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# The Abyss of Complexity:

## Some Remarks on European and German Law in the Migration Crisis

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### *Introduction*

The diffuse reactions of EU Member States to current mass migration are a hardship test for European integration. Not only do proposals for solutions *de lege ferenda* oppose one another. Foremost, it is the unwillingness to comply with applicable law that once more appears as the underlying dilemma of the EU. Besides the common but unlawful practice of some Member States to forward migrants within the Schengen area to other Member States without any registration, the policy of examining applications from asylum seekers regardless of original responsibility as performed by the German government raises concerns as well.

However, it is not only the violation of law but also the law itself that fosters inconsistent answers. The fragmentary and multi-layered framework of asylum law with its numerous actors of different levels and branches of public power leaves room for divergences. The dysfunction in one of the most vital policy areas on the European level challenges basic assumptions of statehood and rule of law. In the German debate on limiting the influx, not least the long-time fundamental dissent regarding the autonomy of constitutional spaces is emerging once again. Hence, a closer look at the events and relevant provisions seems worthwhile.

### *Conscious decisions*

The causal chain of the migration crisis has been subject to countless discussions. Indisputably, the roots of the new dimension of migration lie in the many collapsing states in Africa and the Middle East, above all in war-torn Syria. Notwithstanding the life-threatening situation many migrants had to face, a significant number especially from Africa and the Balkans are motivated by prosperity gaps. Not least considering doubts to use the term ‘refugee’ for persons having escaped immediate persecution by entering comparably safe transit states (see Papier 2016), the indifferent term ‘migrant’ is preferable for an academic approach.

For the purpose of the present study, the view can be narrowed to the activities of the EU and its Member States. With regard to Germany, the precise evaluation of reciprocal effects of political speeches, legal practise or the famous ‘selfie’ showing Angela Merkel with an asylum seeker can be left aside, since legal concerns already culminate in the comparably undisputed events of the ‘Budapest situation’ in September 2015. The Austrian Chancellor Werner Faymann has explicitly confirmed reports of a telephonic agreement between him, the Hungarian Prime Minister Viktor Orbán and Angela Merkel to let 4.000 migrants that were stuck in Hungary pass to Germany (‘Österreich’, 6 September 2015). Later on, this statement was officially confirmed by Angela Merkel (joint press conference, 15 September 2015).

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At the latest from then on, the German de facto approval of border crossings by persons without any right to free movement within the EU has been a conscious decision. Correspondingly, German police do not refuse migrants without visa or identity documents in principle as long as they apply for asylum. Though border controls were selectively installed, authorities on the contrary coordinate the influx towards Germany and Scandinavia. Public prosecutors have ended criminal proceedings due to illegal border crossings by the thousands (Stürzenhofecker 2015). The exceptional state has become permanent.

Even if there was no evidence of a causal link between actions of the German government and the extent of migration, the inaction of authorities with regard to border crossings is not less problematic. This inaction has been going on for a much longer time. In this respect, the point of reference should not be the lack of effective border controls, since the Schengen Borders Code (Regulation (EC) No 562/2006) permits internal border controls only in exceptional cases. Most problematic is rather that normally asylum seekers are not being transferred back to their country of initial reception. In consequence, more than one million new asylum seekers have been registered in Germany in 2015 (Bundesamt für Migration und Flüchtlinge (BAMF), 6 January 2016). Though numbers should be used with caution, it can be noted that there is neither effective limitation at the external borders of the Schengen area nor at Germany's internal borders (Di Fabio 2016, pp. 19-20).

At the same time, the vast majority of the Member States refuses to receive significant numbers of migrants. Especially eastern European Member States have expressed their reluctance from early on. Czech President Milos Zeman even made the claim of an organized invasion (The Guardian, 27 December 2015). In contrast, Sweden has abandoned its until then open-handed asylum policy due to exhaustion of shelter and personnel as recently as November 2015, being followed by Austria in January 2016. Many Member States actively support migrants in the onward travel to the country of their preference, as it has been an explicit part of the agreement between the Hungarian, Austrian and German heads of government mentioned above. It should be emphasized that German authorities followed the same procedure with persons aiming for Sweden (see the statement of the Prime Minister of Schleswig-Holstein, Torsten Albig, Die Welt, 19 December 2015).

With the increasing challenge of providing accommodation and welfare especially at municipal level, there is a strong will to reduce the influx in Germany, too. Nonetheless and irrespective of demands from her own party, the Christian Democratic Union (CDU), and above all from its independent Bavarian sister party, the Christian Social Union (CSU), Angela Merkel refuses to reject asylum seekers at the German border. Instead a closer cooperation with Turkey as the key transit country, as well as an at least partial European burden sharing, became the declared objective of the German government.

### *The failure of the Dublin regime*

Comprehending the relevant legal framework is a difficult undertaking. With a view to German domestic law, well known by now is Article 16a(1) of the German constitution (Grundgesetz, GG), which grants victims of political persecution the right of asylum. But already the paragraph directly following, Article 16a(2) GG, clarifies that the right of asylum has considerable limits: Persons entering German territory from EU Member States or states in which the application of the Geneva Convention and the European Convention on Human Rights is assured may not invoke the right of asylum. Since this exception applies to all neighbouring countries, no person entering German territory by land may invoke the right of asylum. This might seem extremely restrictive, but the conclusion changes when the supranational embeddedness of the provision and its practice is taken into account.

According to Article 78(1) of the Treaty on the Functioning of the European Union the EU shall develop a common policy on asylum, subsidiary protection and temporary protection in accordance with the

Geneva Convention of 1951 and the Protocol of 1967 relating to the status of refugees. With regard to asylum, the key law is the Dublin Regulation ((EU) No 604/2013, also known as Dublin III Regulation), which aims for a rapid determination of the Member State responsible for an asylum claim (recital 5). Hence, there is no free choice of the country of refuge. On principle, the responsible Member State is the state through which the asylum seeker first entered the EU (Article 13(1)).

The most important exception constitutes the sovereignty clause of Article 17(1), after which Member States may decide to examine an application even if they are not responsible under the criteria of the Dublin Regulation. Therefore, the German policy of examining applications from asylum seekers that travelled through several other Member States is not a violation of the Dublin Regulation per se. However, it remains unclear whether this policy is a conscious use of Article 17(1). So far, there is no verification that the German government notified such a use to the Commission or to other Member States – a practice that is incompatible with the principle of publicity of law (Hillgruber 2016).

As statistics reveal, what was meant to be an exception has become principle: According to Eurostat (news release 163/2015, 18 September 2015), 213.200 persons applied for asylum in the EU in the second quarter of 2015. Whereas 14.895 (7 percent) were recorded in Italy and only 2.865 (1.3 percent) in the key European transit country, Greece, Germany accounts for 80.935 (38 percent). It is worth stressing that these numbers show the situation as it was before the climax in the second half of 2015.

This huge discrepancy between reality and the normal case according to the Dublin Regulation is not only due to German altruism. For quite some time even stable Member States like Italy transferred migrants without any registration. This is a clear violation of the Dublin Regulation as well as of the EURODAC Regulation ((EU) No 603/2013), the second pillar of the Dublin regime that provides for registration and identification of asylum seekers. Thus, returns are avoided, since the state of first entrance cannot be determined. A particular problem is the breakdown of securing the external borders, the vital condition for internal freedom of movement. On paper, according to the Schengen Borders Code, border states refuse persons without any residence permit entry to EU territory, unless special provisions apply. In reality, already in 2014 280.000 detections of illegal border crossings had been reported (Frontex, Annual Risk Analysis 2015).

One of the biggest challenges to the Dublin regime is the difference of human rights situations within the EU. According to the jurisdiction of the EJC as well as of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), deportations to Greece are unlawful due to systemic deficiencies in Greece's asylum system (ECJ, Joined Cases C-411/10 and C-493/10 *N.S. et al.* [2011] ECR I-0000; BVerfGE 128, 224 ff.). Contrary to a ruling of the ECJ, the Administrative Court of Munich furthermore took the same stand with regard to Hungary (VG München, judgement of 26 September 2014 – M 24 K 14.50320). This shows that the exceptional case of application examinations regardless of the state's responsibility does not only become relevant with regard to mere executive discretion. In fact, the decentralised judicial system of the EU undermines the main premise of any functional joint asylum system: the principle of mutual trust (see recital 22 of the Dublin Regulation, see also Di Fabio 2016, pp. 82-83, Velluti 2015, p. 141 et seqq.).

With regard to securing the external border, the legal review yields a complex picture, too: Border states might generally be obliged to refuse entry by the Schengen Borders Code. However, a far-reaching exception is laid down in Article 3(1) of the Dublin Regulation. Pursuant to this provision, access to the asylum procedure is not only to be given for applications on the territory of a Member State but also for applications at its border. Further restrictions arise from the judicature of the European Court of Human Rights. For instance, enforced returns to certain non-Member States in connection with interceptions at sea have been found a violation of the ECHR even if a migrant has not requested international protection

(see *Hirsi Jamaa and Others v. Italy*). Hence, contrary to widespread assumption as an almost total sealing off, securing of the external border under applicable law is in fact a highly relative obligation.

In contrast to human rights violations and negligence regarding registrations, the much-deplored violation of the Dublin Regulation by extensive use of the sovereignty clause is hardly to be exactly determined. As a matter of fact, no article makes a predication about limiting such a practice. The recitals likewise only name ‘the establishment of criteria and mechanisms for determining the Member State responsible for examining an application for international protection’ but no limitation as the regulation’s objective (see recital 40, see also Bast, Möllers 2016). Insofar, criticism should be more thorough (see Michl 2015).

As to the question concerning a domestic obligation to make use of the sovereignty clause, much confusion in the public debate has been caused by the many speeches and statements of Angela Merkel mentioning human dignity in the same breath with the right of asylum (see Federal Government, press conference on 31 August 15). The protection of human dignity according to Article 1 GG certainly applies for foreigners as well. But just as certainly it does not grant any right of residence itself (see Di Fabio 2016, pp. 92-93). As the BVerfG has made clear, the right of asylum on the contrary is no element of Article 1 GG but alterable by constitutional amendment in accordance with the ‘eternity clause’ Article 79(3) GG (BVerfGE 94, 49). Art. 16a(2) GG is such an amendment and incorporates the restrictions as provided for by the Dublin Regulation into the Grundgesetz. Insofar, it is therefore circular to argue with the constitutional right of asylum (see Papier 2016).

In conclusion, even though not every alleged violation of the Dublin Regulation proves as such, one can hardly argue that the regulation serves the purpose of an orderly allocation of asylum seekers in times of mass migration. With an increasingly tense situation for public order in the affected countries, the two pivotal elements – mutual trust and solidarity (see recital 22) – are given less than ever. In fact, the regulation itself is based on this assumption, as the intention to establish a process for the management of asylum crises mentioned in recital 22 reveals.

### *The Temporary Protection Directive*

The political debate on burden sharing has widely ignored the fact that a relevant act of secondary law has already been adopted in the aftermath of the conflicts in the Balkans (see Ineli-Ciger 2016): The Council Directive 2001/55/EC of 2001 (Temporary Protection Directive) does not only provide standards for giving temporary protection in the event of a mass influx of displaced persons but also measures promoting a balance of efforts between Member States. Temporary protection is a flexible mechanism which – compared to conventional asylum – is well targeted to uncomplicated temporary help for specific groups of displaced persons. Notwithstanding definition difficulties, this selective character would at least cover the current influx from certain areas of Syria and Iraq (Orchard, Chatty 2014, see also Arenas 2005, p. 444 et seqq.). According to Article 5 of the Temporary Protection Directive, the establishment of a mass influx requires a Council decision adopted by a qualified majority, though. Neither a Member State nor the Commission have triggered this activation process so far nor have they announced to do so. Besides fears of creating a ‘pull factor’ the political obstacles to secure a qualified majority vote in the Council seem to be the main reason for this disuse (Ineli-Ciger 2015, p. 245). Once a mass influx is established, the Member States are obliged to receive persons in a ‘spirit of Community solidarity’. Yet, this distribution lacks binding quotes and requires the consent of the person concerned (Schmidt 2015).

With regard to the sovereignty clause of the Dublin Regulation, Article 7 of the Temporary Protection Directive nevertheless contains an interesting predication: A Member State may extend temporary protection as provided for in the directive to additional categories of displaced persons. However, such an extension is only permitted for persons that are displaced for the same reasons and from the same region.

Above all, there is no obligation to solidary reception for other Member States in view of such an extension. Though the scopes of the Dublin Regulation and the Temporary Protection Directive are separated by the activation mechanism of the latter, the overall inverse conclusion shows that there is no obligation of burden sharing at present, for there is neither an activation of the Temporary Protection Directive nor an effective differentiation of the current influx based on origin (see Di Fabio 2016, p. 94).

In summary, the current legal framework with its strong reliance on enforcement by Member States and various exceptions fosters moral hazard as well as unilateral sense of mission with effect to the EU as a whole. The order originally intended has almost totally collapsed (Papier 2016). Just as judicial enforcement, the well-suited instrument of temporary protection remains unused due to procedural, respectively political obstacles.

### *Domestic separation of powers*

In view of the Member State's discretion, in particular as provided for by the sovereignty clause of the Dublin Regulation, there should be a closer look at the requirements of German law. As shown above, the course of the German government is solely executive-borne. But not only does it lack parliamentary legitimisation, it also conflicts with sub-constitutional domestic law, foremost with § 18 of the Asylum Act (Asylgesetz, AsylG). According to § 18(2) points 1 and 2 AsylG, border authorities are obliged to reject asylum seekers entering from a safe third state and in case of indications that another country is responsible for the asylum procedure pursuant to European or international law. In accordance with § 18(4) point 2 AsylG, the Federal Ministry of the Interior may however decree to abstain from rejections for humanitarian reasons, reasons of international law or for the safeguard of national interests. To this day, there has been no publication of such a decree (Hillgruber 2016). In reply to a question of the author, officials confirmed that only an oral decree had been issued.

In any case, the duration of the exception of not only several hours or days but of months seems to contradict the basic decision of the legislator (Di Fabio 2016, p. 93 et seqq.). Correspondingly, this application is problematic with regard to the separation of powers as provided for in the Grundgesetz and the jurisdiction of the BVerfG. Even if parliamentary will had not already been manifested, as it has been in § 18(2) no. 1 and 2 AsylG, according to consistent case law, essential decisions must be taken by parliament. This reservation of parliamentary act in particular includes decisions concerning the exercise of fundamental rights (BVerfGE 49, 89 (126 et seqq.); 53, 30 (56); 88, 103 (116)) and decisions with far-reaching implications for citizens (BVerfGE 49, 89 (127)).

In this respect, the long duration of asylum proceedings and the low rate of deportations are to be taken into account. Although the average duration has been reduced to less than half a year, the waiting time before the actual application of sometimes more than a year must be added (Der Spiegel 42/2015). In 2015, the recognition rate was 49.8 percent (BAMF Asylgeschäftsstatistik December 2015). Above all, in the majority of the cases, rejected asylum seekers are not deported due to further legal protection anyway (see Hirte 2016). As a consequence, most asylum seekers stay in Germany for years regardless of their need for protection. Irrespective of positive effects, challenges to the housing market, social care and internal security have already emerged. Pointedly, one could ask which decision since the Hartz reforms of the Schröder government has had comparably far-reaching implications.

There might be cases in which the basic decision of the national legislator is reshaped by the Dublin Regulation and hence the exception as provided for in § 18(4) point 2 AsylG needs to be activated. This can be assumed if persons have not previously been registered and are at risk of being moved back and forth between the Member States (Bast, Möllers 2016). However, this reshaping does not cover the proactive attraction of migrants by organising transportation through other Member States or the

arrangement of violations of the Dublin regime. In this respect, fundamental principles of democratic sovereignty have been put aside in favour of moral considerations (Di Fabio 2016, p. 103, Papier 2016, Nettesheim 2015).

### *Tensions for federalism*

For the purpose of legal assessment of the German government's policy not least the federal structure of Germany is to be taken into account. In a much noticed expert opinion for the Bavarian government (see above) *Di Fabio* has prominently put forward the opinion that the federal government is obliged to limit border crossings by the unwritten principle of federal loyalty (Bundestreue), a federalist expression of the principle of bona fides (Bauer 1992, p. 243 et seqq.). With regard to border security, according to Article 73(1) no.5 and the second sentence of Article 87(1) GG, the exclusive legislative competence as well as enforcement powers lies with the federal level (Bund). The competence includes the participation in decision-making at the supranational level. Hence, the federal states (Länder) have little influence on the scale of migration. This applies in particular with regard to executive measures such as the government's course in question, where there is no equivalent to the legislative chamber of states (Bundesrat) as an instrument of integration. At the same time, the Länder are obliged to provide accommodation for asylum seekers by § 44(1) AsylG and remain responsible for social integration, health care and education as well as for expulsions of rejected asylum seekers, public safety and prosecution in accordance with Article 30, 83 GG.

Thus, there is a strong entanglement of federal and state responsibilities, in which the Bund in exercise of its powers has to respect the democratic order of the Länder pursuant to Article 28 GG (Di Fabio 2016, p. 32 et seqq.). This applies in particular in matters vital for the statehood of the Länder as such. Referring to the famous Lisbon judgement of the BVerfG he himself had shaped (see BVerfGE 123, 267 (356) and also 89, 155 (207)) *Di Fabio* emphasises that the Grundgesetz presupposes a sovereign and democratic order of the federation as an entity of Bund and Länder, a constitutional core that may not be touched even by the constitutional objective of European integration. Arguing with Jellinek's doctrine of the three elements of statehood and limited functional capacities, he sees this presupposition at stake. He holds the view that the capability to control migration is a crucial aspect of effective control over state territory. The Bund may confer the responsibility of border security upon the EU. If however such a supranational mechanism proves dysfunctional the Bund is obliged to exercise its constitutional powers again. With regard to the collapse of the external border and insufficient or rather non-existing subsidiary measures at the internal borders, *Di Fabio* takes such a dysfunction as given (p. 77 et seqq., see also Nettesheim 2015).

This line of argument did not remain unopposed. *Bast* and *Möllers* have described the understanding of statehood as a constitutional presupposition as an outdated 19<sup>th</sup>-century-styled conception (Bast, Möllers 2016). However, they fail to recognise that both the Grundgesetz and (in so far much less noticed) the European Treaties postulate the existence of statehood below the supranational level. For instance, already the first subparagraph of Article 1 of the Treaty on European Union emphasises that the EU derives its competence from conferral by its Member States. The second sentence of Article 1(1) GG presupposes state power by obliging it to preserve human dignity. As many other provisions, Article 1(1) GG cannot be reduced to a mere requirement for state activity, but is rather to be seen an imperative to provide statehood as a trustee and expression of human dignity (see BVerfGE 123, 267 (341, 343)).

It is then again correct that effective control of territory does not necessarily require the control of borders, since most borders in history as well as in modern days were and are 'green borders' (Bast, Möllers 2016). However, if a state is a priori obliged to a certain degree of welfare and public safety, its

existence might nonetheless indirectly be jeopardised by unlimited and uncontrolled migration. For determining the critical threshold, one must rely on highly subjective assessments. But that such an elusiveness does not release from the need for legal scrutiny is a basic assumption of settled case law of the BVerfG, as judgements concerning the reservation of parliamentary act for essential decisions mentioned above or the fiscal overall responsibility of the German Federal Parliament (Bundestag) in connection with supranational financial stability mechanisms show (BVerfGE 130, 318-367 – EFSF, Rn. 60, see also BVerfGE 135, 317-433 – ESM). In short, just because a constitutional breach may not exactly be defined it does not become insignificant. Therefore, however it is to determine, there is an obligation of the Bund to an at least minimal control over migration. Whether the policy of the federal government in question complies with this obligation appears at least doubtful.

It should be mentioned that the argumentative starting point of an untouchable constitutional core is highly controversial. At this point, the relation of domestic constitutional law and European primary law becomes relevant – a question disputed *ad nauseam* since the first Solange-judgement of the BVerfG. In times of rapidly changing multi-layered governance, it now has become fashionable to picture domestic constitutional jurisprudence as outdated and escapist. Above all, it has been commonly argued that the concept of sovereignty can explain modern functions of European and international law only to a limited extent (Bogdandy 2013). Insofar, the obvious absence of clear guidelines and law enforcement in the migration crisis is a chance to reflect the value of fundamental guarantees – especially with regard to parliamentary participation and publicity of law – as laid down in the Grundgesetz. Of course constitutional jurisprudence is no substitute for politics. Scholars and former judges should therefore criticise actors only with a certain caution (Hirte 2016). However, legal safeguards of formalized decision-making are the prerequisite of any lasting and democratic solution. In exceptional situations they must be claimed more categorically than ever.

### *Conclusion and outlook*

On paper the partly overlapping, partly juxtaposition of supranational and domestic asylum law might be manageable. But particularly in times of crisis, the legal framework appears to be practically dysfunctional. As with most tensions within the EU, one might blame the selfishness of many Member States for this – be that of incompetence, nationalistic isolation or altruistic zeal. As the analysis of the interplay of supranational and German domestic provisions has shown, in fact the law itself with its patchiness and diversity of competent actors leaves plenty of scope for conflicts and blockades. This is certainly no specific of asylum law, but rather the mere consequence of the general gap between supranational aspiration and competence, especially with regard to law enforcement. However, if fundamental questions of statehood as controllability of migration and human rights are at stake, the reliance of the EU on its Member States with their diverse legal cultures becomes particularly apparent. At present, these deficiencies are fostered by an unprecedented malfunction of major protagonists. This includes the forwarding of unregistered migrants by most of the effected Member States. But as the reflection of domestic law has shown, the policy of open borders as practised by the German government in its current form is unlawful, too.

In normal supranational practise, the legal argument could be held in low esteem, since the EU has revealed flexibility towards intergovernmental methods, whenever its legal setup seemed insufficient. As measures in the wake of the sovereign debt crisis such as the creation of the European Stability Mechanism have revealed, public international law is a popular instrument to avoid restrictions that were to face in search of supranational solutions (see Uerpmann-Witzack 2013). However, the usual proceeding of clarifying legal tensions by consensus rather than confrontation does not seem to work out this time. In fact, the policy on migration especially seems to put an end to the German fixation on



consensus, a path that had been successfully followed ever since the Second World War (see Münkler 2015). Furthermore, in particular the Visegrád states emphasize the legal argument since it was the German government itself that stressed the legal limits of European solidarity in the course of the sovereign debt crisis. Thus, the roles of those demanding obedience to the Treaties and of those falling back on solidarity as a euphemism for the absence of legal claims have reversed.

This inner dilemma leads to a need for external solutions. The agreement between the EU and Turkey might be the crucial puzzle piece to get back to an orderly situation. In fact, a Union that is surrounded by semi-democracies will always rely on these semi-democracies to manage migration, as long as it commits itself to the highest aspiration for human rights not only for its own citizens but also for foreigners violating the conditions on which to enter its territory. The great hopes for a significant reduction of the influx resting on the agreement with Turkey are implicitly based on a barely existing rule of law on the other side of the Aegean as a chance for sealing off. This is the hypocritical, but unavoidable consequence of the current diffusivity of law.

For the sake of independence and preservation of integration steps allegedly already taken, a long-term solution should be established within the *acquis communautaire*. No matter what understanding the Member States might reach: A multi-level framework for migration and asylum will only function on the basis of mutual trust, considerate use of exceptions even at the price of compromising moral beliefs and persistent claiming of compliance. In this regard, the status quo hopefully will someday be remembered as a costly lesson.

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