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ARTICLE

The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis

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Abstract
This article explores the role which Member State-led infringement proceedings can play in overcoming the EU's rule of law crisis, and hypothesizes that it can prove helpful in breaking the current impasse. It begins by understanding why the EU's "traditional" rule of law enforcement mechanisms—such as Article 7 of the Treaty on European Union (TEU) and the recent rule of law conditionality regulation—have failed (Section 2), before exploring how infringement proceedings operate, what their shortcomings are, and why Scheppele's proposed "systemic infringement proceedings" are important (Section 3). It then seeks to apply said findings to the rule of law crisis, using two recent developments as an example: The oral proceedings of *Commission v. Poland (Régime disciplinaire des juges)* and a recent vote by the Dutch Parliament compelling its government to take Poland before the Court of Justice of the European Union (CJEU) (Section 4). Finally, it explores the broader constitutional implications of relying on Article 259 Treaty on the Functioning of the European Union (TFEU) to overcome the rule of law crisis: It discusses Kochenov's notion of "biting intergovernmentalism", what Article 259 illustrates about the European Union's (EU) hybrid constitution, and how intergovernmental legal instruments can facilitate further European integration (Section 5). It concludes by restating and summing up article's hypothesis.

Keywords: EU Law; European integration; Rule of Law; CJEU; Infringement proceedings

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."
>
> Article 2, Treaty on European Union

A. Introduction

On March 6, 2013, the Foreign Ministers of Denmark, Germany, the Netherlands, and Finland submitted a letter to the President of the European Commission, calling for a "new and more

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effective mechanism to safeguard fundamental values in Member States."[1] At the time, the Union's so-called "rule of law crisis" was in full swing: Viktor Orbán's government had just amended his country's Fundamental Law,[2] the famous Tavares Report was about to be released,[3] and Poland's Law and Justice Party was two years away from being elected. Yet already back then, there was a widespread feeling that not all was well in European Union (EU) law —that existing mechanisms to protect the rule of law were either insufficient or under-used, and reformation was urgently needed if Article 2 TEU[4] was to be safeguarded.

Seven years later, on December 1, 2020, the Dutch House of Representatives (the *Twede Kamer*) adopted a resolution compelling its government to bring Poland before the CJEU.[5] In light of the European Commission's failure to enforce the CJEU's previous judgements, the House noted, and of the "serious" threats the Polish judiciary was facing to its independence, the Dutch government should take the lead instead, and ensure the protection of the rule of law across the EU by challenging the Polish government's actions. In effect, therefore, the Dutch executive was being compelled to launch infringement proceedings under Article 259, the lesser known of the judicial avenues in the TFEU.

Despite the ample coverage the rule of law crisis has received throughout the past decade, much of the academic literature has focused on the failure of the EU's main legal mechanisms, including Article 7 TEU, the Rule of Law Framework, or Article 258 TFEU. Comparatively little, however, has addressed the use of inter-state infringement proceedings under Article 259 TFEU. It is this gap in the literature which this article hopes to address, by hypothesizing that Article 259 provides an effective way of enforcing the rule of law across the European Union. It will focus on three fundamental sub-questions: Why existing mechanisms have failed, how Article 259 can break the current legal and political impasse, and what this suggests about the functioning of the EU's constitution.

The article will proceed in the following fashion. Section B will focus on the shortcomings of two instruments: Article 7 TEU and the newly introduced Rule of Law Conditionality Regulation. Section C will address Articles 258–260 TFEU: It will lay out the structure of Article 259, assess the flaws of infringement proceedings more generally, and discuss Scheppele's case for "systemic" infringement proceedings. Section D will draw on recent political developments across the European Union to demonstrate how Article 259 can be used in practice, as well as the benefits it provides. Finally, Section E will take a step back, and aim to address two of the constitutional implications of Member State-led rule of law enforcement. Section F will conclude.

B. The EU's Response to Democratic Backsliding

Few phenomena in EU law and politics have received more widespread coverage than the so-called "rule of law crisis": Indeed, an exhaustive analysis of said crisis, its contemporary manifestations, or the Union's patchwork response thereto would bring this article beyond its scope and

[1]Viviane Reding, Vice-President of the Eur. Comm'n, Speech at the Center. for European Policy Studies: The EU and the Rule of Law—What Next? (Sept. 4, 2013) (transcript available on https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677).

[2]*See* PAUL LENDVAI, ORBÁN: EUROPE'S NEW STRONGMAN, (2017), 101–110 (providing an overview of Viktor Orbán's constitutional reforms since 2010).

[3]*Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012)*, (June 24, 2013), https://www.europarl.europa.eu/doceo/document/A-7-2013-0229_EN.pdf.

[4]Treaty on European Union, art. 2 ("[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.").

[5]Guillermo Íñiguez, *The enemy within? Article 259 TFEU and the Union's intergovernmentalism*, NEW FEDERALIST, (Dec. 12, 2020) https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr (last accessed June 10, 2021).

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word count.[6] This chapter will highlight two key aspects of the EU's attempt to "protect democracy and the rule of law inside Member States"[7]: Article 7 TEU, and the recently introduced Conditionality Regulation. This will pave the way for a discussion of infringement proceedings, which will be addressed in Section 3.

I. Article 7 TEU

Article 7 TEU, first incorporated into the EU *acquis* via the Treaty of Amsterdam, expressly protects the values referred to in Article 2 TEU, facilitating the sanctioning of Member States which repeatedly violate them. As Besselink has noted, the Article 7 procedure involves three steps: "[T]he determination of a '*clear risk of a serious breach*'; the determination of 'a serious and persistent breach' ... and the decision to impose sanctions" on the Member State in question.[8]

Article 7(1), the so-called "preventive" mechanism, applies where there is a "clear risk of a serious breach" of Article 2. It can be triggered by the Parliament, by one third of Member States or by the Commission, and requires the consent of four-fifths of Member States, who can issue recommendations to the infringing government.[9] If, over time, the violations in question become "serious and persistent", the "sanctioning" mechanism can be triggered—Under Article 7(2), following a proposal by Member States or by the Commission, and after inviting the infringing country to "submit its observations", the Council may *unanimously* trigger the sanctioning mechanism, and can decide, acting by a qualified majority, to suspend the Member State's Treaty rights—for example, its right to vote in the Council pursuant to Article 7(3).[10]

The provision's current two-limb structure, amended through the Treaty of Nice, reflects the lessons learned from the infamous "Haider affair" in the early 2000s. Following the inclusion of the far-right FPÖ in Austria's coalition government, there was talk of a *cordon sanitaire* against said government. At the time, however, Article 7's predecessor only contained a "sanctioning" mechanism. Rather than triggering what was widely viewed as a "nuclear option," the remaining Member States decided to take the enforcement of the rule of law outside the Treaty framework, agreeing, instead, to a set of coordinated diplomatic measures against Austria.[11]

Over time, however, the sanctions agreed by the EU-14—such as the "freezing of bilateral contacts" with high officials[12]—illustrated two things. On the one hand, they indicated "the shortcomings of unilateral action," which became evident once Member States started breaking up the "common front" they had formed against Austria. On the other hand, they showcased the inadequacy of what is now Article 7, and the need for a "preventive" mechanism which could be triggered before resorting to the "nuclear" option. The above, alongside the numerous doubts about the legality of the intergovernmental action against a Member State, led to calls for a supranational instrument—one which acknowledged the "European collective dimension" of any future "Haider affair."[13]

[6]For the sake of simplicity, this article will use "rule of law crisis," "democratic backsliding," or "constitutional capture" interchangeably. *See* Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. OF EUR. LEGAL STUD., 3–47 (2017) (providing an overview of what "democratic backsliding has entailed); *see also* Licia Cianetti, James Dawson & Sean Hanley, *Rethinking "Democratic Backsliding" in Central and Eastern Europe – Looking Beyond Hungary and Poland*, 34 E. EUR. POL. 243–56 (2018).

[7]*See* Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUR. L. J. 141, 151 (2015).

[8]Leonard F.M. Besselink, *The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives*, *in* THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE 128, 129 (András Jakab & Dimitry Kochenov eds., 2017).

[9]Consolidated Version of the Treaty on European Union Title I, art. 7, 2012 O.J. (C 326).

[10]*See* Besselink, *supra* note 8, at 129–31 (discussing which rights can be suspended).

[11]Wojciech Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 COLUM. J. EUR. L. 385, 396–401 (2010).

[12]Besselink, *supra* note 8, at 130.

[13]Sadurski, *supra* note 11, at 401.

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It was against this background that the "preventive" mechanism in Article 7(1) was incorporated. In the report leading to its introduction, the authors had called for "preventive and monitoring procedures . . . so that a situation similar to the current situation in Austria would be dealt with within the EU [Treaties] from the very start."[14] Through introducing the "preventative" mechanism, it was thought mistakes made throughout the "Haider affair" could be avoided because the EU would have a legal basis to act, but it would be possible to avoid triggering the "nuclear option."

Twenty years after the Treaty of Nice, Article 7 TEU is widely acknowledged to have failed—and the reasons for said failure are manifold. Perhaps most significantly, the unanimity requirement has proven to be the "sanctioning" mechanism's Achilles' heel: A commitment by Poland and Hungary to veto any such procedure has sufficed to empty it of any legal and political force. Yet no less importantly, much of its failure is also due to the EU's misuse of the "preventive" mechanism.[15] Despite many calls for its early activation as far back as 2016, the Commission and Council showed themselves reluctant to do so, pointing towards its political risks, highlighting the need for a sustained political dialogue, and establishing mechanisms which would precede the triggering of Article 7.[16]

In fact, many such legal instruments, rather than enhancing its efficacy, have served to further weaken Article 7's role.[17] The best example of this phenomenon is the so-called "Rule of Law framework," adopted by the Commission in 2014, and which was meant to bridge the gap between enforcement proceedings and Article 7 by establishing a dialogue between the institutions and the Member State in question.[18] As Pech and Scheppele have extensively argued, the mechanism's very focus—premised on *bona fides* dialogue and on Member States' implementation of the Commission's "recommendations"—was misconceived: Rather than serving to facilitate a beneficial dialogue, it bought the Hungarian and Polish governments time, allowing them to further strengthen their "capture" on their countries' institutions while the Commission stood to one side.[19] Furthermore, by expressly referring to Article 7 proceedings as a "nuclear option," it contributed to its stigmatization among Member States.[20] What was meant to be a stepping-stone before triggering Article 7, therefore, only served to make the latter more unlikely.

This brief discussion on Article 7 brings to the fore two of the themes underlying this section. On the one hand, that although the Treaties do include mechanisms which can be used to protect Article 2 TEU, their high institutional thresholds—in this case, the unanimity requirement under Article 7(2)—make them almost impossible to trigger. On the other hand, even where such windows of opportunity do arise, the EU institutions' equivocal action—for example, through misconceived instruments such as the "rule of law mechanism"—has often served to close them off.

II. The Rule of Law Conditionality Mechanism

In November 2020, after four months of dramatic political negotiations, the EU approved the so-called "conditionality mechanism," a legal instrument which ties the disbursement of EU funds to

[14] *Id.* at 409.

[15] Christophe Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, *in* REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 74–78 (Carlos Closa & Dimitry Kochenov eds., 2016).

[16] *See* Bojan Bugarič, *Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism* 93–96, *in* REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 74–78 (Carlos Closa & Dimitry Kochenov eds., 2016)

[17] Kim Lane Scheppele, *EU Can Still Block Hungary's Veto on Polish Sanctions*, POLITICO (Jan. 11, 2016) https://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/.

[18] *Communication from the Commission to the European Parliament and the Council. A New EU Framework to Strengthen the Rule of Law*, (COM 2014) 158 final.

[19] Jan-Werner Müller, *Rising to the Challenge of Constitutional Capture*, EUROZINE (Mar. 21, 2014) https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/.

[20] Pech & Scheppele, *supra* note 6, at 12.

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Member States' compliance with the values laid out in Article 2 TEU.[21] For the Conditionality Regulation to be triggered, the Member State's conduct must "affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficient direct way."[22] Although the mechanism was (rightly) hailed as a landmark moment for the defense of the rule of law in Europe, a closer look at both its detail and its political context paints a more nuanced picture—one which reinforces the trends identified in the preceding discussion on Article 7 TEU.

Firstly, the Regulation itself is narrowly framed. Despite its allegedly twofold aim of protecting the Union budget *and* safeguarding the rule of law in Member States,[23] Article 4(1), which refers to the Union's "financial interests" and calls for the budget's "sound management," places a disproportionate emphasis on the former. As Íñiguez has previously noted, this emphasis on sound financial administration is striking, and provides an example of how the trees often impede the Commission from seeing the forest.[24] The sound administration of EU funds—a goal which was most recently highlighted by Ursula von der Leyen in her 2020 State of the Union address[25]—can already be protected through mechanisms such as the Common Provisions Regulation (CPR) governing the European Structural and Investment Funds (ESIF).[26] Instead, the conditionality mechanism was meant to expressly tie the disbursement of EU funds to the compliance with Article 2 TEU, thereby impeding Member States which violate said values from using EU funds to sustain their regimes.[27]

The mechanism's material scope has been further narrowed by the requirement that the financial impact of any Article 2 violation be "sufficiently direct" (Article 4(1)). Once again, this phrasing reflects the complex political negotiations which the EU-27 had to undertake; yet similarly to the "sound management" requirement, its ambiguity raises questions over whether such a narrowly framed mechanism will be able ever to address the problem it was born to remedy—"sufficiently direct," after all, can mean starkly different in different contexts.[28]

On top of the above, the European Council's *realpolitik* will serve to undermine the Regulation's effectiveness. In response to Hungary and Poland's threatened veto, which would have brought down not just the conditionality mechanism, but the Multiannual Financial Framework as a whole, the European Council issued a set of Conclusions on how the former should be interpreted, applied, and executed by the Commission. For present purposes, the most

[21]Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I), 1–10 (describing regulation will only apply to funds disbursed under the Multiannual Financial Framework (MFF) 2021–2027 and the Next Generation EU deal).

[22]*Id.* at art. 4(1).

[23]Justyna Lacny, *The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?*, 13 HAGUE J. ON RULE L. 79, 84 (2021).

[24]Guillermo Íñiguez, *El Regreso del Estado de Derecho*, POLÍTICA EXTERIOR (Nov. 11, 2020), https://www.politicaexterior.com/el-regreso-del-estado-de-derecho/.

[25]Ursula von der Leyen, President of the European Commission, State of the Union Address by President von der Leyen at the European Parliament Plenary (Sept. 16, 2020) (transcript available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655).

[26]R. Daniel Kelemen & Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, VERFASSUNGSBLOG (Sept. 10, 2018), https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/; *see* Regulation (EU) 2021/1060 of 24 June 2021 Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, 2021 O.J. (L 231), 159–706 (discussing the 2021–2027 budgetary cycle).

[27]*See* R. Daniel Kelemen, *The European Union's Authoritarian Equilibrium*, 27 J. EUR. PUB. POL'Y 481, 490–91 (2020); *see also* Israel Butler, *Two Proposals to Promote and Protect European Values Through the Multiannual Financial Framework: Executive Summary*, C.L. UNION FOR EUR. (Mar. 2018) https://dq4n3btxmr8c9.cloudfront.net/files/C6kowK/Liberties_MFF_Israel_20180302_ES.pdf.

[28]Guillermo Íñiguez, *Europe's "Groundhog Day,"* AGENDA PÚBLICA (Dec. 10, 2020), https://agendapublica.es/europes-groundhog-day/.

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important is Conclusion 2(c), which reads that, should an action for annulment be introduced by any party with standing—as, indeed, occurred in May 2021[29]—the conditionality mechanism would be suspended pending the CJEU's ruling on its legality.[30] For several months, therefore, the landmark Regulation, which was meant to exponentially increase the EU's capacity to enforce the rule of law, found itself in a legal limbo, suspended by the very Member States it was meant to apply against.

It may be argued that it is too soon to evaluate the conditionality mechanism's efficacy, and that any such assessment cannot precede its current suspension. Yet as in the section on Article 7 TEU, two underlying themes can once again be detected: The Regulation's high institutional thresholds and the impact of the political deals surrounding its implementation. The conclusions themselves have been heavily criticized: Not only have they made rule of law conditionality more difficult, but also as a "non-legally binding political declaration" which "de facto suspend[s]" the mechanism's application, Alberto Alemanno has argued, they constitute an *ultra vires* act by the Council, which could be challenged—as the European Parliament has already threatened to do[31]—by EU institutions with sufficient standing.[32]

No less importantly, and despite its unquestionable normative significance, the conditionality mechanism once again showcases the legal and political shortcomings of the EU's existing rule of law enforcement mechanisms. Even once the Member States overcame their reluctance to envisage rule of law conditionality, the Commission's over-cautious approach when drafting the Regulation, as well as the Council's *realpolitik* during the December 2020 summit, contributed to the creation of a "paper tiger": An instrument far less agile and effective—if it gets triggered at all—than was first envisaged.[33]

By discussing Article 7 TEU and Regulation 2020/2092, therefore, this section has illustrated some of the shortcomings of the Rule of Law enforcement mechanisms available to the EU. Some of these, it has been suggested, are inherent in the Treaties themselves: The unanimity requirement under Article 7(2) TEU, for example, has allowed Hungary and Poland to form an explicit alliance whereby "two governments which would fail to satisfy the Copenhagen Criteria . . . are preventing the Union from upholding its values."[34] Yet others—such as conditionality regulation's narrowness and its current suspension, or the unintended consequences of the "Rule of Law framework"—are the result of the EU institutions' own actions. It is in light of this legal and institutional impasse that intergovernmental infringement proceedings—governed by Article 259 TFEU—might come in. To said provision, we now turn.

[29]Vlad Makszimov, *Hungary, Poland Refer Controversial Rule of Law Mechanism to Court*, EURACTIV (Mar. 11, 2021), https://www.euractiv.com/section/justice-home-affairs/news/hungary-poland-refer-controversial-rule-of-law-mechanism-to-court/.

[30]European Council, *European Council Meeting (10 and 11 December 2020)—Conclusions*, (Dec. 11, 2020) 1–4 https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

[31]Eur. Parl. Press Release, Rule of Law: Parliament Prepares to Sue Commission for Failure to Act (Oct. 6, 2021) https://www.europarl.europa.eu/news/en/press-room/20210604IPR05528/rule-of-law-parliament-prepares-to-sue-commission-for-failure-to-act.

[32]Alberto Alemanno, *Rule of Law Mechanism*, TWITTER (Dec. 9, 2020), https://twitter.com/alemannoEU/status/1336737375750397952.

[33]Alexandra Philoleau, *Is There Any Hope Left for the Conditionality Regulation?*, RULE L. (Mar. 11, 2021), https://ruleoflaw.pl/is-there-any-hope-left-for-the-conditionality-regulation/.

[34]Guillermo Íñiguez, *Hungary and the Union's Achilles' Heel*, NEW FEDERALIST (Mar. 31, 2020), https://www.thenewfederalist.eu/hungary-and-the-union-s-achilles-heel?lang=fr&fbclid=IwAR2QbnU4ChHVMuhB7pcik__VpsEo6tJKZvsNTw5-rQF7VecwFx7ZZFxu4Jk; *See also* Müller, *supra* note 19.

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C. The Structure and Shortcomings of Infringement Proceedings

I. The Structure of Article 259 TFEU

Infringement proceedings are "one of the most important means available to ensure the timely and correct application of EU law."[35] They are governed by Articles 258–260 TFEU, and concern situations where a Member State is alleged to have violated Union law and is brought before the CJEU either by an institution or by another Member State. Whereas Article 258 governs "traditional" infringement proceedings—that is, those initiated by the European Commission—Article 259, its lesser-known sister provision, regulates actions conducted by Member States themselves.

According to Article 259(1), "[a] Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the Court of Justice of the European Union." As Kochenov notes, its wording "is truly broad with regard to its requirements for standing"; unlike the stringent requirements under Article 263(4), all that is needed is for the Member State to detect a violation of the Treaties, and there is no obligation "to demonstrate direct and individual concern with the violation in question."[36]

Before an action can be brought before the CJEU, the referring State is to bring the matter before the Commission (Article 259(2)), which can choose to take up the case and, if it decides to do so, has three months to "deliver a reasoned opinion" (Article 259(3)). Where the Commission fails to deliver such an opinion within three months, or where it decides against taking any further action, the Member State can proceed in bringing its case (Art 259(4)). Once it reaches the CJEU, it is Article 260 that steps in, allowing the claimant to suggest financial sanctions for the defendant's violation of EU law (Art 260(2)) and permitting the CJEU to impose lump sum payments if the defendant fails to comply with its judgements (Art 260(3)).

If "traditional" infringement proceedings form an essential part of the Commission's role as the guardian of the EU treaties (Article 17 TEU), inter-state proceedings—that is, those governed by Article 259—aim to "maximise" the "effectiveness" of EU law: By allowing Member States to jointly monitor any violations, Butler has noted, the latter are deemed to be "equally interested—just like the institutions—in ensuring sustained compliance with the Treaties by their peers."[37] Indeed, inter-state proceedings serve to complement "traditional" ones under Article 258: During the "pre-adjudication" phase in Article 259(2), Member States are obliged to bring the case before the Commission, which can then choose whether to conciliate between both parties, ignore the claim, or indeed "channel" it into an Article 258 case.[38]

Yet where the Commission decides against the latter—for example, because it deems the dispute trivial or abusive of EU law—Member States are not precluded from bringing such an action themselves: As Article 259(4) highlights, they can proceed before the Court even without the Commission's approval. The TFEU, in other words, partly outsources the guardianship of the Treaties to the Member States, which can decide to sidestep the Commission when they deem the latter to be overly cautious or to have erred in its assessment of the case.[39] This, Butler concludes, is the most important practical and conceptual difference between "traditional" and "inter-state" proceedings.

This crucial procedural step also helps explain two characteristics of Article 259: Its infrequent usage and the political nature of cases brought under it. On the one hand, infringement proceedings which the Commission *does* deem worthy of a legal suit are "channelled" into Article 258,

[35]Luca Prete & Ben Smulders, *The Coming of Age of Infringement Proceedings*, 47 COMMON MKT. L. REV. 9, 61 (2010).

[36]Dimitry Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, 7 HAGUE J. RULE L. 153, 170 (2015).

[37]Graham Butler, *The Court of Justice as an Inter-State Court*, 36(1) Y.B. EUR. L. 179, 184 (2017).

[38]Kim Lane Scheppele, Dimitry Vladimirovich Kochenov & Barbara Gabrowska-Moroz, *EU Law Values are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 29 Y.B. EUR. L. 3 (2020).

[39]Prete & Smulders, *supra* note 35, at 27.

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meaning that "the most meritorious Article 259 TFEU cases are not famous," reaching the Court as ordinary infringement proceedings instead.[40] On the other hand, the cases which *are* brought under said provision often amount to little more than politically unsavory disputes between national governments: In Kochenov's words, such cases are often "futile attempts by the Member States to distort the cogent functioning of the EU law enforcement system for internal political ends, as opposed to empowering the expression of genuine concern about the enforcement of EU law."[41]

As the literature suggests, therefore, Article 259 is closely tied to the need to avoid inter-state conflict within the EU. Indeed, Butler has noted that, when the CJEU decides on cases under Article 259, it becomes an "inter-state" court, rather than performing its traditional supranational function of addressing questions of EU law issued by parties with standing.[42] Interestingly, this conflict avoidance rationale is carried out in two seemingly contradictory ways. On the one hand, as the very few cases brought under Article 259 have illustrated, the provision's substantive scope is interpreted narrowly, thereby making it difficult for Member States to exploit EU law to settle internal political conflicts.[43] Alongside this conflict-minimization dimension, on the other hand, Article 259 also provides a "safety valve" for Member States to channel said political disputes to the CJEU, providing a legal "backstop" to ensure a peaceful resolution of political disputes concerning EU law. Despite its infrequent usage, therefore, the mere existence of Article 259 plays an important role in EU law—particularly, as the rule of law crisis has illustrated, when Member States' concerns about potential Treaty violations are legitimate, rather than merely opportunistic.

II. Unduly Narrow, Unduly Politicised: The Shortcomings of Infringement Proceedings

This article's hypothesis is that Article 259 infringement proceedings can provide a seemingly easy way out of the Union's existing impasse: By putting Member States in the driving seat when it comes to rule of law enforcement, it can allow them to overcome the Commission's overly cautious approach, and can provide a new avenue for Article 2 TEU enforcement. Indeed, Scheppele, Kochenov and Gabrowsa-Moroz have noted, "the chequered history of the public use of Article 259 TFEU should not discourage Member States from bringing meritorious claims under EU law"—including claims for violations of Article 2 TEU.[44]

The above, however, does not mean that using infringement proceedings to tackle rule of law violations is straightforward—the literature, in fact, is littered with debates on the shortcomings of said mechanisms, many of which are applicable to both Articles 258 and 259. Two main criticisms have been levied against the use of infringement proceedings: Their undue narrowness, and their dependence on the Commission. This section will address both, before exploring how Member States can overcome them through the use of "systemic" infringement proceedings.

The first main criticism involves their excessive dependence on the Commission, which has the sole discretion to start the administrative phase, to bring cases before the CJEU, or to suggest sanctions for violations of EU law.[45] Although Carlos Closa has found no correlation between

[40]Scheppele et al., *supra* note 38, at 100.

[41]*See* Kochenov, *supra* note 36.

[42]Butler, *supra* note 37, at 180.

[43]Two of the most recent cases, those of ECJ, Case C-364/10, Hungary v. Slovakia, ECLI:EU:C:2012:630 (Oct. 16, 2012), https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-364%252F10 and Grand Chamber, Case C-145/04, Spain v. Gr. Brit. and N. Ir., ECLI:EU:C:2006:543 (Sept. 12, 2006), https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-145%252F04 provide a good example of the provision's misuse: Both were overtly political disputes between Member States, who attempted to rely on Article 259 TFEU to resolve unrelated diplomatic tensions. They were therefore duly rejected by the CJEU.

[44]Scheppele et al., *supra* note 38, at 102.

[45]*See* Case 247/87, Star Fruit v. Comm'n, ECLI:EU:C:1989:58 (Feb. 14, 1989), at 11–12, https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=247%252F87; *see also* Case 416/85, Comm'n v. U. K., ECLI:

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the Commission's political composition and its inaction when confronting Hungary and Poland's democratic backsliding,[46] the former's unfettered discretion undeniably carries the risk of such proceedings being captured by its political agenda—for example, by taking into account long-term political considerations when opening or discarding Article 258 investigations.[47]

Indeed, it is not difficult to envisage that such discretion might lead to Stockholm syndrome; as has been pointed out, President Ursula von der Leyen's designation was preceded by the Polish and Hungarian government's veto of Frans Timmermans, who had been in charge of rule of law enforcement as First Vice President of the Juncker Commission, while her investiture was unlocked with the support of the Polish Law and Justice Party.[48] Despite Closa's claim to the contrary, and as Kelemen has suggested, it is therefore not beyond the realm of possibility that such considerations could play a role in guiding the Commission's judicial strategy.[49]

Even where the Commission *does* overcome its political reluctance to bring such proceedings, the instrument's undue narrowness makes it difficult to capture what is truly at stake in many rule of law cases. As Gormley has suggested, infringement proceedings are "the Swiss cheese in the armoury of the European Commission": "Like Swiss cheese," he adds, "they look attractive [and] have an initially diverting taste, but on closer examination, being full of holes, are not quite what one might first imagine."[50] The structure of Articles 258–259, it has been argued, reduces the EU treaties to narrow, technical *acquis*, thereby recasting rule of law violations as mere breaches of said technical provisions. In doing so, it has been noted, it creates the risk of compliance "becom[-ing] an empty shell."[51]

The best example of the mechanism's structural deficiencies is perhaps provided by the famous *Hungarian Judges* case, decided by the Court of Justice in 2012.[52] As part of its broader assault on its country's institutions, Gabor Hálmai writes, the Hungarian executive lowered the retirement age of 274 judges at all levels of the judiciary, hoping to replace them with judges more sympathetic to the government. Following both domestic and international backlash, the Commission decided to refer the case to the Court of Justice, yet due to the narrowness of infringement proceedings, the only way it could do so was under the Equal Treatment Directive, alleging that the lowering of the retirement age constituted an example of unlawful age discrimination.[53] Once it reached the Court, therefore, a case concerning an ill-disguised widespread assault on judicial independence had been narrowed to a technical violation of an anti-discrimination directive, which of course meant that, when the Court ruled against Hungary, Orbán's government was able to offer the judges in question a lump sum compensation—a standard remedy in age discrimination cases—but was not subjected to any broader obligations to protect the independence of the judiciary or to reverse the purge of its upper echelons.[54]

EU:C:1988:321 (June 21, 1988), https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=416%252F85.

[46]Carlos Closa, *The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance*, 26 J. Eur. Pub. Pol'y 696, 705 (2019).

[47]Kelemen, *supra* note 27, at 490–91. *See also* R. Daniel Kelemen, *Europe's Faustian Union*, Foreign Pol'y (July 30, 2020, 11:55 AM), https://foreignpolicy.com/2020/07/30/europes-faustian-union/.

[48]Guillermo Íñiguez, *The Rule of Law and the Recovery Fund's Conditionality: Institutional Deadlock or Lack of Political Will?*, 45 Araucaria 185, 191 (2020).

[49]Kelemen, *Europe's Faustian Union*, *supra* note 47.

[50]Laurence Gormley, *Infringement Proceedings*, *in* The Enforcement of EU Law and Values: Ensuring Member States' Compliance 65 (András Jakab & Dimitry Kochenov eds., 2017).

[51]Scheppele et al., *supra* note 38, at 47.

[52]CJEU, Case C-286/12, Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012), https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-286%252F12.

[53]Council Directive 2000/78/EC of Nov. 27, 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 (L303).

[54]Gábor Hálmai, *The Early Retirement Age of the Hungarian Judges, in* EU Law Stories: Contextual and Critical Histories of European Jurisprudence 471–88 (Fernanda Nicola & Bill Davies eds., 2017).

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The above has several consequences, three of which are particularly relevant for the present article. On the one hand, the narrowness of the CJEU's rulings makes it easy for Member States to circumvent them—for example, by offering token remedies, as was the case in *Hungarian Judges*. On the other hand, by reducing the extent to which violations which can be persecuted, it limits the scope and magnitude of lump sum payments and penalties imposed under Article 260(2) TFEU, which could act as a deterrent to national governments.[55] Perhaps most importantly, however, it forces the Commission to bring small, discrete cases under specific EU law provisions, thereby failing to capture the systemic violation of the rule of law which is often at stake. As Scheppele, Kochenov and Gabrowska-Moroz have argued, the use of infringement proceedings in EU values cases has become analogous to arresting Al Capone for tax evasion, rather than for murder—except that in the Al Capone analogy, they conclude, his imprisonment effectively impeded him from continuing his murder spree.[56]

III. The Case for Systemic Infringement Proceedings

Of the two main shortcomings identified throughout this section, the first—the unfettered discretion exercised by the Commission—can be easily overcome through Article 259: After all, nothing impedes a Member State from launching infringement proceedings if it believes a violation to have taken place. Yet the second such shortcoming—the instrument's narrowness—is equally acute regardless of who is bringing the legal claim, and is therefore worth analyzing in greater depth.

In light of cases such as *Hungarian Judges*, numerous calls have been voiced for parties bringing infringement proceedings to "connect the dots"—for example, by "bundling" together individual cases "to identify the pattern of government action that is undermining the central values at stake."[57] This involves the concept of "systemic" infringement proceedings, first put forward by Kim Lane Scheppele. In rule of law cases, Scheppele writes, traditional infringement actions often address the "symptom," that is, the technical violation of a legal provision, while neglecting the "disease" itself—for example, the underlying capture of a Member State's institutions.[58] Much of the current impasse, she argues, could be broken through a "simple extension" to the "old mechanism" of infringement proceedings; the Commission or Member State, she writes, could "bundle" together a group of specific Treaty violations, thereby demonstrating that "the infringement of EU law in a Member State is not minor or transient, but systemic and persistent." In doing so, it would "identify a pattern" of state defiance of EU law, which, "when the individual elements [were] added up," could constitute "an even more serious violation of a Member State's fundamental EU law obligations than the individual elements."[59]

The specific way such systemic proceedings could be framed—whether through the independent use of Article 2 TEU, by tying Article 2 to specific provisions within the Charter of Fundamental Rights, or by reading it in conjunction with the TFEU's citizenship provisions, all of which have been suggested by different commentators—falls beyond the scope of this article.[60] However, in making the case for Member State-led infringement proceedings, three benefits are worth highlighting.

[55]*See* Pal Wenneras, *Making Effective Use of Article 260 TFEU, in* The Enforcement of EU Law and Values: Ensuring Member States' Compliance (András Jakab & Dimitry Kochenov eds., 2017).

[56]Scheppele et al., *supra* note 38, at 43–44.

[57]*Id.* at 48.

[58]*Id.* at 63.

[59]Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions*, *in* Reinforcing Rule of Law Oversight in the European Union 107–08 (Carlos Closa & Dimitry Kochenov eds., 2016).

[60]For a more detailed overview, see Scheppele et al., *supra* note 38, at 67–85, 103; *see also* Hillon, *supra* note 15, at 66.

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The mechanism's main advantage is evident at first sight: Rather than winning Pyrrhic victories in "pointless battles . . . against narrow violations of the Union *acquis*"[61]—such as that over the retirement age of Hungarian judges—the Commission would be able to bundle violations together, presenting a detailed and cogent vision of why a government is systematically violating the values enshrined in Article 2. Once a case reached the Court, the Article 260(2) sanctioning mechanism could be utilized more effectively, both because any penalty would be of a greater magnitude, and because the Court could impose more satisfactory remedies. This, it has been argued, could involve requiring "systemic compliance," such as a proactive protection of the rule of law, and could be linked to the disbursement of EU funds under the newly adopted conditionality mechanism.[62]

Moreover, the practice of "bundling" cases together is by no means new: Scheppele, Kochenov, and Gabrowska-Moroz have pointed out that in *Commission v. Ireland*, a case concerning the 1975 Waste Directive, the Commission packaged 12 discrete violations within the same proceedings, using the sheer number of infringements by different local and national bodies as evidence of what the Court labelled "a large-scale administrative problem."[63] What would have been a mere technical violation thus acquired a national and systemic scale, becoming easier for the Commission to prosecute and for the Court to rule on.[64] Embracing a similar approach, albeit in the context of rule of law violations, would therefore present no major normative challenges, nor would it entail a significant departure from the Court's very own precedents. When finding violations of Article 2, however, it could make all the difference to the outcome of such cases.

Finally, Member State-led systemic infringement proceedings could also act as an incentive for a more proactive use of Article 258 by the Commission: By bundling together individual cases and presenting a set of "overarching legal theories" highlighting the existence of systemic rule of law violations, Member States would be able to test the (judicial) waters, exploring the CJEU's willingness to entertain such arguments. A favorable ruling by the Court—such as the recent explicit reference to Article 2 TEU in *Commission v. Poland*[65]—could undoubtedly be seized by a Commission which seems increasingly alert to the existential risk posed by democratic backsliding.[66]

Member State-led systemic infringement proceedings under Article 259 could therefore provide a way out of the current rule of law enforcement impasse. By giving Member States a leading role, the Commission's unwillingness to exercise its discretion could be overcome. By "bundling" together discrete violations, the mechanism's undue narrowness would cease to be an obstacle. The following section will illustrate how said enforcement could work out in practice.

D. "The Willing Five": A Case Study in Rule of Law Enforcement

Until very recently, the debate entertained throughout Section 3 was a largely theoretical one: Even Kochenov himself, in discussing the benefits of using Article 259 to protect EU values, called his proposal a "largely instrumental thought experiment."[67] Recent political developments, however, point towards the possibility of Article 259 finally being employed in an Article 2 context. In this

[61]Scheppele et al., *supra* note 38, at 62.

[62]*Id.* at 103–18.

[63]Case C-494/01, Comm'n v Ir., ECLI:EU:C:2005:250 (Apr. 26, 2005), ¶ 133, https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-494%252F01.

[64]Scheppele et al., *supra* note 38, at 64.

[65]ECJ, Case C-791/19, Comm'n v. Pol., ECLI:EU:C:2021:596 (July 15, 2021), 50–51, (Régime disciplinaire des juges) [Disciplinary Regime for Judges], https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-791%252F19.

[66]Sam Fleming & Ben Hall, *EU could be Destroyed by National Legal Challenges, Brussels Warns*, FIN. TIMES, (June 30, 2021) https://www.ft.com/content/9c862bff-5351-4293-8dfc-df121c727709.

[67]Kochenov, *supra* note 36, at 153.

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section, said developments will serve a case study to draw together the different threads addressed throughout this article.

More than five years have passed since the European Commission first activated the rule of law framework in relation to Poland. Since then, its government has engaged in a large-scale capture of its counter-majoritarian institutions—not least, through the infamous "muzzle law," which has "legalised the systemic violation of EU and ECHR judicial independence requirements."[68] "[F]ollowing years of sustained attacks targeting Polish courts, judges and prosecutors," Pech, Wachowiec and Mazur have suggested, "Poland can now be considered the first EU Member State to no longer have an independent judicial branch."[69]

If the early years of democratic backsliding saw widespread indifference among Member States, as Scheppele's account of Article 7 proceedings illustrates,[70] their attitude appears to have changed throughout the past few months. In December 2020, and against the backdrop of the Polish government's prosecution of Judge Igor Tuleya,[71] the Dutch Lower House adopted a resolution calling on its government to bring the Polish government before the CJEU for its "systemic assault on judicial independence."[72] At the same time, five Member States—Sweden, Belgium, Denmark, Finland and the Netherlands—appeared before the Court of Justice in the oral proceedings of *Commission v. Poland (Régime disciplinaire des juges*), the recently decided Article 258 case concerning the new disciplinary regime for Polish judges.[73]

Although said events may seem unrelated, both are relevant for the purposes of this article because they showcase how Member States can take an active role in rule of law enforcement. On the one hand, the Dutch parliament's resolution contradicts one of the most frequently used argument against inter-state infringement proceedings: Governments will be unwilling to take each other to court under Article 259, as doing so would spell the end of mutual trust and cooperation, which the EU is reliant on. That this fear may be overcome is undoubtedly a welcome development. Emmons and Pavone argue, on the other hand, the "perverse" backlash which authoritarian governments have instigated, by repeatedly demanding "that EU decision-making be a model of legal proceduralism" and "meticulously abide by rule of principles for any supranational intervention to be … legitimate,"[74] should not deter Member States from bringing infringement proceedings. After all, their duty of care under Article 259 is owed not to fellow national governments, but to the integrity of EU law as a whole and to the EU citizens who suffer the consequences of rule of law backsliding.

Secondly, the oral hearing in *Commission v. Poland* featured an unprecedented level of express coordination between the five intervening Member States supporting the Commission's case—once again, a sign that times may be changing. Throughout the hearing:

[68]For a detailed overview of the Polish government's actions, *see* Laurent Pech, Patryk Wachowiec & Dariusz Mazur, *1825 Days Later: The End of the Rule of Law in Poland (Part I)*, VERFASSUNGSBLOG (Jan. 13, 2021), https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-i/; *see also* Laurent Pech, Patryk Wachowiec, & Dariusz Mazur, *1825 Days Later: The End of the Rule of Law in Poland (Part II)*, VERFASSUNGSBLOG (Jan. 18, 2021), https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-ii/.

[69]Pech et al., *Part I*, *supra* note 68.

[70]Scheppele, *supra* note 17.

[71]Aleksandra Gliszczynska & John Morijn, *Today Tuleya, Tomorrow the EU*, VERFASSUNGSBLOG (Oct. 1, 2020), https://verfassungsblog.de/today-tuleya-tomorrow-the-eu/.

[72]Guillermo Íñiguez, *Taking (Fundamental) Rights Seriously*, NEW FEDERALIST (Jan. 21 2021), https://www.thenewfederalist.eu/taking-fundamental-rights-seriously?lang=fr.

[73]Case C-791/19, Comm'n v. Pol., ECLI:EU:C:2021:596 (Jul. 15, 2021), 50–51, (Régime disciplinaire des juges) [Disciplinary Regime for Judges], https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-791%252F19.

[74]Cassandra Emmons & Tommaso Pavonne, *The Rhetoric of Inaction: Failing to Fail Forward in the EU's Rule of Law Crisis* 1, 12 (July 19, 2021).

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> Belgium . . . showcased its "concerns" surrounding the new disciplinary framework: it will have a "chilling effect" on the judicial system as a whole, Finland noted, introducing "an element [of fear] into judges" work. "A Polish judge," it added, "may have to show exceptional courage just to rule on a case in a way that they consider fair based on their expertise." As Denmark concluded, such a regime is incompatible with the principle of mutual trust—an essential aspect of European cooperation as a whole.[75]

As the above extract illustrates, *Commission v. Poland* showcases the different ways in which Member States can take an active role in enforcing the rule of law. In their oral submissions, all intervening parties expressly referenced the existential threat posed by rule of law backsliding—not only to the EU's fundamental values or to its normative *raison d'être*, but also to the proper functioning of its legal order.[76] Although, on the facts, the Commission chose to bring infringement proceedings, the "Willing Five" could have done so themselves had the Commission abstained; and even once Article 258 proceedings have been launched, any Member State willing to have a say—for example, because they feel the Commission is not going far enough or is failing to focus on the most important issues at stake—can intervene in the case, as the "Willing Five" did in *Commission v. Poland*.[77] Perhaps most importantly, no unanimity or widespread intra-Council support is required in either case: Whether to step in, and if so how to do so, is at the full discretion of each Member State.

Article 259 proceedings, therefore, provide two ways of breaking the current impasse in enforcing the rule of law: Direct action, as the Dutch parliament has asked its government to do; and indirect action, by making one's case through written and oral observations, as the 'Willing Five' did in *Commission v. Poland*. In either case, Member States are afforded a straightforward way of overcoming the institutional limitations of Article 7 or of Article 258 TFEU; and in either case, they are not bound by the political considerations which supranational institutions may entertain.

E. The Constitutional Implications of Article 259

Having analyzed the scope and possible application of Article 259, it is worth taking and step back and addressing some of the broader issues raised by its application to Article 2 cases. This section will discuss two points: The concept of "biting intergovernmentalism," and how Article 259 illustrates the hybrid nature of the EU's constitution.

I. "Biting Intergovernmentalism"

The first way of conceptualizing the provision's role is provided by Dimitry Kochenov, who has coined the term "biting intergovernmentalism" when referring to its use by Member States.[78] In Kochenov's eyes, Article 259 provides an intergovernmentalist mechanism to advance EU law and values or, in his own words, "the most sensitive way, in the context of EU federalism, to approach the values crises and enforce Article 2 TEU." It does so, as previous sections have highlighted, by affording Member States an instrument through which to *directly* access the Court of Justice in cases where they believe a fellow government has violated EU law.

The notion of "biting intergovernmentalism" adds some nuance to one of the main truisms in EU law: That the Commission is the sole guardian of the Treaties. Through Article 259 TFEU, this

[75]Íniguez, *supra* note 5.

[76]Hans von der Burchard, *Commission, 5 Members Clash in Court with Poland over Rule of Law*, POLITICO (Dec. 1, 2020), https://www.politico.eu/article/five-eu-countries-and-commission-clash-with-poland-over-rule-of-law-at-court-hearing/; Íñiguez, *supra* note 72.

[77]*See* Statute of the Court of Justice of the European Union art. 40 ("Member States and institutions of the Union may intervene in cases before the Court of Justice.").

[78]Kochenov, *supra* note 36 at 164.

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article has illustrated, Member States are afforded a direct tool for the advancement of EU law and values; and in employing said mechanism to ensure other governments fulfill their EU law obligations, all Member States—not just the Commission—take ownership of the treaties' guardianship. Indeed, the provision's very existence is premised on a pluralistic view of said guardianship. One of the key benefits of Article 259, it has been suggested, is the Member States' ability to overcome institutional straitjackets, as well as the Commission's "residual over-caution and institutional inertia" when it comes to enforcing the rule of law across the EU.[79] When they choose to bring direct actions under Article 259, Member States are not doing so as agents of the EU institutions; rather, they are playing a crucial role in what is a multi-layered enforcement procedure. In other words, adds Kochenov, "since the values declared in Article 2 are shared between the EU and its Member States' legal orders, it is impossible to claim that the [EU] institutions ... are the key actors primarily responsible for their enforcement."[80]

Understanding the above is crucial in order to capture the second point raised by Kochenov: That Article 259, despite encouraging "biting intergovernmentalism," also ensures that the EU's "federal sensitivities" are respected.[81] One of the main lessons drawn from the "Haider affair," as discussed in Section 2, was that any response to the rule of law backsliding had to be meticulous; national governments had to ensure that the Treaty framework was respected, and that any measures were compliant with general principles of EU law such as conferral, proportionality or subsidiarity. As Wojceich Sadurski argued, it was the Treaties' need for such a mechanism—one which enabled Member States to adopt measures, but which fell short of Article 7's "sanctioning mechanism"—which the Ahtisaari, Frowein and Oreja Report highlighted, and which led to the introduction of the "preventive" mechanism in Article 7(1).[82]

Member State-led enforcement under Article 259, which was not relied on at the time, would have facilitated this. On the one hand, because it respects the balance of power between the EU and Member States as codified by the Treaties, thereby rebutting the potential accusation that rule of law enforcement may be *ultra vires* and reducing the risk of said cases being rejected by the Court.[83] On the other hand, because it allows any Member State to *complement* the Commission's actions where, for political, economic, or institutional reasons, the latter is unable or unwilling to step in.[84] By enabling States to "bite," rather than "bark,"[85] in other words, the uniform application of EU law is facilitated.

It is all of the above, Scheppele, Kochenov and Gabrowska-Moroz conclude, which makes Article 259—and the notion of "biting intergovernmentalism"—a more satisfactory tool than others which have been suggested, such as the *ad hoc* response to the "Haider approach," the dialogic Rule of Law framework, or the so-called "horizontal *Solange* approach," a proposal which calls for the horizontal suspension of the principle of mutual trust where a given Member State systemically violates the EU's values or fundamental rights.[86]

Finally, but by no means less importantly, Article 259 illustrates the richness and complexity of EU law—a body of law which is constantly evolving and changing to overcome the internal problems it encounters. If Article 2 TEU enforcement has proven as difficult as it has, this is largely

[79]*Id.* at 162.

[80]Kochenov, *supra* note 36, at 163.

[81]*Id.* at 174.

[82]Sadurski, *supra* note 11, at 407.

[83]Scheppele et al., *supra* note 38, at 96.

[84]Kelemen, *Europe's Faustian Union*, *supra* note 47; *see also* Slawomir Sierakowski, *Europe Bails Out Its Populists*, PROJECT SYNDICATE (July 29, 2020), https://www.project-syndicate.org/commentary/eu-recovery-fund-weakens-rule-of-law-poland-hungary-by-slawomir-sierakowski-2020-07.

[85]Besselink, *supra* note 8, at 133; Sadurski, *supra* note 11.

[86]*See* Iris Canor, *Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law*, *in* DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 183–206 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Toborowski, & Matthias Schmidt eds., 2021).

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because respect for the rule of law was taken for granted by the EU's founding fathers, who failed to envisage the constitutional capture which has taken place across several Member States.[87] As the decades went by and rule of law backsliding intensified, a wide range of possible solutions was suggested, many of which have proven futile. Faced with this obvious impasse, many commentators are now turning their eyes to Article 259—a hitherto residual clause, which was long overshadowed by Article 258 but which may now prove fundamental in overcoming the existing deadlock. The EU's constitutional architecture, in other words, is neither ossified nor outdated: It provides a well-equipped toolbox, albeit one which is being misused by both the institutions and the Member States.[88] Faced with an existential threat to its legal order, which the Commission and Member States are increasingly alert to, it is crucial that said toolbox is applied to its fullest extent.

II. A Hybrid Constitution

Many of the constitutional implications raised by the concept of "biting intergovernmentalism," which the above section has discussed, are not unique to Article 259; Member State-led infringement proceedings, which is an instrument triggered by the national governments, reviewed by the European Commission, and adjudicated on by the CJEU, are more broadly reflective of the hybrid nature of the EU's legal order, in which intergovernmental and supranational instruments frequently complement one another.

As Sergio Fabbrini writes, the role played by Member States in EU decision-making is best conceptualized on a spectrum. In areas of exclusive EU competence, such as the single market or competition policy, it is more limited, with legislative power being shared with the Parliament and the Commission, which bears the right of initiative. Areas more akin to those of a nation-state, such as defense or security, are purely intergovernmental, with national governments taking the leading role.[89] Rule of law enforcement, this article has suggested, lies somewhere between both ends of the spectrum; contrary to what happens in traditional federal states, where the federation is solely responsible for ensuring the compliance of its federated states,[90] the protection of Article 2 is tasked to both Member States and supranational institutions, and is therefore reliant on the use of both supranational, such as Article 258, and intergovernmental, such as Article 259, instruments.

Graham Butler's work, which has been discussed in previous sections, also reflects this hybrid dimension. When addressing Article 259 cases, Butler notes, the CJEU appears to become an "inter-state" court, one which adjudicates on disputes between Member States, in a manner reminiscent of international law courts such as the European Court of Human Rights.[91] At first sight, Butler notes, this "inter-state" dynamic seems to go "against the very nature and custom of an integration project like the EU"[92]—a supranational legal order constructed through landmark rulings such as *Van Gend en Loos*, which expressly discredit this international law analogy by speaking of a "new [and *sui generis*] legal order of international law."[93] The CJEU's primary role, in

[87]Scheppele et al., *supra* note 38, at 4.

[88]Kelemen & Scheppele, *supra* note 26; *see also* Tomasz Tadeusz Koncewicz & Marcin Michalak, *The EU's Rule of Law Toolbox in the Light of Europe's Constitutional Heritage: The Polish Experience*, RECONNECT EUR. (Nov. 27, 2020), https://reconnect-europe.eu/blog/the-eus-rule-of-law-toolbox-in-the-light-of-europes-constitutional-heritage-the-polish-experience/.

[89]*See* Sergio Fabbrini, *Intergovernmentalism in the European Union. A Comparative Federalism Perspective*, 24 J. EUR. PUB. POL'Y 580, 581 (2017).

[90]*See generally* THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE, Ch. 15–22 (András Jakab & Dimitry eds., 2016).

[91]Butler, *supra* note 37.

[92]Id. at 202.

[93]Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1, 3 (Feb. 5, 1963) https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=26%252F62.

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other words, is not to adjudicate in litigation between Member States, but to "answer questions of EU law that arrive before it via a number of different mechanisms."[94]

Yet despite the above, this "inter-state" dimension of the CJEU plays a crucial role not only in sustaining the EU's legal order, but also in driving it forward. By allowing Member States to "channel" political disputes into the Treaty's framework, Section 3 has argued, it provides a forum for the peaceful resolution of political disputes. Similarly, by granting MS a direct way of challenging violations of EU law, it democratizes the guardianship of the Treaties, a function which the Commission has not always performed to the best of its abilities.[95] Doing so facilitates both the detection and the prevention of Treaty infringements, thereby ensuring that EU law is fully complied with across the Union. In other words, Butler adds, Article 259 is best understood as a "useful retention of competence for the Member States," which can be used—and this is crucial in the context of the rule of law crisis—to overcome "the unwillingness of the Commission to take an infringement case."[96]

Infringement proceedings, therefore, are a perfect reflection of the hybrid nature of the EU's constitution; one in which supranational and intergovernmental enforcement mechanisms complement one another on a regular basis. Of course, this tension may be deemed a fundamental weakness, as AG Bobek has famously written, the "effective protection of something tends to dramatically decrease if everyone is made responsible for it."[97] Yet in a context such as the rule of law crisis, in which the European Council, the Commission and Member States have all shown themselves unwilling to act at different stages, this hybrid Treaty enforcement system can be viewed as a key strength, enhancing rule of law protection by allowing both Member States and supranational institutions to hold each other accountable.

Finally, the above analysis also has implications in shaping the debate on whether – and if so how—the EU is to move forward in years ahead. When assessing how to overcome the EU's institutional limitations, numerous calls—which this author sympathizes with—have been voiced for further European integration; a more agile Union, it has been repeatedly argued, could overcome the unanimity requirement in provisions such as Article 7 TEU, and would be afforded more effective mechanisms to ensure the rule of law is upheld.[98] Yet the analysis carried out throughout this article shows that said supranational Europe is not necessary, provided that the Member States use the mechanisms available to them. In cases where the institutions show themselves reluctant to move forward, this article has demonstrated it is an *intergovernmental* push by Member States—such as seen in systemic and systematic use of Article 259—which can help break the current impasse, thereby driving European integration forward.

F. Conclusion

This article has hypothesized that Article 259 provides an effective way of protecting the rule of law across the European Union. As Sections 2 and 3 have demonstrated, existing mechanisms—such as Article 7 TEU, the rule of law conditionality regulation, or "traditional" Article 258 TFEU—have shown themselves to be unsuitable; their high institutional thresholds and their dependence on the political discretion of the Commission or Council, it has been argued, has left them vulnerable to "capture" by the Member States engaged in rule of law backsliding.

In light of the above, "systemic" infringement proceedings can provide a way out of the existing impasse. By giving Member States a leading role in the enforcement of EU law, Article 259 TFEU

[94]Butler, *supra* note 37, at 180.

[95]*See* Sierakowski, *supra* note 84.

[96]Butler, *supra* note 37, at 204.

[97]Case C–40/17 Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW e.V., ECLI:EU:C:2018:1039, ¶ 98 (2018), https://curia.europa.eu/juris/liste.jsf?num=C-40/17 (Opinion of AG Bobek).

[98]*See* Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, 21 EUR. L. J. 546–57 (2015) (providing a general overview).

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maximizes the latter's effectiveness, as well as providing a counterbalance to the Commission's guardianship of the Treaties. Similarly, "bundling" several cases together could allow Member States to overcome the undue narrowness of infringement proceedings, which has enabled governments to circumvent the Court's rulings for decades. Combining Article 259 with other instruments—such as Article 260, the rule of law conditionality regulation, or the Common Provisions Regulation governing the ESIF—could further increase the former's effectiveness, providing a financial incentive for Member States to comply with EU law.

Finally, this article has sought to highlight some of the constitutional implications of Member State-led enforcement. On the one hand, it has been argued, infringement proceedings showcase the hybrid nature of the EU Treaties, which are reliant on both intergovernmental and supranational mechanisms to ensure their rules, values, and standards are being complied with. On the other hand, Article 259 exemplifies the importance of "biting intergovernmentalism" in securing compliance with EU law. By bringing direct actions for violations of Article 2 TEU, thereby sidestepping the European Commission, Member States can claim a joint guardianship of the Treaties and play a more active role in protecting the EU's legal order against the existential risk posed by rule of law backsliding. Doing so recognizes their fundamental interest—both normative and instrumental—in ensuring the Treaties are complied with, and points towards the need for effective checks and balances on the Commission's actions.

This article has showcased that Member State-led infringement proceedings may no longer be the "largely theoretical thought experiment" which Kochenov once claimed. Yet it has not suggested that "systemic" Article 259 enforcement will be easy, that the rule of law crisis can be easily overcome, or that Member States carry no blame for the impasse the EU finds itself in. Similarly, it has not sought to exhaustively address all the questions raised by Article 259 or by the enforcement of Article 2 TEU more generally, a task which would require an academic lifetime's work. It does hope, however, to have made a compelling case as to why Article 259, hitherto the "ugly duckling" of infringement proceedings, matters, why Member States should take ownership of rule of law enforcement, and why Article 259 illustrates some broader trends underlying the EU's constitution. Only time will tell whether the conclusions reached in this article are accurate. Yet in as fast-changing a field as EU constitutional law, and as democratic backsliding intensifies, the questions it has posed are certainly worth asking.

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