

Loyalty and Solidarity

Peter G. Xuereb*

Article 10 EC, Article 6 EU, Article I-5 Draco¹

While the Union's powers and responsibilities are ever on the increase and co-operation deepens as the Union begins to take positions more easily in the areas of freedom, security, justice and defense, it is seeking to keep the Member States and the Union together via the duties of loyalty. These are spelled out in general terms in Article I-5, and in more specific terms in specific contexts, such as those of the Common Foreign and Security Policy, Article I-15(2). Article I-5 is entitled 'Relations between the Union and the Member States', but it is also central to the relations between the Member States themselves in terms, for example, of the exercise of their voting rights in the Council of Ministers. The Article consolidates provisions that are currently scattered over various Treaties but not without adding some novelties.

Article I-5(1) builds on Article 6(3) EU as far as it obliges the Union to respect the national identities of the Member States. At the same time, and this is new, it links these identities to the Member States' fundamental structures, political and constitutional, inclusive of regional and local self government. It also requires that the Union shall respect the Member States' essential state functions, among which are the safeguarding of the territorial integrity and of internal security, and the maintenance of law and order. Article I-5(2) contains, besides the duty of the Member States to facilitate the Union's tasks which is presently contained in Article 10 EC, the provision that the Union and the Member States, in full mutual respect, shall assist each other in carrying out tasks which flow from the Constitution. Questions arise around the interplay between the concept of individual and collective Member State loyalty to the

* Professor of European and Comparative Law, Jean Monnet Chair, Chairman of the European Documentation and Research Centre, University of Malta and member of the Advisory Board of the European Constitutional Law Review.

¹ All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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Union and its policies on the one hand, and Union (and majority Member State) respect for (individual) Member State constitutional ‘identity’ and essential diversity on the other. Here the focus is on the latter.

THE RELEVANCE OF VALUES

A first question relates to the scope of the Union’s duty to respect the national identity of the Member States. National identity can be located not only in Member States’ *structures* and *functions* but also in certain *values*. Article I-5(1) links the Union’s respect for national identity only with structures and functions. Therefore, the question arises whether the duty to respect national identity also encompasses the duty to respect certain values. Surely Article I-5(1), by referring to fundamental *constitutional structures*, at least contains the duty to respect certain values of the Member States. In this context, one might also point to the Charter on Fundamental Rights, which is incorporated in the Constitution, because it emphasizes the duty of respect for the diversity of cultures and traditions (Article II-22). Respect for diversity is also evoked in the Preamble.

Relevant in this context is also Article I-2, which speaks of the values that the Union has in common with the Member States, among which are solidarity, democracy, rule of law and respect for human rights. Other values are set out in the second sentence, but they are not labeled as such.² The latter ‘values’ are apparently used simply as adjectival references to the nature of the ‘society’ for which the Constitution caters. Apart from the clear ‘polity-creating’ intent inherent in its phrasing – for the ‘society’ referred to must be the ‘European society’ of which we have barely begun to conceive (however much we aspire to it) – it seems that Article I-2 draws a distinction between different sets of values. Does it? Are the values in the second sentence merely ‘programmatic’ or otherwise of a different nature or order than those in the first sentence? Let it be remembered that the second sentence refers to such vital values in European culture as justice, tolerance, pluralism, non-discrimination and solidarity. Are these ‘second order’ values?

However that may be, how is the Union going to deal with divergent views as to different ‘human rights’, for example, different views on abortion, penology, euthanasia, surgical intervention, in the various twenty-five Member States? Does the Constitution – viewed in the round as incorporating an institutional framework, decision-making processes and substantive content – promise to bring us to a common understanding of them? Are the Constitution

² At least not in Article I-2, but see for example the reference to solidarity as a value in the Preamble to Part II of the Draft Constitution wherein, incidentally, democracy and the rule of law are termed ‘principles’.

and its provisions more indicative than the current Treaties as to where the ‘last word’ lies or of the route to the last word on the interpretation and application of the Union’s values in the concrete case? Does the European Constitution, in speaking of ‘common values’ (Article I-2), a core of which certainly exists, provide sufficiently for the dialogue that must inevitably occur around that ‘core’ and around the actual practice of the ‘values’ broadly shared?

MUTUAL LOYALTY AND POLITICS: DECISION-MAKING

The increase in areas of majority or qualified majority voting may be a threat to respect for national identity and undermine the requested loyalty of the Member States towards the Union. Or will the increase of majority voting be counterbalanced by heightened and real dialogue on all levels, so that across all policy areas the specificities and particular needs or circumstances of each Member State will be factored into all deliberations in all institutions?

Article I-5(2), according to which the Union and the Member States shall, in full mutual respect, assist each other ‘in the carrying out of the tasks which flow from the Constitution’, expresses the general duty of loyalty as a duty of loyal co-operation. Reading this in light of the above, the emphasis appears to be on making decisions in such a way that all Members are able not only ‘to live with them’, but also to participate wholeheartedly in implementing them, *because* those States’ identities will have been respected and *because* they will have been ‘assisted’ in case of difficulties. Seen from this angle, Article I-5(2) embodies and generalizes the historical horizontal dialogical process between the EU legal order and the constitutional legal orders that the European Court of Justice and the national constitutional courts are engaged in. Article I-5(2) thus expresses the idea that, after the Constitution enters into force, the European Constitutional Space should be as much a space of dialogue between constitutional orders as it was before.

How much reliance does the Constitution place on ‘decision-making processes’ to ensure that loyalty of the Member States can be legitimately demanded and expected? In other words, are EU decision-making processes capable, i.e., conceived and intended to operate in practice, of guaranteeing that the ‘outcome’ of it will be such that the duty of loyalty of the Member States to carry it out is unproblematic? Will the ‘old’ and ‘new’ processes of dialogue and voice (for example, the involvement of national parliaments) and provisions for ‘mediation’ (for example, the intervention as mediator of the Minister of Foreign Affairs as per Article III-201(2)), as well as the specific provisions on solidarity (e.g., Article III-15), and on identity and specificity (e.g., Article I-40(2)), in a new Union of twenty-five or more Member States in which deci-

sions will increasingly be made by majority vote, together amount to a workable framework for the operation of the *Maximum Cohesion with Necessary Differentiation* formula that has served the Union so well thus far? In this context, the resurrection (or survival?) of a kind of Ioannina agreement, as was decided in Brussels on 17/18 June 2004, is relevant. There and then, agreement was reached on a draft Council decision relating to the implementation of Article I-24, to be adopted on the day the European Constitution enters into force. The draft decision states that if members of the Council, representing at least three-quarters of the level of population or at least three-quarters of the number of Member States (which are necessary to constitute a blocking minority), indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue and do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address the concerns raised.³ Is that enough?

MUTUAL LOYALTY AND THE JUDICIARY: PRIMACY AND LIMITS ON THE USE OF COMPETENCES

It is far from clear where the duty of loyalty of a Member State ends and its right to preserve national identity and to exercise autonomy of action in essential internal affairs begins. This might also affect the primacy principle as enshrined in Article I-10 of the Draft Constitution, because it may be read as applying only where the Union's law has been made in full respect of the Union's duties, including the duty of respect for national identity. In other words, the question is if the use of Union competences, next to the principles of subsidiarity and proportionality, is also governed by the Union's duty to respect national identity. Would a Member State be able to impugn a Council act for breach of the duty to respect national identity or the values and principles enshrined in Article I-2 before the Court of Justice?

QUESTIONS FOR FUTURE SCHOLARSHIP AND PRACTICE

1. Are the decision-making *processes* in the Constitution adequate to properly guide the search for decisions that, while made by majority vote, fully respect Article I-5(1) and the value of solidarity as enshrined in Article I-2, so as to legitimize the invocation then of the primacy rule and the obligation of loyalty?
2. Can Member States challenge Union acts before the Court of Justice for the alleged breach of the Union's duty to respect national identity?

³ CIG 85/04.