

The European Union Facing The Challenge Of The Subsidiarity

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Abstract: *In the last few months, the stability and the maturity of the European Union (EU) have been put to the test as a consequence of the epidemic of Covid-19. Whereas the mobility rights enjoyed by many citizens in Europe are at the core of the principles guaranteed under the treaties, the freedom of movement has been significantly restricted through unilateral national measures. In addition, more than ever before, the EU is encountering resistance from Member states and their people, which takes a variety of forms. Indeed, beyond the health and sanitary crisis, the EU has to deal with the economic crisis and the global recession which are looming over the horizon, the migrant crisis and, not to forget, the repeated infringements of the rule of law in some Member States. All of this in the context of the twin green and digital transition that seems to frighten many people in Europe. These challenges, however different they may be, can be understood in terms of subsidiarity because this principle seems to be at the confluence of several current issues which this paper tries to highlight. We believe that a rational application of the principle of subsidiarity could be part of the response to the global crisis facing Europe today.*

I. Introduction

The principle of subsidiarity, which is closely connected with the principle of proportionality, is defined in Article 5 of the Treaty on European Union¹. Its specific aim is to ensure that in the areas that fall within the scope of concurrent competences, the EU does not take action, unless its action is more effective than action taken at national or local level ; whereas the principle of proportionality requires, more generally, that European action should not go beyond what is necessary to achieve the objectives of the treaties. Despite its technical features and a limited legal scope of application, the principle of subsidiarity conceals political potentialities that the EU and its members would gain from exploiting. Depending on the circumstances and needs, the principle may favor or, on the contrary, disadvantage centralized action at EU level since the dynamics of subsidiarity can be adapted to almost any situation. We suggest that the current context should be an opportunity to activate centripetal or centrifugal virtualities of the subsidiarity, according to requirements and challenges specific to each issue. Beyond this, an overall reflection on subsidiarity as a principle of a federal nature could be very useful in order to envisage the architectural evolution of the EU in the more or less long term.

¹ In accordance with this article, « Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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 ». The preamble to the Treaty states that Member States are « resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity ».

II. The Sanitary Crisis : Between Health And Freedom Of Movement

During the pandemic each Member State was able to decide for itself to close borders and every country has worked to protect its own citizens. The first Member State that reintroduced border control was Austria in mid-march before being followed by 9 other States. Such a situation was unprecedented in Europe, given that the treaties have established a common market and an area of freedom, security and justice (AFSJ) by ensuring the mobility rights and prohibiting obstacles to freedom of movement. It should not be forgotten that this freedom was the first conquest of European construction. The European institutions, like the Commission, could only witness what seemed to be a bidding war between Member States. Although temporary re-establishment of border controls had already been possible, this was the first time that States decided to do so in such a drastic way for reason of public health. Beyond the issue of borders, disputes over personal protective equipment (PPE) and other medical or pharmaceutical supplies deemed vital have also divided Member States and undermined European solidarity. The current hysteria surrounding the race for vaccines is another example of this lack of union and common position.

As with most health threats, viruses know no borders. However, health systems responding to the crisis continue to be managed at the national level. Would it not be more appropriate, in the interest of all Europeans, to provide a global response to an issue of transnational scope ? It is true that in legal terms the EU can only intervene to support, coordinate or supplement the actions of the States in the field of health. According to Article 168 of the the treaty on the functioning of the European union (TFEU) « a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities ». Although health policy remains a core competence of the States, the EU is empowered to coordinate and complement national actions in accordance with Article 6 TFEU. However, it is clear that such a division of competences that marked the EU approach during the Covid crisis has its limits.

From the point of view of subsidiarity, understood as a legal principle of European Union law, the supporting competence the EU enjoys involves a delicate balance in its exercise. It is nevertheless possible to imagine combining health and the improvement of the internal market to develop a legislation favorable to EU intervention in order to ensure the free movement of health equipment (as pharmaceuticals and medical devices), health carers and patients within the Union. Thus, article 168 TFEU may be combined with the general clause on approximation of national legislations (article 114 TFEU). In this way, the EU can effectively propose a legislation in the field of health, as the internal market is a shared competence to which the principle of subsidiarity applies. Given the transnational dimension of the problem, there is no doubt that the principle of subsidiarity justifies intervention at EU level. The Covid crisis should logically favor the activation of the centripetal or ascendant dimension of the subsidiarity in area of health. But it would probably be wisest to adjust the European system of distribution and exercise of competences in a more federal direction, which implies revising the treaties, always taking into account the subsidiarity, understood as a political principle. For example, one could conceive of a system in which the European/federal level regulates health protection, admission to the health professions and medical devices, while the Member States (in concert with their local authorities) focus primarily on investment in hospitals and public health services. Moreover, for health policies to be effective, it is important for the EU to be able to directly involve regions and cities in its actions to tackle health crises. In accordance with the principle of subsidiarity, federalism always leaves a great deal of initiative, autonomy and responsibility because it takes into account pluralism and diversity. Yet, a federal system does guarantee a minimum of unity and cohesion between the different levels of government.

It appears that what is desirable for health is also desirable for the economy since the sanitary crisis has led to an economic crisis whose spectre is prompting Europeans to be more united than ever.

The economic crisis : towards a federal Europe ?

The Covid crisis has completely undermined the certainties and the principles on which the EU is based: for example, the derogations from the rules of the Stability and Growth Pact which have been shattered, at least for the time of the crisis, were necessary because of the socioeconomic lockdown ; most Member states were in a long period of containment which will have major economic consequences and most all economies are in decline, some more than others. In addition, there is a risk of fragmentation in the euro area. While at the peak of the pandemic, it was mainly national withdrawal that seemed to guide the behavior and decisions of States, many voices are now being raised in favor of more solidarity at EU level, even from the States that are traditionally reluctant to address these issues. If the European leaders agree on a massive recovery plan, including debt pooling and transfers to the Member States most affected by the Covid crisis, they could lay the foundations for a federal logic comparable to that of a Federation as the United States. In addition, the question of the creation of new European taxes (the so-called « coronavirus tax ») is at the heart of many debates. A federal leap is more likely than ever before.

Of course, such a perspective may frighten many observers who see this as a forced march towards European federalism and fear the establishment of a « centralized superstate ». The latter do not hesitate to promote, in economic matters, the principle of subsidiarity, understood in its descending dimension. It should be remembered, however, that federalism is precisely opposed to any hegemonic undertaking of centralization since it is based, on the contrary, on respect for autonomy and a balanced sharing of competences. Moreover, the dynamics of subsidiarity aims to respond precisely to the federal dialectic of unity and diversity by ensuring that a compromise is found between democratic proximity and political effectiveness. The only question that needs to be asked is whether, in order to tackle the Covid crisis and revive economies, a European plan is necessarily more effective than a series of national plans ? It seems obvious that a reworked budget is needed to enable the EU and its members, especially those who were most affected, to get their economies back on their feet. We believe that more than ever the activation of ascending subsidiarity is necessary in this field which has long suffered from a lack of cohesion between Member States on the condition, however, that the federal leap of the common debt receives the consent of the peoples and, in particular, the vote of the national parliaments. In this respect, the role of the European Parliament should not be neglected either. Indeed, there can be no federalism without democracy.

But the federal response should not be limited to a simple increase in budgets. It is also necessary to go further in the fight against inequalities and to show solidarity in the face of specific problems encountered by certain States. In this regard, what has come to be known as the migrant crisis is another major challenge facing the EU.

III. The migrant crisis : between solidarity and sovereignty

Since 1997, the EU has been vested with competences in migration matters thanks to the Treaty of Amsterdam which allowed the europeanization of migration policies in the framework of the establishment of AFSJ. Harmonisation of migration rules made it possible to develop closer cooperation in the wake of the establishment of an area without internal borders. It appears that in an area of free movement of persons, it is at EU level that the policy relating to asylum and immigration should be managed most effectively because the creation of an area without internal borders necessarily entails an area without borders for people from all over the world. If there is no doubt that in the policy of immigration the EU level seems to be the most appropriate in view of the scale of the phenomenon, the political dimension and the high sensitivity of the issue require European institutions to exercise the utmost caution. Indeed, migration has necessarily transnational aspect but at the same time Member States are not prepared to give up their ability to control the flow of immigrants on their territory. Since the summer of 2015 the number of refugees entering the EU has dramatically increased.

With the chaotic and massive influx of more than a million migrants fleeing war and misery into the Mediterranean, the southern States were quickly overwhelmed. Italy and Greece, in the front line as the main gateway to Europe, tried to appeal to the solidarity of the rest of the EU. To relieve Italy and Greece, Europeans adopted quotas for the distribution of asylum seekers, despite opposition from several Eastern European countries such as Poland, Hungary and the Czech Republic. This temporary plan, satisfactory to no-one, has only served to reinforce the divisions among Europeans on the issue of the refugee crisis.

Five years after the first mass influx of migrants, the EU has tightened its border controls but remains torn and struggles to establish an effective asylum policy. If the year 2020 is the year of the health and economic crisis, the EU will not escape the migrant crisis. Is it not time to apply the principle of subsidiarity rationally and to provide a response that is appropriate and proportionate to the severity of the problem ? Furthermore, the word « subsidiarity » which comes from the Latin (« subsidium ») means support, assistance, help or protection. So, the principle of subsidiarity implies the duty of the higher level (EU level) to provide aid and assist the lower level (national level) when necessary. For example, if the lower level has failed to protect the rights of persons, such as fundamental rights, the higher lever should intervene. While the European Commission is due to present a new immigration policy plan, EU is still as divided as it was in 2015 at the peak of the refugee crisis. If the Member States seem to be on the verge of reaching an agreement in the face of the Covid crisis, notably by setting up a common budget and debts, can they not show the same solidarity with the migration crisis that is hitting hard the southern States which have already been weakened by the sanitary and economic crisis ?

It is true, however, that the issue of immigration touches the heart of the identity, culture and sovereignty of States, especially those in the East, which do not always seem to be on the same political line as their partners. The recent attacks on the rule of law in Poland, for example, are evidence of this.

IV. The moral crisis : The spectre of Thomas Aquinas

For the ruling « populist » party *Law and Justice* (PiS) in Poland, immigration is not the only target of political attacks since recently the LGBT community has been straightforwardly identified as Poland's enemy. The overtly homophobic atmosphere in the country is not the only controversy that has strained relations between Poland and the EU since the independence of the judiciary has also been called into question by the European institutions on several occasions in recent months². For the conservative government of this still predominantly Catholic nation, the principle of subsidiarity enshrined in both the Polish constitution and the European treaties remains a principle of non-interference marked by its theological heritage and the social doctrine of the Roman church³. To this end, the principle of subsidiarity is supposed to protect sensitive national areas such as education, culture, family and private life matters from EU intrusion⁴. This is why the EU institutions have no direct powers to legislate in these fields by harmonizing national laws. It is in this troubled context that the President of the European Commission von der Leyen assured in her speech on the state of the Union that homophobia has no place in the EU and that the Commission will soon propose a strategy to

² Commission v. Poland (24 June 2019, case C-619/18, Independence of the Supreme Court [GC]).

³ Barroche, J. (2008). La subsidiarité: Le principe et l'application. *Études*, tome 408(6), 777-788.

⁴ Millon-Delsol C., L'État subsidiaire, coll. « Léviathan », Paris, PUF, 1992, 232 pages.

strengthen the rights of LGBTQI, namely the mutual recognition of family relationships in the EU, including same-sex couples⁵.

It should not be forgotten that, beyond a common market, the EU is based on common values. Since the entry into force of the Treaty of Lisbon (2009), the Charter of Fundamental Rights is applicable to the EU institutions in accordance with the principle of subsidiarity and it is also applicable to Member States when they implement EU legislation. But under no circumstances the Charter can extend the powers and tasks conferred on the EU institutions by the treaties. With Brexit and the rise in recent years of Eurosceptic and even Europhobic parties, the EU is facing, as never before, a real moral crisis. Would the EU benefit from cracking down on Europe's most sceptical governments on the grounds that they do not respect the rule of law? While the EU presents itself as a Community of rights, its democratic legitimacy is nonetheless questioned. Governments, even illiberal ones, have been democratically elected, and subsidiarity itself favors the level closest to the citizens. Once again, the will of the people cannot be overshadowed, lest the EU federal vocation be compromised forever.

The question facing all Europeans is: « what kind of Europe do we want? » A real Federation based on subsidiarity and respect for national identities or a looser form of organisation in which only market values and economic interests unite its members ?

V. The green and digital transition

The crises that the EU has experienced have always presented an opportunity for Europeans to ask themselves how they can be better prepared to face the future. Concerning ecological transition, for example, it is necessary for Member States to move forward together because the issues at stake, such as the climate change, transcend national borders and interests are common. Similarly, with regard to digital development, a strategy on a European scale must be put in place in view of the scale of the problem but also of the competition on a global scale from the American and Asian continents. The draft European climate legislation is nevertheless causing concern among national political actors. The objective of climate neutrality by 2050 raises important issues in the economic, industrial and social fields. Is it the responsibility of the European institutions to define the greenhouse gas reduction trajectory when this is an eminently political issue ? More and more moratoria are being demanded from national and local elected representatives.

The regions and municipalities also have a role to play in this overall transition. What about regional and local self-government in the face of the issues that concern all European citizens? The health crisis has demonstrated the inability, or at least the weakness, of central authorities in some European States to respond urgently to crisis situations. The Covid crisis has sometimes highlighted the need to apply the descending dynamics of the principle of subsidiarity at the level closest to the citizens. Mayors and local councillors have been at the forefront of the fight against coronavirus. The destabilization caused by the COVID-19 crisis has shown the need for new solidarity with all levels of government in all European countries. The collective efforts of local authorities to protect citizens during the pandemic should also contribute to economic and social recovery. It is crucial that the EU accompanies these efforts to support local economies. Subsidiarity should in the future encourage stronger and more effective solidarity and cross-border cooperation. European mechanisms to integrate and rationalise EU, national and local resources are necessary but must take into account the expectations and concerns of civil society. With regard to the principle of subsidiarity, the state level is not the

⁵ Von Der Leyen U., State of the Union speech at a plenary session of European Parliament in Brussels, Belgium, 16 September 2020.

only alternative at the European level because sometimes political efficiency rhymes with democratic proximity. The principle of subsidiarity invites not only the UE but also the Member States to be more introspective in their decision-making. Respect for the principle of subsidiarity implies more frequent consultations, particularly on issues as sensitive as the development of 5G, which raise questions relating to the protection of the environment and public health.

VI. Conclusion

There is no doubt that the principle of subsidiarity in Europe should make it possible to respond to the challenges and opportunities of our time. Nevertheless, it seems necessary for Member States to overcome a certain *stato-centrism* by agreeing to reconsider the sharing of competences in a certain number of areas. This implies abandoning the myth of the *Nation-state* and the dogma of *sovereignty* and valuing all levels of government, from the local to the European level. In order to avoid falling into chaos, Europeans must first agree on certain values that currently remain under debate. They should ask themselves what they want to do together, since subsidiarity implies agreeing on objectives to be achieved. A rational application of subsidiarity could lead to a federal Europe in which the autonomy of communities and the diversity of peoples would be ensured while at the same time making it possible to guarantee greater solidarity and cohesion among European citizens. Only subsidiarity can enable Europeans to be united in diversity, rather than divided in the so-called European Union⁶ because this principle allows the different peoples of Europe to be proud of their own national identities and at the same time give them the possibility to transcend their former divisions to forge a common destiny.

Works Citation

- Barroche, J. (2008). La subsidiarité: Le principe et l'application. *Études*, tome 408(6), 777-788.
- Millon-Delsol, C., L'État subsidiaire, coll. « Léviathan », Paris, PUF, 1992, 232 pages.

⁶The motto of the Union is '*united in diversity*' and refers to European values, its cultural, humanist and religious heritage.