

Journal of Contemporary European Research

Volume 15, Issue 4 (2019)

Commentary

Understanding the European Integration in the Asylum Policy: State-of-the-Art and Avenues for Future Research

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Citation

Silvestre, S. (2019). 'Understanding the European Integration in the Asylum Policy: State-of-the-Art and Avenues for Future Research', *Journal of Contemporary European Research* 15 (4): 401-409.
<https://doi.org/10.30950/jcer.v15i4.1070>

First published at: www.jcer.net

Abstract

This commentary reviews the literature on European integration in the asylum policy area and offers a roadmap for future research. Whereas early studies explain integration through a state-centred approach, recent studies rely on the theory of institutionalism to address the circular causality in the European process. The Council has so far been at the heart of decision-making in this policy area. However, there are still important dimensions of the Council's dynamics unexplored in the literature. Therefore, this commentary proposes a research agenda to better understand not only the member states' negotiation behaviour, policy preferences and positions in the Council but also the interplay between the EU institutions and its impact on the European integration.

Keywords

European integration; Asylum policy; Literature review

In the mid-1980s five member states (Germany, France, the Netherlands, Belgium and Luxembourg) shared their desire to abolish the internal borders within the EU to facilitate the full achievement of the single market (Faist and Ette 2007). With the abolishment of the borders, states orientated by a 'realist' policy frame of internal security, pushed for the so called 'compensatory measures' that included strengthening external border controls and cooperation in the field of asylum and immigration (Lavenex 2001a: 27; Niemann 2006: 196-98). Accordingly, these five countries signed the Schengen agreement in 1985, which established common rules regarding visas, the right to asylum and checks at external borders – though, only after signing the Treaty of Amsterdam was this agreement incorporated into the EU *acquis*.

Other non-binding cooperation initiatives were launched during the 1990s. These first intergovernmental efforts to cooperate at the European level on asylum policy coincided with the influx of refugees into several member states, especially Germany and France, following the conflicts in the Balkans, the dissolution of the Soviet Union, and the fall of the Berlin wall (Lavenex 2001a; Hatton 2005). However, only with a new chapter on asylum and immigration policies in the Amsterdam Treaty, which came into force in 1999, were legislative powers granted to the EU institutions in this policy area – asylum was now part of the first pillar of the EU (Bačić 2012). In other words, the Treaty gave the European Commission (EC) the right of initiative to propose a set of harmonised legislation in this policy area.

Despite this new supranational approach, the Amsterdam Treaty foresaw a transitional period of five years in which 'member states were still left with a wide range of powers and remained the main actors in the asylum policy area' (Bačić 2012:48; see also Ripoll Servent & Trauner 2014; Trauner & Ripoll Servent 2016). By way of explanation, during this transitional period the EC had to share its right of initiative with the EU states, and the European Parliament (EP) only had an advisory role (Guiraudon 2000: 263-264; Kaurert & Léonard 2012: 1404-1405).

Only with the Lisbon Treaty, which entered into force on 1 December 2009, was the ordinary legislative procedure introduced (article 294 of TFEU), and the veto power was replaced by qualified majority voting (QMV) in the Council of the EU (hereafter referred to as the Council). Nevertheless, the Amsterdam Treaty showed that member states were ready to take the next step in this policy area.

This commitment was reinforced during the special European Council meeting held in Tampere (1999). Since this meeting, 'the EU has been working to create a Common European Asylum System (CEAS), and improve the current legislative framework' (European Commission 2014: 3). We are currently in the third phase of the conception of this common system. The first policy harmonisation happened in 2000 – 2005; followed by a second phase in 2009 – 2013; and finally, a third phase that started in 2016 when the EC tabled two legislative packages to reform the CEAS to the Council and EP.

This commentary traces back how scholarship has explained these developments in EU cooperation and integration in the area of asylum policy and proposes avenues for future research. The existing literature provides knowledge on why member states accepted cooperation at the EU level in this policy area, and how it influenced domestic policies and institutions; but less is known on how this cooperation is translated at the EU level, not only between member states but also between EU institutions.

VENUE-SHOPPING AND THE ROLE OF THE EU INSTITUTIONS

European integration in the area of immigration and asylum policies has been often explained in the literature by an intergovernmental, state-centred approach. Building on the theory of 'policy-venues' (Baumgartner and Jones 1993), Guiraudon (2000: 251) argues that 'venue-shopping' seems the most appropriate thesis not only to explain the beginning (mid-1980s) of EU cooperation on migration and asylum policy, but also to account for the shape and content of this policy. The idea behind the 'venue-shopping' theory is that member states are in control of European integration and pursue a new policy venue to overcome the existing institutional constraints in their domestic policy-making arena. It is argued that this new type of vertical policy-making allows actors to foster their restrictive political goals by avoiding national judicial restrictions, eliminating possible national opponents, and by finding new international allies (Guiraudon 2000).

While some scholars claim that this new EU venue permitted the development of a more restrictive domestic asylum policy (Guiraudon 2000; Lavenex 2001b), others argue that cooperation on EU asylum has actually raised protection standards for asylum seekers in several member states (Kaunert & Léonard 2012). According to this last study, two main factors explain why the adopted EU asylum legal instruments have not turned out to be as restrictive as anticipated by Guiraudon, namely because: i) the 'changes in the EU institutional framework'; and ii) the 'increasing "judicialization" of the EU asylum policy venue' (Kaunert & Léonard 2012: 1404).

With the analysis of the development of the EU asylum policy, the authors demonstrate that through the years there was an 'increasing communitarization of asylum, with growing roles for the European Commission, the European Parliament and the ECJ' (Ibid.: 1406). The growing role of these institutions prevented the most restrictively-minded member states from influencing the development of a more rigid legal framework. Furthermore, the strengthening of the role of the European Court of Justice (ECJ), the influence of the European Court of Human Rights (ECHR), and the incorporation of both the Geneva Convention and the EU Charter of Fundamental Rights (CFR) in the EU treaties resulted in the 'judicialization' of this venue and in the promotion of a more liberal agenda.

A more recent study also recognises that 'the dynamics of supranationalism have become more discernible' in this policy area (Trauner and Ripoll Servent 2016: 1429). However, it is argued that member states still remained the key players, and that the existence of new actors was not sufficient

to change the 'core' of the policy (Ripoll Servent & Trauner 2014: 1154). The authors emphasise the states' ability to unite forces when in need of confronting the other EU institutions. In other words, despite the new institutional framework, national governments have proven to be successful in shaping the policy debates and setting standards of legitimacy in the Area of Freedom, Security and Justice (AFSJ) (Trauner & Ripoll Servent 2016). This new research line calls for new analytical perspectives to account for the major institutional changes, particularly the enhanced powers of the EU supranational institutions, their role and capacity to impact the decision and policy-making in the asylum policy (e.g. Kaurert & Léonard 2012; Maurer & Parkes 2007; Ripoll Servent & Trauner 2014, 2015).

Even if cooperation in asylum policy may have raised the legal standards in a number of member states, different 'securitisation' dimensions have been observed in the decision-making process of this policy area (Huysmans 2000; Lavenex 2001c; Boswell 2003; Guild 2006; Chou 2009; Karamanidou 2015; Trauner 2016). For example, one academic noted that there was a notable concern during the Central and Eastern European countries (CEECs) accession negotiations to safeguard the security of the rest of the Union (Lavenex 2001a). The EU made clear to the CEECs that the accession would not take place before they had 'fully implemented the Schengen acquis and secured their borders' (Ibid.: 38). This position was prompted by a twofold concern. The first apprehension was with the fact that the CEECs still needed to implement more liberal values to respect the rule of law, international human rights and fundamental freedoms. Secondly, they lacked the practices and institutions to maintain internal security and immigration control, which ultimately could affect all member states.

The securitisation of the EU asylum policy has been also endorsed by linking migration and asylum with issues such as economic and financial crisis (Trauner 2016), criminal activity and terrorism (Karamanidou 2015). The financial burden of increasing the rights of asylum seekers during the economic crisis has become a relevant discursive argument in the EU (Trauner 2016). The first countries that felt the pressure of the new economic situation in their administrative asylum structures were the Southern member states. During the 2015 refugee crisis, this pressure increased and frontline countries, such as Greece and Italy, were not able to contain the influx of asylum seekers seeking to reach the northern part of the EU (Ibid.).

Europe's migration crisis resulted in a division in the Council culminating in a 'consensus-breach' (Trauner 2016: 322). There was a clear opposition from the Eastern European states to the relocation scheme, nonetheless the legal instrument was adopted. Another example of the 'consensus – breach' in the asylum policy is the non-decision in the refugee quota system (Zaun 2018). Clearly the refugee crisis has exacerbated division in the Council, and it is difficult to see what pattern will emerge in the decision-making amongst all the new legislative proposals.

This logic of securitisation translated into different arguments and migration control tools seems to contradict the policy efforts undertaken to enhance and harmonise the protection of asylum seekers (Boswell 2003). In other words, The EU normative commitment to rights has been visibly constrained by discourses and practices of securitisation (Aramanidou 2015; Trauner 2016).

EUROPEANISATION

From a historical perspective, the development of the EU political system had a profound effect on member states, resulting in an evolution of the dynamic between the EU and its members (Ladrech 2014). Theories of European integration, by and large, do not take into consideration what has been called the circular causality in the European Process, i.e., there is a loop whereby integration defines a new phenomenon (Europeanisation) that ultimately leads back to integration (Coman 2009). As a result, a new theoretical framework was needed to better understand how member states have adjusted to integration.

It was provided a conceptual starting point when it was stated that 'Europeanisation is an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making' (Ladrech 1994: 69). However, by assuming that national states are both actors in EU decision-making and drivers of European integration, other scholars comprehend Europeanisation more broadly as a two-way process, i.e., it not only encompasses a process of domestic adjustment of member states to the EU (downloading), but also a process of uploading national preferences to the EU level (Börzel and Risse 2000; Börzel 2002a, 2002b; Bulmer and Lequesne 2005).

In accordance with Börzel and Risse (2000), some scholars argue that when studying the asylum policy one should not dissociate the EU from the national policy level (for a wider debate see Lavenex 2007; Menz 2011; Radaelli 2004; Toshkov & de Haan 2013). Put differently, the analysis of the Europeanisation process in this policy area should consider not only the impact of the EU into domestic institutions and policies, but also the member states' response to EU policy pressures (Ibid.). As Lavenex (2007: 318) points out 'the evolution of the harmonization agenda in asylum policy may be interpreted as a reaction to the imbalances created by Europeanization based on negative integration'.

However, it is noted that one vulnerability of the current Europeanisation debate is to assume that this process is sequential. In short, it is claimed that the process may well overlap or occur simultaneously (Menz 2011). The idea behind this argument is that national governments play a multilevel game by actively shaping EU policy, according to national preferences, even before the impact of Europeanisation is felt. Germany, for example, successfully stalled the EU process on the Qualification Directive (QD) adopted in 2004. Only after a domestic compromise was reached on labour market access rights for individuals eligible for subsidiary protection and on the recognition of persecution by non-state actors as a legitimate legal basis for asylum, did Germany proceed with the negotiations (Ibid.: 450-452).

An early contribution on the interplay between bottom-up and top-down processes of integration is the study of Lavenex (2001b) on Germany and France. Regarding the European level, the author found that due to a prioritisation of internal security over human rights considerations, specific national histories and identities, and the high politicisation of this issue in the member states, cooperation in this field was shaped by intensive 'transgovernmentalism'. This has reinforced the influence and restrictive position of JHA officials at both national and European level. At the national level, while the European restrictive asylum frame 'resonated well with the long-lasting politicisation of asylum seekers' in Germany; in France it required a modification of the traditional republican discourse and understanding of France as a land of asylum (Ibid.: 203). To sum up, this scholar argues that the requirement to adapt to European asylum legislation changed the cleavage structures and validated the ideational basis for a more restrictive asylum policy in both countries.

By building on the 'misfit model' (Börzel & Risse 2000), Zaun (2016) also makes a valuable contribution to the Europeanisation literature. The scholar has shown that whereas strong regulators (mostly Western and Northern countries of the EU) have actively and successfully uploaded their status quo policies into the EU legislation in order to avoid domestic administrative costs; weak regulators avoided adaptation costs by not complying with EU law, resulting in an ineffective domestic policy transposition. Contrary to what the venue-shopping theory suggests, this academic demonstrates that member states did not rely on the EU asylum policy to lower their domestic standards, but rather pursued 'policy stasis' according to their status quo (Zaun 2017). She has not only studied member states' preferences and positions in the Council, but also their implementation capacity and transposition to domestic policy.

It is indeed a notable contribution to the literature, but her focus is on the first phase of the CEAS in which decisions were only made by the Council and under unanimity voting. This 'two-way' Europeanisation process (Börzel 2002a) has yet to be studied in the subsequent phases of the CEAS.

With the promulgation of the Lisbon Treaty in 2009 a new institutional setting needs to be studied. Specifically, the impact of the ordinary legislative process, the changed voting rule in the Council, and the accession of twelve new member states in the development of this policy. However, this is not the only direction for future research as the following section of this commentary will show.

AVENUES FOR FUTURE RESEARCH

Whereas early studies focused on explaining integration through a state-centred approach, recent studies rely on institutionalism theory to address the circular causality in the European process. Despite the new supranationalism dynamic, according to the majority of scholars, member states continue to have a key role in this policy area. Nevertheless, the existing studies left certain dimensions of the Council's dynamics unexplored. Specifically, topics such as decision-making in the different levels of the Council (see Roos 2018b), the impact of QMV on the consensus norm (see Roos 2018a), as well as the interplay between EU institutions and its impact on integration in the asylum policy area.

Three main lines of research on Council dynamics in the asylum policy area can be highlighted in the existing studies, namely: policy formulation and negotiation behaviour in the Council (Zaun 2016, 2017, 2018; Silvestre 2019); decision-making in the Council (Aus 2008; Ripoll Servent and Trauner 2015; Trauner 2016; Roos 2018a; Zaun 2018); and finally the impact of the 2015 refugee crisis in the EU integration (Lavenex 2018; Niemann and Zaun 2018).

A first contribution to the literature has shown that issue-salience along with regulatory expertise and administrative capacity is important to understand negotiation behaviour, bargaining success and policy output during the first phase of the CEAS (Zaun 2016, 2017). However, it is argued that after the Lisbon Treaty these factors are no longer sufficient to fully explain old member states' negotiation behaviour (Silvestre 2019). It is proposed a bargaining model that not only considers issue-salience, but also formal and informal institutional rules to explain the changed behaviour in the Council. For example, if under unanimity voting rule strong regulators adopted hard bargaining strategies (Zaun 2016), under QMV the use of these more confrontational strategies is constrained (Silvestre 2019). There is a shift from an intergovernmental, state-centred approach to institutionalism. However, there is still a gap in the literature. The new member states were not included in both studies, and might respond differently to these factors. Furthermore, the current reform is under more pressure than the previous phases, so it would be interesting to study if there was a significant change in the negotiation behaviour in the Council.

This last dimension takes us to the following two topics. Like other policy areas, there is evidence that Council decisions in the JHA are also mainly reached without vetoing or explicitly voting (Aus 2008; Ripoll Servent and Trauner 2015). However, recent studies demonstrate that this assumption is no longer 100 per cent accurate (Trauner 2016; Niemann and Zaun 2018; Roos 2018a; Zaun 2018). The analysis of 12 years of Council voting records show that in the post-Lisbon period (2010-16) member states voiced more opposition than in the period pre-Lisbon (2004-2019) (Roos 2018a). It is noted that this increasing contestation in the JHA policy area is mainly related to concerns with sovereignty; with regulatory and political misfit; overall functionality of the proposal; and budgetary concerns (Ibid). According to the literature these concerns were enhanced by the 2008 economic crisis and the 2015 refugee crisis.

Moreover, in case of a more divisive and confrontational Council, the consensus norm might be undermined (Trauner 2016; Niemann and Zaun 2018; Zaun 2018). The assumption that the enlargement had little impact on EU decision-making (see Mattila 2008) no longer applies in the current reform of the asylum policy area. The negotiations on the quota system have demonstrated that the 'new' members have become more vocal, organised and consequently more successful in the

Council (Zaun 2018). The ‘new members’ have clearly contributed to a more divisive Council in terms of policy preferences and positions (Ibid.).

Though there is still room to study the current reform and assess if there are differences in the decision-making between the different legislative instruments, and which countries were crucial in changing the Council dynamic and influencing the policy output. Last but not least, future studies could also take a closer look not only to the empowerment of the EP and its impact on European integration in this policy area but also in the inter-institutional relations throughout the different phases of the CEAS.

Studying these institutional dynamics is the key to understanding the future of the European integration in the asylum policy. There has been an increasing intensification of the ‘securitisation’ debate in the asylum policy area, which can ultimately result in a paradigm shift in terms of protection for refugees and asylum seekers. Furthermore, the current division in the Council and between the EU institutions might also have important future policy implications. Therefore, evidence-based policy-making is what researchers, practitioners including policy analysts and policy-makers should aim for.

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to Robert Ladrech, Florian Trauner, João Carvalho and to the anonymous reviewer for their valuable comments on an earlier version of this commentary.

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