

long-standing questions of judicial power, but this discussion could have been expanded, or dealt with at greater length in the substantive chapters. The book is first and foremost a practical contribution that is to be lauded in a field arguably overly replete with theory. Yet, given the important implications for debates around the exercise of judicial power that a better understanding of fact-finding may present, it would have been interesting to dedicate more attention to how this novel and robust research might inform, or subvert, understandings of the judicial institutional role.

In sum, this book should be widely read across jurisdictions. It contributes something new in proportionality, which is hardly to be understated, and rigorously captures the nature of the field in an understudied area of practice, addressing “how” questions while feeding into wider debates around proportionality in Australia and beyond. The reasons for which Carter argues facts matter – improved transparency and understanding of the judicial role, and closeness to empirical reality – also point to the importance of this book, and of its practical and detailed endeavour. This reviewer hopes that the book will galvanise further discussion on, and close scrutiny of, the place of facts in public law adjudication.

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The Constitutional Theory of the Federation and the European Union. By SIGNE REHLING LARSEN. [Oxford University Press, 2021. xvi + 212 pp. Hardback £88.00. ISBN 978-0-19885-926-0.]

Signe Rehling Larsen’s book on the constitutional theory of the federation and the EU provides a novel analytical framework for thinking about the nature of the EU. The EU, Rehling Larsen argues convincingly, should be conceived of as a federation rather than a *sui generis* entity. Although this is by no means a novel claim, the implications that Rehling Larsen attaches to the concept of federation weave together a rich framework for understanding the emergence of the EU, the political tensions between the EU and the Member States, and the management of the Eurozone crisis.

According to Rehling Larsen, the federation is a distinct political form that differs from the other two political forms of modernity, namely the state – including the federal state – and the empire (p. 1). Following Carl Schmitt’s federal theory, she argues that states participate in federations to preserve their political existence, or sovereignty (p. 49). By constituting a federation, however, they also create an entity with autonomous political existence (p. 77). The relative autonomy of the federation and of the Member States creates friction, as the federation seeks to secure homogeneity among the Member States and thus tends to push for ever further integration, while the Member States see the federation as a means to preserve their sovereignty and are, therefore, opposed to federal encroachments to it (p. 104). The tension becomes clearest in the case of an emergency (p. 149). Both the federation and each individual Member State claim authority to resolve

the emergency, either in favour of the federal political entity – the federal people – or in favour of the people of the individual Member State (p. 179). The common good as conceived by officials claiming to represent the federal people can come apart from the common good invoked by representatives of an individual people (pp. 161–62).

Rehling Larsen distinguishes between a legal and a political conception of sovereignty. Political sovereignty, which is the focus of Rehling Larsen's argument, refers to the "autonomy of the realm of the political from religion and private power" (p. 41), to the "authority-generating nexus between people and government" (p. 82) or to the "foundation of the public power of the state" (p. 76). It "expresses the supreme authority of the state to make law and, as such, [it] underpins the modern idea of law" (p. 42). This conception appears to differ from a more classical view on sovereignty, familiar from Hobbes and, to an extent, Rousseau, according to which sovereignty refers to the final authority of a person or group to decide, make law and resolve any conflict within a territory. Political sovereignty for Rehling Larsen attaches to the state and expresses a political relation between a people and a Government that generates authority.

One may wonder what counts as a political relation and whether the authority that emerges from that relation is meant as a *de jure*, normatively binding, authority or as a *de facto* authority that derives from the dominant political views, whether benign or repugnant, that support a Government. Making sense of these questions will help the reader understand what the book is trying to achieve, that is, whether it makes a normative argument or whether it proposes an analytical framework, the practical significance of which is to help one predict the development of the EU based on the example of federations of the past.

Rehling Larsen's position on these questions is ambivalent. As Rehling Larsen's account of sovereignty draws heavily on Martin Loughlin's work, one may hazard the assumption that his account of the political is relevant to understanding Rehling Larsen's account. For Loughlin, a political relation exists when the members of a group identify with a comprehensive conception of their common good, that is, with a particular political worldview (*The Idea of Public Law* (Oxford 2004), 159).

In view of this conception of the political and its generative relation with authority, a distinction between *de jure* and *de facto* authority is redundant: it is not necessary to ask whether or not one should comply with the directives of an official claiming authority; one either willingly complies, because one identifies with the group whose interests the official represents, or one does not belong to the group.

The book cannot, therefore, be read as a normative argument for the authority of either EU law or Member State law within their respective areas of competence: on the basis of Rehling Larsen's framework, one cannot be convinced by arguments about authority, nor can one be justifiably held to account for failing to comply with the directives of an authority that represents a group that one does not identify with.

In any case, the political worldview that is said to ground the authority of law cannot reliably ground *de jure* authority, as it is malleable enough to be compatible with morally repugnant aims. It may secure political equality within the group, but it is compatible with deep hostility towards outsiders. A group may mobilise around social justice just as another group mobilises around racial superiority or religious zeal.

The book cannot be read to provide any guidance on how to resolve legal disputes between the EU and the Member States, either: Rehling Larsen states that such disputes have no legal answer (p. 108). This is unsurprising, given her conception of law. If Rehling Larsen is committed to explaining the authority of law by reference to the political worldview of a group, sovereignty becomes indispensable for the existence of law; and law runs out when claims to sovereignty conflict.

Let me bracket my examination of the book's normative ambitions to make explicit an interesting implication of this conception of law for the role of sovereignty within a federation. If the federation is to be a political form governed by law, one must assume, contrary to some of Rehling Larsen's comments, that a federation is not defined by the absence of sovereignty but by the coexistence of two types of political groups, namely the federal people and the individual Member State peoples, that both claim sovereignty but whose political worldviews tend to converge only in times of normalcy. So, contrary to Hannah Arendt's appeal to federation as a political form that does away with sovereignty altogether, Rehling Larsen regards the federation as an uneasy truce between two political groups that are both ultimately motivated to preserve and, if given the opportunity, expand their sovereignty, even at the expense of the other.

The normative argument one can draw out of this book is one against further political integration. Rehling Larsen issues a warning along those lines in the book's concluding chapter. Further political integration would be undesirable, because the transition from federal union to federal state is seldom a peaceful process (p. 200). Even that warning is baffling as a direction on what ought to be done, given Rehling Larsen's earlier account of: (1) how the current stage of economic integration was partly to blame for the vulnerability of several Member States during the Eurozone crisis (p. 165), and (2) how the reluctance for further integration has resulted in a state of affairs in which the implementation of financial assistance programmes by bailout Member States is effectively immune to fundamental rights review at the EU level – a state of affairs that Rehling Larsen compares to Ernst Fraenkel's concept of the dual state (p. 177).

This state of affairs strikes me as normatively problematic. Although there are reasons to be wary of a European federal state, surely Rehling Larsen must be committed, based on her argument, to reform towards more accountability for EU institutions – for example, towards establishing avenues of judicial review of whether particular financial assistance programmes are compatible with EU standards of protection of social rights and the right to property. One can plausibly understand such reform as further integration.

With these considerations in mind, the aim of Rehling Larsen's book is better understood as a purely analytical one. Conceiving of the EU as a federation allows us to draw general conclusions about how political groups act in order to maintain and expand their sovereignty. What is meant by that? Rehling Larsen's discussion of the threat that constitutional change within Member States may pose for a federation hints at an answer. There, Rehling Larsen refers to the "political right of a community to decide on its own fate" (p. 135).

One may perhaps understand this phrase by thinking of sovereignty as group autonomy. Autonomy is the capacity of a person or group to be the author of one's life, to critically reflect on one's options and determine one's fate according to values that make sense to them, and not to have decisions imposed upon them

by some external authority. Persons and groups that see value in autonomy are driven by a desire to have as wide a range of options as possible available to them. But as persons and groups necessarily interact with other persons and groups, maximising one's overall freedom, in terms of a real capacity to successfully engage in a range of actions, bears the risk impeding the freedoms of others. It also undermines trust in commitments that require mutual sacrifice. I will refer to this desire to maximise one's overall freedom, perhaps somewhat provocatively, as will to power.

The conception of sovereignty as a scalar rather than a categorical concept is a virtue of Rehling Larsen's analysis that allows her to reject the familiar Schmittian claim that decision on the emergency determines the sovereign: the European Central Bank's successful assertion of authority with respect to emergency measures that have considerable implications for economic policy (pp. 179–87) does not mean that the EU has become a federal state. One would hope that the book had pursued this reasoning further by rejecting the notion of *Kompetenz-Kompetenz* as a concept that does not apply to the EU Constitution (pp. 38–40): whether or not the European Court of Justice has the final say in jurisdictional disputes with apex courts of the Member States has no implication on whether, for example, the EU legislative organs have the competence to determine their own competences and, therefore, legislate without being constrained by the EU treaties.

The will to power of political groups explains the emergence of federations as a means for Member States to preserve their overall freedom. In this connection, Rehling Larsen's account of the emergence of the EU as a response to the decline of European empires (pp. 57–63) is illuminating. In this account, war and decolonisation rendered European empires unsustainable and forced the EU's founding Member States to federate, in order to maintain their economic prosperity. Perhaps the will to power also explains the emergence of empires as an expression of the drive to expand the overall freedom of the imperial state.

As is evident from Rehling Larsen's analysis, this Thucydidean account has much explanatory and predictive power. One may, of course, maintain some misgivings on whether the relevant political groups are the peoples of a state and not the smaller category of persons who in fact mobilise around, identify with and stand to gain from promoting the relevant political worldview; but, such misgivings aside, an unrestricted will to power may well be a plausible framework for anticipating the actions of self-interested political groups among whom there is no immanent mutual trust or disposition of fair treatment. Rehling Larsen is successful in alerting readers to the number of developments in the EU that can be explained and anticipated by reference to that framework – think of the Luxembourg Compromise, the EU-Turkey statement in relation to the refugee crisis of 2016, or the failure of the Member States to effectively coordinate economic policy prior to the financial crisis of 2008. The application of this realist framework on the relations among EU Member States provides sobering insights on the difficulties of European integration. Though the book eschews sustained normative argument, its analysis is a starting point for anyone interested in how to transcend the rather bleak state of affairs that the book outlines.

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