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European solidarity with refugees?

The treaties on which the European Union is legally based recognize a “Common European Asylum System”. This will probably come as a surprise to anyone who has been following the never-ending media reports about the wrangling between EU Member States over border closures and refugee acceptance quotas. In practice, there is still no discernable trace of either a ‘system’ or a ‘European’ response to the arrival of refugees in the EU. The number of people seeking protection in Europe has been increasing since 2010. It reached a temporary peak last year. In 2015, around 1.1 million applications for asylum were submitted in the EU; almost 442,000 of them were filed in Germany, the country to which over one million people are reported to have fled.

There is talk of a ‘refugee crisis’ and this refers not only to the increasing demand for protection but, clearly also, to the difficulties of ensuring an adequate response to this demand. While it may be grossly exaggerated to declare a state of emergency and refer to the rule of injustice, the failure of the European asylum system cannot be overlooked. This is largely due to systematic weaknesses in the regulations in force. Whether these weaknesses can be eliminated would appear doubtful – at least at the time of writing this report. Given the pressure for reform, it is possible that by the time these words are read, a solution is emerging, or has even been agreed on. Whatever form it may take, the question regarding the conditions of reception for refugees, in particular the extent to which they are granted social rights, will assume a crucial significance.

former and these, in turn, depend on the status of the foreign person involved. In principle, a distinction is made between the two reasons for granting protection to foreigners. The first one is the “refugee status”, which is based on the Geneva Convention on Refugees of 1951 (with the Protocol of 1976) and requires that a person “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality” (Art. 1 A No. 2 Convention Relating to the Status of Refugees). This term largely corresponds to “persons persecuted on political grounds”, who have the right to asylum in accordance with the Basic Law of the Federal Republic of Germany (GG) (Art. 16a Para. 1 GG). The second reason is “subsidiary protection”. This covers all cases in which refugee status is not applicable, particularly due to a lack of any specific motivation relating to persecution, but in which people are at “real risk” of suffering “serious harm” in their home country. This risk includes a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. Both grounds for protection are referred to today as “international protection” because the term “asylum” was traditionally reserved for refugees in the stricter sense.

For this reason, it would be more accurate to speak of persons who have the right to asylum, on the one hand, and persons who have the right to subsidiary protection, on the other. And based on this, a distinction must then be made according to whether someone has only applied for protection, or has already been granted protection. For the duration of this process the right of residence is unclear and arises (only) from the necessity to verify the right to protection. Applicants are initially therefore either asylum or protection seekers. If this differentiation is made, the term “refugee” can be used in line with general usage as an umbrella term that covers all those entitled to and seeking protection.

The “Common European Asylum System” referred to at the outset rests on four pillars, which were established for the first time around the turn of the millennium and have been updated – for the most part, at least – in recent years, namely before the significant increase in refugee numbers. They relate to all major aspects of the granting of international protection. The first of these pillars is the Qualification Directive (Directive 2011/95/EU), which defines both the requirements for international protection and the fundamental rights associated with the granting of protection status. The second is the Asylum Procedures Directive (Directive 2013/32/EU), which contains provisions on the procedures involved in the grant-



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It is important to establish some terminological clarity from the outset – particularly in view of the fact that this is often lacking in the public debate. It is less a question of linguistic accuracy than one centring on a clear understanding of the different groups of people involved here. This is important because the rights a person enjoys when resident in a particular country depend on the rights of residence of the

ing and withdrawing of international protection. Third, the conditions governing the reception of persons seeking protection are set down in a separate legislative act, the Reception Directive (Directive 2013/33/EU). Fourth, and finally, the question as to which Member State of the EU is responsible for the examination of applications for international protection must be clarified. This issue is currently regulated by the Dublin III Regulation (Regulation (EU) No 604/2013), which is very well-known at this stage and is accompanied by requirements for the registration of persons seeking international protection (the Eurodac Regulation, Regulation (EU) No 203/2013).

Although the aforementioned legislative provisions were intended to achieve consistency at least in relation to fundamental questions, they do not work in practice. On the one hand, the interpretation of the requirements for international protection varies significantly from one Member State to the next. This is evident in the fact that the rates for the granting of protection to persons from certain countries of origin vary considerably within the EU – something that can hardly be explained by the peculiarities of the cases in question alone. Far more serious are the weaknesses of the so-called Dublin system. For a long time, the states located in the middle of Europe could safely assume that they would not have to accept any refugees, as it is the states in which refugees enter the EU, meaning the states located on its external borders, that are primarily responsible for them. With the arrival of an increasing number of refugees, the border states were no longer willing or able to fulfil this obligation. In an area with open internal borders, the so-called Schengen Area, this situation led to largely uncontrolled migration. This is the reason why some states like Sweden, Austria and most of the Balkan states have closed their borders and are, in this way, attempting to prevent or limit internal migration. It cannot be ignored that this is causing very difficult situations in the border states.

The difficulty of the current situation lies in the fact that a successful asylum policy requires “more Europe” and not less. There are reasons why the situation of the “Common European Asylum System” is reminiscent of that of the euro as the cornerstone of the European Economic and Monetary Union. In both cases a situation exists whereby certain fundamental issues essential for the functioning of a common policy have not been communitized. In the context of the reception of refugees, it is particularly the securing of the external borders that must be understood as a common task of all Member States. In addition, the assumption of joint responsibility for the reception of refugees will also be required.

Particularly in a situation like the current one, i.e. a mass migration prompted by civil war in neighbouring regions, an agreement on quotas would prove a particularly suitable instrument. Such quotas would enable refugees to enter EU territory safely, and would relieve the authorities and courts in the reception states of the burden of implementing complex procedures for the examination of individual cases. A separate legal basis for this actually exists in the EU, i.e. the Temporary Protection Directive (Council Directive 2001/55/EC). The lengthy title of this directive states that it also serves the purpose of “promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof”. It has not been possible, however, to reach agreement within the EU on such a “balance of efforts”. For this reason, the directive proves futile and has not been applied to the present day.

THE INCREASED RECEPTION OF REFUGEES IN THE EU CAN ONLY BE CONTROLLED IF COMMON STANDARDS EXIST THAT GUARANTEE HUMAN DIGNITY IN EVERY EU MEMBER STATE.



Irrespective of how the reception of refugees in the EU should be controlled, it can only succeed if common standards exist as to the handling of residence status, standards which guarantee a dignified life in any of the Member States. This applies in particular also to compliance with the rules of jurisdiction. A Member State is basically entitled to transfer a refugee back to another Member State if it is the duty of the latter to complete the procedure for the granting of international protection based on existing regulations. However, this option is invalid on legal grounds if a responsible Member State does not treat refugees in a way that guarantees a dignified standard of living during the examination procedure. The background here is the obligation of all EU Member States to observe the rights enshrined in the European Convention on Human Rights. No state may be involved in the contravention of these rights by exposing a person seeking protection to treatment that violates human rights as a result of the person's transfer back to another state. Consequently, however, a state can evade its obligation to grant protection

by refusing to grant minimum social rights to refugees. The response to this should take the form of an enforcement by EU bodies of the obligation to desist from contravening human rights in this way in all Member States. Ultimately, however, it is a question of all EU states accepting their responsibility for the safeguarding of social standards and taking practical action on this basis.

But what form do these standards take? This question was examined by a comparative law project carried out at the Max Planck Institute for Social Law and Social Policy. Included in the study were the southern European border states of Spain, Italy and Greece, two states located on the so-called Balkan route (Hungary and Bulgaria), Germany's most important neighbouring states (France, Austria, Poland and the Netherlands), and the United Kingdom, Sweden and Turkey. It concentrated on the social rights of persons seeking protection during the recognition procedure, specifically in relation to four areas: accommodation, the ensuring of means of subsistence, healthcare and access to the labour market. EU law specifies requirements for all these areas in the above-mentioned Reception Directive. This directive was initially enacted in 2003 and was reformed in 2013. It aims to enable applicants to have "a dignified standard of living", to guarantee "comparable living conditions in all Member States" and to limit "secondary movements of asylum seekers influenced by the variety of conditions for their reception". The directive was supposed to have been largely implemented in national law by 20 July 2015 at the latest. Against this background, the question arose, first, as to how far the Member States had progressed in implementing this directive and, second, whether common standards emerged in the interaction between national law and the minimum requirements under EU law, which would then have led to the same reception conditions for persons seeking protection, in principle at least.

The comparative law survey is sobering. A veritable patchwork of regulations and provisions can be found in the EU Member States. The national legal orders provide a very wide

range of service types, modalities and scopes, which also vary according to the stage of the asylum procedure or the type of procedure in question (accelerated procedure, regular procedure, Dublin procedure). Regarding accommodation, restrictions on residence are the rule during the procedure. The use made of the three accommodation options provided for in the EU legislation – "premises used for the purpose of housing applicants during the examination of an application for asylum lodged at a border or in transit zones"; "accommodation centres" and private or "other premises adapted for housing applicants" – varies in the countries compared. Although some quality specifications exist, the difficulties involved in the task of actually providing suitable accommodation are obvious. A sufficient quantity of accommodation is lacking. This is due to the insufficient preparation for the high number of claims being made for international protection in many countries.

Regarding material reception conditions, an "adequate standard of living" is the requirement applicable under EU law. Compliance with it presupposes that asylum seekers are guaranteed an adequate standard of living along with the protection of their physical and psychological health. In ensuring subsistence, a considerable number of countries tend to make use of the possibility to set different levels of support, differentiating between their own and foreign nationals. In many places, this is evidently linked with the risk of failing to comply with the subsistence level.

The situation regarding the provision of healthcare services appears to be somewhat more favourable. Different regulatory approaches can be observed here which are based on residence status, and ultimately give rise to three different situations. First, under some legal orders, asylum seekers can claim the same services in terms of medical treatment as citizens of the country in question (for example in Italy, Poland and the United Kingdom). Second, in the context of the general basic services provision, asylum seekers can only be granted access to basic medical care, which is not necessarily equivalent to the national catalogues of basic services. Third, in some countries, the right to treatment is limited to acute care. Incidentally, the experience from the situation in Germany already shows that when it comes to healthcare services, what mainly matters is the actual provision of care, and this operates anything but smoothly.

Regarding access to the labour market, obvious obstacles clearly exist in the majority of Member States. EU law offers many options to the Member States in this regard: access

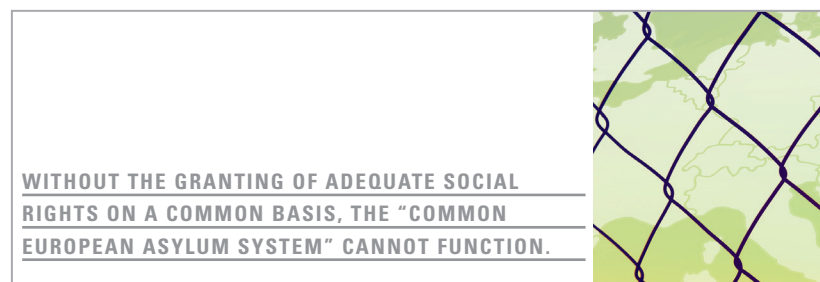


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must only be provided to asylum seekers after nine months and then only under the condition that no decision has been taken on their application for protection. For reasons relating to labour market policy, the priority given to EU citizens and third-country nationals with rights of residence is an understandable limitation; however, carrying out the corresponding checks is often too laborious, hence the obligation under EU law to provide asylum seekers with “effective access to the labour market” remains unfulfilled in all too many cases. The situation is aggravated by the fact that in some states asylum applicants are only allowed to work in certain occupations, for example as seasonal workers or in selected occupations which suffer from a shortage of work force. Although they are allowed to work within the asylum accommodation, the number of such employment opportunities remains extremely limited, and the earning potential from such employment is very modest.

The current situation is therefore, on the one hand, characterized by many practical difficulties, about which much can be heard and read. On the other hand, from a legal perspective, a lot remains to be done to attain the targeted comparable reception conditions for refugees across the European Union. It was with good reason that the European Commission instigated a series of treaty infringement proceedings against dilatory Member States in this regard up to spring 2016. Hence, some attempts have at least been observed that can be built on. This relates very generally to the fact that persons seeking protection are, by way of legislative provisions, granted services and opportunities for participation in everyday life in the Member States. It also relates to the efforts of some national courts to formulate the requirements for a “dignified standard of living” in more concrete terms. For example, in summer 2014, the German Federal Constitutional Court decided that “a short duration of residence or prospect of residence in Germany” did not justify “the narrowing down of the right to the guarantee of a dignified living standard to the mere safeguarding of a person’s physical existence.” Instead – in accordance with a decision adopted in relation to the Hartz IV welfare benefits – refugees must also be granted a socio-cultural subsistence level from the outset of their stay. The High Court of Justice of England and Wales later referred to this decision and argued that all necessary elements to cover one’s personal living requirements should be taken into consideration in the calculation of benefits for asylum seekers. However, it has emerged that the application of this judgement faces certain difficulties. Although, by its own account, the responsible ministry in England conducted new calculations, the findings did not result in any right to an increase in benefits. Asylum seekers in the United Kingdom can still only claim a financial

payment equivalent to half of the welfare benefit payment. A rather generous legal arrangement often fails to help in other countries too: while all foreigners in Italy have the right to claim access to the general healthcare services, and asylum seekers in Greece also have access to the labour market, full registration is required to avail of this access. As long as registration procedures and proper accommodation are lacking, the legally granted social rights will come to nothing in practice. The acceptance of the challenges associated with this situation requires both political will and an effective bureaucracy. Of course, here too, there is ultimately a connection with the controlling of borders and the distribution among EU states of persons seeking protection.



In conclusion: The emergence of reception standards that would reflect the aim of ensuring a dignified standard of living applicable across the EU is clearly in its early stages. Further statutory substantiation is required, at both national and European levels, and court judgements that demand such substantiation, if necessary, are often lacking. Accordingly, comparative legal research should be continued. New reforms that also affect the social rights of civil war refugees in many countries require critical scientific scrutiny in particular. Without the granting of adequate social rights on a common basis, the “Common European Asylum System” referred to at the outset cannot function. This brings us back to the aforementioned legal basis provided by the EU treaties. This states that the implementation of European asylum law “shall be governed by the principle of solidarity and fair sharing of responsibility [...] between the Member States” (Art. 80 TFEU). It is written there in black and white. In reality, the current concern, particularly in relation to the reception of refugees, must be to foster European solidarity – or, in other words, to ensure that sharing responsibility and helping each other will actually become the basis of European integration.