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The Populist Assault on the Asylum Seeker: A Path Dependent Approach to the Impact of TAN Populist Executives on the Hungarian and Italian Asylum Systems following the 2015/16 Migration Crisis
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The Populist Assault on the Asylum Seeker

***A Path Dependent Approach to the Impact of TAN Populist Executives on the Hungarian
and Italian Asylum Systems following the 2015/16 Migration Crisis***



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**Thesis in partial fulfilment of the MSc. Public Administration in International and
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Institute of Public Administration

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Abstract: *This thesis takes a comparative approach to understanding the impact of TAN populist executives on the asylum systems of Hungary and Italy following the 2015/16 migration crisis. The interlinking concepts of TAN populism, autocratization, and their relationship with judicial control and the asylum seeker are first expanded upon in the Literature Review. Then, the Theoretical Framework chapter delves into the applicability of the path dependence approach for understanding the links between these concepts and hypothesises that the degree to which a TAN populist executive can inflict Asylum System Assault (ASA) depends on its ability to reshape judicial control. This hypothesis is tested using a research design based on MSSD-I which is discussed in the Methodological Approach chapter. The comparative part of the thesis begins with a chapter on the case study of Hungary. In this case we see how the drafting of a new constitution by the Fidesz party in 2010 severely weakened judicial independence, allowing for a path dependent trajectory of further autocratization and, following the migration crisis, of ASA. In turn, this led to the structural death of asylum in the country by 2020. Meanwhile, the next chapter on the Italian case shows how an independent judiciary can act as a lifebuoy for migrant rights by stopping the successful implementation of key TAN populist executive ASA policies. This being the case both during the Conte I government, and in the current Meloni-led government.*

Keywords: *historical institutionalism, path dependence, critical juncture, populism, TAN/GAL, far-right, autocratization, democratic backsliding, illiberal constitutionalism, illiberal democracy, asylum system, judicial control, Hungary, Fidesz, Viktor Orbán, Italy, Fratelli d'Italia, Lega, Giorgia Meloni, Matteo Salvini.*

The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow, we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance.

- John Rawls, *A Theory of Justice* (1970).

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Glossary of Abbreviations & Acronyms

ASA	Asylum System Assault
CEAS	Common European Asylum System
CoE	Council of Europe
CPD	'Common Procedure Directive' 2013/32/EU
CSM	Italian High Council of the Judiciary
DC	<i>Democrazia Cristiana</i>
ECRE	European Council on Refugees and Exiles
EU	European Union
FdI	<i>Fratelli d'Italia</i>
Frontex	European Border and Coast Guard Agency
FI	<i>Forza Italia</i>
GAL	Green/Alternative/Liberal
IMPIC	Immigration Policies in Comparison Dataset
IOM	International Organisation for Migration
MENA	Middle East and North Africa
MSSD-I	Most Similar System Design I
NGO	Non-Governmental Organisation
M5S	<i>Movimento Cinque Stelle</i>
NOJ	Hungarian National Office of the Judiciary
OECD	Organisation for Economic Co-operation and Development
PD	<i>Partito Democratico</i>
SAR	Search and Rescue Zone
TAN	Traditional/Authoritarian/Nationalist
TRIAL	Trust, Independence, Impartiality and Accountability of Judges and Arbitrators Safeguarding the Rule of Law under the EU Charter National Reports
UNHCR	United Nations High Commissioner for Refugees
US	United States of America
USSR	Union of Soviet Socialist Republics

Lin-Nannu Žaren

I.

Introduction

In order to preserve Christian culture, we need to build a physical and spiritual defence line.

Victor Orbán (*Magyar Nemzet*, 2018).

A naval blockade is the only way to stop 'clandestine' migration.

Giorgia Meloni (*Sky TG24*, 2022).

a. TAN Populism & Asylum: The Context

When studying the policy and politics of migration, it's common to come across the slogan 'no human being is illegal' (Gambino, 2015). Putting the semantics aside, the facts on the ground do in fact show that the vast majority of migrants are in fact 'legal.' EU Commission President von der Leyen may refer to the 'European challenge' that migration constitutes, citing 330,000 irregular border crossings and 924,000 asylum applications (*European Commission*, 2023), however it remains essential to keep things in perspective. 3.6% of the global population, amounting to 281 million in 2020, live in a country other than the one in which they were born (*IOM*, 2022, p. 3). Out of these migrants, 27.1 million are refugees, and an additional 4.6 million are asylum seekers. Furthermore, 83% of the world's refugees are actually hosted in low-and middle-income countries. Turkey hosts the largest total number of refugees, or the fifth largest number relative to its population with 1 in every 23 people living there being refugees. The other top four states for this metric being Aruba, Lebanon, Curaçao, and Jordan respectively (*UNHCR*, 2021, p. 2). Therefore, if asylum seekers and refugees are to be analysed through the lens of a crisis, it is surely not simply just a 'European' one.

De Haas, Natter, and Vezzoli's (2018) study shows how since the Second World War, migration policy has only been getting less restrictive and more open overall. However, in stark contrast to this overall trend, 'border controls' and 'exit policies' have only been getting consistently more restrictive. A similar conclusion was also made by Schultz, Lutz, and Simon (2020) who analysed the IMPIC dataset for OECD states to find that while migrant admissions policies are getting more liberal overall, a shift can also be seen in the stances of political parties before and after the Cold War. Before the fall of the Iron Curtain, both left- and right-wing political parties favoured asylum migration, while after they started to favour more labour migration. Therefore, it can be said that migration policy overall is becoming more selective, to the detriment of the asylum seeker. In spite of the rhetoric expressed in this chapter's opening quotes, it has long been observed how migration is not just beneficial to the

receiving state overall ‘regardless of motives, skill levels, or legal status,’ but the World Bank’s *Migrants, Refugees, and Societies* also reports how migration to wealthy countries is increasingly becoming a necessity to counter relative demographic decline, sustain their economies, and keep their welfare states feasible (2023, pp. 2-7). Nevertheless, ‘the Specter of Populism’ continues to cloud a ‘Fortress Europe’ (Dubiel, 1986; Lehne, 2016). Be it because of rising economic insecurity as a product of neoliberalism; sovereigntist cultural backlash against ‘post-modernist values’; or the political product of a post-War path dependency defined by increasing party cartelization and the locking-in of liberal non-majoritarian institutions (Zürn, 2021); the rise of populism is one of the defining phenomena for this centuries’ political scientists to analyse.

Hooghe, Marks, and Wilson (2002) began the millennium by suggesting the birth of a new political cleavage in European party systems. This cleavage being one that pitches the Green/Alternative/Liberal (GAL) politics against forces of Traditionalism/Authority/Nationalism (TAN). This cleavage being one where questions of sovereignty and national identity, and therefore today’s far-right – or rather ‘TAN’ – populists, take centre stage. Naturally, a key political battle ground for TAN populists is migration, and especially the asylum seeker. The scholarly debate on populism converges in its universal agreement that populism feeds on the creation of an ‘us’ that represents the ‘pure’ or ‘good’ people which must defeat an antagonistic ‘them’ (Mudde and Rovira Kaltwasser, 2017; Laclau, 2005; Moffit and Tormey, 2013; Weyland, 2017). For the TAN populist, the migrant, particularly the asylum seeker, is arguably too easy a scapegoat. Van Spanje’s (2015) paper shows clearly how TAN populist parties, which in fact are referred to as simply ‘anti-immigrant parties,’ have not only risen in popularity, but also in indirect influence as their rhetoric seeps into the stances of entire party systems. Perhaps the most interesting finding being how in spite of this clear pattern of anti-immigrant contagion in politics, this is not as clearly the case in the realm of policy. This is so as after all “when in government, the party leader’s hands are tied” (ibid, p. 17),

Seminal political scientist David Easton (1965) had rightly pointed out decades ago, that politics and policy may be interlinked, but remain distinct. However, the facts on the ground are of course far more complicated than Easton’s ‘input-output’ model had suggested. A study by Akkerman (2012) shows how between the years 1996 till 2010, right-wing governments across the nine European countries studied did in fact show a general trend towards more restrictive migration policies. Notwithstanding this, it was in fact traditional centre-right, not TAN populists who were responsible for this change in course. Much of this boiled down to the fact that TAN populists themselves were ‘organisationally weak,’ which was something that became especially evident once they started entering governing roles. Therefore, it cannot simply be stated point blank that a TAN populist with executive power will successfully implement their political platform.

Organisational weakness is not the only ‘lifebuoy’ preventing a more restrictive migration policy. In the domain of asylum policy, it is also seen how the more independent judiciaries are, the less effective TAN populists can be in implementing their agenda. This is what Zaun, Leroch, and Thielemann (2023) proposed when they observed a correlation between judicial independence in EU member states and higher asylum recognition rates. Ergo, the natural question which presents itself is whether TAN populists, who effectively manage to corrode their independent judiciaries, are actually able to better advance their anti-asylum seeker agenda.

b. Why Hungary & Italy?

Both Italy and Hungary are EU and Schengen area member states that find themselves on the Union’s effective external border as the former has a maritime border with Tunisia and Libya, while the latter has a land border with Serbia. Therefore, both states are on the ‘frontline’ for asylum seekers wishing to enter the EU. This was put on full display during the 2015/16 migration crisis, which saw large influxes of people attempting to enter both countries (OECD, 2015). In tandem, both states have become renowned for their ongoing histories with TAN populist parties and government.

The Hungarian experience with TAN populist governments has been quite consistent. While the Victor Orbán led *Fidesz* party already had a stint at the helm of a centre-right coalition government between 1998 and 2002, the party only took on an increasingly TAN populist flavour in the years running up to their re-election in 2010 and consistent re-election as recently as 2022. The same cannot however be said for Italy, whose attachment to TAN populist administrations has been more punctuated and varied.

The 1992 *Tangentopoli* corruption scandal and the subsequent implosion of the country’s post-War political establishment saw a first populist wave with Silvio Berlusconi’s *Forza Italia* that governed Italy three times between 1994 and 2011. However, populism really took root in the 2010s, first with the rise of Matteo Salvini’s *Lega* (previously *Lega Nord*) party who eventually entered government with the *Movimento Cinque Stelle* (M5S) between 2018 and 2019. Differences between the TAN populist *Lega* and the also populist, however more politically ambiguous, M5S quickly led to TAN populism’s brief break from government. This was only for TAN populism to come back with vengeance following the downfall of Mario Draghi’s technocratic government which gave rise to an even more ardent TAN populist coalition led by Giorgia Meloni’s *Fratelli d’Italia* (FdI), with the participation of the aforementioned *Lega* and *Forza Italia*.

An analysis of freely available Eurostat data on asylum statistics also shows how the two states also vary in interesting ways that immediately justifies further investigation. *Figure 1*, which displays the ‘percentage positive first instance asylum decisions’ of the two states and the EU average between 2011 and 2022, shows an interesting trend that in isolation may create a false image of the situation.

The graph shows how prior to 2018, Hungary had a lower rate of ‘positive first instance asylum decisions’ than both Italy and the EU generally. The situation changes drastically following 2020 as the rate sores to 86% in 2022, which compared with the EU’s 49%, and Italy’s virtually identical 48%, makes Hungary look much more generous.

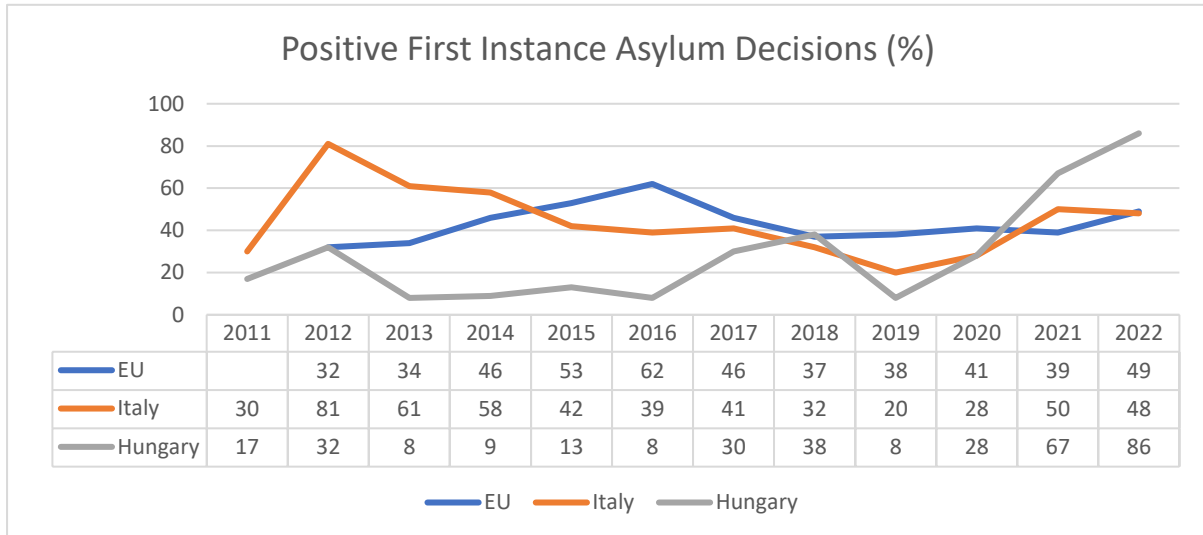


Figure 1 Positive First Instance Asylum Decisions (Eurostat, 2023).

Figure 2, showing ‘percentage positive second or higher instance asylum decisions’ shows a different reality than Figure 1 might suggest. This is why it can be argued that Italy’s asylum system is shown to be significantly more generous in terms of appeals compared with the EU average, especially between 2012 and 2017. Meanwhile, an already much more restrictive Hungarian appeals process grinds to a complete halt in 2017. There have been no positive second or higher instance asylum decisions in Hungary between 2017 and 2022.

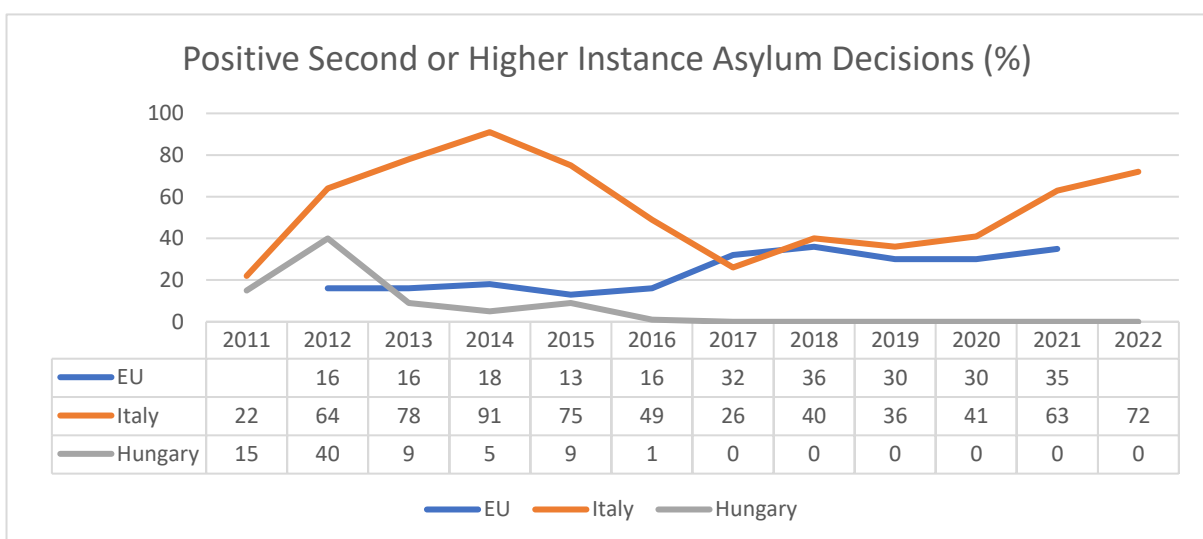


Figure 2 Positive Second or Higher Instance Asylum Decisions (Eurostat, 2023).

Figure 3 displays ‘percentage change from previous year of first instance asylum applicants.’ Italy broadly aligns with the EU average in terms of percentage change, alternating gently between positive and negative fluctuations, with a spike in 2015/2016 for both due to the migration crisis. Meanwhile, the picture in Hungary appears very different. In spite of a positive spike in 2013, the migration crisis impacted applications less in 2016, with 2015 registering an overall decline from the previous year. Furthermore, the years 2017 till 2022 saw a consistent downward trend in applications for Hungary, the results of which are seen in Figure 4.

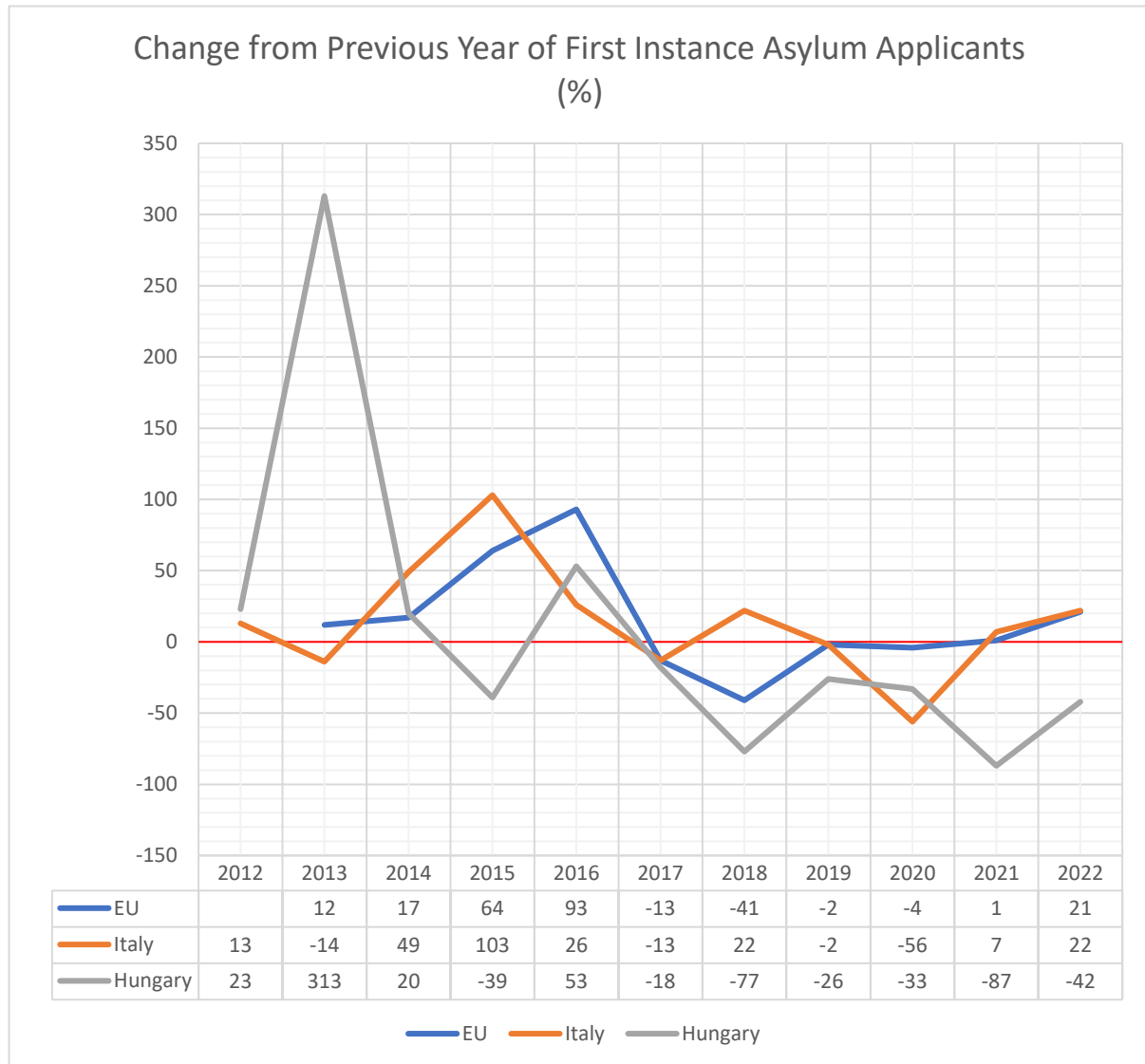


Figure 3 Change from Previous Year of First Instance Asylum Applicants (Eurostat, 2023)

Figure 4 shows in absolute figures the number of ‘first instance asylum applications’ in both countries from 2015 till today. This graph shows how Italy’s number dwarfs Hungary’s. Differences of size, population, and geography do not account for the entirety of this graph. The already small figures of applicants in Hungary have all but collapsed from 5,105 in 2016, to only 35 in 2022.

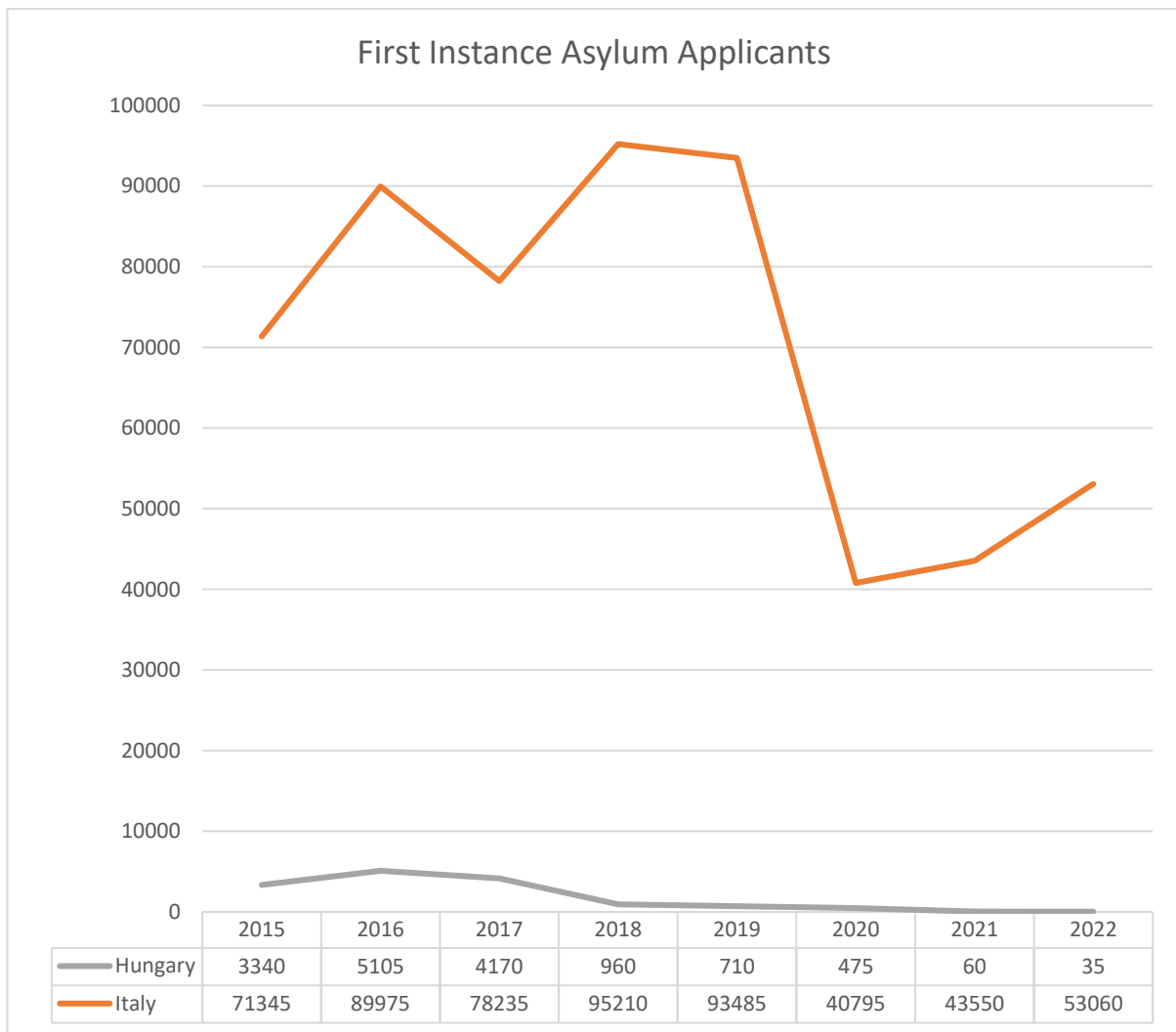


Figure 4 First Instance Asylum Applicants (Eurostat, 2023)

Analysis of these four graphs may therefore suggest that the Italian asylum system is in a broadly ‘healthy’ state relative to the EU average. Meanwhile, the Hungarian figures show a complete divergence to Italy and the EU at large. The end of appeals and the collapsing number of applicants since 2017, at first glance contrasts in a paradoxical manner with the rising positive first instance asylum decisions since 2019. This opening analysis therefore raises the suspicion that the Hungarian asylum system itself has significantly become more selective, with the state in some form controlling who is able to officially apply for asylum to begin with.

c. Research Questions & Thesis Structure

Smet and Stoyanova speak of a trifecta of ‘[TAN] populism, restrictive migration policies, and democratic decay’ (2022, p. 1). While all three phenomena and their interlinkages are well discussed within the context of EU member states, a gap appears to exist when discussing the differing effectiveness of TAN populist governments in implementing the anti-asylum-seeking policies that are the consequence of democratic backsliding, and in particular the loosening of independent judicial

control over these very executives, especially following the migration crisis. TAN populism's emergence and tangible implications on the asylum systems of Italy and Hungary are well suited to being understood through a lens that is sensitive to the 'specific patterns of timing and sequence' such as the path dependence approach (Pierson, 2000, p. 251). This thesis therefore seeks to answer the following research questions:

1. Can the migration crisis be considered a critical juncture for the Hungarian and Italian asylum systems?
2. What effect do TAN populist executives have on the functioning of these asylum systems following the migration crisis?
3. What accounts for the different paths taken by the two asylum systems?

This thesis seeks to provide answers to these questions and ultimately show how an effective TAN populist 'assault' on the Italian and Hungarian asylum systems is currently underway. This is done by first discussing the relevant literature, and the gaps present, in Chapter II. This is then followed by an outline of the thesis' theoretical framework in Chapter III, and of the methodological approach in Chapter IV. The case study chapters on Hungary (V.) and Italy (VI.) constitute the core of this work which then culminates in the research's concluding remarks in Chapter VII.

II.

Literature Review

a. Introduction

In the spirit of Huntington's, *The Third Wave: Democratization in the Late Twentieth Century* (1993), some are keen to describe an ongoing 'third wave of autocratization,' while others critique whether there was ever even a post-1989 'third wave of democratization' to begin with (Lührmann and Lindberg, 2019; Skaaning, 2020). The common ground between both perspectives lies in how at the very least, especially among mature liberal democracies, democratic progress has grinded to a halt (ibid, p. 1540). History – as the cliché goes – did in fact not end with the fall of the Berlin Wall with total victory for universal liberal democracy. The same author of *The End of History and the Last Man* (1989), Francis Fukuyama, himself writing about what in his opinion now constitutes an internal attack on liberal democracy in the West, from forces of the 'nationalist-populist right' and the 'progressive left', in his recent *Liberalism and its Discontents* (2022). Nevertheless, when delving into the literature on the politics and policy of populism, it's easy to draw a fatal image based solely on the 'discontents' as goes the sentiment behind Levitsky and Ziblatt's bestseller, *How Democracies Die* (2019). Indeed, as is poignantly put by Lührmann and Lindberg:

As it was premature to announce the "end of history" in 1992, it is premature to proclaim the "end of democracy" now (2019, p. 1108).

It is with this in mind that the following literature review is written. This literature review first seeks to conceptually, locate and, clarify 'TAN populism' among various competing understandings in the literature. Secondly, the interlinking concepts of *autocratization* and a state of *illiberal constitutionalism* are elaborated upon. Thirdly, a discussion of how these concepts tie into the asylum seeker and the concept of *judicial control* ensues. Finally, concluding remarks discussing the primary gaps in the literature are made.

b. The Politics of TAN Populism

It is ironic that populism, a political phenomenon which so eagerly searches for scapegoats, itself seems to sometimes be the go-to scapegoat for many political scientists. As a textbook example of a 'stretched concept' (Brett, 2013, p. 410), it is essential that its use in this thesis is defined with precision so as to ensure analytical clarity. The literature offers a number of varying approaches to understanding populism, from Laclau's (2005) 'Essex School' that sees populism as a 'discourse,' to the 'political

style approach’ proposed by Moffitt and Tormey (2013), and Weyland’s (2017) ‘political-strategic approach.’

Notwithstanding these conceptualisations of populism, the most conventional typology used, which is also the approach taken by this thesis, is the ‘ideational approach’ to populism. Spearheaded by Mudde and Rovira Kaltwasser, their understanding of populism, as found in their seminal *Populism a Very Short Introduction*, is as follows:

*Populism is a thin-centred ideology that considers society to be ultimately separated into two homogenous and antagonistic camps, “the pure people” versus “the corrupt elite” and which argues that politics should be the expression of the *volonté générale* (general will) of the people (2017, p. 6).*

This approach to populism, views this phenomenon as something which arises out the populist’s ability to ‘combine a broad range of social grievances’ neglected by the political establishment of the day to forge an innately innocent ‘us’ against a corrupt, antagonistic ‘them.’ While Mudde and Rovira Kaltwasser understand populism as an essentially anti-pluralist, and even, monist ‘thin-centred ideology’ which risks harming liberal democracy, their approach falls short of stating that populism is an unequivocal threat. Instead, the approach leaves the door open to the notion of populism having a potentially positive impact on democracy, as it attempts to compensate for the issues in society that for long had remained un-/under-addressed (ibid). In this regard, the ideational approach is the middle ground between the aforementioned more fatalistic political style and political strategic approaches on the one hand, and the Essex School which above all understands populism as a democratic corrective.

As stated, the ideational approach views populism as a ‘thin-centred ideology’ which supplements a political movement’s primary ideological beliefs. This position pragmatically interacts with a reality of multiple ‘populisms’ existing, and a lack of theoretical parsimony to understand them. This being so as multiple, often interlapping, concepts for understanding these strains of populism may at times prove confusing. From the ‘traditional’ (far-)left or (far-)right wing conceptions of populism; to more modern denotations such as Bickerton and Invernizzi Accetti’s (2021) ‘Technopopulism’; ‘polyvalent’ populism as was used by Pirro (2018) for the M5S; to Vachudova’s (2020) ‘ethnopolulism,’ and Zürn’s ‘authoritarian populism.’

This thesis concerns itself with the strain of populism that seeks to assault the asylum seeker. This form of populism is one that finds near, but not perfect, interoperability with mentioned notions of (far-)right and authoritarian populism. Taking Hooghe, Marks, and Wilson’s (2002) TAN/GAL understanding of the dominant political cleavage in *postfunctionalist* European party systems, TAN populism is a more accurate descriptor for three interrelated reasons. Firstly, it contextualises as well as conceptualises better the reasons why this particular strain of populism has become so potent. Secondly, it better outlines this political ideology’s inherent quest to reforge institutions in its TAN vision. Finally,

it illustrates the fundamental reason why migration, especially the asylum seeker, is in the TAN populist's direct range of fire.

As established, the base of populism is the 'us' (the people) versus the 'them' (the other). What arguably makes TAN populism particularly potent is in how the hollow 'us-vs-them' provided by populism is given depth and meaning by what is perhaps the most enduring and visible 'us-vs-them' dynamic. This is the one provided by identity politics, particularly in this case, the identity politics of nationalism. Fukuyama, in his *Identity: The Demand for Dignity and the Politics of Resentment* (2018), discusses how the very 'demand for recognition' of a group's identity is "a master concept that unifies much of what is going on in world politics today," and one that clearly and directly impacts populism (p. 13). Nationalism, particularly because of its enduring uncomfortable link with ethnicity, has for long been recognised as one of the most potent and enduring political forces in modern history (Colm, 2009; Muller, 2008). Benedict Anderson, in his seminal *Imagined Communities*, defines the nation as "an imagined political community – and imagined as both inherently limited and sovereign," where its 'deep, horizontal comradeship' is 'limited' because of its intrinsically finite boundaries. These are boundaries that create 'the other' in 'the foreigner' – or as is more accurate in this scenario, 'the migrant' (1991, pp. 5-6). In its quest to uphold 'tradition,' 'the nation' requires a force that can only be provided by authoritarianism. In his conceptualisation of 'authoritarian populism,' Zürn directly mentions how the people supporting authoritarian (TAN) populists support the inherently authoritarian measures necessary to seal the borders. This is positioned as the anti-liberal, anti-international, and anti-pluralist will of the *volonté générale*, as embodied by the leader (2022, p. 789).

Therefore, the TAN instinct fits like a glove into the thin-centred ideology of populism to create a very potent political force that is typical of many of nationalism's mutations overtime. The natural conclusion from the literature reviewed in this section is that the TAN populist sells the idea of an 'elite establishment' that actively subverts the *volonté générale* by permitting the entry of 'the other.' Nevertheless, the 'other,' in the form of the 'foreigner,' is a wide margin that must be narrowed down significantly when a populist deals with the reality of government. The following two sections will clarify how TAN populists act at the helm of the executive, and how it in turn settles on the asylum seeker as its main target. This being similar to how nationalism in isolation famously targeted minorities such, as asylum seekers and refugees in numerous occasions (Ko and Choi, 2020; Smith, 1994; Stone *et al*, 2020; O'Doherty and Augoustinos, 2008).

c. Autocratization & Illiberal Constitutionalism

In her book, *Me the People: How Populism Transforms Democracy*, Nadia Urbinati (2019) makes a riveting proposal when stating that populism has for too long been viewed in the literature as simply election talk, and that scholars ought to begin to view populism also as a serious 'project of government'

in its own right. This project seeks, albeit in a ‘disfigured way,’ to fundamentally rebalance the scale in representative democracy away from its liberal conventions, towards majoritarianism. The present thesis, especially with the above outlining of ‘TAN populism,’ wishes to build on this bridge between TAN populism as being both a phenomenon of politics and policy.

Examining how a TAN populist executive can impact a liberal democracy necessitates a conceptual understanding of what a liberal democracy even is. This thesis looks towards Robert Dahl’s *Polyarchy Participation and Opposition* (1971) for a sufficient definition of liberal democracy. This definition outlines how a liberal democracy, referred by him as ‘polyarchy,’ is fundamentally based on the “combination of open contestation for power and inclusive political participation,” that therefore necessitates a number of basic freedoms for its functioning, namely: freedom of organisation, freedom of expression, the right to vote, the right for leaders to compete for support, the freedom to access alternative sources of information, free and fair elections, and finally that the work of policymaking institutions are dependent on voter preferences. As shall be seen, the TAN populist’s main interest is in the curtailing of the ‘inclusive political participation’ side of polyarchy – i.e., the ‘liberal’ in liberal democracy.

The most relevant concept in the literature that explains the degradation of liberal democracy, is the term *democratic backsliding*, which is defined by Bermeo as a broad concept that infers “the state-led debilitation or elimination of the political institutions that sustain an existing democracy” (2016, p. 5). Three prominent methods which the author lists as being the most common forms of contemporary democratic backsliding are *promissory coups*, *manipulating elections* strategically, and perhaps most relevant to this review, backsliding by means of *executive aggrandizement*. This refers to the gradual process by which elected executives begin to take measures to increasingly concentrate power in their own hands through institutional change that undermines their opposition challengers and weakens checks-and-balances on themselves (ibid, pp. 8-14).

Executive aggrandizement as a form of democratic backsliding can also be classified under what Gora and De Wilde (2022) term the ‘institutional-legal’ form of backsliding in EU states where matters of deliberation and rule of law take centre stage. A complementing concept to that of this specific form of democratic backsliding is in fact the concept that opened this literature review – that of *autocratization*. Autocratization is understood by Lüthmann and Lindberg as the antipode of *democratization*, ergo meaning the “substantial de-facto decline of core institutional requirements for electoral democracy” (2019, pp. 1096-1099). While semantic differences between ‘democratic backsliding’ and ‘autocratization’ exist, for the purposes of this analysis they can be taken as interchangeable concepts. Notwithstanding this, the latter is preferred over the former in this thesis. One other critical point of convergence between the ‘executive aggrandisement’ strain of backsliding, and its complementing concept of autocratization, is in how both emphasise the gradual nature of this form

of democratic decay. This is a concept that clearly opens the door to interaction with historical institutionalist, particularly path dependent analysis, as shall be expanded upon in the theoretical framework.

Indeed, another hallmark of the current wave of gradual autocratization in European democracies seems to be the *legal façade* which it maintains, where executives continue to access power legally, and generally maintain free – fair being another matter – elections, while concurrently degrading other democratic institutions (ibid, pp. 1104-11050). Wunsch and Blanchard visualise the autocratization process as an incremental process, where vertical (electoral process), diagonal (competitive character of regime and capacity for viable opposition), and horizontal (institutional constraints) safeguards are all potential subjects for erosion (2023, pp. 282-283). Their finding is one where diagonal safeguards are the most vulnerable among the ‘third wave democracies’ studied. However, once horizontal safeguards are dismantled it is a fatal omen for potentially accelerated total democratic reversal (ibid, p. 295).

TAN populism’s role in government, as already alluded to in the introduction, has not always been one of gleaming success in its translation of political agenda into policy. Organizational weakness, and ‘taming’ being two examples (Akkerman, 2012; Zaslove, 2012; Minkenberg, 2001), as we see a reality where European TAN populist positions often infect other parties by shifting the centre ground of politics towards them both when they are inside, but also outside, coalition governments (van Spanje, 2015; Schain, 2018; Schain, 2006). Notwithstanding the complexities, successful populist administrations, such as the post-2010 Orbán Administration, have served as a testament to TAN populism as a real project of government, and indeed, as is seen in the case study chapter on Hungary, as a successful autocratizing force.

Vachudova also notices this link between TAN populism in politics and policy, by describing how what she terms the ‘ethnopolitist playbook’ at play in Central European states is one that is flexible with truth and in its identification of ‘friends’ and ‘enemies’ of the people, so as to accommodate a central autocratizing mission (2020, p. 335). Therefore, she takes a different path to what had generally been thought when stating that for the TAN populist, the politics can also accommodate policy, rather than just the other way around. Meanwhile, Huber and Pisciotta (2023) propose a more systematic analytical framework to understanding how populism successfully leads to democratic backsliding, using Hungary and Tunisia as case studies. They point to ‘pernicious polarization’ as an important ‘middle step’ in the causal chain between populism and democratic backsliding.

A state of ‘illiberal democracy’ is frequently cited as the effective policy product of TAN populist induced autocratization (Zakaria, 1997; Plattner, 2019; Mudde 2021). However, Drinóczi and Bien-Kacała’s (2023) concept of ‘illiberal constitutionalism’ is one that can be seen as more precise, at least for the purposes of this thesis. It is defined as “a process of democratic deterioration that has not

resulted (yet) in an autocracy or modern authoritarianism because there is still a weak constraint on public power,” i.e., there is still a constitutionalist structure in place in part because the state exists within a broader liberal *acquis*, namely the EU (ibid, p. 45). This concept is one that is particularly applicable to autocratic processes within EU member states and aligns well with this review’s focus of TAN populist autocratization defined by maintaining the *legal façade*.

One lynchpin in the TAN Populists’ autocratic quest in establishing and maintaining a state of illiberal constitutionalism, is a level of control over the judiciary. Prendergast notes how the courts have a specific role to play in helping “halt or at least slow down populist-led erosion of democracy” (2019, p. 261). It is therefore no wonder that TAN populist administrations often seek to erode the independence of the judiciary so as to allow for the state’s autocratization to take place. Petrov discusses how TAN populists in Poland and Hungary successfully continue to ‘de-judicialize’ politics, and in turn, politicise courts as part of a gradual, necessary consolidation of their power (2022, p. 1199). The next section will elaborate on the notion of the gradual acquisition of judicial control as a necessary part of successful autocratization, which is a process that is itself crucial for a TAN populist force to deliver on their political agenda – as is so well illustrated by the assault on the asylum seeker.

d. Judicial Control & the Asylum Seeker

One of this thesis’ opening arguments was the fact that while migration policies in the West have generally been getting more permissive since the Second World War, policies impacting the asylum seeker have generally been getting more restrictive (De Haas, Natter, and Vezzoli, 2018; Schulz, Lutz, and Simon, 2020). A similar study by Natter, Czaika, and De Haas (2020) also interestingly found that the partisan composition of both the executives and legislatures of 21 Western states between 1970 and 2012 is in fact an insufficient variable for understanding immigration policy outcomes. Instead, it is economic cycles, political system features, and welfare system strength that are the biggest determinants of overall immigration system restrictiveness. A booming economy is a key factor for leniency, while lower labour protections and stronger welfare states are determinants for restrictiveness. What is certain is that one should not take traditional assumptions of left- and right-wing views on immigration as a perfectly correlating dichotomy (Zasolve, 2016, p. 10).

This context is essential in order to understand the TAN Populists’ steadfast focus on eroding judicial controls. This being so as it proves a necessity for the effective delivery of the autocratization process required to implement their political agenda. From the literature reviewed it can be argued that the doubling down of long observed trends in migration policy, by ramping up what is in effect the assault on the most inconsequential form of ‘migrant’ is the most logical course of action for the TAN Populist. Could it be that the policy goal of an effectively dismantled asylum system appeases their political base that wishes to symbolically see their government ‘handle’ migration, while also not

hampering the economically necessary bulk of immigration that ultimately sustains the standard of living of this same electoral base?

In addition to the discussed economic argument in favour of lenient migration policies generally, Christian Joppke first proposes how in post-war Europe, two other potent factors kept migration policies and their implementation lenient. These being in the form of ‘legal and moral constraints’ (1998, p. 272). Joppke (2001), in a later paper, makes a strong case for how the judiciary acts not only as the upholder of these legal and moral constraints in the US, Germany, and the EU more widely, but in fact as being responsible for the expansion of migrant rights. The moral component in the first article seems to be refined in the second cited article as a ‘human rights’ argument. This argument being especially applicable for the legitimation of the fundamental right of asylum, which is seen as the only ‘alien right’ tied purely to personhood (ibid, p. 363). The concept of an independent judiciary serving as the primary protector, or *life buoy*, of the asylum seeker, is an idea found in Zaun, Leroch, and Thielemann’s (2023) seminal article on this topic. They find that while anti-immigrant pressure does correlate to lower asylum recognition rates, with neither asylum officers nor judges being immune, independent courts are able to directly act as a *life buoy* for refugee rights by on average overturning more appeals on negative first instance asylum decisions, while also creating a ‘judicial foreshadowing effect’ where first-instance decision makers themselves succumb less to political pressure. In sum, a more independent judiciary, generally, fosters an asylum system that in practice values legal norms and human rights such as *non-refoulement* rather than succumbing to political pressure (ibid, p. 19).

The power of an independent judiciary as a roadblock to autocratization, and therefore successful asylum system assault, is not even rivalled by the impact of non-majoritarian supranational institutions. Thielemann and Zaun in fact discuss how in spite of the fact that the EU’s impact has been positive in its capacity to bolster the rights of asylum seekers in response to rising populism, the policy outcomes diverge substantially in the differing member states as successful implementation is ultimately dependent on the member states themselves (2018, p. 218). Meanwhile scholars such as Hintjens and Bilgic (2019) argue that in many ways the EU is not only complicit but actively waging a ‘proxy war’ against refugees themselves through migration externalization agreements. These EU negotiated, or sanctioned agreements, occurring even with plainly unsafe states such as Libya. Therefore, we can safely conclude that the principal roadblock for the European TAN populist governments, in their road to autocratization-dependent assault on the asylum system, remains their domestic judiciary.

In spite of already discussed literature that suggests that there is little for advocates of a just asylum system to fear from a TAN populist government, the road to illiberal constitutionalism *à la* Hungary is not beyond the realm of reason. Stoyanova and Smet’s edited book *Migrant Rights*,

Populism and Legal Resilience in Europe (2022), represents the conceptual cutting edge of the argument that this literature review has been building up towards. Their introductory chapter clearly discusses this reality which they describe as “between populism and restrictive migration laws and policies, on the one hand, and between populism and democratic decay, on the other” (ibid, p. 16).

Indeed, while Stoyanova and Smet (2022) go into great detail in this regard, especially in its case specific literature including that of Hungary and Italy, what it does lack is a focussed comparative element between the case studies reviewed. This is a primary gap in the literature which this thesis aims to fill, in relation to Hungary and Italy. A focussed comparative study on the “incremental but purposive” autocratization process happening in states like Hungary cannot be regarded as simply isolated cases (ibid, pp. 3-12). This is why we need to better conceptualise and test the proposed casual chain. Furthermore, the emphasis on the gradual nature of successful TAN populist autocratization begs for a path dependent analysis which gives more meaning to the concepts of time, and sequence.

e. Conclusion

This literature review sought to compile, contextualise, and critically evaluate literature concerning the concepts termed by this chapter as TAN Populism, autocratization, judicial control, the asylum seeker, and therefore how they link with each other in a bridge spanning both the realms of politics and policy. This review concludes with the notion that a gap in the literature exists for a comparative approach to studying how these notions work as a causal mechanism that emphasises the legalistic and gradual nature of this form of autocratization. The primary suggestion being that the path dependent approach would fit well for such a comparative analysis. The next chapter therefore elaborates on this approach and outlines a viable theoretical framework of analysis that is later applied to the cases of Hungary and Italy.

III.

Theoretical Framework

Is path dependence merely a trendy name for old ideas?

- Paul Pierson (2000, p. 265)

a. Introduction

TAN populism is not the sole cause of this long running trend towards more restrictive asylum policies. Nevertheless, it is clear that it may be acting as an accelerant in the demise of a just asylum system. This can be viewed as a symptom of TAN populist government-induced autocratization process where delivery of their political agenda, as illustrated by the assault of the asylum system, is tied with the shift away from liberal to illiberal constitutionalism. The lynchpin in this process being that of the level of executive control over the judiciary.

The aim of this chapter is to organise and contextualise the key concepts discussed in the literature review, into a consistent theoretical framework that is fit for empirical application on this thesis' case studies of Hungary and Italy. This is first done by explaining the fundamentals of the *path dependent* approach to institutional change, followed by its application to understanding TAN populist autocratization in the context of post-migration crisis Asylum System Assault (ASA) in Hungary and Italy. Finally, a testable hypothesis is proposed upon which the research design and subsequent empirical analysis is centred upon.

b. Historical Institutionalism: Path Dependence & Critical Junctures

The 'new institutionalism' is defined by its belief that institutions are "political actors in their own right" (March and Olsen, 1984, p. 738). Therefore, referring to the basic assumption that institutions, be they policy institutions like the asylum system, or the organisational institutions which support them, exhibit a high degree of autonomy in political and social life. The path dependence approach aligns with one of new institutionalism's main branches known as 'historical institutionalism.' This school of thought is one which views the individual as always acting within institutional structures and constraints (Kay, 2005, p. 555). Pierson and Skocpol identify three primary features of historical institutionalist analyses. Firstly, there is the notion of academic curiosity to seek answers about the 'big, substantive questions' which are of interest not only to scholars but the informed public at large. Secondly, when attempting to explain their answers to these 'big' questions, historical institutionalists pay special

attention to factors of sequence and timing, as this is assumed to be key in understanding institutional change, or lack thereof. Thirdly, scholars of this persuasion aim to “analyse macro contexts and hypothesize about the combined effects of institutions and processes” – meaning that context is deemed essential, and that it is rare for any given variable, in isolation, to add much explanatory value without it (2002, p. 694). Furthermore, historical institutionalism believes that as much as politics influences policy, policy also influence politics, and that temporally minded comparative analysis of case studies can prove a powerful tool uncovering the sources of change stemming from both directions (Pierson, 1993, pp. 595-596).

Path dependence represents perhaps one of the most salient analytical tools provided by the historical institutionalist school. Pierson builds on the works of Krasner (1989), Collier (1991), and Ikenberry (1994) in defining the specific concept of path dependence as an approach that rests on the:

specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively "small" or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse; and consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life (2000, p. 251).

Therefore, a path dependent process is aided by causal mechanisms. The principal ones being the *self-reinforcement* and *increasing returns* of a path that consequently triggers a *positive feedback loop* or *mechanism of reproduction* which becomes increasingly difficult to change as time progresses. A revision of this path may happen during the mentioned *critical juncture*, which is described later in this section (Leithner and Libby, 2017, p. 5).

Pierson goes on to outline how these processes have four primary attributes. Firstly, the notion of *multiple equilibria*. This essentially means that when an initial choice, or a choice at a *critical juncture*, is made, different outcomes leading to different trajectories are all possible, and thus, analysts should avoid being too deterministic. Secondly, there is the idea of *contingency*. This implies that relatively small events have the potential to leave a long and enduring legacy. Thirdly, this approach understands the *critical role for timing and sequence*, meaning that the earlier an event happens the more potential for impact it can have and vice versa. Finally, there is the notion of *inertia*, which refers to the level of change-resistant stability reached when the multiple potential equilibria become one single equilibrium, and a path dependent trajectory is established (ibid, p. 263).

The path dependent approach is also subject to additional causal mechanisms. The major ones being the *rules of the game*, including the various formal and informal rules making up and followed by institutions; *cognitive constraints* such as the power of historical analogies and basic cognitive biases; the *negative feedback* loop which represents the inverse of a *positive feedback loop*, meaning that if a particular opposing variable is strong enough it may reverse an initial option and break the

inertia; and *lock-in* (Leithner and Libby, 2017, p. 5). The *lock-in* mechanism is perhaps the most powerful causal mechanism in the path dependence approach, actually preceding the approach itself. It describes the strongest form of *positive feedback loop*, where an initial decision has such high transaction costs to overcome that, even if proven inefficient, it will never realistically be rectified (Pierson, 2000, p. 254).

One of the most well-known concepts in the path dependence approach is that of a *critical juncture*. Much like the notion of political cleavages, such as the TAN/GAL cleavage which this thesis makes use of in its conceptualisation of ‘TAN Populism,’ the critical juncture also finds its roots in Lipset and Rokkan’s seminal *In Party Systems and Voter Alignments* (1967). The concept was however first properly defined by Collier and Collier, who famously described it as “a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies” (1991, p. 29). Perhaps however, a more specific and updated definition of this concept is the one provided by Giovanni Capoccia who understands a critical juncture as “situations of structural indeterminacy and fluidity during which several options for radical institutional innovation are available, one (including possibly institutional re-equilibrium) is selected as a consequence of political interactions and decision-making, and this initial selection carries a long-lasting legacy” (2016, p. 101). What Capoccia’s definition better conceptualises, compared with Collier and Collier, is the possibility of institutional re-equilibrium – i.e., a return of the initial trajectory, and by the rule of *increasing returns* the further strengthening of this path.

Path dependence scholars are themselves uncertain about what does and does not constitute a critical juncture. Nevertheless, these are generally regarded as either being the consequences of internal events, such as the consequences of socio-political movements, or ‘external shocks’ such as war and economic, or as shall be seen, migration, crises (Leithner and Libby, 2017, p. 4; Pierson, 2000, p. 266). Notwithstanding this, Collier and Collier outline three rigorous components to understanding and academically approaching a critical juncture. Firstly, by analysing the claim of a significant change having occurred, followed by then looking into how the different cases may have reacted differently to this same significant change, and finally by hypothesizing about potential explanatory variable(s) to accounting for the differing consequences among cases (1991, p. 30).

There are several approaches towards analysing critical junctures. The most salient consideration being that of analysing *antecedent conditions*, referring to the structural factors in a given case which weigh in heavily on forging a particular institutional outcome. On the other hand, the *agency-based approach* to analysing critical junctures also looks into the specific socio-economic conditions decision-makers are embedded in and, by extension, the plausible choices available to them. Taking things a step forward – especially for a traditionally materialist approach – there is also the role of *ideational change* that can play a major role in the institutional outcome of a critical juncture. Such

approaches emphasise how influential actors often attempt to take advantage of the uncertainty during a critical juncture to maximise their interests and forge new institutional trajectories in their own image (Capoccia, 2016, pp. 93-98).

Blyth (2007), in his analysis of *neoliberalism*, was a strong proponent of the *politics of ideas* in understanding critical junctures. His view being that it is ultimately always the ‘winning idea’ that forges new institutions, and therefore the winning idea that sets the new trajectory. Understanding the role of *ideas* in a historical institutionalist analysis allows for the mending of the long running ‘unconscious uncoupling’ between the ideational and the traditionally materialist considerations of the school. Blyth, Helgadottir, and Krig suggest that both aspects should be taken equally seriously (2016, p. 159). It was in fact Hall and Lamont who pointed out how conceptually, material ‘institutions’ and ‘interests’ can be regarded as having a very strong conceptual relationship (2013, p. 12). Upon discussion of the notions of institutions and ideas – natural curiosity extends to understanding the role of power. In this regard, Pierson makes a bold claim when stating that within this theoretical outlook one can observe how “winning coalitions will typically seek to institutionalize their advantages” by changing the very *rules of the game* so as to further cement their own position of power (2016, p. 131).

c. The Migration Crisis, TAN Populism & ASA: A Framework

The 2015/16 migration crisis, itself described by Koppa as a ‘security tsunami’ that was the product of a whole other series of long-standing trends in the MENA region, especially following the Arab Spring (2022, p. 124). This long simmering tension boiled over into a serious crisis in the EU’s Schengen system, and by extension, to the CEAS and its individual national systems. The migration crisis can therefore safely be regarded as an exogenous shock (Schimmelfenning, 2018; Cortinovic, 2017; Bourbeau, 2015). By virtue of this, the crisis can therefore be regarded as a critical juncture, particularly for the ‘frontline states’ like Hungary and Italy. The best way of understanding the impact of this critical juncture, is to analyse the relevant structural *antecedent conditions*, *agency-based conditions*, and the role of *ideational change*. This approach’s theoretical tools readily apply the concepts elaborated upon in the literature review. These concepts, namely of TAN populism and autocratization will provide a solid basis for a testable hypothesis.

There are two critical longstanding *antecedent conditions* which form the bedrock of the framework. On the one hand, there is the reality of a long-running post-war trend, found across the political spectrum, towards more selective migration policies that place more barriers towards being physically able to claim asylum (De Haas, Natter, and Vezzoli, 2018; Schulz, Lutz, and Simon, 2020; Natter, Czaika, and De Haas 2020). On the other hand, there is the emergent political reality of a rise in abjectly anti-immigration politics, and of TAN populism as its complementing and actively agitating political force (van Spanje, 2015; Schain, 2018; Schain, 2006; Zürn, 2021).

Upon understanding this, one must then recognise the context of the TAN populists who are already in executive power, or soon after gain power under the shadow of the exogenous shock. Indeed, it would be wise to contend with two *agency-based conditions* for these TAN populist decision makers. Firstly, we must assume that executives have the motivation to carry out their political agenda – this is especially so for TAN populists who have to serve their *volonté générale*. In this case we are dealing with the need to appease a direct and explicit anti-immigrant political agenda (Zürn, 2022, p. 789; Ko and Choi, 2020; Smith, 1994; Stone *et al*, 2020; O’Doherty and Augoustinos, 2008).

A second assumption is also necessary, this being that executives wish to govern. On this front it must be understood that, while migration policies have been getting more selective, they have also generally become more liberal. This being so as in the Global North, immigration is regarded as crucial to maintaining national economies and welfare systems (De Haas, Natter, and Vezzoli, 2018; Schulz, Lutz, and Simon, 2020; *The World Bank*, 2023, pp. 2-7). Ergo, TAN populist administrations arguably face a dilemma between their role as a political movement on the one hand, and a project of government on the other: how are they going to deliver on their anti-immigrant political agenda, without causing undue harm to their countries’ socio-economic prosperity? The migration crisis, or perhaps more accurately the asylum crisis, diverts attention towards one particular group of migrants who are also on average the smallest, and least economically consequential group (IOM, 2022, p. 3). Therefore, asylum seekers can be seen as a clear target that appeases both preferences – the perfect scapegoat.

Looking at the scope of *ideational change* completes our theoretical understanding of what was at stake during and in the shadow of this exogenous shock on the asylum system. It is in the realm of ideas which arguably account for the different trajectories taken by two otherwise similar states with TAN populist executives. The battle of ideas is well illustrated by the GAL/TAN political cleavage (Hooghe, Marks, and Wilson, 2002), where on one hand GAL forces, seeking to maintain a system of liberal constitutionalism, exhibit more cosmopolitan values, and consequently seek to maintain and deepen fundamental policy institutions designed to defend minorities. On the other hand, ardent TAN forces simply have a different set of values, articulating their majoritarian preferences that represents their views on immigration. Therefore, they simply do not hold human rights, particularly those of ‘the other’s’ in the same esteem. Furthermore, this different set of values funnels a TAN populist executive into a quest of autocratization, inevitably clashing with the institutions that uphold the liberal order. This especially with the ‘life buoy’ protector of human rights of any serious liberal democracy – the independent judiciary (Joppke; 2001; Zaun, Leroch, and Thielemann, 2023; Prendergast, 2019). As already discussed, a TAN populist executive faces the institutional – however also clearly ideational – roadblock of an independent judiciary to fulfil its political agenda. Therefore, the only way to implement a political agenda which clashes with the institution of human rights and the courts which uphold it, is to control and tame this independent locus of ideas, and of power. In effect, the level of judicial control of a TAN populist executive serves as a ‘bellwether’ for the level of autocratization, or in other words,

executive aggrandisement, legal-institutional democratic backsliding (Bermeo, 2016; Gora and De Wilde, 2022; Lührmann and Lindberg, 2019). Further still, autocratization finds a parallel in historical institutionalist analysis as the ability to ‘institutionalise its advantage’ – this being equivalent to the TAN populists’ wish to seek control over the judiciary (Pierson, 2016).

Upon understanding the key antecedent conditions, agency-based conditions, and the ideational clash, that a TAN populist executive faced before, and especially following the 2015/16 migration crisis, in attempting to undermine the asylum system, a central hypothesis emerges that:

the degree to which a TAN populist executive can inflict Asylum System Assault depends on its ability to reshape judicial control.

ASA in this context can be understood as any act by a TAN executive that in some way aims to *de facto* undermine the Right to Asylum as stipulated in Article 18 of the Charter of Fundamental Rights of the European Union, which itself cites the 1951 Geneva Convention and its later 1967 protocol on the status of refugees. ASA can be viewed as an illustration of the autocratizing process in the policy area of asylum.

d. Conclusion

This theoretical framework applies the fundamental concepts for understanding the impact of TAN populist executives on their national asylum system following the migration crisis of the mid-2010s. It is ultimately designed to answer the three research questions stipulated in the introductory chapter of this thesis. In doing so, this framework already contributes towards discussing how the migration crisis can be conceptualised as a critical juncture by virtue of it being an exogenous shock to the Hungarian and Italian asylum systems. In addition, it hypothesises how successful ASA by a TAN populist executive is dependent on its ability to reshape ‘judicial control.’ The next chapter will explain the empirical application of this framework.

IV.

Methodological Approach

a. Introduction

The aim of this chapter is to explain the methodological approach employed to test this above hypothesis. Mindful of the case studies, Hungary and Italy, this aim is reached by first describing the fundamentals of the approach. This is then followed by an outline of how the research questions and hypothesis are tested in a comprehensive research design. Finally, this design's potential pitfalls and limitations are then critically evaluated.

b. The Fundamentals

The path dependent approach, as the key analytical tool in the historical institutionalist school, is one that is designed to be utilised in comparative, and by extension qualitative, case study analysis (Pierson, 1993, pp. 595-596). Indeed, this thesis' research questions and central hypothesis themselves are based on, as Roselle and Spray would put it, the assessment of qualities which are not easily quantified, and therefore necessitates such a qualitative approach (2012, p. 39). Since the nature of this research is also deductive and aims to theory test in a comparative way, on a 'small-N' sample, it can also be regarded as having interpretative characteristics (Seha and Müller-Rommel, 2016, p. 423).

The specific research design chosen employs Most Similar Systems Design I (MSSD-I), as discussed in Toshkov's *Research in Political Science* (2016). As a methodological approach it is perfectly designed to deductively theory test small-N cases in a comparative manner by means of process-tracing. The approach is based on testing, one, as in this case, or a few, major hypothesized causal relationship/s. This is done by first ensuring that all relevant variables, except the main explanatory one, are as constant as possible between the cases (ibid, pp. 262-264).

MSSD-I is also particularly suited for understanding the impact of critical junctures within a path dependence framework as it aligns well with the conventional process-tracing method used in historical institutionalism. As discussed in the previous chapter, Collier and Collier outlined how a scholar must approach critical junctures by first identifying them. This is done by first identifying different cases which faced the same critical juncture but reacted differently, before then hypothesising on possible explanatory variables to account for these differences (1991, p. 30). This research design fits well into this approach in all except in one key way. Collier and Collier propose an inductive method of analysis, while this thesis takes a deductive approach. Notwithstanding this, the initial introductory analysis of the data in the first chapter outlined how the Hungarian and Italian asylum systems diverged

significantly from one another following the same exogenous shock. This perfectly aligns with Collier and Collier's recommendation, but it was simply a starting point that spurred the central qualitative study embarked upon by this thesis. The introductory analysis hinted towards the outcome variables. However, it is the central analysis that will determine the outcome variables as based on qualitative process-tracing that deduces the main explanatory variable.

c. The Research Design

This thesis aims at tackling the following explanatory research questions:

1. Can the migration crisis be considered a critical juncture for the Hungarian and Italian asylum systems?
2. What effect do TAN populist governments have on the functioning of these asylum systems following the migration crisis?
3. What accounts for the different paths taken by the two asylum systems?

As stated in the theoretical framework, the hypothesis which the comparative case study analysis aims to test is that *the degree to which TAN populist executive can inflict ASA depends on its ability to reshape judicial control*. The MSSD-I design tests this hypothesis from the 2015/16 exogenous shock on EU asylum systems till today, by empirically applying path dependence. Hungary and Italy were chosen on the basis of them both being 'frontline' EU member states that experienced the same critical juncture in a similar way. Both also have strong populist movements that have had at least stints in government from before the migration crisis, with both countries having TAN populist executives during or relatively soon after the crisis. In contrast to these constant variables, the hypothesised explanatory variable is therefore the 'ability to reshape judicial controls' – i.e., the level of direct or indirect executive control over the judiciary.

The data collection method employed here is based on process-tracing, mainly of legal changes by TAN populist executives to their asylum systems, during and following the migration crisis, the implementation of these changes, and their outputs. This entailed engaging with, and critically re-reading, documentation which evaluates TAN populism's impact on the asylum systems in the two case studies focused upon here, as well as secondary sources dealing with the same matter. The latter primarily consist of reports and ancillary studies from well-known NGOs, such as *Amnesty International* and *Human Rights Watch*, and academic research institutions such as the *European University Institute*. These provide concise summaries of the facts on the ground in a manner that is significantly more in-depth and conceptually refined than articles in the press. Articles from the International, European, and – specifically for Italy and Hungary – the National media, are used to consolidate the analysis and supplement sources, views, and arguments, made by NGOs in their reports. The National press is particularly used to cover recent events that have not yet been analysed by the

literature nor by available reports. Scholarly literature however still provides the bedrock for the thesis, because it provides the conceptual background, and the theoretical debates, engaged with by this work, and because it offers a more complex, long-term approach to developments which is necessary for the application of this path dependent based theoretical framework.

The first case study chapter (V) is on Hungary, followed by the chapter analysing Italy (VI). The latter chapter will therefore have a strong comparative element in reference to the former. The two case studies are in this order for practical reasons, since Hungary's experience with TAN populist administrations, following and even before the migration crisis, has been much more stable than in the Italian case. This renders the Hungarian case as closer to a 'perfect model' for analysis.

d. Potential Pitfalls and Limitations

Kay (2005) critiques the path dependence approach when describing it as 'theoretically inchoate and difficult to operationalize empirically.' This author also lists three primary theoretical 'flaws.' Firstly, that the approach is geared towards discussing stability, and consequently is much less equipped to discuss change. Secondly, it is critiqued on the normative front, stating that the normative component of this approach is left 'unexplored' at best, and 'confused' at worst. Finally, path dependence is accused of being a mere 'fashionable label' for understanding that history matters in political science, and that it in fact lacks in its ability to temporally account for decision-making over time in a convincing way.

Generally, it can be accepted that all these inherent potential theoretical pitfalls can impact the research design to varying degrees. With regards to the first critique: this approach ought to be sufficient for testing this particular hypothesis. This being so as it itself aims to study a path dependent process following a critical juncture. Out of all forms of change, path dependent change emanating from a critical juncture is the most common mechanism of change conceptualised and applied in this approach. When discussing the second critique, this design strives to partially remedy this normative blind spot. It does so by utilising relatively new and innovative theoretical interpretations of historical institutionalism. In fact, great lengths are gone through to erase the conceptual clashes of the past by incorporating the ideational element behind institutions and how they change.

Furthermore, when dealing with the third critique, this design strives to display how the approach is hopefully much more than a mere 'fashionable label.' Notwithstanding this, a serious point on validity is made that spills over onto the limitations of small-N designs such as MSSD-I. These kind of research designs may be lauded for their attention to detail, yet this comes with a trade off on external validity. This is so since any comparative small-N design simply cannot rely on 'the law of large numbers' to offset potential measurement errors (Toshokov, 2016, pp. 258-261). Seeing that the MSSD-I design is used for theory testing, this makes the issue of external validity even more grave, as the

theory's generalisability becomes inherently limited. In addition, such designs are also known not be able to rule out potential reverse causality, or of unknown confounding variables (ibid, pp. 265-266).

This thesis is also limited by its reliance on secondary source literature. More primary source research, especially through interviews, would perhaps have contributed to an even more robust final product. Nevertheless, the research questions and hypothesis put forward are still more than sufficiently utilised by this design. The complementing nature of the path dependent approach and MSSD-I should provide an in-depth, tangible account based on a sequence of facts.

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

- *Article 18, The Charter of Fundamental Rights of the European Union.*

V.

Hungary: A ‘Model’ for Asylum System Assault

Structurally, the institution of asylum is dead in Hungary.

- Felix Bender (2020, p. 65)

a. Introduction

In this first case study chapter, the aim is to effectively process-trace the Hungarian asylum system’s descent from a state of functionality prior to 2015, to one of total ASA today. The implicit link between TAN populism, autocratization, and ASA is to be contextualised by means of the developed theoretical insights. In addition, it is argued how Hungary’s post 2015 trajectory simply wouldn’t have been possible without the executive ability to reshape judicial control.

b. Orbán’s Hungary Prior to the Migration Crisis

Fidesz was elected to government with a ‘sweeping victory’ in April 2010 (Than and Szakacs, 2010). The party, which till today is still led by Viktor Orbán with a commanding supermajority in the Országház (Hungarian Parliament), hit the ground running. This as the ‘model case of third wave democratization’ suddenly emerged as a ‘pioneer’ of autocratization (Huber and Pisciotta, 2023, p. 358), and as this chapter will show, a model for successful ASA.

As soon as *Fidesz* entered government, their first aim was to radically overhaul the country’s legal framework. This was done with the drafting of the first constitution that would completely replace the one written in 1949 under Communist Party rule. This new constitution – the *Fundamental Law* – was adopted by parliament in April 2011, exactly one year after the election, and entered force in January 2012 (*Human Rights Watch*, 2013). The symbolism of the first constitution to be drafted and adopted in a democratic Hungary was nevertheless completely overshadowed by its arguably very undemocratic contents. The TRIAL national report on rule of law noted how the Fundamental Law served as a key method to “stabilise a new authoritarian structure and has made replacement of the constitutional system by an eventually elected new government almost impossible” (Fleck and Kovács, 2022). This is a clear case of manufactured institutional *lock-in*.

The Fundamental Law, followed by a number of amendments, fundamentally recalibrated the scales of political life compared to its predecessor, which while nominally being from the times of communism had been heavily amended following the fall of the Iron Curtain. In a clear act of

‘institutionalising your advantage,’ Fidesz’s new constitution slashed the number of parliamentary seats from 386 to 199, redrew electoral districts in a blatant act of gerrymandering, and vastly extended the need for a two thirds majority in parliament (Cardinal Acts). This requirement was even extended to a number of policy laws in a bid to cement the party’s control for the long-haul (Pierson, 2016; *Netherlands Helsinki Committee*, 2022; Fleck and Kovács, 2022, p. 35-36).

Crucially, this effective autocratization with a very legal façade also extended to Hungary’s judiciary. Fidesz managed to swiftly and meticulously reshape the series of judicial controls which gradually evolved in post-1989 Hungary to form a broadly functioning independent judiciary. This was done by firstly annulling all Constitutional Court decisions prior to the adoption of the Fundamental Law. Following the creation of this legal *carte blanche*, the entire judicial system was centralised in the hands of the newly created President of the National Office of the Judiciary (NOJ), a post elected directly by parliament for a nine-year term. The NOJ President was designed to be nominally accountable to a ‘self-governing’ Judicial Council, but this Council had effectively been rendered ‘legally and administratively weak’ from day one. Indeed, the ground was laid for a mass entry of Orbán loyalists, who subsequently forced a large number of court executives and even Supreme Court (Curia) justices into early retirement. All this before the Fundamental Law even formally went into effect. Of course, once 2012 came, the new centralised NOJ appointed regime loyalists swiftly filled the vacant places (Fleck and Kovács, 2022, p. 38).

The critical groundwork may have been laid for what was to come. However, it is important to note that all the way up till the 2015 migrant crisis, Hungary continued to have a functioning asylum system. The main reason for the government’s passivity being because there was frankly little interest in the topic until it became salient (Bender, 2020, p. 61). In fact, 2015 itself was also the year when the Hungarian Parliament actually last amended the ‘Asylum Act’ in a positive manner, that aimed to improve asylum seekers’ access to the labour market, in accordance with the Common Procedure Directive 2013/32/EU (CPD) (Kovács and Nagy, 2022, p. 222).

c. ‘Up Goes the Fence’

Everything radically changed in the Summer of 2015. This was when a surge of migrants led to the frantic construction of a 4-metre-high border fence straddling the entirety of the Serbo-Hungarian border. In the words of government spokesperson Zoltán Kovács, the new fence was designed to “stop the floods” of asylum seekers entering the country from the Serbo-Hungarian land border (Kingsley, 2015). Nevertheless, this barrier, later complemented with a second €120 million 155km fence in 2017 (Saeed, 2017), would become a ‘brick-and-mortar’ symbol for TAN populism as a project of government. The migration crisis, aided by the new Fundamental Law that reshaped judicial control, kickstarted what can be described as a path dependent process of gradually crippling the asylum system.

September 2015 saw the government use the new Article 15(1) of the Fundamental Law for the first time to declare a ‘state of emergency caused by mass migration.’ This offered the government a pretext to exercise extraordinary powers not typically granted by law, ranging from several EU mandated provisions on migration and asylum policy to fundamental human rights as stipulated in the *European Convention of Human Rights*. This state of emergency has been renewed every six months and still applies at the time of writing (*Asylum Information Database*, 2023; Kovács and Nagy, 2022, pp. 216-218). This very provision in the constitution was bolstered in June 2016, with the Sixth Constitutional Amendment introducing the possibility for government to declare a newly defined ‘terrorism state of emergency’, offering the state near unfettered power without the need of parliamentary approval. The justification for this legislation being ‘in [the hypothetical] case of threats from migration crisis induced terrorism’ (Fleck and Kovács, 2022, p. 37; *Deutsche Welle*, 2016). The message in this amendment is clear, the ‘asylum seeker’ should be seen as a potential terror threat. This can therefore be taken as evidence that the TAN Populist executive is actively forging an ‘other’ for them to ‘protect’ their people against.

The declared state of emergency, and the added tone of the Sixth Amendment later on, were complemented by a range of other policy measures. Chief of which being the aforementioned construction of the border fence; the establishment of prison like ‘transit zones’ as the only point of entry for asylum seekers; and the criminalisation of clandestine border crossings. Such crossings, from then on, became subject to a penalty of up to one year in prison – extendable to three years if the fence is in any way damaged – followed by permanent expulsion (Bender, 2020, pp. 61-62). Aside from this, only a very small group of asylum seekers will even be subject to the already unsatisfactory ‘regular asylum procedure,’ as the vast majority fall under the designed system applied during this time of emergency. Under this system, the only way for an asylum seeker to enter Hungary was by managing to eventually enter a transit zone that was deliberately operating at a snail’s pace. Therefore, an asylum seeker could be left waiting for a number of months or even years (Kovács and Nagy, 2022, pp. 224-227).

Upon eventually entering a transit zone, they would be automatically detained for an indefinite period of time, typically beyond the four weeks permitted by the CPD. Furthermore, reports indicate how those inside the zones were denied a fair asylum procedure, and faced inhumane treatment, with a number of asylum seekers facing starvation. In a move completely against the basic principle of *non-refoulement*, and therefore a clear and tangible act of ASA, most people were prevented access to Hungarian territory in defiance of international law which stipulates your right to irregularly enter a state for the purposes of requesting international protection. In addition, people found to have an irregular status within Hungarian borders would be automatically expelled in an extra-legal manner to the other side of the fence (*Hungarian Helsinki Committee*, 2020; Kovács and Nagy, 2022, pp. 224-227). The high number of automatic asylum rejections was due to another aspect of legislation

introduced with the declaration of a state of emergency, this being the addition of the ‘safe third country rule’, which following 2015 started to include the country were most asylum seekers passed through to reach the Hungarian border – Serbia. Therefore, unless asylum seekers could prove a specific threat to their safety in Serbia, they would be pushed-back from Hungarian soil into the shanty towns which emerged on the other side of the fence (Bender, 2020, p. 63).

d. The Seventh Amendment & ‘Stop Soros’

The next major step taken by Orbán’s government was in 2018 with yet another constitutional amendment, followed by yet another dishing out of complementary policies that aggravates the trajectories of autocratization and therefore of asylum assault. Furthermore, it lays bare their ethno-nationalist laden TAN populist political agenda. This is immediately seen in the Seventh Amendment to the Fundamental Law which seriously deviated from the principles of the Geneva Convention by declaring that “alien people cannot settle in Hungary and that protection of Hungary’s constitutional self-identity and Christian culture is an obligation of all state organs” (Fleck and Kovács, 2022, p. 37). The amendment also facilitated further reform of the asylum system to offer asylum effectively only to those who enter Hungary directly from the state in which they fear persecution. This was a significant tightening from the previous, already illegal, automatic denial of asylum to those who feared for their safety in the third country they entered Hungary from (Amnesty International, 2018; Bender, 2020, p. 64).

In a clear illustration of how the TAN populist executive forges a ‘corrupt other,’ the ‘Stop Soros’ legislative package was named after Hungarian American businessman and philanthropist George Soros who Orbán and his party machine consistently use as a figure to blame-shift many of Hungary’s woes, such as the migration crisis, on. This, as Soros is also seen also as the figurehead for all pro-refugee NGO activity in the country (Walker, 2020). The contents of the package chiefly included the criminalisation of NGOs and individuals who in any way attempt to offer support or even advice to ‘illegal migrants’ with a prison sentence of up to 90 days (*Amnesty International*, 2018; *Human Rights Watch*, 2018). This package is therefore an example of how an ‘enemy elite’ has been forged by the TAN populist executive so as to justify its own ongoing autocratization.

Remarkably, this time also saw an even more unprecedented attack on the independence of the judicial system as Orbán’s administration successfully managed to develop a parallel high court to the one already, by and large, controlled by his loyalists. The new constitutional provisions outlined the development of an ‘Administrative High Court,’ which would strip the Constitutional Court’s competence in administrative matters, such as the asylum system, and was to be even more directly controlled by the executive branch as the justice minister would directly control the hiring and promotion of judges (Novak and Kingsley, 2018; Bender, 2020, pp. 64-65). Surprisingly, Parliament

repealed this measure in early 2020, just before it was due to take effect, following immense international pressure. Nonetheless, considering what was to come, this can be regarded as an anomalous occurrence in the trajectory (Patyi, 2021).

e. COVID-19 & the Ukraine War

The onset of the COVID-19 pandemic led the government to establish a ‘state of danger’ in March 2020 that granted the state unfettered regulatory powers without parliamentary oversight in virtually all policy areas. By May this transpired into Act LVIII on Medical Preparedness (the ‘Transitional Act’) which served as a formalised ‘enabling act’ granting full decree-making powers to government (Fleck and Kovács, 2022, p. 37; Kovács and Nagy, 2022, pp. 227). With regards to the asylum system, the state of danger offered the pretence to effectively scrap the previous ‘Transit Zone System’ and replace it with what can be considered a state of total ASA. Bearing in mind that the state of emergency with regards to migration was still in force, the new system for asylum was essentially designed under the premise of an ‘exception to an exception.’ Nevertheless, as shall be seen, there seems to be no end in sight for this ‘exceptional exception.’

The Transit Zone asylum system was replaced by what was known as the ‘Embassy System.’ This involved the hermetic sealing of the Serbo-Hungarian border to any asylum seeker, as the new system stipulates that the only way to apply for asylum in Hungary is by first registering ‘your intent’ to apply from the Hungarian Embassies in Belgrade or Kyiv. Following this, the Embassy can evaluate your ‘expression of intent’ within sixty days. After passing this phase, you are then issued with travel documents to enter Hungary, where arbitrary detention awaits you as your asylum case is processed, typically taking around 4 weeks. Surprisingly, unless already offered subsidiary protection or a family member already has some form of international protection in Hungary, it is not even possible to apply for asylum within Hungary itself, as attempting to so would result in immediate forced expulsion. This new system has therefore rendered it almost impossible to apply for asylum in Hungary as the system places a grave bureaucratic hurdle between the asylum seeker and his or her access to an asylum application (*Hungarian Helsinki Committee*, 2023b; Kovács and Nagy, 2022, pp. 227). No information was successfully found as to how exactly Embassies process these applications of intent.

The pandemic is over, but the Embassy System persists. In May 2022, the Tenth Amendment to the Fundamental Law was passed. This amendment further expanded the provisions for establishing a ‘state of danger’ to also include “armed conflict, a war situation or humanitarian catastrophe in a neighbouring country.” Therefore, as soon as the amendment came into force in November 2022, the old state of danger with relation to the pandemic ended, and on the same day a new state of danger in relation to the Ukraine War was declared (*Hungarian Helsinki Committee*, 2023a; Gall, 2022). Only for it to be yet again renewed on May 3rd of 2023 for another six months, marking seven and a half years

since Hungary was last operating outside of some form of state of exception (*Nepszava*, 2023a). This also marked seven and a half years of an ever-aggravating trajectory for the Asylum Seeker that wished to enter the EU through the Hungarian border.

In a recent report, it was pointed out how in 2023 the Hungarian government continues its policy of tough pushbacks which, unlike in countries such as Croatia and Greece, are advertised publicly on official social media channels. This report also highlights how authorities also continue partaking in strange and dehumanising practices against asylum seekers. This includes the driving of cars into border fences to dislodge climbers, setting police dogs loose on asylum seekers, and beatings. The only way for an asylum seeker to cross the border in 2023 is with the help of people smugglers (*Dutch Council for Refugees*, 2023).

f. The TAN Populist's Own Exceptions

Within the context of an ever-aggravating trajectory for the asylum seeker in Hungary, two exceptions to this state of total ASA arguably add further depth to the priorities and considerations of Fidesz's TAN populist project of government.

Firstly, it must be noted that while post-2015 Hungary has gone down a path of mutually reinforcing autocratization and ASA, the TAN Populist executive has not forgotten about the economic necessity of immigration. Legal migration to Hungary not only continues to be tolerated but is actively encouraged by the Orbán Administration with programmes such as the *Stipendium Hungaricum* actively trying to attract workers from third countries. However, while the regular migration policy is broadly run in an economically utilitarian manner, it still reflects their ethnonationalist preferences. This as the naturalisation process is expedited for those who can prove some form of Hungarian origin, while programmes like the *Stipendium* aim particularly at attracting workers from culturally similar places such as Serbia and Ukraine (Kovács and Nagy, 2022, pp. 222). This economic realism is however also suspected of being tainted with corruption as reports even show that under the state of danger, third country workers employed to work for contractors and subcontractors deemed 'priority employers' by the state – such as construction workers for the ongoing Budapest-Belgrade railway project – are given priority over companies which don't have connections with the government (*Nepszava*, 2023b). A report in fact ironically shows how Hungarians are no longer being employed in certain automobile factories, because of the flourishing number of economically competitive guest workers from East and South East Asia (Varga, 2023).

Secondly, there is the question of Ukrainian refugees. Unlike the Serbian border, no barbed-wire fence, transit zone, or any of the likes exist on the Hungary-Ukraine border. Along with the rest of the EU, following the start of the full-scale Russian aggression on Ukraine on February 24th, 2022, the Hungarian Government complied with the triggering of the Temporary Protection Directive

2001/55/EC, and allowed Ukrainians to enter freely. However, due to the state of danger, a number of barriers remain for Ukrainians in Hungary. Since the asylum system has been stripped bare, Ukrainian refugees can only expect basic primary aid such as food and clothing, since all other standard refugee facilities and integration opportunities simply do not exist (Dutch Council for Refugees, 2023). In addition, there is also a strange legal situation where a Ukrainian citizen, who was already in Hungary before the start of the war, is now neither eligible for temporary protection, nor to the standard asylum procedure (*Hungarian Helsinki Committee, 2023a*).

g. Results

This case study chapter has shown how the migration crisis did serve as a critical juncture for the Hungarian asylum system. This as from 2015 till today, Hungary has been going down a path dependent trajectory of ever aggravating ASA through legal means. It has also been shown that a TAN populist government was only able to do so because of its complete redrawing of legal parameters with the drafting of the Fundamental Law that allowed for the complete reshaping of judicial controls.

Following 2015, autocratization and ASA have emerged as mutually dependent processes that facilitate and justify one another, as well as the TAN populist project of government. The ongoing war in Ukraine – following the pandemic – continues to create a pretence for further periodic redrafts of legislation that maintains a legal façade to an ever-worsening state of illiberal constitutionalism. One product of this process is the structural death of asylum in Hungary. Ongoing and increasing legal migration, and the situation regarding Ukrainian refugees, adds depth to the reality of this TAN populist project of government, both with regards to its ethnonationalist core, but especially in its knack for economic utilitarianism. This gives merit to the argument that the asylum seeker, and the ‘evil elite’ that facilitates their arrival, serve as the primary scapegoat to a Hungarian government defined by Traditional/Authoritarian/Nationalist Populism.

VI.

Italy: The Judicial Lifebuoy in Action

The Judiciary has always claimed its independence, but in reality, it has too often allowed itself to be seduced by the enticements of political power.

- Giovanni Falcone (cited in Grasso *et al*, 2022, p. 60)

a. Introduction

The first case study chapter presented a scenario where a TAN populist executive is actively able to reshape judicial control, which in turn, facilitated a path dependent process of further autocratization, and one which following the 2015 critical juncture forged an output policy of total ASA. This chapter also aims to process-trace the developments in the Italian asylum system, following the migration crisis, particularly under the Conte I government lasting from June 2018 till September 2019, and the Meloni government which ascended to power in October 2022. Therefore, the following analysis – which illustrates what is perhaps the closest example of a counterfactual scenario of TAN populist executives in an EU member without the same ability to reshape judicial control – seeks to draw continuous and effective comparisons with the Hungarian case.

b. The Judiciary: Too Independent for its Own Good?

In the Hungarian case, a single populist political movement with TAN ideological tendencies gained and continues keeping a firm hold on power since 2010. It consequently managed to reshape judicial controls, and subsequently set the country on a clear trajectory of autocratization and, after the emerging salience of migration, on its mutually dependent trajectory of ASA. Compared to this conceptually clear and intuitive case, Italy proves to be murky territory where assumptions that can generally be held with confidence in the Hungarian case, quickly breakdown. Prior to process-tracing, two seemingly contradictory realities need to be addressed. These regard the unique relationship between the judiciary and the political sphere, as well as the subsequently complex reality of populism in the *Bel paese*.

The TRIAL national report considers Italy to be a ‘mature democracy.’ This as unlike Hungary, which only democratized following the fall of the Iron Curtain, rule of law and judicial independence in Italy have been steadily developing since the ratification of the new Republican Constitution in December 1947, which entered force at the start of 1948. Article 104 of this very document stipulates how the judicial system’s governance lies in the hands of the High Council of the Judiciary (*Consiglio Superiore della Magistratura* – CSM). This is a self-governing institution both on

paper and in practice that is presided over by the non-executive President of the Republic who, along with the Prosecutor General of the Court of Cassation (the highest court of appeal), serves as an *ex-officio* member. Meanwhile, two thirds of the members are elected directly by ordinary judges, leaving only the remaining one third to be elected by parliament from Italy's pool of law professors and lawyers with at least 15 years of experience. CSM members serve a renewable 4-year term, however, re-election is not automatic. In addition, they must suspend any professional activity and cannot run for national or regional political office while serving (Grasso, *et al*, 2022, pp. 58-65). Benvenuti and Paris (2019) in fact discussed how Italy's system of judicial governance constitutes a 'prime export product.' This as they observe how the *Venice Commission's* Opinion 403/2006 lists a number of guidelines for judicial governance reform for CoE member states which were remarkably similar to how the CSM already operated.

A definitive moment for judicial independence came in the wake of the *Tangentopoli* scandal of the early 1990s that led to the demise of the so called 'First Republic', as half of the Italian Parliament at the time was implicated in what proved to be a severe and endemic system of corruption in Italian political life. *Tangentopoli* subsequently led to the fall the big political players *Democrazia Cristiana* (DC) and the *Partito Socialista*, which withered away along with the *Partito Comunista* following the collapse of the USSR (Rhodes, 2016). The reason for this political earthquake that left no survivors was primarily the *Mani Pulite* ('clean hands') inquiry carried out by the judiciary, in what was a true display of the principle of separation of powers in the country (Grasso *et al*, 2022, p. 57).

In spite of the above, it would nevertheless be a mistake to assume that the Italian judiciary's own 'hands' are themselves completely 'clean,' or without fault. In perhaps the polar opposite situation of Hungary's post-2010s judiciary, the Italian judiciary in many ways can be considered to exist as a political *locus* in its own right. Events like *Mani Pulite*, and arguably also the judiciary's broadly effective *anti-mafia* law enforcement efforts, in spite of risks as high as assassination (Paoli, 2007) – like as happened to jurists Giovanni Falcone and Paolo Borsellino in the same year as the opening of the inquiry – has raised the political clout of members in the judiciary among the public.

This in itself has further contributed to the politization of the CSM and the judiciary at large, which manifests itself in different ways. Firstly, it is not only the members elected by parliamentarians who are at risk of bringing a political element to the Council. This as CSM members elected by the judiciary are known to represent the varying political 'currents' among judges. Therefore, this clearly opens the door to the possibility of 'activist courts' to emerge. Secondly, the rise of the so-called 'Second Republic' in 1994, has seen more prominent members of the judiciary – including magistrates and public prosecutors – entering politics. Generally, most of these new entries into political life adopt more GAL-sympathetic, or if on the traditional right, more anti-populist, political stances. Italy's two experiences with technocratic governments under Mario Monti (2011) and Mario Draghi (2021-2022)

also effectively allowed for jurists to enter politics, albeit in an initially less polarising setting. A historic legacy of judicial intervention in economic matters, and so called ‘publicity seeking’ judges who, without hesitation, express their extra-judicial opinions, are also two realities that set the stage for a flourishing of activists courts (Ferrari, 2019; Grasso *et al*, 2022, pp. 57-60).

This conundrum, like with Hungary’s challenges, also finds its roots in the Constitution itself. This as Article 51 of the Italian Constitution espouses the principle of “a magistrate’s rights not to be excluded from the exercise of his or her electoral rights,” which finds itself in practical conflict with Article 104 of the same document that aims to safeguard “the image of independence of individual magistrates and the credibility of the judiciary” (Grasso *et al*, 2022, p. 61). As can be observed, while both countries’ challenges stem from the same place, they could not be more different. In Hungary there is a situation of clear executive control over the judiciary, while Italy’s challenge is one of a judiciary that itself seems to form its own political locus which rivals that of the executive. What is certain, and indeed most pertinent with regards to this chapter’s aim, is that the threat posed to judicial independence by an Italian TAN populist executive is, for structural reasons, significantly smaller than in the Hungarian case.

c. A Laboratory of Mutating Populisms

Another product of the emergent Second Republic ushered in by Mani Pulite was a political arena that can perhaps best be described as a laboratory of mutating populisms (Zirulia and Martinico, 2022; Verbeek and Zaslove, 2016). The immediate product of what after all can be regarded as a fundamental critical juncture for Italian politics, was the rise of Silvio Berlusconi’s FI, the new relevance and credibility of the *Lega Nord* (now simply *Lega*), and a general consolidation of Italian politics into a multiparty system with a fault line dividing the broad centre-left and centre-right (that is better seen today as GAL/TAN). In this new party system, populist political projects have not just become institutionalised, but have proven as being able to govern. What remains ironic is how the powerful judiciary, which launched Mani Pulite with the aim of upholding liberal constitutionalism in Italy, inadvertently facilitated the rise of what many regard to be its own antithesis – populism. One reason for this being that sways of the Italian public, who disdain the former era symbolised by DC’s decades-long permanence in *Palazzo Chigi*, view populist forces as a ‘democratic corrective.’ What is perhaps more sensible to ask is whether the ideology that latches on to populism (the ‘thin-centred ideology’) is what can be considered the determinant of the phenomenon’s merits as a democratic corrective or threat (Verbeek, Zaslove and Rooduijn 2018; Verbeek and Zaslove, 2016)?

For the purposes of this analysis, it must be understood how, albeit seemingly paradoxical, a mature democracy’s judiciary facilitated the birth of what can be termed a ‘laboratory of mutating populisms.’ Three major strains of populism have arguably emerged since the 1990s that have grasped

levels of power in the executive: that espoused by M5S, termed by Pirro (2018) as ‘polyvalent populism’; ‘technopopulism’ under Monti and now Draghi, which was touted as “Italy’s latest lab leak” by *Politico* columnist Jacopo Barigazzi (2021); and TAN populism. TAN populism itself has a number of strains – a lighter version being displayed by Berlusconi’s FI, while its rawest forms are seen in Salvini’s Lega and Meloni’s FdI.

In near inverse to the previous case, the Italian judiciary may have played a key, albeit unintentional role, in the development of its own antithesis: the TAN populist executive. It shall be seen how this antagonistic relationship between these two defining forces in the Second Republic manifests itself with regards to the Italian asylum system during the first Conte government and the current Meloni government. The latter being a coalition of all three major TAN populist forces led by FdI, while the former is being considered as on balance a TAN populist executive in light of Salvini’s Lega being in the driving seat in the domain of security and asylum. Prior to delving into this, the next section will describe the impact of the migration crisis as a critical juncture that crystallised ASA as a policy preference for the TAN-side of the Italian political spectrum.

d. The Migration Crisis: From Mare Nostrum to the ‘Populist Pressure Cooker’

The migration crisis may have served as a critical juncture for both countries’ asylum systems, yet the manner this same crisis impacted them both was fundamentally different. While Hungary’s crisis was characterised by a sharp, and largely unfamiliar, ‘surge’ of arrivals at the Serbo-Hungarian border in the summer of 2015 (Thorpe, 2015), Italy’s experience was not as sudden. This is because the Balkan migration route to Europe, which Hungary is a part of, only flared up during the crisis itself. Meanwhile, the Central Mediterranean Route directly from the Maghrebi coast to Italy and Malta, especially across the Strait of Sicily, had slowly been simmering since the early 2000s. The Arab Spring accelerated trends until the situation started to be termed a crisis in 2014, when asylum seeker arrivals quadrupled in numbers compared to the previous year (Fargues, 2017, pp. 10-11).

The gravity of the situation in the early 2010s was marked by the PD-led (soft-GAL/centre-left) government’s launch and ensuing termination of the *Mare Nostrum* operation in October 2013 which saw the Italian Navy save a minimum of 100,000 asylum seekers until its replacement with a much more limited *Frontex* mission exactly one year later in October 2014. This EU mission operated with one third of the budget and was tasked mainly with border surveillance. Therefore, from the end of *Mare Nostrum* till today it was NGO-run vessels that had to pick up the mantle of saving lives at sea (Davies and Nelson, 2014; Cusumano and Villa, 2019, p. 2).

Amidst this human tragedy taking place on Europe’s Southern shores, this costly search and rescue operation was regarded by Ferruccio Pastore (2016) as “a technical success but a political failure.” The gravity of this political failure, which followed the severe pressure placed by the migration

crisis on the debt-stricken and austerity-ridden state, cannot be understated, and goes beyond this operation. This as the Letta and later Renzi and Gentiloni administrations succumbed to inflict ASA in part to appease a public that continued seeing them as ‘soft’ on migration. All the while, the migration crisis emboldened a TAN ‘Populist Pressure Cooker’ of anti-immigrant sentiment, spearheaded by Lega against the so-called ‘invasion.’ Like in Hungary, this left a lasting mark in fundamentally tying the fate of TAN populism with the anti-immigrant agenda (Padovani, 2018; Belardo, 2019; Petropoulos, 2020).

The scale of ASA carried out by the *Partito Democratico* led government, which after all remains in line with the broad trend of widely more selective migration policies, is not to be disregarded. Firstly, there was the 2017 Memorandum of Understanding – later extended in 2020 – with war-torn Libya, that aimed to stop migrants from entering the Italian SAR (and by proxy also the Maltese SAR). Amnesty International (2020) decried this as an example of ‘complicity in the torture of migrants and refugees.’ This deal, which was both EU sanctioned and an emulation of deals which came before it, such as the 2011 agreement between the Monti Administration and post-Ben Ali Tunisia, is perfectly legal with regards to not touching asylum seekers’ right to *non-refoulement* (Gumuchian, 2011; Frelick, Kysel and Podkul, 2016). Notwithstanding this fact, such migration externalisation deals are essentially arrangements that instead of actively pursuing a ‘pushback’ strategy, opt to pay a third party to ‘pullback’ for you, therefore creating a grey area in the understanding of ASA.

Secondly, the end of Mare Nostrum gave credence to the idea that search, and rescue operations somehow induce a ‘pull factor’ by inducing demand for irregular crossings across the Mediterranean. This strongly held belief, which has since been completely debunked, contributed to the end of Italy’s properly funded state operated missions in its SAR. This decision to terminate the mission was not only accused of having inevitably ‘put lives at risk’, but also of justifying and fuelling TAN populist forces for years to come (Cusumano and Villa, 2019; *Amnesty International*, 2014). Finally, the migration crisis also saw an internal shift within the Italian asylum system. Up until 2016, a system known as the ‘staircase model’ treated the asylum seeker not just as a potential refugee, but as a potential future citizen. The crisis shifted this model towards a regime of ‘deservingness’, where jobs that would normally be done against remuneration became ‘aggressively’ repackaged as a form of voluntary social responsibility for asylum seekers. While not formally mandatory, it became a known fact that participation in these programmes – that took place in highly regimented ‘hotspot’ centres – became a clear social expectation and almost a precondition for success at the asylum tribunal (Marchetti, 2020, pp. 242-246)

e. Conte I & Salvini’s Security Decree

The Populist Pressure Cooker, albeit fuelled by many woes, rode the wave of anti-migration sentiment into government, when in October 2018 three months of post-election coalition talks saw the rise of the

Governo del Cambiamento ('government of change'). The new 'Conte I' government was composed of TAN populist Lega, and polyvalent populist M5S. These coalition partners may have placed the nominally 'neutral' law professor and (ironically) jurist Giuseppe Conte in *Palazzo Chigi*, yet with regards to security and asylum, it was Lega calling the shots (Garzia, 2019). Furthermore, the new Deputy Prime Minister and Interior Minister, Matteo Salvini, like his Hungarian counterpart Viktor Orbán, hit the ground running. However, considering the challenges he faced from the judiciary, and the coalition's collapse only a year later, arguably Mr. Salvini may have been running into a brick wall.

Lega's *piece de resistance* of attempted ASA came in the form of the Immigration and Security [executive] Decree (113/2018) which shortly after garnering parliamentary approval through an expedited procedure, became a Decree Law (53/2019). The Security Decree was a display of ASA on three main grounds. Firstly, it provided a legal basis for Salvini's 'Closed Ports Policy.' This took the form of an entry-ban for NGO ships conducting search and rescue missions, in a move that emulated Orbán 'Stop Soros', which happened roughly during the same timeframe, and also aimed at bolstering the criminalisation of those who saved lives at sea (Zirulia and Martinico, 2022, pp. 267-268). This proved to be both a tangible step for further ASA, while simultaneously consolidating the idea that NGOs in their facilitation of 'the other', are themselves part of the 'enemy elite.' The government's narrative promoted the idea of life-saving search and rescue missions in fact being operations that encouraged more migrants to make the crossing, and that therefore supported people smugglers.

Secondly, the decree abolished and replaced the status of 'humanitarian protection' which offered asylum seekers who – while not qualifying strictly to Geneva Convention refugee status nor to EU subsidiary protection status – still had serious reasons, based on humanitarian grounds, to be offered protection by the State. The new 'special cases' residence permit therefore severely limited the asylum tribunals ('Territorial Commissions'), as several conditions which previously merited protection were deleted. This saw a subsequent drop in successful asylum decisions (Elli, 2021; Marchetti, 2020, p. 242). Finally, the Decree made strides to dismantle the 'System of Protection for Asylum Seekers and Refugees' which was tasked with a range of support services. This drop in support, led to a rise in regimented containment centres where people, who were once treated as potential citizens, are now considered to be illegal aliens subject to potential deportation (Marchetti, 2020, pp. 242-247).

Unlike in the Hungarian case, where autocratization, particularly through the fundamental reshaping of judicial control, triggered a post-migration path dependent process of mutually dependent autocratization and ASA, this process was not triggered by the Security Decree. It can be seen that since the TAN populist executive never had the ability to reshape judicial control, the independent judiciary fought back, where it legally could, against the Security Decree, and therefore functioned as a true 'lifebuoy' for the Italian asylum system. This was seen to be the case with the Closed Ports Policy, where in spite of the fact that the facilitation of irregular immigration became a criminal act, not a single

conviction has ever been made. When NGOs, especially those running vessels such as *Sea Watch 3* and the *Open Arms*, entered litigation against the entry ban, eventually even reaching the Court of Cassation, the Italian judiciary proved to be a guarantor of fundamental rights. They did so on the ground that NGO ships are bound by their ‘duty to rescue at sea’, as stipulated in international maritime law, and that these higher obligations simply trump any legislation on ‘border control.’ Furthermore, they argued, that the interference by the State with the fundamental rights to personal liberty and integrity of the Commander and the ship’s ‘castaways’, was the unlawful act in this case. This being the specific legal unfolding for the case which followed the arrest of *Sea Watch 3* Captain Carola Rackete in June 2019. The Italian Judiciary proved to be even more of an autocratic blocker and lifebuoy against ASA than the *European Court of Human Rights* whose ruling on the case was significantly more restrained out of respect for the executive’s power over migration policy. In the aftermath, the Court of Cassation now recognises a form of ‘right to resistance’ for NGO vessels against police activities which attempt prohibit their operations (Marchetti, 2020, pp. 268-275). Matters did not even end there, as Matteo Salvini has since been stripped of his parliamentary immunity and stood on trial for ‘kidnapping’ starting from 2020, in spite of the fact that he is once again returned to the post of Deputy Prime Minister (Grasso *et al*, 2022; *France24*, 2021).

The collapse of Conte I was followed by the rise of the PD-M5S Conte II government. Conversely, Conte II itself only lasted from September 2019 to February 2021. This as the pressure exerted by the COVID-19 pandemic led to the rise of another technocratic government, this time headed by Mario Draghi which enjoyed the support of all major political forces in the country. This break from a TAN populist executive, saw the reversal of most Lega inflicted ASA with the introduction of a new Immigration Decree-Law (130/2020). This legislation may have preserved the Interior Minister’s power to issue entry bans, however it is now only subject to administrative sanctions which are more or less toothless anyhow, as a judge will still ultimately need to follow the Court of Cassation’s ruling on the landmark Carola Rackete case. Notwithstanding this, NGO vessels still had to operate in a hampered environment based on the executive’s enforcement of bogus ‘administrative irregularities.’ These are designed with the specific intention of draining these organisations’ time and resources. The situation during the pandemic had been aggravated further by health restrictions that temporarily introduced ‘floating quarantines’ for new arrivals. On the other hand, the Decree did much to counter the ASA committed by deleting the status of ‘humanitarian protection.’ This was by expanding the provisions under which ‘special protection’ can be granted, effectively rendering it a near equivalent to the old ‘humanitarian protection’ status. However, the Conte II and Draghi Administrations did little to rectify the damage done to asylum seeker support and integration services, and also continued the migration externalisation regime by building on the already signed agreements with Tunisia and Libya (Elli, 2021; Marchetti, 2020, pp. 276-277).

f. The Rise of Giorgia Meloni

The fall of the Draghi government led to fresh elections in October 2022. In spite of stellar approval ratings for the technocratic government, it was the initially small TAN populist party, with neo-fascist roots, which refused to join the Draghi-led coalition, which paved the way to victory for Italy's most TAN populist executive in the history of the Republic (*The Guardian*, 2022; Gautheret, 2022). Giorgia Meloni's Fratelli d'Italia in a governing coalition with the post-Draghi bruised Lega, and the nominally soft-TAN populist Forza Italia, entered government with the promise of a 'naval blockade' in a bid that if ever implemented would constitute total ASA. Yet, this 'naval blockade', after eight months in office, is yet to materialise (Bonalume, 2023).

The lack of a naval blockade does not mean a lack of ASA. This being so as the Meloni government's executive Decrees introduced as soon as December 2022, began stipulating a series of complex rules for NGO vessels trying to save lives at sea. These ranged from the new obligation to return to shore 'without delay' as soon as a rescue is completed – even if the ship has capacity to rescue more lives in distress – and subsequently only allowing vessels to disembark in distant ports further North in a bid to deliberately increase their operating expenses (*Reuters*, 2022; Liboreiro, 2023; Armellini and Maccioni, 2023). In addition to this, following the tragic shipwreck off the coast of Cutro, a recent executive Decree, which has been in effect since 11th March 2023, once again attempts to turn back the clock to the Conte I government. This by once again limiting the cases that fall under 'special protection' status, and the technical 're-criminalisation' of these NGO vessel operation (Pastore, 2023; Vigano, 2023). Indeed, this is happening amidst a new rising tide of irregular arrivals, which in April led the government to announce a 'state of emergency' on migration (ECRE, 2023).

It cannot be emphasised enough how this situation pales in comparison to the path dependent process which has ensued in Hungary, as Meloni's government remains constricted by the independent judiciary. What the Hungarian and Italian TAN populist executives also have in common is their pragmatic approach towards legal migration. December 2022 also saw the Council of Ministers (Italian Executive) agree on the 'Flow Decree', which aims to actually increase levels of legal migration into the country. In spite of some humanitarian concessions, the main scope behind this executive decree is economic, as it aims to increase the number of third-country nationals entering Italy for the purpose of seasonal employment in agriculture and tourism (*Il Post*, 2023; *Il Fatto Quotidiano*, 2023).

Furthermore, just because Italy has not followed the Hungarian trajectory towards autocratization and mutually dependent ASA yet, this does not exclude it from ever doing so in future. The average lifespan of any given Italian government may however prove to be a roadblock to such a process. That being said, even if the current executive, or a future TAN populist executive, lasts considerably longer in office than is typical, the power of the independent judiciary will continue posing a formidable structural constraint. Notwithstanding this, Meloni is known to be a fan of semi-

presidential systems of government (Giordano, 2023). Such deep constitutional reform, if ever implemented, could hypothetically tip the balance of power away from the judiciary and enough towards the executive, and therefore forge an environment more similar to that in Hungary following the ratification of the Fundamental Law. As remote a possibility it may be, Italian politics certainly teaches the analyst to expect the unexpected.

g. Results

The migration crisis of 2015 served as a critical juncture for the Italian asylum system, yet unlike Hungary, it did not induce a trajectory of mutually dependent autocratization and ASA. This case study has illustrated how a strong independent judiciary can serve as a lifebuoy against such a trajectory. In spite of the determination of a given TAN populist executive, the Italian judiciary has prevented, or at least significantly slowed down, the possibility of total ASA in the country.

This is not to say that tangible ASA measures have not been successfully implemented by both the Conte I and Meloni governments. However, their results remain incomparable to that of the structural death of asylum that today exists in Orbán's Hungary. What is shared by post-2015 Italian and Hungarian TAN populist executives, is their joint commitment towards an ASA that also criminalises NGOs trying to support asylum seekers in attempt to forge an 'enemy elite' in the public perception. Another point which gives direct credence to the argument that a TAN populist executive needs to balance between its political and policy agendas, is the fact that both the Orbán and Meloni Administration seek to maintain and expand legal migration flows into their respective countries. Therefore, it is the economically less consequential asylum seeker that is casted in the role of a scapegoat.

VII.

Conclusion

The strong do what they can and the weak suffer what they must.

- Thucydides

It can firstly be concluded that the migration crisis did indeed serve as a critical juncture for both asylum systems, albeit much more sharply for the Hungarian case. This, as the crisis made immigration an even more salient topic, which TAN populist political forces quickly emblazoned in the front and centre of their respective political agendas. Secondly, this thesis has shown how in both cases, TAN populist executives exert a negative effect on their respective asylum systems, as the migration crisis' aftermath saw TAN populist governments aim to inflict ASA, irrespective of their successes.

Thirdly, we observe how the central hypothesis introduced in the theoretical framework, can be proven to be correct, as *the ability to reshape judicial control* proved to be the main explanatory variable for explaining the degree to which a TAN populist executive could inflict ASA. In the Hungarian case, the Fundamental Law of 2010 severely weakened judicial independence. This allowed for a path dependent trajectory of further autocratization and, following the migration crisis, of ASA. This in turn led to the structural death of asylum in the country, i.e., total ASA. Meanwhile, the Italian case showed how an independent judiciary can act as a lifebuoy for migrant rights, by stopping the successful implementation of the TAN populist executive's ASA policies. Ergo, also contributing towards the prevention, or at least significant slowdown, of the spectre of total ASA in the country. At present, the structural death of the institution of asylum *à la* Hungary remains a near impossibility in Italy, especially with the context of an independent judiciary, which if anything has itself become too powerful.

In addition, we observe how the key interlinking concepts of TAN populism, autocratization, and ASA, worked in tandem in the Hungarian case which served as a perfect model for this causal relationship. What could be seen in both cases, is that TAN populism is indeed a fully formed project of government, and one that aims to reconcile its political agenda with the need to govern. This was observed with how both cases scapegoated the asylum seeker to appease their anti-immigrant voter base, yet continue to actively encourage legal migration into their countries so as to maintain their economies, and ultimately their welfare systems.

The research questions answered above, were spurred by an observation found when initially analysing the key asylum statistics for both states. This analysis of the data, as found in the first chapter, had observed a notable divergence between the two states' key asylum statistics following the migration crisis. In this capacity, it can be said with confidence that the findings of this MSSD-I research design properly account for the suspicions initially raised, particularly regarding how “the Hungarian asylum system itself has significantly become more selective, with the state in some form controlling who is able to officially apply for asylum to begin with.” This being accounted for by the post-2020 Embassy System which brought about total ASA, as discussed in the case-study chapter on Hungary.

On a final note, future research ought to focus not simply on the TAN populist project of government itself, but on the contagious nature of their political intentions, and how policies such as migration externalisation are being used by governments, across the political spectrum, to inflict what essentially qualifies as ASA-by-stealth.

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