The Subsidiarity Principle and European Refugee Law

https://www.e-ir.info/2021/03/23/the-subsidiarity-principle-and-european-refugee-law/

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On 6 September 2017 the European Court of Justice handed down judgment on an action introduced two years earlier by Slovakia and Hungary against EU Council Decision 2915/1601 concerning the ad hoc relocation of 120,000 refugees. In connection with this action, the Hungarian parliament had adopted a reasoned opinion arguing that the suggested quota system would be in violation of the subsidiarity principle, as laid down in Article 5 of the Treaty on European Union (TEU) (Groenendijk and Nagy 2015; Varju and Czina 2017). In a recent proposal aiming to establish, in the long term, a fairer and more sustainable asylum system in Europe, the European Commission, in the so-called draft Dublin IV Regulation, suggests, among other things, a 'corrective allocation mechanism'. Under this mechanism, whenever a member state is confronted with a number of asylum seekers exceeding a certain threshold, further applicants would be relocated to other EU countries (European Commission 2017, 15).

In response to the proposed legislation, the parliaments of six member states (Czech Republic, Hungary, Italy, Poland, Romania, and Slovakia) raised objections against this particular component, and, subsequently, adopted reasoned opinions in line with Article 7 of the Subsidiarity Protocol. Reasoned opinions by national parliaments, as given in these two cases, must be taken into account by the EU legislative organs and may force them, depending on the number of opinions given, to review the draft (see Craig and de Búrca 2015, 97). Legally, the 'Protocol no. 2 on the application of the principles of subsidiarity and proportionality', forms an integral part of the Treaty on European Union (Article 51 TEU).

In an area as controversial as refugee policy, could the subsidiarity principle indeed lead the way to new solutions? If a common European approach in asylum matters is elusive, will it not make sense to look for national solutions instead? 'Are asylum and immigration really a European Union issue?' asks, for example, Joanne van Selm (2016, 60). These are legitimate questions which will be discussed in this chapter in the light of the motives leading to the creation of a common European asylum system.

The Common European Asylum System

In preparation for the single market, it was the intention of the EU to intensify freedom of movement for its citizens by removing all internal borders between the member states. This idea was put into legal terms in both Schengen Agreements, concluded in 1985 and 1990. At this point in time, not all actors may have been aware that such a decision would also entail the creation of a common asylum system. However, already the Convention implementing the Schengen Agreement of 1990 contained a chapter on the responsibility for processing asylum applications (Articles 28–38). Almost a decade later, in 1999, the European Council Tampere meeting established an 'area of freedom, security and justice'. On this occasion, the heads of state and government concluded:

From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. … This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. … It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the

Union to develop common policies on asylum and immigration.

It thus became obvious that the development of a common asylum policy will be necessary. In fact, given open internal borders, freedom of movement is available to everyone, including asylum seekers and refugees. Yet, without appropriate rules, asylum seekers might engage in 'asylum shopping': the practice by which applicants move to those countries where the procedures for granting asylum are softest and the conditions most generous; or where the highest amount of financial support is available. If, in the Schengen area, one member state opts for a strict asylum policy, while another maintains a 'soft touch', ultimately control powers will not rest in the hands of the former. Under an open border system, an applicant could always gain recognition in one country and move to the preferred destination later.

As a consequence, the member states conferred upon the EU certain legislative powers for a common asylum policy. These are laid down in Article 78 of the Treaty on the Functioning of the European Union (TFEU) which states:

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection … . This policy must be in accordance with the Geneva Convention of 28 July 1951 and … other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: a uniform status of asylumfor nationals of third countries, valid throughout the Union; a uniform status of subsidiary protectionfor nationals of third countries who, without obtaining European asylum, are in need of international protection; a common system of temporary protection … ; common proceduresfor the granting and withdrawing of uniform asylum or subsidiary protection status; criteria and mechanisms for determining which member state is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the receptionof applicants for asylum or subsidiary protection; … .

Accordingly, as foreseen in this Article, the Council and the European Parliament adopted the following directives and regulations:

- The revised Qualification Directive (2011/95/EU) lays down the grounds for granting international protection.
- The revised Asylum Procedures Directive (2013) describes minimum standards for the asylum procedure.
- The revised Dublin Regulation (Dublin III – 2013) regulates the process of establishing the State responsible for examining the asylum application. In most cases, under Article 13 the state is responsible where the asylum seeker first entered the European Union, i.e. very often Italy, Greece, or Spain.
- The revised EURODAC Regulation (2013) allows law enforcement access to the EU database of the fingerprints of asylum seekers.
- The revised Reception Conditions Directive (2013) aims to ensure that there are humane reception conditions for asylum seekers across the EU and that their fundamental rights are respected.

Subsidiarity and the Common Asylum System

For assessing whether the existing EU asylum legislation is in line with the subsidiarity principle, the legal starting point must be Article 5 (3) TEU. It reads as follows:

Under the principle of subsidiarity … the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Accordingly, under EU law, two criteria need to be fulfilled before Brussels can legislate in a certain field. First, a negative condition, in that the objectives of the proposed action cannot be sufficiently achieved by the member states on their own; and, secondly, a positive condition that these objectives can be better achieved at the level of the Union

as a whole. In this provision, the specific words 'the objectives of the proposed action' are obviously most important. Only once these objectives are clearly defined, it will be possible to assess whether the member states, or indeed the EU, are in a better position to achieve them. Thus, whatever political actor determines the 'objectives', largely controls the application of the subsidiarity principle in a particular policy area.

Who determines the objectives of proposed actions? The answer is fairly simple: it is the European Union. Typically, general objectives are stated in relevant provisions of the EU treaties; and, by definition, 'proposed actions' are those proposed by an EU institution. Moreover, the precise objectives of an action are usually given in the preamble of a legislative act, as proposed by the Commission, and, in line with the ordinary legislative procedure, amended and adopted by the Council and the European Parliament (see Articles 289, 294 TFEU). Therefore, the power to set the objectives of legislative action always remains with the EU institutions as central authorities in policy making. As can be seen from the clear wording of Article 5 (3) TEU, the subsidiarity rule refers only to the question as to who is best placed to achieve these objectives, as set by the EU. This finding is true for all policy fields where the treaties give the EU the power to legislate, including the field of immigration and asylum.

Who is best placed to achieve the desired objectives? To answer this second important question, the analysis proceeds by assessing, by way of example, three of the directives mentioned in the previous section. It will be necessary to set out the particular objectives of these legislative acts, before examining the relevance of the subsidiarity clause for each of them.

Revised Qualification Directive

The full title of the revised Qualification Directive reads as follows:

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

The preamble to the Qualification Directive proclaims, in its recital (paragraph) 49, that its objective is to

establish standards for the granting of international protection to third-country nationals and stateless persons by member states, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

Revised Procedures Directive

The full title of the revised Procedures Directive reads as 'Directive 2013/32 EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection'. Again, the preamble to the directive states in recital 56 an objective 'to establish common procedures for granting and withdrawing international protection'.

In both cases, the objectives of legislative acts are already reflected in their titles; and are also largely identical with their content. It seems as if the legislating EU institutions consider these directives as objectives in themselves.

Reception Conditions Directive

In the Reception Conditions Directive, the legislator went a step further by claiming in recital 31 of its preamble that the subsidiarity principle has already been respected:

The objective of this Directive, namely to establish standards for the reception of applicants in member states, cannot be sufficiently achieved by the member states and can therefore, by reason of the scale and effects of this Directive, be better achieved at the Union level.

Can these objectives of the three asylum directives be equally achieved by member states themselves? A negative answer to this question is a fundamental requirement for making use of the EU's legislative competence in the first place. If we accept, in accordance with Article 78 TFEU, that the European Union aims to have a common asylum system, it is hard to conceive how a single member state could create such a system. Indeed, it seems logically impossible. For example, the objective of the revised Qualification Directive concerning a uniform status of refugees cannot be achieved by one or several member states acting alone. The same would be true for the Procedures Directive. If again the objective is along the lines of Article 78 TFEU, common procedures cannot be created by a single member state. In other words, common procedures also presuppose some legislative acts coming from Europe.

For the Directive on Reception Conditions, the situation may seem slightly different as the objective is merely to establish 'standards for the reception of applicants'. Neither mentions the directive's explicitly 'common' standards, nor does Article 78 TFEU. Yet, the significance of this wording should not be overestimated. Under Article 288 TFEU, once certain binding standards are included in a directive, these have to be implemented by all member states; and become automatically 'common'. In addition, in a common asylum system, it appears sensible to establish minimal standards of reception. In the words of the 2009 Stockholm Programme of the European Council:

It is crucial that individuals, regardless of the member state in which their application for international protection is made, are offered an equivalent level of treatmentas regards reception conditions.

In this sense, the standards of reception conditions mentioned in Article 78 TFEU are exactly designed to secure an 'equivalent level of treatment'. Most certainly, the Reception Conditions Directive should be interpreted in the light of the Stockholm Programme. Therefore, as before, the desired objective is unlikely to be ever achieved by member states acting on their own. In short, all three directives confirm, as the result of a basic legal argument, that member states are not in a position to achieve the desired objective.

Furthermore, under Article 5 (3) TEU, the Union shall act only if the objectives of the proposed action can be 'better' achieved at EU level. This condition is closely connected to the previous legal reasoning. As long as the member states are not in a position to create a uniform status of protection, common asylum procedures, or equivalent standards of reception (at central, regional, or local level), the only option to achieve the objectives of the 'proposed action' is to turn to the Union. In sum, the intended common asylum system cannot be created by a member state, but it can be built – better and only – with the help of legislation coming from Brussels.

Individual Provisions of the Asylum Directives

Do such considerations answer all questions regarding subsidiarity in the field of asylum? Probably not! While the mere fact that EU directives concerning qualification, procedures and reception conditions have been issued can be seen in line with Article 78 TFEU (and the subsidiarity principle), specific provisions within these pieces of legislation might not meet a stringent test. It cannot be excluded that certain objectives are achievable by individual member states. Hence, examining article by article of a directive may still reveal partial violations of the subsidiarity principle.

The Reception Conditions Directive, for example, contains the following provisions on

- the obligations of member states to provide applicants with information relevant to their asylum claim, at least including information on any established benefits and on the obligations of applicants (Article 5),
- that member states shall ensure that applicants are provided with a document certifying their status (Article 6),
- the conditions of residence and freedom of movement (Article 7),
- conditions for the detention of an applicant (Article 8),
- the power of member states to require a medical screening of applicants (Article 13),
- the obligation of member states to ensure that victims of torture, rape or other serious acts of violence receive necessary medical and psychological treatment (Article 25).

As before, the guiding question remains whether particular issues can be regulated by member states themselves or whether this is better done at EU level. In each case, the stated objective cannot be achieved by governments acting on their own. Take, for example, the aim to provide psychological support and special treatment for victims of torture throughout the Union. If there were no such provision in a directive, then states may or may not decide to offer such support. If, on the other hand, there is a clear wish to issue documentation for all asylum seekers regardless of location, then only a European-wide rule makes sense. Likewise, limits on legitimate reasons for detention are best served when put into a legally binding EU norm. In short, common standards do not emerge by themselves, but require European actions in one form or another.

Obviously, these considerations are most relevant whenever EU law sets common minimum standards including state obligations. In fact, this is the case with most provisions of the asylum directives. There are, however, exceptions of individual provisions containing no genuine state obligations. As mentioned above, Article 13 of the Receptions Conditions Directive, states that member states 'may require medical screening for applicants on public health grounds.' Similarly, in Article 16, they may allow 'applicants access to vocational training irrespective of whether they have access to the labour market'. Provisions of this kind entitle member states to act in a certain way, but they do not establish a formal obligation. Indeed, one must doubt the contribution of these regulations either to specific objectives of the directive or to the common asylum system as a whole. It would be mere coincidence for common European standards in medical screening or vocational training to emerge. At the same time, the non-obligatory provisions do not harm national autonomy, highlighting instead that member states retain certain powers in a given area. As it appears reasonable for the EU to put these issues under the discretion of governments, the particular composition of the piece of legislation does not conflict with subsidiarity concerns.

Another case in point is the Qualification Directive, elaborating conditions under which refugee status, or a form of subsidiary protection, can be obtained. It is a complex exercise to interpret the concept of 'refugee' and to apply it to the facts of a specific case. For obtaining an equivalent level of refugee protection throughout the EU, member states need a common terminology and common definitions: to understand who can be an actor of persecution (Article 6); who can be an actor of protection (Article 7); what are the rules for internal protection; what are safe areas within the country of origin (Article 8); what are acts of persecution (Article 9); what are reasons for persecution (Article 10); and, what does it mean to be persecuted for reasons of 'political opinion', or 'religious conviction'? Eventually, a range of rules and regulations is applied to complex facts of real-world cases, frequently comprising long-term biographical data and general country profiles. Finally, decisions on asylum claims require notoriously difficult predictions of future events when applying the legal notions of 'danger' or 'well-founded fear of persecution' to individual cases.

In theory, it is possible to imagine individual provisions of the three asylum directives that are, strictly speaking, not relevant for achieving the objectives of a common asylum system. In reality, however, it is much harder to identify such a provision. What is more, even if within the existing body of law an example is found, it would not call into question the general assessment presented here: the objectives of the asylum legislation of the EU, as laid down in Article 78 TFEU and subsequent directives, cannot be achieved by member states acting alone; they can – better and only – be achieved by European Union action. In general, the examined legislation is in line with the subsidiarity principle set out in Article 5 (3) TEU.

Subsidiarity as a Political Principle

Up to this point the subsidiarity term has been used in the narrow, legal sense as established in Article 5 (3) TEU. This rule describes only how the EU should exercise certain powers that are conferred on it by international treaties. Essentially, its application requires that the EU has legislative competence. There can be no doubt that on the basis of Article 78 TFEU the power to regulate asylum matters rests with the Union. Once the EU has decided to make use of this power, it is, as discussed above, difficult to limit this power with the help of subsidiarity considerations as stated in Article 5 TEU.

Does this imply that the subsidiarity principle is irrelevant in European asylum law? Have member states, in other words, no option but to accept EU rules even if they are convinced that certain refugee issues are better regulated at

national level? Clearly, there are some alternatives available. Firstly, recall that the common asylum system, as laid down in Article 78 TFEU, has not been forced upon the member states by some higher European power, but has indeed been introduced by the member states themselves who decided, unanimously, to amend the founding treaties of the EU. Secondly, and equally important, the EU legislative process contains an 'in-built' subsidiarity check. It should not be forgotten that national governments, sitting in the Council of the EU, play the strongest role in creating European law. They typically endorse power transfers to Brussels only to the extent absolutely necessary; and, in doing so, will try to avoid further legal obligations at home.

Thus, the member states maintain a high degree of control over the entire legislative process, enabling them to reject European rules that would excessively tie their hands (Craig 2012, 81–3). Each and every new EU rule needs at least a qualified majority in the Council, and (since 2014) such a majority requires the votes of 55 per cent of the member states comprising 65 per cent of the EU population (Article 16 TEU). It is simply impossible for EU institutions to introduce legislative acts against the will of all (or a majority of) member states. National governments can always say 'no' in the Council, if they are not in favour of additional asylum legislation; and, potentially, can form a blocking minority with like-minded member states. In fact, many legislative proposals in the asylum sphere, and elsewhere, have failed because there was no qualified majority forthcoming in the main decision-making body.

Arguably, in terms of political deliberation and intergovernmental negotiation, subsidiarity does play a very important role in the EU's ordinary legislative procedure. If a representative of a member state defends national control powers against alleged EU intrusion, this behaviour is likely to find copycats in the Council, as the member states have a natural propensity to retain their power. As it stands, subsidiarity can be considered a highly relevant concept in the legislative procedure. It can help to build a strong case for national positions, lend credibility to general arguments and increase overall legitimacy of EU policy making.

In this sense, there is already a subsidiarity culture in the European Union. European institutions – in particular the Commission – are under pressure to justify why certain powers should be exercised by the EU. If they fail to convince governments about the need for EU action, the legislative act will not be adopted. By contrast, if an act is legally adopted, the member states confirm – at least by qualified majority – that the EU is in a comparatively better position to achieve the stated objectives of legislation. Of course, an increase in future legal challenges based on subsidiarity arguments is possible. In fact, it seems desirable that institutions offer stronger and more convincing justifications as to how subsidiarity is respected within a particular piece of legislation. Yet, the room for successful legal challenges is somehow limited due to the power of EU institutions to set their own objectives and the limited review process carried out by the European Court of Justice. The latter has never invalidated an existing EU law on grounds of subsidiarity (Craig and de Búrca 2015, 100). Once a government is outvoted in the Council, there is little chance to find redress in the court system on the basis of subsidiarity concerns. Potentially, this will also be the case for prospective acts of refugee law, including regulations on a quota system for asylum-seekers.

Although it is standard practice to accept majority decisions in the Council, there may be instances where member states find themselves in a minority position with fundamental national interests at stake. In refugee law, it is a question of general policy whether strong resistance by a member state should be overcome with the help of a majority vote. If several governments find the rules on relocating asylum-seekers (as envisaged by the draft Dublin IV Regulation) unacceptable, there might well be another escape route preventing deadlock in the Council, or a general political crisis in the EU. In this case, a majority of member states can consider devising a new distribution system only among themselves, using, as a last resort, the rules on enhanced cooperation as specified in Article 20 TEU (Kreilinger 2015). This solution, if feasible, might indeed reduce the area of conflict between European governments. In addition, it would leave resisting states an opportunity to join the proposed system at a later stage.

Occasionally, it can happen that subsidiarity considerations prevent the adoption of reasonable European solutions. However, the principle does not constitute a permanent stumbling block. If genuine European issues are not properly addressed at the member-state level, they will almost inevitably make a return to Brussels. Then, EU institutions enjoy an added degree of legitimacy to develop a common approach.

All said, law is not always the perfect problem-solver even with issues of a genuine European dimension at hand. In

December 2016, for example, mayors from 80 European cities met in Rome and promoted their local entities as 'welcoming cities' (European Mayor's Summit 2016). In June 2017 an international conference in Gdansk, Poland, carried the title of 'Relaunching Europe Bottom-Up' and advanced the idea 'to transform the so-called refugee crisis into an inclusive European growth and development initiative'. The participants aimed to develop an explicit political strategy with solidarity and decentralised relocation of refugees at its heart. Their emphasis was very much on a multi-stakeholder approach that brings together political interests, the business community, and organized civil society at the regional level (Schwan and Höpfner 2017). These and other initiatives serve as a practical reminder that political solutions are also available at local rather than national or EU level.

Conclusion

Our analysis shows that EU asylum legislation is in line with the subsidiarity principle. The member states have agreed, by introducing Article 78 TFEU, to create a common asylum system. The objectives laid down in this provision – a uniform status of asylum, common asylum procedures, criteria and mechanisms which determine the member state responsible for considering an asylum application, or equivalent reception conditions – cannot be achieved by member states alone, but only by way of EU legislation.

Nevertheless, member states have many options to influence the contents of this legislation. Subsidiarity may be a strong argument in the political debate on draft legislative proposals. It is unlikely that new asylum legislation will contain any disproportionate or unreasonable demands, since such legislation always requires at least a qualified majority of member states' votes in the Council. Ultimately, as 'masters of the treaties', member states could even decide, by way of amending the founding treaties, to move legislative powers in asylum matters back to the level of national legislation. While such a step seems unlikely in the foreseeable future, in cases where individual governments hold very strong objections as regards specific legislative proposals, the majority of member states may consider using the enhanced cooperation procedure and introduce certain pieces of new legislation only for themselves.

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