

Between Dissensus and Dispute: Variations in the Rule of Law Discourse

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ABSTRACT

This article proposes a conceptual framework to distinguish between two forms of disagreement about the Rule of Law: *dissensus* and *dispute*. Dissensus refers to variations in how the Rule of Law is interpreted or applied, while still preserving its internal coherence and normative structure. In contrast, dispute marks a deeper conceptual rupture—where key principles such as judicial independence or the constraint of arbitrary power are strategically undermined, resulting in what the paper terms as a malfunction of the *organic unity*. Building on Moreso's notion of the Rule of Law as part of an organic constitutional system, the article narrows this idea to focus on the internal coherence of the Rule of Law itself. Drawing on cases from the European Union, Hungary, and Russia, the article shows how legal discourse and institutional practices reveal divergent engagements with the Rule of Law across political regimes. While some systems reflect dissensus, others strategically redefine the concept to legitimize non-democratic governance. The dissensus/dispute distinction serves as an analytical tool to assess when legal variation reflects legitimate interpretive diversity and when it signals a fundamental breakdown in the Rule of Law's normative function.

Questo articolo propone un quadro concettuale per distinguere tra due forme di disaccordo sul Rule of Law: il dissenso e la disputa. Il dissenso riguarda le variazioni nell'interpretazione o nell'applicazione del Rule of Law, che tuttavia continuano a preservare la sua coerenza interna e la sua struttura normativa. La disputa, invece, indica una rottura concettuale più profonda: principi fondamentali come l'indipendenza giudiziaria o il controllo del potere arbitrario vengono deliberatamente compromessi, generando quella che l'articolo definisce una disfunzione dell'unità organica. Partendo dalla nozione di Moreso del Rule of Law come parte di un sistema costituzionale organico, l'articolo ne restringe la portata per concentrarsi sulla coerenza interna del Rule of Law in quanto tale. Attraverso esempi tratti dall'Unione Europea, dall'Ungheria e dalla Russia, si mostra come il discorso giuridico e le pratiche istituzionali rivelino modalità divergenti di interazione con il Rule of Law nei diversi regimi politici. In alcuni casi emerge un dissenso, in altri si assiste a una ridefinizione strategica del concetto, volta a legittimare forme di governo non democratiche. La distinzione tra dissenso e disputa si propone quindi come uno strumento analitico per valutare quando la variazione giuridica rappresenta una legittima diversità interpretativa e quando invece segnala un cedimento radicale della funzione normativa del Rule of Law.

KEYWORDS

Rule of Law, dissensus, dispute, organic unity, malfunction

Rule of Law, dissenso, disputa, unità organica, disfunzione

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1. *Introduction*

In recent years, one of the central concerns in European governance has been the erosion of the Rule of Law. This is evident, for instance, in the adoption of the Rule of Law conditionality mechanism by the European Union¹. Yet identifying when a state has genuinely breached or complied with the Rule of Law is far from straightforward. Both liberal and illiberal leaders routinely assert that their governments are upholding the Rule of Law², even when facing credible allegations to the contrary. Such claims generate a complex interpretive challenge: while some governments may sincerely seek to align their legal frameworks with the ideals of the Rule of Law, others instrumentalize the concept rhetorically to legitimize practices that, in substance, subvert or hollow it out.

These contested assertions of compliance raise fundamental questions about how the Rule of Law is interpreted and applied across different political regimes³. How do democratic, populist, and non-democratic systems each conceptualize and operationalize the Rule of Law? Are there identifiable patterns in how its core elements function—or fail to function—within these diverse contexts?

This article looks at how different political systems interpret and apply the Rule of Law in different ways⁴. It draws a distinction between two kinds of disagreement: one is about the conceptual import or meaning, and the other about its applications. Disagreement about the applications—hereinafter *dissensus*⁵—happens when there's a shared understanding of the concept of the Rule of Law, but there are differences about its proper scope of application. In such disagreements, the core idea still holds together as a common background. But when the disagreement is about the very meaning or conceptual import of the Rule of Law, we're dealing with a deeper kind of conflict—hereafter *dispute*—a conflict where, even if the same term is used, it no longer refers to

¹ HALMAI 2019, 171-188.

² SAJÓ 2021, 237.

³ For a distinction between interpretation and application, see, e.g., GUASTINI 2010.

⁴ See, for instance, PEERENBOOM 2003.

⁵ Some scholars, such as COMAN 2022; 2024 and FASONE et al. 2024, use the concept of *dissensus* to capture forms of contestation against liberal democracy, including challenges to the Rule of Law. Fasone, Dirri & Guerra, for instance, distinguishes between weak and strong forms of dissensus (see FASONE et al. *vi*). However, I argue that *dissensus*—whether weak or strong—does not fully capture the distinction at stake here.

a shared ideal⁶. Instead, discussions about the rule of law no longer presuppose a shared concept which is able to guide or unify legal and political practices, but various, at times partly incompatible, though homonymous concepts of the Rule of Law⁷.

The distinction between dissensus and dispute serves as an analytical tool for distinguishing between contexts where disagreements occur within the framework of a unitary concept of the Rule of Law and those where an alternative interpretation fundamentally undermines a unitary framework. In other words, dissensus reflects a tension between competing conceptions of the Rule of Law, whereas dispute signals a deeper conflict over the very concept itself. But this distinction presupposes a more basic claim—namely, that the Rule of Law must be understood as an *organic unity*⁸. This means that the Rule of Law is understood as a cohesive and integrated notion where its various desiderata are interdependent and mutually reinforcing. In fact, the integrity and effectiveness of the Rule of Law depend on the harmonious functioning of all its elements⁹. Viewing the Rule of Law as an organic unity underscores the interdependence and mutual reinforcement of its various elements¹⁰. This conception is inspired in part by MOORE (1903) and DANCY (2004), but draws primarily on MORESO's (2021) account of the Rule of Law as part of an organic triad—alongside democracy and fundamental rights—which together reinforce and sustain constitutional democracy. In his view, the Rule of Law contributes to a broader normative architecture, functioning in close interaction with democracy and fundamental rights to form a coherent whole. While I take from Moreso the idea that certain normative structures operate *organically*, I apply this insight more narrowly and differently: I contend that the Rule of Law itself—*independent of its relations to other values*—ought to be understood as an organic unity. By describing the Rule of Law as an *organic unity*, I mean to capture an internal, immanent structure—one that is best understood from within rather than through its external relations to other normative values. My perspective shifts attention from the functional interplay between the Rule of Law and democracy or fundamental rights, toward the internal logic and interdependence of its constitutive elements.

While *organic unity* is the central concept I employ to analyse the structure of the Rule of Law, it is not the only theoretical lens capable of capturing the phenomena at issue. Given that this paper deals with the distinction between *dissensus* and *dispute*, it is appropriate to situate organic unity in relation to theories that address the conditions for agreement and disagreement. In this respect, organic unity bears a noteworthy parallel to Baumtrog's notion of *entrenched agreements*¹¹.

⁶ The distinction between *dissensus* and *dispute* presupposes a minimal conceptual structure that defines what counts as the Rule of Law in the first place. In this context, I take the concept to refer to key principles such as judicial independence or the constraint of arbitrary power that are widely recognized as constitutive of the Rule of Law's normative identity (RAZ 1977; FULLER 1964; WALDRON 2008; KRYGIER 2011). These principles form the internal structure necessary for the concept to retain semantic integrity. As long as they remain intact, disagreement concerns only the interpretation or application of the Rule of Law and thus constitutes *dissensus*. However, when any of these elements is fundamentally undermined or strategically redefined, the disagreement shifts into *dispute*, signaling a transformation of the concept itself rather than a variation within it.

⁷ In this case, disagreements are perhaps best described as metalinguistic negotiations. See, e.g., WATSON 2023, 487–524. See also RAMÍREZ LUDEÑA 2016, 39–62.

⁸ While the notion of *organic unity* follows its established use in the literature on the Rule of Law, particularly in Moreso's account of constitutional democracy as an *organic system* (MORESO 2021), my understanding departs from his in scope and focus—an observation I owe to Chiara Valentini. Whereas Moreso conceives the Rule of Law as one element within an organic triad that also includes democracy and fundamental rights, my account treats *organic unity* as an internal property of the Rule of Law itself. It refers to the functional interdependence among its constitutive elements, understood as parts of a coherent ideal rather than as components of a broader constitutional ensemble.

⁹ Which does not presuppose that all desiderata of the rule of law (in all possible combinations) are never in conflict with one another.

¹⁰ See KRISTAN 2024.

¹¹ See BAUMTROG 2019, 94–112.

Both concepts identify the foundational conditions that must be preserved in order for disagreement to remain meaningful within a shared normative or linguistic framework. In the case of the Rule of Law, *organic unity* expresses the idea that its constitutive elements—judicial independence, legal predictability, and the constraint of arbitrary power—are not merely additive or optional features, but mutually reinforcing components of a single normative ideal. The Rule of Law retains its identity as a coherent concept only if these elements function together as an integrated whole. Likewise, Baumtrog characterises *entrenched agreements* as deep, pre-theoretical commitments that make rational disagreement possible. These are not explicit propositions about which actors consciously agree, but rather implicit normative assumptions that structure the practice itself and provide the background against which disagreement can occur intelligibly¹².

This conceptual convergence reveals that both ideas serve to identify the threshold beyond which disagreement ceases to be internal to a shared framework and becomes a dispute over the very concept at issue. In Baumtrog’s framework, once entrenched agreements are no longer shared, disagreement is not merely about competing views within the same conceptual space, but rather about fundamentally different frameworks, rendering rational persuasion impossible. Likewise, when the organic unity of the Rule of Law is dismantled, disagreement no longer concerns its application or interpretation, but instead signals a transformation of the concept itself (dispute). What remains may still be called “Rule of Law”, but it no longer refers to the same normative ideal. In Baumtrog’s account, *entrenched agreements*¹³ are the underlying commitments that make rational disagreement possible within a shared practice. In the context of the Rule of Law, *organic unity* refers to the necessary interdependence of its core elements—judicial independence, legal predictability, and the constraint of arbitrary power—which must operate together if the concept is to retain its internal coherence and normative structure. In both cases, once these foundational conditions are no longer present, disagreement is no longer a matter of internal variation but indicates that the concept itself has been replaced or fundamentally altered¹⁴.

Building on this distinction, a crucial dimension of the distinction between dissensus and dispute lies in the concept of semantic integrity—that is, the preservation of a stable and coherent meaning of the Rule of Law across different institutional and political contexts¹⁵. Dissensus, as understood here, entails disagreement within a shared conceptual framework. Even when legal systems differ in their emphasis, the semantic integrity of the Rule of Law remains intact. Its core components are still understood and applied as interdependent and mutually reinforcing. By contrast, in contexts of dispute, this integrity begins to unravel. The Rule of Law may continue to be invoked rhetorically, but the normative content of the original referent is redefined or hollowed out to serve political ends. This is not merely a disagreement over how well the Rule of Law is being implemented, but a transformation of what the concept itself is taken to mean¹⁶. The result is conceptual multiplication, a breakdown of semantic integrity: a point at which the Rule of Law is no longer used to refer to a shared ideal, but instead becomes a discursive tool detached from its foundational elements. The loss of semantic integrity is the result of a shift from dissensus to dispute, and serves as a key indicator of the malfunction of the organic unity.

¹² See also BAUMTROG 2023; CASEY 2020.

¹³ BAUMTROG 2019, 615.

¹⁴ I am grateful to the reviewer for raising this point, which helped me clarify the conceptual structure of this argument.

¹⁵ The notion of *semantic integrity* refers to coherence in meaning—the preservation of a stable conceptual structure that allows interpretive disagreement to remain intelligible. In this sense, *semantic integrity* delineates the threshold between interpretive dissensus and conceptual dispute: it is the condition that prevents what Dworkin termed the “semantic sting” (DWORKIN 1985) from turning disagreement into conceptual disintegration. The idea also resonates with Kramer’s analysis of the semantics of legal normativity, according to which the stability of legal meaning underpins the law’s capacity to perform its normative function (KRAMER 2018).

¹⁶ See nt. 6.

Although this paper develops a theoretical argument, it incorporates selected political discourses and statements from leaders as illustrative examples that support the analysis. These examples help to show both how electoral populist and non-democratic regimes claim adherence to the Rule of Law and how their understanding of it is fundamentally flawed—despite asserting their own interpretation of the concept. While some elements of the Rule of Law may still be present, and regimes may profess adherence to the ideal of the Rule of Law or disagreement about its interpretation, their particular ways of framing and applying it can result in legal frameworks that ultimately undermine or negate the Rule of Law itself.

2. *Rule of Law, between dissensus and dispute*

Leaders from different political systems frequently claim adherence to the Rule of Law, asserting that their governance aligns with its elements while simultaneously advancing their own interpretations of the concept¹⁷. This raises a fundamental problem: by redefining the Rule of Law to fit their political agendas, particularly in electoral populist or non-democratic regimes, leaders can maintain a rhetorical commitment to the ideal while, in institutional practice, undermining its core elements. In particular, we are witnessing a political moment in which «[...] governments not only try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries' laws or constitution» (WALDRON 2008, 5) but where governments are deploying their own conceptions of the Rule of Law to claim that they are fulfilling the ideal.

From the theoretical perspective, while one can think that academic studies are usually detached from the actual practice of law, this does not mean that they have no influence (WALDRON 2020, 17). For example, the literature on restoring the Rule of Law (KRISTAN 2024; SAJO 2023)¹⁸ has increasingly focused on its potential application in real-world legal and political contexts. Because of this influence, it is important to note that the characterization of the Rule of Law as an essentially contested concept¹⁹, makes it difficult to establish a commonly accepted definition.

This conceptual indeterminacy is not accidental but structural. Following Gallie's seminal analysis of essentially contested concepts (GALLIE 1956), the Rule of Law qualifies as such a concept because it involves complex, evaluative criteria that admit of multiple, reasonable interpretations, each rooted in competing normative visions of legality and governance. Yet, as WALDRON (2002) has noted, it is precisely the concept's aspirational nature—its orientation toward ideals such as non-arbitrariness, predictability, and institutional restraint—that makes it vulnerable to manipulation. This allows actors to claim allegiance to the Rule of Law while hollowing out its substance. Moreover, TAMANAHA (2004) has described how the Rule of Law has historically been subject to oscillation between formalist and substantive understandings²⁰, ranging from minimal-

¹⁷ This does not assume that there is a single, uncontested “true” version of the Rule of Law; rather, it acknowledges the concept's interpretive flexibility, as reflected in the wide range of legal traditions and institutional designs across political systems. However, such flexibility is not without limits. While the Rule of Law can accommodate variation in emphasis or implementation, not all interpretations remain faithful to its core structure and normative purpose. The analysis therefore focuses on whether a given interpretation preserves the systemic coherence—or what this paper refers to as the organic unity—of the Rule of Law's constitutive elements, such as judicial independence, legal predictability, and constraints on arbitrary power. When these elements continue to function in an integrated and mutually reinforcing manner, variation reflects functional dissensus. By contrast, when an interpretation entails a conceptual rupture, this systemic coherence is lost, resulting in a malfunction or degradation of the organic unity and rendering the Rule of Law dysfunctional and ineffective as a meaningful constraint on political authority.

¹⁸ SAJÓ 2023.

¹⁹ WALDRON 2021.

²⁰ For the distinction between formalist and substantive conceptions of the rule of law, see e.g. CRAIG 1997.

ist, rule-following definitions to more ambitious accounts that embed liberal democratic values. Rather than indicating progress or conceptual refinement, this variability often reflects deeper ideological struggles. Thus, while the multiplicity of interpretations can enrich theoretical discourse, it also creates a fertile ground for contestation—especially when the Rule of Law is invoked in defence of practices that appear to violate its spirit. The essential contestability of the Rule of Law is therefore not merely a feature of academic debate but a condition of its political life.

In particular, the ambiguity surrounding its meaning, combined with the proliferation of competing approaches—ranging from minimalist, “thin” conceptions to more substantive, “thick” versions—enriches and informs the academic debate, however, at the same time, it risks creating a level of conceptual obscurity that is particularly problematic in times when the Rule of Law is continuously under threat.

Nevertheless, the fact that the Rule of Law is considered an essentially contested concept, does not mean that it is an “anything goes”. While there is room for debate over its precise contours, not all characterizations genuinely fit within the concept. This is where the distinction between dissensus and dispute becomes particularly relevant.

The distinction between dissensus and dispute serves as an analytical tool for distinguishing between contexts where disagreements occur within the framework of a unitary concept of the Rule of Law and those where an alternative interpretation fundamentally undermines a unitary framework. In other words, variations in the Rule of Law may arise either from dissensus—a debate over its application and emphasis (COMAN 2022)—or from a deeper dispute about its constitutive elements. In the first case, dissensus, variations in the Rule of Law applications affect the relative strength of its constitutive elements without dismantling its organic unity. Similarly, differences in ordering or emphasis—such as prioritizing judicial independence over legal certainty—may shape its implementation, but the framework remains intact. In contrast, dispute represents a conceptual rupture, where the disagreement is not about variations in how the elements of the Rule of Law are ordered or applied, or also, how well the Rule of Law is upheld but whether a given interpretation aligns with one and the same concept at all. In such cases, despite rhetorical claims of adherence, the Rule of Law is effectively hollowed out, with key elements either selectively applied or structurally dismantled, resulting in a malfunctioning organic unity in which the components no longer function as a coherent and integrated system. At this point, the Rule of Law loses its internal unity altogether—it no longer operates as a system, but as a set of disconnected or contradictory elements.

When one element is absent or deliberately undermined—such as the erosion of judicial independence—other elements, like legal predictability, are also weakened. This disruption leads to, as I mentioned, a malfunctioning of the organic unity, ultimately resulting in a failure to uphold the Rule of Law as a coherent system²¹.

When variations arise from dissensus they reflect differences in the interpretation of the emphasis of some elements of the Rule of Law, while still preserving the fundamental structure of the Rule of Law. In these cases, all constitutive elements remain present, though they may function with varying degrees of strength since the Rule of Law has (limited) room for flexibility. For example, some systems might emphasize judicial independence more strongly than others, while others might prioritize legal certainty or access to justice. Despite these differences, the Rule

²¹ To clarify this point, it is important to distinguish between two senses in which *dissensus* can be understood. First, dissensus may be descriptive, referring to variations in how the elements of the Rule of Law are ordered or applied within a shared conceptual space, without necessarily ranking these implementations. In this sense, dissensus captures the pluralism of legal cultures and institutional traditions that coexist under the umbrella of the Rule of Law. Second, dissensus may be evaluative, in the sense that even within this shared space, certain configurations may be judged as more robust, complete, or normatively defensible realizations of the Rule of Law ideal. For example, while both systems A and B may adhere to the principle of judicial independence, system A might provide stronger safeguards against executive interference, making it a *better* realization in evaluative terms.

of Law continues to operate as an organic unity²². But dissensus²³ implies disagreement *within a shared*—though not fixed or universal—*conceptual framework*²⁴, whereas in this case, an alternative interpretation effectively negates the Rule of Law as a value in itself. Here, the disagreement is not about how well the Rule of Law is being upheld but whether a given understanding even aligns with one and the same concept at all. When a regime’s alternative interpretation neglects the core elements that define the Rule of Law—such as judicial independence, legal predictability, or the constraint of arbitrary power—this represents a conceptual rupture, not just a weaker fulfilment of the ideal. This type of dispute also results in a malfunctioning organic unity of the Rule of Law, where regimes claim adherence to the Rule of Law while, in practice, subverting its fundamental tenets. In such cases, the interconnected nature of the Rule of Law is broken, leading to a situation where its individual elements exist, or part of them are in place, in name but fail to work together as a cohesive system. For instance, if a government insists it upholds the Rule of Law while simultaneously undermining judicial independence—for instance by packing the Court—or allowing arbitrary rule, this is not merely an imperfect realization of the concept—it is a redefinition that strips the Rule of Law of its normative role.

In fact, dispute about the concept of the Rule of Law correlates with violations of the Rule of Law, where the conceptual rupture leads to an intentional dismantling of its core elements. Violations of the Rule of Law, sometimes, represent systemic actions that undermine judicial independence, enable arbitrary rule, or strip legal norms of their binding force. In such cases, the Rule of Law is strategically subverted, resulting in a malfunctioning organic unity that ultimately nullifies its function as a constraint on power and implies its degeneration.

This is where dissensus aligns with organic unity. In cases where variations in the Rule of Law emerge from different emphases or priorities, or where certain elements are weaker due to a lack of resources necessary for full implementation, the integrity of the Rule of Law remains intact. Differences of this nature do not break the interdependence of its core elements; instead, they reflect adaptive responses to contextual constraints within a shared normative framework. In contrast, dispute corresponds to a malfunction of the organic unity, which arises when one or more fundamental components are undermined or selectively dismantled, leading to a systemic breakdown, a malfunction of the organic unity, rather than an adaptive variation. Unlike organic unity, which allows for flexibility while preserving coherence, its malfunctioning suggests that the disvalue of individual violations does not merely accumulate but multiplies as they interact, amplifying the damage to the system as a whole. For example, judicial independence is not an isolated feature but is intrinsically linked to other Rule of Law elements: if the judiciary loses its autonomy, legal predictability weakens, constraints on executive power diminish, and arbitrary rule becomes more feasible. The consequence is a fundamental rupture—a transformation of the legal order into a fragmented system where the Rule of Law exists in name but not in function. This distinction clarifies why some legal systems, despite their flaws, remain resilient, while others succumb to the weight of interconnected violations. Dissensus allows for variation within a

²² However, not all variation necessarily amounts to *dissensus* in the strict sense. In some cases, actors are not truly contesting which elements make up the Rule of Law or whether they ought to be protected. Rather, the variation may stem from deeper cultural, historical, or institutional differences that lead to shifts in emphasis without amounting to genuine disagreement. These may be better understood as expressions of legal culture rather than conceptual or normative dissensus.

²³ See COMAN 2022, where she argues that dissensus over the rule of law shapes the EU’s related policy tools and policy more generally, and by the same token, the EU’s modes of governance and who governs. However, my understanding of dissensus is different: one that entails graduality into the enforcement of the elements of the rule of law.

²⁴ My argument does not assume a single, rigid framework that all must accept, but rather defends the idea that some minimal structure is necessary for the concept to retain coherence and normative force. In this sense, identifying when an interpretation moves from dissensus to dispute is not a claim to absolute conceptual authority, but a judgment about when the concept ceases to guide practice in a meaningful way.

functioning legal system, whereas dispute signals a strategic manipulation of legal norms that results in the degeneration of the organic unity, where the legal framework no longer operates as an effective constraint on power.

3. *Three Different Political Systems: supranational democracy, electoral populism and non-democratic polity*

Although this paper advances a theoretical argument, the way political systems engage with the Rule of Law in practice offers concrete illustrations of the distinction between dissensus and dispute. Political leaders across regimes often invoke the Rule of Law rhetorically to legitimize their actions. However, the frequency and style of such invocations tell us little unless we examine what these regimes actually *do* with the concept—how legal institutions function, whether the separation of powers is maintained, and whether legal accountability is preserved.

This section focuses on speeches and statements together with institutional and systemic practices surrounding the Rule of Law within three distinct types of political regimes: supranational democracies, electoral populisms, and non-democratic polities, demonstrating the practical relevance of the distinctions developed in the previous section. In supranational democracies²⁵, engagement with the Rule of Law tends to involve genuine efforts at institutional realization, even if marred by occasional deficiencies. In electoral populist regimes, the Rule of Law is often invoked rhetorically while being selectively applied or strategically hollowed out. In non-democratic polities, the concept may be co-opted entirely, used to legitimize authority while systematically dismantling the principles it stands for.

3.1 *Supranational Democracy. Ursula von der Leyen (Speech on the State of the Union, 2022)*

The European Union exemplifies dissensus, where contestation over the Rule of Law occurs within a shared normative and institutional framework. Disagreements often arise not over the value of the Rule of Law itself, but over how it ought to be implemented in specific contexts. A prominent example is the ongoing debate among member states over the appropriate balance between judicial activism and judicial restraint, particularly in relation to the authority of national constitutional courts versus the primacy of EU law²⁶. For instance, in the 2020 PSPP ruling, the German Federal Constitutional Court challenged a decision of the Court of Justice of the European Union (CJEU), raising concerns over the boundaries of judicial review and the scope of EU competence. While this case stirred institutional tensions, it remained within the realm of legal pluralism and did not threaten the foundational elements of the Rule of Law within the EU. This internal dynamic is reinforced by the institutional commitment to uphold the Rule of Law as a living framework of democratic accountability, most clearly articulated in Ursula von der Leyen's 2022 State of the Union address. In her speech, she declared: «The Rule of Law is the guarantor of fundamental rights and freedoms. It ensures judicial independence, protects minorities, and holds governments accountable. It is not an abstract principle but a living reality that underpins democracy». Von der Leyen's rhetoric underscores the EU's vision of the Rule of Law as a proactive tool—one that prevents arbitrary power, ensures legal predictability, and provides institutional safeguards.

Central to this commitment is the Rule of Law Conditionality Mechanism²⁷, introduced in 2021, which links EU financial support to compliance with core Rule of Law –and also democratic–

²⁵ Also in electoral democracies.

²⁶ PETERSEN, CHATZIATHANASIOU 2021.

²⁷ See https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en, accessed on 15-04-2023.

standards²⁸. This measure reflects the EU's stance that the Rule of Law is not merely a legal norm but a structural condition for membership. In this sense, even amid tensions and disagreements, the EU remains firmly within the boundaries of organic unity, with institutions working to address deficiencies while preserving the overall coherence of the Rule of Law.

3.2 *Electoral Populism. Hungary: Rule of Law as National Sovereignty*

Hungary, by contrast, represents a case of dissensus as a dispute, though one that often masquerades as a dissensus over degree. In public discourse, Prime Minister Viktor Orbán claims adherence to the Rule of Law, yet his framing reveals a fundamentally different understanding of the concept—one rooted in national sovereignty rather than universal legal standards. In his 2021 speech on the Future of Europe, Orbán declared: «Brussels bureaucrats do not have the right to tell us how to run our country. Hungary is a sovereign state that respects the Rule of Law, but we reject foreign interference disguised as legal oversight». Similarly, in his 2024 address, he asserted: «Instead of peace, we have war; instead of security, we have a rule of law ruckus; instead of prosperity, we have financial blackmail»²⁹.

These statements exemplify how Orbán redefines the Rule of Law as a defensive mechanism to protect Hungary from external (especially EU) influence. His rhetoric reframes legal oversight as foreign interference, asserting a version of the Rule of Law that is detached from supranational norms and institutional accountability. This represents dissensus as rejection in disguise: while Orbán maintains the language of the Rule of Law, he rejects its shared normative foundation, thereby substituting the original concept with an alternative one that functions as a political tool for justifying illiberal governance.

But how does political discourse align with actual institutional change? Following Viktor Orbán's 2010 electoral victory, Hungary underwent what Gábor Halmai calls a “constitutional counter-revolution”—a deliberate effort to dismantle the institutional foundations of liberal constitutionalism and the Rule of Law. The governing Fidesz party, holding a two-thirds parliamentary majority, enacted a new constitution—the *Fundamental Law*—without political consensus or public deliberation. This document replaced the 1989 transitional constitution and marked a clear break with the earlier liberal-democratic order. Central to this transformation was the systematic weakening of institutional checks and balances, most notably through the curtailment of the Constitutional Court's powers, the politicization of the judiciary³⁰, and the imposition of legal rules that entrenched the ruling party's power. As Halmai emphasizes, this was not a case of institutional malfunction but rather a deliberate strategy to remove accountability mechanisms and erode the separation of powers, thereby displacing the foundational principles of the Rule of Law with an illiberal, majoritarian model of governance (HALMAI 2023, 613–614).

One of the most dangerous institutional moves for the Rule of Law is judicial capture. As András Sajó³¹ reconstructs, achieving judicial capture is a key strategy in the broader transformation of constitutionalist legacy. Rather than outright abolishing courts or overtly suspending judicial review, these regimes manipulate institutional rules, staffing procedures, and retirement norms to gradually neutralize judicial independence. As Sajó notes, illiberal governments «do not destroy the Rule of Law; they co-opt it» (SAJÓ 2021, 147). This is done by appointing loyalists, altering the jurisdiction and competences of courts, and restructuring judicial councils to ensure political

²⁸ See DIRRI, GUERRA 2024.

²⁹ <https://miniszterelnok.hu/en/speech-by-prime-minister-viktor-orban-on-the-176th-anniversary-of-the-hungarian-revolution-and-war-of-independence-of-1848-49/>; See also <https://abouthungary.hu/blog/pm-orban-when-they-question-the-rule-of-law-they-step-on-our-honor>

³⁰ See SCHEPPELE 2018.

³¹ SAJÓ 2021, 147.

influence over judicial careers. These changes often come under the guise of modernization or efficiency, making them difficult to contest externally, especially when procedural formalities are maintained. The result is a judiciary that preserves its external trappings of independence while becoming increasingly compliant with executive interests. In this way, judicial institutions are not eliminated but transformed into instruments of non-democratic governance, offering legalistic legitimacy to deeply illiberal practices.

In addition to institutional restructuring, Halmai shows how the Hungarian government strategically uses language to invoke the moral authority of justice while promoting selective and politically expedient interpretations of the past. Through the manipulation of transitional justice and memory politics, these narratives serve as instruments of political control rather than genuine reconciliation. He explains that The Fourth Amendment to the *Fundamental Law*, for instance, introduced *Article U*, which frames Hungary's Communist past through selective and legally ambiguous narratives. While purporting to deliver justice for historical crimes, these measures were crafted in ways that circumvented prior Constitutional Court rulings and international legal standards, particularly regarding the statute of limitations and retroactive punishment. This legal engineering served not only to criminalize political opposition symbolically—especially targeting the Socialist Party as the alleged successor of the Communist regime—but also to instrumentalize history as a political weapon. The creation of a Committee of National Memory with unchecked powers further illustrates how state control over historical discourse complements the broader erosion of legal safeguards and pluralism (HALMAI 2023, 615–617).

Under this rhetorical interpretation and institutional changes, the Rule of Law is used to legitimize practices such as court-packing, media control, and constitutional amendments that weaken checks and balances while maintaining the appearance of legal order. As a result, the Hungarian “Rule of Law” exhibits signs of a malfunctioning organic unity, where key elements of the Rule of Law—though formally preserved—no longer function in an interdependent, cohesive way. What remains is a disconnected legal structure.

3.3 Non-democracy. Russia: Rule of Law as State Power

In Russia, the Rule of Law is not simply distorted or reinterpreted but openly redefined as a means of consolidating non-democratic power. This represents a clear case of dispute about the meaning of the Rule of Law, where the Rule of Law is invoked only to reinforce executive authority. In a striking 2010 interview, President Vladimir Putin dismissed normative understandings of the Rule of Law, stating:

«Listen, all our opponents clamor for the rule of law. What is the rule of law? It is compliance with existing legislation. What does existing legislation say about marches? You need to obtain authorization from the local authorities. You got one? Go ahead and demonstrate. If you didn't – you don't have the right to demonstrate. If you do anyway – you will get a baton to the noggin' [*poluchite po bashke dubinoi*]. End of story!»³².

Putin's conception of the Rule of Law reduces it to strict adherence to state-imposed regulations, with no reference to constitutionalism, judicial independence, or rights-based protections. His rhetoric highlights the instrumental use of legal norms as mechanisms of control rather than as safeguards against abuse³³. The phrase “baton to the noggin'” makes the coercive nature of this legalism explicit, illustrating a regime where legal authority is indistinguishable from exec-

³² Vladimir Putin cited in “Vladimir Putin: dayu vam chestnoye partiinoe slovo” Kommersant, August 30, 2010, <http://kommersant.ru/doc/1495411>, retrieved from POPOVA 2017.

³³ For a similar argument regarding international law, see BAAZ 2016.

utive will, at least for the most notorious cases such as the Yukos case³⁴ or the Naval’nyj case³⁵. Regarding these cases, Alena Ledeneva³⁶ and Kathryn Hendley explained that these are cases of “telephone law”. Telephone law is described as a practice «by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law»³⁷. According to Hendley, however, this practice does not apply to every case. In fact, there is a difference between politicized cases, where the stakes are high and political manipulation is common, and everyday legal disputes, where the courts often function more normally, leading to a coexistence of “rule of law” and “rule by law” in Russia, representing a dual system³⁸. Of course, this argument is confined to the element of judicial independence³⁹. Popova, for example, argues that «Putin’s Russia is far from the liberal constitutionalism associated with the rule of law. Neither does it have the non-democratic constitutionalism sometimes called rule by law». In fact, she states that in Putin’s Russia, the law serves political purposes—it is used to signal policy goals, manage elites, and reinforce the regime. While legally consequential, its application is often arbitrary and instrumental rather than consistent or principled. Major legal reform toward constitutionalism is unlikely, even after Putin. If change occurs, it may take the form of *authoritarian constitutionalism*, where law is used to preserve elite interests or a more assertive judiciary emerges. Conversely, if the regime weakens, the courts may be used even more aggressively against dissenters and rivals⁴⁰.

This approach embodies a rupture from the normative structure of the Rule of Law. There is no room for a well-functioning organic unity of the Rule of Law, as the core elements—judicial independence, predictability, constraint on arbitrary power—are systematically dismantled. Legal institutions function not as checks on power, but as extensions of it, creating a state in which the Rule of Law exists only in name. Russia thus exemplifies the degradation of the organic unity in its most severe form: a regime where the Rule of Law is not merely violated, but strategically emptied of meaning, retooled to legitimize repression and eliminate opposition.

4. Conclusion

This paper has proposed a conceptual framework for understanding how the Rule of Law is interpreted, applied, and—at times—strategically manipulated across different political regimes. Central to this framework is the distinction between dissensus as a matter of degree and dissensus as a dispute, which allows us to distinguish between disagreements that remain within a shared normative structure and those that reflect a rejection of the Rule of Law’s foundational principles. In the former, the Rule of Law retains its organic unity: the interdependent elements of legality, such as judicial independence, legal predictability, and accountability, continue to function as a coherent system, even if their relative weight is contested. In the latter, the Rule of Law does not

³⁴ THOMPSON 2005, 159.

³⁵ [2018] ECHR 1062, NAVAL’NYJ v. RUSSIA - 29580/12 (Grand Chamber- No violation - Right to a fair trial) (15 November 2018).

³⁶ LEDENEVA 2008, 324; HENDLEY 2009.

³⁷ HENDLEY 2009, 242.

³⁸ SAJÓ 2021, 258. Contra: POPOVA 2017, 65.

³⁹ In fact, «[i]n Hungary, the Russian Federation, South Africa, and Turkey, constitutional courts sometimes deployed their adjudicative functions extremely ambitiously, reaching into the realms of the strongly symbolic and supra-political as well as the purely political. In all such cases we can locate a confluence of institutional strength, strong and personalized leadership, and a contested political context that provided the court the opening it needs into politics proper». BROWN, WALLER 2016, 819.

⁴⁰ SAJÓ 2023.

function anymore as an organic unity, where these same elements are selectively applied or deliberately dismantled, leading to a fragmented legal order that no longer constrains power.

From a legal-theoretical standpoint, political discourse—particularly speeches and public statements by state leaders—offers a valuable entry point for assessing how the Rule of Law is conceptually framed and operationalized within different regimes. These articulations are not merely rhetorical flourishes; they function as interpretative claims about the nature, scope, and purpose of legal order. In this sense, political speech acts as a form of legal argumentation, offering insight into how regimes position themselves within (or outside of) the shared conceptual framework of the Rule of Law. By examining such discourses, we can observe how constitutional reasoning, principles of legality, and claims of normative legitimacy are mobilized to either reinforce or distort the Rule of Law's foundational elements. These claims are often couched in familiar legal language, but their semantic function diverges significantly depending on whether they support systemic coherence or mask structural violations.

Crucially, the concept of organic unity helps clarify when such interpretive variation reflects normatively acceptable diversity and when it signals a deeper conceptual rupture. A legal order maintains its integrity when its constitutive elements—judicial independence, legal certainty, constraints on arbitrary power—operate in mutual support, even if contested in degree or emphasis. This is the condition of internal normativity: the Rule of Law is sustained not by rigid uniformity, but by the reciprocal reinforcement of its principles. By contrast, degradation of the organic unity arises when these elements are no longer integrated within a coherent normative structure, but are selectively invoked, weakened, or abandoned altogether. From a theoretical perspective, this is the moment when formal legality is severed from legal normativity, and the Rule of Law ceases to function as a meaningful constraint on arbitrary power. The distinction between dissensus as variation and dissensus as rupture is therefore indispensable—not only for political analysis, but for understanding the conditions under which the Rule of Law can claim to exist at all.

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