

## **Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 327+xii pages**

BY MARTON VARJU

Marcus Klamert's book is another volume published in the Oxford Series of European Law which delivers excellence both in research and in academic presentation. It is painstakingly thoroughly researched and its points are argued with extreme care and detail. The book manages to combine the best of Germanic and Anglo-Saxon academic tradition, and it, thus, contains an attractive and potent mix of doctrinal and contextual analysis of one of the most fundamental constitutional principles of the European Union. The discussion in some places may come across as overly studious, and readers could have been spared some of the general theoretical and legal overviews and also the lengthy cross-references. Nevertheless, the book manages to compensate these with its comprehensiveness and reference work-like quality. In its detailed legal analyses, the book relies upon the author's considerable expertise in EU external relations law. These sections of the book are particularly engaging, and while they represent a detour from the main constitutional domains of the discussion their analysis is essential in developing the main arguments.

The book examines the very principle which directs the Member States to honour their commitments and comply with their obligations in the EU. It offers a comprehensive overview of the evolution of the principle and of the different positions taken in its academic interpretation. It is easy to get lost in the maze of definitions, aspects and linkages which characterise this area of EU constitutional law. Klamert, however, produces a staunch structure for analysis and, thus, is able to guide readers in this difficult conceptual and doctrinal terrain. This is helped by his robust and detailed knowledge of the fundamentals and the particulars of EU constitutional and economic law, which are presented from refreshingly new perspectives. The four parts of this book – Introducing, Cohesion, Cooperation and Construction – provide a narrative framework which explores every dimension of the principle and which keeps the discussion on narrower and, as a result, accessible discursive pathways.

Loyalty is introduced as a principle with many meanings and dimensions. These were acquired through gradual interpretative evolution before the EU Court of Justice, and the book does not make a secret of the fact that loyalty required some time to find its footing as a constitutional rule governing EU-Member State relations. Loyalty has been interpreted as governing compliance, cooperation, conflict resolution, and abstention from certain conducts in the EU, and it has been put into effect horizontally among the Member States, vertically – in both directions – between the Union and the Member States, and also in between the Union institutions. As discussed in the book, it has been applied as a *lex generalis*, an independent legal basis for distinct obligations, a supporting legal basis, a rule of construction, a legal principle, and as an instrument amplifying existing legal bases in EU law to establish otherwise not existing legal obligations. This conceptual diversity is matched by the diversity of the particular Union interests protected by the principle. When contrasted with the provisions in its immediate environment in the Treaties – Article 4(1) TEU holding that competences not conferred remain with the Member States and Article

4(2) on the protection of Member State national identities, loyalty appears as the main constitutional principle available to protect the interests of the European Union *vis-à-vis* those of the Member States.

These components, directions and positions produce a complex, constantly evolving principle, and the book is consistent in its criticism that loyalty and its application has been characterised by ambiguity and neglect. For constitutional lawyers, it may indeed be shocking to observe – as analysed extensively in the book – how minimal the connection was between the foundational jurisprudence of the EU Court of Justice expounding the obligations of the Member States and the current principled basis for EU-Member State relations provided by the principle of loyalty. The rise of loyalty in the jurisprudence could equally be seen as disturbing. While the foundation of Member State obligations became more transparent, loyalty also brought with itself uncertainty as to its weight and impact. The Member States – especially their courts – were confronted with vaguely defined but far-reaching principles affecting domestic substantive and procedural law, and the only direction they were given was that they are bound to comply with them as otherwise the effective realisation of EU obligations would be put in jeopardy. Although the book does look at the pitfalls of the judicial reasoning followed by the Court of Justice, and there is a discussion of the different ethos for the application of loyalty, for example, in the context of protecting the rights derived from EU law by individuals and in EU external relations law, a more fundamental, non-doctrinal criticism of the maturation of loyalty would have been welcome.

For those interested in the more fundamental rationales of Member State obligations in the EU beyond recognising the Treaties as legally binding, the discussion on distinguishing loyalty from the Union principle of solidarity is particularly interesting. Here, Klamert adopts a formalistic approach when declaring loyalty as the only genuine legal basis of Member State obligations, and he tries to convince proponents of a more constructive interpretation of the jurisprudence by arguing that his analysis does not aim to discredit solidarity as a (semi-)constitutional principle of EU law capable of defining the position of the Member States in the Union. On formal grounds, the argument indeed seems acceptable that while solidarity has often been presented as a principled basis of Member State obligations, breaches of legal obligations by the Member States have only been established in EU law following the principle of loyalty. However, the relevant case law could also be interpreted in a manner which does not drive such a wedge between solidarity and loyalty. Provided that we interpret Article 1(1) TEU – as laying down the foundations of Member State solidarity by declaring the unity of interests among them – with Article 4(3) on loyalty, the jurisprudence could provide a more constructive reading that while the narrower legal foundations of Member State obligations must be found in the principle of loyalty, its broader systemic basis follows – at the same time – from the Union principle of solidarity.

Perhaps the most controversial argument of the book is the questioning of pre-emption as a self-standing ‘constitutionalising’ principle of EU law besides supremacy, competence exclusivity and loyalty. Klamert’s main point is that it is very difficult to find a meaningful function for the principle of pre-emption in the legal domain left unoccupied by the other – previously mentioned – principles of EU constitutional law. Based on careful and sometimes very critical theoretical analysis, the book claims that pre-emption would either be responsible for matters that are already covered by another principle (competence exclusivity), or it would govern such a limited field not covered by another principle (supremacy) that its actual constitutional relevance would be extremely limited or its application would lead to more confusion than it aims to resolve. In this, the book relies on

previous scholarship debating whether pre-emption can indeed be distinguished from other, more fundamental EU legal principles. It is, nevertheless, the first academic work in the reviewer's knowledge which sees no reason and finds no support in the jurisprudence to 'conceive of pre-emption as a distinct legal principle of Union law' which would 'provide a useful categorization of the effects of Union law' and help us understand 'the mechanism of Union law'.

Despite the obvious intention of the book to capture and freeze the principle of loyalty in a comprehensive and detailed doctrinal and analytical framework, it does not avoid discussing the apparent dynamics of the principle and its application. Klamert does not understand the EU constitutional framework – including the principle of loyalty – as being static, and he recognises its evolutionary character, which seems to favour predominantly the Union. In the case of loyalty, the book distinguishes two main forms of evolution and expansion: the first is the gradual development of the principle and its content, and the second is its 'amplification' impact on the EU obligations of the Member States. As discussed in the final chapter, amplification denotes the application of loyalty – among the many other applications mentioned earlier –, which transforms Treaty rules 'into something they alone could not be.' It entails either the transformation of the nature of EU law obligations or the extension of the scope of the application of EU rules in different areas of EU law. This encroachment into the domains reserved for the Member States is, however, not without limits. Apart from the fact that the cases available to support the 'amplification' function of loyalty are few and their actual impact is questionable, Klamert keenly observes that 'amplification' through loyalty – although Article 4(3) TEU could be read as offering such a possibility – is prevented from piggybacking on the general objectives of the EU polity and, thereby, it is excluded that the enumerative provisions of the Treaties generate concrete obligations for the Member States.

Klamert's book invites readers on an awe-inspiring journey into the intricate world of hardcore EU constitutional law and doctrine. It holds surprises even for the most seasoned reader by revealing the richness of analysis possible within the otherwise narrow conceptual remit of EU constitutional principles. There is, however, a nagging feeling of hiatus during the reading of the book. The cold precision and restraint of Klamert's analysis somehow miss capturing the spirit of European integration, and the book is persistent in avoiding to make linkages with the disturbing political and social hiatuses of the EU legal order and the EU polity. There is not a lot of talk of values, democracy and of the legitimacy of it all, and we fail to see what *community* the principle of loyalty has been used to construct.