Solidarity Beyond the State in Europe's Common European Asylum System

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The increase in the flows of asylum seekers towards the European Union (EU) in recent years has re-awakened the discussion over the meaning, extent and limits of the principle of solidarity in European asylum law. In view of this politically sensitive and ongoing discussion, this contribution aims to assess the legal meaning of solidarity in the Common European Asylum System. I will attempt to demonstrate that the evolution and content of the principle of solidarity in both EU primary and secondary law is predominantly state-centred, with claims of solidarity being advanced primarily with states as reference points and as beneficiaries. I will aim to demonstrate the limits of this state-centred approach to solidarity, both in terms of ensuring effective protection of the rights of asylum seekers and refugees and in terms of achieving an efficient and well-functioning European asylum system. I will advocate in this contribution a paradigm change: moving from a concept of state-centred solidarity to a concept of solidarity centred on the individual. I will demonstrate how the application of the principle of mutual recognition in the field of positive asylum decisions can play a key part in achieving this paradigm change. I will argue in particular that positive mutual recognition – if accompanied by full equality and access to the labour market for refugees across the European Union – is key towards addressing the lack of effectiveness in the current system. I will end this contribution by looking boldly to the future, and exploring how refugee-centred solidarity can be achieved by moving from a system of inter-state cooperation based on national asylum determination to a common, EU asylum procedure and status.

State-Centred Solidarity in European Asylum Law – A Constitutional Perspective

An examination of European constitutional law reveals a concept of asylum solidarity, which is state-centred, securitised and exclusionary (Mitsilegas 2014). This view of solidarity has been prominent in the debates on allocation of responsibility for asylum seekers across the EU way before the entry into force of the Lisbon Treaty, with the use of the term 'burden' to describe increased pressures imposed upon the state – with asylum seekers thus viewed implicitly as a burden to national systems. Solidarity here thus takes the form of what has been deemed and analysed as 'burden-sharing' (Betts 2003; Boswell 2003; Noll 2003; Thielemann 2003a and 2003b) and in particular from a legal perspective, the sharing of the responsibility for increased flows of asylum seekers. The logic of burden-sharing in effect securitises asylum flows by viewing asylum seekers and asylum-seeking in a negative light (Noll 2003). While the term 'burden-sharing' does not appear in EU constitutional law, one could argue that it has been replaced in the Treaties of the European Union[1] by a state-centred, securitised and exclusionary concept of solidarity. The emphasis on the interests of the state is confirmed by the provisions of the Lisbon Treaty on solidarity in the Area of Freedom, Security and Justice. According to Article 67(2) of the Treaty on the Functioning of the European Union (TFEU), the Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity *between Member States*, which is fair towards 'third country' nationals.

Article 80 TFEU further states that the policies of the Union on borders, asylum and immigration will be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications,*between the Member*

States. Solidarity is also securitised: as with other areas of European Union law, solidarity in European asylum law reflects a crisis mentality (Borgmann-Prebil and Ross 2010) and has led to the concept being used with the aim of alleviating perceived urgent pressures on Member States. This view of solidarity as an emergency management tool is found elsewhere in the Treaty, in the solidarity clause established in Article 222 according to which the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The concept of solidarity here echoes the political construction of solidarity in European asylum law, in responding to perceived urgent threats. It is framed in a way of protecting the state and requires cooperation not between the state and the individual but between the state and the European Union. State-centred securitised solidarity in the field of asylum echoes Ross's assertion that the political power of security can attempt to appropriate solidarity for its own ends (Ross 2010, 39). This view is confirmed by the growing trend towards the securitsation of migration and asylum in EU law and policy (Guild 2009; Mitsilegas 2012a).

Placed within a state-centric and securitised framework, solidarity is also exclusionary. The way in which the concept of solidarity has been theorised and presented in EU constitutional law leaves little, if any space for the application of the principle of solidarity beyond EU citizens or those 'within' the EU and its extension to 'third country' nationals or those on the outside. In a recent thought-provoking analysis on solidarity in EU law, Sangiovanni argues for the development of principles on national solidarity (which define obligations among citizens and residents of Member States), principles of Member State solidarity (which define obligations among Member States) and principles of transnational solidarity (which define obligations among EU citizens as such) (Sangiovanni 2013, 217). 'Third country' nationals are notably absent from this model of solidarity. This exclusionary approach to solidarity appears to be confirmed by the Treaties, with the Preamble to the Treaty on European Union (TEU) expressing the desire of the signatory states 'to deepen the solidarity *between their peoples* while respecting their history, their culture and their traditions' (Preamble, recital 6, emphasis added).

Solidarity functions thus as a key principle of European identity which is addressed to EU Member States and their 'peoples' (see also Art. 167, TFEU on Culture), but the extent to which such European identity based on solidarity also encompasses 'third country' nationals is far from clear (Mitsilegas 1998). This ambiguity remains after the entry into force of the Lisbon Treaty. One of the few provisions of the TEU which may be seen as leaving the door open to a more human-centred concept of solidarity, is Article 2 on the values of the European Union, which states that these values are common to the Member States *in a society in which…solidarity… [must] prevail*. The inclusion of asylum seekers and refugees in this concept of solidarity is unclear. Although asylum law is centred on assessing the protection needs of 'third country' nationals, and in this capacity they must constitute the primary 'recipients' of solidarity in European asylum law, the application of the principle of solidarity in this field appears thus to follow the exclusionary paradigm of solidarity in other fields of EU law where issues of distributive justice arise prominently. Writing on the position of EU social welfare law concerning irregular migrants, Bell has eloquently noted that 'third country' nationals lack the ties of shared citizenship, whilst the extension of social and economic entitlements to them cannot easily be based on a reciprocal view of solidarity (Bell 2010, 151). Asylum seekers seem to be included in a continuum of exclusionary solidarity in this context.

Dublin as the Embodiment of State-Centred Solidarity: The Failure of Negative Mutual Recognition

In order to understand the issues arising from the discussion regarding solidarity in the context of the allocation of asylum seekers and refugees across the European Union, it is essential to point out that the Common European Asylum System currently in place is based on the development and interaction of national asylum systems. The European Union has not developed a unified EU-wide asylum procedure and refugee status. While a key element of the evolution of the European Union into an Area of Freedom, Security and Justice has been the abolition of internal borders between Member States and the creation thus of a single European area where freedom of movement is secured, this single area of movement has not been accompanied by a single area of law. Already in 1999, the European Council Tampere Conclusions stated that 'in the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum throughout the Union.' (European Council Tampere Conclusions, para. 15). While there has been ongoing harmonisation of national rules on asylum procedure, reception conditions and refugee qualifications since Tampere, more than 15 years after this statement, asylum applications in the EU are still examined by individual Member States following a *national* asylum procedure and

leading to a national refugee status and ensuing rights. In this context, governance of asylum flows within the European Union and allocation of responsibility for asylum seekers and refugees has been designed within a system of interaction between national legal systems rather than under a system of centralized allocation in a single area. A key mechanism of governance of asylum flows within the European Union has been the application of the principle of mutual recognition in European asylum law.

Mutual recognition creates extraterritoriality (Nicolaidis 2007) and pre-supposes mutual trust (Mitsilegas 2006): in a borderless Area of Freedom, Security and Justice, mutual recognition is designed so that the decision of an authority in one Member State can be enforced beyond its territorial legal borders and across this area speedily and with a minimum of formality. As with other areas of EU law, most notably EU criminal law, in the field of EU asylum law automaticity in the transfer of asylum seekers from one Member State to another is thus justified on the basis of a high level of mutual trust. This high level of mutual trust between the authorities that take part in the system is premised upon the presumption that fundamental rights are respected fully by all EU Member States across the European Union (Mitsilegas 2009 and 2012b). The presumption of mutual trust is inextricably linked with automaticity in inter-state cooperation. Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the Area of Freedom, Security and Justice without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation.

In the field of EU asylum law, mutual recognition based on automaticity and trust has been introduced by the Dublin Regulation, which sets out a system of automatic inter-state cooperation which has been characterised as a system of negative mutual recognition (Guild 2004). Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognise the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. The Dublin Regulation thus introduces a high degree of automaticity in inter-state cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria – including notably the criterion of irregular entry via one of the EU Member States – are established to apply, with, at least initially, only limited exceptions (Mitsilegas 2014). In this system of inter-state cooperation based on automaticity and trust, there is little place for the individual situation and rights of asylum seekers to be taken into account. Transfers take place speedily and almost automatically, on the presumption that the receiving state will provide an equivalent human rights protection to asylum seekers as the sending state. Mutual recognition in Dublin thus reflects a model of state-centred, securitised and exclusionary solidarity: Dublin has been designed predominantly with the interests of [certain] states in mind, and is a system that aims to deflect undesirable asylum seekers from Member States' territory.

The Dublin model of automatic mutual recognition has been challenged by the judiciary. Following the finding by the European Court of Human Rights in *M.S.S.* that both the sending and the receiving Member State (in that case Belgium and Greece respectively) were in breach of the European Convention on Human Rights (ECHR) in their implementation of the Dublin system regarding a specific transfer (*M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No. 30696/09), the Court of Justice of the European Union in the cases of *N.S.* and *M.E.* (Joined Cases C-411/10 and C-493/10) set limits to automaticity in EU law. It did so by finding that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental rights (para. 99). Such presumption is rebuttable (para. 104). The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has been accompanied by the establishment of a high threshold of incompatibility with fundamental rights (Mitsilegas 2012b). A transfer under the Dublin Regulation would be incompatible with fundamental rights if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible. This is the case if it results in inhuman or degrading treatment (within the meaning of Article 4 of the Charter on the prohibition of torture and inhuman or degrading treatment or punishment) of asylum seekers transferred to the territory of that Member State (para. 85).

The EU legislator has attempted to incorporate the Court's ruling in the re-casting of the Dublin system in the so-

called Dublin III Regulation, adopted in 2013 and currently in force (EU Regulation No. 604/2013 OJ L180/31; for a commentary, see Maiani 2016a). According to Article 3(2) of the Regulation, second and third indent,

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designed as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

Notwithstanding these developments, Dublin III has maintained essentially a state-centred model of solidarity. The Regulation maintains the system of allocation of responsibility for the examination of asylum applications by EU Member States under the same list of hierarchically enumerated criteria set out in its pre-Lisbon predecessor (see Chapter III of the Regulation, Arts. 7–15). Moreover, the Regulation attempts to translate a version of the principle of solidarity into legal terms. Article 33 of the Regulation introduces a so-called mechanism for early warning, preparedness and crisis management in cases where the Commission establishes that the application of the Dublin Regulation may be jeopardised due to either a substantiated risk of particular pressure being placed on a Member States' asylum system and/or to problems in the functioning of the asylum system of a Member State. In these cases the Commission would invite affected Member States to draw up a preventive action plan, without states being bound by the Commission's request (Art. 33(1)). The early warning mechanism established by the Dublin III Regulation is considerably weaker than an earlier Commission version. Under this version this mechanism would be accompanied by an emergency mechanism which would allow the temporary suspension of transfers of asylum seekers to Member States facing disproportionate pressure to their asylum systems. This has not been accepted by Member States (Conclusions of the Justice and Home Affairs Council of 22 September 2011, Council document 14464/11, 8).

The outcome has been a mechanism that again views the asylum process largely from the perspective of the state and not of the affected individuals. The Preamble to Dublin III confirms this view by stating that an early warning process should be established in order to ensure robust cooperation within the framework of this Regulation and to develop mutual trust among Member States with respect to asylum policy. It is further claimed that solidarity, which is a pivotal element in the Common European Asylum System, goes hand in hand with mutual trust and that early warning will enhance trust (Preamble, recital 22). Solidarity and trust are viewed in reality from a traditional 'burden-sharing' perspective involving negotiation of support by the Union to affected Member States (and with the European Asylum Support Office emerging as a key player). Notwithstanding the case-law of the European courts and the findings of United Nations High Commissioner for Refugees (UNHCR) and civil society, the position of the asylum seeker appears to still be considered as an afterthought (Mitsilegas 2014).

Towards a Paradigm Change: Mutual Recognition of Positive Asylum Decisions as Refugee-Centred Solidarity

A way in which the current conceptual and human rights limits of solidarity in the Common European Asylum System can be transcended is to think differently about the application of the mutual recognition principle and focus on the establishment of a system of mutual recognition of positive asylum decisions, which will then carry with them the rights granted to refugees at the national level throughout the European Union. I have advocated the application of the principle of mutual recognition of positive asylum decisions in a Report I prepared for the Open Society Foundation in 2014 (Mitsilegas 2014b), which I presented at the Italian Presidency of the Council of the EU conference on asylum in November 2014 (for the main findings,see Mitsilegas 2015a). My proposal for adopting a model of mutual recognition of positive asylum decisions has since been endorsed by the Council of Europe Parliamentary Assembly (Council of Europe 2015) and reflected in a recent study prepared for the European

Parliament Civil Liberties Committee (Guild et al. 2015). I have argued that the application of mutual recognition, in order to achieve the extraterritorial reach of rights, has already been applied in the European criminal justice area by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order (OJ L338, 2). The Directive, which was adopted under a legal basis related to judicial cooperation in criminal matters, aims to apply the principle of mutual recognition in criminal matters to orders issued to protect victims in one Member State when these victims find themselves in other EU Member States. In other words, it is aimed that the recognition of a European Protection Order by the authority in the executing Member State will mean that the protection will 'follow' the victim to the Member State they have moved to. (Mitsilegas 2015b and 2016a).

I have argued that the application of the principle of mutual recognition on decisions granting rights to individuals can be applied in the Common European Asylum System (CEAS). The application of the principle of mutual recognition of positive asylum decisions provides five distinct and clear benefits:

1. It will create legal certainty regarding the status and rights of refugees throughout the EU in an AFSJ without internal frontiers.
2. It is consistent with the Treaty aim of establishing a CEAS and a uniform status (TFEU, Art. 78).
3. The necessary harmonisation, which is necessary for the effective operation of mutual recognition, exists at EU level, with the adoption of the second generation CEAS instruments post-Lisbon. There is a need to focus on the implementation of and compliance with these instruments across the EU.
4. Mutual recognition of positive asylum decisions is a corollary to developments examining possibilities for the pooling of reception conditions and join processing of asylum claims. Pooling of reception and procedure must be combined with the pooling of protection. Joint efforts in procedures and reception before the granting of refugee status will create joint ownership and mutual trust which will facilitate the subsequent recognition of positive asylum decisions across the EU.
5. Mutual recognition of positive asylum decisions focuses the discussion on solidarity specifically on the needs and rights of the refugee.

But how can the principle be applied? There are three factors, which must be considered when examining the precise conditions and modalities for the application of the principle of mutual recognition to positive asylum decisions:

1. *Time*. From when will mutual recognition take effect? One option is for mutual recognition to kick in from day one, namely from the date of the judicial decision granting refugee status. This is the preferable option and it could be based on a model granting equal treatment to refugees with citizens of the Union (see also Bast 2016). Another option may be for mutual recognition to take effect after two years of continuous residence in the state that has granted protection in line with the time limits established by the European Agreement of Transfer of Responsibility (see also, with further conditions, Meijers Committee 2015). A third option may be a hybrid model where movement to the second Member State happens immediately but equal treatment with long-term resident 'third country' nationals is granted from day one, whereas equal treatment with nationals of the second state is granted after two years.
2. *Rights*. For mutual recognition to be meaningful, the recognition of status should be accompanied by the recognition of rights. The protection and rights the refugee is granted in the first Member State should follow her in the second Member State. There are different moments in time when this can happen (see no. 1. above).
3. *Quotas*. A possible way forward is to combine mutual recognition with the allocation of responsibility between Member States on the basis of quotas. However, this option faces two challenges: it may disregard the particular situation and wishes of refugees (e.g. in the context of family reunification); and it is difficult to enforce in a Union without internal frontiers.

The application of the principle of mutual recognition of positive asylum decisions was floated by the European Commission some years ago, but the idea seems to have been buried since. Already in 2009, the European Commission, in its Communication on *An Area of Freedom, Security and Justice Serving the Citizen* stated that '[a]s part of a detailed evaluation on the transposal and implementation of second-phase legislative instruments and of

progress in aligning practices and supporting measures…by the end of 2014, the EU should formally enshrine the principle of mutual recognition of all individual decisions granting protection status taken by authorities ruling on asylum applications which will mean that protection can be transferred without the adoption of specific mechanisms at the European level' (European Commission (COM) 2009, 262 final, 27–28). In its Communication informing the follow-up to the Stockholm Programme, the Commission noted that relocation of the beneficiaries of international protection, which has been piloted in recent years from Malta, is one form of solidarity that should be enhanced. It further stated that,

New rules on the mutual recognition of asylum decisions across Member States and a framework for the transfer of protection should be developed in line with the Treaty objective of creating a uniform status valid across the EU. This would reduce obstacles to movement within the EU and facilitate the transfer of protection-related benefits across internal borders (COM 2014, 154 final, 8).

While the principle of mutual recognition has been used thus far in Europe's Area of Freedom, Security and Justice in order to increase and extend the powers of the state, its potential for enhancing fundamental rights and the rights of beneficiaries of international protection is significant. The application of the principle of mutual recognition vis-à-vis positive asylum decisions would help ensure progress towards the policy and Treaty objectives of building a Common European Asylum System including a uniform status, and would be a logical next step in a system that aims at eliminating differences in protection between Member States. Mutual recognition will further focus technical and political efforts upon eliminating the considerable discrepancies regarding asylum determination outcomes in Member States and may help address some of the solidarity-related concerns raised by certain EU Member States. It would, however, need to be designed in a way that would ensure that all Member States would be encouraged to establish and maintain their asylum systems at optimal levels, in order to provide protection beneficiaries with the opportunity to enjoy their rights in the first state that has recognised them.

By focusing on the extraterritorial application and reach of the rights of beneficiaries of international protection, mutual recognition of positive asylum decisions could be seen as an important step towards intra-EU mobility in line with one of the key underlying principles of the EU, providing more flexibility to enable protection holders to use their skills and labour where these could be needed within the Union. It would also ensure legal certainty for both Member States and recipients of international protection vis-a-vis the position of the latter in the borderless Area of Freedom, Security and Justice. It may also act as a first step towards the establishment of a meaningful uniform status for refugees across the European Union, by leading to a centralised EU system of asylum determination and relocation, and by focusing on rights and granting legal certainty in the field – the current failure of the modest EU relocation initiatives. The move to the mutual recognition of positive asylum decisions and ultimately to a uniform status poses fewer challenges than integration on these terms in the field of criminal justice, as European asylum law is marked by a high degree of harmonisation underpinned by a series of detailed human rights standards in European Union and international law (Mitsilegas 2016b). A positive model of mutual recognition would thus empower refugees, and contribute to a paradigm shift from state-centred solidarity towards a model of solidarity centred on the individual.

From Mutual Recognition to Unification: Towards a Uniform Refugee Status in the EU

The application of the principle of mutual recognition to positive asylum decisions pre-supposes the continuation of the current model of the Common European Asylum System, which is based on the interaction of national asylum systems and the existence of national asylum determination procedures. A bold way forward to strengthen refugee-centred solidarity would be to contemplate a move from national to EU asylum determination and refugee status. This idea has been discussed recently and included in the Commission Communication on the reform of the Common European Asylum System published in 2016 (COM 2016, 197 final). One of the options put forward by the Commission was the setting up in the longer term of a new system transferring responsibility for the processing of asylum claims from the national to the EU level. For instance, by transforming European Asylum Support Office (EASO) into an EU-level first-instance decision-making agency with national branches in each Member State, and establishing an EU-level appeal structure (COM 2016, 197 final, 8–9). As seen above in the discussion of Dublin III, this proposal has not been taken forward.

However, the European Union has started examining distributive models – albeit with limited political will by Member States and under a model of solidarity heavily centred on the needs of states, both in its relocation initiatives and in Dublin III. These measures constitute timid but first steps towards rethinking the distribution of asylum seekers and refugees across the European Union. A centralised, EU-wide system is feasible in view of the high level of harmonisation of asylum law in the EU and the international protection roots and needs inherent in the system. Such a centralised system has the potential to achieve the aim of a uniform refugee status across the EU and it can act as a catalyst for the transformation of solidarity under the essential condition that it places the agency and preferences of asylum seekers at its heart.

Conclusion

The development of Europe's Common Asylum System has been based on a concept of solidarity which is predominantly state-centred. This approach has not served EU Member States, or applicants for international protection, well. The Dublin Regulation – notwithstanding its regular revisions – is a highly inefficient mechanism of allocation of responsibility for asylum applications and it poses significant challenges to the rights of asylum seekers without ensuring a high level of compliance with EU asylum law by Member States. The recent revision of the Dublin system by the Commission remains grounded on a state-centred model of solidarity, and therefore it is predicted that it – like its predecessors – will fail if the agency and rights of asylum seekers continue not to be taken into account. This contribution has argued that the way forward to ensure an efficient and rights-compliant asylum system in the European Union is to achieve a paradigm change and move from a concept of solidarity centred on the state to a concept of solidarity centred on the refugee.

This paradigm change can be achieved in two ways. In the short term, by applying the principle of mutual recognition to positive asylum decisions. The contribution has highlighted precedents in the field of criminal justice and has demonstrated the potential that positive mutual recognition has in order to bring the rights and preferences of refugees into the fore. In the longer term, a unified, truly common, European asylum system which will move from national to EU determination and status can be the way forward in reversing the paradigm of solidarity. This paradigm change can only happen if the asylum seeker and the refugee, their agency and choice, are taken into account fully in the development of European asylum law.

Notes

[1] The Treaty on European Union and the Treaty on the Functioning of the European Union.

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