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Analysis of European Institutions and their Role in Determining Asylum Policies

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Abstract

European governments began to show interest in policies related to the migration issue only when they began to show their connections with other important aspects of national sovereignty, such as national security, border control and illegal immigration. The core of European asylum policies has remained anchored to a restrictive vision of refugee protection. The attribution of competences to the European Union, the European Council and the Commission, which draw up guidelines and development policies both in the field of asylum and immigration, with the right doses of ambition and pragmatism have strengthened the trust of the institutions, a path without complexity, but still a safe and progressive evolution, making the European Union a new actor in migration policies, making the legislation of the Member States in this sector not only increasingly homogeneous, but also suitable for the management of a phenomenon of global dimension and destined to continue in the following decades.

Keywords: *European Union; European Council; Migration policies; Increasingly homogeneous*

Introduction

Interest in the topic of immigration only began to grow in the mid-1970s, when, thanks to the economic slowdown due to the oil crisis, xenophobic sentiments spread, strongly fueled by growing unemployment. The architecture of the European asylum system was defined before codecision entered into force in 2005. As the main decision-making body, the Council agreed on very sensitive issues such as the possibility of detaining asylum seekers and the home state principle first choice in the Dublin system. (Carrella G. and E Altri 2012).

The European Parliament, in particular, has been very critical of the EU's early policy achievements and has consistently supported more liberal and refugee-friendly proposals and ideas for European asylum policies. However, contrary to widespread expectations for a more liberal European asylum regime after the introduction of co-location, the changes introduced after 2005 have mainly refined existing instruments. After communitarisation, the central theme of interinstitutional disputes was mainly linked to functional issues, i.e. the determination of the most appropriate methods of cooperation and integration (Carler J. and Saroleas 2016).

At the time of the reform, the EU institutions, in particular the European Parliament, began to interact in a more consensual spirit and to develop a perception of shared responsibility. Changes in the composition of institutional actors, where the Council became more diverse after the 2004 and 2007 enlargements, have reduced the differences between the Council and

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the EP. The need to find intra- and inter-institutional coalitions placed the Christian Democrats in the European Parliament in a privileged position, in fact their agreement was necessary to have a solid majority in Parliament. The opinions of these MEPs were closer to the conservative majority in the Council, which contributed to the political agreement between the two co-legislators, the EP and the Council. Furthermore, member states have managed to position themselves as more experienced and legitimate than the European Parliament, which has been described as a "newcomer" in the field of asylum policies (Costello C.2015).

The cumulative effect of these factors was that the introduction of codetermination did not lead to much progress in terms of policy outcomes. Although the review of the Reception Directive was more detailed and raised standards in several areas, it did not challenge the key issues set out in the first directive in 2003. Furthermore, the main reservations of the previous Directive remain, namely the high degree of flexibility for Member States which can lead to significant gaps in implementation (Vitiello, Mattia 2016). Overall, the scope of EU asylum policy shows how institutional change does not necessarily lead to far-reaching political change. With the introduction of codecision, new procedural rules of conduct emerged which favored political stability rather than political change. It was not so much the political sector that changed, but the way in which the EU institutions – and in particular the Parliament – conceptualized it (Morgese 2013).

Literary Review

The Treaty of Lisbon, which entered into force in December 2009 (1.1.5), introduced qualified majority voting for regular immigration as well as a new legal basis for integration measures. Currently, the ordinary legislative procedure applies to irregular and regular immigration policies, making Parliament a co-legislator on an equal footing with the Council. It should be noted, however, that in the case of a sudden influx of third-country nationals, provisional measures are adopted only by the Council, after consulting Parliament (Article 78(3) TFEU).

As regards asylum policies, the Commission's influence is not easy to assess, since it does not possess – unlike the European Parliament and the Council – concrete powers in the legislative process, with the exception of the possibility of presenting legislative proposals on the subject basis which will then be discussed in the Council and EP. The Commission, in fact, intervenes between these institutions if conflicting opinions emerge on a specific legislative proposal.

The Commission is considered the engine of European integration, producing new political ideas to advance along the path of integration. The Commission is often perceived as an honest broker between the different interests of the Member States, the European Parliament, the Council and civil society as an impartial actor (Egeberg 2016). The Commission's influence is based on its potential ability to lead debates from the beginning, through setting the agenda (the so-called agenda setting role) and its policy proposals (Zaun 2018b, 410).

Since the mid-1990s, the Commission has called for greater integration of all issues that were part of the then "third pillar", proposing in particular the Commission's right of initiative in all sectors and qualified majority voting but the absence of integration has produced poor and unsatisfactory results and this has become particularly evident with the large numbers of immigrants and asylum seekers arriving in Europe after the breakup of the Soviet Union and Yugoslavia (Caggiano G. 2016).

With the movement of immigration and asylum into the first pillar thanks to the Treaty of

Amsterdam, the institutional framework changed significantly even if the decision-making process was not yet fully communitised – given the five-year transitional period in which the Commission continued to share the right of initiative with the Member States, Council decisions were taken unanimously where the EP carried out a purely consultative and limited action in which the jurisdiction of the Court of Justice and the role of the Commission began to strengthen, allowing it to initiate binding legislation (Zwaan K.M. 2016).

With the Tampere summit, the Commission received the exclusive right of initiative in the area of asylum policy, given the will of the Member States to proceed quickly and achieve quick results after the massive influx of refugees from the former Yugoslavia (Uçarer 2001). Overall, the connection between the Amsterdam Treaty and the Tampere summit significantly increased the Commission's possibilities for influence in the field of asylum policies. In this case, the Commission had a clear treaty mandate to notify secondary legislation, as well as being the only actor with such powers, allowing it to direct and regulate the discussion from then on (Zaun 2018). The Commission, however, failed to leave a significant mark in the field of asylum policies, in fact, while the unanimous vote in the Council was still underway, it was forced to accept the concerns raised from time to time by the Member States, softening the nature of the proposals is original, as in the case of the Qualifications Directive (2004). or subsequent reformulation (Zaun 2017).

Crisis situations have been – and still are – a window of opportunity for successful political activism by the Commission, which should use them to exert influence in JHA areas (MacKenzie, Kaunert and Léonard 2015). An important example of the Commission's ability to seize opportunities – beyond the European Arrest Warrant (EAW) – is the creation of the European Border and Coast Guard Agency (EBCGA), launched on 6 October 2016. This idea was born in the early 2000s and presented as a response to the so-called "refugee crisis" in the EU. It was able to do this largely due to the sense of urgency and need for increased anti-terrorism controls spurred by the massive influx of refugees. On the one hand it is demonstrated that crisis situations constitute a window of opportunity for the political activism of the Commission, but on the other hand the fact remains that its success is still strongly linked to the will of the Member States, and an example of This situation is the idea of a refugee quota system, which was also supposed to address the refugee crisis but failed due to lack of support. coming mainly from the countries of the Visegrad group (Poland, Hungary, the Czech Republic and Slovakia) and the high politicization of the proposal (Zaun 2018).

In the absence of an urgent call for more integrated and rigorous European policies, Member States will usually prefer to focus on their own national sovereignty and will tend to attract a repertoire of unilateral actions in the highly sensitive area of JHA, the position of the Commission having significantly shifted weakened. In addition to the ability to grasp crisis situations, the Commission has used other strategies to pursue its objectives in the JHA field. The wise use of the Luxembourg Court and its decisions allowed the Commission to limit the protectionist horizons of the Council. The Commission, in fact, relied extensively on the jurisprudence of the European Court of Justice (and the ECtHR) in drafting the directives on asylum reimbursement, as well as having initiated more than forty infringement proceedings during the height of the "refugee crisis" in 2015, when it became clear that many member states, including those whose asylum systems had demonstrated many shortcomings, had not implemented the CEAS (Carrera, Blockmans, et al. 2015). By intensifying political coordination within the European Council, it is argued that member states promote European integration without the involvement of truly supranational institutions, creating a kind of

“integration without supranationalization” (Bickerton, Hodson, and Puetter 2015, Fabbrini and Puetter 2016). These forms of cooperation allow for greater voluntary policy coordination between member states without the full involvement of the Commission and the Court of Justice at the supranational level (Bickerton, Hodson, and Puetter 2014, 704).

As explained above, the crisis situation provided the Commission with the necessary political support for this purpose, which it had previously lacked to enable the initiation of such a large number of infringement procedures, although the lack of widespread enforcement has indeed been identified as a key issue. of the CEAS. However, always taking into account the concerns of the Member States, the Commission tends to soften its proposals pending any reservations expressed by the Member States. Regarding the content of his positions, they are often described as neutral and technocratic. The Commission is described, at the same time, as promoting “neoliberal” policies that undermine the welfare state and as an ardent supporter of minority rights (Zaun 2018b).

The Commission has advanced more security-related positions or become in favor of greater freedom rights. In fact, if on the one hand the Commission has proposed relatively more liberal policies on asylum and immigration based on the possible improvement of the individual rights of migrants (Thielemann and Zaun 2018), on the other hand it has advanced security-oriented policies in areas of control of borders and counter-terrorism (Parkers 2015). This leads to the conclusion that the Commission can be classified as an “opportunistic” actor regarding the normative bases of its proposals, which makes it very suitable for its conception of a non-ideological and technocratic actor. The policies proposed by the Commission, in fact, are generally in line with its objective and political mandate, namely the strengthening of European integration (Ryan B. and Mitsilegas V 2010).

First, when negotiating minimum levels of standards or even common standards, agreeing on a high level of protection means immediately achieving a high level of harmonization. Policies with a low level of protection that allow for more liberal policies (as in the case of asylum policies) actually mean little or no harmonization. If the EU accepts a high level of protection, Member States below this level must necessarily adjust the level of their policies to make them compatible. Therefore, agreeing on a high level of protection ensures a high degree of harmonization and implies greater integration.

Although the Commission is usually described as a technocratic and neutral organization, it sees itself as a visionary and therefore not only tries to fulfill its tasks, but also proposes policy solutions that offer added value to states and refugees (Palladino R 2018). Secondly, in addition to Member States, NGOs and UNHCR are important contacts for the Commission, providing the necessary expertise for developing legislative proposals. These skills are essential for the Commission, as they usually remain in the hands of the operational institutions of the Member States, which do not offer them openly, as in the case of UNHCR and other NGOs (ibid.). Furthermore, NGOs and UNHCR have always represented important and historical allies for the Commission (Geddes 2000 and Kaunert 2009). In the area of asylum policies, the Commission has generally presented legislative proposals that were too liberal in the eyes of the Council. It therefore gradually "softens" its positions to ensure that these proposals can meet the consensus of member states and allow their adoption as directives. There are three main reasons why the Commission can be classified as a relatively liberal actor in the field of asylum policy.

The European Council's Contribution to Asylum Policies

Recent studies have shown how the European Council has evolved from a body that sets overall priorities for the EU to an institution increasingly involved in the day-to-day politics of the Council (Scipioni 2018). The representation of what has been described is, since 2009, as a permanent Presidency of the Council which allows greater political coordination directly between member states in the European Council. A further indicator of this development is the frequent delegation of specific functions to so-called *de novo* bodies, i.e. semi-autonomous EU agencies that allow collective actions without authorizing the institutions. supranational (Bickerton, Hodson and Puetter 2014).

The analysis of the coordination of Member States' policies during the migration crisis of 2015 and 2016 clearly shows how the European Council took on a crisis management role in the JHA field. However, member states' differing preferences regarding crisis solutions, such as voluntary or compulsory resettlement systems for refugees, have led to paralysis and an inability to resolve the problems. Maricut, in its analysis, notes that in the field of JHA most member states specifically prefer “integration without (rather than with) supranationalisation” (Maricut 2016). At the same time he argues that, despite gradual supranationalisation after Lisbon, neo-institutionalism in the JHA area is evident in ways very similar to older models of intergovernmental decision-making (*ibid.*, p. 542). What is undoubted is the decisive role played by the European Council in defining the JHA area.

Methodology

Analysis of the various European institutions which, with the institutional changes introduced by the Treaties of Amsterdam and Lisbon, have assumed a greater role in determining asylum policies. The main theoretical approach that explains the increased role of European institutions in this policy field is that of “liberal constraints” according to which, implicitly or explicitly, supranational EU institutions adopt a more liberal perspective on migration and asylum than the governments of the Member states.

Moving on to the analysis of the Commission's positions, we are usually inclined to recognize its strong pro-integration position, since this is its mandate and since greater integration would strengthen its role as the administrative summit of the Union (Kassim, et al. 2013). According to Zaun's analysis, the Commission currently appears to be the supranational institution with perhaps more liberal tendencies than the Council and the European Parliament. This is mainly due to the shift towards more restrictive positions of the European Parliament, as it was not influenced by the political pressures that influenced it addresses PE.

However, always taking into account the concerns of the Member States, according to Zaun's analysis, the Commission tends to soften its proposals pending any reservations expressed by the Member States. As for the content of his positions, they are often described as neutral and technocratic. The Commission is described, at the same time, as promoting “neoliberal” policies that undermine the welfare state and – in our field of study – an ardent supporter of minority rights. Finally, the Commission, as an unelected or non-majoritarian institution, should not consider itself accountable to a specific constituency, basing its positions on technocratic capabilities (Thielemann and Zaun 2018).

Conclusion

The Commission, as an unelected or non-majoritarian institution, should not consider itself accountable to a particular constituency, basing its positions on technocratic expertise (Nascitbene B 2001). Several studies have repeatedly demonstrated how Commission officials belong to an elite perhaps much more open to universalist ideas of human rights than to particular interests and national immigration laws (Kassim 2013).

"How has International Legislation Influenced the Development of European Asylum Policies?"

With the Tampere Program it was decided to establish the CEAS based on the implementation of the 1951 Geneva Convention in order to guarantee that no one is exposed to persecution again, in compliance with the principle of non-refoulement. Therefore, we can say that international legislation, without any doubt, has significantly influenced the development of European asylum policies (Kaunert 2009). In our analysis of the supranational institutions of the EU, we can state – according to Kaunert's theory (2009, 2010) – that the Commission has acted as an entrepreneur of supranational policies, managing to keep the CEAS within its borders. of the Geneva Convention, taking advantage of the political windows that opened from time to time after the various crises.

Naturally, Union legislation may still appear incomplete, fragmented and difficult to read systematically. Sometimes it suffers from gaps in the protection of fundamental rights (today attributed above all to international measures aimed at "curbing" immigration from third countries). But these are critical issues, typical of a developing system, which can be gradually overcome. On the contrary, this legislation constitutes, in general, a notable civilizational achievement and a model for states (or groups of states) of the international community who wish to draw inspiration from it. The work aims to provide a general vision of European Union immigration and asylum law, highlighting the principles of this discipline and (also thanks to the multiple references within the work) their horizontal application in the different regulated sectors (Amadeo F. 2019).

Regarding asylum policies, the Commission's influence is not easy to determine, since it does not possess - unlike the European Parliament and the Council - concrete powers in the legislative process, except for the possibility of ongoing legislative proposals. The Commission, in fact, intervenes between these institutions if conflicting opinions emerge on a specific legislative proposal. The Commission's influence is based on its potential ability to lead debates from the beginning, through setting the agenda (the so-called agenda setting role) and its policy proposals (Ippolito F. 2018).

It is difficult to clearly delineate whether the Commission has advanced more security positions or become in favor of greater freedom rights. In fact, if on the one hand the Commission has proposed relatively more liberal policies on asylum and immigration based on the possible improvement of the individual rights of migrants (Thielemann and Zaun 2018), on the other hand it has advanced security-oriented policies in areas of control of borders and counter-terrorism (Parkers 2015). This leads to the conclusion that the Commission can be classified as an "opportunistic" actor regarding the normative bases of its proposals, which makes it very suitable for its conception of a non-ideological and technocratic actor. The policies proposed by the Commission, in fact, are generally in line with its objective and political mandate, namely the strengthening of European integration (Zaun 2018).

In the area of asylum policies, the Commission has generally presented legislative proposals that were too liberal in the eyes of the Council. It therefore gradually "softens" its positions to

ensure that these proposals can meet the consensus of member states and allow their adoption as directives.

There are three main reasons why the Commission can be classified as a relatively liberal actor in the field of asylum policy. First, when negotiating minimum levels of standards or even common agreement standards for a high level of protection, which immediately implies achieving a high level of harmonization. Policies with a low level of protection that allow for more liberal policies (as in the case of asylum policies) actually mean little harmonization. If the EU accepts a high level of protection, Member States below this level must necessarily adjust the level of their policies to make them compatible. Therefore, agreeing on a high level of protection ensures a high degree of harmonization and implies greater integration. Although the Commission is usually described as a technocratic and neutral organization, it sees itself as a visionary and therefore not only seeks to fulfill its tasks, but also proposes policy solutions that offer added value to states and refugees.

Secondly, in addition to Member States, NGOs and UNHCR are important contacts for the Commission, providing the necessary expertise for developing legislative proposals. These expertise are essential for the Commission, as they usually remain in the hands of the operational institutions of the Member States, which do not offer them openly, as is the case with UNHCR and other NGOs. Furthermore, NGOs and UNHCR have always represented important and historical allies for the Commission (Geddes 2000 and Kaunert 2009).

Various studies have repeatedly demonstrated how Commission officials belong to an elite perhaps much more open to universalist ideas of human rights than to particularistic interests and national laws on immigration (Kassim 2013). The Commission currently appears to be the supranational institution with perhaps more liberal tendencies than the Council and the European Parliament. This is mainly due to the shift towards more restrictive positions of the European Parliament and the simultaneous stability of the Commission's preferences, as they were not influenced by the political pressures facing the European Parliament.

To complete this first step in our path of analysis of the supranational institutions of the EU, we can state that according to Kaunert's theory (2009, 2010) - the Commission acted as an entrepreneur of supranational policies, managing to keep the CEAS within the limits of Geneva Convention, taking advantage of the political windows that opened from time to time after the various crises.

"Why have European Asylum Policies Failed?"

However, the lack of an international system of sanctions for failure to fulfill these obligations constitutes one of the main reasons for the weakness of the international protection system created by the Geneva Convention of 1951 and its Protocol of 1967. In the regional aspect and above all at a European level, these obligations are more stringent and thanks to the Strasbourg Court they also have legal protection, which over time the ECHR rulings have allowed for the expansion of the scope of protection of asylum seekers and refugees and the beginning of stimulating legal dialectics with the Luxembourg Court.

For many years, the structure of national political systems and related policy debates on migration enabled governments and international organizations to support moderate liberal policies despite public skepticism (Hammar 1985 and Joppke 1998). This is no longer possible due to the high level of politicization that immigration issues have taken at the moment where the politicization of immigration policies can take any form. The phenomena of populism in

the various member states represent an extreme expression of this. A characteristic of the populist argumentative style is the attacks against the elite and the symbolic appeal to a supposedly homogeneous popular will (Müller 2017). Immigration represents a classic topic to express this message, as is the European Union.

Of course, the European asylum and immigration policy cannot be said to be complete yet. There are many aspects that await a common solution, rather than being left to the initiatives of each member state. The lack of an automatic resettlement system in the event of a mass influx of migrants is particularly felt in the member states most exposed, for geographical reasons, to such phenomena. There are still other steps to be taken. It is up to the European institutions, member states but also the citizens/voters to allow this.

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