

## ALL LAWYERS ARE NEEDED TO DEFEND THE RULE OF LAW AND DEMOCRACY AGAINST ILLIBERAL REGIMES IN THE EU

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### Abstract

*Despite growing attention from academics and the media, this essay warns that the threat to the rule of law and democracy in Europe is still being underestimated. The illiberal regime crisis is difficult to grasp because it manifests itself less in clear violations of the law and more so in the gradual erosion of the culture of the rule of law, which is often only noticeable when it is too late. There are numerous examples of erosion in several EU Member States – and in the EU itself. Countering erosion is a common undertaking of all lawyers. Thus it is all lawyers who need to take responsibility and ask whether the culture of the rule of law still aligns with democratic ideals in all areas of their expertise and day-to-day practice.*

### 1. Introduction

For more than a decade now, the EU has witnessed the slow erosion of the rule of law and democracy in some of its Member States. Despite the gradual nature of this decline, there have also been various flashpoints in the conflict over compliance with the EU's foundational values. Unfortunately, the more frequently such dramatic events occur, the less serious the general decline appears, as people become accustomed to the situation.

Since 2010, the governing FIDESZ party in Hungary has carried out a constitutional shakeup, weakening judicial independence, hijacking the Constitutional Court and controlling the media. It has held free but unfair elections and has made excessive use of emergency powers legislation, often using legal means due to its dominant two-thirds majority.<sup>1</sup>

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1. Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Union. Theory, Law and Politics in Hungary and Romania* (Hart Publishing/Beck 2015); András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution-Building in Hungary' (2020) 68 AJCL 760, doi: 10.1093/ajcl/avaa031.

Triggering Article 7 TEU proceedings has been of little help so far. While Court of Justice of the European Union (CJEU) judgments and an EU funding freeze were presumably more effective, the EU measures have not yet contributed noticeably to improving the situation in Hungary.

Some five years after erosion began in Hungary, Poland began to follow the Hungarian blueprint. The Polish Constitutional Tribunal has been packed with loyal judges and the appointment of personnel in ordinary courts has been purposefully interfered with by the governing Law and Justice (PiS) party. The Polish parliament also introduced judicial ‘reforms’ involving disciplinary chambers to control judges. Although many of Poland’s measures resemble the Hungarian model, they were forced through without the necessary constitutional-amending majority; therefore, their domestic legality has been questionable from the start (which then led to violations of both the European Convention on Human Rights and EU law).<sup>2</sup> Article 7 TEU proceedings were also triggered in relation to Poland. However, in this case too, the procedure, once labelled the ‘nuclear option’, did not have much of an impact. Before the increase in pressure through financial conditionality could be tested, a change of government provided some relief.

Similar events have occurred in other Member States, albeit to a lesser degree and thus less noticeably. For example, events in Romania and Slovakia have proven that a State does not automatically follow the principles of the rule of law once it has joined the EU.

These developments do not occur in isolation; they have effects beyond national legal orders. On 7 October 2021, the Polish Constitutional Court stated clearly in a decision that Union law does not take precedence over Polish national constitutional law. Equally, the attempt of the CJEU to ‘interfere’ in the Polish judiciary would, according to the Polish Constitutional Court, violate the supremacy of the Polish Constitution (in relation to Union law) and the principle that sovereignty must be preserved in the process of European integration.<sup>3</sup> Less noticed, but no less problematic, is the reasoning of the Hungarian Constitutional Court that the

2. For an excellent account of these developments, see Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019); see also Mirosław Wyrzykowski and Michał Ziólkowski, ‘Illiberal Constitutionalism and the Judiciary’ in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2022) 517 reviewing ‘the transformation of the judiciary in illiberal regimes’ as well as offering a case study on Poland.

3. Polish Constitutional Court, Judgment of 7 October 2021, K 3/21. For an impressive rebuke by 27 retired judges of the Polish Constitutional Court, see ‘Statement of Retired Judges of the Polish Constitutional Tribunal’ (*Verfassungsblog*, 11 October 2021) <[verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/](https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/)> (all websites last visited 17 October 2025).

Hungarian government is constitutionally empowered to disapply EU law if it deems it to violate Hungarian constitutional identity.<sup>4</sup> These rulings clearly demonstrate how the erosion of the rule of law and democracy in Member States jeopardizes the functioning of the EU legal order itself.<sup>5</sup>

Member States contribute decisively to the functioning of the EU and those with bad intentions generally have the potential for significant disruption. The EU depends on Member States playing by the rules. This becomes problematic when the underlying assumption that all Member States share a common understanding of certain fundamentals is proved false. Even less noticed, but even more problematic, is the fact that the erosion of the rule of law and democracy in EU Member States has also poisoned the EU, with the EU itself witnessing erosion phenomena too.<sup>6</sup> Some examples of problems regarding the rule of law and democracy at EU level are, to some extent, well known and have been around for quite some time (for example, the democracy deficit in relation to the legitimization of the Commission that can result in the Commission feeling more accountable to the European Council, representing Member State governments, than to the European Parliament (EP), representing the European electorate). Other problems have emerged during recent crises and due to the need for quick decisions. For example, the European Council's dominance has sidelined other institutions, such as the European Commission and the EP. This has led to a concentration of power at the level of national leaders. Still other problems are more explicitly linked with the erosion of the rule of law and democracy in EU Member States – Member States that have become illiberal or hybrid regimes misuse their voting power to undermine the EU decision-making processes. For example, they still have the right to nominate politicians for the Commission and other EU bodies, such as the CJEU and they can veto decisions that require unanimous agreement for completely unrelated reasons.

This trilogy of issues necessitates action, not only with regard to restoring the rule of law and democracy in EU Member States but at EU level too. Specifically, protecting the EU from its illiberal Member States also requires the EU itself to do a lot of work.<sup>7</sup> First, it is important to

4. Hungarian Constitutional Court, Decision CC 32/2021, (XII. 20) AB. For an analysis see Attila Vincze, 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts' (2022) 49 EuGRZ 13.

5. Editorial Comments, 'Clear and Present Danger: Poland, the Rule of Law & Primacy' (2021) 58 CML Rev 1635 at 1648, doi: 10.54648/COLA2021107.

6. See András Jakab and Lando Kirchmair, 'EU Constitutional Resilience' in Leonard Besselink, Nicola Lupo and Mattias Wendel (eds), *Research Handbook on EU Constitutional Law* (Edward Elgar forthcoming).

7. András Jakab and Lando Kirchmair, *Saving the European Union from Its Illiberal Member States* (OUP 2025).

understand the extent of the problem. Using rule of law and democracy indices to measure adherence to the rule of law and democracy is a powerful way of identifying pertinent issues. Focusing on unique events, specific cases, institutions or legal rules can be distracting. Empirical data help to provide a more objective overview of the situation in Europe. However, an adequate and comparable methodology must be used.<sup>8</sup> An important first step in addressing this problem would be to include the EU in these indices. Another approach would be to improve the EU Justice Scoreboard (EJJS) so that it represents a state-of-the-art rule of law and democracy index and, in addition, to include the EU itself as a studied object.<sup>9</sup> Second, democratic accountability could be improved at EU level by following the *Spitzenkandidaten* system in EP elections.<sup>10</sup>

While the EU has reacted to the illiberal regime crises in various ways, it still seems that the motivation to protect these values is not strong enough. New challenges such as economic recession in some Member States, tariffs and, above all, the security situation appear to be more urgent. This is short-sighted. If the EU is to maintain its credibility within and beyond its Member States, it must defend the rule of law and democracy, at least within the EU.<sup>11</sup> Solving the other challenges depends on a functioning legal order based on the rule of law and democracy.

The question posed ten years ago as to whether the EU should protect democracy and the rule of law within its Member States now seems more urgent than ever.<sup>12</sup> Since then, numerous academic works and policy papers have been published that take the same stance. Various proposals address specific aspects, instruments and cases. They are all meaningful and important. This essay takes a slightly different approach. It aims to remind lawyers of their power and responsibility – and of their duty to be alert and ready to contribute to the defence of European values in this illiberal regime crisis in their everyday practice, not just in relation to important events or with specific proposals.

8. See András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 GLJ 936, doi: 10.1017/glj.2021.46.

9. See András Jakab and Lando Kirchmair, 'The Rule of Law in Numbers: How to Use Indices to Measure Adherence by the Member States and the EU Itself' in Jan Wouters and others (eds), *Upholding the Rule of Law in the EU* (OUP forthcoming).

10. See Jakab and Kirchmair (n 7) ch 7.

11. See Christophe Hillion, 'Overseeing the Rule of Law in the EU' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 59.

12. Posed and answered affirmatively by Jan-Werner Müller ten years ago in 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 ELJ 141, doi: 10.1111/eulj.12124, arguing that the EU has the authority to protect liberal democracy in its Member States.

## 2. The threat is underestimated

Despite the flashpoints listed above, which caused some outrage, the threat to the rule of law and democracy in Europe is still widely underestimated, notwithstanding an increasing amount of academic literature on the subject and extensive media coverage of the rise of illiberal and hybrid regimes. The problem is more difficult to grasp than might be expected, even for legal scholars. First, the main driver of the illiberal regime crisis in Europe is the *culture* of the rule of law, or rather the lack thereof. In other words, the *de facto* practices of officials and their narratives (that is, attitudes, beliefs and political rhetoric) shape institutions as much as formal legal rules.<sup>13</sup> Illiberal elements in this legal culture are much more difficult to identify than a clear breach of positive law. Second, the slow but constant erosion of the rule of law and democracy can make it even more difficult to understand the extent of the phenomenon and its consequences. Habituation effects (as in the well-known ‘boiling frog syndrome’) make the process of erosion feel less dramatic. Third, the collapse of a rule of law culture only becomes clearly visible when it is too late and, once lost, it is very difficult to re-establish.

Lawyers play an important role in this process and bear a great deal of responsibility. However, they downplay their influence if they see fit. For a long time, legal discourse in post-World War II Germany blamed positive law and, more importantly, legal positivism when the question of legal responsibility for the horrors of the Nazi era was debated. Gustav Radbruch, who himself was not part of the Nazi law regime, developed what has become known as the ‘defencelessness thesis’. According to this thesis, legal positivism rendered German lawyers defenceless against Nazi injustice.<sup>14</sup> Of course, this was a much easier solution than accepting that many German lawyers had contributed significantly to the Nazi legal system. This meant that the lawyers could be excused – and the blame could be placed on the positivists instead of their having to take personal responsibility.

It was not until the 1970s that Bernd Rüthers, a young academic at the time, argued that this thesis allowed German lawyers to shirk responsibility too easily. In fact, Nazi injustice was precisely the result of turning away

13. For more detail see Jakab and Kirchmair (n 7) 10 ff and 25 ff.

14. Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26 OJLS 1 at 7, doi: 10.1093/ojls/gqi041 [orig. id., ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) *Süddeutsche Juristenzeitung* 105] (‘Positivism, with its principle that “a law is a law”, has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal’).

from traditional positivist standards of a methodical application of the law.<sup>15</sup> There was excessive use of general clauses, the principle of specificity (*lex specialis*) was disregarded and patterns of de-formalizing the law and returning to (Nazi) natural law connected with pre-positive values and principles emerged.<sup>16</sup>

It was not only unjust laws but also the unjust actions of lawyers, be they judges, civil servants or practising lawyers, who came up with unjust interpretations and exhibited fanatical anticipatory obedience. Lawyers contributed significantly to Nazi law and its horrific consequences. This should serve as a warning to us. At the same time, it demonstrates that lawyers have a significant – and ongoing – responsibility to uphold the rule of law and democracy.

### 3. The threat can take on many forms

Various definitions of the rule of law and democracy have emerged over time.<sup>17</sup> This essay does not aim to contribute to analytical debates on these concepts. For the purposes of this piece, it suffices to highlight a few key elements. One such element of the rule of law that has never been questioned, for instance, is restricting or combatting the arbitrary use of State power.<sup>18</sup> The essentials of democracy are understood here as the concurrent presence of: (a) periodically organized, fair and free elections; (b) general and equal suffrage; (c) a realistic chance in law and in practice of voting the incumbent government out of office; and (d) voters having a real opportunity and the legal means to inform themselves about the government's performance.

The concepts of authoritarianism, illiberalism and populism have also been defined and interpreted in various ways by different authors from a range of disciplines. Authoritarianism can be understood as a political

15. Bernd Rüthers, *Die unbegrenzte Auslegung* (9th edn, Mohr Siebeck 2017) [orig.: 1968]. See also Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (Schweitzer 1974).

16. See, eg, Manfred Walther, 'Hat der juristische Positivismus die deutschen Juristen wehrlos gemacht?' (1988) 21 *Kritische Justiz* 263, doi: 10.5771/0023-4834-1988-3-263.

17. The term 'rule of law' is often used in an expanded sense to include the political ideology of the speaker or judge concerned: cf Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz (ed), *The Authority of Law* (Clarendon Press 1979) 210.

18. For an understanding of the rule of law as the opposite of arbitrariness, see Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Bloomsbury 2009) 45. Brian Z Tamanaha, 'A Concise Guide to the Rule of Law' in Palombella and Walker (ibid) 3, 7–8, understands it as a restriction of government discretion.

system characterized by limited pluralism and a lack of democratic practices, often with charismatic or bureaucratic leadership.<sup>19</sup> Illiberalism and illiberal regimes erode civil liberties, the rule of law and democracy.<sup>20</sup> Similarly, populism has also been described as the rejection of pluralism, excluding as it does significant parts of the electorate.<sup>21</sup>

While all these concepts have their merits, I wish to focus on informal elements of the rule of law and democracy in particular. In this piece, I refer to a political entity that explicitly rejects (at least partially) the narrative of liberal values<sup>22</sup> and simultaneously exhibits strong signs of democratic and legal erosion in the *de facto* practices of its officials as an illiberal regime.<sup>23</sup> Such a regime may have already deteriorated into a hybrid regime, where at least one aspect of a minimal democracy is lacking,<sup>24</sup> as is the case in Hungary, or it may be *en route* to becoming one, as was the case in Poland until recently; Slovakia seems to have taken its place and the situation in the Czech Republic will need to be monitored closely. These are just a few examples.

Finding solutions becomes so much more difficult if the main problem lies in the legal culture.<sup>25</sup> The rule of law and democracy are both under

19. See, eg, Juan J Linz, *Totalitarian and Authoritarian Regimes* (Lynne Rienner Publishers 2000).

20. See, eg, Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22, doi: 10.2307/20048274.

21. See, eg, Jan-Werner Müller, *What is Populism* (University of Pennsylvania Press 2016).

22. For an overview of various illiberal regimes like 'dictatorship, despotism, tyranny, autocracy, totalitarianism, and authoritarianism', see Nenad Dimitrijevic, 'Illiberal Regime Types' in Sajó and others (n 2) 121, taking an illiberal regime to be an entity which is 'not based on the primacy of individual liberty' and, in institutional terms, does 'not recognize the supremacy of rights, limited government, or the rule of law'. For an emphasis on the 'gradual suppression of democratic rights and subordination of a pre-existent autonomous civil society to the state' as elements of illiberal regimes, see Benjamín García-Holgado and Anibal Pérez-Liñán, 'The Weaknesses of Illiberal Regimes' in *ibid* 925.

23. Martin Krygier, 'Illiberalism and the Rule of Law' in Sajó and others (n 2) 533, contrasting 'illiberalism with the rule of law', differentiates between 'eliminationist illiberalism', which seeks 'to do away with differentials of power altogether' and "'unbinding'" forms of illiberalism, which 'seek to concentrate power in the state and remove the independence of all sorts of intermediary forces, institutions, and groupings'.

24. For hybrid regimes, see, eg Leonardo Morlino, 'Hybrid Regimes' in Sajó and others (n 2) 142, describing them 'as a set of institutions that have been persistent – be they stable or unstable – for about a decade, have been preceded by authoritarianism, a traditional regime, or even minimal democracy and are characterized by the break-up of limited pluralism and forms of independent, autonomous participation but with the absence of at least one of the four aspects of a minimal democracy.' Cf also Gábor Halmai, 'Illiberalism in East-Central Europe' in *ibid*, 813.

25. For a differentiation between internal (the ideas and practices of legal professionals, meant here) and external (the opinions, interests and pressures of broader social groups) legal culture, see David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1 at 8 quoting Lawrence Friedman, *Total Justice* (Russell

threat from many sources. No institution, individual or legal rule is immune from threat or beyond reproach. There are numerous instances that undermine and erode the rule of law and democracy. In fact, there are so many that it is difficult to identify and list them all.

In general, it is difficult to keep track of all the events endangering the rule of law and democracy. It is hard to imagine all the ways in which a functioning liberal democracy can be jeopardized by malicious intent. There is no single miracle solution to this problem and designing legal solutions to improve or restore a liberal democratic system is challenging.

#### **4. Defeating illiberal regimes with legal means requires many sources**

In order to defeat illiberal regimes by legal means, it is important for all lawyers who share the foundational values of a liberal democracy to recognize the problem and understand how serious the situation is. Based on this understanding, they must constantly consider how to improve or restore the legal order of the EU and its Member States in their everyday practice. As legal culture is so important, the mindset of lawyers – broadly defined as everyone working with the law – and how they react in everyday practice is of enormous importance. One specific decision in one particular case might not achieve much. But many decisions in many cases might. The solution lies in all relevant parts of the system sharing the same foundations and working together to uphold the values of a liberal democracy as enshrined in Article 2 TEU. The idea is to crowdsource the rule of law and the resilience of democracy in the EU.

Due to their influence, lawyers must defend the rule of law and democracy against Member States whose governments have been hijacked by groups seeking to dismantle the rule of law and democracy, both at EU level and in Member States with rule of law issues. Being aware of the dangers, lawyers should constantly strive to interpret the law and solve legal problems in line with Article 2 TEU and the values of the rule of law and democracy.<sup>26</sup> In times of erosion, Article 2 TEU values involve a general

Sage Foundation 1985) and Lawrence Friedman, *The Republic of Choice: Law, Society and Culture* (Harvard University Press 1990).

26. Compare the case law on Art 2 TEU as a legal obligation for the EU and its Member States: Case C-156/21, *Hungary v EP and Council*, EU:C:2022:97, para 232; Case C-157/21, *Poland v EP and Council*, EU:C:2022:98, para 264; and later Case C-119/23, *Valančius*, EU:C:2024:653, para 47, Joined Cases C-29/22 P & C-44/22 P, *KS e.a. v Council e.a.*, EU:C:2024:725, para 68, Case C-814/21, *Commission v Poland*, EU:C:2024:963, para 157; Opinion of AG Capeta in Case C-769/22, *Commission v Hungary*, EU:C:2025:408, paras 164–188.

obligation for lawyers to verify whether the culture in every field of their legal expertise or area of practice is conducive to the ideals of the rule of law and democracy. If any shortcomings are identified, potential solutions to address them must be considered. This should go beyond the minimum requirements of standard practice by taking a proactive approach, without, however, violating the rule of law or democracy itself.

Another straightforward way to defend the rule of law and democracy would be to revise the Treaties and enshrine safeguards in the highest-ranking positive law. However, this can be a lengthy process.<sup>27</sup> An ordinary revision procedure (Article 48 TEU) could install certain safeguards with an unquestionable status. Yet, this would offer no relief in the short or medium term. Moreover, it is questionable whether illiberal Member States would be willing to ratify such an amendment since the consent of all Member States is necessary for a successful amendment. Additionally, a Treaty revision cannot address the fact that lawyers and legal culture play a significant role in threatening and safeguarding the rule of law and democracy.

Therefore, lawyers must start taking responsibility for defending the rule of law and democracy in the EU and its Member States in their day-to-day work. First, this means being aware of the general situation. Second, it includes being alert as to whether specific cases, decisions or legal problems are related to this situation. Third, if there is a relation to the erosion of the rule of law and democracy, lawyers should react adequately within their means. For instance, when interpreting the law, they could consider whether Article 2 TEU is being observed. I will provide one example: the termination of a Member of the European Parliament's (MEP) mandate.

##### **5. An example for the application of Article 2 TEU safeguarding an MEP's mandate**

The mandate of an MEP is a fundamental pillar of the EU's representative democratic system (Article 10 TEU) and MEPs are the Union's democratically elected representatives (Article 14 TEU). The legal rules guaranteeing MEPs' immunity date back to 1957, when the Seventh Protocol on the Privileges and Immunities of the European Union came into effect.<sup>28</sup> Article 8 of the Protocol guarantees immunity in relation to opinions expressed or votes cast by MEPs in the performance of their duties. Article 9 of the

27. Carlos Closa, *The Politics of Ratification of EU Treaties* (Routledge 2013).

28. Protocol (No 7) on the privileges and immunities of the European Union (2012) OJ C 326, 26.10.2012, 266–272. (The numbering has changed though (Arts 9 and 10 have become Arts 8 and 9 of the Protocol), as has the name of the European Parliament.)

Protocol is more complicated, guaranteeing all MEPs immunity from detention and legal proceedings in any other Member State (Article 9(b)). However, within their own State's territory, MEPs only enjoy the same immunities as members of their own national parliament (Article 9(a)). While this made sense when the EP was composed of national parliamentarians, it is outdated today.<sup>29</sup>

The diversity of national rules relating to MEPs' immunity used to be a cumbersome yet manageable issue. However, the situation has worsened dramatically due to the erosion of the rule of law and democracy in some Member States, with this complex, multi-level regulation becoming a triumphal arch for a Trojan horse. In this case, EU law leaves one of the prime pillars of EU democracy vulnerable to its illiberal Member States because it allows them to adjust their laws on parliamentary immunity in order to interfere with democracy at EU level. Unfortunately, recent events in Hungary demonstrate that this is not just a theoretical concern but a real threat.<sup>30</sup>

Péter Magyar, the current opposition leader in Hungary and a Hungarian MEP, Klára Dobrev another Hungarian MEP, and Ilaria Salis, currently an Italian MEP, are a case at hand. They say that they are being persecuted for political reasons in Hungary. The Prosecutor General of Hungary, the Pest Central District Court, requested that their immunities be lifted by the EP. The EP's Committee on Legal Affairs (JURI) voted on all cases on 23 September 2025. In the case of Péter Magyar, the decision not to lift his immunity was rather clear, with 20 votes against lifting it and four votes in favour.<sup>31</sup> In the case of Klára Dobrev, the result was the same and the majority similar: 19 votes against lifting immunity and six votes in favour.<sup>32</sup> In the case of Ilaria Salis, the result was the same but the majority was much thinner: 13 committee members decided against lifting her immunity and 12 members voted in favour of doing so.<sup>33</sup> All decisions assume *fumus persecutionis* – which seems to be justified, without going

29. See, eg, Karl Stöger, 'Zwischen nationalem Verfassungsrecht und Unionsverfassungsrecht: Rechtspolitisches zur Immunität im Europäischen Parlament' (2015) 23 *Journal für Rechtspolitik* 147 at 149, doi: 10.33196/jrp201502014701, one of the worst examples of the otherwise commendable motto 'United in diversity'.

30. See, eg, Dániel G Szabó and Beáta Bakó, 'Removal of Hungarian MEPs Threatens EU Democracy' (*European Law Blog*, 8 April 2025) <[www.europeanlawblog.eu/pub/kzoio9uw/release/1](http://www.europeanlawblog.eu/pub/kzoio9uw/release/1)>.

31. See Committee on Legal Affairs of the EP, 'REPORT on the Request for Waiver of the Immunity of Péter Magyar' A10-0180/2025, A10-0181/2025, A10-0182/2025.

32. See Committee on Legal Affairs of the EP, 'REPORT on the Request for Waiver of the Immunity of Klára Dobrev' A10-0184/2025.

33. See Committee on Legal Affairs of the EP, 'REPORT on the Request for the Waiver of the Immunity of Ilaria Salis' A10-0183/2025.

into any details of the three cases. To justify this decision, reference to the case law of the General Court was made, stating that the EP has ‘broad discretion when deciding whether to grant or to refuse a request for waiver of immunity ... , owing to the political nature of such a decision’.<sup>34</sup> Another reference to the case law of the CJEU serves to underpin a request for concrete evidence that the request to lift immunity was related to the MEPs’ political activities. On this basis *fumus persecutionis* is declared.<sup>35</sup> The EP has decided on all cases with the same result on 7 October 2025.<sup>36</sup> Despite this defence of the rule of law and democracy, it seems that there are ongoing actions to strip at least Magyar of his immunity under Hungarian law.<sup>37</sup>

Article 2 TEU sets out the founding values of the EU, including the rule of law and democracy. Article 4(3) TEU enshrines the principle of sincere cooperation, explicitly requiring Member States to refrain from any measures that could endanger the achievement of the Union’s objectives. Articles 10, 12 and 14 TEU are the foundations of the EU as a democracy. Together, these articles, arguably, provide a solid basis for the claim that the EP has the authority to declare *fumus persecutionis*, in other words, to rule against lifting the immunity of an MEP, even if a Member State regulation suggests otherwise. Currently, the EP declares *fumus persecutionis* if it believes that a request to lift an MEP’s immunity is the result of wrongful persecution. This happens by relying on a broad political discretion as argued by the General Court, not on a sophisticated legal foundation. In this case, therefore, the law is being used to defend EU democracy against Member States with illiberal agendas. The brief arguments presented here are only intended to substantiate this stance. However, this practice, combined with the arguments presented here, could set an example that is vital to defend the rule of law and democracy in the EU and its Member States. The overall argument of this essay is that more examples like this must take place wherever and whenever they are required.

34. Case T-346/11 and T-347/11, *Gollnisch v Parliament*, EU:T:2013:23, para 59.

35. Case C-12/19 P, *Troszczynski v Parliament*, EU:C:2020:725, para 26.

36. See European Parliament, ‘Request for the Waiver of the Immunity of Péter Magyar’ T10-0203/2025, T10-0204/2025, T10-0205/2025; European Parliament, ‘Request for the Waiver of the Immunity of Klára Dobrev’ T10-0207/2025; European Parliament, ‘Request for the Waiver of the Immunity of Ilaria Salis’ T10-0206/2025.

37. See Bea Bakó, ‘Magyar Saved by European Parliament. Hungary’s Govt Might Still Prosecute Him’ (*Reporting Democracy*, 10 October 2025) <[balkaninsight.com/2025/10/10/magyar-saved-by-european-parliament-but-hungarys-govt-might-still-prosecute-him/](https://balkaninsight.com/2025/10/10/magyar-saved-by-european-parliament-but-hungarys-govt-might-still-prosecute-him/)>.

## 6. Conclusion

Every society is held together by certain values that are, at least in theory, beyond dispute. Since the end of World War II in Western Europe and the collapse of communism across the continent, secular constitutional values have played an important role in uniting society. Today, democracy and the protection of fundamental rights seem to be the only credible options for shaping European society.<sup>38</sup> Naturally, there are endless debates about what these concepts actually mean.<sup>39</sup> However, the difficulty lies in defining the values mentioned in Article 2 TEU, which should not result in these values being ignored. Attempts to question these values will continue but if we believe that European integration has a chance, all lawyers must contribute to stopping erosion of the rule of law and democracy before it is too late. If illiberal regimes are tolerated in one Member State, illiberalism will spread to others and the effects will be deeply woven into the fabric of the European legal order. The European edifice that rests on these values will crumble surprisingly quickly if action is not taken. Inaction is contributing to the erosion of the EU's moral and institutional capital, with serious consequences. It is time for all lawyers to stand up and defend the rule of law and democracy within the EU and its Member States. Without the rule of law and democracy, there can be no legal future for the EU.

38. On the concept of European society, see the contribution of Armin von Bogdandy to this issue.

39. Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167, doi: 10.1093/aristotelian/56.1.167.