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Guy Fiti Sinclair's Approach and its Application to EU Law: the Development of the Rule of Law as a Case Study

Abstract

As theories on the development of the European Union do not give sufficient emphasis to aspects of EU law, it may be necessary to complement their application with other integration theories. To this end, the article intends to provide an analytical framework by relying on the field of the law of intergovernmental organisations. Guy Fiti Sinclair's approach provides a framework to understand the expansion of powers in the case of intergovernmental organisations, an area not sufficiently explored concerning matters of EU law. The article examines the development of the rule of law based on the analytical framework. In addition to the introduction of the early context of the rule of law as well as the trends in the development of the rule of law in particular intergovernmental organisations, it also examines the position of the European Commission, the European Parliament and the Court of Justice of the European Union and the understanding of the rule of law within the academic sphere of the 2010s. The article focuses on the ASJP case, which, due to its innovative nature, has significantly impacted the development of the interpretation of the rule of law within EU law. The article, therefore, aims to give a perspective to understand the development of the rule of law, relying on this analytical framework.

Keywords: EU law, rule of law, Court of Justice of the European Union, European Commission, European Parliament, Article 7, law of intergovernmental organisations

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I Introduction

A legitimate criticism of the development of European integration is that the theories describing this phenomenon focus on the political and economic aspects of this process but fail to explain the expansion of powers and the development of European Union (EU) law in this regard.[1] This seems quite a missed opportunity because EU law serves as an engine for the development of the Union. To better understand the expansion of powers of the Union, it may be necessary to borrow a theoretical approach from the field of public international law, more specifically from the law of intergovernmental organisations. Guy Fiti Sinclair's analytical framework relies on a sociological-historical approach. It not only underlines the importance of the content of the instruments issued by the international organs and the decisions of international courts but also highlights specific international trends and the activity of international organs as well as their leaders' approach which are relevant for understanding the expansion of powers of intergovernmental organisations. Based on this, Sinclair relies on so-called constitutional growth, which stresses the change in the interpretation of the provisions of the founding treaties.

This paper aims to give a case study to understand the application of such an analytical framework. In this regard, the paper shows how the rule of law (hereinafter 'RoL') emerged in Community law and later in EU law and how its evolution can be observed up to the decision on the Portuguese judges' case, the so-called ASJP case. The case marked a turning-point, as the Court of Justice of the European Union (Court of Justice or CJEU) based its core reasoning on the RoL as a value and linked it to the question of the independence of the judiciary of a Member State. First, the paper introduces Sinclair's approach and applicability to the European Union (Chapter 2). Other components must then be highlighted in the process, relying on Sinclair's approach and presenting its developmental arc. Chapter 3 outlines the historical context of the RoL, which encompasses the dimension of EU law and specific international trends. As the framework emphasises the positions of organs of international organisations and the academic community, it is essential to describe their role in the process in Chapter 4 and Chapter 5 respectively. Chapter 6 examines the case study, the ASJP case, its context, the content and the outcome.

The study follows a coherent path regarding its sources: it uses historical and jurisprudential works and studies with relevant EU legal sources and case law. Importantly, however, the scope of the study does not allow for a thorough analysis of all cases. As such, the aim is not to give a detailed picture of the development of the RoL but to provide an analytical framework to understand better how an expansion of powers occurs in the Union.

[1] Morten Rasmussen, 'Towards a Legal History of European Law' (2021) 6 (2) European Papers 927–928.

II The Applicability of Guy Fiti Sinclair's Approach to the European Union

1 Sinclair's Analytical Framework

The law of intergovernmental organisations examines their legal relations, structure and functions. However, only a few works studied the expansion of powers of intergovernmental organisations. In 'To Reform the World – International Organizations and the Making of Modern States', Guy Fiti Sinclair examined the expansion of powers of some intergovernmental organisations, such as the activity of the International Labour Organisation (ILO) concerning social and economic reforms, the peacekeeping missions of the United Nations and the matter of development of the World Bank, as well as their related implications, in more depth. He stresses that the expansion of powers is not a zero-sum game but rather a process based on active and changing discourse and practices of these organisations, considering the historical context and the broader social, cultural and political dimensions.[2]

First, Sinclair defines state formation as a cultural process. Instead of defining the state as a distinct, fixed and unitary entity, the author underlines that contemporary states consist of repeated practices and representations that form the state.[3] States are constantly being constructed within an ongoing disorderly process of social interaction. The states acquire new powers in this process. However, this process is not linear, and includes contradictory and complementary elements, and intergovernmental organisations play an essential role in such a development.[4]

Second, Sinclair argues that there are intergovernmental organisations that expand their powers beyond the limits set by their Member States. For this, the author refers to so-called constitutional growth, which originates from Jellinek's constitutional transformation. As Jellinek explains, the texts of the constitution do not change, but the meaning of the provisions does. Relying on this concept, Sinclair explains that the intention of intergovernmental organisations to expand their powers does not appear at the time of their creation. Later, however, they demand new powers through their established practices and the reinterpretation of existing rules. During this process, there are no textual changes in the founding treaty. This can lead to an expansion of powers.[5] This needs the support of the most significant powers within these organisations and the acceptance of the smaller states.[6]

Third, the organs of intergovernmental organisations concerned play an active role in the process, relying on their innovative leadership and technical expertise. For instance,

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[2] Guy Fiti Sinclair, *To Reform the World – International Organizations and the Making of Modern States* (Oxford University Press 2017, Oxford) 5, 8–9, 18, DOI: https://doi.org/10.1093/acprof:oso/9780198757962.001.0001

[3] Ibid, 14.

[4] Ibid, 2, 14–15, 30.

[5] Ibid, 5, 9, 18.

[6] Ibid, 9, 18, 276–287, 291–292.

Sinclair stresses the significance of Albert Thomas, the first Director of the International Labour Office, the permanent secretariat of the ILO. Thomas was dedicated to establishing authority for the organisation. He (and his colleagues) stressed the importance of the ILO gaining a more serious role, a mission of social transformation.[7] In the case of the UN, Dag Hammarskjöld played an exceptional role in introducing modernisation and state-building techniques. In his reports, he emphasised social justice and equality of political and economic rights among nations, equal rights for individuals, and greater social justice within the nations.[8] With regard to the case of the World Bank, then President of the World Bank George Woods and then President George McNamara supported the idea that the organisation should turn to issues of development.[9] In all cases, a comprehensive technical expertise was established within the organisations concerned.

Fourth, this process has its specific attributes. Sinclair does not see the law as a uniform construction but as constantly formed through sociological interaction. Hence, law has a multi-faceted and contradictory nature, which could generate more and more identities and meanings.[10] Furthermore, the author also refers to the multifunctionality of law. On one hand, it has the aspect of being used as a tool for political pressure. On the other hand, intergovernmental organisations rely on moral principles and goals that come from certain (international) trends. These trends appear in internal documents, opinions and recommendations; therefore, they are termed soft law. Later, this could be formulated in 'harder' legal norms.[11] Ultimately, this body of law imposes obligations on the Member States, a process that also affects their competences. In this regard, Sinclair stresses the importance of judicial opinions and academic research that supports the legal discourse.[12]

Finally, international courts have a legitimising role in the expansion of powers. International courts tend to decide on the internal matters of an intergovernmental organisation. In the case studies concerning the ILO and the UN peacekeeping mission, the Permanent Court of International Justice (hereinafter the 'PCIJ') and the International Court of Justice (hereinafter the 'ICJ') examined competence issues and legitimised those developments. The PCIJ, in its advisory opinion, accepted the ILO's competence to regulate the conditions of agricultural workers and stated that the text was not ambiguous as the competence of the ILO covered this matter. In its second advisory opinion, however, the PCIJ denied the ILO had competence in proposals for the organisation and development of the means of production. The PCIJ also stressed that 'the improvement of the conditions of the workers may increase the amount of the production'. In some cases, therefore, the ILO

7 Ibid, 46–48.
8 Ibid, 166–169.
9 Ibid, 237–245.
10 Ibid, 503.
11 Ibid, 3.
12 Ibid, 291–292.

has competence if it is incidental to performing its function under its Constitution.[13] In the case of the UN peacekeeping operations, the ICJ dealt with the expenses regarding the UN Operation in Congo and the UN Emergency Force. The ICJ examined Articles 24 and 48 of the UN Charter on the competences of the UN Security Council, and found that it has primary but not exclusive responsibility concerning international peace and security. Based on the reasoning of Article 11(2) of the UN Charter, 'any such question on which action is necessary shall be referred to the Security Council by the General Assembly' but this did not rule out the role of the UNGA in peacekeeping.[14]

2 The Applicability of the Analytical Framework for the Union

The question arises of whether this theoretical approach is appropriate to examine the European Union. Although it is widely recognised that the EU is an entity beyond the concept of an intergovernmental organisation, it still has some features of such an organisation. In addition, the following aspects should be taken into account:

First, the founding treaties of the Union are similar to the founding treaties of an intergovernmental organisation. The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the predecessor treaties are also international treaties.[15] They contain the objectives, tasks, the list of organs, the intention to establish a permanent infrastructure and the declaration that the Union has a legal personality.[16] However, from quite early on, the founding treaties required special attention, as the Union has its institutions and constitutes a new legal order of international law. In this regard, the Member States limited their sovereign rights, which not only comprise the Member States but also their nationals.[17] In addition, the text of the founding treaties remains obscure and vague and contains little substance. Therefore, much depends on the interpretation of the text. Moorhead calls this the fuzziness of EU law, for which the understanding of values, objectives and interests is needed for the correct interpretation.[18] Unsurprisingly, this is in line with the case-law of the Court of Justice, which characterised one of the founding treaties (the Treaty on the European Economic Community, EEC

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13 *Competence of the International Labour Organisation in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Series B No 2 (12 August 1922), 15–17.

14 *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion,* [1962] ICJ Rep 151, 159–160, 163–164.

15 Preamble and Article 1 TEU, Preamble and Article 1 TFEU.

16 Article 47 TEU.

17 Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* EU:C:1963:1; Opinion 2/13 Accession of the European Union to the ECHR, EU:C:2014:2454, para 157.

18 Timothy Moorhead, *The Legal Order of the European Union – The Institutional Role of the Court of Justice* (Routledge 2014, Abingdon) 43–44, DOI: https://doi.org/10.4324/9780203720547

Treaty) as the constitutional charter of the Union.[19] However, the Member States refused to repeat this in the case of the TEU and TFEU,[20] and the Court emphasised the constitutional features of the Union in its later case-law.[21] A difference between the founding treaties of intergovernmental organisations and the EU Treaties is that the texts of the latter sometimes change. However, in many cases, these changes are merely codifications of the existing development of EU law.[22]

Second, the competences of the Union also expand. Although the EU Treaties contain the principle of conferral mentioned directly or indirectly several times, a catalogue of competences and additional principles, such as the principles of subsidiarity and proportionality, this tendency remains unchanged.[23] An expansion of powers (or relying on a more critical terminology, competence creep) occurs, not just in the form of indirect legislation but in many other forms. Although it is an uncontrolled phenomenon and has worrying tendencies, this exists.[24]

Third, the institutions of the Union (very similar to the organs of the intergovernmental organisations concerned) rely on and promote such an expansion of powers. One of the most critical actors in this process is the European Commission (Commission). From very early on, the Commission has had considerable executive powers and an essential role in the legislation, representing the supranational approach within the institutional framework. In this sense, the leadership of the Commission also had this mindset from early on, which contributed to the development of the Union.[25] In addition, since the entry into force of the EEC Treaty, the Commission contributed to establishing a dedicated technical expertise for itself. It is not just based on legal knowledge but also covers various scientific fields that connect to policy and law-making for the Union.[26] A similar supranational actor is the

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19 Case C-294/83, *Parti écologieste „Les Verts" v European Parliament,* EU:C:1986:166, para 23.

20 Conclusions of the Brussels European Council, (21 and 22 June 2007) 11177/1/07 REV 1, para. 3., Annex 1, paras 1–3.

21 Opinion 2/13, paras 158, 163, 165.

22 Theodore Konstadinides, 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) European Law Review 515.

23 Marcus Klamert, *The Principle of Loyalty in EU Law* (4th edn, Oxford University Press 2014, Oxford) 143, DOI: https://doi.org/10.1093/acprof:oso/9780199683123.003.0007; Marc A. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (2008) 14 (2) Journal of Public Law 95, DOI: https://doi.org/10.1017/S0143814X00007418

24 Sacha Garben, 'Competence Creep Revisited' (2017) 57 (2) Journal of Common Market Studies 207–209, 221–222, DOI: https://doi.org/10.1111/jcms.12643

25 Wilfried Loth, 'Walter Hallstein, a committed European' in *The European Commission, 1958–1972, History and memories of an institution,* European Union (2014) 84, <https://op.europa.eu/en/publication-detail/-/publication/ebec8b45-1aab-4d57-887f-0da73489b19e> accessed 15 December 2023 Belgium; Henriette Müller, 'Setting Europe's agenda: the Commission presidents and political leadership' (2017) 39 (2) Journal of European Integration 133, DOI: https://doi.org/10.1080/07036337.2016.1277712

26 Hans von der Groeben: 'Walter Hallstein as President of the Commission' in Wilfried Loth, William Wallace and Wolfgang Wessels: *Walter Hallstein – The Forgotten European?* (Macmillan Press Ltd. 1998, London) 97–98, DOI : https://doi.org/10.1007/978-1-349-26693-7_7

European Parliament (EP). From the beginning of the European Economic Community, the EP intended to gain more powers, including political control concerning other institutions of the integration, namely the Commission and the Council.[27] However, the Parliamentary Assembly needed to deepen its knowledge of the various policy areas of the Union. Consequently, the different committees and political groups also sought to maintain connections with experts, which helped the committees to become fora for communicating interests within the EP.[28] At the time of the EEC, these committees with sectoral competence (for transport, energy policy, trade policy and agriculture) were active.[29] In line with this development, especially from the beginning of direct elections, the representatives of the EP started to focus more on policy areas and become active in different proposals or setting a policy item on the political agenda.[30]

Fourth, the Court of Justice of the European Union has a legitimising role, but is also an institutional actor. Regarding the legitimising role, the Court of Justice acquired an interpretative monopoly of EU law.[31] Because of the fuzziness of the text of the founding treaties, the Court of Justice must rely on the principles, interests, objectives and values of the Union to fill the gaps and lacunae of EU law.[32] This gives a significantly important role to the Court of Justice and opportunities to legitimise the expansion of powers. The attitude of the Court is also in line with its role in EU law. The Court of Justice is generally highly bureaucratised, comprising divisions undertaking legal or linguistic tasks. In this regard, the judges have a wide range of powers to enact strong leadership. This guarantees the consistency of rulings and the uniformity of its judgments. In addition, unlike judges of international courts and tribunals, there are no individual and dissenting opinions from judges concerning the different judgments. This consistency of the Court remained even

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27 Rapport sur les compétences et les pouvoirs du Parlement européen, Rapporteur: M. Hans Furler, 14 Juin 1963, <http://aei.pitt.edu/13815/1/doc.31.PDF> accessed 15 December 2023; Eric Stein, 'The European Parliamentary Assembly: Techniques of Emerging "Political Control",' (1959) 13 (2) International Organization 240–241, DOI: https://doi.org/10.1017/S0020818300000060

28 Ibid, 242; David A. Alexander, 'Expertise, turnover and refreshment within the committees of the European Parliament: as much like Sisyphus pushing the boulder up the mountain as we may think?' (2022) 44 (7) Journal of European Integration 899–917; Christine Neuholdt: 'The "Legislative Backbone" keeping the Institution upright? The Role of European Parliament Committees in the EU Policy-Making Process' (2001) 5 (10) European Integration online Papers 21, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302785> accessed 15 December 2023.

29 Antoine Vauchez, 'Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity' LSE, Law, Society and Economy Working Papers 19/2013, 26–27, DOI: https://doi.org/10.2139/ssrn.2264795

30 Jan-Henrik Meyer, 'Green Activism. The European Parliament's Environmental Committee promoting a European Environmental Policy in the 1970s' (2010) 17 (1) Jahrbuch der Europäischen Integration Institut für Europäische Politik 73–77, DOI: https://doi.org/10.5771/0947-9511-2011-1-73

31 Gareth Davies, 'Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalization' (2018) 24 (6) European Law Journal 360–361, DOI: https://doi.org/10.1111/eulj.12298

32 Pierre Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interpretation dans la jurisprudence de la Cour de Justice' in *Miscellanea Ganshof van der Meersch Bruyland* (1972, Brussels) 328.

after the enlargements.[33] In this regard, the judges have considerable importance in the life of the institution. From the 1960s, pro-European jurists became judges who intended to give the Court more weight within the institutional framework and Community / EU law. From early on, the judges relied on arguments that pro-European jurists used in academic circles and usually tested them in academic conferences.[34]

Finally, it is important to highlight a solid academic community related to EU law, which has certain features. An academic specialising in EU law writes articles and lectures on EU legal matters and researches a specific topic. They point out the context, correlation and controversies and stress further questions related to EU law. These actions together form a community around the research of EU law in academia. Unsurprisingly, legal experts and practitioners pay attention to lectures and articles. Their significance is especially relevant for Advocate-Generals, who do not just point out previous case-law concerning the legal debate at hand but also refer to the political and legal context, which includes the relevant academic debate to highlight the different angles of the problem.[35] In addition, the academia has connections with the practitioners as well. Practitioners go to conferences to give a detailed snapshot of some legal issues. They interact with the academia during the conferences and in different legal journals.[36]

Considering these points, it is not enough to verify the applicability of Sinclair's analytical framework at an abstract level. A case study should therefore, be used to support such an approach to understand the expansion of powers within the Union in its systematic and dynamic aspects.

III The Rule of Law as an Increasing Trend

1 The Development of the RoL in the Union Founding Treaties

There are different approaches to the occurrence of the RoL at the level of founding treaties. According to Kecsmár and Hertog, the Single European Act introduced the RoL.[37] Pech,

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[33] Arjen Boin, Susanne K. Schmidt, 'The European Court of Justice: Guardian of European Integration' <https://link.springer.com/chapter/10.1007/978-3-030-51701-4_6#Sec2> accessed 15 December 2023.

[34] Vauchez (n 29) 28.

[35] Michal Bobek, 'A Fourth in the Court: Why are there Advocates-General in the Court of Justice?' (2012) 14 Cambridge Yearbook of European Legal Studies 529–561.

[36] Päivi Leino-Sandberg, 'Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?' (2022) 1 (2) European Law Open 246, DOI: https://doi.org/10.1017/elo.2022.17

[37] Krisztián Kecsmár, 'A jogállamiság fogalma az Európai Unió Bíróságának ítélkezési gyakorlatában, avagy a jog került a politika vagy a politika a jog csapdájába?' (2020) 23 (2) Európai Tükör 32–33, DOI: https://doi.org/10.32559/et.2020.2.2; Leonhard den Hertog, 'The Rule of Law in the EU: Understandings, Development and Challenges' (2012) 53 (3) Acta Juridica Hungarica 207–208, DOI: https://doi.org/10.1556/AJur.53.2012.3.3

conversely, identifies the RoL without its explicit identification in EU law. The lack of reference to the RoL can be traced back to the fact that representatives of the government of the United Kingdom (therefore representatives of common law) were not invited to the negotiations, neither in the case of the European Coal and Steel Community (ECSC) nor that of the EEC. In addition, translations of the RoL were less common at that time.[38] What is certain that the Court of Justice underlined in the Les Verts case that 'the European Economic Community is a community based on the RoL'.[39] In this regard, the Court of Justice used the tools of teleological interpretation to point out that the Union is not just any legal order but has a constitutional nature. The Court also underpinned the importance of certain aspects of the principle (such as legality, legal certainty, effective judicial protection, and the right to be heard) with its case law and its link to substantive fundamental rights issues.[40] Regardless of which approach may be correct, it is safe to say that the appearance of RoL was sporadic in the development of EU law and was not given much emphasis in those years.

Soon after, RoL appeared to acquire more critical roles. The Copenhagen Criteria included political, economic and legal requirements in the context of enlargement. The political branch covered the stability of institutions, guaranteeing inter alia the RoL.[41] The concept of the RoL has not only appeared in the enlargement policy but has also occurred in the founding treaties. In addition to the reference to the RoL in the preamble of the Single European Act,[42] the Maastricht and post-Maastricht reforms introduced some relevant provisions to the treaties, including the recognition of the rule of law as one of the founding principles of the Union, and the introduction of the predecessor of the Article 7 TEU procedure, although with no actual practice.[43]

With the Lisbon reforms, two significant changes occurred with the concept of RoL at the level of the founding treaties. First, the RoL appeared in more provisions. First, RoL appeared in more provisions at the level of the founding treaties, including among the objectives, the list of missions of the institutional framework, the Article 7 TEU procedure, the articles of the common foreign and security policy and the Charter of Fundamental Rights of the European Union (Charter).[44] Second, RoL is not mentioned as a principle but a value of the Union, on which the Union is founded and which is common to the Member States.[45]

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38 Laurent Pech, 'The Rule of Law' in Paul Craig, Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021, Oxford) 309–310, DOI: https://doi.org/10.1093/oso/9780192846556.003.0010

39 *Les Verts*, para 23.

40 Nóra Chronowski, 'Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről' (2016) (4) Pro Publico Bono – Magyar Közigazgatás 37–38.

41 European Council Conclusions Copenhagen [1993] SN 180/1/93 REV 1.

42 Single European Act [1987] OJ L 169, 29.6.1987, 1–28.

43 Kecsmár (n 37) 32–34.

44 Articles 3(1), 13(1), 7, 21 TEU, Preamble, *Charter of Fundamental Rights of the European Union* [2007] OJ C 326, 26.10.2012, 391–407.

45 Article 2 TEU.

However, neither the values of the Union nor the RoL were defined in the founding treaties. These provisions do not help to understand the content of the RoL or its precise role as a value of the Union. First, there were critical assumptions on the nature of the values of the Union. Itzcovich stressed that courts enforce laws, not values. Furthermore, Kochenov argued that values are, in fact, legal principles. Some approaches also stressed values as a standalone category. Not even the Court of Justice could give a clear view of the nature of Union values.[46] In its case law, the Court referred to the values common to the Member States and the principles set out in Article 2 TEU, which define the identity of the Union.[47]

This is reminiscent of the fuzzy nature of the EU Treaties, underlined by Moorlock and Sinclair's approach to the nature of the founding treaties. These provisions highlight an increasing need for the Union to say something about the RoL. This growing demand has been exacerbated by the emergence of rule of law deficiencies within Member States, which have been seen as an EU-wide problem.[48] Consequently, the founding treaties are suitable for an expansion of powers of the Union regarding the concept of the RoL.

2 Trends for the Rule of Law in Intergovernmental Organisations

As the RoL is not an EU-specific matter but an international phenomenon and the deficiencies in its RoL can have a far-reaching impact in other fora, intergovernmental organisations and international courts expressed their increasing need to prepare their different (soft law) instruments. Since 2005, there has been considerable interest in the RoL within the UN. In that year, divisions focusing on the RoL were established to ensure the concept would be taken into account in relation to the organisation and international relations.[49] In 2004, Kofi Annan issued a report entitled The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies highlighting the RoL as a key concept in these societies and initiating its relevance within the UN.[50] In this regard, a significant supporter of the RoL, an EU Member State, Austria, introduced the Rule of Law Initiative. Then, Austrian Foreign Minister Benita Ferrero-Waldner emphasised in her address to

[46] Dimitry Kochenov, 'The Aquis and Its Principles: The Enforcement of the 'Law' vs. the Enforcement of 'Values' in the EU', in András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States's Compliance* (2017 OUP) 9–10, DOI: https://doi.org/10.1093/acprof:oso/9780198746560.003.0002

[47] Case C-156/21 *Hungary v European Parliament and Council,* EU:C:2022:97, para 157.

[48] Inês Pereira de Sousa, 'The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)' (2020) 114 Teisé 145, DOI: https://doi.org/10.15388/Teise.2020.114.10

[49] Andreas Kumin, 'Global Activities and Current Initiatives in the Union to Strengthen the Rule of Law – A State of Play' in Werner Schroeder (eds), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 208–211, DOI: https://doi.org/10.5040/9781474202534.ch-012

[50] The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, Report of the Secretary-General, Doc [2004] S/2004/616.

Secretary-General Kofi Annan that strengthening the RoL is a priority for the UN.[51] First, the Initiative introduced a series of panel discussions that focused on the increased role of the Security Council in the international world order and focused on its connection with the RoL.[52] At the end of discussions, Austrian State Secretary Hans Winkler and the Rapporteur Simon Chesterman at the UN Headquarters in New York introduced the Final Report and Recommendations on the topic.[53] The so-called Rule of Law group within the UN, headed by Austria, also initiated bringing The Rule of Law at the National and International Levels Agenda Item to the UN General Assembly.[54] Furthermore, the Rule of Law Unit was created to assist national efforts to re-establish the RoL in conflict or post-conflict societies. Later, a Declaration on the Rule of Law at the National and International Levels was adopted in 2012, underlining that human rights and democracy are interlinked and mutually reinforcing with the RoL.[55]

A similar pattern has been present in other intergovernmental organisations. Within the aegis of the Council of Europe, the Venice Commission considered the various traditions of the RoL. In its Report on the Rule of Law, using a comprehensive approach, focused on identifying the essential elements of the concept.[56] Regarding the Organization for Security and Co-operation in Europe (OSCE), the Helsinki Ministerial Council Decision No. 7/08 encouraged the strengthening of the RoL, especially in the areas of the independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials and respect of RoL in the public administration.[57] In the case of the World Bank, internal instruments underlined the importance of the RoL from an economic perspective. The Bank's internal think-tank (Legal Institutions of the Market Economy) proposed 'reforming laws' and 'reforming institutions' to promote the RoL. Reforming laws include drafting substantive laws for property, contract, company, bankruptcy and competition, while reforming institutions cover courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centres, bar

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[51] Statement by H.E. Dr. Benita Ferrero-Waldner, Federal Minister for Foreign Affairs of the Republic of Austria, at the 59th Session of the UN General Assembly, 23 September 2004, 6.

[52] Konrad G. Bühler, 'The Austrian Rule of Law Initiative 2004–2008 – The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law' [2008] Max Planck Yearbook of United Nations Law, DOI: https://doi.org/10.1163/18757413-90000030a

[53] The UN Security Council and the Rule of Law – The Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative 2004–2008, <https://www.iilj.org/wp-content/uploads/2017/08/unsc_and_the_rule_of_law.pdf> accessed 15 December 2023.

[54] Bühler (n 52) 414–416.

[55] In Larger Freedom: Towards Development, Security and Human Rights for All — Report of the Secretary-General, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005), para 137; Bühler (n 52) 417.

[56] Report on the Rule of Law, Adopted by the Venice Commission, 25–26 March 2011, <https://rm.coe.int/1680700a61> accessed 15 December 2023.

[57] Decision No. 7/08 on further strengthening the rule of law in the OSCE area, <https://www.osce.org/mc/35494> accessed 15 December 2023.

associations and enforcement agencies.[58] In its annual review report on the initiative of legal and judicial reforms in 2004, it stressed that the development experience showed that the RoL promotes effective and sustainable economic development and good governance. Since 2013, the World Bank has considered the RoL as a Worldwide Governance Indicator, which considers the extent to which individuals have confidence in and abide by the rules of society, including the courts and the law.[59]

The activity and case-law of the European Court of Human Rights (hereinafter 'ECtHR') and the Inter-American Court of Human Rights (hereinafter 'IACtHR') are significant in tackling this trend. These international courts have influenced the structure and powers of the judicial systems of their Member States. In their rulings, they interpreted specific provisions of the American Convention on Human Rights and the European Convention on Human Rights (hereinafter 'ECHR').[60] It was necessary because although several human rights aspects had already been raised about the judicial systems of their member states, neither convention contained detailed rules on this matter. Both the IACtHR and ECtHR have sought to interpret the provisions on effective judicial protection in certain cases. This development of the case law covered the issues of judicial remedies, the right to fair trial, the exercise of judicial functions, the enforcement of judgments and access to courts.[61]

In this regard, it should be stressed that the Council of Europe and, specifically, the ECHR have received particular attention from the Union. Article 6(2) TEU requires the Union to accede to the ECHR.[62] In addition, the Charter also pays special attention to the fundamental rights listed in the ECHR. This process is of great interest in the EU legal literature, as is the Court of Justice's consideration of the case law of the ECtHR regarding the interpretation of the provisions of the ECHR.[63]

IV The Rule of Law within the Institutions of the Union

The question arises of whether EU institutions can be compared to the international organs of the intergovernmental organisations examined by Sinclair. As he underlined, the activities of the international organs stimulated the development of certain concepts on which the intergovernmental organisations relied on later in their instruments. If we

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58 Gordon Barron, 'The World Bank & Rule of Law Reforms', Development DESTIN Studies Institute, LSE Working Papers, no. 05-70, <https://www.files.ethz.ch/isn/137920/WP70.pdf> accessed 15 December 2023.

59 See World Bank, 'Rule of law' indicator <https://www.worldbank.org/content/dam/sites/govindicators/doc/rl.pdf> accessed 15 December 2023.

60 David Kosar, Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 (4) The American Journal of International Law 713–715, DOI: https://doi.org/10.5305/amerjintelaw.109.4.0713

61 Ibid, 748–755.

62 Article 6(2) TEU, Preamble, *Charter of Fundamental Rights of the European Union.*

63 Sejla Imamovic, 'The Court of Justice of the EU as a Human Rights Adjudicator in the Area of Freedom, Security and Justice' Jean Monnet Working Papers 5/2017, 5–6.

apply Sinclair's analytical framework to the development of the RoL, some EU institutions concerned should be closely examined.

1 The European Commission

Since 2012, the Commission has applied a comprehensive approach to the RoL as a result of the upcoming RoL concerns in some Member States. In 2012 and 2013, former President of the Commission José Manuel Barroso stressed in his State of the Union speeches, referring to the upcoming concerns about Hungary and Romania, that a political union includes respect of the RoL.[64] He emphasised that this is the backbone of democracy in the Member States.[65] In addition, the Commission intended to put itself into a central position by introducing a general framework 'based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the RoL, and triggered by pre-defined benchmarks'.[66] The approach was reiterated by former Vice President of the Commission, Viviane Reding, who stressed that there was a crisis of the RoL in the Union.[67] Later, commissioners also stressed the importance of the protection of the RoL. For instance, Jourová underlined the link between the RoL and EU subsidies.[68] Later, in 2018, the connection between the RoL and the protection of the financial interests of the Union was also pointed out.[69]

The Commission has also sought to define the RoL in its various instruments. According to the Commission, RoL is a constitutional principle with formal and substantive components that should be consistent with the case law of the Court and ECtHR.[70] The position of the institution is that the term includes the principle of legality, legal certainty, prohibiting the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, effective judicial review, including respect for fundamental rights, equality before the law and separation of powers. Such an approach is intended to be as detailed as

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64 José Manuel Barroso, José Manuel Durão Barroso President of the European Commission State of the Union 2012; José Manuel Barroso, José Manuel Durão Barroso President of the European Commission State of the Union 2013 Address Plenary session of the European Parliament/Strasbourg, 11 September 2013.

65 European Commission, Communication to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (2014) COM (2014) 158 final.

66 Ibid.

67 Viviane Reding, *The EU and the Rule of Law – What next? SPEECH/13/677,* Centre for European Policy Studies/Brussels, 2013, available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677> accessed 15 December 2023.

68 Daniel Matousova, Friedrich Naumann, 'Tying EU Subsidies to Rule of Law?' 4liberty.eu <https://4liberty.eu/tying-eu-subsidies-to-rule-of-law/> accessed 15 December 2023.

69 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM (2018) 324 final.

70 European Commission (n 65); European Commission, Annexes to the 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, Annexes 1-2.

possible. This also appeared in the communication of the Commission, which emphasised not just the principles mentioned above but also stressed it would take the institutional practice and the jurisprudence of the Council of Europe into account.[71] The Commission also applies the same comprehensive approach in its Rule of Law Reports, stressing four key areas of the RoL: the justice system, the anti-corruption framework, media pluralism and freedom and other institutional issues related to checks and balances. This underlines the Commission's similarity to the intergovernmental organisations Sinclair examined.

Furthermore, the Commission also intended to invent instruments to tackle the concept of RoL. These focused on either the prevention of any deficiency of the RoL, or the sanctioning of the Member State concerned. In general, the Commission did not have a specific legal basis for protecting the RoL. However, in many cases, the institution relied on other legal bases indirectly, or underlined that the Commission introduced the instrument at the request of the European Parliament and the Council. In addition, the Commission also expressed that RoL-related instruments already exist under the aegis of different intergovernmental organisations, such as the UN or the Council of Europe. First, the Commission created a new mechanism to address threats to the RoL in a given Member State before the procedure under Article 7 TEU is activated. To this end, it has developed the so-called 2014 Rule of Law Framework.[72] According to the Commission, it established a three-stage process, which it activates in cases where there is a clear systemic threat to the RoL but does not meet the criteria for activating the Article 7 TEU procedure.[73] Second, the framework for the coordination and surveillance of economic and social policies, the so-called European Semester, also goes beyond simple economic policy matters and focuses on the fight against corruption and specific issues of the justice system of the Member States. In this regard, the Commission proposes country-specific recommendations for adoption by the Council. Although these are soft law documents within EU law, their role in creating new competences for the Union is evident.[74] Garben even considers this a form of competence creep.[75] Third, since 2020, the Commission has even provided recommendations to the Member States on its RoL, for which the institution also examines whether the Member State has addressed the problems identified in the recommendations from previous years.[76] Finally, one of the recent inventions is the so-called rule of law conditionality regulation,

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71 European Commission, Communication from the Commission to the European Council, the Council, the European Social Committee and the Committee of the Regions – Strengthening the rule of law within the Union COM (2019) 163 final; Justyna Maliszewska-Nienartowicz and Marcin Kleinowski, 'What Rule of Law for the European Union? – Tracing the approaches of the EU Institutions' (2021) 50 Polish Political Science Yearbook 2–4, 9, DOI: https://doi.org/10.15804/ppsy202155

72 European Commission (n 65).

73 Ibid.

74 Ibid.

75 Garben (n 24) 212.

76 See more: <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en> accessed 15 December 2023.

which underlines the protection of the financial interests of the Union and the RoL. The instrument enables the Council, at the request of the Commission, to sanction Member States if a breach of the RoL in a Member State 'affect[s] or seriously risk[s] affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.[77]

Sinclair highlighted that this trend has similarities to the case of the ILO. As Sinclair puts it, the ILO and especially its organ, the International Labour Office, 'was animated by a powerful sense of its unique mission and mandate to effect social reform through law'. The Office started to expand beyond the founder's expectations since its establishment. Albert Thomas, the first Director of the International Labour Office of the ILO, played a significant role in this process. He was dedicated to establishing authority for the organisation. He (and his colleagues) stressed the importance that the ILO should take on a more serious role, a mission of social transformation.[78] Thomas and other officials from the ILO were similarly active in expanding the powers of ILO to economic-related issues by relying on the written competences of the ILO regarding working conditions.[79] This trend had its context as well. The ILO's vision was to become a *'living organisation'* that tends to rely on social legislation and reform based on the ILO's liberal objectives. In this regard, Thomas stressed that the articles of the ILO were not simple provisions but *'a faith if not a doctrine'* that encouraged the ILO to engage actively and receive more and more powers.[80]

2 The European Parliament

In line with the Commission's active role in the development of the RoL, the EP has also played an active supporting role in the process within the EU institutional framework. First, the EP had a considerable role as a co-legislator. Its role is mirrored in the rule of law conditionality regulation, which even includes a definition of the RoL,[81] also covering matters related to the independence of the judiciary.[82] Second, from a more political perspective, the EP had an initiating role in maintaining the issue of the RoL on the political agenda at the European level. Since 2012, the EP has stressed that Member States should be assessed regularly on their continued respect for the Union's values and their compliance with the requirements of democracy and the RoL.[83] In addition, in 2016, the EP adopted

77 Article 4, Regulation (EU, Euratom) 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] OJ L433I/1.

78 See a series of statements from Albert Thomas: Ibid, 46–48.

79 Ibid, 90–96.

80 Sinclair (n 2) 47.

81 Maliszewska-Nienartowicz, Kleinowski (n 71) 10.

82 Article 2 a) Regulation (EU, Euratom) 2020/2092.

83 For instance, European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010–2011) 2011/2069(INI), 12 December 2012, 3–5; Report on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI), 16 February 2012, E.

the so-called 'in't Veld Report' to introduce a comprehensive 'Union Pact for democracy, the rule of law and fundamental rights'. The resolution gave the Commission a free rein to develop a proposal for a comprehensive mechanism to monitor democracy, RoL and fundamental rights in the Union.[84] In addition, the EP also adopted several resolutions, and its Committee on Civil Liberties, Justice and Home Affairs adopted reports and organised on-the-spot country checks.[85]

Finally, as a more significant demonstration of power, the EP adopted the Sargentini report on Hungary, which triggered the Article 7(1) TEU procedure to determine the existence of a clear and serious breach of EU fundamental values in Hungary.[86] In this regard, RoL-oriented topics later remained on the political agenda of the EP, especially in the cases of Poland and Hungary. In this context, the EP urged the Commission and the Council to continue to ensure that the RoL is respected in the Member States and in the Union.[87]

3 The Court of Justice

Sinclair underlines that international courts legitimise the expansion of powers for the intergovernmental organisations concerned. However, the Court of Justice is also part of the same institutional framework as other institutions, and it is known for its activism in developing EU law. This activist role does not change this role of the Court but gives an additional aspect that should be highlighted to understand the complexity of the process. The question therefore, arises of whether the judges interpreted the RoL in their statements or writings. The short answer is maybe 'not so much' and only some writings can be examined. First, regarding the early case law, it is safe to say that elements of the RoL appeared sporadically to comment on the RoL as a whole. This includes the recognition of effective judicial protection as a fundamental right and its legal development by the Court relying on the Charter. Second, the Les Verts case introduced different questions for the prominent representatives of the European elites, such as the possibility to challenge the decisions of the institutions and the constitutional character of the founding Treaties. However, the

[84] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights [2018] OJ C215/162, 1.

[85] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2020 Rule of Law Report – The rule of law situation in the European Union COM (2020) 580 final, 24.

[86] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [2019] OJ C433/66.

[87] For instance, European Parliament resolution of 1 June 2023 on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds 2023/2691(RSP).

RoL did not have priority at that time.[88] Third, RoL first appeared as a principle and then as a value of the Union. As these were protected under the Article 7 TEU procedure, during which the Court of Justice did not have much of a role because of the political nature of the procedure, this explains why they did not pay attention to this issue for a long time.[89]

However, the RoL had appeared for the judges of the Court regarding judicial independence even before the ASJP case.[90] Quite early on, Lenaerts had been seeking to analyse the RoL in relation to the judiciary as a whole. In his view, the Community courts and Member State courts together play an essential role tin upholding the RoL in Community law. The focus of his analysis was then much more on proceedings before the Court of Justice. He considered the RoL as a tool for the Court of Justice, which heled to strike a balance 'among the different interests in a multi-layered system of governance'. To achieve this, a formalistic understanding of the RoL is not enough. In that regard, it is the task of the Court to fill the constitutional lacunae.[91] Lenaerts emphasised that judicial protection had a significant role in this but was silent on other aspects of the RoL. Even then, he stressed that national courts had an obligation to ensure that Community law was effective, which he defined as a systemic safeguard.

Finally, Article 19 TEU should be mentioned here. During the negotiations on the text of the article, the members of the Discussion Circle, who were also judges in the Court of Justice, did not pay much attention to the second subparagraph of Article 19(1) TEU.[92] The provision was considered a codification of existing rights and obligations. However, later, Lenaerts underlined that the provisions could have far-reaching consequences, as national courts could be forced to introduce new remedies guaranteeing individuals, in all cases, the possibility of challenging EU acts and obtaining preliminary rulings. He pointed out that Article 19 TEU gives the Court of Justice a constitutional mandate to carry out a comparative study of the relevant legislation of the Member States. In addition, Article 19 TEU serves to uphold the RoL within the Union.[93] However, the author also stated that

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88 Anne Boerger, Bill Davies, 'Imagining the Course of European Law? Parti écologiste 'Les Verts' v Parliaments as a Constitutional Milestone in EU Law' in Fernanda Nicola, Bill Davies (eds), *EU Law Stories – Contextual and Critical Histories of European Jurisprudence* (CUP 2017) 83–102, DOI: https://doi.org/10.1017/9781316340479.005

89 Paul van Elsuwege, Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 (1) European Constitutional Law Review 8–10, DOI: https://doi.org/10.1017/S1574019620000085

90 Michal Ovádek, 'The making of landmark rulings in the European Union: the case of national judicial independence' (2023) 30 (6) Journal of European Public Policy 9, DOI: https://doi.org/10.1080/13501763.2022.2066156

91 Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 (5) Fordham International Law Journal 1304, 1307.

92 Second subparagraph of Article 19(1) TEU; Final Report of the Discussion Circle on the Court of Justice (2003) 636/03, para 18.

93 Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 (6) Common Market Law Review 1626, 1629, 1645, DOI: https://doi.org/10.54648/cola2007138

this provision has an 'interpretative fissure' which must be filled in the future.[94] These approaches were more detailed in the author's work after the ASJP case.[95]

V The Concept of the Rule of Law according to the Academics

Sinclair's analytical approach stresses that in the case of the ILO, the UN and the World Bank, expertise tends to rely on the scientific development, results of management and economics. Regarding the development of the European Union, in some cases, the same issue can be observed in the legal scholarly dimension. Schepel and Wesseling underline that European integration is largely driven by legal interpretation and not just by political decisions. It is not surprising because European integration is a project of integration through law. In this process, the legal community plays a vital role in the development of EU law. Academic journals and established transnational associations. as well as the arguments from the academics, contributed to the history of European law.[96] Among others, there are examples of this in the case of direct effect or the supremacy of EU law.[97] In this regard, academics often identified certain problems of law. Sticking to the example from the early development of law, this happened in the case of the correlation of uniform implementation of law and primacy. A similar pattern can be observed regarding the development of the RoL consisting of two components. First, the authors identified concerns of RoL, and second, they gave proposals to solve the concerns of the RoL.

1 Rule of Law as a Concern in EU law

Without conducting serious research, an increased interest in the RoL arose among jurists and publications. On the one hand, this can be seen in the increasing number of publications on the subject between 2012 and 2018. It became an increasingly popular topic in some academic journals and volumes. For instance, in the case of the Common Market Law Review, there was only one article concerning the RoL in 2012 and 2014. However, between 2016 and 2018, there were only a few editorial comments did not mention the RoL and the EU together. Furthermore, in 2017, there was one article highlighting the RoL in relation

[94] Koen Lenaerts, José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' EUI Working Papers 9/2013/, 47.

[95] See Koen Lenaerts, 'New Horizons of the Rule of Law Within the EU' (2020) 21 (1) German Law Journal 29–34, DOI: https://doi.org/10.1017/glj.2019.91

[96] Harm Schepel, Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 (2) European Law Journal 165–188, DOI: https://doi.org/10.1111/1468-0386.00025

[97] Karen J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)' in Karen J. Alter, *The European Court's Political Power – Selected Essays* (Oxford University Press 2009, Oxford) 61–89, DOI: https://doi.org/10.1093/oso/9780199558353.003.0004

to the Rosneft case, while there were several articles on the RoL in 2018.[98] On the other hand, some journals, including *Europarecht*, *Cahiers de Droit Européen* or the European Constitutional Law Review rarely dealt with the issue between 2012 and 2018.[99] On the other hand, it is also true that several volumes of studies have been published in the period focusing on the examination of the RoL in the EU, either at the supranational or national level.[100]

2 Proposals concerning the Rule of Law

Not just the increasing popularity but also certain topics can be distinguished. Regarding the first branch of topics, a variety of publications focused on criticising the EU for the lack of action regarding possible RoL concerns and not providing sufficient protection for the value.[101] In addition, many of these authors explicitly took the view that the Article 7 TEU procedure was not sufficiently effective. There were also early references to the need to give the RoL a more significant role in developing EU law. Considering the second branch, some authors gave *de lege ferenda* proposals to address the issue. These proposals were based on the presumption that the Member States do not have the will to modify the founding treaties, for instance to modify the Article 7 TEU procedure to make it more effective under the changed landscape. One of these is the so-called reverse Solange, whereby, outside the scope of the Charter, Member States retain autonomy in protecting fundamental rights as long as they are presumed to safeguard their substance. If this presumption were to be rebutted, EU citizenship would come to the fore, allowing EU citizens to seek redress before national courts and the Court of Justice.[102] A further proposal was to establish systemic infringement proceedings. The idea behind this was that if a Member State posed a systemic threat to the fundamental values of the Treaties, the Commission should be able to initiate infringement proceedings either based on Article 2 TEU or based on the obligation of sincere cooperation

[98] See: Common Market Law Review <https://kluwerlawonline.com/Journals/Common+Market+Law+Review/2> accessed 15 December 2023.

[99] See Europarecht, <https://www.nomos-elibrary.de/zeitschrift/0531-2485>; see Constitutional Law Review: <https://www.cambridge.org/core/journals/european-constitutional-law-review/all-issues>; see Cahiers de Droit Européen: <https://www.jurisquare.be/fr/journal/cahdroiteur/index.html> accessed 15 December 2023.

[100] To give some examples: Flora A.N.J. Goudappel, Ernst M.H. Hirsch Ballin (eds), *Democracy and rule of Law in the European Union – Essays in Honour of Jaap W. de Zwaan* (Asser Press 2016); András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017, Oxford), DOI: https://doi.org/10.1093/acprof:oso/9780198746560.001.0001

[101] Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' [2015] Yearbook of European Law 16–18, DOI: https://doi.org/10.1093/yel/yev009; Christophe Hillion, 'Overseeing the Rule of Law in the EU' in Carlos Closa, Dimitry Kochenov: *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 81, DOI: https://doi.org/10.1093/yel/yev009

[102] Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj, Armin von Bogdandy, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49 (2) Common Market Law Review 489–519, DOI: https://doi.org/10.54648/cola2012018

set out in Article 4(3) TEU.[103] It should be noted that later infringement proceedings concerning Article 19 TEU are considered as systemic infringement procedures, which are treated as graver breaches of EU law. It was also suggested that a so-called Copenhagen Committee / Commission should be set up to keep under review the compliance of Member States with the Copenhagen Criteria after they became members of the Union.[104] Proposals were also made to place greater emphasis on the protection provided by the Charter.[105] What is certain is that they signalled RoL concerns to the EU institutions. In addition, some of these proposals ultimately looked to the Commission or the Court of Justice for a solution.

Finally, the extensive reading of Article 51 of the Charter should be mentioned here. As von Danwitz underlined, if Article 51 on the scope of the Charter were to be interpreted as giving the Court of Justice of the European Union the power to interpret the Charter rights in a way that would ensure that the CJEU upholds the RoL within the Member States, it would raise several questions. First, it would run counter to the structure of the Charter and to the meaning of its provisions, as it would disrupt the basis for the scope of application of the Charter's provisions. In addition, it would be problematic because it would be an exercise by the CJEU of the exclusive jurisdiction of the national constitutional courts, which would upset the already delicate balance between them. The author also stressed that the Court seemed to refuse to apply such an extensive reading to the application of the Charter.[106]

With regard to the legal discourse of protection of the RoL within the Union, Komanovics summarised how the critiques of the legal profession ensure that the legal nature of the procedures is maintained and remains at the forefront, as opposed to simple political debates. However, it is true that the critics take the political aspects into account in order to initiate some sort of process.[107]

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[103] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Action' in Closa, Kochenov (n 101) 105–132, DOI: https://doi.org/10.1017/CBO9781316258774.007; András Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa, Kochenov (n 101) 187–205, DOI: https://doi.org/10.1017/CBO9781316258774.011

[104] Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) in the EU' in Closa, Kochenov (n 101) 206–224, DOI: https://doi.org/10.1017/CBO9781316258774.012; Claudio Franzius, The Sense and Nonsense of a Copenhagen Commission, <https://verfassungsblog.de/the-sense-and-nonsense-of-a-copenhagen-commission/> accessed 15 December 2023.

[105] Gabriel N. Toggenburg, Jonas Grimheden, 'The Rule of Law and the Role of Fundamental Rights – Seven Practical Pointers' in Closa, Kochenov (n 101) 147–171, DOI: https://doi.org/10.1017/CBO9781316258774.009

[106] Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 (5) Fordham International Law Journal 1337–1338.

[107] Adrienne Komanovics, 'Hungary and the Luxembourg Court: The CJEU's Role in the Rule of Law Battlefield' (2022) 6 EU and Comparative Law Issues and Challenges Series 145, DOI: https://doi.org/10.25234/eclic/22413

VI The Legitimising Role of the Court of Justice of the European Union

In Sinclair's examples, namely the case of the ILO and the UN peacekeeping missions, both the PCIJ and the ICJ examined possible expansion of powers. However, the European Union, more specifically its legal order and institutional framework, represents a different regime. Hence, the Court of Justice has different tools to play this role in the legitimising process. In this regard, the Court of Justice relies on specific procedures, such as preliminary proceedings, annulment procedure and infringement procedure. These procedures provide more channels for the Court to examine competence questions. The question of RoL is no exception from this.

1 The ASJP Case

a) **Background to the case**

The legal literature has a consensus that the ASJP case changed the interpretation of the RoL in the EU legal order regarding its connection with the judiciary. However, this was not the first opportunity for the Court to decide in such a case.

A provision of the Fundamental Law of Hungary allowed all judges, except the President of the *Kúria*, to remain in service until the general retirement age. However, a transitional provision of the Fundamental Law would have introduced that if a judge had reached retirement age before 1 January 2012, his or her service would have ended on 30 June 2012. On this basis, the age of 62 would have applied to the office of a judge.[108] It should be noted that, on 16 July 2012, the Constitutional Court declared these provisions unconstitutional,[109] a decision welcomed by the Commission.[110] Nevertheless, the Commission launched infringement proceedings. It argued that the contested provisions were contrary to the provisions of Directive 2000/78/EC (Equality Framework Directive), as discrimination on the grounds of age cannot be justified, or at least is neither appropriate nor necessary.[111] With regard to the case, Advocate General Kokott pointed out inter alia that the sudden retirement of judges raises doubts about the independence of the courts and thus about the quality of justice. Kokott also underlined the case law of the Court of Justice, which suggests that courts must be independent, particularly during preliminary references. The AG emphasised that the case involved the external aspect of judicial independence, whereby the judiciary is protected from any external interference or pressure which might jeopardise

[108] Vincze Attila, 'Az Európai Unió Bírósága a bírói nyugdíjazásról – A diszkrimináció tilalma és a bírói függetlenség' (2012) 3 (4) Jogesetek Magyarázatai 65–66.

[109] 33/2012. (VII. 17.) AB of the Constitutional Court of Hungary ABH, 16 July 2011.

[110] Viviane Reding's tweet, 2012.07.16., <https://twitter.com/vivianeredingeu/status/224894097805160448> accessed 15 December 2023.

[111] Case C-286/12 *European Commission v Hungary,* EU:C:2012:687 paras 24 and 26–31.

the judges' judgments.[112] The AG also pointed out that any misunderstanding about the external influence of the courts needs to be avoided. However, the AG neither stressed this point and argument in more detail in the opinion later, nor mentioned the matter of RoL. Finally, the Court did not stress the matter of judicial independence. Instead, it based its reasoning only on age discrimination.

***b)* The context of the case**

In contrast, the so-called ASJP case took a different approach, taking into account the emerging trend of the RoL, and thus commencing the legitimisation process of the expansion of power of the Union. In 2011, Portugal started implementing austerity measures to comply with some of the commitments made in the May 2011 Memorandum of Understanding and its subsequent amendments with the Commission to obtain financial assistance for Portugal under the European Financial Stabilisation Mechanism. A number of these measures were referred to the Portuguese Constitutional Court, which itself ruled them unconstitutional, including, for example, the reduction of public servants' salaries. Although certain national courts explicitly suggested that the Court's interpretation should be sought on aspects of fundamental rights protection, the Court of Justice repeatedly refused, claiming that it had no jurisdiction.

However, in this particular case, the Portuguese legislation reduced the salaries of judges holding public office or working in the public service in Law No 75/2014, putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility. It included the Court of Auditors as well, from October 2014 until 1 January 2016. The Associação Sindical dos Juízes Portugueses, the Portuguese association representing the interests of Portuguese judges, brought proceedings before the Portuguese Supreme Administrative Court, arguing that the measures infringed the independence of judges. Interestingly, the Supreme Administrative Court referred to EU law, as it stated that the interim measures on salaries were also based on EU law obligations. However, taking a closer look, it is not that surprising: from the earlier case law the Constitutional Court had considered it constitutional. As such, the association probably decided to follow a different approach in that regard.[113] The Supreme Administrative Court stressed, however, that judicial protection must be guaranteed primarily to the court of the Member States based on the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, and that the independence of the courts depends on the remuneration of judges. In this regard, it stressed that *'the independence of judicial bodies depends on the guarantees that attach to their members' status, including in terms of remuneration'*.[114] The Supreme Administrative Court asked the Court of Justice whether the Member States may apply measures for a general

[112] Case C-286/12 *European Commission v Hungary,* EU:C:2012:602, Opinion of AG Kokott paras 54–56.

[113] Matteo Bonelli, Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 (3) European Constitutional Law Review 626, DOI: https://doi.org/10.1017/S1574019618000330

[114] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* EU:C:2018:117, para 17.

reduction of salaries in the civil service to members of the judiciary if those measures were linked to obligations to reduce excessive public deficits and to the EU financial assistance programme.

***c)* The decision of the Court and its relevance to the expansion of power**

First, the Court echoed the argument of the Supreme Court. It underlined that the scope of Article 19(1) TEU is broader than that of Article 51 of the Charter. The Court of Justice underlines that this principle follows both from the constitutional traditions of the Member States and from the provisions of the ECHR.[115] However, this separation means that there are cases where the Member States must ensure effective judicial protection, even if the Charter does not otherwise provide such protection at the level of fundamental rights.[116] This underlined that article 19 TEU provides broader obligations than the Charter in this regard.

However, the Court of Justice went further in analysing the situation. It also made findings about Article 2 TEU. It stressed that the RoL is a value common to the Member States, which are societies based on justice, and in that regard, the Union is also a legal union.[117] The Court of Justice underlined that Article 19 TEU gives some sort of manifestation to the RoL as a value enshrined in Article 2 TEU, in which the case the possibility of judicial review is granted not only to the Court of Justice but also to the courts of the Member States as well.[118] The Court of Justice linked this to the duty of loyal cooperation, which, read in conjunction with the second subparagraph of Article 19(1) TEU, ensures that the Member States provide the legal remedies necessary to ensure effective judicial protection.[119] This is another turn of the previous approach of the Court of Justice and the academia. Article 2 TEU was now used in a very strict argument for the first time, and a value was linked to a newly introduced (and seemingly forsaken) provision of the founding Treaties.

The Court further stated that this requirement is essential for the proper functioning of the system of judicial cooperation between the courts of the Member States and the Court of Justice. In essence, the European judicial system ensures respect for the law within the Union.[120] According to the Court, this is guaranteed by Article 19 TEU, from which the obligation is to ensure effective judicial protection. In that regard, the Court of Justice held that, since questions relating to the Union's resources and financial resources may affect the application and interpretation of Union law, national courts must ensure that, in their examination of the question, they comply with the requirements of effective judicial protection.[121] In this respect, Article 47 of the Charter is fundamental to the independence

[115] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* paras 29, 31 and 35.
[116] Bonelli, Claes (n 113) 631.
[117] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* paras 30–31.
[118] Ibid, para 32.
[119] Ibid, para 34.
[120] Ibid, paras 32–33.
[121] Ibid, paras 39–41.

of the judiciary. With this argument, the Court gave the link between the two aspects: the structural and fundamental right perspectives of the judiciary in EU law.[122] Here, the Court, similarly to Advocate General Kokott's opinion, referred to the external independence of the judiciary and emphasised that they must protect any external interference that might jeopardise the independence of the decision-making and the decision itself.

It is clear that although the Court of Justice had relied on previous decisions to derive its reasoning, it based its decision on EU values, namely the RoL. It inferred from this that Article 19 TEU guarantees the value of the RoL, which can be linked to the principle of effective judicial protection under Article 47 of the Charter. The exercise of this fundamental right is a guarantee of the independence of the judiciary. Menzione submits that it is not necessary to apply a teleological interpretation of the law to deduce that reasoning since that is what the textual interpretation leads to.[123] On the other hand, the academia could not identify such an interpretation before, not regarding the nature of EU values, nor regarding the exact content of the second subparagraph of Article 19(1) TEU and its reference to Article 2 TEU, therefore referring to a meta-teleological interpretation, in which competing principles and values are interpreted.

What is more interesting is that this resulted in the legitimisation of a power expansion by the Union. The Court interpreted EU law concerning the relation of the remuneration of judges, as this affects the obligation of the Member States under Article 19 TEU(1) to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. The Court of Justice highlighted a new aspect of the application of Union law, but an interesting one: this is an aspect of the RoL. Consequently, this represents a legitimisation of an expansion of power concerning the RoL, representing the Court's view on the matter. In this respect, Bonnelli and Claes stress that it has become a priority for the Court of Justice to make the Member States understand that their judicial system is not entirely a national competence, as they have obligations to ensure the proper enforcement of EU law.[124] Some judges have made it very clear in their speeches that they consider the judicial independence and the RoL of paramount importance,[125] although such an interpretation is in line with von

[122] Ibid, paras 42–44.

[123] Serena Menzione, 'Case Note: Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the ASJP Case' (2019) (2) Review of European Administrative Law 231, DOI: https://doi.org/10.2139/ssrn.3470622

[124] Bonelli, Claes (n 113) 623.

[125] See inter alia Edric Porter, Swedish EU judge Nils Wahl: 'The EU will collapse' 2021, DealMakerz <https://dealmakerz.co.uk/swedish-eu-judge-nils-wahl-the-eu-will-collapse/> accessed 15 December 2023; Ineta Ziemele, 'Speech by the President Ineta Ziemele at the 7th International Scientific Conference of the University of Latvia Faculty of Law' 2019, <https://www.satv.tiesa.gov.lv/en/runas-un-raksti/the-rule-of-law-of-today-serving-the-european-citizen/> accessed 15 December 2023; Lars Bay Larsen, 'Rule of Law and Independence of National Judges', Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges 2022, <https://cortecostituzionale.it/jsp/consulta/convegni/5_sett_2022/Giornata-Studio-BayLarsen.pdf> accessed 15 December 2023, 6.

Danwitz's argument about Article 51 of the Charter. The expanded scope of Article 19 TEU holds the same issue as the author highlighted, namely the conflicting power with national constitutional courts. However, this process did not end here.

2 Furthering the Legitimisation Process of the Court of Justice

Shortly after the decision, the Commission sent Poland a formal notice to initiate infringement proceedings. The case concerned an infringement of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, as Poland had reduced the retirement age of judges of the Supreme Court.[126] The Commission thus gave the Court of Justice a further opportunity to clarify its reasoning. This move was underpinned by the fact that the EP supported the Commission with its resolution regarding initiating the Article 7 TEU procedure against Poland. The biggest Member States also supported the Commission triggering the process.[127] In C-619/18, the Court of Justice clarified the relationship between Article 7 TEU and the infringement proceedings that can be brought under Article 258 TFEU, and also further elaborated on the relationship between Article 19 TEU and Article 47 of the Charter. In addition, it confirmed that the RoL enshrined in Article 2 TEU is precisely spelled out in Article 19 TEU.[128] Further infringement proceedings addressed the concerns regarding the Polish judiciary, during which the Court of Justice further highlighted other details of the concept. It can be stated that these proceedings can be very similar to the proposals of the academia regarding systemic infringement proceedings.[129]

VII Conclusion

From the above, it seems reasonable that Sinclair's analytical framework can be used to understand the development of the RoL within the Union as an expansion of power.

First, the content and precise nature of the values enshrined in Article 12 and Article 19 TEU cannot be understood by relying on the text of the founding treaties only. At the time of the drafting, neither the authors from the academic sphere nor other actors reflected on their context as in the ASJP case. Consequently, the wording of the provisions in question was intact but the meaning changed. The nature of these provisions is in line with Sinclair's standpoint on constitutional growth, that the provisions of the text remain unchanged, but the interpretation of the text could differ.

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126 Case C-619/18 *European Commission v Poland,* EU:C:2019:531.

127 Ovádek (n 90) 18.

128 *European Commission v Poland,* paras 42 and 47.

129 Matteo Bonelli, 'Infringement Action 2.0: How to Protect EU Values before the Court of Justice' (2022) 18 (1) European Constitutional Law Review 30–58, DOI: https://doi.org/10.1017/S1574019622000049

Second, there has been an increasing tendency toward the development of the RoL. It was, in fact, a phenomenon that other intergovernmental organisations, such as the UN, the OSCE, the World Bank and the Council of Europe, as well as other international human rights courts, especially regarding the case-law concerning the judicial systems of their Member States rely on the RoL. The EU and its institutions also relied on the trends of these organisations.

Third, EU institutions, particularly the Commission, the EP, and even the Court of Justice, have sought to address the RoL in some way early on. It is also apparent that the institutions concerned have taken a more assertive position on the RoL. From the side of the Commission, a proliferation of the RoL occurred and developed. From the side of the EP, the institution became increasingly active in maintaining the issue on the political agenda and inviting the Commission, the Council and the Member States to ensure the proper implementation of the RoL within the Union. Regarding the side of the Court of Justice, Lenaerts' approach appeared in the later judgments of the Court of Justice. These issues are similar to the international organs Sinclair examined, as they also promoted the development of the expansion of the specific powers of intergovernmental organisations.

Fourth, it is also important to point out that the academic world has sought to emphasise the deficiency of the RoL as a phenomenon. The analysis shows that it became increasingly popular during the period in question. In addition, the criticisms of the Union and the proposals represented pressure for the Union. Furthermore, some proposals, such as systemic infringement procedures, have been put into practice in some form.

Finally, the Court of Justice, similar to the international courts in Sinclair's analytical framework, legitimised the development of the RoL. Relying on Article 2 and Article 19 TEU, the RoL was introduced, and the Court of Justice identified the role of Union values. The approach of the Court highlighted the development of EU law and an expansion of power.

Consequently, Sinclair's analytical framework can be helpful in understanding the development of Union law and the expansion of European Union's powers.