The issues of subsidiarity and member state autonomy in asylum and migration policymaking have been present in the background of the political and legal conflicts among the EU member states. This paper demonstrates that treaty provisions on subsidiarity have been ineffective as safeguards of member state autonomy on immigration and asylum. Nevertheless, the treaties do endow the members with expansive autonomy in this policy area. The paper argues that this autonomy manifests itself in two different regimes that govern decision-making: intergovernmentalism and supranational consociationalism. Outside the scope of the treaties, intergovernmentalism has been effective in preventing irregular migration movements from outside the EU territory. Within the framework of the Lisbon Treaty, member states developed supranational consociationalism, an ultra-consensual decision-making regime that was first introduced in deeply divided societies. Applying this method in the EU context, the national elites have bypassed majority voting on asylum in the Council and resorted to consensus on ‘sensitive’ matters, where it is the governments affected that decide whether a given issue is sensitive. This paper argues that the current combination of intergovernmentalism and consociational arrangements should be maintained as it upholds political peace between the members. Nevertheless, given the ongoing problems with the rule of law in the area of immigration and asylum, the European Commission should limit member states’ non-compliance with the existing legislation.
Table of contents

Summary 3
Introduction 5
Current constitutional arrangement 5
Two regimes of governance 8
The EU’s supranational consociationalism 15
The return of intergovernmentalism 20
Discussion and conclusions 22
Recommendations 27
About the author 28
The issue of member state autonomy and prerogatives in asylum and migration policymaking has for some time been present in the background of the political and legal conflicts among the EU member states. In this context, subsidiarity, or safeguarding the ability of the lower levels of government to take decisions and action, has been contested in EU institutional debates and in the European public space more generally. The question of whether the EU has appropriated too many competences from its members or whether, on the contrary, member state insistence on national autonomy has precluded tackling the bloc’s asylum and immigration conundrums, continues to occupy scholars and policymakers alike.

This paper argues that treaty provisions on subsidiarity have been ineffective as safeguards of member state autonomy on immigration and asylum. Nevertheless, the treaties do endow the members with a large degree of autonomy on asylum and migration. This expansive autonomy manifests itself in two different regimes that govern decision-making in this area: intergovernmentalism and supranational consociationalism.

Intergovernmentalism was the only asylum and migration decision regime before the Lisbon Treaty came into effect in 2009. The member states have revived this decision-making method since the asylum and border crisis of 2015–16; they now frequently use this method when creating and implementing policies outside the scope of the treaties. This arrangement emphasises cooperation, overlapping interests and a voluntary transfer of power between governments; it links the EU’s national democracies horizontally.

The formulation of immigration and asylum policies within the framework of the Lisbon Treaty has led to the development of supranational consociationalism. This decision-making regime strongly resembles Arend Lijphart’s model of consociational democracy, a type of ultra-consensual political system that has been introduced in deeply divided societies. Thus, although the Treaty on the Functioning of the European Union mandates qualified majority voting on immigration and asylum, in practice the national elites have been bypassing majority voting on ‘sensitive’ matters, where it is the governments affected that decide whether a given issue is sensitive. On those specific matters, a government can be outvoted only with its own consent. This respect for national preferences within the EU has paralysed aspects of its asylum system, which is legislated according to the treaties.

1 I would like to thank several anonymous interviewees and correspondents for their insights; and Federico Reho, Dalibor Rohač and Adam Kittl for reviewing the paper. Thanks go also to the participants of a webinar that took place on 17 March 2021 for stimulating discussions and feedback. Tom McDonald assisted with finding voting records from the Council. Responsibility for mistakes or omissions remains mine.

2 In this paper, ‘the treaties’ is synonymous with ‘the Lisbon Treaty’. ‘The treaties’ consist of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.
The intergovernmental regime is compatible with supranational consociationalism. The EU members operate these two regimes in parallel. Under consociational arrangements, the member states’ representatives (‘segmental leaders’ according to Lijphart) have an extra motivation to cooperate when faced with external dangers. Having learned the lessons offered by the migration wave of 2015–16, the EU’s national politicians have united to assist each other in preventing and deterring illegal migration. Abandoning blockages in the Council, they have resorted to intergovernmental instruments that fall outside the treaty framework, in this way creating policy tools to significantly reduce illegal migration.

This paper argues that the current combination of intergovernmentalism and consociational arrangements on migration and asylum should be maintained in the years to come. The combination of these two regimes does not resolve all of the problems that the EU is facing with asylum and migration; yet it continues to be attractive to the national leaders and polities.

With regard to treaty-based policies on asylum, consociationalism favours the peaceful co-existence of its constituent segments over efficiency, decisiveness and the ability to adjust policies. The EU’s consociationalism compensates for disadvantages in the field of inter-state equity on sharing the refugee burden, efficiency and speed by maintaining political peace between the members. The European Commission’s current package of legislative proposals, the New Pact on Migration and Asylum, may succeed with a patient approach and readiness for compromise among the national elites. The preservation of national vetoes in this area remains one of the preconditions of the Pact being adopted if a new EU legitimacy crisis is to be avoided.

Intergovernmentalism has introduced a strong degree of policy flexibility and could be strengthened in those areas where member states, individually and as a collective, can be more effective. The Justice and Home Affairs Council should give mandates to individual member states or groups of member states to prevent and tackle irregular movements from outside the EU territory. With the scale of irregular migration reduced, the scale of the EU’s internal asylum policy riddle would become smaller.

Finally, given the ongoing problems with the rule of law in the area of immigration and asylum, the Commission should limit member states’ non-compliance with the existing legislation, and take them to court more readily than has been the case so far.
Introduction

Although one of the more homogeneous continents, Europe is becoming more ethnically heterogeneous as a result of immigration. And even though Europeans are inhabiting a continent of immigration, the EU’s decision-making methods on the issue continue to be questioned and debated.

The present study looks at the constitutional aspects of migration and asylum with regard to national autonomy, EU-level decision-making and subsidiarity. It first describes the current constitutional arrangements with regard to EU immigration, asylum and border-management policies. It goes on to explain the dual arrangement of the ‘EU immigration system’, which in this paper refers to the sum of migration, asylum and border-management policies at the EU and national levels. The system consists of the EU’s ultra-consensual decision-making arrangement and autonomous member state immigration systems. The following sections focus on the disadvantages and advantages of the present consociational system and on the mechanisms devised by the member states and EU institutions to cope with the disadvantages. The final section draws conclusions with respect to the viability of the consociational system and the concept of the EU as a peace project.

The study does not address the ongoing COVID-19 health crisis. This crisis has pushed down the number of asylum applications and illegal border crossings; it has generated reverse movements of migrants back to their home countries within and outside the EU. Nevertheless, the pandemic has changed nothing about the parameters of decision-making on asylum and immigration.

Current constitutional arrangement

In all existing federal states, including Switzerland, Germany, Austria, the US, Canada and India, migration, asylum and border control are competences that are handled at the central, federal level. This carries numerous advantages, including the creation of effective and enforceable policies; realising economies of scale in administering legislation; uniform standards; scope for rapid responses to crisis situations; and an easier matching of priorities for migration, foreign affairs, investment, trade, security, and humanitarian and development aid.

Decentralised arrangements, whereby policy is run at the constituent unit level, also carry advantages: they allow for policy innovations from below, and enable decision-making by the lower levels of government, which are typically better informed than central government. Decentralised policies tend to command more popular legitimacy. Decentralised arrangements make it much easier for the federal government to implicitly or explicitly allow one state or a group of states to act on behalf of
the federation in foreign policies. In highly diverse entities, decentralised migration policies also tend to take better account of deeply held cultural traditions and feelings of national and regional identity.\(^3\)

The set-up of the EU’s migration system differs both in theory and in practice from a centralised arrangement, typical of federal states. Unlike, for example, monetary policy, which is an exclusive EU competence, the powers relating to migration, asylum and border-control policies are shared between the EU and the member states.

This shared competence means that the EU makes political decisions on whether and to what extent the Union’s competence will be activated. The concept of shared competence implies a potentially large scope of action. Once the Union has adopted legislation, that legislation becomes superior to the constitutions and laws of member states. It follows that the member states may not apply a national rule which contradicts European law.

To limit this potentially vast Union power in the category of shared competences, the treaties include provisions on subsidiarity.\(^4\) Article 5(3) of the Treaty on European Union (TEU) explains that ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’. According to the Protocol on the Application of the Principles of Subsidiarity and Proportionality, attached to the treaties, the ‘Commission shall consult widely’ and send legislative proposals to national parliaments at the same time that it submits them to the European Parliament. The application of subsidiarity does not necessarily entail decentralisation, as a policy may be most appropriately conducted at the central level.

The treaties include a formalised process which allows national parliaments—but not regional or local bodies—to contest a draft law on the basis of the principles of subsidiarity. This defensive mechanism can lead to a review of a legislative proposal by the Commission. The agreement of one-third of the EU’s national parliaments is needed to force a review of a legislative proposal. In reality, groups of national parliaments have used these provisions only three times since the adoption of the Lisbon Treaty. The mechanism has never been used with regard to migration and asylum because the necessary coalition of nine national parliaments has not emerged with regard to any legislative proposal. Most national parliaments prefer to influence their own government’s behaviour in the Council rather than embark on a complex and uncertain subsidiarity procedure.

\(^3\) See F. Reho, *For a New Europeanism*, Wilfried Martens Centre for European Studies (Brussels, 2017), 7.
\(^4\) TFEU, Protocol (no. 2) on the Application of the Principles of Subsidiarity and Proportionality.
Division of competences

The Treaty on the Functioning of the European Union (TFEU) stipulates that the Union's objective is to determine the standards and parameters for border policies, asylum and immigration, including the fair treatment of non-EU nationals; to manage migration flows; and to prevent and combat illegal immigration and human smuggling. The member states determine their own immigrant integration policies. The treaties do not touch upon the prerogative of a member state to guard its external border: Article 4(2) of the TEU guarantees the member states’ right to ‘ensur[e] the territorial integrity of the state’. The treaties specifically reserve to the members the competence of admitting third-country nationals to their own territories. In some areas, for example the conclusion of readmission agreements with third countries, both the EU and the individual member states are able to make agreements under the TFEU.5

Determining the volume of immigration for employment purposes, which forms a substantial part of the EU's migration inflows, is explicitly reserved to the member states. The member states’ autonomy on labour migration is reinforced by the nature of the national labour markets, which tend to be highly specialised and formalised. Treaty provisions on asylum contain no specific limitations on volumes of asylum seekers. However, the acquis communautaire6 gives full autonomy to the member states to assess individual applications for international protection. Varying recognition rates for the same nationality of applicant and varying legal procedures and material conditions for the applicants all result from this set-up.

While endowing the member states with substantial powers in terms of legal migration, the treaties also stipulate the formulation of a ‘common [EU] policy on asylum, immigration and external border control’. Articles 77 to 79 of the TFEU set specific policy objectives for the EU. These articles are centred around and derived from the need to sustain the ‘area of freedom, security and justice’. The free movement of people across the EU, embodied in the ‘Schengen’ regime, is at the core of this.7 The imperative to secure free movement across the EU is reflected in the Union's competence to set the rules for carrying out personal checks on people at the external borders.

The competence to establish the rules for asylum and subsidiary protection and the status of the relevant third-country nationals belongs to the Union, as does the power to set the ‘criteria and mechanisms for determining which member state is responsible for considering an application for asylum or subsidiary protection’ (operationalised as the Dublin rules).

In addition to the standards for border checks and asylum, the Union has been given a third large group of competences that covers ‘a common immigration policy’. This includes the ‘efficient management of migration flows’, and ‘the prevention of, and enhanced measures to combat, illegal im-

---

5 Art. 79 TFEU.
6 The accumulated legislation, legal acts and court decisions that constitute the body of EU law.
7 Art. 77(1) TFEU.
migration and trafficking in human beings. This broad mandate extends to setting the conditions of entry and residence, including those for family reunification; and measures taken to combat illegal immigration and unauthorised residence, including the removal and repatriation of people residing in the EU without authorisation.⁸

Two regimes of governance

The historical development of migration policies in the EU has resulted in a complex division of powers that offers only a distant resemblance to a federal arrangement. The core function of controlling access to territory has been performed by the modern nation state since its foundation in the nineteenth century; this has not changed with the creation of the EU or with the introduction of the concept of subsidiarity in the treaties. Just as a century ago, it is the individual states rather than any EU body that have the legitimacy and means to operate immigration, asylum and foreign policies on a daily basis.

Inside the EU, two separate modes, or regimes, of decision-making have emerged, intergovernmentalism and supranational consociationalism. Both are based on the expansive autonomy that the treaties grant to the members on the issues of immigration, asylum and border management.

The regime that governs migration and asylum decision-making outside the treaties, and goes back to the beginnings of Justice and Home Affairs (JHA) cooperation in 1985, is intergovernmentalism. Intergovernmentalism emphasises cooperation, overlapping interests and a voluntary transfer of power; it horizontally links the EU’s national democracies. The participating states decide on the nature, extent and duration of their cooperation.⁹

This decision-making regime posits that horizontal relationships between states are just as important as the vertical relationships between the different levels of government and between the EU and its citizens. It allows for the preservation of national identities and opens up democracy at the national level to transnational logics. Alternative models, such as that of polycentric subsidiarity as described by van Zeben and Nicolaïdis,¹⁰ are far too all-encompassing to apply to the field of migration and asylum. Polycentric subsidiarity includes all the elements of intergovernmentalism but also includes horizontal transfers of power between governmental and non-governmental actors, emphasising subsidiarity ‘all the way down’¹¹ to the citizen. It aims to ‘facilitate the organic development of self-

---

⁸ Art. 79 TFEU.
¹¹ Ibid., 2.
governing collectives and individuals. Arguably, polycentric subsidiarity does apply to the specific area of migrant integration; however, this stands outside the scope of this paper.

How does intergovernmentalism apply to the EU’s migration policy? The objective of ensuring the free movement of people was first laid out in the Rome Treaty of 1957, the founding treaty of the European Economic Community. The EU’s immigration policy is a by-product of these free movement arrangements. The policy has developed consensually between member states, from ‘below’, outside the treaties and, in the first decades of the European integration process, without any involvement of the European Commission. Thus, the 1990 Schengen Convention to allow the free movement of people was only signed by 6 of the then 10 member states. The European Commission had no role to play in the implementation of the Convention.

Asylum was first mentioned in a European treaty in the Treaty of Maastricht, effective from 1993. Only non-binding resolutions could be adopted based on the provisions included in this treaty. Council voting was strictly unanimous and the European Parliament’s role was limited to that of a consultation partner.

Political and policy developments have gradually led to the emergence of a new decision-making regime. In recognition of the need to coordinate policies and impose a certain degree of uniformity in order to ensure free movement inside the EU and respond to security challenges, subsequent treaties have gradually attempted to harmonise asylum and immigration rules at the EU level. This has begun to dilute the purely intergovernmental model of decision-making in favour of supranationalism, a regime in which the advantages of common action compensate for the inevitable loss of national sovereignty.

The Treaty of Amsterdam, effective from 1999, laid the foundations for this process, having incorporated the Schengen Agreement into the acquis. The Commission was given the sole right of legislative initiative; the European Parliament obtained co-decision powers. The Treaty allowed for the introduction of majority voting five years after its adoption, but this clause was not subsequently activated.

The adoption of the Lisbon Treaty, effective from 2009, sealed the establishment of supranationalism in the area of asylum and migration. The ‘community method’ of law-making made the European Parliament a co-legislator on border control and asylum measures. It also institutionalised majority voting on JHA matters. Majority voting, by definition, makes it possible for a member state or a group of members to be outvoted on immigration, asylum and border-control. Horizontal cooperation can continue; but the values of self-governance and the overlap of interests can no longer be granted

12 Ibid., 22.
13 Art. 16(3) TEU: ‘The Council shall act by a qualified majority except where the Treaties provide otherwise.’ According to Art. 283(3) TFEU, ‘A qualified majority shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States. A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained’. See also Art. 78(2) TFEU and Art. 294 TFEU.
as a national preference may have to give way to the preferences of the majority. Even the losing government is bound by the decisions taken.

The supranationalist management of the area of migration and asylum is governed by its own rules, which distinguish it from the management of other policy areas. In fact, the EU asylum and immigration system replicates all the main features of the consociational democracy model. Arend Lijphart described this democratic model in his book *Democracy in Plural Societies: A Comparative Exploration*, published in 1977. In the twentieth century, consociational democracies were created in societies divided by religion, ethnicity, ideology or class. The Netherlands, Belgium and Austria are examples of democratic political systems that served—and in Belgium, continue to serve—to keep segmented societies together.

The main elements of a consociational model (which is both descriptive and normative) are as follows: a grand coalition, the assurance of a minority veto, proportionality in the distribution of financial resources and rule by the minority over itself. The functioning of the model is fully dependent on cooperation between the ‘segmental leaders’ who continuously maintain ‘intersegmental elite cooperation’ to keep the model functioning. The main objective of the model is the maintenance of a ‘negative peace’. Whereas a ‘positive peace’ would mean fraternity between the segments, a ‘negative peace’ simply means peaceful coexistence. As Lijphart argued, ‘in a plural society, democratic peaceful coexistence is vastly preferable both to nondemocratic peace and to an unstable democracy rent by segmental strife’.

This model can be applied to the entire EU political regime as it operates according to the treaties. EU ‘society’ is composed of its national segments, or constituent nations (currently 27). Facing the need to find institutional mechanisms to manage policymaking in a large polity divided by history, language, administrative tradition and state ideology, the EU’s national leaders have devised a consensual system that ensures the continued existence of this polity.

The EU asylum system in particular displays the main characteristics of a consociational model operated on a supranational level. The ‘grand coalition’ is the permanent coalition of all the member states, with membership changing only with the accession or secession of a member. Self-rule by the minorities over themselves is performed by the EU’s national governments setting their own immigration and asylum rules within the EU legal framework. The right of a minority veto has been cre-

---

15 Ibid. See also V. Bacovský, ‘Democratic Deficit in the EU: The Real Problem of the EU?’, Dahrendorf Taskforce Publication Series, European Liberal Forum and the Friedrich Naumann Foundation for Freedom (Prague, 2015).
17 The nature of the EU immigration system as a consociation fits well with Brendan O’Leary’s concept of the EU as a ‘confederation with consociational decision-making’. Confederations preserve the international legal personality of their members, while permitting the limited pooling of sovereignty. See B. O’Leary, ‘The Nature of the European Union’, *Research in Political Sociology* 27 (2020), 17–44, 31.
ated by the JHA Council, that is, the national ministers of the interior, deliberately avoiding the treaty instrument of majority voting. EU funds for migration, asylum and migrant integration are distributed based on a formula of local need combined with a national entitlement.

Like intergovernmentalism, a consociational arrangement privileges legitimacy over efficiency. Also like intergovernmental systems, consociational systems tend to be wasteful and costly, producing highly unequal outcomes for individuals. However, unlike intergovernmentalism, which naturally favours positive outcomes for the participating entities, the chief objective of consociational arrangements is the maintenance of a negative peace inside the strait jacket of the treaties.

As described below, intergovernmentalism returned as an alternative to supranationalism in the second half of the 2010s. Thus, a complicated arrangement now governs the EU immigration system. At the national level, largely autonomous decisions are taken on who to admit to the country’s territory and how to apply the EU rules. At the EU level, an ultra-consensual decision process has emerged to fulfil the policy objectives set out in the treaties. A number of new policies are now managed under intergovernmental arrangements that allow a flexibility that cannot be deployed through supranationalist means. The resulting system is marked by dysfunctions and a remarkable fragmentation of policies, yet it also serves the function of maintaining peaceful coexistence inside the EU in general and enabling cooperation on border management and the prevention of irregular migration in particular.¹⁸

**Politics of relocation**

Following the adoption of the Lisbon Treaty, the successive presidencies of the Council tended to abide by the provisions on majority voting. Up until 2015 a member state or a minority of states often voted against majority decisions without being able to overturn them. These decisions concerned areas such as labour migration, visas, border control and EU funding for national immigration infrastructure and migrant integration.¹⁹

Publicly available voting records show that the Council used qualified majority voting on asylum legislation between 2009 and 2013. Where there was opposition to a legislative file, it came from a single small or medium-sized country. Several Council votes between 2008 and 2013 demonstrate this point. During a 2008 vote, following negotiations within and between the EU institutions, the JHA Council approved the Returns Directive almost unanimously; no country voted against, but Belgium abstained. In 2013, the JHA Council unanimously adopted the Reception Conditions Directive and Asylum Procedures Directive, with Denmark, Ireland and the UK not voting due to their opt-outs.

¹⁸ Subnational, or regional (meso-level), governments may be involved in implementing migration policies, especially when it comes to the integration of foreign nationals. Nevertheless, in no country do meso-level governments control the admission of migrants to their territory.

The 2015 JHA Council vote on the mandatory relocation of asylum seekers revealed the existence of a new factor. A bloc of four countries, Czechia, Hungary, Romania and Slovakia, was able to politicise this vote. This politicisation had the effect of establishing a new unwritten rule, that of not outvoting a fellow interior minister on a sensitive immigration matter. According to this principle, the ‘sensitivity’ of a particular legislative file or Council decision is in the eye of the beholder, the beholder being the government or governments that are concerned about the issue. Despite claims to the contrary, the collective choice to allow the right of veto on asylum policies is not forbidden by the treaties.

During 2015 hundreds of thousands of migrants and refugees, mostly Syrian refugees residing in Turkey, began crossing the EU’s maritime border to Greece and Italy. With the EU’s border protection still in its infancy, the Greek and Italian asylum systems overwhelmed, and the then Greek government ideologically opposed to border control, the EU’s ‘asylum and border regime crisis’ ensued. By March 2016 almost 1.5 million unauthorised migrants had crossed from Turkey to Greece, causing a temporary breakdown of law and order in the Balkans and sending the EU into an unprecedented political crisis.

The European Commission’s crisis response was multifaceted. As a medium- to long-term measure, the Commission began to prepare legislative proposals to reform the Common European Asylum System. As a short-term measure, the Commission put on the table proposals to immediately relocate irregularly arriving asylum seekers from the front-line states. The first proposal, supported by the European Parliament, was for the relocation of 40,000 refugees. The Council rejected the idea of the relocations becoming mandatory, but on 14 September, it unanimously voted for voluntary relocations from Greece and Italy.

More controversially, the Commission, backed by the majority of members, submitted a proposal to introduce of an obligatory relocation mechanism for 120,000 refugees in Greece and Italy, valid for two years. The proposal was adopted by a large majority of governments on 22 September. However, in the run-up to the vote on this decision (a non-legislative proposal), Czechia, Hungary, Romania and Slovakia discovered the charm of creating a minority alliance in opposition to the rest of the EU. While Finland abstained, these four countries voted against the mandatory relocation proposal, protesting against a Brussels ‘diktat’. Their legal arguments centred around security threats and national sovereignty. On their defeat in the Council vote, these governments immediately chose to extend their criticism of that particular vote to attacking the EU in general. Applying Lijphart’s model to the area of EU JHA in general, and asylum in particular, all the EU member states form ‘the government’. As in Lijphart’s model, in the present case criticism of the ‘government’ became criticism of the EU as a whole.

20 Ibid., 569.
21 The breakdown of the vote is not publicly available. However, a diplomat confirmed that voting was unanimous on this item.
23 Unlike the other three countries, Romania remained quiet on the issue.
of the entire ‘regime’, that is, the EU. The prospect of renewing the mechanism for the mandatory relocation of irregularly arriving asylum seekers continued to divide the bloc into the 2020s.

The 2015 relocation vote demonstrated the perils of sticking to the constitutional rules on qualified majority voting on divisive matters. There were severe consequences for debates on asylum legislation following this vote in the sense of unprecedented rhetorical and political divisions between different groups of member states. The attempt to fix a broken policy by centralising it proved unsustainable. It made no difference that the Court of Justice of the European Union (CJEU) subsequently confirmed the legality of the relocation vote.

The 2015 vote immediately became a symbol of East–West division within the EU and dissenting states’ rejection of alleged Western and Southern European multiculturalism. The governments of Hungary, Slovakia and Czechia were joined by the new Polish government in forming a united opposition against the refugee redistribution elements of the legislative package that the Commission submitted in 2016 to reform the Common European Asylum System. The remaining members—whose views on the various aspects of the proposed reform often differed widely—had to choose between two options. One was the escalation of the legitimacy crisis that would have resulted from forcing legislation to effect permanent refugee distribution. The other was de-escalation and the continued dysfunction of the EU asylum system.

The Council opted for the latter. The legitimacy of the EU and its immigration system was to be saved by de facto unanimity-based decision-making among the EU member states when negotiating the asylum reform bills. A genuine ‘European’ and a properly managerial crisis response would have been to insist on majority voting in order to push through the asylum reform package to clarify the rules. However, as when handling the European financial and economic emergency several years earlier, the EU leaders threw out the rule book in order to protect the ‘negative peace’ in the Union. On 28 June 2018, at the insistence of the Visegrád countries, the European Council of prime ministers and heads of state put the rule in writing. The Council Conclusions from the meeting stated that ‘a consensus needs to be found on the Dublin Regulation’, where the Dublin Regulation, in fact, refers to the mandatory redistribution of migrants.

In the end, the traumatic experience of the fallout from the relocation vote has only reinforced the need to return to pre-Lisbon decision-making on asylum, ‘led by diplomatic manners and administered by neutral bureaucracy’, and strengthened the national elites’ determination to preserve the ultra-consensual system as a peacekeeping mechanism inside the EU.

Since the legislative session that began in 2019, the European Commission has continued to give preference to legitimacy over equity in its asylum proposals. It emphasised that a consensual method, in other words the consociational model, would be applied during negotiations on the New Pact

on Migration and Asylum, which it presented in September 2020. The Council is in agreement with this approach. It is now accepted that each successive presidency of the Council will try to avoid situations that would disrupt the established manner of slow deliberation and patient consensus seeking.

**Role of the courts**

One branch of the European institutional structure has been somewhat influential in policy formulation, sometimes putting a spoke in the wheel of the autonomy of national governments, and sometimes reaffirming this autonomy. The CJEU oversees member state compliance with EU immigration and asylum law and with the Charter of Fundamental Rights which was included in the Lisbon Treaty in 2007. The court’s role is to ensure that EU law is interpreted and applied in the same way in every EU country.

Until recently, the CJEU has not played a major role in the EU’s asylum and migration policy. One exception to this was the 2011 ruling which resulted in the suspension of intra-EU transfers of those asylum seekers who had been registered in Greece back to the country. (On the Commission’s recommendation, these transfers resumed in 2017.) In general, the Commission has been passive about opening infringement proceedings in the field of asylum and migration. When deficits at the national level became apparent in 2014–15, the Commission started dozens of infringement cases. However, the vast majority of the cases only concerned a failure to transpose EU directives into national legal systems. By 2019, only two asylum ‘infringement proceedings [had] resulted in a verdict’. Likewise, only four legal migration cases have reached the court.

The generally low number of infringement cases illustrates that the Commission favours monitoring and supporting the correct implementation and resolving conflicts outside the CJEU. The majority of the asylum rulings made by the CJEU are not related to cases initiated by the European Commission but are in response to requests for clarification by domestic courts. Suits by non-governmental organisations have obtained faster rulings from the court than the Commission has, even on the same issues. Overall, consociational arrangements have prevailed, based on the presumption of member state autonomy and freedom of manoeuvre, even when it comes to implementing legislation.

The role of the CJEU became more prominent in 2020. A ruling in May that had been initiated by a Hungarian regional court led to the immediate abolition of transit zones at Hungary’s border with

---

27 T. de Lange and K. Groenendijk, The EU’s Legal Migration Acquis: Patching up the Patchwork, European Policy Centre (Brussels, 2021), 9. See also K. Groenendijk, ‘Legal Migration’, in P. De Bruycker et al. (eds.), From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration, European Policy Centre (Brussels, 2020), 61–72, 68.
Serbia and a substantial change in Hungarian asylum policy. In an indication of growing Commission vigilance, two high-profile asylum-related cases brought by the Commission reached the CJEU in 2020. First, in April, the court ruled against Czechia, Hungary and Poland with regard to the temporary mechanism for the mandatory relocation of asylum seekers as these countries had refused to take part in the 2015 scheme. (The Commission had waited to bring its complaint until just before the end of the two-year period during which relocations had to take place, to avoid having to request financial penalties from the offending countries and thus bear the brunt of an inevitable political protest.) Second, and separately from the May ruling cited above, in December 2020 the court ruled that Hungary had unlawfully detained applicants in its transit zones and unduly limited access to its asylum procedure.

It is too early to conclude whether these cases signify that the CJEU is taking a stronger position on the EU immigration system. What is evident, however, is that despite the December 2020 ruling, Hungary has openly defied the court and refused to bring its asylum policy into alignment with the judgment. This is an unprecedented occurrence in the area of asylum.

In addition, the TFEU allows one member state to sue another before the CJEU. So far not a single immigration or asylum case has been brought to the court under this rule. When it comes to enforcing the Union’s status as a community of law, the political barriers to bringing a fellow member state to court have been almost prohibitively high.

Finally, the Court has ruled only once that EU legislation has breached the subsidiarity principle. The rulings of the CJEU over time have confirmed that subsidiarity, as defined by the treaties and practiced by EU institutions and the member states, is an unenforceable instrument.

The EU’s supranational consociationalism

The consequences of the ultra-consensual model for the workings of EU asylum policies are multiple. Certain specific features aside, the EU asylum system replicates the advantages and disadvantages of consociational democracy as described by Lijphart. These disadvantages include an executive deficit, difficulty in creating a common sense of purpose among the member states, and the largely optional character of EU asylum and immigration rules. Slowness and the rigidity of segmental cleavages between the members are common denominators.

29 Art. 259 TFEU.
30 Van Zeben and Nicolaïdis, ‘Polycentric Subsidiarity’.
Executive deficit at the EU level

A major drawback of consociationalism is the executive deficit it creates. When the EU is operating in the ultra-consensual mode, the treaty objectives of developing common policies on immigration and asylum are perpetually thwarted by the expansive interpretation of member state autonomy vis-à-vis the European institutions and fellow member states. This is not unlike the reverse relationship between the number of veto players and the potential for policy change in the field of security and defence.\(^{31}\)

In the absence of a recognised asylum and immigration executive body, frequent emergency summits of all the member states or summits of groups of states tend to be called during times of crisis. The Luxembourgish and Dutch Council Presidencies called a high number of emergency summits of leaders in the second half of 2015 and the first half of 2016. In general, these summits are imperfect coping tools. Heads of state and government may have full national legitimacy but usually lack an appreciation of the complexities of migration and asylum matters.

A slow law-making machine with no vision

Analysts have noted that although the European Council can provide an ‘impetus’ for the development of the Union, it very often ‘finds it difficult to be bold and imaginative’ and is better at responding than proposing.\(^{32}\) The EU asylum policy highlights this predicament. The creation and enforcement of bloc-wide asylum rules show that the EU is ‘a very slow law-making machine’ that cannot ‘create a common vision’.\(^{33}\)

As soon as consensus among the 27 members (until 2020, 28) disappears, the legislative machine grinds to a halt. As explained above, the European Commission learned from the 2015 relocation conflict that keeping the machine going despite member state resistance carries grave political risks for the EU. This has translated into a shift to consensual decision-making and a partial paralysis of the legislative process in the Council. While the EU adopted or amended a large number of asylum norms between 2000 and 2015, it has adopted none since 2015, despite the need to harmonise the rules in a system that does not offer appropriate instruments to deal with an increased influx of applicants. As would follow from the consociational model, the set-up is wasteful and costly, and produces unequal outcomes for migrants and indigenous populations alike.


\(^{33}\) M. Povejšíl, Permanent Representative of the Czech Republic to the EU, speaking at the conference ‘Multi-Speed Europe’, organised by the Ralph Dahrendorf Round Tables, the European Liberal Forum and the Friedrich Naumann Foundation, Prague House, Brussels, 7 November 2017.
Labour immigration rules also illustrate the difficulties of creating EU-wide policies and the potential losses in economies of scale. When the European Commission proposed the Blue Card directive in the 2000s, its intention was to create a single work permit that would, alongside national work permits, allow foreign talent to move freely across the EU territory in search of jobs. The directive that was adopted in 2009, on the insistence of the member states, instead diluted the Commission proposal. As a result, obtaining a work permit under the Blue Card Directive is difficult. The member states issue many more work permits under more favourable national schemes, which is explicitly allowed by the legislation. The cost of this fragmented labour immigration legislation for the entire bloc runs to billions of euros every year. At the time of writing in July 2021, provisional agreement has been reached on new legislation to make Blue Card permits more easily accessible and more flexible.

In a similar vein, both the individual member states and the EU can conclude readmission agreements with third countries. In reality, the EU has so far concluded 18 readmission agreements with non-EU countries as well as 6 non-legally binding arrangements. This contrasts with the hundreds of bilateral readmission agreements concluded over the years between individual members and non-EU countries. As a result, the EU does not have the leverage that it seeks in its migration cooperation with third countries; member state autonomy is preserved. Disputes continue over the efficacy of EU versus national readmission agreements.

**Poorly implemented norms**

Poor compliance with the letter and spirit of the rules has marred the EU immigration system since its inception. As late as 2008, a French Member of the European Parliament and presidential advisor remarked that ‘decisions taken by EU interior ministers at Council meetings are rarely followed up as each country continues to draft its own immigration laws afterwards “as if nothing had happened”’. It is argued that poor implementation and free-riding are features of a consociation. The carefully worded laws are often simply not put into practice.

The EU institutions have been able to enforce the bloc’s asylum and migration legislation with only limited success. The legislation adopted over the years has included common definitions of concepts, legal safeguards and standards of treatment. With regard to asylum, the national legal and material standards differ widely. The price of not enforcing EU standards at the national level is a failure to register migrants; the irregular movement of migrants across EU territory; multiple submissions of asylum applications as applicants seek better economic standards, their own diaspora and legal recognition; differing recognition rates; unnecessary bureaucracy; and the low crisis resistance of the EU migration system. As a general consequence, the insufficient implementation undermines

---

34 W. van Ballegooij and E. Thirion, The Cost of Non-Europe in the Area of Legal Migration, European Parliamentary Research Service (Brussels, 2019).

the rule of law, bodes badly for the integration of immigrants and undermines public confidence in the EU’s immigration system.\textsuperscript{36} Similar conclusions apply to the quality of the EU’s external border management and, to a lesser degree, to legal immigration.

It appears that the main problem is not in the transposition of EU rules, which is now fairly well harmonised, but in the application of adopted procedures which, first, falls short of the legal standard and, second, is interpreted differently in different member states. As shown above, the European Commission has been highly reluctant to bring cases of non-compliance to the CJEU.

As in other consociational systems (as well as confederations), free-riding is possible because of the weak enforcement capacities of the central institutions. Burden sharing on asylum has been a challenge for the EU since the moment it was first confronted by a massive refugee wave during the Yugoslav wars in the early 1990s. Free-riding occurs with regard but also not only to relocation and disembarkation following search and rescue fingerprinting asylum applicants and compliance with requests for transfers of asylum seekers within the Dublin system.

The political impossibility of imposing equitable sharing of the refugee burden is reflected in the European Commission proposals in the New Pact on Asylum and Migration, presented in September 2020. The von der Leyen Commission has decided to abandon attempts to enforce uniform rules on the distribution of asylum seekers. Instead, in an unprecedented manner, it has opted for differentiation, dividing up tasks according to presumed national preferences.\textsuperscript{37} The front-line states would be responsible for screening, processing irregular arrivals, hosting their ‘fair share’ of the incomers and repatriating them where merited. The non-front-line states would have to choose between relocating migrants to their territories, sponsoring repatriations from their territories and, to some extent, providing material and logistical assistance to the front-line states. However sophisticated, it is not clear if this proposal will end the free-riding that too many members enjoy.

**Programmatic documents**

The EU members, assisted by the European Commission, have been able to devise coping mechanisms to address some of the problems of the consociational model. These coping mechanisms have contributed to creating a coherent migration policy in some areas although, due to their zero-sum-game character, they have not been able to create an equitable burden-sharing mechanism for asylum inside the EU. The coping mechanisms include political declarations and strategic policy programmes to assist law- and policymaking.


\textsuperscript{37} H. Beirens, *The EU Pact on Migration and Asylum—A Bold Move to Avoid the Abyss?*, Migration Policy Institute Europe (Brussels, 2020).
To overcome the difficulties in generating a common sense of purpose among all EU members, the member states committed to achieving common policy goals. In 1999, the then 15 members issued the ambitious Tampere Conclusions, outlining the goal of creating ‘an area of freedom, security and justice in the European Union’ and common harmonised policies, including the creation of a Common European Asylum System. In 2008, the French Presidency of the Council prompted the formulation of the European Pact on Immigration and Asylum. The European Council adopted documents with strategic objectives in JHA matters in 2005 (Hague Programme), 2010 (Stockholm Programme) and, on a smaller scale, in 2014 and 2019. Judging the success or failure of these programmatic documents is beyond the scope of this piece.

Far from uniting the positions of the member states and far from guaranteeing policy success, these programmatic documents are couched in language generic enough to obtain approval across the negotiating table. They have also helped to further the creation of common policy in those areas where agreement subsequently emerged. The reaching of the Tampere Conclusions, which coincided with the coming into force of the Amsterdam Treaty, led to the adoption of 23 binding regulations on asylum and immigration in the early 2000s.38

**Facing an external threat**

The consociational arrangements within the Lisbon Treaty’s supranationalist regime have proved remarkably adaptable. As described by Lijphart, quarrelling elites tend to come together when faced with a foreign threat and when this threat is ‘perceived as a common danger by all of the segments in order to have a unifying effect’.39

Having learned the lesson of the 2015–16 crisis, national leaders issued the Bratislava Declaration of 16 September 2016, in effect activating the Lisbon Treaty clause on combating illegal migration. Five years on, in 2021, the Declaration’s commitment not ‘to allow return to uncontrolled flows of last year and further bring down number of irregular migrants [and] ensure full control of our external borders’ appears fulfilled. Concerted EU and member state efforts to decrease the volatility of irregular migration flows, chiefly by striking deals with transit countries outside the EU, have brought down the numbers of irregular arrivals. In 2020, Frontex, the EU’s border agency, detected 120,000 border crossings at the EU’s external borders, representing a 93% decrease compared with the 1.8 million detections in 2015.

Legislative developments have accompanied the policy successes in stemming illegal cross-border migration. Between 2017 and 2019 the JHA Council unanimously adopted a set of 10 regulations regarding large-scale EU information technology systems in the area of asylum, migration and Schengen governance, and these systems’ interoperability. The adoption of these norms provoked close

to zero publicity in European and national media, and no national government questioned the legitimacy of these pieces of EU legislation.

The strengthening and expansion of Frontex has been an important element of near consensus among the member states on the security aspects of migration. Having started as an agency for member states to cooperate on border management, Frontex is now a centralised, fully fledged law enforcement body. Significantly, when in November 2019 the Council cast the final vote to provide Frontex with its own staff, Spain and Italy were the only two member states to vote against the agency reform bill. The Spanish and Italian governments opposed the new legislation on the grounds of national sovereignty but opted not to make their opposition public. The Spanish and Italian publics barely noted their governments’ votes against the strengthening of Frontex. Bringing back majority voting has therefore in no way damaged the authority of the agency. The member states apparently find reassurance in the fact that they collectively control Frontex through its management board.

The perception of EU legislative and policy paralysis on migration is thus only partially correct. The states have been able to find unanimity on the security aspects of migration policy, including on better managing access to EU territory and the interoperability of databases. The entirety of the member states has thus responded to the 2017 call by Donald Tusk, then President of the European Council: ‘There will not be a Europe as we know it, if there are no borders and no law enforcement. . . . The realisation that we have a common border and territory must bring us together again, instead of dividing us for good.’

The return of intergovernmentalism

In addition to members uniting under the existing treaty arrangements, intergovernmentalism outside the scope of the treaties enjoyed a remarkable come-back during and following the 2015–16 crisis.

Paradoxically, the first sign of the intergovernmental revival was tied not to migration controls but to the relaxation of them, namely the creation in 2015–16 of an ad hoc ‘humanitarian corridor’ for refugees and migrants spanning from Greece across the Balkans to Germany and further north and west. This inter-state cooperation furthered the breakdown of immigration and asylum law at the time as some states assisted thousands of migrants to cross their territories and move into other states further north and west. More productively, a coalition of EU and non-EU governments then put a

41 European Council, acceptance speech by President Donald Tusk upon receiving an honorary doctorate from the University of Pécs, 8 December 2017.
brake on the humanitarian corridor by deciding to close all national borders on the Western Balkan irregular migration route.

A separate example is bilateral and multilateral cooperation within the EU. This includes the border-management assistance provided by the non-front-line states to the front-line states in the Balkans. This has typically consisted of members of national police forces being posted to the front-line states, outside the framework of Frontex. EU countries have also provided bilateral humanitarian assistance, for example in March 2020 when Greece was facing extreme migration pressure on its Turkish border. The European Commission and the European Asylum Support Office (an EU agency) assisted with the ad hoc transfer of migrants from the front-line states, such as Greece, Italy and Malta, to those EU members willing to undertake such relocations. What unites these instances is the member state belief, often justified, that acting outside the conflict-ridden EU framework is faster and more effective than acting within it.

**Individual members or groups of members**

As an offshoot of intergovernmentalism, the period since 2015 has highlighted another trend in EU policymaking on immigration and asylum, that of individual member states or groups of states acting in their own interest but implicitly acting on behalf of the other members. This type of decision-making does not feature in Lijphart’s consociational democracy model. It could be considered ‘implicit intergovernmentalism’ due to the tacit understanding that actions taken in the interest of one member are beneficial to all the others.

This implicit intergovernmentalism has always been part of the decision-making mix, especially with regard to illegal migration. Italy concluded a treaty with Libya in 2008 under which Italy committed to pay up to five billion euros to Libya and contribute to development in exchange for cooperation to prevent irregular departures to Europe. Following the Libyan uprising in 2011, the two governments subsequently concluded a new agreement in 2017 which empowered the Libyan coastguard to intercept migrants and take them back to the country. This Italy–Libya cooperation, however problematic from a human rights standpoint, was preceded by intensive cooperation between Spain and Morocco. These bilateral arrangements have taken a very different decision-making path than EU-wide mechanisms, bypassing the potential for immobilism and paralysis inside the bloc’s legislative framework. Several bilateral agreements on migration (separate from readmission agreements) were created in the 2010s, with Germany, Italy and France being particularly active on the African continent.

The 2016 agreement between the then 28 EU member states on the one hand, and Turkey on the other hand, was of a different kind. Brokered by the Dutch Presidency of the Council and the German government (a traditional partner of Turkey), the agreement obliged the EU to provide financial assistance to migrants and refugees residing in Turkey, resettle Syrians from Turkey in the EU, and reopen talks on visa liberalisation and EU accession. Turkey committed itself to hosting the migrants and preventing irregular departures from Turkey to Greece. The deal was negotiated by the German
National Prerogatives and EU Migration Policy

Policies conducted in relationships with third countries, such as the security-oriented ones described above, have boomed since the 2015 border control and asylum emergency. This policy approach has been described as ‘proactive containment’. It consists of two elements: first, enlisting countries of origin and transit as enforcers of Schengen border controls; and second, countering the facilitation of irregular movement through the criminalisation of smugglers, traffickers and, sometimes, non-governmental organisations. These intergovernmental policies, however haphazard and sometimes poorly coordinated, have addressed weaknesses in the EU’s collective action on mass irregular migration.

The novelty of developments post-2015 is in the degree of involvement of EU institutions and other member states. Before the 2015 crisis, the EU was reluctant to get involved in bilateral cooperation engaged in by the bloc’s individual members. Since 2015, the European Commission has provided political and financial support to Italy, Spain and other front-line EU states engaged in countering smuggling and preventing irregular departures. This support has gone hand-in-hand with EU-level policies, which have been financed via trust funds for Africa and the Middle East.

Discussion and conclusions

This paper presents what might seem to be a pessimistic view of European integration as examined from the viewpoint of immigration and asylum policies. However, the arguments offered here are realistic rather than pessimistic. Understanding that the divisive history of Europe has not gone away with the creation of the European project is the first step to adopting an effective approach that keeps the negative peace between the EU’s members and, at the same time, advances policies that serve the individual members as well as the entire bloc.

The insistence on treaty-based member state prerogatives on labour migration and a de facto right of veto on asylum legislation at member states’ demand have secured this negative peace between the states over the decades, irrespective of which EU treaty was in place at any given point in time. With hindsight, one can see that the consequences of the 2015 relocation decision in fact re-established the rule of member unanimity on asylum following the majority voting practice in place between 2009 and 2014.

Which governance regime?

The successes in preventing irregular maritime migration since 2015 demonstrate that intergovernmental cooperation outside the treaty framework is an essential accompaniment to supranational consociationalism on migration. It has yet to be seen whether the specific intergovernmental policies currently in place will subsequently be incorporated into the treaty framework, as were the Schengen agreement of 1985 and the Dublin Convention of 1990. There would be a substantial advantage to maintaining the intergovernmental elements of the EU immigration system. Policies such as cooperation with Turkey would undoubtedly run into difficulties if they were subject to the rigid rules of the EU legal machinery. Likewise, it has proven beneficial to the bloc when individual member states have acted on their own volition to strike bilateral deals on stemming irregular migration, bypassing the European Commission, Parliament and CJEU in the process. Bilateral border management and humanitarian assistance between national governments inside the EU has also proven fruitful.

The return to extra-treaty cooperation suggests that when adopting the Treaty of Lisbon, member states had overestimated their own readiness to cede national prerogatives on asylum to EU-level bodies. The return to intergovernmentalism is a sign of recognition that the ‘community method’ based on adopting legislation put forward by the Commission does not necessarily provide the fast policy responses that are so often needed due to both political instability in the EU’s geographical neighbourhood and the recourse to migration pressure sometimes taken by these countries’ governments.

That said, the EU could not do without treaty-based arrangements on asylum and migration. The EU’s supranational consociationalism may be an unattractive model in that it offers an executive deficit, democratic overload and legislative conflict. However, the smooth functioning of passport-free movement for EU citizens is unthinkable without commonly agreed standards for asylum seekers. In addition, the treaty-based reforms of Frontex in 2016 and 2019 respectively have shown that when interests coincide, legislation can be adopted quickly. An EU agency could not be created or modernised outside of the treaty framework.

Resilience of the current policies

The falling numbers of illegal border crossings since 2015 signify that despite many critical voices, the EU has manged to find tools to prevent and hinder illegal immigration at its southern borders. The number of migrant deaths in the Mediterranean and Aegean has also dramatically decreased; while in 2015, some 5,000 died in the Mediterranean, the 2020 figure was less than 1,500.

How resilient is the existing framework vis-à-vis further migration pressures? Two recent instances of significant migration pressure on the EU demonstrate that the EU toolbox is far from perfect but that it is significantly more powerful than it was just six years ago. The first instance occurred in March 2020, when Turkey attempted to push thousands of Afghan and other migrants into Greece. Frontex—even though it was without its own corps at the time—was able to effectively assist the Greek
police in protecting the EU border. In 2020 the number of illegal border crossings in the Aegean was even lower than in 2019. The second instance was in May 2021 when the Spanish border police managed to immediately return to Morocco some 7,000 migrants who, prompted by the Moroccan police, had attempted to breach the border of the Spanish enclave of Ceuta. In both cases, the European Commission provided political support to the respective country, presenting the all-important image of a united front. It is therefore not inaccurate to say that ‘more Europe’ is coming our way not by national parliaments giving up their competences but by them exercising their competences.

Nevertheless, the EU continues to be vulnerable to blackmail by its North African, Asian and East European partners, which are sometimes tempted to use illegal migration as leverage to achieve other policy objectives. A repetition of the 2015–16 crisis is not completely beyond imagination, yet the likelihood of such a catastrophic event has substantially decreased.

The vulnerability of the EU would be further reduced should the bloc find internal agreement on asylum reform. Such a reform would entail registrations of all the illegal border crossers and others who find themselves illegally on EU territory, predictable disembarkation arrangements following search and rescue, swift asylum procedures, the reduction of secondary movements of asylum seekers across the EU, better coordination of repatriations and a coordinated offer of work permits to non-EU nationals.

The lure of delegitimisation

In 2015, a disgruntled minority of states was able to delegitimise the mandatory relocation decision legally taken by the Council. This delegitimisation occurred before the eyes of these countries’ citizens, although certainly not across the EU. The post-2015 mechanism demonstrates that the Council has reimposed upon itself the rule of the minority veto. It has done so to restore the sense of national sovereignty, thus ensuring cooperation between the national elites and stopping the spectre of delegitimisation from affecting further policy areas. Against the backdrop of an almost total agreement on the need for stronger border protection since 2015, reverting back to the Maastricht Treaty has worked for the members.

The politics of asylum and relocation provides a useful outlet for national elites. The symbolism of refugee disembarkation and distribution, and the differing ideas of what constitutes fairness and justice in asylum offer an ideal space for leaders to use to prove to their constituents that they are attuned to national sensitivities. This symbolism serves as a marker of differentiation against the perceived uniformity imposed on the nation by remote EU bodies or, alternatively, against the selfish instincts of other members.

Perhaps the chance of finding consensus on the New Pact would increase if another divisive and even more ‘attractive’ issue displaced the asylum conundrum in the European political discourse. De-politicisation of dissensus is another way forward. As one example, at the time of writing in July 2021 the Council has reached a provisional agreement on the transformation of the European
Asylum Support Office into the European Union Agency of Asylum. Perhaps due to the ongoing COVID-19 pandemic, the technical nature of the legislation, or because of both these factors, the Visegrád countries and Bulgaria voted against the proposal in the committee of permanent national representatives without making their opposition public.

In the long run, the potential for delegitimisation may wane. It is entirely possible that with time, the issue of immigration and asylum will lose its potency to divide, thus allowing a return to the more efficient system of majority voting across all legislative files.

Subsidiarity and immigration

In theory, the application of subsidiarity to a policy field would neatly spread decision-making between the local, regional, national and European levels. In the EU’s immigration system such neatness is hard to find. The present study has shown that selection of the appropriate level of administration is severely circumscribed when it comes to migration and asylum. Instead of the harmonious allocation of competences between the local, regional, national and central, the EU has struggled with starkly dualistic interpretations of the subsidiarity dilemma. On the key concept of admission to territory, neither the treaties nor the national constitutions leave us with many choices. There is an undeniable state-centredness under both intergovernmentalism and supranational consociationalism in that the state alone governs the admission of people to its territory, as well as their possible expulsion. The core function of controlling access to territory has always been performed by the modern European nation state; this has not changed with the creation of the EU. Contradictions in the interpretations of EU norms continue to pit the imperatives of solidarity, efficiency, equity and uniformity at the EU level against the imperatives of national democratic legitimacy and administrative tradition.

To further true subsidiarity, there is perhaps scope for the provision of increased EU funding for local communities in the member states to explain the concept of asylum, and assist with asylum seekers’ and migrants’ integration into society, thus gradually changing attitudes on the ground. Local communities, regional governments and civil society organisations play crucial roles in the integration of immigrants.

The EU as a peace project

Despite these intractable dilemmas surrounding asylum and migration, there is nothing to suggest that the EU has ceased to be a peace project as envisaged by the founding fathers. The decision-making self-correction post-2015 shows that the EU has not lost the flexibility required to preserve the validity of this proposition. The 2015–16 migration crisis had in it the seeds of a violent conflict between European countries. The aftermath of the crisis shows that while EU countries may sometimes see one another as opponents, they do not view each other as enemies.
Perhaps a qualification is required concerning the scope of this peace project. Many people who call themselves Europeans see the EU as an expression of cosmopolitanism. Observers note with concern a recent shift towards understanding the EU as a separate civilisation protected by exclusive notions of regional, that is European, identity, fences and brutal migration enforcement. However, equating the new consensus on border protection with violence and ethnic European exceptionalism is misplaced. The departing UK has placed emphasis on immigration, border control and state sovereignty without calling into question British cosmopolitanism. The same applies to the EU27. Peace in Europe might be endangered by a new massive wave of irregular migration; and there is as yet no evidence that the expansion of Frontex and the appointment of a Commissioner for Promoting our European Way of Life in 2019 have led to increased ethnic discrimination and exclusionary policies inside the EU. The EU is a regional, not a global, peace project. An internally divided polity could hardly claim universal appeal.

A vigilant European Commission

Intergovernmentalism, in its reliance on the national law of the states participating in the given policy, completely does away with EU legal mechanisms. As for legislation adopted according to the EU treaties under the supranational regime, national disregard for the adopted EU rules has been part of the mix. The European Commission—as well as fellow member states, which all have the right to sue before the CJEU—has proved reluctant to enforce EU legislation, leaving effective harmonisation of practices to chance. Could the European Commission step up vigilance against the offending member states without provoking a political backlash against unaccountable Brussels bureaucrats? Contrary to perceptions, this should be easier than it seems. With the exception of the mandatory quota scheme that was in effect between 2015 and 2017, the member states have not questioned the legitimacy of the EU institutions passing legislation or the legitimacy of the CJEU to enforcing this legislation. One exception is the current Hungarian refusal to abide by the court’s judgment concerning the country’s restrictive asylum procedure. No member state has publicly supported this Hungarian position.

There is certainly room for the European Commission to more readily take infringements of EU asylum and migration law to court without worrying about its own legitimacy in the eyes of EU citizens. The member states and citizens regularly question the views and proposals of the European Commission and they have the full right to do so; however, defying court judgments has no place in a polity that is governed by the rule of law.

---

Recommendations

According to Lijphart, consociational democracy is both a descriptive and normative concept. Drawing close parallels between consociational democracy models on the one hand and the EU asylum system on the other, it is proposed that the existing ultra-consensual arrangement be maintained even if the legislative deadlock on asylum continues. In the absence of unanimity, there is a lot of scope for national governments and their asylum agencies to expand exchanges to learn about successful national-level asylum innovations and processes.

The EU’s supranational consociationalism does not necessarily preclude sharing the refugee burden, which currently is disproportionally borne by the front-line states and by several asylum-attractive states such as Germany, France and Spain. Perhaps the right mix of incentives for member states can be found through patient negotiations between the Commission and the national representatives. The preservation of a national veto on the most prominent parameters of asylum remains one of the preconditions of the New Pact being adopted.

Next, based on the positive experience so far, intergovernmentalism could be strengthened when dealing with governments outside the EU. The JHA Council should be giving a mandate to individual member states or groups of them to prevent and tackle irregular movements from outside the EU territory. Frontex and other EU-level agencies could be brought into use in these policies more extensively than has been the case so far. (The newly emerging challenge of visa-free access to the territory, often by plane, followed by an illegal stay or an asylum application has yet to be effectively addressed.) With the scale of irregular migration reduced, the scale of the EU’s internal asylum policy riddle becomes smaller, too.

Finally, to preserve the precious notion of the EU as a community of law, the European Commission should step up its enforcement of the asylum and immigration norms that are already on the EU legislative books. The concept of integration through law (in the areas where the law does apply) remains valid despite the many commendable policies that are being implemented outside the EU legal framework. The existing rules adopted through the supranational method can be undone only by a legislative act, not by member state disregard or claims of national exceptionalism.

As in Lijphart’s description, the current EU immigration model does not have to be preserved for posterity. In countries such as the Netherlands and Austria, consociational democracy systems became superfluous as societal divisions became less acute. The same may well happen with EU policies on migration and asylum and border control. Intergovernmentalism may fade away. The time for federative decision-making based on majority voting in the Council may yet come.
About the author

Vít Novotný is a Senior Research Officer at the Wilfried Martens Centre for European Studies. He specialises in migration, asylum and border management. He has postgraduate degrees in politics, public administration, European studies and clinical pharmacy.
Future of Europe
A Brussels-Based Dictatorship or a Paradise of Subsidiarity?
National Prerogatives and EU Migration Policy
VÍT NOVOTNÝ

Credits
The Wilfried Martens Centre for European Studies is the political foundation and think tank of the European People’s Party (EPP), dedicated to the promotion of Christian Democrat, conservative and like-minded political values.

Wilfried Martens Centre for European Studies
Rue du Commerce 20, Brussels, BE 1000

For more information please visit:
www.martenscentre.eu

External editing: Communicative English
Typesetting: Victoria Agency
Printed in Belgium by Puntgaaf, Kortrijk.

This publication receives funding from the European Parliament.
© 2021 Wilfried Martens Centre for European Studies

The European Parliament and the Wilfried Martens Centre for European Studies assume no responsibility for facts or opinions expressed in this publication or their subsequent use. Sole responsibility lies with the author of this publication.