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A folyóirat a Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskolájának a közleménye. A szerkesztőség célja, hogy fiatal kutatók számára színvonalas tanulmányaik megjelentetése céljából méltó fórumot biztosítson.

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THE ESSENTIAL STATE FUNCTIONS' IMPACT ON THE EU'S INTEGRATION

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ABSZTRAKT ■ Amikor az Európai Unió integrációjának kérdéseiről beszélünk, gyakran találkozunk eltérő nézőpontokkal annak szorosabbra fűzése vagy lazítása kérdésében. Függetlenül a jelen lévő politikai véleményektől, a legfontosabb megvitatandó kérdés az, hogy mit hoz a jövő, és milyen változásokra van szükség ahhoz, hogy olyan hatékony jogi keretet hozzunk létre, amelyben a tagállamok sikeresen együttműködhetnek, és elérhetik a béke, a biztonság és a gazdasági fejlődés közös célját. Az egyik eszköz, amelyet manapság gyakran használnak a szuverén tagállamok döntő fontosságú jellegének hangsúlyozására, az EUSZ 4. cikkének (2) bekezdésére, konkrétan az alapvető állami funkciókra való hivatkozás. Ezen funkciók közül csak néhányat nevesít a szöveg, de több olyan is van, amelyek úgy azonosíthatók, mint a legalapvetőbb funkciók, amelyeket egy államnak el kell látnia ahhoz, hogy létét igazolja, és amelyek nem oszthatók meg, illetve nem adhatók át az EU-nak. Melyek ezek a funkciók? Hogyan hatnak az EU integrációs folyamatára? Ezekben a kérdésekben kívánok elmélyedni ebben a tanulmányban, ahol is végül arra a következtetésre jutok, hogy ezek hatása az EU jövőjére nagyobb, mint azt bárki előre látta volna.

ABSTRACT ■ Concerning the issues of integration in the European Union, one might take different perspectives on the direction of this process. Regardless of any political opinion, the most important matter to discuss is what the future holds, as well as what kind of changes are necessary to create an effective legal framework in which Member States can successfully cooperate and reach the common goals of peace, security, and economic development. Nowadays, the crucial importance of sovereign Member States is often underlined by referring to Article 4(2) of TEU, specifically to the essential state functions. Among them, only a few are named in the text. However, several functions can be identified as the most basic ones that a state must execute to justify its existence and which cannot be shared or given over to the EU. This essay dives into the questions of what these functions are, and how they impact the integration process of the EU. Eventually, the paper concludes that the impact of them on the future of the EU is bigger than anyone could have foreseen.

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1. INTRODUCTION

The European Union's integration process has a lengthy history.² We can only understand its intricacies if we can map out its origins, the intent and reason behind its existence and its standing in our current time. For this reason, I shall use a historic approach to the concept of essential state functions with a particular emphasis on how its current understanding emerged in the European Union.

To fully understand how the EU developed, what influence it had in the history of its Member States' essential state functions, and what they are like, we must briefly examine the process of integration. In addition, it is vital to discuss 2004's failed attempt at drafting and enforcing a constitution for the EU.

It is important to note that when the idea of European integration was first formulated,³ it was intended to be grounded at the political and cultural level.⁴ Of course, there were many earlier attempts to unify Europe,⁵ but these all failed⁶ or were quite short-lived.⁷ Robert Schuman's speech in 1950⁸ opened the way to true integration. In 1957 the Treaties of Rome were signed, creating the European Economic Community and the European Atomic Energy Community.⁹ Throughout the history of integration, cooperation has grown even closer. In recent years, we have reached a point where a collective consciousness has emerged that can be identified with Europe, its values, and its diversity.¹⁰ Today, EU membership is also a secondary identity, especially mostly among

² ZOLTÁN ANGYAL: Az Európai Alkotmányszerződés ratifikációs válsága, avagy a közvetlen demokrácia és az integráció kollíziója. *Publicationes Universitatis Miskolcensis. Sectio Juridica et Politica*, Tomus XXV/1. 2007. 175–190.

³ JEAN MONNET: az Európai Unió megszületése mögött meghúzódó egyesítő erő, https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/jean-monnet_hu.

⁴ TIBOR PINTÉR: Az európai integráció – gazdasági és politikai alapú elméleti megközelítések. *Polgári Szemle*, 13/2017. Iss. 4-6, 341–364., DOI: 10.24307/psz.2017.1225.

⁵ Abbot Charles de Saint-Pierre initiated the creation of a borderless union of 18 sovereign states, with a common treasury and a single economy. CHARLES DE SAINT-PIERRE: "Projet pour perfectionner l'éducation". *Journal littéraire*, Vol. 14, 1729, 170.

⁶ Winston Churchill az „Európai Egyesült Államok” szorgalmazója, https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/winston-churchill_hu.

⁷ ATTILA FÁBIÁN: *Az integráció elmélete*. Sopron, Nyugat-magyarországi Egyetem Kiadó, 2011.

⁸ Schuman Plan – European history, <https://www.britannica.com/event/Schuman-Plan>.

⁹ PÉTER HALMAI: *Európai gazdasági integráció*. Budapest, Dialóg Campus, 2020.

¹⁰ BORBÁLA GÖNCZ: Európai identitás?! *Pro Minoritate*, 23/2013, 79–95. <http://www.prominoritate.hu/folyoiratok/2013/ProMino-1301-05-Goncz.pdf>., MOLNÁR ALÍZ: Az európai és a nemzeti identitás formálódó szerepe, *Prosperitas*, 5 (1). 2018. 114–124.

the young and the more formally educated.¹¹ The only thing that is missing in discussions about a constitutional identity for the EU is the constitution itself. From some points of view, the EU's Treaties, its primary sources of law, could be described as a quasi-constitution.¹² However, there have been attempts at constitutionalism in the EU,¹³ which sought to create a de facto cartel document.¹⁴ If a single European constitution were to be created in the future – the possibility of which is questioned by many – all the conditions for the creation of a constitutional identity for the EU would be met. In that case, however, the constitutional identity of the EU would conflict with the identity of the states. This would create further difficulties for the assertion of the sovereignty of the Member States.

At present, the European Union appears as a specific form of an international organisation, whose legal and political reality differs in several important respects from the order of international organisations.¹⁵ From a legal perspective, the unconditional application of EU standards is essential for the effectiveness of international cooperation in the current framework.¹⁶ One has to wonder to what extent supranationalism and the primacy of EU law¹⁷ in a constitution would push back the constitutions of the Member States, and whether the current sense of the EU as a source of secondary identity for young people could be strengthened to the point where it is on a par with the sense of national

¹¹ NEIL FLIGSTEIN – DOUG McADAM: The Field of Theory. *Contemporary Sociology: A Journal of Reviews*, Volume 43, Issue 3, <https://doi.org/10.1177/0094306114531283a>.

¹² Judgment of the Court of 23 April 1986 Parti écologiste “Les Verts” v European Parliament. Action for annulment – Information campaign for the European Parliament elections. Case 294/83, <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A61983CJ0294>.

¹³ Treaty establishing a Constitution for Europe, https://www.europarl.europa.eu/Europe2004/index_en.htm.

¹⁴ KRISZTINA ARATÓ – ÁGNES LUX: Az Európai Unió alkotmányozási kísérlete. In: ANDRÁS JAKAB – ANDRÁS KÖRÖSÉNYI (eds.): *Alkotmányozás Magyarországon és máshol*. Budapest, Új Mandátum Könyvkiadó, 2012. 177–200.

¹⁵ SIMON DENYS: Les fondements de l'autonomie du droit communautaire in acte du colloque. *Droit international et droit communautaire, perspectives actuelles*, Bordeaux, Párizs, A Pedone, 2000. 209–249.

¹⁶ PÉTER KRUSZLÍCZ: *A nemzeti alkotmányosság tagállami alapjai: a nemzeti szuverenitás és a nemzeti alkotmányos önazonosság, különös tekintettel a francia jogelméletre és a magyar joggyakorlatra*. Doktori értekezés, Szeged, 2019. 52–53.

¹⁷ As stated in *Costa v. ENEL* (Judgment of the Court of 15 July 1964. *Flaminio Costa v E.N.E.L.* Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6-64.) or *Internationale Handelsgesellschaft* (Judgment of the Court of 17 December 1970. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany. Cases 11-70) The Court of Justice of the European Union.

identity. This would also have a clear negative impact on Article 4(2) TEU,¹⁸ as the identity of the Member States could become secondary to a federal Europe. There is a separation between the external and internal aspects of identity. The relevant provision of the TEU is better understood as the external aspect of constitutional identity.¹⁹

The protection of the national identity of the Member States was already introduced by the Maastricht Treaty. Also, the equality of Member States before the Treaties and the respect for the fundamental functions of the State are specific to the Lisbon Treaty.²⁰ In addition, the original idea was that more should have been included in the Treaty. However, at the end of the day, fewer examples from the proposal were listed in the actual provision.²¹

Integration has been an increasingly pressing issue over the decades. Steps were taken to a political cooperation in addition to an economic one. After the 1951 signing of the ECSC Treaty,²² a new beginning was upon Europe. While this specific Treaty expired on 23 July 2002 at the end of the 50-year validity period laid down in its Article 97, the European Economic Community (EEC) and the European Atomic Energy Community (EAEC, or ‘Euratom’), the Treaties of Rome²³ are still in force since 1 January 1958. The first institutional change happened when the Merger Treaty of 8 April 1965 merged the executive bodies into a single Council and Commission of the European Communities.²⁴ The United Kingdom joined on 1 January 1973, together with Denmark and Ireland.²⁵ Since then, the UK has taken an electorate vote in 2016 to leave and left the EU on 31 January 2020 (known as “Brexit”).²⁶ Consequently, there are

¹⁸ For scholarly views on the interpretation of this, see: PATRIK SZABÓ: A felszín alatt. Adalékok az alkotmányos identitás elméleti és dogmatikai problémáihoz. *Közjogi Szemle*, 3/2019, 43.

¹⁹ NORBERT TRIBL: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben*. Doktori értekezés, Szegedi Tudományegyetem, 2020. 104.

²⁰ For the origin of the term, see: ANGAL 2007, 175-190.

²¹ HERMANN – JOSEF BLANKE – STELIO MANGIAMELI (eds.): *The Treaty on European Union (TEU) A Commentary*. Heidelberg–New York–Dordrecht–London, Springer, 2013. 195.

²² <https://eur-lex.europa.eu/EN/legal-content/summary/treaty-establishing-the-european-coal-and-steel-community-ecsc-treaty.html>

²³ <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome>

²⁴ <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/merger-treaty>

²⁵ [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)698877](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)698877)

²⁶ PAUL WHITELEY: Insight. Why Britain really voted to leave the European Union, University of Essex, <https://www.essex.ac.uk/research/showcase/why-britain-really-voted-to-leave-the-european-union> (2023.11.10.)

currently 27 Member States of the EU.²⁷ Greece became a member in 1981. Portugal and Spain joined in 1986.²⁸ On 17 February 1986 nine Member States signed the Single European Act (SEA),²⁹ which extended EU's powers. This was further extended by the Treaty on the European Union (signed in Maastricht on 7 February 1992, entered into force on 1 November 1993) created three pillars for the EU. These pillars include: the European Community, the common foreign and security policy (CFSP), and the cooperation in the fields of justice and home affairs.³⁰ The powers of the EU were further increased by the Treaty of Amsterdam amending the Treaty on European Union. Treaties establishing the European Communities and certain related acts signed in Amsterdam on 2 October 1997, and they entered into force on 1 May 1999.³¹ The Treaty of Nice was signed on 26 February 2001 and entered into force on 1 February 2003,³² followed by the Convention on the Future of Europe.³³ This Convention shall be followed by another one in the coming years which will hopefully answer some of the questions on what path the EU should take.³⁴

The Treaty of Lisbon amended the Treaty on the European Union. The Treaty entered into force on 1 December 2009, established the European Community and gave the EU a full legal personality. It is made up of two Treaties: The Treaty on the European Union³⁵ and the Treaty on the Functioning of the European Union.³⁶ For the first time, the Lisbon Treaty clarified the powers of the Union. Union competence can now be handed back to the Member States during a treaty revision. The Lisbon Treaty originally started as a constitutional project at the end of 2001. It was followed up in 2002 and 2003 by the European Convention which drafted the Treaty and attempted to establish a Constitution for

²⁷ https://european-union.europa.eu/principles-countries-history/country-profiles_en

²⁸ JOSÉ M. MAGONE: *The Politics of Southern Europe: Integration into the European Union*. Westport Conn: Praeger. 2003.

²⁹ <https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a-3e68ff/6d24b681-9251-4e31-8246-6f6ada5bc5e9>

³⁰ <https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-maastricht-on-european-union.html>

³¹ <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-amsterdam>

³² <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-nice>

³³ <https://pace.coe.int/files/10200/html>

³⁴ STEFANO FELLA: *The Conference on the Future of Europe: proposals and next steps*, 2022. <https://commonslibrary.parliament.uk/research-briefings/cbp-9551/> (2023.02.20.)

³⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

³⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

Europe.³⁷ The failure of the ratification of the Constitution is important from our broader perspective of the integration as a whole and the role of Article 4(2) of the TEU in particular.

The Treaty that attempted to establish a constitution of Europe was signed on 29 October 2004 by the representatives of the 25 Member States at the Rome European Council. It was made necessary by the rapid enlargement of the EU, in particular the largest expansion of the EU in 2004.³⁸ The ultimate failure was due to the referendums held in the Netherlands and in France, which decided against its ratification, and, thus, effectively blocked the process.³⁹ The origins of art. 4(2) TEU actually lie in Articles I-5 of this Treaty establishing a Constitution for Europe.⁴⁰ The final report of Working Group V on complementary

³⁷ <https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>

³⁸ <https://eur-lex.europa.eu/EN/legal-content/summary/the-2004-enlargement-the-challenge-of-a-25-member-eu.html>

³⁹ ROBERT PODOLNJAK: Explaining the Failure of the European Constitution. A Constitution-Making Perspective, *Collected Papers of Zagreb Law Faculty, Zagreb Law Faculty*, 57/2007, Iss. 1. 57.

⁴⁰ Article 1

Establishment of the Union

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competence to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives and shall exercise in the Community way the competence they confer on it.

2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

Article 2

The Union's values.

The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity, and non-discrimination.

Article 3

The Union's objectives

1. The Union aims to promote peace, its values, and the well-being of its people.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.

3. The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advances.

competence⁴¹ supports reading the national identity clause and the essential state function clause as having a close relationship.⁴² Under the title of “Principles of the Exercise of Union Competence”, the Working Group formulated an aim to clarify the EU “respects certain core responsibilities” of the Member States by “elaborating the fundamental principle” with respect to their national identities.⁴³

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights.

It shall promote economic, social, and territorial cohesion, and solidarity among Member States.

The Union shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.

5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competence is attributed to the Union in the Constitution.

Article 4

Fundamental freedoms and non-discrimination

1. Free movement of persons, goods, services and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the provisions of the Constitution.

2. In the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 5

Relations between the Union and the Member States

1. The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.

2. Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.

⁴¹ Online access: at: <https://ec.europa.eu/dorie/fileDownload.do;jsessionid=jhJXJy2Wp3jhy-lywDtTQBbm2TkDIQ2MpPwnnzFyQcq4GGKIH7qw!469751194?docId=281339&cardId=281339> (2023.02.20.)

⁴² B. GUASTAFERRO: Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause. *Yearbook of European Law* 263, 2012. 271–285.

⁴³ Final Report of Working group V cit. 10.

The Working Group has defined two areas of core national responsibilities,⁴⁴ with “fundamental structures and essential functions of the Member States, notably their political and constitutional structure. Most importantly, it includes regional and local self-government, their choices regarding language, national citizenship, territory, the legal status of churches and religious societies, national defence and the organization of armed forces”.⁴⁵

2. ESSENTIAL STATE FUNCTIONS

As has been stated in Article 4(2) of the Treaty on the European Union, examples of essential state functions are *„ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”*. Interestingly, territorial integrity was also a part of the definition of sovereignty. While the two concepts are also strongly related, essential state functions manifest powers derived from sovereignty. One example of essential state functions can be found in one of the decisions of the Conseil d’État (Council of State) in 2020. The function plays an important role in curbing the growing powers of the European Union, and Member States use it as a shield against fulfilling an obligation imposed by the EU. The Council of State has established that the national constitution is the highest norm of the national legal order,⁴⁶ and it can “clarify” situations in which EU law does not include guarantees according to national constitutional requirements. This shows how important the specified essential state functions have become. In my view, their importance will only grow after the Convent⁴⁷ is about to take place in the EU.

In the context of the European Union, the concept of essential state functions is presented in Article 4(2) of TEUA few of them are named as examples of ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. It is stressed that, in particular, national security remains the sole responsibility of each Member State. While the case law relating to these issues is not particularly broad, the advocate general has had thoughts about the concept of essential state functions on several occasions. The open-ended

⁴⁴ Some believe that national identity and essential state functions are part of the same concept and goals.

⁴⁵ Final Report of Working group V cit. 12.

⁴⁶ Decision n° 393099, <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-21/393099>

⁴⁷ <https://www.europarl.europa.eu/news/en/press-room/20220603IPR32122/parliament-activates-process-to-change-eu-treaties>

nature of essential state functions makes it an interesting subject to research, particularly when it comes to how cases could grab certain aspects of the issue against federal aspirations or just as a basis for disapplying EU regulations.

Related to these named examples of functions which are deemed essential on the EU level, I shall examine their current standing and meaning one by one. Firstly, I shall focus on national security, as it is stressed twice in the text of the regulation. Afterwards, territorial integrity will take center stage as a topic of discussion. To close these named examples, I shall discuss the state's duty of maintaining law and order.

The EU is currently facing increasing threats and challenges, ranging from conventional to transnational threats including hybrid threats, cyber-attacks and conflicts in its immediate vicinity and beyond. Unfortunately, these are not the only issues that which the EU must respond to. Climate change is exacerbating conflicts and instability.⁴⁸ This is why working together has taken precedence.

Until recently, the goal has been that the EU must be able to act autonomously without the United States. This meant that the primary aim of strategic sovereignty should be protecting EU Member States and asserting common European interests. However, this has been incredibly difficult due to Europe's new confrontational security order and the fact that its strategic dependence on the US is likely to grow. Strategic sovereignty must therefore include the pursuit of Europe's collective defence capability in close cooperation and coordination with the EU and the North Atlantic Treaty Organization (NATO).

As for the current occurrences: EU Member States as well as European NATO partners will have to shoulder considerable costs to decouple themselves from Russia in terms of energy policy. This will leave significantly less attention and fewer resources for policy areas that are not directly related to this challenge.⁴⁹ The EU and the NATO must clarify how they will adapt their respective enlargement processes under the conditions of a confrontational security order. Primarily, Sweden and Finland are debating whether to join the alliance.⁵⁰ So far, there has been little indication that other non-aligned EU states such as Ireland, Malta, and Austria are also seriously reconsidering their status.⁵¹

⁴⁸ EU security, defence and crisis response, A Security and Defence policy fit for the future, 24.08.2021.

⁴⁹ See more: GUSTAV GRESSEL: In Europe's defence: *Why the EU needs a security compact with Ukraine*, European Council on Foreign Relations. Policy Brief, 30 September 2022.

⁵⁰ MINNA ÅLANDER – MICHAEL PAUL: Moskau bedroht die Balance im hohen Norden Angesichts der russischen Kriegspolitik rücken Finnland und Schweden näher an die Nato. *Stiftung Wissenschaft und Politik Comment*, 2022/C 24, 31.03.2022, doi:10.18449/2022A19.

⁵¹ NICOLAI VON ONDARZA – MARCO OVERHAUS: Rethinking Strategic Sovereignty German Narratives and Priorities for Europe after Russia's Attack on Ukraine. *Stiftung*

The Commission's ambition in this field has a long history. Between the 1960s and 1980s, there were several proposals, mainly in the defence-industrial field.⁵² In the late 1990s and early 2000s intergovernmental development⁵³ became the central theme. It was only with the Commission's 2009 'Defence Package'⁵⁴ that which the Commission's new role became a viable option. The Package's two directives, combined with the 2007 European Security Research Programme,⁵⁵ made the development of the European Defence Fund possible. By 2017 the Commission launched its work on Military Mobility.⁵⁶

However, national security comes first for all Member States, as they view it as a part of their sovereignty. The concept of sovereignty is complementary to constitutional identity, but it also means much more than that. A sovereign state governs itself independently of any foreign power.⁵⁷ Sovereignty is defined as a state having inviolable territorial integrity and political independence, the right to freely choose and shape its political, social and cultural system, as well as the obligation to fulfil its international obligations in good faith to live in peace with other states.⁵⁸ This concept has both an external and an internal side. The internal side of state sovereignty means the ability of the state to create and apply its own legal order, as well as to exercise supreme authority over the persons and objects within its territory.⁵⁹ External sovereignty, on the other hand, provides that the state is an independent actor in international life, there is no other authority above it, and its decisions do not depend on the approval

Wissenschaft und Politik Comment, 2022/C 31, 28.04.2022, doi:10.18449/2022C31.

⁵² JOCHEN REHRL (ed): *Handbook on CSDP The Common Security and Defence Policy of the European Union*. Fourth Edition, Federal Ministry Republic of Austria, Volume I, ISBN: 978-3-902275-51-6.

⁵³ AMELIA HADFIELD – SIMON LIGHTFOOT: Shifting priorities of the EU as a development actor: context and consequences. *Global Affairs*, 7:4, 2021, 487–504, DOI: 10.1080/23340460.2021.1985400.

⁵⁴ New Directive on defence and security procurement enters into force, 25 August 2009.

⁵⁵ D. BIGO – J. JEANDESBOZ – M. MARTIN-MAZE – F. RAGAZZI: *Review of Security Measures in the 7th Research Framework Programme FP7 2007-2013*. Brussels, European Parliament, 2014. DOI:10.2861/62647

⁵⁶ The European Union is stepping up efforts to improve military mobility, 10 November 2017.

⁵⁷ JOHN BOUVIER: *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law*, Childs & Peterson, 1856.

⁵⁸ ANDRÁS BACK (ed.): *Közigazgatási szakvizsga: Kül- és biztonságpolitikai ágazat*. Budapest, Magyar Közigazgatási Intézet, 2002.

⁵⁹ NÓRA CHRONOWSKI – JÓZSEF PETRÉTEI: *Szuverenitás*. In: ANDRÁS JAKAB – MIKLÓS KÖNCZÖL – ATTILA MENYHÁRD – GÁBOR SÜLYÖK (eds.): *Internetes Jogtudományi Enciklopédia Alkotmányjog rovat*, rovat szerkesztő: Bodnár Eszter, Jakab András, 2020.

or agreement of others.⁶⁰ These concepts and questions will be further explored in the section dealing with the concept of constitutional identity.

The basic political and constitutional structures of a Member State form a framework within which the issue of essential state functions can be interpreted.⁶¹ The exact nature of these functions is important when it comes to the Member States' competence in which the transfer of competence is involved about EU decision-making processes.⁶²

Additional essential state functions besides national security include ensuring the territorial integrity of the State and maintaining law and order.

Territorial integrity and political independence are the two core elements of statehood. Territorial integrity refers to the territorial 'oneness' or 'wholeness' of the State. It protects the territorial framework of the independent State and is an essential foundation of the sovereignty of States.⁶³ This concept is ultimately tied to the principle of the right of nations to self-determination.⁶⁴ The State, to exercise its sovereignty to the fullest extent, should possess the following qualifications: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.⁶⁵ Of these requirements, a defined territory is what this function protects.

It is especially important to mention this specific essential state function when we talk about EU integration issues. It is because there are real-life disputes even today on the question to which nation a certain territory belongs to. For example, since the 1991 break-up of Yugoslavia, there has been a dispute over the contested northern Adriatic waters and a sliver of land between Croatia and Slovenia. The two sides eventually agreed to hand the matter over to the international tribunal in The Hague and the agreement allowed Croatia to join the EU in 2013. The deal was included in Croatia's accession agreement to stop

⁶⁰ BARNABÁS KISS: A nemzetközi jog hatása a szuverenitás „klasszikus” közjogi elméletére Szabó József munkássága tükrében. *Acta Universitatis Szegediensis, Acta juridica et politica*, 77/2014. 313–322.

⁶¹ STELIO MANGIAMELI: The European Union and the Identity of Member States. *L'Europe en Formation*, 369/2013, Iss. 3. 151–168.

⁶² SACHA GARBEN – INGE GOVAERE (eds): *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future*. London, Hart Publishing, 2017.

⁶³ SAMUEL K.N. BLAY: Territorial Integrity and Political Independence. *The Max Planck Encyclopedia of Public International Law Volume IX*, 2012. 859–870.

⁶⁴ AĞALAR ABBASBEYLİ: The territorial integrity of the states and the principle about “the right of nations to self-determination” in the modern era. *The Journal of International Social Research*, 10/2017, Iss. 49. 62–67.

⁶⁵ FRANCIS ANSELM: Threats to territorial integrity. In: A.T. BRYAN – J.E. GREENE – T.M. SHAW (eds.): *Peace, Development and Security in the Caribbean*. London, Palgrave Macmillan, 1990. 224–240.

Slovenia from vetoing its membership. However, the recommendation by the arbitration tribunal was never implemented by Zagreb. In 2017 Slovenia argued that Croatia was violating EU law and as such could be sued.⁶⁶

The third essential state function that was named in the text of the Treaty on the European Union is maintaining law and order. Law and order denote a negative form of peace secured among the members of a given social or political order. Minimally, it is an appeal to restore public order to conditions classed as disordered or to defend it against potential or articulated threats. Although social and political scientists tend to concur that it is determined by tradition and convention, for some, the fact of disorder is sufficient to uphold projects for law enforcement and order maintenance. Others emphasize that facts about disorder are socially made. Law and order are not neutral categories for the interpretation of disorder, let alone for intervention. It is an ideological or discursive construct that warrants scrutiny. For still others it is not just an element of ideology but a component in the technology of neoliberal government which needs to be studied in terms of its functions and structural effects. Some question whether law ought to be conjoined with order at all. They argue that no stable or necessary relation exists between the two and that the very idea of law and order is incongruous, that is to say, law and disorder or law and order are opposed to one another. Law and order is not on this account a solution to all disorder, only those types that call for a specific policy response because they disturb or threaten to disturb the public peace, or involve face-to-face conflict among two or more persons.⁶⁷ This function of the state ties back to the idea of a social contract, whereby the most important reason behind the existence of a state is to facilitate the ability of its citizens to live together in peace.⁶⁸

3. FURTHER POSSIBLE ESSENTIAL STATE FUNCTIONS

A general overview of the most basic state functions has been presented. Now, let me identify what else could be counted among these functions. We must

⁶⁶ CHRISTOPHER M. HARTLEY: Under the Istrian Sun: Navigating international law solutions for the Slovenia-Croatia Maritime Border Dispute. *Boston University International Law Journal*, 38/2020, Iss. 2. 286–321.

⁶⁷ NICK CHEESMAN: Law and Order. *Annual Review of Law and Social Science*, 18/ 2022. 263–281.

⁶⁸ G. BURNYEAT – M. SHEILD JOHANSSON: An anthropology of the social contract: The political power of an idea. *Critique of Anthropology*, 42(3) 2022. 221–237. <https://doi.org/10.1177/0308275X221120168>.

distinguish between necessary, optional, essential, and non-essential functions.⁶⁹ The necessary functions are those that all governments must perform to justify the existence of the state they effectively govern. In other words, they capture the essence of statehood, so they could be called essential state functions. These include, for example, the maintenance of peace, order and security, the protection of persons and property, and the preservation of external security. These are the original primary functions of the state.⁷⁰ Meanwhile, the optional, or non-core, functions of the state are aimed at improving the general welfare – and can be performed by private organisations. These include public welfare, public education, industrial regulation and health and safety standards. Above all, the functions of the state are to preserve legal order and to protect all rights of individuals, families, private associations, and the church. It shall also aim to promote, by positive means, the general welfare of all those goods which contribute to the attainment of this end.⁷¹

Based on this classification, the question is what could be identified as necessary.

In my opinion, we should look at those functions that heavily affect the integration process of the EU when we attempt to find an answer to the relevant questions. First of all, due to the increasing importance of media, especially social media, the effective regulation of this area within the framework of necessary legal frameworks should be considered an essential function of the state. Similar tasks of countries include protecting the privacy and personal data of their citizens as well as protecting them from misinformation. An interesting further question is posed by the rapid spread of Artificial Intelligence, which could be used and used to spread false information to the public. In this case as well as in the aforementioned two phenomena, the problem is global. This is why we must create solutions on an international level. However, the actual effective action must be taken on the level of each state, as they are the ones who have information about the way their citizens think, consume media, approach issues of privacy, etc. This point of view is unfortunately largely overlooked in the process of integration and sharing competence in the European Union. However, we must consider in our discussion what the concept of essential state functions might entail.

⁶⁹ JAMES WILFORD GARNER: *Introduction to Political Science: A Treatise On the Origin, Nature, Functions, and Organization of the State*. Sagwan Press, 2018. 318.

⁷⁰ LUCIUS HUDSON HOLT: *An Introduction to the Study of Government*. Forgotten Books, 2017. 285–305.

⁷¹ THEODOR MEYER: *Institutiones Iuris Naturalis, Seu, Philosophiae Moralis Universae: Ius Naturae Generale Editio 2. Emendata*. 1906, Nabu Press, 2010.

These are new problems but will require cooperation. Therefore, it is worth illustrating that while Member States should become stronger in performing their functions and exercise their sovereignty, it is necessary that their integration and shared responsibility remain on an EU level.

4. CONCLUSION

The answer to the questions imposed by new challenges in the EU requires a strong common answer from all Member States. To achieve the best possible scenario of cooperation and positive integration, we should lay down the groundwork of what Member States must carry as their own responsibility and right, how they can effectively perform their duties to their citizens and what the complicated concept of essential state functions even entails. With the Convent approaching and discourse strengthening around the issue of the European Union's future, our only solution is to move forward with specifying the goals of states as well as of the EU itself. This is why essential state functions may just come to the forefront of undoubtedly influential discussions during the next few years.

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