

BOOK REVIEW

Signe Larsen, The Constitutional Theory of the Federation and the European Union (OUP 2021), ISBN: 9780198859260

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Generations of undergraduate law students (including my own, if they have been listening in class) have absorbed the message that the European Union and its legal system are *sui generis* – though based in international treaties, it is something more than an international organisation, something less than a ‘super-state’.² In her book *The Constitutional Theory of the Federation and the European Union*,³ Signe Larsen exposes this as an intellectual cop-out, rooted in a ‘flawed statist understanding’,⁴ that overlooks both historical evidence and philosophical discussion of alternative models of political association. She argues the EU is the sole remaining example of form of polity that has several historical antecedents stretching back over nearly a millennium of Western history – namely the federation or ‘federal union’. This is not, Larsen is at pains to point out, the same as a federal *state*. The latter is a much more recent development, which (as will be discussed below) occasionally arises out of the transformation of a federation into a state. Larsen posits the federation alongside the state and the empire as one of the ‘political forms of modernity’,⁵ but one that is overlooked – not only because there have been so few of them, but because the state ‘is treated as the universal or essential form of political association’.⁶

Larsen defines the federation as ‘a permanent union of two or more states that rests on a free agreement of all Member States with the common goal of self-preservation. This agreement politically changes the constitutional status of the Member States in relation to their common aim.’⁷ This change may not necessarily be visible in positive constitutional *law*, but exists as a political fact.⁸ The agreement at the heart of the federation is, in the words of Jacques Chirac, ‘Legally a treaty, but politically a constitution’.⁹ It at once transforms the Member States and gives birth to a new political entity, the federation itself. Integration affects Member States in multifarious and profound ways, some positive and some negative; but from the perspective of each state, there is a clear rationale and logic to integration. As will be explored below, this ultimately boils down to the desire to preserve the ‘political

¹In the interests of full disclosure, Signe Larsen is a colleague of mine at Magdalen College. The contents of this review have not been discussed between us.

²For an example of the prevalence of this framing, see generally, Catharine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 4, and more specifically, Bruno De Witte, ‘EU law: is it international law?’ in Catharine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) ch 7.

³Hereafter ‘Federation’.

⁴*Federation* 3 (internal quotation marks omitted).

⁵*ibid* 1.

⁶*ibid* 2.

⁷*ibid* 19.

⁸*ibid* 21 ff.

⁹*ibid* 23.

existence' of the state.¹⁰ However, once it is born in the founding treaty, the federation assumes a political existence, integrationist logic and interests of its own. It acquires the capacity and political incentives to act to preserve this existence and promote its own interests, against threats from both outside and inside the federation. As will be returned to, these actions can ultimately have the effect of destabilising the careful political balance between federation and Member State on which the whole enterprise rests.

The constitutional theory examined and developed by Larsen in this book is certainly sophisticated, and both requires and rewards careful parsing. Key concepts are usefully illustrated with historical examples, some of which may not be immediately familiar to most readers. Chiefly, she relies on comparisons between the EU and the antebellum United States of America, the German Confederation of 1815-66 and (to a lesser extent) the Swiss Confederation (1291-1798 and 1815-48). More familiar to scholars of EU law will be her recounting of the founding of the EU itself,¹¹ as well as the more contemporary history of the Eurozone Crisis,¹² and the (ongoing) crisis of the rule of law and 'democratic backsliding' in certain Member States.¹³ It is to Larsen's credit how she weaves high theory and historical narrative in key sections of the book.

Less fluid is her treatment of the motivations of Member States to integrate, and their experiences of that process. At the highest level of generality, it is certainly convincing that states join a federation like the EU to preserve their political existence from fear of (a) internal political extremism; (b) external influence by powerful neighbours; (c) economic penury, or some combination of the three. Larsen divides the Member States of the EU into blocs, for whom integration has different effects on their constitutions and is thus perceived differently in their political culture. First, there are the 'constrained democracies', whose political project since the Second World War has been to create institutions that rein in the wills of their national populations, diffusing political power through domestic checks and balances, independent governing bodies, and multi-level governance (including the EU).¹⁴ The Member States in this category include the 'Original Six' of France, Germany, Italy, Belgium, the Netherlands and Luxembourg (which Larsen occasionally, I think unfortunately, calls the 'core' Member States),¹⁵ plus Spain, Portugal and Greece. These Member States are (or at least have traditionally been) wary of their own populations and national politicians, in reaction to experience of authoritarian rule. So deep-rooted is this logic of constitutionalism, she argues, that overall the EU remains a project of 'constrained democracy', characterised as it is by indirect political representation and powerful politically-independent institutions like the Commission and European Central Bank,¹⁶ as well as the scope for judicial disapplication of national legislation on the basis of EU law and fundamental rights.¹⁷

Second, there are the 'constitutional modernisers' – Member States with long unbroken experiences of democracy, who are thus not afraid of political power, are 'proud of their

¹⁰ *ibid* 51. This is a distinct explanation from that offered by Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016), which focuses on 'managing interdependence' as the *raison d'être* of the European Union.

¹¹ *ibid* ch 2; see also 85 ff.

¹² *ibid* ch 5.

¹³ *ibid* ch 4.

¹⁴ *ibid* 84 ff.

¹⁵ For example, *ibid* 84.

¹⁶ *ibid* 100-03.

¹⁷ *ibid* 90.

parliamentary traditions' and suspicious of judicial interference with democratic institutions.¹⁸ These experience the EU as a process of 'modernisation' that rescues them from 'institutional and conceptual sclerosis' by bringing them 'into line with continental constitutional regimes',¹⁹ and allowing them to manage otherwise fraught relationships with neighbours or constituent regions (here, Larsen gives the example of the 'unique cross-border arrangement' in respect of Northern Ireland, and UK devolution more broadly).²⁰ Notwithstanding the perhaps somewhat loaded language in this section, Larsen convincingly describes the position of the United Kingdom (prior, obviously, to Brexit) in these terms. In this category she also includes Denmark and Sweden, but there is little examination of how these countries have dealt with 'understand[ing] the constraints of member-statehood as *externally imposed*'.²¹ Implicitly, they have found that experience easier going than the UK (as evidenced by the fact that only the UK sought to leave the Union), but it would be interesting to see Larsen's view of why this has been the case.

Third, Larsen describes those Member States for whom integration represents a 'return to Europe', in which category she includes all the former Communist states that joined the Union after the fall of the USSR and Yugoslavia: Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. These Member States define their constitutional identity in opposition to imperial subjugation (by Russia) and embrace European integration as a means of asserting not only political independence but also *cultural* distinctiveness from the Russian 'sphere of influence'. Recent events in Ukraine have brought this dynamic starkly into view. These 'new' Member States conceive of themselves as having a rightful place in the EU since its *founding*, albeit only realised in accession. Larsen describes this 'strong historical myth' in quasi-religious terms, arguing in a powerful passage:

The idea of the 'ever-closer union of the peoples of Europe' has an element of political theology because it mimics the idea of the founding of the protestant church ... the European peoples (*the faithful*) play an active role in forming the EU (*the church*) to which they already belong as peoples of Europe (*the religious community*) ... [C]oming together in a common union is in this way conceived as the fulfilment of destiny.²²

From the perspective of the Irish reader, Larsen's categorisation of Member States is somewhat frustrating. She does not mention Finland, Austria, Cyprus, Malta nor Ireland in her taxonomy. Perhaps the difficulty in pinpointing the experience of and motivations for European integration in respect of these Member States explains her failure to include them in the categorisation, but that suggests a weakness in her theory. Of course, the book is not an attempt to analyse experience of integration in comparative perspective, so it is hardly a fatal weakness. But it would be particularly interesting to see an analysis of Ireland in terms of her theory. Ireland clearly exhibits aspects of all three categories: a relatively long tradition of democratic politics (spanning both pre- and post-Independence), with a robust system of judicially-driven constitutionalism (informed by the same Christian democratic tradition as animated the Original Six at the time of the Treaty of Rome), and a sense of Europe as a 'common home' wherein shelter can be found from the overbearing tendencies of a larger

¹⁸ *ibid* 89.

¹⁹ *ibid* 91.

²⁰ *ibid*.

²¹ *ibid* 90 (emphasis original).

²² *ibid* 94-95 (emphasis original).

neighbour with which there has historically been an imperial relationship. This latter dynamic, of course, played out most vividly in the negotiations around the UK Withdrawal Agreement and Northern Ireland Protocol, in which Ireland enjoyed steadfast support of the Union and fellow Member States, dramatically reversing the historic balance of power on these islands. I do not know enough about the other Member States omitted by Larsen to make a similar assessment, but one would be useful and informative, and is regrettably absent from *Federation*.

Another tantalising insight that Larsen neglects to elaborate is the prospect of a Christian influence on the project of European integration. Besides the passage cited above, she makes another oblique reference in the context of the ‘constrained democracies’, which at the time of the Treaty of Rome featured political leaders from the Christian democratic tradition – most notably Robert Schuman, Alcide de Gaspari and Konrad Adenauer. ‘Europeanism’ is located by Larsen alongside ‘Christian values’ as ‘the viable myth for the post-WWII Christian democratic parties that came to found the EEC’.²³ It is perhaps understandable that a work of constitutional theory such as *Federation* does not delve further into this theological aspect of European integration. Other works have, and make a compelling case that European unification in the manner pursued by the EU can be understood as being profoundly influenced by Roman Catholicism.²⁴ Though she does not mention it, the three European leaders highlighted by Larsen were all devout Catholics. It is likely that their faith influenced not only their pursuit of peace and unification of ‘Christendom’, as well as resistance to atheistic Communism, but also the particular way in which they were willing to accept (a) transcendent limitations on the legitimacy of even democratic political decisions and actions (in the form of fundamental human rights, rather than religious doctrine); and (b) competence to determine some of these limitations vested outside the nation-state. A similar logic can be seen in the creation of the European Court of Human Rights as ‘the conscience of Europe’.²⁵ It is no coincidence that Schuman was declared Venerable by Pope Francis in 2021 in recognition of his contribution to European integration and ‘commit[ment] to politics – understood as a mission and a service, and as an act of obedience to God’s will.’²⁶ Of course, the EU is an entirely secular project today – but Larsen does remind us of its tendency towards ‘political messianism’, its self-conception as ‘assist[ing] the “chosen” peoples of Europe in fulfilling their destiny and reaching the “promised land” of “peace and prosperity”’.²⁷ A land of the Milk Regulation,²⁸ and the Honey Directive,²⁹ perhaps.

As stated above, this sense of its own legitimacy informs the federation’s actions in pursuit of both further integration or expansion, and the defence of the common values of the Member States and the federation. The ‘European Guardians’ of the Commission, the CJEU and the ECB, are expressly ‘teleological’ institutions, in that they are created (by the Member

²³ *ibid* 87.

²⁴ See for discussion: Alan Fimister, *Robert Schuman: Neo-Scholastic Humanism and the Reunification of Europe* (Peter Lang 2008) and Tiberiu Brailean and Aurelian-Petrus Ploeanu, ‘Catholic Social Teaching and the Origins of European Union’ (2014) VI(2A) Centre for European Studies Working Papers, available at <https://ceswp.uaic.ro/articles/CESWP2014_VI2A_BRL.pdf> (accessed 25 February 2022).

²⁵ Egbert Myjer and others (eds), *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Council of Europe 2010).

²⁶ ‘Robert Schuman, father of European unity, on path to sainthood’ (*Vatican News*, 19 June 2021).

²⁷ *Federation* 102.

²⁸ Commission Delegated Regulation (EU) 2020/692, Title 4.

²⁹ Council Directive 2001/110/EC.

States) to pursue specific ends and have been granted sweeping powers for those purposes.³⁰ It is very difficult to establish concrete limitations on the powers of the federation *vis-à-vis* the Member States because those ends can be very broad,³¹ but also because the Member States themselves occasionally represent a barrier (or even a threat) to the accomplishment of those ends. In her examination of the rule of law and ‘democratic backsliding’ crisis,³² Larsen argues that federation between otherwise culturally, linguistically, ethnically and even economically diverse states, with often radically different historical narratives and a history of violence against one another, is only possible where Member States share a common ‘constitutional identity’. This refers not to the particular arrangements of government (monarchies and republics, unitary and federal states, co-exist in the EU) but to the constitution as a ‘substantive value order’.³³ This means that whatever else they disagree on, the Member States of a federation must be unanimous on *the* (geo)politically salient question that faces states in that particular era, in that particular region. Larsen’s historical allegories come in useful here: in 18th-century America, the question that united the states was the choice of republican government over imperial monarchy, but the failure to cohere around a common position on the key question of the 19th-century (slavery) led to collapse of the US federation, civil war and ultimately the rise of a new federal *state* in its place.³⁴ Insight into how this change in the ‘friend-enemy distinction’³⁵ can play out for the federation and its Member States is afforded by the recent invasion of Ukraine by Russia – even though Ukraine was not a Member State, the European Union and the Member States were unanimous in recognising this as a threat to the political autonomy they had formed the EU to protect, to their geopolitical interests, and to the values they seek to uphold.

Those values are contained in Article 2 TEU:

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

For Larsen, this sums up the ‘substantive value order’ of liberal (and constrained) democracy that the Member States have chosen for themselves as a system of government and constitutional identity, and which they joined the EU in order to help offset the risk of external domination or internal collapse.³⁶ Larsen writes: ‘[F]or most of its Member States... the EU is an extra layer of constitutional guarantee of liberal-democratic constitutionalism. Membership in the EU is a way for the Member States to “lock in” liberal democracy.’³⁷ To this should be added the certain form of capitalism that is predominant in the Union. Of course, there are ‘varieties of capitalism’ as between the Member States,³⁸ but the EU clearly imposes an overarching economic framework, informed by both ordoliberalism and social

³⁰ *Federation* 101.

³¹ *ibid* 102-03.

³² *ibid* ch 4, esp 139 ff.

³³ *ibid* 122 ff.

³⁴ *ibid* 24-26, 128 ff, 156 ff.

³⁵ *ibid* 119.

³⁶ *ibid* 121 ff.

³⁷ *ibid* 145.

³⁸ David Soskice and Peter Hall, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001); discussed by Larsen in *Federation* at 133.

democracy (the great traditions of European centrist politics).³⁹ Larsen exposes the sometimes brutal way in which this ‘economic constitution’ is maintained even in the face of Member State political opposition, as most starkly expressed during the Eurozone Crisis,⁴⁰ and the deconstruction of Soviet economic infrastructure in post-Communist accession candidates.⁴¹

This she offers as an example of a broader question that lies at the heart of any federation. States join a federation in order to preserve their political autonomy. However, the exercise of that autonomy (at least *in extremis*) creates the risk of divergence from the common constitutional identity which allowed federation to occur in the first place. It risks upsetting the ‘federal balance’.⁴² As Larsen puts it, ‘If the constitutional identities of the Member States are not compatible with Article 2 TEU, there is an open constitutional conflict at the heart of the EU’⁴³ – just as divergent beliefs about slavery created constitutional conflict at the heart of the antebellum US federation. As will be recalled, that conflict was only resolved after the federation itself collapsed and, by emerging victorious in the US Civil War and imposing Reconstruction on the southern states, the northern states effected a change in the nature of the US from federation to federal state.

The European Union, obviously, has not experienced a civil war. It has, however, seen the emergence of political movements in several Member States that imperil the federal balance by diverging from the common constitutional identity of the federation. In the case of the UK, the political divergence could not be accommodated and the state chose to secede from the Union.⁴⁴ The implications of Brexit for both the UK and the EU are beyond the scope of this review, and Larsen’s book, but are clearly seismic.⁴⁵ Meanwhile, the rule of law and ‘democratic backsliding’ crisis in the East rumbles on. Larsen convincingly argues that at a constitutional level, the EU is insufficiently equipped to ensure recalcitrant Member States conform to the values of Article 2 TEU.⁴⁶ The ‘federal guarantee clause’,⁴⁷ by which the federation promises to both defend the Member States from external threats, and ‘save them from themselves’, all without itself becoming a threat to their autonomy, is fundamentally flawed in the EU.⁴⁸ She considers that stronger, or at least more practicable, powers to sanction Member States for rule of law violations are necessary for the EU to persist – but also expresses concern that a more forceful Union would undermine its own legitimacy as a free association of Member States,⁴⁹ potentially inspiring more secessions. Of course, *Federation* was published before the Union recently adopted rule of law conditionality for

³⁹ Harm Schepel, ‘Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law’ (2012) 18(2) *European Law Journal* 177; Dragana Damjanovic ‘The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy’ (2013) 50 *Common Market Law Review* 1685; Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) and Floris de Witte, ‘The Architecture of a “Social Market Economy”’ (2015) LSE Legal Studies Working Paper no 13/2015, available at: <<https://ssrn.com/abstract=2613907>> (accessed 28 February 2022).

⁴⁰ *Federation* 187 ff.

⁴¹ *ibid* 132-35.

⁴² *ibid* ch 4, esp 104-14.

⁴³ *ibid* 122.

⁴⁴ *ibid* 91-92.

⁴⁵ For some discussion, see Federico Fabbrini, *Brexit and the Future of the European Union* (Oxford University Press 2020).

⁴⁶ *Federation* 141-43.

⁴⁷ *ibid* 135 ff.

⁴⁸ *ibid* 140-44.

⁴⁹ *ibid* 144.

certain funding mechanisms.⁵⁰ It remains to be seen whether this will have the effect of encouraging Member States to come back into line with the values of Article 2 TEU.

The pressing nature of these examples demonstrate how timely a book *Federation* is. It will be of interest to anyone grappling to understand the role of the European Union in the world, the (changing) relationship between Union and Member States, and between Union institutions themselves. Given the myriad crises Europe and its peoples face, from climate change to migration, economics to pandemics, and even warfare on its frontiers, the relevance of such a work can only be growing. Larsen offers an analysis – though expressly *not* a prognosis – of how the EU deals with such issues and manages the inherent tensions in the federal form. As she concludes, this is a ‘cautionary tale’: the reason we have overlooked the EU’s nature as a federation, she argues, is that we have forgotten the history of other federations; the reason these are not around anymore is that they have all dissolved or fought civil wars, sometimes emerging as ‘super-states’ (or empires) in the aftermath. Avoiding either fate for the continent of Europe will require maintaining the delicate balance between the political autonomy of Member States, and the interests of the Union as a whole in preserving the values that allowed them to integrate in the first place – as well as a deeper understanding of the nature of the European project, to which Larsen’s work is a valuable contribution.

⁵⁰ Regulation (EU, Euratom) 2020/2092. See also ‘Rule of law conditionality regulation’ (European Commission) <https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en> (accessed 28 February 2022).