Varieties of European Subsidiarity

A Multidisciplinary Approach

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Contents

10

Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy

MARCO BALBONI

This chapter investigates the relationship between the principle of subsidiarity and the principle of solidarity in the field of asylum and immigration policy of the European Union (EU). The question is whether or not these principles lead to the same results in the governance of the mentioned policy area. The basic assumption is that both principles move indeed in the same direction or imply similar solutions, even if these solutions seem difficult to adopt and encounter several obstacles. The following analysis explores first the principle of subsidiarity before considering the principle of solidarity.

The principle of subsidiarity was officially introduced in the legal order of the EU by the Treaty of Maastricht. The main rationale of the principle is to allocate the exercise of the power to the lowest level possible, provided that this level responds to satisfactory requirements of efficiency. As affirmed by Article 5 (3) of the Treaty on European Union (TEU), the principle operates only in areas not subject to exclusive EU competences in order to decide if legislative or operational powers can be exercised by the centralised level of the EU or the decentralised level of the member states. As a matter of principle, it requires a double scrutiny: at first establishing if the objectives of the proposed action cannot be sufficiently achieved by the member states; and establishing further, by reason of the scale or effects of the proposed action, if these objectives can be better achieved by the EU.

Although formally neutral, the principle has been adopted with a view to limit the exercise of competences by the centralised level of the EU. In fact, it implies that the European Commission, which has the power of legislative

initiative, has to justify the adoption of an act or an action by virtue of the principle of subsidiarity. The Lisbon Treaty has provided national parliaments with a special mechanism of control, the so-called Early Warning System (EWS). Once national parliaments submit a certain number of reasoned opinions, the European Commission is compelled to review or justify its proposal. What is more, the European Parliament or the EU Council can abandon a proposal if they believe that the principle of subsidiarity is not satisfied. While the Court of Justice retains jurisdiction on the respect of the principle, it has been very reluctant to exercise its power due to the complex political implications this might have.

The principle of subsidiarity in comparative context

Strikingly, and contrary to what may be expected, in complex organisations with different levels of governance, the principle tends to imply that competences in the field of asylum and immigration are exercised at the most central level. The United States offers a significant example in this context. The United States and the EU as political systems differ in many respects. In fact, the principle of subsidiarity is not explicitly enunciated in the US legal framework. Yet, in so far as the consequences of the principle are concerned, a comparison can be justified given that both entities reflect organisational complexity (Delaney, 2013, p. 153).

In the early stages of American federalism, the competence in the field of asylum and immigration was shared between the federation and the member states, and it was unclear which level would ultimately prevail in cases of conflict. At the end of the 19th century, a number of cases reached the Supreme Court disputing restrictive legislative acts adopted by some members of the federation already burdened by high levels of immigration, most notably in the states of New York and California. Such local legislation was not welcomed by other states or the federation due to the consideration that immigration was necessary for economic growth at national level. The Supreme Court decided the matter in favour of the federation. Although the final decision was adopted on the basis of several grounds, one played a particularly important role. The majority view highlighted that the policy in the field of immigration concerns citizens of third countries. Therefore, immigration policy is intrinsically connected with foreign relations, and this implies an inherent policy competence of the federation. For example, unilateral action by a member state of the federation concerning citizens of a third country may entail consequences for the entire federation such as the risk of war. Hence, the exercise of competences in the field of the foreign relations suggests by its nature the exercise of competences in the field of immigration. While the respective debate continued for almost another

century, nowadays nobody doubts that immigration policy essentially rests as a 'federal plenary power' in the hands of the US federation.

It is interesting to note that up to now similar justifications have been adopted in the EU context only to a limited extent, yet leading in practice to comparable results. As is well known, EU policy on asylum and immigration is based on a system of shared competence and, therefore, subject to the principle of subsidiarity. Some provisions reserve specific competence to the member states, but Article 67 (2) TFEU assigns a general competence to realise a common policy in the field of border control, immigration and asylum to Brussels, as specified by the subsequent provisions for each of these fields. Unfortunately, it is not entirely clear where the dividing line between the two is found. A relevant example refers to the recent process of adopting and enforcing the Directive on Seasonal Workers (European Parliament and Council 2014).

On the one hand, Article 79 (2) TFEU attributes to the EU the competence to adopt measures concerning the conditions of entry and residence of third-country nationals and the definition of their rights. On the other hand, Article 79 (5) TFEU reserves the competence to determine the volume of third country citizens admitted in their state to seek work to national governments. Based on Article 79 (2) TFEU, the proposed Directive on Seasonal Workers provided common criteria for the admission of third-country nationals within the EU and the definition of minimum rights to be granted to them as citizens legally residing in a member state. The European Commission, however, invoked different rationales to justify the exercise of the competence to adopt the directive under the principle of subsidiarity. Among these justifications, the following two stand out: the need to preserve open borders, while avoiding secondary movements in the flow of migrants within the Union; and the need to ensure effective cooperation with third countries on migration issues.

The proposed directive raised several questions in EU circles, precisely on the respect of the principle of subsidiarity. Although national parliaments have not been able to reach the required number of reasoned opinions, their opposition to the adoption of the directive has gathered an impressive consensus, rarely achieved on other occasions. The arguments invoked by national parliaments were based on two aspects: first, the directive was not necessary to preserve open borders within the EU as its purpose was only to ensure minimal rights to seasonal workers; and second, the directive was not necessary for ensuring efficient EU cooperation in migration matters with third countries. The first reasoning was difficult to reject by the European Commission, whereas national parliaments were not able to provide valid arguments in support of the second.

In fact, given that member states are free to provide for better living conditions or workers' rights, it is not easy to argue on part of the Commission that the directive is strictly necessary to prevent secondary movements of third-country nationals. By contrast, it is far more difficult to deny the existence of a strong connection between the adoption of the directive and the need to ensure effective cooperation with third countries on migration issues. As further specified by the Commission, the treaties also confer competences in development policy to the EU level, which in line with Article 208 (1) TFEU, has the duty to take into account respective objectives in the implementation of all policies 'which are likely to affect developing countries', including asylum and migration policy. Clearly, actions from member states alone are not sufficient to attain the objectives of development policy, especially in cases of extensive and widespread migration. This necessarily requires a common EU approach. As the Commission (1995, 2) explained, immigrants often,

> retain strong links with their countries of origin, and the economies of the latter benefit from welcome contributions in the form of salary remittances. If planned cooperation with the countries in question fails to produce a methodical way of tackling migration pressure, friction could easily result, hurting not just international relations but also the groups of immigrants themselves.

Frequently more concerned with national sovereignty, member states have only occasionally shared a joint vision, for example, when acting in the framework of common responsibilities. Accordingly, the French EU Presidency stated in 2008 with reference to migration policy: 'decisions taken by a Member State will have repercussions for all other Member States'.

The principle of solidarity

To a large degree, the principle of solidarity suggests similar consequences. In legal terms, the principle has its roots in the international regime for refugees. After World War II, on 3 December 1949, the UN General Assembly adopted, with Resolution 319 (IV) on Refugees and Stateless Persons, one of the first codified texts in the field. Its preamble explicitly recognised that 'the problem of refugees is international in scope and nature'. Moreover, the fourth sentence of the preamble of the Geneva Convention relating to the Status of Refugees (1951) affirms that,

> the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem

> of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

Although the lack of a direct mentioning leaves practical consequences unclear, there is little doubt that the preceding statements are motivated by the principle of solidarity (Karageorgiou 2016, 3). Any solution to the refugee problem would demand consultation and cooperation between states due to its international dimension. Indeed, countries on their own are not able to deal properly with all its causes and consequences. Yet, depending on perspective, it may be questioned whether the principle of solidarity as a guidance for European asylum and immigration policy does originate in international law rather that in a notion meant to govern the relations between EU member states.

As a guiding principle for asylum and immigration policy, solidarity is recalled in Article 67 TFEU and then further developed in Article 80 TFEU, forming the last provision of the Treaty chapter devoted to policies on border checks, asylum and immigration. Article 80 TFEU states that,

> policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Despite the reference to solidarity and fair sharing between member states, it should be stressed that the first addressee of both elements is the EU legislator, who is called upon to transform abstract ideas into operational policies. Furthermore, given its direct enunciation, it appears that the principle of solidarity within the European legal order goes a step further than what it is implied by its recognition in the international context. As Karageorgiou (2016, 4) points out,

> the provision explicitly couples solidarity with fair sharing of responsibilities. The fact that two distinct terms are deployed to describe the drafters' intentions is rather telling; the concept of solidarity is chiefly concerned with approaching an issue collectively, in support of each other, whereas fair sharing of responsibilities is related to a concrete division of labour.

The principle of solidarity goes beyond the mere adoption of measures at a centralised or common level in order to ensure a better cooperation between states. Thus, it implies more than the same principle proclaimed at international level. As solidarity fundamentally requires the sharing of responsibilities on the basis of a criterion of fairness, it comes with institutional *as well as* substantive policy implications.

Regardless of its standing in the EU Treaty, the solidarity principle has experienced serious implementation gaps, either in the legislation adopted by the EU or in the concrete behavior of national governments. Arguably, this is the causal factor to understand the apparent deficiencies in the EU's common policy on asylum and immigration. The example of the EU's Dublin system, established by an EU regulation of the same name, explains some of the practical consequences stemming from the principle's inadequate implementation (European Parliament and Council 2013).

The relevant piece of legislation states that the member state competent for the examination of an application by any asylum seeker is the country of first entry. In this way, the main burden shifts to the member states directly located at the borders of the Union. In fact, the European Commission specified in its own reform proposal the Dublin system not as a burden-sharing mechanism, but as one of straight burden-shifting (European Commission 2016, 13). In the words of Advocate General Sharpston (2012, 83): 'the whole system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls', and on the basis of a simple 'situation of fact'. As a consequence, there is an almost natural tendency of the most burdened countries to evade the proper application of core rules of the Dublin system and to make their asylum system as unattractive as possible in order to reduce the practical demands placed on them.

Similarly, a lack of attention to the principle of solidarity is evident in other types of measures which were supposed to help the most burdened countries. The German initiative of 2015 is a case in point as it applied unilaterally the discretionary clause provided by Article 17 (1) of the Dublin Regulation. The latter states that,

> by way of derogation from Article 3 (1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The adoption of this unilateral measure outside a concerted framework had

the effect of passing on negative repercussions to other member states. Thus, the initiative became a pull factor for the arrival of new migrants in countries other than Germany and further increased the pressure on member states already exposed to the phenomenon (Shisheva 2016, 4). Not surprisingly, the European Commission has restricted the remit of the relevant clause in its proposals for reform of the Dublin arrangements.

In light of the above, it is fair to say that, within the EU legal order, both the principle of subsidiarity and the principle of solidarity move in the same direction and imply similar consequences, despite some remaining differences. The impact of the principle of subsidiarity is more institutional or procedural in character, in the sense that it essentially asks for the adoption of collective measures at a coordinated, if not central, level. The impact of the principle of solidarity, by contrast, has either an institutional or a substantive dimension. In other words, it implies not only coordinated or central measures, but also real burden-sharing to make more sustainable policies possible for all member states.

All said, it is necessary to clarify how deep the intervention at central EU level should be. How can the central intervention by Brussels be balanced and preserve national competences? Even if the principle of subsidiarity and the principle of solidarity would require a more resolute centralised intervention and more joint measures, it should not be forgotten that the EU model does not aspire to be identical with US style federalism.

To answer the question, the treaties give only a few partial indications. The second sentence of Article 80 TFEU, for example, states: 'whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures' to give effect to the principle of solidarity. Yet, this particular provision assumes an already resolved problem as regards the subject exercising the competence. In fact, finding a proper balance for the application of the subsidiarity and solidarity principles in their institutional as well as substantive dimension depends more on non-legal factors than on provisions inscribed in the treaties.

A number of such factors can be enumerated: first, there is a lack of consensus on the values which should have priority at European level. In contrast to other European crises, the migration problem is more profound as it challenges directly principles and values held by individual member states and depends 'on solutions to address life and death of human beings fleeing war zones and persecutions' (Pascouau 2016, 17). Second, there is a lack of trust among EU states in their mutual capacity to adequately meet the duties of common burden-sharing. It is no coincidence that Northern member states

typically defend their strict approach by demanding from the Southern countries calling for more solidarity to ensure their national asylum systems are up to scratch with European standards. Third, and probably at the heart of the matter, there is a fundamental misunderstanding of this policy area since the very beginning of European cooperation and reflected in the narrative that settled in the collective memory. Indeed, the core of EU asylum and migration policy has always been driven by the emphasis on the positive effects of the elimination of internal borders, while disregarding the necessity to set up a common regime for the Union's external borders. Abolishing borders between France and Germany might be a good idea, but this does not mean that France and Germany will not have any external border. Instead, it means that the external border of France and Germany is now placed somewhere else, for instance, in Italy or in Greece (with significant consequences in terms of available resources and commitments to a larger set of responsibilities) (Shisheva 2016, 5). Taking care of the EU's Mediterranean borders cannot just be a problem for Italy and Greece since their borders have to be considered the borders of all European member states. No one can expect two countries alone to do the job for everybody else in the common European space.

In combination, the factors listed above produced a rather inconvenient situation for the European project. Not only does it negatively affect the possibility to address current challenges, but it also precludes a clear strategy for the future. The measures adopted in EU asylum and immigration policy appear to respond more to contingent circumstances than to reflect long-term aims and objectives. A confirmation of this claim can be found in the documents adopted by the European Commission, admitting that only limited policy actions are feasible and that more long-standing measures are unlikely to be scheduled in the absence of more favourable political conditions. Furthermore, the lack of systematically collected, objective data frequently prevents the conduct of a more thorough analysis as a potential starting point for new policy initiatives at European level.

Conclusion

In EU policy on asylum and immigration, the principle of subsidiarity and the principle of solidarity point in the same direction. Both ask simultaneously for the adoption of measures at a more centralised or coordinated level and for more balanced commitments by the member states. Despite the persistence of serious obstacles to achieve this result, success stories can be found within narrow limits. The adoption of the Directive on Seasonal Workers is a case in point. In terms of the EU's institutional profile, however, the risk of a rather ambiguous framework cannot be excluded. The frequent incapacity of

the EU to adopt adequate measures may coexist with occasional peaks showing centralised efforts. Certainly, from the perspective of a neutral observer, this does make little sense in terms of policy coherence and consistency.

For this reason, an effort should be made to find a sound balance between measures which have to be adopted at central or coordinated level and measures which need to remain in the hands of national governments. Obvious examples for the latter are issues of migrant integration where actual needs change from country to country, or external migration flows that ultimately affect individual member states to different degrees. In the final analysis, what creates most concern is the apparent lack of a long-term strategy. Of course, the general political climate is not conducive, but processes of public deliberation must be initiated and sustained by European institutions to develop a more solid policy approach better aligned with existing needs.

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