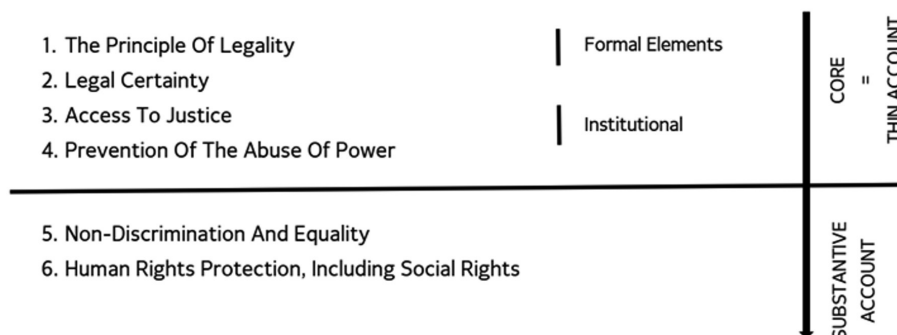
⁵³ A. Bedner, *An elementary approach...*, p. 65.

⁵⁴ N.W. Barber, *The principles...*, p. 116; B.Z. Tamanaha, *On the rule of law...*, p. 91.

⁵⁵ J. Møller, *op. cit.*, p. 22.

legislated in form of positive provisions, its enforcement requires state action and leads to public expenditure. It is, however, important to note, that while many social rights call for a regulatory role of the state, very few social rights demand direct provision of goods and services by the state⁵⁶. It is also true that some negative rights require costly infrastructure – for instance access to justice. An argument based on this divide is thus outdated and can be easily debunked⁵⁷. It should be noted that, as example of some Western European democracies shows⁵⁸, to recognize and enforce social rights does not presuppose their entrenchment in national constitutions. For the constitutionalization of social rights does not determine, by itself, the level of social welfare⁵⁹. This, however, does not affect the possibility of their incorporation as part of the rule of law definition. The present, strongly aspirational, rule of law account has the capacity to encapsulate both human rights protection and social rights protection in its scope.

THE RULE OF LAW



4. CONCLUSIONS

The definition developed in this paper relied on the premise that some of the rule of law attributes are more critical than the others and as such are suitable to

⁵⁶ W. Osiatyński, *Needs-based approach to social and economic rights*, (in:) S. Hertel, L. Minckler (eds.), *Economic rights: Conceptual, measurement and policy issues*, Cambridge 2009, p. 56.

⁵⁷ W. Sadurski, *Myślenie konstytucyjne*, Warszawa 1994, pp. 56–57.

⁵⁸ For example, German constitution does not include any explicit social rights provisions. Social entitlements are inferred from the general notion of *sozialer Rechtsstaat*. See E. Benda, *Der soziale Rechtsstaat*, (in:) E. Benda, W. Maihofer, H.-J. Vogel (eds.), *Handbuch des Verfassungsrechts*. Vol. 1. Berlin 1994, pp. 724 *et. seq.*; B. Banaszak, *System konstytucyjny Niemiec*, Warszawa 2005, pp. 31–32.

⁵⁹ W. Osiatyński, *Human rights...*, p. 127.

make up the commonly accepted core thereof. The paper further maintained that even though the core constitutes an agreeable element of the rule of law, other substantive and morally demanding elements, require to be added to the modern rule of law notion. Their incorporation is necessary due to the constantly changing social, economic, and cultural circumstances, but also because the evolving nature of the rule of law itself demands such adjustments. Only when the formal core is enclosed within the substantive content, the overall surrounding becomes conducive to the rule of law's long-term prevalence and flourishing.

This paper offered thus an incremental rule of law definition – starting from the commonly accepted elements, traditionally belonging to the thin rule of law conceptions, making an argument towards a substantive account. By demonstrating how these substantive features resonate with the most relevant social problems troubling states worldwide, their indispensability for a well-functioning rule of law-based democracy was asserted.

REFERENCES

- Baer S., *Equality*, (in:) M. Rosenfeld, A. Sajó (eds.), *Oxford handbook of comparative constitutional law*, Oxford 2012
- Banaszak B., *System konstytucyjny Niemiec*, Warszawa 2005
- Barber N.W., *Must legalistic conceptions of the rule of law have a social dimension?*, "Ratio Iuris" 2004, Vol. 17, No. 4
- Barber N.W., *The principles of constitutionalism*, Oxford 2018
- Beatty D.M., *Law's golden rule*, (in:) G. Palombella, N. Walker (eds.), *Relocating the rule of law*, Oxford 2009
- Bedner A., *An elementary approach to the rule of law*, "The Hague Journal on the Rule of Law" 2010, No. 2
- Bedner A., *The promise of a thick view*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Benda E., *Der soziale Rechtsstaat*, (in:) E. Benda, W. Maihofer, H.-J. Vogel (eds.), *Handbuch des Verfassungsrechts*. Vol. 1. Berlin 1994
- Blokker P., *EU democratic oversight and domestic deviation from the rule of law: Sociological reflections*, (in:) C. Closa, D. Kochenov (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge 2016
- Cassatella A., *Effektivität und Effizienz des Rechtsschutzes*, (in:) A. von Bogdandy, P.M. Huber, L. Marcussen (eds.), *Handbuch Ius Publicum Europaeum IX*, 2021
- Clifford J., *Equality*, (in:) D. Shelton (ed.), *The Oxford handbook of international human rights law*, Oxford 2013
- European Commission for Democracy Through Law, *Report on the Rule of Law*, 2011
- Fallon M., *The rule of law as a concept in constitutional discourse*, "Columbia Law Review" 2007, No. 1
- Fuller L., *The Morality of Law*, New Haven 1969

- Ginsburg T., *Difficulties with measuring the rule of law*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Henkin L., *Economic-social rights as "rights": A United States perspective*, "Human Rights Law Journal" 1981, Vol. 23
- Krygier M., *Four puzzles about the rule of law: Why, what, where? And who cares?*, (in:) J.E. Fleming (ed.), *Getting to the rule of law*, New York 2011
- Krygier M., *Rule of law (and Rechtsstaat)*, (in:) *International encyclopedia of the social and behavioral sciences*, 2015
- Krygier M., Winchester A., *Arbitrary power and the ideal of the rule of law*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Lorettoni A., *The rule of law and feminism: The dilemma of differences*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Magen A., Pech L., *The rule of law and the European Union*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Marshall G., *Notes on the rule of equal law*, (in:) J.R. Pennock, J.W. Chapman (eds.), *Equality*, New York 1967
- Masternak-Kubiak M., *Prawo do równego traktowania*, (in:) B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002
- May C., *The centrality of predictability to the rule of law*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- May C., *The rule of law: What is it and why is it 'constantly on people's lips'*, "Political Studies Review" 2010, Vol. 9, No. 3
- McIlwaine M., *Denying human rights, upholding the rule of law: A critique of Joseph Raz's approach to the rule of law*, "The Western Australian Jurist" 2016, Vol. 7
- Miller C.C., *The world 'has found a way to do this': The U.S. lags on paid leave*, "The New York Times" 25 October 2021, <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html> (accessed 14.03.2023).
- Møller J., *The advantages of a thin view*, (in:) C. May, A. Winchester (eds.), *Handbook on the rule of law*, Oxford 2018
- Napolitano G., *The rule of law*, (in:) P. Cane et. al. (eds.), *The Oxford handbook of comparative administrative law*, Oxford 2020
- Nicolaidis K., Kleinfeld R., *Rethinking Europe's "rule of law" and enlargement agenda: The fundamental dilemma*, Sigma Paper 2012, No. 49
- Osiatyński W., *Human rights and their limits*, Cambridge 2009
- Osiatyński W., *Needs-based approach to social and economic rights*, (in:) S. Hertel, L. Minkler (eds.), *Economic rights: Conceptual, measurement, and policy issues*, Cambridge 2009
- Raz J., *The authority of law: Essays on law and morality*, Oxford 1979
- Rosenfeld M., *The rule of law and legitimacy of constitutional democracy*, Cardozo Law School Working Paper 2001, No. 36
- Sadurski W., *Equality and legitimacy*, Oxford 2008
- Sadurski W., *Giving desert its due: Social justice and legal theory*, Dodrecht, Boston, Lancaster 1985
- Sadurski W., *Myślenie konstytucyjne*, Warszawa 1994
- Sajó A., *Socialist welfare schemes and constitutional adjudication in Hungary*, (in:) J. Přibáň, J. Young (eds.), *The rule of law in Central Europe: The reconstruction*

- of legality, constitutionalism and civil society in the post-communist countries*, Aldershot 1999
- Sajó A., *The new legalism: Law as an instrument of social transformation*, Working Paper for the American Council of Learned Societies Congress on Constitutionalism and the Transition to Democracy in Eastern Europe, 1990
- Sommermann K.-P., *Staatsziele und Staatszielbestimmungen*, Tübingen 1997
- Tamanaha B., *A concise guide to the rule of law*, (in:) N. Walker, G. Palombella (eds.), *Florence Workshop on the Rule of Law*, 2007
- Tamanaha B., *On the rule of law: History, politics, theory*, Cambridge 2004
- The White House, *Fact sheet: President Biden announces student loan relief for borrowers who need it most*, 24 August 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/> (accessed 14.03.23).
- Upham F.K., *The illusory promise of the rule of law*, (in:) A. Sajó (ed.), *Human rights with modesty: The problem of universalism*, Leiden, Boston 2004
- Venice Commission of the Council of Europe, *The rule of law checklist*, 2016
- Walker C., *The rule of law and terrorism* (in:) C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, Oxford 2018