Why did EU asylum policy reform fail in the aftermath of the refugee crisis?

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Abstract: The 2015 – 2016 refugee crisis that hit the European Union (EU) put its crisis governance mechanisms at a test. The unprecedented influx of migrants divided member states among the lines of responsibility – sharing and exposed the inefficiencies and flawed institutional design of the Common European Asylum System (CEAS). Efforts at reforming the contentions system, in particular the Dublin System, have proved unsuccessful. Through a Historical Institutionalist (HI) framework of analysis this thesis examines the 3 reform rounds of the Dublin System that constitute the case studies. The main finding of the thesis it that the failure to reform the CEAS was due to the path-dependent nature of an institutional structure that proved impervious to change.

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Introduction

In recent years, the European Union (EU) has experienced multiple crises that have put its identity as a norms-based regime into question. The unfolding of the Eurozone crisis, the Ukraine crisis and then the refugee crisis, the recent Covid-19 pandemic, have put strains on the EU's crisis governance system and questioned the role and legitimacy of supranational institutions to set the pace in tackling these crises. Of particular importance for this thesis is the refugee crisis of 2015-2016 and more specifically the failure of the EU to reform the contentious Common European Asylum System (CEAS) (European Commission, Common European Asylum System, n.d.) that has been judged to have been the main impediment to dealing effectively with the crisis, because of its flawed institutional structure and weak regulatory standards. The refugee crisis of 2015-2016 is seen as one of the biggest challenges to the EU integration project that have ultimately shaped the path and future direction of the Union.

The unprecedented number of 1.2 million migrants trying to enter the borders of the EU in 2015 and 2016 posed challenges to two of the fundamental principles of European integration – the Schengen system and the internal market (Eurostat, n.d.). This is also why the response to the crisis is seen as having been crucial, reflecting existing power dynamics and discrepancies between formal rules and their actual enforcement. Therefore, the role of the EU as a norm-setting and regulatory regime was seen as all-important in responding effectively and in time to the crisis - something that did not happen, according to many critics (Bierman et al., 2019; Lavenex, 2018). The significance of the failure to respond is further exacerbated by the fact that the crisis represented a "critical juncture" – it opened the opportunity for decision-makers to take control over the field of asylum policy and make the necessary reforms in order to bring about much needed radical change. Thus, the failure to reform the CEAS can be seen as a failure of the EU to defend its position as the "pace-setter" on the global stage (Zaun, 2020).

Despite having a comprehensive and harmonized asylum system, the EU has failed to use its main instruments properly and later also failed at ensuring implementation among the different member states. Is that because of the concrete institutional design of the system? Is that a by-product of weak EU crisis governance? Or is that the outcome of the failure to reform the established in the 1990s system, which clearly has institutional deficiencies since its inception? The subsequent analysis of the existing literature will try to address this last question by

examining existing theories that try to explain the inter- and intra- institutional dynamics of negotiation on the reform of the CEAS, but also the role of member states in that process. The analysis of these theories will help find the gaps in the literature and to place the theoretical lens of the thesis in the forefront. Therefore, the research question this thesis will try to answer is the following:

Why did EU asylum policy reform fail in the aftermath of the refugee crisis?

The analysis will explicitly focus on the failure to reform the contentious Dublin Regulation, which is the cornerstone of the asylum system, and will show that this failure was due to the impossibility to reverse a path-dependent process of institutional entrenchment that became locked in the preferences for the status quo of the main actors. There were some incremental changes to the system, but at the policy core level nothing changed, which is the main finding of the analysis. The theoretical framework of Historical Institutionalism (HI) will be used in order to trace back the development of the CEAS through 3 reform rounds that constitute the case studies of this thesis. The examination of the reform rounds shows how the field of asylum was established and dominated at the EU level by the preferences for security and national sovereignty of certain powerful member states to the disadvantage of others. These preferences then became locked in the system and the power balance later became impossible to shift.

Having established the angle of focus of this thesis, the structure of the paper will be the following: first, a brief outline of the structure of the CEAS will be provided. Second, a brief rationale for the discussion of the existing body of literature will be given, aiming to put the scope of this paper in perspective, followed by a comprehensive analysis of the existing knowledge on the topic, drawing on different theoretical perspectives. In this part, the main points of the analysis of the literature will be reiterated and gaps in the knowledge identified, which will help guide the subsequent research part of the paper. Third, in the theoretical part of the thesis the HI framework will be presented along with the expectations of the thesis and a presentation of the collected data and what method will be used to analyze it. Fourth, in the empirical section of the thesis, the data will be analyzed and inferences will be drawn for the

purpose of supporting the previously proposed expectations. Fifth and last, the thesis will conclude with a summary of the main findings and arguments advances, as well as the contributions and limitations of the research.

What is the Common European Asylum System (CEAS)?

The CEAS is the main framework within the EU for dealing with asylum-seekers and irregular migrants, whose main aim is to provide for common standards and cooperation at the supranational level to ensure their proper treatment. The system is composed of 5 legislative instruments and one agency (European Commission, n.d.), as follows: the Dublin Regulation, which will be the main focus of this thesis, establishes the "first country of entry principle" – the country through which the asylum-seeker first enters the EU is the one responsible for examining their application and also the one responsible for ensuring protection during the process. The EURODAC Regulation is a complementary system to the Dublin one, which provides for documenting and monitoring the entry of asylum-seekers and migrants and for ensuring the proper management of their placement. The Asylum Procedures Directive sets the conditions for asylum decisions, trying to make them quicker, fairer and of good quality. It also ensures the protection of minors and victims of torture. The Reception Conditions Directive aims at setting common standards in all EU member states for the reception conditions of asylum-seekers. Next, the Qualification Directive clarifies under what conditions an asylum-seeker is to receive international protection. Finally, the European Asylum Support Office (EASO) is the agency that aims at supporting member states in the implementation of the common system by "developing trainings, capacity-building, emergency assistance, information and analysis, and third country cooperation activities" (European Commission, n.d.).

The cornerstone of the system, as already said, is the Dublin system, which was first established by the entry into force of the Dublin Convention in 1997, later amended by Dublin Regulation II in 2003 and subsequently Dublin II was replaced by Dublin III in 2013. The Commission proposal from 2016 for a reform of the Dublin III regulation (Dublin IV) was stuck in the negotiation process at the first reading of Parliament (Legislative Observatory, 2016) and was

subsequently withdrawn by the Commission in 2019. The latest Commission proposal of 2020 is in discussion forums in Parliament and Council (European Commission, 2020).

Before proceeding to examining the reasons for the failure to reform the Dublin Regulation, despite the flawed design of the system, a comprehensive analysis of the existing literature is needed. Although the topic of the handling of the refugee crisis of 2015- 2016 is multifaceted, and no single factor is the most important one for explaining the failure of the EU to achieve solidarity and sufficient cooperation, the literature review will explicitly focus on the body of literature that reviews the insufficient response of the EU in the context of the failure to reform the CEAS and the different explanatory values of theories that try to explain that failure. This exercise is useful for at least 2 reasons: Firstly, in order to later discuss the failure of the reform of the CEAS, we first need to examine existing literature on the topic in order to place the focus of the subsequent literature review in the broader context; and secondly, reviewing the literature will help with the examination of already existing arguments and knowledge on the topic and later will help to identify what is missing and what needs further research.

Theorizing the EU response to the refugee crisis

The analysis of the existing literature will begin with papers that present arguments in the 2 most prominent theoretical traditions – liberal intergovernmentalism and neo-functionalism – exploring the question of the failure to reform the CEAS. Taking the article by Bierman et al. (2019), which is an example of the liberal intergovernmentalist tradition, the authors' main claim is that the response to the refugee crisis is due to differences in member states' preferences and bargaining positions, notably that "the states least affected by migratory pressure were satisfied with the institutional status quo, and were thus able to leave the more affected states aggrieved" (p. 246). Something particularly important for our analysis is the acknowledgement of the importance of international interdependence as a driving force for political reform (Bierman et al., 2019). Therefore, the resulting failure of cooperation and burden-sharing can be attributed to "states having different capacities to absorb the externalities produced by policy response or an external shock" (p. 249). Taking this line of reasoning, it is therefore not surprising how and why

differences in member states' relative capacities vis-à-vis one another (in terms of administrative, economic and social capacities) hindered them in coming to common solutions.

Especially important in the liberal intergovernmentalist tradition is the assumption of rational state behavior- "the goals of governments are seen as varying in response to shifting social groups preferences, which are aggregated through political institutions"; "the interaction of demand (the potential benefits of policy coordination perceived by national governments) and supply (the possible political responses of the EU's political system to pressures from those governments)" shapes the policy behavior of the different states (Moravcsik,1993). The article by Natascha Zaun (2018) further develops the logic of Moravcsik by focusing on the role of the electorate in states' preference formation and on the different positions between Northwestern and Southeastern Member states. Overall, in her argument we can see the same positions as in the former two: the main factors laying behind the non-reform of the CEAS are, from a liberal intergovernmentalist perspective, the dominant preference of a particular group of Member states (notably the ones that were least affected by migratory flows); the influence of the national electorates on the positions of governments, whose main objective is to stay in office; and the institutional framework that is an expression of shifting preferences and power differentials between member states (Zaun, 2018).

On the other hand, the theoretical perspective of neo-functionalism is forwarded by the work of Arne Niemann and Johanna Speyer (2018). The authors use neo-functionalism as a guiding theoretical lens in relation to asylum policy in order to forward their argument that "the functionally flawed and incomplete policies adopted in the 1990s and thereafter substantially contributed to the crisis" (p. 29). The emphasis on functional and political spillover is a central tenet of this line of reasoning. A notable argument of the authors is the connection between Schengen and the subsequent need to protect the external borders with the establishment of a common asylum regime that "created a functional spillover effect that led to the crisis" (p. 30). Essentially, the crisis is a result of existing dysfunctionalities between the two systems – "the combination of Dublin, Schengen and Frontex substantially contributed to the crisis" (p. 30). Important here is to note how decisions taken in the context of the refugee crisis in 2015 – 2016 are dependent on previous decisions or experience in the past in the same policy field.

As pointed out in the beginning of this paper, in recent decades the EU has been faced with multiple crises, the most important one that led to effective supranational governance is notably the Eurozone crisis. Florian Trauner (2016) examines how the multifaceted character of that crisis affected subsequent patterns of policy-making in the EU, which is also illustrated by a neo-functionalist logic. The author contends that "the economic crisis became an important discursive argument for not expanding the rights of asylum-seekers in view of the financial implications of such a step"; and that "the asylum package agreed to in 2013 nuanced the existing legislation without revising the core of the existing regime" (p. 322). Essentially, the EU has engaged in a double strategy- it has kept the core of the existing asylum system, but then also provided more support for the most affected countries. Could we then argue that the main goal of the EU was to secure policy stability?

A different perspective focusing on actor-centered institutionalism is offered by Sandra Lavenex (2018), which presents the CEAS as an example of hypocrisy, where the role of the Schengen Agreement is explicitly linked to the functioning of the CEAS, later also resulting more broadly in a "governance crisis" in 2015 – 2016 (p. 1197). What is particularly important to draw from her work is the notion of institutions as reflections of their environment- notably, claiming that the design of the institutional framework of the CEAS is the result of the negotiations positions of different actors at the time of its inception (Lavenex, 2018). Here, one can argue a glimpse of a neo-functionalist perspective can be notices. The author argues that cooperation on asylum was framed as a compensatory measure for the removal of internal borders in regards to the Schengen Agreement (p. 1201); and that it was "framed in view of protecting the EU's internal "Area of Freedom, Security and Justice" and not as a genuine European policy for refugee protection" (p. 1202). This This line of argument can also be seen in the work of Adina Maricut (2017) that claims that "the institutional responses to the refugee crisis in 2015 have been entrenched for three decades in the institutional positions on asylum and migration of the Commission, Parliament and the Council" (p. 161).

The argument of both articles of the legitimation of actions by the different EU institutions through the adoption of "minimum standards" of the asylum system underlines the embeddedness of their actions in a wider context of a historical pattern– the bargaining power of the most powerful position at the time of the negotiations is reflected in todays' institutional

structure of the CEAS (Lavenex, 2018; Maricut 2017). The problem of institutional design of the CEAS has also been discussed by Ariadna Ripoll Servent (2017), whose argument focusses on the reason why particular agencies (e.g. EASO and Frontex) were established as a solution to institutional deficiencies of the system, instead of reforming the system as a whole. One very crucial finding is in order: there is a conflict between the so called "strong regulator states" and "weak regulator states" which crystallizes in the usage of such agencies as proxies by the strong regulators in order to intervene in the internal affairs in the weak regulators or also impose institutional structures supranationally (p. 84).

In conclusion, the different theoretical perspectives analyzed here give a comprehensive overview of the existing body of literature on the topic of the failure of the reforms of the CEAS. The findings of the separate theoretical lenses often overlap. Many of the already existing articles find that, in order to understand the failure of the reform of the CEAS, we have to consider inter- and intra-institutional bargaining positions of the different institutions of the EU, as well as how the preferences of dominant member states form and end up shaping policy outcomes. However, important flawed aspects remain to be mentioned – the explicit use of the state-centered approached offered by (liberal) intergovernmentalism proves to be quite limited to provide conclusions reaching beyond the mere scope of interests, bargaining power between rational actors and preference formation. The same could be said for neo-functionalism, but in a different context – its explicit focus on supranational institutions as the main actors proves limited; as well as the unexplained content of supranationalization.

The main arguments of the existing literature presented above show how vastly and from different angles the problem has been studied. The reform of the CEAS has been on the agenda of the EU for almost a decade, but no theoretical lens seems to adequately present reasons as to why we have not seen such reform take place. As the analyzed literature shows, the existing explanations tend to focus either explicitly on the supranational-intergovernmental divide and the different role of institutions (Lavenex, 2018; Maricut, 2017) or to attribute the failure of reform to a neo-functionalist argument: the political inadequacies of the existing system are due to a political spillover from the initial flawed design of the system (Niemann & Speyer, 2018). To try to fill that gap, this thesis will answer the research question in the Historical Institutionalist (HI) tradition in order to try to establish the causal mechanisms that were at work in the period

between the surpanationalization of the CEAS since the 1990s and the refugee crisis of 2015-2016. Although at first sight the neo-functionalist and historical institutionalist arguments may seem similar, there are important differences that separate the two – HI concentrates on "the origins and development of the institutions themselves, seen as institutional structures and processes, which are explained by the (often unintended) outcomes of purposeful choices and historically unique initial conditions" (Schimdt, 1999). For HI, the main focus is on path dependency - it focuses on institutional and process development over time. On the other hand, neo-functionalism takes as central the argument of integration through spillover effects – integration in one policy field would likely lead to further integration into other policy fields due to either political or functional spillover (Schmidt, 1999). However, this argument is limited because it presents integration in one policy field as solely dependent on previous integration in another, connected policy field and does not take policy reform initiatives as autonomous from the broader structure within which they are conceived. The most important difference that delineates HI from neo-functionalism is that HI emphasizes the role of sequencing and timing of events and processes, and phases of political change (Schmidt, 1999). For this reason, this thesis will make use of the HI approach. The analysis expects that the failure to reform the CEAS was due to a path-dependent process of institutional persistence that became impossible to reverse. Furthermore, the established institutional structure got entrenched in the institutional setup of the policy field and options for reform became unavailable.

Historical Institutionalism

HI is a framework used by scholars when the goal of research is to look for causal mechanisms that link a certain outcome to a certain historical or temporal process that brought about that outcome. The goal of HI is to construct a narrative that focuses on an important outcome or puzzle, while also focusing on time and sequencing of processes in constructing that narrative (Halperin & Heath, 2017). The use of the HI framework will be useful because it focuses on "macro contexts and hypothesizes about the combined effects of institutions and processes" rather than on examining just one institution at a particular time (Pierson & Skocpol, 2002). Furthermore, the focus on causality is crucial - HI allows us to construct a theoretical account

"showing why this linkage should exist and by evidence suggesting support for that theorized linkage" (Pierson & Skocpol, 2002). The central focus is the development and adaptation of institutions over time, rather than their functioning. It also "assumes that preferences are informed by comparing the costs and benefits of adapting to new circumstances with those of maintaining or losing their investments in past arrangements" (Halperin & Heath, 2017). HI focuses on the "sequential and active unfolding of events" which helps us to "identify causal configurations, by examining relations that are stretched over time" (Halperin & Heath, 2017).

Another argument in which the HI perspective is taken is the one offered by Fritz Scharpf (2006). According to Scharpf (2006), "as negotiation systems with multiple veto players come to accumulate a growing Acquis Communautaire, they will progressively lose the capacity for policy innovation" – as the EU kept enlarging, the accession of new member states proved to be detrimental for speedy and effective decision-making (p. 848). The so called "joint-decision trap" is argued to be the main reason for policy reform failure and blockade. According to the author, the Commission has two modes – joint-decision and supranational-hierarchical mode. For the purpose of this analysis of interest is the first one (p. 850). The joint-decision mode is also called the Community method and consists of the Commission proposing regulations/ directives/ reforms that need to be approved and adopted by the Council and Parliament. However, this leads in some cases (as has been the case in the field of asylum) to a "trap" – in areas of high political salience and where a lot of veto players are present (as is the case with the negotiations on Dublin IV), side payments, coupling of preferences in package deals, and mechanisms for reducing transaction costs will be ineffective and thus policy reform will be impossible (p. 847-851).

Common in the HI tradition are certain concepts that show the centrality of history and causality in constructing a narrative. Important for this analysis are the following: path dependence, critical junctures and positive feedback. Furthermore, borrowing from the work of Trauner & Servent (2016), the concepts of "deep core", "near core", and "secondary aspects" will be used in the later analysis of the presented findings, as well as the conceptualization of gradual institutional change offered by Streeck and Thelen (2005). Before proceeding with conceptualization, an important distinction is first in order. The concepts offered by Streeck and Thelen (2005) on the different types of institutional change, as well as the conceptualization of Trauner & Servent (2016) of a policy fields' structure, will be used in order to understand the

explanandum (the phenomenon to be explained), which here refers to the lack of reform after the refugee crisis. On the other hand, the classical concepts offered by the HI framework will help us to understand the *explanans* (the explanation for the phenomenon).

The most central concept in HI is the one of path dependence – it explains why institutions persist and evolve over time, mainly due to the self-reinforcement of irreversible mechanisms (Halperin & Heath, 2017). Against this and the conceptualization of Pierson & Skocpol (2002) as "the dynamics of self-reinforcing or positive feedback processes in a political system" (p.6), Mahoney (2002) tries to argue that a too simplistic explanation of the concept poses the risk of making it too vague and thus deem the concept less significant. Instead, the author advocates for a stricter conceptualization: "contingent events in the past influence a later sequence of events leading to a particular outcome. The sequence of events, which are related by causal links, deterministically leads to a certain outcome. The origin of an institutional pattern is a "critical juncture", a contingent event, an unexpected unpredictable choice of a certain institutional pattern out of more alternatives" (Mahoney, 2002).

As shown by this conceptualization, the concept of critical juncture is also central in HI and connected to path dependence. In particular, according to Pierson (1997), "the critical object of study, the critical juncture, lies in a preceding set of events which set development along a particular path" (p. 41). Therefore, a critical juncture is an event in time (the refugee crisis) that triggered some sequence of events (proposals for reforms) that resulted in a certain outcome (the failure to reach a common solution). This external shock disrupted the stable institutional equilibrium and opened a space for radical change, after which, however, we did not see any change (Kickert & van der Meer, 2011). According to Pierson & Skocpol (2002), the reforms in the stable periods are incremental and piecemeal. Once institutions are set and move in a certain direction, positive feedback then generates self-reinforcing mechanisms that remove other options or paths as alternatives and the process becomes irreversible (Halperin & Heath, 2017).

As stated above, the conceptualization of Streeck & Thelen (2005) offers an explanation of gradual institutional change. The authors classify change in 5 modes: displacement, which means activating previously existing institutional forms that were ignored before; layering, which means new institutions are added onto already existing ones, without abolishing the old ones; drift, which is when an institution has eroded over time and a change happens; conversion, which

is when the institution gets a new direction, goals, functions; and exhaustion, which means that the institution breaks down gradually, not abruptly (p. 19-28). This conceptualization will be important for the assessment of the policy field of asylum and the functions of new institutional structures and processes within it.

The last conceptualization is the one by Trauner & Servent (2016). A "deep core", according to the authors, is related to some normative beliefs and systems, and axioms of the political authors that shaped it and is very difficult to change. The "near core" constitutes "the fundamental policy positions concerning the basic strategies for achieving the normative axioms of the deep core." And finally, "secondary aspects" relate to information searches or instrumental decisions that are taken in order to reach the goals of the policy core (p. 1420).

After presenting existing arguments in the literature on the topic and placing the research question in the HI tradition, *the analysis in this thesis expects that the failure to reform the CEAS was due to the path-dependent nature of an institutional structure that proved impervious to change.* The policy choices adopted in the 1990s got entrenched in the institutional setup of the policy field and options for reform became unavailable. In particular, the HI framework will guide the analysis and the focus will be on the 3 reform rounds of the CEAS, which will show the causal connection between these processes and the outcome.

Having established the goals of this thesis as analyzing the failure to reform the Dublin system, the construction of a strategy for the investigation of the hypothesis is crucial before proceeding. The method of process-tracing will be applied to the collected data in order to determine if the expectation outlined above is valid or not. Process-tracing is often used in comparative historical designs because it offers the possibility to explore developments over time and to identify what causal relations connect a given hypothesized cause to a certain outcome. It is a "good method for exploring the events and mechanisms that constitute path dependent historical processes" (Halperin & Heath, p. 248). When using process-tracing, one has to trace the sequence of events that constitute a given process (in this case, non-reform of the Dublin regime) in order to identify the causal mechanisms that underlie that link a variable (the refugee crisis) with the outcome (non-reform). In particular, the variant of "explaining-outcomes process-tracing" will be used. According to Beach and Pedersen (2013), explaining-outcomes process-tracing is an inductive strategy whose goal is to construct a "minimally sufficient explanation" of a given puzzling outcome, that is – given all the conditions for a specific outcome (in this case, reform of the

system), no such outcome was produced and instead a different path was taken, despite the existence of a window of opportunity for reform (p. 19-20). The goal of this method is to try to find such a minimally sufficient explanation that is based on the adequacy of all accounted factors, while also making sure that the evidence is best explained by that explanation instead of alternative ones (p. 21). The method will be applied to 3 cases, which constitute episodes of reforms – firstly, the creation of the first laws of the system between 1999-2005; secondly, the first actual reforms between 2008-2013; and lastly, new aims for reforms during the crisis and in response to it. These constitute the case studies of the thesis.

By studying the path dependence of institutional reform and change from different stand points, the paper will provide a more comprehensive analysis. This exercise is referred to as "data triangulation" (Naeem, 2019). Three types of data will be collected in order to test adequately the proposed expectation and to serve as a basis for drawing inferences. Those include: primary sources and secondary sources. Primary data will be obtained from the Legislative Observatory website of the European Parliament, where detailed reports of each proposal and decision of the institutions and legislation are given. Secondary data will be obtained through research of the existing academic literature in an online format. For primary sources, I will make use of Commission, Council and European Parliament documents at each reform round. In particular, these include the following: Commission proposal, Council position, Parliament position, Council conclusion/ adoption of decision. For secondary sources, I will make use of academic literature that describes the decision-making process in detail and theorizes the positions of the different actors involved in it. Furthermore, academic articles will be used to assess different member states' positions at the different reform rounds in order to analyze how preferences change over time and what the incentives for such changes are.

Empirical analysis

The case studies analyzed in the thesis represent the 3 reform rounds of the CEAS. The first round encompasses the years from 1999-2005, when the first creation of asylum laws at the European level happened. The original Dublin convention, which had been adopted as an

international agreement and had been in force from 1997, was amended and transferred to European Union law in the form of the revised Dublin Regulation II, which came into force in 2003 (European Commission, 2001) under the legal basis of the Treaty establishing the European Community (EC, 2002). This is where for the first time the legislative architecture of the CEAS was defined, with the Council playing the most important role and the European Parliament only involved in consultation. That is also why, according to Servent & Trauner (2014), the core principles of the CEAS undermine the role of responsibility-sharing and establish a system for responsibility-shifting – policies overburdened peripheral and borderline states to the benefit of destination countries, who shifted the burden for dealing with migration inflows onto the former. This goal was indirectly further by the Council through the exploitation of the Dublin rules, which was respectively opposed by Parliament, the institution that would remain the main advocate for asylum-seekers' rights and more burden-sharing practices throughout the various reform rounds (p. 1146). Furthermore, according to Servent & Trauner (2014), the role of decision-making under unanimity was crucial for member states showing reluctance in the area of procedural law (p. 1147).

The second round of reforms is from 2008-2013. At the end of this round, Dublin II was reformed and a revised version was adopted, namely Dublin Regulation III, which came into force in 2013 (European Commission, 2008). During the period from the initial proposal from 2008 and the final adoption in 2013, the role of the European Parliament has dramatically changed. Under the Lisbon Treaty, the EP gained the right of co-decision with the Council in the field of asylum and the "ordinary legislative procedure" became the main model of decision-making in the EU (Treaty of Lisbon, 2007). Furthermore, decisions in he Council were to be taken by Qualified Majority Voting (QMV), a significant step towards decision-making that fostered an orientation among member states towards problem-solving and placing the responsibility for decisions on bureaucrats and experts, rather than member states *per se* (Falkner, p. 7)

The third and final round of reforms encompasses the period of the refugee crisis and includes the new proposal by the Commission for reform of the CEAS in 2016. The objective for reform came after the crisis exposed the limits and inadequacies of the system in place and forced member states to question whether burden- and responsibility-sharing were in fact the main objectives of that system. That is also why a new proposal by the Commission from September

2020 was put forward for a recast of the CEAS (European Commission, 2020). The proposed "New Pact on Migration and Asylum" is part of the Commission's new work program and offers a comprehensive approach that covers the areas of migration, asylum, integration and border management and the EU's relations with third countries. The proposal sets out to conclude the negotiations on the reforms proposed by the Commission in 2016 and 2018. Some of the main objectives include the robust management of external borders, efficient asylum rules, a new solidarity mechanism and supporting effective integration policies (European Parliament, 2021). As we can see, there has not been a significant change in language and the question of what shape these objectives will take remains.

I.   First round of reforms: creation of first laws 1999-2005

Starting with the first round of reforms, it is first important to specify the objective of the Dublin Convention that entered into force in 1997. The Dublin Convention was established upholding principle that asylum-shopping should be prevented – that is, attempts by asylum-seekers entering the EU and submitting applications for asylum in several member states; or them choosing their country of destination (Dublin Convention, 1997). The goal was to provide a rule that allocates asylum-seekers to the first country that they enter, the so-called "first country of entry principle", which is the cornerstone of Dublin (Dublin Convention, Articles 1 & 2). The criteria for examining an application of an asylum-seeker were established in the original Dublin Convention and have not changed since. According to the criteria, an application will be examined with priority in a hierarchical order, as follows: principle of responsibility for dealing with the application where a family member is present; where present, a residence permit; possession of a valid visa; application made in a transit airport of that state; irregular crossing of the border; and if no state is deemed responsible, any state may examine the application, especially when it comes to humanitarian or cultural reasons (European Commission, Dublin Convention, n.d.). These initial criteria became the basis for much debate at the first reform round. The proposal of the European Commission in 2001 for a recast of the Dublin Convention

and for establishing a Common European Asylum System aimed at ensuring greater harmonization of asylum law and cooperation between member states.

The proposal, however, has proved to be largely the same in many respects. Although there were some significant changes proposed and attempts at restructuring the system, the practices have remained largely the same – they have favored some member states more than others, and have put the burden of accepting a disproportionate number of asylum-seekers on borderline countries. Starting with the objective of Dublin II, it is clearly stated that its main goal is to "adapt the system to the new realities resulting from the progress made as regards the establishment of an area without internal borders" and "increase the system's efficiency and the member state responsible for the examination of the application to be determined as quickly as possible" (European Commission, 2001). Already from the vagueness of the language we can say that the goal was not to reform the flawed "core" of the system, but to focus on the construction and affirmation of ineffective procedures that will continue to disfavor some countries.

Despite this, however, we can say that there were some new things – for example, due to the efforts and several amendments of Parliament made on the proposal, asylum-seekers got more (although still limited) protective guarantees, in line with Parliament's role as the human rights defender. This was against the role of the Council as the protector of national interests, which was clearly exemplified by policies in the first pillar being dominated by an intergovernmental bias. This bias crystallized in the Council operating in a more modest, security-oriented mode that did not go beyond protection of interests of individual, powerful member states (Trauner & Servent, 2014). Here the concept of "positive feedback" is instrumentalized – the institutional structure of the CEAS, established by Dublin II, was dominated by the Council and the core of the system was delineated with boundaries that later became impossible to remove. The deep core of the system consisted of the objective to prevent asylum-shopping and to ensure the allocation of asylum-seekers to the country responsible. Furthermore, the continued domination of the Council in decision-making meant that *de facto* the voting system in place was not much different than the system that was in place for the original Dublin Convention. The practice of unanimity implied that individual member states who were not so affected by migratory flows

could easily veto a decision that went against their interests. Those limited beliefs of the political elite became locked within the institutional structure of the field of Migration and Asylum.

II.   Second round of reforms: co-decision 2008-2013

We can see these same patterns of division in the second round of reforms. The Commission proposal of 2008 does contain some new features that were added to the CEAS, although it still did nothing to reform the flawed core of the system - the objective to keep the first country of entry principle still exposed the focus on territoriality and the need for member states to secure and protect external borders. Furthermore, it was not in the interest of the Commission to propose something that would have no chance of being passed – an explanation of why language was vague (that way it was not directly binding) and reforms were limited. The changes made were largely procedural and included adding new instruments that were supposed to alleviate the problems – including the focus on detecting early problems in national asylum systems and tackling their root causes; the specification of more protective guarantees for migrants; the specification of detention conditions; and the development of a mechanism for early warning, preparedness and crisis management (European Commission, 2008).

It is important to keep in mind that Dublin III was negotiated under co-decision of the Council and Parliament. We could therefore argue that the positions of the EP and Council were more similar, since the proposal was adopted fairly quickly without much lines of contention. However, the Council still favored non-reform and tried to limit the inclusion of any burden-sharing instruments – the introduction of the "early warning mechanism" is said to be the compromise (Council position, 2013). The mechanism had the purpose of "addressing the root dysfunctional causes of national asylum systems or problems stemming from particular pressures" (European Commission, Dublin Regulation, n.d.). On the other hand, the Commission and the EP wanted further integration and the adoption of new instruments aimed at providing more rights-based provisions for asylum-seekers, and also developing common standards among member states. Still, at this round we can see how the core of the system remained unchanged.

There were only changes in the secondary aspects of the field of asylum that pertained to the implementation of the policy core.

III.   The refugee crisis and Dublin IV

The unprecedented number of migrants entering the EU in 2015-2016, the extremely bad humanitarian situation in result of that, and the reluctance of member states to cooperate with each other showed how the structural problems of the CEAS disadvantaged some states and favored others. In response to this situation, the Commission put forward a proposal amending Dublin III, noting that "the current Dublin system was not designed to ensure a sustainable sharing of responsibility for applicants across the Union", which had led to situations where "a limited number of individual Member States had to deal with the vast majority of applicants across the Union" (European Commission, 2016). The new proposal had the main aim of introducing an automated system that would allow for the registration of applications made in the EU, based on size of population and total GDP of the specific country responsible. This presented a notable difference from previous reform rounds, along with the proposed permanent refugee relocation scheme, which was to be triggered when a member states' system was experiencing a "significant harm" (European Parliament, 2021). The mechanism was to be based on a Commission assessment of a recognition rate of a nationality that was supposed to be 75% or higher. If these conditions are fulfilled, relocation is possible. However, after the Council held discussions on a temporary relocation mechanism, and in view of the raised "security reservations" against it, the discussions proceeded throughout 2016 and no decision was taken. This led the Commission to withdraw its proposal in June 2019 (European Parliament, 2021). Another objective for change in the proposal was the streamlining of procedures and the introduction of extended rights for unaccompanied minors, and also strengthening the rights of the child. Something particularly interesting is the insertion of the so-called review clause – the Commission would review the new mechanism after 18 months and after that annually. As shown, although the genuine will for reform was present, and the proposals were the first real attempt at that, negotiations got deadlocked in the Council. This blockage shows how decision-

making rules played a significant role for the policies discussed. Similarly, the proposals from 2020 keep the same principle.

As discussed by the 3 case studies presented above, the asylum system was established with the main objective of preventing asylum-shopping and for charging the first state of entry with the examination of the asylum application – something which has remained the same, although the EU has recognized that this is the main reason why the system does not work efficiently. Furthermore, the creation of complementary institutions like the European Asylum Support Office and the EURODAC regulation would not do anything to solve the structural problems of the system. So why is the reform of the CEAS proving impossible, given than the refugee crisis proved to be the critical juncture that was supposed to trigger a sequence of events (proposals for reforms) that were supposed to result in a certain outcome (reform of the core of the system)? The concept of path dependence is crucial here – the outcome of political non-reform is conditioned by previous events and actions by political institutions (in this case, the institutions of the EU) that set the policy field on a certain path already in 2003 with the first reform of the system. Positive feedback helped to keep the established institutional structure on that path and generated self-reinforcing mechanisms (less harmonization, dominance of more powerful member states, division between groups of states) that eliminated alternative routes for development. Furthermore, the argument of institutional dynamics advanced by Scharpf (2006) is also crucial for this outcome – as the number of important actors increased, the likelihood of reaching consensus and finding a common solution became smaller and actors instead agreed on lowest common denominator polices that produced irreversible mechanisms. This joint-decision trap proved to be the main reason for the failure to reform the core of the system and instead facilitated the "layering" of institutional structures on top of the flawed core (Streeck & Thelen, 2005).

As also mentioned above, the role of individual member states at the different reform rounds proved crucial for that outcome. The division between the powerful Northwestern member states like France, The Netherlands, and the UK, spearheaded by Germany, and the Southern and Eastern member states (notably Italy, Spain, Greece) proved to be the main determinant for the divergent outcomes we had. At the first and second reform rounds, when the core of the system was shaped, Northwestern and destination countries dominated and had stronger negotiation

positions, since they exploited the fact that they had long-standing traditions of asylum laws and new member states (that accessed the EU in 2004 and 2007) had no particular interest in shaping asylum law at the EU level because they had little asylum legislation that would have to be changed (Zaun, 2020). Therefore, Northwestern countries have acted as pace-setters most notably in the responsibility package of Dublin, since they were mostly affected by secondary movements (Zaun, pp. 6-7). Contrary to this dynamic, at the negotiation rounds of Dublin IV there was more polarization over the parts of the CEAS that aimed at placing the burden explicitly on borderline states. Especially vocal were the Visegrad countries and border countries that have most strongly felt the redistributive implications of the responsibility principle of Dublin. The blocks of countries that formed (the Visegrad supported by CEE countries) managed to further their interest in a stronger solidarity package and block decision-making, claiming that the principles established by Dublin have clearly disadvantaged them and put the strain and responsibility for asylum applications disproportionately on them.

Despite the increased role of Parliament after the entry of the Lisbon treaty, the political beliefs and procedural rules of decision-making in the Council have been so firmly established that other actors were forced to integrate into the existing power structure and were forced to accept the costs along with the minimal gains of having a common asylum system. Furthermore, the role of unanimity voting at the first round is essential – unanimity favors the explicit focus on keeping national states' sovereignty and interest for the sake of a common decision. If those interests align, we see an action that would serve the common interest (Dublin II, which favored security-oriented policies). If the interests of the states are more diverse (as was the case of Dublin III and Dublin IV), we can see compromises on the level of a "lowest common denominator" policy or even complete blockage and non-decision (Falkner, 2011).

Conclusion

As the given analysis has shown, the inadequacies of the EU asylum system have proven to be impossible to resolve and the path of institutional change has been blocked. What the data has shown is how the institutional choices made in the 1990s and how a policy field is established, matter for the future development of that field and for the policy alternatives that are presented to actors at each reform round. The field of asylum has proven contentious at the different reform rounds due to the institutional architecture of prevalence of intergovernmental decision-making modes and security-oriented policy choices by the dominant actor, the Council. This dominance has proven to be the most important determinant for the outcome of non-reform.

Although the analysis found that in the recent proposals for reforms there have been some innovations, and actors have made compromises for the purpose of moving forward in negotiations, one cannot be too optimistic – as of date of writing, we still do not have the so needed reform of the EU asylum system, despite the experience of one of the worst humanitarian crises in recent decades. Still, the findings present a comprehensive picture of those failures and show how the choices political leaders make today shape the institutional structure of the EU and put it on a certain path of development.

However, the analysis presented is nevertheless to some extent limited. What this thesis would have benefited from is a further analysis of game- theory arguments that present the specific motivations of individual actors and institutions. This limitation provides a stimulus for further research in that area, but is beyond the scope of this thesis. Nevertheless, the thesis presents a comprehensive analysis of the EU's response to the refugee crisis in the HI perspective, something that has not been examined before. This analysis proved insightful because it forced us to look beyond history and to take account of timing and sequencing of events as well, which facilitated the better understanding of the mechanisms that were at play at the different reform rounds. Therefore, this analysis is a valuable contribution both to the literature in the HI tradition and to the literature examining the failure to reform the CEAS.

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