

Understanding the EU-led ‘pandemic’ of constitutional foreign policy objectives

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Joris LARIK, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016), pp. 368.

In his last ‘State of the Union’ address as President of the European Commission,¹ Jean-Claude Juncker spoke of ‘the hour of European sovereignty’ to convey the need for greater unity in international relations. He envisaged an EU whose single voice rings clear ‘in the concert of nations’ and that is grounded in the belief that ‘united we stand taller’. His speech called, as many speeches before it, for multilateralism as the new credo of Europe and unleashed a flood of tweets with the unpronounceable hashtag *Weltpolitikfähigkeit* – the EU’s capacity to shape international affairs. The verbosity of analogisms and metaphors characteristic of political speeches of this nature did little, however, to camouflage the underlying frustration with the international consequences of the Union’s internal turmoil. The speech pitted ‘unhealthy nationalism’ against a collective and ‘enlightened’ European patriotism. It was proffered over the background noise of growing populism and xenophobic rhetoric in Europe, of challenges to the rule of law in Poland and in Hungary and the departing cries of the United Kingdom. It used *European* sovereignty as a banner for unity vis-à-vis the outside world, at a time when (the loss of) *national* sovereignty is used by some as a banner for less Europe, not more. It was a speech mostly directed at elevating the Union’s spirits in a time of disintegration rather than at asserting its role on a seemingly hostile international stage, dominated by trade wars between great powers and a geopolitical equilibrium that recycles cold war narratives.

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¹J.-C. Juncker, ‘State of the Union 2018, The Hour of European Sovereignty. Authorised version of the State of the Union Address 2018’, <ec.europa.eu/commission/priorities/state-union-speeches/state-union-2018_en>, visited 8 January 2019.

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The question that lingers is whether Europe's history and the political heterogeneity that characterises it can truly be brought together into a coherent harmony that 'rings clear' beyond its borders. A harmony that can withstand members leaving and lead rather than be led by its own circumstances; and a harmony that can match the growing number of aspirations of a Union that seeks to transform rather than simply preserve the international order that surrounds it.² While the EU engages more and more in multilateral fora and has codified in its 'higher laws' aims as diverse as those to 'contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights ... the strict observance and the development of international law',³ we are often left dumbfounded by the overpowering dimension of these commitments and the impossible task of giving them substance. The prolixity of foreign policy objectives in EU primary law have led some to downgrade them to the level of a 'wish list for a better world'⁴ or to chastise them as 'redolent of motherhood and apple pie'.⁵ These foreign policy objectives, much like Juncker's 'European patriotism', seem like words full of purpose but with little direction, flamboyant political 'aspirations' more apt for discussion within the realm of political science and international relations than for constructive debates on their legal implications.

Not for Joris Larik. His book strips down the content of EU foreign policy objectives to find legal norms similar to those found in the constitutions of most states, moving the debate from the domain of political rhetoric to that of constitutional theory. It provides us with the vocabulary to discuss foreign policy objectives in legal terms and presents a frank – and perhaps underwhelming – account of their limits. What is the 'legal value, function and substance' of EU foreign policy objectives? How do they relate to national foreign policy objectives? How do they limit or amplify member states' powers at the international level? How do they relate to the wider international relations scholarship on the role of the EU as a global actor? These are just some of the questions tackled.

Ultimately, Larik warns legal scholarship not to brush aside the conceptual potential of foreign policy objectives. His work seeks to change the prevailing

² European Union External Action Service (EEAS), 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy', 28 June 2016, p. 10, <europa.eu/globalstrategy/en/shared-vision-common-action-stronger-europe>, visited 8 January 2019.

³ Art. 3(5) TEU.

⁴ J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) p. 3 (citing W. Drescher, 'Ziele und Zuständigkeiten', in A. Marchetti and C. Demesmay (eds.), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos 2010) p. 68).

⁵ *Ibid.*, p. 3 (citing R. Barents, *Het Verdrag van Lissabon: Achtergronden en Commentaar* (Kluwer 2008) p. 181).

views on the mostly cosmetic nature of the Union's list-like aspirations on the international stage; or at least to open the debate about the place of foreign policy objectives within the EU legal order and the accountability of EU institutions in their pursuit.

COMMON THEMES AND EMERGING PATTERNS

Siding with the extensive scholarship on the 'constitutionalised' nature of the EU legal order,⁶ Larik builds a well-reasoned and thoroughly researched argument for the constitutional nature of EU foreign policy objectives. He does so by first identifying a set of shared 'legal properties' common to constitutional state objectives not only of the EU member states but also of a number of non-EU jurisdictions, ranging from the People's Republic of China to Brazil.⁷ The wealth of material reviewed in the identification of these 'common themes and emerging patterns'⁸ from different texts and traditions is in itself an insightful contribution to understanding the operation and legal force of constitutional state objectives as legal norms. This first exercise is largely supported by three constitutional doctrines: the German doctrine of *Staatszielbestimmungen*, the French doctrine of *objectifs de valeur constitutionnelle* and the Indian doctrine of *directive principles of state policy*. While the choice of these three doctrines is grounded on the density of scholarship on constitutional objectives in each system, the inclusion of India also endows the findings with a cross-system and cross-cultural validity. It is particularly telling, for instance, that notwithstanding the distinctive regional specificities of the Indian constitutional system, it seems more frank in its approach to state objectives as non-justiciable norms than the German and French systems, which are often ambiguous about the legal value of these norms.⁹

The similarities found between the German, French and Indian doctrines, it is argued, support the understanding of constitutional state objectives as binding norms addressed to all levels of government (with a focus on the legislature) and imposing an 'obligation' to actively pursue, within the limits of the materially possible, a number of 'perfectible' and 'imperfectible'¹⁰ goals ultimately aimed at the 'common good' of the polity. Their relatively weak legal force and marginal justiciability do not obliterate their legal value as 'interpretive-permissive' tools

⁶On the role of legal scholarship in supporting the ECJ's narrative on the constitutional character of the EU legal order, see T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018) p. 127-129.

⁷Larik, *supra* n. 4, p. 88 ff.

⁸Ibid., p. 68.

⁹Ibid., p. 46.

¹⁰Ibid., p. 38.

used by courts to justify the exercise of public powers and limit individual rights. Regardless of the constitutional tradition from which they emerge, these objectives generally refer to five main categories: rule of law; social justice; culture/civilisation; peace; and the environment.¹¹

The analysis then moves from the common properties of constitutional state objectives to the subset of foreign policy objectives which, Larik argues, should be understood 'not as a category of their own but as an integral part of the constitutional objectives in general'.¹² Foreign policy objectives are basically constitutional objectives with some 'nuances', deriving from the fact that they reside 'at the intersection of constitutional objectives and the foreign affairs constitution'¹³ of a state. Larik's comparative analysis of the foreign policy objectives found in the constitutions of both EU and non-EU member states supports his contention that they are not 'constitutional rarities' but instead the 'codified expression' of a trend of 'dynamic internationalization' of constitutional law.¹⁴ He distils their diversity into the six categories first proposed by Karl-Peter Sommermann: the prohibition of war; international/collective security; international law; human rights; (regional) integration; and international solidarity and development cooperation.¹⁵

While here Larik's analysis gets somewhat repetitive, the parallel between the properties of constitutional state objectives and foreign policy objectives drives home the author's point that the latter are a subset of the former. As norms of 'constitutional rank' themselves, foreign policy objectives impose binding obligations (now on the executive) to 'dynamically' pursue a 'global' common good within the limits of the materially possible (the 'caveat of feasibility'). This global common good generally represents the 'translation' of internal values to an external setting; the realisation of 'internally oriented objectives abroad through foreign policy'.¹⁶ While the wider margin of discretion on the executive's pursuit of these mostly 'imperfectible' objectives dilutes their justiciability even further, Larik again finds that their value as interpretive tools remains intact. In broad strokes, he concludes that foreign policy objectives 'can be better understood as Dworkinian principles or Alexian optimization requirements rather than rigid rules'.¹⁷ They breathe a degree of flexibility into the rigidity of constitutional

¹¹ Ibid.

¹² Ibid., p. 53.

¹³ Ibid.

¹⁴ Ibid., p. 67.

¹⁵ Ibid., p. 89 (citing K.-P. Sommermann, *Staatsziele und Staatszielbestimmungen* (Mohr Siebeck 1997) p. 273).

¹⁶ Ibid., p. 59.

¹⁷ Ibid., p. 276.

norms and serve an important ‘interpretive-permissive’ function in justifying the exercise of public powers and certain limitations to individual rights.

A particular feature of these objectives that could have been further explored in this book is what Larik calls the ‘accentuated caveat of feasibility’¹⁸ that constrains foreign policy objectives. Their pursuit is not only dependent on the state’s own capacity to pursue such goals, but also on other states’ openness to cooperate. This idea of what is ‘materially possible’ in the pursuit of foreign policy objectives therefore brings into play one of the reasons why such ‘common themes and emerging patterns’ can be found in the first place: the aspiration to universality of state foreign policy objectives as a condition for their validity and acceptance by the wider international order that they shape and that shapes them. This largely explains the near uniform repetition of objectives such as the pursuit of international peace and non-aggression, even if state practice does not necessarily conform to it. A case in point would be the Russian Federation’s breach of Ukraine’s sovereignty, notwithstanding its constitutional recognition of ‘universally recognized principles and norms of international law’.¹⁹ Similarly, nearly all of Sommermann’s categories of foreign policy objectives (such as the pursuit of collective security or of international solidarity and development cooperation) presuppose an interaction between states. The external constraints and the interconnectedness and convergence of foreign policy objectives are captured in Larik’s imagery of a clock where ‘if one part fails or is removed, the consequences may be felt by all’.²⁰ This clockwork quality seems particularly relevant in the context of the coordination of the ‘pluralism’ and ‘polyphony’ of the constitutional aspirations of the member states and how EU foreign policy objectives, as interpretative tools or otherwise, can actually help streamline the coherent harmony that Juncker’s speech seemed to allude to.

AN EU-LED PANDEMIC OF CONSTITUTIONAL FOREIGN POLICY OBJECTIVES

Drawing on his analysis of EU and non-EU domestic foreign policy objectives, the remainder of Larik’s argument is set on establishing how the foreign policy objectives found in the EU treaties, although greater in number, largely share the same properties as those found in national constitutions. Larik sees in the ‘kaleidoscope’ of codified EU foreign policy objectives not an ‘epidemic proliferation’²¹ but a sign that the EU is ‘in the vanguard of a global trend’.²²

¹⁸ *Ibid.*, p. 55.

¹⁹ Art. 15(4) Constitution of the Russian Federation (1993).

²⁰ Larik, *supra* n. 4, p. 18.

²¹ *Ibid.*, p. 67.

²² *Ibid.*, p. 123-124.

As he notes, if anything, it would qualify as a ‘pandemic’ led by the EU, which reflects its evolution from the functionalist paradigm of an international organisation to a ‘thick’ constitutionalised legal order. The singularity of the EU, questioned by some,²³ is here used to support both the emergence of foreign policy objectives as part of the constitutionalisation of the EU legal order and to explain the manner in which these objectives can be pursued by an entity such as the EU.

In substance, EU foreign policy objectives follow Sommermann’s taxonomy mentioned above, and add to it the pursuit of trade liberalisation, the promotion of democracy and of the rule of law, in line with the Union’s historical particularities. They also include, however, foreign policy objectives the pursuit of which seems peculiar for a regional integration organisation – *sui generis* or not – and which are seldom found in the constitutions of its member states, such as the aim to contribute to the ‘development of international law’.²⁴ That said, similarly to their national counterparts, EU foreign policy objectives emerge as binding constitutional norms of ‘marginally justiciable’ character (or *normativité limitée*) with a tri-fold legal function: ‘to oblige, to forbid, and to authorize’.²⁵ As constitutional norms, they bind all organs of the Union, within the remit of their competences, to actively and coherently pursue the ‘European’ common good within the ‘bounds of possibility’. The limits to this pursuit are any actions that fundamentally upset the ‘structural foundations of the EU legal order’ and the ‘constitutional identity’ of the member states.²⁶ Thus, EU foreign policy objectives operate primarily as ‘interpretive-permissive devices’ to clarify the scope of institutional competences or to justify limitations to individual rights. Unlike most domestic orders, however, the European Court of Justice has in fact referred to foreign policy objectives on a number of occasions,²⁷ confirming their interpretive value. As norms of constitutional rank, their pursuit requires constant balancing, the paradigmatic example being the *Kadi* case’s²⁸ balancing of fundamental rights protection, as part of the ‘structural principles of the Union’, and the Union’s commitment to the strict observance of international law.

²³ T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge University Press 2004) xv.

²⁴ Larik, *supra* n. 4, p. 102-103; Art. 90 Constitution of the Kingdom of The Netherlands.

²⁵ *Ibid.*, p. 159.

²⁶ Which are seen as aspects ‘immune to integration’ (*integrationsfest*), a term used by the German Federal Constitutional Court (*Bundesverfassungsgericht*) in its Decision of 30 June 2009 (*Lissabon*), BVerfGE 123, p. 267, para. 239; Larik, *supra* n. 4, p. 175, 181.

²⁷ Larik, *supra* n. 4, p. 170 ff.

²⁸ ECJ 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*.

Curiously, while ‘integration’ is listed as a foreign policy objective in a number of member states’ constitutions, Larik extricates it from the catalogue of EU constitutional objectives by distinguishing between these and the notion of *finalité* or pursuit of ‘an ever closer Union’. He argues that blurring these two dimensions and conceiving of objectives as instruments aimed at the accomplishment of a higher integration ‘misconstrues the role of objectives as part of the constitutional law of the Union’.²⁹ The pursuit of constitutional objectives is therefore not subservient to the accomplishment of further integration; integration is instead just a possible but not necessary avenue through which constitutional objectives may be pursued, the resort to which is tightly framed by the principles of subsidiarity, conferral and respect for Union competences. While this argument is compatible with the position defended by others that the pursuit of foreign policy objectives forms part of the Union’s *raison d’être*,³⁰ it carefully isolates integration from this catalogue. It is questionable, however, to what extent the author’s view is actually supported by the practice of the Court of Justice, which is often criticised for flipping this order of priorities and deifying integration as the ultimate panacea.

Another important aspect in Larik’s argument is how foreign policy objectives do not create rights or obligations for individuals, nor do they establish competences. They are generally framed as *directive principles* (following the Indian doctrine’s terminology) abstractedly addressed to the Union itself. They do, however, following Larik’s reasoning, individually bind member states to their active pursuit by force of the principle of sincere cooperation, the demands of which are particularly stringent in the context of EU external policy.³¹ The specificities of the EU system of external relations, where the EU and the member states depend on each other to operate effectively on the international stage, dictate that the ‘clockwork’ functioning of this system is largely dependent on the positive and negative dimensions of loyalty and the coherence achieved through it. The pursuit of foreign policy objectives is shared horizontally by a plurality of organs and vertically between the institutions and the member states, the latter retaining control of their international ‘voice’ in the domains of security and defence policy.

Larik argues, however, that ‘external unity’ is simultaneously a consequence of and a necessary condition for the maintenance of the internal ‘agora’ of EU constitutional pluralism.³² In a way, foreign policy objectives are the ‘talking

²⁹ Larik, *supra* n. 4, p. 151.

³⁰ See G. de Búrca, ‘Europe’s *raison d’être*’, in D. Kochenov and F. Amtenbrink (eds.), *The European Union’s Shaping of the International Legal Order* (Cambridge University Press 2014) p. 21–37.

³¹ A point that the author later revisits in J. Larik, ‘Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity’ in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) p. 175–199.

³² Larik, *supra* n. 4, p. 177.

points' that turn the internal polyphony of individual foreign policy objectives of the member states into a harmonious homophony which, in Juncker's words, rings clear and coherent in the concert of nations. Coherence is therefore a central concept in this work. Following the 'three levels of coherence' proposed by Cremona and adopted by Van Vooren,³³ Larik analyses the role of EU foreign policy objectives in fostering 'unity' or 'coherence' through: (i) legal consistency (including between internal and external objectives); (ii) the delimitation of tasks between the different actors; and (iii) synergy through loyalty, at both the horizontal level (among the plurality of EU policies and actors) and the vertical level (between the Union and its member states). He concludes that from the system of EU external relations and the constitutional pluralism of Europe emerge not a single EU actor, but a single voice, by force of what he calls the '*e pluribus cohaerente*' motto of EU foreign policy.

THE UNTOUCHED 'BOUNDS OF POSSIBILITY'

Larik does not engage in a normative argument per se – arguing that the pursuit of foreign policy objectives is either inherently good or bad – but does subscribe to the view that, in aggregate, the pursuit of foreign policy objectives through the EU maximises gains for all member states, especially the smaller ones, and projects their common voice in an otherwise inaudible way. This does not mean that Larik dismisses the risk that 'aspirational norms have the potential to be instrumentalised by public authorities' or the counterbalancing role that the member states still play in the pursuit of the EU's Common Foreign and Security Policy. But he contends that integration at the foreign policy level entails a 'shift in the "bounds of possibility" for both the Union and the Member States'.³⁴ Any losses in the member states' capacity to pursue their own foreign policy objectives on account of their duty of loyalty to 'unity in international representation' are compensated by their ability to channel these preferences through the Union's structures in a more effective and coherent manner. The argument that the joint pursuit of foreign policy objectives maximises member states' overall projection in the international stage, although legitimate, seems to brush aside a more thorough consideration of the risks that the pursuit of foreign policy objectives by the EU may have in eclipsing the individual preferences of member states. The pursuit of foreign policy objectives that are out of tune with the EU's set-list was one of the

³³ Ibid., p. 189; M. Cremona, 'Coherence in European Foreign Relations Law', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011) p. 60–61; B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2012) p. 57–72.

³⁴ Larik, *supra* n. 4, p. 280.

arguments raised to propel the departure of the United Kingdom from the Union. Similarly, the objections voiced against the EU's conclusion of international agreements such as CETA and the TTIP have shown how the intended harmony in international negotiations is often difficult to orchestrate. While these cases may be more illustrative of the challenges of composing a perfect harmony rather than the EU system's inbuilt 'coherent pluralism', they are arguably symptoms of the growing difficulty in doing so.

Similarly, and with the caveat that length and argumentative aims necessarily shape the choices made in a monograph, it would have been interesting to see a more detailed elaboration of the notions of 'basic structure of the legal order' and 'national identity' constraints on the pursuit of EU foreign policy objectives. While Larik admits that 'in theory' constitutional foreign policy objectives could form part of the 'identity' of the member states, he briefly concludes that 'the degree of substantive convergence, the narrow scope of constitutional identity' as well as the structure of EU external relations render any conflict between the EU and member states' foreign policy aims more hypothetical than not.³⁵ However, it does not seem farfetched to argue that, the wider the breadth of EU external competences and its exercise under the guidance of its foreign policy objectives, the greater the potential for a clash with the constitutional identity of individual member states. For instance, the Union's growing presence as an international security actor capable of deploying military missions abroad may clash with the more neutral tendencies of some of its members. Its ability to speak as an independent actor in international settings, such as the United Nations General Assembly, on issues ranging from migration to humanitarian intervention may not always reflect the concerns of the patchwork of nations that are seen as speaking 'in one voice'. And while the coherence of a single harmony does render the otherwise soft voice of some member states audible, it is interesting to problematise how the EU, by exercising the external dimension of its internal competences or by pursuing its foreign policy goals, may in effect be silencing the dissent of some member states on the international stage.

In conclusion, Larik manages the reader's expectations and takes the moderate stance that the proliferation of foreign policy objectives as constitutionalised norms within the EU legal order 'is neither a reason for unbridled enthusiasm nor for insuperable scepticism'.³⁶ His call thus seems to be directed more against legal scholarship's extreme conceptions of foreign policy objectives than at practitioners exploiting their potential as constraining or legitimating tools. While this can be seen as a rather lukewarm outcome, it sets the groundwork for further problematisations. How have foreign policy objectives been successfully used in

³⁵ *Ibid.*, p. 198.

³⁶ *Ibid.*, p. 14.

EU and national litigation? If their pursuit corresponds to a legal obligation, can there be accountability for failing to pursue them or will their 'imperfectible' nature always preclude it? Does the tendency for dynamic internationalisation foreshadow an even greater multiplication of EU foreign policy objectives as the Union's presence in the international stage consolidates? Even if these questions remain unanswered, Larik's work represents the most comprehensive and legally reasoned argument on the nature, legal force and value of EU's foreign policy objectives to date. By providing academics and practitioners alike with a legal framework in which to understand foreign policy objectives, it has the potential to shape the 'bounds of possibility' of the debate on EU's external action for years to come.

