Special Issue
Constitutional Dimensions of the Refugee Crisis

The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System

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Abstract

While the Dublin System was meant to create a clear and fair division of responsibilities for the examination of applications for international protection, the recent refugee crisis highlighted the extent to which normative aspirations and political realities can diverge. That said, the Dublin System does allow for a certain degree of flexibility: By exercising the discretionary right to assume responsibility under the so-called "sovereignty clause" of Article 17, paragraph 1 of the Dublin III Regulation, Member States can examine asylum applications even when they would not formally have jurisdiction for doing so according to the criteria established by the Dublin System. Germany has relied upon this right extensively during the refugee crisis. Against this backdrop, the following contribution[1] analyzes the reasons for, and limits of, multi-level administrative discretion in the Common European Asylum System. It argues that when a Member State exercises the right to assume responsibility in a sweeping manner, i.e. in hundreds of thousands of cases, it runs the risk of overstretching the legal limits of its discretionary powers. National administrative bodies can only invoke the right to assume responsibility insofar as this does not amount to game-changing decisions by the executive or unilateral decision-making without transnational coordination – particularly when such decisions have severe transnational consequences.

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[1] This Article is a slightly updated and, with regard to the audience, modified version of the article *Asylrechtlicher Selbsteintritt und Flüchtlingskrise*, 71 Juristenzeitung 332 (2016). References to several—though, of course, not all—key articles or books in German are explicitly kept in the footnotes in order to enable those readers who generally work in English, but understand German, to access these sources as well.

A. The Dublin System in the Context of the Refugee Crisis

The ongoing refugee crisis has moved the Common European Asylum System (CEAS)[2] to the forefront of an increasingly polarized societal debate. Not only do opinions diverge with regard to normative expectations about the nature and extent of international protection, as well as the necessary division of responsibilities in Europe towards that end, but the law itself is confronted with challenging questions.

I. Basic Principles

The Dublin System has proved to be a fundamental weakness of the CEAS. The Dublin System is currently rooted in the so-called Dublin III Regulation,[3] based on Article 78, paragraph 2, littera (e) of the Treaty on the Functioning of the European Union (TFEU). Establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection, it forms an integral part of the CEAS. Its main aim is to provide for a consistent and comprehensive system of jurisdiction regarding asylum applications.[4] Its modalities are substantiated in implementing acts,[5] and it is supplemented by the Eurodac Regulation that concerns the personal identification of migrants and asylum seekers in Europe.[6] Norway, Iceland, Liechtenstein, and Switzerland also participate in the Dublin System via international protocols and treaties.[7]

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[2] For a detailed overview of its evolution, see DANIEL FRÖHLICH, DAS ASYLRECHT IM RAHMEN DES UNIONSRECHTS 130 et seq. (2011).

[3] Regulation 604/2013, of the European Parliament and the Council, 26 June 2013, 2013 O.J. (L 180/31) [hereinafter Dublin III *Regulation*], replacing Council Regulation 343/2003, 18 Feb. 2003, 2003 O.J. (L 50/1) [hereinafter Dublin II *Regulation*] on 1 Jan. 2014. The Dublin II Regulation was preceded by the Dublin Agreement (DA), which in turn replaced Article 28 et seq. of the Schengen Implementation Agreement of June 19, 1990.

[4] Article 2(b) of the Dublin III regulation, referring to the Qualification Directive (Directive 2011/95/EU of the European Parliament and of the Council, 2011 O.J., L 337/9), according to which international protection encompasses *refugee protection* in the sense of the GCR as well as *subsidiary protection*.

[5] Commission Regulation 1560/2003, 2003 O.J. (L 222), most recently amended by Commission Implementing Regulation 118/2014, 2014 O.J. (L 39/1).

[6] Council Regulation 2725/2000, 2000 O.J. (L 316) 1.

[7] By contrast, special provisions apply to the EU Member State Denmark. For details, see Kay Hailbronner & Daniel Thym, *Legal Framework for EU Asylum Policy*, *in* EU IMMIGRATION AND ASYLUM LAW 1023, 1027–28 para. 7 (Kay Hailbronner & Daniel Thym eds., 2d ed. 2016).

According to Article 3, paragraph 1 of the Dublin III Regulation, a single Member State is responsible for each asylum application. This so-called "one chance only" principle is intended to preempt EU-wide "asylum shopping" and to reduce the overall number of refugees who proceed from one Member State to the next, unsuccessfully seeking asylum ("refugees in orbit"). Accordingly, a central goal of the Dublin system is the establishment of clear, workable, and fair criteria for establishing jurisdiction, which are also intended to make the process of accessing the CEAS faster and more efficient for the asylum seekers themselves.[8] The Member State that is determined to have jurisdiction over examining an asylum application is then responsible, following a transnational cooperation procedure, for taking the asylum seeker back.[9]

With regard to the direct effect of the regulation, the German statute on asylum (*Asylgesetz* or *AsylG*)[10] does not reiterate the regulation word-for-word, but rather limits itself to a dynamic reference in section 27a. Accordingly, an asylum application in Germany is invalid when another state is responsible for examining the application under the Dublin system.[11] The statute also explicitly authorizes the administration to order Dublin transfers, *i.e.* the transposition of an asylum seeker to the Member State responsible for evaluating his or her claim.[12]

The Dublin Regulation contains a hierarchically ordered list of criteria for determining the Member State responsible for evaluating asylum claims. These criteria include, in order of decreasing relevance, the protection needs of unaccompanied minors, the residence and protection status of the claimant's relatives, any preceding issuance of residency permits of visas by a Dublin Member State, as well as the claimant's first port of illegal entry or residence in the Dublin area. In practice, the most important criterion is the illegal crossing of an external border of the Schengen area.

II. Management and Implementation Inadequacies

The inadequacies of the Dublin system have recently become extraordinarily evident. Driven by the logic that an asylum seeker's escape route will ordinarily determine jurisdiction over

[8] *Cf.* Recitals 4 et seq. of the Dublin III Regulation

[9] Article 18 in conjunction with Articles 21-25 and 29 of the Dublin III Regulation.

[10] Formerly (that is until 23 Oct. 2015) "Asylverfahrensgesetz". An unofficial English translation of the AsylG can be found at http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf.

[11] The term "asylum application" in the sense of section 13 para. 1 AsylG encompasses both the claim for international protection as well as that for asylum in the more restricted sense of Art. 16a of the German Basic Law (Grundgesetz – GG).

[12] Section 34a para. 1 in conjunction with section 27a AsylG.

asylum claims, the system is inherently flawed as it unduly burdens countries in the southern and eastern periphery. Contrary to the principles of solidarity and the fair distribution of responsibilities explicitly prescribed by Article 80 of the TFEU as a federal principle of the CEAS,[13] the Dublin III Regulation does not allocate responsibilities and burdens fairly among Member States.

In combination with negative incentive structures, this results in a significant lack of enforcement. Countries like Italy and Greece or Bulgaria and Hungary, which are usually the first ports of entry in the south and east, have no incentive to follow the registration requirements and implement the Dublin III Regulation, as this would precisely provide the evidence that obliges them to take back thousands of asylum seekers. A lack of solidarity is thus complemented by a lack of efficiency. The reason why, in the context of the negotiations over the Dublin Agreement of 1990, Member States from the southern periphery had initially agreed to this distribution mechanism is because refugees primarily arrived from central and eastern Europe at the time. It was primarily the central and northern European Member States that then later resisted an adjustment of the distribution mechanism.

The dysfunctionality of Dublin is also evident from the low transfer rates.[14] Even more concerning are the divergences in protection levels from one Member State to the next, despite the harmonization by EU secondary law. This is not only reflected in differing protection rates,[15] but also in the inability of several Member States to abide by basic procedural and accommodation standards. These are the roots that give rise to the complex of problems that plague the Dublin System and affect asylum seekers' fundamental and human rights.

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[13] For details, see generally Jürgen Bast, *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, 22 EUR. PUB. L 289 (2016).

[14] BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, MIGRATIONSBERICHT 42 (2014), http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Migrationsberichte/migrationsbericht-2014.pdf?__blob=publicationFile [hereinafter *BAMF 2014*].

[15] *Cf.* EUROSTAT, ASYLUM QUARTERLY REPORT 3/2015 14 tbl. 9 (2015), http://ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q3+2015.pdf/b265b920-3027-4e69-95cf-63f8fb8c80ed

III. Reform Proposals

Reform proposals thus generally focus on financial burden sharing,[16] a recalibration of the criteria for determining jurisdiction,[17] or Dublin-wide distribution quotas. With regard to the latter, opinions inevitably diverge.[18] The introduction of binding quotas—beyond the relocation plans within the Dublin area that were decided upon in September 2015[19]—would necessarily have to be complemented by intensified controls of the external borders of Schengen and the introduction of large-scale and efficient registration centers (so-called "hotspots") in the frontier states. Alternative proposals focus on providing relief through annually determined refugee quotas within the framework of the resettlement programs in cooperation with the United Nations High Commission on Refugees (UNHCR) that enable the direct uptake of refugees from refugee camps in third countries such as Turkey and Lebanon.

Others have voiced their support for a reform proposal—at its core, convincing—that would entail the full harmonization of protection standards in conjunction with the centralization of decision-making power at the supranational level.[20] This reform proposal would lay the foundation for setting a fair quota for redistributing officially recognized beneficiaries of asylum protection among Member States that would then receive financial compensation from an EU fund.[21] Even more comprehensive are proposals that support inner-European freedom of movement for recognized refugees, rather than quotas, which would separate asylum-related management obligations from the Dublin order of jurisdiction.[22] This, in turn,

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[16] *See, e.g.*, GREGOR NOLL, NEGOTIATING ASYLUM 263 et seq. (2000).

[17] Reinhard Marx, *Ist die Verordnung (EG) Nr. 343/2003 (Dublin-II-VO) noch reformfähig?*, 6 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 188, 191 et seq. (2012).

[18] *Cf.* Daniel Thym et al., *Germany's Domestic „Königstein Quota System" and EU asylum policy*, VERFASSUNGSBLOG (Oct. 11, 2013), http://verfassungsblog.de/germanys-domestic-koenigstein-quota-system-and-eu-asylum-policy/, *with* Anna Lübbe, *Dublin ist gescheitert: Thesen zum Umbau des europäischen Asylsystems*, VERFASSUNGSBLOG (May 19, 2015), http://verfassungsblog.de/dublin-ist-gescheitert-thesen-zum-umbau-des-europaeischen-asylsystems/.

[19] *See* Council Decision 2015/1523, 2015 O.J. (L 239/146) and Council Decision 2015/1601, 2015 O.J. (L 248/80) regarding the relocation of a total of 160,000 claimants. From a legal-technical perspective, this is considered a special competence of secondary law in which the UK in particular is not participating. With the relocation of only several hundreds of people so far, implementation remains precarious.

[20] *See* Harald Dörig & Christine Langenfeld, *Vollharmonisierung des Flüchtlingsrechts in Europa - Massenzustrom von Flüchtlingen erfordert EU-Zuständigkeit für Asylverfahren*, NJW 1, 3 et seq. (2016); *see also* Kay Hailbronner, *Asyl in Europa - wenn, wie, wann, wo?*, FRANKFURTER ALLGEMEINE ZEITUNG 6 (Oct. 12, 2015), http://www.faz.net/aktuell/politik/die-gegenwart/fluechtlinge-asyl-in-europa-wenn-wie-wann-wo-13851277.html.

[21] *Dörig & Langenfeld*, *supra* note 20, at p. 4.

[22] See *Bast*, supra note 13, at 301 et seq., criticizing—convincingly—the quota solution as bureaucratic and based on planned-economy principles.

would necessitate a clarification of how to avoid preferential treatment of third-country nationals over citizens of the Union that do not enjoy unconditional freedom of movement.[23]

In terms of legal competences, Article 78, paragraph 2, littera (e) of the TFEU grants the European lawmaker discretion over a wide range of possibilities.[24] On May 4, 2016, the European Commission presented a first set of proposals to reform the CEAS, the most prominent of which is the reform proposal regarding the Dublin system.[25] This Article is not the place to summarize or to assess this extensive reform package, though it should be noted that the proposal tries to address the weaknesses of the current Dublin system by supplementing it with a new "corrective allocation mechanism."[26] This mechanism builds on three elements: First, a new automated system to monitor the number of asylum applications that each Member State receives and the number of applicants it effectively resettles; second, a reference key to help determine when a particular Member State is considered to be under disproportionate pressure; and third, the actual fairness mechanism to alleviate that pressure.

B. The Discretionary Right to Assume Responsibility

Criteria-based responsibility and the actual location of examination have been diverging for thousands of cases for many years now. This applies most notably to Germany, which, in recent years, has been accepting the highest absolute numbers of asylum claims[27] without technically having jurisdiction for doing so according to the Dublin list of criteria. Contrary to widespread opinion, this does not necessarily imply that Germany is violating the Dublin Regulation. The reason for this is the existence of the so-called right to assume responsibility.

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[23] *Cf.* Article 7 para. 1 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, 2004 O.J. (L 158/77. With view to Article 18 TFEU, see CJEU, Case C-333/13, Dano v. Jobcenter Leipzig, ECLI:EU:C:2014:2358 (Nov. 11, 2014), paras. 69–80.

[24] That a centralization of the decisions of granting or refusing international protection at the EU level would be covered by Article 78 paragraph 2 of the TFEU is questionable. *See* Dörig & Langenfeld, *supra* note 20, at 1, 3 et seq. with an emphasis on transitional arrangements.

[25] *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast)*, COM (2016) 270 final (May 4, 2016) [hereinafter *Dublin Reform Proposal*].

[26] According to the *Dublin Reform Proposal*, the new Dublin Regulation would contain a new Chapter 7, entitled "Corrective Allocation Mechanism."

[27] *Cf.* EUROSTAT, ASYLUM QUARTERLY REPORT 4/2015 11 (2015), http://ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q4+2015.pdf/7c7307b1-a816-439b-a7d9-2d15e6e22e82.

I. Administrative Discretion

The right to assume responsibility is rooted in Article 17, paragraph 1 of the Dublin III Regulation, formerly also known as the "sovereignty clause." According to this clause, any Member State can decide to examine asylum applications even if it is not technically responsible for doing so according to the criteria listed in the Dublin regulation. As a discretionary clause, the right to assume responsibility has been an integral part of the Dublin system from the beginning.[28] Even though the content of the clause has remained relatively stable over the years,[29] the basis of its legitimacy has changed significantly. The entry into force of the Lisbon Treaty entailed the introduction of the ordinary legislative procedure and thus also fundamental gains in parliamentary legitimacy in the Area of Freedom, Security and Justice (AFSJ). The European Parliament and the Council of the European Union (Council) have accounted for nearly all central legal acts in this area ever since, a fact that has barely been acknowledged by the general public.

In the Dublin III Regulation, the right to assume responsibility forms, together with the humanitarian clause of Article 17, paragraph 2, an integral part of the Regulation's discretionary clauses. According to the CJEU, both provisions "grant a wide discretionary power to Member States."[30] Contrary to the humanitarian clause,[31] the sovereignty clause does not establish any substantive criteria[32] and is thus rather broadly phrased. Legally, the right to assume responsibility entails that the respective Member State "shall become the Member State responsible and shall assume the obligations associated with that responsibility."[33] Given that exercising the discretionary right to assume responsibility creates specific legal consequences under the Dublin III Regulation, this discretionary right must be considered an act implementing EU law within the meaning of Article 51, paragraph 1 of the EU Charter and, therefore, as falling within the scope of application of the Charter.[34]

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[28] *See* already Article 3 para. 4 of the Dublin Agreement and Article 3 para. 2 of the Dublin II Regulation.

[29] Under Article 3, paragraph 4 of the Dublin Agreement, the right to invoke the sovereignty clause required the consent of the claimant.

[30] *See* CJEU, Case C-394/12, Abdullahi v. Bundesasylamt, ECLI:EU:C:2013:813, para. 57 (Dec. 10, 2013) [hereinafter *Abdullahi*, Case C-394/12]. On the humanitarian clause, see C-245/11, K. v. Bundesasylamt, ECLI:EU:C:2012:685, para. 27 (Nov. 6, 2012).

[31] Article 17, paragraph 2 of the Dublin III Regulation is essentially limited to family reunifications, presupposes the written consent of the claimant, and merely allows the examining Member State to request another Member State that is not formally responsible according to the Dublin criteria to take on the applicant.

[32] *See also* CJEU, Case C-528/11, Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet, ECLI:EU:C:2013:342, para. 36 (May 30, 2013) [hereinafter *Halaf*, C-528/11].

[33] Article 17, para. 1(2) of the Dublin III Regulation.

[34] *See* CJEU, Joined Cases C-411/10 & C-493/10, N.S. v. Secretary of State for the Home Department et al., ECLI:EU:C:2011:865, paras. 64–69 (Dec. 21, 2011) [hereinafter: *N.S. et al.*, Joined Cases C-411/10 & C-493/10].

The case law furthermore suggests that the applicant does not have a subjective right to oblige national authorities to exercise the discretionary right to assume responsibility.[35]

From a scholarly point of view, the right to assume responsibility is an example of a directly applicable discretionary clause that is established by the legislative branch at the EU level and enforced by the administrative branch at the national level as a "top-down proceeding."[36] It is here that the multi-level or federal dimension becomes apparent. EU law confers discretionary powers on the national administration which the latter exercises according to national procedural standards and within the limits of EU law.[37] The wording of Article 17, para. 1 of the Dublin III Regulation certainly addresses the Member States in general when it states that, by way of derogation from Article 3, para. 1, each Member State may decide to examine an individual application for international protection, though it is clear from the legal context that the Dublin III Regulation is specifically geared towards granting national authorities *administrative* discretion. This already follows from the fact that the Dublin procedure was designed to be an administratively enforceable procedure, as reflected in the corresponding chapter on "administrative cooperation."[38] Moreover, Dublin III explicitly requires the availability of national authorities that are capable of effectively enforcing the norm.[39] Hence, it does not come as a surprise that all Dublin States enforce the Dublin Regulation via administrative bodies, most of them by governmental departments.[40] In Germany, the relevant administrative body is the Federal Office for Migration and Refugees (BAMF),[41] which is subject to the legal and professional supervision of the Federal Ministry of the Interior and has numerous branches in the federal states.

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[35] *See* CJEU, Case C-4/11, Bundesrepublik Deutschland v. Puid, ECLI:EU:C:2013:740, paras. 33–37 (Nov. 14, 2013) [hereinafter *Puid*, Case C-4/11]. For commentary supporting the CJEU's interpretation, see Daniel Thym, *Überstellung von Asylsuchenden nach Griechenland – Anmerkung*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 130, 131 (2014); Jan Bergmann, *Das Dublin-Asylsystem*, 3 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 81, 85 (2015); Michael Funke-Kaiser, *§ 27a*, *in* GEMEINSCHAFTSKOMMENTAR ZUM ASYLVERFAHRENSGESETZ (GK-AsylVfG), para. 52 (2016).

[36] For a more detailed discussion, see generally Giacinto Della Cananea, *The European Union's Mixed Agreements*, 68 L. & CONTEMP. PROBS. 197 (2004); PAUL CRAIG, EU ADMINISTRATIVE LAW 29 (2d ed. 2012). For a typology of implementation modes see also THOMAS V. DANWITZ, VERWALTUNGSRECHTLICHES SYSTEM UND EUROPÄISCHE INTEGRATION 484 et seq. (1996).

[37] Among others, the principles of equivalence and effectiveness.

[38] Chapter 7 of the Dublin III Regulation.

[39] Article 35 of the Dublin III Regulation: EN "[A]uthorities responsible for fulfilling the obligations . . . ."; FR "autorités charges . . . de l'exécution"; DE "für die Durchführung dieser Verordnung zuständigen Behörden."

[40] *See* O.J. (C 55) 2015/C 55/05.

[41] The Federal Office for Migration and Refugees translates to "Bundesamt für Migration und Flüchtlinge" in German.

II. Transnational Impact and Purpose

The transnational impact of the discretionary exercise of the right to assume responsibility for the purposes of determining jurisdiction is of particular interest in the present context. Article 17, paragraph 1 follows the transnational model in the sense of a "one for all" decision-making mode.[42] While a single Member State may thus have jurisdiction, [43] that Member State can still not disentangle itself from a transnational network of mutual obligations. This already suggests that the exercise of administrative discretion in a multi-level setting is limited by federal principles.

Due to a lack of substantive limitations, Article 17, paragraph 1 can be used towards a plurality of ends, which suggests taking a look at its origin. When the Commission proposed the enactment of the Dublin II Regulation, it explained that Member States could consider political, humanitarian, and even practical reasons for invoking the right to assume responsibility.[44] The Commission's proposition of highlighting humanitarian reasons and cases of hardship in Dublin III was rejected during the legislative process.[45] The current legal framework, however, already suggests that the sovereignty clause serves as a provision relating to cases of undue hardship since the humanitarian clause is limited to aspects of family reunification.[46] In addition, Member States can also invoke the sovereignty clause for practical or procedural reasons, *e.g.* for accelerating the evaluation of asylum claims.[47]

At the time when it was introduced, protecting the right to autonomous action at the national level was one of the central aims of the sovereignty clause—including the respect for the right of Member States to grant asylum independently, *e.g.* in the case of France and Germany, among others.[48] This is also where the term "sovereignty clause" stems from. The term is potentially misleading: It is less concerned with defensive reflexes against the EU than it is with flexibility—that is, allowing Member States to initiate asylum proceedings for

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[42] *See* GERNOT SYDOW, VERWALTUNGSKOOPERATION IN DER EUROPÄISCHEN UNION 123, 138 et seq. (2004).

[43] *Cf id*. at 139.

[44] *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, at 11, COM (2001) 447 final (July, 26 2001). In response see *Halaf*, C-528/11 at para. 37.

[45] The wording "in particular for humanitarian and compassionate reasons" did not make it from the proposal (COM(2008) 820 final, p. 36) into the final version.

[46] *Cf.* CHRISTIAN FILZWIESER & ANDREA SPRUNG, DUBLIN-III-VERORDNUNG art. 17, K14 (2014).

[47] *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System*, at 21, SEC (2007) 742 (June 8, 2007).

[48] *See* Kay Hailbronner & Claus Thiery, *Schengen II und Dublin - Der zuständige Asylstaat in Europa*, 17 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 51, 56 (1997).

politically opportunistic reasons.[49] In its reform proposal of May 4, 2016, the Commission again tried to narrow the scope of the sovereignty clause to ensure that it is "only used on humanitarian grounds in relation to wider family."[50] Whether or not the Council and the European Parliament will agree to the narrowed scope remains to be seen, but it seems rather unlikely in the current political climate.

C. The Right to Assume Responsibility and Fundamental Rights

The humanitarian challenges of the refugee crisis as well as the substantive breadth of Article 17, para. 1 of the Dublin III Regulation make clear why calls for aligning the Dublin System with human rights standards have particularly focused on the right to assume responsibility. In this context, human rights could, in certain cases, turn discretion into obligation and oblige the Member State in question to exercise its right to assume responsibility.

I. Prohibition of Dublin Transfers: Diverging Standards

A coherent and predictable determination of the limits of administrative action is particularly challenging where diverging standards of fundamental rights protection exist on different levels. In the context of Dublin, the prohibition on transfers has become a particularly contested question, that is, the conditions in which one Dublin Member State is prohibited from transferring persons seeking international protection to another Dublin Member State on the grounds that the latter cannot sufficiently guarantee core human rights. Can the transferring state then be obliged to exercise the right to assume responsibility?

1. Human Rights Standards

More generally, this question concerns the issue of whether the principle of non-refoulement applies to inner-European refugee cases without modification.[51] While the international principle of non-refoulement is traditionally rooted in Article 33, paragraph 1

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[49] *Cf.* also Christian Schmid & Romy Bartels, HANDBUCH ZUM DUBLINER ÜBEREINKOMMEN 92 (2001); Kay Hailbronner, *§ 27a AsylVfG (67th supplement 2010)*, *in* AUSLÄNDERRECHT (Kay Hailbronner ed. loose-leaf), para. 62.

[50] *See Dublin Reform Proposal*, *supra* note 25. The recast clause would read (emphasis added):

> By way of derogation from Article 3(1) *and only as long as no Member State has been determined as responsible*, each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person *based on family grounds in relation to wider family not covered by Article 2(g)*, even if such examination is not its responsibility under the criteria laid down in this Regulation.

[51] Based on the French *refouler*, "sending back." The notion is intensely debated in the U.S. Supreme Court. *See, e.g.*, Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

of the Geneva Convention on Refugees (GCR),[52] it has nowadays also been framed in terms of human rights. The most prominent concept in this respect is derived from Article 3 of the European Convention on Human Rights (ECHR).[53] This specific approach is preventive in nature, that is, it is intended to ensure the protection of Article 3 of the ECHR already by the transferring state.[54] If there is a "real risk" that the refugee in question could experience inhuman or degrading treatment in the destination country, the act of transferring a refugee may thus already violate the ECHR.[55]

In principle, the relevant protection standards in international and EU law should not diverge on this point. EU law consequently approximates the ECHR: Not only is the wording of Article 4 of the EU Charter equal to that of Article 3 of the ECHR, but Article 52, paragraph 3 of the EU Charter also stipulates that the Charter is to be interpreted in conformity with the ECHR.[56] In practice, the two Courts in Luxembourg and Strasbourg, i.e. the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), agree that a Member State at any rate violates its obligations under Article 3 of the ECHR and Article 4 of the EU Charter if it transfers an asylum seeker to a destination country that fails to guarantee minimum procedural and housing standards to the extent that Greece did until 2011, as reflected in the ECtHR's 2011 ruling in *M.S.S.*[57]

2. The EU Law Perspective: Systemic Deficiencies and Mutual Trust

Relying on *M.S.S.*, the Court of Justice of the European Union (CJEU) in turn reached the conclusion that transfers to Greece violated Article 4 of the EU Charter due to "systemic

[52] For details, see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 87 et seq. (Erika Feller, Volker Türk & Frances Nicholson eds., 2003); GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 51 et seq. (3d ed. 2007).

[53] Even the non-refoulement under the GCR is construed by some scholars in a human rights sense. *Cf.* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 196 et seq. (2d ed. 2014).

[54] For other human rights, this only applies in highly exceptional cases, if at all. *Cf.* Cathryn Costello & Minos Mouzourakis, *Reflections on reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough?*, 10 ASIEL & MIGRANTENRECHT 404, 406 et seq. (2014).

[55] ECtHR, Soering v United Kingdom, App. No. 14038/88, para. 88 (July 7, 1989).

[56] *Cf.* Martin Borowsky, Article 52, *in* CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, para. 37 (Jürgen Meyer ed., 4th ed. 2014). The explicit non-refoulement of Article 19 para. 2 of the EU Charter has only been applied in the context of third countries so far. *Cf.* CJEU, Case C-562/13, Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Abdida, ECLI:EU:C:2014:2453, paras. 46 et seq. (Dec. 18, 2014); Case C-239/14, Tall v. Centre public d'action sociale de Huy, ECLI:EU:C:2015:824, paras. 53 et seq. (Dec. 17, 2015).

[57] ECtHR, M.S.S. v. Belgium & Greece, App. No. 30696/09, para. 338 et. seq. (January 21, 2011) [hereinafter *M.S.S.*, App. No. 30696/09].

deficiencies" in the Greek asylum system at the time.[58] The key concept of systemic deficiencies has since not only been codified in Article 3, paragraph 2, subparagraph 2 of the Dublin III Regulation,[59] but is highly relevant in other areas of EU law as well.[60] In essence, it serves a fundamental function, striking a balance between the principle of mutual trust within the EU, on one hand, and the preventative extension of human rights protection to the transferring EU Member States, on the other.

A key precondition of the AFSJ is that all EU Member States[61] can mutually trust each other to generally comply with the EU Charter[62] as well as the ECHR and the GCR. The CJEU has made clear from the beginning that this presumption of compliance is to be rebutted if there is sufficient evidence that there are systemic deficiencies in the destination country that may, with a certain degree of probability, result in inhuman or degrading treatment.[63] This approach, fittingly dubbed "horizontal Solange" in the literature,[64] enables national courts, when assessing administrative acts with transnational impacts, to evaluate compliance with fundamental rights in other Member States, albeit only under specific conditions. To a certain extent at least, this division of labor with regard to the realization of fundamental rights can fulfil the normative promise of constitutionalism in a plural legal system.[65]

It is still true that, according to the CJEU's case law, the presumption of compliance with fundamental rights cannot be rebutted by single or sporadic infringements by the Member State of destination, but requires the kind of gravity, generality, and predictability that the criterion of systemic deficiencies is intended to conceptualize.[66] EU law thus avoids forcing national courts into assuming a horizontal policing function on the basis of a case-by-case prognosis. EU law *can* do so, because EU fundamental rights protection is available before

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[58] *N.S. et al.*, Joined Cases C-411/10 & C-493/10.

[59] The stipulation speaks of "systemic flaws."

[60] *See generally* Armin von Bogdandy & Michael Ioannidis, *Systemic Deficiency in the Rule of law: What it is, What has been done, What can be done*, 51 COMMON MKT. L. REV. 59 (2014).

[61] And Dublin-associated third party countries.

[62] Under the conditions laid down in Article 51 para. 1 of the EU Charter.

[63] *N.S. et al.*, Joined Cases C-411/10 & C-493/10 at paras 79–86, 104–06 regarding the asylum procedure and reception conditions for asylum applicants. For expulsions based on a European Arrest Warrant, see CJEU, Joined Cases C-404/15 & C-659/15 PPU, Aranyosi et al., ECLI:EU:C:2016:198, paras. 77 et seq., 89 et seq (Apr. 4, 2016).

[64] *See generally* Iris Canor, My brother's keeper? *Horizontal* solange: *"An ever closer* distrust *among the peoples of Europe"*, 50 COMMON MKT. L. REV. 383 (2013) for critical appraisal.

[65] *Id*.

[66] Kay Hailbronner & Daniel Thym, *Entscheidungsbesprechung : Vertrauen im europäischen Asylsystem*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 406, 408 (2012).

the courts of the EU Member State of destination—if necessary, also in dialogue with the CJEU and before the ECtHR. EU law *must* do so because the preservation of the Union as a quasi-federal unit would otherwise be at stake.

The telos of the CJEU's case law is that, within the Union, the horizontal suspension of EU obligations between Member States by way of a preventative extension of human rights protections to countries that are not immediately responsible for the conditions of the asylum system in the destination country should not be exercised too liberally. Rather, the primary responsibility should remain with the country of destination—which connects back to the negative incentive structures of the Dublin system. Hence, the CJEU rejects prohibitions on inner-European transfers in cases that do not rise to the level of systemic deficiencies in the destination country.[67] While the German Federal Administrative Court (*Bundesverwaltungsgericht*, or *BVerwG*) immediately adopted this case law,[68] the German Federal Constitutional Court (*Bundesverfassungsgericht*, or *BVerfG*) has so far avoided explicitly commenting on the relevance of the criterion of systemic deficiencies in asylum cases,[69] though it did, in its recent decision on the European Arrest Warrant, express a clear preference for the differing case-by-case approach of the ECtHR.[70]

3. The ECHR Perspective: A Case-by-Case Evaluation

The Grand Chamber of the ECtHR decided in *Tarakhel* in 2014 that inner-European transfers could also be forbidden for fundamental rights reasons that do not rise to the level of systemic deficiencies.[71] More specifically, the ECtHR voiced its support for prohibiting inner-

[67] *Abdullahi*, C-394/12 at para. 60, arguing that where a

> Member State agrees to take charge of the applicant for asylum . . . the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State.

[68] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 10 B 35/14, June 6, 2014, para. 6.

[69] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 1795/14, Sept. 17, 2014, para. 7. The BVerfG essentially requires that the authorities ensure, "in coordination with the authorities of the destination country," that families with small children will be guaranteed accommodation. Further clarification is expected from the decisions on the merits of Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 602/15 and Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 3024/14.

[70] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], European Arrest Warrant II, 2 BvR 2735/14 (Dec. 15, 2015). *See* T. Reinbacher & M. Wendel, *The Bundesverfassungsgericht's European Arrest Warrant II Decision*, 4 MAASTRICHT J. 702 (2016).

[71] ECtHR, Tarakhel v. Switzerland, App. No. 29217/12, para. 103–05 (Nov. 4, 2014) [hereinafter *Tarakhel*, App. No. 29217/12]. Affirmative Costello & Mouzourakis, *supra* note 54, at 404, 406 et seq.

European Dublin transfers to Italy[72] in the case of families with small children,[73] unless sufficient individual administrative guarantees were given by the state of destination—in that instance, Italy. The ECtHR highlighted the real risk of inhuman treatment in the country of destination as the key criterion of the prohibition on transfers.[74] Accordingly, the exact nature and source of the risk are irrelevant and do not exempt the transferring Member States "from carrying out a thorough and individualized examination."[75] The fact that the ECtHR does not want to forgo the possibility of a preventive examination of each individual case reflects the logic of human rights control as an institutionally externalized supervision of human rights focused on the individual.[76] From this perspective, the approach of the CJEU would either have to be rejected or broadened in such a way that the concept of "systemic deficiencies" would also encompass specific circumstances of individual cases.[77]

The result of these disagreements between Strasbourg and Luxembourg is a highly erratic individualized adjudication, memorably dubbed the "Dublin lottery."[78] From the practical perspective of the executive bodies and the administrative courts, it thus remains barely possible to delineate the negative boundaries of administrative discretion rooted in secondary law in a consistent and predictable manner.

II. Obligatory Exercise of the Right to Assume Responsibility?

What does this imply in terms of an obligation to invoke the sovereignty clause? The CJEU's adjudication and its codification in Article 3, paragraph 2, subparagraph 2 of the Dublin III Regulation provide a clear answer: The Member State determining which state is responsible

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[72] For details, see Mattias Wendel, *Menschenrechtliche Überstellungsverbote: Völkerrechtliche Grundlagen und verwaltungsrechtliche Konkretisierung*, *in* DEUTSCHES VERWALTUNGSBLATT 731, 735 et seq. (2015).

[73] Cf. A.M.E. v. the Netherlands, App. No. 51428/10, para. 34 et seq. (Feb. 5, 2015) with the clarification that the conclusions of *Tarakhel* do not apply to young and healthy asylum seekers.

[74] Whether or not this was an accurate depiction of the concrete circumstances was heavily debated. Compare the dissenting opinion of judges *Casadevall*, *Berro-Lefèvre* and *Jäderblom*, who fundamentally contributed to the foregoing section's jurisprudence.

[75] *Tarakhel*, App. No. 29217/12 at para. 104.

[76] An individual perspective was—at least retrospectively—also envisioned in M.S.S. No. 30696/09, at para. 366. The BVerfG suggests that the principle of mutual trust may be disproved on a case-by-case basis. *Cf.* BVerfG, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], European Arrest Warrant II, 2 BvR 2735/14, 15 Dec. 2015, paras. 74, 83, 105.

[77] *See e.g.*, Anna Lübbe, *"Systemische Mängel" in Dublin-Verfahren*, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 107 (2014).

[78] *Cf. Bergmann*, *supra* note 35, at 81, 87. In Germany, this is aggravated by the lack of jurisprudential coherence between higher courts in the case of non-appealable decisions by individual judges in summary proceedings, cf. sections 76, 80 AsylG.

under Dublin is not obligated to exercise the right to assume responsibility in light of systemic deficiencies, but rather to continue its evaluation of jurisdiction.[79] This can result in a transfer to yet another Member State or in the activation of subsidiary jurisdiction according to Article 3, paragraph 2, subparagraph 1 or 3 of the Dublin III Regulation, respectively. According to EU law, the question of whether or not to exercise the discretionary right to assume responsibility is thus decoupled from prohibitions of Dublin transfers based on human rights considerations. Regarding Dublin transfers, the system ensures compliance with fundamental rights by excluding, in the case of systemic deficiencies, the state which would in principle be responsible under the Dublin criteria and by continuing the process of determining jurisdiction.[80] This solution broadly ensures the integrity of the system of responsibility established by the EU legislature.[81]

That is not to say, however, that the sovereignty clause could not be further interpreted in conformity with fundamental rights. For instance, an obligation to exercise the right to assume responsibility—and thus the transformation from discretion to obligation—may result from a procedure of unreasonable length.[82] The EU legislature and CJEU, however, do not ensure the preventative protection of Article 4 of the EU Charter through a mandatory exercise of the right to assume responsibility. Whereas the right to invoke the sovereignty clause remains untouched, there is no room for an obligation to invoke the sovereignty clause below the threshold of systemic deficiencies.

The ECtHR, by contrast, considers the administrative discretion conferred on Member States by the sovereignty clause a convenient way to implement human rights obligations. According to the ECtHR, its *Bosphorus* case law[83] does not apply in the case at hand, since the sovereignty clause puts it within the discretion of EU Member States to refrain from transfers.[84] In other words, the fact that EU law provides the option for alternative courses of action entails the unlimited applicability of the ECHR and a full review by the ECtHR of the

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[79] *Puid*, Case C-4/11 at paras. 33–37.

[80] This in turn leads to the follow-up question of whether—in the case of the impossibility of transfers to a Dublin Member State with an external border, such as Greece—other Dublin Member States should de jure be considered states with external borders, for instance with regard to Article 13, paragraphs 1 and 2 of the Dublin III Regulation. The wording of Article 3, paragraph 2, subparagraph 2 of the Dublin III Regulation suggests otherwise. After all, the stipulation solely prescribes the continuation of the assessment of jurisdiction and does not call for an overhaul of the criteria for jurisdiction, whatever they may be.

[81] Accordingly, the recast discretionary clauses of Article 17 of the Dublin III Regulation were explicitly placed outside of the chapter on general principles and criteria for jurisdiction.

[82] *Puid*, Case C-4/11 at para. 35.

[83] ECtHR, Bosphorus v. Ireland, App. No. 45036/98, paras. 152–57 (June 30, 2005). Strictly speaking, this leads to a justification of the Member State's action.

[84] *M.S.S.*, App. No. 20696/09 at para. 340; *Tarakhel*, App. No. 29217/12 at para. 90.

actions of the transferring EU Member State. The ECtHR thus considers Dublin transfers to be non-mandatory legal obligations. If taken to its logical conclusion, this would imply that Article 3 of the ECHR entails, contrary to the jurisprudence of the CJEU, an obligation to exercise the right to assume responsibility, because the sovereignty clause is the door-opener for human rights monitoring by the ECtHR.[85] Certainly, Article 52, paragraph 3 of the EU Charter would allow, if not oblige, the CJEU to approximate its jurisdiction to that of the ECtHR. Its opinion on the EU's accession to the ECHR, however, raises doubts as to whether the CJEU will actually follow the ECtHR's example.[86]

D. Germany 2015: The Boundaries of a Sweeping Exercise of the Right to Assume Responsibility

Germany's sweeping exercise of the right to assume responsibility in 2015 raises the question of the boundaries of administrative discretion in the CEAS. Here, we are no longer concerned with the issue of whether a Member State is obligated to exercise the right to assume responsibility but rather with the limits that restrain the exercise of the discretionary powers conferred on Member States by Article 17, paragraph 1 of the Dublin III Regulation. This question is of cross-disciplinary interest as it addresses the extraterritorial effects, or externalities, of administrative discretion.[87]

I. Sweeping Exercise of the Right to Assume Responsibility

What would be the limits of the discretionary "flexibility"[88] proclaimed by the German federal government in the late summer of 2015? The difficulty of finding an answer to this question begins with the legal form chosen by the German executive. The BAMF had "suspended"—to use its own words—the Dublin procedure for Syrian applicants as early as August 21, 2015 so that its administrative resources could be redirected toward examining

[85] If the ECtHR had considered EU law—and more specifically Article 3, paragraph 2, subparagraph 2 of the Dublin III Regulation and the judgments *Puid* and *Abdullahi*—as a self-contained regulatory system, then it would have had to have applied the *Bosphorus* jurisprudence. The presumption of an equivalent standard of fundamental rights protection by EU law should have then either been confirmed or rejected—the latter being the case, for instance, in *Michaud v. France*, App. No.12323/11, para. 115 (Dec. 6, 2012).

[86] CJEU, Opinion 2/13, ECLI:EU:C:2014:2454, para. 191 et seq. (Dec. 18, 2014).

[87] For details, see MATTIAS WENDEL, BEHÖRDLICHE ENTSCHEIDUNGSSPIELRÄUME ALS MEHREBENENRÄUME ch. 8 (forthcoming 2017).

[88] In its press release of August 31, 2015, the federal German government explicitly calls for "mehr deutsche Flexibilität," or "more German flexibility."

the substance of hundreds of thousands of unprocessed applications.[89] The public also interpreted this act as a unilateral and temporary suspension of the Dublin system.[90]

A more generous observer could, alternatively, conclude that this act essentially constituted a sweeping exercise of the right to assume responsibility—or at least an announcement to do so.[91] Of course, this rather convenient interpretation, which builds a golden bridge back to legality, is not entirely unproblematic. After all, a Member State exercising the right to assume responsibility does not suspend, but applies, the Dublin system. The sovereignty clause forms an integral part of the CEAS and, according to the CJEU, must be exercised in accordance with the other provisions of the Dublin Regulation.[92] Its exercise triggers, in particular, a number of transnational obligations, such as information and reporting requirements,[93] with which the BAMF did not entirely comply when suspending the Dublin system.[94] What raises additional questions is the "exceptional"[95] decision taken by German

[89] See the internal administrative guidelines, VERFAHRENSREGELUNG ZUR AUSSETZUNG DES DUBLIN-VERFAHRENS FÜR SYRISCHE STAATSANGEHÖRIGE (Aug. 21, 2016), http://www.reinbek.de/files/Fluechtlinge/4_Aussetzung_Dublinverfahren_Syrien.pdf. An official change of course followed on 21 October 2015, based on the directions of the Ministry of the Interior. The percentage of Dublin decisions made by Germany, however, is still exceptionally low. Until September 2016, only 2.8% of all decisions taken by the BAMF in 2016 were decisions within the framework of the Dublin procedure, compared to almost 18.2% in 2014 (see BAMF ASYLGESCHÄFTSSTATISTIK 12/2014, p. 7, http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201412-statistik-anlage-asyl-geschaeftsbericht.pdf?__blob=publicationFile and BAMF ASYLGESCHÄFTSSTATISTIK 9/2016, p. 8, http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201609-statistik-anlage-asyl-geschaeftsbericht.pdf;jsessionid=02B102EB990749713614F02F20C9A066.1_cid359?__blob=publicationFile).

[90] See exemplarily *Dublin-Prüfung für syrische Flüchtlinge ausgesetzt*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 25, 2015), http://www.faz.net/agenturmeldungen/dpa/dublin-pruefung-fuer-syrische-fluechtlinge-ausgesetzt-13768817.html; *Deutschland setzt Dublin-Verfahren für Syrer aus,* ZEIT-ONLINE (Aug. 25, 2015), http://www.zeit.de/politik/ausland/2015-08/fluechtlinge-dublin-eu-asyl; *Syrien-Flüchtlinge dürfen in Deutschland bleiben*, SPIEGEL-ONLINE (Aug. 25, 2015), http://www.spiegel.de/politik/deutschland/syrien-fluechtlinge-deutschland-setzt-dublin-verfahren-aus-a-1049639.html.

[91] This was also the official position of the federal government. *See* Government Press Conference of August 26, 2015, https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2015/08/2015-08-26-regpk.html: "Das sogenannte Selbsteintrittsrecht gibt jedem Staat in jedem Einzelfall ein völlig freies Ermessen" („The so-called right to assume responsibility confers upon every Member State an entirely free discretionary power in every individual case").

[92] *N.S. et al.*, Joined Cases C-411/10 & C-493/10 at para. 65–66.

[93] Article 17 para. 1(2)–(3) of the Dublin III Regulation.

[94] That the suspension of Dublin was technically not intended to amount to an exercise of the right to assume responsibility in all cases, can, accordingly, be derived from the internal guidelines.

[95] Compare press release No 309/2015 of the German federal government of September 5, 2015, https://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2015/09/2015-09-05-merkel-orban.html as well as the article *Bundeskanzlerin Merkel telefoniert mit Ministerpräsident Orbán*, DIE BUNDESREGIERUNG (Sept. 5,

Chancellor Angela Merkel on the night of September 4 through September 5, 2015. This decision was made following a telephone call with the federal chancellor of Austria and, later, with the prime minister of Hungary, to allow asylum seekers stranded at the Hungarian border to enter Germany and to apply for asylum by means of applying the sovereignty clause. Since no formal agreements exist, or are at least known, in this area, many questions remain open.[96]

What is certain, by contrast, is that the Federal Republic of Germany relied on the right to assume responsibility in order to allow several hundreds of thousands of asylum seekers to stay in the country in the second half of 2015. From the perspective of constitutional law alone, it is questionable whether the executive was authorized to take such a fundamental decision or whether it would not have rather been the parliament's right to do so.[97] The extent to which Article 17, paragraph 1 of the Dublin III Regulation actually still allows for such a legislative key decision at the national level need not be answered conclusively at this point. After all, the question only becomes relevant insofar as a sweeping exercise of the right to assume responsibility is permissible under EU law.[98] This, however, clearly remains questionable.

The polarization of the public debate is reflected in the legal scholarship in this case. On the one hand, the German government is accused of openly breaking the law, since its actions would imply that political expediency trumps conformity with the law.[99] Others suggest that a sweeping application of the sovereignty clause is compatible with the letter and spirit of the Dublin III Regulation, because it achieves its primary goal: To determine a single state responsible for evaluating asylum claims.[100] Whereas the former legal interpretation

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2015), https://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2015/09/2015-09-05-merkel-orban.html.

[96] For an excellent investigative account of what presumably happened that night, see now, a year later: *Was geschah wirklich?*, ZEIT ONLINE (Aug. 22, 2016), http://www.zeit.de/2016/35/grenzoeffnung-fluechtlinge-september-2015-wochenende-angela-merkel-ungarn-oesterreich/komplettansicht.

[97] *See* Martin Nettesheim, *Ein Vakuum darf nicht hingenommen werden*, FRANKFURTER ALLGEMEINE ZEITUNG (Oct. 29, 2015), http://www.genios.de/presse-archiv/artikel/FAZ/20151029/ein-vakuum-darf-nicht-hingenommen-w/FD1201510294701364.html.

[98] Of course, this is only valid insofar as the principle of the primacy of the application of EU law is respected and if one does not resort to a potential breach of identity.

[99] Hans Jürgen Papier, *Sicherheitsrisiko Bundesinnenministerium?*, HANDELSBLATT (Jan. 16, 2016) ("The narrow guardrails of German and European asylum law have been blown up."). *See also* Alexander Peukert et al., *Die Flüchtlingskrise kann rechtsstaatlich bewältigt werden*, FRANKFURTER ALLGEMEINE ZEITUNG (Feb. 9, 2016). For a drastic formulation, see Ulrich Vosgerau, *Herrschaft Des Unrechts*, *in* CICERO 92, 93 (2015), http://wobo.de/news/Vosgerau%20Cicero.pdf ("[S]tate-initiated breach of the law.").

[100] *Cf.* Jürgen Bast & Christoph Möllers, *Dem Freistaat zum Gefallen: über Udo Di Fabios Gutachten zur staatsrechtlichen Beurteilung der Flüchtlingskrise*, VERFASSUNGSBLOG (Jan. 16, 2016),

neglects the existence of the sovereignty clause, the latter tends to overstretch its normative limits.

One of the counterarguments against the claim that the German government engaged in a "blatant" violation of the Dublin system is that the right to assume responsibility under Article 17, paragraph 1 of the Dublin III Regulation is not tied to any substantive requirements. The executive therefore has broad discretion for decision-making, which allows it to include various considerations as a motive of its administrative actions. In the case of a potentially life-threatening emergency scenario, such as the one that several tens of thousands of asylum seekers were facing at the Hungarian border on September 4, 2015, humanitarian considerations justify an anticipated exercise of the right to assume responsibility—inevitably, within the context-dependent limits of the specific emergency and not in the sense of a general application of the sovereignty clause. The concept of transnational solidarity also points in the direction of a compatibility between the German government's actions and EU law. By invoking the sovereignty clause, one or several Member States that would otherwise not be responsible for evaluating asylum claims can alleviate those Member States that are usually overburdened, thus compensating, to a certain extent at least, for the inherent lack of solidarity within the Dublin system.[101] From a scholarly point of view, one could consider this an act of interpreting the Dublin III Regulation in accordance with EU primary law, because it applies the Dublin III Regulation along the lines of Article 80 of the TFEU. This does not, of course, result in a fair division of responsibilities within the Dublin area, as envisioned by Article 80 of the TFEU, considering that the vast majority of EU Member States refuse to shoulder their share of the burden.

But, above all, Article 80 of the TFEU, which primarily addresses the EU legislature, does not empower national administrations to generally recast the system of responsibility enacted by the EU legislature. The need to generally respect the EU's basic legislative decisions regarding the system of responsibilities, which may not be hollowed out completely, is one of the central arguments against the transformation of the sovereignty clause into an executive general clause.[102] The considerable deficits of the Dublin system alone do not empower national administrations to replace legislative design decisions in the sense of Article 78, paragraph 2 of the TFEU. In other words, independent decisions of national executives may not result in a substantial overhaul of the Dublin System that inevitably

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http://verfassungsblog.de/dem-freistaat-zum-gefallen-ueber-udo-di-fabios-gutachten-zur-staatsrechtlichen-beurteilung-der-fluechtlingskrise/.

[101] This is reflected in the European Commission's first reaction on August 25, 2015, which, as reported by Euractiv, spoke of an "act of European solidarity." http://www.euractiv.com/section/global-europe/news/germany-suspends-dublin-agreement-for-syrian-refugees/

[102] Compare —in the sense of an *effet utile*-argument—FILZWIESER & SPRUNG, *supra* note 46, at Article 17, K2; *Thym*, *supra* note 35, at 129, 131.

impacts all participating Member States; the responsibility to reform the Dublin system is instead incumbent upon the EU legislature.[103]

II. The Principle of Sincere Cooperation as a Limit on Discretionary Powers

A particularity of the exercise of multi-level administrative discretion is that its legal framework is not only determined by the usual discretionary boundaries but also those that are specific to the multilevel system.[104] These "federal" discretionary boundaries do not refer to the classic relationship between the national administration and the national legislature or court inherent to that particular level, but determine the relationship of the administration of one Member State with the administrative bodies of other Member States (horizontally) or with those at the supranational level (vertically).[105] Of central importance as a specifically federal discretionary limit in the "European Composite Administration"[106] is the principle of sincere cooperation under Article 4, paragraph 3 of the Treaty on the European Union (TEU). This key federal principle entails obligations of loyalty, cooperation, and responsiveness—commonly substantiated in secondary law—not only vertically between the EU and its Member States but also horizontally between Member States at the national level.[107] In the present context, the principle of sincere cooperation plays a particularly prominent role with regard to the externalities that may arise from the exercise of administrative discretion.

1. The Principle of Sincere Cooperation as a Boundary of Administrative Externalities

In general terms, the principle of sincere cooperation obliges national administrations to be loyal, cooperative, and considerate at the horizontal level.[108] Article 4, paragraph 3 of the

[103] In addition, there must be a better implementation of those legislative measures that have already been taken, more specifically of the two relocation decisions of September 2015, *supra* note 19.

[104] For a detailed evaluation, see WENDEL, *supra* note 87.

[105] Note that the term "vertical" does not imply any legal hierarchy.

[106] *See generally* Eberhard Schmidt-Aßmann, *Introduction: European Composite Administration and the Role of European Administrative Law, in* THE EUROPEAN COMPOSITE ADMINISTRATION (Oswald Jansen & Schöndorf-Haubold eds., 2011).

[107] On the horizontal dimension in particular, see CJEU, Case 42/82, Commission of the European Communities v. French Republic, para. 36 (Mar. 22, 1983), concerning the notification duties in cases of changing administrative practice; Case C-251/89, Athanasopoulos v. Bundesanstalt für Arbeit, para. 57 (June 11, 1991), regarding horizontal cooperation in the area of social security systems, here in relation to child benefit entitlements; Case C-116/11, Bank Handlowy w Warszawie SA v Christianapol Sp. z.o.o., para. 62 (Nov. 22, 2012), relating to transnational coordination obligations with regard to principal and non-principal insolvency procedures.

[108] *Cf.* Wolfgang Kahl, Article 4 TEU, *in* EUV/AEUV (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016), para 116; Rudolf Streinz, Article 4 TEU, *in* EUV/AEUV (Rudolf Streinz ed., 2nd ed. 2012), paras. 50 et seq.

TEU must therefore limit the exercise of discretionary powers conferred upon national administrations by EU law when that exercise risks causing disproportionate externalities in partnering countries. Regarding the discretionary right to assume responsibility this implies: its exercise is in any case limited to the extent that it channels or magnifies migratory movements such that other Member States can, if at all, handle them only with disproportionate effort or such that it does not undermine the willingness or capability of other Member States to comply with applicable EU law.

Special care must of course be taken when trying to substantiate such effects with empirical evidence. Besides the fact that policy making is only one of the determining factors of transnational migration, one should distinguish between whether certain circumstances or decisions influence the number of asylum seekers coming to Europe as a whole or whether they channel migratory movements in such a way that they contribute to asylum seekers choosing a certain country within Europe as their country of destination.[109]

It is worth keeping in mind the main push factors behind recent refugee flows: The lack of prospects and the ongoing threat scenarios in the respective homelands, most notably in civil war-torn Syria. The situation was aggravated by considerable supply shortages for foodstuffs in refugee camps close to conflict areas due to reductions in state-financed aid.[110] As a consequence of the closure of the Balkan route as well as the agreement between the EU and Turkey of March 18, 2016,[111] the number of asylum seekers arriving in Europe dropped significantly in 2016. The escape routes, however, shifted again towards the Mediterranean, where more people have drowned this year than ever.

In terms of the migratory flows in 2015, Germany received by far the most asylum seekers in absolute numbers, registering more than a million people seeking international protection,[112] a number which has been adjusted to approximately 890,000 in 2016 due to

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[109] *Cf.* Thomas Spijkerboer, *Fact Check: Did 'Wir Schaffen Das' Lead to Uncontrolled Mass Migration?*, BORDER CRIMINOLOGIES BLOG (Sept. 28, 2016), https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-, arguing that it is "quite possible" that Germany's refugee policy contributed to asylum seekers choosing Germany, while at the same time suggesting that it is "highly unlikely" that it influenced the number of Syrian asylum seekers and refugees in Europe in autumn 2015.

[110] Compare the interview with regional vice-coordinator of the UN World Food Programme Egendal, ZEIT ONLINE (Sept. 30, 2015), http://www.zeit.de/wirtschaft/2015-09/fluechtlinge-syrien-wfp-rasmus-egendal-nachbarlaender.

[111] *See* European Council, EU-Turkey statement (Mar. 18, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

[112] *See 2015: Mehr Asylanträge in Deutschland als jemals zuvor*, BUNDESMINISTERIUM DES INNERN (Jan. 6, 2016), http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2016/01/asylantraege-dezember-2015.html, determined on the basis of the so-called EASY system, which does not exclude multiple registrations, on one hand, but does not reflect the number of non-registrations, on the other.

the phenomenon of multiple registrations.[113] Even in relative numbers, Germany experienced a significant influx.[114]

Several circumstances suggest that the federal government's refugee policy at the very least contributed to this phenomenon. Setting aside more general factors, such as a comparably solid social security system, this begins with the way and scope of the sweeping exercise of the right to assume responsibility. The publicly unveiled "suspension" of the Dublin procedure provided Syrian nationals with the perspective of an examination of their asylum claims in Germany—independent from possible prohibitions on transfers—as long as they just made it across the border. Furthermore, the examination of the applications followed more relaxed procedural rules. Already in late 2014, BAMF had begun to recognize entire categories of people seeking international protection—particularly Syrians—as refugees in the sense of the GCR,[115] on the basis of a short written questionnaire and without an oral examination. The GCR-status is a protection status for persons who have a well-founded fear of persecution because of individual characteristics[116] and thus does not necessarily apply to war refugees[117] in general. Compared to the subsidiary protection status that applies particularly to indiscriminate violence in situations of international or internal armed conflict,[118] the GCR-status is more comprehensive.[119] Those falling into these

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[113] *See 890.000 Asylsuchende im Jahr 2015*, BUNDESMINISTERIUM DES INNERN (Sept. 30, 2016), http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2016/09/asylsuchende-2015.html.

[114] Alongside several other Member States, in particular Sweden, Hungary, and Austria, *cf.* BAMF, ASYLGESCHÄFTSSTATISTIK 3/2016, p. 10, http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201603-statistik-anlage-asyl-geschaeftsbericht.pdf?__blob=publicationFile.

[115] BAMF introduced the simplified asylum procedure for Syrians and members of Iraqi religious minorities on November 18, 2014, extended it to Eritreans on June 25, 2015, and suspended it again at the beginning of 2016. In order to be recognized as GCR refugees, Syrians had to affirm the following statement in the questionnaire: "I fear persecution in Syria on behalf of my race, religion, nationality, political beliefs or membership in a particular social group and thus request to be recognized as a refugee in Germany."

[116] These characteristics include race, religion, nationality, membership of a particular social group, or political opinion.

[117] For a more elaborate discussion of the challenge of refugee legal classification, see NORA MARKARD, KRIEGSFLÜCHTLINGE 151 et seq., 303 et seq. (2012).

[118] *See* Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council, 2011 O.J. (L 337/9), in particular Article 18 in connection with Article 2 lit. f and Article 15.

[119] This specifically applies to the right of family reunification, which is obligatory only for GCR refugees according to Articles 9 et seq. of Directive 2003/86/EC, 2003 O.J. (L 251/12). At the same time, in Germany, the federal legislature in its amendment of the Residence Act (section 29 para. 2 sentence 2, taking effect on August 1, 2015) ceased to distinguish between those recognized as GCR refugees and those receiving subsidiary protection. This was changed in the course of a political U-turn before the end of 2015 when the legislature again reintroduced a different treatment. For details, see Daniel Thym, *Schnellere und strengere Asylverfahren*, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1625, 1632 (2015).

abovementioned categories could, therefore, expect to be recognized as GCR refugees without being scrutinized in an individualized examination. The GCR recognition rate for Syrians was 94.7% in Germany between January and December 2015, while the subsidiarity protection rate was 0,1%.[120] Since the reintroduction of the ordinary procedure, along with individual examinations, in early 2016, the GCR recognition rate has dropped continuously, reaching its lowest level so far in September 2016 with 27%.[121] At the same time the subsidiarity protection rate reached a level of 71% in September 2016.[122]

Back in 2015, the "suspension" of Dublin and the relaxed procedural rules were supplemented by the federal government's communications policy, which at least insinuated that its willingness to grant protection was open-ended and may thus have created the impression of issuing an "invitation."[123] Moreover, if we are to lend credence to significant parts of the modern migratory scholarship, then migratory movements increasingly take place within the framework of so-called transnational migration systems or networks,[124] which, once established, have a self-reinforcing impact.[125]

All in all, we are confronted with a particularly complex situation in which causal relations cannot be determined with any meaningful certainty. It would, therefore, be misguided to suggest that administrative decisions alone are at the root of refugee flows towards Germany. There are merely indications that Germany's sweeping exercise of the right to assume responsibility had at least factual effects and transnational repercussions of a

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[120] *See* BAMF, ASYLGESCHÄFTSSTATISTIK 12/2015, p. 7 (regarding first applications), http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201512-statistik-anlage-asyl-geschaeftsbericht.pdf?__blob=publicationFile. The GCR recognition rate was thus significantly higher than the EU average at the time, *see* Eurostat, Asylum Quarterly Report 3/2015, tables 6 and 9, http://ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q3+2015.pdf/b265b920-3027-4e69-95cf-63f8fb8c80ed. Other Member States, particularly Sweden, were much more likely to grant subsidiary protection.

[121] In the month of September 2016, out of 33,698 applicants from Syria, 23,909 (71 %) were granted subsidiarity protection, while roughly 9,000 (27%) were recognized as GCR refugees, cf. http://www.faz.net/aktuell/politik/fluechtlingskrise/asyl-statistik-immer-weniger-syrer-erhalten-vollen-fluechtlingsschutz-14478121.html.

[122] *Ibid*. Whether or not the new practice will be confirmed by the courts remains to be seen.

[123] This was at least the criticism of French Prime Minister Valls, in an interview with the BBC (Jan. 22, 2016), http://www.bbc.com/news/world-europe-35391084.

[124] Individual attempts of explanation, in turn, differ with regard to their underlying assumptions and empirical methods. For an overview *see* FRANCK DÜVELL, EUROPÄISCHE UND INTERNATIONALE MIGRATION 99 et seq. (2006).

[125] This is prominently reflected in the theory of "cumulative causation", *cf.* DOUGLAS S. MASSEY, ECONOMIC DEVELOPMENT AND INTERNATIONAL MIGRATION IN COMPARATIVE PERSPECTIVE, POPULATION AND DEVELOPMENT REVIEW 383, 396 et seq. (1988). The American migration scholar Demetrios Papademetriou, among others, specifically recognized a self-reinforcing impact in the German refugee policy, see *Migration produziert mehr Migration*, ZEIT-ONLINE, Nov. 22, 2015, http://www.zeit.de/2015/45/migration-fluechtlinge-grenzen-grenzsicherung-interview.

magnitude that may become legally and normatively relevant from the standpoint of loyal cooperation.

Two things are worth noting at this point with regard to the principle of loyal cooperation: First, when a Member State decides to engage in a widespread application of the sovereignty clause, it may not present its EU partners with a *fait accompli*. A widespread application of the sovereignty clause presupposes intensive and ongoing coordination as well as the greatest possible consideration for the interests of fellow EU Member States. This could compensate for, or at least contain, the extraterritorial impact of the sovereignty clause. With view to Germany, there are at least doubts that the German government sufficiently abided by the coordination obligations that flow from the principle of sincere cooperation. From an EU law perspective, national executives of course have a margin of appreciation when it comes to the concrete choice of cooperation; however, in light of the reaction of other Member States, e.g. that of the French government,[126] the German government's actions had a bitter aftertaste of poorly coordinated unilateral decision-making.[127]

Second, the exercise of the sovereignty clause may not undermine the willingness of other Member States to abide by European law or even trigger a collective breach of the law, for instance in the form of a widespread suspension of Schengen, Dublin, or Eurodac. Of course, breaches of the law in this area were not unheard of even prior to the German decision to invoke the sovereignty clause, most notably in the case of Greece and Italy. It was only after Germany's decision to generally apply the sovereignty clause, however, that the politics of systematically waving through migrants along the Balkan route—also in countries such as Croatia, Slovenia, and Austria—and the resulting impression that asylum seekers *de facto* had the freedom to choose in which country to apply for asylum became a widespread practice.[128] When cooperation and responsiveness no longer suffice to absorb transnational repercussions, then a general application of the sovereignty clause reaches its legal limits. Supranational legislation is then the only remaining legitimate way forward.

Approaching the question from a theoretical viewpoint—equally concerned with the extraterritorial impact of national policymaking but from the perspective of representation—points to the same conclusion. The basic assumption here is that national

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[126] *Cf.* French PM Manuel Valls, *supra* note 123.

[127] *Cf.* the conclusions of Ruud Koopmans, *How to Make Europe's Immigration Policies More Efficient and Humane*, 4 AM. POL. SCI. ASS'N 55, 57 (2016), https://higherlogicdownload.s3.amazonaws.com/APSANET/e5be2e91-9721-4513-acb8-799a93991666/UploadedImages/Newsletters/APSACitizenshipMigrationNewsletter_4(2)_final.pdf. As a coordination measure, the one-off telephonic consultation with the heads of state of Austria and (later) Hungary would have sufficed only, if at all, to manage the concrete emergency situation at the Hungarian border.

[128] On the issue of waving through, see the "17-point plan" in European Commission Press Release IP/15/5904, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action (Oct. 25, 2015), discussing the result of the special meeting on the Balkan route of October 24–25, 2015.

constitutional states reach the structural limits of their democratic capacity to act when those affected by their actions cannot contribute to the shaping of public power and thus cannot adequately hold those states accountable for their actions.[129] A sufficient representation of non-German EU citizens that are affected by the German government's actions, and thus also by the internalization of externalities in accordance with Article 10, paragraphs 1 and 2 of the TEU, can only be achieved by involving the EU legislature, including the European Parliament.[130]

2. Rejecting and Waving Through: Preventing the Perpetuation of National Breaches of EU Law

The principle of sincere cooperation also became relevant in the course of the refugee crisis in the sense that a significant number of EU Member States, including Germany, began to engage in a practice of "waving through" those seeking international protection. This refers to the active or passive channeling of asylum seekers in the direction of other Dublin Member States—from Germany in the direction of Sweden, for example—without asylum seekers having applied for asylum or even having been registered by a national authority.

By contrast, contrary to a widespread belief, when those seeking international protection express their desire to do so at the border already, it does not constitute a substantive breach of EU law when the competent authorities do not return them to transit countries, such as Austria in the case of Germany. While Article 14, paragraph 1, sentence 1 of the Schengen Borders Code (SBC)[131] suggests that Member States should refuse entry[132] to third-country nationals that do not satisfy the conditions for entry (Article 6, paragraph 1, SBC),[133] according to Article 14, paragraph 1, sentence 2 of the SBC, this explicitly does not apply to

[129] Christian Joerges, *Integration durch Entrechtlichung?*, *in* GOVERNANCE IN EINER SICH WANDELNDEN WELT 213, 224 et seq. (Gunnar F. Schuppert & Michael Zürn eds. 2008). The underlying assumptions of legitimation through those affected by a state's actions may be questioned, of course. The discussion here is limited to the specific context of the European Union, which—unlike in traditional third party contexts—already recognized a supranational civilian democratic foundation with its EU citizenship.

[130] Article 78, para. 2 TFEU.

[131] Regulation 2016/399 of the European Parliament and of the Council of March, 9 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) – formerly Regulation 562/2006 – [hereinafter SBC].

[132] As of January 2016, this rule is again applied to refugees seeking protection at the German-Austrian border who do not express their desire to apply for asylum but suggest that they want to continue their journey to Sweden.

[133] And who do not belong to the group of people listed in Article 6 Abs. 5 SBC.

those seeking international protection, as their ability to enter the Schengen area is governed by a separate set of provisions, such as Dublin among others.[134]

According to German asylum law, returns are similarly restricted. Among others, returns are only permissible when there are indications that another Dublin Member State is responsible for processing the asylum claim and a procedure for "taking charge" or "taking back"[135] has been initiated,[136] or when the person seeking international protection entered via a safe third country.[137] The first case requires, at the very least, a cursory[138] assessment of jurisdiction according to the Dublin criteria as well as the subsequent initiation of the Dublin procedure for taking charge or taking back.[139] Nor can Germany ignore the Dublin procedure in the second case—entry via a safe third country. According to German law,[140] an immediate return is impermissible when Germany would be responsible for examining the asylum application according to the Dublin system, which again requires the application of the Dublin procedure. A potential return, therefore, presupposes the application of the Dublin procedure in both cases.[141] This reading is compatible with the Dublin III Regulation—which has primacy over national law in the case of conflicts because Article 3, paragraph 1 in connection with Article 20, paragraph 1 of the Dublin III Regulation, obliges the Member State that first receives the application for international protection to apply the Dublin

[134] Peukert et al., *supra* note 99. Peukert and his co-authors disregard this provision when they postulate a right to refuse entry along the lines of Article 14, paragraph 1, sentence 1 of the SBC, according to which—contrary to Article 3 para. 1 of the Dublin III Regulation—an asylum application issued to German border officials at the German-Austrian border is to be considered issued within Austrian sovereign territory, so that Austria would have jurisdiction for evaluating the claim according to Article 20, para. 4 of the Dublin III Regulation. It is, moreover, questionable whether Article 20, paragraph 4 of the Dublin III Regulation even extends to this constellation.

[135] This refers back to Articles 20 et seq. of the Dublin III Regulation.

[136] Section 18 paragraph 2 No 2 AsylG.

[137] Section 18 paragraph 2 No 1, para. 4 in connection with section 26a AsylG.

[138] *Cf.* Holger Winkelmann, *§ 18 AsylG*, *in* AUSLÄNDERRECHT (Jan Bergmann & Klaus Dienelt eds., 2nd ed. 2016), para. 23.

[139] The same applies to deportation, see section 57 of the Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BGBL I . [hereinafter *Residence Act*].

[140] Section 18 para. 4 No 1 AsylG

[141] *Cf.* Roman Lehner, *Grenze auf, Grenze zu? Die transnationale Wirkung von Rechtsverstößen im Dublin-System*, Verfassungsblog (Oct. 30, 2015), http://verfassungsblog.de/grenze-auf-grenze-zu-die-transnationale-wirkung-von-rechtsverstoessen-im-dublin-system/. This is also why an order on the basis of section 18 Abs. 4 No 2 AsylG would largely be futile. By contrast, Christian Hillgruber claims that in "the absence of such an order, the unencumbered entry of the many (Syrian) refugees would be blatantly illegal.", see Christian Hillgruber, Ein Geheimerlass zur Öffnung der Grenze?, Frankfurter Allgemeine Zeitung (Jan. 21, 2016), http://www.faz.net/aktuell/politik/staat-und-recht/fluechtlinge-ein-geheimerlass-zur-oeffnung-der-grenze-14024916.html.

procedure[142] and thus effectively precludes the return of the asylum seeker.[143] The creation of so-called transit zones in border proximity would be equally questionable from a legal perspective.[144]

Yet, insofar as determining the Dublin responsibility at transit points is aggravated or made impossible by breaches of the law by transit countries—particularly when those countries neglect to perform the necessary Eurodac registrations or violate parts of the SBC[145]—then this may not play out to the detriment of the Member State that abides by the Dublin procedure. The principle of loyal cooperation functions as a *venire contra factum proprium*[146] in this case, and, more specifically, as a prohibition of the transnational perpetuation of breaches of EU law. Accordingly, the consequences of a violation of EU law may not be transferred transnationally to, or even invoked against, another Member State.

With view to the refugee crisis, this implies that transit countries may not invoke breaches of law that they themselves committed against the Member State that is determining who is responsible under Dublin. This applies, insofar as a transit country systematically neglected its EU legal obligations by methodologically waving migrants through to the next country. The Member State evaluating jurisdiction thus must not bear the burden of a breach of law committed by the transit country.[147] More specifically, in the context of a procedure for taking charge or taking back, the transit country may not rely on the fact that the exact escape route cannot be determined due to a lack of registrations. The principle of sincere cooperation must therefore entail a reversal of the burden of proof according to Article 22 of the Dublin III Regulation.[148]

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[142] Bast & Möllers, *supra* note 100.

[143] On Article 20, paragraph 4 of the Dublin III Regulation see supra note 134.

[144] *See* Walther Michl, *Transitzonen für Flüchtlinge im Dublin-System?*, VERFASSUNGSBLOG (Oct. 14, 2015), http://verfassungsblog.de/wie-passen-transitzonen-fuer-fluechtlinge-ins-dublin-system/.

[145] In cases in which, due to the absence of an official asylum application, there is no registration obligation according to Article 9, paragraph 1 of the Eurodac Regulation, Articles 7 et seq. of the SBC determines border controls and entry refusals.

[146] "To come against one's own fact (is not allowed)."

[147] For a different approach, see Lehner, *supra* note 141.

[148] The provision does not employ the term "burden of proof." Article 22, paragraphs 2–5 of the Dublin III Regulation do suggest, however, that the burden of proof, in the sense of formal evidence and indications, is incumbent upon the requesting state.

E. Looking Ahead: Legislative Responsibilities

All in all, an increase in discretion, if it is to take place within the framework of current law, should not enable national executives to engage in singlehanded decision-making. The foregoing reflections have highlighted the competence but also the responsibility of the EU legislature from several perspectives. The need to respect the prerogative of the EU legislature highlights the shortcomings of domestic debates surrounding a national-constitutional parliamentary prerogative. This prerogative would only become relevant inasmuch as the general exercise of the right to assume responsibility is compatible with EU law. Beyond this threshold, an intervention of the EU legislature is indispensable, since the necessary degree of democratic representation can only be achieved at EU level—by virtue of the participation of both the Parliament and the Council.

At the heart of any reform of the Dublin system must be the fair and solidary distribution of responsibilities that allows those seeking international protection access to effective and efficient asylum proceedings. A legislative substantiation of the law is equally necessary and important to ensure the respect of fundamental rights,[149] as demonstrated by the case of prohibitions on transfers. In the context of a reform of the Dublin system, the EU legislature could, for instance, particularize the modalities and limits of an exercise of the right to assume responsibility. The proposal of the Commission of May 4, 2016 would restrict the sovereignty clause considerably. One could also consider overhauling Article 3 paragraph 2, subparagraph 2 of the Dublin III Regulation. Reform efforts would also provide the EU legislature with the opportunity to particularize the role that the principle of loyal cooperation plays in the horizontal relationship between Member States.

One can only hope that the EU legislature will live up to its responsibility sooner rather than later. The European Commission's proposal to reform the Dublin system is a step in the right direction. Now it is up to the European Parliament and the Council to go ahead within the framework of the ordinary legislative procedure. Time is fleeting.

[149] *Cf.* JÜRGEN BAST, AUFENTHALTSRECHT UND MIGRATIONSSTEUERUNG 189 (2011).