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The History of (Essential) State Functions²

Abstract

Article 4(2) of the Treaty on European Union plays a central role in balancing the exercise of European Union competences with respect for the national identities and essential state functions of the Member States. Despite its constitutional significance, the precise scope and meaning of “essential state functions” remain contested. This paper adopts a historical and theoretical approach to clarify the origins and normative foundations of the concept, tracing its intellectual development from early theories of sovereignty through Enlightenment constitutional thought to modern democratic state theory. Building on this historical analysis, the paper applies a post-functionalist framework informed by the concept of practical identity to explain how essential state functions operate as expressions of national and constitutional identity within the European constitutional order. It argues that essential state functions are not merely administrative competences but normative practices through which states sustain their constitutional self-understanding and democratic legitimacy over time. The study further demonstrates that the deliberate openness of Article 4(2) TEU – particularly the relationship between constitutional structures and essential state functions – provides the flexibility necessary to accommodate constitutional diversity within the Union, while also giving rise to interpretative challenges that continue to shape the evolving balance between European integration and Member State autonomy.

Keywords: constitutional identity, essential state functions, sovereignty, EU competences

I. Introduction

We can only understand the intricacies of a phenomenon if we are able to map out its origins, the intent and reason behind its existence and its standing in our current time. For this reason, I shall take a historical approach to the concepts of sovereignty and essential state functions, with a particular emphasis on how the current standing of this concept came to be in the European Union. Through this work, my aim is to introduce the thoughts of scholars throughout history regarding the role and functions of the state that serve as a common theoretical core of the “essential functions” debate around the EU, despite state-specific differences, followed by questions of the EU as an entity.

This topic is vital because Article 4(2) TEU³ serves as a cornerstone of the European Union’s constitutional framework, balancing the exercise of EU competences with respect for the constitutional identities and essential state functions of the Member States. However, despite the importance of the aforementioned provision, its exact scope remains contested. It is

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³ The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including 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.

a fact that the three examples given in the text (ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security) are merely examples, and there are more state functions that could be considered essential in nature. Thus, to understand what the definition of “essential state functions” may entail in today’s European Union, we must first take a look at the original intent of the codification and draw our conclusions from there.

1.1. Scholarly Approaches Throughout History

Constitutional identity, national identity, and the nature of state functions have always been contested subjects and have raised questions.⁴ The concept of sovereignty is closely related to these topics, especially to the definition of the nature of essential state functions. Throughout most of history, sovereignty was derived from a transcendent, divine source.⁵ Jean Bodin legitimized absolute power in the name of the ‘common good’ with his theory that sovereignty is absolute, permanent, and irrevocable.⁶ This way of thinking changed in the 17th century, and in Johannes Althusius’s work, the people already appear as the holders of political power – that is, holders of sovereignty.⁷

If we accept Althusius’s assumption, it becomes clear that the basis of sovereignty can only be a social contract, within which the exercise of power is a kind of mandate from the people – the holders of sovereignty. This leads us to the principle of popular sovereignty. But how do we define who ‘the people’ are? Every state necessarily has a population, which can be most simply defined as the community with the right to vote that participates in the creation of public authorities in that state.⁸

Among the theories of social contract, Thomas Hobbes’s *Leviathan* is worth mentioning, in which he defined sovereign power as absolute in order to ensure the survival of the state and the maintenance of social order and security.⁹ The idea of security was tied to citizens and their desire to be free from outside forces in this case, which is an early possible interpretation of national security being a vital reason for the existence of the state – i.e. an essential state function.

On the other hand, Jean-Jacques Rousseau sees the embodiment of popular sovereignty in the general will (*volonté générale*), a theory that continues to influence the constitutional structures and functions of the Member States of the European Union to this day.

Yet another theory that originated from the thinkers of the Enlightenment and is still valid today is Montesquieu’s theory of the separation of powers. In his understanding, there are three branches of power: legislative power, executive power relating to matters governed by international law, and judicial power. For the democratic functioning of the state, it is essential

⁴ Varga Zs., András – Berkes, Lilla: Constitutional Identity and Relations Between the European Union Law and the Hungarian Law. In Varga Zs. András – Berkes Lilla (ed.): *Common Values and Constitutional Identities – Can Separate Gears Be Synchronised?* Miskolc–Budapest, Central European Academic Publishing, 2023, pp. 165–223.

⁵ Arseni, Alexandru – Pozneacova, Veronica: The Concept of Sovereignty in the Political Philosophy; From Antiquity to the Contemporary Epoch. In *Humanities and Social Science Research*, Vol. 4, No. 3, 2021, pp. 1–15.

⁶ Bodin, Jean: *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*. Edited and translated by Julian H. Franklin, Cambridge University Press, Cambridge, 1992.

⁷ Jenei, György: A modern európai állam, állami szuverenitás, népszuverenitás. In *Köz-Gazdaság Review of Economic Theory and Policy*, 2018/4, pp. 124–137.

⁸ Rodríguez, Cristina M.: Noncitizen voting and the extraconstitutional construction of the polity. In *International Journal of Constitutional Law*, Volume 8, Issue 1, 2010, pp. 30–49.; Schanda, Balázs: Az államalkotó tényezők. In Trócsányi, László – Schanda, Balázs (szerk.): *Bevezetés az alkotmányjogba. Az Alaptörvény és Magyarország alkotmányos intézményei*, 5. átdolgozott kiadás, HVG-Orac, Budapest, 2016, pp. 109–115.

⁹ It is explicitly stated that a “Kingdome” is “an estate ordained by men for their perpetuall security against enemies, and want”. Hobbes, Thomas: *Leviathan* (szerk. Gaskin, J. C. A.). Oxford University Press, Oxford, 2008, p. 246.

that these branches of power are not concentrated in one hand and that they exercise mutual control over each other.¹⁰ The three branches of power also embody essential functions of the state, with the legislative branch creating codes of conduct by which citizens must live their lives, the executive branch making decisions on the future of the country and questions of international relations, and the judicial branch deciding on issues that come up between citizens or a citizen and the state. These are all necessary in order for a state to legitimately exist, serve its citizens, and ensure stability.

Montesquieu defines three types of government: a republic, where power is exercised by the whole or a significant portion of the people; a monarchy, where power is concentrated in the hands of one person; and despotism, where one person exercises power in a tyrannical manner, without any laws or rules.¹¹ According to Montesquieu, the most important task of the state is to guarantee freedom, which includes the expression of individual will and security. In this concept, we also find the precursor to the maintenance of public order as an essential function of the state.¹²

Benjamin Constant distinguished between the three branches of power outlined by Montesquieu and the power of the head of state (the “royal”) as a neutral branch of power.¹³ In Constant’s interpretation, this branch of power is a kind of guarantee, designed to resolve conflicts between the other branches of power. However, the head of state may be part of the executive branch in some systems (for example in the U.S.) or lack real powers to influence decision making (the King’s powers in the United Kingdom are mostly symbolic and ceremonial), therefore, this separate branch of power cannot be an essential function of a state.

Another question that has arisen in the past century is whether the press and the constitutional court can be interpreted as independent branches of power.¹⁴ However, I am of the belief that neither is an essential state function in and of itself. They play a vital part in our modern world, but their existence is not tied to the legitimate existence of the state. In fact, Győző Concha considers constitutional courts¹⁵ to be merely part of judicial activity, comparing the state to an organism with a unified will.¹⁶ According to him, this unified will consists of various elements and processes that represent the functions of the manifestation of the state’s will. These functions are themselves “powers” according to Concha, and the unified “sovereign will” consists of three elements: internal decision-making, which is carried out by the legislative function; external action, which is carried out through execution; and “final decision-making,” which sets these two other functions in motion.¹⁷ These three functions are also essential in nature, as they can be understood as the legislative and executive branch, together with decision-making of the people (for example through a referendum).

The functions of the state also play a role in Hans Kelsen’s theory. Among other things, he dealt with the democratic legitimacy of the exercise of sovereignty, recognizing that state power does not exist only in and for itself, but has tasks and goals that legitimize the state – and above all the holder of executive power – in the eyes of the society it governs. Such goals include promoting the common good and enforcing the public interest, protecting public order

¹⁰ Montesquieu, Charles-Louis de Secondat, baron de La Brède et de: A törvények szelleméről (ford.: Csécsy, Imre – Sebestyén Pál). Osiris Kiadó – Attraktor, Budapest, 2000.

¹¹ Montesquieu 2000: 56–68. p.

¹² Montesquieu 2000: 293. p.

¹³ Constant, Benjamin: A régiek és a modernek szabadsága. Atlantisz Kiadó, Budapest, 1997, 79. p.

¹⁴ Szmodis, Jenő: Az alkotmánybíróság és a hatalmi ágak kérdése. In De Iurisprudencia et Iure Publico, 2016/1. sz. <http://dieip.hu/wp-content/uploads/2016-1-09.pdf>

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¹⁶ Concha, Győző: Az államhatalmak megosztásának elvei, Magyar Jogászegyleti Értekezések, VIII. kötet, 2. füzet, Franklin-Társulat Könyvnyomdája, Budapest, 1892.

¹⁷ Constant, Benjamin: A régiek és a modernek szabadsága. Atlantisz Kiadó, Budapest, 1997.

and public safety, and the state's economic management, monetary reserve and distribution.¹⁸ Constitutional democratic state tasks include guaranteeing peace and security both externally and internally, ensuring the internal order and preservation (self-sustainability) of the state through the operation of appropriate institutions, and contributing to guaranteeing and shaping the living conditions of citizens and other residents within its territory.¹⁹

These tasks remain vital today when discussing the structure of a state, and they overlap significantly with the essential functions of the state mentioned above. As European integration progresses, the question of how to reconcile Member State sovereignty, respect for essential state functions, and the primacy of European Union law with the Union's common values and constitutional principles is becoming increasingly prominent.

Today, European Member States face complex challenges with technological, economic, financial, ecological, and demographic dimensions. Such challenges include the rapid spread of artificial intelligence, which is increasingly changing our world, and its significantly differing regulation across continents; natural disasters that are constantly occurring as a result of climate change; rampant inflation; and aging societies. It is increasingly difficult for individual states to face these challenges in our globalized world, which is the practical reason why cooperation between EU Member States is essential. Additionally, we must not forget the principle of sincere cooperation laid down in Article 4(3) TEU, which provides the constitutional framework for this balance by requiring the Union and the Member States to act in mutual respect and good faith in pursuing the objectives of the Treaties. At a time when many of Europe's most pressing challenges transcend national borders, this principle has become an essential foundation for effective and coordinated action while respecting the constitutional identities of the Member States.

1.2. A post-functionalist theory on national identity and essential state functions

Despite the EU's goal of ever-closer-union, we must also take a look at potential pitfalls of integration, as well as differences of sovereignty interpretations, which can oftentimes stem from differences in national and constitutional identity. Following a post-functionalist theory,²⁰ we must conceptualize national identity as '*practical identity*', shaping Member States' responses to these ever-present challenges. According to moral-philosopher Christine Korsgaard,²¹ practical identities are at the source of normativity. Her work elucidates the process of what she calls '*self-constituting practical identities*' as the major source of normativity. According to her philosophical teachings, identity and its present interpretation are at the basis of what people come to consider a right course of action. Thus, identity is placed at the source of normative action. The key to understanding how she thinks about national identity (of EU Member States) is to ascertain that she specified the issue as a part of '*practical identity*'.

The concept of practical identity implies a constant interplay between purpose and action in defining who an actor is. For an individual, a practical identity might be that of a human being, for example: someone can be a man or woman, a person belonging to a religion, profession, or someone else as a friend or family member. These characteristics of belonging to someone or something give an individual being their identity-forming blocks. However, an

¹⁸ Téglási András: Az állam szervezete. Dialóg Campus Kiadó, Budapest, 2018, p. 17.

¹⁹ Petrétai, József: Az alkotmányos demokrácia alapintézményei. Dialóg Campus, Budapest–Pécs, 2009, p. 266.

²⁰ Hooghe, Liesbet – Marks, Gary: A Postfunctionalist Theory of European Integration; From Permissive Consensus to Constraining Dissensus. In *British Journal of Political Science*, Volume 39, Issue 1, 2009, p. 1–23.

²¹ Korsgaard, Christine M.: *Self-Constitution: Agency, Identity, and Integrity*. Oxford University Press, Oxford, 2009.

autonomous actor must also specify what it is to be (universally) a good friend, employee, or citizen.

For Korsgaard, autonomous moral behavior means that we must identify the relevant practical identity (in the case of states, what it is to be a state), and then pair this with what it means to be a “good” state – what purpose and action can drive the actor (the state) to having a good practical identity. Thus, a practical identity essentially means: how social actors would describe a good or virtuous version of themselves.

Since purpose includes the notion of identity, a given action over time by definition leads to ‘*self-constitution*’. According to Korsgaard, the reason an actor will choose to act with moral regard is because they respect the integrity of their own identity. Therefore, the primary moral imperative on an actor is to engage in ‘*self-constitution*’: to select between courses of action that constitute that actor as a good state over time. Ultimately, the practical identity of an actor – and its self-constitution – is the only source of normativity for an autonomous, sovereign actor.²²

This concept naturally means that for a state, practical identity is historically and culturally constituted, based on a set of national ideas²³ which shape a nation’s self-image based on a collective’s experience.²⁴ The collective narrative that emerges from this political interpretation constitutes a state’s national identity,²⁵ and if it is enshrined in their constitution, it becomes part of their constitutional identity. Therefore, a state’s practical identity is usually defined as its national narrative, i.e. its national identity. If we apply this concept to essential state functions, we can also see that practical identity can be represented through practical implementation of functions in a state. This ties back to the idea that essential state functions exist to protect a nation’s “soul”, i.e. its identity.²⁶

Ringmar defines national identity as “national stories”,²⁷ while Berenskoetter calls it “national biography”,²⁸ and Subotic “biographical narratives”.²⁹ Whatever we call the constituents of a nation’s identity, they heavily influence the self-constitution process.³⁰ In countries, any meaning of past events, such as wars, conquests and losses, is constantly renegotiated via re-narration. There is also moral meaning created through these invocations, that define national identity.

The concept of ‘*self-constituting practical identity*’ also provides a useful framework for understanding the relationship between the Member States and the European Union. From this perspective, the constitutional identities protected by Article 4(2) TEU are not static collections of historical characteristics but evolving practical identities, continuously constituted through the exercise of essential state functions and democratic self-government. Respect for these identities therefore does not stand in opposition to European integration; rather, it forms one of

²² Korsgaard, Christine M.: *The Sources of Normativity*. Cambridge University Press, Cambridge, 1996.

²³ Legro, Jeffrey W.: *The Transformation of Policy Ideas*. In *American Journal of Political Science*, Volume 44, Issue 3, 2000, pp. 419–432.

²⁴ Anderson, Benedict: *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Verso, London, 1983.

²⁵ Olick, Jeffrey K. – Robbins, Joyce: *Social Memory Studies; From „Collective Memory” to the Historical Sociology of Mnemonic Practices*. In *Annual Review of Sociology*, 1998/24, pp. 105–140.

²⁶ Tribl, Norbert: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben*. PhD értekezés, Szeged, 2020.

²⁷ Ringmar, Erik: *On the Ontological Status of the State*. In *European Journal of International Relations*, 1996/4, pp. 439–466.

²⁸ Berenskoetter, Felix: *Parameters of a National Biography*. In *European Journal of International Relations*, 2014/1, pp. 262–288.

²⁹ Subotic, Jelena: *Narrative, Ontological Security and Foreign Policy Change*. In *Foreign Policy Analysis*, Volume 12, Issue 4, 2016, pp. 610–627.

³⁰ Balatoni, Mónika: *Az állam, a nemzeti ünnepek és szimbólumok szerepe a nemzeti identitás, önreprezentáció alakításában*. PhD-értekezés, NKE Közigazgatás-tudományi Doktori Iskola, Budapest, 2025.

the constitutional principles upon which the Union itself is founded. The principle of sincere cooperation further requires that Member States exercise their essential state functions in a manner consistent with the common values and objectives of the Union, while the Union, in turn, must respect the constitutional diversity through which those identities are expressed. Essential state functions can thus be understood as the practical manifestations of a Member State's constitutional identity, enabling states to preserve their self-constitution while participating in an increasingly integrated European legal order.

II. The integration of the European Union

In order to fully understand how the EU came to be and what influence it had on the history of its Member States' essential state functions, as well as what these functions entail, we must briefly take a look at the process of integration through a historical method. In addition, it is vital to talk about the failed attempt at drafting a constitution for the EU in 2004, as precursors of Article 4(2) TEU can be found in the text.

It is important to note that when the idea of European integration was first formulated,³¹ it was intended to be grounded at the political and cultural level.³² Of course, there were many earlier attempts to unify Europe,³³ but these either failed or were short-lived.³⁴ Finally, Robert Schuman's speech in 1950³⁵ opened the way to integration, and in 1957 the Treaties of Rome were signed, creating the European Economic Community and the European Atomic Energy Community.³⁶ Atomic energy is a source of nuclear infrastructure, and is of critical importance in the EU to this day. Therefore, efforts to keep atomic energy safe can be considered under national security issues – part of essential state functions, just like economic considerations that ensure livable conditions, empowering law and order.

Throughout the history of integration, cooperation has grown ever closer. In recent years, we have reached a point where a collective consciousness has emerged that can identify with Europe, its values and its diversity.³⁷ Today, EU membership is also seen as a secondary identity for Member State citizens, mostly among the young and the more formally educated.³⁸ While there is no true pan-European identity per se (yet), the main thing that is missing in order to talk about a constitutional identity for the EU is still the constitution itself, as well as the constitutional self and subject.³⁹ In other parts of the world, being European is underlined with certain common cultural aspects, but if we dig deep within EU Member States, we will see a

³¹ Monnet, Jean: Az Európai Unió megszületése mögött meghúzódó egyesítő erő. https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers/jean-monnet_hu (date of download: 2026.05.21.)

³² Pintér, Tibor: Az európai integráció; gazdasági és politikai alapú elméleti megközelítések. In Polgári Szemle, 13. évf. 4–6. szám, 2017, pp. 341–364.

³³ Abbot Charles de Saint-Pierre initiated the creation of a borderless union of 18 sovereign states, with a common treasury and a single economy. de Saint-Pierre, Charles-Irénée: *Projet pour perfectionner l'éducation*. Briasson, Paris, 1728.

³⁴ Fábrián, Attila: Az integráció elmélete. Nyugat-magyarországi Egyetem Kiadó, Sopron, 2011.

³⁵ Schuman Plan – European history, <https://www.britannica.com/event/Schuman-Plan>

³⁶ Halmai, Péter: Európai gazdasági integráció. Dialóg Campus, Budapest, 2020.

³⁷ Göncz, Balázs: Európai identitás. In *Pro Minoritate*, 2011/1. sz. pp. 79–95.; Molnár Aliz: Az európai és a nemzeti identitás formálódó szerepe. In *Prosperitas*, 2018/1. sz. pp. 114–124.

³⁸ Fligstein, Neil – McAdam, Doug: The Field of Theory. In *Contemporary Sociology: A Journal of Reviews*, 2014/3.

³⁹ Rosenfeld, Michel: *The Identity of the Constitutional Subject; Selfhood, Citizenship, Culture, and Community*. Routledge, London, 2009.

significantly weaker feeling of belonging than expected of a unified entity.⁴⁰ From some researchers' point of view, the EU Treaties, primary sources of law, could be described as a quasi-constitution.⁴¹ However, there have been attempts at constitutionalism in the EU,⁴² which sought to create a *de facto* charter document.⁴³

If a single European constitution were to be created in the future,⁴⁴ 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 be in conflict with the identity of the states, and 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 international organization, whose legal and political reality differs in a number of important respects from other international organizations.⁴⁵ From a legal perspective, the unconditional application of EU standards is essential for the effectiveness of international cooperation in the current framework.⁴⁶ I wonder to what extent supranationalism and the inclusion of the primacy of EU law⁴⁷ in a constitution would limit the 'legroom' of the constitutions of the Member States,⁴⁸ 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 belonging brought on by national identity.⁴⁹

There is a separation between the external and internal aspects of identity, and the relevant provision of the TEU is better understood as the external aspect of constitutional identity.⁵⁰ The protection of the national identity of the Member States was already introduced by the Maastricht Treaty, and the equality of Member States before the Treaties and respect for the fundamental functions of the State are specific to the Lisbon Treaty.⁵¹ In addition, the original idea was that more should have been included in the Treaty, but fewer examples from the proposal were listed in the actual provision.⁵²

⁴⁰ Bruhagen, Åsa: European Identity-Building and the Democratic Deficit; A Europe in Search of its 'Demos'. Master's Thesis. Jönköping International Business School, Jönköping, 2006.

⁴¹ Judgment of the Court of 23 April 1986, Parti écologiste "Les Verts" v European Parliament, Case 294/83, ECLI:EU:C:1986:166, ECR 1986 I-01339

⁴² Treaty establishing a Constitution for Europe, https://www.europarl.europa.eu/Europe2004/index_en.htm

⁴³ Arató, Krisztina – Lux, Ágnes: Az Európai Unió alkotmányozási kísérlete. In Jakab, András – Körösenyi, András (szerk.): Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések. Új Mandátum Könyvkiadó – MTA Társadalomtudományi Kutatóközpont Politikatudományi Intézet, Budapest, 2012, pp. 177–199.

⁴⁴ Schneider, Friedrich: Is a Minimal Federal European Constitution for the European Union Necessary?; Some Preliminary Suggestions Using Public Choice Analysis. In *Homo Oeconomicus*, 2023/40, pp. 61–78.

⁴⁵ Simon, Denys: Les fondements de l'autonomie du droit communautaire. In *Société française pour le droit international* (dir.): *Droit international et droit communautaire, perspectives actuelles*. A. Pedone, Paris, 2000, pp. 207–249.

⁴⁶ Kruszslisz, Péter: A nemzeti alkotmányosság tagállami alapjai; a nemzeti szuverenitás és a nemzeti alkotmányos önazonosság, különös tekintettel a francia jogelméletre és a magyar joggyakorlatra. Doktori (PhD) értekezés, Szeged, 2019.

⁴⁷ As established by the Court of Justice of the European Union in *Costa v. ENEL* (Case 6/64) and *Internationale Handelsgesellschaft* (Case 11/70), the primacy of European Union law extends even over national constitutional provisions.

⁴⁸ For scholarly views on the interpretation of this, see: Szabó, Patrik: A felszín alatt; Adalékok az alkotmányos identitás elméleti és dogmatikai problémáihoz. In *Közjogi Szemle*, 2019/3, p. 43.

⁴⁹ For example: A Comprehensive Federal Constitution for Europe by the Federal Alliance of European Federalists
⁵⁰ Tribl, Norbert: Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben. PhD értekezés, Szeged, 2020.

⁵¹ For the origin of the term, see: Angyal, Zoltán: Az Európai Alkotmányszerződés ratifikációs válsága, avagy a közvetlen demokrácia és az integráció kollíziója. In *Publicationes Universitatis Miskolcensis Sectio Juridica et Politica*, 2007/1, pp. 175–190.

⁵² Blanke, Hermann-Josef – Mangiameli, Stelio (eds.): *The Treaty on European Union (TEU) A Commentary*. Springer, Heidelberg – New York – Dordrecht – London, 2013, p. 195.

Integration has been a more and more pressing issue, with steps taken to make it a political cooperation in addition to an economic one. As I have already mentioned, after the 1951 signing of the ECSC Treaty,⁵³ a new beginning dawned on 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 Rome 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.⁵⁴ The United Kingdom joined on 1 January 1973, together with Denmark and Ireland.⁵⁵ Since then, the UK has taken an electorate vote in 2016 to leave, and left the EU on 31 January 2020, which is known as “Brexit”.⁵⁶ Consequently, there are now 27 Member States of the EU. Greece became a member state in 1981, and Portugal and Spain joined in 1986.⁵⁷ On 17 February 1986 nine Member States signed the Single European Act (SEA),⁵⁸ which extended the EU’s powers. This was further extended by The Treaty on European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, which 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.⁵⁹ The powers of the EU were further increased by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997, entered into force on 1 May 1999. The Treaty of Nice was signed on 26 February 2001 and entered into force on 1 February 2003, followed by the Convention on the Future of Europe.

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009, and it gave the EU full legal personality. It is made up of two Treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty for the first time clarified the powers of the Union. Union competences can now be handed back to the Member States in the course of a Treaty revision. The Lisbon Treaty originally started as a constitutional project at the end of 2001 and was followed up in 2002 and 2003 by the European Convention which drafted the Treaty establishing a Constitution for Europe.⁶⁰ This Constitution’s failure to ever enter into force is important from the broader perspective of how we now view integration as a whole and the role of Article 4(2) TEU in particular.

The Treaty establishing a Constitution for Europe, signed on 29 October 2004 by the representatives of the 25 Member States at the Rome European Council, was made necessary by the rapid enlargement of the EU, in particular the largest expansion of the EU in 2004. The reason why it ultimately failed were two referendums held in the Netherlands and in France, that came out against ratifying it, thus effectively blocking its path.⁶¹ The origins of Art. 4(2) TEU actually lie in Articles 1-5 of this Treaty establishing a Constitution for Europe. These articles establish the European Union as a voluntary union of states and citizens that confers

⁵³ Treaty establishing the European Coal and Steel Community, ECSC Treaty.

⁵⁴ Treaty of Brussels (Merger Treaty).

⁵⁵ Ireland and Denmark in the EU: Fiftieth anniversary of accession.

⁵⁶ Whiteley, Paul: Insight: Why Britain really voted to leave the European Union. <https://www.essex.ac.uk/research/showcase/why-britain-really-voted-to-leave-the-european-union> (date of download: 2026.05.26.)

⁵⁷ Magone, José M.: The Politics of Southern Europe. Praeger, Westport, Connecticut, 2003.

⁵⁸ The signing of the Single European Act.

⁵⁹ Treaty of Maastricht on European Union.

⁶⁰ The Treaty of Lisbon.

⁶¹ Podolnjak, Robert: Explaining the Failure of the European Constitution; A Constitution-Making Perspective. In Collected Papers of the Faculty of Law in Zagreb, Vol. 57, No. 1, 2007, pp. 119–167.

competences on the EU to pursue shared objectives, while preserving Member State sovereignty in essential areas. The Union is founded on common values such as human dignity, democracy, the rule of law, equality, and human rights, and aims to promote peace, prosperity, sustainable development, social justice, and an internal market based on free movement and non-discrimination. At the same time, the EU must respect the national identities and essential state functions of its Member States, including territorial integrity and internal security, and operate according to the principle of loyal cooperation. Overall, the provisions enshrined in this document balance supranational integration with constitutional pluralism and state autonomy.⁶²

The final report of Working Group V on complementary competences⁶³ supports reading the “national identity clause” and the “essential state function clause” as having a close relationship.⁶⁴ 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” of respect to national identities of them.⁶⁵ The Working Group has defined two areas of core national responsibilities,⁶⁶ with “*fundamental structures and essential functions of the Member States, notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defense and the organization of armed forces*” being the most important.⁶⁷

In my reading, political and constitutional structure, including regional and local self-government is a category within fundamental structures (constitutional identity) of the state, while choices regarding language, national citizenship, territory, legal status of churches and religious societies, national defense and the organization of armed forces are essential (Member State) functions. Historical reading suggests that the drafters intended to merge structural and functional dimensions of statehood into a single, composite idea under constitutional identity, but this fusion blurs analytical boundaries. In particular, language policy might be better understood as a structural element, reflecting the cultural and constitutional foundations of a polity; whereas the organization of armed forces is an essential function, tied to the performance of sovereignty and security. Citizenship, meanwhile, occupies a hybrid position: it is structural in defining membership within the political community, yet functional because it determines who exercises and benefits from state authority. Similarly, churches and religious societies reflect both structure (as part of the constitutional order and tradition) and function (in their social role and regulatory implications). However, to our current understanding, determining the structure of government, choosing an official language, and deciding on where citizens may belong (churches, territory, defense) are all essential state functions. The purpose of these functions is to protect a vital (and practical) national core identity, strengthening a reading of Article 4(2) TEU as suggesting that essential state functions exist to protect constitutional identity.

However, by failing to clearly distinguish between structures and functions, the Working Group’s formulation introduced interpretive uncertainty into Article I-5 of the Constitutional Treaty – and, subsequently as well as consequently, into Article 4(2) TEU. This vagueness

⁶² Articles 1-5 of Treaty establishing a Constitution for Europe.

⁶³ Available at: <https://ec.europa.eu/dorie/fileDownload.do;jsessionid=jhJXJy2Wp3jhylywDtTQBbm2TkD1Q2MpPwnnzFyQcq m4GGKIH7qw!469751194?docId=281339&cardId=281339>

⁶⁴ Guastafarro, Barbara: Beyond the Exceptionalism of Constitutional Conflicts; The Ordinary Functions of the Identity Clause. In Yearbook of European Law, Volume 31, Issue 1, 2012, pp. 263–318.

⁶⁵ Final Report of Working group V.

⁶⁶ Some believe that national identity and essential state functions are part of the same concept and endgoals. For further information, see: Guastafarro, Barbara: Beyond the Exceptionalism of Constitutional Conflicts; The Ordinary Functions of the Identity Clause. In Yearbook of European Law, Volume 31, Issue 1, 2012, pp. 285–286.

⁶⁷ Final Report of Working group V.

complicates efforts to understand the intricate links between constitutional identity and essential state functions. When identity-related competences are ambiguously categorized, Member States can invoke the national identity clause to shield a wide range of policies from Union scrutiny, including those not genuinely structural or essential. Thus, what began as a protection of core statehood risks expanding into a general clause of national exemption.

III. Conclusion

The historical record shows that the Working Group's report and the draft for the Constitution aimed to preserve Member State sovereignty symbolically, while acknowledging the functional interdependence of Union (supranational) and state-level (national) competences. Yet precisely this ambiguity has rendered Article 4(2) TEU both pivotal and problematic: it serves both as the constitutional hinge between the EU's integration and the Member States' enduring sovereignty, which may unhinge them from the integration.

This paper has argued that the contemporary debate surrounding essential state functions under Article 4(2) TEU cannot be understood without a historical and theoretical reconstruction of sovereignty, state functions, and constitutional identity. From early theories of absolute sovereignty through Enlightenment conceptions of popular sovereignty, separation of powers, and democratic legitimacy, a persistent theoretical core emerges: certain functions of the state are indispensable to its existence as a legitimate political community. These functions – such as maintaining public order, exercising legislative and executive authority, and safeguarding the conditions for collective self-determination – have consistently been regarded as essential, regardless of the evolving form of the state.

By introducing a post-functionalist framework grounded in the notion of practical identity, the analysis has further demonstrated that essential state functions are not merely technical or administrative competences, but practical expressions of a state's self-understanding. National identity, shaped through historical narratives and constitutional choices, provides the normative foundation upon which states determine what it means to act as a “good” state. Essential state functions, in this sense, serve to protect and reproduce a polity's constitutional identity over time, giving concrete form to otherwise abstract notions of sovereignty and self-rule.

Against this backdrop, Article 4(2) TEU appears as an attempt to reconcile two competing imperatives: the effectiveness of supranational integration and the preservation of Member State sovereignty rooted in constitutional identity. The historical origins of the provision – particularly its emergence from the failed Constitutional Treaty and the Working Group's report – reveal an intention to shield the core responsibilities of statehood from the European Union's growing interference. However, the failure to clearly distinguish between structural elements of constitutional identity and functional expressions of sovereignty has introduced a lasting ambiguity into the provision. This ambiguity allows Article 4(2) TEU to function simultaneously as a safeguard of constitutional pluralism and as a potential instrument of broad national exemption from EU obligations.

Ultimately, the tension embedded in Article 4(2) TEU reflects a deeper unresolved question within European integration itself: whether the Union can develop a shared normative foundation that is sufficiently robust to coexist with, rather than erode, the practical identities of its Member States. As long as national identity remains a primary source of normativity for state action, essential state functions will continue to shape the constitutional relationship between the Union and its Member States, defining an important framework within which integration takes place. Rather than viewing this framework as an obstacle, it is more productive to understand it as a constitutive feature of the European project – one that enhances the

legitimacy of integration by respecting the diverse constitutional identities upon which the Union is founded. In this sense, Article 4(2) TEU should not be understood as limiting integration for its own sake, but as providing the constitutional conditions under which deeper integration can command democratic legitimacy and enduring acceptance across the Member States.

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