

The Lisbon Treaty Evaluated: Impact and Consequences

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The Development of the EU Asylum Policy: Revisiting the Venue-shopping Argument after the Lisbon Treaty

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Abstract:

It is generally argued that the development of EU cooperation on asylum and migration can be best explained by the idea of 'venue-shopping', i.e. the search by rational policy-makers for new venues of policy-making that are more amenable to their preferences and goals. According to that perspective, the development of the EU policy on asylum is the result of an attempt by EU Member States to avoid liberal constraints at the national level with a view to adopting more restrictive asylum measures at the EU level. This article argues that, whilst this argument held true at the beginning of the EU cooperation on asylum, various recent changes have rendered it problematic. A thorough examination of the evolution of the EU asylum policy demonstrates that, overall, it has become more liberal, and less restrictive, than had been envisaged by policy-makers and scholars alike a few years ago. This is mainly due to broader changes that have affected the EU 'system of venues', which have in turn made the EU asylum policy venue more liberal. As recent Treaties have cemented such changes, it is highly unlikely that policy-makers would ever manage to develop a more restrictive policy in the EU asylum policy venue. Attempts to 'venue-shop outwards' into the realm of foreign policy, as an alternative, have not proved successful in the field of asylum. Therefore, it appears that the only avenue left for those willing to develop a more restrictive asylum policy is through increasing border controls in order to restrict the access of asylum-seekers to these more liberal asylum provisions.

Introduction

EU cooperation on asylum has greatly developed in recent years, making this policy area one of the most dynamic in the EU (Da Lomba, 2004; Peers and Rogers, 2006; Kaunert, 2009a, 2010). Many scholars have argued that the ‘EU asylum and migration policy’ - as it is generally referred to, although asylum and migration are actually two different policy issues - has been mostly restrictive and has primarily aimed to keep would-be asylum-seekers and migrants outside the EU territory (see Joly 1996; Uçarer 2001; Brouwer and Catz 2003; Guild 2004; Boswell, 2003a, 2003b, 2007, 2008; Ellermann, 2008; Geddes, 2000, 2001; Thielemann, 2001a, 2001b, 2006; Lavenex, 1998, 1999, 2001a, 2001b, 2006 Levy 2005; Baldaccini and Guild 2007; Chebel d’Appollonia and Reich 2008). When analysing why Member States have increasingly been cooperating at the EU level on asylum and migration matters, the main explanation found in existing scholarship is that they ‘venue-shopped’. According to this argument, first made by Guiraudon (2000, 2003) and subsequently developed by Lavenex (2006) and Maurer and Parkes (2007), national policy-makers in the field of asylum and migration moved policy-making on these matters to a new EU policy-venue, in a bid to circumvent the liberal pressures and obstacles that they faced at the domestic level. Amongst those, one can mention judicial constraints or political adversaries holding different view on migration and asylum, such as labour ministries or pro-migrant non-governmental organisations (see Joppke, 1998, 2001; Freeman, 1998). At the EU level, the argument goes, they found a different policy-venue that sheltered them from these constraints and were therefore able to adopt more restrictive asylum and migration measures as they intended.

Since the publication of Guiraudon’s seminal article ten years ago, EU cooperation on asylum has continued to grow, including the creation of new institutions such as the European Asylum Support Office. The EU itself has also considerably changed, as it has seen the adoption of new treaties amending its institutions and decision-making processes, the latest of

which is the Lisbon Treaty that entered into force on 1 December 2009. Given that ‘venue-shopping’ is currently the main explanation for the development of the EU asylum policy and that, at the same time, both the EU asylum policy and the EU itself have significantly changed over the last few years, it is important and necessary to re-visit this argument in the light of more recent policy developments. This article therefore aims to re-assess venue-shopping in the development of the EU asylum policy. To what extent have policy-makers been able to adopt more restrictive asylum provisions at the EU level as they intended?

The article starts by presenting the concept of venue-shopping and how it has been applied to the development of EU cooperation on asylum and migration matters, firstly by Guiraudon in 2000. Then, it examines the evolution of the EU asylum policy and analyses the extent to which the ‘venue-shopping’ to the EU policy venue has allowed policy-makers to fulfil their goal of developing more restrictive provisions on asylum. It shows that, overall, the switch to an EU venue for asylum policy-making has not led to more restrictive asylum provisions at the EU level. Actually, standards have been raised in several EU Member States. The article then sets out to explain this puzzle: why have policy-makers not been able to adopt more restrictive asylum provisions as they intended when switching to the EU asylum policy venue? In order to answer this question, the venue-shopping framework is first revisited and amended in several respects. This allows for the analysis to highlight the main factor accounting for the inability of policy-makers to adopt more restrictive asylum policies, namely the significant changes that have affected the EU ‘system of venues’ as a whole and, in turn, the EU asylum venue policy, making it more liberal. The article then considers how policy-makers willing to adopt more restrictive asylum provisions have reacted to this liberalisation of the EU asylum policy venue by looking for alternative policy venues once again.

Venue-shopping in the EU asylum and migration policy

Drawing upon the literature on ‘policy venues’ developed by Baumgartner and Jones (1993), Guiraudon (2000; see also Lahav and Guiraudon, 2006) has argued that a ‘venue-shopping’ framework is the most adequate to account for the timing of the creation, the form and the content of EU cooperation on asylum and migration matters. ‘Venue-shopping’ refers to the idea that policy-makers, when encountering obstacles in their traditional policy venue, tend to seek new venues for policy-making that are more amenable to their preferences and goals. In her first article on venue-shopping, which was published in 2000, Guiraudon argued that national officials began to cooperate on asylum and migration matters at the European level after encountering obstacles when attempting to develop increased migration controls at the beginning of the 1980s (Guiraudon 2000, p. 252). According to Guiraudon (2000; see also Lahav and Guiraudon, 2006), these obstacles were mainly situated at the national level and took various forms, such as judicial constraints, the activities of pro-migrant groups or the necessity for Interior ministries to compromise with other ministries (e.g. labour, social affairs) when making national legislation. Guiraudon particularly emphasised how attempts to further increase migration controls were stifled in several European countries by the jurisprudence of higher courts – what has come to be known as the ‘judicialisation’ of asylum and migration policies. The courts drew upon domestic constitutional principles such as fundamental rights, general legal principles such as due process, as well as international legal instruments to some extent.

Still according to Guiraudon (2000), venue-shopping has allowed the policy-makers who aimed to increase migration controls to do so by avoiding the afore-mentioned obstacles. First of all, venue-shopping helped policy-makers avoid judicial constraints as the European Court of Justice was not given the function to adjudicate on asylum matters under the Maastricht Treaty. In addition, the institutional mechanisms to deal with asylum and migration matters in

the EU with the Maastricht Treaty allowed Interior Ministers to keep firmly in control of these matters, by considerably restricting the roles of the European Commission, the European Parliament and the European Court of Justice, which were seen as more ‘migrant-friendly’. The creation of a separate Third Pillar also led to a decoupling of the issues of migration and asylum from other related issues such as employment and social affairs, which were dealt with by other parts of the European Commission. In addition, the switch to the EU policy venue made it more difficult for NGOs to monitor policy-making on asylum and migration, as they were organised at the national level until then. Finally, still according to Guiraudon, the development of intergovernmental cooperation on asylum and migration matters also made it easier to construct alliances with sending and transit countries in order to achieve a so-called ‘buffer zone’ around the European Union, with the effect of reducing numbers coming into the EU.

Guiraudon (2003, p.264) reasserted and refined her earlier argument in an article in 2003. She suggested that only one side in the EU asylum and migration debate managed to ‘venue-shop’ at the international level to pursue its own ambitions: national Interior ministers sought to regain control over asylum and migration policies from domestic courts and national adversaries by escaping to the EU level. In this article, Guiraudon (2003) analyses the way in which only one ‘camp’ managed to ‘go transnational’ in order to venue shop and escape domestic constraints – the national Interior ministers. Her empirical study explains the particular timing, form and content of EU policies through a political sociology approach, as she calls it. Initially, Guiraudon (2003, p.267) explains the way in which ‘policemen replaced diplomats’ during the intergovernmental negotiations leading up to the Maastricht Treaty and the creation of the Third Pillar. In this process, the Commission was excluded, apparently unable to play its role as a ‘policy entrepreneur’ (Guiraudon, 2003, p.269), despite the fact that she concedes that ‘diplomats stroke back’ (Guiraudon, 2003, p.270) in the negotiations on the Amsterdam Treaty. Yet, in her view, the ‘logic of the policy process has not drastically

changed', and even Brussels-based pro-migrant groups have not been able to change the environment significantly.

To date, there have been two main attempts to build upon Guiraudon's 'venue-shopping' framework to understand the development of the EU asylum and migration policy. Whilst Lavenex's (2006) contribution has focused on highlighting new patterns of 'venue-shopping' (*i.e.* outwards, rather than upwards), Maurer and Parkes (2007) have called for the inclusion of 'policy-images' in the analytical framework in order to better understand policy change.

Whilst Guiraudon has focused on the move of policy-making from the national level to the EU level where cooperation would mainly develop according to a pattern of intergovernmental cooperation (*i.e.* an upward shift), Lavenex has emphasised the importance of an outward shift of policy-making on migration matters towards the realm of EU foreign policy. According to her, this shift was a new attempt by immigration and asylum officials to regain more autonomy from more liberal actors in order to increase migration controls. Indeed, the EU policy venue had gradually changed and had seen the arrival of actors willing to develop a more comprehensive approach to migration, rather than an approach centred on migration control. As a result, asylum and migration officials tried to regain some room for manoeuvre by pushing asylum and migration matters into the realm of EU foreign relations, where according to Lavenex (2006, p. 346) 'supranational actors have fewer powers than they do in the now communitarised "internal" asylum and immigration policies'. Lavenex illustrates her argument with various examples which mainly concern irregular migration and border controls. Those include the activities of the Budapest Group to combat illegal immigration in Eastern Europe, the '5+5 Dialogue' for the Western Mediterranean that focuses on the fight against irregular migration and trafficking in human beings, the organisation of joint border patrols in the Mediterranean, the signing of readmission agreements, and the contents of the European Neighbourhood Policy. The only example mentioned that relates to asylum concerns the discussions of certain proposals on offshore

asylum processing in 2003-2004, which has virtually no impact on the EU asylum policy in the end. Thus, Lavenex has pointed to the interesting development of ‘outward venue-shopping’, but has not demonstrated its existence in the specific field of asylum.

In contrast with Lavenex’s work, Maurer and Parkes (2007) have not highlighted a new category of venue-shopping, but have rather sought to emphasise the importance of ‘policy-images’ in the ‘venue-shopping’ framework. In their view, there has not been any shift away from what they call the ‘previous security- and control-orientation of asylum policy’ after the entry into force of the Amsterdam Treaty. They have claimed that there have not been any significant policy changes in the field of asylum, because the policy-image of asylum has not changed (contrary to the institutional arrangements). Their argument is based on the analysis of one directive on asylum adopted in 2003 and that of the debates on the joint external processing of asylum claims in 2003.

Thus, the literature on venue-shopping in the field of asylum and migration suggests that national policy-makers have mainly decided to cooperate on these policy matters at the EU level in order to avoid domestic constraints and be able to adopt more restrictive provisions. One would therefore expect the EU measures adopted in recent years to involve a restriction of the rights of the persons to which they are applied. The next section puts this hypothesis to the test.

The development of the Common European Asylum System (CEAS): towards more restrictive asylum provisions?

The aim of this section is to analyse the extent to which the switch to the EU asylum policy-venue EU has allowed policy-makers to fulfil their goal of developing more restrictive provisions on asylum. On the basis that it is necessary to be as exhaustive as possible in order to capture any policy changes in the analysis, the section examines all the main legal

instruments adopted in the field of asylum to date.¹ Those are three directives that were adopted during the first phase of the development of the Common European Asylum System (CEAS) between 1999 and 2004 - the so-called 'reception conditions', 'qualification' and 'procedures' directives -, as well as the so-called 'Dublin Regulation'.²

The 'reception conditions' directive

The 'reception conditions' directive (Council Directive 2003/9/EC of 27 January 2003) lays down minimum standards for the reception of asylum seekers across Member States.. According to Hailbronner (2004, p. 78), this directive is particularly important (see also Monar, 2004, p. 118). Firstly, the substantial differences in reception conditions in the various EU Member States can be a factor for migratory movement of refugees within the EU. Logically, based on the Dublin convention and now the Dublin regulation, asylum seekers can only apply for asylum once in the EU, and thus the conditions in which they are being received matter significantly in their choice. In 2001, the Commission initiated this legislation, which was subsequently passed by the Council in January 2003. It defines certain key terms of the Geneva Convention, such as applicants for asylum, family members, unaccompanied minors, reception conditions, and detention. The directive only applies to applicants for asylum, which has been criticised (Guild, 2004, p. 213), especially as it does not apply to the 'temporary protection' directive. The directive generally accords freedom of movement to asylum seekers within the territory of the host state or within an area assigned to them by that state. This addresses more restrictive regulations of some EU Member States (Hailbronner, 2004, p. 79). Detention will only be allowed in order to check the identity of the applicant for asylum. In conclusion, this directive rectified one particular problem within the Member States - the wide variance of reception conditions. For most Member States, they

¹ Because of space constraints, this article focuses on asylum legislative instruments and does not consider the European Refugee Fund, which is a financial instrument.

² Other important instruments in the field of asylum include the so-called 'temporary protection' directive (Council Directive 2001/55/EC of 20 July 2001), which can only be implemented in the context of mass refugee movements. However, it has never been implemented to date. Another potentially significant development in the field of asylum was the decision to create a 'European Asylum Support Office' (EASO) in 2010; however, this Office is not operational yet. The EASO and the temporary protection directive are therefore not considered in this article.

will need to be higher than before the directive. Equally, there is no obligation to lower any favourable conditions.

The 'asylum qualification' directive

The asylum qualification directive (Council Directive, 29.04.2004, 2004/83/EC) addresses three important elements of asylum: (1) the recognition of refugees, (2) the content of refugee status, and (3) the approximation of rules. In addition, the directive highlights the grounds for qualification for subsidiary protection. In order to make the distinction between subsidiary protection and refugee status clear, the directive provides definitions of both concepts. As Hailbronner (2004, p. 58) suggests, both protection as a refugee within the terms of the Geneva Convention, and subsidiary protection – for those who fall outside the convention - are included in this legislation. The directive addresses many of the issues in substantive asylum law that have had forced divergences in national practices before, and it increases protection. Firstly, the established grounds for persecution are the same as in the Geneva Convention, thereby solidifying the group of people qualifying for refugee status. In addition to the generally accepted forms of persecution, the directive sets out three principles, which have not been applied by Member States prior to it (Hailbronner, 2004, p. 60). For the first time, '*persecution can stem from non-state actors*' where the state is unable or unwilling to provide protection. Given the increase in people fleeing on such grounds, this is a significant widening of the concept. Secondly, the directive also includes child specific and gender specific forms of persecution, not in existence prior to the legislation (Monar, 2005, p. 132). Finally, persecution may take place even though all persons in a particular country face generalised oppression. In essence, the effect of all these legal changes means that the directive goes beyond existing refugee rights enshrined in the Geneva Convention.

The 'asylum procedures directive'

On 9 November 2004, the Council agreed politically on the directive on minimum standards for procedures - the Asylum Procedures Directive (Balzacq and Carrera, 2005, p. 50). The Commission had first presented its proposal for the directive in September 2000, and submitted an amended version by June 2002. After intense negotiations, a 'general approach' was agreed in April 2004, and politically confirmed in November 2004. The directive had not formally been adopted by the end of 2004 due to the lack of agreement on a list of 'safe country of origin'. Yet, on 1 December 2005 it was finally formally adopted, leaving the list to the side. The harmonisation of asylum procedures is of vital importance for a common asylum system together with the reception conditions directive. Firstly, it contributes to the prevention of secondary movements of asylum seekers. Secondly, it is vital for the asylum seekers themselves as they are no longer able to freely choose their country of application under the Dublin Regulation. As they cannot choose their country anymore, it is vital to harmonise procedures in order maintain fairness towards people in need of protection. Thirdly, this legislation will enable follow-up legislations in the area in the longer term (Hailbronner, 2004, p. 70).

The Asylum Procedures Directive defines minimum standards for procedures, which include: (1) access to the asylum process; (2) the right to interview; (3) access to interpretation and legal assistance; (4) detention circumstances; and (5) the appeals procedure. In addition, it defines controversial concepts, such as: (1) 'First country of asylum': this allows applications to be rejected where applicants have been recognised as refugees in another country with sufficient protection in that country; (2) 'Safe country of origin'³: this allows considering a group of applications of nationals of one country to be unfounded, thereby entering into an accelerated procedure; (3) 'Safe third country': this allows the transfer of responsibility for the processing of an asylum application to countries of transit to the EU.

³ It is worth noting that the European Parliament has successfully challenged aspects of the safe country of origin provisions before the European Court of Justice (ECJ) in case C133/06

Despite some severe criticisms of the three controversial concepts included in the directive, Ackers (2005) argues that several Member States will have to raise their standards to comply with the provisions in the general approach. Fullerton (2005) fully agrees with this view. In her article, she analyses the asylum situation in Spain and Portugal. Although the Iberian Peninsula is closer to regions of conflict and migratory routes than most European Union states, the numbers of asylum seekers registered in Spain and Portugal are far lower than in other Member States of comparable size and economic development (Fullerton, 2005, p. 659). While multiple factors deter refugees from seeking asylum in Spain and Portugal, their inadmissibility procedures are the most important. Both states employ an inadmissibility procedure which results in the rejection of a substantial majority of applicants for asylum prior to any hearing on the merits. The Asylum Procedures Directive limits the grounds for rejecting a claim as inadmissible, whereas the Spanish and Portuguese procedures dismiss asylum applications on far broader grounds. In conclusion, this section has demonstrated that the CEAS has brought legal advances in terms of refugee protection.

The 'Dublin II Regulation'

Regulation EC 343/2003 of 18 February 2003 established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The main goal of this regulation is to ensure that every asylum application is only examined by one Member State. Although some have criticised this regulation (which replaced the so-called 'Dublin Convention' of 1990) for putting an end to the possibility of multiple applications for asylum across the EU, the regulation prevents the phenomenon of 'refugees in orbit' by establishing clear criteria for identifying the state responsible to process a specific application for protection. This is a positive development compared to the previous situation where some asylum-seekers were sent from one EU Member State to another, without any of them being willing to process their application. Recent developments concerning Greece have also shown that EU Member States do not transfer applicants back to the country through which they entered the EU (as

the regulation authorises them to do) when there are concerns about how these applications would be processed in that country.⁴

It can therefore be concluded that the first phase of the development of the CEAS has, overall, led to an improvement of international protection standards in the EU. The agreement on common minimum standards prevents a ‘race to the bottom’ between national legislators. They are not competing with each other anymore for more restrictiveness, and thus do not need to lower their standards below their neighbours in order to reduce the numbers of asylum applications that they receive. In addition, the adoption of common minimum standards with respect to various aspects of the asylum systems has actually led to improvements in several Member States, whilst there is no evidence that Member States that had higher standards than the minimum standards lowered them as a result of the adoption of the various directives previously discussed. Thus, the legislative instruments adopted at the EU level have *not* led to increasing restrictiveness as one would have expected according to the ‘venue-shopping’ framework, but rather to the adoption of asylum measures that are, overall, more liberal.

Furthermore, this trend is set to continue in the future. The Lisbon Treaty has recently granted the EU the competence to adopt, in accordance with the ordinary legislative procedure, legislative instruments for, amongst others, a uniform status of asylum valid throughout the Union, a uniform status of subsidiary protection, a common system of temporary protection, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, criteria and mechanisms for the determination of the Member State responsible for considering an application for protection, standards for reception conditions, and partnership and co-operation with third countries for the purpose of managing inflows of people applying for protection (Article 78 TFEU). Thus, the objective is to set common (rather than minimum standards) at the EU level. As one cannot envisage that these standards

⁴ At the time of writing, several EU Member States, including the United Kingdom, the Netherlands, and Belgium, as well as Norway, no longer transfer asylum applicants back to Greece, whilst waiting for a ruling of the European Court of Human Rights on the transfer of asylum applicants to Greece.

could be below the existing minimum standards, it can be argued that those are set to increase, which will further strengthen the liberal character of the EU asylum policy venue and, concomitantly, decrease its restrictive nature.

Explaining the absence of a less restrictive EU asylum policy

As the systematic examination of the most important legal instruments in the field of asylum has revealed that the switch to the EU policy venue has not led to an increase in restrictiveness in the field of asylum (but rather to a decrease), it is important to explain this outcome since it differs from one would have anticipated on the basis of the venue-shopping framework.

Revisiting the venue-shopping framework

In order to explain this puzzle, it is necessary to revisit the venue-shopping framework originally applied by Guiraudon. This article suggests making three main changes to it. First of all, it is suggested analytically breaking down the ‘EU asylum and migration’ policy venue considered by Guiraudon (as well as Lavenex) into three distinct venues that concern asylum, borders and migration respectively. The main reason for this move is the fact that these three issues, albeit closely related, are distinct policy issues with regard to which policy-makers pursue significantly different goals. The EU defines the goal of its ‘common policy on asylum, subsidiary protection and temporary protection’ as ‘offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*’, whereas the goal of the EU’s ‘common immigration policy’ is defined as ‘ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings’ (Articles 78 and 79 of the consolidated version of the Treaty on the Functioning of the EU). With regard to the external borders, the EU aims to gradually introduce an integrated management

system for external borders with a view to ensuring a high and uniform level of control of persons and surveillance at the external borders (Article 77 TFEU). As EU activities concerning each of these policy issues have significantly developed over the last few years, distinguishing between them allows for a more precise analysis of their development, including the possibility to highlight the existence of different trends in the different policy venues.

Secondly, this article suggests that an analytical framework based on policy venues can be enhanced by acknowledging that some policy venues, whilst being distinct, partially depend on one another. This means that any analysis can be enhanced by considering what can be termed the ‘co-dependent’ venue(s). For example, in the EU, the asylum policy venue is dependent on the borders venue. This is because Member States generally require asylum-seekers to be on their territory (or at least at their borders) in order to be able to apply for asylum (see Danish Centre for Human Rights 2002; Noll 2005). In other words, measures decided in the borders policy venue, although they correspond to a specific and distinct aim, have a significant impact on asylum, which is decided upon in a distinct venue. The borders policy venue therefore needs to be also considered in any analysis of the asylum policy venue.

Thirdly, this article argues that it is important to analyse any policy venue in the broader context of the ‘system of policy venues’ to which it belongs. This idea was already put forward by Baumgartner and Jones, who have developed their framework with reference to the US federal system (1993, 2009). Of particular interest to the present analysis is their observation that ‘[while] the various parts of the federal system differ from each other in a number of ways, they are also part of a whole. As parts of a single system, they can all simultaneously be affected by changes in the structure of the federal system itself’. Such institutional changes can, in turn, cause ‘dramatic changes in the behaviors’ of the actors concerned over time (Baumgartner and Jones 2009, p. 216). Adapted to the EU political system, this refers to the idea that policy venues, such as the EU asylum policy venue, may be

affected by the constitutional-level changes that remodel the EU institutional setting. The various treaties that have been adopted in recent years, the most recent of which is the Lisbon Treaty, have had an impact on the competences of the various EU institutions and the rules for decision-making. In turn, those may have had an important effect on the behaviour of the actors that are active in the EU asylum policy venue, as well as on that of the actors who are active in the co-dependent EU borders policy venue.

In application of these conceptual developments, the next section examines the changes that have been made to the ‘system of policy venues’ to which the EU asylum policy venue belongs. As previously argued, it is necessary to examine those as they have had an important impact on the actors’ behaviours in specific venues and the policies that have subsequently been adopted.

Changes to the EU ‘system of policy venues’

Recent years have seen significant changes made to the EU system of policy venues through the entry into force of various treaties, such as the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty. Whilst they affected the EU system of policy venues in its entirety, changes had two important effects on the EU asylum policy: (1) the strengthening of the role of the EU institutions (European Commission, European Parliament and European Court of Justice) in the EU asylum policy venue compared to the initial intergovernmental institutional setting established by the Maastricht Treaty (‘communitarisation’ of asylum) and (2) a significant increase in the importance of judicial actors and texts (‘judicialisation’) in the EU asylum policy venue.

Changes to the institutional framework: the increasing communitarisation of asylum

There have been significant changes affecting the EU institutional framework in recent years and some of those have had an important impact on the EU asylum policy. At the time of writing her 2000 article, the asylum policy venue examined by Guiraudon had been strongly intergovernmental for the most part, as the few changes introduced by the Amsterdam Treaty were only to come into force in 1999. Indeed, the Maastricht Treaty had established two new ‘intergovernmental pillars’, one for the Common Foreign and Security Policy (CFSP) and the other for Justice and Home Affairs (JHA) matters (which included asylum issues). With regard to asylum matters (see Article K of the Maastricht Treaty), Member States were largely dominant in the policy-making process. The European Commission was only ‘fully associated with the work’ in the area of asylum, whilst the role of the European Parliament was limited to being informed and consulted on the initiatives of the Member States. As for the European Court of Justice, it was not given any role with respect to EU asylum provisions.

This institutional architecture was already significantly changed by the Amsterdam Treaty, which entered into force in 1999. Several of these institutional changes had an important impact on the EU asylum venue, leading to an increased ‘communitarisation’ of asylum. The role of the European Commission was reinforced as it received the competence to draft proposals on various aspects of the EU asylum policy, as has been explained in the previous section. However, during a transitional period of five years, the European Commission was to share its right of initiative with the Member States, before acquiring the sole right of initiative (Article 73o of the Amsterdam Treaty). Although this institutional arrangement has often been seen as a ‘brake’ on the Commission in order to curb its legislative powers, the European Commission managed to significantly influence the EU asylum provisions adopted during the transitional period by playing the normative role of ‘supranational policy entrepreneur’ as argued in the previous section (Kaunert, 2009a). During the transitional five-year period, the Council took decisions unanimously after consulting the European Parliament. The Amsterdam Treaty also contained a provision granting the Council the

possibility to decide, after the five-year transition period, that the co-decision procedure was to apply to various policy issues, including asylum. The application of the co-decision procedure would greatly enhance the role of the European Parliament in the development of the EU asylum policy.

The Amsterdam Treaty also gave the European Court of Justice a more prominent role in the EU asylum policy venue. With regard to asylum matters, the ECJ was granted the competence to rule, when asked by a national court or tribunal, on two types of questions: those on the interpretation of the Treaty provisions on asylum and those on the validity or interpretation of acts of the institutions of the Community based on the Treaty provisions on asylum, but only in cases ‘pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’. Although the limitations to the role of the ECJ have often been criticised, this was nevertheless a significant change, which led to several cases before the Court as will be discussed in the next section.

The Lisbon Treaty, which has entered into force on 1 December 2009, has further strengthened the role of the ECJ and the European Parliament respectively (Kaunert, 2009b). This has in turn reinforced the liberal character of the EU asylum venue and is rendering the adoption of more restrictive asylum provisions less likely. The Lisbon Treaty has amended and reorganised existing treaties into two separate treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Article 3(2) TEU has elevated the ‘Area of Freedom, Security and Justice’ (AFSJ) to the status of EU objective, on par with the Internal Market (Article 3 (3) TEU).⁵ In addition, the EU legal competences in the AFSJ have been clarified, as Article 4 (2j) TFEU has categorised this policy area, including asylum matters, as one of shared competences. Article 294 TFEU (formerly Article 251 TEC) has established co-decision as the standard decision-making

⁵ It states that ‘[the] Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime.’

procedure in the whole AFSJ, including asylum matters, with qualified majority voting (QMV) in the Council. This gives the European Parliament joint decision-making power. In addition, judicial control is expanded by applying the normal court rules on the European Court of Justice's jurisdiction to all AFSJ matters in all EU Member States, including asylum. These institutional changes may have very strong implications for the development of the EU asylum policy. In general, the role of supranational institutions has been greatly strengthened, with the European Parliament having the potential to greatly influence the future balance of power between the different EU institutions and the resulting policy outcomes. Nonetheless, while this supranational dimension in the EU institutional structure has been strengthened, the role of the European Council (Heads of State or Government) as a strategic decision-making institution in the whole AFSJ has also been reinforced. Overall, this might very well lead to a diminished influence of EU Interior Ministers.

This analysis of the development of the EU 'system of policy venues' has showed how it has led to an increasing 'communitarisation' of asylum, with growing roles for the European Commission, the European Parliament and the European Court of Justice. More 'refugee-friendly' than Interior ministers, the growing presence of these institutions in the EU asylum policy venue has represented an increasingly important obstacle for national policy-makers willing to develop a more restrictive asylum regime in the EU. This has led to the adoption of asylum provisions that, although they were criticised by some observers for not being generous enough, overall made asylum provisions less restrictive than was previously the case.

The increasing 'judicialisation' of the EU asylum venue policy

In addition to these institutional changes, another important factor to explain why the asylum provisions adopted at the EU level have not turned out to be as restrictive as might have been anticipated by both policy-makers and scholars alike is a series of changes that amount to the increasing 'judicialisation' of the EU asylum policy venue, which can be defined in a broad

sense as the increasing influence of juridical texts and actors on asylum policy-making). Amongst those, one can highlight the gradual strengthening of the role of the ECJ with respect to asylum matters⁶, as well as the inscription of the Geneva Convention and the EU Charter of Fundamental Rights in the EU treaties.

As previously explained, the ECJ has been given an increasing amount of competences towards asylum matters, which have led to several cases in recent years.⁷ In that respect, case C-465/07 (*Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*) - which followed a referral by the Dutch *Raad van State* and was related to Directive 2004/83/EC, that is, the so-called ‘qualification directive’ – is particularly important. By clarifying some of the ambiguous provisions contained in the ‘qualification directive’ regarding the scope its Article 15 (c) , it has demonstrated the important role that the ECJ has begun and will continue to play in offering less restrictive and more generous interpretations of EU legislation than the Member States. In addition to the other cases on which the ECJ is expected to rule in the near future, the role of the ECJ in the EU asylum policy venue will be reinforced following the introduction in 2008 of a new high-speed preliminary ruling procedure for references in the area of freedom, security and justice for cases where an urgent response is required because of issues of personal freedom (Millett 2008). It can notably be applied to provisions concerning asylum.

⁶ This comes in addition to the (indirect, but significant) influence of the Strasbourg Court of Human Rights. The Court is not part of the EU; neither is the EU party to the European Convention on Human Rights (ECHR). However, all Member States of the EU are party to the Court, which has ruled more than 45 times on cases concerning asylum since 2005 (Bossuyt, 2010). The ECJ rulings also make references to the ECHR. The ECHR and the Strasbourg Court of Human Rights have also indirectly contributed to the ‘judicialisation’ of the EU asylum policy venue.

⁷ Case C-133/06 (*European Parliament v. Council*) concerned an action for annulment brought by the European Parliament against Council Directive 2005/85/EC of 1 December 2005 on minimum standards of procedure in Member States for granting and withdrawing refugee status. Case C-19/08 (*Migrationsverket v. Petrosian*) followed a referral by a Swedish Court and concerned the implementation of two specific provisions of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

In addition to the reinforced role of the ECJ with regard to asylum matters, the ‘judicialisation’ of the EU asylum policy venue is also the result of the growing importance of legal texts that increasingly constraint policy-makers when adopting EU asylum provisions. The most important of them are the Geneva Convention and the Charter of Fundamental Rights. The Amsterdam Treaty made reference to the Geneva Convention in the provisions concerning asylum by indicating that the various asylum measures foreseen by the treaty should be adopted ‘in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties’. This is an important development because it has strengthened the legal value of the Geneva Convention (see Kaczorowska, 2003; Shaw, 2000). This was particularly well illustrated by developments in the UK, where calls for withdrawing from the Geneva Convention had been regularly aired a few years ago, notably by the then Home Secretary David Blunkett in 2003 (BBC, 05.02.2003) and the then leader of the opposition Michael Howard in 2005 (BBC, 22.04.2005). While this might have been legally possible before under international law, the proponents of such a move had to rapidly acknowledge that this was no longer the case. The UK has opted into all the EU asylum directives, which have been adopted in accordance with the Geneva Convention and are fully binding and enforceable in UK courts. In other words, the UK would only be able to withdraw from the Geneva Convention if it were also to leave the EU altogether. This case highlights how the development of EU cooperation on asylum has led to the direct introduction of the Geneva Convention within the EU legal order, which has strengthened the legal standing of the Geneva Convention in the EU and, thereby, significantly constrains those policy-makers who are interested in adopting more restrictive asylum provisions.

Another important change to the EU political system that has affected the asylum policy venue - also by making it less restrictive – has been the incorporation of the Charter of Fundamental Rights into the EU’s legal order following the entry into force of the Lisbon Treaty on 1 December 2009. Article 6(1) TEU provides a cross-reference to the Charter on

Fundamental Rights which renders the latter directly legally binding for the European institutions, Union bodies, offices and agencies, as well as Member States when they adopt and implement Union law, including in the field of asylum (except those that have exceptions to various degrees, such as the UK, Poland, and in principle, soon the Czech Republic and Ireland⁸). Amongst these fundamental rights, the right to asylum is enshrined in Article 18 of the Charter. According to Gill-Bazo (2008), this provision concerns all individuals falling under EU legislation, whose international protection grounds are established by international human rights law, including the Refugee Convention and the European Convention on Human Rights. The fact that the Charter of Fundamental Rights, which notably contains the right to asylum, has now become legally binding is an important development for the EU political system as a whole. It significantly affects the EU asylum policy-venue by rendering it less restrictive and more liberal than before. Article 19 of the Charter also forbids collective expulsions and states that ‘no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.

Thus, the increasing ‘judicialisation’ of the EU asylum policy venue has rendered it increasingly liberal and less amenable to the adoption of restrictive asylum provisions as favoured by national policy-makers. Taken together with the increasing communitarisation of asylum, which has strengthened the position of relatively more liberal actors at the EU level, the EU asylum policy venue has become increasingly less attractive to those willing to develop a more restrictive asylum regime. If one follows the ‘venue shopping’ argument once more, one would expect these rational policy-makers from the national Interior ministries to start looking for new policy venues more suitable to their policy objectives. The following section examines whether national policy-makers have been looking for alternative policy-venues.

⁸ The guarantees given to the Czech Republic and Ireland do not have legal force until they are added to the next EU treaty, due at the time of the next enlargement of the EU.

In search of alternative venues for the adoption of more restrictive asylum measures?

Given that the upward venue-shopping has not led to the adoption of more restrictive asylum measures, but rather of more liberal provisions overall, one would expect the rational policy-makers aiming to adopt more restrictive asylum measures to look for alternative venues that would be more amenable to their objectives. The main alternative to upward venue-shopping is *outward* venue-shopping, which corresponds to a displacement of policy-making towards the realm of external relations. As previously explained, Lavenex had already reported this trend in 2006 in the field of immigration control. It is now necessary to examine whether there has been outward venue-shopping with respect to the specific issue of asylum.

The answer to this question is clearly negative. It is particularly interesting to note that one EU Member State, namely the United Kingdom, actually put forward a proposal that would have organised EU outward venue-shopping in the field of asylum, had it not been resoundingly defeated a few weeks later. Indeed, in March 2003, the British government sent to its counterparts in the EU a proposal entitled ‘New International Approaches to Asylum Processing and Protection’ (UK Government, 2003), which aimed to develop the so-called ‘extra-territorial processing of asylum claims’. This proposal had two complementary components, namely (1) the adoption of measures to improve the regional management of migration flows, including the establishment of ‘protected areas’ for asylum processing and (2) the establishment of processing centres for asylum-seekers on transit routes to Europe. It is the latter that turned out to be particularly controversial and was sharply criticised by pro-migrant non-governmental organisations and some media outlets. The German and Swedish governments also openly expressed their opposition to the British proposal, which had come to be known as the ‘“concentration camp” plan’ in EU circles (Independent, 19.06.2003). The British proposal was sharply criticised on moral, practical, economic, and legal grounds. It was branded immoral for attempting to shift asylum responsibilities to countries that are poorer and lack asylum infrastructures. It was seen as impractical, notably because of the

necessity to transport asylum-seekers to and from the asylum processing centres and the difficulties to find hosting countries for these centres. It was also argued that the implementation of the British proposal would have a prohibitive cost, whilst raising many legal difficulties, in particular with regard to the standards of protection granted to the asylum applicants. Ultimately, all these problems proved to be insurmountable, which led the British government to withdraw its proposal in June 2003. Thus, there has not been any outward venue-shopping in the field of asylum. Moreover, and perhaps even more importantly, it can be argued that such outward venue-shopping with respect to asylum is highly unlikely in the future. This is because the main obstacles to such a development that were identified in 2003 still hold as much as before - and perhaps even more given the recent developments that have further increased the liberal and progressive character of the EU asylum venue.

However, this does not mean that national policy-makers are entirely unable to restrict asylum provisions in the EU. This is because it is also possible to indirectly influence policy outcomes by acting in a 'co-dependent' policy venue, as argued earlier. It is therefore important to recognise that, whilst standards have, overall, been raised for refugees and asylum-seekers in the EU, it has become increasingly more difficult to access them as strengthened border controls have made it more difficult for most persons, including asylum-seekers, to cross the EU's external borders (Léonard, 2010). Thus, this validates to some extent the argument that there have been restrictive tendencies with regard to refugee protection in the EU. The use of a venue-shopping framework allows us to highlight that the EU asylum policy venue has become more liberal and less restrictive over the years, which has led to more generous policies towards asylum-seekers and refugees in the EU. However, developments in the 'co-dependent' external border policy venue have made it more difficult to access these more generous provisions. Given the fact that the more liberal character of the EU asylum policy venue has become legally cemented to a large extent, constraining policy-makers significantly, one may therefore expect national policy-makers to focus their efforts in that policy venue, which is more amenable to their restrictive policy preferences.

Conclusion

This article aimed to re-assess the value of the venue-shopping framework in explaining the development of EU cooperation in the field of asylum, ten years after this idea was originally put forward by Guiraudon (2000). According to this perspective, national policy-makers decided to move to the EU asylum policy venue in order to free themselves from the liberal constraints present in domestic politic contexts, such as the role of courts in protecting asylum-seekers' and refugees' rights, in order to develop more restrictive policies. This article has examined the development of the EU asylum policy and has showed that the main legislative instruments adopted in the field of asylum to date have made asylum provisions more generous, rather than more restrictive. Thus, the switch to the EU asylum policy venue has not allowed national policy-makers to fulfil their goal of developing more restrictive provisions on asylum.

It has been argued that this can be explained by considering the broader 'system of venues' in which the EU asylum policy venue is embedded. This system of venues has seen important changes following the adoption of various treaties in recent years. Those have led to an increased communitarisation of asylum matters and a growing judicialisation of the EU asylum policy venue, which have rendered this policy venue less amenable to the fulfilment of the restrictive policy interests of national policy-makers. As this trend is already significant and is set to continue, one has observed an attempt to 'venue-shop outwards', which has not been and is not likely to be successful in the field of asylum, mainly because of the continued presence of significant legal constraints that already exist at the EU level. The only alternative left to these policy-makers willing to restrict asylum provisions is to try and influence the asylum regime through policy measures adopted in a distinct, but closely related, policy venue, that of the external borders policy. In this way, policy-makers are not able to restrict the contents of the asylum provisions adopted at the EU level, but are able to restrict access to these more generous asylum provisions. This trend has already been observed and is set to

increase in the future, as the last alternative left for national policy-makers willing to develop a more restrictive regime.

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