

A new theoretical framework of the law of intergovernmental organizations and its applicability to the European Union

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In some cases, the existing theories about the European Union do not explain coherently some phenomena related to European integration, such as the expansion of powers. That issue is so specific that a complex approach is needed. The aim of this study is to show an appropriate theoretical approach which consists of two elements. The first is an element of international political theory, namely the English School, while the second is an element of international jurisprudence, Guy Fiti Sinclair's approach. Recent literature specifically focused on the special relationship between the foundations of international society and intergovernmental organizations. In my opinion, such an approach would fit to Sinclair's theory who examined the expansion of powers of intergovernmental organization.

Keywords: international political theory, English School, Guy Fiti Sinclair, expansion of powers of international organizations, European Union law

1. Introduction

Jurisprudence and the study of international relations are not compatible at first glance. They have different theoretical backgrounds and use fundamentally different methodologies. Both examine international law, and sometimes, even the law of the European Union (EU) from different viewpoints, and could infer different results. Unfortunately, both fields usually refuse to accept that these results could be combined effectively.¹ For the study of international relations, law has secondary importance as the dominant realism has neglected its importance for a long time. For the study of law, the branch of international relations was considered to be too young and unimportant. There were approaches which tried to develop cooperation between the two fields but these did not yet gain wide acceptance.² I think there are matters where the cooperation of jurisprudence and international relations (IR) analysis is not only recommended, but rather necessary, as in the case of the law of intergovernmental organizations.

This cooperation is even more problematic when the subject is not a "simple" international organization. There are ongoing academic debates related to the exact nature, identity and characteristics of the European Union. In addition, there are competing theories which try to explain the behavior of the European Union and its member states, e.g. neo-functionalism, intergovernmentalism, and multilevel governance. However, these models are imperfect as they either consider the EU to be just a simple forum for pursuing state interests or they neglect the fact the member states have their own goals and will in the global international community and the European Union as well.³

¹ C. J. Christopher, *International Law is, as International Theory Does?* American Journal of International Law, Vol. 100, No. 1, January 2006, p. 248.

² A. Irish & C. Ku, & P. F. Diehl, *Bridging the International Law-International Relations Divide: Taking Stock of Progress.* Georgia Journal of International and Comparative law, Vol. 41, No. 2, 2013, pp. 357-388.

³ A. Kaczorowska-Ireland, *European Union Law*, 4th edn., Taylor-Francis Ltd, New York, 2016. pp. 33-36.

The purpose of this study is to present a theoretical framework which could combine jurisprudence and international relations in one concept. The theory consists of two components. I use the English School from the field of international political theory. It does not only accept the importance of the realities of power in the international arena but also considers intergovernmental organizations and law as important factors for the international community. From the field of law, I will rely on Guy Fiti Sinclair's approach because he specifically examined the expansion of power of intergovernmental organizations. In his research, he took into consideration the legal-sociological process within intergovernmental organizations. Sinclair accepts both the importance of power in the development of those organizations and the ideas and the law as relevant factors. In the current academic literature, his research is unique.

As I present a theoretical framework in this study, I must examine scientific results related to the English School. I concentrate on the "founding fathers" of the school but I also pay attention to the recent trends within the theoretical approach (Section 2). In Section 3, I focus on Guy Fiti's Sinclair's theory and analyze whether such an approach is compatible with the English School. I rely on Sinclair's 'To Reform the World – International Organizations and the Making of Modern States'⁴ in that section. In Section 4, I specifically examine the applicability of this theoretical framework to the European Union. I rely on sources related to the "nature" of the EU and the law of the European Union as well. For this, I examine the most relevant thinkers and EU law sources.

2. English School as a "base theory"

The school of realism acquired a dominant position in the study of international relations (IR) at the beginning of the Cold War. The reason for this is that the events of the Second World War did not attest the liberal theoretical ideas and their core, the concept of cooperation. However, the Cold War generated controversial tendencies in the international arena. On the one hand, nuclear proliferation, the bipolar world, or the international crises that occurred during the time of the Cold War could fit easily into realist or neorealist theories. On the other hand, realists could not give convincing explanations to the phenomenon of economic interdependencies, such as the GATT, IMF or even European integration. Neoliberalism did provide an explanation for these interdependencies, but it was still unable to interpret power relations convincingly and comprehensively.⁵ Consequently, new theoretical approaches appeared in IR, which criticized the two competing theories.

One of them was the English School, which followed an idiosyncratic approach. According to Romsics, liberal and realist theories reflected on the political theoretical traditions in the USA.⁶ Instead, the English School tried to synthesize the two dominant schools of IR with a new set of expressions.⁷ As a result, the English School recognizes the importance of power, state interest, and material capabilities but emphasizes that alliances, rights, norms, the principle of reciprocity and debates also influence international relations. The reason is that all of these are connected to human

⁴ G. F. Sinclair, *To Reform the World – International Organizations and the Making of Modern States*, OUP, Oxford, 2017.

⁵ J. Sterling-Folker, *Neoliberalism*, In T. Dunne, M. Kurki & S. Smith (Eds.), *International Relations Theories – Discipline and Diversity* (3rd ed.). OUP, Oxford, 2013, pp. 114-118.; A. Whyte, *Neorealism and neoliberal institutionalism: born of the same approach*. <https://www.e-ir.info/2012/06/11/neorealism-and-neoliberal-institutionalism-born-of-the-same-approach/> (21 March 2020).

⁶ Romsics G., *A hallgatástól a kritikáig – A nemzetközi kapcsolatok elmélete és az emberi jogok*. Fundamentum, Vol. 13. No. 3, 2009, p. 33.

⁷ R. Scheele, *Is the English School Just Another Paradigm in IR?*, 2013, <https://www.e-ir.info/2013/10/24/is-the-english-school-just-another-paradigm-in-ir/> (21 March 2020), para. 5.

nature.⁸ The concept of the English School comes from Hedley Bull and Martin Wight.

2.1. The traditions of English School

These two prominent thinkers distinguished three ‘traditions’ in international politics: the realist (Hobbesian), the rational (Grotian) and the universalist / revolutionist (Kantian) traditions.⁹ The traditions represent a certain aspect of international relations, which could be coupled with three additional concepts: realism with the international system, rationalism with the international society, and universalism with the world society. These three traditions have different ontological, and epistemological backgrounds and they use distinct methodologies within IR.¹⁰ These patterns embody different aspects of the nature of international politics,¹¹ therefore considering all of them helps to understand international politics in its entirety.

According to the first concept, realism, the core of the international system stems from the power relations between states because they are still the most important actors in international relations.¹² The international system is, therefore, ruled by anarchy, because states, unlike individuals, are not subject to a common government. In that regard, the most important aim of the state is survival. However, this does not exclude the possibility that a state might set out other goals as well.¹³ A pessimistic, or even “tragic” view of human nature may also be considered a realistic approach.¹⁴ Based on the concept of realism, Bull defines the international system as a system in which “two or more states have sufficient contact between them, and have sufficient impact on one another’s decisions, to cause them to behave – at least in some measure – as part of a whole”.¹⁵

Regarding the second (rational) concept, Bull stresses that international society “exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions”. An international society, therefore, focuses on the institutionalization of common interests of states, the norms, the rules, and the institutions.¹⁶ One of the reasons for the existence of such an international society is the presence of trade and other economic relations between states. The sovereignty of states has significant importance in the maintenance of this society but some of the rules necessarily restrict it.¹⁷ A further characteristic of the international society is its anarchical nature. There is no common government or other effective power structure which could enforce the law or secure cooperation. Regardless, states are conscious of the common rules and values of their community.¹⁸ Writers of the English School categorized international societies in history. Bull made two separate groups: a pluralist

⁸ H. Bull, & A. Watson, *Conclusion*, In H. Bull & A. Watson (Eds.), *The Expansion of International Society*, OUP, Oxford, 1984, p. 452.

⁹ Scheele 2013, para 5.

¹⁰ F. C. Buranelli, *Global International Society, Regional International Societies and Regional Organizations: A Dataset of Primary Institutions*, in T. B. Knudsen & C. Navari (Eds.), *International Organization in the Anarchical Society*, Palgrave Macmillan, New York, pp. 233-263.

¹¹ H. Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn.), Palgrave Macmillan, New York, 2012, p. 9.

¹² B. Buzan, *From International World Society? - English School Theory and the Social Structure of Globalisation*, Cambridge UP, Cambridge, 2004, p. 7.

¹³ S. J. Barkin, *Realist Constructivism*, *International Studies Review*, Vol. 5, No. 2, 2003, p. 328.

¹⁴ R. N. Lebow, *The tragic vision of politics – Ethics, interests and orders*, Cambridge UP, Cambridge, 2003.

¹⁵ Bull 2012, p. 9.

¹⁶ *Ibid.* 13.

¹⁷ Scheele 2013, para 5.

¹⁸ Bull 2012, pp. 44-49.

international society builds on a thin and weak basis of shared norms and values; in contrast, a solidarist international society has a thicker basis of these norms.¹⁹ Buzan applied a more detailed differentiation, displaying pluralist and solidarist societies as two opposing ends of a scale.²⁰

It is important to separate the rationalist tradition from the universalist / revolutionist tradition, which is connected to the concept of world society. Bull states that IR cannot be considered only as interstate relations.²¹ The universalist / revolutionist tradition focuses on the individuals, and other non-state actors, and even the world population as a whole in some cases. The English School uses this concept to examine the transnational element in IR.²² This approach is not unprecedented, as history provides several examples of the importance of the transnational element. For instance, the Catholic Church played a significant role in the different periods of history and the international community of Europe.²³ It is important to highlight that the concept of world society has a unique connection with the concept of international society. Buzan emphasizes that international society provides the political framework which is essential for world society to face all the dangers of anarchy. In return, world society provides the 'community foundation' which is crucial to give rise to an international society from a fairly basic level.²⁴

2.2. The institutions of international society

Institutions are considered by the English School to be the pillars of the international society.²⁵ According to Bull, institutions are the customs and regularities of the international society which constitute a framework to reach common goals and create common practices. The English School refers to institutions as symbols of the international society. They prove that such a society is not just a group of states but also a community which makes conscious efforts to fill itself with substantial content. Institutions are the conditions for the maintenance of international society.²⁶ Bull distinguished five institutions ('constitutional normative principles'): diplomacy, international law (IL), balance of power, great power management, and war.²⁷ He also emphasized that they originate from a ground norm, which is the principle of sovereignty.²⁸ Other authors considered other institutions as well, or they categorized them in a different way.²⁹ It is important to highlight though that institutions existed far before the Westphalian state system.³⁰ Certain aspects of IL and diplomacy existed in the Middle Ages, while the balance of power, great power management and war were

¹⁹ B. Ahrens, *The European Union Between Solidarist Change and Pluralist Re-Enactment*, in T. B. Knudsen & C. Navari (Eds.), *International Organization in the Anarchical Society*, New York: Palgrave Macmillan, 2019, p. 266.

²⁰ P. Marton, *Barry Buzan és az Angol Iskola*, <http://www.grotius.hu/publ/displ.asp?id=PKHCDP> (21 March 2020).

²¹ Bull 2012, p. 35.

²² Buzan 2004, p. 7-8.

²³ T. Dunne, *The English School*, in T. Dunne, M. Kurki & S. Smith (Eds.), *International Relations Theories – Discipline and Diversity*, 3rd edn, OUP, Oxford, 2013, p. 140.

²⁴ B. Buzan, *From International Society to International System: Structural Realism and Regime Theory Meet the English School*, *International Organization*, Vol. 47, No. 3, 1993, p. 351.

²⁵ A. Wendt & R. Duvall, *Institutions and International Order*, in E.-O. Czempiel (Ed.), *Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s*, Lexington Books, Lexington, 1989, pp. 52-53.

²⁶ T. B. Knudsen, *Fundamental Institutions and International Organizations: Theorizing Continuity and Change*, in T. B. Knudsen & C. Navari (Eds.), *International Organization in the Anarchical Society*, Palgrave Macmillan, New York, 2019, p. 28.

²⁷ Bull 2012, pp. 68-71.

²⁸ C. Navari, *Modelling the Relations of Fundamental Institutions and International Organizations*, in T. B. Knudsen & C. Navari (Eds.), *International Organization in the Anarchical Society*, Palgrave Macmillan, New York, 2019, p. 53.

²⁹ Knudsen 2019, pp. 30-33.

³⁰ M. Wight, *Systems of States*, Leicester UP, Leicester, pp. 110-152.

settled practices in the Medieval international society.³¹ However, the ground norm of sovereignty gave these practices concrete forms.

Institutions possess unique characteristics, which must be detailed to understand their complex nature. As Jackson states, they are intersubjectively real. They are real in the sense of shared understandings which come from (limited) human rationality and the interactions between people. They are formed in the society, and in the international community at the end.³² Bull and Knudsen mention balance of power as an example. This institution comes from human nature and appears as a cause for the existence of alliances and also the cause of proliferation.³³

Furthermore, there is an improved interaction between states and institutions. States, as members of the international society, establish and maintain relations with other actors based on the rules provided by the institutions. A good example of this are diplomatic traditions which exist between states, and – obviously – war. In addition, the actions of states generate and reproduce institutions. Consequently, there is a mutually reinforcing relationship between institutions and states. Meanwhile institutions provide the existence of interstate relations, the ongoing activities of states legitimize them within this institutional frame.³⁴ Unfortunately, this description does not touch upon the role of other actors in the international community, such as intergovernmental organizations (IGOs).

2.3. The connection between primary and secondary institutions

The constructivist turn in IR had an effect on the English School as well, leading to the rebirth of the school. One of their pioneer thinkers, Barry Buzan relied on the works of Alexander Wendt and other constructivist authors and turned his attention to the tradition of world society. His approach can be considered as international sociology, which focuses on the role of non-state actors in the English School.³⁵ Furthermore, Buzan's 'From International to World Society?' also took into consideration that authors from the English School neglected the importance of sub-global events in the world and the role of regional IGOs.³⁶

Buzan identified primary and secondary institutions.³⁷ According to his approach, primary institutions are the institutions which were described in section 2.2. On the other hand, the author categorized IGOs as secondary institutions.³⁸ The usage of similar terminology is not a coincidence. In section 2.2., it was stated that there is a mutually reinforcing relationship between states and (primary) institutions. According to Buzan, there is also a strong connection between primary and secondary institutions.³⁹ As Knudsen states, the primary group is essential for the existence of IGOs. Moreover, primary institutions do not only create, but also formalize secondary institutions because they embody, specify and reproduce the basic principles and practices of secondary institutions. For instance, the membership of the United Nations Security Council (UNSC) represents the institution of great power management (a primary institution) through the fact that UNSC com-

³¹ Knudsen 2019, p. 39.

³² P. T. Jackson, *The Conduct of Inquiry in International Relations: Philosophy of Science and Its Implications for the Study of World Politics*, Routledge, New York, pp. 126-137.

³³ Knudsen 2019, p. 28.

³⁴ Wendt & Duvall 1989, pp. 53, 58-63.

³⁵ Marton.

³⁶ Buzan 2004, pp. 205-227.

³⁷ Ibid pp. 163-167.

³⁸ Navari 2019, pp. 8-9.

³⁹ Ibid.

prises five permanent members which have certain voting privileges.⁴⁰

On the other hand, secondary institutions / IGOs have further significant roles in this matter. They do not simply verify the existence of primary institutions but also have an effect on them. The reason for this is that IGOs “socialize” states in international relations. They lay down the rules, procedures and practices and the frame in which states could pursue their interests.⁴¹ As these rules originate from primary institutions, secondary institutions have a considerable effect on the former. During this process, IGOs cannot change primary institutions at their core. However, secondary institutions affect the whole concept of international society, and therefore, world order.⁴² It must also be emphasized that not only universal IGOs are capable of provoking such changes. Regional organizations could affect their own regional international societies, or even the universal international society.⁴³

2.4. The English School and international law

Bull states that IL is one of the (primary) institutions for international society.⁴⁴ He emphasizes though that IL is not the base of international order because international order derives from the interactions of more (primary) institutions.⁴⁵ Therefore, the English School recognizes the fact that law is sometimes subjugated to power.⁴⁶ Bull emphasizes though that this is not an unhealthy relationship, proved by the connection between the balance of power and IL. International law establishes trust between states through the creation of a framework for diplomacy and interstate alliances. Therefore, IL has an important role regarding the institution of the balance of power. On the other hand, the consequences of the balance of power sometimes contradict the rules of IL to keep the order in international relations.⁴⁷ It can be said though that IL is considered to be a normative frame for the international society.⁴⁸

The English School admits that the most important difference between IL and domestic law is the lack of an authority in IL, which would enforce the rules for states.⁴⁹ Considering this, the school establishes some assumptions. First, self-help gets a greater role in the international community. As there is no central authority which could keep the order, a state must help itself, or rely on its allies. A suitable example is Article 51 of the UN Charter about self-defense, or Articles 39-42 on collective security.⁵⁰ Second, IL is not a tool for social control and can be considered only restrictively as a possible way for reforms. The reason for this is that a reform through IL can only be successful if great powers agree with the process.⁵¹ On the other hand, law can introduce certain changes. If an accepted rule of IR has a blurred meaning, the members of the international community consider

⁴⁰ Knudsen 2019, p. 41.

⁴¹ Ibid pp. 41-42.

⁴² C. Navari & T. B. Knudsen. *Introduction: A New Approach to International Organization*, in T. B. Knudsen & C. Navari (Eds.), *International Organization in the Anarchical Society*, Palgrave Macmillan, New York, 2019, p. 8.

⁴³ Knudsen 2019, pp. 42-43; B. Buzan & A. Gonzales-Pelaez, *International Society and the Middle East – English School Theory at the Regional Level*, Palgrave Macmillan, New York, 2009.

⁴⁴ Bull 2012, pp. 122-155.

⁴⁵ P. Wilson, *The English School's approach to international law*, in C. Navari (Ed.), *Theorising International Society: English School Methods*, Palgrave Macmillan: New York, 2009, p. 177.

⁴⁶ Ibid p. 206.

⁴⁷ Bull 2012, p. 138.

⁴⁸ Wilson 2009, p. 177.

⁴⁹ A. James, *Law and Order in International Society*, in A. James (Ed.), *The Bases of International Order: Essays in the Honour of C. A.W. Manning*, OUP, Oxford, 1973, p. 65.

⁵⁰ Knudsen 2019, p. 35.

⁵¹ Wilson 2009, pp. 178-180.

that carefully. Consequently, IL has an effect on the conduct of actors in IR.⁵²

Third, IL is a normative framework for the international community. It creates the rules for concluding, suspending or terminating an international agreement. There are also rules which establish the legal background for diplomatic and consular relations. These rules do not nullify the cruel nature of the international arena, but they make it more predictable.⁵³ It is not that obvious though, why states obey these rules. It can be a matter of custom, the fear from the threat or use of force, or simply state interests.⁵⁴ Even the fear from the image of a rule-breaker can be a motivational force.⁵⁵ Fourth, the existence of IL proves that there is little solidarity in international society essentially. States do not trust others to make obligatory rules for them. It also means that IL is very difficult to change.⁵⁶

As we can see, the English School examined the concept of IL but it did not try to focus on specific issues related to the concept of law. In my opinion, the authors from the English School neglected to answer certain questions related to IL though. Regarding the first, the school does not focus on the issue, what role IL has for secondary institutions / IGOs. Regarding the second, there is no research which would focus on the relationship between law and the expansion of powers of IGOs (Knudsen, 2019: 35).⁵⁷ My position is that international jurisprudence could fill this space and give satisfactory answers to these questions.

3. English School meets jurisprudence – Guy Fiti Sinclair’s approach

3.1. The expansion of the powers of IGOs

International legal scholarship examines the legal questions relating to IGOs, including their (legal) status, structure, functions and powers. The problem is that the field has paid little attention to the expansion of IGOs’ powers and the effects of the expansion in its entirety. The majority of the authors focused only on certain tendencies and tools such as implied powers or ultra vires acts.⁵⁸ In contrast, Guy Fiti Sinclair’s ‘To Reform the World – International Organizations and the Making of Modern States’ focuses on the composite nature of law regarding this phenomenon. Although he is an international lawyer and does not take into consideration the tendencies of international political theory, his work can be coupled with the approach of the English school.

According to Sinclair, IGOs are created with their founding treaties which define their objects and purposes, enumerate their powers, list their organs and declare their procedural rules. However, he emphasizes the volatile nature of these rules because IGOs tend to set new goals and acquire adequate powers to achieve those goals. These objectives appear through the new ideas appearing

⁵² James 1973, p. 80.

⁵³ Wilson 2009, p. 184.

⁵⁴ C. A. W. Manning, *The Legal Framework in a World of Change*, in B. Porter (Ed.): *The Aberystwyth Papers: International Politics, 1919-1969*, OUP, Oxford, 1972, pp. 322-323.; Bull 2012, p. 139-140.

⁵⁵ Wilson 2009, p. 185.

⁵⁶ *Ibid* p. 187.

⁵⁷ Knudsen 2019, p. 35.

⁵⁸ C. F. Amerasinghe, *Principles of the institutional law of international organizations*, Cambridge UP, Cambridge, 2005.; N. Blokker, *Constituent instruments*, in J. K. Gogan, I. Hurd & I. Johnstone (Eds.), *The Oxford Handbook of International Organizations*, OUP, Oxford, 2016, pp. 943-961.; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge UP, Cambridge, 2002; H. G. Schermers & N. M. Blokker, *International Institutional Law 6th Revised edn.*, Martinus Nijhoff, Leiden, 2018.

in the international community. IGOs have the tendency to embrace these new ideas and create powers for themselves related to those ideas. Sinclair gives three case studies for this peculiar phenomenon: the International Labour Organization (ILO), the UNSC, and the World Bank. In his work, he examines what kind of challenges the IGOs faced during their expansions, which ideas and goals they picked, how this affected their member states, and what role the law of the specific IGOs had during that process.⁵⁹

This phenomenon has a political theoretical and legal perspective as well. From the viewpoint of political theory, we can observe the phenomenon of power aggregation. As Schabert states, an organization can hold power only if there is an ongoing aggregation of power, which power is continuously reproduced.⁶⁰ The public administration, which spends human and material resources and time producing policy papers, constantly aggregates power. In the case of IGOs, the same perception appears. The growing number of UN organs and their work, which creates an ongoing symbolical legitimization for the international community, is a good example for such an aggregation.⁶¹

Concerning the legal perspective, Sinclair relies on the concept of “constitutional growth”.⁶² The intention of IGOs to expand their powers does not appear at the time of their creation, hence there are no provisions for such expansion in the text of the founding treaties at all. Regardless, the IGOs demand new powers using their established practices and through the reinterpretation of existing rules. During this process, there are no textual changes in the founding treaty.⁶³ Georg Jellinek named this concept “constitutional transformation.” He pointed out that the constitution of a state can change even if the written text remains intact.⁶⁴ This comes from the so-called “normative force of the factual”. According to Jellinek, human nature tends to reproduce the usual and frequently repeated beliefs and convictions. He states that “the belief grows that the frequently repeated command in itself and isolation from its source constitutes [...] a norm to be fulfilled per se.”⁶⁵ The text of the written constitution implies these beliefs which can be considered as norms but their interpretations could change from time to time.⁶⁶ In the case of IGOs, the same phenomenon could occur. IGOs would like to expand their own powers but do not want to alter the texts of their founding treaties. These informal expansions of powers are often presented as reforms.⁶⁷

3.2. The creation of modern states

Sinclair contradicts those approaches which consider IGOs as simple forums in which sovereign states try to acquire as many benefits as they can and give away as few powers as they must.⁶⁸ In his view, IGOs have a molding or forming effect on their member states; the expansion of powers results in a process that creates the so called concept of “modern state” based on a broadly Western model. This logic also determines that the expansion of IGOs does not only occur at the expense

⁵⁹ Sinclair 2017, p. 9.

⁶⁰ T. Schabert, *A politika méltóságáról és jelentőségéről*, Századvég, Budapest, 2013, p. 34.

⁶¹ T. M. Franck, *The Power of Legitimacy among Nations*, OUP, Oxford, 1990, p. 100.

⁶² Sinclair 2017, p. 18.

⁶³ Ibid p. 3.

⁶⁴ G. Jellinek, *Verfassungsänderung und Verfassungswandlung: Eine staatsrechtlich-politische Abhandlung*. Häring, Berlin, 1906, p. 8.

⁶⁵ P. Sólyom, *Az állam általános elmélete és a jog viszonylagos ereje – Észrevételek Georg Jellinek államelméletéhez*, Pro Futuro, Vol. 2, No. 2, 2012, p. 62.

⁶⁶ P. Takács, *Államelmélet a XIX-XX. században – Georg Jellinek elmélete*, Állam- és Közigazgatástudományi Szemle, Vol. 1, No. 2, December 2011, p. 6.; J. Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*. Yale Journal of International Law, Vol. 38, No. 2, p. 305.

⁶⁷ Sinclair 2017, p. 5.

⁶⁸ Ibid. p. 284.

of the member states. He defines states as superstructures which have been and are still formed through different practices during a cultural process. These states acquired new abilities and new powers as a part of this process. This process is not linear, it includes contradictory and complementary reform proposals and counter-proposals as well.⁶⁹ Consequently, the Western model of states comes from a unique series of reforms. In this development, not only states, IGOs and their organs but also non-state actors play an important role.⁷⁰

3.3. Sinclair's concept of law

To achieve a comprehensive analysis, Sinclair does not examine law from the inside. He investigates the chosen IGOs from a sociological-legal viewpoint, considering the historical context (Donaldson, 2019).⁷¹ As the process mentioned above is not coherent and contains contradictory elements, Sinclair does not see law as a uniform construction but as a content which is constantly formed through sociological interactions. Hence, law has a multi-faceted and contradictory nature, which could generate more and more identities and meanings. This approach facilitates the interpretation of the expansion of IGOs.⁷² In addition, the author refers to the multifunctionality of law. On one hand, he recognizes law as a tool for political pressure.⁷³ On the other hand, he emphasizes the role of law in expertise and moral questions and their connections with each other. In his view, law in expertise is legitimized by that fact that IGOs embraces certain moral principles and goals like human dignity, equality, peace or justice. The concept of law does not only appear in both levels but also creates connections between the two. According to Sinclair, this issue is strengthened by judicial opinions and academic research as well.⁷⁴

3.4. The compatibility of Sinclair's approach and the English School

At first glance, the combination of the two theoretical approaches holds a great challenge. However, the concept of the English School and Sinclair's socio-legal approach have significant similarities which makes them compatible with each other.

First, both of them considers IL and IGOs as important factors in IR. Additionally, they recognize the importance of (state) power in international relations as well. The English School lists IL among the primary institutions and takes into account the importance of the correlation between primary institutions and secondary institutions / IGOs. Furthermore, the school does not neglect the importance of power and the interests of states. Sinclair's approach also pays attention to IL and IGOs, and power relations as well. He is aware that the will of great powers and the acceptance of small states are needed for the reforms of IGOs.⁷⁵ He also recognizes that IGOs and their laws are quasi arenas for state interests. However, Sinclair goes beyond these when he examines the complex nature of these organizations and their laws.

⁶⁹ Ibid pp. 2, 14-15, 30.

⁷⁰ G. F. Sinclair, *State Formation, Liberal Reform, and the Growth of International Organizations*, *European Journal of International Law*, Vol. 26, No. 2, September 2015, pp. 448-449.

⁷¹ M. Donaldson, *International Organizations and the Making of Modern Legal Histories*, <https://www.ejiltalk.org/international-organizations-and-the-making-of-modern-legal-histories/> (21 March 2020).

⁷² Sinclair 2015, p. 503.

⁷³ Sinclair 2017, pp. 276-287.

⁷⁴ Ibid pp. 291-292.

⁷⁵ Ibid p. 284.

Second, both concepts accept the fact that secondary institutions influence primary institutions. According to the English School, they cannot alter them to their core, but they still have an impact on them. Consequently, secondary institutions have an effect on the whole international society as well. As a comparison, Sinclair states that IGOs acquire powers embracing the emerging ideologies and using them as a base of their own reforms. During their expansion, they acquire more and more powers but they also create new powers for their member states. Such a phenomenon changes the concept of sovereignty as it receives additional meanings. As sovereignty is the first among the primary institutions, it is safe to say that Sinclair describes the same correlation between primary and secondary institutions as the English School.

Third, Sinclair's statements about the concept of law can be combined with the ideas of the English School. He states that the law can be a tool to achieve power. At the same time, he also emphasizes though that IGOs embrace the emerging ideas and create new principles for themselves. These ideas often come from non-state actors which reminds us of world society and the Kantian tradition. IGOs use these ideas and principles to create detailed regulations around these issues, which is a quasi-epitome of the Grotian tradition of the English School. Furthermore, Sinclair points out that law appears in the "worlds" of international relations and indicates the complex nature of law.

These similarities show that IGOs and their laws can be examined with a combined theoretical framework using elements of the English School from IR and Guy Fiti Sinclair's approach from the field of IL. But the question arises whether such a theoretical approach can be applied in the case of a sui generis entity, namely in the case of the European Union.

4. The theoretical framework and the European Union

The theoretical framework detailed above can be applied to all IGOs which have the tendency to expand their own powers.⁷⁶ The question occurs whether certain IGOs can be examined in this case. Sinclair picked the ILO, the UNSC and the World Bank as they had such an expansive tendency and they supported the creation of modern states. It is clear that these organizations are universal IGOs, but I think that certain regional entities have the will and the capabilities worth examining from this theoretical perspective. The EU has a unique status though, which must be taken into account.

4.1. The status of the European Union

As Isiksel states the dilemma about the exact character of the EU "is as old as European integration itself."⁷⁷ A safer approach stresses the sui generis nature of the entity, which is a mere tautology. This perspective only circumvents to answer the question.⁷⁸ Some radical approaches consider European integration as a special federal entity.⁷⁹ Odermatt in this case separates four models for the EU: 1. the concept of a 'new legal order', 2. a 'self-contained regime' in IL, 3. a 'regional economic integration organization' and 4. a 'classic intergovernmental organization'.⁸⁰ The first and second

⁷⁶ Ibid p. 3.

⁷⁷ T. Isiksel, *European Exceptionalism and the EU's Accession to the ECHR*, European Journal of International Law, Vol. 27, No. 3, October 2016, pp. 565, 571.

⁷⁸ R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, OUP, Oxford, 2009, p. 59; K. Ziegler, *International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation*, in A. Orakhelashvili (Ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, 2011, pp. 268, 270.

⁷⁹ R. Schütze, *European Constitutional Law*, Cambridge UP, Cambridge, 2012, pp. 77-79.

⁸⁰ J. Odermatt, *Unidentified Legal Object: Conceptualising the European Union in International Law*, Connecticut

alternatives interpret the EU only as a legal order. However, it is clear that European integration means more than just a regime of IL or a ‘simple’ legal order. Concerning the scenarios related to IGOs, the third and the fourth models could give us more promising explanations. After all, the European Community was conceived as an IGO,⁸¹ and even the member states generally treat it “as a kind of [IGO]”.⁸²

From the point of IL, it is safe to say that the EU is a bit more than just an IGO. The International Law Commission (ILC) Study on the Fragmentation of International Law states that “the European Community [...] is a subject of [IL] and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization”.⁸³ At the same time, European integration has a unique legal order. The EU established a common market and specific legal relations between its members, their enterprises and individuals.⁸⁴ It means that the EU went beyond the normal parameters of a classical IO,⁸⁵ therefore the fourth scenario does not apply. The problem with the approach of the ILC is that it keeps the EU - even if it has unique characteristics compared to other IGOs - at the same level as other IGOs.⁸⁶ It is important to note that the imperfect nature of IL must be recognized in this matter. The concept of law aims to categorize and conserve contemporary matters to manage certain situations. Hence, the categorizations of IL are imperfect as well. It is also problematic that IL does not have consensual definition for IGOs. Despite the fact that it is hard to identify the EU’s exact nature, it can be stated that it has similarities with other IGOs, such as the existence of a founding treaty and a separate legal regime. It is worth noting in this case that the EU has ‘a unique legal order’ which incorporates more characteristics than a legal regime (see section 4.2.).⁸⁷ Furthermore, there are a wide variety of organs under its aegis, just like in the case of other IGOs.

The same identification problem occurs in IR as well because English School writers cannot provide a clear and coherent answer to this question. Bull considered the EU as a super-state, “which is simply a nation-state writ large, but at a process in an intermediate stage”.⁸⁸ For Bull, what matters is not the idea of this super-state. He doubts that such an entity will ever come into existence, rather the societal structure that this idea created.⁸⁹ On the other hand, Ahrens and Buranelli stress the EU’s potential as an IO, which challenged the modern political order of the nation-state.⁹⁰ The recent approaches from this branch of IR agree on one issue though: the EU presents itself as an international society that was formed within a particular regional context with a growing membership.⁹¹ This international society has unique attributes.

Journal of International Law, Vol. 33, No. 2, May 2018, p. 216.

⁸¹ Schütze 2012, p. 48.

⁸² J. Crawford & M. Koskeniemi, *Introduction*, in J. Crawford & M. Koskeniemi (Eds.), *The Cambridge Companion to International Law*, Cambridge UP, Cambridge, 2012, p. 12.

⁸³ M. Koskeniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, A/CN.4/L.682, 2006, supra note 2, p. para. 219. [*Fragmentation of International Law*].

⁸⁴ Odermatt 2018, p. 239.

⁸⁵ G. Nesi, *EU Presidency Statement – Report of the International Law Commission*, United Nations, 2003 <https://www.un.org/press/en/2003/gal3238.doc.htm> (21 March 2020).

⁸⁶ Odermatt 2018, p. 239.

⁸⁷ Schermers & Blokker 2018, §22/B; I. F. Dekker & R. A. Wessel, *Governance by International Organizations: Re-thinking the Normative Force of International Decisions*, in F. Dekker, W. G. Werner (Eds.), *Governance and International Legal Theory*, Springer, Dordrecht, 2004, pp. 219, 231.

⁸⁸ Bull 2012, p. 56.

⁸⁹ Ahrens 2019, pp. 265-266.

⁹⁰ Ibid p. 266; Buranelli 2019, pp. 241-243.

⁹¹ T. Djéz, & R. Whitman, *Analysing European Integration. Reflecting on the English School – Scenarios for an Encounter*, *Journal of Common Market Studies*, Vol. 40, No. 1, 2002, p. 45; Ahrens 2019, p. 266; T. Diez, I. Manners & R. G. Whitman, *The Changing Nature of International Institutions in Europe: The Challenge of the European Union*,

First, the EU generated the phenomenon of the solidarization of international society. Article 2 of the Treaty on the European Union (TEU) gives adequate proof for such a phenomenon. The article clearly states that “[t]he Union is founded on the values of respect for human dignity, freedom, equality, the rules of law and respect for human rights (...)”.⁹² From early on, the goal of European integration was the transformation of the state-centric regional order. There are certain proofs for this process, such as the existence of EU citizenship.⁹³ As Ahrens states, the EU used pluralist structures and impulses (for instance the European Coal and Steel Community, or certain groups and governments during the negotiations of the specific treaties) to constitute a more solidarized international society.⁹⁴ It is also worth pointing out that the EU aims to solidarize not only the regional but also the global international society as well.⁹⁵ As Article 3(5) TEU states regarding the wider world, the Union “shall contribute to peace, security, the sustainable development of the Earth, solidarity [...] as well as to the strict observance and the development of international law.”⁹⁶

Second, the EU has an effect on the primary institutions as well.⁹⁷ As I pointed out in section 2.3., IGOs affect the primary institutions of international society. Regarding this matter, the EU supports almost all primary institutions of contemporary international society. As a part of its effect, it also reinterprets the concept of sovereignty with additional unique features, such as the pooling of sovereignty or supranationalism.⁹⁸ Diez, Manners and Whitman even speak about the transformation of Bull’s primary institutions, such as the alteration of the balance of power into the pooling of sovereignty, war into pacific democracy, or great power management into member state coalitions.⁹⁹ Third, the ‘European world society’ provides a strong basis for the shared values of the international society, which shows that there is a stronger relationship between international and world society in the EU.¹⁰⁰

It follows from the above that the status of the EU is far from obvious. It can be said though that both IL and the concept of the English School considers EU as an IGO ‘with extras’. Even if it is that unique, it created a regional international society, which affects the primary institutions as well.

4.2. The status of the law of the European Union

Just as the EU is considered unique, EU law has similarly peculiar characteristics. As the Court of Justice of the European Union (CJEU) stated, “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals”.¹⁰¹ The CJEU also stated in Opinion 2/13, this new legal order possesses “its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields”. It has “its own constitutional framework and founding principles, a particularly sophisticat-

Journal of European Integration, Vol. 33, No. 2, February, 2011, pp. 117-138.

⁹² Treaty on the European Union, OJ C 326, 26.10.2012, p. 13–390 (GA), Art. 2.

⁹³ Diez & Whitman 2002, p. 51.

⁹⁴ Ahrens 2019, pp. 266-276.

⁹⁵ B. Ahrens, & T. Diez, *Solidatisation and Its Limits: The EU and the Transformation of International Society*. Global Discourse, Vol. 5, No. 3, July 2015, pp. 341-355.

⁹⁶ TEU Art. 3(5).

⁹⁷ Diez & Manners & Whitman 2011, p. 123.

⁹⁸ Buranelli 2019, pp. 242-243.

⁹⁹ Diez, Manners & Whitman 2011, pp. 123-134.

¹⁰⁰ R. Morgan, *A European “Society of States” – But Only States of Mind?* International Affairs, Vol. 76, No. 3, July 2000, p. 563; Diez & Whitman 2002, pp. 53-55.

¹⁰¹ C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Van Gend en Loos), [ECLI:EU:C:1963:1].

ed institutional structure”.¹⁰² On that basis, it may be considered that the founding treaties of the EU are not just simply international agreements, but they have some sort of constitutional nature as well.¹⁰³ According to the CJEU, “[t]he E[U] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter” “based on a rule of law”.¹⁰⁴ From the point of view of international jurisprudence, it must be emphasized though that EU law is not strongly separated from IL yet.¹⁰⁵ The ILC and many authors still state EU law as a candidate for a self-contained regime.¹⁰⁶ Considering the attributes of EU law, nevertheless even the ILC recognizes this constitutional character.¹⁰⁷ To emphasize and preserve this separate nature of EU law, the CJEU emphasized its autonomy. The Court of Justice of the European Union focused on the internal nature of the autonomy of EU law at first, between the Community and its Member States.¹⁰⁸ Later, the earlier case law was referred by the ECJ which helped to establish the external aspect of the autonomy of EU law.¹⁰⁹ According to van Rossem, this external autonomy requires two conditions, namely that “the essential character of the powers of the EU and its institutions remains unaltered by an international agreement” and the procedures that ensure the uniform interpretation of certain treaties (specifically ones utilizing an external judicial body) do not have the effect of binding the EU to a particular interpretation of the rules of EU law.¹¹⁰ This was reaffirmed in the recent case law of CJEU, namely in Opinion 2/13 regarding the accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and in the Achmea case.¹¹¹

The authors of the English School did not focus on the status of EU law specifically as their relevant articles mostly concentrated on the nature of European integration. It can be said though that EU law can be connected to the solidarization of the EU. As Schütze stated, IL is changing from a law of coexistence to a law of cooperation. The emerging rules of IL focus on the positive rules of cooperation, and not the negative code of rules of abstention. The EU embraces this cooperative spirit on a regional scale, and EU law is a means for such a process.¹¹² Regarding the question of institutions, Diez, Manners and Whitman listed EU law as a primary institution, which took the place of IL within the European international society.¹¹³ In my opinion, EU member states remained autonomous and important actors in the global international society. Therefore, the statement that EU law simply succeeded IL in the European international society can be considered as an exaggerated observation. It is safe to say however, that EU law can be considered as one of the primary institutions for the European regional international society.

¹⁰² Opinion 2/13, [ECLI:EU:C:2014:2454], paras 157-158.

¹⁰³ Schütze 2012, p. 4.

¹⁰⁴ Opinion 1/91, [ECLI:EU:C:1991:490], para. 21; C-294/83, *Parti écologiste “Les Verts” v European Parliament*, [ECLI:EU:C:1986:166], para. 23.

¹⁰⁵ E. Klein, *Self-Contained Regime*, Max Planck Encyclopedia of Public International Law, 2018, opil.outlaw.com/home/EPIL (21 March 2020).

¹⁰⁶ Odermatt 2018, pp. 231, 239.

¹⁰⁷ *Fragmentation of International Law* 2006, para. 218; Odermatt 2018, pp. 231, 239; J. W. van Rossem, *Interaction between EU law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Members States but not the Community*, Cleer Working Papers, No. 4., 2009, https://www.asser.nl/upload/documents/11172009_42019cle09-4comb.pdf, p. 41. (11 April 2020).

¹⁰⁸ C-6/64, *Costa v. ENEL* [ECLI:EU:C:1964:66]; J. W. van Rossem, *The Autonomy of EU Law: More is Less?*, in R. A. Wessel & S. Blockmans (Eds.), *Between Autonomy and Dependence – The EU Legal Order Under the Influence of International Organisations*, Springer Verlag, Berlin Heidelberg, 2013, p. 16.

¹⁰⁹ T. Molnár, *Revisiting the External Dimension of the Autonomy of EU law: Is There Anything New Under the Sun?*, Hungarian Journal of Legal Studies, Vol. 57, No. 2, 2016, p. 182, Opinion 1/91, para. 35.

¹¹⁰ Van Rossem 2013, p. 8; Molnár, p. 183.

¹¹¹ Opinion 2/13, [ECLI:EU:C:2014:2454], paras. 174-177; C-2814/16, *Slowakische Republik v. Achmea BV* [ECLI:EU:C:2018:158], paras 32-33, 35-37.

¹¹² Schütze 2009, p. 59.

¹¹³ Diez & Manners & Whitman 2012, pp. 127-128.

4.3. English School and Sinclair's theory for the EU?

The question arises whether the theoretical framework described above is applicable in the case of the EU. After all, both the study of law and IR emphasizes the similarity between the EU and other IGOs.

First, the EU does not have a fundamental difference from other IGOs as regards the expansion of powers. Sinclair separated two elements for his examination. In the first place, he relied on Jellinek's metaphor about the "constitutional transformation" and called the similar phenomenon as "constitutional growth" in the case of IGOs. Furthermore, he emphasized the importance of the administrative way of thinking in the cases of IGOs. Both approaches come from constitutional law analogies. Moreover, he examined IGOs from quasi domestic socio-legal perspectives. It should be noted here that there is a widespread agreement on the fact that the law of the EU has a constitutional character. Therefore, the use of constitutional law analogies in the case of the EU is not that odd.

Second, Sinclair stated that his theoretical approach cannot be applied to all IGOs because they "have not always and everywhere expanded their powers, nor has every attempt of an IGO expansion has been successful."¹¹⁴ In the case of the EU, there is a constant will to build a new political and social order in Europe. Regarding the development of integration, the change and the expansion has been part of the EU since its establishment. As it was stated in section 4.1., the EU used the existing pluralist structures to promote constitutive change towards more solidarist structures. Even the establishment of the European Coal and Steel Community could not have happened without the pursuit of national interests and concerns of state sovereignty. Ahrens illustrated this process with the fact that the changing founding treaties transferred more and more powers to the organizations of European integration.¹¹⁵ This, however, is not a linear progression, rather an ongoing and disorderly process of struggle.¹¹⁶

Third, the EU has extremely strong and effective tools for such an expansion. The Treaty on the Functioning of the European Union (TFEU) lists the exclusive competences of the Union, the shared competences with the member states, and the supplementary competences as well.¹¹⁷ At the same time, these provisions are not comprehensive as EU law provides ample opportunities for a "constitutional change" in this matter. According to Schütze, three crucial legal developments emerged in EU law. First, the rise of the teleological interpretation, which enabled to Union's competences to 'spillover' into other policy areas. Second, the rise of the Union's general competences, which enables the Union to horizontally cut across the various policy areas listed in the Treaties. TFEU prescribes the Union's harmonization competence, which has a clear cut effect for all the policy areas within the EU (TFEU, Article 114). Another example is Article 352 TFEU, which provides the opportunity for the EU to create competences itself if it is considered necessary. Third, the doctrine of implied powers, which focuses on the Union's external powers. The doctrine enables the exclusive competence of the EU in case of a conclusion of an international agreement when its conclusion is necessary to the Union to exercise its internal competence, or may affect common rules or alter their scope (TFEU, Article 3(2)).¹¹⁸ In this process, the CJEU plays a significant role because the Court of Justice has the interpretative monopoly of EU law.¹¹⁹ Furthermore, it should be noted that Sinclair used a broader term of 'law' in his examination, which assumes other, less

¹¹⁴ Sinclair 2017, p. 3., note 6.

¹¹⁵ Ahrens 2019, pp. 269-276.

¹¹⁶ Sinclair 2015, p. 30.

¹¹⁷ Treaty on the Functioning on the European Union, OJ C 326, 26.10.2012, p. 13-390 (GA) Art. 3-4, 6.

¹¹⁸ Schütze 2012, p. 153.

¹¹⁹ T. Moorhead, *The Legal Order of the European Union: The Institutional Role of the Court of Justice*, Taylor & Francis Ltd, New York, 2016.

formal methods for the expansion of powers.

Fourth, the combined approach of the English School and Sinclair's ideas could also point out the complex role of EU law. As it was shown in section 3.2., law can be considered 1. as a tool for power, 2. the detailed regulations and procedural rules for an IO, or 3. even the ideas which come from the non-state actors of world society. In the context of the EU, this complex nature of law is worth examining as well. Regarding the first aspect, it is not great powers but rather member state coalitions which have a great effect on the law of the EU.¹²⁰ Regarding the second aspect, EU institutions have a wide variety of regulatory powers which are used not only to create obligations for states but also to make obligatory rules for their citizens. Considering the third aspect, the EU has a very developed world society, which influences the work of the EU through civil organizations and other ways. A good example for this is the citizens' initiative, which enables European citizens to call on the Commission to make a legislative proposal. Once an initiative gathers a million signatures, the Commission decides on what follow-up action to take.¹²¹

5. Conclusion

The purpose of this study was to create a theoretical framework for the law of IGOs and to apply that framework effectively. During this analysis, I used sources from IR, especially those related to the English School. As a second component, I relied on Sinclair's IL research to fill the holes in the approach of the English School. Although these concepts have different theoretical backgrounds, there are a lot of similarities. The combination of these approaches creates a theoretical synthesis which helps to examine the law of IGOs in its complexity. Furthermore, this approach is not only applicable in the cases of universal IGOs but also for regional IGOs. Even though the European Union is not a simple intergovernmental organization, its similarity to other IGOs makes the applicability of this theoretical framework possible. This is in my view especially true for the expansion of powers and 'competence creep' in the EU. As I see, these questions have significant importance in understanding the European Union, its law and their roles. The combination of the fields of IR and law could make it happen.

¹²⁰ Diez & Manners & Whitman 2011, pp. 123-134.

¹²¹ Art. 24 TFEU