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Excluded by crisis management? Legislative hyperactivity in post-2015 Germany

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Abstract

This article examines the legislative measures taken by Germany since 2014 to manage the "refugee crisis" and analyses the potential effects on the rights and the well-being of asylum seekers and persons with protection needs at large. By taking a closer look at the reasoning given in the respective legislative documents we will show the link between the recent changes in the national asylum and migration law and the underlying migration management framework. The article concludes that Germany has seen a shift from a management to a securitization approach, the latter entailing a special emphasis on deportation ("return turn") rather than focusing on accommodation and integration of those seeking protection. Acting in a mere "crisis mode", the German legislator has implemented an exclusion paradigm that incrementally substituted the prior inclusive policies over time.

INTRODUCTION

In light of the rise in the number of arrivals since 2012 and especially during the so-called "refugee crisis" (for a critical view on the legal implications of this term see Becker, 2017: 55; Janda, 2018a: 495) in 2015/2016 (BAMF, 2019: 9) the German legislator became very active in the area of asylum. Since late 2014, Germany has adopted over 35 amendment laws to the Residence Act (RA) covering the rules on residency and return, the Asylum Act (AA) governing the asylum procedure, as well as to the Asylum Seekers Benefits Act (ASBA) regulating social

benefits for asylum seekers and persons who stay illegally. The necessity for these amendments was articulated by the legislator as the need for faster and more efficient asylum procedures. The aim was to increase returns and reduce incentives to lodge "unjustified asylum applications" in order to master the challenges posed by the unprecedented number of asylum applicants entering Germany (see e.g. BT-Ds. 18/6185: 1). This may be described as a "crisis mode" that—in the beginning—mainly pertained to the provision of accommodation and further social and material assistance to newly arriving persons (ibid.: 2).

Since 2017, the narrative has changed to the extent that the non-execution of deportations of asylum seekers whose claim has been rejected is now presented as a pressing problem that actually endangers the rule of law (see e.g. BT-Ds. 19/10047: 1 "Regarding returns an enhanced enforcement of the law is necessary" (translation by the authors)). Hence, the "crisis mode" continues, but its focus has changed from concrete necessary action on the spot (e.g. providing for food and shelter for all persons arriving in Germany) to more systemic questions like the enforcement of the (positive) "law" in the field of migration in general. Consequently, the 2019 migration package contained—with respect to the field of asylum—mainly measures to increase returns by introducing new possibilities for sanctions in case of non-compliance with the return decision (Hruschka, 2019a). This shift of narratives poses a major stumbling block for the credibility of the legislative action as the speed and efficiency of asylum procedures including the swift execution of deportations had already been problematic (and unresolved) before the "refugee crisis" (EMN, 2017: 8, Hoffmeyer-Zlotnik, 2017: 51). Measures to counter the rather structural deficiencies have been part of the discussions on asylum for at least four decades (Poutrus, 2019).

METHODOLOGY, DATA AND LIMITATIONS

In the following, we will analyse the legislative developments in greater detail and show that the (perceived) political and public pressure in the field of migration, fuelled by singular events attributed to refugees and irregular migrants, manifested in what we call "hyperactivity" of the German legislator. In this context, we analyse the stated goals in the legislative materials and use these processes as examples for the changing role of the law in the field of migration.

The legal implications and the function of permanent legislation in a quasi-permanent state of crisis were at the forefront of our research. This "crisis mode" of the legislator has led to a significant incoherence and fragmentation of the legal framework. Methodologically, in addition to the classical legal method of interpreting the law and examining the respective case law (Sauer, 2017: 176–185), we analysed the draft laws containing the reasoning behind the proposals in order to better understand the aims and motives of the legislator. As a source, those materials, which can be found in the "Dokumentations- und Informationssystem für Parlamentsmaterialien (DIP)", are particularly valuable, because they comprise the motivation and the legal reasoning for the governmental justification of the proposed legislative changes. Examining those documents provides insights not only regarding the underlying political rationales, but also into the legislator´s interpretation of the effects of the interplay between international, EU and national norms. The analysis of these documents is to be seen in the formal institutional setting of the legislative process. Consequently, this approach leads to a certain limitation of this article, as the materials mainly reflect the views of the government and/or the respective majority in the parliament, which has been a coalition of CDU/CSU and SPD since 2013. In these documents "the legislator in action" is predominant and therefore rendering initial and ongoing discussions on the content virtually invisible. The influence of other actors like political parties or civil society as well as the impact of the federal structure and consequent decentralized implementation of the legal order may therefore not be fully reflected in the documents and would require a different methodological approach than the desk research of official documents conducted for this article.

The article starts with an introduction to the German case study highlighting the persistent "crisis mode" by contrasting the developments between 2007 and 2014 with the legislative hyperactivity caused by the arrival of a large number of asylum seekers as well as singular events as of 2015. In this part we link our observations to

existing research on larger trends in the area of asylum and migration (e.g. Eule, 2016; Kosnick, 2019; Wyss, 2019) like the deterrence paradigm, securitization, crimmigration and the increasing focus on returns to historize as well as contextualize our findings and add a distinct legal perspective. We also take account of research on integration and migration management, which suggests that there is a trend to favour management approaches over binding legal instruments (Hruschka & Schader, 2020; Leboeuf, 2019). The main analytical part of the article is structured along the five main objectives presented by the legislator to justify the need for reforms, namely integration support, administrative modifications to enhance efficiency, the reduction of perceived pull factors and abuse, the facilitation of deportations, as well as the reduction of security threats. We conclude with an analysis of the legal effects of the "crisis mode" and the legislative hyperactivity that took place from 2014 to 2019. Navigating the highly politicized field of migration, the crisis-driven German legislator created an incoherent and fragmented legal framework that poses considerable difficulties in its application and, moreover, runs the risk of undermining basic human rights protection standards.

CRISIS MODE

Policy developments between 2007 and 2015

Between 2007 and 2014, the German legislator had mainly been active in the field of asylum law when new legislation was required to transpose EU law. This approach was consistent with the creation of the Common European Asylum System (CEAS) and the Common Framework of the Schengen area for entry, border controls and returns, which—in theory—leaves little to no legal room for manoeuvre for national legislation.

The same period was marked by a considerable increase of asylum applications from a historical low of less than 20,000 first asylum applications in 2007, to 173,072 first asylum applications in 2014 (BAMF, 2019: 15). In light of this development, the legislator started to act in mid-2014 specifically in reaction to the number of asylum applications from Macedonia, Serbia as well as Bosnia-Herzegovina which generated more than 20% of all asylum applications in the first quarter of 2014 (see BT-Ds. 18/1528 of 26/05/2014: 1). At this time, the backlog of asylum cases had already reached more than 100,000 cases (BAMF, 2019: 62).

In an attempt to shorten the asylum procedure and increase returns of those whose claims had been rejected, the abovementioned countries of origin were incorporated into the list of safe countries of origin (Annex II to the then Asylum Procedures Act (APA)—FLG 2015 I 1722). It was also expected that, on grounds of these changes, Germany would become less attractive as a destination for asylum seekers from the respective countries. As a counterbalance to this deterrence measure, integration possibilities were enhanced by significantly shortening the waiting period for gaining access to the labour market for all asylum seekers to three months. Both amendments entered into force on 6 November 2014. In sum, the amendments proposed in 2014 were characterized by a focus on deterrence of people from Western Balkan countries, on the one hand, and a rather liberal approach to integration and administrative facilitation for other asylum seekers, on the other. The latter measures even lifted a part of the existing restrictions, in particular with regard to access to the labour market. The measures regarding the Western Balkan countries were of a highly symbolic character, which may rightly be labelled as "symbolic legislation" or "legislation as a symbolic act" (see e.g. Baer, 2015: 255; Noll, 1981: 349; Schmehl, 1991: 251; Raiser, 2013: 246).

While the preparations for the transposition of the "protection-friendly" norms of the recast Asylum Procedures Directive (Directive 2013/32/EU) and the recast Reception Conditions Directive (Directive 2013/33/EU) that started in April 2015 were abandoned in early 2016, the discussion on the necessity for swift legal and practical action in other areas of the asylum system regained momentum in mid-2015. The defining moment for this period of time in Germany was the decision of the German authorities in September 2015 not to implement "Dublin procedures" for Syrian refugees arriving in Germany, and to allow persons stuck in Hungary to enter Germany, which was symbolically marked by the famous statement "Wir schaffen das!" ("We can do this!", Federal

Press Conference, 31 August 2015) by Chancellor Merkel (Hruschka & Schader, 2020: 5). These large movements were practically possible due to the cooperation between the transit states and Germany, allowing for secondary movements in a state-facilitated way (Gratz, 2016). As a reaction to the great number of arrivals and the call for better control and registration of persons arriving at German borders, Germany notified the EU Commission on 13 September 2015 of the decision to conduct internal border controls for registration purposes. Registering arriving asylum seekers also implied not to turn away persons that had the intention to seek asylum at the German-Austrian border, which had been discussed as one possible way of action in the political arena (Detjen & Steinbeis, 2019: 35). This rather inclusive approach that was fully in line with EU law led the then prime minister of Bavaria, Horst Seehofer, currently serving as minister of the interior of Germany, to bemoan a mere "reign of injustice" (Fuchs & Kain, 2016) alluding to Western German narratives about the GDR (Detjen & Steinbeis, 2019: 17). The attempt to balance efficient refugee protection and full control over immigration, as well as the emergence of new forms of the longstanding deterrence paradigm (Gammeltoft-Hansen & Tan, 2017: 40) eventually led to significant legislative and practical turns in Germany. The first legal amendment that was concluded during this time entered into force on 24 October 2015, after a parliamentary process that had started only on 29 September 2015 (Act on the Acceleration of Asylum Procedures—FLG 2015 I 1722). Very short legislative procedures have become the norm rather than the exception ever since.

Legislative hyperactivity

Such urgency to act is not surprising looking at the deterrence and national or regional insulation logic of political processes in the field of asylum in general (Gammeltoft-Hansen & Tan, 2017: 30–32). In fact, the German legislator tends to react to peaks in the number of asylum applications, as has been observed in the past decades. In this regard, Ulrich Becker speaks of an "interplay between life and law. Whenever applications for protection increased [...] the legislator reacted, and the stronger the increase, the more drastic was the reaction" (Becker, 2017: 62 (translation by the authors)). These historical interplays and action patterns (Poutrus, 2019: 193) can also be observed in the developments since autumn 2014, which resulted in what we describe as "legislative hyperactivity" or, as a presiding judge of the Federal Administrative Court put it, "Gesetzesaktionismus" (legislative activism; Berlit, 2017: 98). Driven, in particular, by the number of arrivals, the "over-proportional burden" on Germany (see e.g. BT-Ds. 18/6185: 1), the lack of efficiency and a perceived loss of control, the German legislator introduced over 40 amendment laws to the respective legal acts since 2014, each regularly comprising dozens of changes or amendments to specific provisions. Besides those challenges for the overall protection and reception system in Germany, the present hyperactivity is also an outcome of symbolic reactions to singular events which—according to the legislative materials—called for political action. Aiming at heterogenous goals in ever shorter time periods led to an unprecedented fragmentation of the national legal framework.

At the same time, international and European law, as well as constitutional requirements stemming from the German Basic Law (Grundgesetz), theoretically should significantly limit the scope for amendments on the national legislative level. In this context, international and European standards have in the draft laws regularly been presented as a hindrance to the efficient execution of administrative procedures required to run the asylum system and led to claims for the need to "deviate from existing norms and standards for a limited period of time" (see e.g. for accommodation BT-Ds. 18/6185: 1 and for immigration detention BT-Ds. 19/10047: 3). In contrast, the German Government cherry-picked some aspects of the reform proposals that had been presented at EU level (see on this Hruschka 2017) in order to enhance the efficiency of return procedures, in particular with a view to countering secondary movements. Also in other areas, like border management (Hruschka, 2019b), the aims of the amendment laws and changes in practice partially conflict with regulations stemming from international public law and European law, which are from a legal perspective binding for the German legislator. In the following, the drivers and repercussions of these developments will be analysed in more detail.

Securitization and crimmigration driven by singular events

The hyperactivity of the German legislator was particularly triggered by singular events that have been widely discussed in the media such as the incidents that occurred on New Year's Eve 2015 in Cologne (SZ, 2019, see on this also Klemm, 2017) or the terrorist attack led by Anis Amri in Berlin in December 2016 (Spiegel, 2016). Also other incidents constituting severe crimes (allegedly) committed by migrants or riots in accommodation centres have fuelled debates on security-related concerns, which were partially ascribed to the high numbers of arriving asylum seekers, even though many of the incidents were caused by persons who had already stayed and lived in Germany for quite some time.

In Cologne, a number of women were on New Year's Eve 2015/2016 sexually harassed in front of the central station by—amongst others—male migrants from Tunisia and Morocco. The public outcry following this event led the Federal Ministry of the Interior to draft an amendment law called "Law to facilitate the expulsion of criminal aliens and to extend the exclusion of refugee recognition" (FLG 2016 I 394), which lowered the hurdles for the expulsion of foreigners who had committed crimes against, *inter alia*, sexual self-determination. The proposal states that the introduced restrictions and the facilitation of expulsions are necessary to preserve societal peace which is endangered by activities of "criminal aliens" and by asylum seekers that commit severe crimes such as those committed in Cologne (BT-Ds. 18/7537: 5). Hence, the German legislator picked up on the trend of intertwining criminality and migration-related questions, which has been described as "crimmigration" and identified particularly in industrialized states in the aftermath of the terrorist attacks on 9/11 (Kogovšek Šalamon, 2020: 3; Walburg, 2016: 380). In Germany, this trend is particularly visible in the legislative proposals aiming at facilitating the expulsion of "criminal aliens" by amendments to the asylum and migration norms.

Another example of this case-by-case legislation and the blending of migration and criminality issues is the "Law on better enforcement of the obligation to leave the federal territory" (FLG 2017 I 2780), which basically was a legislative reaction to the terrorist attack in Berlin in December 2016, when rejected asylum seeker Anis Amri deliberately ran a truck into a Christmas market and killed 12 people. The German legislator reacted by imposing stricter rules on persons who are obliged to leave the country and allegedly pose a security risk (BT-Ds. 18/11546: 1, 13). Explicitly in reaction to the bombing that occurred in Ansbach on 24 June 2016 (BT-Ds. 18/11546: 23), the law allowed data that were collected during the asylum procedure to be transmitted to the competent security authorities. In this context, it seems that the legislator followed the securitization logic (see e.g. Banai & Kreide, 2017; Buzan et al., 1997; Huysmans, 2006; Lazaridis & Wadia, 2015) and the crimmigration trend (Kogovšek Šalamon, 2020: 13–17) of the migration discourse.

In sum, German legislation that according to the reviewed materials was triggered by singular events often had a security focus and led to amendments that aimed at facilitating expulsion orders, administrative detention and deportations of persons perceived as security threats. While criminal law, in general, sanctions violations repressively, the outlined changes pertained to immigration law rules that aim at preventing risks stemming from criminal foreigners. In this way, both the crimmigration as well as the securitization discourse are emulated and mutually reinforced in the legal development.

OVERSIMPLIFICATION, HETEROGENEITY AND FRAGMENTATION OF LEGISLATIVE OBJECTIVES

In this regard, the volatility of the migration discourse (Vollmer & Karyakali, 2017) is further mirrored by the legislative activity aiming at rather heterogeneous targets. The most important amendments have been introduced by the Asylum Packages I (2015, FLG I 1386) and II (FLG 2016 I 390), the Law to facilitate the expulsion of criminal aliens and to extend the exclusion of refugee recognition, the so-called Integration Act (FLG 2016 I 1939), the Law on better enforcement of the obligation to leave the federal territory (FLG 2017 I 2780), as well as several

amendment laws of the so-called "migration package" in 2019 (for a detailed description see Kluth, 2019). In the respective legislative materials, we have identified five main objectives were put forward to explain the necessity of legislative changes—namely integration support, administrative modifications, the reduction of pull factors and the fight against perceived abuse, the facilitation of deportation, and the reduction of security threats—which will be elaborated further in this section.

Integration support

With regard to integration measures, the German legislator has been in a constant struggle of objectives (see e.g. Eichenhofer 2013, Lübbe 2015, Buchholtz 2017). On the one hand, people who eventually will be granted protection should be integrated as early and quickly as possible (BT-Ds. 18/8615: 1). Those whose applications are rejected, on the other hand, should be prevented from forming strong ties with Germany as it could complicate their subsequent return to the respective countries of origin (SVR, 2019: 157). Moreover, the meaning of the notion "integration" is often blurred or unclear as divergent concepts or sets of priorities are employed in the area of migration policy and law (Bast, 2011: 218 et seq.).

Therefore, in almost all cases the inclusive improvements are accompanied by exclusionary side-effects targeted at a marginalized group of "unwanted" migrants. This is another example for inclusion and exclusion not just being two sides of the same coin, but rather existing in simultaneity, which renders migrants exclusion ambiguous and gradual (Foblets et al., 2018: 28, see also introduction to this special issue). Nonetheless, from a legal point of view, some groups of persons are rather positioned within the inclusive sphere, for example, Syrian refugees, and others are more likely to face exclusion from access to rights, in particular asylum seekers from safe countries of origin.

Shortly before 2015, the legislator tried to promote the integration of arriving migrants, for example, by allowing for family reunification for beneficiaries of subsidiary protection, granting social benefits for asylum seekers in cash instead of in kind and widening the access to the labour market for persons holding a toleration status. In 2015, the legislator tried to strike a balance between inclusion and exclusion by introducing an extra-legal concept, namely the good prospect to remain ("Gute Bleibeperspektive"). This concept includes persons stemming from countries of origin that show a rate of protection granted by the Federal Office for Migration and Refugees (BAMF) of over 50% of all decided cases. Starting off as a cluster category proposed by a consulting firm to facilitate the decision making of the BAMF (BT-Ds. 19/2969: 2), the concept was subsequently transposed into the law regulating, *inter alia*, facilitated access to integration courses and to the labour market. For other asylum seekers who do not meet this threshold, these benefits are not available. Additionally, the legislator started to make living conditions for asylum seekers from safe countries of origin as harsh as legally permissible and is, in this regard, constantly testing the legal limits. The formerly unified legal status as "asylum seeker" has therefore been fragmented by using the country of origin as a justification for differential treatment, which is not only in conflict with anti-discrimination law but also detrimental to the overall coherence of the legal framework.

The struggle between effective migration control and the promotion of integration finally culminated with respect to persons who were obliged to leave the country but whose deportation is suspended for legal or factual reasons, leading to a toleration of their stay ("Duldung"—Section 60a RA). As of 2014, more inclusive legal solutions to provide these persons, under certain conditions, with a possibility to integrate were sought. However, as for many other measures, persons originating from safe countries of origin as well as persons with "non-clarified identity" ("ungeklärte Identität") are excluded from these possibilities. Moreover, the restrictive interpretation and application of these norms by immigration authorities has in practice caused a bottleneck preventing people from obtaining such a residence permit (Graf, 2019: 18). As of 2019, these possibilities have been significantly restricted by the new rules focusing on the facilitation of returns.

Overall, the question to whom access to the labour market should be granted is highly disputed due to the constant fear of creating unintended pull factors. The often two-faced and simultaneous character of integration measures and exclusion outcomes (Foblets et al., 2018) also becomes obvious in light of the introduction of the so-called residence rule ("Wohnsitzregelung") in 2016. This rule obliges persons that have been granted protection to take up their place of residence for a period of 3 years in that Federal State to which they have been allocated for the purposes of their asylum procedure, for as long as they rely on social benefits. The rule was implemented against the background of a decision of the CJEU (case C-443/14 and C-444/14—Alo and Osso (2016)), according to which Member States may impose on beneficiaries of international protection the obligation to reside in a particular place as long as it aims at promoting integration. Originally only temporarily in force until 2019, the rule was recently delimited (Delimitation of the Integration Act, FLG 2019 I 914) despite clear indications that integration is, under the above conditions, rather hindered than facilitated (Brücker et al., 2020).

Administrative modifications

Although the discussion about efficient administrative procedures can be traced back to the 1970s (Markard, 2019), it has gained new momentum due to the sharp rise in the number of asylum applications since 2012, and especially since autumn 2015 in the wake of the above described reception crisis. Administrative authorities at federal, state and local level were more or less unprepared for this situation (Bogumil et al., 2016: 295) so that existing deficits in the organizational structures came to light. The main problems were the fragmented and unclear responsibilities, lack of resources, frequent legal changes, the use of indeterminate legal terms and the frictional losses occurring in administrative federal enforcement (Walter & Burgi, 2017: 21 et. seq.). Most of these factors have been further exacerbated by the on-going legislative hyperactivity and increasing fragmentation of the law.

Given those massive shortcomings, it is surprising that the legislator was rather reluctant to make substantial changes to the asylum procedure as such and only incrementally adapted to specific problems—like multiple registrations for one person (BT-Ds. 18/7203: 1)—that occurred in practice.

The most significant move to facilitate the work of the administration and to take pressure off "reception and integration systems in the state and society" (BT-Ds. 18/7538: 1) was the suspension of the family reunification for beneficiaries of subsidiary protection in March 2016, which had been introduced only in 2015. Since August 2018, a new rule allowing for a quota of 1000 persons per month to reunite with family members who have been granted subsidiary protection status in Germany is in place (Section 36a RA). The suspension of family reunion coincided with the decision by the Ministry of the Interior to grant refugee protection to Syrians only if they were able to substantiate a risk of being individually persecuted, while before, refugee protection for Syrian nationals was rather the rule than the exception. The refugee recognition rate at the BAMF level dropped from 97.4% in 2015 (BAMF, 2016: 35) to 57.2% in 2016 (BAMF, 2017: 35) and continued to decline to 43.4% in 2018 (BAMF, 2019: 39) and remained relatively stable afterwards with 48.7% of the Syrian nationals being granted refugee protection in 2020 (BAMF 2021: 40). Administrative facilitation has therefore had some inclusionary effects especially regarding access to accommodation, but at the same time aims to manage and to promote control over the migration process and thereby causes exclusionary effects.

Deprivation of social rights: Reduction of pull factors and the fight against perceived abuse.

In response to the renewed discussions on "Asylmissbrauch" (asylum abuse) (Kluth, 2015: 341) and even "Asyltourismus" (asylum tourism) (Arslan & Bozay, 2019: 48) the legislator passed several amendments to address "unwanted" persons (for asylum seekers from safe countries of origin see already in early 2015 BT-Ds. 18/4097:38; SVR, 2019: 70). It took back many of the previously granted reliefs and restricted rights of asylum seekers in order to reduce so-called pull factors (see e.g. Farahat, 2019 and Markard, 2019). To achieve that aim, the legislator primarily relied on the reduction of benefits foreseen in the ASBA. In light of the constitutional obligation to provide at least the socio-economic minimum subsistence (see Federal Constitutional Court, BVerfGE

132, 134–179, 18 July 2012, No. 2) these changes cannot only be justified by the political will to curb migration (Janda, 2018b). Also, with a view to European legal standards, the possibility to reduce the ordinary benefits for persons who are obliged to leave the country, received protection in another Member State or did not comply with their duty to cooperate with the authorities is at least questionable (Hruschka 2020).

Additionally, the measures to reduce pull factors included the classification of further countries (Albania, Montenegro and Kosovo) as safe countries of origin and—in practical terms far more important—the imposition of further restrictions on persons coming from those countries through, *inter alia*, a general employment ban, the exclusion from integration measures and the obligation to stay in the initial reception facility until the asylum procedure has been completed, and in case of a negative decision until the person is returned. Furthermore, the Federal Office for Migration and Refugees was empowered to issue entry bans against rejected asylum seekers from safe countries of origin to prevent an "abusive use" of the asylum procedure (BT-Ds. 18/4097: 38). Following this narrative, the 2017 Law on better enforcement of the obligation to leave the federal territory (FLG 2017 I 2780) introduced provisions to prevent "abusive recognition of parenthood" (BT-Ds. 18/12415: 15). Indications for abuse are, *inter alia*, that (1) a person is after a final decision obliged to leave Germany and (2) that a person wishing to recognize parenthood has applied for asylum and stems from a safe country of origin.

The (initial) focus of the legislative measures on persons from the Western Balkans can be explained by a high number of asylum seekers from these countries in 2014 and 2015 and by the comparatively low protection rate (BT-Ds. 18/6185: 25). Since April 2016, the Federal Government tried to add Algeria, Morocco, Tunisia (BR-Ds. 18/8039) and Georgia (BT-Ds. 19/5314) to the list of safe countries of origin, claiming that this legal change would reduce the number of asylum applications that are mainly based on "reasons that were not relevant for asylum" ("nicht asylrelevante Motive") and would leave more capacity for "asylum seekers that are actually/really in need of protection" (BT-Ds. 18/8039: 1).

In 2019, the legislator decided to insert into the "Second law on better enforcement of the obligation to leave the federal territory" (FLG 2019 I 1294) some measures aiming at rendering Germany less attractive and curbing secondary movements to Germany by further reducing access to social benefits. This approach is neither in line with EU law nor with public international law, *inter alia* for reasons of the right to asylum that contains a right to be granted the correct status and related benefits without further restrictions (see on this right e.g. CJEU, cases C-297/17, C-318/17, C-319/17 and C-438/17—Ibrahim and Others (2019), para. 98, and on the provision of benefits CJEU, case C-713/17—Ayubi (2018), para. 27). Asylum seekers are to be treated as potential refugees as long as there is no final decision to reject an asylum application (see e.g. ECtHR, case ND and NT v. Spain, 14 February 2020, para. 179).

However, the main focus of this act was on the facilitation of return, namely on "the elimination of incitement for an illegal stay despite an obligation to leave the federal territory" (BT-Ds. 19/10706: 2). In this context, a "toleration with unclarified identity" was introduced by Section 60b RA. This provision does not effectively facilitate deportations but sanctions behaviour that hinders deportations by barring access to social rights. Its main aim is the reduction of a perceived pull factor, namely easy access to the German labour market. Like the status as an asylum seeker, the formerly unified rules for the provision of a "Duldung" has therefore been further fragmented by introducing ambiguous legal requirements such as the "omission to take reasonable steps to comply with the special obligation to obtain a passport"—a notion that is difficult to interpret and implement and therefore—to the day—constitutes a challenge for immigration authorities as well as migrants.

Facilitation of deportations

At the same time, the legislator tried not only to keep "unwanted" migrants away, but also to provide the competent authorities with instruments to facilitate deportations of persons who had already reached German territory. In fact, the effective enforcement of return decisions became central for the shift from a "reception crisis" to a perceived "crisis of the rule of law" with the need of a "better enforcement of the law" (BT-Ds. 19/10706: 1).

Since 2015 (FLG 2015 I, 1722), deportation dates are not announced beforehand anymore, because otherwise—according to the legislative materials—people would evade removal. Another widely discussed obstacle in the enforcement of returns is the lack of identification and travel documents (BT-Ds. 19/10047: 47). In this regard, only limited efforts have been made to improve the institutional deficiencies within the German administrations, for example, by centralizing responsibilities and competencies for the procurement of travel documents at the Federal Office for Migration and Refugees (FLG 2019 I 1301). In order to enable authorities to react to short-term changes the legislator, in 2015, extended detention rules to keep returnees in so-called custody pending departure ("Ausreisegewahrsam") for up to 10 days. Since August 2019, returnees who refuse cooperation in clarifying their identity or a medical examination can be taken into custody for up to 14 days. However, "transplanting" those criminal law standards that actually pertain to witnesses in criminal proceedings—and therefore following the above-mentioned "crimmigration" trend—seems to be at odds with the character of administrative detention, which is only allowed to secure the act of deportation and may not have any repressive or criminalising character (see on this e.g. Upper District Court of Schleswig-Holstein, decision of 17 September 2007—2 W 186/07). Moreover, foreigners may be detained during the deportation and the notion of the risk of absconding ("Fluchtgefahr") that justifies a detention order has been extended and now encompasses *inter alia* cases in which the returnee does not cooperate. In sum, the broad scope of circumstances indicating a risk of absconding ("Fluchtgefahr") basically hollows out the limiting function of this prerequisite that was originally implemented to ensure detention remains the ultima ratio. As a general rule, detention measures are solely permitted if they serve the purpose of ensuring a possible return and ought to have no punitive character (Hörich & Tewocht, 2017: 1154). The latest amendments are—against the backdrop of the constitutional safeguards—at least legally doubtful (Rohmann, 2019).

Reducing security threats

Ever since 2001, discussions on security threats stemming from migration have been present in the German and European discourse (see on this e.g. the contributions in Lazaridis & Waida, 2015 and Klemm, 2017). However, data protection concerns mainly prevailed before the events in Cologne and Berlin but have subsequently been largely outweighed by security concerns expressed in particular in the two Data Exchange Improvement Acts of 2016 (FLG 2016 I 130) and of 2019 (FLG 2019 I 1131). While the first Act of 2016 was still more directed towards the digitalization and facilitation of registration and decision making, the second Act of 2019 had a clearer focus on data exchange for security purposes (BT-Ds. 19/8752: 2, 54 et seq.).

This enhanced cooperation between asylum authorities, the police and law enforcement authorities was also part of the European discourse and is mirrored in current legislative proposals and amendments (Moreno-Lax 2018 and Costello, 2016). The securitization in the migration discourse becomes particularly obvious in view of the new rules on expulsions. The standards for expulsion decisions on security grounds have been significantly lowered over time including decisions against persons with protection needs (see in particular FLG 2019 I 1294). In a rushed, rather symbolic attempt to show to the public that the German state is able and willing to take on security threats by all means available, the immigration law framework has been altered in a way that in practice increases the number of persons holding a toleration ("Duldung"). Since a high proportion of the expulsion decisions are not enforceable (and will therefore lead to the provision of a toleration), the legislator, having no concepts to end this legal limbo situation, moved forward and limited the access to social rights, to residence permits, to freedom of movement and enabled the prolongation of entry and residence bans for holders of tolerations ("Duldungen") that are alleged to constitute a threat to security. This new legislation counteracts the efforts of the legislator in former years, where the aim of the legislation was to reduce the number of persons holding a toleration by opening up ways to a residence permit. In addition, enhanced monitoring in security-related cases as well as passport seizure to hinder the departure of a person that might pose a security threat are also foreseen in the current legislation.

Most of the amendment laws stemming from the past years contain security-related provisions. Measures like the facilitation of prolonged administrative detention of potentially dangerous persons contribute to defining migration as a problem or even a security threat (see e.g. Huysmans, 2006 as well as Banai & Kreide, 2017). The notion of the "reduction of security threats" has become one of the main features of facilitating the adoption of provisions that are, from a human rights perspective, at least doubtful and often have little to no practical effect apart from increasing the feeling of insecurity among the local population (see BKA 2019: 48).

CONCLUSIONS

To conclude, in reaction to the standstill of the negotiations on the CEAS reform at EU level and to the rapid increase of asylum applications, the German legislator went into a "crisis mode" resulting in downright legislative hyperactivity. The reasoning behind most of the issued amendment laws—comprised in the explanatory remarks of the proposals—relates to the overall public discussion on asylum and returns and to its inherent crisis logic (Heitmeyer, 2018: 344–349) in two ways. Firstly, the legislator, spurred on by singular events, often picked up on perceived legal gaps and amended the respective laws incrementally in view of specific practical problems.

Secondly, we identified five main, partially conflicting, objectives oscillating between efficiency, integration, the facilitation of deportations, the prevention of abuse and the reduction of security threats that were used to explain the necessity of legislative changes. These objectives show the complexity of the inclusion-exclusion continuum that is an inherent (and inevitable) feature of laws regulating access to residence (Foblets et al., 2018; Hruschka & Schader, 2020). As our research shows, this continuum has significantly changed between 2014 and 2019, favouring exclusion and in particular security concerns and the facilitation of returns over the inclusion aspect.

With a dropping number of arrivals, the focus of asylum and migration governance has over time shifted from the mastery of an acute factual reception crisis to a (perceived) crisis of the rule of law, which is also marked by a respective shift in the reasoning of the legislator. The amendment laws were therefore presented by the legislator as part of an ongoing attempt to manage migration and to gain control over incoming migrants at large in a time of crisis, but the nature of the crisis changed. Ever since 2015, the German state aimed at faster asylum procedures including registration and accommodation, but eventually moved to an understanding of efficiency as delivering deportations in order to more efficiently exclude persons that are perceived as trying to "abuse the system" and thereby pose a threat. The on-going securitization trend has therefore been reproduced in the legal system and might reinforce existing stereotypes.

Accordingly, the persisting crisis mode has not ended with the significant decrease of asylum applications, and the hyperactivity of the German legislator continues. The initially equally important focus on practical challenges to integration was further upstaged by these developments.

The complex norm structure of international, European and national law, the decentralized implementation of European regulations by the member states and the executive federalism that exists in Germany led to a fragmentation of the law, which is detrimental to both systemic coherence and legal certainty. While there is already uncertainty in the administration offices and administrative courts as to the applicable legal standards, it can no longer be properly communicated to the persons ultimately affected—that is, persons holding a toleration, asylum seekers, persons eligible for subsidiary protection, refugees or persons entitled to asylum—which regulations apply in their specific individual case and why. It is precisely this legal ambiguity—consciously or unconsciously—generated by legislative hyperactivity that limits the chances for integration, determines the reality of the lives of persons seeking protection and has severe repercussions on the functioning of the protection system as a whole.

In many cases, the call for clear guidelines and transparent regulations does not only come from the asylum seekers concerned, but also from administrative staff. It is therefore to be commended if the legislator would indeed try to live up to its responsibility to regulate essential societal questions that potentially interfere with

fundamental rights ("Wesentlichkeitstheorie", see e.g. BVerfGE 49, 89 and BVerfGE 34, 165) and if according action would be taken. However, our analysis has shown that crisis-driven hyperactive legislation that pursues heterogeneous objectives is not suitable for meeting the challenges of flight-related migration. To the contrary, it has led to violations of standards provided for in EU law and forthright discriminations based on nationality (and protection rates), and stretches the limits of equal treatment in a questionable manner (Werdermann, 2018: 17).

Besides those rather legal implications, these developments pose enormous challenges to administrations in general and their staff in particular (Eule, 2016: 51). Eventually, it might evoke implementation gaps and unintended transfers of discretionary powers to the executive branch (Eule et al., 2019: 84–105, Klement, 2013: 125), which limits the steering power of the law, hinders its homogenous application and in the end risks undermining minimum standards in place to protect the rights of migrants. One example where this risk has actually materialized are the recently introduced AnkER centres, which are—from a legal and a practical point of view—highly problematic (for a detailed analysis see Hruschka, 2019; Rohmann, 2019).

From an analytical standpoint, although we could identify certain trends such as "crimmigration" that inform the design of the legal framework, they are rarely the sole nor the dominating influence. Moreover, our research shows that "crimmigration"-tools have been complemented and at least partly replaced by measures aiming at limiting access to social rights. To a large extent, "resisting" return decisions is not only criminalized but sanctioned by status-related restrictions, that is, preventing access to the labour market, to family life and to private accommodation even after long periods of factual stay. The initial objective of the legislator was to provide for clarity of the norms and practical guidance. The effect of the related legislative hyperactivity is quite the opposite: the amendment laws led to divergent practice and insecurity at all levels of decision making as well as for the persons concerned. While trying to process and implement the heterogenous expectations placed on the law by society and especially political actors, the legal system struggles to keep up its autonomy and functionality. Future research engaging with effects of discursive patterns such as "crimmigration" or securitization should therefore be wary of the fact that law is not a constant, mono-lithic block and therefore oversimplified input/output models might not be apt to comprehensively capture its role in migration processes.

The mere number of amendment laws also undermines the ambit of international human rights law and European law in the German context as it is already difficult to keep up with the current legal situation in national law. Therefore, the fragmentation resulting from the legislative hyperactivity threatens to crush the achievements that have been fuelled by the (at least partial) human rights turn in refugee law (Costello, 2016) and exposes migrants to the risk of exclusion from access to basic rights.

PEER REVIEW

The peer review history for this article is available at https://publons.com/publon/10.1111/imig.12926.

DATA AVAILABILITY STATEMENT

The data that support the findings of this study are openly available in "Dokumentations- und Informationssystem für Parlamentsmaterialien (DIP)" at https://dip.bundestag.de/

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