



## Violation of The Principle of Equality Before the Law in The Case of Ilaria Salis

Ahmad Gelora Mahardika

School of Law, Seoul National University, South Korea.

\*Corresponding author : [ahmad1987@snu.ac.kr](mailto:ahmad1987@snu.ac.kr)

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### Abstract

**Background:** The principles of equality before the law and legal certainty are fundamental tenets of a rule-of-law state. Although the European Union (EU) operates under a sui generis legal framework, it is still expected to uphold these core legal principles. The case of Ilaria Salis, an Italian activist granted immunity despite her involvement in a criminal proceeding, raises concerns about the status of EU law within the international legal order.

**Methodology:** Through a normative juridical analysis, this study examines the legal implications of granting immunity in the context of EU law. **Objectives:** To assess whether the immunity granted in the Ilaria Salis case is consistent with the fundamental legal principles of equality before the law and legal certainty, as recognized by EU legal instruments and jurisprudence. **Findings:** The study finds that the granting of immunity in this case led to a violation of both principles under EU legal standards, highlighting potential inconsistencies in the application of EU law. **Originality/Novelty:** This research addresses a contemporary legal dilemma by critically evaluating how the application of immunity in a high-profile case may undermine the foundational legal principles of the EU, thus questioning the coherence of EU law within the international legal framework.

**Keywords:** equality before the law; ilaria salis; legal certainty

### Abstrak

**Latar Belakang:** Prinsip kesetaraan di hadapan hukum dan kepastian hukum merupakan asas fundamental dalam negara hukum. Meskipun Uni Eropa (UE) beroperasi dalam kerangka hukum sui generis, UE tetap diharapkan untuk menjunjung tinggi prinsip-prinsip hukum tersebut. Kasus Ilaria Salis, seorang aktivis asal Italia yang diberikan kekebalan hukum meskipun sedang terlibat dalam proses pidana, menimbulkan kekhawatiran terhadap status hukum UE dalam tatanan hukum internasional. **Metodologi:** Penelitian ini menggunakan pendekatan yuridis normatif untuk menganalisis implikasi hukum dari pemberian kekebalan dalam konteks hukum Uni Eropa. **Tujuan:** Untuk menilai apakah pemberian kekebalan dalam kasus Ilaria Salis sejalan dengan prinsip-prinsip hukum fundamental Uni Eropa, khususnya kesetaraan di hadapan hukum dan kepastian hukum sebagaimana diatur dalam Pasal 20 Piagam Hak Asasi Uni Eropa dan ditegaskan dalam berbagai putusan pengadilan. **Temuan:** Penelitian ini menemukan bahwa pemberian kekebalan dalam kasus tersebut menyebabkan



pelanggaran terhadap kedua prinsip tersebut dalam standar hukum Uni Eropa, yang menunjukkan adanya inkonsistensi dalam penerapan hukum UE. **Orisinalitas/Novelty:** Penelitian ini mengangkat persoalan hukum kontemporer dengan mengkaji secara kritis bagaimana penerapan kekebalan hukum dalam kasus yang menonjol dapat melemahkan prinsip-prinsip dasar hukum Uni Eropa, sehingga mempertanyakan konsistensi hukum UE dalam kerangka hukum internasional.

**Kata Kunci:** kedudukan yang sama didepan hukum; ilaria salis; kepastian hukum

## A. Introduction

The Article 20 of the European Union (EU) Charter of Fundamental Rights establishes that all individuals shall be treated equally before the law. Since 1961, the Court of Justice and the General Court have introduced a fundamental legal principle in the EU: legal certainty, signifying that the law must provide clear, predictable outcomes for all subjects under its jurisdiction.<sup>1</sup> A violation of these principles, particularly equality before the law — where no individual should be subject to discriminatory treatment – constitutes an infringement of EU Law.<sup>2</sup>

The case of Iliaria Salis has become a focal issue ahead of the EU elections, due to legal proceedings against her. The condition arose due to the issue of human rights protection, which became an important topic ahead of the European Election.<sup>3</sup> In addition, the discourse on sanctions for Poland and Hungary due to violations of judicial independence and human rights is one reason why this case has become an interesting concern ahead of the European Election.<sup>4</sup>

Iliaria Salis, an anti-fascist activist from Italy, was detained in Budapest, Hungary, in February 2023, on suspicion of involvement in an alleged assault against members of a far-right extremist group. This incident coincided with the “Day of Honour” commemoration, an event attended by neo-Nazi groups to memorialize events from

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<sup>1</sup> Jérémie Van Meerbeeck, “The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust,” *European Law Review* 41, no. 2 (2016): 275–88.

<sup>2</sup> Sofiya Kartalova, “Trust and the Exchange of EU Classified Information: The Example of Absolute Originator Control Impeding Joint Parliamentary Scrutiny at Europol,” *German Law Journal* 25, no. 1 (2024): 70–93, <https://doi.org/10.1017/glj.2023.104>.

<sup>3</sup> Vesna Ćorić and Aleksandra Rabrenović, “How To Ensure Free and Fair Elections in the Eu and Beyond: A Need for Rule of Law, Democracy and Human Rights Principles To Stand Together,” *EU at the Crossroads – Ways to Preserve Democracy and Rule of Law* 8, no. 8 (2024): 974–1009, <https://doi.org/10.25234/eclic/32311>.

<sup>4</sup> Ivana Jelić and Dimitrios Kapetanakis, *European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR*, *Hague Journal on the Rule of Law*, vol. 13 (Springer International Publishing, 2021), <https://doi.org/10.1007/s40803-021-00155-5>.

World War II. Salis was charged as part of the “ANTIFA” group that allegedly attacked individuals in public spaces due to attire suggesting affiliation with far-right factions.<sup>5</sup> Salis’s detention sparked backlash in Italy, particularly because she appeared in court in shackles, which was deemed an excessive and inhumane treatment. Various parties, including her family and Italian officials, protested the handling of her case, arguing that her detention conditions were inadequate. The Italian government even requested her extradition so she could be detained in Italy, but this request was denied.<sup>6</sup>

The ensuing issue arose when Ilaria Salis sought to avoid prosecution by running as a candidate for the European Parliament. Her candidacy was motivated by the fact that, if elected, Salis would be entitled to certain rights under the TFEU, including immunity.<sup>7</sup> This immunity is provided under the Protocol on the Privileges and Immunities of the European Union, derived from Article 343 TFEU, which states:

*“The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.”*

This matter would be straightforward if Ilaria Salis were already acting in the capacity of a European Parliament member when expressing her political aspirations. However, Salis was detained on February 11, 2023, for alleged assault on neo-Nazi attendees at a far-right event in Budapest, while the EU elections are not scheduled until June 6-9, 2024. Thus, there is a considerable time lapse between Salis’s detention and the EU election date. Under Hungary’s Criminal Code, Salis is charged with offenses under Section 216 and Section 227, which stipulate criminal penalties for assault against individuals based on group affiliation or for physically assaulting and insulting others.

While EU law holds an equal position to Hungary’s constitution under the principle of *lex superiori derogat legi inferiori* (a higher law supersedes a lower law), thus placing

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<sup>5</sup> <https://www.theguardian.com/world/article/2024/jun/25/italian-antifascist-mep-ilaria-salis-on-her-15-month-detention-in-hungary> be accessed 2 November 2024

<sup>6</sup> <https://left.eu/left-co-chair-demands-eu-wide-extradition-ban-to-hungary/> be accessed 2 November 2024

<sup>7</sup> Victor Torre de Silva, “Enlarging the Immunities of European Parliament’s Members: The Junqueras Judgment,” *German Law Journal* 22, no. 1 (2021): 85–101, <https://doi.org/10.1017/glj.2020.102>.

Hungary's Criminal Code subordinate to EU law, the issue lies not in the hierarchy of regulations but in Ilaria Salis's status when the alleged offense was committed. At the time of the offense, immunity was not yet applicable, given that one of EU law's fundamental principles is the non-retroactive effect, which means that no one may be punished under a law if it was not in force when the offense occurred.<sup>8</sup> By this logic, Salis should not be granted immunity for a criminal act committed as an ordinary citizen. The absence of immunity means that Salis must undergo a fair trial in Hungary.

Referring to similar cases in other countries, parliamentary immunity typically applies only upon induction, not retroactively. This is illustrated by cases in India, where Amritpal Singh and Sheikh Abdul Rashid were elected to the Lok Sabha but were unable to enjoy immunity while serving prison sentences for separate charges. Under India's parliamentary regulations, each parliamentarian has immunity rights analogous to those in the EU. Furthermore, a similar instance almost occurred in the United States when Eugene V. Debs ran for the U.S. presidency in 1920. At the time, Debs was incarcerated and ran against William Howard Taft. Although it was unclear whether Debs's status would be expunged if he won, he had intended to grant himself clemency. Like the EU, according to U.S. Supreme Court rulings in *Nixon v. Fitzgerald* (1982), *Clinton v. Jones* (1997), and *Trump v. United States* (2024), sitting presidents are granted absolute immunity for actions within the scope of constitutional powers.<sup>9</sup> Based on the aforementioned points, this article aims to address the question of whether there has been a violation of the principles of equality before the law and legal certainty in the case of Ilaria Salis under EU law?

## **B. Discussion**

The Equality before the law represents a popular concept in a rule of law country, whether in civil or common law systems.<sup>10</sup> This concept forms the basic foundation of the rule of law itself because it eliminates the hierarchy of social castes, which previously distinguished between the people and officials as different legal subjects. Acemoglu and

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<sup>8</sup> Marco Greggi and Anna Miotto, "The OECD Dispute Resolution System in Tax Controversies," *Laws* 13, no. 4 (2024): 1–16, <https://doi.org/10.3390/laws13040045>.

<sup>9</sup> Laura H Burney, "Digital Commons at St. Mary's University Constitutional Law — Presidential Immunity — The President Is Absolutely Immune From Civil Damages Liability For Acts Done Within The 'Outer Perimeter' Of His Official Capacity (Casenote)" 1145 (1982).

<sup>10</sup> N.W Barber, "The Rechtsstaat and the Rule of Law Reviewed Work (s): Weimar: A Jurisprudence of Crisis," *The University of Toronto Law Journal* 53, no. 4 (2003): 443–54.

Wolitzky highlight that equality before the law ensures that laws apply equally to all citizens; in other words, no one is above the law.<sup>11</sup> Thomsen explicitly states that, in the context of the legal process, the concept of equality before the law aligns with the Aristotelian principle of justice, which requires courts to 'treat like cases alike'.<sup>12</sup> In essence, equality before the law demands equal treatment for everyone without discrimination, particularly in the legal process within courts.

The principle of legal certainty, like the principle of equality before the law, plays a crucial role in upholding the rule of law.<sup>13</sup> Its origins trace back to ancient Roman traditions, where Athenian democracy, during the 5th-4th centuries BC, defined definiteness merely as the precise wording of legal texts. However, this approach proved short-term and unstable, failing to provide consistent standards and norms.<sup>14</sup> Different countries developed the principle of legal certainty in varied ways. Historical milestones of legal certainty can be seen in the Magna Carta (1215), the Declaration of the Rights of Man (1789), and the Covenant and Constitution of the rights and liberties of the Zaporozhian, known as the Orlyk Constitution (1710). Theoretical and practical aspects of legal certainty gained significant development in the 20th and 21st centuries. The European Court of Human Rights (ECHR) significantly contributed to shaping the modern theory of legal certainty.<sup>15</sup> Ostapenko Hana offers a more detailed explanation of legal certainty, presenting it as a principle grounded in the rule of law and encompassing various elements. These elements can be categorized into two groups. The first group includes elements that uphold values protected by the principle, such as predictability, stability, and consistency. The second group consists of elements designed to safeguard against threats to legal certainty. These include non-retroactivity, respect for legitimate

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<sup>11</sup> Daron Acemoglu and Alexander Wolitzky, "A THEORY OF EQUALITY BEFORE THE LAW," *NBER Working Paper* No. 24681, 2018, <http://dx.doi.org/10.1016/j.gde.2016.09.008><http://dx.doi.org/10.1007/s00412-015-0543-8><http://dx.doi.org/10.1038/nature08473><http://dx.doi.org/10.1016/j.jmb.2009.01.007><http://dx.doi.org/10.1016/j.jmb.2012.10.008><http://dx.doi.org/10.1038/s4159>.

<sup>12</sup> Frej Klem Thomsen, "Concept, Principle, and Norm-Equality before the Law Reconsidered," *Legal Theory* 24, no. 2 (2018): 103–34, <https://doi.org/10.1017/S1352325218000071>.

<sup>13</sup> Retno Kusniati, Prasit Aekaputra, and Nhonlaphat Pitpiboonpreeya, "Domestic Implementation of International Law in Indonesia and Thailand," *Indonesian Journal of International Law* 22, no. 1 (September 27, 2024), <https://doi.org/10.17304/ijil.vol22.1.1895>.

<sup>14</sup> Oksana Shcherbanyuk, Vitalii Gordieiev, and Laura Bzova, "Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law," *Juridical Tribune* 13, no. 1 (2023): 21–31, <https://doi.org/10.24818/TBJ/2023/13/1.02>.

<sup>15</sup> Bronislav Totskyi, "Legal Certainty as a Basic Principle of the Land Law of Ukraine," *Jurisprudence* 21, no. 1 (2014): 204–22, <https://doi.org/10.13165/jur-14-21-1-10>.

expectations, enforcement of court rulings, res judicata (finality of judgments), clarity of legal norms, dissemination of legal acts and decisions, and limitations on the abuse of power by administrative bodies.<sup>16</sup>

### **1. The Principle of Equality Before the Law and Legal Certainty in EU Law**

The provisions related to equality before the law and legal certainty have essentially been regulated explicitly and implicitly in EU law. EU law itself has 3 (three) sources of law, namely primary law, the general principle of law and secondary law, all of which are regulated in a hierarchy as stated in the Treaty of Lisbon, namely as follows:

**Chart 1. Hierarchy of EU Law**



The graph above illustrates the international agreements established between the EU and non-EU countries under both primary and secondary law. Additionally, regulations addressing the principles of equality before the law and legal certainty are outlined in several legal provisions, including:

#### **a. EU Charter of Fundamental Rights**

- 1) Article 20, Everyone is equal before the law.
- 2) Article 21 Paragraph 1, Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political

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<sup>16</sup> Hanna Ostapenko, "Role of Legal Certainty in Providing Economic Security: Ukraine's Experience," *Theoretical and Practical Research in the Economic Fields* 14, no. 2 (2023): 215–22, [https://doi.org/10.14505/tpref.v14.2\(28\).02](https://doi.org/10.14505/tpref.v14.2(28).02).

or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

b. The general principles established by the Court of Justice of the European Union

1) Judgment of the Court of 22 March 1961. - Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community. - Joined cases 42 and 49/59. In this decision, the CJEU ordered high authorities to refrain from issuing changing or inconsistent policies that would result in legal uncertainty.

2) Plantanol GmbH & Co KG v Hauptzollamt Darmstadt (C-201/08) [2009] E.C.R. I-8343

The judgment concerns the interpretation of Directive 2003/96/EC on energy taxes for biofuels. The case illustrates the need for legal certainty through harmonization of legislation. -taxation related to the EU.

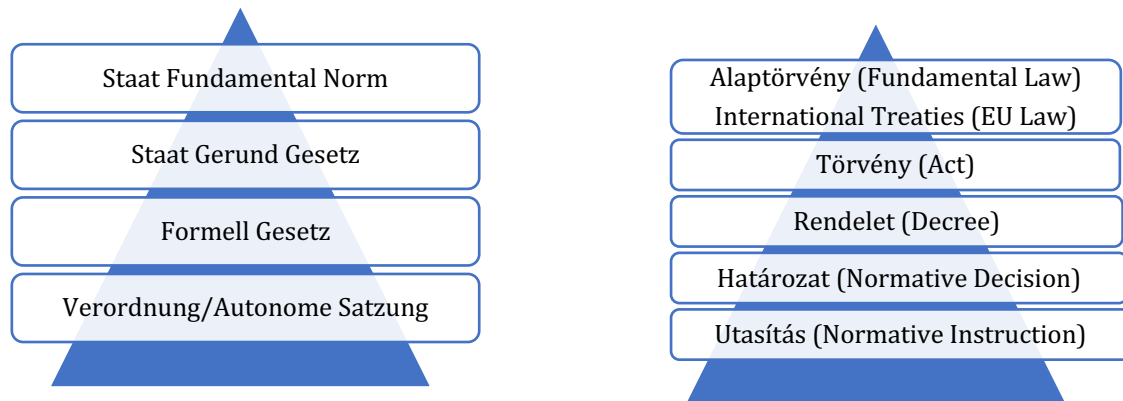
The data above shows that regulations related to the principles of equality before the law and legal certainty are stated in the EU Charter of Fundamental Rights and the general principles established by the Court of Justice of the European Union, both of which fall under primary law.

## **2. Position of the Hungarian Criminal Code in the Hungarian Legislative Hierarchy**

Hungary adopts a civil law system, making legislation a critical aspect of its legal framework. This approach stems from the tendency of civil law countries to adhere to legal positivism. According to Butculescu, legal positivism is based on the idea that the State creates legal norms and, consequently, the law, while public law governs the relationship between the State and its citizens. As a result, the hierarchy of norms plays a crucial role in Hungary.

Hans Nawiasky's theory of norm hierarchy classifies legal norms within a state into four levels: *staat fundamental norm*, *staat gerund gesetz*, *formell gesetz*, and *verordnung/autonome satzung*. Similarly, the Hungarian legal system follows a hierarchy based on Nawiasky's theory. The comparison between Nawiasky's theoretical framework and the hierarchy of Hungarian legal norms is presented as follows:

**Chart 2.** Comparison of Norm Hierarchy in Hans Nawiasky and Hungarian Theory of Countries



- a. *Alaptörvény* (Fundamental Law) is the highest level legal norm governing Hungary's legal system, it defines the basic rights and obligations of citizens, and establishes the main rules for the state structure. No measure of any other norm may contradict the Fundamental Law.
- b. *Törvény* (Act) is the second highest level legal norm. Rights and obligations to be governed by Acts are defined by the Fundamental Law. Acts may only be adopted, amended or repealed by the National Assembly.
- c. *Rendelet* (Decree) is a law based on, or executing provisions of, higher level legal norms. Decrees have the force of law as they are adopted under authorization granted by higher level laws.
- d. *Határozat* (Normative Decision) is a public law regulatory instrument adopted e.g. by the National Assembly, the Government or another collegiate organ of central state administration as well as local governments to regulate their organisation, operation, activities and action plans.
- e. *Utasítás* (Normative Instruction) is a public law regulatory instruments issued by the heads of the administrative organisations of e.g. the National Assembly, ministries, independent regulatory organs and shall be binding upon the personnel of the respective organs.

In Hungary's hierarchy of norms, EU law (including international treaties) ranks below the Constitution but aligns with fundamental law. Despite being subordinate to the Constitution, EU law holds a parallel status. Additionally, Hungary's Criminal Code is



governed by Act C of 2012 on the Criminal Code, indicating that regulations related to criminal acts, including *Törvény*, are positioned below the Constitution.<sup>17</sup>

### **Provisions Concerning the Right to Immunity for Members of the EU Parliament**

Regarding immunity rights for EU parliamentarians, this is a derivative regulation from Article 343 TFEU which states that:

*The Union shall enjoy in the territories of the **Member States** such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on **the privileges and immunities of the European Union**. The same shall apply to the European Central Bank and the European Investment Bank.*

These derivative regulations are specifically regulated in articles 8 and 9 of the Protocol on the privileges and immunities of the European Union, which state that:

#### Article 8

***Members of the European Parliament** shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.*

#### Article 9

*During the sessions of the European Parliament, its members shall enjoy:*

- (a) in the territory of their own State, the immunities accorded to members of their Parliament;*
- (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.*

*Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the European Parliament. Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.*

Meanwhile, referring to the CJEU Decision, the principle of primacy of EU law applies to all EU member states. The position of EU law is below a country's constitution, but the

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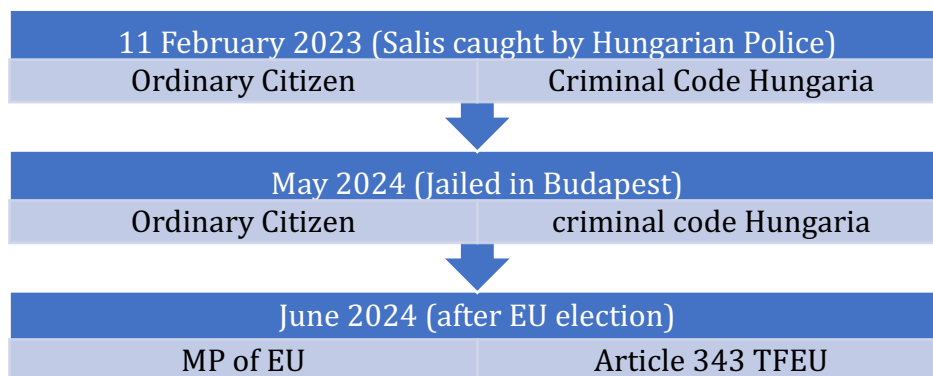
<sup>17</sup> Kemal Gözler, "The Question of the Rank of International Treaties in National Hierarchy of Norms," Prof. Dr. Mehmet Genç'e Armağan [Essays in Honor of Prof. Dr. Mehmet Genç] II (2016): 21–45.

country's constitution must be in harmony with EU law. That indicates that if there is a conflict between the Hungarian Criminal Code and EU law regulating immunity rights, namely the TFEU and TPPI, the Hungarian Criminal Code must be set aside.

### **3. Violation of the Principle of Equality Before the Law Ilaria Salis in the Perspective of EU Law**

The case of Ilaria Salis draws attention because the EU granted her immunity rights after she was elected as a member of the European Parliament.<sup>18</sup> Consequently, regulations outlined in Article 343 TFEU and Articles 8 and 9 of the Protocol on the privileges and immunities of the European Union require her release. But is that the case? In this situation, applying Article 343 TFEU and Articles 8 and 9 of the Protocol appears to conflict with the principle of equality before the law, as stated in Article 20 of the EU Charter of Fundamental Rights. This is because Ilaria Salis held the status of an ordinary citizen when committing the crime and was not performing her duties as a member of the European Parliament. This point is evident in Article 8, which states: 'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings....' In simpler terms, this situation can be illustrated as follows:

**Chart 3. Ilaria Salis's Procees of Law**



As shown in the graph, the graph indicates that Ilaria Salis was still an ordinary citizen when she committed a crime. As an ordinary citizen, the law must treat Ilaria Salis the

<sup>18</sup> <https://www.euronews.com/my-europe/2024/06/10/italian-activist-ilaria-salis-to-be-released-following-her-election-as-an-mep> accessed on February 8, 2025

same as other citizens. To determine whether there has been a violation of the principle of equality before the law, we can analyze it from two perspectives: positive law or the legal process. Rasmussen states that equality before the law has at least two fundamentally different meanings. First, it relates to the rights and duties contained in positive law, i.e., the content of the law, and requires the absence of particular distinctions in their distribution. Second, it relates to the practices of courts, police officers, ministries, and so on, i.e., the legal process, which requires the absence of particular distinctions in its application.<sup>19</sup>

In simple terms, there are some indicators to see whether there has been a violation of the principle of equality before the law, including:

- a. positive law and mandates something like the absence of certain distinctions in the distribution of these
- b. practices of the courts
- c. police officers
- d. ministries
- e. the process of law and mandates something like the absence of certain distinctions in its application

In the context of positive law, neither the Hungarian criminal code nor EU law violates the principle of equality before the law. EU law grants immunity to parliament members but not to ordinary citizens, showing that the violation lies in applying positive law. This becomes evident as authorities did not release Maja T., who was arrested alongside Ilaria Salis.<sup>20</sup> In the context of court practices, the Judge has actively worked to ensure a fair process. Similarly, the police and the ministry have taken steps to request the EU to revoke Ilaria Salis' immunity rights.<sup>21</sup>

In simple terms, violations of the principle of equality before the law can be seen in the following table:

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<sup>19</sup> Kasper Lippert-Rasmussen, *Born Free and Equal?, Etica e Politica*, vol. 15 (New York: Oxford University Press, 2014), <https://doi.org/10.1093/acprof>.

<sup>20</sup> <https://www.dw.com/en/germanys-activist-maja-t-faces-harsh-hungarian-prison-conditions/a-70018750> be accessed 8 November 2024

<sup>21</sup> <https://www.eunews.it/en/2024/10/22/hungary-requests-revoking-parliamentary-immunity-for-ilaria-salis/> be accessed 8 November 2024

**Table 3.** *Violation of the Principle of Equality Before the Law in the Case of Ilaria Salis*

Indicator	Description	Notes
Positive law and mandates something like the absence of certain distinctions in the distribution of these	Violated	The violation lies in the application of Article 343 TFEU, which should not yet apply to Salis.
Practices of the courts	Not Violated	
Police officers	Not Violated	
Ministries	Not Violated	
The process of law and mandates something like the absence of certain distinctions in its application	Not Violated	Hungary has already taken steps to request the EU to temporarily revoke immunity rights.

Based on the table above, we can observe a violation of the principle of equality before the law because Ilaria Salis' status when she committed the crime was the same as Maja T., who was arrested at the same time. Meanwhile, Hungarian legal authorities released Ilaria Salis, who is still undergoing legal proceedings, due to the EU's order. This action does not violate the principle of equality before the law because EU law holds a higher position than Hungarian law. However, the Hungarian authorities demonstrated their commitment to enforcing equality before the law by actively requesting the revocation of Salis' immunity status.

#### **4. Violation of the Principle of Legal Certainty in the Ilaria Salis Case**

The case of Ilaria Salis became an issue when the EU granted immunity status after being elected as a member of the EU parliament. Referring to Ostapenko's opinion, there are at least several indicators to see whether something meets the principle of legal certainty or otherwise, including predictability, stability, consistency, non-retroactivity, respect for legitimate expectations, execution of court rulings, *res judicata*, clarity of legal norms,

divulcation of legal acts and decisions, and limitation of abuse of powers of the administrative bodies.

a. Predictability

Predictability is one of the most prominent rule-of-law desiderata. The rule of law demands that law be made and applied in a way that is predictable, thereby enabling people to plan their lives in accordance with it.<sup>22</sup> Lon Fuller emphasized the fact that people need to know what the law expects of them so that they can conform their behaviour to it and not be blindsided by official action after the fact. As Fuller states, ‘the citizen cannot orient his conduct by law if what is called law confronts him merely with a series of sporadic and patternless exercises of state power.’<sup>23</sup>

In the context of Ilaria Salis, the EU grants immunity rights based on article 343 TFEU and articles 8 and 9 of the Protocol on the privileges and immunities of the European Union.

Article 343 TFEU states that:

***Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by **them** in the performance of their duties.***

There are two points to note in implementing this provision, namely:

- 1) This regulation applies only to Members of the European Parliament, not candidates for EU parliamentarians.
- 2) This provision only applies when members of the European Parliament are carrying out their duties.

If we look at Ilaria Salis’s arrest on 11 February 2023, who were the members of the EU parliament from Italy at that time?

**Table 4.** *List of EU Parliament Members from Italy February 2023*

Matteo Adinolfi	Simona Baldassarre	Alessandra Basso	Matteo Gazzini	Cinzia Bonfrisco	Paolo Borchia
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<sup>22</sup> Retno Kusniati et al., “An ASEAN Transboundary Haze Court: Why Does It Matter and How Is It Possible?,” *Journal of Indonesian Legal Studies* 9, no. 2 (November 30, 2024): 739–66, <https://doi.org/10.15294/jils.v9i2.4488>.

<sup>23</sup> Hillary Nye, “Predictability and Precedent,” *Philosophical Foundations of Precedent* i, no. October 2021 (2023): 443–55, <https://doi.org/10.1093/oso/9780192857248.003.0034>.

Marco Campomenosi	Elisabetta De Blasis	Massimo Casanova	Susanna Ceccardi	Angelo Ciocca	Rosanna Conte
Gianantonio Da Re	Francesca Donato	Paola Ghidoni	Gianna Gancia	Valentino Grant	Danilo Lancini
Elena Lizzi	Alessandro Panza	Luisa Regimenti	Antonio Maria Rinaldi	Silvia Sardone	Annalisa Tardino
Isabella Tovaglieri	Lucia Vuolo	Stefania Zambelli	Marco Zanni	Vincenzo Sofo	Pietro Bartolo
Brando Benifei	Beatrice Covassi	Achille Variati	Caterina Chinnici	Paolo De Castro	Andrea Cozzolino
Giuseppe Ferrandino	Elisabetta Gualmini	Nicola Danti	Pierfrancesco Majorino	Alessandra Moretti	Pina Picierno
Giuliano Pisapia	Franco Roberti	Camilla Laureti	Massimiliano Smeriglio	Irene Tinagli	Patrizia Toia
Isabella Adinolfi	Tiziana Beghin	Fabio Massimo Castaldo	Ignazio Corrao	Rosa D'Amato	Maria Angela Danzì
Laura Ferrara	Mario Furore	Chiara Maria Gemma	Dino Giarrusso	Piernicola Pedicini	Sabrina Pignedoli
Daniela Rondinelli	Marco Zullo	Alessandra Mussolini	Fulvio Martusciello	Giuseppe Milazzo	Aldo Patriciello
Massimiliano Salini	Lara Comi	Salvatore De Meo	Carlo Fidanza	Pietro Fiocchi	Denis Nesci
Nicola Procaccini	Raffaele Stancanelli	Sergio Berlato	Herbert Dorfmann		

The table above shows that Ilaria Salis' name was not listed during the arrest in February 2023. Furthermore, the provisions in Article 8 of the TPPI state something similar, namely:

Article 8

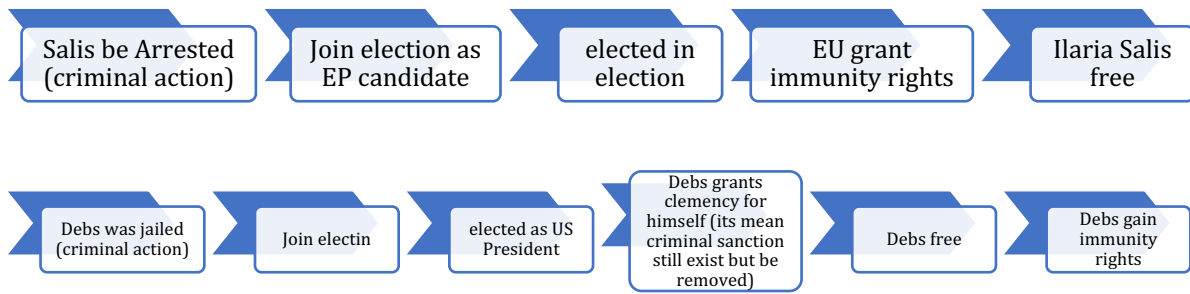
***Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.***

If we apply the concept of predictability, all legal cases must be foreseeable in the future and provide certainty for the parties involved. The Ilaria Salis case does not align with this concept. The criminalization process for Ilaria Salis will depend on whether or not she is elected as a member of the EU parliament. This could set a bad precedent for law enforcement in the EU because anyone convicted in the EU region might run for EU membership and hope to gain immunity rights.

b. Stability

One of the indicators of legal certainty is stability. The definition of stability in Britannica is the quality or state of something that is not easily changed or likely to change. Meanwhile, referring to another definition, legal stability refers to the consistency and predictability of laws and legal principles over time. In this context, the Ilaria Salis case has no similar precedent, so we cannot yet determine whether it meets the stability requirements. However, a similar model occurred in India when Amritpal Singh and Sheikh Abdul Rashid successfully ran for the Lok Sabha parliament. However, both of them could not enjoy immunity rights because they were both in prison at the time for different cases. A similar case also occurred with Eugene V. Debs, who ran for President of the United States and promised that if he won the election, he would issue a pardon for himself.

Although the outcomes differed, both cases show the same pattern with different legal interpretations between Debs and Salis. However, if Debs wins the election, we can describe the situation as follows:



It can be seen in the case of Debs that if he wins the election, he will remove his criminal sanctions first before obtaining immunity rights, meaning that immunity rights are prospective, not retroactive. Therefore, even though there is no precedent in the EU, the EU should be able to use general legal principles to make decisions.

#### c. Consistency

Based on Torben Spaak's opinion, a legal system is consistent if, and only if, there are no norm-conflicts in the strict sense of norm-contradictions in the system, and that consistency is an important property of any system of norms, because it is inconsistent system cannot fulfill its central function properly, that is, to guide human behavior in a rational way.<sup>24</sup> If we look at Article 343 TFEU and its derivative regulations, namely Articles 8 and 9 TPPI, there is no problem. Therefore, the right to immunity in EU law regulations has fulfilled the consistency element.

When viewed in its application, its consistency cannot be proven because there have been no similar cases.

#### d. Non-retroactivity

The principle of non-retroactivity was first clearly articulated in Roman law, where already by the end of the second century B.C. it applied in both criminal and civil law to protect the existing legal order and economic interests. The Roman statesman Cicero explained the importance of the principle of non-retroactivity. According to him, individuals should be able to rely on laws in the expectation that the state will not afterwards interfere with individuals' rights.<sup>25</sup> Cicero further explains the limits of non-retroactivity, such as when the grievous nature of committed actions creates an assumed

<sup>24</sup> Torben Spaak, "Consistency in Law," *SSRN Electronic Journal*, no. April (2023), <https://doi.org/10.2139/ssrn.4418149>.

<sup>25</sup> Yarik Kryvoi and Shaun Matos, "Non-Retroactivity as a General Principle of Law," *Utrecht Law Review* 17, no. 1 (2021): 46–58, <https://doi.org/10.36633/ULR.604>.



positive duty not to commit them, even without positive law expressed in a statute.<sup>26</sup> Referring to this explanation, we can conclude that a person cannot be harmed by a law that has not yet been applied to them.

In the context of Ilaria Salis, she committed a crime in February 2023 when she had not yet obtained immunity rights as regulated in Article 343 TFEU and Articles 8 and 9 TPPI. However, in July 2024, Salis was elected as a member of the EU parliament, meaning she benefited from the implementation of her new status as a member of the EU parliament. This contradicts the legal principle *nullum commodum capere potest de injuria sua propria*, which means no party may benefit from their detrimental actions or conditions not yet regulated in valid legal regulations.<sup>27</sup> When Ilaria Salis committed the crime, she was still an ordinary citizen, meaning she had not yet received the rights or obligations of a member of the EU parliament. These rights and obligations only became inherent after her inauguration. Meanwhile, the crime Salis committed should have been tried with Salis positioned as an ordinary citizen at the time of the crime. Therefore, in this context, the EU violated the principle of non-retroactivity.

e. Respect for legitimate expectations

Alsmadi defines legitimate expectations as legislative rules that should not be issued in a way that shocks individuals and collides with their legitimate expectations, which they made on objective grounds based on existing legislation announced by the public authorities. Referring to regulations in general, the provisions related to immunity rights have generally been in accordance.

f. Execution of Court Rulings

In Britannica, executing a court ruling, also known as enforcement of a judgment, compels the losing party to comply with the court's decision. In the case of Ilaria Salis, we saw that Ilaria Salis, who was still an ordinary citizen at the time undergoing legal proceedings in the Hungarian Court, received immunity rights from the EU, preventing her from undergoing the trial process. Therefore, in the context of the Salis case, we have not yet

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<sup>26</sup> Nathan Moelker, "LAW ONLY FOR THE FUTURE: NONRETROACTIVITY AS A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW," *Gonzaga Journal of International Law* 26, no. 1 (1994): 1–24.

<sup>27</sup> M. Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law,'" *Michigan Journal of International Law* 11, no. 3 (1990): 768–818.

discovered whether the court decision was executed. We cannot know this because the EU granted Salis immunity rights before she received a decision from the judge.

g. Res judicata

The general principles of res judicata were summarised by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*, in which he stated:<sup>28</sup> “*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle”. In the context of Ilaria Salis’ case, no court has sentenced her, so we do not know whether she meets the requirements of *res judicata*.

h. Clarity of legal norms

The principle of maximum certainty (clarity of norms) expects criminal norms to be clear and understandable means the question that should be answered is ‘Who are the addressees of criminal norms?’. Who are the persons who should understand criminal norms properly? Regarding to this question, certainty or clarity of criminal norms can be interpreted in two dimensions depending on the addressees of norms. One of the most important group of persons to whom criminal norms are addressed are the citizens. If ‘clearness’ or ‘certainty’ are to mean from the perspective of the citizen, it is necessary to analyze the special features and circumstances of citizens who have to obey criminal norms. Judges represent the other type of addressees because they are the ones who decide cases according to criminal norms. Judges make clear the content of criminal norms and concepts through interpretation. The crucial issue here is that criminal rules must be drafted in a way which enables judges to unfold a reasonable interpretation of the norm and to avoid the making of arbitrary decisions.<sup>29</sup> In the case of Ilaria Salis, authorities arrested her as an ordinary citizen, not as a member of the EU parliament. Therefore, her release due to the granting of immunity one year later contradicts the principle of clarity of legal norms.

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<sup>28</sup> Joel Semakula, “Res Judicata in Judicial Review,” *Judicial Review* 25, no. 4 (2020): 307–20, <https://doi.org/10.1080/10854681.2020.1871716>.

<sup>29</sup> Krisztina Ficsor, “Certainty and Uncertainty in Criminal Law and the ‘clarity of Norms’ Doctrine,” *Hungarian Journal of Legal Studies* 59, no. 3 (2018): 271–89, <https://doi.org/10.1556/2052.2018.59.3.3>.

i. Divuligation of legal acts and decisions

Divuligation of legal acts and decisions is an action to publish all regulations or court decisions related to immunity rights. In this context, all regulations and decisions related to the EU can be accessed by anyone so that it can fulfil the principle of legal transparency.

j. Limitation of abuse of powers of the administrative bodies

One indicator of legal certainty is the limitation of administrative bodies' abuse of power. The concept of checks and balances is essential to ensure that administrative bodies do not act arbitrarily. In the EU, two institutions have the authority to correct the EU administrative body: the Court of Justice of the European Union (CJEU) and the European Ombudsman.<sup>30</sup>

In the CJEU context, the European Court has stressed the importance of procedural guarantees as a counterbalance to administrative discretion and recognised an array of general administrative principles:<sup>31</sup>

- 1) the principle of good administration,
- 2) the principle of legal certainty,
- 3) the principle of equality,
- 4) the principle of proportionality,
- 5) the principle of non-discrimination

As seen above, good administration is one of the important parameters emphasized by the CJEU towards the administrative body.

Meanwhile for European Ombudsman, one of the most important functions of the ombudsman is to ensure the administrative accountability of public institutions. With the Ombudsman's office, acts that are considered crimes are recorded, whistle-blowers are protected from an official point of view, and cases of abuse of office are revealed. The Ombudsman also helps to improve administrative performance by suggesting some corrective actions to institutions as an external control tool in complaints about

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<sup>30</sup> Amie Kreppel, "Bicameralism and the Balance of Power in EU Legislative Politics," *Journal of Legislative Studies* 24, no. 1 (2018): 11–33, <https://doi.org/10.1080/13572334.2018.1444623>.

<sup>31</sup> Réka Friedery, "Good Administration through the Lens of the CJEU: Direction for the Administrative Bodies," *Bratislava Law Review* 2, no. 1 (2018): 116–22, <https://doi.org/10.46282/blr.2018.2.1.98>.

maladministration. There are at least three views on the meaning of maladministration. First, maladministration can be defined as illegality. Second, maladministration and illegality can be regarded as mutually exclusive, making maladministration an undesirable, yet still legal, action. Maladministration also means that every complaint about political decisions is evaluated outside the jurisdiction of the institutions.<sup>32</sup>

In this context, two institutions limit the administrative body's authority, but these two institutions did not make any decisions. Therefore, we do not know whether these two institutions took a different stance from the EU administrative body in the case of Ilaria Salis. Based on these factors, we can conclude that:

**Table 4.** *Violation of the Principle of Legal Certainty in the Case of Ilaria Salis*

Indicator	Description
Predictability	Violated
Stability	No case yet
Consistency	No case yet
Non-retroactivity	Violated
Respect for legitimate expectations	Compliant
Execution of court rulings	No case yet
Res judicata	No case yet
Clarity of legal norms	Violated
Divulgence of legal acts and decisions	Compliant
Limitation of abuse of powers of the administrative bodies	Compliant, but it is not yet clear whether the limitation applies in Salis' case

As seen from the table above, the EU's decision to grant immunity rights to Ilaria Salis at least violated the principles of predictability, non-retroactivity, and clarity of legal norms. Therefore, it can be concluded that the principle of legal certainty has been violated.

<sup>32</sup> Demokan DEMİREL, "The Role of the European Ombudsman in Good Administration. Politics, Economics and Administrative Sciences," *Journal of Kirsehir Ahi Evran University* 5, no. 2 (2021): 127–44, <https://www.ombudsman.europa.eu/en/our-strategy/home/en>.

### C. Conclusion

The supremacy of EU law over national law illustrates the sui generis concept found in EU law. However, the specificity in the EU should not eliminate basic legal concepts that are already general, such as the principle of legal certainty and equality before the law. Based on the analysis the author conducted, it is clear that authorities have violated the principle of equality before the law and legal certainty in handling the Ilaria Salis case. Salis, as the perpetrator of a violent crime in Hungary, should have undergone the legal process first as an ordinary citizen, not automatically exempted because immunity rights were granted when Salis was elected as a member of the EU parliament. Based on these factors, the author suggests that the Court of Justice of the EU or the European Ombudsman review the legal basis of granting immunity the action of granting immunity rights to Salis in July 2024 for the case that occurred in February 2023, so it does not set a precedent in the future. This condition allows anyone who commits a crime in an EU country to follow the same path as Salis. This situation certainly violates the principle of legal certainty.

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